

12-1534

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

JACKIE L. BROWN, II,

Plaintiff,

v.

Civil Action No.: 12-C-211
Paul M. Blake, Jr., Judge

THE CITY OF MONTGOMERY,
A Municipal Corporation, and
JAMES F. HIGGINS, JR., individually
and in his capacity as Mayor
of the City of Montgomery,

Defendants.

ORDER

WHEREAS, on August 26, 2012, the Defendants filed the *Defendant's* [sic] *Motion to Dismiss* the above-captioned action; and

WHEREAS, on September 25, 2012, the Plaintiff filed the *Plaintiff's Response to Defendant's Motion to Dismiss*; and

WHEREAS, on September 28, 2012, the Plaintiff, by his attorneys, Michael T. Clifford, Esq. and Richelle K. Garlow, Esq., and the Defendants, by their attorney, Vaughn T. Sizemore, Esq., appeared before the Court and were heard regarding the *Defendant's* [sic] *Motion to Dismiss*; and

WHEREAS, on September 28, 2012, the Court entered an *Order Following September 28, 2012 Hearing and Setting Forth Briefing Schedule* that directed each party to submit a memorandum of law and a proposed order containing proposed findings of fact and proposed conclusions of law by October 26, 2012; and

WHEREAS, on October 26, 2012, the Plaintiff filed the *Plaintiff's Supplemental Memorandum in Support of Response to Defendant's Motion to Dismiss* ("Plaintiff's Supplemental Memorandum"), *Plaintiff's Proposed Findings of Fact and Conclusions of Law*, a *Motion for Leave to File First Amended Complaint* ("Motion to File Amended Complaint"), and a proposed *First Amended Complaint* ("Amended Complaint"); and

WHEREAS, on October 26, 2012, the Defendants filed the *Defendant's* [sic] *Supplemental Memorandum in Support of Motion to Dismiss* ("Defendants' Supplemental Memorandum") and a proposed *Order*; and

WHEREAS, on November 2, 2012, the Defendants filed the *Defendant's* [sic] *Response to Plaintiff's Supplemental Memorandum in Opposition to Motion to Dismiss*;

NOW, THEREFORE, upon careful consideration of (a) the record in this matter, (b) the parties' arguments, and (c) the relevant legal authority, the Court **GRANTS** the *Motion to Dismiss* and **DENIES** the *Motion for Leave to File First Amended Complaint*, based upon the following findings of fact and conclusions of law:

STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is a means of testing the formal sufficiency of a complaint. *See Collia v. McJunkin*, 178 W.Va. 158, 358 S.E.2d 242 (1987), *cert. denied*, 484 U.S. 944, 108 S.Ct. 330 (1987); *Mandolitis v. Elkins Industries, Inc.*, 161 W.Va. 695, 717, 246 S.E.2d 907, 920 (1978) (*superseded in part by statute see Gallapoo v. WalMart Stores*, 197 W.Va. 172, 475 S.E.2d 172 (1996)). A motion to dismiss enables a court to weed out unfounded suits. *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104 (1996). The primary purpose of a motion to dismiss is to seek a

determination of whether the plaintiff is entitled to offer evidence in support of the claims made in the complaint. *Dimon v. Mansey*, 198 W.Va. 40, 47 n.5, 479 S.E.2d 339, 346 n.5 (1996) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974)). Although a motion to dismiss for failure to state a claim is viewed with disfavor, if a plaintiff's complaint states no cause of action upon which relief may be granted, then the defendant's motion to dismiss should be granted. See *Fass v. Newsco Well Services, Ltd.*, 177 W.Va. 50, 52-53, 350 S.E.2d 562, 564-65 (1986).

Governmental immunities are properly determined pursuant to a motion to dismiss because the purpose of such immunities is to protect governmental officers from being subjected to suit. See *Hutchinson v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996).

According to *Hutchinson*:

Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.

198 W.Va. at 148, 479 S.E.2d at 658 (citing *Swint v. Chambers County Comm.*, 514 U.S. 35, 115 S.Ct. 1203 (1995)). This includes the burden of discovery. See *Yoak v. Marshall University*, 223 W.Va. 55, 59, 672 S.E.2d 191, 195 (2008). Finally,

The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.

Syllabus Point 2, *Messer v. Huntington Anesthesia Group, Inc.*, 218 W.Va. 4, 620 S.E.2d 144 (2005) (citing Syllabus Point 1, *Hutchinson v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996)).

