IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

WILLIAM OWENS, Plaintiff, v. CITY OF MONROE, LOGAN PROPES, in his individual capacity, and R.V. WATTS, in his individual capacity Defendants.	)	CIVIL ACTION FILE NO. 3:21-cv-00084-CDL

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

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Defendants City of Monroe, Georgia ("City" or "Monroe"), Logan Propes ("Propes"), and R.V. Watts ("Watts") (collectively, "Defendants") file this Motion to Dismiss Plaintiff's Amended Complaint ("Complaint" or "Am. Compl.") for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6), showing as follows:

I. SUMMARY OF PLAINTIFF'S ALLEGATIONS

Plaintiff is a firefighter and former Fire Chief of the City. (Doc. 14, Am. Compl. ¶ 8.) Propes is the City Administrator, while Watts is the Police Chief. (Id. ¶¶ 9-10.)

Plaintiff had a "professional and personal relationship with K.I" during his employment. (Am. Compl. ¶ 11.) He does not identify K.I. and vaguely categorizes their relationship as "intimate." (Id.) Like most people in professional and personal relationships, Plaintiff and K.I. regularly communicated via text and email using their personal electronic devices. (Id. ¶¶ 12-13.)

Plaintiff contends that on May 12, 2020, while K.I. was in the hospital for surgery, K.I.'s son – who is not identified as a City employee, contractor, or agent – "illegally and without permission accessed K.I.'s Apple Watch to obtain electronic communications that were sent between the Plaintiff and K.I." (Am. Compl. ¶ 15.) Plaintiff provides no detail about the content of the communications (including whether or how the content was embarrassing). Plaintiff also does not allege that he owned, possessed, used, or controlled K.I.'s Apple Watch. Before accessing the Apple Watch, K.I.'s son "notified" Propes and Watts that he would access these communications and requested their "assistance and participation." (Id. ¶ 16.) Watts then purportedly notified Propes, who both traveled to meet K.I.'s son. (Id. ¶ 17).

Plaintiff alleges that K.I.'s son, Watts, and Propes subsequently accessed communications between Plaintiff and K.I. that were stored on the Apple Watch. (Id. ¶ 18.) Later, K.I.'s son asked Propes to terminate Plaintiff, to use the information obtained from K.I.'s Apple Watch to do so,

and to share the personal and private information with others. (Id. ¶ 23). Propes agreed, and then contacted Plaintiff to demand that he either resign or face termination for "conduct unbecoming." (Id. ¶¶ 24-25.) Propes also "falsely" told Plaintiff that if he did not resign, he would not receive his accrued leave. (Id. ¶ 26).

Plaintiff did not personally object to or disclose an alleged violation of or non-compliance with a law, rule, or regulation to either a supervisor or a government agency charged with the enforcement of laws, rules, or regulations. (Am. Compl. ¶¶ 28, 32). Instead, Plaintiff "retained an attorney" who "advised the *City of Monroe* of the illegal actions" taken by Watts and Propes. (Id. ¶ 28) (Emphasis added). No detail about this disclosure is alleged. For instance, Plaintiff does not identify who his attorney contacted to disclose the Apple Watch incident or what law, rule, or regulation his attorney claimed was violated. Plaintiff was eventually terminated. (Id. ¶ 33.) Plaintiff claims that his "public suggestion" that the City's "Shop with a Cop" program be run by a private non-profit organization was also a basis for his termination. (Id. ¶¶ 38-48.)

II. STANDARD OF REVIEW

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, (2007); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In deciding a motion to dismiss, the Court should accept all well-pled factual allegations as true and take them in the light most favorable to Plaintiff. Erickson v. Pardus, 551 U.S. 89 (2007). But "[l]egal conclusions without adequate factual support are entitled to no assumption of truth." Mamani v. Berzaín, 654 F.3d 1148, 1153 (11th Cir. 2011).

III. ARGUMENT AND AUTHORITY

A. Plaintiff's First Amendment Retaliation Claim Fails As a Matter of Law.

Plaintiff's revamped First Amendment claim now alleges that Defendants retaliated against him based on his suggestion of having a nonprofit organization run the City's "Shop with a Hero" program in violation his First Amendment rights.[1] (Am. Compl. ¶¶ 37-48.)

To establish First Amendment retaliation, Plaintiff must allege that: (1) he engaged in speech (a) as a citizen (b) relating to a matter of public concern; (2) his free speech interests outweigh his public employer's interest in efficiently fulfilling its responsibilities; and (3) the speech played a substantial or motivating role in his employer's decision to take adverse action. See Akins v. Fulton Cty., 420 F.3d 1293, 1303 (11th Cir. 2005). As explained in more detail below, Plaintiff failed to plead any of these essential elements.

