

## Lowe v. Clift

United States District Court for the Eastern District of Tennessee

October 31, 2006, Decided; October 31, 2006, Filed

Case No. 1:06-cv-76

### Reporter

2006 U.S. Dist. LEXIS 112895 \*

ROBERT W. LOWE, II, Plaintiff, v. OFFICER JIMMY CLIFT, et al., Defendants.

### Core Terms

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allegations, motion to dismiss, individual capacity, official capacity, rights, absolute immunity, cause of action, adult bookstore, state law claim, adverse action, deprivation, willful, fail to state a claim, conspiracies, reckless disregard, civil conspiracy, police report, patronizing, retaliation, malicious, privacy, false light invasion, intrusion, seclusion, libel

**Counsel:** [\*1] For Robert W. Lowe, II, Plaintiff: Charles P Dupree, LEAD ATTORNEY, Charles P. Dupree, Attorney at Law, Chattanooga, TN USA.

For Officer Jimmy Clift, individually and as members and employees of the Hamilton County, TN Sheriff's Dept, William Johnson, individually and as members and employees of the Hamilton County, TN Sheriff's Dept., Hamilton County, Tennessee, Sheriff John Cupp, Defendants: R Dee Hobbs, LEAD ATTORNEY, Hamilton County Attorneys Office, Chattanooga, TN USA.

For **Mary Sullivan Moore**, individually and as an Asst. District Atty for Ham. Co., TN, Defendant: Sarah Henry Akin, LEAD ATTORNEY, FedEx Corporation, Memphis, TN USA.

**Judges:** HARRY S. MATTICE, JR., UNITED STATES DISTRICT JUDGE.

**Opinion by:** HARRY S. MATTICE, JR.

### Opinion

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### MEMORANDUM AND ORDER

Plaintiff Robert W. Lowe, II, brings this action against Defendants Jimmy Clift, William Johnson, Hamilton County, **Mary Sullivan Moore**, and John Cupp, alleging causes of action for the violation of his rights under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution pursuant to 42 U.S.C. §§ 1983 and 1985, and for negligence *per se*, libel, intrusion upon seclusion, public disclosure of a private fact, and false light invasion of privacy.

Before the Court is Defendant Moore's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

For the reasons [\*2] explained below, Defendant Moore's Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**.

### I. STANDARD

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint that fails to state a claim upon which relief can be granted. The purpose of Rule 12(b)(6) is to permit a defendant to test whether, as a matter of law, the plaintiff is entitled to relief even if everything alleged in the complaint is true. *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). A complaint should not be dismissed for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Arrow v. Fed. Reserve Bank*, 358 F.3d 392, 393 (6th Cir. 2004). The complaint must contain either "direct or inferential allegations respecting all the material elements to sustain a recovery . . . ." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988) (internal quotations and citations omitted). The Court must determine not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support his claims. *Scheuer*

*v. Rhodes*, 416 U.S. 232, 236 (1974). In making this determination, the Court must construe the complaint in the light most favorable to plaintiff and accept as true all well-pleaded factual allegations. *Arrow*, 358 F.3d at 393; *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999). The Court need not accept as true mere legal conclusions or unwarranted factual inferences. *Id.*

## II. FACTS

Viewing [\*3] the complaint in the light most favorable to Plaintiff and accepting as true all well-pleaded factual allegations, the relevant facts are as follows.

Plaintiff Robert Lowe is a Case Manager with the State of Tennessee Department of Children's Services ("DCS"). (Court Doc. No. 1-1, Compl. ¶ II.) On March 16, 2005, Lowe and three other DCS employees went to Rossville News, an adult bookstore in Chattanooga, Tennessee, on their lunch break. (*Id.*) At the same time, Defendant Jimmy Clift, an officer with the Hamilton County Sheriff's Department, entered Rossville News as a part of an investigation. (*Id.* ¶ III.) Clift recognized Lowe from prior matters involving DCS. (*Id.*) Clift then called Defendant **Mary Sullivan Moore**, an Assistant District Attorney General, and told her that Lowe was present in Rossville News. (*Id.*) Moore told Clift to make contact with Lowe, and as Lowe and his co-workers left the store, Clift said hello to Lowe. (*Id.*) Lowe responded, and then he and his co-workers left the store and returned to work. (*Id.*)

