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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18-3485

Susan Lloyd

Plaintiff-Appellant

v.

City of Streetsboro, Streetsboro Fire Department, Streetsboro Police Department, Jeff Allen, Melissa Procop, Glenn Broska, Robert Reinholz, Kevin Grimm, Chris Fredmonsky, Brian Novotny, Darin Powers, Patricia Wain, Andrew Suvada, John Hurley, Joe Smolic, Jason Sackett, Jason Hall, Michael Cipriano, Ryan Wolf, Aaron Coates, Hayley Otto, Portage County Prosecutor, Thomas Buchanan, Victor Vigluicci, John Doe, Jane Doe

Defendants- Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Filed December 20, 2018

O R D E R

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Before: GUY, STRANCH, and LARSEN, Circuit Judges

Susan Lloyd , a pro se litigant, appeals a district court judgment dismissing her complaint alleging various constitutional and federal law violations. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. See Fed R. App P 34(a)

Lloyd filed this action in 2018 against the City of Streetsboro; the City's mayor; a City council member; four City employees; the Streetsboro Fire Department; the Fire Departments chief; the Streetsboro Police Department; the Police Departments chief; two sergeants; six officers; and two employees of the Police Department; the Portage County Prosecutors Office; the Portage County prosecutor and assistant prosecutor; and Jane and John Doe. Lloyd has sued each individual defendant in his or her individual and official capacities. She seeks damages and declatory and injunctive relief.

At its core, Lloyds complaint alleges that the defendants failed to take action against her non-party neighbor, Joshua Thornsbery, with whom Lloyd has been in dispute since she moved into her home in 2016. Lloyds primary allegations are that : Thornsbery, his friends and dogs have trespassed onto her property; Thornsbery and his friends have "harassed, defamed and threatened"her on social media and have videotaped her inside her home; and Thornsbery has maintained illegal fires on his property. According to Lloyd, the defendants have ignored these acts of

misconduct and have allowed them to continue. She also alleges that the defendants have "harassed, lied to, defamed and injured her maliciously all because they are either friends with Thornsbery or one of his friends or they just decided they were not going to enforce their own laws."

Lloyd also raises a number of other allegations against the defendants. For instance, she alleges that: the City of Streetsboro and Melissa Procop, a city employee, have blocked her from posting on the Citys Facebok page; the defendants have harassed her about her legally placed cameras that she installed when Thornsbery began trespassing on her property; and the defendants defamed her by telling Thornsbery that she has mental issues when they have no knowledge to that fact.

Based on these allegations, Lloyd brings claims for violations of (1) the First, Fifth, Eighth, Ninth and Fourteenth Amendments pursuant to 42 USC 1983 (2) Titles II and III of the Americans with Disabilities Act (ADA) (3) section 504 of the Rehabilitation Act of 1973 (Rehab Act) and 42 USC 1985

Five of the defendants filed motions to dismiss, which the district court granted pursuant to Federal Rule of Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The district then determined that Lloyds remaining claims "are so devoid of merit that they fail to establish a basis for federal court jurisdiction" and sua sponte dismissed them accordingly. Thereafter, the district court denied several post judgment motions for reconsideration, one of which contained a request for recusal.

We review de novo a district court's dismissal of a complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft V Iqbal 556 US 662, 678 (2009) quoting Bell Atl Corp v Twombly, 550 US 544, 570 (2007)*

We also review denovo the district courts sua sponte dismissal for lack of subject matter jurisdiction. *Russell v Lundergan-Grimes, 784 F 3d 1037, 1045 (6th Circ 2015)*"As a general rule a district court may not sua sponte dismiss a complaint where the filing fee has been paid unless the court gives the plaintiff opportunity to amend the complaint." *Wagenknecht v United States, 533 F 3d 412, 417 (6th Circ 2008)(quoting Apple v Glenn 183 F 3d 477, 479 (6th Circ 1999) (per curiam)*If the court believes dismissal is in order, it should notify the parties of its intent to dismiss the complaint and give the plaintiff an opportunity to amend the complaint or otherwise respond to the stated reasons. Id There is one small exception id to these requirements:

A district court may, at any time, sua sponte dismiss a complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure when the allegations of a complaint are totally implausible, attenuated, unsubstantial, frivolous, devoid of merit, or no longer open to discussion. *Apple 183 F 3d at 479.* In this case, the district court did not give Lloyd notice of its intent to dismiss or an opportunity to amend her complaint.

