

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD BANKS, JUDY BANKS, : CIVIL ACTION
ROGER McCARREN and LARRY MEYER :

Plaintiffs :

v. :

NO. 3:08-cv-1110

KAREN GALLAGHER, ANTHONY MARIANO, :
WILLIAM STADNITSKI and DICKSON :
CITY BOROUGH :

Defendants :

DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants, Karen Gallagher, Anthony Mariano, William Stadnitski and Dickson City Borough, by and through their attorneys, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, hereby move for an Order dismissing from Plaintiffs' Complaint the first identified Count IV of the Complaint and Count V of the Complaint, and to strike all claims for punitive damages, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and in support thereof aver as follows:

1. Plaintiffs allege in their complaint that the Defendants illegally threatened, harassed, detained and/or arrested them, and otherwise interfered with their rights under the First, Fourth, Fifth, and Fourteenth Amendments. (See Exhibit "A" for a true and correct copy of the Complaint).

2. Plaintiffs claim that on May 9, 2008, at or about 6:30 p.m., they were having dinner at Old County Buffet located in Dickson City. (See Exhibit "A" at ¶ 8).

3. Plaintiffs contend that at the time, Richard Banks, Roger McCarren and Larry Meyer were openly carrying legally possessed and displayed handguns, which were secured in a holster. (See Exhibit "A" at ¶ 9).

4. Officers Gallagher and Mariano arrived on the premises in a marked police car and in full uniform. (See Exhibit "A" at ¶ 10).

5. Plaintiffs claim that although they were not doing anything improper, illegal or suspicious, Officers Gallagher and Mariano "accosted" them and "illegally threatened, harassed, detained and/or arrested them, and otherwise interfered with their rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution". (See Exhibit "A" at ¶ 11).

6. In Count I of the Complaint, Plaintiffs, Richard Banks, Roger McCarren and Larry Meyer claim that Officers Gallagher and Mariano violated their constitutional rights by illegal arrests, detentions, searches and seizures, and deprivation of property without due process of law. (See Exhibit "A" at ¶¶ 12-23).

7. In Count II, Judy Banks and Richard Banks claim that Officers Gallagher and Mariano violated Mrs. Banks First Amendment rights. (See Exhibit "A" at ¶¶ 24-27).

8. Count III is against Dickson City for failing to "adequately and properly supervise and train its police officers in various aspects of law enforcement procedure and substance". (See Exhibit "A" at ¶¶ 28-30).

9. The first identified Count IV of the Complaint is against Chief of Police William Stadnitski for failing to "adequately and properly supervise and train police officers in various aspects of police procedure". (See Exhibit "A" at ¶¶ 31-35).

10. The second identified County IV of the Complaint is against all the Defendants for “acting in concert and under color of state law” to deprive the Plaintiffs of their rights under the First, Fourth, Fifth and Fourteenth Amendments. (See Exhibit “A” at ¶¶ 36-37).

11. Count V is against Officers Gallagher and Mariano for conspiracy to interfere with civil rights. (See Exhibit “A” at ¶¶ 38-43).

12. Count VI is against all the Defendants for denying Plaintiffs’ rights under Article I § 8 of the Constitution of the Commonwealth of Pennsylvania. (See Exhibit “A” at ¶¶ 44-46).

13. Plaintiffs also pray for punitive damages against Officers Gallagher and Mariano. (See Exhibit “A”).

**FIRST IDENTIFIED COUNT IV OF PLAINTIFFS’ COMPLAINT SHOULD BE
DISMISSED AGAINST CHIEF WILLIAM STADNITSKI**

14. In the first identified Count IV of the Complaint, Plaintiffs’ claim that Chief William Stadnitski failed to adequately and properly supervise and train its police officers in various aspects of police procedure. (See Exhibit “A” at ¶¶ 31-35).

