UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Northern Division

CHRISTOPHER SHARP, Plaintiff, v. BALTIMORE POLICE DEPARTMENT, et al., Defendants.	)	**Civil No. 11-cv-2888 BEL**

DEFENDANTS BALTIMORE POLICE DEPARTMENT AND FREDERICK H. BEALEFELD'S MOTION TO DISMISS COMPLAINT OR FOR SUMMARY JUDGMENT

Defendants, Baltimore Police Department (the "BPD") and Police Commissioner Frederick H. Bealefeld (the "Police Commissioner"), by and through counsel, respectfully move this Honorable Court, pursuant to Fed. R. Civ. P. 12(b) (6), 12(d) and 56 (b), to dismiss each count of the Complaint against these two Defendants as they fail to state a claim upon which relief can be granted. In support thereof the Defendants state as follows:

1. Plaintiff has filed a three count *Monell* complaint against the Defendants in connection with allegations of constitutional violations, when an unknown police officer allegedly deleted video images from the Plaintiff's cellular phone.[1]

2. Plaintiff alleges that an unknown officer requested his consent, which he gave, to review and copy video footage of the arrest of Ms. Anna Chyzhova for the assault of an unknown patron for evidence of the crime.

[1] Plaintiff filed counts I, III, and IV against the Baltimore Police Department and its Police Commissioner.

3. Plaintiff further alleges that upon the return of his phone, he realized that the unknown officer had deleted all of the video recordings from his phone.

4. Plaintiff now seeks declaratory judgment and injunctive relief and monetary damages in an amount exceeding five thousand dollars ($5000.00).

5. None of the counts of the Complaint against these two Defendants, however, assert a sustainable cause of action. Rather, the Complaint fails to state a claim and cannot state a claim upon which relief can be granted against these Defendants.

6. Plaintiff's twenty-four paged complaint is an amalgamation of conclusions and speculations that are not supported by facts.

7. Plaintiff is attempting to re-cast a *respondent superior* claim into a *Monell* cause of action, which is impermissible as a matter of law.

8. Plaintiff cannot simply insert six random police encounters, including his own, that span a two year period, into his complaint and somehow convert them into an allege examples of practices and customs for *Monell* purposes.

9. Moreover, the Plaintiff is attempting to use an alleged Fourth Amendment violation suffered at the hands of an unidentified police officer, to manufacture a claim for First Amendment declaratory and injunctive relief against the BPD and its Police Commissioner.

10. The Plaintiff's complaint does not support his request for declaratory or injunctive relief.

11. Assuming arguendo that at the time of filing, the Plaintiff had a ripe case and controversy grounded in a First Amendment violation, which he did not, that claim would now be moot.

12. As of August 17, 2011, the BPD has trained and continues to train its members on the recent legal analysis addressing a citizen's right to video or photograph police activity in public places. (*See* attached Exhibits)

13. In addition to training it officers, the BPD has promulgated a General Order that directs its police officers, among other tactical things, to refrain from preventing individuals from video recording, or photographing police activity conducted in public.

14. Accordingly, for the reasons stated, and those more fully set forth in the accompanying memorandum of law which is incorporated herein, the Defendants are entitled to judgment as matter of law on each and every count filed against them in the Complaint.

WHEREFORE, the Defendants request that the Court dismiss the complaint filed against them, with prejudice and without leave to amend.

Respectfully Submitted,

/s/

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Northern Division

CHRISTOPHER SHARP, Plaintiff, v. BALTIMORE POLICE DEPARTMENT, et al., Defendants.	)	**Civil No. 11-cv-2888 BEL**

DEFENDANTS BALTIMORE POLICE DEPARTMENT AND FREDERICK H. BEALEFELD'S MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS COMPLAINT OR FOR SUMMARY JUDGMENT

Defendants, the Baltimore Police Department and its Police Commissioner Frederick H. Bealefeld, by and through their undersigned counsel, submit this memorandum of law in support of their motion to dismiss or for summary judgment and state as follows:

INTRODUCTION

It is no secret that the American Civil Liberty Union (the "ACLU") has undertaken a nationwide crusade challenging the arrest of citizens for video recording law enforcement activities conducted in public spaces. This is undoubtedly a worthy cause.

