

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

Meleanie & Scott Hain	:	
Individually & as Husband & Wife	:	
333 2 nd Avenue	:	
Lebanon, PA 17042	:	
	:	
Plaintiffs	:	CIVIL ACTION NO.: 1:08-CV-2136
	:	
v	:	
	:	JURY OF TWELVE (12) JURORS
	:	DEMANDED
Michael J. DeLeo, et al	:	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’ RESPONSE TO
DEFENDANTS’ MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR
LEAVE TO FILE AN AMENDED COMPLAINT PURSUANT TO F.R.C.P. 15**

I. Operative Facts

On September 11, 2008, Plaintiff, Meleanie Hain (“Hain”), was watching her daughter’s soccer game at Optimist Park (“Park”) in Lebanon County. (Plaintiffs’ Complaint, ¶ 11¹). While at the soccer game, Hain was approached by the opposing team’s coach, Charlie Jones (“Jones”). (¶ 16). Jones is Lebanon County’s Public Defender. *Id.*

Jones advised Plaintiff about other parents’ concerns about Plaintiff’s then openly carrying her firearm. *Id.* Though Hain was not doing anything improper, illegal or suspicious, she moved to another part of the field after Jones’ warning notwithstanding that she has the constitutional right to openly carry her firearm as well as an unrelated permit to conceal. (¶¶ 14, 15 & 17).

After the game, Hain approached Jones to explain her rights to openly carry (as well as conceal) a firearm, to provide Jones an explanatory pamphlet, and to explain her circumstances giving rise to her openly carrying. (¶ 18). Hain attempted to calm any fears Jones’ may have

¹ When referring Plaintiffs’ Complaint, only the paragraph will be cited unless otherwise indicated.

had or harbored. Id. Instead of listening, Jones interrupted Hain and made wild, false accusations questioning Hain's intention vis-à-vis violence. (¶ 19). None of Jones' accusations were true; Jones' communication seemingly arose out of his unprovoked fears. Id.

Prompted by Jones, Hain received an e-mail from Nigel Foundling ("Foundling"). (¶ 20). Foundling was the director of the Lebanon Recreational Youth Soccer ("LRYS") association of which Hain's daughter was a member. (Id.; ¶ 11). Without basis, Foundling advised Hain that she would no longer be able to carry a firearm to any LRYS game and that any further "incidents" would be referred to the Lebanon City Police Department ("police"). (¶ 21). Hain responded to Foundling by requesting additional information about Jones' complaint, as well as the written rules of LRYS (and Foundling's reasoning for anticipating police involvement). (¶ 22). Plaintiff did not receive a response from Foundling. (¶ 23).

On the following Monday, September 15, 2008, Plaintiff and her daughter arrived for a previously scheduled soccer practice only then to find that no one else attended. (¶ 24). The soccer practice had been canceled without notice to Hain or her daughter. (¶¶ 24 & 25). The practice was otherwise to be conducted by Colleen Foundling, Foundling's wife. (¶ 25).

On September 20, 2008, Plaintiff received a notice ("notice") authored by Sheriff Michael J. DeLeo ("DeLeo"). (¶ 26). The notice implied that DeLeo had authority granted to him by Co-defendants, Office of the Lebanon County Sheriff ("Sheriff's Office") and Lebanon County. Id.

The notice indicated that Sheriff DeLeo was unilaterally revoking Hain's license to conceal and carry firearms ("LTCF"). Id.

The notice was not preceded by any hearing, judicial process, or even Hain's opportunity to offer a defense. (¶ 27). The notice merely referenced Hain's presence in the Park advising Hain that some unidentified individuals in the Park were upset by Hain's open carrying. (¶ 28). The notice did not reference any misconduct by Hain, only stating that Hain was observed carrying a weapon openly in her belt holster. (¶ 28).

Pursuant to Hain's "Right-to-Know" request vis-à-vis the circumstances underlying the unilateral revocation, DeLeo and the Sheriff's Office refused to respond. (¶ 27).