1. Plaintiff Has Failed to Plausibly Plead That He Spoke as a Citizen.

Plaintiff fails to state a viable First Amendment claim because he fails to plausibly allege that he spoke in his capacity as a citizen. In the Amended Complaint, Plaintiff alleges the existence of a Walton County program called "Shop with a Cop" which included personnel from the City's police and fire departments. (Am. Compl. ¶¶ 38-39.) Plaintiff essentially suggests that he was punished for "publicly suggest[ing]" and "promot[ing] that the program be run by a private non-profit organization." (Id. ¶ 41.) Beyond the conclusory assertion that his comments were "public" and "matters of public concern," no additional facts regarding the speech are pled.

Two inquiries guide interpretation of the constitutional protections granted public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). If the answer

[1] Plaintiff originally alleged that he was terminated because of his communications with K.I. or his attorney's alleged disclosure of illegal actions to the City. (Doc. 1 ¶¶ 10-14, 21-24).

is no, the employee has no First Amendment cause of action based on the employer's reaction to the speech. See Connick v. Myers, 461 U.S. 138, 147 (1983).

When a public employee makes statements under his official duties, "the Constitution does not insulate [his] communications from employer discipline." Hubbard v. Clayton Cty. Sch. Dist., 756 F.3d 1264, 1267 (11th Cir. 2014) (citing Garcetti v. Ceballos, 547 U.S. 410, 421 (2006)). There is no "comprehensive framework for deciding whether a public employee has spoken as a citizen." Moss v. City of Pembroke Pines, 782 F.3d 613, 618 (11th Cir. 2015) (quoting Garcetti, 547 U.S. at 424). Yet, the "proper inquiry is a practical one that should focus on whether the employee's speech at issue owes its existence to the employee's professional responsibilities." Id. The Court may consider the employee's job description, where the speech occurred, and whether the speech concerns the subject matter of the employee's job. Id.

Here, Plaintiff alleges his comments on "Shop with a Hero" were a "motivating factor" for his termination. However, no factual detail beyond conclusory assertions (which must be disregarded for present purposes) has been provided to establish the "citizen" element. For instance, Plaintiff does not allege he was a member of the Board of Directors for the program or otherwise had any involvement with it outside of his role as Fire Chief, let alone where the speech occurred. What Plaintiff does plead is that the "Shop With a Hero" program involved firefighters and that he was the Fire Chief at the time his statements were made. This establishes that his comments were made in his capacity as a City employee, rather than as a citizen.[2]

Simply put, Plaintiff has failed to plead plausible facts necessary to show the content, form, or context of the speech demonstrates Plaintiff was speaking in his capacity as a citizen. See

[2] The Eleventh Circuit has "consistently discredited narrow, rigid descriptions of official duties" urged by public employees to support an inference that they were speaking as citizens. Abdur-Rahman v. Walker, 567 F.3d 1278, 1286 (11th Cir. 2009). Thus, an expansive interpretation of Plaintiff's role as Fire Chief is warranted.

Garcetti, 547 U.S. at 425; Moss, 782 F.3d at 618. This is precisely the type of conclusory pleading that Twombly and Iqbal prohibit. As such, Plaintiff's First Amendment claim fails.

2. Plaintiff Has Not Pled That His Interests Outweigh the City's.

Even if Plaintiff's speech involved a matter of public concern, he has not pled that his interest in making the speech outweighed the City's interests in regulating the speech. Paramilitary organizations, such as a Fire Department, have a significant interest in maintaining the efficiency of the department and the respect of the public. For instance, in Busby v. City of Orlando, 931 F.2d 764, 774 (11th Cir. 1991), the Eleventh Circuit noted that public employers have an "interest in maintaining loyalty, discipline, good working relationships among the employees, and, in general, the [department's] **reputation,**" particularly when the plaintiff's department is a ***quasi-military organization***. Id. at 777 (emphasis added).

Given the foregoing, the City has a strong interest in preventing speech that disrupts the efficient rendering of public services, as well as speech that could cause the public to lose confidence in the Fire Department. See Akins, 420 F.3d at 1304. As such, the Court must balance the City's interest of regulating speech against Plaintiff's in making the speech. See Pickering, 391 U.S. at 568. Because Plaintiff pleads no facts which could possibly demonstrate that his interests in commenting on the "Shop with a Hero" program outweigh the City's interests, dismissal is appropriate for this reason as well.

B. Plaintiff Fails to State a Claim for Freedom of Association Retaliation.

In Count III, Plaintiff alleges Defendants violated his First Amendment right to "Freedom of Association." In support of this cause of action, he alleges, in conclusory fashion, that "Plaintiff's intimate relationship with K.I. was protected and guaranteed under the United States Constitution," that "Defendants interfered with" this relationship, and that Propes and the City

retaliated against Plaintiff because of his relationship with K.I. (Am. Compl. ¶¶ 49-52). As shown below, Plaintiff fails to state a Freedom of Association claim.