15. In suits against municipal employees who act in a supervisory capacity, the Supreme Court has differentiated between claims against those individuals in their personal (individual) capacities and their official capacities. See Boria v. Bowers, 2007 U.S. Dist. LEXIS 68794 (E.D. Pa. 2007) (citing Kentucky v. Graham, 473 U.S. 159 (1985)).

16. In determining whether a plaintiff sued a defendant in his personal capacity, official capacity, or both, the court looks to the complaint and the course of proceedings. Atwell v. Schweiker 2007 U.S. App. LEXIS 23306 (3d. Cir. 2007).

17. Official-capacity suits “generally represent only another way of pleading an action against an entity of which an officer is an agent.” Monell v. New York City Dep’t of Social Services, 436 U.S. 658, 690 n.55 (1978).

18. The Supreme Court has held that official capacity suits cannot be maintained against state officers acting in their official capacity on behalf of the state. Boria, 2007 U.S. Dist. LEXIS 68794 (citing Hafer v. Melo, 502 U.S. 21, 27 (1991) (state officers sued for damages in their official capacity are not “persons” for purposes of the suit because they assume the identity of the government that employs them)).

19. In the instant case, pursuant to the first identified Count IV of the Complaint, Plaintiffs are suing Chief Stadnitski in his official capacity as a supervisor.

20. Plaintiffs have included Dickson City as a defendant in this action.

21. Therefore, Plaintiffs claims against Chief Stadnitski that he was acting in his official capacity are in effect a suit against Dickson City.

22. Since Dickson City has been named as a defendant, Plaintiffs claims against Chief Stadnitski should be dismissed.

COUNT V OF THE COMPLAINT AGAINST OFFICERS, KAREN GALLAGHER AND ANTHONY MARIANO MUST BE DISMISSED AS PLAINTIFFS HAVE NOT ALLEGED ANY FACTS TO SUPPORT THE CLAIM THAT OFFICERS GALLAGHER AND MARIANO VIOLATED 42 U.S.C. §§ 1985 AND 1986

23. In Count V of the Complaint, Plaintiffs seek to proceed against Officers, Gallagher and Mariano under 42 U.S.C. §§ 1985 and 1986.

40. Defendant officers violated 42 USC § 1985 in that they have conspired for the purpose of impeding, hindering, obstructing and/or defeating the due course of justice with the intent to deny the Plaintiffs the protection of the laws and to injure them and their property,

41. Defendant officers have each done and/or have caused to be done acts in furtherance of this conspiracy whereby the Plaintiffs have been injured and have been deprived of their rights and privileges as citizens of the United States;

42. The Defendant officers each had actual knowledge of the conspiracies to deprive the Plaintiff of their rights protect by

§1985, and each had the powers and the opportunity to prevent the violations from occurring and/or continuing and failed to do so;

(See Exhibit “A” at ¶¶ 40-42).

24. It is not clear from the face of the Complaint under which subsection of § 1985 the Plaintiffs intend to proceed.

25. It appears, however, that based on the facts alleged in the Complaint, the Plaintiffs could only possibly proceed under § 1985(3).

26. 42 U.S.C. § 1985(3) sets forth in relevant part:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1994).

27. A § 1985(3) conspiracy claim must be pled with factual specificity. Kelleher v. City of Reading, 2001 U.S. Dist. LEXIS 14958 (E.D. Pa. 2001) (citing Robinson v. McCorkle, 462 F.2d 111, 113-14 (3d Cir.), *cert. denied*, 409 U.S. 1042 (1972)).

28. To make out a valid cause of action under § 1985, a plaintiff must allege each of the following elements: (1) a conspiracy; (2) for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws or of the equal

privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; and (4) injury to either person or property, or deprivation of any right or privilege of a United States citizen. Griffin v. Breckenridge, 403 U.S. 88 (1971) (citing 42 U.S.C. § 1985(3)).

29. To satisfy the second element, plaintiff must allege that the Defendants were motivated by “some racial, or perhaps otherwise class-based, invidiously discriminatory animus. . . .” Kelleher, 2001 U.S. Dist. LEXIS 14958 (quoting Griffin, 403 U.S. 88).

