IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Northern Division

FRANKLIN SAVAGE et al.,

Plaintiffs,

v.

POCOMOKE CITY, et al.,

Defendants.

Case No. 1:16-cv-00201-JFM

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT COUNTY COMMISSIONERS OF WORCESTER COUNTY'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO BIFURCATE

TABLE OF CONTENTS

Page

INTRODUCTION 1

FACTS 3

STANDARD OF REVIEW 6

ARGUMENT 8

I. THE COUNTY CAN BE HELD LIABLE FOR THE HOSTILE WORK ENVIRONMENT CREATED BY CET MEMBERS 8

A. Plaintiffs Have Plausibly Alleged that the Final Policymakers on the CET and in the Sheriff's Office Were Acting on Behalf of the County 8

B. Even if the County Had Acted as a State Policymaker, Plaintiffs Have Adequately Alleged that the County is a Joint Employer....................................16

1. The Joint Employer Status of Worcester County Requires A Factual Determination. 16

2. Officer Savage Has Alleged Sufficient Facts In His Complaint To Make a Plausible Claim that Worcester County was His Employer 20

II. THE COUNTY IS LIABLE FOR VIOLATION OF THE RIGHT TO BE FREE FROM A HOSTILE WORK ENVIRONMENT UNDER 42 U.S.C. § 1981 21

CONCLUSION..24

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Ashcroft v. Iqbal,
556 U.S. 662 (2009)....................7

Beardsley v. Webb,
30 F.3d 524 (4th Cir. 1994)....................11

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007)....................20

Brown v. Sessoms,
774 F.3d 1016 (D.C. Cir. 2014)....................24

Chao v. Rivendell Woods, Inc.,
415 F.3d 342,349 (4th Cir. 2005)....................20

Crump v. TCoombs & Assocs.,
LLC, No. 2:13-707, 2015 U.S. Dist. LEXIS 128160 (E.D. Va. Sept. 22, 2015)....................18

Dennis v. County of Fairfax,
55 F.3d 151 (4th Cir. 1995)....................23

Edwards v. City of Goldsboro,
178 F.3d 231 (4th Cir. 1999)....................7

Evans v. Wilkinson,
609 F. Supp. 2d 489 (D. Md. 2009)....................17

Fed'n of African Am. Contractors v. City of Oakland,
96 F.3d 1204 (9th Cir.1996)....................23

Fether v. Frederick Cty., Md.,
No. CIV. CCB 12-1674, 2013 WL 1314190 (D. Md. Mar. 29, 2013)....................15

Graves v. Lowery,
117 F.3d 723 (3d Cir. 1997)....................17, 18

Hall v. Burney,
No. 11-6566, 2011 WL 5822176 (4th Cir. Nov. 18, 2011)....................7

Harrods Ltd. v. Sixty Internet Domain Names,
302 F.3d 214 (4th Cir. 2002)....................13

Hukill v. Auto Care, Inc.,
192 F.3d 437 (4th Cir.1999) 17

James v. Univ. of Maryland, Univ. Coll.,
No. CIV. PJM 12-2830, 2013 WL 3863943 (D. Md. July 23, 2013) 23

Jeandron v. Bd. of Regents of Univ. Sys. of Maryland,
510 F. App'x 223 (4th Cir. 2013)....................3

Jett v. Dallas Independent School Dist.,
491 U.S. 701 (1989)....................22, 23

Johnson v. City of Shelby, Miss.,
135 S.Ct. 346 (2014)....................24

Knight v. Vernon,
214 F.3d 544 (4th Cir. 2000) 14

Lindsey v. Jenkins,
No. CIV.A. RDB-10-1030, 2011 WL 453475 (D. Md. Feb. 3, 2011)....................15

Magnuson v. Peak Technical Servs.,
808 F. Supp. 500 (E.D. Va. 1992) 17, 19

Maine v. Thiboutot,
448 U.S. 1 (1980)....................23

McMillian v. Monroe Cty.,
520 U.S. 781 (1997)....................9, 10, 11, 14

Monell v. Dep't of Soc. Servs. of City of New York,
436 U.S. 658 (1978).................... *passim*

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977)....................16

Murphy-Taylor v. Hofmann,
968 F. Supp. 2d 693 (D. Md. 2013)....................16, 17

Pembaur v. City of Cincinnati,
475 U.S. 469 (1986)....................9, 11, 15

Porchea v. Google,
No. 2:15-2783, 2015 U.S. Dist. LEXIS 159495 (D.S.C. Nov. 3, 2015)....................18

Presley v. City of Charlottesville,
464 F.3d 480 (4th Cir. 2006) 19

Revene v. Charles Cty. Comm'rs,
882 F.2d 870 (4th Cir. 1989) 8

Rossignol v. Voorhaar,
321 F. Supp. 2d 642 (D. Md. 2004) 14

Santos v. Frederick Cty. Bd. of Comm'rs,
725 F.3d 451 (4th Cir. 2013) 9, 10, 15

Slade v. Hampton Roads Reg'l Jail,
407 F.3d 243 (4th Cir. 2005) 7

Spriggs v. Diamond Auto Glass,
242 F.3d 179 (4th Cir. 2001) 21

Takacs v. Fiore,
473 F. Supp. 2d 647 (D. Md. 2007) 17

Tobey v. Jones,
706 F.3d 379 (4th Cir. 2013) 7

Vanguard Justice Soc'y, Inc. v. Hughes,
471 F. Supp. 670 (D. Md. 1979) 17

Vega v. Hempstead Union Free Sch. Dist.,
801 F.3d 72 (2d Cir. 2015)...11

Veney v. Wyche,
293 F.3d 726 (4th Cir. 2002) 8

Wells v. Gates,
336 F. App'x 378 (4th Cir. 2009)..21

West v. J.O. Stevenson, Inc.,
No. 7:15-87, 2016 U.S. Dist. LEXIS 22526 (May 22, 2016) 19

Williams v. Grimes Aerospace Co.,
988 F. Supp. 925 (D. S.C. 1997)..17, 19

STATE CASES

Clea v. City of Baltimore,
541 A.2d 1303 (Md. 1988) 14

Durham v. Somerset Cty.,
Md., No. CIV.A. WMN-12-2757, 2013 WL 1755372 (D. Md. Apr. 23, 2013).....................16

