

Justin Daniels
723 Suhrke Rd
Plymouth, WI 53073

vs.

PFC Complaint No.: _____

Christopher Domagalski
Chief of Police, Sheboygan Police Department
1315 N 23rd St
Sheboygan, WI 53081

MOTION TO DISMISS and BRIEF IN SUPPORT OF RESPONDENT’S MOTION TO DISMISS INDIVIDUAL CHARGES

Introduction

Chief Christopher Domagalski (“RESPONDENT”), by his attorney, Adam James Westbrook, respectfully submits the following Brief in support of the included Motion to Dismiss individual charges by Justin Daniels (“COMPLAINANT”). In the interest of clarity, I have included all of the motions in one document however I have separated the motions by numbering them throughout. While this is being presented as one document, I request that the Board review each individual motion separately and make determinations on each motion individually.

Standard of Review

While not bound by the Federal Rules of Civil Procedure (“FRCP”), the Board has elected to follow the FRCO to ensure that due process is granted to complainants and respondents. Under the FRCP, motions for dismissal are generally governed by Rule 12(b)(6), which is substantially mirrored by Wis. Stat. s. 802.06(2). When considering a motion to dismiss, Rule 12(b)(6) requires the decision maker to accept “the well-pleaded facts in the complaint as true.” *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011). “Importantly, the [United States] Supreme Court’s decisions in *Twombly* and *Iqbal* ushered in a requirement that civil pleadings demonstrate some merit or plausibility in complaint allegations to protect defendants from having to undergo [the litigation process] unless a substantial case is brought against them.” *United States v. Vaughn*, 722 F.3d 918, 926 (7th Cir. 2013). A complaint must “contain sufficient

factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Id.* At 678. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the [respondent] is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a [respondent] has acted unlawfully ... When a complaint pleads facts that are merely consistent with a [respondent’s] liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Iqbal*, 556 U.S. at 678. If allegations give rise to an “obvious alternative legitimate explanation” for the allegedly wrongful conduct, the claim must be dismissed. *Id.* at 678.

MOTION 1. SPD Policy 1010.8 – Administrative Leave

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED

Argument

The first charge in the complaint is that Chief Domagalski violated a Police Department policy when he did not place Officer Pray on administrative leave during the investigation. The policy states: “When a complaint of misconduct is of a serious nature, or when circumstances indicate that allowing the accused to continue to work would adversely affect the mission of the Department, the Chief of Police or the authorized designee *may* temporarily assign an accused employee to administrative leave.”

The policy that is alleged to have been violated is a discretionary policy that allows the Chief to decide whether or not to place an officer on administrative leave. Taking all of the facts in the light most favorable to the Complainant, the Chief could not have violated this policy when he decided to not place Officer Pray on administrative leave. That is exactly what the policy requires: for the Chief to decide whether to place someone on administrative leave or not. The Chief can not be disciplined for following policy just because the Complainant does not like the decision the Chief made.

Conclusion

The Chief followed policy 1010.8 when he made the decision whether to place Officer Pray on administrative leave, and because he followed the policy, there is no policy violation to be considered and no discipline to be issued. As such, we respectfully request this commission dismiss this charge with prejudice.

Dated this 26th day of May, 2023

CITY OF SHEBOYGAN

By: electronically signed by Adam James Westbrook

Adam James Westbrook

Director of Human Resources and Labor Relations Attorney

State Bar No. 1098561

MOTION 2. SPD Policy 1010.9 – Criminal Investigation

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED and LACK OF SUBJECT MATTER JURISDICTION

Argument

The second charge in the complaint is that Chief Domagalski violated a Police Department policy when he did not assign a separate supervisor or investigator to investigate criminal conduct. The policy states, in part, “where a member is accused of potential criminal conduct, a separate supervisor or investigator shall be assigned to investigate the criminal allegations apart from any administrative investigation.”

The operative language in this policy is “where a member is accused of potential criminal conduct.” While the Complainant uses a lot of subjective and opinion-based language in his complaint, the facts do not support that a member was accused of potential criminal conduct. Officer Hernandez’s original complaint was about sexual harassment, and the incident that occurred at the intoximeter training was brought up as one of many items of possible harassment between Officer Pray and Officer Hernandez. An allegation of sexual harassment, while extremely serious, is not a “criminal allegation” as contemplated by the policy. As the investigation continued, it became evident to the Chief that the actions of Officer Pray were not criminal.

