

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

<b>JOHNNY HAMM,</b>	)	<b>CASE NO. 1:15CV273</b>
	)	
<b>Plaintiff,</b>	)	<b>JUDGE CHRISTOPHER A. BOYKO</b>
	)	
<b>vs.</b>	)	<b><u>OPINION AND ORDER</u></b>
	)	
<b>CALVIN D. WILLIAMS, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**CHRISTOPHER A. BOYKO, J.:**

This matter comes before the Court upon the Motion (ECF DKT #9) of Defendants, City of Cleveland and Calvin D. Williams, to Dismiss Plaintiff's Complaint. For the following reasons, the Motion is granted in part and denied in part.

**I. FACTUAL BACKGROUND**

On November 29, 2012, more than one hundred Cleveland police officers were involved in a high-speed pursuit of a suspect vehicle through the streets of Cleveland and East Cleveland. The chase came to an end when the officers fired upon and killed the two occupants of the vehicle. The Ohio Bureau of Criminal Investigation issued a report on

February 5, 2013, finding the events of that night revealed a “systematic failure” of the Cleveland Police Department. On May 30, 2014, the Cuyahoga County Prosecutor announced that a grand jury had indicted one officer on two counts of Manslaughter and five other officers on Misdemeanor charges. The Indictments were highly publicized in local and national media.

On June 1, 2014, Plaintiff Johnny Hamm, a Sergeant in the Cleveland Police Department, commented on the indictments, discussed the surrounding circumstances and expressed support for his fellow officers on the social media website, Facebook. Plaintiff did this while off-duty and using his home computer. (Complaint, ECF DKT #1, ¶ 12). A week later, also while on his own time and on his personal computer, Plaintiff posted additional comments on Facebook related to his original post, and noted that an unidentified individual was upset by Plaintiff’s comments.

Defendant, Calvin D. Williams, Cleveland’s Chief of Police, instructed the Inspection Unit to investigate Plaintiff’s Facebook posts and determine whether he violated any departmental policies. Ultimately, Plaintiff was charged with violating nearly thirty provisions of the rules and regulations governing the Cleveland Police Department, as well as the City’s Civil Service rules. Following a hearing on September 15, 2014, Plaintiff was found guilty of all the charges against him and was suspended for ten days without pay, the maximum, unreviewable suspension that the Chief of Police is authorized to impose under Section 119 of the City’s Charter. Defendant Williams initiated the investigation, determined the charges Plaintiff would face, presided over Plaintiff’s disciplinary hearing, and disclosed midway through the hearing that he was the complaining witness against Plaintiff.

(Complaint, ECF DKT #1).

On December 11, 2014, a Cleveland Police Commander requested that Plaintiff serve as the Acting Commander of the Bureau of Support Services while the Commander was on vacation. The request was approved through the normal chain of command, but Defendant Williams countermanded that approval. (Complaint, ECF DKT #1, ¶¶ 26-27).

On February 11, 2015, Plaintiff brought suit under 42 U.S.C. §1983 and alleged in Counts One and Two of the Complaint that he was retaliated against for engaging in constitutionally protected expression in violation of his rights secured by the First and Fourteenth Amendments of the United States Constitution and Art. I, §11 of the Ohio Constitution; and that his Due Process rights, secured by the Fourteenth Amendment to the United States Constitution and Art. I, §16 of the Ohio Constitution, were violated. Count Three seeks a declaratory judgment that the policies underlying the disciplinary charges lodged against Plaintiff are unconstitutionally overbroad and vague. In Count Four, Plaintiff alleges that the City's policies caused him irreparable harm, entitling him to injunctive relief.

On April 1, 2015, Defendants, City of Cleveland and Calvin D. Williams, moved for dismissal of the Complaint, pursuant to Fed.R.Civ.P. 12(b)(6), arguing that Plaintiff's allegations are not sufficient to state a claim under the First and Fourteenth Amendments to the United States Constitution; that the Ohio Constitution does not confer a private right of action for violations of Article I, § 11 and § 16; and that the claims against Defendant Williams in his official capacity should be dismissed as duplicative. (ECF DKT #9).

## **II. LAW AND ANALYSIS**

### **Standard of Review**

“In reviewing a motion to dismiss, we construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.” *Directv, Inc. v. Treesh*, 487 F.3d 471,476 (6th Cir.2007). Factual allegations contained in a complaint must “raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). *Twombly* does not “require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. Dismissal is warranted if the complaint lacks an allegation as to a necessary element of the claim raised. *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485 (6th Cir.1990). The United States Supreme Court, in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), discussed *Twombly* and provided additional analysis of the motion to dismiss standard:

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-plead factual allegations a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.  
*Id.* at 679.