1. **Plaintiff Has Failed to Show His Relationship with K.I. is Protected.**

Plaintiff's Complaint tries to categorize his relationship with K.I. as "intimate" to state a claim. This bare allegation is insufficient.

It is true that "intimate association" may be protected in some circumstances. See Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984); City of Dallas v. Stanglin, 490 U.S. 19, 23-25 (1989). However, the right of intimate association is a limited freedom of choice to enter and maintain certain intimate human relationships, such as marriage[3] or family, free from undue government intrusion. See Roberts, 468 U.S. at 617-20. Generally, the right of intimate association encompasses the relationships associated with *family*. McCabe, 12 F.3d at 1563 (citing Roberts, 468 U.S. at 619). "Whether the right extends to other relationships depends on the extent to which those attachment share the qualities distinctive to family relationships, such as 'relative smallness' and 'seclusion from others in critical aspects of the relationship.'" McCabe, 12 F.3d at 1563.

Here, Plaintiff alleges that he had "a professional and personal relationship with K.I." and summarily describes their relationship was "intimate." (Am. Compl. ¶ 11.) Merely labeling his relationship with K.I. as "intimate" is not enough to state a claim. Twombly, 550 U.S. at 555.

Plaintiff's claim appears to be based on Robinson v. City of Darien, 362 F. Supp. 3d 1345 (S.D. Ga. 2019), in which the district court assumed a protected relationship when the plaintiff was **dating** a married co-worker. Robinson cited Starling v. Bd. of Cty. Comm'rs, 602 F.3d 1257, 1261 (11th Cir. 2010), where the Eleventh Circuit also assumed without deciding that an extramarital

[3] Unlike the relationship described by Plaintiff, "[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were," and "marriage embodies a love that may endure even past death." Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

affair is protected by the First Amendment. But Plaintiff does not allege that he and K.I. were having an extramarital affair—or even that they were dating. All Plaintiff alleges is that the relationship was "intimate," an unclothed legal conclusion which, again, must not be accepted as true. For these reasons, Count III fails to state a claim on which relief can be granted.

C. Plaintiff Lacks Standing to Pursue a Fourth Amendment Claim.

In Count VI of the Complaint, Plaintiff asserts a Fourth Amendment claim under 42 U.S.C. § 1983, as well as an identical claim under the Georgia Constitution, based on an alleged search and seizure of K.I.'s watch. (Am. Compl. ¶¶ 64-67). These claims also fail.

Nothing in Plaintiff's Complaint shows he has standing under either the Fourth Amendment or the Georgia Constitution to challenge any alleged search or seizure of K.I.'s Apple Watch. Before a plaintiff may challenge a search or seizure as violative of the Fourth Amendment, he must have "standing." See United States v. Cooper, 133 F.3d 1394, 1398 (11th Cir. 1998). "Standing" under the Fourth Amendment is different from constitutional standing because it requires Plaintiff to show (1) a *subjective* expectation of privacy, and (2) society is prepared to recognize that expectation as *objectively* reasonable. See United States v. Harris, 526 F.3d 1334, 1338 (11th Cir. 2018). To determine whether a person has made this showing, courts examine whether: (1) he **owns** the property, (2) he has a **possessory interest** in the thing seized or place searched, (3) he has the right to exclude others from the place or thing, and (4) he took normal precautions to maintain his privacy.[4] See id.

The Eleventh Circuit has held that a person lacks standing to challenge a search of a third party's cell phone contents. See U.S. v. Tercier, 835 F. App'x 471, 481 (11th Cir. 2020); see also

[4] The Georgia Constitution contains the same language as the guarantee of the Fourth Amendment and is applied in accord with the Fourth Amendment. Ga. Const. of 1983, Art. I, Sec. 1, Par. XIII; Brown v. State, 293 Ga. 787, 791 n.6 (2013).

U.S. v. Matthews, No. 1:19-cr-00221-TWT-RGV, 2020 U.S. Dist. LEXIS 58032, at *7-8 (N.D. Ga. Feb. 21, 2020), R.&R. adopted by 2020 LEXIS 56684 (N.D. Ga. Mar. 27, 2020) (finding no expectation of privacy where defendant presented no evidence showing ownership of searched cell phones). The Eleventh Circuit has also found that there is no privacy interest in text messages retrieved from the recipient's cell phone. See U.S. v. Jones, 149 F. App'x 954, 959 (11th Cir. 2005) (per curiam) (comparing text messages to received letters and emails to explain why no expectation of privacy exists).[5]

Plaintiff alleges the watch was K.I.'s property, not his personal property. Plaintiff tries to show an expectation of privacy by merely alleging he had an expectation of privacy in his personal devices and communications. (Am. Compl. ¶ 14.) Merely pleading an expectation of privacy does not change the fact that Plaintiff cannot have a subjective or objective expectation of privacy in the communications contained in K.I.'s Apple Watch. See Jones, 149 F. App'x at 959.

