

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CARL CAVALIER	*	CIVIL ACTION
	*	
VERSUS	*	DOCKET NO. 21-656
	*	
STATE OF LOUISIANA: DEPT. OF	*	JUDGE JOHN W. DEGRAVELLES
PUBLIC SAFETY & CORRECTIONS:	*	
PUBLIC SAFETY SERVICES; OFFICE	*	MAGISTRATE RICHARD L. BOURGEOIS, JR.
OF STATE POLICE	*	

RULE 12(b) MOTION TO DISMISS PLAINTIFF’S CLAIMS AGAINST DPSC/LSP

For the reasons set forth in their contemporaneously filed supporting memorandum of law, the Louisiana Department of Public Safety & Corrections (Office of State Police) (erroneously named and referred to in the Petition as “State of Louisiana: Department of Public Safety & Corrections: Public Safety Services; Office of State Police”) (hereafter referred to as “DPSC/LSP”) moves to dismiss some or all of Plaintiff’s claims against it under FED.R.CIV.P. 12 and specifically asserts challenges related to subject-matter jurisdiction, the sufficiency of process and/or service of process, personal jurisdiction and failure to state a claim.

WHEREFORE, DPSC/LSP prays that this Rule 12(b) motion be deemed good and sufficient and that after all due proceedings are had herein there be judgment in its favor and against Plaintiff, dismissing Plaintiff’s demands against it, with full prejudice and at Plaintiff’s sole cost, and subject to an attorney fee award in favor of DPSC/LSP under 42 U.S.C. § 1988, and for all general and equitable relief.

Respectfully Submitted,
JEFF LANDRY
Attorney General

BY: /s/ Ben L. Mayeaux

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for the Louisiana Department of Public Safety &
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CERTIFICATE OF SERVICE

I hereby certify that on Thursday, December 30, 2021, a copy of the *Rule 12(b) Motion to Dismiss Plaintiff's Claims against DPSC/LSP* was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be forwarded to all counsel by operation of the Court's electronic filing system.

/s/ Ben L. Mayeaux
Counsel

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MEMORANDUM IN SUPPORT OF RULE 12(b) MOTION TO DISMISS

Plaintiff, Carl Cavalier (“Plaintiff”), claims that during his employment with the Louisiana Department of Public Safety & Corrections (Office of State Police) (hereafter referred to as “DPSC/LSP”), he was transferred, harassed, suspended and demoted because of his race and whistleblowing activities.¹ Plaintiff filed suit against DPSC/LSP alleging violations of 42 U.S.C. § 1981 (Equal Rights) and LSA-R.S. 23:967 (the Louisiana whistleblower statute). Prior to removal to federal court, Plaintiff filed an amended petition in which he added a First Amendment retaliation claim under 42 U.S.C. § 1983.² On information and belief, however, Plaintiff did not satisfy the service requirements for DPSC/LSP under LSA-R.S. 39:1538(D) within the time delays provided for in FED.R.CIV.P. 4(m) and therefore, this Court may lack jurisdiction over DPSC/LSP. Moreover, Plaintiff fails to state claims under Sections 1981 and 1983. Consequently, his claims against DPSC/LSP should be dismissed.

¹ Rec. Doc. 1-2, pp. 5-10 – Original Petition, paras. 6, 9, 11, 13, 15, and 16.

² Rec. Doc. 1-2, pp. 13-19 – First Amended Petition, para. 19.

FED.R.CIV.P. 12(b)(4) & (5) – INSUFFICIENT PROCESS AND/OR SERVICE OF PROCESS

Under FED.R.CIV.P. 4(j)(2) and (m), Plaintiff was required to effect service on DPSC/LSP within ninety days by delivering a copy of the lawsuit and citation to DPSC’s/LSP’s chief executive officer or through service in accordance with state law.³ To the extent that Plaintiff did not timely request and effect service on the Secretary of DPSC and the Office of Risk Management and the Louisiana Attorney General,⁴ the service requirements of FED.R.CIV.P. 4(j)(2) and (m)⁵ have not been satisfied.⁶

³ See LSA-Const. Art. 10 § 41(creating Louisiana State Police Service); LSA-R.S. 36:4 (characterizing DPSC as part of the State’s executive branch of government); and LSA-R.S. 36:403 (providing for a secretary of DPSC). James M. LeBlanc is the duly appointed secretary of DPSC and is the chief executive officer of the Department. He has served 11 years as Secretary and was appointed by two governors. See DPSC About Our Offices, Office of the Secretary <https://doc.louisiana.gov/about-the-dpsc/> (follow “About Our Offices/Leadership” hyperlink) (last visited 12/29/2021).

