

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

WAYNE B. LYNCH, Administrator of the)
Estate of Donovan W. Lynch, Deceased,)

Plaintiff,)

v.)

Civil Action No. 2:21-cv-00341

SOLOMON D. SIMMONS, III,)
a/k/a, SOLOMON D. SIMMONS,)
Individually And In His Official Capacity)
As A Police Officer For The City Of)
Virginia Beach, Virginia,)

And)

CITY OF VIRGINIA BEACH,)

Defendants.)

**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT CITY
OF VIRGINIA BEACH’S MOTION TO DISMISS THE AMENDED COMPLAINT**

This case arises from the tragic murder of Donovan Lynch, a young, innocent Black man, in Virginia Beach. Mr. Lynch was killed by Solomon D. Simmons, an officer of the Virginia Beach Police Department (“VBPD”), who struck Mr. Lynch with two bullets fired from his gun while on duty.

On the night he died, Mr. Lynch and his friend, Darrion Marsh, were walking towards their cars after an evening at a restaurant. As they were walking, they encountered Officer Simmons and several other VBPD officers. The officers were in the area to respond to an unrelated dispatch call. Mr. Lynch was neither a suspect in the incidents for which the police were on the scene, nor acting in a threatening manner.

Nevertheless, without even identifying himself, Officer Simmons shot Mr. Lynch on sight. Rather than attempting to save Mr. Lynch by arranging for transport to the hospital about four miles away or rendering medical aid at the scene, Officer Simmons and the other VBPD officers moved Mr. Lynch—who was still alive—around the parking lot. As a result of Officer Simmons’ and his fellow officers’ actions, Mr. Lynch died approximately 14 minutes after Officer Simmons shot him.

Officer Simmons’ unprovoked and unnecessary use of deadly force, coupled with the City of Virginia Beach’s failure to adequately train and supervise its officers, led directly to Mr. Lynch’s death. Plaintiff Wayne Lynch, Mr. Lynch’s father and the Administrator of his Estate, alleges in his Amended Complaint that Virginia Beach fails to train its officers to adhere to several of its policies, including: to use verbal warnings before exerting deadly force, to exhaust all non-lethal options before using deadly force, to render life-saving medical aid after using potentially deadly force, and to properly utilize Body-Worn Cameras (“BWC”) to prevent unnecessary use of deadly force. Plaintiff also alleges that Virginia Beach failed to reasonably supervise its officers’ adherence to these policies, and that these failures to train and supervise its officers to follow its policies and take seriously any use of deadly force caused Mr. Lynch’s death.

Virginia Beach is mistaken in its assertion that the Amended Complaint rests on boilerplate allegations premised on the actions of only Officer Simmons. While the city attempts to pick off various pieces of the Amended Complaint in a piecemeal fashion, in doing so it fails to acknowledge the strength of the well-pleaded facts and circumstances *together*, as the Court must at this stage.

The Amended Complaint contains specific, well-pleaded allegations, which go above and beyond what is sufficient to state a claim for relief. Virginia Beach offers *virtually no response* to

Plaintiff's well-pleaded allegations regarding: (1) Virginia Beach's failures to train its officers to follow its policies regarding using verbal warnings, exhausting non-lethal options before using deadly force, and rendering life-saving medical aid, and (2) Virginia Beach's failure to supervise officers' adherence (and lack thereof) to these policies.

These unanswered allegations in the Amended Complaint are sufficient to state and support a claim of municipal liability against Virginia Beach for Mr. Lynch's untimely death at the hands of one of its officers. In addition, Virginia Beach's disproportionate emphasis on (and misunderstanding of) Plaintiff's allegations regarding Virginia Beach's BWC policy is not persuasive. Accordingly, Plaintiff respectfully requests that the Court deny Virginia Beach's Motion to Dismiss the Amended Complaint (Dkt. No. 18).

FACTUAL BACKGROUND

On the evening of March 26, 2021, Mr. Lynch and his long-time friend Darrion Marsh went to the Virginia Beach Oceanfront Resort Area (the "Oceanfront") to socialize with the other people enjoying the nightlife in the area. Amended Complaint ("AC"), Dkt. No. 17, ¶ 18.

