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
WITH INCORPORATED MEMORANDUM OF LAW IN SUPPORT

COME NOW Defendants City of Monroe, Georgia (the "City" or "Monroe"), Logan Propes ("Propes"), and R.V. Watts ("Watts") (collectively, "Defendants"), and hereby file this Motion to Dismiss Plaintiff's Complaint 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. 1, Compl. ¶ 7.)[1] Propes is the City Administrator, whereas Watts is the Police Chief. (Id. ¶¶ 8-9).

[1] When considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must accept all of the complaint's well-pled factual allegations as true. See Pielage v. McConnell, 516 F.3d 1282, 1284 (11th Cir. 2008). Accordingly, for purposes of this motion only, Defendants accept as true the well-pled factual allegations.

Plaintiff alleges that, during his employment, he had a "professional and personal relationship with K.I." (Id. ¶ 10.) He does not identify K.I. or otherwise explain the nature and extent of their relationship.

Plaintiff alleges 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." (Compl. ¶ 11.) Plaintiff does not allege that the communications at issue involved a matter of public concern – in fact, he provides no detail whatsoever concerning the content of the communications. Notably, Plaintiff also does not plead that he owned, possessed, used, or controlled K.I.'s Apple Watch. Prior to accessing the Apple Watch, K.I.'s son "notified" Propes and Watts that he was going to access these communications and requested their "assistance and participation." (Id. ¶ 12.) Watts then purportedly notified Propes, who both traveled to meet K.I.'s son. (Id. ¶ 13).

Plaintiff alleges that K.I.'s son, Watts, and Propes then accessed communications between Plaintiff and K.I. that were stored on the Apple Watch. (Id. ¶ 14.) Subsequently, 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. ¶ 19). Propes agreed, and then contacted Plaintiff and demand that he either resign or face termination for "conduct unbecoming." (Id. ¶¶ 20-21.) Propes also "falsely" told Plaintiff that if he did not resign, he would not receive his accrued leave. (Id. ¶ 22).

Plaintiff does not allege that he personally objected to or disclosed 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. (Compl. ¶¶ 24, 28). Instead, Plaintiff claims that he "retained counsel, and through his counsel, he advised the *City of Monroe* of the illegal actions" taken by Watts and Propes. (Id. ¶ 24) (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 from his position. (Id. ¶ 29.)

Based on these allegations, Plaintiff asserts the following claims: (1) "Violations of Georgia Whistleblower Law"; (2) "Retaliation for Exercise of First Amendment Rights" under 42 U.S.C. § 1983; (3) "Violation of Right to Freedom of Association" under § 1983; (4) "Violation of State Law by Illegal Interception of Electronic Communications"; (5) "Illegal Search and Seizure in Violation of the United States and Georgia Constitutions" under § 1983; and (6) "Violation of Right to Privacy by Public Disclosure of Private Facts."

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). To survive dismissal,

Plaintiff must raise "plausible" factual allegations "enough to raise a right to relief above the speculative level." Id. at 555; see also Edwards v. Prime Inc., 602 F.3d 1276, 1291 (11th Cir. 2010). This burden requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); see also Roe v. Aware Woman Ctr. for Choice, Inc., 253 F.3d 678, 683 (11th Cir. 2001).

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). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678.

III. ARGUMENT AND AUTHORITY

A. Plaintiff Has Not Stated a Prima Facie Case of First Amendment Retaliation.

In Count II, Plaintiff alleges that his "comments" were protected by the First Amendment and that the "Defendants violated [his] rights to free expression..." (Compl. ¶¶ 33-36). This claim is woefully pled and cannot survive.

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 Not Shown His Speech Was a Public Concern.

Two inquiries guide interpretation of the constitutional protections accorded 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 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).