⁴ See Rec. Doc. 1-2, pp. 5-10 – Original Petition (Citation issued on October 1, 2021).

⁵ Stating that “[a] state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by: (B) serving a copy of each in the manner prescribed by that state’s law for serving a summons or like process on such a defendant.” FED.R.CIV.P. 4(j)(2)(B).

⁶ LSA-R.S. 39:1538(D) provides that in actions brought against the state or any of its agencies to recover damages in tort for money damages against the state or its agencies for injury caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his employment:

... process shall be served upon the head of the department concerned, the office of risk management, and the attorney general, as well as any others required by LSA-R.S. 13:5107.

FED.R.CIV.P. 4(m) provides:

If a defendant is not served within 90 days after the complaint is filed, the court-- on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

Proper citation is the foundation of all actions, and knowledge of the legal action and/or receipt of the petition fails to satisfy the requirement of citation and service under Louisiana law.⁷

Because Plaintiff failed to timely serve DPSC/LSP, this Court lacks personal jurisdiction over it:

If there is no valid service of process, proceedings against a party are void because a court cannot exercise personal jurisdiction over a defendant unless he or she was properly served.⁸

Therefore, Plaintiff's suit should be dismissed.

FED.R.CIV.P. 12(b)(6) – FAILURE TO STATE A CLAIM

I. Section 1981 and Section 1983 Claims

DPSC/LSP moves to dismiss Plaintiff's Section 1981 and Section 1983 claims pursuant to FED.R.CIV.P. 12(b)(6) because the petitions (both original and amended) fail to set forth sufficient facts to state a plausible claim for relief under the statutes. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'"⁹

⁷ See *Naquin v. Titan Indemnity Company*, 2000-1585 (La. 2/21/01), 779 So.2d 704, 710 (recognizing that "it is well-accepted that even a defendant's actual knowledge of a legal action cannot supply the want of citation because proper citation is the foundation of all actions . . ." and holding that "[t]he argument that the defendants' knowledge of the plaintiff's suit can somehow fill the role of service of citation lacks merit.") (citations omitted).

⁸ See *Carmouche v. Garber*, No. 6:19-CV-00023, 2020 WL 733236, at *1 (W.D. La. Feb. 12, 2020).

⁹ *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 126 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal citations omitted).

To plead a Section 1981 claim, a plaintiff must allege “intentional discrimination”¹⁰ and “that, but for race, [he] would not have suffered the loss of a legally protected right.”¹¹ To plead a claim for First Amendment retaliation under Section 1983, a plaintiff must allege “an adverse employment action was taken, speech involving a matter of public concern was uttered, the employee’s interest in speaking outweighs the employer’s interest in efficiency, and the protected speech precipitated the adverse employment action.”¹² Moreover, where, as here, the claim is against a state agency, there is no respondeat superior liability and the plaintiff must show that the violation of his rights protected by Section 1981 or Section 1983 was caused by a custom or policy “within the meaning of *Monell* . . .”¹³ This requires a plaintiff to plead and show “a policy maker; an official policy; and a violation of constitutional rights whose ‘moving force’ is the policy or custom.”¹⁴ Plaintiff failed to allege sufficient facts to support any of the requisite elements.

A. The Pleadings Do Not Allege *Monell* Liability

1. No Identification of a Policymaker

Plaintiff has not identified any DPSC/LSP policymaker, nor has he alleged facts to establish that any such policymaker “caused the deprivation of rights at issue” or acquiesced in a constitutionally offending practice or custom of DPSC/LSP.¹⁵

¹⁰ *Bellows v. Amoco Oil Co.*, 118 F.3d 268 (5th Cir. 1997).

