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# [***Ford v. City of Harrsiburg***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5R1G-7R31-F06F-22JY-00000-00&context=)

United States District Court for the Middle District of Pennsylvania

November 22, 2017, Decided; November 22, 2017, Filed

Civil No. 1:17-CV-908

**Reporter**

2017 U.S. Dist. LEXIS 193834 \*

ROBERT FORD, Plaintiff v. CITY OF HARRSIBURG, ERIC PAPENFUSE, JOHN O'CONNER, DERIC MOODY, and UNKNOWN PARTICIPANTS, Defendants.

**Core Terms**

allegations, motion to dismiss, recommended, training, rights, seizure, district court, municipal, wearing, Marine, retaliation claim, police officer, courts, personal involvement, retaliation, encounter, factual allegations, confronted, questions, articles, unknown, seized, stolen, amend, valor, constitutional violation, fail to state a claim, reasonable person, entry of default, magistrate judge

**Counsel:** **[\*1]**Robert D. Ford, Plaintiff, Pro se, Marysville, PA.

For City of Harrisburg, PA, Hbg. Mayor Eric Papenfuse, Hbg. Officer John O'Conner, Captain Derik Moody, Defendants: Frank J. Lavery, Jr., Joshua M. Autry, Lavery Faherty, Harrisburg, PA.

**Judges:** Martin C. Carlson, United States Magistrate Judge. Judge Kane.

**Opinion by:** Martin C. Carlson

**Opinion**

**REPORT AND RECOMMENDATION**

**I. Introduction**

This case involves a 75-year-old Marine veteran plaintiff, Robert Ford, who asserts a violation of his federal civil rights stemming from a 2015 incident where he was accosted by a police officer and accused of "stolen valor;" that is, the wearing of unearned military decorations Mr. Ford alleges that the humiliation caused by this incident led to his developing a serious heart condition. In addition to bringing suit against Harrisburg police officer John O'Conner and an unknown participant in this incident, Mr. Ford also names as defendants the city of Harrisburg (the "City"), Harrisburg Mayor Eric Papenfuse, and Harrisburg Bureau of Police Captain Deric Moody. Mr. Ford brings his constitutional claims pursuant to *42 U.S.C. § 1983*.

In its current form, this complaint raises two fundamental issues for the court to determine: First, whether each of the**[\*2]** named defendants, and particularly the supervisory and institutional defendants, is liable to be sued under *§ 1983*; and second, whether Mr. Ford has legitimate constitutional claims under the *First* or *Fourth Amendments*. Now pending before the court is the defendants' motion to dismiss Mr. Ford's complaint. (Doc. 13.) For the reasons set forth below, we recommend that the motion to dismiss be granted but that Mr. Ford, who is proceeding *pro se*, be given leave to file an amended complaint.

**II. Factual and Procedural Background**

The well-pleaded facts in the complaint, which we accept as true for purposes of this motion to dismiss, indicate that the Plaintiff Robert Ford, a Marine Corps veteran, wore his uniform to the Marine Corps League Memorial Day ceremony at the Harrisburg City's Riverside Park on Memorial Day, 2015. During the ceremony, Ford alleges that he was confronted by John O'Conner, a uniformed police officer. (Doc. 1.) Although the factual allegations in the complaint are limited, Mr. Ford states that Officer O'Conner and an unknown civilian colleague "publicly and loudly, verbally assaulted, abused, harassed, and humiliated [him] beyond description." (Doc. 1, at 7.) Mr. Ford also claims that Officer**[\*3]** O'Conner waved his hand over his service weapon, "as if ready to draw." (Doc. 1, at 7.) Officer O'Conner allegedly shouted that Mr. Ford was a fake marine and that he was not entitled to wear his uniform, while Officer O'Conner's civilian accomplice filmed the incident. After being confronted for more than fifteen minutes, Mr. Ford eventually located Police Captain Deric Moody, informed Captain Moody of the incident, and expressed his intent to file a formal complaint against Officer O'Conner. (Doc. 1, at 7.)

The footage taken by Officer O'Conner's unknown associate later appeared on YouTube. According to Mr. Ford, at the time of his complaint the video had over 900,000 views. Following the incident, Mr. Ford agreed to an interview and recorded statement at his home to aid the City's police department in conducting an Internal Affairs investigation, but he never heard from the City again thereafter. (Doc. 1, at 7.)

Mr. Ford initiated this suit on May 23, 2017, requesting a jury trial and damages in the amount of $1,000,000 for pain and suffering due to his development of a heart condition in the wake of the incident. He alleges constitutional violations under the *First* and *Fourth Amendments*. Additionally,**[\*4]** Mr. Ford asks the court to consider any other potential claims of which he may not be aware. (Doc. 1.)

