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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

HENRY MUSE,  
Plaintiff,  
v.  
CITY OF DEL RAY OAKS, et al.,  
Defendants.

Case No. 17-cv-05323 NC

**ORDER ON MOTION TO DISMISS  
SECOND AMENDED COMPLAINT**

Re: Dkt. No. 37

In this civil rights case, plaintiff Henry Muse alleges that defendants the City of Del Rey Oaks and police chief Ronald Langford blacklisted him from further employment as a law enforcement professional after Muse left the Del Rey Oaks Police Department. This alleged blacklisting occurred through negative employer evaluations regarding Muse that Chief Langford provided to inquiring law enforcement agencies. Muse also alleges that Del Rey Oaks had a policy and practice of discriminating against African American staff. Langford and Del Rey Oaks move to dismiss Muse’s second amended complaint (SAC) under Federal Rule of Civil Procedure 12(b)(6).

The motion to dismiss is GRANTED WITH PREJUDICE as to the stigma-plus claim against Del Rey Oaks. The motion is GRANTED WITH LEAVE TO AMEND as to the stigma-plus claim against Chief Langford and the *Monell* claim against Del Rey Oaks.

**I. BACKGROUND**

The Court generally reiterates the factual background provided in the Court’s Case No. 17-cv-05323 NC

1 previous Rule 12(b)(6) order. Dkt. No. 25.

2 Muse was a Del Rey Oaks police officer from 2005 to 2013, when he alleges he was  
3 “forced to leave the Department after being the subject of an intolerable pattern of racial  
4 discrimination.” Dkt. No. 36 at 2, 4. Muse claims he left Del Rey Oaks because Sergeant  
5 Robert Ingersoll, one of Chief Langford’s subordinates, “routinely” hurled racial epithets  
6 at him. *Id.* at 4. Muse contends that Sgt. Ingersoll was terminated from a neighboring  
7 police department for civil rights violations against African Americans, but that Chief  
8 Langford hired him anyway. *Id.* This is not a wrongful termination lawsuit. *Id.* at 3.

9 Subsequent to leaving Del Rey Oaks, Muse sought employment in law enforcement  
10 in the San Diego Police Department, Fresno County Sheriff’s Department, Santa Cruz  
11 Police Department, Hayward Police Department, Monterey County Sheriff’s Department,  
12 Walnut Creek Police Department, Sacramento County Sheriff’s Department, and Oakland  
13 Unified School District. *Id.* at 4. Muse was unable to gain employment at these agencies.  
14 Muse claims defendants are “haunting” him in his attempts to gain comparable  
15 employment through giving him negative reviews to prospective employers. *Id.* at 4-5.  
16 He claims Chief Langford and Del Rey Oaks are “blacklisting” him. *Id.* at 5. To support  
17 this contention, he cites to two incidents.

18 Officer Matthew Young, who appears to have been Muse’s colleague at the  
19 department, received materials from Orange and Fresno Counties’ background  
20 investigators regarding Muse. *Id.* at 4. Officer Young reportedly approached Chief  
21 Langford who told him: “I wouldn’t even send it back. From what I’m going to tell them,  
22 they’re never going to hire him.” *Id.* (italics omitted). Chief Langford reportedly  
23 described Muse as “lazy” and that he “never did anything.” *Id.* (italics omitted). Muse  
24 does not disclose language Chief Langford actually used in any of the reviews he  
25 submitted to Muse’s prospective employers. The other instance Muse cites to is a question  
26 posed to him by a police department’s background investigator. *Id.* at 5. According to  
27 Muse, the investigator asked him whether the people at the Del Rey Oaks Police  
28 Department were racist, given that they were the only ones who gave Muse a negative

1 evaluation. *Id.* Muse also refers to another incident with an investigator for another  
2 county in which the investigator said “I would not touch your file.” *Id.*

3 Muse filed this lawsuit on September 13, 2017, and the Second Amended Complaint  
4 claims violations of 42 U.S.C. § 1983 under a “stigma-plus” theory and for *Monell*  
5 liability. *See id.* Defendants move to dismiss the SAC. Dkt. No. 37.

6 All parties consented to the jurisdiction of a magistrate judge under 28 U.S.C. §  
7 636(c). Dkt. Nos. 7, 8.

## 8 **II. LEGAL STANDARD**

9 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal  
10 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). On a  
11 motion to dismiss, all allegations of material fact are taken as true and construed in the  
12 light most favorable to the non-movant. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-  
13 38 (9th Cir. 1996). The Court, however, need not accept as true “allegations that are  
14 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re*  
15 *Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Although a complaint need  
16 not allege detailed factual allegations, it must contain sufficient factual matter, accepted as  
17 true, to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,  
18 550 U.S. 544, 570 (2007). A claim is facially plausible when it “allows the court to draw  
19 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*  
20 *v. Iqbal*, 556 U.S. 662, 678 (2009).

