

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

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EMMANUEL ANDRO,

Plaintiff,

v.

TOWN OF BROOKLINE, et al.,

Defendants.

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Civil Action No. 15-13030-NMG

**DEFENDANT NORFOLK COUNTY'S MEMORANDUM IN  
SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS**

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Defendant Norfolk County submits this memorandum in support of its Motion for Judgment on the Pleadings under Fed. R. Civ. P. 12(c). Andro's scattershot complaint asserts a number of unsupported claims, many of which have no relation to Norfolk County and none of which implicate wrongful conduct on the part of Norfolk County. Andro's complaint seeks redress for, among other things, the actions of the Norfolk County District Attorney's Office, which, as an agency of the Commonwealth, has no relation to Norfolk County. Because the pleadings do not contain facts plausibly suggesting Andro's entitlement to relief – and even if they did Norfolk County is shielded by the doctrine of sovereign immunity – Norfolk County's Motion for Judgment on the Pleadings should be granted.

### **STATEMENT OF FACTS<sup>1</sup>**

Andro's claims arise from his arrest by the Brookline Police for violating a restraining order and his subsequent detention pursuant to an immigration detainer issued by Immigration and Customs Enforcement ("ICE"). *See* Compl. generally. In March of 2014 Andro was assaulted by his domestic partner David M. Sanderson in Brookline Massachusetts. Compl. ¶¶ 19, 50. Andro called 911 and Mr. Sanderson was arrested by the Brookline Police and was charged with assault and battery. Compl. ¶ 50. After his arrest Mr. Sanderson obtained a restraining order against Andro. Andro was then arrested by the Brookline Police on March 17, 2014 for violating Mr. Sanderson's restraining order. Compl. ¶ 52. While at the Brookline Police Station for booking, the Brookline Police questioned Andro regarding his national origin and subsequently reported information regarding Andro's national origin to ICE. Compl. ¶ 52. Andro is subject to a 2010 outstanding final order of removal from an administrative removal proceeding initiated against Andro by ICE in 2006.<sup>2</sup> ICE issued an immigration detainer and faxed it to the Brookline Police. Neither the Brookline Police nor the Norfolk County District Attorney's Office notified ICE that Andro was a victim of domestic violence. Compl. ¶¶ 55-56, 63.

Andro was brought before a judge of the Brookline District Court for arraignment on March 19, 2014. Compl. ¶ 65. The court ordered Andro be released on his own recognizance, but the Brookline Police requested that the ICE detainer be enforced. Compl. ¶¶ 66-67. Again, no one in the courtroom, including a victim-witness advocate of the Norfolk County District

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<sup>1</sup> The statement of facts focuses on the facts and allegations relevant to Norfolk County. Setting aside any disputes Norfolk County has with Andro's allegations, the facts as alleged by the non-moving plaintiff in the Complaint are stated as true for purposes of this motion. *Feliciano v. Rhode Island*, 160 F.3d 780, 788 (1st Cir. 1998).

<sup>2</sup> *See* Exhibit to Memorandum in Support of Dfts. Gallagher, Thurlow, Chambers, Milley, Gilbert, Sapia, McNeice, I.C.E. Does 21-30, and the United States' Motion to Dismiss, Declaration of Declaration of Assistant Field Office Director George Sullivan, ¶¶ 5-6.

Attorney's Office, raised the fact that Andro was a victim of domestic violence. Compl. ¶¶ 69, 72. Andro was never provided a copy of the detainer, and did not know it existed until his arraignment. Compl. ¶ 72.

After the arraignment Andro remained in the custody of the Brookline Police, and was subsequently picked up by ICE later that day. Compl. ¶ 73. Andro remained in ICE custody for 18 days housed at the South Bay House of Correction under the supervision of Suffolk County Sheriff Steven Thompkins. Compl. ¶¶ 46-47. While in ICE custody, Andro claims he was denied access to a court hearing in Brookline. Compl. ¶ 3. Andro also claims Defendants Morrissey, Friedman, and Nelson ("the Norfolk DA Defendants") among others, "caus[ed] and promot[ed] ... Mr. Andro's in absentia status from the Brookline District Court in favor of a U.S. born litigant, [and] fail[ed] to seek [] incriminating evidence[] against Mr. Andro's abuser." Compl. ¶ 164. In addition, Defendants Morrissey and Friedman "discriminated against Mr. Andro by denying him victim certification ... on the basis of national origin." Compl. ¶ 161.