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In addition, we may affirm a district courts decision "on any grounds supported by the record even if different from the reasons of the district court." *Abercrombie & Fitch Stores Inc. V Am Eagle Outfitters Inc 280 F 3d, 619, 629 (6th Circ 2002)*

1. Forfeiture on Appeal

As an initial matter with the exception of her First, Fifth and Fourteenth Amendment claims, Lloyds appellate brief does not raise any specific challenge to the district courts order dismissing her complaint or the reasons set forth therein as to why her claims were subject to dismissal. Rather she merely restated many of the factual allegations of her complaint and reiterates her primary assertion that the defendants have done nothing to stop the misconduct of Thornsbery and his friends and have engaged in some of the same misconduct themselves.

The "failure" to raise an argument in an appellate brief constitutes a waiver of the argument on appeal. *Radvansky v City of Olmsted Falls, 395 F 3d, 291, 311 (6th Circ 2005)*

Although pro se filing should be liberally construed, "pro se parties must still brief the issues advanced and reasonably comply" with the briefing standards set forth in Federal Rule of Appellate Procedure 28. *Bouyer v Simon22 F App'x 611, 612 (6th Circ 2001)(order) (citing Mcneil v United States, 508 US 106, 113 (1993) see also Geboy v Brigano 489 F 3d 752 767 (6th Circ 2007)*(concluding that the Plaintiff had "waived any possible challenge to the dismissal of certain claims by failing to advance any sort of argument for the reversal of the district courts rulings on these

matters") Accordingly, with the exception of her First, Fifth and Fourteenth Amendment claims, Lloyd has forfeited any challenges to the district courts dismissal of her complaint.

II. Rulings Pursuant to Motions to Dismiss

A. Section 1983 Claims Against the Streetsboro Police Dept, the Streetsboro Fire Department, and the Portage County Prosecutor's Office

The district court properly dismissed Lloyds 1983 claims against the Streetsboro Police Department, the Streetsboro fire Department and the Portage County prosecutors Office. We have held that under Ohio law, sheriffs and police departments are not entities capable of being sued under 1983. See *Petty v County of Franklin 478, F 3d 341, 347 (6th Circ 2007) Tysinger v Police Dept 463 F 3d 569, 572 (6th Circ 2006).* Although we have not specifically addressed whether Ohio law permits a fire department or a county prosecutors office to be sued under 1983, Ohio federal district courts have routinely precluded such suits. See eg *Lee v City Of Moraine Fire dept No 3:13-cv-222, 2015 WL 914440 at *9 (SD Ohio Mar 3 2015); Willaims v Ohio No 1:16-cv-1053, 2016 WL 3555204 at *2 (ND Ohio June 30, 2016).* We agree with their analysis.

B. Section 1983 Claims Against Vigluicci and Buchanan

We find that Lloyds claims against Vigluicci and Buchanan were also properly dismissed. First, Lloyd cannot sue these Defendants in their official capacities as prosecutor and assistant prosecutor of Portage county because such a suit is not a suit against these officials but rather a suit against the Portage County

Prosecutors office and, in turn, Portage County. See *Matthews v Jones 35 F 3d, 1046, 1049 (6th Circ 1994)* ("A suit against an individual in his official capacity is the equivalent of a suit against the government entity") and as set forth below, Lloyds 1983 claims against Portage County were properly dismissed.

Second to the extent that Lloyd sued Vigluicci and Buchanan in their individual capacities, they are entitled to absolute prosecutorial immunity. Lloyd alleges that the defendants ostensibly including Vigluicci and Buchanan failed to take action in response to the purportedly unlawful acts committed by Thornsbery and friends; we liberally construe these allegations as claiming that Thornsbery and his friends should have been prosecuted for their unlawful acts. The decision whether or not to prosecute is intimately associated with the judicial phase of the criminal prosecution. *Imbler v Pachtman 424 US 409, 420, 431 (1976); Holloway v brush 220 F3d 767, 775 (6th Circ 2000); Grant v Hollenbach 870 f2d 1135, 1138 (6th Circ 1989).* Accordingly to the extent that Lloyd alleges that Vigluicci and Buchanan in their individual capacities failed to prosecute Thornsbery and his friends, they are entitled to absolute immunity.

III. Sua Sponte Dismissal of Remaining Claims

A. Section 1983 Claims Against the remaining defendants

To state a viable 1983 claim a plaintiff must allege that 1. She was deprived of a right, privilege or immunity secured by the Federal Constitution or laws of the United States, and 2. The deprivation was caused by a person acting under color of state law. *Flagg Bros. v Brooks 436 US 149, 155(1978)*

I. First Amendment Claim under 1983

Lloyd alleges that the "review" she posted on the City of Streetsboros Facebook page was deleted and that she was blocked from the City of Streetsboros Facebook page by the City of Streetsboro and Melissa Procop for exercising her freedom of speech in violation of the First Amendment. We construe this claim as one brought against both the City and Procop and consider the potential liability of each defendant in turn.

