IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

JEFFREY E. WIGGINTON,	)	
	)	**Civil Action No. 4:12CV51-SA-JMV**
Plaintiff	)	
	)	
v.	)	
	)	
WASHINGTON COUNTY, MISSISSIPPI; SHERIFF MILTON GASTON, in his official and individual capacities; and WASHINGTON COUNTY SHERIFF'S DEPARTMENT	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF AUTHORITIES
IN OPPOSITION TO DEFENDANT MHSAA MOTION TO DISMISS

COMES NOW the Plaintiff, JEFFREY WIGGINTON, by and through counsel, and files this his memorandum in opposition to the Defendants' Motion to Dismiss, and would show unto the Court the following:

INTRODUCTION

On June 25, 2012, Plaintiff Jeffrey Wiggington (hereinafter "Plaintiff") filed a civil action against the following individuals/entities: Washington County, Miss. (hereinafter "County"), Washington County Sherriff's Department (hereinafter "Sherriff's Department") and Washington County Sheriff Milton Gaston (hereinafter "Gaston"). Plaintiff alleged that some or all of the Defendants violated Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., as amended by the Civil Rights Act of 1991, by discriminating against him because of his race and retaliating against him for engaging in protected activities. He also alleged a state law claim of malicious interference with employment.

Defendants answered Plaintiff's complaint on July 27, 2012, and also filed a FRCP 12(b)(6) motion to dismiss for failure to state a claim on the same day.

STANDARD OF REVIEW

A Rule 12(b)(6) motion is disfavored and is rarely granted.[1] To survive a Rule 12(b)(6) motion to dismiss, a plaintiff's Complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief."[2] "'[D]etailed factual allegations' are not required."[3]

However, the complaint must allege "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'"[4] "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[5] Thus, if a complaint contains factual allegations describing "how, when and where" the Plaintiff suffered injury, he will have nudged his claims "across the line from conceivable to plausible" and the complaint will satisfy the pleading standard detailed in *Iqbal*.[6]

When faced with a Fed. R. 12(b)(6) motion to dismiss, the Court must conduct a two part analysis.[7] "First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions."[8] Additionally, "[T]he pleadings must have sufficient precision and factual detail to reveal that more than guesswork is behind the allegation."[9]

---

[1] *Sosa v. Coleman*, F.2d 991, 993 (5th Cir. 1981).
[2] *See* Fed.R.Civ.P. 8(a)(2).
[3] *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007)).
[4] *Id.* at 1949 (*quoting Twombly*, 550 U.S. at 570).
[5] *Id.* at 1949 (*citing Twombly*, 550 U.S. at 556).
[6] *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3rd Cir. 2009) (*citing Twombly,* 550 U.S. at 570).
[7] *Id.* at 210.
[8] *Id.* at 210-211 (*citing Iqbal,* 129 S.Ct. at 1949).
[9] *Floyd v. City of Kenner*, 08-30637 (FED5). *See also Schultea v. Wood*, 47 F.3d 1427, 1433-34 (5th Cir. 1995) (en banc).

"Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'"[10] "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[11] "In other words, the height of the pleading requirement is relative to circumstances."[12] In accordance with prevailing precedent, there are only three instances in which the Supreme Court has elevated the pleading standard in a case: (i) complexity,[13] (ii) immunity[14] and (iii) conspiracy[15].

Because this case does not fall within the three categories outlined,[16] dismissal is appropriate only when the court accepts as true all the well-pled allegations of fact and "it appears beyond doubt that the [plaintiff] can prove no set of facts in support of his claim which would entitle him to relief."[17] "If it is possible to hypothesize a set of facts consistent with the complaint that would entitle the plaintiff to relief, dismissal under Rule 12(b)(6) is inappropriate."[18]

Finally, even if Plaintiff's complaint is deficient, Plaintiff should be permitted to amend his complaint or it is reversible error.[19]

ARGUMENT

In filing their motion to dismiss, Defendants have raised four (4) legal issues to be addressed by this Court. First, the Sherriff's Department argued that it is not an entity capable of being sued in