On September 19, 2008, a Deputy ("Deputy") in the Sheriff's Office advised Hain that her LTCF would be reinstated if she agreed to conceal her firearm in the future. (¶ 30). Rejecting the Deputy's offer, on September 22, 2008, Hain hired counsel and formally appealed Defendants' revocation of her LTCF. (¶ 31).

On October 14, 2008, a hearing ("hearing") was held at which time Lebanon County argued in favor of Defendants' revocation of Hain's LTCF. (¶ 32).

At the hearing, Hain's LTCF was reinstated by Court of Common Pleas' Judge Eby. (¶33). Judge Eby confirmed Hain's good-standing, and Defendants' failure of legal foundation for the revocation. Id.

Plaintiffs bring this action for Defendants' remaining (see below-Concessions) Civil Rights violations pursuant to United States Constitutional Amendments 2, 4, and 14, per 42 U.S.C. § 1983. *Passim*. Likewise, Plaintiffs contend municipal Defendants' Monell and all Defendants' "conspiracy" (42 U.S.C. §§ 1985-1986) liability. Id. Plaintiffs also aver Defendants' common law liability under wrongful use ("Dragonetti"), and abuse and misuse of process. Id.

On behalf of Sheriff's Office and the County, at the behest of Public Defender Jones, DeLeo revoked Hain's LTCF without (statutory defined) good cause and a pre-deprivation hearing, as adjudicated improper, intending that revocation to punish Hain by it impinging Hain's Pennsylvania and United States' Constitutional rights to open carry her firearm, merely to satisfy his constituents for Defendants' political gain.

II. Question Presented

For political gain and as punishment, can Lebanon County Sheriff DeLeo revoke Hain's permit to carry a concealed firearm under 18 Pa.C.S. §6109 without pre-seizure process or good cause to prevent, via §6106, Hain from openly carrying a firearm as she is entitled under both the United States' and Pennsylvania's Constitutions?

Suggested Answer: **No.**

III. Relevant Procedural Posture

On November 24, 2008, Plaintiffs filed their Complaint. On December 5, 2008, the Complaints' Summonses were returned executed upon Defendants, Sheriff's Office and Lebanon County respectively. (Docket Nos. 3 & 4).

Despite DeLeo's receipt, he did not execute the waiver of service as required leaving him liable for Plaintiffs' attendant fees and costs. FRCP 4(b)(2). Having refused to waive service notwithstanding, his counsel noticed his appearance (No. 6) and filed a Motion to Dismiss (No. 7) on DeLeo's behalf as well as other Defendants. DeLeo was nonetheless served on December 22, 2008. (No. 13). Service was complete within less than one (1) month of filing.

In violation of Rule 11, Defendants contend in their Motion (No. 7) that "plaintiffs failed to make proper service of process upon Defendants" (Defendants' Motion, ¶ 30) not only in

disregard of the foregoing but also that Plaintiffs' time for service (120 days) has not yet even elapsed. FRCP 4(m).

Then, Defendants filed their Brief in Support of their Motion, out of time. LR 7.5.

Per this Honorable Court's partial leave, Defendants filed their fifty (50) page or so Motion to Dismiss Plaintiffs' approximately ten (10) page Complaint. Despite prior courtesies, Defendants then did not respond to Plaintiffs' first request for concurrence towards an enlargement of time, so plaintiffs could to respond to Defendants' complex brief, necessitating Plaintiffs' Motion for Enlargement, which was granted. Then, Defendants concurred in Plaintiffs' second request for brief enlargement which was then retracted by Defendants only to oppose upon a renewed Motion (the prior Motion having been prematurely filed). In opposing Plaintiffs' Motion for Enlargement, Defendants refused to respond to Plaintiffs' pre-response deadline request for concurrence (so to allow the response deadline to elapse only then to respond in opposition). Defendants opposed Plaintiffs' Motion for Enlargement contending Plaintiffs' counsel's unexpected personal tragedy as well as Defendants' Motion's literal weight as irrelevant vis-à-vis a mere five (5) business day extension.