Afterward, Clift made a formal police report concerning Lowe's presence at Rossville News and assigned a complaint number to the report. (*Id.* ¶ IV.) Clift faxed the [\*4] police report to Moore. (*Id.*) After receiving the police report, Moore contacted Lowe's supervisor at DCS and told the supervisor that Clift had seen Lowe at Rossville News during an investigation. (*Id.*) Moore faxed the police report to the supervisor. (*Id.*)

On the day after Moore contacted the supervisor, Lowe was written up and restricted to his office. (*Id.* ¶ V.) Lowe alleges that his supervisor was searching for a reason to place him on leave without pay. (*Id.*) Lowe filed a formal complaint with the Sheriff's Department regarding the actions of Clift, Moore, and the supervisor. (*Id.*) The written response to the complaint, which was written by William Johnson and adopted by Sheriff John Cupp, stated that every action taken by the Sheriff's Department was correct and that it was "improper" for Lowe to have been at Rossville News. (*Id.*) Lowe alleges that the Sheriff's Department equated visiting an

adult bookstore with being a budding pedophile. (*Id.*)

No allegations of impropriety have ever been made against Lowe in his job performance, and there is no DCS policy against employees visiting adult bookstores. (*Id.* ¶ IV.)

## III. ANALYSIS

Defendant **Mary Sullivan Moore**, who is sued in her individual [\*5] and official capacities, seeks the dismissal of Plaintiff Lowe's claims against her on several grounds.

### A. Plaintiff's Claims Against Moore in Her Official Capacity

#### 1. Section 1983 and 1985 Claims

Defendant Moore seeks the dismissal of Plaintiff's § 1983 and § 1985 claims against her in her official capacity on the basis that she is not a "person" capable of being sued under § 1983 and § 1985.

Section 1983 states, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. "Section 1983 makes liable only those who, while acting under color of state law, deprive another of a right secured by the Constitution or federal law." *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 636 (6th Cir. 2005).

"[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against [\*6] the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); see also *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985); *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994) ("A suit against an individual in his official capacity is the equivalent of a suit against the governmental entity."). Thus, Plaintiff's official-capacity claims against Moore, an Assistant District Attorney General and, therefore, an

officer of the state, are actually claims against the state of Tennessee. The United States Supreme Court has previously held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will*, 491 U.S. at 71. Because states and state officials are not proper defendants under § 1983, Plaintiff fails as a matter of law to state a claim under § 1983 against Defendant Moore in her official capacity.

Similarly, states and state officials acting in their official capacities also are not "persons" under § 1985. *Quern v. Jordan*, 440 U.S. 332, 339-42 (1979); *Disney v. Tenn. Dep't of Safety*, No. 3:06-CV-00048, 2006 WL 1469453, at \*1 (E.D. Tenn. May 25, 2006). Therefore, as a matter of law, Plaintiff fails to state a claim under § 1985 against Defendant Moore in her official capacity.

Accordingly, Defendant Moore's Motion to Dismiss is **GRANTED** with respect to Plaintiff's § 1983 and § 1985 claims against her in her official capacity, and such claims are **DISMISSED WITH PREJUDICE**.

## 2. State Law Claims

Defendant Moore seeks the dismissal of Plaintiff's [\*7] state law claims against her in her official capacity because such claims are barred by the doctrine of sovereign immunity.

As explained above, Plaintiff's claims against Defendant Moore in her official capacity are actually claims against the state of Tennessee. See *supra* III.A.1.

"It is a well-settled principle of constitutional and statutory law . . . that 'the State of Tennessee, as a sovereign, is immune from suit except as it consents to be sued.'" *Stewart v. Tennessee*, 33 S.W.3d 785, 790 (Tenn. 2000). The Tennessee Constitution provides that suits may be brought against the state in such a manner as the Tennessee legislature may permit. *Id.*; see Tenn. Const. art. I, § 17. With the creation of the Tennessee Claims Commission, the Tennessee legislature permitted certain claims—those specifically listed in Tenn. Code Ann. § 9-8-307(a)—to be brought against the state, *Stewart*, 33 S.W.3d at 790, but only before the Claims Commission, which has exclusive jurisdiction, § 9-8-307(a)(1). The Tennessee legislature specifically provided that "[n]o language contained in this chapter is intended to be construed as a waiver of the immunity of the state of Tennessee from suit in federal courts guaranteed by the eleventh amendment to the Constitution of the United States." § 9-8-307(f). Thus, while the state of Tennessee has consented to be sued for certain causes of action before the Claims

Commission, the [\*8] state has not consented to be sued for any causes of action in federal courts. Therefore, as a matter of law, Plaintiff's state law claims against Defendant Moore in her official capacity, which are actually claims against the state of Tennessee, must fail due to the state's sovereign immunity.