After counsel entered an appearance on their behalf in this action, the defendants filed the instant motion to dismiss for failure to state a claim pursuant to [*Federal Rule of Civil Procedure 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) on August 22, 2017. (Doc. 13.) In the brief in support of their motion to dismiss, filed on September 1, 2017, the defendants argue that Mr. Ford's *First* and *Fourth Amendment* claims fail because no official action was taken; because the individual defendants are entitled to qualified immunity; and because Mr. Ford does not plead how the City, Mayor Papenfuse, or Captain Moody was the "moving force" behind any alleged constitutional violation. (Doc. 15.) Mr. Ford filed a brief in opposition to the motion to dismiss on October 3, 2017, and attached a medical diagnosis from his family doctor of 28 years, who Mr. Ford expects to testify on his behalf at trial. (Doc. 18.) The defendants filed a reply brief on October 17, 2017, and Mr. Ford submitted a sur reply ten days later. (Docs. 19 and 20.) Having been fully briefed, this Motion to Dismiss is now ripe for resolution.[[1]](#footnote-0)1

**III. Discussion**

**A. Motion To Dismiss Standard of Review**

Under [*Rule 12(b)(6) of the Federal Rules of Civil Procedure*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), a complaint should**[\*5]** be dismissed for "failure to state a claim upon which relief can be granted." [*Fed. R. Civ. P. 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=). The United States Court of Appeals for the Third Circuit has explained:

Beginning with the Supreme Court's opinion in [*Bell Atlantic Corp. v. Twombly, 550 U. S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=), and continuing ... with the Supreme Court's decision in [*Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (May 18, 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=), pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss.

[*Fowler v. UPMC Shadyside, 578 F.3d 203, 209-10 (3d Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4X1S-WS60-TXFX-52CT-00000-00&context=).

When considering whether a complaint states a claim for which relief may be granted, a court must accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom are to be construed in the light most favorable to the plaintiff. [*Jordan v. Fox Rothschild, O'Brien & Frankel, Inc., 20 F.3d 1250, 1261 (3d Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-73T0-003B-P4X1-00000-00&context=). However, a court "need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss." [*Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RN7-DGS0-0038-X299-00000-00&context=). Additionally, a court need not "assume that a . . . plaintiff can prove facts that the . . . plaintiff has not alleged." [*Associated Gen. Contractors of Cal. v. California State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5500-003B-S0SB-00000-00&context=). As the Supreme Court held in Bell Atlantic Corp., some factual grounds for relief are necessary, as "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." [*Bell Atlantic, 550 U.S.at 555*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=). Furthermore,**[\*6]** "factual allegations must be enough to raise a right to relief above the speculative level." Id.

In Fowler, the Third Circuit also noted that:

[A]fter Iqbal, when presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts.

[*Fowler, 578 F.3d at 210-11*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4X1S-WS60-TXFX-52CT-00000-00&context=).

In practice, consideration of the legal sufficiency of a complaint entails a three-step analysis: "First, the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.' [*Iqbal, 129 S.Ct. at 1947*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). Second, the court should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.' [*Id. at 1950*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). Finally, 'where there are well-pleaded factual allegations, a court should**[\*7]** assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.' Id." [*Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51PJ-8WH1-652R-1000-00000-00&context=)."

To decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint, and matters of public record." [*Pension Benefit Guaranty Corp. v. White Consol. Indus., Inc., 998 F. 2d 1192, 1196 (3d Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FFY0-003B-P1RJ-00000-00&context=); see also [*Sands v. McCormick, 502 F.3d 263, 268 (3d Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PP9-8SR0-TXFX-51VN-00000-00&context=). Thus, a court may consider "undisputedly authentic document[s] that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the [attached] document[s]." [*Pension Benefit, 998 F.2d at 1196*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FFY0-003B-P1RJ-00000-00&context=). In addition, "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered." [*Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 560 (3d Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45SB-V3M0-0038-X24R-00000-00&context=) (quoting 62 Fed. Proc., L.Ed. § 62:508); see also [*U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 383, 388 (3d Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4553-5X30-0038-X472-00000-00&context=) ("Although a district court may not consider matters extraneous to the pleadings, a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment."). However, a court may not rely on other parts of the record in rendering a decision on a motion to dismiss. [*Javaid v. Weiss, No. 4:11-CV-1084, 2011 U.S. Dist. LEXIS 145513, 2011 WL 6339838, at \*4 (M.D. Pa. Dec. 19, 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54HG-8BC1-F04F-423K-00000-00&context=).

**B. Mr. Ford has not shown that the City, Mayor Papenfuse, or Captain Moody are proper defendants under [\*8]  *§ 1983***

*Section 1983* provides a private cause of action for the violation of a federal constitutional right. The text of the statute provides, in pertinent part, that:

"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*. In order to prevail on a *§ 1983* claim, a plaintiff must establish that the defendant deprived the plaintiff of a right secured by the United States Constitution while acting under color of state law. See [*Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FY10-001T-D4KG-00000-00&context=).

