

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK OTTOVICH, HARVEY OTTOVICH,
individuals,

Plaintiffs,

v.

CITY OF FREMONT: CITY OF FREMONT
POLICE OFFICERS, RICARDO CORTES
AS DOE 1, SARGEANT HEININGE AS DOE
2, OFFICER SETTLE AS DOE 3, OFFICER
DANG AS DOE 4, Farmer as doe 5,
VETERANS ADMINISTRATION PALO
ALTO HEALTH CARE SYSTEM AS DOE 6,
VETERANS ADMINISTRATION PALO
CARE SYSTEM EMPLOYEE JOANIE
DROBRICK PATIENT ADVOCATE as Doe
7, DOES 8 THROUGH 25,

Defendants.

No. CV-09-04181 MMC

**ORDER GRANTING DEFENDANT CITY
OF FREMONT'S MOTION TO DISMISS
THIRD AMENDED COMPLAINT**

Before the Court is defendant City of Fremont's ("Fremont") Motion to Dismiss
plaintiffs' Third Amended Complaint ("TAC"), filed April 27, 2010, by which Fremont seeks,
pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissal of plaintiffs'
First through Fourth Causes of Action.¹ Plaintiffs Mark Ottovich and Harvey Ottovich have

¹ Plaintiffs' Fifth Cause of Action is alleged only against defendant Veterans
Administration. (See TAC ¶¶ 70-72.)

1 filed opposition,² to which Fremont has replied. Having read and considered the papers
2 filed in support of and in opposition to the motion, the Court deems the matter appropriate
3 for determination on the parties' written submissions, hereby VACATES the June 4, 2010
4 hearing, and rules as follows.

5 **BACKGROUND**

6 On April 13, 2010 plaintiffs' filed their TAC, in which plaintiffs allege, as against
7 Fremont, two Causes of Action under 42 U.S.C. § 1983:³ (1) "Deprivation of Civil Rights as
8 a Result of Official Custom or Policy" (Third Cause of Action), and (2) "Deprivation of Civil
9 Rights as a Result of All Entity [sic], In their Official Capacity, Defendants' Failure to Train
10 Their Officers" (Fourth Cause of Action).

11 In support of said claims, plaintiffs allege the following: On or about November 14,
12 2006, police officers employed by Fremont forcibly entered Mark Ottovich's office, without a
13 warrant, in search of Harvey Ottovich, Mark's brother. (TAC ¶¶ 13, 22-24.) At such time,
14 Harvey was not present at Mark's office (*id.* ¶ 24), and Mark was arrested under the
15 "pretext" that said officers believed Mark to be Harvey (*id.* ¶ 33). The officers were on
16 notice that Mark was not Harvey by reason of, *inter alia*, repeated statements by an
17 employee at the scene that Harvey was not present (*id.* ¶¶ 25), identifications of Mark by
18 two other individuals who worked and/or lived in the building (*id.* ¶ 25, 34), Mark's arrest in
19 an office having a door bearing his name and while he was carrying identification in his
20 name (*id.* ¶ 33), and the officers' receipt of a description of Mark from the police dispatcher
21 (*id.* ¶ 34). No charges were filed against Mark arising from the above-described events.

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23 ² Although the First through Fourth Causes of Action are alleged to be brought on
24 behalf of "plaintiffs," plaintiffs have indicated in a prior filing that said causes of action are
25 brought only on behalf of Mark Ottovich. (*See* Pls.' Opp'n (Docket No. 33) at 1:25-2:2, 6:3-
6.) Consequently, all claims to which the instant motion is addressed are brought solely on
26 behalf of Mark Ottovich.

27 ³ By the Court's order of March 16, 2010, plaintiffs' First and Second Causes of
28 Action, to the extent they were alleged against Fremont, were dismissed without leave to
amend. (*See* Mar. 16 Order at 7:16-17.) Although plaintiffs' TAC realleges such claims
against Fremont, plaintiffs, in their opposition to the instant motion, make clear they have
withdrawn those claims. (*See* Pls.' Opp'n at 4:14-5:5.)

1 (Id. ¶ 31.)

