IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

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SOUTHERN DISTRICT OF IA

JOHN DAVIDSON,	)	
	)	
Plaintiff,	)	
	)	CIVIL NO. 4-00-CV-10263
vs.	)	
	)	
ANDY COUNTRYMAN, *et al.*,	)	
	)	ORDER
Defendant.	)	

THE COURT HAS BEFORE IT cross motions for summary judgment, filed by plaintiff and the combined defendants on July 13, 2001 and September 17, 2001, respectively. Pursuant to this Court's December 21, 2001 Order, the parties filed statements of undisputed material facts in support of their motions on January 11, 2002. Plaintiff responded to the combined defendants' statement of undisputed material facts on January 25, 2002, and the combined defendants submitted their response on January 25, 2002. In addition, defendant Countryman submitted a separate response on January 28, 2002. The motions are considered fully submitted.

I. BACKGROUND

A. Events Surrounding Plaintiff's Arrest

The following facts either are not in dispute or are viewed in a light most favorable to the party or parties resisting the motion to which a particular fact is relevant.

On May 29, 1998 at approximately 5:30 p.m., plaintiff John Davidson arrived at a bar named "Ebenezer Frogs" in Windsor Heights, Iowa. He consumed several bottles of beer during the next several hours. At approximately 9:30 p.m., plaintiff was involved in an altercation with

several other men.

Shortly thereafter, three Windsor Heights police officers arrived at the bar: Officer Anthony Giampolo, part-time Officer Cheeko Camel and Sargeant Andy Countryman. There was evidence that a fight had occurred in the bar by virtue of overturned tables and chairs, broken glass and broken pool cues. Plaintiff was bleeding from a cut above his eye, which caused the officers to question plaintiff about his involvement in the altercation.

Plaintiff told the officers that he had not been in a fight, but had fallen in the parking lot outside the bar. Plaintiff testified in deposition that he knew he was lying when he made this statement, but that his statement "was my way of telling them I'm not going to cooperate with you after I'd already told them I'm not cooperating with you." Defendants' Mike Rolow and the City of Windsor Heights Second Supplemental Appendix ("Defs.' Second Suppl. App.") at 164. Plaintiff admits he smelled of alcohol during this discussion.

Sargeant Countryman asked plaintiff to walk outside with him to be questioned. The two men then left the bar.[1] During the ensuing discussion, plaintiff told Countryman: "I don't want to file any charges. I'm not telling on anybody. I'm going to go home." Defendants' Joint Supplemental Appendix ("Defs.' Suppl. App.") at 137. Countryman then told plaintiff that if he walked away from Countryman, Countryman would place him under arrest. Despite this warning, plaintiff turned and began to walk away.

Sargeant Countryman placed plaintiff under arrest for public intoxication and disorderly conduct. The record is unclear, however, as to whether Sargeant Countryman placed plaintiff

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[1] There is a dispute as to whether plaintiff left voluntarily, or was forced to do so by Countryman.

under arrest while they were outside, or after they had re-entered Ebenezer Frogs. During his deposition, on direct examination Sargeant Countryman indicated the arrest took place after they were inside the bar. Defs. Suppl. App. at 112. When cross-examined by plaintiff, however, Sargeant Countryman suggested he arrested plaintiff *outside* of the bar when plaintiff started to walk away from him. Defendants' Joint Appendix ("Defs.' App.") at 66. Officer Giampolo, who completed the police report, stated in deposition that the arrest took place inside the bar by a pool table. Defs.' Suppl. App. at 99.[2] In his January 11, 2002 Statement of Facts, plaintiff alleges the arrest took place outside of the bar "when the plaintiff ended the interview with him and started to walk to his home." Plaintiff's January 11, 2002 Statement of Facts at 10 (citing Attachment 6 to Index of Attachments in Support of Plaintiff's Resistance to Summary Judgment).

