

FILED

Pro Se 15 (Rev. 12/16) Complaint for Violation of Civil Rights (Non-Prisoner)

UNITED STATES DISTRICT COURT

for the

Western District of TX

Austin Division

MAR 01 2023

CLERK, U.S. DISTRICT CLERK WESTERN DISTRICT OF TEXAS BY [Signature] DEPUTY

1:23 CV 00233 RP

Case No.

(to be filled in by the Clerk's Office)

Jury Trial: (check one) [] Yes [X] No

SHERMAN Wilson

Plaintiff(s)

(Write the full name of each plaintiff who is filing this complaint. If the names of all the plaintiffs cannot fit in the space above, please write "see attached" in the space and attach an additional page with the full list of names.)

-v-

Austin Police Dept

Defendant(s)

(Write the full name of each defendant who is being sued. If the names of all the defendants cannot fit in the space above, please write "see attached" in the space and attach an additional page with the full list of names. Do not include addresses here.)

COMPLAINT FOR VIOLATION OF CIVIL RIGHTS (Non-Prisoner Complaint)

NOTICE

Federal Rules of Civil Procedure 5.2 addresses the privacy and security concerns resulting from public access to electronic court files. Under this rule, papers filed with the court should not contain: an individual's full social security number or full birth date; the full name of a person known to be a minor; or a complete financial account number. A filing may include only: the last four digits of a social security number; the year of an individual's birth; a minor's initials; and the last four digits of a financial account number.

Except as noted in this form, plaintiff need not send exhibits, affidavits, grievance or witness statements, or any other materials to the Clerk's Office with this complaint.

In order for your complaint to be filed, it must be accompanied by the filing fee or an application to proceed in forma pauperis.

Pro Se 15 (Rev. 12/16) Complaint for Violation of Civil Rights (Non-Prisoner)

I. The Parties to This Complaint

A. The Plaintiff(s)

Provide the information below for each plaintiff named in the complaint. Attach additional pages if needed.

Name SHERMAN WILSON
Address 5403 VILLAGE LN
Austin TX 78744
County TRAVIS
Telephone Number 512-783-3274
E-Mail Address SHERWIL635@GMAIL.COM

B. The Defendant(s)

Provide the information below for each defendant named in the complaint, whether the defendant is an individual, a government agency, an organization, or a corporation. For an individual defendant, include the person's job or title (if known) and check whether you are bringing this complaint against them in their individual capacity or official capacity, or both. Attach additional pages if needed.

Defendant No. 1

Name Austin Police Dept Joseph Chacon
Job or Title (if known) THE POLICE
Address 715 E 8th
Austin TX 78701
County TRAVIS
Telephone Number 512-974-5000
E-Mail Address (if known)

Individual capacity Official capacity

Defendant No. 2 Chief of Police Joseph Chacon

Name JOSEPH CHACON
Job or Title (if known) CHIEF
Address 715 E 8th
Austin TX 78701
County TRAVIS
Telephone Number 512-974-5000
E-Mail Address (if known)

Individual capacity Official capacity

Pro Se 15 (Rev. 12/16) Complaint for Violation of Civil Rights (Non-Prisoner)

Defendant No. 3

Name _____

Job or Title (if known) _____

Address _____

City _____

State _____

Zip Code _____

County _____

Telephone Number _____

E-Mail Address (if known) _____

Individual capacity

Official capacity

Defendant No. 4

Name _____

Job or Title (if known) _____

Address _____

City _____

State _____

Zip Code _____

County _____

Telephone Number _____

E-Mail Address (if known) _____

Individual capacity

Official capacity

II. Basis for Jurisdiction

Under 42 U.S.C. § 1983, you may sue state or local officials for the “deprivation of any rights, privileges, or immunities secured by the Constitution and [federal laws].” Under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), you may sue federal officials for the violation of certain constitutional rights.

A. Are you bringing suit against (check all that apply):

Federal officials (a *Bivens* claim)

State or local officials (a § 1983 claim)

B. Section 1983 allows claims alleging the “deprivation of any rights, privileges, or immunities secured by the Constitution and [federal laws].” 42 U.S.C. § 1983. If you are suing under section 1983, what federal constitutional or statutory right(s) do you claim is/are being violated by state or local officials?

