UNITED STATE DISTRICT COURT

DISTRICT OF MINNESOTA

Michael Bounds, Forest Oliver, Wia Day, Adam Laguna, Daniel Bell, and Zachary Lorenz,

Plaintiffs,

v.

The State of Minnesota, et al.,

Defendants.

Civil File No. 13-cv-00266 (JRT/FLN)

MEMORANDUM OF LAW IN SUPPORT OF STATE'S MOTION TO DISMISS COMPLAINT AGAINST THE STATE OF MINNESOTA, THE MINNESOTA STATE PATROL AND RICCARDO MUNOZ

INTRODUCTION

Plaintiffs bring claims against Defendants under authority of 42 U.S.C. § 1983 and Minn. Stat. § 3.736, Minnesota's Tort Claims Act. Plaintiffs' Complaint seeks an Order enjoining the State of Minnesota and the Minnesota State Patrol from conducting present and future Drug Recognition Expert (hereinafter "DRE") programs and seeking damages in excess of $1 million. Defendants the State of Minnesota, the Minnesota State Patrol, and Riccardo Munoz move this Court pursuant to Fed. R. Civ. P. 12(b)(6) for an Order dismissing the Complaint as it pertains to the State of Minnesota, the Minnesota State Patrol and Riccardo Munoz on the grounds that Plaintiffs have failed to state a claim upon which relief can be granted.

FACTS DISCLOSED IN PLAINTIFFS' COMPLAINT

Plaintiffs' Complaint alleges that the State Defendants[1] developed a DRE Program that was designed to provide training for police officers in the detection of drugs used by individuals. Compl. ¶11. On or about April 26-27, 2012, Occupy Minnesota members were engaged in a rally in downtown Minneapolis. Compl. ¶¶13, 27-28. Plaintiffs allege that several of the Defendants listed in the Complaint approached them, offered them marijuana, and that Plaintiffs accepted Defendants' offer and used the marijuana. Compl. ¶¶29-41. Plaintiffs do not allege that any State Defendant offered marijuana. Compl. ¶¶28-50. Plaintiffs further alleged that after the substance was consumed, Defendants would conduct various exercises for the purposes of observing the effects of the marijuana on the subjects as part of the DRE Training Program. Compl. ¶¶9-18. Plaintiffs allege that upon concluding their observations, Defendants returned Plaintiffs to the rally or other activity upon their request. Compl. ¶¶31, 41.

Plaintiffs claim that Defendants' conduct violated their constitutional rights under authority of 42 U.S.C. § 1983 and seek damages for those violations. Plaintiffs also seek an injunction against the State of Minnesota and the State Patrol from further conducting DRE Programs. Lastly, Plaintiffs assert that Defendants are liable under the Minnesota Tort Claims Act.

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[1] The State of Minnesota, the Minnesota State Patrol and Riccardo Munoz, are collectively referred to hereinafter as "State Defendants."

STANDARD OF REVIEW

Under Fed. R. Civ. P. 12(b)(6), a motion to dismiss for failure to state a claim must be granted where the complaint does not allege "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 the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id. at 679.

In addition, "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams,* 490 U.S. 319, 326 (1989). Whether a complaint states a cause of action is a question of law. *Morton v. Becker,* 793 F.2d 185, 187 (8th Cir. 1986).

If the Court relies on matters outside the pleadings, the motion is converted to a motion for summary judgment. Fed. R. Civ. P. 12(c). However, in ruling on a motion to dismiss, a court may consider materials that are part of the public record or do not contradict the complaint, as well as materials necessarily embraced by the pleadings, without converting the motion to one for summary judgment. *See Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999); *Stahl v. United States Dep't of Agric.,*

327 F.3d 698, 700 (8th Cir. 2003); *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n.4 (8th Cir. 2003).

I. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST THE STATE OF MINNESOTA AND THE MINNESOTA STATE PATROL.

Defendants argue that this Court lacks jurisdiction over the State of Minnesota or the Minnesota State Patrol. Even if this Court was vested with jurisdiction, Plaintiffs have failed to allege any facts indicating that the State of Minnesota or the Minnesota State Patrol violated their rights. Lastly, Plaintiffs' claim for injunctive relief is without legal support.