Using the same formulaic strategy of producing and disseminating online videos of a Plaintiff's rendition of the fact of a case, and appearing on the news, ACLU attorneys and Plaintiffs attempt to frame the issues for prospective jurors. Similarly, in the case at bar, Christopher Sharp (the "Plaintiff") has made several recorded public statements, including his own ACLU produced online video, describing the alleged facts of this case.

Plaintiff filed this action against the Baltimore Police Department (the "BPD"), its Police Commissioner, Frederick H. Bealefeld (the "Commissioner"), and Unknown Officers 1, 2, and 3 seeking damages on the basis that Unknown Officer #2 deleted videos from his cellular phone.

The Plaintiff alleges that Officer #2 requested his consent, which he gave, to review and copy the video footage he took of his friend Ms. Anna Chyzhova striking an unknown patron in the head, fighting with two police officers, and her subsequent arrest, for evidence.[1] Plaintiff further alleges that upon the return of his phone, he noticed that all video recordings were deleted.

In the Plaintiff's complaint under the heading, "Nature of the Case," he rightly describes the gravamen of his claim as one of an alleged Fourth Amendment violation. (Complaint ¶1) The rest of the Plaintiff's averments consist of speculation and conjecture in an attempt to formulate a viable First Amendment *Monell* claim against the Defendants.

Plaintiff in his complaint simply avers, despite evidence of facts to the contrary, that BPD officers arrested him and took his property without a warrant. (Complaint ¶1) Plaintiff speculates that the reason for his encounter was the authorized custom of the BPD to "menace" citizens who video record police activity. (Complaint ¶23)

At most the Plaintiff's complaint describes an officer, having received consent to review the video on his phone, mistakenly or maybe even purposely erasing his video recordings. Moreover, Plaintiff has established through his complaint that he was acutely aware of his prerogative to refuse, without consequence, the request by police to review

[1] Ms. Chyzhova was arrested on May 15, 2010 for striking a citizen in the presence of a police officer, resisting arrest, assault second degree-law enforcement, and she entered a guilty plea for assault-second degree. Exhibit A

and copy his footage. The Plaintiff has averred that when asked by the other unknown officers to consent to the review of the evidence captured on his cellular phone he refused. (Complaint ¶34)

In a not very compelling attempt to stave off a motion to dismiss, the Plaintiff has randomly averred six dissimilar events, including his own, that supposedly establish a pattern of officers thwarting citizens' ability to video record police activity.

The Plaintiff's bald allegation that a policy existed in May 2010 giving rise to his alleged wrongful detainer, and the seizure of his camera-phone, is incoherent, and does not show how the BPD and/or the Police Commissioner were at fault for that event. Plaintiff says this policy – a "misapplication of the Maryland Wiretap Act by Baltimore City police officers" (Complaint ¶4) – is one that "advises police officers that they may unlawfully detain the subjects, seize the devices used for recording, improperly search the phones, and delete the recordings," (Complaint ¶22). But the incident Plaintiff himself alleges had, based upon his allegations, nothing to do with an application of the Wiretap Act, and only one of the disparate examples he puts forth is arguably such an application.

Moreover, the other supposedly key element of this policy – search of a recording device and the deletion of recordings – appears nowhere except in his own alleged experience. None of this reflects a policy attributable to Defendants, and without such a policy Defendants can have no liability to Plaintiff here. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978) (municipal liability under § 1983 results only when execution of a government's policy or custom inflicts the injury).

The Plaintiff's allegations concerning the state of current BPD policy is conclusively refuted by the current policy and training conducted by the Defendants as described by the Department's Deputy Police Commissioner of Administration, John Skinner in his declaration. Once again it is clear that the Complaint's collection of unrelated incidents do nothing more than tee up the policy-level declaratory relief that Plaintiff has, in effect, already been granted by the training and General Order. Plaintiff cannot state a claim on the basis of his subjective belief that some other policy exists.

