

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

MARK A. BRUCE,

Plaintiff,

v.

LAURA KELLY, in her official  
capacity as Governor of the State of Kansas,  
WILL LAWRENCE, in his individual  
capacity as Chief of Staff to  
Governor Laura Kelly, and  
HERMAN T. JONES, in his official and  
individual capacities as Superintendent  
of the Kansas Highway Patrol,

Defendants.

Case No. 20-4077-DDC-GEB

**MEMORANDUM AND ORDER**

Plaintiff Mark A. Bruce brings this civil rights lawsuit arising from his separation from employment with the Kansas Highway Patrol (“KHP”). He asserts federal constitutional and Kansas law claims against three defendants: (1) Laura Kelly, the Governor of Kansas, sued only in her official capacity; (2) Will Lawrence, Governor Kelly’s Chief of Staff, sued only in his individual capacity; and (3) Herman T. Jones, the current Superintendent of the KHP, sued both in his individual and official capacities. Defendants have filed a Motion to Dismiss (Doc. 11), asking the court to dismiss each claim asserted against them either for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) or for failing to state a claim under Fed. R. Civ. P. 12(b)(6).<sup>1</sup>

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<sup>1</sup> Defendants’ motion also asks the court to dismiss plaintiff’s claims for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2) and for insufficiency of process under Fed. R. Civ. P. 12(b)(5). Doc. 11 at 7–8. But, defendants’ Reply withdraws this argument, explaining that, after defendants filed their Motion to Dismiss, plaintiff cured the service defects. Thus, the court doesn’t need to address the Rule 12(b)(2) and (b)(5) dismissal arguments.

For reasons explained, the court grants defendants' motion in part and denies it in part. The court grants defendants' request to dismiss Count IV—plaintiff's 42 U.S.C. § 1983 claim against Superintendent Jones for violating plaintiff's First Amendment free speech rights—because qualified immunity bars this claim.

But, the court denies the motion in part for Counts I, II, and III, and without prejudice. Counts I and II allege § 1983 claims against Governor Kelly and Chief of Staff Lawrence for violating plaintiff's Fourteenth Amendment due process rights, and Count III alleges a Kansas common law claim for tortious interference with prospective business relations against Chief of Staff Lawrence. These claims require plaintiff to allege that defendants deprived him of a property interest or prospective business advantage. Plaintiff alleges that a Kansas statute vested him with such a property interest in continued employment with the KHP at the rank of Major as a member of the classified service. Defendants disagree. They argue that the Kansas statute conferred no such property interest. The Kansas statute at issue—Kan. Stat. Ann. § 74-2113—is not a model of clarity. Each party offers a competing reading of the statute based on its plain language. And, no case law interprets the statute's language to decide whether the rank of Major is a classified or unclassified position in the Kansas civil service. Without any guidance on this unsettled and dispositive question, the court exercises its discretion to certify questions to the Kansas Supreme Court under Kan. Stat. Ann. § 60-3201.

The court explains how it reaches these conclusions, below.

**I. The Court Won't Convert the Motion to Dismiss to a Motion for Summary Judgment.**

Before turning to defendants' Motion to Dismiss, the court addresses an argument that plaintiff asserts in his Opposition to defendants' motion. Plaintiff argues that defendants' Motion to Dismiss relies on matters outside the pleadings. So, plaintiff contends, the court must

invoke Fed. R. Civ. P. 12(d) and convert the motion to dismiss to one for summary judgment. *See* Fed. R. Civ. P. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.”). The court disagrees that defendants’ motion relies on matters outside of the pleadings.

Plaintiff asserts that four exhibits attached to defendants’ Motion to Dismiss qualify as matters outside of the pleadings, thus requiring the court to convert the Motion to Dismiss to a Motion for Summary Judgment. Each exhibit is a document filed in a Kansas state mandamus proceeding that plaintiff filed against Governor Kelly and Superintendent Jones. Exhibit 1 is a Petition for Writ of Mandamus that plaintiff filed with the Kansas Supreme Court on January 15, 2020. Doc. 11-1; Pet. in Mandamus, *Bruce v. Kelly*, No. 122,370 (Kan. Jan. 15, 2020). Exhibit 2 is a Memorandum of Points and Authorities in Support of Petition in Mandamus that plaintiff filed with the Kansas Supreme Court on January 15, 2020. Doc. 11-2; Mem. of P. & A. in Supp. of Pet. in Mandamus, *Bruce v. Kelly*, No. 122,370 (Kan. Jan. 15, 2020). Exhibit 3 is a Joint Response to Petition for Writ of Mandamus that Governor Kelly and Superintendent Jones filed with the Kansas Supreme Court on May 1, 2020. Doc. 11-3; Joint Resp. to Pet. for Writ of Mandamus, *Bruce v. Kelly*, No. 122,370 (Kan. May 1, 2020). Exhibit 4 is the Kansas Supreme Court’s Order denying plaintiff’s Petition for Writ of Mandamus on May 27, 2020. Order, *Bruce v. Kelly*, No. 122,370 (Kan. May 26, 2020).