In October 2014 Andro filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") charging the Norfolk County District Attorney's Office with discriminating against Andro based on his national origin. Compl. ¶ 82. District Attorney Morrissey then appointed special prosecutors to handle the cases against Andro and Mr. Sanderson. Compl. ¶ 162. The MCAD subsequently dismissed Andro's complaint for lack of probable cause, and the decision was upheld on appeal. *See* Exhibit 1, Investigative Disposition and MCAD Dismissal and Notification of Rights, Exhibit 2, MCAD Letter dated February 3, 2016.

Andro claims that the actions by the Norfolk District Attorney's Office were pursuant to "a policy of enforcing all immigration detainers" and "a policy or practice of disregarding or

neglecting to request any available evidence, i.e., charging documents showing that individuals named in detainers are subject to arrest warrant or judicial orders of detention.” Compl. ¶ 95. He also claims that the Norfolk District Attorney’s Office “had no training and no policies in place to prevent unlawful detentions based on wrongly issued immigration detainers. Nor did they have any policies in place regarding the treatment of individuals subject to detainers.” Compl. ¶ 96.

### **ARGUMENT**

This motion seeks judgment on the pleadings under Fed. R. Civ. P. 12(c) as to Andro’s complaint in its entirety. Andro’s complaint – even taken in the light most favorable to Andro – fails to set forth facts plausibly suggesting a right to relief against Norfolk County.

Rule 12(c) of the Federal Rules of Civil Procedure provides that “[a]fter the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). A defendant’s motion under Rule 12(c) is generally treated in the same manner as a Rule 12(b)(6) motion to dismiss. *Aponte-Torres v. Univ. of Puerto Rico*, 445 F.3d 50, 54 (1st Cir. 2006). In order to survive such a motion based on a failure to state a claim, a complaint must contain factual allegations sufficient “to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering the merits of a motion for judgment on the pleadings, the court may look only to the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which judicial notice can be taken. *Nollet v. Justices of the Trial Court of Mass.*, 83 F. Supp. 2d 204, 208 (D. Mass. 2000), *aff’d*, 248 F.3d 1127 (1st Cir. 2000); *see also* Fed. R. Civ. P. 12(d).

Furthermore, the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the non-moving party's favor. *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 69 (1st Cir. 2000). Legal conclusions, however, will not be credited as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Once a complaint is stripped of its conclusory allegations, for the purposes of a Rule 12(b)(6) analysis, the Court must assess whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (quoting *Twombly*, 550 U.S. at 555). As the Supreme Court has explained, "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense ... . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

Under this standard, Andro's complaint must be dismissed.

**I. Andro's Complaint Fails to State a Claim Upon which Relief Can Be Granted.**

**A. Norfolk County has no connection to Andro's claims and must therefore be dismissed from this case.**

As an initial matter, Andro's complaint fails to assert any claims against Norfolk County, which in itself is a ground for dismissal. *Wamala v. City of Nashua*, 2010 U.S. Dist. LEXIS 68049 at \*7 (D. N.H. July 6, 2010). Andro's complaint is replete with allegations leveled at the Norfolk County District Attorney's Office, but what Andro has failed to realize is that the Norfolk County District Attorney's Office is an agency of the Commonwealth, not Norfolk

County. *See e.g.* Mass. Gen. Laws c. 12 (defining the role and purpose of the District Attorneys including method of election (§ 12), setting of salary to be paid by the Commonwealth (§ 15), and allowing District Attorneys to enter certain contracts on behalf of the commonwealth (§ 24)). Norfolk County does not employ, pay, or exercise any control over the Norfolk County District Attorney's Office whatsoever, and therefore cannot be liable for the actions Andro complains of. Andro's complaint does not raise any allegations against the Norfolk County Commissioner, the Engineering Department, the Registry of Deeds, or any of the other branches of Norfolk County. In essence, Andro, in his haste to hold as many parties liable for his alleged injuries as possible, has mistakenly named Norfolk County as a party to an action to which it has no connection. Therefore, Andro's claims against Norfolk County must be dismissed.