Accordingly, Defendant Moore's Motion to Dismiss is **GRANTED** with respect to Plaintiff's state law claims against her in her official capacity, and such claims are **DISMISSED WITH PREJUDICE**.

## B. Plaintiff's Claims Against Moore in Her Individual Capacity

### 1. Section 1983 and 1985 Claims

Defendant Moore seeks the dismissal of Plaintiff's claims under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution pursuant to § 1983 and § 1985 on the basis that Plaintiff fails to state a claim for the violation of those rights by Moore.

#### a. First Amendment

Defendant Moore seeks the dismissal of Plaintiff's First Amendment claims on several grounds.

First, Defendant Moore argues that, to the extent Plaintiff's claim is based on a violation of Plaintiff's First Amendment right to patronize an adult bookstore, Plaintiff's claim must be dismissed, as Plaintiff was not prohibited from patronizing the adult bookstore. As noted by Defendant Moore, Plaintiff's complaint alleges that Plaintiff did, in fact, visit the bookstore. (Compl. [\*9] ¶¶ II-III.) Thus, Plaintiff's complaint does not state a claim under the First Amendment for any direct violation of Plaintiff's right to do so. Accordingly, to the extent Plaintiff's § 1983 claim under the First Amendment against Moore in her individual capacity is based on a violation of Plaintiff's right to patronize an adult bookstore, Defendant Moore's Motion to Dismiss must be **GRANTED**, and such claim must be **DISMISSED WITH PREJUDICE**.

Second, Defendant Moore argues that, to the extent Plaintiff's claim against her is based on retaliation for the exercise of his First Amendment rights, such claim must be dismissed because Moore did not take any adverse action against Plaintiff. To state a claim under § 1983, and thereby survive a motion to dismiss, a plaintiff must allege that he was deprived of a right secured by federal law by a person acting under color of state law. *Mezibov*

*v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005); *Gregory v. Shelby County*, 220 F.3d 433, 441 (6th Cir. 2000). When a plaintiff alleges that the deprivation involved retaliation for the exercise of his First Amendment rights, the plaintiff must sufficiently allege three sub-elements: (1) that the plaintiff engaged in constitutionally protected activity; (2) that the defendant took an adverse action against the plaintiff that would deter a person of ordinary firmness from continuing to engage [\*10] in that conduct; and (3) that the adverse action was motivated, at least in part, by the plaintiff's protected conduct. *Mezibov*, 411 F.3d at 716; *Serrato v. Bowling Green State Univ.*, 104 F. App'x 509, 513 (6th Cir. 2004); *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999).

Defendant Moore contends that Plaintiff has failed to sufficiently allege that Moore took any adverse action against Plaintiff. The term "adverse action" is drawn from the employment law context, and examples of adverse actions include discharge, demotions, refusal to hire, nonrenewal of contracts, and failure to promote. *Thaddeus-X*, 175 F.3d at 396. Actions of lesser severity may be deemed adverse if those actions would deter a person of ordinary firmness from exercising the right at issue. *Id.* The only possible adverse actions alleged in the instant case are Plaintiff's write-up and restriction to his office. (Compl. ¶ V.) Those actions, however, were taken by Plaintiff's supervisor, not by Defendant Moore, and Plaintiff does not allege that Defendant Moore personally took any adverse action against him. In the absence of any allegation that Defendant Moore personally took an adverse action against Plaintiff, Plaintiff fails to state a claim against Moore for retaliation for the exercise of his First Amendment rights. Thus, to the extent Plaintiff's § 1983 claim against Moore in her individual capacity is [\*11] based on retaliation for his exercise of his First Amendment rights, Defendant Moore's Motion to Dismiss must be **GRANTED**, and such claim must be **DISMISSED WITH PREJUDICE**.

Third, Defendant Moore argues that, to the extent Plaintiff's complaint attempts to state a claim against Moore for a conspiracy to retaliate against Plaintiff for the exercise of his First Amendment rights, Plaintiff's claim must be dismissed, as the claim is not supported by sufficient factual allegations. The Court concludes that, regardless of whether Plaintiff has attempted to assert a civil conspiracy claim under § 1983 or § 1985, the allegations supporting such conspiracy are not sufficient to survive a motion to dismiss.