**1. The City**

The sole allegation in the complaint involving the City is that it purportedly failed to follow up with Mr. Ford regarding its investigation into the incident. (Doc. 1, at 7.) The Supreme Court has determined that municipalities are persons who can be sued under *§ 1983*, however, *respondeat superior* is not a basis for rendering municipalities liable for the constitutional**[\*9]** torts of their employees. [*Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8SP0-003B-S1RH-00000-00&context=). A local governing body can be sued under *§ 1983* where the municipality either "implements or executes a policy statement, ordinance, ***regulation***, or decision officially adopted and promulgated by that body's officers" or acts "pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." [*Id. at 690*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8SP0-003B-S1RH-00000-00&context=); [*Wright v. City of Phila., 685 F. App'x 142, 147 (3d Cir. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NBM-M0W1-F04K-K0MP-00000-00&context=).

Here, Mr. Ford fails to identify any specific policy or custom adopted by the City that caused the alleged constitutional violations. In an effort to liberally construe his pleading, the court nonetheless construes Mr. Ford's complaint as alleging that the City failed to adequately train Officer O'Conner. *Section 1983* claims against municipal entities based on an alleged failure to train police officers typically fail without specific allegations of training or types of training that would have prevented the injuries in question. See [*Bradley v. Kuntz, 655 F. App'x. 56, 59 (3d Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5K5V-WHM1-F04K-K1MP-00000-00&context=), cert. denied, *137 S. Ct. 513, 196 L. Ed. 2d 419, 2016 WL 5874545 (U.S. 2016)*. Unlawful behavior from a police officer is attributable directly to that specific officer and thus does not necessarily establish a city's failure to train. See [*Pahler v. City of Wilkes-Barre, 31 F. App'x. 69, 72 (3d Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45BT-DCM0-0038-X15J-00000-00&context=). Generally, a municipal entity must be deliberately indifferent in training its police officers**[\*10]** on a certain subject area in order to be subject to *§ 1983* liability; even when officers do not remember their training, the municipality is not deemed to have been deliberately indifferent. [*Jewell v. Ridley Tp., 497 F. App'x. 182, 186 (3d Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56M3-9V71-F04K-K1VB-00000-00&context=). In order to hold a municipality liable for deliberate indifference under *§ 1983*, a plaintiff must allege that his or her injury was caused by a municipal policy or custom. [*Blakeslee v. Clinton County, 336 F. App'x. 248 (3d Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4WS4-96X0-TXFX-51S3-00000-00&context=).

The necessity of a causal connection between alleged police misconduct and a failure to train was underscored in Hernandez v. Borough of Palisades Park Police, where the Third Circuit rejected a municipal liability claim asserting a "failure to train" theory after determining that there was no "inherently high risk that officers would commit robberies absent ethics training." [*58 F. App'x. 909, 915 (3d Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47TN-65K0-0038-X16T-00000-00&context=). Here, like in Hernandez, Mr. Ford fails to assert that there was an unreasonably high risk that officers would accuse veterans of stolen valor absent some form of specialized training. Without these allegations, there is no basis upon which a finder of fact could conclude that the City acted with deliberate indifference. Furthermore, Mr. Ford does not identify any specific training or type of training that would have prevented his injury. It is therefore recommended**[\*11]** that any *§ 1983* claim against the City be dismissed for failure to state a claim.

**2. Mayor Papenfuse and Captain Moody**

The defendants further argue that any *§ 1983* claims against Mayor Papenfuse and Captain Moody must be dismissed for lack of personal involvement. (Doc. 15.) To state a *§ 1983* claim, a plaintiff must show that supervisory defendants actively deprived him of a right secured by the Constitution. [*Morse v. Lower Merion School Dist., 132 F.3d 902, 907 (3d Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RN7-DGS0-0038-X299-00000-00&context=); see also [*Maine v. Thiboutot, 448 U.S. 1, 4, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-74G0-003B-S10C-00000-00&context=). "A defendant in a civil rights action must have personal involvement in the alleged wrongdoing; liability cannot be predicated solely on the operation of *respondeat superior*. Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence." [*Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-17R0-001B-K038-00000-00&context=). Applying these benchmarks, courts have frequently held that, without allegations of supervisory knowledge and approval of subordinates' actions, a plaintiff may not maintain an action against supervisors based upon the misdeeds of their subordinates. [*O'Connell v. Sobina, No. 06-238, 2008 U.S. Dist. LEXIS 2467, 2008 WL 144199, at \*21 (W.D. Pa. Jan. 11, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RKF-WKP0-TXFR-P2M1-00000-00&context=); [*Neuburger v. Thompson, 305 F. Supp. 2d 521, 535 (W.D. Pa. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4C3S-37G0-0038-Y02G-00000-00&context=).

