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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

JAMES R. WALBERT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 10-1234-EFM-GLR
	)	
WICHITA POLICE DEPARTMENT,	)	
	)	
Defendant.	)	
_____	)	

**DEFENDANT WICHITA POLICE DEPARTMENT'S  
MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS**

COMES NOW, Defendant Wichita Police Department and in support of its Motion to Dismiss submits the following:

**NATURE OF THE CASE**

Plaintiff brings this action pursuant to 42 U.S.C. §1985 and §1986 against the Wichita Police Department alleging that his constitutional rights were violated by the Wichita Police Department in their investigation of plaintiff in Case 08 DM 8647. Plaintiff further asserts state law claims of negligence, assault, battery and intentional infliction of emotional distress.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), this action should be dismissed as plaintiff's complaint fails to assert a cause of action against the "Wichita Police Department."

Plaintiff's state law claims are barred by his failure to comply with K.S.A. 12-105b. Lastly, plaintiff's complaint fails to state a cause of action pursuant to the Federal Tort Claims Act, 28 U.S.C. 2671, *et seq.*, or 42 U.S.C. §1985(3) or 42 U.S.C. §1986.

### **ARGUMENTS AND AUTHORITIES**

#### **I. THE WICHITA POLICE DEPARTMENT IS NOT A LEGAL ENTITY SUBJECT TO SUIT.**

##### **STANDARD FOR MOTIONS TO DISMISS**

A court may dismiss a complaint for failure to state a claim upon which relief can be granted under any set of facts that could be proven consistent with the allegations *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the Complaint is true. *Mayer v. Mylod*, 988 F.2d 635, 640 (6<sup>th</sup> Cir. 1993).

A complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) if it does not plead enough facts to state a claim to relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L.Ed. 929 (2007). A plaintiff's obligation is to provide the grounds of his entitlement to relief which requires more than labels and conclusions. *Id.* at 1974

The Wichita Police Department is entitled to dismissal because it is only a subunit of the City of Wichita and not an entity which is itself subject to suit.

The capacity to be sued is governed by Federal Rule of Civil Procedure 17(b) which provides that the capacity to be sued is determined by state law. Accordingly, Kansas law governs.

In *Hopkins v. State*, 237 Kan. 601, 702 P.2d 311 (1985), the Kansas Supreme Court recognized a well-established principle that subordinate governmental agencies do not have the capacity to sue or be sued in the absence of a statute providing such capacity. Based on that principle, the court affirmed the dismissal of the Kansas Highway Patrol as a defendant. *Id.* at 605–607.

That same principle was applied to a municipal police department in *Whayne v. State of Kansas*, 980 F. Supp. 387 (D. Kan. 1997). In that federal case, the court held that the Topeka Police Department is “only a subunit of city government and, therefore, is not a governmental entity subject to suit.” *Id.* at 391 (citing cases). See also: *Fugate v. Unified Government of Wyandotte County*, 161 F. Supp. 2d 1261, 1266 (D. Kan. 2001) (Sheriff’s department is merely an agency of the county and is not itself capable of being sued.)

In this case, the Wichita Police Department is likewise merely a subunit of the City. No state statute exists giving the Wichita Police Department the capacity to sue or be sued. Therefore, the Wichita Police Department is not an entity, which is itself subject to suit, and plaintiff’s complaint must be dismissed.

**II. PLAINTIFF’S STATE LAW CLAIMS, MUST BE DISMISSED FOR HIS FAILURE TO COMPLY WITH K.S.A. 12-105b.**

K.S.A. 12-105b requires that a municipality be given proper written notice of claims asserted against it, prior to a legal action being filed against the municipality.

The purpose of the notice requirement is to sufficiently advise the municipality of the time and place of the injury and give the City an opportunity to ascertain the character and extent

of the injury sustained. *Tucking v. Board of Commissioners of Jefferson Co.*, 14 Kan. App. 2d 442, 796 P.2d 1055, 1059 (1990).

The filing of a proper notice under K.S.A. 12-105b is a mandatory condition precedent to the filing of a tort action against a municipality. *Miller v. Brungardt*, 916 F. Supp. 1096, 1098 (D. Kan. 1996). Section 12-105b(d) applies not only to claims against a municipality, but also to claims against municipal employees acting within the scope of their employment. *Midwestern Motor Coach Co. v. Blattner*, 2003 WL 21105083 (D. Kan. 2003).