If speech is personal in nature, it cannot be protected because it is not on a matter of public concern. See Akins, 420 F.3d at 1304; Garcetti v. Ceballos, 547 U.S. 410 (2006).[2] Whether speech is personal or related to an issue of public concern "must be determined by the content, form, and context of a given statement[.]" Connick v. Myers, 461 U.S. 138, 147-48 (1983). "Speech is public and not personal in nature if it can be fairly considered as relating to any matter of 'political, social, or other concern to the community' but not when it pertains only to matters of personal interest to the employee." Phillip v. Moore, 2005 U.S. Dist. LEXIS 36202, at *4 (2005) (quoting Connick at 146) (quotations omitted); Rankin v. McPherson, 483 U.S. 378, 384 (1987). Thus, the Court must look at the purpose

[2] See, e.g., Cochran v. City of Atlanta, 150 F. Supp. 3d 1305, 1313 (N.D. Ga. 2015) (citing U.S. v. Nat'l Treasury Emps. Union (NTEU), 513 U.S. 454, 466 (1995) ("A citizen's comment on a matter of public concern is distinguished from an employee'[s] comment on matters related to personal status in the workplace."))

behind the employee's speech, and a "public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run." Boyce v. Andrew, 510 F.3d 1333, 1334 (11th Cir. 2007)[3] (internal quotation omitted).

Here, while Plaintiff's Complaint is difficult at times to understand, it appears he is alleging his "communications" with K.I. were "speech" protected by the First Amendment and/or that he engaged in protected speech when his attorney "advised the City of Monroe of the illegal actions" taken by Propes and Watts. (Compl. ¶¶ 10-11, 14, 21-24).

To the extent Plaintiff's First Amendment claim is based on the assertion that communications with K.I. were protected by the First Amendment, the claim is completely meritless. Again, Plaintiff has not pled that the communications at issue involved a matter of public concern – in fact, no detail whatsoever is provided concerning the content of the communications, when they were made, why they were made, etc. In turn, there is no assertion that K.I. was a political figure, connected with the media, or that their communications involved a political, social, or other concern *to the community*.

Alternatively, to the extent Plaintiff claims he or his attorney's alleged "disclosure to the City [of] the [alleged] violation of O.C.G.A. § 16-11-64" was a matter of public concern, this theory is also baseless. Given the content, form, and context of the speech,

[3] "Restraints are justified by the consensual nature of the employment relationship and by the unique nature of the government's interest." Borough of Duryea v. Guarnieri, 564 U.S. 379, 387 (2011) (internal grievance often does not communicate a message to the public or advance a political or social view beyond the employee's own situation).

such a theory would reflect an attempt to perform the very transformation of a personal grievance (which involved the alleged access by the City of private communications between Plaintiff and K.I., involving who knows what) into a public concern that Boyce disallows. Plaintiff alleges this "speech" was made *after* Propes requested that he resign in lieu of termination for "conduct unbecoming." Plaintiff's speech "through his attorney" thus amounts to nothing more than a complaint to his employer about not wanting to lose his job. Cf., U.S. v. National Treasury Emples. Union, 513 U.S. 454, 466 (1995) (speech that "involves nothing more than a complaint about a change in the employee's own duties does not relate to a matter of public concern."). Plaintiff also has not and cannot plausibly plead that there was a political, social, or community interest in – let alone that public statements were made about – the allegedly unlawful access of the Apple Watch of a private citizen. Again, no allegation is pled that Plaintiff even owned the watch in question, and Plaintiff clearly alleges he communicated through his attorney to protect his own interests after receiving the option to resign in lieu of termination. See Murphy v. Gilmer Cty., No. 2:11-CV-114-RWS, 2013 U.S. Dist. LEXIS 41058, at *20 (N.D. Ga. Mar. 25, 2013) (employee complaint to supervisor is expression of "concern for his own job and well-being") (citing Maggio v. Sipple, 211 F.3d 1346, 1352 (11th Cir. 2000)).

Thus, Plaintiff's "speech" is simply not protected because it was made in furtherance of his own private interest in remaining employed, rather than as a citizen on a matter of public concern. See May v. Sasser, 666 F. App'x 796, 797 (11th Cir. 2016) (per

curiam) (public employee's comments at public meeting were made because he feared termination, not because they were a matter of public interest).

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

Even if Plaintiff's speech was on a matter of public concern, he has not pled that his interest in making the speech outweighed the City's interests. It is well-settled that 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.

In light of 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 communicating with K.I. outweighed the City's, dismissal is appropriate for this additional reason.