FEDERAL STATUTES

42 U.S.C. § 1981 .... 3, 21, 22, 23

42 U.S.C. § 1983 .... *passim*

STATE STATUTES

Md. Code Cts. & Jud. Proc. § 2-309 .... 13, 15

Md. Code, Public Safety § 7-104 (2005) 13

RULES

Fed. R. Civ. P. 12(b)(6) 6, 19, 20

Fed. R. Civ. P. 8 .... 1, 7

INTRODUCTION

The motion to dismiss filed by the County Commissioners of Worcester County ("County") presents only one issue: whether the County controls the practices of the Worcester County Sheriff's Office or its Criminal Enforcement Team ("CET"). The First Amended Complaint ("FAC") makes detailed allegations of fact regarding the origin of the CET, its supervision, the source of its equipment and vehicles, its power to evaluate the performance of its members, its assignment of duties, and other facts bearing directly on the Fourth Circuit's test for joint employment. FAC ¶¶ 5, 28, 53-65. One of the two supervisors of the CET, Nathaniel Passwaters, a Sergeant in the County Sheriff's Office, is alleged to have directly participated in numerous acts of racial discrimination. *Id.* ¶ 5, 67, 71-75. In addition, the EEOC, the expert agency in this area, has now found that Worcester County was a joint employer of then-Detective Franklin Savage. As both the Supreme Court and the Fourth Circuit have recognized, the test for "joint employer status is a fact-intensive analysis and depends on the unique circumstances of the particular employment environment as a whole. It is uniquely ill-suited for resolution on the pleadings, for much of the evidence of joint employment rests with the defendants and can only be uncovered in discovery. *See* Part II.B.1. Plaintiffs have clearly alleged enough to make the County's joint employment status plausible under Rule 8 of the Federal Rules of Civil Procedure, and they are confident that discovery of CET and County records of duty assignments, evaluations, and funding will further support the joint employer allegations of the FAC.

In its motion to dismiss, the County contends that every sheriff and deputy sheriff in Maryland is a state employee rather than a county employee, at all times and in all job functions. But the County is both legally and factually wrong.

Legally, the County's position is inconsistent with state law, the actual operations of

Worcester County, and Supreme Court and Fourth Circuit precedents. Adoption of such a broad rule would obliterate well-settled distinctions between state policymakers and county or municipal policymakers. Ironically, it would denude the County of its significant delegated authority to set law enforcement priorities and policy within its borders and work a fundamental shift in law enforcement authority that the County would no doubt disavow in other contexts.

Factually, the County's position is belied by the facts of its detailed participation in the CET, rendering it a joint employer of then-Detective Savage with Pocomoke City Police Department. The implications of the County's broad rule would be alarming and far reaching. To tackle illegal drug trafficking and abuse in Worcester County, the County Sheriff in 2008 created the Worcester Criminal Enforcement Team ("CET") that includes police officers from the Worcester County Sheriff's Office, the Department of Maryland State Police, and local municipalities including Pocomoke City, Ocean City, and Ocean Pines. The CET "deputizes" municipal police officers to help implement county policies, is located in buildings provided by the county, uses county equipment, and is subject to county or sheriff's office approval of certain personnel matters, expenses, and cooperative agreements with municipal governments. It appears to operate as a stand-alone narcotics investigatory team, akin to a specialized branch of the County Sheriff's Office, with delegated authority from the County Sheriff's Office, performing its own investigations, setting priorities based on county-specific narcotics issues, and establishing workplace policies, work assignments, and disciplinary investigations loosely under the control of the county sheriff's office but no other government unit. Indeed, then-Detective Savage had police powers throughout the County only because he was deputized by the County Sheriff's Office and a member of the CET. Otherwise, his ability to make arrests and execute search warrants would have been limited to the boundaries of Pocomoke City.

The premise to the County's entire defense is that, because state law labels the Sheriff as a state constitutional officer, the County can never be liable for any action of the Sheriff or his deputies or any group established by the Sheriff's Office. The Sheriff could then create task forces to violate the Constitution with impunity. Pocomoke City and Worcester County are playing an employment "shell game" with the Court, where it ends up that no one employed then-Detective Savage. That is not and cannot be the law.

Having misunderstood the underlying law, the County also is mistaken in its application. The County can have *Monell* liability for the hostile work environment claims in Counts I and VII, and the legal rights embodied in 42 U.S.C. 1981 are a well-established basis for bringing a claim against a county government.

FACTS

Formed in 2008 by a previous Worcester County Sheriff, the CET's purpose is to "reduce drug trafficking activities within Worcester County." Worcester County, County Commissioners Meeting Minutes (June 6, 2015) at 2 ("*Worcester County Meeting Minutes*"), https://www.co.worcester.md.us/departments/commissioners/minutes?page=1.[1] To achieve this purpose, the Worcester County Sheriff's Office cooperates with municipal police departments and has developed cooperative agreements to obtain officers on detail from the municipalities of Pocomoke City, Ocean City and Ocean Pines for the CET. *Id.*; Ocean Pines Association, Fall 2015 Ocean Pines Newsletter at 11, http://oceanpines.org/about-ocean-pines/quarterly-newsletters/ ("*Ocean Pines Newsletter*"); Reggie Mason, *Re-Elect Reggie Mason for Worcester County Sheriff,* at 3 (2014), http://reelectreggiemasonforsheriff.bravesites.com/your-worcester-

[1] In deciding a motion to dismiss, "[a] court may take judicial notice of information publicly announced on a party's web site." *Jeandron v. Bd. of Regents of Univ. Sys. of Maryland*, 510 F. App'x 223, 227 (4th Cir. 2013). Despite this public information showing county involvement in many CET functions, the County maintains in its motion to dismiss that all members of the CET implement state policy at all times. In light of the conflict between statements on the County's own website and its motion to dismiss, the need for discovery in this case is especially apparent.

county-sheriffs-department. In some cases, the Worcester County Sheriff's Office has even developed memoranda of understanding with other municipalities to outline their "cooperation and participation" in the CET and sought approval for these memoranda of understanding from the county's governing Board of County Commissioners. *Worcester County Meeting Minutes* at 2. The Worcester County Sheriff, deputy sheriffs including Dale Smack, and deputy sheriffs assigned to the CET including Passwaters share a close relationship.