B. Even if Norfolk County is a properly named party in this suit, Andro's complaint fails to state a claim upon which relief can be granted.

Norfolk County is only briefly mentioned in the factual allegations, and thereafter is mentioned only in sparse conclusory allegations of wrongdoing.<sup>3</sup> The complaint includes specious alleged violations of Andro's civil rights but does not include how Norfolk County specifically might be responsible for them. Andro cannot state a cognizable claim against Norfolk County without setting forth specific facts as to the conduct that proximately caused a violation of his rights. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988); *see Soriano v. Beard*, No. 1:14-cv-01047-MJS, 2014 U.S. Dist. LEXIS 122885, at \*5 (E.D. Cal. Sep. 2, 2014) (dismissing civil rights claims where the plaintiff did not demonstrate that the defendant participated in the deprivation of his rights). Accordingly, Andro's claims fail and his complaint must be dismissed.

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<sup>3</sup> For example, in paragraph 166 of the complaint Andro alleges "Mr. Andro's rights were violated when he was detained after being ordered released on personal recognizance, because of his national origin and that the Brookline Police Department, Brookline Housing Authority and Norfolk County acted with a discriminatory purpose."

1. Andro cannot hold Norfolk County vicariously liable for alleged violations of 42 U.S.C. § 1983.

Again, Andro's claims against Norfolk County fail for the simple reason that the Norfolk County District Attorney's Office is not a part of Norfolk County. In the event that Andro somehow could connect the Norfolk County District Attorney's Office to Norfolk County, his claims will still fail. The only counts in Andro's complaint that come close to implicating Norfolk County are Count VI (§ 1983 and Equal Protection), Count VIII (Negligence) and Count XII (Declaratory Relief). Notably, Counts VI and VIII level charges at former defendants Michael W. Morrissey, Pamela Friedman, Erica L. Marathas, and Steven G. Nelson, but not at Norfolk County itself.<sup>4</sup> The former defendants are each members of the Norfolk County District Attorney's Office, and therefore, if read indulgently, Andro's claims could be read as asserting a claim for vicarious liability on the part of Norfolk County for the actions of the Norfolk County District Attorney's Office. Although Norfolk County and the Norfolk County District Attorney's Office are not implicated in Counts IV and V, which generally allege that Andro's detention violated the Fourth and Fourteenth Amendments, scattered throughout the complaint are conclusory allegations that the Norfolk County District Attorney's Office was somehow involved, and they will therefore be addressed as well. As detailed further below, any attempt to hold Norfolk County liable for the acts of the Norfolk County District Attorney's Office must fail.

It is well-settled law that vicarious liability does not lie in a § 1983 civil rights claim. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 659 (1978) ("[I]n other words, a local government cannot be held liable under § 1983 on a respondeat superior theory."); *Canton v. Harris*, 489 U.S. 378, 387 (1989) (without more, city is not automatically liable under § 1983 when one of its

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<sup>4</sup> Count XII (Declaratory Judgment) merely requests the Court declare Andro's civil rights were violated and therefore adds nothing novel to his complaint.

employees happens to apply a policy in an unconstitutional manner). A local government could be liable under a theory of vicarious liability, however, if a plaintiff can prove the deprivation of a constitutional right was brought about by an official policy or custom attributed to a policymaker. *Monell*, 436 U.S. at 659; *Bibbo v. Mulhern*, 621 F.Supp. 1018, 1027 (D. Mass. 1985).

Here, Andro alleges the “Norfolk Defendants had no training and no policies in place to prevent unlawful detentions based on wrongly issued immigration detainers. Nor did they have any training or policies in place regarding the treatment of individuals subject to detainers.” Complaint ¶ 96. Andro contradicts this allegation by also claiming “[the] Norfolk Defendants had a policy of enforcing all immigration detainers received from ICE . . .” Andro goes on to state in conclusory fashion that the nebulous policy caused a deprivation of his rights. Complaint, ¶ 40.

Andro’s attempts to hold Norfolk County liable under *Monell*’s policy or custom theory fails for four distinct reasons. First, because Norfolk County does not control the Norfolk County District Attorney’s Office, any policy or custom of the Norfolk County District Attorney’s Office cannot be imputed to Norfolk County.