A local govt entity is responsible for a constitutional violation under 1983 where a plaintiff alleges facts showing that a municipal custom or policy caused the alleged violation. See *Monell v Dept of Soc Servs 436 US 658 692-94(1978)* A plaintiff can show an illegal policy or custom by demonstrating 1. The existence of an illegal official policy or legislative enactment 2. That an official with final decision making authority ratified illegal actions 3. The existence of a policy of inadequate training or supervision or 4. The existence of a custom of tolerance or acquiescence of federal rights violations." *Burgess v Fischer 735 F 3d 462, 478 (6th Circ 2013)*

Lloyd alleges that the Facebook page at issue is an official page and that she was blocked by the city and one named city employee, Procop. The district court stated that Lloyd did not explain in her complaint which individual defendants were responsible for maintaining the site. This is incorrect. Lloyd alleges she was blocked by Procop. Moreover, drawing all plausible inferences in Lloyds favor, we may infer that city employees monitor the postings and users of the Citys official

Facebook page either by exercising their discretion or by measuring posted content against a formal or informal policy. Either structure could give rise to a Monell Claim. If employees exercise discretion they may have final decision making authority. Id If employees enforce set rules, those rules may amount to actionable policies or customs, See id

We therefore consider the potential constitutional violation. Importantly Lloyds claims against the City was dismissed sua sponte without giving her an opportunity to amend or respond, we do not ask whether the claim is likely to succeed on the merits, but only whether her allegations of a constitutional violation are totally implausible, attenuated, unsubstantial, frivolous, devoid of merit or no longer open to discussion. *Apple 183 F 3d at 479*

First Amendment liability of government entities for social media interactions is a new and evolving area of the law. *Cf Packingham v North Carolina 137 S Ct 1730, 1736 (2017)*

("The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.") Analyzing such a claim generally requires answering one or both of two questions. First, is the page a public forum or merely a vehicle for government or personal speech? Compare *Davison v Plowman 247 F Supp 3d 767, 776 (ED Va 2017)* "the Loudon County Social Media Comments policy serves to create a limited public forum as applied to the Loudon County Commonwealths attorneys Facebook page") and Knight *First Amendment Inst at Columbia Univ v Trump 302 F Supp 3d*

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541, 575 (SDNY 2018) (the interactive space of a tweet from the @realDonaldTrump account constitutes a designated public forum) with *Morgan v Bevin 298 F Supp 3d 1003, 1010 (ED Ky 2018)*(holding a governors social media pages are not public for a and that his "use of privately owned Facebook and Twitter pages is personal speech). Second, is the government action such as deleting a post or blocking a user attributable to viewpoint discrimination or to the application of a reasonable and nondiscriminatory restriction? Compare *Davison 247 F 3d at 777* (Plaintiffs comment did not comport with the purpose of the forum and the restriction justifying its removal was both viewpoint neutral and reasonably related to the purpose of the forum.) with *Knight 302 f Supp 3d at 575*(the individual plaintiffs were indisputably blocked as a result of viewpoint discrimination)

In this case, the district court determined that Lloyds claim was sua sponte dismissal because a government entity may restrict speech within a forum, But such restrictions must at a minimum be reasonable in light of the purpose served by the forum and viewpoint neutral. *Cornelius v NAACP Legal def & Educ Fund 473US 788, 806 (1985)*(describing requirements for a nonpublic forum) at the early stage of sua sponte dismissal the court may not assume that the citys restriction on Lloyds speech was reasonable and viewpoint neutral- particularly in light of Lloyds allegation that she and others have been blocked because the Mayor does not like what they have said. Rather the court must ask whether the claim is totally implausible, attenuated unsubstantial, frivolous, devoid of merit or no longer open to discussion. *Apple 183 F 3d at 479* Although Lloyds claim may eventually be

dismissed or otherwise found wanting, the claim alleges viewpoint discrimination on an official webpage so is not frivolous. Remand for further consideration of the First Amendment claim against the City is therefore in order.