30. The failure to plead racial or otherwise class-based, invidiously discriminatory animus is fatal to a claim under § 1985(3). Kelleher, 2001 U.S. Dist. LEXIS 14958 (citing Davis v. Township of Hillside, 190 F.3d 167, 171 (3d Cir. 1999)).

31. If a plaintiff cannot set forth a cause of action under § 1985, he cannot set forth a claim under § 1986. Jane Doe v. Barbara Dendrinis, et al., 1997 U.S. Dist. LEXIS 2052 n. 8 (E.D. Pa. 1997)

32. In the instant case, Plaintiffs have not alleged the existence of a racial or otherwise class-based invidiously discriminatory animus.

33. Plaintiffs’ Complaint does not allege that Officers, Gallagher and Mariano were motivated by racial or other class-based invidiously discriminatory animus, or that the Plaintiffs belong to a protected class.

34. Plaintiffs cannot maintain an action against Officers, Gallagher and Mariano under 42 U.S.C. § 1985.

35. Since Plaintiffs have failed to allege any facts that Defendants, Gallagher and Mariano are liable under 42 U.S.C. § 1985, they cannot maintain an action under § 1986.

PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES AGAINST OFFICERS, KAREN GALLAGHER AND ANTHONY MARIANO SHOULD BE STRICKEN

36. In Smith v. Wade, 461 U.S. 30 (1983), the United States Supreme Court held that a jury may impose punitive damages against defendants in a § 1983 for conduct which demonstrates a reckless or callous disregard of, or indifference to, the rights or safety of others. Id. at 56.

37. For a plaintiff in a section 1983 case to qualify for a punitive award, the defendant's conduct must be, at a minimum, reckless or callous. Savarese, 883 F.2d 1194, 1204 (3d. 1989).

38. Punitive damages might also be allowed if the conduct is intentional or motivated by evil motive, but the defendant's action need not necessarily meet this higher standard. Savarese, 883 F.2d 1194, 1204.

39. “[A] jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, *or* when it involves reckless or callous indifference to the federally protected rights of others.” Smith, 461 U.S. 30, 56.

40. The term “reckless indifference” refers to the defendant's knowledge that he “may be acting in violation of federal law.” Alexander v. Riga, 208 F.3d 419, 430-431 (3d Cir. 2000) (citing Kolstad v. American Dental Ass'n, 527 U.S. 526, 537 (1999)); see also Miller v. Apartments & Homes, 646 F.2d 101, 111 (3d Cir. 1981) (punitive damages appropriate where defendant acts with reckless disregard as to whether he is violating a federally protected right, or consciously and deliberately disregards consequences of actions).

41. The term “reckless” focuses on the defendant's state of mind. Alexander, 208 F.3d 419, 431.

42. The Supreme Court observed in Kolstad that the mere existence of a civil rights violation is not a guarantee of eligibility for punitive damages because a defendant might not be aware of the federal law he violated or he might have believed that the discrimination was permissible. Kolstad, 527 U.S. 526, 536-537.

43. Plaintiffs have failed to plead the culpable state of mind that is required for a punitive damages claim.

44. Plaintiffs' Complaint has failed to allege any facts whatsoever to support the allegations that Officers Gallagher and Mariano were reckless and/or callous and/or acted with reckless indifference.

WHEREFORE, Defendants, Karen Gallagher, Anthony Mariano, William Stadnitski and Dickson City Borough, respectfully request this Court to dismiss the first identified Count IV of the Complaint and Count V of the Complaint, and to strike all claims for punitive damages.