Ten months after joining the Pocomoke City Police Department in April 2011, Officer Savage was asked to join the CET in February 2012. First Amended Complaint ("FAC") ¶ 17. He became the first African American police officer to join the CET. *Id.* Originally, operated out of the same building as the Worcester County Sheriff's Office, the CET consisted of six other members, including five white males and one white female. *Id.* ¶ 61. It was jointly supervised by Nathaniel Passwaters, a Sergeant in the Worcester County Sheriff's Office, and Patricia Donaldson, a Sergeant in the Department of Maryland State Police. *Id.* ¶¶ 28, 32, 63. The CET supervisors were delegated final policymaking authority to determine the duties and priorities of for its members, set personnel policies, assign work duties, set investigation priorities, and supervise the use of technology and equipment. *Id.* ¶ 59. As part of the delegation, Passwaters and Donaldson had to prepare an employment evaluation for each member on an annual basis to send back to that member's parent agency. *Id.* ¶ 65.[2]

Officer Savage remained on the CET for 28 months, until he resigned on June 12, 2014. *Id.* ¶ 113. During that time, Officer Savage faced repeated and persistent acts of racial harassment and discrimination by other members of the CET. Passwaters, for instance, regularly

[2] Interestingly, the MSP Motion denies that Patricia Donaldson, the other CET supervisor, filled out any evaluations for then-Detective Savage. MSP Mot. at 24 n.11. Taking the allegations of the FAC as true, that means that Passwaters must have done so. FAC ¶ 65. This situation also highlights how Defendants might game the system.by disclaiming authority over the CET in a way that *no one* employs members of any task force.

referred to African Americans as "niggers," replayed on multiple occasions an arrest video where he emphasized the arrestees use of the word, developed a synonym of "ninja" to use instead but which was known to carry the same meaning, and refused to take any action to intervene when other CET members took Officer Savage to so-called "KKK Lane" and when another placed a bloody deer's tail on Officer Savage's car. *Id.* ¶¶ 67, 70, 71, 77-78, 82-83. Because supervisors participated in the most egregious acts of racial discrimination, and failed to take any action when others used racially derisive language and streamed racially charged videos, Officer Savage eventually concluded that reporting acts of discrimination to final policymakers on the CET was ineffective. *Id.* ¶ 84. Left with no other option, Officer Savage reported further race-based insults outside the CET to Kelvin Sewell, who was the police chief at Savage's parent agency, the Pocomoke City Police Department. The first such report occurred in April 2014, when a fake food stamp depicting President Obama—which Officer Savage perceived to ridicule African Americans—was placed in Officer Savage's desk drawer. *Id.* ¶ 86-87. The second was on May 31, 2014, after receiving a text message by CET member Brooks Phillips addressing him as "nigga." *Id.* ¶ 88-90. Because Chief Sewell did not have any policymaking control over the CET, he reported the second incident to the Maryland State Police to investigate; the Maryland State Police eventually determined that the text violated the rules and regulations of the Maryland State Police. *Id.* ¶¶ 89, 117.

Passwaters was aware of Officer Savage's reports of misconduct, and he reacted quickly to Officer Savage's decision to report the racially hostile conduct outside of the CET channels. On June 3, 2014, Passwaters created a rumor that Officer Savage was repeatedly tardy and that Savage's debt collectors and a wife were calling the Worcester County Sheriff's Office. *Id.* ¶ 91. No such calls were made, and Officer Savage has never been married. *Id.* Passwaters asked

Officer Savage if he was on drugs, an accusation that was then expanded another member of the CET during an undercover drug purchase. *Id.* ¶¶ 92-93.

On June 12, 2014, Officer Savage resigned from the CET. In his resignation letter, he stated that the repeated use of the word "nigger" and other acts of racial discrimination had created an "uncomfortable, demeaning, and unbearable work environment," and that he hoped his resignation might ensure that such acts of racial discrimination never occurred again in the CET. *Id.* ¶ 113. But in fact, his resignation had the opposite effect. Retaliation by Passwaters only intensified, and Passwaters spread a false rumor on July 15, 2014 that Officer Savage had wrongfully used a false identification for personal purposes, on July 29, 2014 that he had falsely identified himself as a member of the CET, and in late July that he had sold his off-duty weapon. *Id.* ¶¶ 119, 132, 134.

Despite being aware of the allegations of racial harassment and discrimination within the CET and therefore Passwaters' motive to retaliate, the second-in-command at the Worcester County Sheriff's Office, Dale Smack, accepted these rumors at face value and perpetuated the earlier racial harassment against Officer Savage with additional acts of retaliation. *Id.* ¶ 135. On August 14, 2014, Smack informed Chief Sewell that Worcester County would no longer respond to emergency calls or requests for backup from Officer Savage or Lieutenant Green (apparently because of his support for Savage), and Officer Savage was thereafter refused assistance from Worcester County's K-9 unit on multiple occasions, despite the fact that such assistance was routinely provided to the Pocomoke City Police Department in other investigations. *Id.* ¶¶ 139-40.

STANDARD OF REVIEW

A party seeking dismissal under Fed. R. Civ. P. 12(b)(6) must show that, "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual

inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). All complaints must meet the "simplified pleading standard" of Rule 8(a)(2), which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

To determine whether a complaint meets this standard, a court first must divide genuine factual allegations, which are entitled to deference, from "[t]hreadbare recitals of the elements of a cause of action supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), *quoted in, e.g.*, *Tobey v. Jones,* 706 F.3d 379, 387 (4th Cir. 2013). Next, the court must "assume [the] veracity [of the genuine factual allegations] and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. A complaint will survive when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged." *Id*. at 678. A court must "draw on its judicial experience and common sense" to determine whether a reasonable inference can be made, and thus whether the pleader has stated a plausible claim for relief. *Id*. at 679.

In applying its experience and common sense, however, a court must accept all genuine factual allegations as true and construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff. *See Tobey*, 706 F.3d at 390. Finally, if "the motion to dismiss involves 'a civil rights complaint, [a court] must be especially solicitous of the wrongs alleged and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged.'" *Hall v. Burney*, No. 11-6566, 2011 WL 5822176, at *1 (4th Cir. Nov. 18, 2011) (quoting *Edwards*, 178 F.3d at 244); *accord Slade v. Hampton Roads Reg'l Jail*, 407 F.3d 243,

248 (4th Cir. 2005) (same); *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002) (same). That context is highly salient in this case.