The claim fails as to Procop however, becaue she unlike the City see *Owen v Independence 445 US 622, 638 (1980)* is entitled to qualified immunity. In determining whether a government official is entitled to qualified immunity, we consider whether a constitutional right would have been violated on the facts alleged and if so whether the right was clearly established. *Occupy Nashville V Haslam 769 F3d 434, 442 (6th Circ 2014) (quoting Saucier v Katz 533 US 194 200 (2001).* A right is clearly established if the contours of the right are sufficiently clear that a reasonable official would understand that what she is doing violates that right. *Baynes v Cleland 799, F3d 600, 610 (6th Circ 2015)*(first and second alterations in original)(*quoting Anderson v Creighton 483 US 635 640(1987)*While some district court decisions support the plausibility of Lloyds claim, Lloyd has cited no decision from the Supreme Court, this Court or other courts in this circuit or any other circuit court to support her position. See *Brown v Lewis 779 F3d 401, 418-19(6th Circ 2015)* "to determine whether a constitutional right is clearly established we must look first to decisions of the Supreme Court then to decisions of this court and other courts within our circuit and finally to decisions of other circuits." (quoting *Baker v City of Hamilton 471 F 3d 601, 606 (6th Circ 2006)*Nor have we located nay. In the absence of "cases of controlling authority in this jurisdiction at the time of the incident or a consensus of cases of persuasive

authority, *Ashcroft v al-Kidd 563 US 731, 746 (2011)* (citation and internal quotation marks omitted) it cannot be said that it was reasonably clear to Procop that her alleged act of blocking Lloyd from the City's Facebook page violated a clearly established constitutional right. *Cf Baynes 799, F3d at 610* Lloyd therefore cannot overcome Procops qualified immunity defense as to Lloyds First Amendment claim. See *Silberstein v City of Dayton 440 f 3d, 306, 311 (6th Circ 2006)* ("Once the qualified immunity defense is raised, the burden is on the Plaintiff to demonstrate that the official is not entitled to qualified immunity") Although Lloyds claim against the City may proceed, the claim against Procop was properly dismissed.

2. Fifth and Fourteenth Amendment Claims under 1983

The primary allegation underlying Lloyds Fifth and Fourteenth Amendment due process claims are that the defendants have ignored Thornsberys crimes and have failed to initiate criminal charges against him. The Supreme Court however has made it clear that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. *DeShaney v Winnebago Cty Dept of Soc Srvs 489 US 189 195(1989)* While the due process clause prohibits injury caused by state action, "its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." Id Thus "a states failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause. Id at 197 see also *Linda RS v Richard D 410*

US 614, 619(1973) A private citizen lacks a judicially cognizable interest in the prosecution of another)

Moreover as to the municipal Defendants Lloyd did not allege facts in her complaint showing that a custom or policy of the City of Streetsboro or Portage County caused any deprivation of her Due Process Rights; nor has she alleged facts showing that there was a causal link between a policy or custom of these entities and the alleged violation of her constitutional rights. Given this authority, we find that the district courts dismissal of Lloyds Fifth and Fourteenth Amendment claims for lack of merit was proper.

3. Eighth Amendment Claim Under 1983

Lloyds Eighth Amendment claim was properly dismissed as meritless because that amendment concerns only prisoners who have been convicted of a crime, see *Richmond v Huq 885 F3d, 928, 937 (6th Circ 2018)* and Lloyd was not a prisoner at any time.

4. Ninth Amendment Claim Under 1983

There is no merit to Lloyds claim for violations of the Ninth Amendment because the Ninth Amendment "does not confer substantive rights in addition to those conferred by other portions of our governing law" *Gibson v Matthews 926 F2d, 532, 537 (6th Circ 1991)*

5. State Law Claims Under 1983

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To the extent that Lloyds 1983 claims alleged any violations of state law (eg defamation) relief if unwarranted because 1983 does not provide redress solely for state law violations See *Pyles v Raisor 60 F 3d 1211, 1215 (6th Circ 1995)*

B. ADA Claims Against All Defendants

The district court correctly found Lloyds ADA claims to be without merit.

First to the extent that Lloyds Title II claim was brought against the individual defendants in their personal capacities, it was properly dismissed because there is no individual liability under the ADA. See *Carten v Kent State Univ 282 F 3d 391, 396-97 (6th Circ 2002)*

Second Lloyds official capacity claim under Title II was also properly dismissed for failing to plead the essential elements of the claim. To establish a prima facie case of discrimination under Title II, a plaintiff must allege facts showing that she 1. is disabled under the statutes 2. Is otherwise qualified for participation in a government program and 3. Is being excluded from participation in, denied the benefits of, or subjected to discrimination under the program because of her disability or handicap. *Gohl v Livonia Pub Sch Dist 836 F 3d 672, 682 (6th Circ 2016) (quoting GC v Owensboro Pub Schs 711 F 3d, 623, 635 (6th Circ 2013)* Although Lloyd alleges a disability, she does not allege that she was denied access to or the benefits of a govt program or that she was discriminated against under a govt program on account of her alleged disability. Because Lloyd failed to plead the necessary elements of a Title II claim, it was properly dismissed