A. This Court Lacks Jurisdiction Under § 1983 Over The State Of Minnesota And The State Patrol.

Any assertion that this Court has jurisdiction under § 1983 over the State of Minnesota or the Minnesota State Patrol must be rejected. The Eleventh Amendment to the United States Constitution bars private parties from suing an unconsenting state in federal court unless Congress has unequivocally abrogated the State's constitutional sovereign immunity. *Atascodero State Hospital v. Scalon,* 473 U.S. 234, 238-40 (1985). Absent state consent or congressional abrogation, the Eleventh Amendment bars federal claims against the State of Minnesota and the State Patrol. Neither exception applies in the instant matter.

First, the State of Minnesota has not waived Eleventh Amendment immunity from claims in federal court for alleged violations of the federal constitution. *DeGidio v. Perpich,* 612 F. Supp. 1383, 1388-89 (D. Minn. 1985) (recognizing that the State of Minnesota's limited waiver of sovereign immunity from tort actions in state court is not a

waiver of Eleventh Amendment immunity from claims in federal court for alleged federal constitutional violations). Second, Congress did not abrogate the states' Eleventh Amendment immunity in enacting the civil rights statutes. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66-67 (1989); *see also Quern v. Jordan,* 440 U.S. 332, 338-45 (1979) (holding that Congress did not abrogate the states' Eleventh Amendment immunity in enacting § 1983); *Singletary v. Missouri Dep't of Corrections*, 423 F.3d 886, 890 (8th Cir. 2005) (holding same as to § 1981); *Beach v. Minnesota*, No. 03-862, 2003 WL 21488679, at *3 (D. Minn. June 25, 2003) (holding same as to § 1985), *aff'd* 92 Fed. App. 386 (8th Cir. 2004); *Jimenz v. Illinois*, No. 11–CV–4707, 2012 WL 174772, at *4 (N.D. Ill. Jan. 18, 2012) (holding same as to § 1986). Accordingly, the Eleventh Amendment deprives this Court of jurisdiction over Plaintiffs' federal claims against the State of Minnesota and the State Patrol.

Plaintiffs' 42 U.S.C. §§ 1983, 1985 and 1986 claims also fail because neither the State of Minnesota or the State Patrol are a "person" within the meaning of those statutes. *Will v. Michigan Dep't of State Police,* 491 U.S. at 71 ("we hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983"); *Small v. Chao,* 398 F.3d 894, 898 (7th Cir. 2005) (concluding that a lack of personhood under § 1983 equates to a lack of personhood under § 1985); *Sandoval v. Dep't of Motor Vehicles,* 333 F. Supp.2d 40, 43-44 (E.D.N.Y. 2004) (finding state and its agencies are not "persons" under § 1985); *Coffin v. South Carolina Dep't of Social Servs.,* 562 F. Supp. 579, 586 (D.S.C. 1983) (concluding state and agencies are not "persons" within § 1983, § 1985 or

§ 1986). Therefore, Plaintiffs' federal claims for any relief against the State and the State Patrol must be dismissed.

B. Injunctive Relief Is Not Available Because The Need Is Speculative.

Plaintiffs argue that Defendants "The State of Minnesota and The Minnesota State Patrol should be prospectively enjoined from running the DRE Program now and in the future." Compl. ¶62. In order for injunctive relief to be granted, the Court must balance the following factors as stated by the Court in *Fogie v. Thorn Americas, Inc.*, 95 F.2d 635 (8th Cir. 1996).

> The Eighth Circuit balances four factors to determine whether injunctive relief is warranted: (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the harm to be suffered by the nonmoving party if the injunction is granted; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc). The standard is the same for a permanent injunction except that the movant must show actual success on the merits. *Amoco Production Co. v. Village of Gambell, Alaska,* 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 1404 n. 12, 94 L.Ed.2d 542 (1987).

Id. at 654.

Plaintiffs have failed, however, to provide any legal basis in support of its position that the DRE Program should be enjoined. Furthermore, the DRE Program has already been suspended by Defendants.[2] As a result a temporary injunction by this Court is unwarranted. Additionally, even if Munoz or any other state official was found to be subject to a § 1983 cause of action, Plaintiffs fail to justify their demand that the State Defendants' DRE training programs be permanently enjoined.

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[2] Affidavit of Minnesota State Patrol Colonel Kevin Daly is attached stating that the State Patrol is not currently conducting a DRE Program.