2 Plaintiffs further allege that Mark Ottovich “is informed and believes” that the named
3 Fremont police officers, for “approximately 34 years,” have engaged in an “ongoing pattern
4 and practice of harassment and arresting” Mark Ottovich (id. ¶¶ 13, 14), as evidenced by
5 the following: “[o]n several occasions he [was] arrested but no charges were filed against
6 him, or the complaint filed by the district attorney was dismissed” (id. ¶ 14), he “has been
7 pulled to the side of the road” and “giv[en] a sobriety test . . . when he does not drink” (id. ¶
8 14), and, in 2008, he was arrested for “dumping garbage in a dumpster when in fact he was
9 . . . authorized” to do so (id. ¶ 15). Plaintiffs’ allege that Fremont’s “training program was
10 not adequate to train its officers to properly handle usual and recurring situations” (id. ¶ 64),
11 that Fremont was “deliberately indifferent to the need to train its officers adequately” (id. ¶
12 65), and that the above-described conduct on the part of the named Fremont police officers
13 “occurred as a result of official policy or custom of the City of Fremont” (id. ¶ 58).

14 All of the above-referenced allegations were contained in plaintiffs’ Second
15 Amended Complaint (“SAC”). In the TAC, plaintiffs additionally allege, on “information and
16 belief,” that Fremont police officers make “arrest[s] without probable cause, search without
17 probable cause,” and “incarcer[ate]” individuals who are “never charged with a crime” (id. ¶
18 61) and that such conduct is “routinely practiced and committed on an ongoing basis by . . .
19 Fremont police officers . . . only for the purpose of harassment of individuals and for no
20 legitimate law enforcement purpose, . . . [and] occurs as either official policy or custom of
21 the City of Fremont” (id. ¶ 61). Similarly, plaintiffs’ allege, “[t]he City of Fremont’s
22 official policy and/or custom of deliberate indifference toward its citizens . . . has resulted in
23 its officers[’] . . . failure to observe the distinctions between reasonable suspicion to detain
24 and probable cause to arrest.” (Id. ¶ 62.)

25 **LEGAL STANDARD**

26 Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure can be based
27 on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a
28 cognizable legal theory. See Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir.

1 1990). Rule 8(a)(2), however, “requires only ‘a short and plain statement of the claim
2 showing that the pleader is entitled to relief.’” See Bell Atlantic Corp. v. Twombly, 550 U.S.
3 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, “a complaint attacked by
4 a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations.” See id.
5 Nonetheless, “a plaintiff’s obligation to provide the grounds of his entitlement to relief
6 requires more than labels and conclusions, and a formulaic recitation of the elements of a
7 cause of action will not do.” See id. (internal quotation, citation, and alteration omitted).

8 In analyzing a motion to dismiss, a district court must accept as true all material
9 allegations in the complaint, and construe them in the light most favorable to the
10 nonmoving party. See NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).
11 “To survive a motion to dismiss, a complaint must contain sufficient factual material,
12 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,
13 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570). “Factual allegations
14 must be enough to raise a right to relief above the speculative level[.]” Twombly, 550 U.S.
15 at 555. Courts “are not bound to accept as true a legal conclusion couched as a factual
16 allegation.” See Iqbal, 129 S. Ct. at 1950 (internal quotation and citation omitted).

17 DISCUSSION

18 **A. Third Cause of Action: Deprivation of Civil Rights as a Result of Official 19 Custom or Policy**

20 In the Third Cause of Action, plaintiffs, as noted, again allege the above-described
21 conduct on the part of the named Fremont police officers was the “result of official policy or
22 custom of the City of Fremont.” (TAC ¶ 58). Fremont moves to dismiss the Third Cause of
23 Action on the ground that plaintiffs’ claim is “unsupported by factual allegations and
24 insufficient to withstand dismissal under Iqbal.” (See Mot. at 8:23-24.)

25 Municipalities and other local governments are deemed “persons” under § 1983 and
26 are subject to liability thereunder where an alleged constitutional violation is the result of
27 official policy or custom. See Monell v. Dep’t of Soc. Servs. of City of New York, 436 U.S.
28 658, 690 (1978). A plaintiff may demonstrate municipal liability, based on policy or custom,

1 in one of three ways. First, a plaintiff "may prove that a city employee committed the
2 alleged constitutional violation pursuant to a formal governmental policy or a longstanding
3 practice or custom which constitutes the 'standard operating procedure' of the local
4 governmental entity." See Gillette v. Delmore, 979 F. 2d 1342, 1346 (9th Cir. 1992) (citing
5 Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989)) (internal quotation omitted). Second,
6 a plaintiff may "establish that the individual who committed the constitutional tort was an
7 official with 'final policy-making authority' and that the challenged action itself thus
8 constituted an act of official governmental policy." See Gillette, 979 F.2d at 1346. Third, a
9 plaintiff "may prove that an official with final policy-making authority ratified a subordinate's
10 unconstitutional decision or action and the basis for it." Id. at 1346-47. A municipality may
11 not, however, be held vicariously liable for the unconstitutional acts of its employees under
12 a theory of respondeat superior. See Monell, 436 U.S. at 691; see also Bd. of County
13 Comm'rs v. Brown, 520 U.S. 397, 403 (1997).