Because each of the four exhibits is a public document filed with the Kansas Supreme Court in plaintiff’s mandamus action, the court may take judicial notice of them. *See, e.g., Gee v. Pacheco*, 627 F.3d 1178, 1194 (10th Cir. 2010) (holding that a district court properly considered records from another lawsuit on a Rule 12(b)(6) motion to dismiss); *see also Pace v.*

*Swerdlow*, 519 F.3d 1067, 1072–73 (10th Cir. 2008) (finding that district court “was correct in considering” state court documents of which it took judicial notice on a Rule 12(b)(6) motion to dismiss); *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006) (explaining that a court may “take judicial notice of its own files and records, as well as facts which are a matter of public record” on a Rule 12(b)(6) motion to dismiss (citation and internal quotation marks omitted)); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 n.1 (10th Cir. 2004) (considering only the allegations in the Complaint and those alleged in another lawsuit on a Rule 12(b)(6) motion); *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979) (explaining that “federal courts, in appropriate circumstances, may take [judicial] notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue”).

Also, the court may consider the four exhibits that defendants have attached to their Motion to Dismiss without converting the motion into one for summary judgment. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (“[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and *matters of which a court may take judicial notice.*” (emphasis added)); *see also Pace*, 519 F.3d at 1072–73 (finding that district court “was correct in considering” state court documents of which it took judicial notice on a Rule 12(b)(6) motion to dismiss); *Grynberg*, 390 F.3d at 1278 n.1 (declining to “recharacterize the defendants’ motion as a summary judgment motion because [the court] need consider only the allegations in [plaintiff’s] complaint and those in the prior . . . action”).

But the court won't consider plaintiff's Declaration that he's attached to his Opposition to the Motion to Dismiss. Doc. 15-1. That document is outside the pleadings, and the court can't consider it on a motion to dismiss.<sup>2</sup> Also, none of the assertions plaintiff makes in his Declaration can change the motion's outcome.

## II. Factual Background

The following facts come from plaintiff's Complaint (Doc. 1). The court accepts them as true and views them in the light most favorable to plaintiff. *Doe v. Sch. Dist. No. 1*, 970 F.3d 1300, 1304 (10th Cir. 2020) (explaining that on a motion to dismiss the court "accept[s] as true all well-pleaded factual allegations in the complaint and view[s] them in the light most favorable to" plaintiff (citation and internal quotation marks omitted)).

The KHP is an agency of the State of Kansas that enforces traffic, criminal, and other laws of Kansas throughout the state. Doc. 1 at 2 (Compl. ¶ 8). In June 1989, the KHP hired plaintiff as a trooper. *Id.* at 3 (Compl. ¶ 11). On March 14, 2008, the KHP promoted plaintiff to the position of Major. *Id.* After his promotion, plaintiff served a probationary period of six months, as Kan. Stat. Ann. § 75-2946 requires. *Id.* After this probationary period, plaintiff attained permanent status as a Major in the classified service. *Id.*

On April 2, 2015, then-Governor of Kansas, Sam Brownback, appointed plaintiff to serve as the Superintendent of the KHP, at the pleasure of the Governor. *Id.* (Compl. ¶ 12). In November 2018, Laura Kelly was elected as the Governor of Kansas. *Id.* (Compl. ¶ 13). As Governor-elect, Ms. Kelly announced that plaintiff would remain as KHP Superintendent. *Id.*

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<sup>2</sup> Also, plaintiff's Declaration contains improper legal conclusions. *See, e.g.*, Doc. 15-1 at 2 (Bruce Decl. ¶ 5) ("Subsection (a) of [Kan. Stat. Ann. §] 74-2113 is intended to protect both the KHP and officers eligible for promotion to its highest positions.").

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