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' OBJECTION TO MAGISTRATE'S REPORT AND RECOMMENDATION

INTRODUCTION

These Defendants object to Magistrate Judge Noel's February 4, 2014 Order [*Doc. 78*] granting in part and denying in part the Motion to Dismiss. This case arises from Plaintiffs' voluntary participation in a Drug Recognition Evaluators program in which Plaintiffs agreed to allow officers to observe them under the influence of marijuana. Plaintiffs allege officers provided them marijuana, observed the effects, and returned them to their "Occupy Minneapolis" protest. Plaintiffs do not claim they were forced to use marijuana, forced to participate in the program, or threatened with arrest if they did not participate. Even if Plaintiffs remedy the many deficiencies in their Complaint, their claims do not rise to the level of a constitutional violation, and accordingly, Defendants are entitled to qualified immunity. Defendants request a hearing on this matter.

STATEMENT OF FACTS

The City and County Defendants sought this Motion to Dismiss in lieu of an Answer.[1] Plaintiffs assert officers participating in the Minnesota State Patrol's Drug Recognition Evaluators program ("DRE program") "provided vulnerable members of the public with marijuana . . ., encouraged them to get high, observed them, and then abandoned them while they were still high." *Complaint, ¶ 10.* Officers observed what individuals looked and acted like while high. *Id., ¶ 11.* Plaintiffs assert the Minnesota State Patrol focused on obtaining volunteer participants who were "Occupy Minneapolis" participants, the homeless, and drug addicts. *Id., ¶¶ 12-14.*

Participation was undeniably voluntary. *Id., ¶ 18.* Participants did not sign informed consent forms or provide their medical histories before participating. *Id., ¶¶ 18-19.* Participants received food or cigarettes for participating. *Id., ¶ 17.* Plaintiffs allege some participants received cash or illegal drugs to take home. *Id.* Plaintiffs also generally allege some officers "intimated to the 'volunteers' that they would be arrested if they did not participate." *Id.*

[1] "City and County Defendants" refers specifically to the following departments and their employees: the Cities of Big Lake, Chaska, Coon Rapids, Farmington, Hutchinson, Lakes Area Police Department, Maple Grove, and Worthington and the Counties of Chisago, Fillmore, Kanabec, Lyon, Nobles, and Washington. The individually named Defendants include Mark Hanneman, Karl Willers, Barb Mathwig, Peter Zajac, Troy Luke, Troy Kemp, Paul Ireland, Michael Hadland, Chad Vanhorn, Daniel Lewis, Steve Schulz, Andrew Mahowald, Joshua Lawrenz, Matt Olsen, Adam Conner, Dustin Roemeling, Kenneth Willers, Joshua McCuen, Chris Heinrichs, Lonnie Roloff, and Dan Sherburne. The Defendants not included in this Motion are the State of Minnesota, Minnesota State Patrol, Riccardo Munoz, Bryce Schuenke, Chris McCall, Marc Suchy, Michelle Ness, Nicholas Jacobson, and the Counties of Anoka, Dakota, Olmsted, and Ramsey.

Plaintiff Michael Bounds claims he is epileptic and schizophrenic. *Complaint,* ¶ *27.* On April 26, 2012, he was approached by two unidentified officers. *Id.,* ¶ *28.* The officers asked if Bounds was high and he responded he was not. *Id.,* ¶ *29.* The officers told Bounds they would get him high and provided him with marijuana. *Id.,* ¶¶ *29-30.* The officers did not evaluate Bounds. *Id.,* ¶ *31.* The officers also gave Bounds a quarter of a baggie filled with marijuana in exchange for information about the "Occupy Minneapolis" movement. *Id.,* ¶ *32.* Bounds does not allege he was threatened with arrest if he did not get high, and he does not identify the officers involved.

Plaintiff Forest Olivier was a participant in the "Occupy Minneapolis" movement who was approached three times on April 27, 2012 and offered drugs by officers. *Complaint,* ¶ *33.* Olivier was given marijuana, taken to a facility for evaluation, evaluated by officers, and returned to Peavey Plaza to continue protesting in the Occupy Minneapolis movement. *Id.,* ¶ *34.* The second time he participated in the program, Olivier was again given marijuana, evaluated off-site, and returned to his protest. *Id.,* ¶ *35.* Olivier does not identify the officers involved.

In the third instance, Olivier alleges he was approached by Officer Willers[2] and another officer Olivier does not identify. *Id.,* ¶ *36.* Officer Willers asked Olivier if he possessed any marijuana and Olivier responded he did not. *Id.,* ¶ *37.* Olivier got into the back of the squad car and his belongings were placed in the trunk. *Id.,* ¶ *38.* Olivier claims Officer Willers provided him with marijuana, which Olivier smoked in the back of

[2] Plaintiffs name Officers Karl Willers and Kenneth Willers but do not identify which officer Olivier refers to.

the squad car. *Id.*, ¶ *39.* The officers took Olivier to the facility for evaluation but other law enforcement officials declined to allow Olivier to further participate. *Id.*, ¶ *40.* Olivier asserts he was no longer used as a participant because he was associated with a YouTube video regarding Occupy Minneapolis and the DRE program.[3] *Id.* The officers returned Olivier to downtown Minneapolis. *Id.*, ¶ *41.* Olivier does not allege he was threatened with arrest if he did not participate.