What is left of this case – whether Mr. Sharp's rights were infringed by individual members of the BPD – is a fact-specific question that can be litigated between Plaintiff and those officers. It has nothing to do with department-wide policy or custom, past or present.

Plaintiff must do more than assert conclusory allegations of a pattern and practice, as well as the existence of a case and controversy in order to survive the Defendants' dispositive motion. As will be discussed in further detail, *inter alia*, the Plaintiff has not proffered a cognizable claim against these two defendants. Neither the BPD, nor the Commissioner has condoned or promulgated a pattern or practice that authorizes Baltimore police officers to prohibit citizens from video recording police activity. Accordingly, the claims against them should be dismissed.

UNDISPUTED FACTS

The Plaintiff conveniently omits from his rendition of the facts that both he and Ms. Chyzhova, moments before her arrest for assault, engaged in a profanity laced argument with another patron, which ultimately resulted in the pair being ordered by police to leave the race track. (Ex. #1 –Wilkes Decl. ¶4) Despite the lawful order by

police, Ms. Chyzhova returned to the ticket window to strike an unknown patron in the head with her fist, apparently with Plaintiff in tow.

It is clear that, but for Ms. Chyzhova and the Plaintiff's decision to disobey the lawful order of Officer Wilkes to leave the race track after the verbal altercation, the Plaintiff would not have had a second encounter with police, if in fact he did, and there would not have been any incident for the Plaintiff to film.

Notwithstanding the fact that Plaintiff should have left the race track as ordered, it is undisputed that his complaint is devoid of any averments that any of the officers referred to the Maryland Wiretap Act, or any other violation of law when they requested his consent to review and copy the alleged video footage on his cell phone for evidence. (Complaint ¶36) Moreover, there is no allegation that any officer stopped the Plaintiff from filming the arrest of Ms. Chyzhova. It is undisputed that Plaintiff was not arrested on May 15, 2010 for allegedly video recording police activity.

It is also undisputed that the Plaintiff was aware of, and did in fact exercise his right to disallow the review of his footage by police and he "politely" declined their request without suffering any consequence. (Complaint ¶34)

Lastly, it is undisputed that dating back to August 17, 2011 to the present, the BPD has implemented training, sent email blasts to all members of the department, and has promulgated departmental policy addressing the issue of video recording police activities performed in public by citizens, as well as reviewing procedures for the appropriate handling of consent search and seizures.

LEGAL STANDARD

It is clear that the, "Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief …." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) *quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957). In short, a complaint must give "notice" of the alleged claims to the Defendant. However, a complaint is not sufficient if it only "tenders naked assertions devoid of further factual enhancement. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Hence, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim [for] relief that is plausible on its face." *Id.* "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." *Id.*

The Fourth Circuit has recognized that the "notice pleading" characterization may even be too simplistic. In fact, recently the Court, in *Francis, et al. v. Giacomelli, et al.*, noted that, when considered in the aggregate, Federal Rules of Civil Procedure 8, 9, 11, and 12 "reveals the countervailing policy that plaintiffs may proceed into the litigation process only when their complaints are justified by both law and fact." 588 F3d. 186, 192 (2009). The Court in *Iqbal* held that, "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not shown- that the pleader is entitled to relief as required by Rule 8. *Iqbal*, 129 S. Ct. at 1959.

A district court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim "if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief . . . . accept[ing] as true the factual

allegations of the challenged complaint, [and] . . . viewing those allegations in the light most favorable to the plaintiff." *Lambeth v. Bd. of Comm'rs*, 407 F.3d 266, 268 (4th Cir. 2005) (citations omitted). The Court, however, "need not accept as true 'unwarranted inferences, unreasonable conclusions, or arguments' nor 'the legal conclusions drawn from the facts." *Smoot v. Simmons*, 2006 U.S. Dist. LEXIS 51561 at *12.