At some point after his arrest, plaintiff was transported to Broadlawns Hospital, where he refused medical treatment. He was then taken to the Polk County Jail, which is operated by the Polk County Sheriff's Department.

At the Polk County Jail, plaintiff shared a one-person cell with another individual. He was not provided with a pillow, blanket or mattress and he had to lie on the floor. Plaintiff's sister secured his release within a few hours, however, by posting his bond. There is no evidence plaintiff sought medical treatment after his release from the Polk County Jail.

B. Formal Charges and Procedural History in State Court

As a result of the above incident, plaintiff was charged with public intoxication and disorderly conduct, in violation of Iowa Code §§ 123.46(2) and 723.4(4), respectively. The

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[2] The Court notes that although Sargeant Countryman made the arrest, Officer Giampolo filled out the paperwork, and listed his name on the police report as the arresting officer. *See* Defendants' Joint Appendix ("Defs.' App.") at 4, 5, and 58.

Preliminary Complaint filed in the Iowa District Court for Polk County is signed by an assistant Polk County Attorney as approving the charges. Defs.' App. at 50.

Plaintiff subsequently was convicted of disorderly conduct, and fined $100. *Id.* Polk County Magistrate Judge Louise M. Jacobs dismissed the public intoxication charge. *Id.* at 51.

Plaintiff filed an appeal of the disorderly conduct conviction. The appeal was dismissed as untimely. Defs.' App. at 48-49.

C. Miscellaneous Facts Regarding Defendants Rolow, Windsor Heights and Baer

There is no evidence in the record that Mike Rolow, the Chief of Police for Windsor Heights, knew of a pattern of alleged unconstitutional actions by either Sargeant Countryman, Officer Giampolo or Officer Camel prior to the May 29, 1998 incident at Ebenezer Frogs. Likewise, there is no evidence the City of Windsor Heights knew of a pattern of alleged unconstitutional conduct on the part of Chief Rolow, or any of the three officers who investigated the May 29, 1998 incident.

Kimberly Baer is an attorney employed by the City of Windsor Heights who prosecuted plaintiff on behalf of the City on the charges of public intoxication and disorderly conduct. Baer interviewed at least one witness to the May 29, 1998 incident, Mike Ward, prior to defendant's trial, but did not disclose Ward or his proposed testimony to plaintiff prior to trial. Baer likewise produced no other discovery to plaintiff prior to trial, and did not supply plaintiff with a proposed list of witnesses.

D. Present Complaint

Plaintiff filed the present complaint in this Court on May 26, 2000, alleging defendants violated his Fourth and Eighth Amendment rights. Plaintiff also claims defendant Baer

and the City of Windsor Heights engaged in malicious prosecution when Baer allegedly chose to prosecute him for public intoxication without probable cause. Defendants subsequently filed a motion to dismiss, which the Court granted in part on December 19, 2000. Specifically, the Court found that plaintiff could not proceed with his malicious prosecution claim under 42 U.S.C. § 1983, but that plaintiff's state law claim alleging malicious prosecution could stand. *See* December 19, 2000 Order Partially Granting and Partially Denying Motion to Dismiss ("Dismissal Order") at 2-4.

The Court denied the motion to dismiss with regard to plaintiff's Eighth Amendment claim, which the Court construed as against defendant Countryman, on the basis that the claim required consideration of matters outside of the pleadings. *Id.* at 5. The Court also denied the motion to dismiss as against defendants Rolow and the City of Windsor Heights for allegedly failing to properly train and supervise the officers involved in plaintiff's arrest. *Id.* at 6-7.

On October 26, 2001, plaintiff filed his First Amended Complaint, ("Amended Complaint") in which he appears to allege several new charges. Two of these charges, excessive force and sexually discriminatory arrest, are directed toward defendant Countryman. *See* Amended Complaint ¶ 1. The majority of plaintiff's remaining new claims are against defendant Baer, including that she wrongfully blocked plaintiff's access to the courts, and failed to make appropriate pre-trial disclosures. Amended Complaint ¶ 3.

