IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

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

Plaintiffs,

vs.

THE STATE OF MINNESOTA, et al.,

Defendants.

Case No. 13-cv-00266 JRT/FLN

CITY AND COUNTY DEFENDANTS'[1] REPLY MEMORANDUM IN SUPPORT OF RULE 12 MOTION TO DISMISS IN LIEU OF AN ANSWER

INTRODUCTION

The City and County Defendants submit this Reply Memorandum in support of their Motion to Dismiss, and in response to Plaintiffs' Memorandum of Law in Opposition. Although Plaintiffs voluntarily dismissed their Fourth and Eighth Amendment claims, they have still failed to establish First and Fourteenth Amendment constitutional violations or sustainable *Monell* claims. Additionally Plaintiffs' claims do not rise to the level of a constitutional violation, and Defendants are entitled to the protection of qualified immunity and the dismissal of Plaintiffs' claims.

[1] Except the counties of Anoka, Dakota, Ramsey, and Olmsted and their employees.

ARGUMENT

I. PLAINTIFFS FAIL TO STATE A § 1983 CLAIM.

Plaintiffs' remaining First and Fourteenth Amendment claims should be dismissed because Plaintiffs fail to state a constitutional violation; fail to identify only culpable defendants; and any identified defendant is entitled to qualified immunity.

A. Plaintiffs fail to state a claim for a constitutional violation.

1. First Amendment.

To prevail in an action for First Amendment retaliation, a plaintiff must show a causal connection between a defendant's retaliatory animus and plaintiff's subsequent injury. *Baribeau v. City of Minneapolis*, 596 F.3d 465, 481 (8th Cir. 2010). Plaintiffs ignore the fact their Complaint does not allege they were singled out to participate in the DRE program because they were protesting. Plaintiffs also fail to set forth facts to establish a retaliatory motive, and then claim they do not need to establish they actually stopped protesting. *Pl. Memo. at 19-20.* However, Plaintiffs must show the officers' "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). A conclusory argument restating the test does not meet Plaintiffs' burden. *See Pl. Memo, p. 19-20.*

The critical missing element is an adverse action. Voluntary use of marijuana is not an adverse action to support a First Amendment retaliation claim. This is in contrast to claims where a plaintiff has alleged a penalizing or adverse action like a citation or

other penalty as a result of their First Amendment activities. In those cases where a sufficient adverse action has been pled or alleged, the court has determined a jury must evaluate the claim. *See Garcia v. Trenton*, 348 F.3d 726, 728 (8th Cir. 2003) (alleging First Amendment retaliation for issuance of four parking tickets after complaining about municipal policy); *Lawrence v. City of St. Paul*, 740 F.Supp.2d 1026, 1043-44 (D. Minn. 2010) (alleging First Amendment retaliation for towing vehicle and testing blood).

Accordingly, Plaintiffs fail to allege facts that rise to the level of a First Amendment constitutional violation.

2. Fourteenth Amendment.

Plaintiffs' responsive memorandum attempts to salvage a Fourteenth Amendment claim by arguing the officers failed to disclose "what was occurring was an experiment," there was no informed consent form, and officers hid the "true nature of the experiment from the Plaintiffs." *Doc. 51 at p. 21-22.* In other words, Plaintiffs argue the officers did not tell them why the officers wanted to observe the plaintiffs while they were high.

The crux of a substantive due process claim related to bodily integrity, however, is knowing participation. An individual's substantive due process rights are not violated when the individual knowingly participates in a study or experiment or knowingly uses a drug. *See Wright v. Fred Hutchinson Cancer Research Center*, 269 F.Supp.2d 1286 (W.D. D. Wa. 2002). Plaintiffs do not allege they were tricked into believing the use of marijuana would be for medical treatment. Plaintiffs also make no allegation they were unaware of the effect the use of marijuana would have on their person. No Plaintiff alleges being administered a substance they were not aware of. Plaintiffs apparently

argue they should have signed a form before they recreationally used marijuana and allowed police to observe the effects. Signing a form does not change the voluntary participation by Plaintiffs.

Plaintiffs argue their consent was not voluntary because officers intimated individuals possessing marijuana would be arrested if they did not participate. But no named Plaintiff alleges he or she was actually threatened with arrest if he or she did not participate. More importantly, no named Plaintiff admits to possessing marijuana during their interaction with officers. Because Plaintiffs knowingly used the marijuana, there is no substantive due process claim. Accordingly, Plaintiffs fail to allege facts to support a substantive due process violation.

B. Plaintiffs fail to identify only culpable defendants.

Complaints alleging violations of 42 U.S.C. § 1983 should be prepared in a fashion that will identify the specific claims of the individual plaintiffs for specific constitutional violations as against only culpable defendants. *Liggins v. Morris*, 749 F.Supp. 967, 971 (D. Minn. 1990); *see also Martin v. Sargent*, 780 F.2d 1334, 1338 (8th Cir. 1985). When a complaint fails to allege a named defendant was personally involved in alleged misconduct, the complaint fails to state a claim against a defendant. *Krych v. Hvass*, 83 F. App'x. 854, 855 (8th Cir. 2003).