At or around 11:20 p.m., the two men were in a restaurant. AC ¶ 19. Before midnight, they decided to leave the Oceanfront and began to walk away from the area and towards the lot where they had parked. AC ¶ 21. While on the way to their cars, Mr. Lynch and Mr. Marsh encountered Officer Solomon Simmons and several other VBPD officers. AC ¶ 22. Officer Simmons and the other VBPD Officers were in the Oceanfront area to respond to a dispatch call that was entirely unrelated to either Mr. Lynch or Mr. Marsh. AC ¶ 19-20.

A former college athlete, he stood six feet, five inches tall and weighed 305 pounds at the time of his death. AC ¶ 24. When Mr. Lynch and Mr. Marsh encountered Officer Simmons and

the other VBPD Officers, neither was speaking or acting in a manner that would suggest they posed any threat, let alone a deadly threat, to anyone. AC ¶ 25.

Nonetheless, Officer Simmons, without warning or provocation, fired his police-issued firearm at Mr. Lynch and hit him twice. AC ¶ 23. Officer Simmons never identified himself or issued any warning prior to opening fire. AC ¶¶ 26, 28.

Mr. Lynch was alive for approximately 14 minutes after Officer Simmons shot him twice. AC ¶ 42. Officer Simmons and the other VBPD Officers did not attempt to render life-saving medical aid at the scene or arrange to transport Mr. Lynch, still alive at that point, about four miles to the nearby hospital. AC ¶ 37. Instead, Officer Simmons and his fellow officers picked up and moved Mr. Lynch's wounded body as he lay fighting for his life. *Id.*

VBPD has policies designed to govern its officers' performance of their official duties. Such policies include issuing verbal warnings (AC ¶ 26), engaging non-violent efforts to address situations (AC ¶ 27), activating BWCs (AC ¶¶ 29-36), and rendering medical aid to those injured by an officer's use of force (AC ¶ 37).

VBPD failed to train and supervise its officers on any of these policies. As a result of that failure, Donovan Lynch's average night out turned fatal. Had Officer Simmons been trained to identify himself and/or issue a verbal warning (AC ¶ 26), he would have done so and would have realized that Mr. Lynch, too large to be mistakable for anyone else at the Oceanfront, let alone a suspect from the night's separate incidents, posed no threat (AC ¶¶ 24-25). Had Officer Simmons been trained to approach Mr. Lynch non-violently and had done so, rather than immediately opening fire, he would have reached the same conclusion. AC ¶¶ 27-28. If Officer Simmons had been trained to comply with VBPD's policies for rendering aid after using deadly force, he or any of his fellow officers could have rendered the requisite medical aid or ensured that Mr. Lynch was

sent to the nearby hospital to receive treatment, rather than leaving him to fight for his life for approximately 14 minutes after being shot. AC ¶¶ 40-42. If Officer Simmons had turned on his BWC when dispatched to the unrelated crime scene, or when he approached Mr. Lynch, or even after he shot Mr. Lynch in accordance with VBPD policy, he may have acted in accordance with the relevant policies thereafter when faced with the choice. AC ¶¶ 29-36.

If Officer Simmons or his fellow officers had followed *any one* of the policies on which Virginia Beach failed to train and supervise them, Mr. Lynch might be alive today. If Officer Simmons and his fellow officers had followed *all* of the policies on which Virginia Beach failed to train and supervise them, Mr. Lynch certainly would not have died in the streets he grew up on.

PROCEDURAL BACKGROUND

Plaintiff filed this lawsuit on June 21, 2021, in response to his son’s tragic death (Dkt. No. 1). Defendant Virginia Beach moved to dismiss the claims against it (Dkt. No. 9), and Officer Simmons filed an Answer and Grounds of Defense (Dkt. No. 11) on July 19 and 21, 2021, respectively. Plaintiff amended his Complaint, as of right, on August 9, 2021 (Dkt. No. 17). Again, on August 23, 2021, Officer Simmons filed an Answer and Grounds of Defense (Dkt. No. 20), and Virginia Beach filed its Motion to Dismiss (Dkt. No. 18) and accompanying Memorandum (Dkt. No. 19, hereinafter “Mot.”).