Plaintiffs assert Wia Day, Adam Laguna, Daniel Bell, and Zachary Lorenz had similar experiences but the Complaint does not provide specific details. *Complaint,* ¶ *42.* Day, Laguna, Bell, and Lorenz do not allege whether they actually participated in the DRE program, but even if they did, they do not allege they were threatened with arrest if they did not participate. Additionally, no Plaintiff alleges unknowingly being administered a drug.

Procedural History

These Defendants filed a Motion to Dismiss in Lieu of an Answer on March 29, 2013. *Doc. 37.* In response, Plaintiffs voluntarily withdrew their Fourth and Eighth Amendment claims and stipulated to the dismissal of the State of Minnesota and Minnesota State Patrol. *Docs. 51, 56, 59.* The Court heard the Defendants' motions on July 22, 2013. *Doc. 75.* On February 4, 2014, Magistrate Noel granted the City and County Defendants' Motion to Dismiss in part and denied the Motion to Dismiss in part.

[3] The referenced video was once viewable at http://www.youtube.com/watch?v=vTgN17F26KE. It has since been removed. A true and correct copy of the video has been preserved by counsel for the City and County Defendants.

Doc. 78. Specifically, the Court denied the Motion to Dismiss all claims against Officers Karl Willers and Kenneth Willers in their individual and official capacities. *Doc. 78, p. 20.* The Court granted the Motion to Dismiss in all other respects, but did so without prejudice. *Id.*

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.

With regard to the Motion to Dismiss, Federal Rule of Civil Procedure 12(b)(6) provides that a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. In considering a motion to dismiss, the pleadings are construed in the light most favorable to the nonmoving party, and the facts alleged in the complaint must be taken as true. *Hamm v. Groose*, 15 F.3d 110, 112 (8th Cir. 1994); *Ossman v. Diana Corp.*, 825 F.Supp. 870, 879-80 (D. Minn. 1993). Any ambiguities concerning the sufficiency of the claims must be resolved in favor of the nonmoving party. *Ossman*, 825 F.Supp. at 880. Federal Rule of Civil Procedure 8(a) states that pleadings "shall contain a short and plain statement of the claim showing that the pleader is entitled to relief." A pleading must contain "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). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Determining whether a complaint states a

plausible claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but not 'shown' – 'that the pleader is entitled to relief.'" *Id.* (quoting Fed.R.Civ.P. 8(a)(2)). While a complaint does not need to contain detailed factual allegations, it must raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555. "[L]abels and conclusions or a formulaic recitation of the elements of a cause of action are not sufficient to state a claim." *Iqbal*, 129 S.Ct. at 1949.

ARGUMENT

I. PLAINTIFFS FAIL TO STATE A § 1983 CLAIM.

Magistrate Noel denied Defendants' Motion to Dismiss with regard to Officers Kenneth Willers and Karl Willers. *Doc. 78, p. 7.* The Court improperly determined Plaintiff Olivier stated a sufficient claim against both Karl Willers and Kenneth Willers, despite acknowledging Olivier only alleged a claim against one Officer K. Willers. *Doc. 78, p. 3 n. 2, 8.* Magistrate Noel also determined Officers Karl Willers and Kenneth Willers are not entitled to qualified immunity. *Doc. 78, p. 9.*

The Court granted the Motion to Dismiss the claims against the remaining City and County officers or deputies and properly rejected Plaintiffs' argument they should be able to proceed with discovery against the named officers. *Id.* The Court, however, erred by dismissing the claims against the remaining officers without prejudice. *Id.* The Court also erred by dismissing the claims of Plaintiffs Day, Laguna, Bell, and Lorenz without prejudice. *Doc. 78, p. 8.* Since filing of the Motions to Dismiss, Plaintiffs never

attempted to amend their Complaint to include more specific facts, despite knowledge of the weaknesses of their Complaint.

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).

A. First Amendment.

Plaintiffs allege officers targeted "Occupy Minneapolis" protestors exercising their First Amendment right to free speech and peaceful assembly. *Complaint, ¶ 13.* Plaintiffs essentially argue officers targeted protestors to remove them from their protest, get them high, and then abandon them. Magistrate Noel determined the officers are not entitled to qualified immunity because a protestor watching police officers transport voluntary participants in the DRE program may have been enough to deter a protestor from continuing to exercise their First Amendment rights. *Doc. 78, p. 11.* Plaintiffs Olivier and Bounds never alleged they were forced to participate, they were threatened with arrest if they did not participate, and were never placed in police custody. *See Complaint.*

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*, 596 F.3d at 481. "Retaliation need not have been the sole motive, but it must have been a 'substantial factor' in selecting participants. *See Kilpatrick v. King*, 499 F.3d 759, 767 (8th Cir. 2007). Further, Plaintiffs must show the retaliatory motive

was a "but-for" cause – i.e. they were singled out as test subjects because of their exercise of constitutional rights. *Id.*

The critical missing element is an adverse action. 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)). 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).