1. DRE Training Programs Are Recognized As An Effective Law Enforcement Tool And Accordingly Should Be Rejected.

In *State v. Klawitter,* 518 N.W.2d 577 (Minn. 1994), the Court reviewed a DRE Program conducted by the Minnesota State Patrol. In that case, the Court reviewed a lower court record demonstrating that the purpose of a DRE program is to train law enforcement officials how to identify people who are under the influence of drugs so that they can be removed from roadways. As further discussed in *Klawitter,* the DRE Program has its roots in Los Angeles in the early or mid-1970's. The program began as a refinement of the standardized field sobriety test for alcohol. Police officers in Los Angeles had noticed an increasing number of individuals who were under the influence of drugs and experienced related traffic problems. Police officers culled their own observations and added information contained from outside sources in an attempt to train police officers to recognize signs of drug impairment. *Id.* at 582.

The 12-Step DRE protocol currently used by DREs to detect the presence of drugs was primarily developed by the Los Angeles Police Department ("LAPD") with the assistance of physicians, nurses, toxicologists, psychiatrists and health care professionals. *Id.* at 581-82. California studies indicate that 94 percent of the time, a DRE evaluation correctly detected the presence of substances other than alcohol. *Id. at* 581. The DRE protocol has been deemed reliable. *Id.* at 582. Upon examining the DRE protocol in Minnesota, the *Klawitter* Court concluded that the DRE protocol is not a new or novel scientific technique and that the protocol meets the Minnesota Rules of Evidence relative to admissibility. *Id.* at 585. Hence, DRE Programs have been nationally-recognized as

an effective tool for law enforcement in determining whether an individual is under the influence of a controlled substance.

2. Plaintiffs Offer Only Speculation To Support The Issuance Of An Injunction.

Plaintiffs ask this Court for an Order enjoining the State of Minnesota and the State Patrol from training individuals to become drug recognition experts, thereby, depriving Minnesota law enforcement officers of a valuable tool to determine if a driver is under the influence of a controlled substance. Plaintiffs' request for a permanent injunction is without legal support and should be denied.

Plaintiffs' mere fear that a future DRE Program may be improperly implemented provides no basis for injunctive relief. Plaintiffs seek to enjoin the State Patrol from conducting DRE Programs in the future to prevent the mere possibility of a recurrent violation and to assuage fears of what may happen in the future, neither of which provides a basis upon which relief should be granted. *See U.S. v. W. T. Grant Co.,* 345 U.S. 629 (1953) (holding that mere possibility of recurrent violations is insufficient to justify relief); *Roseboro v. Fayetteville County Board,* 491 F. Supp. 110 (E.D. Tenn. 1977) (observing that the power to grant injunctive relief should never be exercised to assuage fears of what may happen in the future). Any injunction is particularly unwarranted here, where Plaintiffs' Complaint provides no basis upon which to conclude that the DRE Program conducted by the State of Minnesota or the Minnesota State Patrol caused or contributed in any way to the alleged violations recited in Plaintiffs' Complaint.

In addition, Plaintiffs cannot show that any future injury is irreparable because there are adequate remedies available both in state civil and criminal courts. *See Fogie v. Thorn Americas, Inc.,* 95 F.3d 645, 654 (8th Cir. 1996) (plaintiff must show irreparable injury among other factors to secure permanent injunction). For example, if the Minnesota State Patrol renews its DRE Program in the future in a manner which allegedly offends the rights of an individual participant, an injunction or tort claim could then be filed in state court depending on the particular circumstances of the case. Addressing that hypothetical situation is not before this Court, is speculative, and not ripe for consideration here. For these reasons, Plaintiffs' request for injunctive relief has no legal basis and should be dismissed.

C. Plaintiffs' State Law Claims Against The State Are Barred By The Eleventh Amendment.

This Court also lacks jurisdiction over Plaintiffs' claims against the State of Minnesota or the Minnesota State Patrol under the Minnesota Tort Claims Act. *See Cooper v. St. Cloud State Univ.*, 226 F.3d 964, 968-69 (8th Cir. 2000), *citing Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89 (1984) (stating that the Eleventh Amendment bars federal court jurisdiction over state law claims against unconsenting states). "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.* at 106. Thus, the Eleventh Amendment bars a federal court from deciding claims that a state has violated or is not complying with state law, even if such claims are pendent to federal claims. *Pennhurst,* 465 U.S. at 120-21.

Accordingly, courts consistently have applied Eleventh Amendment immunity to bar state law causes of action in federal court. *See, e.g., Cooper*, 226 F.3d at 968-69 (barring Minnesota Human Rights Act claim against State university on Eleventh Amendment grounds); *DeGidio v. Perpich*, 612 F. Supp. at 1389 (D. Minn. 1985) (holding in case against Minnesota Department of Corrections officials that Minnesota Tort Claims Act is not a waiver of state's Eleventh Amendment immunity in federal court to tort suits); *Woody v. City of Duluth*, 176 F.R.D. 310, 312-13 n.2 (D. Minn. 1997) (stating that bringing state law claim in federal court against the state was "patently without merit").

