UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

WAYNE B. LYNCH, Administrator of the Estate of Donovan W. Lynch, Deceased, Plaintiff, v. SOLOMON D. SIMMONS, III, Individually and in His Official Capacity as a Police Officer for the City of Virginia Beach, Virginia, and CITY OF VIRGINIA BEACH, Defendants.	Civil No. 2:21cv341

ORDER

Pending before the Court is Defendant City of Virginia Beach's Motion to Dismiss Plaintiff's Amended Complaint. ECF No. 18. For the following reasons, Defendant's Motion to Dismiss is **GRANTED in part and DENIED in part**.

I. BACKGROUND

In deciding a motion to dismiss for failure to state a claim, the Court accepts the complaint's well-pled factual allegations as true and draws any reasonable inferences in favor of the plaintiff. *See Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012). This Court construes the following facts as alleged in Plaintiff's Amended Complaint.

This case arises out of a police shooting and killing of Donovan W. Lynch ("Mr. Lynch"), an event of a type that has plagued this Country in recent memory. Am.

Compl. ¶ 1, ECF No. 17. Plaintiff is Mr. Lynch's father, Wayne B. Lynch, who brings this suit on behalf of Mr. Lynch's estate. *Id.* at ¶ 4. Plaintiff argues that Mr. Lynch was shot, in part, because he was Black and that the shooting constituted excessive and unreasonable force in violation of his Fourth and Fourteenth Amendment rights. *Id.* at ¶ 51. Defendants are Officer Solomon Simmons ("Officer Simmons"), who shot and killed Mr. Lynch while employed by the Virginia Beach Police Department ("VBPD"), and the City of Virginia Beach ("City of Virginia Beach" or "the City"). *Id.* at ¶ 14. The Court considers Officer Simmons's alleged conduct insofar as it is relevant to the instant Motion by the City of Virginia Beach.

On March 26, 2021, Mr. Lynch was socializing with one of his friends, Darrison Marsh, at the Virginia Beach Oceanfront Resort Area. *Id.* at ¶ 18. Around 11:20 p.m, Mr. Lynch and Mr. Marsh were inside a restaurant when the Virginia Beach Police were called to the area to investigate reports of gunshots. *Id.* at ¶¶ 19–20. Mr. Lynch and Mr. Marsh subsequently exited the restaurant, at which point they encountered a group of people and a group of Virginia Beach Police Officers. *Id.* at ¶ 21. They began walking away from this area towards their vehicles, which is when they encountered Officer Simmons. *Id.* at ¶ 22. Immediately and without any warning, Officer Simmons fired his police-issued firearm, shooting Mr. Lynch twice and killing him. *Id.* at ¶ 23.

Officer Simmons allegedly failed to do multiple things before firing his weapon. He failed to determine Mr. Lynch's identity prior to shooting and did not identify himself or provide a verbal warning that put Mr. Lynch on notice (such as "Police,

stop or I'll shoot"). *Id.* at ¶ 26. He also failed to activate his body-worn camera upon entering an active crime scene. *Id.* at ¶ 29. Body-worn camera footage is an excellent source of evidence of what police officers are doing on the job. *Id.* He failed to turn on his body-worn camera after discharging his weapon. *Id.* at ¶ 32. Without this footage, it can be extremely difficult to parse out series of events that resulted in tragic events such as this. Other officers who were present at the scene similarly failed to activate their body-worn cameras. *Id.* at ¶ 31. Further, after shooting Mr. Lynch, Officer Simmons failed to render life-saving medical aid. *Id.* at ¶ 37.

The City's failure to train its officers to use force in a lawful manner and to follow other crucial policies allegedly caused Officer Simmons's actions and Mr. Lynch's death. *Id.* at ¶¶ 80–82. Plaintiff contends that, had the City properly trained its officers, specifically in this case Officer Simmons, "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 [body-worn camera] 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." *Id.* at ¶ 81.

Specifically, Plaintiff alleges that Officer Simmons's inadequate training led him to act in violation of a particular VBPD General Order and a Virginia Statute. VBPD General Order 5.01 explicitly outlines that police officers must give a verbal warning identifying themselves as police and warning that they might shoot if a suspect does not stop what they are doing. Am. Compl. ¶ 26, ECF No. 17. It states that

officers must immediately activate their body-worn cameras when they are called to an active crime scene. *Id.* at ¶ 31. The same General Order requires that officers at the scene render life-saving medical aid to persons against whom deadly force has been used. *Id.* at ¶ 37. Virginia Code 19.2-93.5 dictates that an officer exhaust non-lethal force options before using lethal force. *Id.* at ¶¶ 27 & 66.

