UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

C. MCCADDEN, by his next friend, CHRYSTAL MCCADDEN

Plaintiff,

v

CITY OF FLINT, et al.,

Defendants.
_____/

Case No. 2:18-cv-12377-DPH-MKM
Hon. Denise Page Hood

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REPLY BRIEF IN SUPPORT OF CITY DEFENDANTS' PARTIAL MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

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CONTROLLING AUTHORITY SUPPORTING MOTION

Movants rely primarily upon the following most controlling or persuasive authority in support of this motion:

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

While what happened to Plaintiff C. McCadden was unfortunate, it does not excuse his failure to plead viable claims against the City of Flint and Chief Timothy Johnson. Dismissal of all claims against them remains warranted.

II. ANALYSIS

McCadden argues that he satisfied the *Iqbal* and *Twombly* plausibility standard, but fails to examine or correctly apply that standard. *Iqbal* instructs that "[w]here 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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). *Iqbal* also holds that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679. In other words, a plaintiffs allegations must not only be compatible with illegal conduct, but must also not be easily explained by legally permitted activity. McCadden fails to satisfy this standard and so dismissal remains warranted.

A. THE FLINT POLICE DEPARTMENT IS NOT, IN ANY WAY, A SEPARATE LEGAL ENTITY FROM THE CITY OF FLINT

McCadden argues that "[i]n Flint the police department is for all practical purposes an active, viable, independent entity notwithstanding the fact that technically it is a division of the City of Flint." Pl. Resp., Dkt 20, at 19. This

conclusory allegation lacks any support beyond his own wishful thinking. The organization of the City and its departments is no mere technicality.

The Flint Police Department ("FPD") is a department of the City. *See* Flint City Charter, §4-203; Flint Code of Ord., §2-75 *et seq.* (attached as Exhibit A). The Mayor appoints FPD's Chief, with the authority to lead, organize, and enact rules for FPD, *subject to the Mayor's approval*. *See* Flint Code of Ord., §2-76, 78-79. FPD exists to exercise City functions, cannot independently raise funds, and is completely dependent on the City of Flint for funding. *See McPherson v. Fitzpatrick*, 63 Mich. App. 461, 463-64, 234 N.W.2d 566, 568 (1975) (police department may not be sued in tort because department is only a means of efficient municipal operation and has no ability to independently raise funds).

Sixth Circuit precedent directs that as Chief Johnson is named only in his official capacity, McCadden's claims against him are duplicative of his claims against the City and can serve no legitimate, legal purpose. *See Doe v. Claiborne Cty.*, 103 F.3d 495, 509 (6th Cir. 1996). The claims against Chief Johnson should therefore be dismissed.

B. MCCADDEN HAS FAILED TO PLAUSIBLY ALLEGE AN UNCONSTITUTIONAL CITY POLICY JUSTIFYING *MONELL* LIABILITY

McCadden's constitutional claim is for an alleged unconstitutional seizure. He appears to concede that FPD's Juvenile Offender policy is the relevant policy but argues that he "set[] forth facts that make plain that the Defendant officer complied

with this official policy in unconstitutionally handcuffing Plaintiff." Pl. Resp., Dkt 20 at 13. This disingenuous argument lacks merit because it falsely implies that FPD's policy required or directed that Officer Walker handcuff McCadden.

In contrast, Section III(C)(2) of FPD's Juvenile Offenders Policy clearly states that "[j]uveniles taken into custody for status offenses should normally be frisked for weapons . . . and may be handcuffed or otherwise restrained at any time ***if, in the judgment of the officer, the juvenile poses a physical risk to the officer or others***." *See* Dkt 15-1, at 4 (emphasis added). Nothing in the policy *requires* that officers handcuff juveniles. Instead, it allows officers to do so *if* the officer determines that a juvenile poses a physical risk to the officer or others.

FPD's Juvenile Offenders Policy thus provides officers with discretion and guidance in applying that discretion. This could only be constitutionally deficient if there were *no* situations under which juvenile handcuffing were permittted. No authority supports this position and dismissal as to the City is thus warranted.

McCadden also attempts to delay dismissal by arguing that "at a later stage in the case, the finder of fact will determine whether the officer's use of handcuffs on a seven-year old child with a disability for an hour was 'objectively reasonable' . . ." Pl. Resp., Dkt 20 at 13. This argument is also without merit because it conflates the issues of whether Officer Walker's actions were "were objectively reasonable" and whether the FPD Juvenile Offender Policy was itself constitutionally deficient.

While related, the answers to each questions is not dependent on the other. Allowing juvenile handcuffing only when an officer determines that "the juvenile poses a physical risk to the officer or others" satisfies constitutional standards, which requires just such a particularized determination. *See Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 1872 (1989) ("The question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.").