Pursuant to Fed. R. Civ. P. 12(d), the Court has discretion, upon notice to the parties, to convert a motion to dismiss into a motion for summary judgment, so as to permit consideration of "matters outside the pleadings."

A court may grant judgment under Rules 12(b)(6) and 56(b) if there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court construes all facts in the light most favorable to the plaintiffs, the non-moving party, and draws all inferences in their favor. *See Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 304 (4th Cir. 2004). However, the opponent of the motion must bring forward evidence upon which a reasonable fact finder could rely. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). "Once the movant has established the absence of any genuine issue of material fact, the opposing party has an obligation to present some type of evidence to the Court demonstrating the existence of an issue of fact." *Pension Ben. Guar. Corp. v. Beverley*, 404 F.3d 243, 246-47 (4th Cir. 2005) (citing *Pine Ridge Coal Co. v. Local 8377, UMW*, 187 F.3d 415, 422 (4th Cir. 1999)).

The mere existence of a "scintilla" of evidence in support of a nonmoving party's case is not sufficient to preclude an order granting summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Moreover, a "party cannot create a

genuine dispute of material fact through mere speculation or compilation of inferences." *Shin v. Shalala*, 166 F. Supp. 2d 373, 375 (D. Md. 2001). Indeed, it is the Court's affirmative obligation to prevent factually unsupported claims from going to trial. *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993).

Summary judgment is also proper where a plaintiff seeking declaratory and/or injunctive relief cannot show the existence of a controversy that requires "specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts." *Duane v. Government Employees Ins. Co.*, 784 F. Supp. 1209, 1213 (D. Md. 1992) (allowing monetary damages claim to proceed, but dismissing claims for declaratory and injunctive relief because risk of insurer's refusal to insure the plaintiff in the future was hypothetical), *citing Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241, 81 L. Ed. 617, 57 S. Ct. 461 (1937). *See also Johnson v. Jones*, No. 93-2386, 1994 U.S. App. LEXIS 34263 (4th Cir. Dec. 2, 1994) (where defendants voluntarily discontinued challenged activities, mootness arose because they could demonstrate there was no reasonable expectation that the alleged violation would reoccur, and that interim relief had completely and irrevocably eradicated the effects of the alleged violation); *Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 Fed. Appx. 566, 571 (4th Cir. 2007) (because Town enacted a revision of a challenged ordinance governing signage, and provided assurance that it would not reenact the ordinance, a live controversy ceased to exist, and this was not merely a temporary abeyance of a harm).

"The question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having

adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273, 85 L. Ed. 826, 61 S. Ct. 510 (1941); *White v. National Union Fire Ins. Co.,* 913 F.2d 165, 167-68 (4th Cir. 1990).

ARGUMENT

I. PLAINTIFF HAS NOT STATED A CLAIM AGAINST THE BPD OR THE POLICE COMMISSIONER.

In order to sufficiently allege a claim against Defendants for his allegedly wrongful detainer, Plaintiff must alleges more than just an employment relationship between Defendants and the individual BPD officers with whom Plaintiff says he interacted. This is because municipalities cannot be liable under a *respondeat superior* theory for constitutional violations alleged against their employees, simply because of the employment relationship. *Spell v. McDaniel*, 824 F.2d 1380,1385 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988) *citing Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 692-94, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).

Liability can result "only 'when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.'" *Spell*, 824 F.2d at 1385 citing *Monell*, 436 U.S. at 694. This requires that the policy or custom under attack be "fairly attributable to the municipality as its own," and that the municipality be the "moving force" behind the particular constitutional violation. *Spell*, 824 F.2d at 1387 (4th Cir. 1987) (quotations and citations omitted).

