

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Luis Roberto Rodriguez Trevino,	:	
	:	Case No. 1:08-cv-00339-HJW
Plaintiff,	:	
	:	
-vs-	:	
	:	Magistrate Judge Timothy S. Black
Richard K. Jones, et. al.,	:	
	:	
Defendants.	:	

**DEFENDANTS RICHARD K. JONES, ROBERT E. MEDELLIN, DANIEL BERTER
AND BUTLER COUNTY, OHIO'S MOTION FOR SUMMARY JUDGMENT**

Defendants Richard K. Jones, Robert E. Medellin, Daniel Berter and Butler County, Ohio move this court for summary judgment as to all of Plaintiff's claims. First, Defendants, in their individual capacity, are entitled to qualified immunity from Plaintiff's claims because (1) no constitutional violation occurred and, even if there were a violation, (2) the law regarding such violation was not clearly established. Next, Defendants, in their official capacity, are entitled to summary judgment because, again, (1) no constitutional violation occurred and, even if there were a violation, (2) Plaintiff cannot connect any alleged violation to an official policy, procedure or custom. As such, Defendants are entitled to summary judgment.

Defendants arguments in support of summary judgment are set forth more fully in the Memorandum in Support below.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. SUMMARY OF THE ARGUMENTS

Defendant Medellin is a civilian employed as an immigration specialist with the Butler County Sheriff's Office. In December of 2006, he received complaints regarding a construction site located on Port Huron Road in Butler County, Ohio. The complaints were from trade unions (pipefitters, carpenters etc.) who were upset at the presence of undocumented workers at the site. The complainants advised that there was going to be a confrontation at the worksite.

On January 2, 2007 Mr. Medellin, accompanied by Deputy Dan Berter, went out to the worksite to speak with the employers regarding the proper paperwork needed for employees, specifically, documentation relevant to an I-9 Employment Form. Mr. Medellin spoke with Bruce Geiser, a foreman for J & A Interior Systems (J & A), which was one of the companies mentioned by the complainants. Mr. Medellin asked Mr. Geiser if he (Medellin) could speak with Mr. Geiser's employees. Mr. Geiser stated that he did not have any employees, only subcontractors, and that Mr. Medellin could speak with them.

Mr. Geiser or another J & A employee summoned all of the subcontractors to a construction trailer. According to Plaintiff, once inside the trailer, Mr. Medellin asked the J & A workers to show their identifications. The workers were of varying races including Caucasian, African-American and Hispanic. Individual workers were then briefly interviewed by Mr. Medellin in one of the trailer's offices. None of the workers were arrested or charged with any crime except Plaintiff who left the trailer, went out to his vehicle, retrieved a false social security card and a false permanent resident card and then presented those cards as identification to Deputy Berter. Plaintiff was arrested for forgery. The other workers went back to work.

For Plaintiff's federal claims, qualified immunity proves applicable. Government officials in this matter are charged with constitutional misconduct for:

- Asking Plaintiff to show identification while in the construction trailer;
- Speaking to Plaintiff about his identification documents;
- Arresting Plaintiff for forgery following his presentation of fraudulent documents;
- Charging Plaintiff with forgery;
- Allegedly violating Plaintiff's equal protection rights.

No case law supports constitutional violations based upon the foregoing. Defendants deny that the purpose of the worksite visit was an immigration investigation, but, assuming that it was an investigation, Defendants were not in violation of clearly established law. On the contrary, Defendants, as local law enforcement, have the ability to investigate federal crimes, specifically immigration offenses. *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983); *United States v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984); *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999). Such investigatory authority has been confirmed by the Ohio Attorney General's Office. Ohio Atty. Gen. Op. No. 2007-018. Further, the Supreme Court has found that law enforcement may initiate questioning regarding an individual's immigration status without reasonable suspicion. *Muehler v. Mena*, 544 U.S. 93 (2005).

Defendants did not detain Plaintiff or any other worker while in the construction trailer—the encounter was consensual. Questioning by law enforcement at one's place of employment is generally considered non-custodial. *United States v. Mahan*, 190 F.3d 416 (6th Cir. 1999); *United States v. Swanson*, 341 F.3d 524 (6th Cir. 2003). Numerous factors in this case indicate that none of the workers, Plaintiff included, were seized for Fourth Amendment purposes while in the construction trailer. The workers had freedom of movement, no threats were made, and Plaintiff actually left the trailer, went out to his car, and came back. Plaintiff's subjective view that he felt compelled to cooperate with Mr. Medellin is irrelevant. *INS v. Delgado*, 466 U.S.

210 (1984).

Plaintiff's arrest for forgery was supported by probable cause. First, Plaintiff's subsequent indictment for forgery forecloses the possibility of lack of probable cause for Plaintiff's § 1983 claim. *Barnes v. Wright*, 449 F.3d 709 (6th Cir. 2006). In regards to his state law malicious prosecution claim, the indictment is "prima facie evidence of probable cause" to which a plaintiff must bring forward substantial evidence to rebut. *Harris v. United States*, 422 F.3d 322 (6th Cir. 2005). Plaintiff has failed to bring forth any substantial evidence to rebut the indictment.

Plaintiff's equal protection claim fails because he has not provided any evidence that Defendants had a discriminatory purpose or discriminatory intent. All J & A workers were called to the trailer regardless of race, and the evidence indicates that all J & A workers had to show identification.

Plaintiff's official capacity claims fail because Plaintiff has never identified any policy, practice or custom that is unconstitutional. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) (plaintiff cannot rely on *respondeat superior* to hold a municipality liable under § 1983. Plaintiff's theories of inadequate training are unsupported. Defendant Medellin was well trained in the field of immigration law and has thirty years of law enforcement experience.

Other immunity defenses apply as well. All state law claims are barred by Ohio's Political Subdivision Immunity Act ("PSIA"). Plaintiff alleges two state law claims: (1) malicious prosecution and (2) abuse of process. These claims are contradictory to each other and, as such, at least one of them must be dismissed regardless of merit. *Coleman v. City of Beachwood*, 8th Dist. No. 92399, 2009 Ohio 5560, at ¶¶ 30-31; *Claus v. Merkel*, 11th Dist. No.

2003-T-0082, 2004 Ohio 5011, at ¶¶ 12-13, 16; *Moffitt v. Litteral*, 2nd Dist. No. 19154, 2002 Ohio 4973, at ¶ 61. Plaintiff also fails to show that Defendants acted with malicious intent and, thus, Defendants are entitled to immunity under R.C. 2744.03.

For the reasons set forth in more detail below, all of Plaintiff's claims must fail. Defendants are entitled to qualified and statutory immunity in their individual capacities. Plaintiff's failure to prove a constitutional violation renders any official capacity claim meritless. Plaintiff's official capacity claims also fail because he has not even alleged an unconstitutional policy or procedure.

II. FACTS

A. Public Complaints Regarding Illegal Immigration In Butler County, Ohio

Richard K. Jones is the sheriff of Butler County, Ohio. (Deposition of Richard K. Jones, Sr., hereinafter "Jones depo.", p. 4). In 2006, Sheriff Jones began receiving complaints from the community regarding undocumented and illegal immigrants (living and working in Butler County). (*Id.*, p. 5). At the same time, the Butler County Sheriff's Office experienced increases in its jail population due to illegal immigrants and saw crimes associated with illegal immigrants, including, but not limited to, false document offenses and drug offenses. (*Id.*). Moreover, illegal immigrants would be released from the Butler County Jail, only to return to the jail with new charges. (*Id.*, pp. 28-29). Finally, it was also clear to Sheriff Jones that undocumented workers were being exploited and abused. (*Id.*, pp. 6, 42-43).