Respectfully submitted,

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Dated: August 4, 2008

IN THE UNITED STATES DISTRICT COURT
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RICHARD BANKS, JUDY BANKS, : CIVIL ACTION
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NO. 3:08-cv-1110

KAREN GALLAGHER, ANTHONY MARIANO, :
WILLIAM STADNITSKI and DICKSON :
CITY BOROUGH :

Defendants :

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS’
PARTIAL MOTION TO DISMISS PLAINTIFFS’ COMPLAINT**

Defendants, Karen Gallagher, Anthony Mariano, William Stadnitski and Dickson City Borough, by and through their attorneys, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, submit this memorandum of law in support of their Partial Motion to Dismiss the first identified Count IV of the Plaintiffs’ Complaint and Count V of Plaintiffs’ Complaint, and to strike all claims for punitive damages, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. INTRODUCTION

Plaintiffs allege in their complaint that the Defendants illegally threatened, harassed, detained and/or arrested them, and otherwise interfered with their rights under the First, Fourth, Fifth, and Fourteenth Amendments. (See Exhibit “A” for a true and correct copy of the Complaint).

As detailed below, the first identified Count IV of the Complaint and Count V of the Complaint should be dismissed, and the claim for punitive damages should be stricken as to the Defendants, pursuant to Fed. R. Civ. P. 12(b)(6). The first identified Count IV of the Complaint

should be dismissed to the extent that Plaintiffs are claiming that Chief Stadnitski was acting in his official capacity. Count V of the Complaint should be dismissed as Plaintiffs have failed to allege any facts that Officers Gallagher and Mariano violated 42 U.S.C. § 1985. Finally, Plaintiffs' claim for punitive damages against Officers Gallagher and Mariano should be stricken as Plaintiffs have failed to plead the proper elements for punitive damages against Officers Gallagher and Mariano. (See Exhibit "A").

II. FACTUAL BACKGROUND

According to the Complaint, Plaintiffs claim that on May 9, 2008, at or about 6:30 p.m., they were having dinner at Old County Buffet located in Dickson City. (See Exhibit "A" at ¶ 8). Plaintiffs contend that at the time, Richard Banks, Roger McCarren and Larry Meyer were openly carrying legally possessed and displayed handguns, which were secured in a holster. (See Exhibit "A" at ¶ 9). Officers Gallagher and Mariano arrived on the premises in a marked police car and in full uniform. (See Exhibit "A" at ¶ 10). Plaintiffs claim that although they were not doing anything improper, illegal or suspicious, Officers Gallagher and Mariano "accosted" them and "illegally threatened, harassed, detained and/or arrested them, and otherwise interfered with their rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution". (See Exhibit "A" at ¶ 11).

In Count I of the Complaint, Plaintiffs, Richard Banks, Roger McCarren and Larry Meyer claim that Officers Gallagher and Mariano violated their constitutional rights by illegal arrests, detentions, searches and seizures, and deprivation of property without due process of law. (See Exhibit "A" at ¶¶ 12-23). In Count II, Judy Banks and Richard Banks claim that Officers Gallagher and Mariano violated Mrs. Banks First Amendment rights. (See Exhibit "A" at ¶¶ 24-

27). Count III is against Dickson City for failing to “adequately and properly supervise and train its police officers in various aspects of law enforcement procedure and substance”. (See Exhibit “A” at ¶¶ 28-30). The first identified Count IV of the Complaint is against Chief of Police William Stadnitski for failing “to adequately and properly supervise and train its police officers in various aspects of police procedure”. (See Exhibit “A” at ¶¶ 31-35). The second identified County IV of the Complaint is against all the Defendants for “acting in concert and under color of state law” to deprive the Plaintiffs of their rights under the First, Fourth, Fifth and Fourteenth Amendments. (See Exhibit “A” at ¶¶ 36-37). Count V is against Officers Gallagher and Mariano for conspiracy to interfere with civil rights. (See Exhibit “A” at ¶¶ 38-43). Count VI is against all the Defendants for denying Plaintiffs’ rights under Article I § 8 of the Constitution of the Commonwealth of Pennsylvania. (See Exhibit “A” at ¶¶ 44-46).