STANDARD OF REVIEW

“To survive a motion to dismiss, each claim asserted in a complaint must set forth sufficient facts to state a claim that is facially plausible.” *DePaola v. Clarke*, 884 F.3d 481, 486 (4th Cir. 2018). When deciding a motion to dismiss, the court “accept[s] all well-pleaded allegations in the plaintiff’s complaint as true and draw[s] all reasonable factual inferences in the plaintiff’s favor.” *Edwards v. Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). The various allegations in a complaint

must be “[t]aken together” rather than considered in isolation. *Edwards v. CSX Transp., Inc.*, 983 F.3d 112, 118 (4th Cir. 2020). This deferential standard allows complaints to survive motions to dismiss “even if it appears that a recovery is very remote or unlikely.” *Moody v. City of Newport News, Va.*, 93 F.Supp. 3d 516, 526 (E.D.Va. 2015).

Motions to dismiss civil rights complaints are treated with particular skepticism in the Fourth Circuit. “Where, as here, a Rule 12(b)(6) motion is testing the sufficiency of a civil rights complaint, [courts in the Fourth Circuit] must be specially solicitous of the wrongs alleged, and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief *under any legal theory which might plausibly be suggested by the facts alleged.*” *Goldsboro*, 178 F.3d at 244 (quotation marks omitted, italics added). It is, moreover, “improper for courts to apply ‘a heightened pleading standard,’ beyond that of Federal Rule of Civil Procedure 8, in Section 1983 municipal liability cases.” *Moody*, 93 F. Supp. 3d at 531. To satisfy Rule 8, a plaintiff is required “to provide nothing more than a short and plain statement of his claims giving the [municipality] fair notice of what his claims are and the grounds upon which they rest.” *Goldsboro*, 178 F.3d at 245.

ARGUMENT

I. PLAINTIFF ADEQUATELY PLEADED A CLAIM FOR *MONELL* LIABILITY AGAINST THE CITY OF VIRGINIA BEACH.

A local government is liable under 18 U.S.C. § 1983 if it is responsible for depriving a plaintiff of his or her civil rights. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 692 (1978). “Under *Monell*, a plaintiff can prevail if (1) he suffered a deprivation of his federal rights, and (2) the execution of the government’s ‘policy or custom’ inflicted the injury.” *November v. Chesterfield Cnty. of Va.*, No. 3:17-CV-113-JAG, 2017 WL 4922017, at *3 (E.D.Va. Oct. 31, 2017).

Plaintiff pleaded that “Officer Simmons, in his capacity as subordinate of the City of Virginia Beach, did violate Mr. Lynch’s rights guaranteed by the . . . Fourth and Fourteenth Amendments, by unlawfully murdering him.” AC ¶ 59. Virginia Beach concedes the first element of Plaintiff’s *Monell* claim: it makes no attempt to argue that Officer Simmons did not violate Mr. Lynch’s constitutional rights when he shot and killed Mr. Lynch. Instead of defending the (indefensible) actions of its agent, Virginia Beach contests only the second element of Plaintiff’s *Monell* claim: that is, whether Virginia Beach’s policies or customs caused Mr. Lynch’s death.

In the Fourth Circuit, a plaintiff may allege that a municipality’s policies or customs caused a deprivation of his or her constitutional rights at the hands of a municipal agent in any of the following four ways:

(1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, that ‘manifest[s] deliberate indifference to the rights of citizens’; or (4) through a practice that is so ‘persistent and widespread’ as to constitute a ‘custom or usage with the force of law.’

Moody, 93 F.Supp. 3d at 529 (quoting *Lytle v. Doyle*, 326 F.3d 464, 471 (4th Cir. 2003)). Under whichever path a plaintiff proceeds, the plaintiff “must also show a ‘direct causal link between the municipal action and the deprivation of federal rights.’” *Wright v. Va. Peninsula Jail Authority*, No. 2:19-cv-189, 2020 WL 1055665, at *2 (E.D. Va. March 4, 2020).

Here, Plaintiff pleaded *Monell* liability against Virginia Beach under the third path of liability: Virginia Beach failed to properly train and supervise its officers in a manner that manifests deliberate indifference to the rights of citizens.