In violation of LR 7.5, among others, Defendants' Motion to Dismiss should be stricken.

IV. Standard: Motion to Dismiss and Alternative Motion for Leave to Amend

When deciding a Motion to Dismiss under FRCP 12(b)(6), the Court is "required to accept as true all the facts pleaded in the Complaint and to draw all inferences in favor of the Plaintiff." Independent Enterprises, Inc. v. Pittsburgh Water & Sewer Authority, 103 F.3d 1165, 1168 (3d. Cir. 1997). The question at the Motion to Dismiss stage is whether "the facts alleged

in the Complaint, even if true, fail to support the... claim...” Ransom v. Marrazzo, 848 F.2d 398, 401 (3d. Cir. 1988).

In ruling on the Motion, the Court may consider the pleadings, “matters of public record, exhibits attached to the Complaint and items appearing in the record of the case.” Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384, n. 3 (3d. Cir. 1994).

In Twombly, the United States Supreme Court discussed the Conley standard in adjudicating a Motion to Dismiss. Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007); Conley v. Gibson, 78 S.Ct. 99 (1957). Previously, Conley identified the standard: “a Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley, supra. A complex antitrust lawsuit arising from state law, Twombly reconciled but *did not overrule* Conley instead holding that the standard “does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will provide evidence” that the facts set forth in the Complaint will enable Plaintiff a right to relief. Twombly, supra.

After Twombly, the United States Supreme Court applied the Conley standard in vacating the Trial Court’s dismissal of a **Civil Rights Complaint** by a prisoner-plaintiff who averred having suffered harm as a result of the defendant-prison’s discontinuance of hepatitis C treatment. Erickson v. Pardus, 147 S.Ct. 2197 (2007).

In reconciling Twombly and Erickson with Conley, the Third Circuit held that Twombly has *not* altered the pleading standard. Phillips v. County of Allegheny, 515 F.3d 224 (3d. Cir. 2008). The Third Circuit has clearly held that Twombly does *not* require “detailed factual

allegations,” but “only a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the Defendant a fair notice of what the claim is and the grounds upon which it rests.” Phillips, supra. Phillips recognized that the “plausibility” analysis of Twombly is contextual: the more complicated a cause of action (such as antitrust, as in Twombly) the more a Plaintiff must “show” in terms of facts to “nudge” a claim “across the lines from conceivable to plausible”. Phillips, supra.; Twombly, supra. On the contrary, factually simplistic causes of action, such as expressly Section 1983 (civil rights), applies the Conley “no set of facts” analysis. In fact, a Plaintiff need not plead any causes of action (merely facts with request for relief). See 2 James Wm. Moore et al., *Moore's Federal Practice* P 8.04[3]..

However, a Plaintiff should be provided an opportunity to file an Amended Complaint if it appears that the deficiencies can be corrected, *even if not requested*. Twombly, supra.; See, 2A J. Moore, *Moore's Federal Practice* ¶12.07 [2.-5], P.12-99 (2d ed. 1994); *accord*, In re Spree.com Corp., 2001 WL 1518242 (Bankr.E.D. Pa. 2001). Thus, courts should not dismiss a complaint for failure to state a claim if it “contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.” Montville Twp. v. Woodmont Builders LLC, No. 05-4888, 2007 WL 2261567, at *2 (3d Cir. 2007) (quoting Twombly, at 1969) (emphasis added). Under this liberal pleading standard, courts should generally require plaintiffs amend their claims before dismissing a complaint that is merely deficient. See Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002); Shane v. Fauver, 213 F.3d 113, 116-17 (3d Cir. 2000).

In our case, Plaintiff alleges Defendants’ Federal and State Constitutional as well as state statutory and common law violations.

Under any standard, Plaintiff's Complaint is simple and factually set forth. It is not a complex lawsuit for antitrust violations as in Twombly but rather a civil rights action discussed in both Phillips and Erickson.

