

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

**TERRY BEVILL,
*Plaintiff,***

v.

**CITY OF QUITMAN, TEXAS; CITY OF
QUITMAN POLICE DEPARTMENT;
TOM CASTLOO, Wood County Sheriff;
DAVID DOBBS, City of Quitman Mayor;
JAMES “JIM” WHEELER, Former Wood
County District Attorney;
JEFFREY FLETCHER, and
WOOD COUNTY, TEXAS,
*Defendants.***

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CIVIL ACTION NO. 4:19cv406

JURY DEMANDED

**DEFENDANTS TOM CASTLOO, JAMES “JIM” WHEELER AND WOOD COUNTY,
TEXAS’ PARTIAL MOTION TO DISMISS OR, IN THE ALTERNATIVE, REQUEST
FOR A RULE 7(a) REPLY ON THE ISSUE OF QUALIFIED IMMUNITY**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Defendants Tom Castloo, James “Jim” Wheeler and Wood County, Texas, by and through undersigned counsel and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and file this their Partial Motion to Dismiss, or in the alternative, Request for a Rule 7(a) Reply on the Issue of Qualified Immunity, and in support thereof, would respectfully show unto the Court the following:

**I.
INTRODUCTION**

In his Complaint, Plaintiff asserts the following causes of action:

First Cause of Action: §1983 against City of Quitman, Mayor Dobbs, and Quitman Police Department

Second Cause of Action: §1983 violation by Wood County and Sheriff Castloo

Third Cause of Action: §1985 conspiracy/retaliation against all Defendants

Fourth Cause of Action: §1985 conspiracy/criminal prosecution against District Attorney Wheeler, Sheriff Castloo and Wood County

Fifth Cause of Action: State law conspiracy to violate §1983 claim against City of Quitman, Quitman PD, District Attorney Wheeler, Sheriff Castloo and Mayor Dobbs

Defendants' Partial Motion to Dismiss addresses Plaintiff's second and fifth causes of action. As explained below, Plaintiff has failed to state both a deprivation of constitutional rights and a County policy in his second cause of action. Furthermore, Defendant Castloo should be dismissed from Plaintiff's second cause of action because he is entitled to qualified immunity and Plaintiff's claims against him are duplicative of those against Wood County. Also, there is no waiver under the Texas Tort Claims Act for intentional torts such as conspiracy as alleged in Plaintiff's fifth cause of action.

II.

APPLICABLE LAW FOR MOTION TO DISMISS

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to dismiss an action for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). In considering a Rule 12(b)(6) motion, the court "accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2005)). The court, however, need not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Plotkin v. IP Axess, Inc.*, 407 F.3d 690, 696 (5th Cir. 2005); accord *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009). Instead, "[t]o 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.” *Id.* at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); accord *Wilson v. Birnberg*, 667 F.3d 591,595 (5th Cir. 2012). A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Iqbal*, 556 U.S. at 678). The standard of plausibility “is not akin to a probability requirement, but asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678-79. 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. *Iqbal*, 556 U.S. at 678.

III. APPLICABLE LAW FOR QUALIFIED IMMUNITY

“[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). Qualified immunity protects all except those that are incompetent or who knowingly violate the law. See *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). The well-established test for qualified immunity requires a two-step inquiry. First, the court must determine whether a public official’s conduct deprived a § 1983 plaintiff of a “clearly established” constitutional or statutory right. See *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738; *Sanchez v. Swyden*, 139 F.3d 464, 466 (5th Cir. 1998); *Salas v. Carpenter*, 980 F.2d 299, 304 (5th Cir. 1992). The constitutional right must be sufficiently clear to put a reasonable officer on notice that certain conduct violates that right. See *Anderson*, 483

U.S. at 639, 107 S. Ct. At 3039; *Sanchez*, 139 F.3d at 466; *Melear v. Spears*, 862 F.2d 1177, 1187 (5th Cir. 1989). The Supreme Court has warned against vague or general assertions of constitutional rights and has required a § 1983 plaintiff to state with specificity the constitutional right that has been allegedly violated – otherwise, liability could be imposed in every case. See *Anderson*, 483 U.S. at 639, 107 S. Ct. at 3039. “A constitutional violation does not occur every time someone feels that they have been wronged or treated unfairly.” *Sanchez*, 139 F.3d at 466-67 (citing *Shinn ex rel. Shinn v. College Station Indep. Sch. Dist.*, 96 F.3d 783, 786 (5th Cir. 1996)). Not every alleged tort or wrong by a Plaintiff constitutes a violation of a civil right. *Albright v. Oliver*, 510 U.S. 226, 269-71 (1994). Section 1983 does not grant a cause of action to the Plaintiff for every action taken by a state official. *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