It is not disputed that Sheriff Jones believes that illegal immigration is an important issue. (See Jones depo., Exhibit "Medellin 15"). He sits on the immigration committee for the National Sheriff's Association. (*Id.*, p. 7). He has testified before the Ohio State Senate regarding illegal immigration issues. (*Id.*, p. 8). To address these issues, Sheriff Jones hired Robert Medellin in

October 2006. (*Id.*, pp. 4-5; Deposition of Robert Medellin, hereinafter “Medellin depo.”, p. 74). Mr. Medellin was experienced in the area of immigration law and policy, having just retired after thirty years as a Special Agent with the office of Immigrations and Customs Enforcement (“ICE”, formerly the Immigration and Naturalization Service). (Jones depo., p. 6). Mr. Medellin was hired as an Immigration Specialist working for the Butler County Sheriff’s Office as a civilian and did not have arrest powers. (Jones depo., p. 33; Medellin depo., p. 9). Sheriff Jones’s goal was to educate the public that the hiring of undocumented workers violated the law and to provide a resource for the public regarding documents needed for employment in the United States. (Jones depo., pp. 6, 27-28). Mr. Medellin also served as a liason between the Sheriff’s Office and ICE on immigration issues. (Medellin depo., p. 5; Jones depo., pp. 43-44).

One of the activities that Mr. Medellin engaged in was visiting worksites and educating employers about documents and forms that employees needed in order to be able to legally work in the United States. (Medellin depo., pp. 57-58, 67-69). Indeed, sometimes, Mr. Medellin would get calls from companies that had questions regarding this subject and would ask him to speak to them. (*Id.* p. 72; See also Affidavit of Joe Kathman, hereinafter Kathman Affidavit, ¶ 13, attached hereto as Exhibit 1).

B. The Worksite Visit On January 2, 2007

1. Complaints Regarding the Construction Site

There is a large construction site located at 8514 Port Huron Road in Butler County, Ohio (Kathman Affidavit, ¶ 2). In December of 2006, Mr. Medellin began receiving calls from individuals who were stating that they believed there was going to be a confrontation at the worksite. (Medellin depo., p. 5-6). Apparently, the presence of undocumented workers at the worksite was causing friction with individuals that worked in various trades e.g. pipefitters,

carpenters, drywallers etc. (Medellin depo., pp. 6-8).

Mr. Medellin decided to visit the construction site on January 2, 2007. (Medellin depo., p. 9). The purpose of the visit was to educate employers as to the document requirements for legal employment, specifically, the completion of I-9 forms.¹ (Medellin depo., p. 57-58). Mr. Medellin was not going to the worksite to investigate a crime. *Id.*

2. Arrival at the Construction Site

Mr. Medellin arrived at the construction site on January 2, 2007. (Medellin depo., p. 9). Mr. Medellin was dressed in casual, civilian clothes.² (Medellin depo., p. 35). Mr. Medellin was accompanied at the site by Deputy Sheriff Daniel Berter. (Deposition of Daniel Berter, hereinafter Berter depo., p. 15). Deputy Berter has been a sheriff's deputy since 1995. (*Id.* at p. 5). On January 2, 2007, Deputy Berter was assigned to the corrections division of the Butler County Sheriff's Office. (*Id.* at pp. 5-6). Mr. Medellin's regular partner, Deputy Newton, was injured and so Deputy Berter went out to the site to provide a uniformed presence (*Id.* at pp. 6-7). Deputy Berter had not gone on any previous worksite visits with Mr. Medellin and did not know anything about the task that they were engaging in until they arrived. (*Id.* at pp. 15-16). Deputy Berter was wearing a standard uniform. (*Id.* at p. 7).

After arrival, Mr. Medellin and Deputy Berter went to one of the offices inside the construction site. (Berter depo., p. 18). Mr. Medellin spoke with Denny Bruneman, an employee for EGC Construction (EGC).³ (Medellin depo., p. 9). He also spoke with Joe

¹ The Employment Eligibility Verification Form I-9 is a U.S. Citizenship and Immigration Services form. It is used by an employer to verify an employee's identity and to establish that the worker is eligible to accept employment in the United States. See *United States v. Garcia-Ochoa*, Nos.: 2:08cr104, 2:08cr153, 2009 U.S. Dist. LEXIS 67546 (E.D. VA, 2009).

² There is some discrepancy as to exactly what Mr. Medellin was wearing. Mr. Medellin recalls that he was wearing a sport shirt, olive vest and slacks. (Medellin depo., p. 35). Plaintiff recalls that Mr. Medellin was wearing a suit. (Trevino depo., p. 47). Finally, Oscar Falcon recalls that Mr. Medellin was wearing a beige-brownish jacket. (Falcon depo., p. 32). Regardless, it is not disputed that Mr. Medellin was dressed as a civilian.

³ EGC Construction Corp. was a large sub-contractor at the worksite.

Kathman, a project manager and subcontractor for EGC Construction. (Kathman Affidavit, ¶ 6). Mr. Medellin introduced himself to Mr. Kathman, and handed him (Kathman) his card. (*Id.*). Mr. Bruneman introduced Mr. Medellin to Virgil Arrington, the superintendant for Parsons Construction which was the lead construction company at the site. (Medellin depo., p. 9). Mr. Arrington and Mr. Medellin discussed the I-9 Employee Verification Forms. (Medellin depo., pp. 10, 27-28; Berter depo., p. 19). At some point during Mr. Medellin's conversation with Mr. Arrington, the discussion turned to J & A Drywall, Inc.⁴ (Medellin depo., p. 27). This may have been because J & A was the company that had been named in complaints made to Mr. Medellin. (Medellin depo., pp. 29-30). Mr. Medellin spoke to Bruce Geiser, the foreperson for J & A. Mr. Medellin asked Mr. Geiser if he had any employees, and Mr. Geiser responded that he did not have any employees, only subcontractors. (Medellin depo., p. 30; Berter depo., p. 20). Mr. Medellin asked Mr. Geiser if he could speak to the J & A subcontractors regarding I-9 Forms, and Mr. Geiser agreed. (*Id.*; Kathman Affidavit, ¶ 7). Deputy Berter recalls that the employers offered to bring the J & A employees or subcontractors to a construction trailer. (Berter depo., p. 21).

3. The J & A Employees/Subcontractors Are Asked to Come to the EGC Trailer

Mr. Medellin and Deputy Berter waited to meet with the J & A employees/subcontractors in the EGC trailer. (Kathman Affidavit, ¶ 8; Medellin depo., pp. 5, 26). Plaintiff was one of the employees/subcontractors for J & A. (Deposition of Luis Roberto Rodriguez Trevino, hereinafter Trevino depo., p. 24). The Plaintiff is a citizen and national of Mexico. (*Id.*, p. 4). In addition, he is not a legal citizen or national of any other country. (*Id.*, pp. 5-6). Plaintiff

⁴ J & A Interior Systems aka J & A Drywall was a sub-contractor for EGC Construction Corp. (Kathman Affidavit, ¶ 3).

came to the United States in 1997, using a tourist visa⁵ and a passport to gain entry to the country. (*Id.*, p. 6). At the time of this incident, Plaintiff was in the United States illegally. (See *Id.*, p. 5).