A policy, custom or usage such as a widespread practice of a particular unconstitutional method may be the basis of "only if its continued existence can be laid to the fault of municipal policy makers, and a sufficient causal connection between the 'municipal custom and usage' and the specific violation can then be established." *Spell*, 824 F.2d at 1390. Liability requires, first, that the municipality had "actual or constructive knowledge" of the custom and usage by its responsible policy makers, and second, a failure by those policy makers, "as a matter of specific intent or deliberate indifference," to correct or terminate the improper custom and usage. *Randall v. Prince George's County*, 302 F.3d 188, 210 (4th Cir. 2002).

Proof of a single incident of the unconstitutional activity charged is not sufficient to prove the existence of a municipal custom. *Semple v. City of Moundsville*, 195 F.3d 708, 713-714 (4th Cir. 1999); *Chin v. City of Baltimore*, 241 F. Supp. 2d 546, 549 (D. Md. 2003) (court will not infer pattern and practice liability from one event); *Lansford v. Prince George's County*, 199 F. Supp 2d 297, 304 (D. Md. 2002) (grant of motion to dismiss affirmed: plaintiff "provided no allegations, except those surrounding his own arrest and injury" to establish a policy or custom); *Giarrusso v. Chicago*, 539 F. Supp. 690, 693 (N.D. Ill. 1982) (plaintiff "attached a conclusory allegation of 'policy' to what in essence is a claim based on a single unconstitutional act[.]").

Here, Plaintiff asserts the existence of a policy but substantiates it with one-off, unrelated events that, taken together, do not amount to policy, or to a clear custom that Defendants could have had knowledge of or taken steps to correct. The policy alleged is apparently based upon a misapplication of the Maryland Wiretap Act (Complaint ¶4), but only one incident is alleged that is arguably such an application. (*See* Complaint ¶23(c)).

Plaintiff does not say that he was told by BPD officers that his own temporary detention, and the alleged taking of his camera, was premised upon his violation of the Wiretap Act. He simply alleges random, bad behavior when he alleges one officer told him about his camera, "they'll probably just erase it and give it back," (Complaint ¶43) None of his other examples reflect this deleting of videos, even though this is another key aspect of the policy he alleges is in place. (Complaint ¶22) It is hard to see how these disparate events occurred "under the auspices of a policy or practice of the Baltimore Police Department and Commissioner Bealefeld[.]" (Complaint at 24)

This "nebulous chain" does not amount to a policy upon which the Defendant's *Monell* liability could be based. *Carter v. Morris*, 164 F.3d 215, 219 (4th Cir. 1999) (plaintiff does not show *Monell* liability with "past generalized bad police behavior led to future generalized bad police behavior, of which her specific deprivations are an example").

The Court should dismiss the Counts against Defendants to the extent they rely on the existence of a policy, in existence at the time of the incident Plaintiff complains of, that Plaintiff has failed to properly state.[2]

[2] Plaintiff's Count IV alleges a claim directly under the Fourteenth Amendment, without reference to 42 U.S.C. § 1983. To the extent Plaintiff bases a claim for damages and attorney's fees on this Count, it appears to be improper. Defendants are unaware of an implied private right of action for damages outside of *Bivens* and its progeny. *See* Bivens *v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971); *Holly v. Scott*, 434 F.3d 287, 289 (4th Cir. 2006) (noting extension of *Bivens* in only two other contexts).

II. EVEN IF PLAINTIFF HAD FILED A VIABLE CAUSE OF ACTION, THERE IS NO REASONABLE EXPECTATION THAT THE VIOLATION ALLEGED BY PLAINTIFF WOULD REOCCUR, AND THE INTERIM RELIEF HAS COMPLETELY AND ADEQUENTLY ADDRESSED ALLEGED VIOLATION.