However, it is not just the Chief’s determination that you can look to in order to determine that criminal conduct did not occur. This event happened outside of the City of Sheboygan, and under the jurisdiction of a different police department. That department has made no arrests and has not referred any charges. The Complainant has said that he has spoken with “several” unidentified attorneys who have said that Officer Pray’s actions constitute criminal conduct, yet none of them have referred charges.

Even when reviewing the facts in the light most favorable to the Complainant, there is no way to find that a policy was violated. Officer Hernandez’s report was not that criminal conduct occurred, but rather that she was being sexually harassed. The events at the hotel, even when viewed in the light most

favorable to the Complainant also don't reach the level of criminal conduct. Officer Hernandez made the decision to expose her breasts to Officer Pray in a public hallway in a hotel; a space where any member of the public could have viewed her breasts, clearly showing that there was no expectation that her actions were "private." In fact, to even further support the idea that there was no expectation of privacy, Officer Hernandez herself acknowledged that others saw what had happened.

In the original investigation the following was reported:

"I directed her attention back to the night in the hotel at intoximeter training back in 2019. I explained to her that when we previously met, she had described to me an event where she went out into the hallway to take a phone call on a private matter. I explained to her that she had described to me that she had been in a vestibule just off the hallway outside of her room when Off Pray came out by her. At some point, at his request, she exposed her breasts in the hallway to him, and this activity was noticed by an employee of the hotel, who could have presumably known that she was a member of our department. I asked her if this was an accurate representation of what she had told me, and she told me "Yes, this is fair". I asked her if her conduct in the hallway that night in 2019 was a violation of our standards of conduct policy and of our value of professionalism and she admitted that she had committed these violations when she exposed herself in the hallway." Incident C21-00937 page 10.

This admission by Officer Hernandez speaks to the idea that the action of her exposing her breasts to Officer Pray in a public hallway was not some action where she believed she had an expectation of privacy, like if she were in a locker room, inside a hotel room, or a different area where it would be reasonable to think that no one you didn't want to would see you naked. She acknowledged that she was in a public area and that a hotel worker was close enough to notice what happened. To be clear, this is not to say that the actions after this were sanctioned by Officer Hernandez, but only to illustrate that in order for the actions in the hallway to be criminal, Officer Hernandez would have needed to be in an area where there was a reasonable expectation of privacy, which was not the case here.

Even if the Board were to find that the Complainant has stated enough to move forward on this charge, this Board does not have the subject matter jurisdiction to make the determination of whether "criminal conduct" was alleged. In order to make that determination given the facts presented here, this

Board would have to analyze the legal elements of a crime, which this Board is not authorized to do. Clearly the Board may make determinations of policy violations when, by a preponderance of the evidence, a policy was violated. However, in order for that bar to be met here, the Board would need to engage in legal and statutory analysis beyond its authority.

Conclusion

Even when viewed in the light most favorable to the Complainant, he has failed to provide enough facts that would allow this Board to find a policy violation. If the Board determined that enough evidence was supplied to render a decision on an alleged policy violation, the Board is not authorized to determine if a crime occurred. As such, we respectfully request this commission dismiss this charge with prejudice.

Dated this 26th day of May, 2023

CITY OF SHEBOYGAN

By: electronically signed by Adam James Westbrook

Adam James Westbrook

Director of Human Resources and Labor Relations Attorney

State Bar No. 1098561

Motion 3. SPD Policy 321.3.1 – Supervisor Responsibilities

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED and FRIVOLOUS FILING

Argument

The third charge in the complaint is that the Chief violated Police Department policy because he was not aware that officers were exchanging and then showing nude photographs of one another. The policy states that supervisors may be disciplined for “failure to be reasonably aware of the performance of their subordinates or to provide appropriate guidance and control.”

This policy begins by saying “Supervisors and managers are required to follow all policies and procedures and may be subject to discipline for: failure to be reasonably aware of the performance of their subordinates or to provide appropriate guidance and control.” The policy is clearly referencing items that the supervisors are responsible for overseeing, such as report writing, calls for service, response time, etc. The only facts that the Complainant states in support of this charge are that 30 officers were interviewed as a part of this investigation and that Chief Domagalski was unaware that sexual harassment was happening until it was reported. Complainant presented no facts that support a finding that the Chief failed to be aware of the performance of officers, or that he failed to provide appropriate guidance and control.