The J & A employees/subcontractors were asked to come to the EGC trailer. Plaintiff recalls that “one of the Hispanic guys” working for J & A told him to go to the trailer. (*Id.*, p. 43). Oscar Falcon, a co-worker of Plaintiff, recalls that Bruce Geiser told the J & A workers to go to the trailer. (Deposition of Oscar Falcon, hereinafter Falcon depo., p. 14). Neither Mr. Medellin nor Deputy Berter summoned Plaintiff or any other worker to the trailer. The workers were not told why they need to go to the trailer. (Trevino depo., p. 43; Falcon depo., p. 15). Some employees simply ignored the request and did not go to the trailer. (Falcon depo., p. 15). None of the employees who failed to come to the trailer were arrested or detained. (*Id.* at 17). Finally, it is undisputed that J & A workers from various ethnic groups went to the trailer. (See Trevino depo., p. 44, stating that white and Hispanic workers went to the trailer; Falcon depo., p. 17, stating that white, black and Hispanic workers went to the trailer; Kathman Affidavit, ¶ 9, indicating that Caucasian and Hispanic males came to the trailer, and, in addition, regular J & A employees as well as sub-contractors; Medellin depo., p. 32, Hispanics, blacks and Caucasians).

4. The J & A Employees/Subcontractors and Various Construction Supervisors Meet In The EGC Construction Trailer.

There are varying estimates as to how many people were in the trailer, however, there were approximately twenty to thirty-five people present in the trailer. (See Trevino depo., p. 45, 25 people; Berter depo., p. 21, 20-30 people; Medellin depo., p. 31, 20-22 people; Falcon depo., p. 17, 35 people). The construction trailer itself was roughly divided into two areas: (1) a conference area with a large table or tables in the center surrounded by chairs and (2) an office

⁵ A tourist visa makes one eligible to enter the United States for a limited time. See http://travel.state.gov/visa/temp/info/info_1298.html#Visa.

area which contained the office of Joe Kathman. (Berter depo., Exhibit Medellin 10; Medellin depo., Exhibit 3; Kathman depo., pp. 14-16, Exhibit 1; Falcon depo., pp. 23-24). In addition, there were two doors that led outside the trailer. (Berter depo., Exhibit Medellin 10; Kathman depo., pp. 14-16, Exhibit 1). Finally, there was a door to Mr. Kathman's office in the back of the trailer. (*Id.*).

In addition to the workers for J & A who came to the trailer, Bruce Geiser was present and a few other construction supervisors were present. (Trevino depo., p. 46; Kathman depo., p. 19; Medellin depo., p. 34). As the workers came to the trailer they were not ordered where to sit or stand and simply "put [themselves] in the position [they] wanted to be in around the room." (Falcon depo., p. 21). Mr. Medellin first spoke to all of the people in the trailer together. (Trevino depo., p. 52; Kathman Affidavit, ¶ 10; Falcon depo., pp. 21-22; Medellin depo., p. 35). Mr. Medellin spoke both English and Spanish to the group. (Trevino depo., p. 52; Kathman Affidavit, ¶ 10; Medellin depo., p. 39).

First, Mr. Medellin introduced himself to the group. (Trevino depo., p. 52). He identified himself as an immigration specialist with the Butler County Sheriff's Office. (Berter depo., p. 28; Medellin depo., p. 36; see also Falcon depo., p. 22, indicating that Mr. Medellin stated that he worked for Butler County). Mr. Medellin made it clear that he did not work for immigration. (Kathman Affidavit, ¶ 6).

According to Plaintiff, Mr. Medellin requested that each person present their identification documents. (Trevino depo., p. 51; Falcon depo., pp. 22-23). It was not only Hispanics who presented identification. Every worker, except those that did not have identification, showed their papers. (Falcon depo., p. 24; Kathman Affidavit, ¶ 10). Some people either did not have identification or refused to show identification. (Trevino depo., p. 53;

Falcon depo., p. 24). Significantly, Mr. Medellin and some of the employers, including Mr. Geiser, were reviewing the identification documents. (Falcon depo., pp. 24-25; Berter depo., pp. 32-33).

At this point, Plaintiff indicated that he had left his identification in his car. (Trevino depo., pp. 53-54; Berter depo., p. 32). Plaintiff choose to leave the trailer and walked, unescorted, back to his vehicle, got additional documents, and came back to the trailer. (Trevino depo., p. 70; Berter depo., pp. 40-41).

It is not disputed that following the initial showing of paperwork, Mr. Medellin spoke with Plaintiff and most, if not all, of the J & A workers, individually, in Mr. Kathman's office. (Kathman Affidavit, ¶ 11; Medellin depo., p. 41; Trevino depo., p. 55; Falcon depo., p. 27). According to Plaintiff, Mr. Medellin asked him whether he was legal or illegal and asked him whether his visa had expired. Plaintiff told Mr. Medellin that he was illegal. (Trevino depo., pp. 56-57). Mr. Medellin asked Mr. Falcon where he got his immigration papers. (Falcon depo., p. 29). These interviews were brief, lasting only 2-3 minutes. (Kathman Affidavit, ¶ 11; Falcon depo., p. 27). Moreover, the workers who had finished their interview or were waiting to be interviewed were simply sitting around the conference room talking amongst themselves. (Falcon depo., p. 33). Following the interviews, most of the J & A employees/subcontractors simply returned to work. (Falcon depo., p. 30).

During this entire process, the workers were not physically touched by Mr. Medellin or Deputy Berter, they were not threatened, no weapons were displayed, no handcuffs were displayed, the door to the trailer was open, and Mr. Medellin was cordial for the entire visit.

(Falcon depo., pp. 25-27; Kathman Affidavit, ¶ 14).⁶ In addition, Deputy Berter, the only uniformed officer present in a room of twenty-five or more people was not doing much of anything and, in fact, stood in the corner. (Falcon depo., p. 31; Kathman Affidavit, ¶ 10).

5. Plaintiff is Arrested For Forgery

Plaintiff had stated that he had additional identification in his truck and wanted to know if he could get it. (Berter depo., p. 39). As stated above, Plaintiff went out to his vehicle and came back to the trailer. At this point, Plaintiff states that he presented the additional identification to Mr. Medellin.⁷ The two pieces of identification were purported to be a Social Security Card and a Permanent Resident Card (Trevino depo., Exhibits 3 and 4, respectively). Deputy Berter and Mr. Medellin saw that the security features on the Permanent Resident Card were incorrect, and thus, believed the identification was fraudulent. (Berter depo., p. 42). In addition, a check on the social security number came back “nothing in file” which indicated that the Social Security Card was fraudulent. (Berter depo., p. 44). As a result of Plaintiff’s presentation of fraudulent documents, Deputy Berter then took Plaintiff into custody for forgery. Notably, Plaintiff was not handcuffed even at this time. (Berter depo., p. 47).

At the Butler County Sheriff’s Office, Plaintiff gave a statement that he had purchased the cards in Dayton for either \$200 or \$250 and that he knew they were fraudulent. (Berter depo., p. 48; Trevino depo., Exhibit 5). Plaintiff was then handcuffed and booked into the jail on a state law charge of forgery. (Berter depo., p. 48). Plaintiff purchased the fraudulent social security card to be able to work in the United States. (Trevino depo., Vol. II, pp. 90-91).