Even if a controversy in the constitutional sense exists at first, a case can become moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 23 L. Ed. 2d 491, 89 S. Ct. 1944 (1969)

On August 17, 2011, the BPD initiated Roll Call Training on the topic of "Wire Tapping Law" and the recording of officers while they perform their official duties. (Ex. #2-Skinner Decl. ¶3) That training made clear to BPD members that "[i]t is lawful for a person to videotape activities by a law enforcement officer in a public place and in the course of a law enforcement officer's regular duty." (Ex. #3 – Roll Call Training) Further, the training explained the scope of the Maryland Wiretap Act, and why it would not apply in the majority of police-citizen encounters. (Ex. #3 – Roll Call Training) This Roll Call Training was repeated on September 23, 2011. (Ex. #2 - Skinner Decl. ¶5)

The BPD also transmitted a Department-wide electronic message on the same topic on or around September 24, 2011, automatically appearing on the computer screen of every employee of the BPD. (Ex. #2 - Skinner Decl. ¶6 and Ex. #4 – Computer message)

An additional training for all active Sergeants was conducted on October 4 and 5 of this year by BPD's Legal Affairs Division, which included an explanation of the scope of the Maryland Wiretapping Act consistent with the Roll Call Training, and an

explanation of the right of citizens to record public police activities. (Ex. #2- Skinner Decl. ¶7)

Finally, on November 8, 2011, the BPD promulgated General Order J-16 which affirms the right of individuals to observe, photograph, and/or video record the official public duties and actions of any member of the Baltimore Police Department. (Ex. #2 - Skinner Decl. ¶8) Police Academy trainees are being trained on General Order J-16, and current officers will review the Order during their annual in-service training. (Ex. #2 - Skinner Decl. ¶9)

The training conducted by the BPD, and the General Order it promulgated, embodies the department's acknowledgement of the importance of First Amendment rights, and the lawful exercise of those rights. The three Counts (I, III, IV) against Defendants are all based upon the existence of some contrary policy, which is why each of these Counts fail to state a claim.

Accordingly, the Plaintiff is unable to show an immediate or live controversy. Moreover, he is unable to show that there is a likelihood that the alleged violation is likely to happen to him again in the future.

The BPD's training and General Order is a timely recognition of very recent Maryland authority that clarifies First Amendment rights to video record the activity of public officials in an age where "technology has advanced, resulting in a proliferation of ever smaller and more portable devices with ever increasing capabilities that often include the capacity to record sound." Maryland Attorney General Letter of Advice, July

7, 2010, Application of the Maryland Wiretap Act to situations in which citizens record public activities of police officers[3] ("Letter of Advice"), at 4.

As late as 2009, the Fourth Circuit, in an unpublished opinion, noted that a plaintiff's "asserted First Amendment right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct." *Szymecki v. Houck*, 353 Fed. App'x 852, 853 (4th Cir. 2009).

But subsequent law suggests that such recording is conduct protected by the First Amendment. The First Circuit answered "in the affirmative" the question, "is there a constitutionally protected right to videotape police carrying out their duties in public?" *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). That court found that "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Id*. (citation omitted).

A Harford County, Maryland state court dismissed a charge violation of this Act, brought against an individual who recorded his interaction with two Maryland State Police Troopers, because the interaction did not involve a "private conversation." *State v. Graber*, Case No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS (Cir. Ct. Harford Co. Sept. 27, 2010) ("the Troopers had [no] reasonable expectation of privacy in their conversation with the Defendant which society would be prepared to recognize as reasonable). The Third Circuit suggested the same outcome would be proper under a Pennsylvania statute analogous to Maryland's Wiretap Act.[4] *See Kelly v. Borough of Carlisle*, 622 F.3d 248,

[3] Http://www.oag.state.md.us/Topics/WIRETAP_ACT_ROSENBERG.pdf

[4] Both statutes outlaw the interception of oral communications, *cf.* 18 PA. CONS. STAT. § 5703 *and* Md. Code Ann. Cts. And Jud. Proc. § 10-402, and both define such

258 (3d Cir. 2010) ("a reasonable expectation of privacy was a prerequisite for a Wiretap Act violation"). The case law cited by that court, which had to remand the matter for additional fact finding, suggested an ultimate conclusion equivalent to the one suggested by the 2010 Letter of Advice from the that police interaction with individuals in public is not "a private conversation and therefore does not involve an oral communication covered by the State Wiretap Act." Letter of Advice at 10.[5]

