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.: 0:13-cv-00266 (JRT/FLN)

ANOKA COUNTY DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiffs' claims against all Defendants are based on their 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 they were forced to use marijuana, forced to participate in the program, or threatened with arrest if they did not participate.

Plaintiffs' claims do not arise to the level of a constitutional violation and Defendants are entitled to qualified immunity and the dismissal of

Plaintiffs' claims. The Anoka County Defendants seek this Motion to Dismiss in lieu of an Answer.[1]

FACTS[2]

Plaintiffs imply that Officer Chris McCall of the Anoka County Sheriff's Office, while participating with other law enforcement officers 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." (Doc. 1, ¶ 10 and ¶ 11)[3] Plaintiffs allege that the DRE program was designed to target individuals who were "Occupy Minneapolis" participants, the homeless, and drug addicts. *Id.,* ¶¶ 12-14. There is no allegation that the Plaintiffs did not voluntarily participate in the program. *Id.* ¶ 18; ¶¶ 28 - 42. Participants did not sign informed consent forms or provide their medical histories before participating. *Id.,* ¶¶ 18-19. Plaintiffs allege that Participants received food, cash, cigarettes or illegal drugs for participating. *Id.,* ¶ 17. Plaintiffs also allege some unnamed officers

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[1] The "Anoka County Defendants" refers to the Anoka County Sheriff's Office and Deputy Chris McCall of the Anoka County Sheriff's Office.

[2] The Anoka County Defendants accept the facts as alleged in Plaintiffs' Complaint as true, only for the purpose of this motion.

[3] "Doc. 1" refers to Plaintiff's complaint filed as Docket # 1.

"intimated to the 'volunteers' that they would be arrested if they did not participate." *Id.* Plaintiffs supply no factual allegations to support these allegations.

Plaintiff Michael Bounds claims that, on April 26, 2012, he was approached by two unidentified officers. *Id.,* ¶ 28. The officers asked Bounds if he was high. 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 that his participation was not voluntary, nor does he allege that he was threatened with arrest if he did not get high, nor does he identify the officers involved.

Plaintiff Forest Olivier alleges that, on April 27, 2012, he was approached three separate times and offered drugs by officers. *Id.,* ¶ 33. On the first two occasions Olivier was given marijuana, taken to the DRE facility for evaluation, evaluated by officers, and subsequently returned to Peavey Plaza. *Id.,* ¶¶ 34-35. On the third occasion, Olivier alleges he was approached

by Officer Willers[4] and another officer that 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 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 because of his involvement with OccupyMinneapolis. *Id.,* ¶ 40. Olivier was subsequently returned to downtown Minneapolis. *Id.,* ¶ 41. Olivier does not allege that his participation was not voluntary, nor does he allege that he was threatened with arrest if he did not participate, nor does he identify any Anoka County Defendants as being the officers involved.

Plaintiffs assert Wia Day, Adam Laguna, Daniel Bell, and Zachary Lorenz had similar experiences but the Complaint does not provide specific details. *Id.,* ¶ 42. Plaintiffs Day, Laguna, Bell, and Lorenz do not allege that they actually participated in the DRE program, that they were members of Occupy Minneapolis, nor do they allege they were threatened with arrest if they did not participate nor do they identify any of the officers who asked

[4] Plaintiffs name Officers Karl Willers and Kenneth Willers in their complaint, but do not identify which Officer Olivier that is being referred to in this allegation.

them to participate in the program. Additionally, none of the Plaintiffs allege that they unknowingly were administered a drug.

At no point in their complaint do Plaintiffs allege that any Anoka County Defendants offered any of the Plaintiffs drugs, assisted any officers who offered drugs to the Plaintiffs or had any contact with any of the Plaintiffs. *Id.* at ¶¶ 28 – 50.

STANDARD OF REVIEW

A party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). For purposes of the motion to dismiss, the court takes all facts alleged in the Complaint as true. *See*, *Westcott v. Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990); *Hamm v. Groose*, 15 F.3d 110, 112 (8th Cir. 1994); *Ossman v. Diana Corp.*, 825 F. Supp. 870, 879-80 (D. Minn. 1993). The Court must construe the allegations in the Complaint and reasonable inferences arising from the Complaint favorably to Plaintiff. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). A motion to dismiss will be granted if "it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Id.*

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 the misconduct alleged." *Ashcroft v. Iqbal*, 556 US 662, 663 (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.* at 663-664. "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." *Ashcroft,* 556 US at 678.

ARGUMENT

I.

PLAINTIFFS' CLAIMS AGAINST THE ANOKA COUNTY DEFENDANTS SHOULD BE DISMISSED IN THEIR ENTIRETY BECAUSE PLAINTIFFS DID NOT PLEAD FACTS SHOWING PERSONAL INVOLVEMENT.