⁶ Plaintiff in his deposition states that “they told us they were going to search the cars and everything,” but upon further questioning this statement turns out to be hearsay: “Somebody said Medellin said that they were going to search—search you and search your cars.” (Plaintiff depo. p. 58).

⁷ Deputy Berter recalls that Plaintiff presented the identifications to him (Berter) first. (Berter depo., pp. 41-42).

C. Plaintiff's Indictment, Trial And Removal

Plaintiff was indicted on two counts of forgery in violation of R.C. 2913.31. (See Indictment, attached hereto as Exhibit 2). Following a trial, Plaintiff was found not guilty of the charges. (Complaint, ¶ 31). Unrelated to Plaintiff's state law charges, the Department of Homeland Security began removal proceedings against Plaintiff because he was not in the country legally. (Trevino depo., p. 69). Plaintiff agreed to voluntary departure from the United States and left the country on or about August 16th, 2008. (Trevino depo., p. 70). Plaintiff currently resides in Guadalajara, Mexico. (Trevino depo., Vol. II, p. 104).

Plaintiff now claims that Defendants violated his constitutional rights under 42 U.S.C. § 1983 for merely going to the worksite and asking him questions. (Complaint, ¶ 33). Plaintiff claims that his arrest and prosecution was unlawful under state and federal law. (Complaint, ¶¶ 42, 45). Plaintiff also claims abuse of process (¶ 44) and equal protection violations (¶ 43). Finally, Plaintiff alleges that Defendants are responsible for his voluntary departure to Mexico. (Complaint, ¶ 41).

III. LAW AND ARGUMENT

A. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY FROM PLAINTIFF'S CLAIMS.

"A law enforcement officer's key defense to a § 1983 action is encapsulated in the concept of qualified immunity." *Drogosch v. Metcalf*, 557 F.3d 372, 377 (6th Cir. 2009). "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009) (citation and internal quotation marks omitted).

Until recently, federal courts were required to conduct the qualified-immunity analysis using the two-step sequential inquiry set forth in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). The first step required courts to determine "whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right." *Pearson*, 129 S. Ct. at 816 (citations omitted). And if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right. *Id.* (citation omitted).

In *Pearson*, however, the Supreme Court held that the sequential *Saucier* protocol was no longer mandatory. *Id.* at 818. The Court reasoned that [t]he procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right. *Id.*

1. It Is Not Clearly Established That Local Law Enforcement Officials Are Prohibited From Inquiring About An Individual's Immigration Status.

The premise of Plaintiff's entire Complaint—Defendants conducted an illegal raid on working Hispanics—is flawed. (Complaint, p. 4). This allegation assumes that local law enforcement has no ability to investigate immigration status. (See Complaint, p. 4, ¶ 14). Plaintiff's assumption is wrong. While Defendants deny that their visit to the worksite on January 2, 2007 was any sort of raid or investigation of immigration status⁸, assuming, *arguendo*, that Plaintiff's allegation is true, such an investigation would not have violated clearly

⁸ The idea that the worksite visit constituted a "raid" is absurd when the objective facts are considered: (1) out of the entire Butler County Sheriff's Office, only two persons were present, one of whom had no arrest power; and (2) only one person (Plaintiff) was arrested (on state law charges) despite the fact that many of the workers stated they were illegal immigrants or had no legal documents.

established law. As such, the merits of Plaintiff's claims based on these allegations are unfounded.

It is well settled that local law enforcement officials have the authority to investigate, and even make arrests, for violations of federal law and, specifically, violations of immigration law. First, the United States Supreme Court has repeatedly recognized that local law enforcement officials are authorized to enforce federal laws. In *United States v. Di Re*, 332 U.S. 581 (1948), the Court concluded that:

No act of Congress lays down a general federal rule for arrest without a warrant for federal offenses. None purports to supersede state law. And none applies to this arrest which, while for a federal offense, was made by a state officer accompanied by federal officers who had no power of arrest. Therefore the New York statute provides the standard by which this arrest must stand or fall.

Id. at 591. The Court again addressed the issue of state arrest authority in *Miller v. United States*, 357 U.S. 301 (1958), a case concerning an arrest for federal offenses by an officer of the District of Columbia. No delegation of federal arrest authority was necessary because “the validity of the arrest . . . [was] to be determined by reference to the law of the District of Columbia.” *Id.* at 305-306. Thus, generally, the Supreme Court has held that there is no prohibition regarding local enforcement of federal laws.

Second, several circuit courts of appeal have reached the same conclusion in the immigration context specifically. For example, in *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983)⁹, the Ninth Circuit held that local police officers have the authority to arrest an alien for a violation of the criminal provisions of the Immigration and Naturalization Act (hereinafter, “INA”) if such an arrest is authorized under state law: “There is nothing inherent in that specific enforcement activity that conflicts with federal regulatory interests.” *Id.* at 474. The Tenth Circuit has similarly concluded that “[a] state trooper has general investigatory authority to

⁹ Overruled in part on other grounds by *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999).

inquire into possible immigration violations.” *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984). As the Tenth Circuit characterized this arrest power in 1999, there is a “preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws. *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999). Within the Sixth Circuit, the Northern District of Ohio has similarly held that federal law does not preclude local or state enforcement of the penal provisions of the INA. *See Farm Labor Org. Comm. v. Ohio State Hwy. Patrol*, 991 F. Supp. 895, 903 (N.D. Ohio 1997).¹⁰

The Ohio Attorney General’s Office has also concluded that state law allows local law enforcement, specifically a county sheriff, to arrest and detain an alien without a warrant when evidence establishes probable cause to believe that the alien has violated a criminal provision of federal immigration law. Ohio Atty. Gen. Op. No. 2007-018, at ¶ 1 of the syllabus. Indeed, the Attorney General concluded that violations of certain provisions of the INA are breaches of the public peace under R.C. 311.07(A) and R.C. 311.08(A) for which a sheriff has a duty to enforce. *Id.* at 4-6. Of course, any arrest or investigation must comply with constitutional safeguards such as the Fourth Amendment, and, as discussed below, there were no constitutional violations in this case. *See Id.* at 7.

Closely related to the authority of state and local police to make arrests on the basis of immigration violations is the authority of state and local police to initiate questioning regarding an individual’s immigration status. In March 2005, the Supreme Court unequivocally stated that a person’s immigration status is the sort of basic information that police officers may inquire about, *without* first establishing reasonable suspicion: “We certainly did not, as the Court of

¹⁰ The District Court’s conclusions regarding local enforcement of immigration laws were not disturbed by the Sixth Circuit’s review of the case. *See* 308 F.3d. 523 (6th Cir. 2002).

Appeals suggested, create a “requirement of particularized reasonable suspicion for purposes of inquiry into citizenship status.” *Muehler v. Mena*, 544 U.S. 93, 101 n.3 (2005).

