IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MICHAEL BOUNDS, *et al.*,

Plaintiffs,

v.

THE STATE OF MINNESOTA, *et al.*,

Defendants.

Docket No. 0:13-cv-00266-JRT-FLN

JURY TRIAL DEMANDED

PLAINTIFFS' OMNIBUS MEMORANDUM OF LAW IN RESPONSE TO THE DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

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INTRODUCTION

On February 4, 2014, the Honorable Franklin L. Noel, U.S.M.J. issued a Report and Recommendation denying the Defendants' motions to dismiss ("Motions") in material part.[1] On February 18, 2014, the Defendants filed objections to the Report and Recommendation ("Objections"). Plaintiffs Michael Bounds, Forest Olivier, Adam Laguna, Daniel Bell, Wia Day, and Zachary Lorenz ("Plaintiffs"), by and through their counsel, respectfully submit this memorandum in opposition to the Objections.

In the Motions, the Defendants argued that the Plaintiffs failed to allege the violation of a right secured by the Constitution, and therefore failed to state a claim under § 1983. The police officers then argued that they are entitled to qualified immunity because, even if they did violate the Plaintiffs' constitutional rights, those rights were not "clearly established" at the time of the violation. Finally, the counties and municipalities employing the officers argued that they are immune under Monell v. Department of Social Services, 436 U.S. 658 (1978).

Judge Noel correctly rejected these arguments, holding that (1) the Plaintiffs plausibly alleged a violation of their First and Fourteenth Amendment rights; (2) those rights were "clearly established" at the time of the violation, making qualified immunity inapplicable; and (3) the counties and municipalities' failure to train the officers is tantamount to an official policy for which liability can lie.

In their Objections, the Defendants simply express disagreement with the Report and Recommendation, and do not demonstrate legal error.

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[1] The Plaintiffs have withdrawn their claims against the State of Minnesota and the Minnesota State Patrol.

STATEMENT OF THE FACTS

The Defendants developed and ran a program called the "Drug Recognition Evaluators" program ("Program"), an unethical clinical trial whereby armed police officers provided vulnerable individuals with substantial quantities of marijuana, encouraged them to get high, observed them, and then abandoned them while they were still high.[2] The Program purportedly existed for the purpose of allowing law enforcement to understand how individuals look and act while high.[3] In actuality, the Defendants wished to target members of Occupy Minneapolis, members of the homeless population, and other vulnerable members of the public and see what quantity of drugs their bodies could tolerate.[4]

Indeed, officers running the Program were instructed to specifically target Occupy Minneapolis protesters exercising their First Amendment rights, the homeless, and individuals addicted to cocaine, and in fact targeted such individuals.[5] The targeted individuals were taken into police custody, provided with substantial quantities of drugs (principally marijuana) by the police, observed by the police while under the influence, and then simply released onto the streets in a high and incoherent state.[6] Additionally, the officers sometimes intimated to the "volunteers" that they would be arrested if they did not participate.[7]

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[2] See Exhibit A, ¶ 10.
[3] See Exhibit A, ¶ 12.
[4] See Exhibit A, ¶ 13.
[5] See Exhibit A, ¶¶ 12, 13.
[6] See Exhibit A, ¶ 15.
[7] See Exhibit A, ¶ 17.

The Plaintiffs and other "participants" were not provided with an informed consent form, nor could any consent have ever been truly voluntary.[8]

Plaintiff Michael Bounds, a member of Occupy Minneapolis, suffers from epilepsy and schizophrenia.[9] On or around April 26, 2012, Mr. Bounds encountered two armed officers participating in the Program.[10] Mr. Bounds was asked whether he was high; he responded that he was not. One of the officers responded, "That's alright, we'll get you high."[11] Officers then provided him with a substantial quantity of powerful marijuana.[12] Officers did not conduct any evaluation of him; rather, he was released downtown while high.[13] Mr. Bounds was also given marijuana to take home in "exchange" for information on the Occupy Minneapolis movement.[14]