EXCESSIVE FORCE
 Shot ME with Shotgun Loaded w/ Bean BAGS
 after being in compliance with their orders
 at Point Blank Range

C. Plaintiffs suing under *Bivens* may only recover for the violation of certain constitutional rights. If you are suing under *Bivens*, what constitutional right(s) do you claim is/are being violated by federal officials?

- D. Section 1983 allows defendants to be found liable only when they have acted "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." 42 U.S.C. § 1983. If you are suing under section 1983, explain how each defendant acted under color of state or local law. If you are suing under *Bivens*, explain how each defendant acted under color of federal law. Attach additional pages if needed.

III. Statement of Claim

State as briefly as possible the facts of your case. Describe how each defendant was personally involved in the alleged wrongful action, along with the dates and locations of all relevant events. You may wish to include further details such as the names of other persons involved in the events giving rise to your claims. Do not cite any cases or statutes. If more than one claim is asserted, number each claim and write a short and plain statement of each claim in a separate paragraph. Attach additional pages if needed.

- A. Where did the events giving rise to your claim(s) occur?

5400 Village Lane
Austin TX 78744

- B. What date and approximate time did the events giving rise to your claim(s) occur?

June 22, 2022 approx 11 maybe 12 or
later or earlier. Uncertain of exact time

- C. What are the facts underlying your claim(s)? (For example: What happened to you? Who did what? Was anyone else involved? Who else saw what happened?)

Selling Handbags to neighbors T shirt
miscellaneous items including BB Pistol
that didn't work. Someone called 911. Police
showed up. Order given "Drop the Weapon. Droppe
Put arms stretched out to side. Done, Walk
Backwards to my voice. Doing it, Get on knees
Sir I'm Disabled Veteran with BAO knees have
Braces on both knees. Well Turn around Slowly
doing it when Boom. I'm shot. see Back

All the neighbors 1st + 2nd Floor of Apt
Complex Located at 5400 Village Lane. Mexican
Family with Husband Wife and Daughter that
Bought Expensive Handbag Michael Kors for
\$2000. Which was deposited into to inmate
account at Central Booking. Travis Cty.
Was arrested and charged with 5 counts
Terroristic Threat from June 22 to July 1st
when posted Bond \$2500. Atty Jesus Gabriel
Hernandez Atty for Plaintiff.

IV. Injuries

If you sustained injuries related to the events alleged above, describe your injuries and state what medical treatment, if any, you required and did or did not receive.

Deep Bruising, PTSD diagnosis at
VA Olin E Teague Waco Bldg 94, + Temple
Mental Health Clinic.

Bldg 94 Waco - Dec - Dec 23, 2022
Bldg 202 Temple Tx - Jan 10, 2023 Discharge Date 3/10/23
All Mental Health Records immediately Available

V. Relief

State briefly what you want the court to do for you. Make no legal arguments. Do not cite any cases or statutes. If requesting money damages, include the amounts of any actual damages and/or punitive damages claimed for the acts alleged. Explain the basis for these claims.

Excessive Force claim 2.5 million punitive
Damages for Pain + Suffering, Dismissal of
False Charges placed on Me, to include
Mental Health issues resulting from
Shotgun Blast to abdomen and Rib

VI. Certification and Closing

Under Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my knowledge, information, and belief that this complaint: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Rule 11.

A. For Parties Without an Attorney

I agree to provide the Clerk's Office with any changes to my address where case-related papers may be served. I understand that my failure to keep a current address on file with the Clerk's Office may result in the dismissal of my case.

Date of signing: 3/21/23

Signature of Plaintiff Sherman Wilson

Printed Name of Plaintiff SHERMAN WILSON

B. For Attorneys

Date of signing: _____

Signature of Attorney _____

Printed Name of Attorney _____

Bar Number _____

Name of Law Firm _____

Address _____

Telephone Number _____

E-mail Address SHERWIL635@gmail.com

City State Zip Code
512-783-3274

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

SHERMAN WILSON,	§	
	§	
Plaintiff,	§	
V.	§	
	§	A-23-CV-233-RP-ML
AUSTIN POLICE DEPARTMENT,	§	
Defendant.	§	

**ORDER ON *IN FORMA PAUPERIS* STATUS AND
REPORT AND RECOMMENDATION ON THE MERITS OF THE CLAIMS**

TO THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE:

The Magistrate Court submits this Report and Recommendation to the United States District Court pursuant to 28 U.S.C. § 636(b) and Rule 1 of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges.