A. Plaintiff Alleges Numerous Specific Ways In Which Virginia Beach Failed to Train Its Police Officers.

Virginia Beach’s argument that the Amended Complaint relies on “conclusory, boilerplate allegations” about Virginia Beach’s failures to train its police officers (*see* Mot. at 6-8) flatly ignores pages and pages of specific allegations about the policies and procedures Virginia Beach failed to train Officer Simmons and his fellow officers to follow, and how those failures directly caused Mr. Lynch’s death. Far from alleging only that Virginia Beach failed to train its officers to follow its BWC policies, (*see* Mot. at 2-3), Plaintiff also alleges the following specific failures related to VBPD policies:

- Virginia Beach failed to train its officers to follow the requirement of VBPD General Order 5.01 that officers are to provide a “verbal warning such as ‘Police, stop or I’ll shoot’” when it is “feasible” to do so. AC ¶ 26.
- Virginia Beach failed to train its officers to follow the requirement of Virginia Code ¶ 19.2-83.5 that officers “exhaust” all non-lethal force options before using lethal force. AC ¶¶ 27, 66. Examples of such options include “verbalization, soft control techniques, intermediate techniques, hard control techniques, and/or non-lethal force.” AC ¶ 63.
- Virginia Beach failed to train its officers to follow the requirement of VBPD General Order 5.01 that officers render life-saving medical aid to persons against whom officers use force, including deadly force. AC ¶ 37.
- Virginia Beach failed to train its officers to follow the requirement of VBPD General Order 5.01 that officers activate their BWCs when called to an active crime scene. AC ¶ 31.

Had Officer Simmons followed *any one* of these policies on the night he shot Mr. Lynch, or if any of his fellow officers had stepped in to do it for him, Mr. Lynch would likely be alive today.

Thus, Plaintiff specifically identified four forms of training that Virginia Beach failed to adequately provide to Officer Simmons and/or ensure that he and his fellow officers followed. Virginia Beach focuses extensively on Mr. Lynch’s allegations regarding BWCs, but offers no response whatsoever to Plaintiff’s specific allegations regarding the training that Virginia Beach failed to provide regarding offering verbal warnings, exhausting non-lethal force, and rendering

life-saving medical aid. *See* AC ¶¶ 26, 27, 31, 37, 63, 66. These allegations are unquestionably adequate to put Virginia Beach on notice of the type of training it has failed to provide to its police officers and thus survive Virginia Beach's Motion to Dismiss.

Turning to Plaintiff's allegations regarding BWCs, (AC ¶¶ 29-36), as it is the only one of these four shortcomings addressed by the Motion, Virginia Beach's arguments betray a failure to appreciate the import of these policies as they contribute to Mr. Lynch's death. Nowhere does Plaintiff allege that the city's failure to properly train its officers in connection with the use of BWCs and the proper review of footage amount to a violation of citizens' rights, nor has Plaintiff taken any position suggesting he will argue that there is a constitutional right to video footage, even when police officers are committing heinous crimes as Officer Simmons did here. Rather, Virginia Beach's failures associated with training and supervision for BWCs is illustrative of the problem that created the environment that led to Mr. Lynch's death: Virginia Beach does not take its police officers' use of force, including lethal use of force, seriously.

Putting into place a policy aimed at reviewing and improving police encounters with the citizens they are meant to protect fails when the training that accompanies it and the supervision of its deployment in the field are inadequate. Here, Virginia Beach's inconsistency in following the BWC policies related to use of force sends the message to its officers that making the streets of the city safer by doing a better job determining when to *and when not to* use lethal force is not a priority. *See* AC ¶ 35; 71. Although the city tries to put distance between BWC policies and Mr. Lynch's killing, the reality is the policy for when officers must turn on their BWCs changed *in the wake of Mr. Lynch's death*, which suggests, contrary to its Motion, that the city acknowledges how this failure provided the foundation for Officer Simmons' unlawful actions against Mr. Lynch earlier this year. Indeed, had Officer Simmons turned on his BWC as he

approached Mr. Lynch that night, he may have acted with greater caution and restraint, rather than killing Mr. Lynch.