When applying the correct standard, Plaintiff's Complaint is sufficiently specific and Defendant's Motion should be denied. In the alternative, Plaintiff request leave to amend as this Honorable Court is, respectfully, directed to allow.

V. Concessions

Plaintiffs concede withdrawal of their Complaint's claims of punitive damages, solely against municipal Defendants and DeLeo *in his official capacities* (remaining against DeLeo in his individual capacity).

Plaintiffs also concede withdrawal of their common law claim of negligence.

Plaintiffs concede withdrawal of their First and Fifth Amendment claims.

Plaintiffs concede withdrawal of their claim of malicious prosecution.

Plaintiffs concede withdrawal of Scott Hain's Loss of Consortium claim as derivative of § 1983's constitutional violations only (not as derivative of Hain's state tort claims).

These concessions are made for efficiency without admission.

VI. Argument

Defendants' argue Plaintiff's Complaint warranting dismissal contending: (1) the Second Amendment does not apply to the states; (2) the Pennsylvania Constitution does not grant a private remedy; (3) motive irrelevant in evaluating DeLeo's revocation; (4) due process was afforded by Hain's appeal; (5) Hain has no property right in her LTCF; and (6) DeLeo is entitled to qualified immunity.

Conversely, Hain argues that: (1) Cruikshank and its progeny provide for the Second Amendment's application to the states, especially in the context of the Pennsylvania Constitution's and §6109 like grant; (2) Heller otherwise abrogates the inapposite Cruikshank by expressly applying the Second Amendment to the states; (3) the statutory "shall issue" peculiarities of §6109 makes a LTCF a protected property right; (4) the LTCF did, in fact, issue, rendering that permit, once issued, a property right; (5) there exists a peculiarity vis-a-vis the inter-relationship between Pennsylvania's Constitution, Second Amendment and the LTCF, wherein the LTCF is required to transport a firearm to fulfill the federal and state Constitutional guarantees of the right to bear arms, which Defendant unconstitutionally impinged without a required pre-deprivation hearing; (6) a non-legislative actor, the Sheriff's conduct should be analyzed for motive; and (7) in the wake of Heller and in the complete absence of good cause, qualified immunity does not exist for DeLeo as his conduct was not within the fuzzy realm for which qualified immunity would ordinarily apply especially given his improper motives.

The inter-relationships between the LTCF and Hain's open carry as well as the federal and state constitutions' freedoms invoke the equal protection clause, and the procedural and substantive due process clauses of the Fourth and Fourteenth Amendments. The intentional impingement of Hain's Second Amendment right to bear arms by DeLeo necessarily occurring upon LTCF revocation, requires the totality of the law yield a finding that Defendants' Motion to Dismiss in balance should be denied.

A. Procedural Due Process

To prevail in a procedural due process claim, a Plaintiff must show that "a person acting under color of state law deprived [her] of a protected property interest" and that "the state

procedure for challenging the deprivation does not satisfy the requirements of procedural due process.” DeBlasio v. Zoning Board of Adjustment, 53 F.3d 592, 597 (C.A.3 1995). To be adequate for due process purposes, “deprivation of property [must] ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’” Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 680 (C.A.3 1991) (quoting Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985)).

Generally, due process requires that there be notice and an opportunity to be heard *prior to the deprivation of a property*. Loudermill, supra. “The opportunity to be heard must be at a meaningful time and in a meaningful manner.” Id.; Midnight Session, supra.

In determining what due process must be afforded, a court must consider: (1) the liberty or property interest at stake in the matter; (2) the value of the procedure in protecting that right; and (3) the efficiency interests of the government in providing the procedure. *See*, Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893 (1976).

Instantly, none of the Matthews prongs favor the absence of a pre-deprivation hearing, especially since Heller has even moreso raised the fundamental interests related to personal firearm carry which, uniquely in Pennsylvania, cannot be afforded without an LTCF (so to transport), and as Hain’s conduct at issue was unrelated to the LTCF. 18 Pa.C.S. §6106, et seq.

