IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MICHAEL BOUNDS, FOREST OLIVIER, ADAM LUGUNA, WIA DAY, DANIEL BELL, and ZACHARY LORENZ,

Plaintiffs,

vs.

KARL WILLERS, in his official and individual capacities; CITY OF HUTCHINSON; KENNETH WILLERS, in his official and individual capacities; NOBLES COUNTY; NICHOLAS JACOBSON, in his official and individual capacities; OLMSTED COUNTY; BRYCE SCHUENKE, formerly identified as JOHN DOE #1, in his official and individual capacities; DAKOTA COUNTY; JOHN DOE #2, in his official and individual capacities; PINE COUNTY; CHRIS MCCALL, in his official and individual Capacities; ANOKA COUNTY; DANIEL LEWIS; in his official and individual capacities; STEVE SCHULZ, in his official and individual capacities; KANABEC COUNTY; MICHAEL HADLAND, in his official and individual capacities; and FILLMORE COUNTY,

Defendants.

Case No. 13-cv-00266 JRT/FLN

DEFENDANTS KARL WILLERS, CITY OF HUTCHINSON, KENNETH WILLERS, NOBLES COUNTY, PINE COUNTY, DANIEL LEWIS, STEVE SCHULZ, KANABEC COUNTY, MICHAEL HADLAND, AND FILLMORE COUNTY'S RESPONSE TO PLAINTIFFS' OBJECTION TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

INTRODUCTION

Defendants Karl Willers, Kenneth Willers, Daniel Lewis, Steve Schultz, Michael Hadland, the City of Hutchinson, Nobles County, Pine County, Kanabec County, and Fillmore County submit this Response to Plaintiffs' Objection to Magistrate Judge Noel's January 13, 2016 Report and Recommendation. *Doc. 182.* Deputy Daniel Lewis and Kanabec County filed an Objection to the denial of their Motion for Summary Judgment regarding Plaintiff Wia Day's Fourteenth Amendment claim against Lewis and the *Monell* claim against Kanabec County. *Doc. 183.* Other than the dismissal of Day's First Amendment claim, her claims are not addressed in this Memorandum. Because each Plaintiff failed to establish a violation of his or her First and Fourteenth Amendment rights by these officers, the court correctly dismissed Plaintiffs' claims. Moreover, Plaintiffs failed to establish a *Monell* claim since an individual officer's poor decision at a training course conducted by the Minnesota State Patrol, even if held unconstitutional, does not establish a failure to train by their employing agencies.

FACTS

Defendants incorporate the facts set forth in their Summary Judgment Memorandum. *Doc. 150.*

STANDARD OF REVIEW

With regard to this objection, a district court judge shall modify or set aside a magistrate judge's order found to be clearly erroneous or contrary to law. Fed. R. Civ. P. 72; L.R. 72.2.

ARGUMENT

I. THE COURT CORRECTLY DISMISSED PLAINTIFFS' FIRST AND FOURTEENTH AMENDMENT CLAIMS.

Plaintiffs object to Magistrate Judge Noel's Report and Recommendation, claiming the court improperly made credibility determinations regarding Plaintiffs' claimed facts; incorrectly determined Plaintiffs' participation in the DRE program was voluntary; and erroneously dismissed Plaintiffs' First Amendment claim. As explained below, the court's decision is supported by the record, as opposed to Plaintiffs' unsupported speculation or mere allegations.

A. Plaintiffs' failure to provide record evidence to establish their claims is not the same as making findings of fact or credibility determinations.

If "opposing parties tell two different stories," the court reviews the record to determine which facts are material and genuinely disputed, and then views those facts in a light most favorable to the nonmoving party – as long as those facts are not so "blatantly contradicted by the record . . . no reasonable jury could believe" them. *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Reed v. City of St. Charles*, 561 F.3d 788, 790 (8th Cir. 2009). The nonmoving party may not "rest on mere

allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." *Krenik v. County of LeSueur*, 47 F.3d 953, 957 (8th Cir. 1995). To withstand the motion for summary judgment, a plaintiff must substantiate his allegations with "sufficient probative evidence that would permit a finding in his favor without resort[ing] to 'speculation, conjecture, or fantasy.'" *Reed*, 561 F.3d at 790 (quotations omitted). The district court correctly applied this standard for the dismissal of Plaintiffs' claims, and as pointed out in Defendants' Objection to Report and Recommendation, gave Plaintiffs the benefit of the doubt with regard to the issue of Day's voluntary participation.