Along with his brief in opposition to the motion to dismiss, Mr. Ford attaches newspaper articles containing statements made by Mayor Papenfuse in which he defended the actions of the police. (Doc. 18, at 14-18). In these articles, Mayor Papenfuse**[\*12]** is quoted as having said "a preliminary report shows that the officer's actions were in line, but an internal investigation continues" and "our initial findings indicate police officers acted appropriately and respectfully in this incident." (Id.) However, these statements were never mentioned or incorporated in Mr. Ford's complaint. (Doc. 1.) To the extent that Mr. Ford attempts to defeat this motion to dismiss and amend his pleading by stating these additional factual allegations in his oppositional brief, it is "axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." [*Commonwealth of Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173 (3d Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3XG0-001B-K22D-00000-00&context=) (quoting [*Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-V8J0-003B-G3SR-00000-00&context=). Accordingly, the court need not consider the newspaper articles provided by Mr. Ford because they were not alluded to in the complaint.

However, even if we were to weigh these newspaper articles in contemplating this motion to dismiss, the articles do not provide any basis to find that Mayor Papenfuse was personally involved in the alleged wrongdoing. Indeed, after-the-fact statements or conduct by a supervisory official does not establish personal involvement under *§ 1983*. See [*Frederico v. Home Depot, 507 F.3d 188, 201-02 (3d Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R3D-8WM0-TXFX-530H-00000-00&context=) ("[W]e do not consider after-the-fact allegations in determining the sufficiency of [a] complaint**[\*13]** . . . ."); [*Rode, 845 F.2d at 1207-08 (3d. Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-17R0-001B-K038-00000-00&context=) (holding that participation in an after-the-fact review of a grievance or an appeal is insufficient to establish personal involvement); see also [*Brooks v. Beard, 167 F. App'x 923, 925 (3d Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4J8J-SWS0-0038-X45H-00000-00&context=) ("Although the complaint alleges that Appellees responded inappropriately to Brooks's later-filed grievances about his medical treatment, these allegations do not establish Appellees' involvement in the treatment itself."). Because the only factual allegations with respect to Mayor Papenfuse involve comments made after the purported constitutional violations occurred, Mr. Ford fails to establish the Mayor's personal involvement in any potential constitutional infringement.

Mr. Ford's *§ 1983* claims against Captain Moody fail for this same reason. The lone factual averment concerning Captain Moody in the complaint is that Mr. Ford contacted Captain Moody on the day of the incident to state that he wished to file a formal complaint against Officer O'Conner for the harassment and allegations of stolen valor that he endured. (Doc. 1, at 7.) There are no allegations that the harassment continued after Mr. Ford reported Officer O'Conner's conduct to Captain Moody. Although Mr. Ford goes on to state that he was not kept abreast of the ensuing**[\*14]** Internal Affairs investigation, Mr. Ford does not allege in his complaint that Captain Moody had any involvement in or responsibility for this investigation. (Doc. 1, at 7.) Moreover, even if Captain Moody was responsible for failing to keep Mr. Ford informed of the status of the investigation, the inadequacy of this after-the-fact review process is insufficient to establish personal involvement in any alleged constitutional wrongdoing. See [*Rode, 845 F.2d at 1207-08*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-17R0-001B-K038-00000-00&context=). Because the only allegations concerning Captain Moody took place after the purported misconduct occurred, Mr. Ford has not sufficiently alleged that Captain Moody was personally involved in any constitutional violations.

For these reasons, it is recommended that all *§ 1983* claims against Mayor Papenfuse and Captain Moody be dismissed for failure to state a claim.

**C. *Section 1983* Claims on the Merits**

**1. *First Amendment* Claims**

As for the allegations leveled by the plaintiff against Officer O'Conner, the court first construes Mr. Ford's complaint as alleging a *First Amendment* retaliation stemming from the harassment and humiliation he alleges he experienced at the hands of Officer O'Conner and the unknown associate in response to Mr. Ford wearing his uniform and presenting himself as a marine veteran.**[\*15]** To state a *First Amendment* claim for retaliation, a plaintiff must allege that: (1) he was engaged in constitutionally protected conduct; (2) he was retaliated against by someone acting under color of state law in a way that was "sufficient to deter a person of ordinary firmness from exercising his constitutional rights," and there is (3) a causal link between the protected conduct and the retaliatory action. [*Thomas v. Independence Twp., 463 F.3d 285, 296 (3d Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4KXG-B960-0038-X0HF-00000-00&context=).