A unilateral revocation of a license without a pre-deprivation hearing absent exigency violates due process. Ginorio v. Contreras, 2006 U.S. Dist. LEXIS 144 (D.P.R. 2006). A unilateral revocation of a driver’s license without a pre-deprivation hearing violates due process. Lee v. Rhode Island, 942 F. Supp. 750 (D.R.I. 1996); Dixon v. Love, 431 U.S. 105 (1977). None

of the instant factors militate towards due process' acceptance of a lack of a pre-deprivation hearing. The Bethune Plaza, Inc. v. Lumpkin, 1987 U.S. Dist. LEXIS 11723 (N.D.IL. 1987).

There was no pre-deprivation process in place for Plaintiff to challenge the unlawful seizure of her LTCF. It does not satisfy the requirements of procedural due process for Defendants to seize the LTCF without any opportunity to be heard, let alone without any legal basis (such as, "good cause"), and then to say that violation of no moment because Plaintiff can and did seek the return of the property by filing an appeal. Similarly, it would not comport with procedural due process to intentionally conduct an illegal search only to call the motion to suppress the fruits of that poisonous tree a wholly curative civil rights remedy.

But, there is more:

Plaintiff contends the LTCF seizure impinging on her Constitutional rights (United States' and Pennsylvania's) to openly carry a firearm. Unique to Pennsylvania, Plaintiff cannot exercise those Constitutional rights to openly carry without, of course, transporting her firearm (namely, by her vehicle); however, it is impermissible to transport a firearm without a LTCF. 18 Pa.C.S. §6106, et seq.

Thus, even if the permit itself is not a protected property right (denied), the seizure of the LTCF was intended to and did preclude Plaintiff's exercise of her constitutional rights to openly carry.

Defendants may argue contrarily, but it was they who found good cause existing to grant the permit, nothing legally having changed in the interim, and they who argue the open carry unrelated to the LTCF. While Plaintiff suggests this Honorable Court hold the LTCF revocation necessarily impinging Plaintiff's open carry by virtue of the necessity to transport and

Pennsylvania's prohibitions necessarily linking open carry with concealed carry and the LTCF, Plaintiff notes Defendants have made no argument against a pre-deprivation hearing under the instant facts instead suggesting Plaintiff's having remedied their due process violation by her hiring an attorney to file an appeal to undo their harm-this is not consistent with a due process analysis.

B. Substantive Due Process

To establish a substantive due process claim, Plaintiff must prove that she was deprived of a protected property interest by government action that was so egregious as to be considered arbitrary in the constitutional sense or shocking to the conscience. Chainey v. Street, 523 F.3d 200, 219 (C.A.3 2008); County of Sacramento v. Lewis, 523 U.S. 833, 841 (1998). Ownership of property is considered to be a protected property interest. Chainey, supra.

Potts, infra., reliance on Midnight Sessions is misplaced as Midnight Sessions was later overruled by UA Theatre. Midnight Sessions Ltd v. Philadelphia, 945 F.2d. 667 (C.A. 3 1991); UA Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392 (C.A. 3 2003). Discussing UA Theatre, County Concrete holds consistent with Nicholas that non-legislative state action violates substantive due process if "arbitrary, irrational or tainted by improper motive," or if "so outrageous that it 'shocks the conscience.'" County Concrete Corp. v. Twp. Of Roxbury, 442 F.3d 159 160 (C.A.3 2006); Nicholas v. Pennsylvania State Univ., 227 F.3d. 133, 139 (C.A.3 2000).

Defendants state no legitimate basis for the LTCF seizure nor do they even attempt to explain away that seizure's intended impingement on Plaintiff's rights to openly carry.

C. Equal Protection

Plaintiff contends her intentional, unequal treatment from other licensees.