¹¹ *Comcast Corp. v. National Association of African-Owned Media*, 140 S.Ct. 1009, 1019 (2020).

¹² *Angel v. La Joya Independent School District*, 717 Fed.Appx. 372, 376 (5th Cir. 2017) (parentheticals omitted).

¹³ *Jett v. Dallas Independent School District*, 491 U.S. 701, 736, 109 S.Ct. 2702, 2723 (1989); *Angel*, 717 Fed.Appx. at 377.

¹⁴ *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001).

¹⁵ *Jett*, 491 U.S. at 737, 109 S.Ct. 2702, 2724.

2. No Identification of an Offending Official Policy

A plaintiff must “specifically identify” an official policy he contends caused the constitutional violation.¹⁶ Here, not only has Plaintiff failed to plead that his alleged discrimination was the result of an official policy; he acknowledges that he is unable to specifically identify any offending official policy. Instead, he complains of the absence of effective policies: “Defendant failed to have in force and effect an effective policy regarding illegal discrimination/harassment and retaliation.”¹⁷ Assuming the truth of this allegation, the negligent failure to have a policy condemning racism or unlawful retaliation is a far cry from showing a policy that intentionally discriminates on the basis of race or serves as a “moving force” for constitutional violations. A mere “showing of simple or even heightened negligence will not suffice” to establish *Monell* culpability.¹⁸

3. No Identification of an Offending Custom

Plaintiff has not alleged facts to show an offending custom, which requires allegations of “a persistent widespread practice of [State Police] officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents [State Police] policy.”¹⁹ While Plaintiff alleges he personally experienced incidents of racial discrimination and retaliation by co-workers, he fails to allege facts to establish that any such discrimination or retaliation was persistent or widespread across DPSC/LSP vis-à-vis its employees. Isolated “actions of officers or employees of a

¹⁶ *Piotrowski*, 237 F.3d at 578.

¹⁷ Rec. Doc. 1-2, pp. 5-10 – Original Petition, para. 17.

¹⁸ *Piotrowski*, 237 F.3d at, 579.

¹⁹ *Id.*

municipality do not render the municipality liable under Section 1983 unless they execute official policy.²⁰

4. No Allegations of “Moving Force” Causation

Absent identification of an offending policy or custom, Plaintiff cannot show that policy or custom was the “moving force” behind his alleged constitutional deprivations. Stated simply, Plaintiff has failed to allege facts sufficient to show any of the elements necessary to establish *Monell* liability as to DPSC/LSP, and his Section 1981 and Section 1983 claims should be dismissed.

B. The Pleadings Do Not Allege “But-For” Causation

Plaintiff also has failed to allege facts sufficient to show that any action taken against him was based on race, much less that the employment actions taken would not have occurred “but-for” his race. Although Plaintiff alleges he experienced racial discrimination prohibited by Section 1981, he fails to support these conclusory allegations with facts.²¹ Conclusory allegations are insufficient to state a plausible claim for relief.²² Moreover, while Plaintiff describes alleged adverse employment actions, he fails to explain why or how those actions were race-based. And, he also identifies alternative, non-race-based, explanations for the alleged adverse employment actions: ticketing a Houma police officer; violation of use of patrol unit policy; making public

²⁰ *Id.*

²¹ Rec. Doc. 1-2, pp. 5-10 – Original Petition, para. 6 (“On or about May 5, 2018, Petitioner began experiencing racial discrimination from his chain of command . . .”); para. 16 (“Petitioner contends that the actions directed at him constituted illegal race-based harassment/discrimination and were taken in retaliation/reprisal for his whistle blowing activity.”).

²² *Iqbal*, 556 U.S. at 678, 126 S.Ct. at 1949-1950.

statements in violation of State Police policy; and violation of State Police secondary employment and officer conduct policy.²³

In sum, Plaintiff's own allegations negate the notion that "but-for" his race he would not have experienced adverse employment actions. The Section 1981 claim should be dismissed on this ground as well.