Plaintiff further alleges that Officer Simmons's alleged actions and Mr. Lynch's death must be viewed in light of Virginia Beach Police Department's "longstanding" acceptance of police misconduct. *Id.* at ¶¶ 76–79 ("Officer Simmons is not the exception at VBPD. He is the rule."). Officers from this police department act in accordance with a pattern where the police department fails to enforce its own safety policies. *Id.* at ¶ 43. The VBPD inadequately trained its officers on circumstances where using a firearm is appropriate and did not provide them with training on non-violent alternatives as prior resorts to deadly force. *Id.* at ¶ 63. Plaintiff contends that this constitutes deliberate indifference to instances where officers like Officer Simmons fail to activate their body-worn cameras, fail to render life-saving medical aid, and—most importantly—use excessive and unreasonable force against an individual like Mr. Lynch. *Id.* at ¶ 60.

Virginia Beach Police Department historically has practices and customs that allegedly were known by the City and allowed for constitutional violations by officers to continue. *Id.* at ¶ 77. Plaintiff alleges that there are many other instances where other officers used similar deadly or otherwise excessive force, yet Virginia Beach Police Department has not changed its enforcement policies or enhanced its

supervision or training of officers. *Id.* at ¶¶ 44–46. As noted above, the center of this contention is Virginia Beach Police Department's General Order 5.01. This Order outlines when an officer must warn a civilian prior to using their weapon, when body-worn cameras must be activated, and a series of other protocols that officers must follow. *See generally* Am. Compl., ECF No. 17. Plaintiff alleges that Virginia Beach Police Department insufficiently enforces this General Order and that this caused the insufficient supervision and training that resulted in Mr. Lynch's death. *Id.*

Plaintiff filed suit on June 21, 2021. Compl., ECF No. 1. After an initial Motion to Dismiss, Plaintiff filed the operative Amended Complaint. ECF No. 17. The City filed the instant Motion to Dismiss the Amended Complaint on August 23, 2021. ECF No. 18. In it, the City urges that the sole 42 U.S.C. § 1983 claim asserted against it (Count Two) must be dismissed. Mem. in Supp. of Mot. to Dismiss, ECF No. 19. Plaintiff opposes. This matter is fully briefed and ripe for resolution. Both Parties have waived oral argument and request a decision without a hearing. Not. of Waiver, ECF No. 27.

II. LEGAL STANDARDS

A. Rule 12(b)(6) Motion to Dismiss

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint. Rule 12(b)(6) permits a defendant to seek dismissal of a complaint based on a plaintiff's "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion to dismiss should be granted

if the complaint does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

"The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that [the] defendant" is liable. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Facts that are 'merely consistent with' liability do not establish a plausible claim to relief." *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 455 (4th Cir. 2013). The "'factual allegations must be enough to raise [the] right to relief above the speculative level,' thereby 'nudging [the plaintiff's] claims across the line from conceivable to plausible.'" *Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 543 (4th Cir. 2013) (quoting *Twombly*, 550 U.S. at 555) (alterations omitted).

At this stage, as noted above, "(1) the complaint is construed in the light most favorable to the plaintiff, (2) its allegations are taken as true, and (3) all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader." 5B Charles A. Wright et al., Federal Practice & Procedure § 1357 & n.11 (3d ed.) (collecting cases); *accord Wag More Dogs*, 680 F.3d at 365. But courts are not bound by "legal conclusions drawn from the facts" and "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). A threadbare recitation of the "elements of a cause of action [or] bare assertions devoid of further factual enhancement fail to constitute well-pled facts for Rule 12(b)(6) purposes." *Nemet Chevrolet,*

Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009); *see also Iqbal*, 556 U.S. at 663 (noting that "mere conclusory statements" are insufficient).

B. 42 U.S.C. § 1983

42 U.S.C. § 1983 provides a remedy to private citizens for the deprivation of rights under the U.S. Constitution and other federal laws. The statute itself does not create substantive rights. *Albright v. Oliver*, 510 U.S. 266, 271 (1994); *Perry-Bey v. City of Norfolk*, 679 F. Supp. 2d 655 (E.D. Va. 2010). For municipal liability to attach under 42 U.S.C. § 1983, the municipality or other relevant entity must have an unconstitutional policy or custom in place. *See Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978). The alleged unconstitutional act must be the result of implementation or execution of "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by" the locality's policymaking officials. *Greensboro Pro. Firefighters Ass'n v. City of Greensboro*, 64 F.3d 962, 964 (4th Cir. 1995). And a plaintiff must show proximate causation between the official policy or custom of the municipality and the deprivation of the plaintiff's constitutional rights, in addition to failure on the part of responsible policymakers to correct or terminate such policy or custom. *Randall v. Prince George's Cnty.*, 302 F.3d 188, 203 (4th Cir. 2002). In other words, the Fourth Circuit has required that a plaintiff must show the following: (1) a deprivation of federal rights and (2) that the execution of a government's policy or custom caused the injury. *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003).