On three separate occasions in April 2012, Plaintiff Forest Olivier, also an Occupy member, was approached by local law enforcement (including Nicholas Jacobson and an Officer Willers) and offered substantial quantities of drugs.[15] The first time, Mr. Olivier was given eight pipe bowls worth of marijuana, taken to a testing facility to be evaluated, evaluated there, and then returned to Peavey Plaza, where the protesters were gathered.[16]

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[8] See Exhibit A, ¶ 18.
[9] See Exhibit A, ¶ 27.
[10] See Exhibit A, ¶ 28.
[11] See Exhibit A, ¶ 29.
[12] See Exhibit A, ¶ 30.
[13] See Exhibit A, ¶ 31.
[14] See Exhibit A, ¶ 32.
[15] See Exhibit A, ¶ 33.
[16] See Exhibit A, ¶ 34.

On the second occasion, Mr. Olivier was given ten or more pipe bowls worth of marijuana, taken to the facility to be evaluated, and then returned to Peavey Plaza.[17]

On another occasion, an Officer Willers and another officer approached Mr. Olivier.[18] Officer Willers asked Mr. Olivier whether he possessed any marijuana; he responded no.[19] Thereafter, Mr. Olivier was placed in the back of a squad car, and his belongings were placed in the trunk.[20] Officer Willers then provided Mr. Olivier with a substantial quantity of marijuana, which he smoked in the back of the car.[21] Thereafter, he was taken to the testing facility but not let in.[22] He was then taken back downtown and released while incredibly high.[23] The remaining Plaintiffs had similar experiences.[24]

Thereafter, certain officers participating in the program began making allegations that triggered an investigation.[25] One deputy personally witnessed Mr. Olivier being provided drugs by an Officer Willers, and provided details to investigators.[26] Six police officers (including Karl Willers) refused to provide sworn statements.[27] During the investigation, an Officer Willers openly admitted to providing illegal drugs to individuals, and questioned what was wrong with that.[28]

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[17] See Exhibit A, ¶ 35.
[18] See Exhibit A, ¶ 36.
[19] See Exhibit A, ¶ 37.
[20] See Exhibit A, ¶ 38.
[21] See Exhibit A, ¶ 39.
[22] See Exhibit A, ¶ 40.
[23] See Exhibit A, ¶ 41.
[24] See Exhibit A, ¶ 42.
[25] See Exhibit A, ¶ 44.
[26] See Exhibit A, ¶ 45.
[27] See Exhibit A, ¶ 46.
[28] See Exhibit A, ¶¶ 47, 48.

As a result of the Defendants' individual and collective wrongdoing, the Plaintiffs have suffered physical and emotional damages and harm.[29]

Finally, the police officers were acting in accordance with their employers' official policy and custom, including but not limited to their employers' negligent training or failure to train about (1) providing illegal drugs to members of the public; (2) experimenting upon the public; (3) targeting individuals exercising First Amendment rights; and (4) reporting misconduct by fellow police officers.[30]

LEGAL ARGUMENT

1. The Plaintiffs Have Stated § 1983 Claims for Violations of the First and Fourteenth Amendments

Simply put, "[t]o state a claim under [42 U.S.C.] § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law."[31]

a. Fourteenth Amendment

The Fourteenth Amendment's Due Process Clause provides as follows: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Its substantive due process provisions protect individuals from certain arbitrary, wrongful actions by state and local authorities "regardless of the fairness of the procedures used to implement them."[32] "Government action that violates an individual's

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[29] See Exhibit A, ¶ 50.
[30] See Exhibit A, ¶ 55.
[31] See, e.g., West v. Atkins, 487 U.S. 42, 47 (1988).
[32] See id. at 331.

integrity in a way that 'shocks the conscience' should be found arbitrary in the constitutional sense."[33]

"The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity."[34] As far back as the nineteenth century, the Supreme Court observed that "[n]o right is held more sacred … than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[35] Indeed, there can be no doubt that "[t]he right to bodily integrity is a fundamental right protected by the Constitution."[36]

Numerous courts have held that "[t]he right to be free of state-sponsored invasion of a person's bodily integrity is protected by the [constitutional] guarantee of due process."[37] Similarly, numerous courts "have ruled that the right to bodily integrity includes protection from government-sponsored radiation experiments that have no therapeutic value and are not disclosed as such."[38] As one District Court has observed,

> [t]hese well-reasoned opinions argue that the failure to disclose the alleged true nature of the experiments – that they were conducted with no expectation of therapeutic value to the patients but rather only to observe the effects of radiation on human subjects – vitiates any "consent" that may have

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[33] See Docket No. 78, page 12 (citation omitted).