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

In Count III, Plaintiff alleges the Defendants violated his First Amendment right to

"Freedom of Association." In support of this cause of action, he alleges in conclusory form that "Plaintiff's 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. (Compl. ¶¶ 37-40). As shown below, Plaintiff fails to state a Freedom of Association claim as a matter of law.

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

As an initial matter, Plaintiff has completely failed to plead *any* facts, let alone *plausible* ones, necessary to establish that he had a protected relationship with "K.I." In this regard, not every association is protected by the First Amendment. Rather, Supreme Court precedent only gives special protection to two forms of association: "intimate association" and "expressive association." 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). The right of intimate association is a limited freedom of choice to enter into and maintain certain intimate human relationships, such as marriage or family, free from undue government intrusion. See Roberts, 468 U.S. at 617-20. The right to expressive association is limited to associating "for the purpose of engaging in activities protected by the First Amendment such as speech, assembly, petition for the redress of grievances, and the exercise of religion." McCabe v. Sharrett, 12 F.3d 1558, 1563 (11th Cir. 1994). Generally, the right of intimate association encompasses the personal 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.

The Eleventh Circuit has recognized marriage is an intimate association. McCabe, 12 F.3d at 1563. However, the Eleventh Circuit has ***not*** recognized that an intimate association exists if the persons are merely friends or close co-workers. See Moore v. Tolbert, 490 F. App'x 200, 204 (11th Cir. 2012) (per curiam).

Here, Plaintiff alleges that he had "a professional and personal relationship with K.I." (Compl. ¶ 10.) Any business relationship could be described as "professional," and virtually all relationships can be categorized as "personal." Nothing in the Complaint suggests that Plaintiff and K.I.'s relationship share the qualities distinctive to family relationships. Plaintiff and K.I. were apparently friends, a relationship that is not protected. See Moore, 490 F. App'x at 204. As such, Count III should be dismissed.

C. Plaintiff Does Not Have Standing to Challenge the Search of K.I.'s Watch.

In Count V of the Complaint, Plaintiff asserts a Fourth Amendment claim pursuant to 42 U.S.C. § 1983, and a claim pursuant to the Georgia Constitution, based on an alleged search and seizure of K.I.'s watch. (Compl. ¶¶ 45-47). These claims also fail.

Plaintiff has not shown that he has standing under ether 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. 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 United States v. Tercier, 835 F. App'x 471, 481 (11th Cir. 2020) (per curiam); see also United States 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 United States v. Jones, 149 F. App'x 954, 959 (11th Cir. 2005) (per curiam) (comparing text messages to received letters and emails to explain

[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).

why no expectation of privacy exists).[5]

Here, Plaintiff alleges the watch was K.I.'s property, not his personal property. He has also not alleged any facts showing that he had a subjective expectation of privacy in K.I.'s watch that was objectively reasonable. Plaintiff additionally fails to plead that he possessed, used, or controlled K.I.'s Apple Watch at any relevant period. Nor can Plaintiff claim an objective expectation of privacy in the communications contained in K.I.'s Apple Watch. See Jones, 149 F. App'x at 959. Therefore, Count V is also due to be dismissed.

D. Propes and Watts are Entitled to Qualified Immunity.

For reasons previously stated, Plaintiff's constitutional rights were not violated. Thus, Plaintiff cannot assert any federal claims against Propes and Watts because he cannot establish the "merits prong" of his case. Regardless, Propes and Watts are entitled to qualified immunity.

Qualified immunity requires proof that the official "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). Here, the factual allegations set forth in the Complaint indicate that Propes and Watts were acting within their discretionary authority at all

[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) (citing Rakas v. Illinois, 439 U.S. 128, 134 (1978)); 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).

relevant times. Propes, as City Administrator, had a duty to manage and monitor City employees.[6] Watts, as Chief of Police, was within his discretionary authority to investigate potential criminal activity or wrongdoing, especially by City employees.

Moreover, 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 Supreme Court, the Eleventh Circuit, or the highest court in a state can "clearly establish" the law. Id. This 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). The Eleventh Circuit has instructed that public servants should be entitled to 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).