21 If a court grants a motion to dismiss, leave to amend should be granted unless the  
22 pleading could not possibly be cured by the allegation of other facts. *Lopez v. Smith*, 203  
23 F.3d 1122, 1127 (9th Cir. 2000).

## 24 **III. DISCUSSION**

25 Muse’s § 1983 claim has two theories: (1) “stigma-plus,” and (2) a claim under  
26 *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). Defendants move  
27 to dismiss Muse’s § 1983 claim because (1) Muse cannot state a claim for defamation, (2)  
28 Muse suffered no injury to a constitutional right, and (3) Muse does not present facts

1 sufficient to support a *Monell* claim, even under Rule 12(b)(6). Dkt. No. 14 at 17-20.  
2 Muse disagrees on each point.

3 To prove a violation under § 1983, a plaintiff must show that (1) the defendant’s  
4 conduct deprived plaintiff of a right, privilege or immunity secured by the Constitution or  
5 laws of the United States, and (2) that the defendant committed the act under color of state  
6 law. *West v. Atkins*, 487 U.S. 42, 48 (1988). To state a claim under 42 U.S.C. § 1983  
7 based on defamation, a plaintiff must do more than allege simple defamation by a state  
8 official. *Paul v. Davis*, 424 U.S. 693, 712 (1976). “Under that standard, to establish a  
9 deprivation of liberty, a plaintiff must show the public disclosure of a stigmatizing  
10 statement by the government, plus the denial of ‘some more tangible interest such as  
11 employment,’ or the alteration of a right or status recognized by state law.” *Peter Turner*  
12 *v. City & Cty. of San Francisco*, No. 11-cv-01427 EMC, 2012 WL 6631490, at \*6 (N.D.  
13 Cal. Dec. 19, 2012), *aff’d sub nom. Turner v. City & Cty. of San Francisco*, 788 F.3d 1206  
14 (9th Cir. 2015), *and aff’d sub nom. Turner v. City & Cty. of San Francisco*, 617 F. App’x  
15 674 (9th Cir. 2015) (brackets omitted) (quoting *Paul*, 424 U.S. at 701, 711).

16 “[A] plaintiff can meet the stigma-plus test for Section 1983 purposes by alleging  
17 either that (1) the injury to reputation caused the denial of a federally protected right (e.g.,  
18 accusations made in the press by a prosecutor to deny a defendant an impartial jury under  
19 the Sixth Amendment); or (2) the injury to reputation was inflicted in connection with a  
20 federally protected right (e.g., defamation in the course of termination of public  
21 employment by the state).” *Eberhard v. California Highway Patrol*, 73 F. Supp. 3d 1122,  
22 1130 (N.D. Cal. 2014) (citing *Cooper v. Dupnik*, 924 F.2d 1520, 1532 (9th Cir. 1991)).

23 **A. Defamation**

24 “The elements of a defamation claim are (1) a publication that is (2) false, (3)  
25 defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special  
26 damage.” *Wong v. Tai Jing*, 189 Cal. App. 4th 1354, 1369 (2010) (citation omitted). In  
27 order to be defamatory, a statement must be a statement of fact, rather than a statement of  
28 opinion. *Morrow v. Los Angeles Unified Sch. Dist.*, 149 Cal. App. 4th 1424, 1443 (2007).

1 Yet an opinion “may still be actionable if it implies the allegation of undisclosed  
2 defamatory facts as the basis for the opinion.” *Id.* (citations omitted). “The issue whether  
3 a communication was a statement of fact or opinion is a question of law to be decided by  
4 the court.” *Id.*

5 Muse claims on information and belief that “defendants” made defamatory  
6 statements to his prospective employers that Muse was lazy and never did anything. Dkt.  
7 No. 36 at 4. Muse alleges these statements are false. *Id.* For purposes of this motion,  
8 Muse sufficiently alleges Chief Langford defamed him based on the allegedly false and  
9 damaging review Chief Langford stated he intended to give Muse. Assuming for purposes  
10 of this motion that Chief Langford followed through with his intentions, only the statement  
11 that Muse never did anything would qualify as a factual statement. It is a close call, but  
12 stating that a police officer “never did anything” when the officer is attempting to find a  
13 new position *could* be defamatory. But as a matter of common sense, calling someone  
14 lazy is an opinion, and is not actionable. *See e.g., Botos v. Los Angeles Cty. Bar Assn.*, 151  
15 Cal. App. 3d 1083, 1088-89 (1984) (finding that a statement that an attorney is not  
16 qualified to sit as a judge is an un-actionable opinion).