The parties each seek summary judgment in their favor on all claims.

II. APPLICABLE LAW AND DISCUSSION

A. Summary Judgment Standard

Summary judgment is properly granted when the record, viewed in the light most

favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994). The moving party must establish its right to judgment with such clarity there is no room for controversy. *Jewson v. Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

B. Excessive Force Prior and During Arrest

Paragraph one of plaintiff's Amended Complaint alleges in relevant part that:

> Countryman used excessive force during this arrest by using mental duress to intimidate the plaintiff and handcuffing the plaintiff, even though the plaintiff had been beaten severely and it was clearly apparent to Countryman that the handcuffs were aggravating his injuries from the beating. Defendant Countryman also shoved the plaintiff, knowing full well that this would aggravate the plaintiff's injuries.

First Amended Complaint ¶ 1. Claims of excessive force brought by arrestees or pre-trial detainees generally are evaluated under an "objective reasonableness" standard. *Andrews v. Neer*, 253 F.3d 1052, 1060 (8th Cir 2001) (citing *Graham v. Connor*, 490 U.S. 386, 388 (1989)). Nevertheless, "[t]he right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercions," and therefore, "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the fourth amendment." *Graham*, 490

U.S. at 396. Following *Graham*, the Eighth Circuit held in *Curd v. City Court of Judsonia, Arkansas*, 141 F.3d 839, 841 (8th Cir. 1998) that where an arrestee failed to demonstrate actual injury, an officer's act in seizing the plaintiff's arm and turning her body was a *de minimus* use of force that was not objectively unreasonable--even if the force was not needed to make the arrest.

Similarly, in the present case, the Court finds plaintiff's allegations that he was "shoved" unnecessarily during the arrest process, as well as handcuffed after having been in a brawl, do not rise to the level of objective unreasonableness as a matter of law.[3] Summary judgment is granted in favor of defendant Countryman, as well as defendants Rolow and the City of Windsor Heights on the charge of excessive force.[4]

C. Sexually Discriminatory Arrest

In addition to the excessive force claim, paragraph one of the Amended Complaint alleges without further explanation that plaintiff's arrest "was also selective and sexually discriminatory." Amended Complaint ¶ 1. "The Equal Protection Clause 'prohibits government officials from selectively applying the law in a discriminatory way.'" *Brandt v. Davis*, 191 F.3d 887, 893 (8th Cir. 1999) (quoting *Central Airlines, Inc. v. United States*, 138 F.3d 333, 334-35 (8th Cir. 1998)). Absent specific allegations to show a *similarly situated* individual was treated differently than plaintiff, summary judgment is granted in favor of defendants on this claim.

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[3] Although plaintiff claims to have been "beaten severely," during the altercation with other bar patrons, the record reveals he declined initial treatment at Broadlawns, *see* Defs. App. at 30, 31, 52, did not request medical treatment while in the jail, *see id.* at 34, and did not seek medical treatment after leaving the jail. *Id.* at 37. These facts all mitigate against plaintiff's claim he was suffering from serious injuries at the time of his arrest.

[4] Likewise, because the Court finds defendant Countryman's conduct during plaintiff's arrest did not violate plaintiff's constitutional rights, it follows that neither defendant Rolow nor the City of Windsor Heights can be held liable based on the same allegations.

D. Eighth Amendment Violations Following Arrest

Plaintiff next alleges what appears to be a claim for cruel and unusual punishment under the Eighth Amendment based on his treatment at the Polk County Jail. Specifically, plaintiff alleges he was denied medical treatment at the jail, was confined in a cell with one bunk and another prisoner, and forced to lay on the concrete floor with painful injuries. Amended Complaint ¶ 2.