FINDINGS OF FACT

1. The Plaintiff was hired as a municipal police officer with the City of Montgomery in or about 2007. *See Complaint* at ¶ 1 and *Amended Complaint* at ¶ 1.
2. The Plaintiff admits that he accepted the position of chief of police of the City of Montgomery. *See Amended Complaint* at ¶ 1.
3. The Plaintiff alleges that an officer of the City of Montgomery, Officer James Ivy, filed a civil action against the City on or about April 7, 2011, which was ultimately settled. *See Complaint* at ¶ 4 and *Amended Complaint* at ¶ 4.
4. The Plaintiff alleges that, during his employment, the Mayor of the City of Montgomery, James F. Higgins, Jr., a Defendant in this action, ordered him to retaliate against Officer Ivy. *See Complaint* at ¶ 5 and *Amended Complaint* at ¶ 5.
5. The Plaintiff specifically alleges that Mayor Higgins requested that a GPS tracking device be placed on the police cruiser driven by Officer Ivy. *See Complaint* at ¶ 5 and *Amended Complaint* at ¶ 5.
6. The Plaintiff admits that he refused to follow Mayor Higgins's request because he believed it to be unlawful. *See Complaint* at ¶ 5 and *Amended Complaint* at ¶ 5.
7. The Plaintiff alleges no other specific request or command that he claims to be unlawful. *See Complaint* at ¶¶ 5 & 6 and *Amended Complaint* at ¶¶ 5 & 6.
8. The Plaintiff alleges that he was discharged on November 29, 2011. *See Complaint* at ¶¶ 1 & 7 and *Amended Complaint* at ¶¶ 1 & 7.
9. The Plaintiff does not allege specific actions of Mayor Higgins, other than the allegation relating to the GPS tracking device and the allegation regarding his termination, that he claims violated a clearly established law or showed that his actions were malicious,

wanton, or oppressive. *See Complaint* at ¶¶ 5-6, 10 and *Amended Complaint* at ¶¶ 5-6, 10.

10. The Plaintiff does not allege that Officer Ivy owned or had any expectation of privacy in the police cruiser involved in this matter. *See Complaint* at ¶ 5 and *Amended Complaint* at ¶5.

11. The Plaintiff concedes, and the Court finds, that the police cruiser involved in this matter was owned by the City of Montgomery. *See Complaint* at ¶ 5 and *Amended Complaint* at ¶5.

CONCLUSIONS OF LAW

I. The Plaintiff's claims based on his termination without a pre-termination hearing are without merit because he was not entitled to a pre-termination hearing after he accepted the *at-will* position of chief of police.

W.Va. Code § 8-14-7 establishes "Policemen's Civil Service Commission[s]" for "Class I and Class II cit[ies]." The Court takes judicial notice of the fact that the City of Montgomery had a population of 4,689 people as of the 2010 census. *See Defendants' Supplemental Memorandum*, Exhibit C. This makes the City of Montgomery a Class III city. W.Va. Code § 8-1-3(3) ("Every municipal corporation with a population in excess of two thousand but not in excess of ten thousand [is] a Class III city."). Therefore, the officers hired by the City of Montgomery are members of a "noncivil service department," and the Plaintiff, as the chief of police of a Class III city, was not entitled to the protections of W.Va. Code §§ 8-14-16 and 8-14-17. W.Va. Code § 8-14A-1(5) ("Noncivil service,' when followed by the terms 'department,' 'officer' or 'accused officer[,'] means any department, officer or accused officer who is not

subject to the civil service provisions of article fourteen, chapter eight of this code or article fifteen, chapter eight of this code.”). Furthermore, pursuant to W.Va. Code 8-10-1, the mayor has the right to control the police of the municipality and the right to appoint special officers. *See also Complaint* at ¶ 3 and *Amended Complaint* at ¶3. Mayor Higgins’s right to control the police of the municipality gave him authority to appoint a chief of police to serve at the Mayor’s will and pleasure. *See Vetter v. Town of Moorefield*, No. 11-1353 (W.Va. Supreme Court, June 22, 2012) (memorandum decision) (“The Plaintiff, Frank Vetter, as Chief of Police, was an at will employee of the Town of Moorefield, and, as such, he could be terminated for any reason or for no reason, so long as his dismissal did not violate the law. *Skaggs v. Elk Run Coal Co., Inc.*, 479 S.E.2d 561, 198 W.Va. 51 (1996).”) (*quoting* the *Order* of Judge Charles E. Parsons, Circuit Court of Hardy County, Conclusions of Law ¶ 1).