A locality can develop a policy or custom in four ways:

> (1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policy-making authority; (3) *through an omission, such as a failure to properly train officers, that manifests 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.

Id. (internal quotation marks and citation omitted) (emphasis added). Local governments are liable only for their own illegal acts and are not liable under *respondeat superior* for unlawful actions by their officers. *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986) (citation omitted). Plaintiff here has pleaded *Monell* liability under the third requirement, Resp. in Opp'n at 7, ECF No. 21, which the Court addresses in more detail below.

Inadequate training of municipal officers may qualify as official policy for § 1983 purposes. *City of Canton v. Harris*, 489 U.S. 378, 398 (1989). Failure to train officers is interpreted as official policy where it shows deliberate indifference to the constitutional rights of those who encounter them. *Id.* There are two ways to show deliberate indifference in this context. First, one can show such a claim by proving "that policymakers were aware of, and acquiesced in, a pattern of constitutional violations." *Id.* at 397. Second, a failure-to-train claim can "be based on a supervisory power's failure to train its employees concerning an obvious constitutional duty that the particular employees are certain to face." *Id.* at 390. It is reasonable to find that a supervisory power has made a "deliberate or conscious choice" where it does not adequately train subordinates who will encounter repeat situations involving similar

constitutional rights. *Id.* at 389. The Court in *Canton* specifically noted that police officers would certainly face encounters with deadly force. *Id.* at 391 n. 10.

Deliberate indifference "is a stringent standard of fault," and is present only where the constitutional violation is a "known or obvious" consequence of the decision to not provide adequate training. *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 410 (1997). A showing that further training was necessary and would have prevented the injury can be the basis for such a claim under limited circumstances. *Id.* at 407. However, "the specific deficiency or deficiencies must be such as to make the specific violation almost bound to happen, sooner or later, rather than merely likely to happen in the long run." *Spell v. McDaniel*, 824 F.2d 1380, 1390 (4th Cir. 1987) (citation and internal quotation marks omitted). Evidence of deliberate indifference in this context can include "express authorizations of unconstitutional conduct," "tacit authorizations," or failure to "prohibit or discourage readily foreseeable conduct in light of known exigences of police duty." *Id.*

A pattern of similar violations by inadequately trained employees is "ordinarily necessary" to demonstrate deliberate indifference for the purposes of this standard. *Brown*, 520 U.S. at 409. "[P]roof of a single incident of the unconstitutional activity charged is not sufficient to prove the existence of a municipal custom." *Semple v. City of Moundsville*, 195 F.3d 708, 713–14 (4th Cir. 1999). Nevertheless, the Supreme Court in *Brown* found that the ruling in *Canton* did not foreclose the possibility that a single violation, if combined with a showing of failure to train employees to handle

a recurring and obviously foreseeable situation, could support a failure-to-train claim. *Brown*, 520 U.S. at 409–10.

The Supreme Court has discussed the conditions under which a municipality may be liable under 42 U.S.C. § 1983 in *Connick v. Thompson*, 563 U.S. 51 (2011). *Connick* affirmed that deliberate indifference can be shown by showing a pattern of constitutional violations of the same nature by employees of a municipality. *Id.* at 62. The relevant violations may be similar but need not be identical. The heart of this standard is notice. *Id.* at 61. If a municipality or policymakers have notice of a particular omission in the training program, the city can be deemed to be deliberately indifferent in continuing to adhere to a faulty program. *Id.* This is because the decision to keep a program that causes constitutional violations "is the functional equivalent of a decision by the city itself to violate the Constitution." *Id.* at 61–62 (quoting *Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part)).[1]

[1] This Court recognizes that the holding of *Connick* is that four dissimilar *Brady* violations were insufficient to establish a pattern of constitutional violations that put a municipality on notice, showing that its training was deficient in a manner that constituted deliberate indifference. *Connick*, 563 U.S. at 71. However, City of Virginia Beach's arguments regarding the applicability of the facts and holding of *Connick* to this case are not grounded in sound analysis. *See* Def. Reply at 9–10, ECF No. 22. The four violations in *Connick* were committed by attorneys in a context that the Court specifically noted was uniquely different compared to the exercise of excessive force by police officers. *See Connick*, 563 U.S. at 64–68 (explaining at length substantial distinctions between *Brady* and excessive-force contexts). It is doubtful that the majority reasoning expounded by *Connick* would apply to cases such as this where it is alleged that a police department and municipality have notice of police officers repeatedly engaging in the same type of unconstitutional conduct such as unlawful use of excessive force. Moreover, outside of the *Brady* context, the decision in *Connick* left open the possibility noted in *Canton* of a valid failure-to-train claim even without a pattern. *See id.* at 63–64.