Even if an official violated a plaintiff’s civil rights, that official may assert the defense of qualified immunity if his conduct was objectively reasonable. *Sanchez*, 139 F.3d at 467 (citing *Mouille v. City of Live Oak*, 918 F.2d 548, 551 (5th Cir. 1990); *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990)). In other words, the official is entitled to qualified immunity if a reasonable person in the official’s position would have done the same thing. Whether an official’s conduct is objectively reasonable depends upon the circumstances confronting the official as well as “clearly established law” in effect at the time of the official’s actions. *Anderson*, 483 U.S. at 641, 107 S. Ct. at 3040; *Sanchez*, 139 F.3d at 467. The official’s knowledge of the relevant law need not rise to the level of a “constitutional scholar.” *Sanchez*, 139 F.3d at 467 (citing *Harlow*, 457 U.S. at 815-17, 102 S. Ct. at 2736-38). An official’s conduct is objectively reasonable unless “all reasonable officials would have realized the particular challenged conduct violated the constitutional

provisions sued on.” *Wooley v. City of Baton Rouge*, 211 F.3d 913, 918-19 (5th Cir. 2000). Also, “the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson*, 483 U.S. at 640. 107 S. Ct. at 3039. It must be apparent that the official’s action is unlawful. *Id.*

IV.
MOTION TO DISMISS BASED ON FAILURE TO
ASSERT A CONSTITUTIONAL VIOLATION

Section 1983 “is not itself a source of substantive rights,” but merely provides “a method for vindicating federal rights elsewhere conferred.” *Baker v. McCollan*, 443 U.S. 137, 144, n.3 (1979). The first step in any such claim is to identify the specific constitutional right allegedly infringed. *Graham v. Connor*, 490 U.S. 386, 394 (1989); *Baker*, 443 U.S. at 140. Furthermore, under section 1983, a county cannot be held liable on a theory of *respondeat superior*, but it can be held liable when conduct depriving a person of constitutional rights was pursuant to county policy. *Monell v. Dep’t of Social Services*, 436 U.S. 658, 694 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). To prove municipal liability under section 1983, the Fifth Circuit has held that three elements are required: 1) a policymaker; 2) and official policy; and 3) a violation of constitutional rights whose “moving force” is the policy or custom. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell*, 436 U.S. at 694). These three elements “are necessary to distinguish individual violations perpetrated by local government employees from those that can be fairly identified as actions of the government itself.” *Piotrowski*, 237 F.3d at 578. If a municipal officer has authority to establish final municipal policy and makes a decision or orders a course of action, the municipality may be held liable for the officer’s decision or order when

it violates constitutional rights. *Parm v. Shumante*, 513 F.3d 135, 142 (5th Cir. 2007) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-482 (1986)).

In Plaintiff's Complaint, Plaintiff fails to allege a deprivation of a constitutional right by Sheriff Castloo and Wood County. Plaintiff's section 1983 cause of action against Sheriff Castloo and Wood County consists of vague allegations of intimidation and harassment, which presumably consist of alleged comments made by Sheriff Castloo to Plaintiff at a gas station about Sheriff Castloo's opinion of Plaintiff's pending criminal charges. See *Plaintiff's Original Complaint*, ¶ 23. Nothing in this interaction constitutes a violation of a constitutional right, and had nothing to do with Plaintiff's arrest or the termination from his job. Plaintiff's claim of retaliation by Sheriff Castloo and Wood County is also not supported by the allegations. Plaintiff alleges that Sheriff Castloo spoke to Plaintiff's employer, City of Quitman, and addressed the city council at a city council meeting about Plaintiff's sworn statement that a third party could not receive a fair trial in Wood County due to the alleged relationships between Judge Fletcher, Sheriff Castloo and District Attorney Wheeler. *Id.* at ¶¶ 33-34, 43. These alleged facts do not establish a deprivation of a constitutional right. According to the Complaint, the arrest warrant was issued by Judge Fletcher, and the City of Quitman was the employer who terminated Bevill. Wood County and Wood County officials have no control over a municipality's decisions to hire and fire. Because Plaintiff has failed to allege a deprivation of a constitutional right, Sheriff Castloo is entitled to qualified immunity and Plaintiff's section 1983 claims against him should be dismissed on that basis.

Furthermore, Plaintiff has failed to sufficiently allege a custom, policy or practice of harassment, oppression or retaliation against the citizens of Wood County. Plaintiff

references a 2013 employment case which occurred before Sheriff Castloo was sheriff to establish a policy. *Id.* at ¶¶ 21, 22a. Because Sheriff Castloo was not sheriff at that time, he was likewise not the policymaker. The other two cases presented by Plaintiff are still pending, and are no evidence of a policy to violate citizens rights. *Id.* at ¶¶ 22b, 22c. Because Plaintiff has failed to allege a deprivation of a constitutional right by either Sheriff Castloo or Wood County, Plaintiff's section 1983 claim against them should be dismissed.