This highlights why prior instances of unconstitutional conduct are generally needed to justify *Monell* liability. *See Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013). While McCadden selectively cites from *Connick v. Thompson* in an attempt to invoke single-incident liability, he fails to acknowledge that, in that case, the Supreme Court did *not* recognize single-incident liability. *Connick v. Thompson*, 563 U.S. 51, 54, 131 S. Ct. 1350, 1356 (2011). Instead, *Connick* held that a prosecutor's office's failure to train on *Brady* obligations did not justify single-incident liability for two main reasons. *Id.* at 54. First, *Connick* recognized that prosecutors have legal training, are subject to ongoing training and ethical requirements, and could reasonably be presumed to understand their legal duties. *Id.* at 64-66. Second, it noted that the hypothetical used to justify potential single-incident liability "assumes that the armed police officers *have no knowledge at all of the constitutional limits on the use of deadly force."* *Id.* at 67 (emphasis added).

Using that *Connick* analysis, single-incident liability is not warranted here. FPD officers must satisfy the training requirements of the Michigan Commission on Law Enforcement Standards (MCOLES) to be employed as police officers. *See* MCL §28.601 *et seq*; *see also* Mich. Admin. Code R28.14101 *et seq*. MCOLES has published an Approved Basic Training Curriculum that includes training relevant here, such as Modules I(C)(3)-(4): "Laws of Arrest" and "Arrest Procedures"; Module II(B)(2): "Laws Pertaining to Civil Rights and Human Relations" (including ADA Title II and the PWDCRA); Module II(E)(1): "Dealing with Juvenile Offenders"; and Module IV(C): "Arrest and Search." *See* Exhibit B: MCOLES Basic Training Curriculum. Clearly, Flint's police officers are not untrained, as were the theoretical officers in *Connick's* hypothetical

As a result, this is not a situation where the City utilizes untrained police officers despite the obvious need for such training. Instead, at best, McCadden can only reasonably argue that the training is inadequate. However, the inadequacy of this training and need for additional training cannot be established without a pattern of violations showing that such training is needed. *See Burgess*, 735 F.3d at 478. McCadden fails to allege such a pattern and his *Monell* claim therefore fails.

C. MCCADDEN'S ADA, REHABILITATION ACT, AND PWDCRA CLAIMS ARE INADEQUATELY PLED AGAINST THE CITY OF FLINT

McCadden's Response also tries to excuse his failure to plead key elements of his ADA, Rehabilitation Act, and PWDCRA claims by arguing that here has been

insufficient factual development. However, his error cannot be rectified by "fleshing out" allegations in his Complaint with discovery. Instead, his error is that key allegations are missing, conclusory, or are contradicted by public records.

As previously explained, FPD did not have "a policy and practice of imposing unnecessary mechanical restraints such as handcuffs on children with disabilities," Compl., at ¶74, but instead had a policy that granted officers discretion to handcuff a juvenile if "the juvenile poses a physical risk to the officer or others." This policy simply cannot violate the ADA, Rehabilitation Act, or PWDCRA, especially since McCadden has failed to allege that the City or Officer Walker *knew that McCadden suffered from a disability and required any accommodation under those statutes.* While he alleges that *YouthQuest* staff were so informed, *see* Compl., Dkt 1 at ¶¶32-33, he does not allege that this information was ever provided to the City or Officer Walker. Indeed, McCadden himself admits that Officer Walker was relatively unknown, which weighs against the reasonableness of any inference that he was informed of McCadden's disability. Compl., Dkt 1 at ¶¶39-40.

Absent such knowledge, the City and Officer Walker could not have discriminated against McCadden *because* of his disability. *See Tucker v. Tennessee*, 539 F.3d 526, 532 (6th Cir. 2008) ("the plaintiff must show that the discrimination was *intentionally* directed toward him or her in particular"). McCadden has thus failed to plausibly allege a City policy that discriminates against him, which he must

do in order to allege an ADA claim. *See Anderson v. City of Blue Ash*, 798 F.3d 338, 357 (6th Cir. 2015). Nor has he plausibly alleged that the City enacted a discriminatory policy for the purpose of discriminating against people such as him, or that the allegedly discriminatory policy was aimed at him in particular. *See id.* Furthermore, while McCadden now argues that he was discriminated against with respect to the service of law enforcement in making arrests, Pl. Resp., Dkt 20 at 21, this new argument still fails unless Officer Walker or the City knew of McCadden's disability and discriminated against him because of that disability.

Consequentially, McCadden's ADA claim against the City still fails. McCadden appears to acknowledge that the failure of his ADA claim will necessarily result in the failure of his Rehabilitation Act (which also fails due to his failure to allege that he was discriminated against solely because of his disability) and PWDCRA claims. *See, e.g.*, *Gohl v. Livonia Pub. Sch. Sch. Dist.*, 836 F.3d 672, 690 (6th Cir. 2016)); *Donald v. Sybra, Inc.*, 667 F.3d 757, 764 (6th Cir. 2012). Dismissal of those claims thus remains warranted.

III. **CONCLUSION**

The City and Chief Johnson respectfully request that this Court dismiss all counts of Plaintiff's Complaint as applied to them.

Respectfully submitted,

Dated: November 19, 2018 **/s William Y. Kim (P76411)**

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2018, I electronically filed the foregoing pleadings using the ECF system which will send notification of such filing to the counsels of record.

Dated: November 19, 2018 **/s William Y. Kim (P76411)**