Plaintiffs' state law claims against Defendant the State of Minnesota and the State Patrol for violation of the Minnesota's Tort Claims Act are, therefore, barred and must be dismissed.

II. CLAIMS AGAINST DEFENDANT RICCARDO MUNOZ SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO STATE ANY FACTS INDICATING THAT DEFENDANT MUNOZ VIOLATED PLAINTIFFS' CONSTITUTIONAL OR STATUTORY RIGHTS.

Plaintiffs' claim against Riccardo Munoz must be dismissed for failure to state a claim for which relief can be granted.[3] Plaintiffs have failed to plead any facts indicating that any state official violated Plaintiffs' rights. Accordingly, the Complaint should be dismissed.

[3] Fed. R. Civ. P. 12(b)(6) provides the authority for a court to dismiss a complaint in federal court for failure to state a claim upon which relief can be granted. The identical authority for dismissal of state claims is set forth in Minn. R. Civ. P. 12.02(e).

A claim against state officers must allege a set of facts which if proven true demonstrate that the officers violated the plaintiffs' constitutional rights while acting under color of law. *See West v. Atkins,* 487 U.S. 42, 48 (1988). "To establish personal liability of the supervisory defendants [in a 1983 case, the plaintiff] must allege facts of personal involvement or a direct responsibility for, a deprivation of [the plaintiff's] constitutional rights." *Mayorga v. Missouri,* 442 F.3d 1128, 1132 (8th Cir. 2006) (citations omitted).

Plaintiffs' suggestion that Defendant Munoz may be liable simply because he supervised the State Patrol DRE Training Program does not state a section 1983 claim. As the U.S. Supreme Court has made clear, "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Iqbal,* 556 U.S. at 677. "Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 676; *Clemmons v Armontrout,* 477 F.3d 962, 967 (8th Cir. 2007) (same). *Cf. Travis v. Reno,* 163 F.3d 1000, 1007 (7th Cir. 1998) ("[T]he proper defendant is the person whose actions cause injury, not the author of the legal rule that leads to those actions.").

In *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937 (2009), Iqbal, a Pakistani citizen, was arrested and detained upon suspicion of terrorism following the September 11, 2001 attacks. He was placed in a maximum security facility and kept on lockdown for 23 hours a day. Plaintiff brought an action against defendants alleging *inter alia* that defendants "designated Iqbal a person" of high interest "on account of his

race, religion or national origin in contravention of the First and Fifth Amendments." *Id.* at U.S. 662. The defendants ranged from correctional officers at detention facilities to the highest level of federal officials. Defendants filed a motion to dismiss the complaint because it failed to state sufficient facts, which, if accepted, would allow the Court to draw a reasonable inference that defendants engaged in the alleged misconduct. The Court agreed and concluded that the complaint failed to state a sufficient basis for relief. The Court stated:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id. at 678 (internal citations omitted).

Similarly, here, Plaintiffs' Complaint fails to state any facts upon which a plausible conclusion can be drawn that the State of Minnesota, the Minnesota State Patrol or Trooper Munoz engaged in any misconduct in violation of Plaintiffs' constitutional rights. Nor do the facts alleged by Plaintiffs provide the Court with sufficient content to allow the Court to draw the reasonable inference that Defendants are liable for the misconduct alleged.

The necessity to plead sufficient facts to allege causation by each section 1983 defendant applies whether the defendant is sued in his individual capacity, or in his