The steps the BPD has taken to clarify the rights of individuals to record public police activity tracks the law as it is evolving. The right to record law enforcement officers was still not "clearly established" according to recent decisions by both the Fourth Circuit (in *Szymecki*, above at 82) and the Third Circuit. *See Kelly*, 622 F.3d at 262 (qualified immunity was properly granted on the First Amendment claim because a right to videotape police officers during a traffic stop was not clearly established). Nonetheless, because it has become increasingly common for individuals to record public police activity, the BPD has advised its members of citizen's rights to do so. (*See* Ex. #2 - Skinner Decl.) Because of the likelihood that a First Amendment right to record public policy activity will become clearly established, notwithstanding and current lack of clarity on the issue, the training and the General Order advises members of the BPD on the best practices in a burgeoning area of law.

Accordingly, the Defendants are entitled to judgment in their favor.

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communications as those in which the participants have an expectation of privacy or non-interception, *cf.* 18 PA. CONS. STAT. § 5702 *and* Md. Code Ann. Cts. And Jud. Proc. § 10-401(2).

[5] *Graber* was decided in September 2010, and *Kelly* was decided in October 2010; the latest-occurring example alleged by Plaintiff of improper conduct by a BPD officer against a person recording police activity was just a month later, in November 2010.

CONCLUSION

For the reasons set forth above, the Baltimore Police Department and Police Commissioner Frederick H. Bealefeld respectfully request that the Court grant judgment in their favor on all counts where they have been named as defendants. A proposed Order is attached.

Respectfully Submitted,

/s/

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHRISTOPHER SHARP,	*	
Plaintiff,	*	
v.	*	**CASE NO. 11-cv-2888 BEL**
BALTIMORE CITY POLICE DEPARTMENT, et al.,	*	
	*	
Defendants.	*	

* * * * * * * * * * * * *

DECLARATION OF MONICA WILKES
IN SUPPORT OF MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

I, Monica Wilkes, hereby declare under 28 U.S.C. § 1746:

1. I am a Police Officer for the Baltimore Police Department, and make this declaration in support of the Motion to Dismiss or For Summary Judgment by Defendants Baltimore City Police Department ("BPD") and Frederick H. Bealefeld, III ("Commissioner").

2. I was assigned to work the 2010 Preakness at Pimlico race track, on the club level.

3. On May 15, 2010, I witnessed a verbal altercation between an unknown patron and a male and his female companion, later identified as Christopher Sharp and Anna Chyzhova.

4. I separated the individuals and ordered Ms. Chyzhova and Mr. Sharp to leave the race track.

I declare under penalty of perjury that the foregoing is true and correct.

Baltimore, Maryland
November 30, 2011

Officer Monica Wilkes

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHRISTOPHER SHARP,	*	
Plaintiff,	*	
V.	*	**CASE NO. 11-cv-2888 BEL**
BALTIMORE CITY POLICE DEPARTMENT, ET AL.,	*	
Defendants.	*	

* * * * * * * * * * * * *

DECLARATION OF JOHN P. SKINNER
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I, John Skinner, hereby declare under 28 U.S.C. § 1746:

1. I am the Deputy Police Commissioner of Administration for the Baltimore Police Department, and make this declaration in support of the Motion for Partial Summary Judgment by Defendants Baltimore City Police Department ("BPD") and Frederick H. Bealefeld, III ("Commissioner").

2. The BPD does not have a policy or practice of retaliating against the public for video or audio recording of Police officers while they perform their official duties.

3. In a continuing effort to implement best practices, on August 17, 2011, the BPD initiated Roll Call Training on the topic of "Wire Tapping Law" and the recording of officers while they perform their official duties; the roll call agenda is annexed hereto at Exhibit 1.