As noted by defendants in their joint brief, under Iowa law, county sheriffs maintain control over county jails, and maintain custody of detainees housed in their jails. IOWA CODE §§ 356.1-356.2. In fact, plaintiff conceded in his deposition that he understood the Polk County Sheriff's Office operates the Polk County Jail. Defs.' App. at 33-34. Accordingly, since the charges made by plaintiff in support of his post-arrest Eighth Amendment claim all relate to plaintiff's treatment while at the Polk County Jail, his claim as against the present defendants–none of whom have any control over the Jail–must be dismissed.

E. Improper Arrest

1. Lack of Probable Cause

Plaintiff also alleges in paragraphs one and two of the Amended Complaint that Sargeant Countryman violated his Fourth Amendment rights by arresting plaintiff without probable cause. Amended Complaint ¶ 1.

Defendants seek summary judgment on the grounds of qualified immunity, which will protect Countryman, Rolow and the City of Windsor Heights from liability on this claim if it is shown Countryman arrested plaintiff "under the mistaken belief that [he had] probable cause to do so." *Smithson v. Aldrich*, 235 F.3d 1058, 1062 (8th Cir. 2000). "Probable cause exists if the

totality of facts based on reasonably trustworthy information would justify a prudent person in believing the individual arrested had committed . . an offense at the time of the arrest." *Id.* (internal citations omitted). Furthermore, "'[t]he issue for immunity purposes is not probable cause *in fact* but arguable probable cause.'" *Id.* (quoting *Habiger v. City of Fargo*, 80 F.3d 289, 295 (8th Cir. 1996)).

The undisputed facts reveal that between 5:30 and 9:30 on the on the night of his arrest, plaintiff admits to "probably" having drunk between eight and ten bottles of beer. Defs.' App. at 22. At approximately 9:30 p.m., plaintiff was involved in an altercation with several other patrons. *Id.*

When the Windsor Heights police officers arrived, they noticed evidence of an altercation or fight: overturned tables and chairs, broken glass and broken pool cues. *Id.* at 54-55, 57. Plaintiff was bleeding from a cut above his eye, *see id.* at 23 which suggested he was involved in some way in the incident. Despite his obvious involvement in the incident, plaintiff refused to give the officers any information regarding what had happened. *Id.* at 25. Based on these facts, the Court finds a prudent person would be justified in concluding plaintiff had committed the crime of disorderly conduct, which prohibits the unauthorized disturbance of "any lawful assembly or meeting or persons by conduct intended to disrupt the meeting or assembly." IOWA CODE § 723.4.

Once probable cause existed to arrest plaintiff on the disorderly conduct charge, whether probable cause existed for the public intoxication charge became immaterial. *See Smithson*, 235 F.3d at 1062 ("[A]n officer need only demonstrate probable cause to carry out an arrest for any offense arising out of an incident. That the officer may have had a mistaken belief that she had

probable cause to arrest for other offenses is immaterial so long as probable cause existed for the one offense.") (citing *Arnott v. Mataya*, 995 F.2d 121, 124 n. 3 (8th Cir. 1993)). Summary judgment is granted in favor of Sargeant Countryman, Chief Rolow and the City of Windsor Heights on plaintiff's Fourth Amendment False Arrest claim.

2. Arrest Versus Citation

Plaintiff further claims Countryman violated his [presumably Fourth Amendment] rights by choosing to arrest him, rather than to issue a citation. Amended Complaint ¶ 2; *see also* IOWA CODE § 805.1(1) (authorizing law enforcement officers to issue a citation in lieu of an arrest for offenses other than those "for which the individual would not be eligible for bail under section 811.1 or a violation of section 708.11"). Whether to arrest an individual or issue a citation is left to discretion of the individual officer. *See State v. Adams*, 554 N.W.2d 686, 690 (Iowa 1996). Furthermore, "whether a person appears to be under the influence of intoxicants or drugs" is expressly enumerated in the statute as a factor to be considered in making this determination. IOWA CODE § 805.1(3)(b). Because plaintiff admits to having consumed eight to ten beers during the four hours prior to his arrest, and was demonstrably uncooperative with Sargeant Countryman's attempts to investigate the incident, the Court finds Sargeant Countryman did not abuse his discretion in deciding to arrest plaintiff. Summary judgment is granted in favor of defendants on this aspect of plaintiff's Fourth Amendment claim.