To set forth a claim for violation of equal protection, Plaintiff must establish that she was intentionally treated differently from others similarly situated by the Defendants and that there was no rational basis for such treatment. Philips v. County of Allegheny, 515 F.3d 224, 243 (C.A.3 2008).

“Granting unfettered discretion to City officials’ beliefs is unconstitutional because it can lead to ‘arbitrary deprivations of liberty interests’ and/or creates the potential to abuse power at the expense of another.” See, Welsch v. Township of Upper Darby, Civ. A. No. 07-4578, 2008 U.S. Dist. LEXIS 65500 (E.D. Pa. 2008) (citing City of Chicago v. Morales, 527 U.S. 41, 52, 119 S. Ct. 1849 (1999); Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855 (1983)).

Plaintiff’s LTCF was seized in improper retaliation for her exercising her locally, politically despised rights to openly carry. Defendants contend and Plaintiffs agree that the right to the LTCF is entirely dissimilar to rights to open carry. In fact, it is that dissimilarity which is why Defendants’ revocation violates equal protection, much the same way the revocation of a fishing license for openly carrying a firearm would be likewise prohibited.

D. Second Amendment

Heller prohibits the nullification of citizens’ Second Amendment rights.

In interpreting Cruikshank, Defendants suggest that Second Amendment protection applies only to prohibit Federal Congressional infringements-deeming Plaintiff’s claim inapplicable to instant state Defendants. 92 U.S. 542. In narrowly interpreting 120 year old Cruikshank, Defendants overlook Heller’s discussion.

In Heller, the United States Supreme Court reviewed Cruikshank's dicta that the Second Amendment does not "apply to anyone other than the Federal Government." Heller, at 2812. However, Heller clearly holds that dicta non-binding, stating Cruikshank's "limited discussion of the Second Amendment... supports, if anything, an individual-rights interpretation" Id., at 2813.

"In any case, we would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms..." Id., 2820 (emphasis added). In fact, Heller notes that Cruikshank likewise incorrectly "said that the First Amendment did not apply against the states and did not engage in the sort of 14th Amendment inquiry required by our later cases¹." Id., at 2813.

In arguing Plaintiff's Second Amendment rights irrelevant as here alleged violated by the State and not Federal authority, Defendants require this Court find that Heller was decided solely regarding a jurisdiction, District of Columbia, coincidentally Federal. Said another way, in order for Heller to have any merit in precluding blanket prohibitions against Second Amendment state restrictions (which the Supreme Court explicitly says is precluded), it must be interpreted as applying the Second Amendment to the states or risk its prohibition being immediately overruled thereby ("...[W]e would not stake the interpretation of the Second Amendment... in effect in a single city..."). Heller, supra.

Even if holding Cruikshank as rendering Heller binding only on the District of Columbia, Cruikshank (as discussed by Heller) merely hold that the Second Amendment "does not *by its*

¹ While specifically not overruling these *later cases* (as the *Roberts Court* is know to avoid), Heller clearly stands for the broader individual protection afforded by the Second Amendment against States and Federal Governmental authorities alike. "...[B]ut what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct." Id., at 2822.

own force apply to anyone other than the Federal Government.” Heller, supra. (emphasis added). Instantly, Pennsylvania’s Constitution (preceding the United States’ Constitution) provides that additional *force* by independently guaranteeing Plaintiff’s right to openly carry. Ortiz v. Commonwealth, 545 Pa. 279, 681 A.2d 152 (1996); Pa.Const., Art. 1, Section 21.

In examining the language of § 6109, the Sheriff’s administrative act of issuance and revocation is limited by Heller not broadened by Potts.

E. Potts

Without explanation, Defendants contend there is no property interest in Plaintiff’s LTCF- relying only on Potts.

Defendant cites Potts for the proposition that Pennsylvania’s LTCF “does not trigger the protections of procedural or substantive due process.” Potts v. City of Philadelphia, 224 F. Supp.2d 919 (E.D. Pa. 2002) (quoting Defendants’ Motion, 14th Amendment). Potts held that the Second Amendment does not guarantee an individual’s right to bear arms absent some reasonable relationship between the instrument and the preservation or efficiency of a well regulated militia. Potts, supra. By necessary implication, Heller overrules Potts.