Plaintiffs are seeking the following: an injunction to prohibit the Defendants from any future violations of civil and constitutional rights; an injunction to prohibit Dickson City from promulgating or attempting to promulgate, enforcing, or attempting to enforce, any policy, rule or regulation which purports to limit, interfere with or restrict constitutional rights of citizens; and injunction requiring the individual Defendants to receive additional training to prevent recurrence of the alleged illegal activities. Plaintiffs are also seeking compensatory damages. Finally, Plaintiffs are claiming punitive damages against Officers Gallagher and Mariano. (See Exhibit “A”).

III. ARGUMENT

A. Standard of Review

Pennsylvania Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. Dismissal is appropriate if, after accepting all factual allegations in the complaint as true “and drawing all reasonable inferences in plaintiff’s favor, no relief could be granted under any set of facts consistent with the allegations in the complaint.” Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc., 140 F.3d 478, 483 (3d Cir. 1998).

In deciding a motion to dismiss, the Court should consider the allegations in the complaint, exhibits attached to the complaint and matters of public record. See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). The Court may also consider “undisputedly authentic” documents. Id. The Court, however, need not accept any conclusions of law, unsupported conclusions, or unwarranted inferences from the Complaint. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). In order to survive a motion to dismiss, a plaintiff must set forth information from which each element of a claim may be inferred. See Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). The movant bears the burden of establishing that the complaint fails to state a claim upon which relief can be granted. See Gould Elecs. v. United States, 220 F.3d 169, 178 (3d Cir. 2000).

B. First Identified Count IV Of Plaintiffs’ Complaint Should Be Dismissed Against Chief William Stadnitski.

In suits against municipal employees who act in a supervisory capacity, the Supreme Court has differentiated between claims against those individuals in their personal (individual) capacities and their official capacities. See Boria v. Bowers, 2007 U.S. Dist. LEXIS 68794 (E.D. Pa. 2007) (citing Kentucky v. Graham, 473 U.S. 159 (1985)). In determining whether a plaintiff

sued a defendant in his personal capacity, official capacity, or both, the court looks to the complaint and the course of proceedings. Atwell v. Schweiker 2007 U.S. App. LEXIS 23306 (3d. Cir. 2007).

Personal-capacity damage suits under section 1983 seek to recover money from a government official, as an individual, for acts performed under color of state law. Official-capacity suits, in contrast, “generally represent only another way of pleading an action against an entity of which an officer is an agent.” Monell v. New York City Dep't of Social Services, 436 U.S. 658, 690 n.55 (1978). The Supreme Court has held that official capacity suits cannot be maintained against state officers acting in their official capacity on behalf of the state. Boria, 2007 U.S. Dist. LEXIS 68794 (citing Hafer v. Melo, 502 U.S. 21, 27 (1991) (state officers sued for damages in their official capacity are not “persons” for purposes of the suit because they assume the identity of the government that employs them)).

In the instant case, pursuant to first identified Count IV of the Complaint, Plaintiffs have included Chief William Stadnitski as a defendant in this action. According to the allegations of the Complaint, Plaintiffs are suing Chief Stadnitski in his official capacity as a supervisor. Plaintiffs have included Dickson City as a defendant in this action. Therefore, Plaintiffs claims against Chief Stadnitski that he was acting in his official capacity are in effect claims against Dickson City. Since Dickson City has been named as a defendant, Plaintiffs claims against Chief Stadnitski should be dismissed.

C. Count V Of The Complaint Against Officers, Gallagher and Mariano Must Be Dismissed As Plaintiffs Have Not Alleged Any Facts To Support The Claim That Gallagher And Mariano Violated 42 U.S.C. §§ 1985 And 1986.