ARGUMENT

I. THE COUNTY CAN BE HELD LIABLE FOR THE HOSTILE WORK ENVIRONMENT CREATED BY CET MEMBERS

Despite clear case law holding that counties can be liable for some actions of sheriffs and their deputies, the County[3] improperly asks this court to adopt a legal fiction that all Sheriff's Office employees are state employees at all times. Brief of County Commissioners of Worcester County in Support of Motion to Dismiss ("Comm'rs Br.") at 4. That request distorts binding case law, and is far too premature before discovery on whether the sheriff and his deputies were implementing state or county policy. It is enough that Officer Savage has alleged that at least some of the acts that created the hostile work environment he experienced were caused by a custom or policy of the County. And even if the CET were implementing state policy—which it was not—that determination would not warrant dismissal. The County also faces liability as a joint employer of members of the CET, and the Plaintiffs have plausibly alleged that the County is the joint employer of members of the CET.

A. Plaintiffs Have Plausibly Alleged that the Final Policymakers on the CET and in the Sheriff's Office Were Acting on Behalf of the County

Following discovery, this Court will appropriately perform a functional analysis of whether the CET and the Sheriff's Office were acting as state employees or county employees when they engaged in acts that created a hostile work environment for Officer Savage. But at the

[3] This response refers to the County as shorthand for the County Commissioners. The County Commissioners are the named party in the complaint because they are the governing body for the county and thus would be responsible for any unconstitutional or unlawful customs or policies of the sheriff or any deputy sheriffs for purposes of *Monell* liability. *See Revene v. Charles Cty. Comm'rs*, 882 F.2d 870, 874 (4th Cir. 1989) ("Rightly construed under current doctrine, this comes to a claim that in the realm of county law enforcement, the sheriff was the duly delegated policy-maker for the county, and it is therefore effectively a claim against the governing body of the county.").

current time, it is sufficient that Officer Savage has alleged some facts showing that the County is liable for (1) the racial discrimination and retaliation by members of the CET, (2) the unconstitutional acts of retaliation by CET members and the Sheriff's Office after Officer Savage resigned from the CET and returned to the Pocomoke City Police Department. If the alleged facts are true—and they must be assumed to be so on a motion to dismiss—the County would be subject to *Monell* liability, and therefore dismissal of claims against the County is not warranted.

Under 42 U.S.C. § 1983, every "person" who subjects another person to the deprivation of rights, privileges, or immunities secured by the federal Constitution and laws is subject to liability. The class of persons subject to suit includes "municipalities and other local government units" 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." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690, 694 (1978). It is well-settled that counties are considered "persons," and that a county can be held liable for the actions of sheriffs who implement policies or customs on behalf of the county. *See, e.g,*, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 n.12 (1986); *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 470 (4th Cir. 2013).

Therefore, the all-or-nothing approach urged by the County must be rejected. Whether the Defendants were exercising county or state policymaking authority depends on "a particular area, or on a particular issue." *McMillian v. Monroe Cty.,* 520 U.S. 781, 785 (1997). The Fourth Circuit has instructed district courts how to perform this analysis. In *Dotson v. Chester*, for example, the Plaintiffs brought suit against county commissioners and the sheriff in Dorcester County, Maryland, based on alleged civil rights violations in the management and operation of

the county jail. 937 F.2d 920 (4th Cir. 1991). At issue in *Dotson* was whether the county or the state was liable for any judgment rendered against the sheriff. The court concluded that the answer depended on the facts: "[c]ounty liability for the Sheriff's operation of the County Jail depends on whether the Sheriff had final policymaking authority for the County over the County jail." *Id.* at 924. Put another way, when the sheriff acted as the final policymaker on an issue of local or county policy, the county—and the county commissioners as the governing board of the county—would be liable, whereas if the sheriff acted as a state policymaker, recovery for *Monell* liability would be limited to prospective relief. *See id.* at 924 ("The *Praprotnik* test indicates liability relies more on final policymaking authority than on the technical characterization of an official as a state or county employee."); *McMillian*, 520 U.S. at 785-86 ("[W]e are not seeking to make a characterization of Alabama sheriffs that will hold true for every type of official action [but] whether Sheriff Tate represents the State or the county when he acts in a law enforcement capacity."). The court in *Dotson* had no trouble concluding that, when operating the county jail, the sheriff was the final policymaker for the county and thus subject to *Monell* liability. 937 F.2d at 932 ("[W]e conclude that both state and local law point to the Sheriff as the final policymaker for the County when operating the County Jail, and hold that the County is properly responsible . . . ."). This functional analysis remains good law. *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 470 (4th Cir. 2013) ("[O]n remand, the district court should determine whether the deputies' unconstitutional actions are attributable to an official policy or custom of the county or the actions of a final county policymaker."). The CET is in many ways analogous to the county jail at issue in *Dotson*. It was created and run by the County and the County Sheriff's Office and its duties were not state-wide, rather they were confined to the boundaries of the county. It was the county that decided to target local drug-trafficking and to do so on a

county-wide basis. The deputized members of the CET were analogous to the county employees at the jail in *Dotson* in terms of the scope and nature of their duties making and executing county rules and county policies.

In performing the function-by-function analysis, a court must look at the particular function that caused the alleged constitutional violation and whether that function is a county function under state law. *See McMillian*, 520 U.S. at 786 ("[O]ur inquiry is dependent on an analysis of state law."); *Pembaur*, 475 U.S. at 485 ("In ordering the Deputy Sheriffs to enter petitioner's clinic the County Prosecutor was acting as the final decisionmaker for the county.").

The County's blanket assertion that the County is never liable for the actions of the Worcester County Sheriff's Office—including the operation of a task force created to tackle a county problem—ignores this line of cases. And for an unsurprising reason: an analysis of the particular functions at issue in Counts I and VII show that they are highly likely to be matters of county rather than state policy.

Count I alleges a race-based hostile work environment during the period from February 2012 to June 2014 when Officer Savage was assigned to the CET. FAC ¶¶ 208-10. That hostile work environment extended past his time at the CET, as the same individuals retaliated against Officer Savage after he left the CET in acts that perpetuated the earlier acts of racial discrimination.[4] *Id.* ¶¶ 119, 131-32. Count VII encompasses the same period within the CET but also extends to the hostile work environment created by the acts of retaliation by other members of the Worcester County Sheriff's Office after Officer Savage returned to the Pocomoke City Police Department, including the acts of Dale Smack. *Id.* ¶¶ 276, 278.