In this case, the plaintiff did not file a claim with the City of Wichita. (See Exhibit A, Affidavit of Karen Sublett) Because plaintiff failed to meet the requirements of K.S.A. 12-105b, all of his state law claims must be dismissed. See: *Cowdrey v. City of Eastborough*, 730 F.2d 1376 (10<sup>th</sup> Cir. 1984)

### **III. PLAINTIFF'S CLAIMS PURSUANT TO 42 U.S.C. §1985 FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.**

The four elements of a claim under 42 U.S.C. §1985 are: (1) a conspiracy; (2) to deprive plaintiff of equal protection or equal privileges and immunities; (3) an act in furtherance of the conspiracy; and (4) an injury or deprivation resulting therefrom. *Murray v. City of Sapulpa*, 45 F.3d 1417, 1423 (10<sup>th</sup> Cir. 1995); and *Griffin v. Breckenridge*, 403 U.S. 88, 102-03, 91 S.Ct. 1790 29 L.Ed.2d 338 (1971).

To state a claim pursuant to 42 U.S.C. §1985, plaintiff must allege a racial or class-based invidious discriminatory animus against the defendant. See: *Tilton v. Richardson*, 6 F.3d 683, 686 (10<sup>th</sup> Cir. 1993) and *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1429-30 (8<sup>th</sup> Cir. 1986). The intended victim of the conspiracy must be a victim not because of any personal malice the contributors have toward him, but because of his membership in or

affiliation with a particular protected class. *United Brotherhood of Carpenters and Joiners v. Scott*, 463 U.S. 825, 850, 103 S.Ct. 3352 (1983)

Plaintiff has failed to assert that any actions of Defendant regarding its investigation of plaintiff were based on his membership in or affiliation with a particular protected class.

Plaintiff has also failed to establish the existence of a conspiracy. An allegation of a conspiracy must provide some factual basis to support the existence of the elements of a conspiracy: agreement and concerted action. *Crabtree By & Through Crabtree v. Muchmore*, 904 F.2d 1475, 1476 (10<sup>th</sup> Cir. 1990); *Sooner Products Co. v. McBride*, 708 F.2d 510, 512 (10<sup>th</sup> Cir. 1983). Mere conclusory allegations of a conspiracy with no supporting factual averments are insufficient to state a claim under Section 1985(3). See: *Durre v. Dempsey*, 869 F.2d 543, 545 (10<sup>th</sup> Cir. 1989) and *Sooner Products Co. v. McBride*, 708 F.2d 510, 512 (10<sup>th</sup> Cir. 1983). Plaintiff's complaint has no factual allegations which allege any conspiracy on behalf of this defendant to violate his constitutional rights.

Plaintiff's claims of conspiracy, pursuant to 42 U.S.C. §1985, fail and must be dismissed by the Court.

#### **IV. PLAINTIFF'S CLAIMS PURSUANT TO 42 U.S.C. §1986 FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.**

42 U.S.C. §1986 imposes liability upon "[e]very person who, having knowledge that any of the wrongs conspired to be done and mentioned in [Section 1985(3)] are about to be committed and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so." 42 U.S.C. §1986

Section 1986 imposes liability on any person who refuses to take positive action where the circumstances demand to prevent acts which give rise to a Section 1985(3) conspiracy cause

of action. *Drake v. City of Ft. Collins*, 927 F.2d 1156, 1163 (10<sup>th</sup> Cir. 1991). The Section 1986 claim fails if the Section 1985(3) claim is insufficient. *Id.*

Because plaintiff's complaint fails to establish a conspiracy to violate his constitutional rights pursuant to 42 U.S.C. §1985(3), plaintiff's complaint likewise fails to state a claim pursuant to 42 U.S.C. §1986.

**V. THE WICHITA POLICE DEPARTMENT IS NOT SUBJECT TO SUIT UNDER THE FEDERAL TORT CLAIMS ACT.**

28 U.S.C. §2674 provides that the United States is subject to liability in the same manner and to the same extent as a private individual under like circumstances.

28 U.S.C. §2671 defines those federal agencies which are subject to the provisions of the Act. Defendant is a subunit of the City of Wichita. It is not a federal agency and its employees are not employees of a federal agency.

Because the Wichita Police Department is not a federal agency, plaintiff's claims asserted pursuant to the Federal Tort Claims Act fail as a matter of matter of law and should be dismissed. See: e.g. *Allen v. City of Kansas City*, 660 F. Supp. 489 (1987).

**CONCLUSION**

For the above reasons, defendant requests that plaintiff's claims against it, be dismissed.

Respectfully submitted,

/s/ Sharon L. Dickgrafe

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 20<sup>th</sup> day of August, 2010, I presented the foregoing to the clerk of the court for filing and uploading to the CM/ECF system, which will send a notice of electronic filing to the following:

Any party or counsel who has entered an appearance,  
and that I served a true and correct copy of the above and foregoing on James R. Walbert by placing the same in the United States mail, postage prepaid and properly addressed to James R. Walbert, 330 S. Tyler, #605, Wichita, Kansas 67209.

/s/ Sharon L. Dickgrafe

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