Plaintiff also argues he had an expectation of privacy in his **personal** cell phone contents, which may be true. See Riley v. California, 573 U.S. 373, 403 (2014). But Plaintiff goes too far in alleging an expectation of privacy in **K.I.'s** Apple Watch and its contents. He establishes no subjective expectation of privacy in K.I.'s Apple Watch or text messages contained in it. He does not allege he owned K.I.'s Apple Watch, had a possessory interest in it, or even had the right to restrict K.I.'s use of her Apple Watch or prevent her from disclosing the text messages contained in it. He also fails to show any precautions he took to maintain his alleged expectation of privacy. Plaintiff likewise fails to plead any facts showing society would be willing to recognize a person

[5] Other courts have similarly held that a person has no privacy interest in property belonging to a third party, including cell phones. See, e.g., Christensen v. Cty. of Boone, 483 F.3d 454, 461 (7th Cir. 2007); United States v. Lindsey, No. 10-15 (JNE/JJK), 2010 U.S. Dist. LEXIS 123762, at *90-92 (D. Minn. July 20, 2010) (defendant did not have Fourth Amendment standing where he failed to show that he owned, possessed, used, or controlled the cell phone at issue).

has an expectation of privacy in every device where his communications have been sent or in devices owned and controlled by another. For that reason, Count VI is also due to be dismissed.

D. Plaintiff Fails to State a Claim Under the Stored Communications Act.

In Count IV, Plaintiff brings a claim described as "Violation of Stored Communications Act," based on allegations that Watts and Propes "illegally" accessed communications on K.I.'s Apple Watch, including text messages. (Am. Compl. ¶¶ 53-59). These allegations fall far short of stating a claim under the Stored Communications Act, 18 U.S.C. § 2701 et seq. ("SCA").

To state a claim under the SCA, Plaintiff must show someone (1) intentionally accessed without authorization a **facility** through which an "electronic communication service" ("ECS") is provided or exceeded an authorization to that facility and (2) obtained, altered, or prevented authorized access to a wire or electronic communication while it is in "**electronic storage**" in such system. 18 U.S.C. § 2701(a) (emphasis added); see also Snow v. DirecTV, Inc., 450 F.3d 1314, 1321 (11th Cir. 2006). A facility is commonly known as a place, such as a building, where a particular activity happens (such as a shopping, sports, or medical facility). The SCA does not define "facility," but it defines ECS as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15) (incorporated by reference in 18 U.S.C. § 2711(1) of the SCA). The SCA also defines "electronic storage" as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." Id. § 2510(17).

As an initial matter, Plaintiff lacks standing to assert this claim for the same reasons he lacks standing to assert his search and seizure claims. Moreover, even if he did have standing, courts routinely find that an individual's computer, laptop, or mobile device do not fit the statutory

definition of a "facility through which an [ECS] is provided." See U.S. v. Steiger, 318 F.3d 1039, 1049 (11th Cir. 2003) (the SCA did not apply to hacker's access of plaintiff's computer but may have applied to extent hacker retrieved information stored with plaintiff's internet service provider). This is because "the relevant 'facilities' that the SCA is designed to protect are not computers that *enable* the use of an electronic communications service, but instead are facilities that are *operated* by electronic communication service providers and used to store and maintain electronic storage." Garcia v. City of Laredo, 702 F.3d 788, 792 (5th Cir. 2012) (quoting Freedom Banc Mortg. Servs., Inc. v. O'Harra, 2012 U.S. Dist. LEXIS 125734, at *9 (S.D. Ohio Sept. 5, 2012)). Thus, Plaintiff's and K.I.'s personal mobile devices are not "facilities through which an [ECS] is provided." Garcia, 702 F.3d at 792; In re Google Inc. Cookie Placement Consumer Privacy Litig., 806 F.3d 136, 146 (3d Cir. 2015) (same); In re iPhone Application Litg., 844 F. Supp. 2d 1040, 1058 (N.D. Cal. 20120) (concluding laptop, computer, and iPhone is not a "facility" under the SCA); Stirling Int'l Realty, Inc. v. Soderstrom, 2015 U.S. Dist. LEXIS 64018, at *15 (M.D. Fla. May 15, 2015) ("Plaintiffs must show that the facility they allege [defendant] breached is one which was operated by an electronic communication service provider . . . and not an end user device like a personal computer, laptop, hard drive, or cell phone.").