The Plaintiff has cited no authority in his *Complaint*, in his proposed *Amended Complaint*, in his *Plaintiff’s Supplemental Memorandum*, or in his *Proposed Findings of Fact and Conclusions of Law*, that would entitle him to a pre-termination hearing. During the hearing on this matter, the Court requested additional authority upon which the claim for a hearing was based. The Plaintiff, in all of his arguments and submissions to the Court, has merely reiterated the claim that he was entitled to a hearing under W.Va. Code § 8-14A-1 *et seq.* The Plaintiff argues in the *Plaintiff’s Supplemental Memorandum* that he “was fired for cause,” but the cause he alleges is “not participating in the racial discrimination and harassment of James Ivy.” *Plaintiff’s Supplemental Memorandum* at 3; *see also Complaint* at ¶ 14 and *Amended Complaint* at ¶ 14; *Complaint* at ¶ 14. That is hardly an allegation of wrongdoing. Article 14A, however, only applies to the termination of an officer accused of wrongdoing. The plaintiff has not

alleged that he was an “accused officer,” and, therefore, there were no “issues involved” for the Police Board to determine. *See* W.Va. Code § 8-14A-3(a).

As noted above, the Plaintiff accepted the position as chief of police of a Class III city. As such he served at the will and pleasure of Mayor Higgins. There was, thus, no requirement of a pre-termination hearing.

II. The Plaintiff’s *Complaint* must be dismissed because the Defendants are entitled to qualified immunity.

The Plaintiff’s *Complaint* alleges that Mayor Higgins “often ordered the Plaintiff to do things that were not consistent with the laws of the State of West Virginia. When [the] Plaintiff refused and pointed out the illegality of such orders, [the] Defendant would become enraged and verbally abusive.” *Complaint* at ¶ 6. The Plaintiff further alleges that “the [D]efendants directed [him] to retaliate against the said James Ivy for Ivy’s filing of the law suit against the City.” *Complaint* at ¶ 5. The Plaintiff offers the same allegations in his proposed *Amended Complaint*. *Amended Complaint* at ¶¶ 5 & 6. The only *specific* command or request, however, that the Plaintiff alleges is that the Mayor Higgins “specifically asked [the] [P]laintiff to place a GPS device in Ivy’s cruiser to track his whereabouts.” *Complaint* at ¶ 5. The Plaintiff specifies the same request, and only that request, in his proposed *Amended Complaint*. *Amended Complaint* at ¶ 5.

The Plaintiff has, thus, staked his entire retaliation case on a single allegation that placing a GPS tracking device on Officer Ivy’s cruiser would have been illegal. The Plaintiff attempts to support this conclusion by citing to *United States v. Jones*, ___ U.S. ___, 132 S.Ct. 945, 181

L.Ed.2d 911 (2012). *Jones*, however, cuts against the Plaintiff's conclusion and strongly supports the Defendants' claim that the command was lawful.

Jones was a criminal case where the defendant was suspected of participating in narcotics trafficking. The federal government installed a GPS tracking device on his personal vehicle and tracked the vehicle's movements over a 28-day period. The United States Supreme Court unanimously determined that the placement of the tracking device constituted a "search" within the meaning of the Fourth Amendment, though the Justices differed about the reasons supporting this conclusion. The key factor for the *Jones* majority was the fact that the tracking device was attached to the defendant's *personal* vehicle. The *Jones* Court writes:

It is important to be clear about what occurred in this case: The Government physically occupied *private property* for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.

Jones, 132 S.Ct. at 949 (*emphasis added*). The defendant's personal vehicle was an "effect" for purposes of the Fourth Amendment and entitled to the Amendment's protections. *See Jones*, 132 S.Ct. at 953.

The facts of *Jones* are plainly at odds with the facts of the case at bar. The cruiser in question was not an "effect" of Officer Ivy. It belonged to the City of Montgomery. Officer Ivy, while on duty, had no property interest in the City's police cruiser and no reasonable expectation of privacy in its movements. In fact, the City has the absolute right to control its own property.

The Fourth Circuit Court of Appeals recently released an opinion that further supports the Defendants' position. In *U.S. v. Martinez-Turcio*, Nos. 10-5046, 10-5189, 10-5190, 10-5250, 10-5262, 10-5291, 2012 WL 4054875 (4th Cir. Sept. 17, 2012), two of the four defendants argued that their Fourth Amendment rights were violated when the DEA placed a GPS tracking

device on a van. The defendants did not, however, own the van. This fact was fatal to their Fourth Amendment claim. *Id.* at *9. (“[T]he van did not belong to [the defendant] and [he] fails to direct the court to any place in the record suggesting that he had some legitimate expectation of privacy in the van. He, therefore, has no privacy interest in the van and lacks standing to challenge the search.”) (citing *United States v. Carter*, 300 F.3d 415, 421 (4th Cir. 2002) (per curiam)).