---

[10] *Id.* at 210-211 (*citing Iqbal,* 129 S.Ct. at 1950).
[11] *Id*, 129 S. Ct. at 1950.
[12] *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009).
[13] *Bell Atl. Corp. v. Twombly*, 550 U.S. 554
[14] *Ashcroft v. Iqbal*, 129 S.Ct. 1937
[15] "Even before the Supreme Court's new pleading rule, as we noted, conspiracy allegations were often held to a higher standard than other allegations; mere suspicion that persons adverse to the plaintiff had joined a conspiracy against him or her was not enough. *Cooney*, 583 F.3d 971.
[16] Even if this Court were to apply *Iqbal*, Plaintiff has pled facts sufficient to overcome the elevated pleading standard.
[17] *Thomas v. Smith*, 897 F.2d 154, 156 (5th Cir. 1989) (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). *See also Hishon v. King & Spaulding*, 467 U.S, 69, 73 (1984); *McLean v. International Harvester Co.,* 817 F.2d 1214, 1217 n. 3 (5th Cir. 1987); *Jones v. U.S.*, 729 F.2d 326, 330 (5th Cir. 1984).
[18] *Veazey v. Communication and Cable of Chicago, Inc.*, 194 F.3d 850, 854 (7th Cir. 1999).
[19] *Brown v. Texas A&M University*, 804 F.2d 327, 334 (5th Cir. 1986) (*citing Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir. 1986)).

Mississippi. Second, all Defendants argued they are entitled to blanket state law immunity from Plaintiff's claim of malicious interference with employment. Third, Gaston argued he is entitled to a dismissal, both in his official and individual capacities, from Plaintiff's Title VII claims. Finally, all Defendants argue that the law prohibits an award of punitive damages in this case. Defendants' legal conclusions are wrong on all four (4) counts.

I. THE SHERIFF'S DEPARTMENT IS A PROPER PARTY IN THIS CASE.

Plaintiff, out of an abundance of caution, and in reliance on *Oden v. Oktibbeha County, Miss.*,[20] named the Washington County Sheriff's Department as a Defendant. The Fifth Circuit wrote in Footnote 3:

> In any event, there is no evidence in the record that the promotion to chief deputy was in accordance with any custom or policy of the County. Rather, Sheriff Bryan's employment decision represented the policy of the Sheriff's Department, **a separate government entity**. Therefore, the judgment against the County cannot be imposed on the basis of *respondeat superior*.[21]

Though Defendants cite two district court decisions to support the premise the Sheriff's Department is not a proper party, it is clear the law is unsettled on this issue.

Plaintiff was faced with a Catch-22 dilemma – name the Sheriff's Department and face a motion to dismiss or name just the County and face a motion to dismiss. Plaintiff, thus, decided to follow the rationale of the higher court and name the Sheriff's Department.

Because the Fifth Circuit trumps a district court, the Sheriff Department's motion should be denied.

II. DEFENDANTS ARE NOT IMMUNE FROM PLAINTIFF'S STATE LAW CLAIM OF MALICIOUS INTERFERENCE OF EMPLOYMENT.

Plaintiff alleged that the actions detailed in his complaint resulted in the malicious interference with his employment. All Defendants have argued that they are entitled to a dismissal of

[20] 246 F.3d 458, 464 FN. 3 (5th Cir. 2001).
[21] *Id.* (**emphasis added**).

the said claim because (i) Plaintiff did not file a notice of claim and (ii) Defendants are entitled to blanket immunity. Defendants are wrong.

A. Notice of Claim Not Required.

Defendants argue Plaintiff failed to file notice under the MTCA and his state law claim is barred. This argument is in error as Plaintiff was under no obligation to file such notice. "Under Mississippi law, plaintiff may only assert state law claims outside the scope of the MTCA against the individual officers and only if the officers' alleged misconduct is deemed to fall outside the scope and course of their employment."[22]

Unlike the plaintiff in *Herman*, Defendants' actions were outside the scope of their employment. As detailed in the Complaint, Defendants used their position to target and harass Plaintiff.[23] The reprimanded him for infractions that other employees committed free from reprimand.[24] The Defendants also blocked Plaintiff's employment advances.[25] In other words, by marring his five (5) year record with baseless reprimands and blocking him from working with the US Marshalls, Defendants were able to terminate Plaintiff and forever damage his reputation as a competent law enforcement officer. Because Defendants used their authority to issue reprimands they knew to be baseless, they maliciously interfered with Plaintiff's employment.

By their very nature of being malicious, Plaintiff's claim of **malicious** interference with employment falls outside the scope of the MTCA. The complaint expressly alleges that Defendants' actions were malicious and willful, calculated to cause damage to Plaintiff and were done with the purpose of interfering with Plaintiff's employment. Because this claim alleges malice, Defendants are

[22] *Herman v. City of Shannon, MS*, 296 F.Supp.2d 709, 715 (N.D. Miss. 2003).
[23] Complaint, ¶¶ 18-32.
[24] *Id.*
[25] *Id.*

not afforded the protection of immunity set forth in Section 11-46-7(2) on this claim.[26] Such an understanding, thus, defeats Defendants' second argument that they are immune from suit.