In the event this Court does not grant Defendants' motion to dismiss Plaintiff's second cause of action in its entirety, Defendants move that Sheriff Castloo be dismissed as the claims made against him are duplicative of the claims made against Wood County. In Plaintiff's second cause of action, Plaintiff is clearly suing Sheriff Castloo in his official capacity as a final policymaker for Wood County. *Id.* at ¶¶ 58, 60. An official capacity claim is an action against the governmental entity only. *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985). The United States Supreme Court has observed that "[t]here is no longer a need to bring official-capacity actions against local officials, for under *Monell*, local government units can be sued directly for damages and injunctions or declaratory relief." *Id.* at 167 n. 14. The Fifth Circuit has held that it is correct to dismiss allegations of municipal officers in their official capacities, as these allegations duplicate claims against the respective governmental entities themselves. *Castro Romero v. Becken*, 256 F.3d 349, 355 (5th Cir. 2001).

V.
REQUEST FOR A RULE 7(a) REPLY

In the alternative, Defendant Castloo moves that Plaintiff be required to file a Rule 7(a) reply to Defendant Castloo's assertion of qualified immunity under *Schultea v. Wood*,

47 F.3d 1427 (5th Cir.1995). Under Federal Rule of Civil Procedure 7(a), “the district court may, on the official’s motion or on its own, require the plaintiff to reply to that defense in detail.” *Schultea*, 47 F.3d at 1433. The Fifth Circuit Court of Appeals has encouraged district courts to require highly fact-specific pleadings by a plaintiff in a section 1983 lawsuit who attempts to overcome a plea of qualified immunity. See *Geter v. Fortenberry*, 849 F.2d1550, 1559-60 (5th Cir.1988); *Elliott v. Perez*, 751 F.2d 1472, 1479 and n. 20 (5th Cir.1985).

Here, Plaintiff appears to have brought a claim against Defendant Castloo, individually, under 42 U.S.C. § 1983. See *Plaintiff’s Original Complaint*, ¶¶ 57-61. Defendant Castloo possesses the affirmative defense of qualified immunity, and will assert that defense in his answer. Plaintiff does not articulate the unconstitutional actions allegedly taken by Defendant Castloo in his individual capacity.

VI. MOTION TO DISMISS STATE LAW CONSPIRACY CLAIMS

Section 101.057(2) of the Texas Tort Claims Act excludes from the waiver of governmental immunity under state law all “claims arising out of assault, battery, false imprisonment, or any other intentional tort. *Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 761 (S.D. Tex. 2011); see *Bustos*, 599 F.3d at 463; *Telles v. City of El Paso*, 481 F. Supp. 2d 773, 780, 785 (W.D. Texas 2007); *Hardin Cnty. Sheriff’s Dep’t v. Smith*, 290 S.W.3d 550, 552-53 (Tex. App. – Beaumont 2009, no pet.); *City of Garland v. Rivera*, 146 S.W.3d 334, 337-38 (Tex. App. – Dallas 2004, no pet.). The Texas Supreme Court has held that in Texas, a civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Triplex*

Communications, Inc. v. Riley, 900 S.W.2d 716, 719 (Tex. 1995). The “gist of a civil conspiracy” is the injury the conspirators intend to cause. *Id.* at 720. Civil conspiracy requires specific intent. *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608 (Tex. 1996). It follows that civil conspiracy is an intentional tort for which there is no waiver of governmental immunity. As such, Plaintiff’s fifth cause of action against Sheriff Castloo and Jim Wheeler should be dismissed.

VII. CONCLUSION

In the instant case, the Plaintiff has failed to state a claim for which relief can be granted since there is no allegation of a constitutional violation by Sheriff Castloo or based on a policy of Wood County. Plaintiff’s section 1983 claim against Defendant Castloo should be dismissed because he is entitled to qualified immunity and Plaintiff’s claims are duplicative of those against Wood County. Additionally, Plaintiff’s state law claims are barred by the Texas Tort Claims Act.

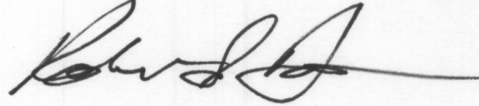
In the alternative, Defendant Castloo respectfully requests that Plaintiff, pursuant to Fifth Circuit practice, be required to file a reply under Rule 7(a). Defendant further requests that Plaintiff’s Rule 7(a) reply put forward specific, non-conclusory factual allegations regarding his section 1983 claim against Sheriff Castloo, clearly articulating the alleged constitutional violation, and pleading with particularity the specific acts taken by Sheriff Castloo that Plaintiff alleges violated his rights.

WHEREFORE, PREMISES CONSIDERED, Defendants Tom Castloo, Jim Wheeler and Wood County respectfully request that Plaintiff’s second and fifth causes of action against them be dismissed. Alternatively, Defendants request that Plaintiff be required to

file a reply under Rule 7(a).

Respectfully submitted,

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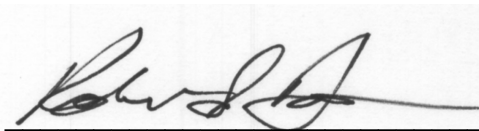
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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing instrument was served upon all counsel of record in the above entitled and numbered cause on July 12, 2019, in the following manner:

 X Via ECF



Robert S. Davis