With respect to § 1985, Plaintiff has not alleged any facts that would state a claim under any of the three subsections of that statute. Section 1985(1), which prohibits conspiracies to interfere with federal officers in the performance of their duties, and the first clause of § 1985(2), which prohibits conspiracies to influence parties, witnesses, or jurors in federal court proceedings, are not applicable to this case. 42 U.S.C. § 1985(1)-(2); *Fox v. Mich. State Police Dep't*, 173 F. App'x 372, 376 (6th Cir. 2006). Both the second clause of § 1985(2), which prohibits conspiracies to interfere with due process in state courts with the intent to deprive persons of [\*12] their equal protection rights, and § 1985(3), which prohibits conspiracies to deprive persons of their equal protection rights, require an allegation of racial, or otherwise class-based, invidiously discriminatory animus. 42 U.S.C. § 1985(2)-(3); *Fox*, 173 F. App'x at 376. Plaintiff's complaint does not contain any allegations of racial or class-based discriminatory animus. Accordingly, Plaintiff's complaint fails to state a claim for the violation of any subsection of § 1985.

With respect to § 1983, Plaintiff also has not alleged sufficient facts to state a claim for civil conspiracy. "A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. . . . All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant." *Mettetal v. Vanderbilt Univ. Legal Dep't*, 147 F. App'x 577, 585 (6th Cir. 2005). To survive a motion to dismiss, a plaintiff must plead his conspiracy claim with some specificity. *Farhat v. Jopke*, 370 F.3d 580, 599 (6th Cir. 2004). "[V]ague and conclusory allegations that are unsupported by material facts are not sufficient to state a § 1983 claim." *Id.* In the instant case, Plaintiff alleges that the following actions were taken by Moore and the supervisor: [\*13] Moore informed Plaintiff's supervisor that Cliff had seen Plaintiff at the adult bookstore and faxed the police report to the supervisor, and the supervisor wrote-up Plaintiff the next day and restricted him to his office. (Compl. ¶¶ IV-V.) These allegations are simply insufficient to state a claim for civil conspiracy under § 1983, as they fail to present any material facts in support of a "single plan" or a "general conspiratorial objective" of which Moore was a part. See *Mettetal*, 147 F. App'x at 585. Without specific factual allegations connecting Defendant Moore to the adverse employment action taken by the supervisor, the Court must conclude that Plaintiff has failed to state a claim under § 1983 for civil conspiracy to retaliate

against him for exercising his First Amendment rights. Accordingly, Defendant Moore's Motion to Dismiss is **GRANTED** with respect to Plaintiff's civil conspiracy claim under § 1983 or § 1985 against Moore in her individual capacity, and such claim is **DISMISSED WITH PREJUDICE**.

b. Fifth Amendment

Defendant Moore seeks the dismissal of Plaintiff's § 1983 claim under the Fifth Amendment on the ground that Plaintiff has failed to allege the deprivation of any of the Fifth Amendment liberty interest.

To the extent Plaintiff's Fifth Amendment claim is, in fact, based on the theory that Plaintiff [\*14] was denied his liberty interest in patronizing an adult bookstore, Defendant Moore is correct that the claim cannot survive the motion to dismiss, as Plaintiff was not prohibited from patronizing the bookstore. Thus, Defendant Moore's Motion to Dismiss is **GRANTED** with respect to Plaintiff's § 1983 claim against Moore in her individual capacity based on an alleged deprivation of his Fifth Amendment liberty interest in patronizing an adult bookstore, and such claim is **DISMISSED WITH PREJUDICE**.

c. Fourth Amendment

Defendant Moore seeks the dismissal of Plaintiff's § 1983 claim based on the Fourth Amendment because Plaintiff does not allege any facts that would support a Fourth Amendment claim.

Defendant Moore is correct that Plaintiff's complaint does not contain any allegations related to any warrant or any unreasonable search or seizure. The complaint alleges only that Cliff made a formal police report after he saw Plaintiff at the bookstore (Compl. ¶ IV), but it does not allege that anyone conducted any search or seizure of Plaintiff's belongings or person at any time, nor does it allege that anyone sought any warrant. Thus, the Court concludes that Plaintiff's allegations are not sufficient to state a cause of action under the Fourth Amendment pursuant to § 1983 against Defendant [\*15] Moore. Accordingly, Defendant Moore's Motion to Dismiss is **GRANTED** with respect to Plaintiff's § 1983 claim against her in her individual capacity based on the Fourth Amendment, and such claim is **DISMISSED WITH PREJUDICE**.

d. Ninth Amendment

Defendant Moore seeks the dismissal of Plaintiff's § 1983 claim based on the Ninth Amendment on the basis

that the Ninth Amendment cannot provide the sole basis for a § 1983 claim.