B. Defendants are not Entitled to Immunity.

Defendants argues that they are immune from suit under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1, et seq. (2002) for "acts or omissions occurring within the course and scope of [his] duties." Defendants' claim is frivolous.

Under Mississippi common law, government actors enjoy only a limited immunity from tort liability.[27] A government actor, therefore, has "no immunity to a civil action for damages if his breach of a legal duty causes injury and (1) that duty is ministerial in nature, or (2) that duty involves the use of discretion and the governmental actor greatly or substantially exceeds his authority and in the course thereof causes harm, or (3) the governmental actor commits an intentional tort."[28] Plaintiff has pled a specific state law tort, malicious interference with employment, which included elements of malice, is intentional in nature and, therefore, is not covered by the Mississippi Tort Claim Act. Thus, despite sovereign immunity, Mississippi permits claims for intentional torts against individuals. Malicious conduct, thus, **is not covered by the Mississippi Tort Claim Act**.

Miss. Code Ann. §11-46-7(2) reads, in part:

> For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, **malice**, libel, slander, defamation or any criminal offense.

Malice is defined as: (i) the intent, without justification or excuse, to commit a wrongful act; (ii) reckless disregard of the law or a person's legal rights; or (iii) ill-will; wickedness of heart. Black's Law Dictionary, 8th Ed. (1999).

[26] *See Moore v. Shearer Richardson Nursing Home*, Civil Action No. 1:10CV170-B-D (N.D. Miss. 2010).
[27] *Evans v. Trader*, 614 So.2d 955, 957 (Miss. 1993).
[28] *Barrett v. Miller*, 599 So.2d 559, 567 (Miss.1992).

Because of this clear language of the statute, the Northern District of Mississippi rejected the same argument raised by Defendants in this case and held:

> While the MTCA does not define 'malice,' the court agrees with plaintiff that the allegations raised in the complaint, accepted as true, raise claims of wrongdoing against Kimmel (an individual defendant) which potentially fall outside of the 'course and scope' of his duties as planning director … In enacting the MTCA, the legislature elected not to personally immunize employees for their own tortious acts committed outside the course and scope of their employment, and it likewise chose not to waive the sovereign immunity enjoyed by governmental entities as to such tortious acts. The court concludes that the allegations raised in this complaint, accepted as true, involve claims as to which the legislature intended neither to immunize Kimmel personally, nor to waive its own sovereign immunity.[29]

The Southern District took the same approach and held:

> In his immunity defense motion, defendant contends he is immune from plaintiff's state law claims pursuant to the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1, et seq. In a related vein, he argues in his summary judgment motion that plaintiff's state law claims are due to be dismissed because under the MTCA, defendant may not be held personally liable for acts or omissions occurring within the course and scope of his employment. See Miss. Code Ann. § 11-46-7(2). In response to both motions, Plaintiff contends that because he has alleged the defendant's actions constitute malice, his claims are not covered by the MTCA. See Miss. Code Ann. ¶ 11-46-7(2) (stating that "an employee shall not be considered as acting in the course and scope of his employment and the governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense"). The Court agrees and concludes that this is not a basis for dismissal of claims of malicious interference with employment.[30]

In their briefing, Defendants express some confusion as to Plaintiff's state law claim. Specifically, they state that Plaintiff, while including a cause of action for malicious interference with employment, also mention wrongful termination. As reasoned by Judge Mills in the first footnote in

[29] *Jessie N. Williams, Jr. v. City of Horn Lake, and Rich Kimmel*, Slip Opinion, Civil Action No. 2:04-CV-5 (N.D. Miss. Sept. 30, 2004).
[30] *Knight v. Little, et al*, United States District Court, No. 4:06CV32TSL-LRA, 2007 WL 735676, (S.D.Miss. Mar. 8, 2007).

Williams, malicious interference with employment and wrongful termination are the same tort in Mississippi.[31] Specifically, Judge Mills goes on to explain that this tort exists with different names, but at the end of the day it is the same tort – malicious interference with employment.

Plaintiff raised and pled facts that would give rise to malicious interference with employment. Plaintiff had a solid job record with the Sheriff Department until 2011.[32] Starting in January 2011, months before his August 2011 termination, Defendants began a pattern of harassment.[33] Specifically, Defendants: (i) reprimanded Plaintiff inconsistently and differently than it did other employees,[34] (ii) denied Plaintiff career opportunities without cause[35], (iii) targeted Plaintiff for termination,[36] and (iv) denied Plaintiff personal advancements.[37]

A jury could find that Defendants acted out of malice when they committed the above referenced actions. Further, under the motion to dismiss standard, Plaintiff's allegations that the Defendants did act out of malice **must be accepted as true**.[38]

III. PLAINTIFF'S TITLE VII CLAIMS AGAINST GASTON.

Gaston argues that Plaintiff's Title VII claim against him in his individual and official capacities should be dismissed. He is wrong.

