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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Brian A. Wilkins,

Plaintiff,

vs.

City of Tempe et al,

Defendants.

) CV: 09-752-PHX-MHM

) OPPOSITION TO DEFENDANT'S
) MOTION TO DISMISS, MEMORANDUM
) OF POINTS, AND AUTHORITIES

INTRODUCTION

Defendants bring a motion to dismiss challenging Plaintiff's right to bring 42 U.S.C. §§ 1983 & 1985(3) and all other claims. Defendants make several false statements in their motion, misunderstand and misapply the U.S. Supreme Court's ruling in *Heck vs. Humphrey* in arguing dismissal of the Plaintiff's claims by introducing a claim the Plaintiff has not brought, and deliberately undermine and/or ignore the true and actual nature of the claims the Plaintiff brings. The Defendants fail to address specific customs alleged by the Plaintiff, mainly that the City of Tempe's Police Chief, Tom Ryff, encourages his officers to lie in police reports, to their commanders, and to the media. Defendant Ryff admitted he encourages his subordinate officers to lie and Plaintiff will present video of Ryff telling a CBS News reporter that it is in fact him on a tape (which the Plaintiff will also present) encouraging a subordinate officer to "adjust his hours" and "lie to his commander" so he and the officer could partake in some sort of adulterous activities.

The Defendants motion to dismiss is an attempt to divert the attention of the Court from Tempe's customs and practices of lying and clearly malicious and discriminatory

1 treatment of “black” citizens of Tempe, to two charges brought by Maricopa County
2 which the Plaintiff was forced to plead guilty to after being denied a trial. The Plaintiff
3 seeks to bring attention to a police chief and police department that, by their actions,
4 policies, and customs, execute a discriminatory system of arrests and incarcerations
5 which is covered up by lying and deceit, while City administrators allow it all to happen
6 without repercussion or reprimand.

7 **I. Defendants’ “Facts” Section of Motion To Dismiss**

- 8 a. Defendants dismiss several clear and unequivocal facts as “allegations”
9 by the Plaintiff.
- 10 b. The extortion and physical threats from the Tempe’s Police alleged
11 “victim,” Michael Arthur Wood, are clear and unequivocal, and will be
12 presented and submitted as evidence to the court when required. Again,
13 the messages are still contained in the Plaintiff’s cellular phone.
- 14 c. Defendants say the Plaintiff makes “allegations” that are actually matters
15 of fact. In the police report from the night (Exhibit A; attached), on the first
16 page, Defendant Johnson wrote that Wood said “his neighbor pointed a
17 gun at his head thirty minutes prior (at 2:10 a.m.).” This same page also
18 contains Tempe’s victim saying he doesn’t remember anything from the
19 night because he’s “too intoxicated.” On the third page of that same
20 exhibit, the alleged witness, Linette Wittman, said this alleged incident
21 happened “between [11pm] and [midnight.]” a four hour time difference,
22 according to Johnson.

23 **II. Defendants Assert §§1983 and 1985(3) Claims Should Be Dismissed by**

24 ***Heck***

- 25 a. The defendants, again, are trying to divert attention to a plea agreement
26 the Plaintiff was forced to sign, and do not address the claims made in the
27 Initial or Amended Complaint (the only differences between the two are
28 the latter added Defendant’s true identities and a few cosmetic clean-ups.)
According to the Defendants, the Plaintiff’s claims are “tantamount to a

1 collateral attack on his conviction,” which is what they desire the Court to
2 believe.

- 3 b. In attached Exhibit B, which are the charges the Plaintiff faced at the initial
4 bond hearing, it is clear the Plaintiff was charged, by the Tempe Police,
5 with three (3) counts of misconduct involving a weapon (Class 6
6 dangerous felonies), one (1) count of aggravated assault with deadly
7 weapon (Class 3 dangerous felony), and one (1) count of possession/use
8 of a weapon in a drug offense (Class 4 felony).
- 9 c. Defendants misapply *Heck v. Humphrey*, 512 U.S. 477, 487 (1994) in a
10 number of ways. “A plaintiff may be unable to go forward with a § 1983
11 claim if a “judgment in favor of the prisoner **necessarily would imply** the
12 invalidity of the prisoner’s conviction or sentence, unless the prisoner can
13 demonstrate that the conviction or sentence has been previously
14 invalidated.”
- 15 d. The purpose behind *Heck* is to prevent litigants from using a § 1983
16 action, with its more lenient pleading rules, to challenge their conviction or
17 sentence without complying with the more stringent exhaustion
18 requirements for habeas corpus. See *Muhammad v. Close*, 540 U.S. 749,
19 751-52, 124 S.Ct. 1303, 158 L.Ed.2d 32 (2004) (*per curiam*).
- 20 e. The Plaintiff did not plead guilty, nor was he found guilty of any crimes the
21 Tempe Police tried to charge him with, thus there can be no collateral
22 attack in the §§1983 and 1985(3) claim because Plaintiff was not
23 convicted of the crimes Tempe tried to charge him with. The Plaintiff
24 pleaded guilty to “undesigned” disorderly conduct and “undesigned”
25 possession of drug paraphernalia on charges brought by Maricopa
26 County.
- 27 f. However, since the Defendants insist on trying to make this action about a
28 plea agreement, the Plaintiff allows he is in fact engaged in the only
means of collateral attack afforded to him on charges he was forced to

