**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' MEMORANDUM IN SUPPORT OF RULE 12 MOTION TO DISMISS IN LIEU OF AN ANSWER**

---

## INTRODUCTION

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 with marijuana, observed the effects, and returned Plaintiffs to a site where they participated in an "Occupy Minneapolis" protest. No Plaintiff claims he or she was forced to use marijuana, forced to participate in the program, or threatened with arrest if he or she did not participate, and all six Plaintiffs were returned to their protest site to continue protesting. Plaintiffs' claims do not arise to the level of a constitutional violation; and accordingly, Defendants are entitled to qualified immunity and the dismissal of Plaintiffs' claims.

## FACTS

The City and County Defendants seek 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 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.

## STANDARD OF REVIEW

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

[3] The referenced video may be viewed at http://www.youtube.com/watch?v=vTgN17F26KE.

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.

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.* This claim appears to be a First Amendment retaliation claim. Plaintiffs essentially argue officers targeted protestors to remove them from their protest, get them high, and then abandon them.

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.* 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)).

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

**B. Fourth Amendment.**

Plaintiffs next allege Defendants violated their Fourth Amendment rights, but Plaintiffs do not explain the basis for their Fourth Amendment claim. *Complaint, ¶ 57.* While they allude to an unreasonable seizure, a seizure only occurs when an officer restrains the liberty of an individual through physical force or show of authority. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). That is, when an officer restrains an individual's freedom to walk away, he has "seized" that person. *Id.*

Voluntary encounters do not constitute seizures under the Fourth Amendment. *United States v. Hendrix*, 726 F.2d 433, 434 (8th Cir. 1984). In *Hendrix*, the Eighth Circuit Court of Appeals upheld a district court's determination a suspect's voluntary encounter with a DEA agent was not a seizure. *Id.* After determining Hendrix fit a drug courier profile, a DEA agent identified himself and asked Hendrix to speak with him. *Id.* at 433. Hendrix agreed to accompany the agent to a small first aid room with two other law enforcement agents. *Id.* at 433-34. The agent asked several questions about Hendrix's trip and luggage. *Id.* at 434. After 45 minutes, the agents told Hendrix he could not take a briefcase with him and Hendrix refused to allow them to search the briefcase. *Id.* Hendrix was permitted to leave. *Id.* Hendrix was subsequently charged with possession of a controlled substance with intent to distribute and he sought to exclude his statements to the agents as fruits from an illegal arrest. *Id.* The Eighth Circuit agreed the DEA agent's initial approach of Hendrix was not a seizure of his

person. *Id.* His discussion with the agent was voluntary, both outside and inside the airport terminal, and he was free to leave at any time. *Id.*

Here, Plaintiffs do not claim they were restrained or forced to participate in the DRE program. Participation was entirely voluntary. While Plaintiffs generally allege they were intimated individuals would be arrested if they did not participate, none of the named Plaintiffs in this action actually claim an officer threatened them with arrest if they did not voluntarily participate. Plaintiffs' own YouTube video shows a participant literally hopping in the back of a squad car. *Video at 1:39-1:54.*

Accordingly, Plaintiffs have not alleged any facts to convert their voluntary participation into an unconstitutional seizure under the Fourth Amendment.

**C. Eighth Amendment.**

Plaintiffs next assert an Eighth Amendment violation but no plaintiff was a convicted prisoner during the DRE training. *Complaint, ¶ 57.* The Eighth Amendment protects convicted prisoners against cruel and unusual punishment, including excessive force, and imposes a duty upon prison officials to provide humane conditions of confinement and to take reasonable measures to guarantee the safety of inmates. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Hudson v. McMillian*, 503 U.S. 1 (1992). Plaintiffs were not convicted prisoners so Plaintiffs' Eighth Amendment claim must be dismissed.

**D. Fourteenth Amendment.**

Next, Plaintiffs' claim under the Fourteenth Amendment appears to be a substantive due process claim. *Complaint, ¶ 57.* 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).

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]

Accordingly, Plaintiffs fail to allege facts to support a substantive due process violation.

**E. Plaintiffs Fail To State A Claim For Any Other § 1983 Relief.**

Although not stated as a legal claim in their Complaint, Plaintiffs mention 45 C.F.R. § 46.101, et seq., federal regulations governing human subject research. *Complaint, ¶ 21.* These federal regulations do not provide a private cause of action and they are not enforceable under § 1983, despite counsels' prior attempts. *See Wright v. Fred Hutchinson Cancer Research Center*, 269 F.Supp.2d 1286, 1289 (W.D. Wa. 2002).

[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).

Only Congress can create new rights enforceable under § 1983, and agency regulations cannot give rise to a private cause of action when the authorizing statute does not confer such a right. *Id.* (citing *Gonzaga Univ. Doe*, 536 U.S. 273 (2002)).

Plaintiffs also mention the Belmont Report but do not assert a legal claim based on the guidelines. *Complaint, ¶ 25.* The Belmont Report provides guidelines for ethical conduct of research involving human subjects. *Id.* In *Wright*, plaintiffs asserted a claim they were third-party beneficiaries to a contract between the center and the Department of Health and Human Services for following guidelines for ethical conduct of research, abiding by federal regulations, and presenting research to a review board for approval. 269 F.Supp.2d at 1290. There was no language in the agreement that granted any subject a private cause of action and the court dismissed the claim. *Id.* Here, there are no facts alleged that there is a contractual grant to anyone to bring a private cause of action regarding research guidelines.

Accordingly, Plaintiffs cannot state a claim upon which relief can be granted under any of the federal regulations or research guidelines.

## II. PLAINTIFFS FAIL TO STATE A CLAIM FOR RELIEF UNDER MINN. STAT. § 3.736.

Plaintiffs assert the Defendants' conduct violates the Minnesota State Tort Claims Act and is not subject to any immunity set forth in the statute. *Complaint, ¶ 65.* Section 3.736 is an indemnification statute applicable to the State of Minnesota. *See* Minn. Stat. § 3.736. This statute does not provide Plaintiffs a private cause of action. *See id.*

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

Plaintiffs name numerous police departments and sheriff's departments as Defendants. 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.

## 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

Dated: March 29, 2013

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