Here, Plaintiff does not allege any facts showing that the balancing test would

[6] 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).

inevitably conclude that his termination (or access of the watch) was unlawful. As previously explained, Plaintiff's speech concerned either a personal relationship with K.I. and/or his personal grievances rather than a matter of public interest, there is no indication that the content of his messages with K.I. involved a matter of public concern, 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 Fourth Amendment and First Amendment freedom of association rights were similarly not violated, much less "clearly established" at the time. As previously explained, Plaintiff has not pled facts showing an "intimate association" with K.I. See McCabe, 12 F.3d at 1563; Gary v. City of Warner Robins, 311 F.3d 1334, 1338 (11th Cir. 2002) (no generalized right to associate with other adults). Nor has Plaintiff pled facts showing that he had a reasonable expectation of privacy in the contents of K.I.'s Apple Watch such that he has standing to challenge the search or seizure. Tercier, 835 F. App'x at 481; Riley v. California, 573 U.S. 373, 403 (2014) (defendant had a privacy interest in his personal cell phone contents); United States v. Gregg, 771 F. App'x 983 (11th Cir. 2019) (defendant lacked expectation of privacy in abandoned cell phone); United States v. Cochran, 682 F. App'x 828, 839-841(11th Cir. 2017) (per curiam) (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).[7] As such, Propes and Watts did not violate Plaintiff's constitutional rights, much less his "clearly established" ones and are entitled to qualified immunity.

E. 28 U.S.C. § 1367(c) Gives the Court Discretion to Decline to Exercise Jurisdiction After Dismissing Plaintiff's Federal Claims.

28 U.S.C. § 1367(c)(3) provides that "[t]he district court[] may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." See also Raney v. Allstate Ins. Co., 370 F.3d 1086, 1089 (11th Cir. 2004) ("We have encouraged district courts to dismiss any remaining state claims when, as here, the federal claims have been dismissed prior to trial."). Thus, once the Court dismisses Plaintiff's federal claims, the entire suit may be dismissed.

F. Sovereign Immunity Bars the Intentional Tort Claims Plaintiff Pursues against the City in Counts IV and VI.

Plaintiff does not identify any waiver or grounds for overcoming the City's sovereign immunity. "Sovereign immunity applies to municipalities" like the City, "unless waived by the General Assembly or by the terms of the State Constitution. City of Albany v. Stanford, 347 Ga. App. 95, 97 (2018) (citing Ga. Const. of 1983, Art. IX, Sec. II, Par. IX; O.C.G.A. § 36-33-1). And "any exception or waiver must be found in that same document or in a law passed by the General Assembly." Id. Because sovereign immunity is a liability from suit, the "court should consider the issue of governmental immunity and

[7] 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").

its waiver before addressing issues of causation." Cameron v. Lang, 274 Ga. 122, 126 (2001); Gatto v. City of Statesboro, 353 Ga. App. 178, 181 (2019).[8]

Here, Plaintiff does not allege the General Assembly or Georgia Constitution waived the City's sovereign immunity on his claims for "Illegal Interception of Electronic Communications" and "Violation of Privacy by Public Disclosure of Private Facts" (Counts IV and VI). Nor could Plaintiff because, as intentional torts, the claims do not fall within the scope of Georgia's narrow "nuisance exception" to sovereign immunity. City of Albany, 347 Ga. App. at 98. In fact, the general rule is that "[e]mployment decisions ... including those related to the retention and supervision of employees[] are [a] discretionary function that are not covered by this waiver." Chastain v. City of Douglasville, No. 1:14-CV-4038-AT-CMS, 2017 U.S. Dist. LEXIS 229294, at *37 (N.D. Ga. Jan. 20, 2017) (citing Goddard v. City of Albany, 285 Ga. 882 (2009) (affirming judgment on "invasion of privacy, libel, unlawful interference with employment, emotional distress, and negligent retention" claims against a city based on sovereign immunity). Thus, the Court should find sovereign immunity bars Plaintiff's Georgia tort claims against the City as a matter of law.

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

Plaintiff has likewise failed to meet his burden of pleading a viable claim under the Georgia Whistleblower Act, O.C.G.A. § 45-1-4 ("GWA"). The GWA provides that "[n]o public employer shall retaliate against a public employee for objecting to or disclosing a

[8] Plaintiff bears "the burden of proving such a waiver." Albertson v. City of Jesup, 312 Ga. App. 246, 249 (1) n.10 (2011).