[34] See Albright v. Oliver, 510 U.S. 266, 272 (1994).

[35] See Union Pacific Railroad Co. v. Botsford, 141 U.S. 250 (1891); accord Schmerber v. California, 384 U.S. 757 (1966).

[36] See, e.g., Ammend v. BioPort, Inc., 322 F. Supp. 2d 848 (W.D. Mich. 2004); cf. Washington v. Harper, 494 U.S. 210 (1990).

[37] See, e.g., In re Cincinnati Radiation Litigation, 874 F. Supp. 796 (D. Ohio 1995); Heinrich ex rel. Heinrich v. Sweet, 62 F. Supp. 2d 282 (D. Mass. 1999).

[38] See Heinrich, 62 F. Supp. 2d at 313; accord Stadt v. Univ. of Rochester, 921 F. Supp. 1023 (W.D.N.Y. 1996); Cincinnati Radiation Litigation, 874 F. Supp. at 810-11.

> been given, thereby rendering the experiments similar to the forced, involuntary invasions of bodily integrity that the Supreme Court has deemed unconstitutional.[39]

Indeed, "the [federal] judiciary has not hesitated to find that, where the human research subjects were not told that they were participating in an experiment and/or the government conducted the experiments knowing they had no therapeutic value, the subject's constitutionally protected right to life and/or liberty had been violated."[40]

Against this backdrop, Judge Noel correctly concluded that (1) the context in which the Plaintiffs were approached was "ripe for police coercion, whether verbalized or implied more subtly"; (2) the "Plaintiffs were recruited solely for the DRE officer trainees' benefit," and there was no possible therapeutic value to the Plaintiffs; and (3) "[b]ecause the DRE officer trainees' actions were deliberate and indifferent to Plaintiffs' liberty interests and bodily integrity, their conduct was sufficiently brazen to conclude that it 'shocks the conscience.'"[41] These conclusions are unassailable.

In their Objections, the Defendants first argue that "Plaintiffs knew they were participating in a program where officers observed their conduct and physiological characteristics when they were under the influence of marijuana." This lacks any record support and, even if true, is irrelevant given the fact that the Program lacked therapeutic value. The Defendants then argue: "Even if some officers actually provided marijuana to a participant, if a Plaintiff knowingly used the marijuana, there is no substantive due

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[39] See id.; accord Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1989).

[40] See Wright v. Fred Hutchinson Cancer Research Center, 269 F. Supp. 2d 1286, 1294 (D. Wash. 2002).

[41] See Docket No. 78, pages 14-16.

process claim." This argument ignores the Fourteenth Amendment case law cited above. Furthermore, at the motion-to-dismiss stage, the inference is that Mr. Oliver did not consent to the first bowl because of the officers' conduct, and did not consent to the second through eighth bowls due to an altered state of consciousness, and both the officers' conduct and Mr. Bounds' mental health issues vitiated any "consent."

The Defendants' subsequent argument – "But no named Plaintiff alleges he or she was actually threatened with arrest if he or she did not participate." – similarly ignores that, under the case law, the Plaintiffs did not need to be "threatened with arrest" in order for their participation to be considered involuntary. As Judge Noel concluded, "[a]n objectively reasonable person in Plaintiffs' shoes would question the sincerity of a law enforcement officers' provision of an illicit drug for their immediate consumption with no strings attached."[42] The Defendants' final argument – "More importantly, no named Plaintiff admits to possessing marijuana during their interaction with officers." – is incomprehensible.

b. First Amendment

It is "clearly established" that a citizen has the right to exercise First Amendment freedoms "without facing retaliation from government officials."[43] Among other things, "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions … on the basis of his constitutionally protected speech."[44] In order to prevail on a § 1983 claim for retaliation, a plaintiff must show "(1) that he engaged in a