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Third, Lloyds claim for alleged violations of Title III was also properly dismissed because the individual defendants are all employees of public entities, and Title III prohibition on disability discrimination in public accommodations and services applies only to private entities. See *Sandison v Mich High Sch Athletic Assn 64 F3d 1026, 1036 (6th Circ 1995)*

C. Rehabilitation Act Claim Against All Defendants

To the extent that Lloyd asserts her Rehabilitation Act claim against the individual defendants in their personal capacities, it was subject to dismissal. Like the ADA, the Rehabilitation Act does not impose personal liability upon individuals. *See Hiler v Brown 177 F3d, 542, 547 (6th Circ 1999); Lee v Mich Parole Bd 104 F App'x 490, 493 (6th Circ 2004)*

Lloyds rehabilitation Act claims also fails against all defendants in their official capacities. The only differences between the Rehabilitation Act and Title II of the ADA are the formers requirements that the government program be federally funded and that the benefits of such a program are denied solely by reason of disability. See *SS v E Ky Univ 532 F 3d 445, 452-53 (6th Circ 2008)*Neither of these differences is applicable here. Thus for the reasons set forth above explaining that Lloyds Title II claim was properly dismissed, her Rehabilitation Act claim was also properly dismissed.

D. Section 1985 Claim Against All Defendants

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Finally the district court did not err in dismissing Lloyds 1985 claim for lack of merit. In order to state a claim for conspiracy under 1985 (3) (the only subsection that could apply here based on Lloyds allegations, a plaintiff must plead:
1. a conspiracy involving two or more persons 2. For the purpose of depriving directly or indirectly a person or class of persons the equal protection of the laws and 3. An act in furtherance of that conspiracy 4. That causes injury to person or property or a deprivation of a right or privilege of a United States citizen *Collyer v Darling 98 F3d 211, 233 (6th Circ 1996)* "The plaintiff must also show the conspiracy was motivated by racial, or other class based animus." Id. Moreover, conspiracy claims must be pled with some degree of specificity" *Gutierrez V Lynch 826 F 2d 1534, 1538 (6th Circ 1987)* Aside from Lloyds single vague and conclusory allegation of a conspiracy, she alleged no facts that would lead to an inference that any of the defendants were involved in a conspiracy to deprive her of equal protection of the laws. And although Lloyd alleges a disability 1985 "does not cover claims based on disability-based discrimination or animus". *Bartell v Lohiser 215 F3d 550, 559 (6th Circ 2000)* This claim therefore was properly dismissed.

In sum, we find that the district courts decision to sua sponte dismiss Lloyds complaint in its entirety for lack of subject matter jurisdiction was warranted with regard to all the claims except the First Amendment claim against the City See *Apple 183 F 3d at 479*

IV. Motions for Reconsideration

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On appeal, Lloyd challenges the district courts decision to deny her motions for reconsideration, including her request for recusal, primarily arguing that Judge Adams is "mentally incompetent" and should not be hearing any cases, including hers. But Lloyds challenge to the district courts post judgment order denying her motions for reconsideration is not properly before this Court because Lloyd did not file a notice of appeal or amended notice of appeal from this order as required by Federal Rule of Appellate Procedure 4(a)(4)(B)(ii). Even if we had jurisdiction to review the decision to deny Lloyds motions, which are reviewed for an abuse of discretion, *Decker v GE Healthcare Inc 770 F3d 378, 388 (6th Circ 2014)* denial of the motion was proper because Lloyd has not shown that Judge Adams exhibited any personal or extrajudicial bias against her. See *United States v Jamieson 427 F3d, 394, 405 (6th Circ 2005)*

V. **Conclusion**

Accordingly, we **REVERSE** the sua sponte dismissal of the First Amendment claim against the City of Streetsboro, **AFFIRM** the remainder of the district courts judgment and **REMAND** for further proceedings consistent with this opinion.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S Hunt

Deborah S Hunt, Clerk

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Susan Lloyd,

Plaintiff

V.