B. The court correctly dismissed Plaintiffs' Fourteenth Amendment claims.

Magistrate Judge Noel correctly determined voluntary conduct negates a substantive due process claim arising from a liberty interest in bodily integrity. The Fourteenth Amendment interest at issue here is a liberty interest in bodily integrity. *Rogers v. City of Little Rock, Ark.*, 152 F.3d 790, 795 (8th Cir. 1998). The question, however, "is not simply whether a liberty interest has been infringed but whether the extent or nature of the [infringement] … is such as to violate due process." *In re Scott County Master Docket*, 672 F.Supp. 1152, 1166 (D. Minn. 1987). Plaintiffs have pled their claims under the "shocks-the-conscience" branch of substantive due process jurisprudence. *Doc. 108 at 10 ¶65.* For that reason, as

argued at *Doc. 150 p. 16*, the court is concerned with "violations of personal rights… so severe… so disproportionate to the need presented, and …so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Id.*

Plaintiffs' voluntary conduct, in the absence of coercion, is fatal to their substantive due process claim. *See Villanueva v. City of Scotsbluff*, 779 F.3d 507, 513 (8th Cir. 2015) (distinguishing consensual conduct not the result of coercion). They knew they were participating in a program where officers observed their conduct and behavior when they were under the influence of marijuana. *See Wright v. Fred Hutchinson Cancer Research Center*, 269 F.Supp.2d 1286, 1295-96 (W.D. Wa. 2002) (finding no constitutional violation when physicians failed to adequately inform the patient of risks, benefits, and alternatives or potential conflicts and volunteers knew they were participating in experiments). Plaintiffs' references to the officers' uniforms does not remove the consensual nature of their participation: "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." *U.S. v. Drayton,* 536 U.S. 194, 205 (2002), (quoting *INS v. Delgado,* 466 U.S. 210, 216 (1984)).

Plaintiffs knew exactly what they were doing. No Plaintiff denies knowing they were participating in a program and no Plaintiff claims they used a substance they were not aware of. Rather, Plaintiffs assert they were offered marijuana, which they voluntarily used. Even if some officers actually provided marijuana to a participant, if a Plaintiff knowingly used the marijuana, there is no substantive due process claim. The only individual officers among these Defendants that Plaintiffs identify as officers who provided them with marijuana are Officer Karl Willers (to Olivier) and Deputy Daniel Lewis (to Bell, Lorenz, Olivier, and Day). The provision of marijuana by officers to the volunteers may rise to a violation of criminal law or violations of department policy and procedure, but such a violation does not provide a civil remedy. *United States ex rel. Mattson v. Northwest Paper Co.*, 327 F. Supp. 87, 94 (D. Minn. 1971). Simply put, offering a person free marijuana and letting them choose whether to smoke it or not is not a substantive due process violation.

The record contains no evidence that any of the Defendants gave any of the Plaintiffs reason to believe they would receive any therapeutic benefits. No Plaintiff claims they used a substance they were not aware of. Rather, Plaintiffs assert they were offered marijuana, which they voluntarily used. Moreover, Plaintiffs readily admit using marijuana on their own before they ever became volunteers in the DRE Program and they continued to use it after this event.

Depo. Day, 23:9-25, 24:1-5; Depo. Olivier, 98:11-25, 99:1-6; Depo. Lorenz, 8:24-25, 9:1, 12:10-13; Depo. Bell, 19:22-25; Depo. Luguna, 7:16-23.

Because offering a person free marijuana and letting them choose whether to smoke it or not is not a substantive due process violation, this claim must be dismissed.

C. The court correctly dismissed Plaintiffs' First Amendment claims.

The district court held Plaintiffs "failed to put forth any evidence that any Defendant's decision to approach an individual at Peavey Plaza was motivated by the individual's participation in the Occupy Minneapolis protests." *Doc. 182 at p. 8.* The court carefully reviewed each officer's testimony for any evidence a Defendant approached a named Plaintiff because he or she was exercising a First Amendment right. *Id. at p. 8-11.* The court noted the record instead demonstrated officers approached individuals at Peavey Plaza "because they knew that there were a multitude of individuals in that area who were under the influence of controlled substances." *Id. at p. 8.* The court correctly noted Plaintiffs must substantiate their allegations with sufficient probative evidence to permit a finding in their favor based on more than mere speculation, conjecture, or fantasy. *Id. at p. 12 (*citing *Putman v. Unity Health Sys.*, 348 F.3d 732, 733-34 (8th Cir. 2003) (quotation omitted)).

Moreover, Plaintiffs had no injury. Each Plaintiff must show an individual defendant officer's "adverse action caused [them] **to suffer an injury** that would 'chill a person of ordinary firmness from continuing in the protected activity.'" *Williams v. City of Carl Junction*, 480 F.3d 871, 878 (8th Cir. 2007) (quoting *Carroll v. Pfeffer*, 262 F.3d 847, 850 (8th Cir. 2001) (emphasis added). That objective standard is applied to Plaintiffs' purported injury, and here, the lack of an injury or chilling effect with regard to Plaintiffs supports the conclusion they did not suffer an injury that would chill a person of ordinary firmness from continuing to participate in the Occupy movement.