Before the court is Plaintiff’s Application to Proceed *In Forma Pauperis* (Dkt. #2). Because Plaintiff is requesting permission to proceed *in forma pauperis*, this court must review and make a recommendation on the merits of Plaintiff’s claims pursuant to 28 U.S.C. § 1915(e).

I. REQUEST TO PROCEED *IN FORMA PAUPERIS*

The court has reviewed Plaintiff’s financial affidavit and determined Plaintiff is indigent and should be granted leave to proceed *in forma pauperis*. Accordingly, the court hereby **GRANTS** Plaintiff’s request for *in forma pauperis* status. The Clerk of the Court shall file the complaint without payment of fees or costs or giving security therefor pursuant to 28 U.S.C. § 1915(a). This indigent status is granted subject to a later determination the action should be dismissed if the allegation of poverty is untrue or the action is found frivolous or malicious

pursuant to 28 U.S.C. § 1915(e). Plaintiff is further advised, although Plaintiff has been granted leave to proceed *in forma pauperis*, a court may, in its discretion, impose costs of court at the conclusion of this lawsuit, as in other cases. *Moore v. McDonald*, 30 F.3d 616, 621 (5th Cir. 1994).

As stated below, this court has made a § 1915(e) review of the claims made in this complaint and is recommending Plaintiff's claims be dismissed prejudice under 28 U.S.C. § 1915(e). Therefore, service upon Defendant should be withheld pending the District Court's review of the recommendations made in this Report. If the District Court declines to adopt the recommendations, then service should be issued at that time upon Defendant.

II. REVIEW OF THE MERITS OF THE CLAIM

A. Factual Background

Plaintiff Sherman Wilson sues the Austin Police Department and Chief of Police Joseph Chacon for excessive force under § 1983. He alleges the police were called when he was selling handbags and other items, including a BB pistol that did not work. The police officer ordered Wilson to drop the weapon, stretch out his arms, and walk backwards to his voice, which Wilson did. Wilson was ordered to get on the ground, but informed the officer that he was a disabled veteran with bad knees. The officer ordered him to turn around slowly. As he was doing so, Wilson was shot in the back at point blank range with bean bag rounds from a shotgun.

B. Standard of Review

Because Plaintiff has been granted leave to proceed *in forma pauperis*, the court is required by statute to review the Complaint. Section 1915(e)(2) provides in relevant part that “the court shall dismiss the case at any time if the court determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii)

seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). A complaint is frivolous, if it “lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325, (1989); *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). A claim lacks an arguable basis in law when it is “based on an indisputably meritless legal theory.” *Neitzke*, 490 U.S. at 327. A claim lacks an arguable basis in fact when it describes “fantastic or delusional scenarios.” *Id.* at 327–28.

Pro se complaints are liberally construed in favor of the plaintiff. *Haines v. Kerner*, 404 U.S. 519, 20–21 (1972). However, *pro se* status does not offer a plaintiff an “impenetrable shield, for one acting *pro se* has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets.” *Ferguson v. MBank Houston N.A.*, 808 F.2d 358, 359 (5th Cir. 1986).

C. Discussion

The Austin Police Department is not an entity that can be sued. *Darby v. Pasadena Police Dep't*, 939 F.2d 311 (5th Cir. 1991). Accordingly, the court construes Wilson’s claim as a claim against the City of Austin. In *Monell v. Dep’t of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that a municipality cannot be held liable under 42 U.S.C. § 1983 solely because its employee committed a constitutional tort. *Id.* at 691. Municipalities and other local governments may incur Section 1983 liability, however, where official policy or custom causes a constitutional violation. *Bennet v. City of Slidell*, 728 F.2d 762, 766 (5th Cir. 1984). For municipal liability to attach, the plaintiff must show three elements: (1) a policymaker; (2) an official policy; and (3) a “violation of constitutional rights whose ‘moving force’ is the policy or custom.” *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (quoting *Monell*, 436 U.S. at 694); *Johnson v. Deep East Tex. Regional Narcotics Trafficking Task Force*, 379 F.3d

293, 309 (5th Cir. 2004). In order to prevail on a municipal liability claim, a plaintiff must show “(1) that the policy itself violated federal law or authorized or directed the deprivation of federal rights or (2) that the policy was adopted or maintained by the municipality’s policymakers with deliberate indifference as to its known or obvious consequences.” *Johnson*, 379 F.3d at 309. Although Wilson alleges he was subject to excessive force, he does not allege any City policy that was the moving force behind the use of excessive force. Accordingly, he has failed to state a claim against the City.