C. Relevant Case Law

Unfortunately, various courts have been required to analyze the issue presented in this case: whether a municipality is liable under *Monell* based on a failure-to-train claim for the unlawful shooting of an individual by the police. Both Parties extensively rely on and dispute the applicability of these decisions. The Court reviews them in detail below to aid in the adjudication of the instant Motion to Dismiss.

This District Court has found that an individual stated a valid § 1983 claim against the City of Newport News, Virginia based on its failure to train police officers in the police-shooting context. *Moody v. City of Newport News, Va.*, 93 F. Supp. 3d 516 (E.D. Va. 2015). After police officers pulled the plaintiff over to the side of an Interstate, they pointed a gun at him. *Id.* at 522. Plaintiff was instructed to exit the vehicle. *Id.* After he asked the police officers why he was being pulled over and what the charges against him were, another officer started to handcuff him. *Id.* Two separate officers fired their guns at different times. *Id.* The bullets struck plaintiff in his spine, causing him to be permanently paralyzed. *Id.* In addition to suing the individual officers involved, plaintiff filed suit against the City of Newport News because the police department ratified malicious conduct including and not limited to routine use of excessive force by police officers. *Id.* at 523–24.

Although it found that the plaintiff's allegations were not sufficient to plead a pattern of similar violations, the court held that plaintiff had properly alleged a claim against the City of Newport News for purposes of surviving a motion to dismiss. *Id.* at 538–40. The allegations showed that there was a failure to train police officers

regarding an obvious constitutional duty that the officers were likely to face. *Id.* Because arresting officers were likely to encounter risks associated with suspects, they required special training, which allegedly was absent. *Id.* The omission of this type of training ensured that such an incident would occur "sooner or later." *Id.* at 540.

Similarly, another court in this District reached the same conclusion in a separate instance. *Brown v. Cobb*, No. 3:17cv627, 2018 WL 6304405 (E.D. Va., Dec. 3, 2018). The suit arose from the shooting of an 18-year-old individual by an off-duty Richmond police officer. *Id.* at *1. The individual died as a result and the administrators of his estate brought suit against the officer and the City of Richmond for failure to train its police officers. *Id.* The court held that the plaintiffs stated a plausible claim pursuant to § 1983 for *Monell* liability against the city. *Id.* at *4. This was because the officer did not take a number of specific actions before using deadly force. *Id.* These included alternatives to using deadly force and giving verbal commands. *Id.* It was reasonably inferable that other Richmond police officers would encounter similar situations involving deadly force, and therefore there were sufficient facts to show deliberate indifference. *Id.*

The Western District of Virginia has ruled in a comparable manner at the motion-to-dismiss stage. *Booker v. City of Lynchburg*, No. 6:20cv11, 2021 WL 519905 (W.D. Va. Feb. 11, 2021). In *Booker*, plaintiff brought a claim against the City of Lynchburg for excessive use of force when he was attacked by a police canine and struck by police officers' batons over thirty times. *Id.* at *4. He was punched and choked by the police officers as well. *Id.* The court found that plaintiff had sufficiently

alleged a *Monell* liability claim because plaintiff had pointed to four previous instances of similar types of excessive force involving canines, pepper sprays, and tasers. *Id.* This was sufficiently similar to the conduct plaintiff faced to show a custom on the part of City of Lynchburg and therefore illustrate that the city was deliberately indifferent. *Id.* The court explicitly noted that a plaintiff need not "plead multiple incidents of constitutional violations" at the motion-to-dismiss stage nor does the plaintiff need to provide more than a few examples. *Id.* (quoting *Jordan by Jordan v. Jackson*, 15 F.3d 333, 339 (4th Cir. 1994)).

