UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Michael Bounds, et al.,

Plaintiffs,

v.

State of Minnesota, et al.

Defendants.

Civil File No. 13-cv-266 JRT/FLN

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COMPLAINT BY DAKOTA COUNTY DEFENDANTS

The Dakota County Defendants do not concede any arguments made by Plaintiffs in their response memorandum of law, but due to word limitation, only address a few points herein.

A. SECTION 1983 LIABILITY CANNOT BE BASED ON ALLEGED COLLECTIVE WRONGDOING OF DEFENDANTS.

In their response memorandum of law, Plaintiffs argue that their rights under the First and Fourteenth Amendments were violated by the individual and collective actions of the Defendants. An individual Defendant's liability under § 1983 cannot be based on the actions of any other Defendant. Plaintiffs must prove that each Defendant had direct, personal involvement in the acts that deprived them of their rights secured by the First and/or Fourteenth Amendments.

Hence, to successfully plead a § 1983 claim against Defendant Schuenke, Plaintiffs must plead facts showing Defendant Schuenke's personal involvement in alleged constitutional wrongdoing. *Delgado-O'Neil v. City of Minneapolis*, 2010 WL

330322 at *6 (D.Minn Jan. 20, 2010) citing *Ellis v. Norris*, 179 F.3d 1078, 1079 (8th Cir. 1999); *Beck v. LaFleur*, 257 F.3d 764, 766 (8th Cir. 2001). There are no facts averred in the Complaint that Defendant Schuenke gave marijuana to any of the Plaintiffs, transported any of the Plaintiffs or conducted evaluations of any of the Plaintiffs. To the contrary, Plaintiff Bounds did not identify which Defendants he had contact with (*Complaint, ¶28; Response Memorandum of Law, p. 9*); Plaintiff Olivier identified Defendants Nicholas Jacobson, Karl Willers and Kenneth Willers (*Complaint, ¶¶33-39; Response Memorandum of Law, 9-10*); and the remaining Plaintiffs failed to identify any of the Defendants and instead simply averred that they "had similar experiences." (*Complaint, ¶42; Response Memorandum of Law, p. 10*).

Plaintiffs have failed to plead facts showing Defendant Schuenke's direct responsibility for any constitutional violation. Accordingly, Plaintiffs' § 1983 claims against Defendant Schuenke, in both his individual and official capacities, must be dismissed.

B. NAMING DEFENDANT SCHUENKE IN BOTH HIS INDIVIDUAL AND OFFICIAL CAPACITIES DOES NOT PRECLUDE THE APPLICATION OF THE DOCTRINE OF QUALIFIED IMMUNITY.

In their response memorandum of law, Plaintiffs assert that qualified immunity is not applicable to Defendant Schuenke because he was named in both his official and individual capacities. Plaintiffs misconstrue the law and the pertinence of naming a public employee in both capacities.

A suit against a public employee in his official capacity is the legal equivalent of a suit against the government entity itself. *Bankhead v. Knickrehm*, 360 F.2d 839, 844 (8th

Cir. 2004) (citation omitted). In suing Defendant Schuenke in his official capacity, Plaintiffs sued Dakota County. Accordingly, this Court must analyze whether Defendant Schuenke is immune from liability under the qualified immunity doctrine in his individual capacity and separately determine whether Dakota County, by virtue of Defendant Schuenke being named in his official capacity, is subject to liability under § 1983. Contrary to Plaintiffs' argument, simply naming Defendant Schuenke in both his individual and official capacities does not preclude the application of the qualified immunity doctrine.

C. PLAINTIFFS HAVE FAILED TO PLEAD SUFFICIENT FACTS TO SUPPORT A *MONELL* CLAIM AGAINST DAKOTA COUNTY.

A municipality may not be sued under § 1983 for an injury inflicted solely by its employees or agents on a *respondeat superior* theory of liability. *Parrish v. Ball*, 594 F.3d 993, 997 (8th Cir. 2010) citing *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (quotations omitted). It is only when the execution of the municipality's policy or custom inflicts the injury that the municipality may be held liable under § 1983. *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) (citations and quotations deleted).