Second, Andro’s threadbare recital of the *Monell* elements is not enough to survive a motion to dismiss. *Iqbal*, 556 U.S. at 678; see *Comeau v. Town of Webster*, 881 F. Supp. 2d 177, 186-87 (D. Mass. 2012) (dismissing § 1983 claim against municipality where “[p]laintiffs’ formulaic allegation . . . [concerning official policy or custom] is precisely the type of blanket, conclusory allegation that the Supreme Court has determined should not be given credit when standing alone”); *Pollard v. Georgetown Sch. Dist.*, 132 F. Supp. 3d 208, 226 (D. Mass. 2015) (same); *Carpinone v. City of N.Y.*, 2012 U.S. Dist. LEXIS 32115, at \*7 (S.D.N.Y. Mar. 8, 2012)



(holding a “run-down” of the legal elements of a *Monell* claim against City of New York stemming from City Police Officers’ wrongful acts were mere conclusory allegations and insufficient to survive a motion to dismiss).

Third, in ¶ 40 of his Complaint Andro admits the custom or policy that actually caused the alleged deprivation of rights resulted from 8 C.F.R. § 287.7, the Department of Homeland Security’s regulations regarding detainers, not Norfolk County. Because the policy Andro claims injured him is that of the Department of Homeland Security and not Norfolk County, Andro cannot state a claim under *Monell*, and his claims against Norfolk County must therefore be dismissed.

Finally, all of the Norfolk DA Defendants – Norfolk County’s only tenuous connection to this case – have been dismissed from this lawsuit. Norfolk County cannot be liable under a vicarious liability theory if the actual alleged wrongdoers, in this case the Norfolk DA Defendants, are found not to have violated Andro’s civil rights. Put another way, if Andro cannot state a claim that the Norfolk County DA Defendants violated his civil rights, he cannot state a claim against Norfolk County for those same civil rights violations. According to this black-letter doctrine, Andro’s attempts to hold Norfolk County liable for alleged wrongdoing of the Norfolk County District Attorney’s Office must fail.

2. Andro has not alleged a civil rights violation against the Norfolk DA Defendants.

Andro’s allegations, even read in a light most favorable to him, do not support a claim that the Norfolk DA Defendants violated his civil rights. The balance of Andro’s claims against the Norfolk County District Attorney’s Office are that it: (1) honored an ICE detainer (Compl. ¶ 161), (2) denied Andro victim certification (Compl. ¶ 161), (3) appointed a special prosecutor to handle the criminal case against Mr. Sanderson (Compl. ¶ 162), (4) failed to keep Andro

informed of the proceedings in the criminal case against Mr. Sanderson (Compl. ¶ 81), (5) failed to provide support and assistance pursuant to the Massachusetts Victim Bill of Rights (Compl. ¶ 163), and (6) caused and promoted Andro's "in absentia status" from the Brookline District Court and failed to seek incriminating evidence against Mr. Sanderson (Compl. ¶ 164). Andro asserts that these actions were carried out pursuant to discriminatory animus against Andro's national origin. (Compl. ¶ 165).

Andro's claims against the Norfolk DA Defendants are based on the specious and speculative conclusion that the Norfolk DA Defendants honored an unlawful immigration detainer on him. But Andro does not even come close to demonstrating how this was the case. Andro does not dispute that his arrest for violating a restraining order was legitimate. He does not offer any allegations demonstrating how he was improperly classified as a deportable alien. Thus, the only conduct undertaken by the Norfolk DA Defendants that is even remotely connected with the plaintiff's requests for relief was their subsequent compliance with an ICE immigration detainer request. However, Andro does not – and cannot – allege what role, if any, the Norfolk County or the Norfolk County DA Defendants played in enforcing the detainer. Andro concludes this is a violation of his civil rights, but pleads no facts vaulting that conclusion from the realm of possible to plausible, and utterly fails to show how Norfolk County was connected to the alleged deprivation in any way whatsoever. Such conclusory pleadings are insufficient to state a claim, and are the proper subject of a motion to dismiss. *Dantone v. Bhaddi*, 570 F.Supp.2d 167, 171 (D.Mass.2008).