Section 1983 "creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere." *Gardenhire v. Schubert*, 205 F.3d 303, 310 (6th Cir. 2000). The Ninth Amendment, however, also does not confer any substantive rights. *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991). Thus, Plaintiff cannot maintain a § 1983 cause of action based only upon the Ninth Amendment. Accordingly, Defendant Moore's Motion to Dismiss is **GRANTED** with respect to Plaintiff's § 1983 claim against her in her individual capacity based on the Ninth Amendment, and such claim against Defendant Moore is **DISMISSED WITH PREJUDICE**.

2. State Law Claims

Defendant Moore seeks the dismissal of Plaintiff's state law claims against her in her individual capacity on the basis that she is entitled to absolute immunity from such claims pursuant to Tenn. Code Ann. § 9-8-307(h).

Section 9-8-307(h) provides that "State officers and employees are absolutely immune from liability for acts or omissions within the scope of the officer's or employee's office or employment, except for [\*16] willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain." Such absolute immunity applies to state law claims filed in state and federal courts. *Purisch v. Tenn. Technological Univ.*, 76 F.3d 1414, 1421 (6th Cir. 1996). Moore argues that, because she acted within the scope of her employment, she is entitled to absolute immunity.

Plaintiff brings the following state law causes of action against Moore in her individual capacity: negligence *per se*, libel, intrusion upon seclusion, public disclosure of a private fact, and false light invasion of privacy. First, pursuant to § 9-8-307(h), Moore is entitled to absolute immunity with respect to the cause of action for negligence *per se*, as that claim does not involve willfulness or maliciousness. See, e.g., *Luther v. Compton*, 5 S.W.3d 635, 640-41 (Tenn. 1999). As a result, Defendant Moore's Motion to Dismiss is **GRANTED** with respect to Plaintiff's claim of negligence *per se* against Moore in her individual capacity, and such claim is **DISMISSED WITH PREJUDICE**.

Second, with respect to Plaintiff's claim of libel, the elements of the claim are as follows: (1) a party published a statement (2) with knowledge that the statement was false and defaming, with reckless

disregard for the truth of the statement, or with negligence in failing to ascertain [\*17] the truth of the statement. *Hibdon v. Grabowski*, 195 S.W.3d 48, 58 (Tenn. Ct. App. 2006). Thus, whether Plaintiff alleges that the statements were made with knowledge, reckless disregard, or negligence will determine whether Defendant Moore is entitled to absolute immunity pursuant to § 9-8-307(h). First, although Plaintiff has not specified which written statement is at issue with respect to this claim, the Court concludes that the relevant statement must be the fax sent by Moore to Plaintiff's supervisor, as that represents the only written statement alleged in the complaint. Second, with respect to such statement to Plaintiff's supervisor, the Court concludes that Plaintiff has not sufficiently alleged that the statement was made with knowledge of the falsity of, or with reckless disregard as to the truth of, the statements. Without an allegation that the statements were made with knowledge or reckless disregard, Plaintiff has failed to sufficiently allege that Defendant Moore's actions were willful or malicious, and as a result, Moore is entitled to absolute immunity under § 9-8-307(h). Accordingly, Defendant Moore's Motion to Dismiss is **GRANTED** with respect to Plaintiff's claim of libel against Moore in her individual capacity, and such claim is **DISMISSED WITH [\*18] PREJUDICE**.

Third, the elements of intrusion upon seclusion are as follows: (1) the information sought by the defendant was not properly discoverable or was otherwise subject to some form of privilege; (2) the defendant knew that the information was not discoverable or was otherwise subject to a privilege but nevertheless proceeded to obtain that information; (3) the obtaining of such information would be highly offensive to a reasonable person; and (4) injury was suffered from the invasion of privacy. *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 412 (Tenn. 2002). Defendant Moore has not argued that Plaintiff failed to state a claim under this cause of action; rather, Defendant has argued only that she is entitled to absolute immunity, essentially because she did not act willfully. The Court disagrees. Without expressing any opinion as to whether Plaintiff's complaint adequately alleges all elements of the claim of intrusion upon seclusion, the Court concludes that the complaint does sufficiently allege that Defendant Moore's actions in obtaining information about Plaintiff were willful — that is, "intentional or voluntary rather than accidental or inadvertent." *United Color Lab & Digital Imaging, Inc. v. United Studios*, No. W2005-00133-COA-R3- [\*19] CV, 2006 WL 694645, at \*5 (Tenn. Ct. App. Mar. 21, 2006). While the allegations of the complaint show that Defendant Moore did not