III. ANALYSIS

Defendant City of Virginia Beach argues that it is not liable under *Monell* based upon the facts pled by Plaintiff. Mem. in Supp. Mot. to Dismiss, ECF No. 19; Def. Reply, ECF No. 22. The Court rejects Defendant's argument. Plaintiff has plausibly alleged a § 1983 claim against the City of Virginia Beach. Plaintiff successfully pleads "deliberate indifference" under two separate failure-to-train theories. First is the inadequacy of training by City of Virginia Beach regarding an obvious constitutional duty such that its police officers disregard individuals' constitutional rights. Resp. in Opp'n at 11, ECF No. 21. Second is by showing a pattern of similar constitutional violations by untrained officers. *Id.*

A. Deprivation of Mr. Lynch's Constitutional Rights

As an initial matter, a party must show that they have been deprived of constitutional rights. Defendant only cursorily addresses this point by stating that Officer Simmons's delayed activation of his body-worn camera is not a constitutional

violation. Mem. in Supp. of Mot. to Dismiss at 8–11, ECF No. 19. Beyond this, Defendant offers little argument contesting that the shooting of Mr. Lynch as alleged violated his constitutional rights to be free from excessive use of force. The Court determines that this requirement is satisfied.

The Amended Complaint contains sufficient details to state a plausible claim that Officer Simmons violated Mr. Lynch's constitutional rights. Although Defendant refuses to recognize it, the focus here is on the shooting of Mr. Lynch rather than the ancillary issue of body-worn cameras. Based on the facts before the Court, Mr. Lynch was not armed or engaging in any behavior that was threatening to Officer Simmons or any other police officer. Am. Compl. ¶¶ 21–28, ECF No. 17. He was not resisting arrest or evading the police. *Id.* at ¶ 25. He did not act in any manner that would result in a reasonable person or officer thinking that he was a danger to them, except simply existing.[2] *Id.* Officer Simmons's actions, as described by Plaintiff and taken as true by this Court for the purposes of Rule 12(b)(6), show that he used unlawful excessive force against Mr. Lynch in violation of his Fourth and Fourteenth Amendment rights. *Cf. Lee v. City of Richmond*, No. 3:12cv471, 2013 WL 1155590, at *3 (E.D. Va. Mar. 19, 2013) (holding, in analyzing *Monell* liability, that evidence of police

[2] Various journalists and scholars have documented Black persons being subjected to negative encounters with the police simply for existing. For example, "Black adults are about five times as likely as whites to say they've been unfairly stopped by police because of their race or ethnicity (44% vs. 9%)." *10 Things We Know About Race and Policing in the U.S.*, PEW RESEARCH CENTER, https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/. Families of Trayvon Martin, Michael Brown, Tamir Rice, Breonna Taylor, George Floyd, and too many more know the difference between a presumption of innocence and having to prove oneself as not criminal, and how the failure to do so can be fatal. *See id.*

officers shooting and killing unarmed individual stated Fourth Amendment violation for excessive force).

Neither Plaintiff nor Defendant substantially contests this requirement, and this Court concludes that Mr. Lynch has sufficiently alleged a deprivation of his constitutional rights. The Court proceeds to the core of the Parties' arguments regarding the second element of whether the City of Virginia Beach caused the deprivation by failing to train its police officers in a manner that constitutes deliberate indifference.

B. Deliberate Indifference

As noted above, Plaintiff successfully pleads "deliberate indifference" under two separate failure-to-train theories.[3] First is the inadequacy of training by the City of Virginia Beach such that its police officers disregard individuals' constitutional rights. Resp. in Opp'n at 11, ECF No. 21. Second is by sufficiently alleging a pattern of similar constitutional violations by untrained officers. *Id.*

i. Failure to Train – Inadequacy of Training by City of Virginia Beach

Plaintiff has sufficiently stated a claim that shows deliberate indifference through the City of Virginia Beach's failure to train its officers about use of deadly force, an obvious constitutional duty that police officers will repeatedly encounter.

[3] At this stage, Plaintiff is properly pleading alternative ways of establishing municipal liability, even if contradictory. *Spell v. McDaniel*, 824 F.2d 1380, 1391 (4th Cir. 1987). "If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient." Fed. R. Civ. P. 8(d)(2). Plaintiff has a right to plead multiple or alternative claims based on the same facts. *Id.* Plaintiff is not redrafting his Amended Complaint by asserting multiple theories of the deliberate-indifference standard, as City of Virginia Beach suggests. Def. Reply at 2–6, ECF No. 22.

Brown v. Mitchell, 308 F. Supp. 2d 682, 705 (E.D. Va. 2004); *Moody*, 93 F. Supp. 3d at 539–40.