Plaintiffs have failed to plead any facts alleging that Deputy Chris McCall or any other Anoka County official was personally involved with the alleged misconduct.

The only specific allegation in the Complaint that relates directly to Deputy McCall or Anoka County is as follows:

> 4. At all relevant times, Defendants . . . Chris McCall of the Anoka County Sheriff's Department[5]. . . [was a] duly authorized police officer[ ] deputized to perform official functions and acting under color of state law. These Defendants are being sued in their official and individual capacities (Doc. 1, ¶4).

The remaining allegations in the Complaint address the actions of named individual defendants (which do not include the Anoka County Defendants) or allege, in a conclusory fashion that all defendants "individually and collectively designed, developed, and/or ran a program called the "Drug Recognition Evaluators" program and that therefore they must be liable to Plaintiffs (*Id.,* ¶9). Plaintiffs allege guilt by association, claiming that any unspecified officers who did not actually participate in the alleged unlawful conduct "knew about, and failed to stop it, in reckless disregard of the Plaintiffs rights" (*Id.,* ¶15-16). These types of conclusory and non-specific allegations are insufficient to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

A complaint that only lists a defendant's name in the caption or elsewhere in the complaint, without alleging that the defendant was personally involved in the alleged misconduct, fails to state a claim against a

[5] It is properly called the Anoka County Sheriff's Office.

defendant. *Krych* v. *Hvass,* 83 F. App'x. 854, 855 (8th Cir. 2003) (citing *Potter* v. *Clark,* 497 F.2d 1206, 1207 (7th Cir. 1974) (per curium) (holding that court properly dismissed complaint that was silent as to defendant except for his name appearing in the caption)).

A § 1983 claim against a police officer must allege a set of facts which, if proven true, demonstrate that the officer violated the plaintiff's constitutional rights while acting under color of state law. *See West* v. *Atkins,* 487 U.S. 42, 48 (1988). In a civil rights action brought pursuant to 42 U.S.C. § 1983, the complaint must contain allegations setting out a defendant's direct involvement in the alleged unconstitutional actions. *Martin* v. *Sargent,* 780 F.2d 1334, 1338 (8th Cir. 1985). Mere knowledge is not sufficient to establish personal participation. *Ashcroft,* 550 U.S. 662, 677 (2009). "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." *Ashcroft,* 550 U.S. at 676. Additionally, courts have held that "a well-pleaded complaint must contain something more than mere conclusory statements that are unsupported by specific facts." *Kaylor* v. *Fields,* 661 F.2d 1177, 1183 (8th Cir. 1981).

Plaintiffs in this case have failed to make any allegations of fact showing that it is plausible that Deputy McCall took any action or failed to

take any action with the intent of violating their federal civil rights. Plaintiffs do not even allege that they ever had contact with Deputy McCall or anyone else from the Anoka County Sheriff's Office. In sum, Plaintiffs' Complaint fails to state any facts upon which a plausible conclusion can be drawn that Deputy McCall or the Anoka County Sheriff's Office engaged in any misconduct. Additionally, the facts as alleged by Plaintiffs do not provide the Court with sufficient information to allow the Court to draw the reasonable inference that Anoka County Defendants are liable for the misconduct alleged. For the foregoing reasons, the claims against the Anoka County Defendants should be dismissed in their entirety and with prejudice.

II.

PLAINTIFFS' § 1983 CLAIMS AGAINST DEFENDANT ANOKA COUNTY DEPUTY CHRIS MCCALL SHOULD BE DISMISSED BECAUSE HE IS ENTITLED TO QUALIFIED IMMUNITY.

"Under the doctrine of qualified immunity, a county employee may be held personally liable for a constitutional violation only if his own conduct violated a clearly established constitutional right" of which a reasonable person would have known. *Baribeau v. City of Minneapolis,* 596 F.3d 465, 482 (8th Cir. 2010); *Pearson* v. *Callahan,* 555 U.S. 223, 232 (2009). Qualified immunity is decided by the district court, and it is "immunity from suit rather than a mere defense to liability." *Pearson,* 555 U.S. at 231 (quoting *Mitchell* v. *Forsyth,* 472 U.S. 511, 526 (1985)).

"Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985). 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 from harassment, distraction, and liability when they perform their duties reasonably." *Pearson,* 555 U.S. at 231.

A. Deputy McCall Is Entitled To Qualified Immunity Because His Conduct Did Not Violate The Plaintiffs' Constitutional Rights.