Wilson also names Police Chief Chacon as a defendant. But Wilson has not alleged any action that Chacon took or failed to take, or any policy adopted by Chacon, that led to the use of excessive force. Accordingly, Wilson has also failed to state a claim against Chacon.

III. ORDER AND RECOMMENDATIONS

The Magistrate Court hereby **GRANTS** Plaintiff’s Application to Proceed *In Forma Pauperis* (Dkt. #2). The Magistrate Court **RECOMMENDS** the District Court **DISMISS** Plaintiff’s cause of action pursuant to 28 U.S.C. § 1915(e)(2)(B).

The referral of this case to the Magistrate Court should now be canceled.

IV. WARNING

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm’n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party’s failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings

and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996)(en banc).

SIGNED April 24, 2023.



MARK LANE
UNITED STATES MAGISTRATE JUDGE

RECEIVED

MAY 24 2023

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY [Signature]
DEPUTY

Sherman Wilson
3614 Bill Piner Rd
DEL VALLE TX
78617

United States District Court
For Western District of Texas
Austin Division

FILED
MAY 24 2023
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY [Signature]
DEPUTY CLERK

To Honorable Judge of Said Court
Comes now Sherman Wilson Plaintiff
in a Case Pro Se against the Austin
Police Dept. I've been granted in
Forma Pauperis but magistrate judge
wants the case dismissed and
Leaves the final decision with you.
I'm prepared to serve Defendants
that includes my Summons, Discovery
and Motion to appoint Atty. This case
involves Police shooting me causing
harm, injury and Loss. I guess I'm appealing
to you to order this case move forward
If you could view the body cams

Video you would conclude in a
positive manner this case has merit

Sincerely

Sherman Wilson Pro Sr



AUSTIN TX 787
RIO GRANDE DISTRICT
22 MAY 2023 PM 3 L

SCREENED BY CSO

MAY 24 2023

Phemany Wilson
3614 Ball Prairie Rd
Del Valle TX 78617

US District Court Clerk
501 West 5th
Austin TX 78701

78701-381398



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SHERMAN WILSON,

Plaintiff,

v.

AUSTIN POLICE DEPARTMENT and
JOSEPH CHACON, *Chief of Police*,

Defendants.

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1:23-CV-0233-RP

ORDER

Before the Court is the report and recommendation from United States Magistrate Judge Mark Lane concerning Plaintiff’s Complaint, (Dkt. 1). (R. & R., Dkt. 4). Pursuant to 28 U.S.C. § 636(b) and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Judge Lane issued his report and recommendation on April 24, 2023. (*Id.*). In his report and recommendation, Judge Lane recommends that the Court dismiss Plaintiff’s cause of action pursuant to 28 U.S.C. § 1915(e)(2)(b). (*Id.* at 4). Plaintiff filed an objection to the report and recommendation. (Dkt. 24).

A party may serve and file specific, written objections to a magistrate judge’s findings and recommendations within fourteen days after being served with a copy of the report and recommendation and, in doing so, secure *de novo* review by the district court. 28 U.S.C. § 636(b)(1)(C). Because Plaintiff timely objected to the report and recommendation, the Court reviews the report and recommendation *de novo*. Having done so, the Court overrules each party’s objections and adopts the report and recommendation as its own order.

Accordingly, the Court **ORDERS** that the report and recommendation of United States Magistrate Judge Mark Lane, (Dkt. 4), is **ADOPTED**.

IT IS FURTHER ORDERED that Plaintiff's case is **DISMISSED**.

SIGNED on May 26, 2023.

A handwritten signature in blue ink, appearing to read "R. Pitman", with a long horizontal flourish extending to the right.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SHERMAN WILSON,

Plaintiff,

v.

AUSTIN POLICE DEPARTMENT and
JOSEPH CHACON, *Chief of Police*,

Defendants.

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1:23-CV-0233-RP

FINAL JUDGMENT

On this day, the Court adopted United States Magistrate Judge Mark Lane’s report and recommendation concerning Plaintiff’s complaint, (Dkt. 1). (R. & R., Dkt. 4). The Court’s order dismiss Plaintiff’s claims.

As nothing remains to resolve, the Court renders final judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS FURTHER ORDERED that the case is **CLOSED**.

SIGNED on May 26, 2023.



ROBERT PITMAN
UNITED STATES DISTRICT JUDGE