official capacity for injunctive relief. *See Jones v. Horne,* 634 F.3d 588, 600 (D.C. Cir. 2011) ("Because the person sued must have 'caused' the deprivation of rights, section 1983 liability cannot rest on a *respondeat superior* theory, whether the person is sued in his official capacity . . . or in his individual capacity[.]") (citations omitted); *Lipsett v. Univ. of Puerto Rico,* 864 F.2d 881, 884, 915 (1st Cir. 1988) (concluding chancellor could not be found liable in his individual or official capacity in section 1983 equal protection action for declaratory judgment and injunctive relief, since plaintiff failed to show chancellor had notice of alleged sexual harassment and failed to remedy it); *Corrente v. Rhode Island, Dep't of Corr.,* 759 F. Supp. 73, 78 (D.R.I. 1991) (dismissing section 1983 first amendment retaliation claim for prospective injunctive relief against governor because plaintiffs failed to plead with particularity facts that objectively alleged governor knew of and acquiesced in retaliation). *Cf. Ex Parte Young,* 209 U.S. 123, 157 (1908) (stating that fact that state official is charged, in general sense, with execution of laws, is insufficient connection to unconstitutional statute to subject that official to suit for injunctive relief); *Harris,* 106 F. Supp.2d at 1276-77 (finding governor's federal authority to enforce laws was "insufficient to make him a proper party whenever a plaintiff seeks to challenge the constitutionality of a law"). Because Plaintiffs allege only formulaic supervisory identifications, they fail to state a claim against Defendant Munoz in any capacity. *See Iqbal,* 556 U.S. at 681 ("'formulaic recitation of the elements' of a . . . claim . . . are conclusory and not entitled to be assumed true"), *citing Twombly,* 550 U.S. at 555.

The Eleventh Amendment presents a jurisdictional limit on federal courts in civil rights cases against states and their employees so this pleading requirement is strictly enforced. *Nix v. Norman,* 879 F.2d 429, 431 (8th Cir. 1989). "Generally, individual capacity suits involve actions taken by government agents outside the scope of their official duties. Official capacity suits typically involve either allegedly unconstitutional state policies or unconstitutional actions taken by state agents possessing final authority over a particular decision." *Id.* Therefore, in a civil rights action brought under 42 U.S.C. § 1983, the complaint must allege actions setting out defendant's direct involvement in the alleged unconstitutional actions. *Martin v. Sergeant,* 780 F.2d 1334, 1338 (8th Cir. 1985).

Here, it is obvious from the four corners of the Complaint that Defendant Riccardo Munoz is named solely because he had some involvement in conducting the DRE Program. Plaintiffs have failed to identify any improper conduct by Munoz. Defendant Riccardo Munoz's name appears only in the caption of the Complaint and is not mentioned in any of the factual recitations of the Complaint. There is no other reference to Riccardo Munoz or allegation of any activity in which he engaged that violated Plaintiffs' rights. More importantly, in identifying the individuals who participated in the alleged misconduct, Riccardo Munoz's name is omitted. Compl. ¶4. Thus, the Complaint fails to state a claim against Defendant Munoz.

In addition, the conclusory and boilerplate pleading suggesting that Riccardo Munoz may somehow be involved does not satisfy Plaintiffs' burden of pleading under Fed. R. Civ. P. 8 or Minnesota's counterpart to the Federal Rule. The

United States Supreme Court held that similar conclusory pleadings were insufficient to state a claim. *Ashcroft,* 556 U.S. 662, 129 S. Ct. 1937, 1959. In that case, plaintiff pled that defendant Ashcroft and others "knew of, condoned and willfully and maliciously agreed to subject to harsh conditions of confinement as a matter of public policy solely on account of religion, race and national origin." The complaint also identified Ashcroft as the "principle architect." *Id.* at 680, 695, 129 S. Ct. at 1951. The Supreme Court held that those assertions were conclusory and "not entitled to be assumed true." The court concluded that plaintiff would have to prove more factual content that would "nudge" his claim of purposeful discrimination "across the lines from conceivable to plausible." *Id.* at 678-680, 129 S. Ct. 1937, 1949-51. *Citing Twombly,* 550 U.S. at 570 (clarifying the necessity of sufficient allegation of fact rather than conclusory. Similarly, Plaintiffs in this case have failed to make any allegations of fact establishing that Defendant Munoz took any action that violated Plaintiffs' constitutional rights.

The Complaint should also be dismissed as to Defendant Munoz because it fails to state sufficient facts supporting the claim that Defendant Munoz violated Plaintiffs' constitutional or statutory rights under federal or state law.

CONCLUSION

The State of Minnesota, the Minnesota State Patrol and Riccardo Munoz request that this Court dismiss the Complaint for failure to state a claim upon which relief can be granted.

Dated: March 27, 2013.

Respectfully submitted,
OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

s/Jeffrey S. Bilcik
Jeffrey S. Bilcik
Assistant Attorney General
Atty. Reg. No. 0136268

445 Minnesota Street, Suite 1800
St. Paul, Minnesota 55101-2134
Telephone: (651) 757-1205
Fax: (651) 297-4077
jeffrey.bilcik@ag.state.mn.us

Attorney for Defendants The State of Minnesota, The Minnesota State Patrol, and Riccardo Munoz