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[42] See Docket No. 78, page 15.
[43] See, e.g., Kilpatrick v. King, 499 F.3d 759, 767 (8th Cir. 2007).
[44] See Osborne v. Grussing, 477 F.3d 1002, 1004 (8th Cir. 2007).

protected activity; (2) that the government official took adverse action against him that would chill a person of ordinary firmness from continuing in the activity; and (3) that the adverse action was motivated at least in part by the exercise of the protected activity."[45]

In applying the ordinary-firmness test, the Eighth Circuit has recognized that "[t]he effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable."[46] Furthermore, "[t]he chilling effect of an adverse action must be determined on an objective basis."[47] As the ordinary-firmness test "is an objective one, not subjective," "[t]he question is not whether the plaintiff herself was deterred … ."[48]

Judge Noel rejected the Defendants' misguided arguments, pointing out that "watching uniformed police officers repeatedly take protesters away in their squad cars may have been enough to deter a protester of ordinary firmness from continuing to exercise their First Amendment Rights."[49]

In the Defendants' Objections, they first contend that "there is no allegation [that the Plaintiffs] were singled out because they were protesting." This is untrue. The Complaint makes clear that the police officers targeted the Plaintiffs to participate in an unconstitutional experiment based upon the exercise of First Amendment rights. The Defendants then contend that "[v]oluntary use of marijuana is not an adverse action to

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[45] See Santiago v. Blair, 707 F.3d 984, 991 (8th Cir. 2013); see also Lawrence v. City of St. Paul, 740 F. Supp. 2d 1026, 1043 (D. Minn. 2010).

[46] See Garcia v. City of Trenton, 348 F.3d 726, 728-29 (8th Cir. 2003).

[47] See Lawrence, 740 F. Supp. 2d at 1043-44.

[48] See id.

[49] See Docket No. 78, page 12.

support a First Amendment retaliation claim." The Plaintiffs were unwitting participants in an unethical state-sponsored experiment, not voluntary marijuana users.

Perhaps most misguided is the Defendants' argument that "no Plaintiff alleges he or she stopped participating in the protests or other exercise of First Amendment activities after volunteering in the program." As set forth above, the ordinary-firmness test is objective, not subjective, and therefore it is irrelevant whether the Plaintiffs themselves were deterred from protesting.

3. The Officers' Qualified Immunity Defense Fails

Where "the facts shown by the plaintiff make out a violation of a constitutional or statutory right," and "that right was clearly established at the time of the defendant's alleged misconduct," the qualified immunity defense is inapplicable.[50]

"[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."[51] Indeed, "[t]o defeat a qualified immunity defense, the officials need only have fair warning that their alleged conduct was unconstitutional."[52] Ultimately, "[c]ourts are charged with the responsibility of ensuring that the defense of qualified immunity gives no more protection than is necessary for the official in question to effectively fulfill his duties."[53]

As discussed in detail above, "the facts shown by the [Plaintiffs] make out a violation of a constitutional … right … ."[54] Additionally, "that right was clearly

[50] See Garcia, 707 F.3d at 989.
[51] See Hope v. Pelzer, 536 U.S. 730 (2002).
[52] See Lawrence, 740 F. Supp. 2d at 1045 (internal alterations deleted).
[53] See Cincinnati Radiation Litigation, 874 F. Supp. at 807-08.
[54] See Garcia, 707 F.3d at 989.

established at the time of the [Defendants'] alleged misconduct."[55] First, "the right to be free from nonconsensual experimentation on one's body – the right to bodily integrity – [is] a right which has been recognized throughout this nation's history," and was recognized by the Supreme Court as far back as 1891.[56] Indeed, "the judiciary has not hesitated to find that, where the human research subjects were not told that they were participating in an experiment and/or the government conducted the experiments knowing they had no therapeutic value, the subject's constitutionally protected right to life and/or liberty had been violated."[57] Similarly, in the words of the Eighth Circuit, it is "clearly established" that a citizen has the right to exercise First Amendment freedoms "without facing retaliation from government officials."[58] Given the clearly established nature of the constitutional rights at issue, Judge Noel's ruling on qualified immunity was unassailable.