Pursuant to Count V of the Complaint, the Plaintiffs seek to proceed against Defendants, Gallagher and Mariano under 42 U.S.C. §§ 1985 and 1986. Plaintiffs allege in relevant part:

40. Defendant officers violated 42 USC § 1985 in that they have conspired for the purpose of impeding, hindering, obstructing and/or defeating the due course of justice with the intent to deny the Plaintiffs the protection of the laws and to injure them and their property,

41. Defendant officers have each done and/or have caused to be done acts in furtherance of this conspiracy whereby the Plaintiffs have been injured and have been deprived of their rights and privileges as citizens of the United States;

42. The Defendant officers each had actual knowledge of the conspiracies to deprive the Plaintiff of their rights protect by §1985, and each had the powers and the opportunity to prevent the violations from occurring and/or continuing and failed to do so;

(See Exhibit "A" at ¶¶ 40-42).

It is not clear from the face of the Complaint under which subsection of § 1985 the Plaintiffs intend to proceed. It appears, however, that based on the facts alleged in the Complaint, the Plaintiffs could only possibly proceed under § 1985(3).

42 U.S.C. § 1985(1) concerns itself only with interference with officials of the Federal Government. Jane Doe v. Barbara Dendrinis, et al., 1997 U.S. Dist. LEXIS 2052 n. 8 (E.D. Pa. 1997) (citing Meza v. Lee, F.Supp. 325, 327 (D. Nev. 1987)). 42 U.S.C. § 1985(2) is concerned only with conspiracies to prevent parties, witnesses, or jurors from attending or testifying in courts of the United States. Id. 42 U.S.C. § 1985(3) is thus the only possible statute under which the present facts could possibly state a cause of action.

42. U.S.C. § 1985(3) sets forth in relevant part:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . in any case of

conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1994).

A § 1985(3) conspiracy claim must be pled with factual specificity. Kelleher v. City of Reading, 2001 U.S. Dist. LEXIS 14958 (E.D. Pa. 2001) (citing Robinson v. McCorkle, 462 F.2d 111, 113-14 (3d Cir.), *cert. denied*, 409 U.S. 1042 (1972)). To make out a valid cause of action under § 1985, a plaintiff must allege each of the following elements: (1) a conspiracy; (2) for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws or of the equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; and (4) injury to either person or property, or deprivation of any right or privilege of a United States citizen. Griffin v. Breckenridge, 403 U.S. 88 (1971) (citing 42 U.S.C. § 1985(3)). To satisfy the second element, the plaintiff must allege that the Defendants were motivated by “some racial, or perhaps otherwise class-based, invidiously discriminatory animus. . . .” Kelleher, 2001 U.S. Dist. LEXIS 14958 (quoting Griffin, 403 U.S. 88). The failure to plead racial or otherwise class-based, invidiously discriminatory animus is fatal to a claim under § 1985(3). Kelleher, 2001 U.S. Dist. LEXIS 14958 (citing Davis v. Township of Hillside, 190 F.3d 167, 171 (3d Cir. 1999)).

Once a plaintiff satisfies the § 1985 requirements, he may also maintain a § 1986 action, if he can prove that the Defendants had knowledge of the § 1985 violations and neglected to prevent their occurrence. Jane Doe, 1997 U.S. Dist. LEXIS 2052 (citing 42 U.S.C. § 1986). If,

however, a plaintiff cannot set forth a cause of action under § 1985, he cannot set forth a claim under § 1986. Jane Doe, 1997 U.S. Dist. LEXIS 2052.

In the instant case, Plaintiffs have not alleged the existence of a racial or otherwise class-based invidiously discriminatory animus. Plaintiffs' complaint does not allege that Officer Gallagher and Mariano were motivated by racial or other class-based invidiously discriminatory animus, or that the Plaintiffs belong to a protected class. Plaintiff cannot maintain an action against Officers Gallagher and Mariano under 42 U.S.C. § 1985. Moreover, because Plaintiffs have failed to allege any facts that Officers Gallagher and Mariano are liable under 42 U.S.C. § 1985, they cannot maintain an action under § 1986. Therefore, Plaintiffs' claims brought pursuant to 42 U.S.C. §§ 1985 and 1986 under Count V of the Complaint should be dismissed.