1 plead guilty to, pursuant to *Ariz. R. Crim. P. 32*. It should be noted that
2 none of the claims in the “post-conviction relief petition” filed in Maricopa
3 County Superior Court on June 10, involve the Tempe Police, thus Plaintiff
4 has procedurally and otherwise precluded any claims involving the Tempe
5 Police in any subsequent appeal proceedings in regards to said plea
6 agreement. (*Id.* 32.2).

- 7 g. Plaintiff’s § 1983 action is not barred by *Heck* because the malicious acts
8 (equal protection, due process) by the Defendants were employed against
9 him subsequent to the time he engaged in the [alleged] conduct that
10 constituted the basis for the plea agreement. see *Smith vs. City of Hemet,*
11 (*9th Cir. 2005*) 394 F.3d 689 and *Sanford v. Motts (9th Cir. 2001)* 258 F.3d
12 1117. The race-based charges from Tempe, which were dropped a week
13 later, were finalized the following afternoon when Defendant
14 Loewenhagen confirmed the actions of Defendants Wallace and Johnson.
- 15 h. Plaintiff’s § 1983 action seeks declaratory relief, compensatory and
16 punitive damages based on conduct that occurred subsequent to the
17 arrest and the customs and practices of the City of Tempe that led to the
18 Plaintiff being damaged. Plaintiff was not convicted on the charges
19 brought by Tempe because they were dismissed not only on indictment,
20 but further as part of a plea agreement. Plaintiff’s plea agreement for
21 charges brought by Maricopa County may not form the basis for the
22 application of *Heck* where there is no challenge to that conviction in
23 Plaintiff’s § 1983 claim. see *Butler vs. Compton, (10th Circuit)* 482 F.3d
24 1277 at 21. Roy Heck, in his § 1983 claim, specifically named Dearborn
25 County prosecutors James Humphrey and Robert Ewbanks, thus the
26 dismissal because of collateral attack on the prosecution.
- 27 i. Defendants have the burden of showing pursuit of this federal § 1983
28 action would “necessarily imply invalidity” of a conviction. As they have not
done so, *Heck* is not a bar.

1 j. Plaintiff asserts in the initial and amended complaints that Defendants lie
2 for one another to cover malfeasance and misconduct under color of law,
3 as a result of their practices and customs of lying and misconduct
4 perpetuated by their Chief, Ryff. A clear § 1985(3) claim is stated.

5 **III. Defendants Assert §§1983 and 1985(3) Claims Should Be Dismissed on**
6 **Merits**

- 7 a. The Defendants assert that “the majority of Plaintiff’s chosen defendants
8 are inappropriate defendants and should be dismissed as such.” Further,
9 Defendants assert, “Plaintiff seems to merely assume that Defendants
10 Ryff and Loewenhagen deprived him of his civil rights.” Further,
11 Defendants assert, “Defendants Ryff and Loewenhagen should be
12 dismissed from the case because they had no personal involvement in the
13 actions that allegedly led to the violation of Plaintiff’s rights.”
- 14 b. Again, the Defendants are either dodging the claims at hand or are trying
15 to use tactics to minimize and/or ignore the claims at hand, while creating
16 claims the Plaintiff has not brought.
- 17 c. State officers may be held personally liable for damages under § 1983
18 based upon actions taken in their official capacities. *Hafer vs. Melo, 502*
19 *U.S. 21 (1991).*
- 20 d. Defendant Ryff is the Chief of Police and thus, ratifies, administers, and
21 creates by example all policies and customs of the Police department.
22 Again, the Defendants have completely dodged the issue and fact of Ryff
23 telling his officers to lie to cover malfeasance and misconduct. The fact
24 Ryff also is an admitted adulterer who was still promoted to chief even
25 with a sexual harassment complaint lodged against him by a female traffic
26 officer for the Tempe Police Department, shows his officers by example,
27 as he is still in the position of Chief, that malfeasance, official misconduct,
28 and childish behavior are condoned and encouraged by the City of
Tempe, and can possibly lead to promotion. Defendants Wallace and