While Plaintiffs allege officers focused on the "Occupy Minneapolis" protest to find volunteers, there is no allegation they were singled out because they were protesting. Significantly, Plaintiffs participated in the DRE program voluntarily. Plaintiffs could have remained at their protest. Moreover, no Plaintiff alleges he or she stopped participating in the protests or other exercise of First Amendment activities after volunteering in the program. Instead, the court determined Plaintiffs' participation could have a chilling effect on other protestors, not party to this lawsuit. Accordingly,

Plaintiffs fail to allege facts to rise to the level of a First Amendment constitutional violation and the officers are entitled to qualified immunity.

B. Fourteenth Amendment.

Magistrate Noel declined to dismiss Plaintiffs' Fourteenth Amendment claim against Officers Karl and Kenneth Willers, after questioning whether Plaintiffs consented to participate in the program and whether trainees' conduct was sufficiently brazen to conclude that it "shocks the conscience." *Doc. 78, p. 15-16.* The court dismissed the claim against other officers but did so without prejudice.

Substantive due process protects individuals from certain arbitrary, wrongful, government actions "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Rights are protected under the due process clause if they are "so rooted in the tradition and conscience of our people as to be ranked as fundamental" or if such rights reflect "basic values implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

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). In *Wright*, representatives of deceased participants in a cancer research study alleged failure to obtain informed consent violated the subjects' procedural or substantive due process rights. *Id.* at 1290-91. The court evaluated cases finding a subject's constitutionally protected right to life and/or liberty had been violated

when the human research subjects were not told they were participating in an experiment. 269 F.Supp.2d at 1294. Examples included secret administration of LSD, radiation experiments with no therapeutic value, and injection of plutonium without knowledge or consent. *United States v. Stanley*, 483 U.S. 669 (1987) (secret administration of LSD); *Heinrich v. Sweet*, 62 F.Supp.2d 282 (D. Mass. 1999) (radiation experiments with no therapeutic value); *Stadt v. University of Rochester*, 921 F.Supp. 1023 (W.D.N.Y. 1996) (injection of plutonium); *In re Cincinnati Radiation Litig.*, 874 F.Supp. 796 (S.D. Ohio 1995) (not informed radiation was military experiment rather than cancer treatment).

The *Wright* court noted the decedents knew the true nature of the experiments and refused to find a constitutional violation when the physicians failed to adequately inform the patient of risks, benefits, and alternatives or potential conflicts. *Id.* at 1295. The lynchpin of the analysis is whether the subjects knew they were participating in an experiment. *Id.* at 1296.

Here, Plaintiffs knew they were participating in a program where officers observed their conduct and physiological characteristics when they were under the influence of marijuana. No Plaintiff alleges being administered a substance they were not aware of. Plaintiffs allege they were provided with 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.[4] Magistrate Noel credited

[4] Even if the provision of marijuana may arise to a violation of criminal law, the violation of a criminal statute does not provide a civil remedy. *United States ex rel. Mattson v. Northwest Paper Co.*, 327 F. Supp. 87, 94 (D. Minn. 1971).

Plaintiffs' argument 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.

C. The Officers are Entitled to Qualified Immunity.

Even if Plaintiffs remedy the deficiencies in their Complaint, the purported claims do not rise to the level of a clearly established constitutional violation and the officers 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, Plaintiffs must establish a claim for a violation of their constitutional rights. They fail to do so in their Complaint, and even if Plaintiffs remedy the deficiencies of their Complaint, the individual defendants are entitled to qualified immunity. As set forth above, 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. The concerns expressed in the Report and Recommendation are based on speculation, not alleged facts. On the actual facts asserted in the Complaint before it, the Court should have determined the officers were entitled to qualified immunity.

"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.

D. Plaintiffs Fail To State A Claim For Failure to Train.

Magistrate Noel determined Olmsted and Nobles County and the City of Hutchinson should not be dismissed based on a failure to train claim. *Doc. 78, p. 18-19.* "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.

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

Magistrate Noel's Report and Recommendation granted Defendants' Motion to Dismiss all claims against the sheriff and/or police departments without prejudice. *Doc. 78, p. 6, 20.* Plaintiffs named numerous police departments and sheriff's departments as Defendants and conceded at oral argument it was not appropriate to do so. *Doc. 78, p. 6.* Municipal police 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). Similarly, a sheriff's department is not subject to suit since it does not have a

legal existence separate from the county. *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 the Motion to Dismiss these entities should be granted with prejudice.

CONCLUSION

For the foregoing reasons, these Defendants respectfully request the court reverse Magistrate Noel's Order denying these Defendants' Motion to Dismiss with regard to the claims against Officers Karl Willers and Kenneth Willers on the basis of qualified immunity, modify the grant of Defendants' Motion to Dismiss on all remaining claims and against other parties to a dismissal with prejudice, and dismiss this case in its entirety.

IVERSON REUVERS CONDON

Dated: February 18, 2014

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