[4] Acts of retaliation by the same individuals that previously engaged in racial discrimination can be a "mixture of retaliation and continued sexual harassment" and are actionable under the Fourteenth Amendment. *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994). *See also Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 82 (2d Cir. 2015) (holding that Section 1983 implicitly addresses retaliation claims because "retaliation is a form of discrimination").

For Count I, Officer Savage alleges that the CET supervisors acted as final policymakers for the County, and that therefore their actions are imputable to the County. This allegation presents a fact question for discovery: nowhere does state law define whether a task force created by a county sheriff to meet county drug enforcement needs is a state or county policymaker, or whether the personnel, disciplinary, and workplace environment within that CET are controlled by final state or county policymakers.

Indeed, all appearances are that the CET is exercising county policymaking authority. The CET was formed to tackle a county drug problem: its goal is "to reduce drug trafficking activities within Worcester County." *Worcester County Meeting Minutes* at 2.[5] It was created by the Worcester County Sheriff's Office in 2008, and the Sheriff himself makes personnel decisions about who should be on the CET, free from state control. *See Re-Elect Reggie Mason* at 3. One of the primary ways the CET is effective is by partnering with municipal police departments either on specific projects or by detailing police officers from municipalities to the CET. *Worcester County Meeting Minutes* at 2; *Ocean Pines Newsletter* at 11. This cooperation is on at least some occasions incorporated into formal memoranda of understanding ("MOU") with local police departments that must be approved by the Worcester County Commissioners. *Worcester County Meeting Minutes* at 2. The State of Maryland is not itself a party to these MOUs, only the county and the other police forces that staff the CET are signatories. Indeed, the Worcester County Code contains an explicit provision that any mutual aid agreement for law enforcement activities must be approved by the Sheriff's Office and executed by the County, and this provision creates an inference that the CET itself was approved by the County. Worcester Cty., Md. Code, Public Safety § 7-104 (2005). By contrast, there is no indication that these

[5] As explained in note 1, *supra*, it is appropriate for the Court to take judicial notice of information on the County's website in light of the County's position in its motion to dismiss that is inconsistent with such public documents.

agreements must be approved by the State Police. *Worcester County Meeting Minutes* at 2. In short, although the members of the CET are provided by state, county, and municipal government, the CET appears to be under county control. This perception is supported by the factual allegations in the complaint: the Worcester County Sheriff provided the initial location for the CET and continues to provide much of the equipment used. FAC ¶ 57.[6]

The specific functions of the CET implicated by the hostile work environment claim are also functions about which the county traditionally has policymaking authority, and where the First Amended Complaint sufficiently alleges control by the County, acting through the Worcester County Sheriff. The supervisors on the CET were delegated policymaking authority by Worcester County to determine the duties and priorities of members of the CET, set personnel and technology policies, and conduct disciplinary procedures. FAC ¶¶ 59, 208. It appears that they were given authority to act as the final policymakers for the Worcester County Sheriff's Office for these functions, without day-to-day oversight. *Id.* But even if they remained under the general control of the Worcester County Sheriff, state law also provides that personnel policies are determined by the county rather than the state. Md. Code Cts. & Jud. Proc. § 2-309 ("[T]he personnel rules and regulations of Worcester County as adopted by the County Commissioners shall apply to all employees of the Sheriff of Worcester County . . . .").

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[6] These facts alone create a plausible case of county control. This is a case that cries out for discovery on this issue. The documentation of the Sheriff's selections to the CET, the funding records and communications from the County Sheriff's Office to the CET, such as emails, are all exclusively in the custody and control of the County Defendants. Dismissal on the pleadings is particularly disfavored where much of the relevant evidence lies exclusively with the defendant. *See Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 246-47 (4th Cir. 2002) ("Generally speaking, 'sufficient time for discovery is considered especially important when the relevant facts are exclusively in the control of the opposing party.'") (citing 10B Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE § 2741, at 419 (3d ed.1998)).

This initial information indicating that the CET exercises county policymaking authority is sufficient to state a claim that the County is liable for policies or customs of the CET.[7] The exact nature of the relationship, informal practices, and degree of delegation between the Sheriff's Office and the CET are proper subjects for discovery, not resolution on a motion to dismiss. *See, e.g.*, *Knight v. Vernon*, 214 F.3d 544, 552 (4th Cir. 2000) (determining that North Carolina sheriff was state employee on summary judgment and following discovery of informal practices between the county and sheriff).

The County ignores any discussion about specific functions, and place primary emphasis on the fact that Maryland state courts have held that a county sheriff is a designated state constitutional official for state-law claims. Comm'rs Br. at 4-6 (collecting Maryland state court cases). Yet those state-law cases do not control county liability for purposes of 1983: "with regard to federal law liability under 42 U.S.C. § 1983, the state law classification . . . would not be decisive." *Clea v. City of Baltimore*, 541 A.2d 1303, 1306–1307 n. 5 (Md. 1988). For purposes of § 1983 liability, a county cannot insulate itself from liability by "simply labeling as a state official an official who clearly makes county policy." *McMillian*, 520 U.S. at 786.

To be sure, a few district court opinions have concluded that county sheriffs in Maryland who implement law enforcement functions are state rather than county policymakers. Comm'rs Br. at 6. But these cases are distinguishable or irrelevant, for at least three reasons. *First*, those cases addressed law enforcement rather than personnel functions, so are not dispositive of the function-by-function analysis required by 1983. *See Rossignol v. Voorhaar*, 321 F. Supp. 2d

[7] The County has not challenged the sufficiency of the alleged customs or policies creating the hostile work environment, but only whether the County can be liable for the wrongful acts of the CET and Sheriff's Office policymakers. Because the merits issue was not raised, the Court must treat those allegations as undisputed. Obviously, Defendant Passwater's abuse of his supervisory position (assigned by the County itself) both his active participation and failure to stop the racially hostile work environment, should bear on the County's liablity. FAC ¶¶ 5, 67, 71-75. 84.