Furthermore, any alleged texts and pictures stored on K.I.'s Apple Watch do not fit within the definition of "electronic storage." According the SCA, "electronic storage" includes only "the information that has been stored by an electronic communication service provider." Garcia, 702 F.3d at 793. "Thus, information that an Internet service provider stores to its servers or information stored with a telephone company—if such information is stored temporarily pending delivery or for purposes of backup protection" can constitute electronic storage. Id. It follows that "information that an individual stores to his hard drive or cell phone is not in electronic storage

under the statute." Id.; accord Sunbelt Rentals, Inc. v. Victor, 43 F. Supp. 3d 1026, 1032 (N.D. Cal. 2014) (employer's access to employee's text messages by reviewing the messages on his iPhone did not state a claim under the SCA). Thus, Count IV fails to state a claim.

E. Propes and Watts are Entitled to Qualified Immunity.

Plaintiff's federal claims against Propes and Watts are also subject to the doctrine of qualified immunity.[6] The defense of qualified immunity is available to a public official who "was acting in within the scope of his discretionary authority when the alleged wrongful acts occurred." Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002); Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1265 (11th Cir. 2004). Plaintiff alleges Propes and Watts were acting within their discretionary authority. Propes, as City Administrator, had a duty to manage and monitor City employees.[7] Watts, as Chief of Police, was within his discretionary authority to investigate potential criminal activity or wrongdoing, especially by City employees.

Qualified immunity "shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Mullenix v. Luna, 577 U.S. 7, 11 (2015) (quoting Pearson v.Callahan, 555 U.S. 223, 231 (2009)). The doctrine shields "all but the plainly incompetent or those who knowingly violate the law." Gates v. Khokhar, 884 F.3d 1290, 1296 (11th Cir. 2018). Only decisions of the

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[6] Qualified immunity is available for SCA claims because Congress did not provide the defense is unavailable. See John K. Maciver Inst. For Pub. Policy, Inc. v. Schmitz, 885 F.3d 1004, 1015 (7th Cir. 2018) (finding that qualified immunity is available under the SCA because it is available for alleged Wiretap Act violations); Tapley v. Collins, 211 F.3d 1210, 1216 (11th Cir. 2000) (recognizing availability of qualified immunity for alleged Wiretap Act violations); Walker v. Coffey, 2018 U.S. Dist. LEXIS 208473, at *16-17 (E.D. Pa. Dec. 11, 2018) (similar).

[7] Additionally, a supervisor's request for an employee to resign is a quintessentially discretionary act, much like hiring or firing. See Barr v. Silberg, No. 4:17-cv-00203, 2020 U.S. Dist. LEXIS 156932, at *26 (S.D. Ga. Aug. 28, 2020) (asking plaintiff for resignation was within discretionary authority).

Supreme Court, the Eleventh Circuit, or the highest court in a state can "clearly establish" the law. Id. This burden requires either (1) "case law with indistinguishable facts," (2) "a broad statement of principle within the Constitution, statute, or case law," or (3) "conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." Lewis v. City of W. Palm Beach, 561 F.3d 1288, 1291–92 (11th Cir. 2009). In First Amendment cases, public servants should receive immunity except "in the extraordinary case where Pickering balancing would lead to the inevitable conclusion that the [act taken against] the employee was unlawful." Hansen v. Soldenwagner, 19 F.3d 573, 576 (11th Cir. 1994).

Plaintiff does not allege any facts showing that the balancing test would *inevitably* conclude that his termination (or access of the watch) was unlawful. As explained above, Plaintiff's speech was made as an employee on matters directly related to his job duties as Fire Chief, and his interest in making the speech is outweighed by the City's interest in efficient delivery of public services. Thus, Plaintiff's speech was *not* protected, much less clearly protected.

Plaintiff's SCA, Fourth Amendment, and First Amendment freedom of association rights were similarly not violated, much less "clearly established" at the time. No decision of the Eleventh Circuit has "clearly established" that a non-marital "personal and professional" relationship is constitutionally protected. And, as earlier explained, Plaintiff has not pled facts showing an "intimate association" with K.I. beyond merely labeling their relationship as categorically "intimate." See McCabe, 12 F.3d at 1563. Nor does Plaintiff plead facts identifying a reasonable expectation of privacy in K.I.'s Apple Watch or its contents such that he has standing to challenge the search or seizure or that any alleged access of the Watch violated the SCA. Tercier, 835 F. App'x at 481; Riley v. California, 573 U.S. at 403; U.S. v. Cochran, 682 F. App'x 828, 839-841(11th Cir. 2017) (reasoning that Supreme Court's evolving approach to public employer

searches of employee cell phones did not provide employer with "fair warning" that he was clearly violating employee's constitutional rights); Garcia, 702 F.3d at 792.[8] Finally, other Circuits and district courts, including those within this Circuit, have determined accessing text messages and photos stored on a personal device is not actionable under the SCA. As a result, Propes and Watts did not violate Plaintiff's SCA and constitutional rights, much less his "clearly established" ones, and are entitled to qualified immunity. Since there are no cases directly on point with this unique and unusual claim, which raises no clearly established rights, qualified immunity is established.