1 Johnson's behavior and acts, in following by example, practice and
2 custom, the lead of their chief, willfully and wantonly deprived the
3 Plaintiff's of his 14th Amendment due process and equal protection rights,
4 without any fear of discipline from their chief or the City.

- 5 e. Defendant Loewenhagen, as displayed in Exhibit C, violated the Plaintiff's
6 right to due process and equal protection of law when he simply glanced
7 at the report Wallace and Johnson filed, and deemed the case closed the
8 same day via a two (2) paragraph "review" of a 16 page report. All the
9 inconsistencies and status of a "victim" being on probation (Exhibit D) and
10 intoxicated are enough for any reasonable detective to investigate the
11 issues further.

12 **IV. Defendants Claim Tempe Police Dept. Should Be Dismissed Because It is a**
13 **"non jural" entity.**

- 14 a. Plaintiff amended the initial complaint on May 1, 2009 and dismissed the
15 Tempe Police Department as a defendant.

16 **V. Defendants Claim City of Tempe should be dismissed from complaint**

- 17 a. A Plaintiff "need not specifically allege a custom or policy; it is enough if a
18 custom or policy can be inferred from the allegations of the complaint."
19 *Shaw v. Cal. Dep't of Alcoholic Beverage Control, 788 F.2d 600, 610 (9th*
20 *Cir. 1986)*. A court may not dismiss a complaint for failure to state a claim
21 "unless it appears beyond doubt that the plaintiff can prove no set of facts
22 in support of his claims which would entitle him to relief." *Barnett v.*
23 *Centoni, 31 F.3d 813, 816 (9th Cir. 1994)*(citing *Buckley v. Los Angeles,*
24 *957 F.2d 652, 654 (9th Cir. 1992)*). "All that is required are sufficient
25 allegations to put defendants fairly on notice of the claims against them."
26 *McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991)* (citing *Conley v.*
27 *Gibson, 355 U.S. 41, 47(1957); 5 C. Wright & A. Miller, Federal Practice &*
28 *Procedure § 1202 (2d ed. 1990)*).

- 1 b. The Plaintiff states specifically the customs, practices, and policies of
2 Tempe in the complaint and will not address it further here.

3
4 **VI. Defendants Assert Selective Enforcement Claims Should Be Dismissed**

- 5 a. As the Plaintiff stated in his Amended Complaint (paragraph 43), “the
6 actions of Defendants Wallace and Johnson, and at least five other
7 Tempe Police Officers that night had a “discriminatory effect and [was]
8 motivated by a discriminatory purpose” *United States v. Dumas*, 64 F.3d
9 1427, 1431 (9th Cir.1995). Equal protection is violated when the decision
10 to prosecute (or not) is based upon impermissible factors such as race
11 (*Id*).
- 12 b. Further, these allegations are sufficient to withstand Tempe’s motion since
13 the claims are based on the allegation that “individual officers’ conduct
14 conformed to official policy, custom, or practice.” *Karim-Panahi v. Los*
15 *Angeles Police Dept.*, 839 F.2d 621, 624 (9th Cir. 1988) (citing *Shah v.*
16 *County of Los Angeles*, 797 F.2d 743, 747 (9th Cir. 1986)).
- 17 c. Plaintiff also illustrates the misconduct charges brought against him,
18 though none were brought against Wood in Paragraphs 40-43 in the
19 amended complaint.
- 20 d. Plaintiff will not address the falsehoods in this section of Defendants
21 motion, as Defendants selectively read what they wanted to in the
22 complaint to further their defense.