17 Like the First Amended Complaint, the Second Amended Complaint does not state  
18 a defamation claim against Del Rey Oaks. There are no allegations that Del Rey Oaks, as  
19 an entity, defamed him. As noted in the Court’s previous order, the only way Muse could  
20 state such a claim would be through a *Monell* claim, which he attempts to do. He may not  
21 vicariously hold Del Rey Oaks liable for the alleged malfeasance of a bad actor, and so any  
22 stigma-plus § 1983 action against Del Rey Oaks is DISMISSED WITH PREJUDICE.

23 **B. Protected Liberty Interest**

24 The Court next considers whether Muse alleged sufficient facts to conclude that  
25 Chief Langford violated a protected liberty interest. As stated above, “a plaintiff can meet  
26 the stigma-plus test for Section 1983 purposes by alleging . . . the injury to reputation was  
27 inflicted in connection with a federally protected right[.]” *Eberhard*, 73 F. Supp. 3d at  
28 1130. Here, the “stigma,” or reputational injury is the allegedly defamatory statements

1 made about Muse, and the “plus” is Chief Langford’s alleged campaign that has prevented  
2 Muse from obtaining a position in law enforcement.

3 Courts have dismissed cases where the alleged defamation was not uttered in  
4 connection to a termination. *See Siegert v. Gilley*, 500 U.S. 226, 234 (1991); *see also*  
5 *Ulrich v. City & Cty. of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002) (noting that the  
6 remedy for a stigma-plus claim is a fairness hearing); *Murphy v. Goss*, 103 F. Supp. 3d  
7 1234, 1241 (D. Or. 2015), *aff’d*, 693 F. App’x 636 (9th Cir. 2017). In its previous order,  
8 the Court informed Muse that he had not sufficiently alleged a violation of a protected  
9 liberty interest. Dkt. No. 25 at 10; *see also Harrington v. City of Portland*, 677 F. Supp.  
10 1491, 1500-01 (D. Or. 1987) (“to state a claim for deprivation of a liberty interest of  
11 constitutional magnitude, the charges made against Harrington by Clark must have  
12 surpassed subjects relating to incompetence or the inability to get along with others or lack  
13 of judgment and trust. The charges must constitute accusations of moral turpitude such as  
14 dishonesty or immorality.”). Muse has not stated a stigma-plus claim, and his opposition  
15 to defendants’ motion is bare-bones, lacking in legal argument, and does not address the  
16 Court’s previously stated concerns.

17 This is the third iteration of the complaint in this case. In an abundance of caution,  
18 the Court will give Muse one final chance to cure his stigma-plus claim against Chief  
19 Langford. Should Muse fail to cure this claim, the Court will dismiss this claim with  
20 prejudice. The Court GRANTS defendants’ motion to dismiss WITH PREJUDICE as to  
21 Del Rey Oaks, and WITH LEAVE TO AMEND as to Chief Langford.

22 **C. Del Rey Oaks’ *Monell* Liability**

23 Muse alleges that he “is informed and believes that Defendant Del Rey Oaks has a  
24 long-standing and pervasive custom, policy, pattern, and well settled practice of  
25 discriminating against current and former African American employees based on race.”  
26 Dkt. No. 36 at 6.

27 A municipality may be held liable under *Monell* “when execution of a  
28 [municipality’s] policy or custom, whether made by its lawmakers or by those whose

1 edicts or acts may fairly be said to represent official policy, inflicts the injury that the  
2 government as an entity is responsible under § 1983.” *Monell*, 436 U.S. at 694; *id.* at 691  
3 (“Congress did not intend municipalities to be held liable [under § 1983] unless action  
4 pursuant to official municipal policy of some nature caused a constitutional tort.”). A  
5 plaintiff may show a policy or custom of a municipality in three ways:

6 (1) by showing “a longstanding practice or custom which  
7 constitutes the ‘standard operating procedure’ of the local  
8 government entity;” (2) “by showing that the decision-making  
9 official was, as a matter of state law, a final policymaking  
10 authority whose edicts or acts may fairly be said to represent  
11 official policy in the area of decision;” or (3) “by showing that  
12 an official with final policymaking authority either delegated  
13 that authority to, or ratified the decision of, a subordinate.”