A. Individual Capacity Claim.

Though Plaintiff recognizes that the Fifth Circuit has established that individual liability does not attach to supervisors in Title VII cases, he makes the good faith argument this decision, which addresses a critical issue of national importance, was erroneous.

---

[31] *See* Footnote 29.
[32] Complaint, ¶ 18.
[33] *Id.*, ¶¶ 20-32.
[34] *Id.*, ¶¶ 20, 25-28, 31.
[35] *Id.*, ¶¶ 21-23.
[36] *Id.*, ¶¶ 21-32.
[37] *Id.*, ¶ 24.
[38] See Opinion of Judge Michael P. Mills in the case styled *Williams v. City of Horn Lake, Miss., et al.*, U.S.D.C. 2:04CV5.

As noted by the Sixth Circuit, "[t]he law is clear that individuals may be held liable for violations of [42 U.S.C. § 1981]."[39] In discussing the similarities between Title VII and 42 U.S.C. § 1981, the Sixth Circuit held, "Since the individual employees sued were at least arguably 'agents' of the employer, we think it obvious that Jones's counsel were intentionally and properly seeking recovery against the individuals under both statutes."[40]

Furthermore, the language of Title VII itself introduces the concept of agency.[41] Both the Supreme Court and the Circuit Courts have suggested that agency principles should be followed in analyzing liability under Title VII.[42] It does not require a leap of faith, therefore, to see that according to traditional principles of agency, both employer and agent can be held liable for the actions of the agent and judgment can issue against each.[43]

Gaston hopes to hide behind a technical issue of the law to escape liability from his discriminatory and unlawful actions. This he cannot do. Just as in *Jones*, Gaston was sued as an agent of the Sheriff Department and/or County.

Even if this Court finds that Gaston, as an individual, cannot be held liable under Title VII, it should permit Plaintiff leave to file an amended complaint in which a 42 U.S.C. § 1981 cause of action can be added. The Fifth Circuit stated, "Unless we have search every nook and cranny of the record, like a hungry beggar searching a pantry for the last morsel of food, and have determined that 'even the most sympathetic reading of the plaintiff's pleadings uncovers no

---

[39] *Jones v. Continental Corp. et al.*, 789 F.2d 1225, 1231 (6th Cir. 1986). *See also Taylor v. Jones*, 653 F.2d 1193, 1200 (8th Cir.1981) ("Section 1981 applies to all types of racial discrimination, public or private"); *Faraca v. Clements*, 506 F.2d 956, 957 (5th Cir.1975) (individual director held liable while corporation exonerated); *Vietnamese Fishermen's Association v. Knights of Ku Klux Klan*, 518 F.Supp. 993, 1008 (S.D.Texas 1981) ("private citizens are proper defendants" in suits under Sec. 1981).

[40] *Id. See also Owens v. Rush*, 636 F.2d 283 (10th Cir.1980); *Robson v. Eva's Super Market, Inc.*, 538 F.Supp. 857, 862-63 (N.D.Ohio 1982); *Munford v. James T. Barnes & Co.*, 441 F.Supp. 459, 466 (E.D.Mich.1977); *Compston v. Borden, Inc.*, 424 F.Supp. 157, 158 (S.D.Ohio 1976).

[41] 42 U.S.C. § 2000e.

[42] Wilson v. Wayne County, 856 F. Supp. 1254, 1994 WL 317720 at *10. *See also Meritor Savings v. Vinson*, 477 U.S. 57, 72, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986) ("Congress wanted courts to look to agency principles for guidance"); *Kauffman, v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 184 (6th Cir. 1992). ("applying the broader general agency theory in supervisor liability fits the purpose of Title VII").