Notwithstanding that Potts has been overruled, Potts held that “to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” Potts, at 940 (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972)).

On the contrary, 18 Pa.C.S § 6109 requires (i.e., “*shall* be issued”) an LTCF to be granted unless falling under the specifically enumerated sections *requiring* refusal. § 6109(e)(1)

(emphasis added). Notwithstanding, Plaintiff had already been issued that license which could not be revoked without “good cause.” § 6109(i). Contrary to Potts’ analysis, § 6109 specifically makes Pennsylvania a *shall* or *shall not* issue state from which there is no discretion.

While the expression *good cause* superficially appears discretionary, the plain reading of § 6109 indicates that the sheriff *shall* conduct an investigation to determine whether “the enumerated errors or defects are present to withhold the license”; if the sheriff’s investigation determines “no good cause exists to deny the license” as enumerated, the license “shall issue.” § 6109(d); (e)(1). Revocation is likewise governed. 6109(i).

But for the nominal use of the expression *good cause*, nothing within § 6109 grants discretion; on the contrary, the legislature’s word choice *shall* as well as *good cause*’s definition by enumeration makes the sheriff’s investigation and determination instead mechanical.

Regardless, pertinently, the license did issue to Plaintiff, and Plaintiff avers it was revoked without any cause.

Notably, Potts has been cited by no appellate courts of any circuit, primarily involves unrelated facts, and is well pre-Heller, and, now obsolete, embodies the then Third Circuit concept of the necessary inter-relationship between the Second Amendment and a militia. Green v. City of Phila., Civ.A.No. 03-1476, 2004 U.S. Dist. LEXIS 9687 (E.D. Pa. 2004).

To the extent Defendants would then argue Pennsylvania’s Constitutional violations irrelevant as not providing a private remedy, Defendants seek to have this Court hold against Heller’s broad pronouncement by disregarding its expressed words. While debatable whether providing its own private remedy, Pennsylvania’s Constitution, regardless, is that additional

force which Cruikshank states would apply the Second Amendment to the states (notwithstanding Heller's abrogation holding likewise).

F. State Law Claims

DeLeo commits an abuse of process by unilaterally revoking Hain's permit to conceal carry for her openly carrying.

DeLeo's unilateral revocation was not authorized. The revocation was done for an ulterior motive (punishment, to impinge her right to openly carry, at the behest of Jones, to please his constituency). The permit is a property right, or, alternatively, infringes on Hain's right to openly carry as a firearm cannot be openly carried from one location to another if traversed via vehicle without a permit to conceal carry (i.e., a permit to conceal is required to transport a firearm within a vehicle).

Dragonetti is violated by DeLeo's notice of revocation.

A notice of revocation is a "declaration." If not a civil proceeding, Defendants then must implicitly suggest that notice could be disregarded instead of appealed; on the contrary.

G. Monell

Without reiterating the foregoing, Plaintiffs' complaint and as discussed above pleads Defendants' violation of Plaintiffs' Constitutional, *inter alia*, rights (except as conceded withdrawn).

H. Conspiracy

DeLeo and Jones (both governmental actors) acted along with the Sheriff's Office and county co-defendants to conspire to violate Plaintiffs' rights as well as to commit the aforesaid remaining torts against Plaintiffs.

I. Qualified Immunity

It is not reasonable for the chief law enforcement officer within a county to revoke a concealed carry permit in retaliation for an individual's open carry so to satisfy his constituents at the request of a co-governmental actor by intentionally interfering with his citizen's long-standing Constitutional and statutory rights.