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).

1. There is No Individual Liability Under the GWA.

Like all of his causes of action, Plaintiff's GWA claim fails to indicate whether it is only asserted against the City, or if it is also being asserted against Propes and Watts. (Compl. ¶¶ 25-32). To the extent that Plaintiff alleges a claim under the GWA against Propes and Watts, he simply cannot do so. The GWA prohibits retaliation by *public employers*. The GWA defines "public employer" in relevant part as "any local or regional governmental entity that receives funds from the State of Georgia or any state agency." O.C.G.A. 45-1-4(a)(4). "[T]he definition of 'public employer' necessarily excludes individuals from its ambit." Skolweck v. Garden City, No. 4:12-cv-227, 2012 U.S. Dist. LEXIS 171236, at *6 (S.D. Ga. Dec. 3, 2012) (citing O.C.G.A. 45-1-4(a)(4)). As such, 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).

2. There is No Viable Claim Pled Against the City Under the GWA.

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 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).

As an initial matter, Plaintiff does not allege that he *personally* made the disclosure, whatever that disclosure was. Rather, Plaintiff claims his legal counsel made the legal demands to the City related to the Apple Watch. (Compl. ¶ 24.) 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.[9]

[9] The GWA defines "public employee" in relevant part as "employees, officials, and administrators of . . . any local or regional government entity that receives funds from the State of Georgia or any state agency." O.C.G.A. § 55-1-4(a)(3). A third party does not meet this 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).

Second, while Plaintiff alleges Propes was his supervisor, he does not contend that he disclosed the alleged violation to Propes. In fact, Plaintiff says nothing regarding to whom or when the disclosure was made. Plaintiff instead vaguely alleges that his attorney made the disclosure to "the City." (Compl. ¶ 28.) Plaintiff's purported disclosure to "the City" is insufficient. Further, Plaintiff has not pled that he or his lawyer disclosed the violation of law to an agency charged with the enforcement of laws, rules, or regulations (such as the GBI). Accordingly, Plaintiff's threadbare allegations fail even to recite the essential elements of a claim under the GWA.

H. Plaintiff Cannot State a Claim for Invasion of Privacy

Plaintiff also attempts to assert a claim under Georgia law for a violation of his right to privacy by public disclosure of private facts. (Compl. ¶¶ 48-52.) 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 Complaint fails to establish any of these in non-conclusory fashion elements. It merely alleges that "[t]he Defendants obtained, disclosed, and made public, private and secret facts about the Plaintiff" and that the disclosure was embarrassing. (Compl. ¶ 50.) 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 as 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 sufficiently widespread 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 professional and personal 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 VI Fails to Meet the Twombly Pleading Standards.

Plaintiff's last substantive cause of action is reflected in Count IV, which Plaintiff describes as a claim for "Violation of State Law by Illegal Interception of Electronic Communications." (Compl. ¶¶ 41-44). Georgia law contains several statutes pertaining to the interception, dissemination, and illegal access of electronic communications. See O.C.G.A. §§ 16-11-60 *et seq.*, 16-11-90, 16-9-93. None of these are mentioned.

In support of this claim, Plaintiff pleads that Propes, and Watts accessed electronic communications from K.I.'s Apple Watch between Plaintiff and K.I. and divulged the communications illegally. (Compl. ¶¶ 14, 17-18, 41-44.) 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). Without more, Defendants are unaware of what specific actions Plaintiff alleges are illegal and on what statute Plaintiff bases his right to relief under. He has also not pled 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 VI.

J. Counts IV and VI Are Barred by Official Immunity.

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 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). Official immunity applies to municipal employees. Cameron, 274 Ga. at 124-25.

> 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).

Here, it would strain credulity for Plaintiff to argue any of Propes's and Watts's actions were ministerial. All relevant actions required deliberation and judgment, such as 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. Accordingly, 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. Accordingly, Propes and Watts are entitled to official immunity with respect to Counts IV and VI.

V. CONCLUSION

As the analysis 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.

Respectfully submitted this 4th day of August, 2021.

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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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