### **Official Capacity Claims Against Williams**

Plaintiff has sued the City of Cleveland and Calvin D. Williams individually, and in his official capacity as Chief of Police of the City of Cleveland. Further, Plaintiff seeks damages against Defendants, jointly and severally.

Official capacity suits “generally represent only another way of pleading an action against an entity of which an officer is an agent.” *Monell v. New York City Dep’t of Social*

*Service*, 436 U.S. 658, n.55 (1978). Plaintiff acknowledges that his claims against Williams, in his official capacity, are duplicative of his claims against the City of Cleveland; and he recognizes that he is not entitled to a double recovery. (ECF DKT #10 at 12). Therefore, the Motion to Dismiss the official capacity claims asserted against Williams is granted.

### **Claims under the Ohio Constitution**

Plaintiff alleges Defendants retaliated against him for engaging in constitutionally protected expression, as secured by Article I, § 11 of the Ohio Constitution. He also alleges that, as the direct and proximate result of Defendants' misconduct, he was deprived of his right to due process, as secured by Article I, § 16 of the Ohio Constitution.

The Ohio Supreme Court, in *State v. Williams*, 88 Ohio St.3d 513, 521 (2000), addressed whether a provision of the Ohio Constitution is self-executing or “whether reliance upon [a] constitutional provision without other enabling legislation is misplaced”:

A constitutional provision is self-executing when it is complete in itself and becomes operative without aid of supplemental or enabling legislation. . . . Likewise, a constitutional provision is not self-executing if its language, duly construed, cannot provide for adequate and meaningful enforcement of its terms without other legislative enactment. (internal citations omitted). *Id.*

An Ohio appellate court has noted that the Ohio Supreme Court, in *Provencs v. Stark County Bd. of Mental Retardation & Developmental Disabilities*, 64 Ohio St.3d 252, 254 (1992), held that the freedom of speech right secured by Article I, § 11 of the Ohio Constitution is not self-executing and does not create a private cause of action. *PDU, Inc. v. City of Cleveland*, No. 81944, 2003 WL 21555157, at \*3 (Ohio 8th Dist.Ct.App. July 10, 2003). The *PDU* court concluded further that “Sections 2, 11, and 16 of Article I of the Ohio Constitution are not self-executing provisions.” *Id.* at \*5. “Unlike the federal system where

42 U.S.C. § 1983 creates a private cause of action to remedy violation of the United States Constitution, there exists no statute in Ohio analogous to Section 1983.” *Id.* See also, *Barksdale v. City of Cleveland*, No. 1:04CV2130, 2006 WL 7077216, at \*4 (N.D. Ohio May 5, 2006).

In accordance with this reasoning, the Court grants the Motion to Dismiss as to Plaintiff’s claims for relief pursuant to Article I, § 11 and § 16 of the Ohio Constitution.

**Remaining Claims**

Plaintiff alleges that, when he posted comments on Facebook about the November 29, 2012 police chase and shooting, he was speaking as a private citizen on matters of public concern. Construing the Complaint in Plaintiff’s favor, accepting his allegations as true, and drawing all reasonable inferences in favor of Plaintiff, the Court finds that Plaintiff has stated a claim for First Amendment retaliation for engaging in constitutionally protected speech that is plausible on its face.

Moreover, the Court finds that Plaintiff has alleged a plausible claim for deprivation of his right to Due Process, as secured by the Fourteenth Amendment of the United States Constitution. Under the facts as alleged, Defendant Williams initiated the investigation into Plaintiff’s internet postings; determined the charges that would be lodged; presided over the disciplinary hearing; disclosed, only during the proceeding, that he was the complaining witness; found Plaintiff guilty; and imposed the maximum penalty not subject to review. These allegations raise the claim, beyond the speculative level, that Plaintiff was denied a meaningful hearing due to the bias and/or conflict of interest of the supervisory official, Chief of Police, Calvin D. Williams.

Furthermore, the Court notes that Defendants did not specifically challenge Count Three's request for a declaratory judgment that the policies at issue are unconstitutionally overbroad and vague. Nor did Defendants move for dismissal of Plaintiff's claim of irreparable harm entitling him to injunctive relief, as set out in Count Four.

### **III. CONCLUSION**

Therefore, for the foregoing reasons, the Motion (ECF DKT #9) of Defendants, City of Cleveland and Calvin D. Williams, to Dismiss Plaintiff's Complaint is granted in part as to the official capacity claims against Defendant Williams and the claims under Article I, § 11 and § 16 of the Ohio Constitution, and denied as to all the remaining claims in Plaintiff Johnny Hamm's Complaint.

**IT IS SO ORDERED.**

**DATE: June 22, 2015**

**s/Christopher A. Boyko**  
**CHRISTOPHER A. BOYKO**  
**United States District Judge**