### 3. Andro's State Law Tort Claims are Barred by Sovereign Immunity and the Massachusetts Tort Claims Act.

Norfolk County is protected against state law tort claims based on principles of state-law sovereign immunity and General Law Chapter 258, the Massachusetts Tort Claims Act

(“MTCA”). Under the common law, the Commonwealth enjoys sovereign immunity against civil actions. *DeRoche v. Massachusetts Comm’n Against Discrimination*, 447 Mass. 1, 12 (2006). Those acting on the Commonwealth’s behalf are entitled to the same protection when sued in their official capacities. *See, e.g., Sullivan v. Chief Justice for Admin. & Management of the Trial Court*, 448 Mass. 15, 24-27 (2006). The MTCA waives the Commonwealth’s sovereign immunity in certain limited circumstances and subject to several exceptions. Mass. Gen. Laws c. 258 §§ 1-13; *Sharon v. City of Newton*, 437 Mass. 99, 111 (2002). For example, Andro’s claims of intentional torts, including his claim for false arrest or imprisonment, are barred by § 10(c). *See* Mass. Gen. Laws c. 258, § 10(c) (“The provisions of sections one to eight do not apply to...(c) any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest...”). Thus, to the extent Andro’s complaint could be construed to assert intentional tort claims against Norfolk County, it is patently defective and must be dismissed.

More importantly, “[A] State’s constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued.” *Rivera v. Commonwealth of Massachusetts*, 16 F.Supp.2d 84, 87 (1998) (quoting *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984)). Thus, a state may waive its sovereign immunity against suits in state court while maintaining its sovereign immunity against the same suits in federal court. *See Rivera*, 16 F.Supp.2d at 87 (determining MTCA does not waive sovereign immunity of public employers in federal court). Accordingly, Andro’s negligence claim, to the extent it could be construed to state a claim against Norfolk County, must fail.

Finally, even if Andro’s claims are properly in federal court and were cognizable under the MTCA, which they are not, Andro has failed to follow the MTCA’s strict present requirements. Under § 4 of the MTCA, “[b]efore any civil action for damages may be brought

against a public employer, the claimant must present his claim to the employer's executive officer; only if the claim is denied, or if the executive officer fails to deny the claim within six months of its presentment, may the claimant file a civil suit." *Pruner*, 382 Mass. at 315, 415 N.E.2d at 210. Section 4's requirement of "[p]resentment is ... a statutory condition precedent to recovery under G.L. c. 258." *Vasys v. Metropolitan Dist. Comm'n*, 387 Mass. 51, 55, 438 N.E.2d 836, 840 (1982). The failure to allege presentment provides an additional, independent basis for the dismissal of the plaintiff's state-law tort claims under Fed. R. Civ. P. 12(b)(6). *See G & B Associates, Inc. v. City of Springfield*, 39 Mass. App. Ct. 51, 54, 653 N.E.2d 203, 206 (1995) ("If the claimant fails to make any presentment of his or her claim prior to bringing an action against the public employer, the plaintiff's complaint is subject to dismissal on a motion made under Mass. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted." (Quotation omitted.)); *Lodge*, 21 Mass. App. Ct. at 284, 486 N.E.2d at 768 ("A plaintiff must demonstrate that he has properly complied with the presentment requirement when the defendant raises the issue in a timely manner."). Here, Andro has not alleged that he presented his claims to Norfolk County's executive officer, and he therefore has not alleged that he complied with the MTCA's presentment requirement. Accordingly, Andro's tort claims against Norfolk County must be dismissed.

### **CONCLUSION**

Andro's complaint is a scattershot attempt to establish liability for alleged civil rights violations, and seeks to hold Norfolk County liable for the actions of a completely unrelated entity. Even read indulgently, Andro's complaint fails to state a claim for relief against Norfolk County and thus, Andro has unsuccessfully attempted to find liability where none exists. For the

reasons stated above, Andro's Complaint should be dismissed in its entirety as to Norfolk County.

Respectfully submitted,

NORFOLK COUNTY

By its attorneys,  
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**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the NEF and paper copies will be sent to those indicated as non-registered participants by first class mail on November 15, 2016.

/s/ Scott P. Lopez  
Scott P. Lopez