F. The City is Entitled to Immunity under Monell.

Even assuming the Amended Complaint states viable claims under § 1983 against the City, the City is entitled to immunity under Monell v. New York Department of Social Services, 436 U.S. 658 (1978). Plaintiff cannot establish vicarious liability in connection with any claim asserted under § 1983. Under § 1983, the City is not subject to liability via *respondeat superior*. Griffin v. City of Opa-Locka, 261 F.3d 1295, 1307 (11th Cir. 2001) (citing Monell, 436 U.S. at 663). Rather, a municipality is only liable under § 1983 for constitutional deprivations that are caused by a governmental policy or custom. Id. To impose § 1983 liability on the City, Plaintiff must show: "(1) that his constitutional rights were violated; (2) that the City had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." McDowell v. Brown, 392 F.3d 1283, 1289 (11th Cir. 2004) (citing City of Canton v. Harris, 489 U.S. 378, 388 (1989)). The Eleventh Circuit recognizes three ways to show a governmental policy or custom caused a constitutional violation: (1) an express policy; (2) a

[8] The law surrounding public employees' Fourth Amendment rights when their employer searches their electronic devices is also generally unclear. See City of Ontario v. Quon, 560 U.S. 746, 759 (2010) ("The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology"). The law surrounding the accessing of text messages or personal devices as violative of the SCA is similarly unclear.

widespread practice that is so permanent and well-settled as to constitute a custom; or (3) the act or decision of a municipal official with final policy-making authority. Cuesta v. Sch. Bd. of Miami-Dade Cty., 285 F.3d 962, 966-968 (11th Cir. 2002). Thus, Plaintiff bears the burden of identifying "(1) an officially promulgated [City] policy or (2) an unofficial custom or practice of the [City] shown through repeated acts of a final policymaker of the [City]." Grech v. Clayton Cty., 335 F.3d 1326, 1329-30 (11th Cir. 2003) (citing Monell, 436 U.S. at 690-91)). This burden requires that the plaintiff "show that the municipal action was taken with deliberate indifference to its known or obvious consequences." Sturdivant v. City of Atlanta, 596 F. App'x 825, 830 (11th Cir. 2015) (internal citations omitted). Plaintiff does not satisfy this standard.

First, Plaintiff identifies no express policy of the City which caused any alleged constitutional violation. This is because no such policy exists.

Second, Plaintiff does not allege or identify a widespread practice of First or Fourth Amendment violations that is so permanent and well-settled as to constitute a custom. The Eleventh Circuit instructs that:

> to prove § 1983 liability against a municipality based on custom, a plaintiff must establish a **widespread practice** that, although not authorized by written law or express municipal policy, is **so permanent and well settled** as to constitute a 'custom or usage' with the force of law.

Brown v. City of Ft. Lauderdale, 923 F.2d 1474, 1481 (11th Cir. 1991) (emphasis added). "Normally random acts or isolated incidents are insufficient to establish a custom or policy." Suber v. Seminole Cty., 78 F. Supp. 2d 1298 (M.D. Fla. 1999).[9] Instead, Plaintiff must show "deeply imbedded traditional ways of carrying out policy[,] that are so widespread that it is a permanent and well settled way of acting." Fundiller v. Cooper Cty., 777 F.2d 1436, 1442 (11th Cir.1985).

[9] See, e.g., Depew v. City of St. Marys, 787 F.2d 1496, 1499 (11th Cir. 1986); Church v. City of Huntsville, 30 F.3d 1332, 1343 (11th Cir. 1994).

At most, Plaintiff alleges a random act or isolated incident of purported violations of his rights. Plaintiff does not allege a single fact claiming similar, ongoing conduct occurred. Nothing in the Complaint even suggests widespread constitutional violations that the City was deliberately indifferent to practices so "deeply imbedded" that they constituted a custom.

Finally, Plaintiff fails to even allege that Propes had final policy making authority to terminate him. Rather, Plaintiff undermines his own theory by conceding Propes could only *recommend* his termination. (Am. Compl. ¶ 45.) An official is not a final policymaker where his decisions are subject to meaningful administrative review. Scala v. City of Winter Park, 116 F.3d 1396, 1401 (11th Cir. 1997); Quinn v. Monroe Cty., 330 F.3d 1320, 1326 (11th Cir. 2003). By Plaintiff's own account, Propes was not the final policymaker and thus any alleged constitutional violations committed by Propes cannot be imputed to the City.

Thus, the Court should dismiss Counts II, III, IV, and VI as asserted against the City for these additional reasons.