[43] Restatement (Second) of Agency §359C(1) (1957).

theory and no facts that would subject the present defendants to liability,' we must remand and permit plaintiff to amend [her] claim."[44]

B. Official Capacity Claim.

Gaston's claim that he is entitled to dismissal on the Title VII claim brought against him in his official capacity is meritless. In *Kentucky v. Graham*,[45] the Court sought to eliminate lingering confusion about the distinction between personal- and official-capacity suits. It was emphasized that official-capacity suits "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'"[46] A suit against a state official in his official capacity therefore should be treated as a suit against the State.[47]

Indeed, when an official sued in this capacity in federal court dies or leaves office, his successor automatically assumes her role in the litigation.[48] Because the real party in interest in an official-capacity suit is the governmental entity, and not the named official, "the entity's 'policy or custom' must have played a part in the violation of federal law."[49] For the same reason, the only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses.[50]

Because Plaintiff's official capacity claim against Gaston is the same as one pled against the Sheriff's Department/County, he is not entitled to a dismissal.

IV. PUNITIVE DAMAGES.

Plaintiff is not seeking punitive damages from the County and/or Sheriff's Department under Title VII and/or the malicious interference with employment claim. Plaintiff is, however, seeking such damages from Gaston because the claims against him are raised in his **individual**

[44] *Brown*, 804 F.2d at 334 (*citations omitted*).
[45] 473 U.S. 159 (1985).
[46] *Id.* at 165 (*quoting Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690, n. 55 (1978)).
[47] *Id.* at 166
[48] See Fed.Rule Civ.Proc. 25(d)(1); Fed.Rule App.Proc. 43(c)(1).
[49] *Graham*, 473 U.S. at 166.
[50] *Id.*

capacity. Because the claims are in Gaston's individual capacity, punitive damages are an available remedy.[51]

Moreover, as discuss above, an employee acting outside the course and scope of his employment is not afforded the protection of the MTCA.[52] Because Plaintiff has alleged that Gaston did act outside the course and scope of his employment,[53] Plaintiff's claim for punitive damages against Gaston should not be dismissed at this time.[54] The Mississippi Supreme Court has held "that a plaintiff can recover punitive damages . . . if there is a demonstrated willful or malicious wrong or if there is gross, reckless disregard for the rights of others."[55] The plaintiff in the case has alleged willful or malicious wrongdoing on the part of Gaston, and his claim for punitive damages survives dismissal at this early stage.[56]

V. ASSUMMING ARGUENDO THAT PLAINTIFF HAS NOT PLED HIS CLAIMS SUFFICIENTLY, THIS SHOULD GRANT HIM LEAVE TO FILE AN AMENDED COMPLAINT.

Again, the Fifth Circuit stated, "Unless we have search every nook and cranny of the record, like a hungry beggar searching a pantry for the last morsel of food, and have determined that 'even the most sympathetic reading of the plaintiff's pleadings uncovers no theory and no facts that would subject the present defendants to liability,' we must remand and permit plaintiff to amend [her] claim."[57]

---

[51] *Smith v. Wade*, 461 U.S. 30, 56 (1983) ("We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others").
[52] See Miss. Code Ann. § 11-46-7(2); see also § 11-46-5(2) ("For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense other than traffic violations.").
[53] Complaint, ¶¶ 18-32.
[54] *Moore v. Shearer Richardson Nursing Home*, Civil Action No. 1:10CV170-B-D (N.D. Miss. 2010).
[55] *Doe ex rel. Doe v. Salvation Army*, 835 So. 2d 76, 79 (Miss. 2003).
[56] *Moore v. Shearer Richardson Nursing Home*, Civil Action No. 1:10CV170-B-D (N.D. Miss. 2010).
[57] *Brown*, 804 F.2d at 334 (*citing Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir. 1986)).

CONCLUSION

For all the reasons stated herein, Plaintiff respectfully requests that Defendants' Motion to Dismiss be denied.

Respectfully Submitted,

/s/ Joseph R. Murray, II
Joseph R. Murray, II
MS Bar #101802
MURRAY LAW FIRM, PLLC.
104 South Commerce Street
Ripley, MS 38663
(662) 993-8010
jrm@joemurraylaw.com

W. Brent McBride
MS Bar No. 101442
MCBRIDE LAW FIRM, PLLC.
Post Office Box 84
Tupelo, Mississippi 38802
(662) 397-9028
brent@brentmcbride.com

CERTIFICATE OF SERVICE

I, Joseph R. Murray, II, attorney for Plaintiff, do hereby certify that I have filed the forgoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

Paul Scott Phillips
sphillips@campbelldelongllp.com, yholmes@campbelldelongllp.com

Walter B. McBride
mcbridelawfirm@bellsouth.net

Respectfully submitted this the 30th day of July, 2012,

/s/ Joseph R. Murray, II

Joseph R. Murray, II
MS Bar #101802
Murray Law Office, PLLC
P.O. Box 1473
104 South Commerce Street
Ripley, MS 38663
(662) 993-8010
jrm@joemurraylaw.com