The same may be said in the case at bar. The police cruiser belonged to the City of Montgomery, not Officer Ivy. Officer Ivy had neither a property nor a privacy interest in the City’s police cruiser. Accordingly, the Plaintiff has failed to allege any specific violation of law that Mayor Higgins asked or commanded him to commit.

Qualified immunity is designed to protect public officials from the threat of litigation resulting from difficult decisions which must be made in the course of their employment. *See, e.g., Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995). To sustain a claim against a political subdivision or its employees or officials acting within the scope of their authority sufficient to overcome this immunity, it must be established that the agency employee or official knowingly violated a clearly established law, or acted maliciously, fraudulently, or oppressively. *Parkulo v. West Virginia Bd. of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996); Syllabus Point 3, *Clark*, 195 W.Va. 272, 465 S.E.2d 374 (citing *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992)). In other words, the City of Montgomery, its agencies, officials, and employees are immune for acts or omissions arising out of the exercise of discretion in carrying out their duties, so long as they are not violating any known law or acting in malice or bad faith. Syllabus Point 8, *Parkulo*.

In outlining qualified immunity, the West Virginia Supreme Court of Appeals relied on previous discussions from federal courts. It commented that qualified immunity is designed to “insulate the decision making process from the harassment of prospective litigation.” *Chase* 188 W.Va. at 361, 424 S.E.2d at 596. ““The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suit.”” *Id.* at n.12 (*quoting Westfall v. Erwin*, 484 U.S. 292, 295-96, 108 S.Ct. 580, 583 (1988)).

In *Chase*, the Supreme Court of Appeals adopted the test used by the United States Supreme Court in *Harlow v. Fitzgerald*, holding that “[G]overnment officials performing discretionary functions generally are shielded from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Chase* 188 W.Va. at 362, 424 S.E.2d at 597 (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 812, 102 S.Ct. 2727, 2738 (1982)). The Court explained further that the term “reasonable person” is defined as “a reasonable public official occupying the same position as the defendant public official.” *Id.* at n.16 (*citing Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034 (1987)).

The Supreme Court of Appeals extended the qualified immunity to which the official was entitled to the State, writing: “we endorse the principle, expressed in the *Restatement*, that the immunity of the State is ordinarily coterminous with the qualified immunity of the public executive official whose acts or omissions give rise to an action[.]” *Parkulo v. West Virginia Bd. of Probation*, 199 W.Va. 161, 177, 483 S.E.2d 507, 523 (1996). Accordingly, Mayor Higgins

and the City of Montgomery are shielded from liability because their qualified immunity is coterminous.

Dispositive motions filed on behalf of governmental defendants implicated immunities that require unique consideration. “Immunities under West Virginia law *are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all.*” *Hutchinson v. City of Huntington*, 198 W.Va. 139, 148, 479 S.E.2d 649, 658 (1996) (emphasis added). Indeed “[t]he very heart of the immunity defense is that *it spares the defendant from having to go forward with the inquiry into the merits of the case.*” *Id.* (emphasis added) (citing *Swint v. Chambers County Commission*, 514 U.S. 35, 115 S.Ct. 1203 (1995)). As Justice Cleckley in *Hutchinson* wrote:

An assertion of qualified or absolute immunity should be heard and resolved prior to any trial because, if the claim of immunity is proper and valid, the very thing from which the defendant is immune—a trial—will absent a pretrial ruling occur and cannot be remedied by a later appeal. On the other hand, the trial judge must understand that a grant of summary judgment based on immunity does not lead to loss of right that cannot be corrected on appeal.

Id. at n.13.

Similarly, the United States Supreme Court used almost identical reasoning to that of Justice Cleckley in *Hutchinson* to guide the federal judiciary as to the importance of a government official’s right to be summarily dismissed from litigation when qualified immunity is applicable. “The privilege is ‘an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.’” *Saucier v. Katz*, 533 U.S. 194, 200-01, 121 S.Ct. 2151, 2156 (2001) (emphasis added) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815 (1985)) (overruled on other grounds by *Pearson v. Callahan*, 555 U.S.