The idea that this policy is intended to mean supervisors must be aware of every policy violation happening in the department at the time it occurs or before it’s reported to supervision is illogical and impractical. For this Board to suggest that the Chief should have known that sexual harassment occurred before he was made aware of it is unreasonable and cannot be policy.

Conclusion

The Complainant has provided no facts to support this charge, and therefore viewing his submission in a light most favorable to him still offers no evidence of a policy violation. As such, we respectfully request this commission dismiss this charge with prejudice.

Dated this 26th day of May, 2023

CITY OF SHEBOYGAN

By: electronically signed by Adam James Westbrook

Adam James Westbrook

Director of Human Resources and Labor Relations Attorney

State Bar No. 1098561

Motion 4. SPD Policy 1004.3 – Retaliation Prohibited

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED

Argument

The forth charge in the complaint is that the Chief violated Police Department policy by retaliation against Officer Hernandez. The Complainant provides five examples of what he calls “retaliation” of Officer Hernandez.

1. the chief “failing to provide [Officer Hernandez] protection from Officer Pray”
2. allowing Officer Pray to appear on the department Facebook page for Black History Month
3. allowing Officer Pray to “partake in a Sheboygan Beacon story”
4. giving Officer Pray an award at the SPD Banquet.
5. requiring individuals to attend sexual harassment training.

Under the City of Sheboygan policy (and every definition of retaliation) retaliation occurs when an adverse action is taken *against an employee* because of protected conduct. There is agreement that Officer Hernandez engaged in the protected activity of filing a complaint of sexual harassment. However, the Complainant does not list a single action that, even viewed in a light most favorable to the Complainant, could constitute retaliation.

As noted about, retaliation must be an adverse action against the employee who engaged in the protected activity. Officer Pray appearing on the Facebook page, partaking in a news story, and receiving an award, cannot constitute retaliation as they are not actions taken against Officer Hernandez. The other two items could possibly be retaliation if they were true, but the facts and Complainants own statements show they are not.

First, the Complainant states that the Chief retaliated by failing to protect Officer Hernandez. However, the COMPLAINANT contradicts his own assertion when he acknowledges that the Chief took actions to try and prevent Officer Pray from having contact with Officer Hernandez. That admission contradicts any claim of retaliation for “not protecting” Officer Hernandez.

The second item of alleged retaliation is also factually untrue. The COMPLAINANT states that two female police officers had to attend sexual harassment training, and implies no one else did. However, the entire department was required to attend sexual harassment training and therefore this can not possibly be an adverse action against Officer Hernandez. In fact, to have singled her out and said “you will not attend sexual harassment training with the rest of the department” would have been retaliation.

Conclusion

When viewed in the light most favorable to the Complainant, he has failed to show any instance that could possibly constitute retaliation under the City or Department policy. As such, we respectfully request this commission dismiss this charge with prejudice.

Dated this 26th day of May, 2023

CITY OF SHEBOYGAN

By: electronically signed by Adam James Westbrook

Adam James Westbrook

Director of Human Resources and Labor Relations Attorney

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Motion 5. Criminal Violations

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION and THE CHARGES RELATE TO A PENDING CRIMINAL MATTER

Argument

The final two items of the Complainant's charges allege that the Chief committed two crimes. As the COMPLAINANT indicated at the scheduling hearing, he has filed a John Doe investigation with Circuit Court against the Chief and the Sheboygan County District Attorney for these same two items (Case No. 2022JD02). Due to the pending Circuit Court matter, this Board should not collect evidence or hold a hearing on these alleged criminal violations until after the criminal processes has concluded.

Additionally, while the PFC is responsible for disciplining police officers, including the Chief, for policy violations, the Commission does not have the authority or jurisdiction to review or handle criminal violations or allegations. Such charges must be adjudicated in a Court of Law, not in a quasi-judicial hearing in front of a citizen Board.

Conclusion

The Complainant has filed a John Doe investigation in Circuit Court alleging the same criminal violations that he alleges here, and even without that case, this Board does not have jurisdiction to hear criminal charges. As such, we respectfully request that all charges of criminal violations be dismissed.

Dated this 26th day of May, 2023

CITY OF SHEBOYGAN

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