14 *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005) (quoting *Ulrich*, 308 F.3d at  
15 984-85). “Liability for improper custom may not be predicated on isolated or sporadic  
16 incidents; it must be founded upon practices of sufficient duration, frequency and  
17 consistency that the conduct has become a traditional method of carrying out policy.”  
18 *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). The Ninth Circuit has previously held  
19 that two incidents are insufficient to prove a custom under *Monell*. *Meehan v. Cty. of Los*  
20 *Angeles*, 856 F.2d 102, 107 (9th Cir. 1988). “A longstanding practice or custom is one that  
21 is so ‘persistent and widespread’ that it constitutes a ‘permanent and well settled’  
22 governmental policy.” *Bagley v. City of Sunnyvale*, No. 16-cv-02250 JSC, 2017 WL  
23 5068567, at \*4 (N.D. Cal. Nov. 3, 2017) (quoting *Trevino*, 99 F.3d at 918).

24 Other than his own experience, Muse points to the experience of Milton Carter,  
25 “who also suffered under [Del Rey Oaks’] racially charged and discriminatory  
26 environment.” Dkt. No. 36 at 6. Muse points to one incident involving Mr. Carter:

27 Plaintiff is informed and believes that Del Rey Oaks’ former city  
28 manager, Daniel Dawson, threw a \$20 bill on Mr. Carter’s desk  
and asked him to cut weeds in his yard. Mr. Carter felt this work  
was a misuse of city funds, returned the bill, and refused to  
appear at Mr. Dawson’s house. According to Mr. Carter’s  
government tort claim, “Dawson became enraged by his refusal  
to perform the maintenance work on his private property.” Mr.  
Carter approached Defendant Langford, his supervisor and  
Chief of Police at the time, about Mr. Dawson’s demand.

1 Defendant Langford ordered Mr. Carter to return to Dawson's  
2 property and perform the work. Mr. Carter complied because he  
3 feared losing his job. Plaintiff is informed and believes that  
4 several months later, Defendant Langford terminated Mr. Carter  
5 without providing a reason. Mr. Carter alleged discrimination  
6 and wrongful termination in his government tort claim against  
7 Defendants Del Rey Oaks and Ronald Langford. The parties  
8 reached a settlement in or about September 2017.

9 *Id.* at 6-7.

10 Muse seeks to hold Del Rey Oaks liable under the first theory: that the racial  
11 discrimination is longstanding custom or procedure. The problem with this claim that  
12 proves fatal is that there is no apparent relation between what allegedly happened to Muse  
13 and what allegedly happened to Mr. Carter except for Chief Langford. But what is the  
14 longstanding practice or custom that gives rise to the *Monell* claim? Muse claims he was  
15 the victim of blacklisting and the receiver of racial epithets, while Mr. Carter was allegedly  
16 ordered in a degrading manner to cut weeds and was later fired. If their experiences were  
17 alleged to be more similar, Muse might be able to squeeze by a 12(b)(6) motion, but they  
18 are not. As far as the Court knows, the incident with Mr. Carter was an isolated one. And  
19 that is insufficient to state a *Monell* claim. *Trevino*, 99 F.3d at 918. Without support, bare  
20 legal assertions that Del Rey Oaks has a practice of discriminating against current and  
21 former African American employees are insufficient.

22 The other problem with the *Monell* claim is that the conduct Mr. Carter allegedly  
23 suffered does not in itself raise an inference of discrimination. If true, the incident with the  
24 \$20 bill surely demonstrates disrespect and is reprehensible. But it does not raise the  
25 inference of *racial* discrimination against African Americans, which *is* what Muse alleges.  
26 Dkt. No. 39 at 6 (“Twelve straight years of discriminatory conduct against 100% of the  
27 African Americans employed at Del Rey Oaks during that timeframe”). As far as the  
28 Court’s knows, Mr. Carter has not alleged that Del Rey Oaks staff also hurled racial  
epithets at him. The *Monell* claim is dismissed WITH LEAVE TO AMEND.

#### 29 **IV. CONCLUSION**

30 For the reasons stated above, the Court GRANTS defendant’s motion to dismiss.  
31 The motion is GRANTED WITH PREJUDICE as to the stigma-plus claim against Del  
32 Case No. 17-cv-05323 NC



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Rey Oaks. The motion is GRANTED WITH LEAVE TO AMEND as to the stigma-plus claim against Chief Langford and the *Monell* claim against Del Rey Oaks.

Muse may file a third amended complaint, but must do so by May 10, 2018, or the Court will terminate the case without further notice. Muse may not add further claims or defendants without advance leave of Court.

**IT IS SO ORDERED.**

Dated: April 26, 2018

  
NATHANAEL M. COUSINS  
United States Magistrate Judge