City of Streetsboro, Et al

Defendants

Case No 5:18 CV 0073

Decided May 14, 2018

MEMORANDUM OF OPINION AND ORDER

Before Judge John Adams

Pro se Plaintiff Susan Lloyd filed this action against the City of Streetsboro, the Streetsboro Mayor, a Streetsboro City Councilman, four employees of the City of Streetsboro, the Streetsboro Fire Dept, the Fire Chief, three employees of the Fire Dept, the Streetsboro Police Dept, the Police Chief, ten officers or employees of the Police Dept, the Portage County prosecutor and an Assistant Portage County Prosecutor. In the Complaint, Plaintiff contends the Defendants did not side with her in her ongoing dispute with her neighbor and failed to arrest him or bring charges against him. She seeks monetary damages.

I. Background

Plaintiffs lengthy Complaint details her two year feud with her neighbor, Mr Thornsbery who is not a Defendant in this action. She contends that when she moved into her house in 2016, Thornsbery allowed his dogs to trespass on her property and defecate on her lawn. She called the dog warden and reported Thornsbery for not having proper dog licenses and allowing his dogs to roam off leash. Thornsbery and his social media friends posted derogatory statements about Plaintiff on his social media pages. Although Plaintiff contends she feels harassed by these comments, she still continues to follow Thornsbery on his social media accounts. Plaintiff alleges Thornsbery hired a tree removal service that cut down two trees on her side of the property line. She states Thornsbery burns fires in a fire pit on his property using brush and other materials and starts them with accelerants. She indicates Thornsbery and his friends smoke cigarettes on his property. She posted no smoking signs which Thornsbery removed and continues to ignore. She built a fence along the property line and installed a security camera facing into his yard, which she uses to monitor and record all of Thornsberys outdoor activities. She states Thornsbery and his friends throw debris over the fence and into her yard. She has repeatedly called the Streetsboro Police, Fire Department and the Portage County Prosecutors Office to report Thornsberys actions and provide them with footage from the security camera. She indicates they refused to bring charges against Thornsbery. Plaintiff asserts her First, Fifth, Eighth, Ninth and Fourteenth Amendment rights were violated. She also asserts

claims under Title II and Title III of the Americans with Disabilities Act, Section 504 of the Rehab Act and 42 USC 1985.

The Police and Fire Department Defendants filed a Motion to Dismiss (ECF No 13). They contend they are not sui juris, meaning they have no legal existence separate and apart from the City of Streetsboro. As the City is already named a Defendant, they assert their inclusion in this action is redundant.

The Portage County Prosecutor Defendants also filed a Motion to Dismiss (ECF No 14). They claim the prosecutors office is not sui juris, that Plaintiff failed to state a claim for relief under 42 USC 1983 or 1985 and that the prosecutors are absolutely immune from damages for decisions they made with regard to initiating a criminal prosecution.

For the reasons stated below, the Motions to Dismiss are granted. The Court further finds that there are no plausible federal law claims. This is a dispute between neighbors over which this Federal Court lacks subject matter jurisdiction.

II. Standard of Review

In deciding a Rule 12(b)(6) Motion to Dismiss for failure to state a claim upon which relief can be granted, the Court must determine the legal sufficiency of the Plaintiffs claim. See *Mayer v Mulod 988 F2d 635, 638 (6th Circ 1993) see also Bell Atl Corp v Twombly 550 US 544 570 (2007)*(clarifying the legal standard for a Rule 12(b)(6) Motion to Dismiss)*Ashcroft v Iqbal 556 US 662, 677-78 (2009)*(same) When determining whether a Plaintiff has stated a claim upon which relief may be granted, the Court must construe the Complaint in the light most favorable to the

Plaintiff, accept all factual allegations to be true and determine whether the Complaint contains enough facts to state a claim to relief that is plausible on its face. *Twombly 550 US at 570.* A plaintiff is not required to prove beyond a doubt that the factual allegations in the Complaint entitle him to relief, but must demonstrate that the factual allegations are enough to raise a right to relief above the speculative level on the assumption that all the allegations are true. Id *at 555* The Plaintiffs obligation to provide the grounds for relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id

The Supreme Court in *Iqbal* clarified the plausibility standard outlined in *Twombly* by stating that " a claim has facial plausibility when the Plaintiff pleads content that allows the Court to draw the reasonable inference that the Defendant is liable for the misconduct alleged." *Iqbal 556 US at 678* Additionally, the plausability standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a Defendant acted unlawfully." Id Making this determination is a "context specific task that requires the reviewing Court to draw on its judicial experience and common sense" Id For this analysis, a Court may look beyond the allegations contained in the Complaint all without converting a Motion to Dismiss to a Motion for summary Judgment. FED R CIV P 10© *Weiner v Klais & Co 108 F 3d 86,89 (6th Circ 1997)*