C. The Pleadings Do Not Allege Any Adverse Employment Action in 2018

Plaintiff alleges he experienced adverse employment actions in 2018 and then again in 2020. However, the pleadings fail to show any adverse employment action during 2018. Plaintiff complains that in that year, his supervisors subjected him to "additional scrutiny" and "harsh criticism" after he ticketed a Houma police officer.²⁴ However, "being subjected to heightened scrutiny is not an adverse employment action,"²⁵ nor is "sporadic use of abusive language."²⁶ Although Plaintiff also complains about his 2018 transfer to a different assignment, that transfer was at his own request.²⁷ The allegations fail to set forth facts sufficient to show any adverse employment action occurred in 2018. Consequently, the claim of employment discrimination in 2018 should be dismissed.

²³ Rec. Doc. 1-2, pp. 5-10 – Original Petition, paras. 6, 8, 14, 15.

²⁴ Rec. Doc. 1-2, pp. 5-10 – Original Petition, para. 6.

²⁵ *Williams v. E.I. du Pont de Nemours and Co.*, 180 F.Supp.3d 451, 464 (M.D. La. 2016) (citing *Magiera v. City of Dallas*, 389 Fed. Appx. 433, 437 (5th Cir. 2010)).

²⁶ *Magiera v. City of Dallas*, 389 Fed. Appx. 433, 437 (5th Cir. 2010).

²⁷ Rec. Doc. 1-2, pp. 5-10 – Original Petition, para. 9 ("Petitioner requested a transfer to BOI by correspondence dated August 27, 2018.").

II. LSA-R.S. 23:967 Louisiana Whistleblower Statute

DPSC/LSP moves to dismiss the LSA-R.S. 23:967 (“Louisiana Whistleblower Statute”) claim pursuant to FED.R.CIV.P. 12(b)(6) because the petitions fail to set forth sufficient facts to state a plausible claim for relief under this statute. To state a claim under the Louisiana Whistleblower Statute, the employee must allege “the defendant violated the law through a prohibited workplace act or practice; plaintiff advised defendant of the violation; plaintiff then refused to participate in the prohibited practice or threatened to disclose the practice; and plaintiff was fired as a result of the refusal to participate in the unlawful practice or threat to disclose the practice.”²⁸ Moreover, a plaintiff must show an actual violation of Louisiana law committed by the employer, not other employees.²⁹

The petitions fail to sufficiently allege that DPSC/LSP violated any specific state law. Plaintiff alleges he disclosed “criminal conduct by commissioned personnel” to the media.³⁰ This allegation neither identifies the alleged unlawful conduct in question nor attributes the wrongdoing to Plaintiff’s employer, DPSC/LSP. The only allegation specific to DPSC/LSP is that Plaintiff communicated with a State representative his “concerns that LSP had committed misconduct with the death of Ronald Greene.”³¹ This allegation does not identify an actual violation of law as required to assert a claim under the Louisiana Whistleblower Statute. Hence, Plaintiff’s claim under LSA-R.S. 23:967 should be dismissed with prejudice.

²⁸ *Randolph v. St. Tammany Parish School Board*, 2021 WL 1967479 *20 (parentheticals omitted) (E.D. La. 2021).

²⁹ *Id.* (citing *Dillon v. Lakeview Reg’l Med. Ctr. Auxiliary, Inc.*, 2011-1878 (La. App. 1 Cir. 6/13/12); 2012 WL 2154346 *5, *writ denied*, 2012-1618 (La. 10/26/12); 99 So.3d 651).

³⁰ Rec. Doc. 1-2, pp. 5-10 – Original Petition, para. 14.

³¹ Rec. Doc. 1-2, pp. 13-19 – First Amended Petition, para. 16.

WHEREFORE, DPSC/LSP prays that this motion be granted, that all of Plaintiff's claim against it be dismissed with prejudice, and at Plaintiff's sole cost and expense, and for all general and equitable relief, etc.

Respectfully Submitted,
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/s/ Ben L. Mayeaux
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