As a retired marine, confronted for wearing his uniform, Mr. Ford clearly appears to satisfy the first and third elements required to state a retaliation claim. Regarding the first element, the Supreme Court has established that wearing certain articles of clothing can be constitute speech for the purposes of the *First Amendment*. [*Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FBM0-003B-S2KY-00000-00&context=). In Tinker, the Supreme Court determined that students wearing armbands in protest of the Vietnam War were taking part in protected speech under the *First Amendment*. Id. In the instant case, Mr. Ford wore his uniform to the Marine Corps League Memorial Day ceremony to show that he was a former military member and, presumably, as a show of patriotism. This form of speech has been explicitly accepted as falling within the parameters of *First Amendment* protection. See [*Schacht v. United States, 398 U.S. 58, 63, 90 S. Ct. 1555, 26 L. Ed. 2d 44 (1970)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F1D0-003B-S22S-00000-00&context=) (holding that actor had a *First Amendment* right to wear a**[\*16]** military uniform while taking part in a play that criticized the United States military's role in the Vietnam War). Regarding the third element, the defendants do not dispute that Mr. Ford's protected speech in the form of wearing his uniform was the sole reason he was confronted by Officer O'Conner. If Mr. Ford had not been wearing his uniform, he never would have drawn the attention of Officer O'Conner and be falsely accused of stolen valor. Because the first and third elements of a *First Amendment* retaliation claim are easily resolved in favor of Mr. Ford, the motion to dismiss this claim turns on whether Officer O'Conner's actions constituted retaliatory conduct sufficient to deter a person of ordinary firmness from exercising his constitutional rights.

The Supreme Court has noted that "[o]fficial reprisal for protected speech 'offends the Constitution because it threatens to inhibit exercise of the protected right,' and . . . the *First Amendment* prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out."[[2]](#footnote-1)2 [*Hartman v. Moore, 547 U.S. 250, 256, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JTG-G8N0-004B-Y03F-00000-00&context=) (quoting [*Crawford-El v. Britton, 523 U.S. 574, 588 n.10, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SM3-DNK0-004B-Y001-00000-00&context=). When a public official restricts or terminates public benefits to a private citizen based on that citizen's exercise**[\*17]** of his or her *First Amendment* rights, that person's rights have been adversely affected. See, e.g., *Board of County Comm'rs v. Umbehr, 518 U.S. 668, 686, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996)*. However, courts are skeptical of finding retaliation where a public official's act is itself a form of speech, because the public official's own *First Amendment* speech rights are implicated. [*Bartley, 25 F. Supp. 3d at 532*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CDD-XBW1-F04F-400B-00000-00&context=) (citing [*Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 686-88 (4th Cir. 2000))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YGK-WSP0-0038-X4YD-00000-00&context=). "Thus, where a public official's alleged retaliation is in the nature of speech, in the absence of a threat, coercion, or intimidation intimating that punishment, sanction, or adverse ***regulatory*** action will imminently follow, such speech does not adversely affect a citizen's *First Amendment* rights, even if defamatory." [*Suarez Corp., 202 F.3d at 687*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YGK-WSP0-0038-X4YD-00000-00&context=) (citing [*X-Men Sec., Inc. v. Pataki, 196 F.3d 56 (2d Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XT6-KY70-0038-X00H-00000-00&context=); [*Colson v. Grohman, 174 F.3d 498, 512 (5th Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WND-26Y0-0038-X068-00000-00&context=); [*R.C. Maxwell Co v. Borough of New Hope, 735 F.2d 85, 89 (3d Cir. 1984))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-X040-003B-G4C7-00000-00&context=).

Here, Mr. Ford alleges that the incident that gives rise to this complaint began when Officer O'Conner confronted him and asked a series of questions about his service in the Marine Corps before advising Mr. Ford that he was being "investigated" for stolen valor. (Docs. 1, 18.)[[3]](#footnote-2)3 About twenty minutes later, Officer O'Conner encountered Mr. Ford again and loudly accused him of being a "fake Marine," which drew the attention of the surrounding crowd and caused Mr. Ford great embarrassment. (Doc. 18, at 5.) This second interaction lasted about fifteen minutes, but did not appear to include threats of**[\*18]** adverse action or any additional mention of an investigation. The confrontation ultimately ended when Mr. Ford told Officer O'Conner to call his supervisor because Mr. Ford wished to submit a formal complaint. (Doc. 18, at 5-6.)