Furthermore pursuant to *Apple v Glenn 183 F 3d 477, 479 (6th Circ 1999)* (per curiam) District Courts are permitted to conduct a limited screening procedure and

to dismiss sua sponte a fee paid Complaint filed by a non prisoner if it appears that the allegations are "totally implausible, attenuated, unsubstantial, frivolous, devoid of merit, or no longer open to discussion," *Apple 183 F 3d at 479 (citing Hagans v Lavine 415 USW 528, 536-37(1974)* Dismissal on a sua sponte basis is also authorized where the asserted claims lack an arguable basis in law, or if the District Court lacks subject matter jurisdiction over the matter. Id at 480; see also *Neitzke v Williams 490 US 319 (1989); Sistrunk v City of Strongsvbille 99 F 3d 194, 197 (6th Circ 1996); Lawler v Marshall 898 F 2d 1196 (6th Circ 1990)*

III. Analysis

As an initial matter,the Motion to Dismiss filed by the Streetsboro Police and Fire Departments (ECF No 13) is granted. Police and Fire Departments are not legal entities separate and apart from the City itself and are therefore incapable of suing or being sued for purposes of 1983. Petty v County of Franklin Ohio 478 F 3d 341 (6th Circ 2007); Brett v Wallace 107 F Supp 2d 949 (SD Ohio 2000) (The Sheriffs Office is not a proper legal entity and therefore is not subject to suit or liability under 42 USC 1983) The claims against these Defendants are essentially claims against the City. The city of Streetsboro is also named as a Defendant so the claims against the Police and Fire Department are redundant.

The Portage County Prosecutors office is also not a proper defendant. It too is not a legal entity seperate and apart from Portage County and cannot sue or be sued in a civil rights action. These claims are construed against Portage County. As a rule, local governments may not be sued under 42 USC 1983 for an injury

inflicted solely by employees or agents under a respondeat superior theory of liability. See *Monell v Department of Soc Serv 436 US 658 691 (1978)* "Instead it is when execution of a governments policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under 1983. Id at 694. A municipality can therefore be held liable when it unconstitutionally implements or executes a policy statement, ordinance, regulation or decision officially adopted by that bodys officers" *Id at 690 DePiero v City of Macedonia 180 F 3d 770, 786 (6th Circ 1999)* The complaint contains no suggestion of a custom or policy of Portage County which may have resulted in the deprivation of a federally protected right of the Plaintiff.

The individual prosecutors named as Defendants Victor Vigluicci and Thomas Buchanan are absolutely immune from suits for damages. Prosecutors are entitled to absolute immunity from damages for initiating a prosecution and in presenting the states case. *Imbler v Pachtman 424 US 409, 431 (1976); Pusey v Youngstown 11 F 3d 652, 658 (6th Circ 1993)* Immunity is granted not only for actions directly related to initiating a prosecution and presenting the states case but also to activities undertaken "in connection with the duties in functioning as a prosecutor" *Imbler 424 US at 431; Higgason v Stephens 288 F 3d 868, 877 (6th Circ 2002)*

Plaintiff contends they refused to bring criminal charges against Thornsbery. This is precisely the type of behavior for which immunity is granted. The Motion to

Dismiss filed by the Portage County Prosecutors Office, Victor Vigluicci and Thomas Buchanan (ECF No 14) is also granted.

Plaintiffs remaining claims are so devoid of merit that they fail to establish a basis for Federal Court jurisdiction. The heart of Plaintiffs Complaint is her contention that the Defendants did not side with her in this dispute, and initiate criminal charges against Thornsbery. Even if Thornsberys conduct violated a local ordinance, which this Court is not in a position to decide, Defendants refusal to prosecute him in the manner Plaintiff envisions does not violate her constitutional rights. The benefit that Plaintiff may receive from having Thornsbery arrested for a crime does not trigger protections under the Due Process Clause, neither in its procedural nor in its substantive manisfestations. *Howard ex rel Estate of Howard v Bayes 457 F 3d 568, 575 (6th Circ 2006)* Neither the Fifth Amendment nor the Fourteenth Amendment were meant to cover situations clearly within the parameters of state tort law. *Parratt v Taylor 451 US 527, 544 (1981); Howard ex rel Estate of Howard v Bayes 457 F3d 568, 575 (6th Circ 2006)*

In addition, Plaintiff cites to the Eighth and Ninth Amendment which are not relevant in this case. The Eighth Amendment applies specifically to post-conviction inmates incarcerated in prison and is wholly inapplicable in this situation. *Barber v City of Salem Ohio 953 F 2d 232, 235 (6th Circ 1992).* The Ninth Amendment simply states that the enumeration of certain rights in the Constitution shall not be construed to deny others retained by the people. It does not provide substantive rights to Plaintiff to bring her relief in this situation.