actively seek out any information about Plaintiff but instead was provided unsolicited information by Cliff, the allegations do show that Defendant Moore accepted such information and reacted to it by asking Cliff to make contact with Plaintiff. (Compl. ¶ III.) Thus, while the complaint does not allege that Moore's actions were intentional, the complaint does sufficiently allege that Moore's actions in receiving the information about Plaintiff from Cliff were voluntary. Because the complaint alleges an element of willfulness, Moore is not entitled to absolute immunity under § 9-8-307(h) with respect to this claim. Accordingly, Defendant Moore's Motion to Dismiss is **DENIED** with respect to Plaintiff's claim of intrusion upon seclusion against her in her individual capacity, and such claim remains pending, as Defendant has presented no other arguments in favor of its dismissal.

Fourth, the elements of public disclosure of a private fact are as follows: (1) a private matter is made public (2) by communicating the matter to the public at large or to so many people that the matter must be regarded as substantially certain to become [\*20] one of public knowledge. *Stein v. Davidson Hotel Co.*, No. 01-A-01-9509-CV-00407, 1996 WL 230196, at \*8 (Tenn. Ct. App. May 8, 1996). Again, Defendant Moore has not argued that Plaintiff failed to state a claim under this cause of action; rather, Defendant has argued only that she is entitled to absolute immunity because her actions were not willful or malicious. Thus, the only question is whether the complaint sufficiently alleges that Moore willfully or maliciously communicated the information she received about Plaintiff. The Court concludes that it does. The complaint alleges that Moore called Plaintiff's supervisor and told the supervisor that Plaintiff had been seen at the bookstore. (Compl. ¶ IV.) This action can only be characterized as intentional or voluntary and, therefore, willful. The Court expresses no opinion as to whether the complaint adequately alleges the elements of this cause of action, but does conclude that the complaint adequately alleges that Moore's conduct in communicating information to Plaintiff's supervisor was willful. Accordingly, Defendant Moore's Motion to Dismiss is **DENIED** with respect to Plaintiff's claim of public disclosure of a private fact against her in her individual capacity, and such claim remains pending, as Defendant has presented no other arguments [\*21] in favor of its dismissal.

Fifth, the elements of false light invasion of privacy are as follows: (1) the defendant publicized a matter that placed the plaintiff in a false light; (2) the false light would be highly offensive to a reasonable person; and

(3) with respect to claims involving a public official, a public figure, or a matter of public concern related to a private individual, the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed, or with respect to claims involving a matter of private concern related to a private individual, the defendant was negligent as to the falsity of the publicized matter and the false light in which the plaintiff would be placed. *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 645, 647-48 (Tenn. 2001); *Restatement (Second) of Torts* § 652E (1977). With respect to Defendant Moore's statements to Plaintiff's supervisor, the Court concludes that Plaintiff has not sufficiently alleged that such statements were made with knowledge of or reckless disregard as to the falsity of the statements. Without an allegation that the statements were made with knowledge or reckless disregard, Plaintiff has failed to sufficiently allege that Defendant Moore's actions [\*22] were willful or malicious, and as a result, Moore is entitled to absolute immunity under § 9-8-307(h). Accordingly, Defendant Moore's Motion to Dismiss is **GRANTED** with respect to Plaintiff's claim of false light invasion of privacy against her in her individual capacity, and such claim is **DISMISSED WITH PREJUDICE**.

#### IV. CONCLUSION

For the reasons explained above, Defendant Moore's Motion to Dismiss [Court Doc. No. 7] is **GRANTED IN PART** and **DENIED IN PART**. Defendant's Motion is **GRANTED** with respect to Plaintiff's § 1983, § 1985, and state law claims against Moore in her official capacity; Plaintiff's claims under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments pursuant to § 1983 and § 1985 against Moore in her individual capacity to the extent described above; and Plaintiff's state law claims of negligence *per se*, libel, and false light invasion of privacy. Such claims are **DISMISSED WITH PREJUDICE**. Defendant's Motion is **DENIED** in all other respects.

SO ORDERED this 31st day of October, 2006.

/s/ Harry S. Mattice, Jr.

HARRY S. MATTICE, JR.

UNITED STATES DISTRICT JUDGE