The words and actions attributed to Officer O'Conner—although disturbing to Mr. Ford—clearly fall within O'Conner's own *First Amendment* speech rights. Moreover, courts have held that Officer O'Conner's threat to initiate an investigation for stolen valor, without more, does not rise to the level of sufficiently adverse action to satisfy a *First Amendment* retaliation claim. See [*Colson, 174 F.3d at 511*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WND-26Y0-0038-X068-00000-00&context=) (holding that an investigation is not a sufficiently adverse action for the purpose of a *First Amendment* retaliation claim unless the investigation results in some formal action being taken against the plaintiff); see also [*Lakkis v. Lahovski, 994 F. Supp. 2d 624, 633 (M.D. Pa. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BDB-0JX1-F04F-40F4-00000-00&context=) (same); [*Herman v. Hosterman, No. 1:11-CV-898, 2011 U.S. Dist. LEXIS 120750, 2011 WL 4974184, at \*3 (M.D. Pa. Oct. 19, 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83FG-MPH1-652J-J2N6-00000-00&context=) ("[*D*]*e minimis* responses to protected speech such as criticism, false accusations, or verbal reprimands do not rise to the level of actionable retaliation."). Although Officer O'Conner's accusations proved to be unfounded and inaccurate, even defamatory statements are not sufficiently adverse for the purposes of a *First Amendment* retaliation claim. [*Bartley, 25 F. Supp. 3d at 538*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CDD-XBW1-F04F-400B-00000-00&context=); see also [*Laird v. Tatum, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-D5B0-003B-S27S-00000-00&context=) ("[A]llegations**[\*19]** of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."). Furthermore, Mr. Ford does not allege that Officer O'Conner even threatened to arrest him, and it is clear from Mr. Ford's filings that he was not subjected to any formal police action. See [*Penthouse Int'l Ltd. v. Meese, 939 F.2d 1011, 1015-16, 291 U.S. App. D.C. 183 (D.C. Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B4S0-008H-V1HM-00000-00&context=) ("[T]he Supreme Court has never found a government abridgment of *First Amendment* rights in the absence of some actual or threatened imposition of governmental power or sanction."). Because Officer O'Conner's speech did not involve threats, coercion, or intimidation intimating that punishment, sanction, or adverse ***regulatory*** action would imminently follow, the conduct that Mr. Ford complains of simply is not enough to satisfy the second element of a retaliation claim. Accordingly, it is recommended that Mr. Ford's *First Amendment* retaliation claim be dismissed.

**2. *Fourth Amendment* Claims**

In addition to alleging that Officer O'Conner violated his rights under the *First Amendment*, Mr. Ford also claims that O'Conner and his companion took part in conduct that constituted an illegal seizure under the *Fourth Amendment*. (Doc. 1, at 7.) The *Fourth Amendment* protects individuals from unreasonable searches and seizures. A "seizure" requires some sort of meaningful**[\*20]** interference with the person's ability to move freely or walk away, no matter how brief.[[4]](#footnote-3)4 [*Brown v. Texas, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8130-003B-S126-00000-00&context=). Thus, "[w]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." [*Terry v. Ohio, 392 U.S. 1, 16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FHX0-003B-S04Y-00000-00&context=). "[P]olice can be said to have seized an individual 'only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.'" [*Michigan v Chesternut 486 U.S. 567, 573, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F1M0-003B-43DW-00000-00&context=) (quoting [*United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-77J0-003B-S1MD-00000-00&context=). Furthermore, a seizure only occurs where there is either: "a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful" or "submission to the assertion of authority." [*California v. Hodari D., 499 U.S. 621, 626, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KTC0-003B-R1VP-00000-00&context=) (noting that Mendenhall test is "a necessary, but not a sufficient, condition for seizure"); see also [*Florida v. Bostick, 501 U.S. 429, 435-436, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KRT0-003B-R0G6-00000-00&context=) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." (quoting [*Terry, 392 U.S. at 19 n.16*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FHX0-003B-S04Y-00000-00&context=))). However, a violation of the *Fourth Amendment* does not occur if "a reasonable person would feel free to decline officers' requests or otherwise terminate the encounter." [*Brendlin v. California, 551 U.S. 249, 255, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P0M-CTF0-004C-002T-00000-00&context=) (quoting [*Florida, 501 U.S. at 435-436*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KRT0-003B-R0G6-00000-00&context=)).

The facts alleged by the plaintiff in the case at bar make clear that Mr. Ford was never seized within**[\*21]** the ambit of the *Fourth Amendment*. First, on balance, the circumstances indicate that a reasonable person in Mr. Ford's shoes would have felt free to terminate the encounter with Officer O'Conner. "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." [*Mendenhall, 446 U.S. at 554*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-77J0-003B-S1MD-00000-00&context=). However, "[a]s long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." [*Mendenhall, 446 U.S. at 554*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-77J0-003B-S1MD-00000-00&context=).