642, 651 (D. Md. 2004) ("[T]his Court concludes that the St. Mary's County Sheriff and his Deputies are state officials when acting in their *law enforcement capacities*.") (emphases added). State law distinguishes those functions: personnel functions of the Worcester County Sheriff are a matter of county rather than state policy. Md. Code Cts. & Jud. Proc. § 2-309 ("[T]he personnel rules and regulations of Worcester County as adopted by the County Commissioners shall apply to all employees of the Sheriff of Worcester County . . . ."). *Second*, those cases all involved actions directly taken by a sheriff or under a sheriff's control. They do not address the separate scenario where a sheriff creates a task force and deputizes members of municipal police departments in the county to tackle a county drug problem. Whatever status the Sheriff may have when exercising his law-enforcement duties, that status would not automatically extend to a county task force created to solve a drug problem in counties and municipalities. *See Pembaur*, 475 U.S. at 483 ("[P]articular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances."). *Third*, all of the district court cases were decided before the Fourth Circuit's opinion in *Santos*, which compels this court to perform an analysis of the specific functions performed by the CET and effectively overrules any cases holding that sheriffs are state officials for all functions.[8] Even before *Santos*, the opinions cited by the County did not reflect the weight of persuasive authority, and just as many district court opinions had held that the sheriff's status was inappropriate to determine on a motion to dismiss. *Fether v. Frederick Cty., Md.*, No. CIV. CCB 12-1674, 2013 WL 1314190, at *7 (D. Md. Mar. 29, 2013) ("[I]t may be that notwithstanding Sheriff Jenkins's status as a state employee, his actions or inactions could

[8] The fact that *Santos* overruled the earlier cases cited by the County to the extent they are inconsistent cannot be in doubt. One of them, for instance, involved the same Frederick County Commissioners and held that the county could not be liable for the actions of the sheriff (*Lindsey v. Jenkins*, No. CIV.A. RDB-10-1030, 2011 WL 453475, at *3 (D. Md. Feb. 3, 2011)); *Santos* held that it could.

represent Frederick County's policies or customs for which Frederick County will be legally responsible."); *Durham v. Somerset Cty.*, Md., No. CIV.A. WMN-12-2757, 2013 WL 1755372, at *3 (D. Md. Apr. 23, 2013) ("As to Sheriff Jones' status as a state or county policymaker, sheriffs can be either or both, depending on the area in which the policy is being made."); *Murphy-Taylor v. Hofmann*, 968 F. Supp. 2d 693, 743 (D. Md. 2013) ("Perhaps the underlying facts would support a *Monell* claim directly against the County for harms to Ms. Murphy–Taylor arising from the County's policies with respect to medical leave, or the explicit exemption of deputy sheriffs from County human resources policies regarding workplace harassment."). Where, as here, the County Sheriff had authority to determine the members of the CET, provide much of its equipment, actually house the CET in the Sheriff's Office for a period of time, the County Sheriff's participation was as much or more administrative as it was a law enforcement function.[9]

B. Even if the County Had Acted as a State Policymaker, Plaintiffs Have Adequately Alleged that the County is a Joint Employer

1. *The Joint Employer Status of Worcester County Requires A Factual Determination.*

Even if the County were correct that the CET did not exercise county policymaking authority, that would not resolve the county's potential liability for the conduct of members of a CET. In any event, Worcester County still would face potential liability under Section 1983 as a joint employer for a hostile work environment, and that determination requires fact-based discovery and resolution outside the context of a motion to dismiss.

[9] To the extent that the County implies that sovereign immunity case law is relevant to its liability (Comm'rs Br. at 7), it is incorrect. Counties do not have sovereign immunity under well-established Supreme Court case law, and the many cases that it cites that relate to sovereign immunity have no relevance to its arguments here. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) ("The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances but does not extend to counties and similar municipal corporations." (internal citations omitted)).

The Fourth Circuit has held that "a defendant that does not directly employ the plaintiff may still be considered an employer under [civil rights] statutes." *Hukill v. Auto Care, Inc.,* 192 F.3d 437, 442 (4th Cir.1999). Finding that the remedial goals and language of Title VII support a broad construction of the term "employer" for purpose of Title VII liability, several courts in the Fourth Circuit have determined that a defendant who does not directly employ a plaintiff, but who "control[s] some aspect of an individual's compensation, terms, conditions, or privileges of employment," is considered a joint employer and subject to Title VII liability. *See, e.g.*, *Magnuson v. Peak Technical Servs.*, 808 F. Supp. 500, 507-08 (E.D. Va. 1992) (broad construction of employer "finds support in the broad, remedial purpose of Title VII which militates against the adoption of a rigid rule strictly limiting 'employer' status under Title VII to an individual's direct or single employer"); *Takacs v. Fiore*, 473 F. Supp. 2d 647, 656 (D. Md. 2007); *Evans v. Wilkinson*, 609 F. Supp. 2d 489, 492 n. 5 (D. Md. 2009); *Vanguard Justice Soc'y, Inc. v. Hughes*, 471 F. Supp. 670, 696 (D. Md. 1979); *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 934–35 (D. S.C. 1997).

Moreover, the determination whether a defendant is a joint employer is a fact-based inquiry, involving an analysis of the totality of the circumstance of the work relationship. *Murphy-Taylor*, 968 F. Supp. 2d at 727 (denying defendant's motion to dismiss and holding that "whether an entity is a plaintiff's 'employer' for purposes of Title VII is a fact-bound question that is not appropriate for resolution as a pure matter of law, before discovery"); *see Magnuson*, 808 F. Supp. at 510; *Williams*, 988 F. Supp. at 935; *see also Graves v. Lowery*, 117 F.3d 723, 729 (3d Cir. 1997) (determination of joint employer status requires a "careful factual inquiry")

In the totality of the circumstances analysis, there are numerous factors to consider to determine whether a defendant is a joint employer. The Fourth Circuit recently adopted a new

test for determining whether an entity is a joint employer. In *Butler v. Drive Automotive Industries of America, Inc.*, the court held that a "'hybrid' test, which considers both the common law of agency and the economic realities of employment, is the correct means to apply the joint employment doctrine to the facts of a case." 793 F.3d 404, 406 (4th Cir. 2015). The court then set out nine factors that trial courts must analyze under this "hybrid" test:

> (1) authority to hire and fire the individual; (2) day-to-day supervision of the individual, including employee discipline; (3) whether the putative employer furnishes the equipment used and the place of work; (4) possession of and responsibility over the individual's employment records, including payroll, insurance, and taxes; (5) the length of time during which the individual has worked for the putative employer; (6) whether the putative employer provides the individual with formal or informal training; (7) whether the individual's duties are akin to a regular employee's duties; (8) whether the individual is assigned solely to the putative employer; and (9) whether the individual and putative employer intended to enter into an employment relationship.