Plaintiff alleges that Defendants Medellin and Berter violated his constitutional rights simply by showing up at the worksite and, as alleged by Plaintiff, speaking with him about his immigration status and paperwork. (Complaint, p. 6, ¶ 33). As stated above, not only were Defendants permitted to question Plaintiff about his immigration status, see *Muehler*, supra, but Deputy Berter would have had authority to arrest Plaintiff, under Ohio law, for any criminal violations of the INA. Nevertheless, it is undisputed that Deputy Berter only arrested Plaintiff for a state law violation. (Berter depo., p. 48; Complaint, ¶ 29). Therefore, it is not clearly established that a person’s constitutional rights are violated when local law enforcement officers come to a worksite and inquire about a worker’s immigration status. As such, Plaintiff’s allegation that Defendants violated his rights by coming to the worksite and questioning him regarding his immigration status fails as a matter of law. Thus, Defendants are entitled to qualified immunity on those claims.

2. Defendants Did Not Violate Plaintiff’s Constitutional Rights

a. Plaintiff was not seized while speaking with Mr. Medellin in the construction trailer.

Plaintiff alleges two unlawful detentions in this case: (1) an unlawful detention in the construction trailer prior to his arrest for forgery and (2) an unlawful arrest for the forgery offenses. Defendants respond to the first allegation noted above here. The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed “to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.” *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976). Indeed, the Supreme Court has noted, “[o]bviously, not all personal intercourse between policemen and

citizens involves ‘seizures’ of persons. Only when an officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” *Terry v. Ohio*, 392 U.S. 1, 19, n.16 (1968). Put another way, an individual’s liberty is restrained “only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). There are several factors that guide this inquiry: the location of the interview; the length and manner of questioning; whether the individual possessed unrestrained freedom of movement during the interview; whether the individual was told he need not answer questions; the threatening presence of several officers, the display of a weapon, some physical touching of one’s person, or the use of language or tone of voice indicated compliance with the officer’s request is compelled. See *United States v. Swanson*, 341 F.3d 524, 529 (6th Cir. 2003); *United States v. Peters*, 194 F.3d 692, 697 (6th Cir. 1999).

Measured by these considerations, the January 2, 2007 the encounter in the construction trailer did not rise to the level of a seizure. Start with the location of the encounter: the EGC construction trailer. (Kathman Affidavit, ¶ 8; Medellin depo., pp. 5, 26). As an initial matter, the Sixth Circuit has found that questioning an individual at his/her place of employment does not subject that individual to a seizure. See *United States v. Mahan*, 190 F.3d 416 (6th Cir. 1999); *United States v. Crossley*, 224 F.3d 847 (6th Cir. 2000). In *Mahan*, as in this case, the employee was summoned to the interview by one of his supervisors at work. *Mahan*, 190 F.3d at 422 (Also, Trevino depo., p. 43; Falcon depo., p. 14). The Sixth Circuit held that this fact did not “even remotely constitute a restraint on the freedom of movement to the degree associated with formal arrest.” *Id.*

During the group meeting in the trailer and the brief individual interviews in Mr. Kathman's office, neither Mr. Medellin nor Deputy Berter physically restrained Plaintiff (or any other worker), handcuffed Plaintiff or limited his freedom of movement. (Falcon depo., pp. 25-27; Kathman Affidavit, ¶ 14). No weapons or handcuffs were displayed. *Id.* See also *Crossley*, 224 F.3d at 862; *Mahan*, 190 F.3d at 422. Most significantly, Plaintiff actually left the trailer, *unescorted*, went out to his car, and came back to the trailer. (Trevino depo., p. 70; Berter depo., pp. 40-41). That fact alone indicates that there was no restriction on the freedom of Plaintiff to move.

Other factors also show the lack of a hostile and coercive environment:

- When the workers first got to the trailer, they were not ordered where to sit or stand, but rather, "put [themselves] in the position [they] wanted to be in around the room." (Falcon depo., p. 21).
- The workers were not threatened with arrest or told that they were going to be subjected to criminal penalties. (Falcon depo., pp. 25-27).
- The length of the interviews in Mr. Kathman's office was very brief, lasting no more than 2-3 minutes. (Kathman Affidavit, ¶ 11; Falcon depo., p. 27). The Sixth Circuit has found far longer interviews to be non-custodial. See *Crossley*, 224 F.3d at 862 (less-than-an-hour interview); *Mahan*, 190 F.3d at 422 (hour-and-a-half interview); *United States v. Panak*, 522 F.3d 462 (6th Cir. 2009) (45 minute interview).
- Deputy Berter was standing in a corner and not doing much of anything. (Falcon depo., p. 31; Kathman Affidavit, ¶ 10).
- During the interviews, the workers in the conference room sat around the table talking amongst themselves. (Falcon depo., p. 33).

Taken together, the objective facts indicate that the meeting in the trailer was a consensual encounter and that neither Plaintiff nor any other worker was seized within the meaning of the Fourth Amendment.

Plaintiff may argue that he felt compelled to cooperate with Mr. Medellin. Such subjective notions of seizure are insufficient to turn a consensual encounter into a seizure: “While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.” *INS v. Delgado*, 466 U.S. 210, 216 (1984). In *Delgado*, the Immigration and Naturalization Service (INS) conducted a survey of the work force at Southern California Davis Pleating Co. *Id.* at 212. During the surveys, agents positioned themselves near the buildings’ exits while other agents dispersed throughout the factory to question most, but not all, employees at their work stations. *Id.* The questioning related to the workers’ citizenship and some workers were asked to produce immigration papers. *Id.* at 212-213. The Court rejected the claim that the questioning, coupled with the stationing of agents at the exits constituted a seizure: “If mere questioning does not constitute a seizure when it occurs inside the factory, it is no more a seizure when it occurs at the exits.” *Id.* at 218. It was obvious in *Delgado*, as it is in this case, that nothing more than questioning was occurring. *Id.* at 220. In this case, when the meeting with Medellin was over, most of the employees, like the employees in *Delgado*, simply returned to work. (Falcon depo., p. 30). Based on *Delgado*, at the cases cited above, it is clear that the meeting in the construction trailer did not constitute a seizure and, as such, Plaintiff’s Fourth Amendment claim must be dismissed.

b. Plaintiff’s arrest for forgery was supported by probable cause.

Plaintiff claims that he was arrested and maliciously prosecuted without probable cause for the offenses of forgery. (Complaint, ¶¶ 42, 45). As in initial matter, these claims can only apply to Deputy Berter as he is the one who arrested and charged Plaintiff. (Berter depo., p. 47). Mr. Medellin had no arrest authority. (Medellin depo., p. 9). Probable cause is defined as "facts

and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). In determining whether there was probable cause to arrest, the court must determine whether at the time of arrest, the "facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964) (citing *Brinegar v. United States*, 338 U.S. 160, 175-176, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949); *Henry v. United States*, 361 U.S. 98, 102, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959)). This determination requires an examination of the "totality" of the facts and circumstances surrounding the arrest. *State v. Miller*, 117 Ohio App.3d 750, 757, 691 N.E.2d 703 (1997) (citing *State v. Bobo*, 37 Ohio St. 3d 177, 524 N.E.2d 489 (1988)).