223, 233, 129 S.Ct. 808, 816 (2009)). Further, *Saucier* holds that immunities spare governmental defendants from the other burdens of litigation. *Id.* Other burdens of litigation have been held to include discovery. *See Yoak v. Marshall University*, 223 W.Va. 55, 59, 672 S.E.2d 191, 195 (2008). Therefore, the Defendants should not be subjected to the burdens of litigation, and this Court must grant the motion dismissing them from this suit.

Neither the *Complaint* nor the *Amended Complaint* alleges a violation of a specific law that Mayor Higgins would have known he was violating. As the Court has already noted, the Plaintiff's allegations regarding (a) his allegedly unlawful termination and (b) the allegedly unlawful request to attach a GPS device to Officer Ivy's cruiser are false. Apart from those false allegations, both the *Complaint* and the *Amended Complaint* fail to allege in any concrete, substantive fashion that a public official breached a specific law or acted maliciously or oppressively. *See Parkulo v. West Virginia Bd. of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996). Therefore, the Plaintiff has failed to identify, in either his *Complaint* or his proposed *Amended Complaint*, the actions of Mayor Higgins that violated clearly established law that a similarly situated mayor would have been aware of. Therefore, the Defendants are entitled to qualified immunity from suit. Thus, dismissal is appropriate.

More to the point, given what the Plaintiff has *offered* to prove in his *Amended Complaint*, the Plaintiff's problem is not that denying his motion would prevent him from presenting "the merits of the action." Syllabus Point 8, *McDowell County Bd. of Educ. v. Stephens*, 191 W.Va. 711, 447 S.E.2d 912. Nor is it that the Defendants would be "prejudiced by the sudden assertion of the subject of the amendment" or that the Defendants would lack "opportunity to meet the issue." *Id.* The problem is simply that the Plaintiff has proposed to plead no additional facts that would alter the Court's conclusion that the case must be dismissed. The proposed *Amended Complaint* contains no "sudden assertions" to surprise the Defendants, and no new issues for the Defendants to "meet," because there is nothing materially new about the substance of the proposed *Amended Complaint*.

When a party requests leave to file an amended pleading, and the proposed pleading would not remedy the defects in the party's initial pleading, a court may properly exercise its discretion to deny the party's request. *Lloyd's, Inc. v. Lloyd*, 225 W.Va. 377, 386-87, 693 S.E.2d 451, 460-61 (2010) ("[T]he circuit court correctly denied Lloyd's motion to amend its complaint because the claims sought to be asserted . . . would not have 'permit[ted] the presentation of the merits of the action,' . . . because such claims also would have been barred by *res judicata*.) (quoting Syllabus Point 2, *State ex rel. Vedder v. Zakaib*, 217 W.Va. 528, 618 S.E.2d 537 (2005)); and *Poling v. Belington Bank, Inc.*, 207 W.Va. 145, 153, 529 S.E.2d 856, 864 (1999) ("The amended complaint raised no issues which are not covered by the applicable statutes. The circuit court did not abuse its discretion in denying the motion to amend.") *abrogated on other grounds by Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008). Thus, when a proposed amended pleading is defective for the same reasons as the original pleading, there is no point in allowing it to be filed just so the Court can entertain—and grant—a second motion to dismiss. If

the Court granted the Plaintiff's *Motion to File Amended Complaint*, the Court has no reason to believe that it would not also, at a later date, grant a subsequent motion by the Defendants to dismiss the *Amended Complaint*. That train of events would be a waste of the Court's time and the parties'.

RULING

For the foregoing reasons, the Defendants' *Motion to Dismiss* is here by **GRANTED** and the Plaintiff's *Motion to File Amended Complaint* is **DENIED**. The Plaintiff's *Complaint* is hereby **DISMISSED** with the parties' objections and exceptions to all adverse rulings being preserved.

The Clerk of this Court is to send a copy of this *Order* to **Michael T. Clifford, Esq.**, 723 Kanawha Blvd. E., Union Building, Ste. 1200, Charleston, WV 25301; and to **Vaughn T. Sizemore, Esq.**, Bailey & Wyant, PLLC, 500 Virginia Street East, Ste. 600, P.O. Box 3710, Charleston, WV 25337-3710. The Clerk is further to remove this matter from the active docket of this Court. **This is a final order.**

ENTERED this the 16th day of November 2012.

PAUL M. BLAKE, JR.
JUDGE

Paul M. Blake, Jr., Judge

A TRUE COPY of an order entered
November 19, 2012
Teste: Daniel E. Wright
Circuit Clerk Fayette County, WV