Id. at 414. Of these nine factors, the first three "are the most important" because they directly address the level of control the entity has over the plaintiff. *Id.* Control over the plaintiff is "the 'principal guidepost' in the analysis." *Id.*

This inquiry is careful and fact intensive and courts in this Circuit applying *Butler* have looked carefully at all available facts to see if employees can make out a claim under the hybrid test. In one such recent case, for example, the District of South Carolina painstakingly reviewed a sexual harassment complaint of a contractor in a Google plant and found that the Plaintiff had alleged enough facts to make out a claim that Google and her joint contractor-employer were joint employers under Title VII because of the nature of Google's control on her work. *Porchea v. Google*, No. 2:15-2783, 2015 U.S. Dist. LEXIS 159495, at *13-25 (D.S.C. Nov. 3, 2015). Likewise, the Eastern District of Virginia found that the Navy was a contractor's employer as a matter of law after applying all nine of Butler's factors to the facts in the record and finding that the Navy exercised sufficient control over the plaintiff. *Crump v. TCoombs & Assocs.*, LLC,

No. 2:13-707, 2015 U.S. Dist. LEXIS 128160, at *56-80 (E.D. Va. Sept. 22, 2015). Finally, the Fourth Circuit itself in *Butler* looked at the amount of control that an employer had over temporary workers and held that the fact that there was no difference in the work done by the temporary employees and regular employees meant that the company was the employer of both categories of workers as a matter of law. 793 F.3d at 415. As demonstrated in these cases, the joint employer analysis is a fact-based totality of the circumstances inquiry that requires discovery and is not amenable to resolution on a motion to dismiss before discovery is conducted. *See Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006) ("[T]he purpose of Rule 12(b)(6) is to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.") (internal citations and quotations omitted); *West v. J.O. Stevenson, Inc.*, No. 7:15-87, 2016 U.S. Dist. LEXIS 22526, at *25-26 (May 22, 2016) ("at the motion to dismiss stage the fact-specific inquiry required to determine whether plaintiff is 'jointly employed' by two or more defendants . . . is all but impossible.").

Discovery has not begun in this case, and Officer Savage should be allowed to examine witnesses and review documents relevant to whether Worcester County was his joint employer before the court considers the issue for resolution.[10] The discovery would focus on questions related to whether Worcester County furnished equipment and the place of work and controlled

[10] Recent findings by the EEOC confirm that discovery is particularly appropriate on the County's joint employer status in this case. Plaintiffs filed charges and amended charges against the Worcester County Sheriff's Office alleging race discrimination and retaliation. After reviewing position statements from both sides and documentary evidence and conducting interviews with the Plaintiffs, the EEOC found probable cause that the Sheriff's Office exerted enough control over Officer Savage to qualify as his employer for purposes of Title VII and that Officer Savage had faced a hostile work environment and retaliation. Conciliation between the EEOC and the Sheriff's Office has failed, and Savage's charge is now in the hands of the Department of Justice for review. As indicated in their FAC, Plaintiffs will amend their complaint to add his Title VII charges as soon as the Department of Justice concludes its review. FAC ¶ 11. As discussed, *supra* note 3, the County Commissioners are the governing body responsible for the Sheriff's Office's implementation of county policy.

aspects of Officer Savage's compensation, terms, conditions, or privileges of employment. *See Butler*, 793 F.3d at 408; *Magnuson*, 808 F. Supp. at 510; *Williams*, 988 F. Supp. at 935.

Facts established thus far in the record demonstrate that Worcester County controlled terms and conditions of Officer Savage's employment and discovery on the issue would further develop the record. For example, Officer Savage alleges, and Defendants do not dispute, that Worcester County officials participated in the racial harassment complaint process. *Compare* FAC ¶¶ 79-81 *with* Br. at 18. Specifically, Officer Savage complained to Sergeant Passwaters, during the relevant time period for this lawsuit, about the racial harassment that he faced and in which Passwaters participated; however, further discovery is necessary to determine the level of control or supervision Worcester County exercised over the complaint process.

2. *Officer Savage Has Alleged Sufficient Facts In His Complaint To Make a Plausible Claim that Worcester County was His Employer*

The Federal Rules of Civil Procedure do not require Officer Savage to prove his entire case regarding his employment with Worcester County based only on his First Amended Complaint without the aid of discovery. *See Chao v. Rivendell Woods, Inc.*, 415 F.3d 342,349 (4th Cir. 2005) (providing that the complaint is not required to "make a case" against a defendant or even "*forecast evidence* sufficient to *prove* an element" of the claim). Nevertheless, Officer Savage has alleged sufficient facts regarding the joint employer status of Worcester County to satisfy the legal standards necessary to avoid dismissal under Rule 12(b)(6). *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Specifically, Officer Savage alleges that "Worcester County controls the practices of the Worcester County Sheriff's Office" and that during his "tenure on the [CET], the Worcester County Sheriff's Office and Defendant Passwaters, a sergeant with the Worcester County Sheriff's Office and one of [Officer Savage's] assigned supervisors of the [CET], exercised

significant control over Officer Savage, supervised his day-to-day activities and furnished his equipment and place of work." FAC ¶ 208. Officer Savage further alleges that Defendant Passwaters had "direct supervision over him and the other [CET] members," *id.* ¶ 28, and that Passwaters had "policymaking authority to determine the duties and priorities of the [CET], set personnel policies within the [CET], and supervise the use of technology and use of [CET] equipment, *id.* ¶ 59. Furthermore, Officer Savage alleges that Passwaters was "required to report misconduct by any [CET] member," *id.* ¶ 64, and that Passwaters determined his duties and was "responsible for preparing his employment evaluation and forwarding that report to Chief Sewell. That evaluation could affect Officer Savage's rank, pay, and future prospects within the Pocomoke City Police Department." *Id.* ¶ 65. These facts provide a sufficient basis to satisfy applicable pleading requirements and defeat the Defendants' motion to dismiss. Most of the pertinent facts, such as the lease for the task force space, the Sheriff's selection process for personnel, evaluations of CET members by the two CET supervisors, and emails between the Sheriff, County Commissioners, and the CET supervisors, will no doubt illuminate the Court's final determination on the joint employer issue. A decision on the pleadings on this issue would be both wildly premature and unfair to the Plaintiffs, who have alleged every fact available to them on this issue.