First, Plaintiff was indicted by an Ohio grand jury on the charges of forgery. (See Exhibit 2). "[I]t has been long settled that the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer." *Barnes v. Wright*, 449 F.3d 709 at 716 (6th Cir. 2006) (quoting *Higgason v. Stephens*, 288 F.3d 868, 877 (6th Cir. 2002)); see also *Harris v. United States*, 422 F.3d 322, 327 (6th Cir. 2005) (observing that under Ohio law; an indictment is "prima facie evidence of probable cause and a plaintiff must bring forward substantial evidence to rebut this" to succeed on a malicious prosecution claim) (internal quotation omitted); *Hubbard v. Gross*, 199 F. App'x 433, 441 (6th Cir. 2006) (holding that defendants were entitled to qualified immunity on plaintiff's malicious prosecution claim because plaintiff had been

indicted); *Bielefeld v. Haines*, 192 F. App'x 516 (6th Cir. 2006) (observing *Higgason* and holding that appellant's malicious prosecution claim failed where appellant was indicted by grand jury). As a matter of law, Plaintiff's indictment is dispositive of his § 1983 malicious prosecution claim.

Second, regardless of the indictment, it is clear that there were sufficient facts to support probable cause for forgery. Ohio's forgery statute provides in pertinent part:

(A) No person, with purpose to defraud, or knowing that the person is facilitating a fraud, shall do any of the following:

(3) Utter, or possess with purpose to utter, any writing that the person knows to have been forged.

Certainly, Plaintiff cannot dispute that the items he possessed, a false social security card and a false permanent resident card were forged (See Trevino depo., Exhibits 3 and 4, respectively). At the time of his arrest, Deputy Berter and Mr. Medellin saw that the security features on the permanent resident card were incorrect, and, thus, reasonably believed the identification was forged. (Berter depo., p. 42). In addition, a check on the social security card showed that the social security number came back "nothing in file" which indicated that it too was forged. (Berter depo., p. 44). Plaintiff ultimately admitted that the identifications were purchased in Dayton for \$200-\$250 and that he [Plaintiff] knew they were fraudulent. (Berter depo., p. 48; Trevino depo., Exhibit 5).

It is anticipated that Plaintiff will argue that he did not have a purpose to defraud when he presented the false identifications. Defraud means to "knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another." R.C. 2913.01(B). Purpose requires an intention to cause a certain result or to engage in conduct that will cause that result. R.C. 2901.22(A). Purpose or intent can be established by

circumstantial evidence from the surrounding facts and circumstances in the case. See *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E.2d 492; See, also, *State v. Seiber* (1990), 56 Ohio St. 3d 4, 13-14, 564 N.E.2d 408. Significantly there is no need to prove that a person actually receives a benefit or that someone actually suffers a detriment. See *State v. Tiger*, 148 Ohio App.3d 61, 722 N.E.2d 144 (2002) citing *State v. Lee*, 1983 Ohio App. LEXIS 11686, at *6 (Nov. 23, 1983), Washington App. No. 82X16, unreported (clarifying that in order for a person to have purpose to defraud under R.C. 2913.01, "one must merely knowingly intend to obtain some benefit or cause some detriment to another by way of deception"). In other words, forgery does not require that anyone actually be defrauded.

In this case, the circumstances presented allowed Deputy Berter to make a reasonable inference that Plaintiff had the requisite purpose to defraud. As a matter of logical probability, the fraudulent instruments' only value would be to (1) falsely represent Plaintiff's right to legally be in this country and (2) to obtain employment. Plaintiff testified that he does not know why he gave the false cards to Mr. Medellin. (Trevino depo., p. 52). However, it is clear from Deputy Berter's deposition that Plaintiff wanted to get additional identification to show them. (Berter depo. p. 32, 39-40). Of course, this is in the context of all of the workers showing their identifications and having their employers look at the identifications. (Falcon depo., pp. 53-54; Berter depo., p. 32). Plaintiff then came back to the trailer and showed the cards to Deputy Berter. By showing the cards to Deputy Berter, Plaintiff was misrepresenting his legal status and his ability to work.¹¹ In *State v. Aranda*, Marion Cty. No. 9-02-41, 2003-Ohio-392, the defendant was charged with two counts of forgery regarding a forged social security card and a forged resident alien card. The court upheld his conviction because defendant acquired the cards

¹¹ Plaintiff has since testified that he purchased the social security card to be able to work in the United States. (Trevino depo., Vol. II, pp. 90-91).

for the purpose of remaining and obtaining employment in the United States. *Id.* at ¶ 3. There was probable cause in this case to believe that Plaintiff acquired his forged cards for the exact same purpose. As such, even if Plaintiff had not been indicted, there would still be probable cause for Plaintiff's arrest and prosecution. Therefore, Defendants are entitled to summary judgment on those claims.

c. Plaintiff has failed to prove any Equal Protection violation

Plaintiff appears to allege a claim that Plaintiff was subjected to unequal treatment because of his race in violation of the Equal Protection Clause. The Supreme Court has explained that a claimant alleging selective enforcement of facially neutral criminal laws must demonstrate that the challenged law enforcement practice "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. United States*, 470 U.S. 598, 608, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985). "To establish discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." *United States v. Armstrong*, 517 U.S. 456, 465, 134 L. Ed. 2d 687, 116 S. Ct. 1480 (1996). A claimant can demonstrate discriminatory effect by naming a similarly situated individual who was not investigated or through the use of statistical or other evidence which "addresses the crucial question of whether one class is being treated differently from another class that is otherwise similarly situated." *Chavez v. Ill. State Police*, 251 F.3d 612, 638 (7th Cir. 2001). Discriminatory purpose can be shown by demonstrating that the "decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Wayte*, 470 U.S. at 610 (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979)).

There is no evidence in this case that any of the Defendants acted with a discriminatory purpose. It is undisputed that all of the J & A employees (except those who left) came to the construction trailer. This included, Caucasian, Hispanic and Black employees and regular employees and subcontractors alike. (See Trevino depo., p. 44, stating that white and Hispanic workers went to the trailer; Falcon depo., p. 17, stating that white, black and Hispanic workers went to the trailer; Kathman Affidavit, ¶ 9, indicating that Caucasian and Hispanic males came to the trailer, and, in addition, regular J & A employees as well as sub-contractors; Medellin depo., p. 32, Hispanics, blacks and Caucasians). According to Oscar Falcon and Joe Kathman, every worker showed their identification not just Hispanics. (Falcon depo., p. 24; Kathman Affidavit, ¶ 10). Moreover, regarding the personal interviews, Mr. Medellin recalls that he interviewed at least one Caucasian. (Medellin depo., p. 41). Deputy Berter recalls that black, white and Hispanic workers were interviewed. (Berter depo., p. 35). There is simply no evidence Mr. Medellin (who is Hispanic, see Complaint, ¶ 5) and Deputy Berter possessed any discriminatory intent at the worksite or at any other time. Indeed, Deputy Berter's had an extremely limited role. He was only filling in because another deputy was injured. (Berter depo., pp. 6-7). By all accounts, his role was extremely limited, at least until Plaintiff showed him the forged identifications. (Falcon depo., p. 31, Kathman Affidavit, ¶ 10). Plaintiff has not met the demanding standard of proof for his contention of an equal protection violation, because he has not proven that Mr. Medellin or Deputy Berter were motivated by a discriminating purpose and has not demonstrated that their actions had a discriminatory effect, especially considering that most of the employees returned to work following the visit.

d. Defendants are entitled to statutory immunity under R.C. Chapter 2744 on all state law claims.