Virginia Beach's confusing critique of the grammar in the Amended Complaint is a wholly inadequate response to the serious allegations in the Amended Complaint. Virginia Beach would have the Court believe that choices between "and" and "or" when describing the deficiencies of Virginia Beach's training policies are somehow legally significant. *See* Mot. at 6-7. They are not. It is well established that plaintiffs are entitled to plead in the alternative at this stage. *See Gaudard v. Carriage House Preservation, L.P.*, No. 3:17-cv-377-JAG, 2017 WL 3331741, at *3 n.7 (E.D. Va. Aug. 4, 2017). Indeed, without the benefit of any discovery from VBPD to date, or the general publication of BWC footage in the aftermath of an officer-involved shooting, Plaintiff has no choice but to plead based on the limited information he has been able to learn in the wake of his son's killing.

Virginia Beach has failed to train and supervise its officers in connection with multiple policies, and Plaintiff has put forth specific allegations related to each of these policies, any one of which could have prevented Mr. Lynch's death. Standing alone, each of Virginia Beach's failures here is sufficient to state a claim. Playing out together, these allegations surpass what is required to proceed to discovery.

B. Plaintiff Alleges that Virginia Beach's Failure to Train Its Officers Amounts to Deliberate Indifference Towards The Rights of Persons, Such As Mr. Lynch.

Virginia Beach next argues that Plaintiff cannot establish a failure to train based on the "mere fact of a putative constitutional violation by a police officer." Mot. at 11-13. That is true, but irrelevant. The Amended Complaint alleges that Virginia Beach's failure to adequately train Officer Simmons and his fellow officers resulted from Virginia Beach's deliberate indifference to Mr. Lynch's rights, and ultimately caused his death. *See, e.g.*, AC ¶ 62. Virginia Beach fails to

meaningfully engage with the “deliberate indifference” framework or address the fact that while Officer Simmons may have been the shooter, he did not act alone in the events that followed. *See, e.g.*, AC ¶¶ 27, 31, 33, 43, 71. Thus, the city fails to rebut the substance of the Amended Complaint’s allegations.

“[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.” *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Deliberate indifference can be established by showing a “pattern of similar constitutional violations by untrained employees.” *Connick v. Thompson*, 563 U.S. 51, 62, (2011). It can also be established by showing that a municipality failed to train officers “concerning an obvious constitutional duty that the particular employees are certain to face.” *Brown v. Mitchell*, 308 F. Supp. 2d 682, 704 (E.D. Va. 2004). Here, Plaintiff pleads deliberate indifference under both theories.

1. *Plaintiff adequately pleads a pattern of similar constitutional violations by officers of the VBPD.*

Plaintiffs may establish a municipality’s deliberate indifference by presenting a “pattern of similar constitutional violations by untrained employees.” *Connick*, 563 U.S. at 62. *Connick* requires that the violations be “similar,” but not that they be identical. Thus, Virginia Beach’s rigid interpretation, in which only adjudicated constitutional claims “count,” is inconsistent with the law. The question is whether the prior incidents provide municipal decisionmakers with “notice that a course of training is deficient in a particular respect.” *Id.* Thus, for instance, a “pattern” regarding unconstitutional force “depends upon the existence of a pattern of excessive force events involving the shooting of citizens by police in the course of performing their official duties.” *Moody*, 93 F. Supp. 3d at 538.

In *Booker v. City of Lynchburg*, No. 6:20-CV-00011, 2021 WL 519905 (W.D. Va. Feb. 11, 2021), for example, the Court held that the plaintiff had alleged “sufficient facts to support [the failure to train allegations] and thereby state a plausible claim.” 2021 WL 519905, at *7. The plaintiff had described “four prior instances of officers’ use of excessive force against individuals not resisting arrest or threatening officers.” *Id.* The plaintiff also alleged that the officers’ use of force ran counter to city policies and that the city was aware of and investigated these instances, but either concluded that the use of force was constitutional or failed to reach any conclusion. *Id.* The Court explained this was sufficient because the recitation of facts at the motion to dismiss stage did not have to be particularly detailed or likely to succeed. *Id.* The Court elaborated that, if true, the plaintiff’s allegations supported “reasonable inferences (1) that officers repeatedly deprived individuals of their constitutional rights, in part by deviating from express use-of-force policies, and (2) that the City was on notice that its existing use-of-force training programs failed to prevent constitutional violations.” *Id.* (citation and quotation marks omitted); *see also Smith v. Centra Health, Inc.*, No. 6:20-CV-00016, 2021 WL 1235023, at *9 (W.D. Va. Mar. 31, 2021) (employing similar approach and taking inferences in plaintiff’s favor to conclude that plaintiff’s allegations regarding prior instances of unreasonable use of force sufficed for purposes of a failure to train claim).