II. THE COUNTY IS LIABLE FOR VIOLATION OF THE RIGHT TO BE FREE FROM A HOSTILE WORK ENVIRONMENT UNDER 42 U.S.C. § 1981

The County also contends that it 42 U.S.C. § 1981 is an "inappropriate vehicle" to bring claims against it. Comm'rs Br. at 7. But that is not so. Section 1981 provides a clear right to recover for alleged discrimination in the making and enforcement of contracts. It indisputably encompasses hostile work environment claims. The elements of such claims are well-established (*see Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001)), and § 1981 provides a

right to recovery whether hostile-work-environment claims are based on racial discrimination or retaliatory conduct. *Wells v. Gates*, 336 F. App'x 378, 387 (4th Cir. 2009).

The County does not dispute the legal rights granted by § 1981 to be free from a race-based or retaliatory hostile work environment. Nor does it dispute that it has been given notice of the nature of the Section 1981 claim. Instead, its sole challenge is that § 1981 claims are subject to a formalistic pleading requirement of invoking § 1983 as the remedial vehicle, and that failure to do so warrants "dismissal with prejudice." Comm'rs Br. at 7.

That argument is a complete misreading of § 1981, which is Section 1 of the Civil Rights Act of 1866 and which prohibits racial discrimination in contracting. 42 U.S.C. § 1981. Passed in the wake of the Thirteenth Amendment's ratification, it was intended as declaration of equal rights for newly freed slaves. *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 713-14 (1989). The rights declared in § 1981 were shortly "constitutionalized" through the passage and ratification of the Fourteenth Amendment. *Id.* at 721 (citing Cong. Globe, 39th Cong., 1st Sess., 2465 (1866) (Rep. Thayer). Section 1981 was amended through the 1991 Civil Rights Act to expand the definition of the enforcement of contracts and to clarify the rights protected by § 1981. 42 U.S.C. § 1981(b)-(c).

A few short years after § 1981 came into existence, Congress passed the Civil Rights Act of 1871 in order to combat the rising violence engaged in by the Klu Klux Klan in the Reconstruction South and to provide an enforcement mechanism for the newly ratified Fourteenth Amendment. *Jett*, 491 U.S. at 722. Section 1 of that Act (codified at 42 U.S.C. § 1983) provided a civil damages remedy in Federal Court against state actors who had violated a person's federal or statutory constitutional rights.

In light of this legislative history—only briefly recounted here—the Supreme Court declared that Congress did not intend for § 1981 to create a private cause of action against state actors. *Jett*, 491 U.S. at 731-32 (holding that a school district could not be held liable for a racially motivated termination under §1981 using the respondeat superior theory of liability). The Fourth Circuit also has held that the 1991 Civil Rights Act did not create that cause of action or change the result of *Jett*. *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995).[11]

The County's argument that *Dennis* requires a dismissal of Detective Savage's § 1981 claims misreads the text and thrust of the law, however. Both *Jett* and *Dennis* limited a Plaintiff's ability to recover against municipal entities under § 1981 to cases where he can prove a custom or policy. *Dennis*, 151 F.3d at 156 (citing *Jett*, 491 U.S. at 735-36). But *Jett* and *Dennis* did not limit the rights that §1981 created: "We think the history of the 1866 Act and 1871 Act recounted above indicates that Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981." *Jett*, 491 U.S. at 731. Therefore, *Jett* explicitly states that rights created by § 1981 still exist for public employees, it is only the remedies for those rights, and in particular the monetary remedies, that must be enforced through § 1983.

The text of § 1983 creates a cause of action for violations of the "laws" of the United States, 42 U.S.C. § 1983, and the use of § 1983 as a remedial vehicle for § 1981 is consistent for other federal laws that do not provide their own remedial scheme. *See, e.g.*, *Maine v. Thiboutot*, 448 U.S. 1 (1980) (allowing suits under § 1983 for a deprivation of welfare benefits under the

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[11] The Ninth Circuit has taken the opposition position and held that the 1991 Civil Rights Act created an implied right of action against state actors. *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (9th Cir.1996). Fourth Circuit cases also are not entirely consistent after *Dennis*, and Fourth Circuit caselaw is "somewhat murkier than that of other circuits" on whether § 1981 creates an implied right of action against state actors. *James v. Univ. of Maryland, Univ. Coll.*, No. CIV. PJM 12-2830, 2013 WL 3863943, at *2 (D. Md. July 23, 2013).

Social Security Act). Even if this court decides that § 1981 does not provide an implied right of action, failure to invoke § 1983 would not warrant dismissal where the County has full notice of the claims against it. As the Supreme Court recently declared, "no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim." *Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346, 347 (2014); *see also Brown v. Sessoms*, 774 F.3d 1016 (D.C. Cir. 2014) (holding that *Johnson* also applies to § 1981 claims that do not invoke § 1983). Contrary to the County's contention, the federal pleading rules "do not countenance dismissal of a complaint for an imperfect statement of the legal theory supporting the claim asserted." *Johnson*, 135 S.Ct. at 346.[12]

CONCLUSION

For all of the foregoing reasons, the Municipal Defendants' Motion to Dismiss should be denied.

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[12] In the alternative, the County requested bifurcation of claims, adopting and incorporating the claims of the Municipal Defendants. *See* Comm'rs Br. at 8. For simplicity, and because multiple briefs included this same request, this argument has been addressed separately in Plaintiffs' Consolidated Response to Defendants' Motions to Bifurcate. To the extent that the Court prefers an opposition to relate to a specific motion, the Plaintiffs' Consolidated Response may be considered part of this Opposition Memorandum, and, following Defendants' practice of incorporation by reference, therefore also adopted and incorporated in the Opposition to the Municipal Defendants' Memorandum as if fully set forth therein.

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2016, I served the foregoing document electronically on the following via the CM/ECF system:

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