23 **VII. Defendants assert Defamation claims should be dismissed**

- 24 a. Plaintiff provides Exhibit A and E. In the police report (Ex. A, page 2),
25 Defendant Johnson asks the alleged victim, “why he waited so long before
26 calling police,” because the alleged incident happened nearly four hours
27 prior to Wood calling police, as he first attempted to extort money from the
28 Plaintiff. In the publication by the City of Tempe (Ex. E), they state, “the
victim contacted police **immediately.**”

- 1 b. Tempe was grossly negligent in not only falsely portraying what happened
2 as referenced above, but did not include any material facts, especially that
3 Wood was on probation, threatened to kill the Plaintiff, and that the
4 Plaintiff was extorted.
- 5 c. Because private individuals characteristically have less effective
6 opportunities for rebuttal than do public officials and public figures, they
7 are more vulnerable to injury from defamation. *Gertz v. Robert Welch,*
8 *Inc., 418 U.S. 323.*
- 9 d. Defendants had knowledge of the falsity and put on display a reckless
10 disregard for the truth to intentionally injure the Plaintiff and again, along
11 Tempe's policy and customary lines, lie to the public to further their
12 agenda and cover malfeasance, and make the "black" person look like the
13 monster attacking an innocent "white victim" in the alleged incident.
- 14 e. Defendants, again, somehow equate the plea agreement on the charges
15 from Maricopa County with the defamation claim. Plaintiff assumes this is
16 simply a desperate reach for some sort of defense, however the
17 Defendants assertion here is baseless.

18 **VIII. Defendants Assert IIED Claims Should Be Dismissed**

- 19 a. Again, Defendants try and insert the plea agreement as a desperate
20 defense for IIED.
- 21 b. Defendants assert that, "Officer Wallace and Officer Johnson acted
22 responsibly and acted within the confines of the law on that night."
- 23 c. As the Plaintiff states here and in his amended complaint, it is not only
24 outrageous, but unheard of for a person (Wood, the alleged "victim") who
25 was on probation (Exhibit E), who extorted and assaulted the Plaintiff, and
26 was completely intoxicated that night, to not be arrested for any crimes,
27 while charging a college student with no criminal record with a potpourri of
28 random crimes.

- 1 d. Defendants also ignore the allegation that Wallace slammed the Plaintiff
2 against a brick wall before handcuffing him, when the Plaintiff already had
3 a broken hand.
- 4 e. Tempe deliberately published a false, malicious story about the Plaintiff
5 which was picked up by several news outlets.

6 **IX. Defendants Assert Plaintiff's Claim for Gross Negligence Should be**
7 **Dismissed**

- 8 a. The Defendants, as asserted by the Plaintiff in his amended complaint,
9 completely failed in their responsibility to investigate charges brought by a
10 citizen of the city. Ignoring a citizen's calls for help puts the entire
11 community at risk and offends the community's sense of fair play and
12 decency. Again, Tempe will not charge "white" perpetrators of crimes
13 committed against "blacks."

14 **X. Defendants Assert Plaintiff's Claim For Failure To Train Should Be**
15 **Dismissed**

- 16 a. There are indeed "limited circumstances in which an allegation of 'failure
17 to train' can be the basis for liability under § 1983." *City of Canton, Ohio v.*
18 *Harris, 489 U.S. 378, 387 (1989)*. "Only where a municipality's failure to
19 train its employees in a relevant respect evidences a 'deliberate
20 indifference' to the rights of its inhabitants can such a shortcoming be
21 properly thought of as a city 'policy or custom' that is actionable under §
22 1983." *Id. at 389*.
- 23 b. Defendants did not address any of the specific allegations made by the
24 Plaintiff in his amended or initial complaint in their motion to dismiss the
25 failure to train claim. They only address claims they fabricated to further
26 their defense and use elongated conjecture made to look legitimate by
27 citing cases irrelevant to the Plaintiff's claims. Therefore, the Plaintiff has
28 nothing more to add.

CONCLUSION

1 The Defendants have failed to show that "it appears beyond doubt that the Plaintiff can
2 prove no set of facts in support of his claim which would entitle him to relief." *Conley v.*
3 *Gibson, 355 U.S. 41, 45-46 (1957)*. This motion to dismiss completely dodges the
4 actual issues and claims at hand and tries to create claims the Plaintiff has not brought.
5 For all the reason stated above, the motion to dismiss should be denied in its entirety.
6

7 Submitted on this _____ day of July, 2009.
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14 **CERTIFICATE OF SERVICE**

15 I hereby certify that on July _____, 2009, I mailed a copy of the foregoing document
16 and all attached exhibits to:

17 Tempe City Attorney's Office
18 Re: CV-09-752-PHX-MHM
19 PO Box 5002
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