Defendants are statutorily immune from Plaintiff's state law claims. Under R.C. § 2744.03(A)(6), an employee of a political subdivision is immune from liability unless one of three enumerated exceptions applies. Revised Code § 2744.03(A)(6)(a) through (c) enumerate the three exceptions to qualified statutory immunity for employees of political subdivisions. The employee is immune unless: "(a) his acts or omissions were manifestly outside the scope of his employment or official responsibilities; (b) his acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; (c) liability is expressly imposed upon the employee by a section of the Revised Code."

Plaintiff appears to allege that Defendants are liable because they acted with malicious purpose. (Complaint, ¶¶ 44-45). In order for a malicious purpose to exist, there must be ill will or enmity of some sort. *Cook v. Hubbard Exempted Village Bd. Of Edn.* (1996), 116 Ohio App.3d 564, 569. Malice includes "the willful and intentional design to do injury, or the intention or desire to harm another * * * through conduct which is unlawful or unjustified." *Id.*, quoting *Jackson v. Butler Cty. Bd. Of Cty. Commsrs.* (1991), 76 Ohio App.3d 448, 453. Conduct is not "malicious" unless the evidence establishes a disposition to perversity on the part of the actor. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356.

In this case, there is no evidence that any Defendant had any ill will or enmity towards Plaintiff. There is no evidence that Defendants even knew who Plaintiff was prior to meeting him on January 2, 2007. Plaintiff admits that he was never mistreated in any way. (Trevino depo. p. 64). He was not called any bad names because he was Mexican. (*Id.*). Even after being taken into custody for forgery, Plaintiff was not handcuffed. (*Id.* at p. 63). These facts belie any

conclusion that Defendants acted with malicious purpose. As such, the Defendants are entitled to immunity under R.C. 2744.03.

Even if Defendants were not entitled to immunity, Plaintiff's state law claims would still fail. As discussed above, Plaintiff's malicious prosecution claim fails because there was probable cause to arrest Plaintiff. Plaintiffs' allegations of abuse of process are equally without merit. To state a claim for abuse of process, the claimant must demonstrate that: "(1) a legal proceeding has been set in motion in proper form and with probable cause; (2) the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) direct damage has resulted from the wrongful use of process." *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 298, 1994-Ohio-503. To demonstrate that a proceeding has been perverted, the claimant must show that the defendant has an ulterior, unlawful purpose for his/her actions. *Nosker v. Greene County Regional Airport Authority* (1997), 2nd Dist. No. 96 CA-101, 1997 WL 271407 at *2 (finding that plaintiff cannot demonstrate abuse of process where only a lawful purpose is apparent).

Plaintiff has joined his abuse of process claim to his malicious prosecution claim almost as an afterthought. Abuse of process and malicious prosecution are contradictory claims. Plaintiff premises this entire action on a lack of probable cause to arrest and prosecute him. Abuse of process requires the existence of probable cause. *Yanklevich*, supra. As such, Plaintiff cannot maintain both a malicious prosecution claim and an abuse of process claim. See *Coleman v. City of Beachwood*, 8th Dist. No. 92399, 2009 Ohio 5560, at ¶¶ 30-31; *Claus v. Merkel*, 11th Dist. No. 2003-T-0082, 2004 Ohio 5011, at ¶¶ 12-13, 16; *Moffitt v. Litteral*, 2nd Dist. No. 19154, 2002 Ohio 4973, at ¶ 61. Regardless, there is absolutely no evidence that Defendants attempted

to pervert any proceeding or had any ulterior motive behind their actions. Therefore, Plaintiff's abuse of process claim fails as a matter of law.

3. Sheriff Jones is Not Liable in His Individual Capacity.

To establish liability under § 1983 against an individual defendant, a plaintiff must plead and prove that the defendant was personally involved in the conduct that forms the basis of his complaint. *Greene v. Barber*, 310 F.3d 889, 899 (6th Cir.2002); *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir.1999). Plaintiff does not allege, and it is undisputed, that Sheriff Jones was not present at the worksite on January 2, 2007. (See Complaint, ¶¶ 18-30; Kathman Affidavit, ¶ 5; Berter depo., pp. 6-9).

When a sheriff's officers violate 42 U.S.C. § 1983, the sheriff may be held liable under supervisory liability theory. This liability cannot be based on the actions of the subordinate alone, but instead, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (U.S. 2009). To show such violation, the plaintiff must show that the sheriff "encouraged the specific incident of misconduct or in some other way directly participated in it." *Petty v. County of Franklin*, 478 F.3d 341, 349 (6th Cir. Ohio 2007). "At a minimum, a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." *Id.* If the sheriff does not expressly encourage the conduct and does not directly participate in the conduct, then a plaintiff must show implicit authorization of the specific conduct.

To show implicit authorization, knowledge of a subordinate's unconstitutional actions, coupled with failure to act, is not alone sufficient to impose liability. *Iqbal*, 129 S.Ct. at 1949; *see also Gregory v. City of Louisville*, 444 F.3d 725, 751 (6th Cir. 2006). However, when there is

a pattern of unconstitutional misconduct that a supervisor fails to remedy or where there is essentially a complete failure to train the police force adequately, supervisory liability may be found based on a failure to train. *Ontha v. Rutherford County*, 222 Fed. Appx. 498, 505 (6th Cir. Tenn. 2007). Plaintiffs may not simply “point after the fact to a particular sort of training which, if provided, might have prevented the harm suffered in a given case.” *Id.*

In this case, Plaintiff has produced no evidence that Sheriff Jones encouraged or directly participated in any part of the worksite visit on January 2, 2007. There is no evidence that Sheriff Jones even knew that Mr. Medellin and Deputy Berter were going to the worksite on January 2, 2007. Next, Plaintiff has failed to produce any evidence regarding a “pattern of unconstitutional misconduct” which, of course, makes any implicit authorization argument meritless. There is also no evidence that Mr. Medellin and Deputy Berter were not adequately trained. On the contrary, Mr. Medellin has thirty years of law enforcement experience, specifically, in the field of immigration law. (Medellin Affidavit, generally, attached hereto as Exhibit 3). In particular, Mr. Medellin has extensive knowledge of laws relating to the employment of undocumented workers. He has participated in hundreds of worksite enforcement actions which included auditing employer/employee paperwork such as I-9 Forms. (*Id.* at ¶ 7). He has attended classes, seminars and courses regarding the Immigration Reform Control Act and fraudulent document detection. (*Id.* at ¶ 6.). In 1989, Mr. Medellin was recognized as Investigator of the Year by the National Association of Federal Investigators for his work in enforcing the employer sanctions provisions of the Immigration Reform and Control Act of 1986. (*Id.* at ¶ 5). Thus, there is no plausible argument that Mr. Medellin did not have appropriate training to educate employers and employees regarding documents needed for employment. Assuming, *arguendo*, that Mr. Medellin was investigating immigration

violations—which is not unconstitutional—Mr. Medellin was certainly qualified to conduct such an investigation.

Lastly, in the context of discrimination claims, the *Iqbal* decision makes clear that purpose, rather than mere knowledge, is required. *Iqbal*, 129 S.Ct. at 1949. This means that any policy, action, or implied authorization would have to be done with the purpose of discriminating, not merely in spite of discriminatory effects, for liability to be found. In this case, Plaintiff has produced no evidence that Sheriff Jones has purposely discriminated against any ethnicity or class. Indeed, Sheriff Jones testified that the immigration concerns in Butler County extend to Russians, Chinese, Hispanics, Europeans and that he does not focus on any particular group. (Jones depo., pp. 42-43). Therefore, Plaintiff has no basis for any individual capacity claims against Sheriff Jones and those claims must be dismissed.