F. Malicious Prosecution

Paragraph three of plaintiff's Amended Complaint alleges in part that defendant

Baer engaged in malicious prosecution.[5] To establish this claim under Iowa law, a party must prove:

> (1) a previous prosecution; (2) instigation of that prosecution by the defendant; (3) termination of the prosecution by acquittal or discharge of the plaintiff; (4) want of probable cause; (5) malice on the part of the defendant for bringing the prosecution; and (6) damage to the plaintiff.

Winckel v. Von Maur, Inc., No. 00-1272, 2001 WL 1658809 (Iowa Ct. App. Dec. 28, 2001). In the present case, the Court finds as a matter of law plaintiff is unable to establish the element of malice. Iowa courts have held that in cases in which malicious prosecution has been alleged against a public official, such as defendant Baer, the element of malice may not be inferred from the lack of probable cause. Rather, a plaintiff must show that "defendant's instigation of criminal proceedings against plaintiff was primarily inspired by ill-will, hatred or other wrongful motives." *Yoch v. City of Cedar Rapids*, 353 N W.2d 95, 102 (Iowa Ct. App. 1984). Nevertheless, when asked during his deposition to explain the basis for his malicious prosecution charge against Baer, plaintiff contended simply that because Baer "knew" he was arrested inside an establishment with a valid liquor license, Baer's decision to prosecute plaintiff for public intoxication was evidence of malice.[6] Defs. App. at 46-47. Even assuming plaintiff's statutory interpretation is correct, the fact

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[5] Defendants argue an assistant county attorney approved the charges on the Preliminary Complaint, thereby relieving Windsor Heights, its police officers or city attorney from liability stemming from the prosecution. *See* Defs.' App. at 50-51. Because plaintiff disputes when the City Attorney actually signed the Preliminary Complaint, however, and Baer appeared on behalf of the City at trial, the Court has addressed the claim on its merits.

[6] Iowa Code § 123.46(2) provides:

> A person shall not use or consume alcoholic liquor, wine, or beer upon the public streets or highways. A person shall not use or consume alcoholic liquor in any public place except premises covered by a liquor control license. A person shall not possess or consume alcoholic liquors,

Baer prosecuted plaintiff "knowing" he could not be convicted of public intoxication falls far short of actual evidence of ill-will, hatred or other wrongful motive. Summary judgment is appropriately granted in favor of defendant Baer on plaintiff's claim of malicious prosecution. *Yoch*, 353 N.W.2d at 102.[7]

G. Blocking Access to the Courts and Miscellaneous Charges Against Baer

Paragraph three of plaintiff's Amended Complaint also alleges defendant Baer blocked plaintiff's access to the courts, blocked plaintiff's "right to compulsory process to obtain witnesses in his favor," blocked plaintiff's right "to be informed of the nature and cause of the accusation against him," and "denied him his right to be confronted with the witnesses against him." Amended Complaint ¶ 3. The Court will address each of these allegations in turn.

Initially, the Court notes plaintiff has failed to produce any evidence that Baer "blocked his access to the courts." As noted by Baer, plaintiff was present at the criminal trial, and

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> wines or beer on public school property or while attending a public or private school-related function. A person shall not be intoxicated or simulate intoxication in a public place. A person violating this subsection is guilty of a simple misdemeanor.

Plaintiff asserts in his October 10, 2001 affidavit that Magistrate Judge Jacobs agreed that Ebenezer Frogs was not a "public place," and therefore, that assuming plaintiff was arrested *inside* the establishment, he could not have violated the statute. As noted by defendants, however, the language "[a] person shall not be intoxicated or simulate intoxication in a public place" likely applies to bars such as Ebenezer Frogs that are open to the public. *See State v. Lake*, 476 N.W.2d 55, 56 (Iowa 1991) ("The phrase 'public place' is defined as 'any place, building, or conveyance to which the public has or is permitted access.'") (citing IOWA CODE § 123.3(23) [now 123.3(27)]). Contrary to plaintiff's argument, it is equally likely the state magistrate judge dismissed the public intoxication charge not because she found plaintiff to have been arrested in a private place, but because there was a lack of forensic evidence to support the charge.