In support of his allegation that he was seized, Mr. Ford alleges that Officer O'Conner and the unknown associate followed on either side of him for three blocks, that they refused to leave him alone, and that O'Conner frequently waived his hand over his service weapon as if prepared to draw. (Doc. 1, at 7.) These allegations alone, however, are insufficient to establish that**[\*22]** a seizure took place. See [*United States v. McFarley, 991 F.2d 1188, 1190-92 (4th Cir.1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GW10-003B-P55Y-00000-00&context=) (holding that encounter was voluntary where individual being questioned by three officers asked whether he was free to leave and was told he could, but the officers continued to walk with and question the individual); see also [*United States v. Logan, 526 F. App'x 498, 502 (6th Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58CS-5MB1-F04K-P08C-00000-00&context=) ("[T]he defendant's 'unequivocal unwillingness to engage in further conversation' at the outset did not amount to a seizure . . . ." (quoting [*United States v. Wilson, 953 F.2d 116, 123 (4th Cir. 1991))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6V80-008H-V1TF-00000-00&context=). On the other hand, Mr. Ford does not allege that either Officer O'Conner or the unknown associate laid hands on him at any point, nor does he claim that Mr. Ford ever touched his weapon. Furthermore, only one uniformed officer was present, the encounter occurred in a public outdoor area as opposed to an enclosed space, and Mr. Ford does not allege that Officer O'Conner used any particularly threatening language or tone of voice to indicate that compliance with O'Conner's investigation was compelled. The court additionally notes that Mr. Ford admits that when he asked to speak with Officer O'Conner's supervisor, Captain Moody, O'Conner complied and the encounter ended. (Doc. 18, at 5-6.)

In weighing these circumstances, as alleged by Ford and in the light of prior case law, the court finds that**[\*23]** a reasonable person in Mr. Ford's position would have felt free to disregard Officer O'Conner's questions and terminate the encounter, just as Mr. Ford did by demanding to speak with O'Conner's supervisor and lodging a complaint. Indeed, "police officers may approach individuals without reasonable suspicion or probable cause and may question them without violating the *Fourth Amendment*." [*United States v. Jenkins, 181 F. App'x 168, 170 (3d Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4K3C-N5Y0-0038-X2FK-00000-00&context=) (citing [*Florida v. Royer, 460 U.S. 491, 497, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5340-003B-S093-00000-00&context=). Because a reasonable person facing the circumstances that Mr. Ford described in his pleading would have felt free to leave, and because this case involved no physical show of force on the part of Officer O'Conner or submission to assertion of authority by Mr. Ford, it is recommended that Mr. Ford's *Fourth Amendment* claim be dismissed.

**D. State Law Claims**

Although the court finds that Mr. Ford fails to state a federal law claim under *§ 1983*, we nonetheless note that Mr. Ford may well have viable causes of action available to him under state law. In a case such as this, however, where the jurisdiction of the federal court was premised on alleged federal claims that are found to be subject to dismissal, the proper course generally is for the court to decline to exercise supplemental jurisdiction over the plaintiff's state law claims.**[\*24]** [*28 U.S.C. § 1367(c)(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSN1-NRF4-44MM-00000-00&context=) ("The district courts may decline to exercise supplemental jurisdiction over a claim under [*subsection (a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSN1-NRF4-44MM-00000-00&context=) if... the district court has dismissed all claims over which it has original jurisdiction."); [*United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G5P0-003B-S3PK-00000-00&context=) (holding that when federal causes of action are dismissed, federal courts should not separately entertain pendent state claims); see also [*Ham v. Greer, 269 F. App'x 149, 151 (3d Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4S2T-BBT0-TXFX-51S9-00000-00&context=) ("Because the District Court appropriately dismissed [the inmate's] Bivens claims, no independent basis for federal jurisdiction remains. In addition, the District Court did not abuse its discretion in declining to address the state law negligence claims."). Since we have found that Mr. Ford's federal claims fail, this court should not entertain any pendent state law claims in this case.

**IV. Motion for Default**

In addition to the defendants' motion to dismiss, also pending before the court is Mr. Ford's application for entry of default, filed on July 17, 2017. (Doc. 10.) Mr. Ford argues that he is entitled to entry of default because the defendants failed to timely respond to his summons and complaint. Specifically, Mr. Ford claims that he properly served the defendants in accordance with [*Rule 4 of the Federal Rules of Civil Procedure*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-RNG2-D6RV-H0KD-00000-00&context=). (Doc. 10.) In his declaration attached to the motion for entry of default,**[\*25]** Mr. Ford states that he served process on the defendants by certified mail on June 23, 2017. (Doc. 10, at 3.) All of the defendants returned a waiver of service on July 17, 2017, the same day that Mr. Ford filed his motion for default and 24 days after process was allegedly served. (Docs. 6-9.) Federal [*Rule 4(d)(1)(F)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-RNG2-D6RV-H0KD-00000-00&context=) provides that defendants to a civil action must be given at least 30 days to return a waiver of service. [*Fed. R. Civ. P. 4(d)(1)(F)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-RNG2-D6RV-H0KD-00000-00&context=). The defendants therefore all filed timely waivers of service under [*Rule 4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-RNG2-D6RV-H0KD-00000-00&context=). Accordingly, Mr. Ford's application for entry of default was premature and should be denied.