B. Plaintiff Has Produced No Evidence To Support Official Capacity Liability

Plaintiff has sued all Defendants in their official capacity. A claim against a municipal or county official in his official capacity is considered a claim against the entity itself. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985); *Brandon v. Holt*, 469 U.S. 464, 471-72, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Because there is no *respondeat superior* liability under § 1983, to establish an official capacity claim a plaintiff must show that the enforcement of the official entity's policy or custom caused the violation of the plaintiff's federal or constitutional right. *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989).

Because a plaintiff cannot rely on *respondeat superior* to hold a municipality liable under § 1983, see *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611, 98

S. Ct. 2018 (1978), he must show that the municipality's policy (or lack thereof) was a "moving force" in the deprivation of the plaintiff's rights and arose from "deliberate indifference" to the plaintiff's rights. *See Doe v. Claiborne County, Tennessee*, 103 F.3d 495, 508 (6th Cir. 1996). In other words, a plaintiff asserting a section 1983 claim on the basis of a municipal custom or policy has the burden to "identify the policy, connect the policy to the [County] itself and show that the particular injury was incurred because of the execution of that policy." *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir.), *cert. denied*, 510 U.S. 1177, 127 L. Ed. 2d 565, 114 S. Ct. 1219 (1994). These stringent standards are "necessary to avoid *de facto respondeat superior* liability explicitly prohibited by *Monell*." *Doe*, 103 F.3d at 508.

In this case, Plaintiff has not and cannot meet his burden to show official capacity liability. First, Plaintiff alleges that "Medellin and Berter and Jones acted pursuant to the policies, practices, customs and usages of Butler County and Sheriff Jones with respect to their conduct in this case" but Plaintiff never identifies what policies, practices or customs he is referring to. A conclusory allegation regarding improper policies is plainly insufficient to obtain liability. Plaintiff may argue that Mr. Medellin's employer visits constituted an official policy of Butler County. Even if that assertion is true, however, it is not an unconstitutional policy. As discussed, *supra*, it is well settled that local law enforcement may ask questions regarding immigration status and enforce federal immigration laws.

Lastly, Plaintiff cannot recover on his official capacity claim through the theories of inadequate training or supervision because he has not developed any evidence that could lead to liability on either of these theories. In order to recover against a political entity on a failure to train claim, the Plaintiff must show the "failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Slusher v. Carson*, 540 F.3d 449,

457 (6th Cir. 2008). In this case, the evidence shows that Mr. Medellin is well trained. (See section A-3 above and Medellin Affidavit attached hereto).

Similarly, any lack of supervision claim must also fail. A municipality is not liable under § 1983 for tolerating or acquiescing in federal rights violations unless the plaintiff establishes “(1) the existence of a clear and persistent pattern of violating federal rights..., (2) notice or constructive notice on the part of the defendants, (3) the defendants’ tacit approval of the unconstitutional conduct, such that their deliberate indifference in failing to act can be said to amount to an official policy of inaction, and (4) that the defendants’ custom was the ‘moving force,’ or direct causal link for the constitutional deprivation.” *Powers v. Hamilton Cty. Pub. Defender Comm’n*, 501 F.3d 592, 607 (6th Cir. 2007). Again, there is no evidence to support any of the above elements. At best, Plaintiff can argue that Sheriff Jones testified that somewhere between 5-10 Hispanics have made complaints about unequal treatment. (Jones depo., pp. 32-32). There is timeframe given for these complaints i.e. last 10 years and no other details regarding the complaints are provided. Clearly, the mere existence of complaints is not sufficient evidence to support a lack of supervision claim. As such, Plaintiff’s official capacity claims fail.

C. Plaintiff Is Not Entitled To Damages Relating To His Removal

It is clear that Plaintiff is expecting to recover damages relating to his removal from the United States. (See e.g. Complaint, ¶ 32). Plaintiff is not entitled to such damages under § 1983. Under § 1983, damages for an alleged unlawful arrest do not extend to the acts of an independent act of another government agency. For example, in *Barts v. Joyner*, 865 F.2d 1187 (11th Cir. 1989), the plaintiff alleged that she was detained unlawfully in violation of the Fourth Amendment. *Id.* at 1189. Plaintiff was then charged with murder and ultimately acquitted of

murder following a second trial. *Id.* Plaintiff sought damages for her criminal trials, conviction (in the first trial), incarceration and aggravation of her Rape Trauma Syndrome. *Id.* at 1195. The Eleventh Circuit rejected Plaintiff's claims for these damages because they were caused by the intervening acts of the prosecutor, grand jury, judge and jury and, as such, the chain of causation was broken. *Id.*

In this case, Plaintiff had been illegally living in the United States for many years. (Trevino depo., pp. 4, 6). Following his arrest, the Department of Homeland Security began removal proceedings against Plaintiff because he was not in the country legally. (Trevino depo., p. 69). Plaintiff did not fight removal. He agreed to voluntarily depart from the United States and left the country on or about August 16, 2008 (Trevino depo., p. 70). The removal proceeding begun by the Department of Homeland Security is an independent intervening act which breaks the chain of causation against Defendants. See also *Smiddy v. Varney*, 803 F.2d 1469 (9th Cir. 1986); *Duncan v. Nelson*, 466 F.2d 939 (7th Cir. 1972); see also *Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988) (in section 1983 action based on false arrest, grand jury or other independent intermediary breaks chain of causation unless defendant policemen mislead intermediary); *Scanlon v. Flynn*, 465 F. Supp. 32 (S.D. Fla. 1978) (stating that under New York law, damages for false arrest are measured only to time of arraignment or indictment because, after such an evaluation, subsequent detention is attributed to independent, supervening determination of probable cause, not to earlier improper arrest). Therefore, Plaintiff is barred from receiving damages based upon his departure from the United States.

Finally, by living in the United States illegally, Plaintiff assumed the risk that removal proceedings could be filed against him. He had no reasonable expectation that his presence here would somehow become legal or that he was entitled to continue residing in the United States.

As such, this Court should not permit Plaintiff to claim damages related to his voluntary departure.

IV. CONCLUSION

Defendants Medellin and Berter did not violate the law when they conducted a worksite visit on January 2, 2007. It is clearly established that local law enforcement may conduct activities relating to the enforcement of federal law. Further, Mr. Medellin's questioning of Plaintiff and the other workers was a consensual encounter for which there was no Fourth Amendment seizure. The subsequent arrest of Plaintiff on state law forgery charges was lawful as evidenced by Plaintiff's indictment as well as the fact that there was no lawful purpose to have fraudulent identification documents.

Plaintiff has produced no evidence that any Defendant acted with a discriminatory purpose or motive. The evidence is clear that all workers from J & A were called to the trailer and showed identification, not merely the Hispanic workers. Finally, Plaintiff has produced no evidence of any unconstitutional policy, procedure or custom. Indeed, Plaintiff does not allege any particular unconstitutional policy in his Complaint.

For the foregoing reasons, Defendants are entitled to summary judgment as to all of Plaintiff's claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2009, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Andrew N. Yosowitz

Andrew N. Yosowitz