[7] The Court need not determine whether in fact probable cause existed on the public intoxication charge.

participated in his defense. *See* Kimberly Baer's Supplemental Appendix at 20-21. Absent any genuine issue of material fact as to whether Baer "blocked plaintiff's access to the courts," this claim must be dismissed.

Likewise, with regard to plaintiff's "compulsory right to obtain witnesses in his favor,"[8] the Court notes there is no provision under the Iowa Rules of Criminal Procedure that requires disclosure of witnesses prior to trial on simple misdemeanors. *But see* IOWA R. CRIM. P. 5(3) (requiring disclosure on indictable crimes). Because disorderly conduct and public intoxication are simple misdemeanors under Iowa law, *see* IOWA CODE §§ 123.46 and 723.4, defendant Baer was not obligated to make any pretrial disclosures to plaintiff. *See also Jones v. Iowa Dist. Court for Wapello Cty.*, 620 N.W.2d 242, 244 (Iowa 2000). In *Jones*, the Iowa Supreme Court found that Iowa Rule of Criminal Procecure 12(1), which allows defendants to depose a prosecution witness for indictable offenses, was *not applicable* to simple misdemeanors. *Id.* at 244. As explained by the court, the rules governing simple misdemeanors "are intended to facilitate disposition of criminal charges with as much speed and as little cost as can be accomplished consistent with a fair trial." *Id.*

Although the Iowa Supreme Court has not expressly determined whether Rule 5(3) is applicable to simple misdemeanor prosecutions, this Court believes that it would follow the *Jones* decision and find that imposing a duty of pretrial disclosures would cause undue delays in the prosecution process. Summary judgment is granted in favor of Baer on plaintiff's allegation she interfered with his "compulsory right to obtain witnesses in his favor."

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[8] Although not explained in the Amended Complaint, this charge appears to stem from plaintiff's charge that Baer failed to supply him with discovery or a list of witnesses prior to trial. Baer's Suppl. App. at 46.

Plaintiff next argues defendant Baer "blocked the plaintiff's right to be informed of the nature and cause of the accusation against him," "denied him his right to be confronted with the witnesses against him," and "denied the plaintiff his right to due process in a criminal proceeding against him." Amended Complaint ¶ 3. With regard to plaintiff's argument Baer "denied him his right to confront witnesses against him," the Court notes plaintiff admits to having had the opportunity to cross-examine government witnesses at trial. *See* Plaintiff's December 3, 2001 Resistance to Baer's Supplement to Defendants' Combined Brief, at 8. The remaining arguments are duplicative of plaintiff's claims that Baer blocked his access to the courts, and blocked plaintiff's "right to compulsory process to obtain witnesses in his favor." Summary judgment is granted in favor of defendant Baer on all charges enumerated in paragraph three of plaintiff's Amended Complaint.[9]

H. Miscellaneous Charges Against Mike Rolow and City of Windsor Heights

Paragraphs four and six of plaintiff's Amended Complaint state causes of action against the City of Windsor Heights and Chief Rolow for failing to properly train and supervise their suboordinates. Because the Court previously has found a lack of evidence to support constitutional violations on the part of Countryman, Camel or Giampolo, summary judgment is granted in favor of Rolow and the City of Windsor Heights on plaintiff's claim of supervisor liability. *See, e.g., Otey v. Marshall*, 121 F.3d 1150, 1155 (8th Cir. 1997) (claim of supervisor liability based on subordinates' unconstitutional acts depends on showing that supervisor

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[9] Although it chose to address plaintiff's charges on the merits, the Court finds in the alternative that, as a matter of law, Kimberly Baer never exceeded her role as prosecutor and as such, is entitled to absolute immunity on all charges against her relating to her actions taken in preparation for plaintiff's trial. *See Kalina v. Fletcher*, 522 U.S. 118, 125 (1997).