There are limited circumstances in which a municipality may be subject to § 1983 liability for inadequate police training. *City of Canton*, 489 U.S. at 387. In *City of Canton*, the Supreme Court held "that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* A

municipality can be liable under § 1983 only where its policies are the moving force behind the constitutional violation. *Id*., at 389. (citations omitted). Municipal liability under § 1983 attaches only where a deliberate choice to follow a course of action is made from among various alternatives by the municipality's policymakers. *Id*. (citations and quotations omitted). "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality – a 'policy' as defined by [prior decisions] – can a city be liable for such failure under § 1983." *Id*.

This standard is not satisfied by simply alleging that the existing training program for a class of employees represents a policy for which the municipality is responsible. *Id*. The issue is whether the training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "municipality policy." *Id*., at 390. To satisfy the standard, a plaintiff must establish

> 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 [municipality] can reasonably be said to have been deliberately indifferent to the need.

Id., at 390. The fact that a particular officer may have been unsatisfactorily trained will not alone suffice to establish § 1983 liability on a municipality because the officer's shortcomings may have resulted from factors other than a faulty training program. *Id*., at 389-90.

Relying on *City of Canton*, the Eighth Circuit has articulated that a plaintiff claiming a municipality is liable under § 1983 for failure to train must establish the

following three elements: (1) the municipality's training practices were inadequate; (2) the municipality was deliberately indifferent to the rights of others in adopting them, such that the failure to train reflects a deliberate or conscious choice by the municipality; and (3) the alleged deficiency in the training procedures actually caused the plaintiff's injury. *Parrish*, 594 F.3d at 997, citing *Andrews v. Fowler*, 98 F.3d 1069, 1076 (8th Cir. 1996). (quotations omitted).

A prerequisite for § 1983 failure to train municipal liability is that an individual officer must have committed a constitutional violation. *Sanders v. City of Minneapolis*, 474 F.3d 523, 527 (8th Cir. 2007) (holding that without a constitutional violation by the individual officer, there can be no § 1983 or *Monell* failure to train municipal liability). Here, Plaintiffs have not satisfied this prerequisite because they failed to plead facts showing Defendant Schuenke's direct responsibility for any constitutional violation. Accordingly, Dakota County is not subject to § 1983 liability for failure to train and Defendant Schuenke must be dismissed in his official capacity.

Alternatively, even if Plaintiffs had alleged sufficient facts against Defendant Schuenke, their § 1983 failure to train claims fail because they have not alleged sufficient facts against Dakota County in support of their respective claims. Plaintiffs aver in paragraph 55 of the Complaint that the 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." This is

nothing more than a legal conclusion unsupported by factual allegations and is not sufficient to support a § 1983 claim against Dakota County.

Moreover, it is important to note that Plaintiffs' respective claims are based on the alleged activities engaged in by peace officers while participating in the DRE course rather than on activities engaged in by the officers in the performance of their day-to-day job duties. The DRE course was sponsored by the Minnesota State Patrol and the focus of Plaintiffs' Complaint is that agency's management of the course and the alleged instructions being provided to the participants during the training. For example, Plaintiffs allege that: (1) the "DRE Program was essentially an unethical clinical trial;" (2) the "parties that designed and ran the Program wished to target members of Occupy Minneapolis;" (3) the officers participating in the DRE Program "were instructed to specifically target Occupy Minneapolis protesters exercising their First Amendment right to free speech and peaceable assembly;" and (4) the parties that designed and ran the Program authorized providing incentives to members of the public in exchange for participation. (*Complaint,* ¶¶ 10, 12, 13 and 17).

There are no facts averred in the Complaint that Dakota County's training of its sheriff deputies had any connection to the State Patrol's management of the DRE course and the alleged instructions being provided to the officer participants. Furthermore, there are no facts averred that Dakota County's training practices were the "moving force" behind any alleged constitutional violations committed during the DRE course.

Because Plaintiffs have not alleged sufficient facts in their Complaint in support of their respective § 1983 failure to train claims against Dakota County, Defendant Schuenke must be dismissed in his official capacity.

Dated: May 1, 2013

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