G. Plaintiff Fails to State a Claim Under the Georgia Whistleblower Act.

Plaintiff again fails to plead a viable claim under the Georgia Whistleblower Act, O.C.G.A. § 45-1-4 ("GWA").[10] The GWA provides that "[n]o public employer shall retaliate against a public employee for objecting to or disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency." O.C.G.A. § 45-1-4(d)(2). To state a GWA claim, Plaintiff must allege facts showing that (1) he made a protected disclosure and (2) there is some causal relationship between the protected activity and the adverse employment action. See Albers v. Ga. Bd. of Regents of the Univ. Sys. of Ga., 330 Ga. App. 58, 61 (2014).

[10] To the extent Plaintiff attempts to lodge a GWA claim against Propes or Watts, it is well-settled there is no individual liability for alleged retaliation under the GWA. See Jones v. Bd. of Regents of the Univ. Sys. of Ga., 262 Ga. App. 75, 80-82 (2003).

Simply put, Plaintiff did not blow the whistle. To engage in protected activity under the GWA, Plaintiff must allege he disclosed "a violation of or noncompliance with a law, rule, or regulation" to either a "supervisor or government agency." O.C.G.A. § 45-1-4(d)(2). Plaintiff has not pled that he made a disclosure to a supervisor or government agency.

The GWA defines a "supervisor" as an individual:

> (A) To whom the public employer has given authority to direct and control the work performance of the affected public employee;
> (B) To whom a public employer has given authority to take corrective action regarding a violation of or noncompliance with a law, rule, or regulation of which the public employee complains; or
> (C) Who has been designated by a public employer to receive complaints regarding a violation of or noncompliance with a law, rule, or regulation.

O.C.G.A. § 45-1-4(a)(6)(A)-(C). "Government agency" is defined as "any agency of federal, state, or local government charged with the enforcement of laws, rules, or regulations." Id. (a)(1).

To begin with, Plaintiff does not allege that he *personally* made the disclosure. Rather, Plaintiff claims his attorney made legal demands to the City related to the Apple Watch. (Am. Compl. ¶ 28.) But the GWA does not protect disclosures by individuals – such as lawyers – who do not meet the definition of a public employee, and Defendants' counsel has searched for but has been unable to find any cases holding that a third party can object to alleged unlawful actions against an employee and thereby satisfy the "protected activity" prong under the GWA.[11] Plaintiff was apparently similarly unsuccessful. (Doc. 12 at 4.)

Second, while Plaintiff alleges Propes was his supervisor, he does not contend that he disclosed the alleged violation to Propes. In fact, the Complaint says nothing about to whom or

[11] The GWA defines "public employee" as "any person who is employed by the executive, judicial, or legislative branch of the state or by any other department, board, bureau, commission, authority, or other agency of the state." O.C.G.A. § 45-1-4(a)(3). A public employee's agent is not included within the definition. Further, because the GWA is "in derogation of the common law," it "must be strictly construed and not extended beyond its plain and explicit terms." City of Atlanta v. Benator, 310 Ga. App. 597, 601 (3) (2011) (quotations omitted).

when the disclosure was made. Plaintiff instead vaguely alleges that his attorney made the disclosure to "the City." (Am. Compl. ¶ 32.) Plaintiff's purported disclosure to "the City" is insufficient. Nor has Plaintiff pled that he or his lawyer disclosed the violation of law to an agency or a department that is charged with the enforcement of laws, rules, or regulations (such as the GBI or the City's police department). Accordingly, Plaintiff's threadbare allegations fail to establish the essential elements of a claim under the GWA.

H. Plaintiff Cannot State a Claim for Invasion of Privacy.

Plaintiff also tries to assert a claim under Georgia law for a violation of his right to privacy by public disclosure of private facts. (Am. Compl. ¶¶ 67-71.) That cause of action requires proof of three elements: (1) the disclosure must be public; (2) the facts disclosed must be private, secluded, or secret; and (3) the matter must be offensive and objectionable to a reasonable person of ordinary sensibilities. See Dep't of Labor v. McConnell, 305 Ga. 812, 819 (2019) (citing Cottrell v. Smith, 299 Ga. 517, 532 (2016)).

The Amended Complaint establishes none of these elements. It merely alleges that Watts and Propes "disclosed and made public, private and secret facts about the Plaintiff" and that the disclosure was embarrassing. (Am. Compl. ¶¶ 69-70.) This is exactly the sort of "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" that is insufficient. Iqbal, 556 U.S. at 678. For instance, Plaintiff provides no detail about to whom the disclosure was made, by whom it was made, what "private and secret" facts were revealed, and nothing about how the disclosures were widespread enough to be considered "public disclosures." See Blakey v. Victory Equip. Sales, 259 Ga. App. 34, 37-38 (2002) (disclosure of credit report to credit reporting agency was not "public disclosure"); Baker v. G4S Secure Sols. (USA), Inc., No. 4:18-cv-267, 2020 U.S. Dist. LEXIS 156901, at 14-15 (S.D. Ga. Aug. 28, 2020). Nor does Plaintiff

offer anything as to why the private communications with K.I. – or anything about his relationship with her – if publicly disclosed would be objectionable to a reasonable person under the circumstances. Thus, this claim should also be dismissed under Rule 12(b)(6).