Likewise, here, Plaintiff alleges several “prior instances of officers’ use of excessive force against individuals not resisting arrest or threatening officers” (AC ¶¶ 44-47); that these uses of force violated VBPD policy; and facts that reflect VBPD’s awareness of these prior troubling instances. *Booker*, 2021 WL 519905, at *7. For instance, Plaintiff alleges that, in 2018, a Virginia jury held several VBPD officers liable under Virginia law for acting with gross negligence in their use of force when they shot and killed India Kager, an innocent Black woman. AC ¶ 45. Plaintiff

also alleges that a Virginia jury found a VBPD officer liable for the fatal shooting of a 57-year-old man in 2019. AC ¶ 46. These allegations mirror those that were deemed sufficient in *Booker* by demonstrating that there were prior instances of use of force, which violated VBPD policies, and which were known to the VBPD (as it defended itself in these lawsuits). As a result, like the case in *Booker*, these facts together in the light most favorable to the plaintiff support “reasonable inferences (1) that officers repeatedly deprived individuals of their constitutional rights, in part by deviating from express use-of-force policies, and (2) that the City was on notice that its existing use-of-force training programs failed to prevent constitutional violations.” *Id.* Moreover, these facts unquestionably put Virginia Beach on notice that its officers were inadequately trained, in the very least, to exhaust all non-lethal options before utilizing deadly force, and to render life-saving medical aid to victims of police shootings.¹

2. *Plaintiff adequately pleads that Virginia Beach failed to train its police officers concerning an obvious constitutional duty.*

Even if this Court were to find that the prior instances alleged in the Amended Complaint do sufficiently establish a pattern, such a pattern is not necessary to establish municipal liability in the context of training for use of force. Therefore, the allegations in the Amended Complaint still survive the motion to dismiss. Instead of (or in addition to) a pattern, plaintiffs may allege that the municipality “fails to train subordinates who will almost certainly encounter situations implicating [a] constitutional right.” *Brown*, 308 F. Supp. 2d at 705. “[B]ecause of the clear and recurrent

¹ The Amended Complaint mentions other suits, such as a pending action in which the Chief Judge of the E.D. Va. denied VBPD’s motion to dismiss a claim that VBPD officers released a K-9 dog on an unresponsive man. AC ¶ 45. The Amended Complaint also alleged that VBPD has been consistently under investigation by federal agencies for civil rights violations. AC ¶ 44. While it may be that none of these incidents in isolation would have put VBPD on notice of the shortcomings of its training and supervision, together they do, and thus they support Plaintiff’s claim that Virginia Beach was on notice that its use of force policies were not adequate.

nature of certain rights, the supervisory power is on fair notice that a failure to train respecting such rights *will result* in a deprivation even in situations where no pattern of deprivation has yet to develop.” *Id.* at 704 (emphasis added). Thus, when a municipality fails to train its agents to avoid violating constitutional rights within the context of these recurring situations, “it is fair to state that the supervisory power has made a ‘deliberate or conscious choice.’” *Id.* at 705.

In fact, as this Court has recognized, the “paradigmatic example of ‘an obvious constitutional duty’ that ‘particular employees are certain to face’ is that of a police officer’s duty concerning the use of deadly force.” *Moody*, 93 F. Supp. 3d at 539. This observation follows from the Supreme Court’s statement that:

City policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force ... can be said to be “so obvious,” that failure to do so could properly be characterized as “deliberate indifference” to constitutional rights.

Harris, 489 U.S. at 391 n.10.