Even liberally construing the Complaint, all 26 named individual Defendants did not have contact with Plaintiffs. Plaintiff Michael Bounds describes contact with two officers. *Complaint, ¶ 28.* Plaintiff Forest Olivier alleges contact with either Officer Karl Willers or Officer Kenneth Willers and Officer Nicholas Jacobson, as well as an

unidentified officer. *Complaint, ¶¶ 33, 36, 37, 39.* Plaintiffs state the "remaining Plaintiffs had similar experiences" but fail to identify any purportedly culpable officer. Instead, they recklessly sue 26 individuals without explaining how each individual allegedly violated Plaintiffs' constitutional rights.

C. Individual defendants are entitled to qualified immunity.

Plaintiffs' section 1983 claims must be dismissed because the individual officers and deputies are entitled to qualified immunity for their alleged conduct during DRE training. An officer is entitled to qualified immunity unless his conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 815 (2009); *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Qualified immunity is a question of law to be decided by the district court, and it is "immunity from suit rather than a mere defense to liability." *Pearson*, 555 U.S. 223, 129 S. Ct. at 815 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227-28 (1991)). Simply put, "[q]ualified immunity is an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)). Like absolute immunity, qualified immunity is effectively lost if a case is erroneously permitted to go to trial. *Id.* The intent behind a qualified immunity analysis is to balance the need to hold officers accountable when they exercise power irresponsibly and the "need to shield officials when they perform their duties reasonably." *Pearson,* 129 S.Ct. at 815.

Section 1983 is not intended to create constitutional torts. Rather, the lynchpin to Plaintiffs' section 1983 claim for relief is establishing a claim for a violation of their

constitutional rights. They fail to do so and the individual defendants are therefore entitled to qualified immunity. As set forth in Defendants' initial memorandum and this reply, there is no constitutional violation. However, if the court determines the officers violated Plaintiffs' constitutional rights when they voluntarily participated in the DRE program, the officers are entitled to the protection of qualified immunity because it was not clearly established a reasonable officer would violate an individual's constitutional rights under similar circumstances.

"Clearly established Federal law . . . refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions at the time of the relevant state-court decision." *Carey v. Musladin*, 127 S. Ct. 649, 653 (2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). As the Supreme Court determined in *Hope v. Pelzer*, 536 U.S. 730, 739 (2002):

> [Q]ualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, [533 U.S. at 206]. ***For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right***. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell* [*v. Forsyth*, 472 U.S. 511, 535 (1958)]; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, [483 U.S. 635, 640] (1987).

(*emphasis added*). It was not clearly established utilizing volunteers for the DRE program would violate volunteers' constitutional rights under the First or Fourteenth Amendments. Because the officers did not violate a clearly established constitutional

right by utilizing volunteers for the DRE program, they are entitled to qualified immunity.

II. THE INDIVIDUAL POLICE DEPARTMENTS AND SHERIFF'S DEPARTMENTS ARE NOT ENTITIES SUBJECT TO SUIT.

Plaintiffs ignore their failure to name a defendant for their purported *Monell* claim. The numerous police departments and sheriff's departments are not legal entities subject to suit but are instead departments or subdivisions of the city. *Ketchum v. City of West Memphis*, 974 F.2d 81, 82 (8th Cir. 1992); *Anderson v. City of Hopkins*, 805 F.Supp.2d 712, 719 (D. Minn. 2011); *Franco v. Grant*, No. 09-0552, 2010 WL 653855, *6 (D. Minn. Feb. 22, 2010). Therefore, the named police departments and sheriff's departments are not legal entities subject to suit and must be dismissed. There is no remaining defendant to attach a *Monell* claim, so this claim must be dismissed.

To the extent the court determines naming individuals in their official capacities provides a party to assert a *Monell* claim against, the claim nonetheless fails. "Suits against public employees in their official capacity are the legal equivalent of suits against the governmental entity itself." *Buford v. Runyon*, 160 F.3d 1199, 1201 n. 3 (8th Cir. 1998) (quoting *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). A municipality may only be held liable under § 1983 if a municipal custom or policy caused the deprivation of the right protected by the constitution or federal law. *Kuha v. City of Minnetonka*, 365 F.3d 590, 603 (8th Cir. 2003). A plaintiff must prove that municipal policy or custom was the "moving force [behind] the constitutional violation." *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999). "Proof of a single incident of unconstitutional activity

is not sufficient to impose liability under *Monell,* unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Oklahoma City v. Tuttle,* 471 U.S. 808, 823-24 (1985); *Davison v. City of Minneapolis*, 490 F.3d 648, 659 (8th Cir. 2007). Plaintiffs presented no evidence of a widespread policy or custom that would require or cause any individual's constitutional rights to be violated.

Additionally, with no constitutional violation by the individual officers and deputies, there can be no § 1983 or *Monell* municipal liability. *Sanders v. City of Minneapolis*, 474 F.3d 523, 527 (8th Cir. 2007). Because Plaintiffs fail to establish an unconstitutional act attributable to an unconstitutional policy or custom or failure to train, any purported civil rights claims against the cities and counties must be dismissed.

CONCLUSION

For the foregoing reasons, these Defendants request the court grant their Motion to Dismiss and dismiss Plaintiffs' claims in their entirety, with prejudice, together with costs and disbursements.

IVERSON REUVERS CONDON

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By s/ Jason M. Hiveley
Jason M. Hiveley, #311546
Stephanie A. Angolkar, #388336
Attorneys for City and County Defendants
9321 Ensign Avenue South
Bloomington, MN 55438
(952) 548-7200