D. Plaintiffs' Claim For Punitive Damages Against Officers Karen Gallagher And Anthony Mariano Should Be Stricken.

In Smith v. Wade, 461 U.S. 30 (1983), the United States Supreme Court held that a jury may impose punitive damages against defendants in a § 1983 for conduct which demonstrates a reckless or callous disregard of, or indifference to, the rights or safety of others. Id. at 56. In the course of examining state law, the Supreme Court in Smith noted that:

Most cases under state common law, although varying in their precise terminology, have adopted more or less the same rule, recognizing that punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others or even gross negligence.

Savarese v. Agriss, 883 F.2d 1194, 1204 (3d. 1989) (citing Smith, 461 U.S. at 48-49). In addressing whether or not the same standard applies in a § 1983 context, the Court in Smith stated that “we discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort

cause of action.” Savarese, 883 F.2d at 1204 (citing Smith, 461 U.S. at 48-49). Accordingly, the Court held that “reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law, should be sufficient to trigger a jury’s consideration of the appropriateness of punitive damages.” Smith, 461 U.S. at 51.

Therefore, for a plaintiff in a section 1983 case to qualify for a punitive award, the defendant’s conduct must be, at a minimum, reckless or callous. Savarese, 883 F.2d at 1204. Punitive damages might also be allowed if the conduct is intentional or motivated by evil motive, but the defendant’s action need not necessarily meet this higher standard. Id. “[A] jury may be permitted to assess punitive damages in an action under § 1983 when the defendant’s conduct is shown to be motivated by evil motive or intent, *or* when it involves reckless or callous indifference to the federally protected rights of others.” Smith, 461 U.S. at 56.

The term “reckless indifference” refers to the defendant’s knowledge that he “may be acting in violation of federal law.” Alexander v. Riga, 208 F.3d 419, 430-431 (3d Cir. 2000) (citing Kolstad v. American Dental Ass’n, 527 U.S. 526, 537 (1999)); see also Miller v. Apartments & Homes, 646 F.2d 101, 111 (3d Cir. 1981) (punitive damages appropriate where defendant acts with reckless disregard as to whether he is violating a federally protected right, or consciously and deliberately disregards consequences of actions). The term “reckless” focuses on the defendant’s state of mind. Alexander, 208 F.3d at 431. The Supreme Court observed in Kolstad that the mere existence of a civil rights violation is not a guarantee of eligibility for punitive damages because a defendant might not be aware of the federal law he violated or he might have believed that the discrimination was permissible. Kolstad, 527 U.S. at 536-537.

In the instant matter, the Plaintiffs have failed to plead the culpable state of mind that is required for a punitive damages claim. Plaintiffs’ Complaint has failed to allege any facts

whatsoever to support the allegations that Officers Gallagher and Mariano were reckless and/or callous and/or acted with reckless indifference. Therefore, Plaintiffs' claim for punitive damages must be stricken.

IV. CONCLUSION

For the foregoing reasons, Defendants, Karen Gallagher, Anthony Mariano, William Stadnitski and Dickson City Borough, respectfully request this Court to dismiss the first identified Count IV of the Complaint and Count V of the Complaint, and to strike all claims for punitive damages.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP

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Dickson City Borough

Dated: August 4, 2008

CERTIFICATE OF SERVICE

Louis J. Isaacsohn, attorney for Defendants, Karen Gallagher, Anthony Mariano, William Stadnitski and Dickson City Borough, hereby certifies that on August 4, 2008, he served a true and correct copy of the Defendants, Karen Gallagher, Anthony Mariano, William Stadnitski and Dickson City Borough's Partial Motion to Dismiss Plaintiffs' Complaint in Part on counsel for plaintiffs by U.S. Mail, postage prepaid, as addressed below:

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/s/Louis J. Isaacsohn
Louis J. Isaacsohn, Esquire
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