I. Count V Fails Because Plaintiff Pleads No Facts or Theory Supporting the Claim.

Plaintiff attempts to lodge a claim styled "Violation of State Law by Illegal Interception of Electronic Communications," but he fails to elaborate on the factual basis for this claim or to identify a cause of action under Georgia law. (Am. Compl. ¶¶ 60-63). This is a classic "defendant-unlawfully-harmed-me" pleading that fails to satisfy Twombly and Iqbal. See Weiland v. Palm Beach Cty. Sheriff's Office, 792 F.3d 1313, 1323 (11th Cir. 2015).

To support his unspecified claim, Plaintiff (re)pleads that Propes and Watts accessed electronic communications between Plaintiff and K.I. from K.I.'s Apple Watch and then divulged the communications illegally. (Am. Compl. ¶¶ 18, 22-23, 60-62.) But Plaintiff does not identify a statute or cause of action under Georgia law permitting such a claim. Without more, Defendants are unaware of what specific actions Plaintiff alleges are illegal and on what statute Plaintiff bases his right to relief under. Plaintiff also does not allege how or why he has standing to sue based on the interception of communications from an Apple Watch owned and possessed by K.I. As a result, the Court should also dismiss Count V.

J. Official Immunity Bars Counts V and VII Against Propes and Watts.

Even under the facts alleged by the Amended Complaint, Propes and Watts are entitled to official immunity with respect to Count V and VII. Under Georgia state law, official immunity "protects individual public agents from personal liability for discretionary actions taken within the scope of their official authority, and done without willfulness, malice, or corruption." A public officer or employee may be personally liable only for ministerial acts negligently performed or

discretionary acts performed with malice or an intent to injure. Cameron v. Lang, 274 Ga. 122, 123 (2001). Whether official immunity applies is a legal question. Conley v. Dawson, 257 Ga. App. 665, 668 (2002).

> A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act, however, calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.

Common Cause/Ga. v. City of Atlanta, 279 Ga. 480, 482 (2005).

None of the actions at issue in this case were ministerial. Rather, both Propes and Watts allegedly engaged in conduct that required deliberation and judgment, including whether to investigate or ask for an employee's resignation, rather than executing a specific duty. Thus, both Propes and Watts were performing discretionary acts. As a result, Plaintiff must allege facts showing that Propes and Watts acted with malice or intent to injure.

Malice "requires a deliberate intention to do wrong . . . Actual malice requires more than harboring bad feelings about another. While ill will may be an element of actual malice in many factual situations, its presence alone cannot pierce qualified immunity." Adams v. Hazelwood, 271 Ga. 414, 414-15 (1999). Plaintiff has pled nothing to suggest that Propes and Watts even harbored bad feelings toward him, much less that they acted with the intention to do wrong. For these reasons, Propes and Watts are entitled to official immunity from Counts IV and VI.

K. The City Has Sovereign Immunity From Plaintiff's Non-GWA State Law Claims.

The state law claims asserted against the City in Count V, VI, and VII of the Amended Complaint are also subject to sovereign immunity. Whether or not the City has "[s]overeign immunity [from these claims] is a threshold issue that the [district] court is required to address before reaching the merits of any other argument." State Dep't of Corr. v. Developers Sur. &

Indem. Co., 324 Ga. App. 371, 374 (2013) (internal punctuation omitted). To establish a waiver of sovereign immunity, Plaintiff must show either an act of the General Assembly which waives the City's immunity from these claims, that the claims implicate a ministerial function of the City, or that the claims are actually covered by insurance. See O.C.G.A. § 36-33-1; Gatto v. City of Statesboro, 353 Ga. App. 178, 184 (2) (2019) (analyzing the City's policy and determining that a sovereign immunity endorsement excluded coverage from the claims in that case). The Plaintiff has the burden of establishing such a waiver. See City of Alpharetta v. Vlass, 2021 Ga. App. Lexis 365, at *10-11 (Ga. App. June 30, 2021) (finding plaintiff failed to establish an exception to sovereign immunity). Because no such showing has been made (or even attempted), the City is entitled to sovereign immunity. See Lathrop v. Deal, 301 Ga. 408, 444 (concluding sovereign immunity extends to claims for injunctive or declaratory relief that rest upon constitutional grounds).

IV. CONCLUSION

As this brief shows, Plaintiff fails to state viable claims for relief against any Defendant. Thus, the Court should grant this entire motion and dismiss all claims with prejudice.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing upon all parties to this matter via the Court's designated e-filing system and/or by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

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