Here, Plaintiff alleges that “Virginia Beach can expect that its police officers will regularly confront situations in which their lack of adequate training in, *inter alia*, identifying themselves and potential suspects, proper use of force, use of BWCs, and rendering potentially life-saving medical aid, will result in obvious violations of constitutional rights.” AC ¶ 62. As Plaintiff further alleges, this lack of training “made it substantially more likely that innocent individuals like Mr. Lynch would be subjected to unreasonable and/or deadly force by Virginia Beach Police Officers, be subjected to encounters with police officers that were not recorded by camera, and/or be subjected to improper care in emergency situations.” AC ¶ 65. Indeed, it is entirely predictable that, having received inadequate training in VBPD’s policies regarding the use of deadly force,

rendering medical care, and using BWCs, VBPD's armed officers would fail to comply with those policies and cause grievous injury and death while carrying out their regular duties.

Courts in this district have held that similar allegations are sufficient to adequately allege a municipality's deliberately indifferent failure to train and supervise its police officers not to use handguns in a manner that violates the Fourth Amendment. For instance, in *Moody*, the plaintiff alleged that the City of Newport News was responsible for an incident in which police officers shot him in the leg and back during an arrest. 93 F. Supp. 3d at 522. Plaintiff made the following allegations regarding the City of Newport News's deliberately indifferent failure to train its officers in proper procedures for using force during arrests:

[i]n light of the duties ... of those police officers that participate in arrests[,] ... the need for specialized training and supervision is so obvious, and the inadequacy of the training and/or supervision is so likely to result in the violation of constitutional and federal rights[,] that the failure to provide such specialized training and supervision is deliberately indifferent to those rights.

Id. The district court held that, “[i]n light of the Supreme Court’s statement in *Canton* about the obvious need to train armed officers tasked with arresting fleeing felons . . . Plaintiff has alleged a sufficient factual basis to satisfy the deliberate indifference element of a failure-to-train claim.”

Id. at 540.

Here, Plaintiff has exceeded the bar set in *Moody*. In *Moody*, it was sufficient that the plaintiff only alleged that certain “specialized training” was lacking. Here, Plaintiff identifies *several* specific forms of training that Virginia Beach failed to provide to officers, including Officer Simmons.

Likewise, in *Brown v. Cobb*, on facts tragically akin to those of the instant case, the court held that similar allegations were sufficient to establish the municipal defendant’s deliberate indifference to the Fourth Amendment rights of the community. There, an officer shot and killed

18 year-old Patterson Brown, Jr. No. 3:17-cv-00627-JAG, 2018 WL 6304405, at *1 (E.D. Va. Dec. 3, 2018). Mr. Brown's Estate alleged:

a number of specific actions Cobb failed to take before using deadly force—actions they claim a properly trained officer would take. These include inquiring into the mental condition of an individual when the individual displays signs of mental disturbance, exhausting all alternatives to non-deadly force, ensuring the level of force used matches the level of force required, and giving clear verbal commands in a crisis situation.

Id. at *4. The Court concluded that, “[t]aken together with the reasonable inference that RPD officers ‘are likely to encounter’ situations involving the use of deadly force, the amended complaint alleges sufficient facts to satisfy the deliberate indifference element.” *Id.* (citation omitted). The same is true here.

Virginia Beach offers virtually no response to the similar allegations in Plaintiff's Amended Complaint that are independently sufficient under *Canton* to establish Virginia Beach's deliberate indifference. Virginia Beach does not argue, for instance, that its officers are not likely to encounter situations such as the one that ultimately led to Mr. Lynch's death, or that deaths like Mr. Lynch's are not a foreseeable result of Virginia Beach's failure to offer adequate training in, *inter alia*, the limited, appropriate use of deadly force or the use of life-saving medical aid.

Nor does Virginia Beach offer any response to Plaintiff's allegations that although Officer Simmons pulled the trigger, he was accompanied by several other VBPD officers. *See e.g.*, AC ¶¶ 27, 31. None of those other officers attempted to use non-lethal means to resolve the situation (AC ¶ 27), turned on their BWCs (AC ¶ 33), or rendered life-saving medical aid (AC ¶ 37). Although unnecessary to establish Plaintiff's claims, these pleaded facts underscore the systemic nature of Virginia Beach's failure to train its officers to follow policies that could have saved Mr. Lynch's life.