Here, Plaintiff uses Officer Simmons' omission of actions as the basis to argue that the City of Virginia Beach failed to train its officers on the use of deadly force. Plaintiff alleges that Officer Simmons shot and killed Mr. Lynch despite Mr. Lynch presenting no threat to him, and that a properly trained officer would not have done so. *See* Am. Compl. ¶¶ 40, 68, ECF No. 17. He further alleges precise actions Officer Simmons failed to take before resorting to deadly force and that a properly trained officer would have taken these actions. For example, Officer Simmons failed to determine Mr. Lynch's identity. *Id.* at ¶ 26. Officer Simmons failed to provide a verbal warning that would put Mr. Lynch on notice to the presence of an officer. *Id.* He failed to activate his body-worn camera at the beginning of the encounter and even after he drew his firearm on Mr. Lynch.[4] *Id.* at ¶ 64. Officer Simmons did not attempt to use

[4] The City claims that the assertions regarding lack of enforcement of policies surrounding body-worn cameras do not address constitutional violations and "undermine any claims that VBPD is 'deliberately indifferent.'" Mem. in Supp. of Mot. to Dismiss at 8–11, ECF No. 19. The Court need not address this argument in the same detail as the City of Virginia Beach because this is just an illustration of how VBPD fails to train its officers (none of whom allegedly activated their cameras at the scene of the instant shooting) with respect to deadly force. Resp. in Opp'n at 9, ECF No. 21. Even though there may be a body-worn-camera policy in place, this allegation shows an inadequacy in the way that it is instilled and enforced, which risks individual lives. It is evident that the training of officers in relation to body-worn cameras, as evidence in support of a failure-to-train theory, is a question of fact that must be resolved through discovery. The Parties may, if appropriate, reassert their arguments surrounding body-worn cameras, related policies, and Officer Simmons's conduct at the summary-judgment stage.

any alternatives to non-deadly force, thereby not ensuring that the level of force used was proportional to events occurring. *Id.* at ¶ 63.

These allegations fall squarely within the bounds of this District's previous decisions in *Moody* and *Brown v. Cobb*. 93 F. Supp. 3d at 540; 2018 WL 6304405. In both those cases, the courts allowed materially identical deliberate-indifference, failure-to-train claims to proceed because actions and omissions such as Officer Simmons's were "paradigmatic example[s]" of a disregard for obvious constitutional duties regarding deadly force that police officers would inevitably encounter. *Brown v. Cobb*, 2018 WL 6304405 at *4 (citing *Moody*, 93 F. Supp. 3d at 539–40). While a more detailed analysis of the City's training program and practices with the benefit of discovery may or may not yield a different result later in the proceedings, Plaintiff's allegations are sufficient for the claim to survive the motion to dismiss in accordance with precedent.

Defendant has failed to substantially challenge this specific theory of failure to train. In its Motion, City of Virginia Beach focuses on the policies surrounding body-worn cameras and VBPD's training surrounding such. Mem. in Supp. of Mot. to Dismiss, ECF No. 19. Defendant does not address Plaintiff's arguments on this point in its Reply either, Def. Reply, ECF No. 22, except that Defendant attempts to distinguish the reasoning in *Moody*.

Attempting to distinguish the reasoning by Chief Judge Davis in *Moody*, Defendant asserts that *Moody*'s holding relies on dicta by the Supreme Court in *Canton*. Def. Reply at 11, ECF No. 22. This Court agrees that the decision is based in part on

a *Canton* footnote describing a hypothetical omission of training for officers regarding constitutional limits on deadly force. *Moody*, 93 F. Supp. 3d at 539 (citing *Canton*, 489 U.S. at 391 n.10)). However, as the City fails to note, the *Canton* footnote does not establish that a failure-to-train claim must involve a complete absence of training as opposed to a failure to provide adequate and complete training. *Id.* To the contrary, regardless of whether some training was provided or not, there is a question as to the *adequacy* of that training. *See Canton*, 489 U.S. at 391 & n.10 (referring to "inadequacy" and "failure to provide *proper* training" as basis for establishing equivalent of "policy for which the city is responsible" (emphasis supplied)). That is the heart of Plaintiff's allegations. Am. Compl. ¶ 62, ECF No. 17. This Court is required to accept Plaintiff's facts as true, and doing so, the Court must reasonably infer that even if VBPD has some form of training, it is not implemented properly or is wholly inadequate. This conclusion is strengthened by Plaintiff's detailed allegations about what specific aspects were lacking in Officer Simmons's conduct. Am. Compl. ¶ 60–70, ECF No. 17.