14 As noted, "[t]o survive a motion to dismiss, a complaint must contain sufficient
15 factual material, accepted as true, to state a claim to relief that is plausible on its face."
16 See Iqbal, 129 S. Ct. at 1949 (internal quotation and citation omitted). Here, plaintiffs have
17 not offered any new factual allegations in support of their claims against Fremont that were
18 not alleged in their Second Amended Complaint. As noted in the Court's prior order, such
19 allegations are insufficient to support a plausible claim that the alleged constitutional
20 violations were the result of either a "formal governmental policy or a longstanding practice
21 or custom which constitutes the 'standard operating procedure' of the local governmental
22 entity." See Gillette, 979 F.2d at 1346 (internal quotation and citation omitted). Nor, as
23 noted in the Court's prior order, are plaintiffs' conclusory allegations with respect to official
24 policy or custom sufficient to remedy such deficiency. (See TAC ¶¶ 61, 62); see also
25 Iqbal, 129 S. Ct. at 1950 (holding "conclusions couched as factual allegations" insufficient
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1 to support claim).⁴

2 Accordingly, the Third Cause of Action will be dismissed.

3 **B. Fourth Cause of Action: Deprivation of Civil Rights as a Result of Defendant's**
4 **Failure to Train its Officers**

5 In the Fourth Cause of Action, plaintiffs again allege that Mark Ottovich suffered the
6 above-described injuries because Fremont's "training program was not adequate to train its
7 officers to properly handle usual and recurring situations" (TAC ¶ 64), and Fremont was
8 "deliberately indifferent to the need to train its officers adequately" (*id.* ¶ 65).

9 "[T]he inadequacy of a police training program may serve as the basis for § 1983
10 liability only where the failure to train amounts to deliberate indifference to the rights of
11 persons with whom the police come into contact." *See City of Canton v. Harris*, 489 U.S.
12 378, 388 (1989). "That a particular officer may be unsatisfactorily trained," however, "will
13 not alone suffice to fasten liability on the city, for the officer's shortcomings may have
14 resulted from factors other than a faulty training program." *See id.* at 390-91. "Only where
15 a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality . . . does the
16 failure to train constitute a policy for which the city is responsible, and for which the city
17 may be held liable if it actually causes injury." *See Clouthier v. County of Contra Costa*,
18 591 F.3d 1232, 1249 (9th Cir. 2010) (internal quotations and citations omitted). "[F]or
19 liability to attach in this circumstance the identified deficiency in a city's training program
20 must be closely related to the ultimate injury." *See City of Canton*, 489 U.S. at 391.

21 Here, the TAC fails to identify any deficiency in Fremont's training program, let alone
22 how any such deficiency reflects a deliberate or conscious choice by Fremont or resulted in
23 the alleged injury to Mark Ottovich. Rather, plaintiffs' allegations are wholly conclusory,
24 and, consequently, insufficient to support plaintiffs' claim. *See Iqbal*, 129 S. Ct. at 1950
25 (holding courts "are not bound to accept as true a legal conclusion couched as a factual
26 allegation").

27 ⁴ Plaintiffs' reliance on *Leatherman v. Tarrant County*, 507 U.S. 163 (1993), and
28 *Karim Penahi v. Los Angeles Police Dept.*, 839 F.2d 621 (9th Cir. 1988), is unavailing as
those cases predate *Twombly* and *Iqbal*.

1 Accordingly, to the extent the claim therein is alleged against Fremont, the Fourth
2 Cause of Action will be dismissed.

3 **C. Leave to Amend**

4 The above-discussed deficiencies were called to plaintiffs' attention in the Court's
5 prior order dismissing the Third and Fourth Causes of Action, and plaintiffs have neither
6 remedied said deficiencies nor suggested how further leave to amend would assist them in
7 doing so. Rather, plaintiffs assert that a "bare allegation" of policy, custom, or practice
8 suffices to plead plaintiffs' claims. (See Pls.' Opp'n at 8:28.)

9 Accordingly, no further leave to amend the Third and Fourth Causes of Action will be
10 granted.

11 **CONCLUSION**

12 For the reasons stated above, Fremont's Motion to Dismiss is hereby GRANTED
13 and plaintiffs' Third and Fourth Causes of Action as alleged against Fremont are hereby
14 DISMISSED.

15 **IT IS SO ORDERED.**

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18 Dated: May 28, 2010

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20 MAXINE M. CHESNEY
21 United States District Judge
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