Indeed, in their Objections, the Defendants' qualified immunity argument is essentially that, because Judge Noel erroneously determined that the officers violated the Constitution, his qualified immunity ruling was also incorrect. The Plaintiffs' Complaint contains compelling § 1983 claims based upon violations of well-established First and Fourteenth Amendment rights. The officers obviously should have known better, and are plainly unentitled to qualified immunity.

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[55] See id.

[56] See Stadt, 927 F. Supp. at 1027; accord Ammend, 322 F. Supp. 2d at 870 ("The right to bodily integrity has long been recognized."); cf. Schmerber, 384 U.S. at 772 ("The integrity of an individual's person is a cherished value of our society.").

[57] See Wright, 269 F. Supp. 2d at 1294.

[58] See, e.g., Kilpatrick, 499 F.3d at 767.

4. The Defendants' Monell Argument Fails

In Monell, the Supreme Court held that, although a municipality is a "person" that can be held liable under 42 U.S.C. § 1983, it cannot be held liable under § 1983 on a theory of *respondeat superior*. Under Monell, a municipal entity is liable under § 1983 only "when execution of a government's policy or custom … inflicts the injury … ."[59] In City of Canton, Ohio v. Harris, the Supreme Court expanded Monell in holding that there are "circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983."[60] It further held:

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.[61]

Judge Noel unassailably concluded that "[e]ven if the counties claim they were unaware of the DRE instruction or tacit approval of the officers providing illicit substances to citizens, the fact that officers allegedly made such provisions to citizens reflects on the counties failure to train."[62] In their Objections, the Defendants' argument is again essentially that, because Judge Noel erroneously determined that the officers violated the Constitution, his ruling as to Monell immunity was incorrect. This argument fails.

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[59] Monell, 436 U.S. at 690-94.
[60] See City of Canton, Ohio v. Harris, 489 U.S. 378 (1989).
[61] See id. at 390.
[62] See Docket No. 78, page 19.

5. Finally, the Defendants' Argument That the Dismissed Claims Should Have Been Dismissed With Prejudice Fails

Judge Noel held that Plaintiffs Bounds and Olivier alleged claims with enough specificity against (1) Nicholas Jacobson, in his individual and official capacity (i.e., Olmstead County); (2) Karl Willers, in his individual and official capacity (i.e., Hutchinson County); (3) Kenneth Willers, in his individual and official capacity (i.e., Nobles County); and (4) John Does #1 and #2, in their individual and official capacities. He dismissed the claims against all other Defendants without prejudice due to what he concluded was the lack of specificity within the Complaint.

The dismissed Defendants claim that they should have been dismissed with prejudice. Tellingly, they could not locate a single case to support their argument.

"District courts routinely do not terminate a case at the same time that they grant a defendant's motion to dismiss; rather, they generally dismiss the plaintiff's complaint without prejudice and give the plaintiff at least one opportunity to amend her complaint."[63] Indeed, "decisions from the Eighth Circuit and this Court generally favor dismissals under Rule 12(b)(6) without prejudice, at least where there is no evidence of persistent pleading failures."[64]

Here, the Plaintiffs have not yet had the opportunity to amend their Complaint, and will be making further filings based upon additional specific information implicating additional Defendants. Judge Noel correctly dismissed those Defendants without prejudice. It would be the height of injustice if, as the Defendants baselessly suggest, the

[63] See, e.g., Foster v. DeLuca, 545 F.3d 582 (7th Cir. 2008).

[64] See Milliman v. Stearns, 2013 U.S. Dist. LEXIS 141440 (D. Minn. August 12, 2013).

Plaintiffs are forever foreclosed from pursuing claims that were dismissed due to lack of specificity, as opposed to on the merits.

Finally, the Defendants must file the required transcript.[65]

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[65] See Federal Rule of Civil Procedure 72(b)(2); accord Docket No. 78, page 21.

CONCLUSION

For the foregoing reasons, the Objections should be overruled in their entirety.

Dated: Tuesday, March 4, 2014

Respectfully submitted,

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