Lastly, Defendant fails to address the reasoning of *Brown v. Cobb*, 2018 WL 6304405. The court in *Brown* rejected the same argument City of Virginia Beach is making here. 2018 WL 6304405 at *4. There, the Richmond Police Department had training, and the defendant officer argued that his actions comported with that type of training. *Id.* This allowed an inference that even though some form of training existed, the City of Richmond failed to train its officers (that is, to train them *adequately*) and that this failure constituted deliberate indifference. *Id.* In other words,

the *Brown* court relied on the reasoning in *Moody* even though there was evidence of training as opposed to no training at all. This Court follows suit and agrees with the reasoning expressed in these cases.

ii. Failure to Train – Pattern of Constitutional Rights Violations

Whether Plaintiff has sufficiently shown a pattern of constitutional rights violations is a closer question. Plaintiff argues that because violations need not be identical, there are enough instances described to show a pattern. Resp. in Opp'n at 11–13, ECF No. 21. City of Virginia Beach avers that Plaintiff's recounting of previous lawsuits against VBPD is insufficient to show a pattern of violation of constitutional rights so as to put the City of Virginia Beach on notice of a flaw in its training program. Mem. in Supp. of Mot. to Dismiss at 13–14, ECF No. 19; Def. Reply at 9–10, ECF No. 22. In accordance with other courts that have found the same on similar facts, this Court agrees with Plaintiff.

There are a series of similar constitutional violations by police officers described in the Amended Complaint that put the City of Virginia Beach on notice that its training was inadequate with respect to use of excessive force. Although not identical, these examples are sufficient at this stage to show deliberate indifference for purposes of a failure-to-train claim against the City of Virginia Beach. There are sufficient examples alleged to show that Officer Simmons's conduct was by no means unique within VBPD. Am. Compl. ¶¶ 43–47, ECF No. 17. Plaintiff describes at least three prior instances where VBPD officers used excessive force against individuals in the community. *Id.* One of these instances involved the same circumstances of a police

officer wrongfully shooting an individual resulting in his death. *Id.* at ¶ 46. The other two instances are similar enough as dictated in *Booker*. 2021 WL 519905. As described earlier, another example is an officer using excessive force by wrongfully releasing a "K-9" police dog on an individual, and this case was adjudicated in this same Court. As recently as March 2021, the Chief Judge of this Court denied VBPD's motion to dismiss on similar claims for excessive use of force by a police officer when he released a K-9 on an individual. Am. Compl. at ¶ 45. (citing *Keenan v. Ahern*, No. 2:20cv78, ECF No. 11 (E.D. Va. Mar. 8, 2021)). The third example is of an individual who was wrongfully detained, after which media noted allegations that Black men being treated this way by VBPD officers was normal. *Id.* at ¶ 47.

Plaintiff goes beyond these specific examples as well. He explains that VBPD has been notified of its "brutality allegations" as early as the 1990's, by local news outlets and the Washington Post—in an article revealingly titled "Brutality Allegations Hound Va. Beach Police." *Id.* at ¶ 44. Importantly, Plaintiff also alleges that VBPD has been investigated by the FBI and U.S. Department of Justice based on this reported pattern of violations. These are not disparate examples as Defendant attempts to argue. Mem. in Supp. of Mot. to Dismiss at 14, ECF No. 19. These examples directly shed light on Plaintiff's allegations that even if "training" and "policies" are nominally put in place, conduct far beyond the bounds of tolerability is ratified or ignored by the City of Virginia Beach.

It is unclear to this Court what examples would be sufficient if these examples do not provide notice that the training of police officers is inadequate. Plaintiff alleges

that multiple individuals have either been unconstitutionally assaulted or killed due to VBPD officers' unacceptable conduct. The violations described by Plaintiff do not take place during a short period of time. Instead, the instances span from the 1990s to 2020. This bolsters the conclusion that a factfinder "could reasonably infer from them [the City of Virginia Beach's] tacit approval of the conduct in issue." *Booker*, 2021 WL 519905 at *4 (quoting *Milligan v. City of Newport News*, 743 F.2d 227, 230 (4th Cir. 1984)).

Defendant's arguments about the holding in *Booker*, 2021 WL 519905, are unpersuasive. Def. Reply at 10, ECF No. 22. In *Booker*, a plaintiff filed suit for excessive use of force by Lynchburg police when they allowed a "K-9" police dog to attack him. 2021 WL 519905 at *2. The court denied plaintiff leave to amend in an attempt to establish a *Monell* liability claim under the theory of *express policies*, but, more importantly, it held that plaintiff *had* properly pleaded a *Monell* liability claim under the failure-to-train theory, as is relevant here. *Id.* at *6. Because the complaint described different instances where officers lacked excessive force training and Lynchburg did not adequately train its officers to handle recurring situations, plaintiff alleged a proper failure-to-train claim. *Id.* at *7. The court explicitly noted that separately these facts may not support such a claim but together they supported a reasonable inference of deliberate indifference. *Id.* While the complaint in *Booker* did outline four instances of an officer's use of excessive force, the court noted that at the 12(b)(6) stage there need not be an extremely detailed recitation of such facts. *Id.*