To the extent Virginia Beach responds to these serious allegations at all, it argues that the fact that Virginia Beach implemented a BWC policy in the first place indicates that Virginia Beach is not deliberately indifferent towards the lives of people like Mr. Lynch. It is black letter law that at the motion to dismiss stage, the court must accept Plaintiff's allegation that VBPD does not take its BWC policy "seriously," AC ¶¶ 33-35, rather than crediting Virginia Beach's circular and conclusory rebuttal, which is itself limited to discussion of its BWC policies. Moreover, Virginia Beach conflates Virginia Beach's *having* a BWC policy (which Plaintiff does not contest) with Virginia Beach *training its officers to follow* its BWC policy (which is Plaintiff's position, to which Virginia Beach makes no response).

Finally, Virginia Beach's argument about BWCs does not even attempt to address Virginia Beach's failures to train its officers to adequately utilize verbal warnings, to use non-lethal-force, or to render life-saving medical aid. AC ¶¶ 26, 27, 37, 63, 66. As such, even if the Court did not credit Plaintiff's allegation that Virginia Beach's failure to implement its BWC policy manifests its deliberate indifference to the rights of persons like Mr. Lynch, as it should at this stage, the Amended Complaint should still survive this Motion to Dismiss, as it contains adequate, unrebutted allegations to support the other theories of liability based on Virginia Beach's failure to train its officers to follow other, non-BWC policies.

C. Plaintiff Alleges that Virginia Beach's Failure to Train Its Officers Caused Mr. Lynch's Death.

"Finally, to survive the Rule 12(b)(6) motion, a plaintiff proceeding under a failure to train theory must allege a causal nexus between the failure to train and the complained of injury." *Brown*, 308 F. Supp. 2d at 707 (citing *Canton*, 489 U.S. at 391).

In the Amended Complaint, Plaintiff clearly alleges that Virginia Beach's failure to train Officer Simmons to follow its policies caused Mr. Lynch's death:

- Mr. Lynch's death is yet another tragic result of VBPD's longstanding and ongoing failure to train its officers to use force in a lawful manner, to enforce its stated policies, and to instill the serious nature of using deadly force in the field. AC ¶ 80.
- These failures of training and enforcement of its policies resulted in the shooting that violated Mr. Lynch's Fourth and Fourteenth Amendment Constitutional Rights and ultimately cost him his life. Had the City of Virginia Beach properly trained Officer Simmons or enforced its policies, he would have, *inter alia*, identified himself before shooting, exhausted all non-lethal responses to his encounter with Mr. Lynch before using deadly force, activated his BWC so that he would not be able to act without accountability, and rendered potentially life-saving aid to Mr. Lynch so that Mr. Lynch could have survived his injuries. AC ¶ 81.
- As a direct and proximate result of Virginia Beach failing to perform its ministerial duties as stated above-both in failing to train, instruct, and/or supervise; and in allowing persistent and widespread failures in custom and policy to remain unaddressed-Mr. Lynch was subjected to the unconstitutional use of force by Officer Simmons, and was hereby deprived of his civil rights as guaranteed under the United States Constitution, and state and federal statutes and, ultimately, his life. AC ¶ 82.
- Had Officer Simmons (or any of his fellow officers) followed any one of the policies Virginia Beach failed to adequately train and supervise, Mr. Lynch would likely be alive today. AC ¶¶ 40-41.

Again, Virginia Beach's attempt to rebut the causal link between its failure to train and Mr. Lynch's death is constrained to Plaintiff's allegations regarding the BWC policy. *See* Mot. at 8-11. As explained more fully, *supra* at 9-10, Plaintiff is not arguing that a single failure to turn on a BWC in accordance with the applicable policy could be a literal cause of a person's death. Rather, the manifest indifference of Virginia Beach in training and supervising its police officers on the serious nature of use of deadly force bred the conditions that allowed Officer Simmons to feel comfortable shooting an un-armed man, without warning, even though he was unmistakably *not* a suspect in any crimes and posed no threat to anybody otherwise. As for the other three

policies at issue here, the City does not, because it cannot, argue that its failure to train its officers to follow its policies regarding verbal warnings, exhausting non-lethal options, and rendering life-saving medical aid did not cause Mr. Lynch's untimely death.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court DENY Virginia Beach's Motion to Dismiss.

**WAYNE B. LYNCH,
ADMINISTRATOR OF THE ESTATE
OF DONOVON W. LYNCH, DECEASED**

By: _____/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was filed on September 7, 2021, through the ECF System and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ _____
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