As argued above, Plaintiffs have not pleaded any facts upon which a plausible conclusion or even an inference can be drawn that Deputy McCall or the Anoka County Sheriff's Office engaged in any misconduct. Plaintiffs cannot even establish by inference through the allegations made in their complaint that Deputy McCall had contact with them. For this reason alone, the claims should be dismissed and Deputy McCall is entitled to qualified immunity. But even if this Court concludes that it is plausible or inferable that Deputy McCall and Anoka County engaged in the conduct alleged in the Complaint, Plaintiffs do not establish that their federal rights were violated.

III.

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. Plaintiffs Fail to State Any First Amendment Claims Against The Anoka County Defendants.

Plaintiffs allege officers targeted "Occupy Minneapolis" protestors exercising their First Amendment right to free speech and peaceful assembly. (Doc. 1, ¶ 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.[6]

A plaintiff must show a causal connection between a defendant's retaliatory animus and plaintiff's subsequent injury to establish a First Amendment Claim. *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). Plaintiffs additionally must establish that 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*

[6] Plaintiffs only allege that Bounds and Oliver are members of Occupy Minneapolis. Plaintiffs Day, Laguna, Bell, and Lorenz do not allege that they were members of Occupy Minneapolis.

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. Plaintiffs also fail to allege how each were specifically harmed by any actions of the Anoka County Defendants. 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. Plaintiffs Fail to State Any Fourth Amendment Violation Against The Anoka County Defendants.

Plaintiffs next allege Defendants violated their Fourth Amendment rights, but Plaintiffs do not explain the basis for their Fourth Amendment claim. (Doc. 1, ¶ 57.) In determining whether an encounter between a police officer and a citizen constitutes a Fourth Amendment detention or seizure, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and

go about his business." *Florida v. Bostick,* 501 U.S. 429, 437, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (quoting *Michigan v. Chesternut,* 486 U.S. 567, 569, 108 S.Ct. 1975, 100 L.Ed.2d 565.) Examples of circumstances that might indicate a seizure would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980). Voluntary encounters are not seizures under the Fourth Amendment. *United States v. Hendrix*, 726 F.2d 433, 434 (8th Cir. 1984). Further, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen . . . ." *Bostick,* 501 U.S. at 438 (quoting *Florida v. Royer,* 460 U.S. 491, 497 (1983)).

Plaintiffs were asked if they wanted to participate in the DRE program. Defendants did not touch Plaintiffs, make any commands of them, display their weapons in a menacing manor, or otherwise take any action to restrain or control Plaintiffs' movements. While Plaintiffs generally allege they were intimated by being 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.

Applied to the facts of this case, the Plaintiffs were not seized within the meaning of the Fourth Amendment when they were asked to voluntarily participate in the DRE program.

C. Plaintiffs Fail to State Any Eighth Amendment Claim Against The Anoka County Defendants.

Plaintiffs also assert an Eighth Amendment violation. (Doc. 1, ¶ 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 nor is there is there an allegation that they were convicted prisoners, so Plaintiffs' Eighth Amendment claim must be dismissed.

D. Plaintiffs Fail to State Any Fourteenth Amendment Claim Against The Anoka County Defendants.

Plaintiffs also seem to be making a substantive due process claim under the Fourteenth Amendment. (Doc. 1, ¶ 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*, the court held that the participants in the research knew the true nature of the experiments, refusing 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. "Knowledge that one is participating in a human subjects experiment … is a "crucial" factor in determining whether a constitutional right is at stake." *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.[7]

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 Against The Anoka County Defendants.

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. (Doc. 1, ¶ 21.) These federal regulations do not provide a private cause of action enforceable under § 1983. *See Wright v. Fred Hutchinson Cancer Research Center*, 269 F. Supp. 2d 1286, 1289 (W.D. Wa. 2002). 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. v. Doe*, 536 U.S. 273 (2002)). [8]

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

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[7] 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).

[8] Plaintiffs also mention the Belmont Report but do not assert a legal claim based on the guidelines. (Doc. 1, ¶ 25.)

IV.

PLAINTIFFS FAIL TO STATE A CLAIM FOR RELIEF UNDER MINN. STAT. § 3.736 AGAINST THE ANOKA COUNTY DEFENDANTS.

Plaintiffs assert the Defendants' conduct violates the Minnesota State Tort Claims Act and is not subject to any immunity set forth in the statute. (Doc. 1, ¶ 65.) Minn. Stat. § 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 against the Anoka County Defendants.

V.

THE ANOKA COUNTY SHERIFF'S OFFICE IS NOT SUBJECT TO SUIT.

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). Courts have similarly held that a sheriff's office 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), citing, *Polta v. City of St. Paul Police Dep't,* 06–CV–1014, 2006 WL 1174210 at *2 (D. Minn. May 1, 2006).

Therefore, the Anoka County Sheriff's Office is not a legal entity 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.

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Dated: April 3, 2013.

By: *s/Thomas G. Haluska*_____

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