"[r]eceived notice of a pattern of unconstitutional acts committed by subordinates").

In addition, plaintiff claims in paragraph four that Chief Rolow "manufactured evidence" against plaintiff and denied plaintiff "equal protection of the laws" by refusing to take a complaint from plaintiff. In support of this former charge, plaintiff alleges in his January 11, 2002 Statement of Facts that a narrative report written by Rolow summarizing witness Mike Ward's account of the May 29, 1998 incident differs from Ward's testimony at trial.[10] Viewing the evidence in a light most favorable to plaintiff, this fact nevertheless does not create a triable issue on plaintiff's claim of manufactured evidence. At most, it suggests a witness may have presented two different versions of the event at issue.

Plaintiff's "equal protection" claim appears to stem from an August 18, 1998 letter plaintiff wrote to Chief Rolow claiming that "Sargeants Countryman and Huygen" refused to file a criminal complaint against the individuals he claimed attacked him on May 29, 1998. *See* Defs. Second Suppl. App. at 174. On August 25, 1998, however, Chief Rolow responded to plaintiff's letter indicating he would instruct his staff to accept plaintiff's complaint as long as it was timely, but cautioned plaintiff that in doing so, he would risk incurring a "False Report or Obstructing charge." *Id.* at 175-76. The Court fails to see an alleged equal protection violation based on these facts, and there are no other facts in plaintiff's January 11, 2002 Statement of Facts to support this claim. *See* Local Rule 56.1(b)(3) (requiring parties resisting summary judgment to set forth "additional material facts that the resisting party contends preclude summary judgment"). Absent a genuine issue of material fact, the Court finds plaintiff's "equal protection" claim against

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[10] Plaintiff claims that Mike Rolow falsely reported that plaintiff called Mike Ward a "nigger," which allegedly led to, or exacerbated the May 29, 1998 altercation. *See* Fact 34 of Plaintiff's January 11, 2002 Statement of Facts.

Mike Rolow is appropriately dismissed.

H. Plaintiff's Claims against Defendant Huygen

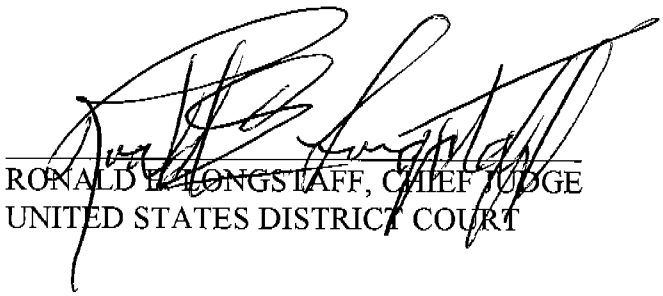
Paragraph five of plaintiff's Amended Complaint alleges various charges against "defendant Huygen," who plaintiff alleges to be employed by Windsor Heights as a detective. Defendant Huygen has not been served in compliance with Rule 4 of the Federal Rules of Civil Procedure, and accordingly, is not a proper defendant to the current action. Even if Sargeant Huygen were a proper defendant, however, for the same reasons as set forth in the discussion regarding Chief Rolow, above, the Court finds plaintiff has failed to generate a material issue of fact as to whether Sargeant Huygen violated plaintiff's constitutional rights. Paragraph five of plaintiff's Amended Complaint is dismissed.

III. CONCLUSION

For the reasons outlined above, defendants' various motions for summary judgment are granted on all counts. Plaintiff's motion for summary judgment is denied. The Clerk of Court is directed to enter judgment in favor of defendants and against plaintiff.

IT IS ORDERED.

Dated this 4th day of March, 2002.



RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT