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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

BRIAN A. WILKINS,
Plaintiff,

v.

CITY OF TEMPE;
TEMPE POLICE DEPARTMENT;
TOM RYFF, in his individual and official
capacity as Tempe Police Chief;
OFFICER MIKE WALLACE in his
individual and official capacity;
OFFICER T. JOHNSON in his individual
and official capacity;
DEFECTIVE JEFF LOEWENHAGEN, in
his individual and official capacity;
Defendants.

No. CV-09-0752-PHX-MHM

**DEFENDANTS' REPLY IN SUPPORT
OF MOTION TO DISMISS
COMPLAINT**

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Defendants hereby submit their Reply in Support of Motion to Dismiss Complaint. Nothing in Plaintiff's Opposition to Defendant's Motion to Dismiss ("Response") changes the fact that Plaintiff has failed to state a claim against Defendants and his claims should be dismissed in their entirety. This Reply is supported by the attached Memorandum of Points and Authorities.

1 Additionally, although Plaintiff alleges that his allegations are based on conduct
2 that occurred after the night he was arrested, it is clear from reading Count One of
3 Plaintiff's Complaint that his § 1983 and 1985 claims are based of the actions of the
4 arresting officers on the night of July 22, 2008 and not those of Detective Jeff
5 Loewenhagen, Chief Tom Ryff or any other City employee.

6 **B. Defendants Loewenhagen and Ryff Should Be Dismissed from the
7 Complaint.**

8 Defendants Loewenhagen and Ryff should be dismissed from the Complaint unless
9 they had "an affirmative role in any alleged deprivation." King v. Atiyeh, 814 F.2d 565,
10 568 (9th. Cir. 1987) (citing Rizzo v. Goode, 423 U.S. 362, 377 (1976)). Moreover, "a
11 plaintiff must allege facts, not simply conclusions that show that an individual was
12 personally involved in the deprivation of his civil rights." Barren v. Harrington, 152 F.3d
13 1193, 1194 (9th. Cir. 1998). The only allegation alleged against Defendant Loewenhagen
14 is contained in paragraph 25 of Plaintiff's Complaint where he states "[t]hough the
15 incident [on the night of July 22, 2008] had much more to it than what Wallace and
16 Johnson reported, Detective Jeff Loewenhagen deemed the case closed the next morning,
17 and failed to do any further investigation." With regard to Defendant Ryff, Plaintiff
18 asserts in paragraph 25:

19 Tempe Police have a 'code of silence' and well-known 'good
20 'ol boy' network, where they conspire to cover and lie for one
21 another frequently. This behavior is perpetuated by their
22 chief, Tom Ryff, who admitted he encourages his subordinate
23 officers to lie to get what they want and/or to cover
24 misconduct.

25 In paragraph 45 of his Complaint, Plaintiff continues to make random allegations against
26 Defendant Ryff that are not related to the incident which led to Plaintiff's arrest. In his
27 Response, Plaintiff states that Defendant "Ryff is the Chief of Police and thus, ratifies,
28 administers, and creates by example all policies and customs of the Police department."
Response at III.d.

 None of the allegations against Defendant Loewenhagen or Defendant Ryff
establish that either one of them played an affirmative part in the conduct which led to

1 Plaintiff's alleged deprivation. At most, Defendant Loewenhagen played a minor and
2 passive role in Plaintiff's arrest by forwarding the charges to the County Attorney. And
3 Defendant Ryff played no direct role in Plaintiff's arrest. Plaintiff's only complaint about
4 Ryff seems to be from a policy standpoint and not as a result of any affirmative acts on his
5 part. Therefore, both Defendants should be dismissed.

6 **C. Plaintiff Does Not Allege a Specific Policy, Custom, or Practice By Tempe
7 That Would Result In Liability.**

8 Plaintiff does not allege a specific policy, custom, or practice by Tempe that would
9 result in liability. Plaintiff simply makes conclusory statements and allegations against
10 Tempe and the police department, which are not allowed when determining whether a
11 municipality is liable under Monell. See Greenawalt v. Sun City West Fire Dist., 250
12 F. Supp.2d 1200, 1215 (D.Ariz. 2003). Plaintiff must allege a specific policy or custom
13 that was the moving force behind the violations. Id. at 1215 (*quoting Board of*
14 *Supervisors v. Brown*, 520 U.S. 397, 400). Plaintiff has failed to do so, and his complaint
15 should be dismissed.

16 **D. Plaintiff Has Not Alleged a Proper Conspiracy Under § 1985(3).**

17 Plaintiff failed to allege a proper conspiracy under § 1985(3). As stated in
18 Defendant's Motion, to prove a conspiracy, Plaintiff must establish: "(1) a conspiracy; (2)
19 for the purpose of depriving, either directly or indirectly, any person or class of persons of
20 the equal protection of the laws, or of equal privileges and immunities under the laws; and
21 (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his
22 person or property or deprived of any right or privilege of a citizen of the United States."
23 United Bhd. of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825, 829 (1983).
24 Plaintiff must do more than make conclusory statements that Defendants conspired to
25 deprive him of his rights. Here, he has not done so.

26 **II. PLAINTIFF ADMITS THAT THE TEMPE POLICE DEPARTMENT**
27 **SHOULD BE DISMISSED.**

28 To his credit, Plaintiff agrees with Defendants that the police department should be
dismissed as a defendant, and he assert that his Amended Complaint does not list it as a
defendant. Therefore, the Tempe Police Department should be dismissed.

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1 **III. PLAINTIFF’S SELECTIVE ENFORCEMENT CLAIM SHOULD BE**
2 **DISMISSED.**

3 Plaintiff contends that by simply alleging that his claims are based on an official
4 policy or custom, his selective enforcement claim can withstand a motion to dismiss. This
5 is not the case. “In United States v. Armstrong..., [the Court] held that a defendant who
6 seeks discovery on a claim of selective prosecution must show some evidence of both
7 discriminatory effect and discriminatory intent.” United States v. Bass, 536 U.S.
8 862 (citing U.S. v. Armstrong, 517 U.S. 456 (1996)).

9 This two-prong requirement to reach discovery on a selective enforcement claim is
10 an intentionally rigorous standard. Armstrong, 517 U.S. at 468 (“[t]he justifications for a
11 rigorous standard for the elements of a selective-prosecution claim thus require a
12 correspondingly rigorous standard for discovery in aid of such a claim.”). This standard
13 requires that Plaintiff not only allege a custom motivated by a discriminatory intent, but
14 also requires that Plaintiff show “credible evidence” that the custom had a discriminatory
15 effect. Id. To show that an alleged custom had a discriminatory effect in a race-based
16 selective enforcement claim, the plaintiff must show “credible evidence” that “similarly
17 situated individuals of a different race were not prosecuted.” Id. at 465.

18 To show that an alleged custom had a discriminatory effect, Plaintiff once again
19 points to the misconduct charges to which he pled guilty. He believes that his neighbor
20 should have faced the same charges. However, as explained in the motion to dismiss,
21 Plaintiff’s neighbor was not sufficiently similarly situated to Plaintiff to qualify as a
22 comparator in a selective enforcement claim.

23 To reiterate, Plaintiff and his neighbor engaged in dissimilar activities on that
24 night. Plaintiff has not claimed that his neighbor discharged a firearm or possessed drug
25 paraphernalia that night- the Plaintiff admitted to engaging in both these activities on that
26 night. The differences between Plaintiff and his neighbor demonstrate that these
27 individuals are not similarly situated for the purposes of a selective enforcement claim.
28 Because Plaintiff failed to produce credible evidence that the alleged custom had a

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1 discriminatory effect, Plaintiff’s selective enforcement claim cannot withstand this motion
2 to dismiss.

3 **IV. PLAINTIFF’S DEFAMATION CLAIM REMAINS UNSUPPORTED BY**
4 **THE FACTS.**

5 As explained in the motion to dismiss, to create liability for defamation under the
6 Restatement there must be a false and defamatory statement concerning another.
7 Restatement (Second) of Torts § 558 (a). This defamation element can be broken into two
8 distinct parts: first, there must be a statement concerning another; second, that statement
9 must be defamatory and false.

10 In his response, Plaintiff alleges defamation for two reasons: first, Plaintiff alleges
11 that the statement in the police report that “the victim contacted police *immediately*” is
12 false, Response, VII, paragraph a., line 27-28 (emphasis added); and second, Plaintiff
13 believes that the police report failed to include facts that he found relevant, Response at
14 VII, ¶ b. The statements and omissions Plaintiff refers to in his Response fail to meet at
15 least one of these requirements.

16 First, these allegedly defamatory communications are not statements concerning
17 Plaintiff. Whether the victim contacted police immediately or four hours after the inciting
18 events began, does not affect Plaintiff one way or the other. Additionally, a statement
19 about the Plaintiff’s neighbor is not a statement about the Plaintiff.

20 Second, these communications are not defamatory. “A communication is
21 defamatory if it tends so to harm the reputation of another as to lower him in the
22 estimation of the community or to deter third persons from associating or dealing with
23 him.” Restatement (Second) of Torts § 559. Using the word immediately in the police
24 report does not alter Plaintiff’s reputation nor does it deter third party’s from associating
25 with him.

26 Furthermore, while private individuals may be more vulnerable to injury for
27 defamation, as Plaintiff suggests in his response, this does not alleviate the requirements
28 for defamation- a plaintiff must still allege the essential elements of defamation to

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1 maintain his claim. Because Plaintiff failed to show the essential elements of defamation,
2 the defamation claim should be dismissed.

3 **V. PLAINTIFF’S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**
4 **IS WITHOUT MERIT.**

5 In his response, Plaintiff claims that the officers’ conduct on that night was
6 outrageous. Plaintiff also seems to claim that posting the police report qualifies as
7 extreme and outrageous conduct. Defendants dispute these contentions. It bears repeating
8 that conduct qualifies as extreme and outrageous only when it is “so outrageous in
9 character, and so extreme in degree, as to go beyond all possible bounds of decency, and
10 to be regarded as atrocious, and utterly intolerable in a civilized community . . . in which
11 . . . an average member of the community would . . . exclaim, ‘Outrageous!’” Ford v.
12 Revlon, 734 P.2d 580, 585 (Ariz. 1987) (*quoting* Restatement (Second) of Torts § 46, cmt
13 b (1965)). Under this strict standard, it is clear that the officers’ conduct was not extreme
14 and outrageous.

15 Plaintiff claims that it is outrageous that his neighbor was not arrested on that
16 night. This non-arrest does not qualify as extreme or outrageous because it is within an
17 officers’ prudent discretion to charge individuals with crimes. See Rosenbaum v. City &
18 County of San Francisco, 484 F.3d 1142, 1152 and 1157 (9th. Cir. 2007) (“a government
19 entity has discretion in prosecuting its criminal laws” and “police have discretion to
20 determine the appropriate level of enforcement.”).

21 Plaintiff also claims that it is extreme and outrageous that he was pushed against a
22 wall during his arrest. This alleged action also falls short of extreme and outrageous and
23 was clearly an exercise of reasonable force. Finally, Plaintiff claims that posting the
24 police report was extreme and outrageous. Posting the police report was not extreme or
25 outrageous. The police report was factual and not defamatory, as Plaintiff has admitted to
26 the factual elements reported in the police report, like firing his handgun and possessing
27 drug paraphernalia.

28 The court may determine as a matter of law whether the alleged conduct was
extreme and outrageous enough to state a claim for intentional infliction of emotional

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1 distress. Midas Muffler v. Ellison, 650 P.2d 492, 499 (Ariz. App. 1982). Taken as true,
2 these allegations are not so atrocious and utterly intolerable in a civilized community to
3 conclude that the conduct was extreme and outrageous for the purposes of an intentional
4 infliction of emotional distress claim. Plaintiff’s claim for intentional infliction of
5 emotional distress should be dismissed.

6 **VI. PLAINTIFF’S GROSS NEGLIGENCE CLAIM SHOULD BE DISMISSED.**

7 Plaintiff does not challenge any of Defendants’ arguments about gross negligence
8 in his Response. Additionally, Plaintiff removes the gross negligence claim in the
9 Amended Complaint he is seeking to file. Defendants once again assert that gross
10 negligence is not recognized as an independent cause of action in Arizona. Therefore, the
11 claim should be dismissed.

12 **VI. PLAINTIFF’S FAILURE TO TRAIN CLAIM SHOULD BE DISMISSED.**

13 In his response, Plaintiff cites Canton v. Ohio, 489 U.S. 378, 387 (1989), to support
14 his failure to train allegation. Canton does not, however, support Plaintiff’s claim.
15 Instead, Canton supports Defendants assertion that Plaintiff failed to lay out an actionable
16 failure to train claim. In Canton, the court states that the “first inquiry in any case alleging
17 municipal liability under § 1983 is the question whether there is a direct causal link
18 between a municipal policy or custom and the alleged *constitutional deprivation*.” Id. at
19 385 (emphasis added). This initial analysis is critical because, as stated in Defendant’s
20 motion to dismiss, “if no right is violated, there is no basis for finding that the officers
21 were inadequately trained.” Los Angeles v. Heller, 475 U.S. 796, 799 (1986).

22 A plaintiff must demonstrate that one of his constitutional rights was violated to
23 establish liability for failure to train. City of Phoenix v. Superior Court In and For County
24 of Maricopa, 180 Ariz. 472, 479, 885 P.2d 160, 167, (Ariz.App. Div. 1, 1994) (“[T]he
25 plaintiff must prove that the individual defendants by their conduct violated one or more
26 of the plaintiff’s ‘clearly established’ constitutional rights.”).

27 Plaintiff failed to allege facts, in his Response or in his Complaint, tending to show
28 that his Constitutional rights were violated by the officers. The “specific allegations”

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1 Plaintiff alludes to in his response, are not allegations that would demonstrate that
2 Plaintiff's constitutional rights were violated. See Complaint at ¶ 36. Without showing
3 that his rights were violated, Plaintiff cannot establish the necessary elements in a failure
4 to train claim. Because Plaintiff failed to allege facts tending to show that his
5 Constitutional rights were violated, this claim should be dismissed.

6 **VII. CONCLUSION.**

7 Based on the foregoing, Defendants respectfully request that this Court dismiss
8 Plaintiff's Complaint in its entirety for his failure to state a claim upon which relief can be
9 granted.

10 **RESPECTFULLY SUBMITTED** this 16th day of July, 2009.

11 TEMPE CITY ATTORNEY'S OFFICE

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2009, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, and mailed a copy of same to:

Brian A. Wilkins
P. O. Box 66
Tempe, AZ 85280

I further certify that on July 16, 2009, the attached document was hand-delivered to:

HONORABLE MARY H. MURGUIA
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 525
401 W. Washington Street, SPC 53
Phoenix, AZ 85003

s/ Erin Fillmore

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