Plaintiffs First Amendment claim is different in that it is based on her inability to repost comments from Thornsberys Facebook page to the Facebook page of the City of Streetsboro to show what he and his friends are doing. Her comments were removed and she was blocked from the further postings. Plaintiff does not allege which Defendant if any, was responsible for maintaining the City Facebook site. Furthermore, a government entity may police the boundaries of its own forum and limit its content to discussions of certain subjects without violating the First Amendment. Davidson v Plowman 247 F Supp 767 776 (ED Va 2017)

Plaintiff also attempts to invoke federal court jurisdiction by citing the Americans with Disabilities act and the Rehabilitation Act. The ADA forbids discrimination against persons with disabilities in three major areas of public life: 1. Employment, which is covered by Title I of the statute, 2. Public services, programs, and activities which are the subject of Title II and 3. Public accommodations which are covered by Title III. *Tennessee v lane 541 US 509 516-17(2004)* Plaintiff focuses on Title II and Title III of the ADA.

Title II prohibits a public entity from discriminating against disabled individuals by excluding them for participation in or denying them the benefits of the services, programs or activities of the public entity by reason of their disability. 42 USC 12132. The requirements for stating a claim under the RA are substantially similar to those under the ADA, but the RA specifically applies to programs or activities receiving federal financial assistance. 29 USC 794(b)(1). Neither the ADA nor the RA permits public employees or supervisors to be sued in

their individual capacities, *Williams v McLemore 247 Fed Appx 1, 8 (6th Circ 2007)* ("We have held repeatedly that he ADA does not permit public employees or supervisors to be sued in their individual capacities") *Lee v Mich Parole Bd 104 Fed Appx 490, 493 (6th Circ 2004)* (Neither the ADA nor the RA imposes liability upon individuals); *Tanney v Boles 400 F Supp 2d 1027, 1044 (ED Mich 2005)* (Neither the ADA nor the RA allows suits against government officials in their individual capacity) Consequently, Plaintiffs Individual Capacity claims must be dismissed. Moreover, Plaintiff does not allege she has been excluded from a City program or denied program benefits on the basis of a disability. Title II does not appear to be applicable to this situation.

Title III applies only to private entities operating public accommodations and services. It expressly does not apply to public entities such as cities, counties, and states or to the departments and agencies thereof. See 42 USC 12131(1), 12181(6). None of the Defendants is a private entity, and therefore Title III is not relevant here.

Finally, plaintiff cites to 42 USC 1985 as a source for federal court jurisdiction. To establish a violation of 1985 Plaintiff must allege the Defendants conspired together for the purpose of depriving her of the equal protection of the laws and committed an act in furtherance of the conspiracy which was motivated by racial or other class based invidiously discriminatory animus. *Bass v Robinson 167 F3d 1041, 1050 (6th Circ 1999)* To succeed on this claim, Plaintiff must allege both that the alleged conspiracy was motivated by discriminatory animus against an

identifiable protected class such as race or gender and that the discrimination against the identifiable class was harmful. Id *Farber v City of Patterson 440 F 3d 131 135 (3rd Circ 2006).* Plaintiff does not allege facts suggesting she can meet any of the elements of this cause of action. She does not allege any facts suggesting there was a conspiracy, identifying her membership in a protected class or suggesting the conspiracy was prompted by a desire to discriminate against that protected class. Federal Court jurisdiction cannot be based on 42 USC 1985.

As stated above, this case is at its heart a dispute between neighbors. It is matter for the state courts to resolve. Indeed Plaintiff filed a lawsuit against Thornsbery and his Facebook friends in the Portage County Court of Common Pleas. *See Lloyd v Thornsbery No 2016 CV 00230 (Portage County Ct Common Pleas filed Mar 16, 2016)* That lawsuit is still pending. This court lacks subject matter jurisdiction over this matter.

IV. Conclusion

Accordingly, Defendants Motion to Dismiss (ECF Nos 13 and 14) are granted. Furthermore, this action is dismissed for lack of subject matter jurisdiction. This court certifies pursuant to 28 USC 1915 (a)(3) that an appeal from this decision could not be taken in good faith^1

IT IS SO ORDERED

Date May 14, 2018 /s/ John R. Adams

JOHN R. ADAMS

BIC
US DISTRICT JUDGE

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28 USC 1915 (a)(3) provides:

An appeal maynot be taken in forma pauperis if the trail court certifies that it is not taken in good faith.