4. Roll call training materials are read to all active patrol officers at five consecutive roll calls.

5. The BPD initiated a repeat of the above stated Roll Call Training on September 23, 2011. Once again the training materials were read to all active patrol officers at five consecutive roll calls.

6. On or around September 24, 2011, the BPD transmitted a Department wide electronic message, which automatically appeared upon the computer screen of every employee of the BPD once they logged onto their computer, the electronic message is annexed hereto at Exhibit 2.

7. On October 4-5, 2011, the Legal Affairs Division of the BPD conducted additional in-service training for all active Sergeants, which included an explanation of law regarding the Maryland Wiretapping Act, and the right of citizens to record public police activities, related hypotheticals, and a question and answer segment.

8. In addition to the training, on November 8, 2011, BPD promulgated General Order J-16 which contains law enforcement procedures that instructs all sworn members on the Departments protocol for addressing the video recording police activity and/or the video recording of a suspected crime.

9. Police trainees in the Academy are being trained on general order J-16, and current officers will review the order during their annual in-service training.

10. The BPD is, to my knowledge, among a select few police departments in the nation that have promulgated a General Order regarding the issue of video recording of police activity.

I declare under penalty of perjury that the foregoing is true and correct.

Baltimore, Maryland
November 14, 2011

Deputy Commissioner John P. Skinner

EXHIBIT 3

Roll Call Training regarding "Wiretap Laws" and video taping of Law Enforcement Officers

The information contained in this training was prepared by the Legal Affairs Section. It is to be read out at all roll calls for five (5) consecutive days.

District Commanders will ensure that all Shift Commanders, Specialized Unit Supervisors, OICs, etc., communicate the contents of this training to their subordinates and ensure compliance. Copies of this document will be posted on bulletin boards, read-out clipboards, and in any other places frequented by members of the Department.

- It is lawful for a person to videotape activities by a law enforcement officer in a public place and in the course of a law enforcement officer's regular duty.

- There are no federal or Maryland laws that directly regulate video taping in public places. Federal and Maryland wiretap laws ("Wiretap Laws") only regulate the interception of oral and wire communications – NOT VIDEO.

- The only time that the Wiretap Laws implicate video-recording are situations when videos capture an oral communication that is part of a **private** conversation. A private conversation is one in which a party has a reasonable expectation of privacy in the intercepted oral communication.

- Although there may be particular exceptions, the majority of encounters between police and citizens are not private conversations - particularly when they occur in a public place and involve the exercise of police powers. Absent any other indications of a reasonable expectation of privacy, Wiretap Laws would not cover a video capturing a conversation between a citizen and a police officer.

EXHIBIT 4

CITIZENS CAN RECORD, PHOTOGRAPH, AND VIDEO LAW ENFORCEMENT ACTIVITIES CONDUCTED IN PUBLIC. Wiretap laws only regulate the interception of oral and wire communications where a person has a reasonable expectation of privacy in the intercepted communication. The majority of encounters between police and citizens **are not private** conversations, and officers **should not** confiscate cell phones used to video police active, nor should the officer order the citizen to stop videoing because it is illegal-it is not. Call Legal with questions.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHRISTOPHER SHARP,	*	
Plaintiff,	*	
v.	*	**CASE NO. 11-cv-2888 BEL**
BALTIMORE CITY POLICE DEPARTMENT, et al.,	*	
Defendants.	*	

* * * * * * * * * * * * *

ORDER

Upon consideration of the Defendants, Baltimore Police Department and Commissioner Frederick H. Bealefeld's Motion to Dismiss or For Summary Judgment, and the Plaintiff's opposition thereto, it is this _____ day of _____, 2011,

ORDERED AND ADJUDGED:

1. That the Defendants' Motion to Dismiss is hereby GRANTED; and

2. That the Complaint is hereby DISMISSED with prejudice and without leave to amend; and

3. That judgment is hereby ENTERED in favor of Defendants and against the Plaintiff; and

4. Costs to be paid by the Plaintiff.

_____
Honorable Benson E. Legg
United States District Court for the District of Maryland