A civil rights defendant would ordinarily be entitled to qualified immunity when its conduct "does not violate clearly established statutory or constitutional rights." Yarris v. County of Delaware, 465 F.3d. 129, 140-141 (C.A.3 2006). However, Defendants have the burden of proof to prove their conduct did not violate a constitutional right. Id (citing Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151 (2001)). If Defendants' conduct was unconstitutional, Defendants must demonstrate the constitutional right was not "clearly established" at the time the violation occurred. Id. Clearly established rights are rights "with contours sufficiently clear" a reasonable officer would understand his actions violate the right. McKee v. Hart, 436 F.3d. 165, 171 (C.A. 3 2006). At the time of the violation, the officer must have notice through precedent that the law or the Constitution would prohibit such conduct. Id. (citing McLaughlin v. Watson, 271 F.3d. 566, 571 (C.A.3 2001)).

While Plaintiff contends that any reasonable officer within DeLeo's position at the time of the revocation would know that revocation without cause and, in fact, in retaliation with an intent to impugn Hain's right to carry was clearly established as impermissible, Heller had been decided approximately four (4) months prior holding Hain's rights clearly established. Just the news storm surrounding Heller within his rural jurisdiction certainly should have given DeLeo pause.

There are no special circumstances here present which would otherwise invoke qualified immunity – all circumstances involving individual rights vis-à-vis firearms, of course, can be politicized and debated, but those circumstances do not make them axiomatically qualified immunity invoking. In fact, as the United States Supreme Court demonstrated exhaustively in Heller, these rights have been long held notwithstanding their codification within both the United States and Commonwealth of Pennsylvania’s Constitutions¹.

VI. Conclusion

Defendants’ Motion should be stricken. If not stricken, Defendants’ Motion should be denied.

Plaintiffs’ Complaint pleads Defendants’ civil rights violations. As the Court of Common Pleas adjudicated, Sheriff DeLeo cannot act unilaterally, punitively to revoke a permit to conceal, especially not to please constituents at the behest of a co-governmental actor for Hain’s legally unrelated open carrying.

The balance of the Motion is rebut by the face of Plaintiffs’ complaint which must be accepted as true, as well as all reasonable inferences therefrom.

If final disposition (dismissal) upon Defendants’ motion is entertained, Plaintiffs request oral argument. If issues raised require additional briefing (such as whether Pennsylvania’s Constitution grants a private remedy for violations of Article I, §§8 and 21), Plaintiffs request leave to supplement.

Alternatively, if her complaint is deficient, Plaintiff moves for leave to file a curative amendment.

¹ Pennsylvania’s constitution preceded the United States constitution.

WHEREFORE, Plaintiffs request this Honorable Court deny Defendants' Motion. In the alternative, Plaintiffs request leave to file a curative first amended complaint pursuant to F.R.C.P. 15.

PROCHNIAK WEISBERG, P.C.

/s/ Matthew B. Weisberg
MATTHEW B. WEISBERG
Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

Meleanie & Scott Hain	:	
Individually & as Husband & Wife	:	
333 2 nd Avenue	:	
Lebanon, PA 17042	:	
	:	
Plaintiffs	:	CIVIL ACTION NO.: 1:08-CV-2136
vi.	:	
	:	JURY OF TWELVE (12) JURORS
	:	DEMANDED
Michael J. DeLeo, et al	:	

CERTIFICATION OF WORD COUNT PURSUANT TO LR 7.8(b)(2)

I, Matthew B. Weisberg, Esquire, certify that the number of words in the Brief, pursuant to the word count feature of Microsoft Word, totals 4,985.

PROCHNIAK WEISBERG, P.C.

/s/ Matthew B. Weisberg, Esquire
MATTHEW B. WEISBERG, ESQUIRE

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

Meleanie & Scott Hain	:	
Individually & as Husband & Wife	:	
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Lebanon, PA 17042	:	
	:	
vii.	:	
	:	CIVIL ACTION NO.: 1:08-CV-2136
	:	
	:	JURY OF TWELVE (12) JURORS
	:	DEMANDED
Michael J. DeLeo, et al	:	

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