**V. The Complaint Should be Dismissed Without Prejudice**

While our merits analysis of this complaint calls for dismissal of this action in its current form, we recommend that Mr. Ford be given another, final opportunity to further litigate this matter by endeavoring to promptly file an amended complaint setting forth well-pleaded claims. We recommend this course mindful of the fact that in civil rights cases *pro se* plaintiffs often should be afforded an opportunity to amend a complaint before the complaint is dismissed in its entirety, see [*Fletcher-Hardee Corp. v. Pote Concrete Contractors, 482 F.3d 247, 253 (3d Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NDX-HJ00-0038-X3MX-00000-00&context=), unless granting further leave to amend is not necessary in a case such as this where**[\*26]** amendment would be futile or result in undue delay, [*Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4C3D-F7T0-0038-X207-00000-00&context=). Accordingly, it is recommended that the Court provide Mr. Ford with an opportunity to correct the deficiencies in this *pro se* complaint, by dismissing this deficient complaint without prejudice to Mr. Ford mustering one final effort to comply with the rules governing civil actions in federal court, by filing an amended complaint containing any timely and proper claims that he may have.[[5]](#footnote-4)5

**VI. Recommendation**

Accordingly, for the reasons enumerated above, it is hereby recommended that the motion to dismiss (Doc. 13) be GRANTED, but that the plaintiff's complaint be dismissed without prejudice to the plaintiff endeavoring to correct the defects cited in this report, provided that the plaintiff acts within 30 days of any dismissal order.

The parties are further placed on notice that pursuant to [*Local Rule 72.3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5T0C-RFD0-01Y5-V2SX-00000-00&context=):

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in *28 U.S.C. § 636 (b)(1)(B)* or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve**[\*27]** on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in [*Local Rule 72.2*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5T0C-RFD0-01Y5-V2SW-00000-00&context=) shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 22d day of November, 2017.

*/s/ Martin C. Carlson*

Martin C. Carlson

United States Magistrate Judge

**End of Document**

1. 1In addition to the pending motion to dismiss, this court also addresses within this Report and Recommendation the application for entry of default filed by Mr. Ford on July 17, 2017, in which he alleges that the defendants failed to timely respond to his summons and complaint. (Doc. 10.) [↑](#footnote-ref-0)
2. 2Retaliation claims were initially used by public employees to bring suit against their government employers to vindicate employees who were punished for their speech. See [*Bartley v. Taylor, 25 F. Supp. 3d 521, 530 (M.D. Pa. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CDD-XBW1-F04F-400B-00000-00&context=). However, courts subsequently have broadened their interpretation of the scope of the ***First Amendment's*** protection from retaliation to encompass claims brought by private citizens against public officials. [*Bartley, 25 F. Supp. 3d at 530*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CDD-XBW1-F04F-400B-00000-00&context=). [↑](#footnote-ref-1)
3. 3The bulk of these allegations are contained in Mr. Ford's brief in opposition to the motion to dismiss, as the bare-bones complaint is limited to a single page of factual assertions. Although it is "axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss," [*Commonwealth of Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173 (3d Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3XG0-001B-K22D-00000-00&context=) (quoting [*Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-V8J0-003B-G3SR-00000-00&context=), we nonetheless exercise our discretion to consider the additional factual allegations in Mr. Ford's oppositional brief. See [*Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218, 227, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GVH0-003B-S4BB-00000-00&context=) (noting that courts have discretion to manage their docket in order "to make pleadings a means to achieve an orderly and fair administration of justice"); [*In re Fine Paper* ***Antitrust*** *Litig., 685 F.2d 810, 817-18 (3d Cir. 1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2F60-003B-G0P7-00000-00&context=) ("[M]atters of docket control and conduct of discovery are committed to the sound discretion of the district court."). These additional details make clear that Officer O'Conner's conduct simply does not amount to a ***First Amendment*** violation. [↑](#footnote-ref-2)
4. 4A seizure generally "is unreasonable if the police lack either probable cause or a warrant—though courts have created several exceptions to the warrant requirement." [*United States v. Davis, 726 F.3d 434, 439 (3d Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5935-W991-F04K-K029-00000-00&context=). Because the defendants do not contend that Officer O'Conner had probable cause or any other justification to seize Mr. Ford, the sole determination before the court with respect to this ***Fourth Amendment*** claim is whether Mr. Ford was actually seized. [↑](#footnote-ref-3)
5. 5Alternatively, we also note that Mr. Ford certainly could instead choose to pursue his potential state law claims in state court, provided that those claims are timely. [↑](#footnote-ref-4)