The Amended Complaint is in adherence with the parameters described in *Booker*. The Amended Complaint describes similar unconstitutional conduct by VBPD officers, as discussed above. ECF No. 17 at ¶ 44. As the court in *Booker* discerned, a plaintiff need not recite "particularly detailed" facts nor must plaintiff's ultimate "chance of success . . . be particularly high" at this stage. 2021 WL 519905 at *7 (quoting *Owens v. Balt. City State's Atty's Office*, 767 F.3d 379, 403 (4th Cir. 2014)). If Plaintiff's factual allegations here are true, they support a valid claim that various officers have used excessive force against individuals in violation of their constitutional rights and that the City of Virginia Beach was on notice of this conduct since the 1990s yet failed to take necessary steps to properly train its officers. Therefore, Plaintiff has satisfied the deliberate-indifference element required to state a valid § 1983 claim against the City of Virginia Beach.

C. Causation

The City of Virginia Beach does not explicitly contest this element. *See* Mem. in Supp. of Mot. to Dismiss, ECF No. 19; Def. Reply, ECF No. 22. Therefore, the Court will not belabor its analysis.

This element is met by a showing that there is causal link between the training deficiency and the violation of the plaintiff's rights. *Spell*, 824 F.2d at 1390. As opposed to a "general laxness," it "requires that the deficiency . . . make occurrence of the specific violation a reasonable probability rather than a mere possibility." *Id.* It must be the case that misconduct becomes inevitable as opposed to a mere possibility. *Id.* (citation omitted).

Here, Plaintiff shows the causation element is satisfied. It is satisfied for the same reason that the previous element is met. *See Brown v. Cobb*, 2018 WL 6304405 at *4 (citing *Moody*, 93 F. Supp. 3d at 540). Plaintiff has shown that VBPD officers have a clear constitutional duty and require proper training surrounding the use of excessive force and will inevitably encounter situations that test this skill. It is certain, then, that any failure to adequately train officers as to the appropriate use of force or failure to enforce protocols that already exist will necessarily, "sooner or later," result in violation of individuals' constitutional rights. *Id.*

Accordingly, because Plaintiff has adequately alleged both that the City of Virginia Beach is deliberately indifferent to the rights of individuals who encounter its officers and that this deliberate indifference caused his injuries, Count Two survives the Motion to Dismiss.

D. Official Capacity Claims Against Officer Simmons

Defendant argues that Counts One, Three, Four, Five, Six, and Seven against Officer Simmons in his official capacity should be dismissed because Plaintiff has failed to state a claim against the City of Virginia Beach and official-capacity claims against Officer Simmons are essentially claims against the City. Mem. in Supp. of Mot. to Dismiss at 15, ECF No. 19. Plaintiff failed to address this argument in his Response in Opposition. *See* ECF No. 21. Nevertheless, this Court evaluates Defendant's arguments appropriately.

Defendant is correct that official capacity claims are the same as bringing suit against a municipality. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Because

Plaintiff has sued the City of Virginia Beach as well as Officer Simmons in his official capacity, the latter claims are essentially duplicative of the claims against the City itself and are due to be dismissed, even though the equivalent claim against the City will survive. *McMillian v. Monroe Cnty.*, 520 U.S. 781, 785 n.2 (1997); *Smith v. Town of South Hill*, No. 3:19cv46, 2020 WL 1324216 at *9 (E.D. Va. Mar. 20, 2020) ("Smith brings her claims against both the Town of South Hill and the individual South Hill Defendants in their official capacities . . . . Because Smith's official capacity claims against the individual . . . Defendants are redundant of her claims against the Town of South Hill, the Court will dismiss all counts against the individual South Hill Defendants brought against them in their official capacities.").

Accordingly, Counts One, Three, Four, Five, Six, and Seven against Officer Simmons in his official capacity are **DISMISSED**. However, these claims remain against Officer Simmons in his personal capacity.

* * *

"Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of [B]lack lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a [B]lack man at the hands of police, this time George Floyd in Minneapolis. This has to stop." *Estate of Jones by Jones v. City of Martinsburg*, 961 F.3d 661, 673 (4th Cir. 2020) (Floyd, J.) (emphasis added).

IV. CONCLUSION

For the foregoing reasons, Defendant City of Virginia Beach's Motion to Dismiss (ECF No. 18) is **GRANTED in part and DENIED in part**.

The Clerk is **REQUESTED** to forward a copy of this Order to counsel of record for all parties.

IT IS SO ORDERED.

/s/
Arenda L. Wright Allen
United States District Judge

March 7, 2022
Norfolk, Virginia