Indeed, Day, Olivier, and Lorenz continued to participate in the protests after volunteering in the DRE Program. *Depo. Day, 8:7-14, Aff. Angolkar, Exhibit 2: Depo. Olivier, 66:3-25, 67:6-23.* Bell was not even a protestor at Peavey Plaza and therefore has no standing to make this claim. *Depo. Bell, 9:3-10.* While Luguna claims he avoided Peavey Plaza for a few days after volunteering in the DRE Program, he admits he cannot identify a particular officer who approached him. *Aff. Angolkar, Exhibit 5: Depo. Luguna, 68:3-10.* Since constitutional liability must identify the responsible individual, his First Amendment claim must fail. *Wilson v. Northcutt*, 441 F.3d 586, 591 (8th Cir. 2006).

Accordingly, the district court correctly determined Plaintiffs failed to establish facts that rise to the level of a violation of clearly established First Amendment rights by any of these officers.

II. THE DISTRICT COURT CORRECTLY DISMISSED THE *MONELL* CLAIMS AGAINT THE CITY OF HUTCHINSON, NOBLES COUNTY, PINE COUNTY, AND FILLMORE COUNTY.

Since Plaintiffs' claims were properly dismissed, their *Monell* claims should not survive. *See, e.g., Hayek v. City of St. Paul*, 488 F.3d 1049, 1055 (8th Cir. 2007) ("Without a constitutional violation by the individual officers, there can be no § 1983 or *Monell* . . . municipal liability.") (quoting *Sanders*, 474 F.2d 523, 527 (8th Cir. 2007)). Even assuming Plaintiffs' constitutional rights were violated by voluntarily leaving a protest, smoking marijuana, participating in sobriety testing, and returning to a protest, there is no basis for *Monell* liability in the absence of any factual support establishing official municipal policy or deficient practices caused the conduct to occur.

Plaintiffs cannot rest on mere allegations but must demonstrate in the record the existence of a genuine issue of material fact regarding these entities' training of officers on the First and Fourteenth Amendment. *Krenik v. County of LeSueur*, 47 F.3d 953, 957 (8th Cir. 1995). To succeed on a failure-to-train theory, a claimant must present evidence the municipality received notice of a pattern of unconstitutional acts. *Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1216-

17 (8th Cir. 2013). There are no facts to suggest these Counties' and the City's lawmakers or policymaking officials had notice of such a pattern of unconstitutional misconduct. While Plaintiffs point to speculative, inadmissible hearsay about impressions of the DRE program from unidentified prior participants, that testimony does not establish each of these entities' policymakers had notice of a pattern of unconstitutional acts prior to 2012.

Plaintiffs also assert this single incident establishes a *Monell* claim against these entities. "In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983." *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011). As explained in *Doc. 163 p. 30-31,* the Supreme Court's example of when the "unconstitutional consequences" are deemed "patently obvious" is a city which arms officers and deploys the officers to capture fleeing felons without training officers on the constitutional limitations on the use of deadly force. *Connick*, 131 S. Ct. at 1361 (quoting *Canton v. Harris*, 489 U.S. 378, 390 n. 10 (1989)). Municipal liability in the Court's example does not arise simply because it may be obvious police should not use an unconstitutional level of deadly force. Rather, it arises if, "the **known frequency** with which police attempt to arrest fleeing felons" and the "predictability that an officer lacking specific tools to handle that situation **will**

violate citizens' rights," constitutional violations would become "the highly predictable consequence." *Id.* (quoting *Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997)) (emphasis added); *see also Szabla v. City of Brooklyn Park*, 486 F.3d 385, 393 (8th Cir. 2007) (elaborating on importance of clarity and notice to city).

This Circuit's decisions rejecting the recognition of "single incident" liability in officer-rape cases is a vivid demonstration of why Plaintiffs' claims were correctly dismissed. Courts reject municipal liability where a person has been raped, and there was no training "not to rape." *See, e.g. Parrish v. Ball*, 594 F.3d 993, 999 (8th Cir. 2010). There is no patently obvious need to train an officer not to commit rape. *Id.; Andrews*, 98 F.3d at 1077. Here, there can be no liability for providing drugs to a person, even if there was no directive to not give drugs to people, particularly when that deputy attended training **for the purpose of detecting and apprehending individuals under the influence of drugs**.

There are no facts establishing these entities had inadequate training practices, that the entities acted with deliberate indifference towards the rights of citizens when adopting its policies, or that the alleged deficiencies actually caused Plaintiffs' injuries. Indeed, Plaintiffs' counsel did not request any of these officers' training records or ask a single question about these officers' training preceding participation in the DRE program. An individual officer's poor

decision at DRE training does not establish a *Monell* claim against these entities. Accordingly, the district court correctly dismissed Plaintiffs' *Monell* claim.

CONCLUSION

For the foregoing reasons, these Defendants request the Court overrule Plaintiffs' Objection to the Magistrate Judge's Report and Recommendation.

IVERSON REUVERS CONDON

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