IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ANAKA HUNTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No: 4:12-CV-0004-ERW
	)	
CITY OF SALEM, MISSOURI, BOARD OF TRUSTEES, Salem Public Library, and GLENDA WOFFORD, Individually, and in her official capacity As Director of the Salem Public Library,	)	
	)	
Defendants.	)	

DEFENDANT CITY OF SALEM'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

In Plaintiff's Memorandum in Opposition to Defendant City of Salem's Motion to Dismiss, Plaintiff essentially argues that Plaintiff has stated a plausible claim against the City of Salem ("the City") because the City retains some control over the library, in that it has the power to "maintain" the library and the mayor, with the approval of the board of aldermen, has the power to appoint and remove trustees to the library board. See Plaintiff's Memorandum in Opposition to Defendant City of Salem's Motion to Dismiss ("PMIO"), p. 4. However, absent from Plaintiff's memorandum, as well as Plaintiff's Complaint, is any allegation that City engaged in conduct that caused Plaintiff injury, which is necessary to state a plausible claim for relief against the City. The "Background" section of Plaintiff's memorandum evidences the lack of any conduct by the City, as it alleges conduct by Defendant Glenda Wofford ("Wofford") and the Board of Trustees ("the Board"), but fails to mention the City. Accordingly, Plaintiff has

failed to state a plausible claim against the City and her claims against the City should be dismissed.

I. Standard of Review

In order to survive a motion to dismiss under Rule 12(b)(6), a complaint must contain "sufficient factual matter, acceptable as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (internal quotations omitted). Two "working principals" underlie this analysis. Id. First, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 1949-51. Second, only a complaint that alleges a plausible claim for relief can survive a motion to dismiss. Id. at 1950. A complaint is plausible on its face when it pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged. Id. at 1949. The plausibility requirement is not akin to probability, but asks for more than "a sheer possibility that a defendant has acted unlawfully." Id. Where 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. Id. (internal quotations omitted). A Complaint that tenders "naked assertions" devoid of "further factual enhancement" will not suffice. Id. Here, Plaintiff has failed to allege sufficient factual matter to state a facially plausible claim for relief against the City under 42 U.S.C. § 1983.

II. Plaintiff has not stated a plausible claim for relief against the City.

Plaintiff argues that she has stated a plausible claim against the City because the City maintains control over the operation of the library. See PMIO, p. 1. Plaintiff argues that the City retains control because the mayor can appoint and remove trustees. Apparently, Plaintiff is

arguing that in appointing certain trustees and having the power to remove them for cause, the City is effectively setting policy for the library. Plaintiff fails to address Sections 182.200.2, which empowers the board to "make and adopt such bylaws, rules and regulations for their own guidance, and for the government of the library, as may be expedient and not inconsistent with section 182.140 to 182.301." Mo. Rev. Stat. Section 182.200.2. The statute also authorizes the hiring of a librarian, and gives the board "exclusive control of the expenditure of all moneys collected to the credit of the library fund . . . ." Section 182.200.2-3. Moreover, Plaintiff fails to address Section 70.210, which expressly includes a "city library" within its definition of a "Political subdivision" of the state of Missouri. A plain reading of these statutes demonstrates the legislature's intent to vest control of the library to the Board. Absent from the relevant statutes is any provision reserving authority to a city to direct, oversee, manage or set policy for a library once the board of trustees is appointed. Plaintiff's arguments otherwise are unavailing.

Plaintiff cites to Section 182.170 for the proposition that cities have the power to establish and maintain libraries. Section 182.170 reads as follows:

> When any city establishes and maintains a public library under sections 182.140 to 182.301, the mayor or other proper official of the city, with the approval of the legislative branch of the city government, shall proceed to appoint a library board of nine trustees, chosen from the citizens at large, with reference to their fitness for the office. No member of the city government shall be a member of the board.

Mo. Rev. Stat. § 182.170 (WL 2012). Under a plain reading of the statute, it is clear that Section 182.170 does not convey control of the library to a city by authorizing a city to maintain a library, but conversely mandates that a city with a library appoint a board of trustees to operate the library. The intent to separate the library from city control is further demonstrated by the statute's last sentence, which dictates that no member of the city government shall be a member of the board. Mo. Rev. Stat. § 182.170 (WL 2012).

Plaintiff also argues that the City retains control because the monies received from the library are deposited in the City treasury pursuant to 182.200.4. See PMIO, p. 4. While Plaintiff is technically correct that the statute states that library monies shall be deposited in the City treasury, Plaintiff ignores the rest of the statute mandating that library monies "shall be kept separate and apart from other moneys of the city" and that the trustees "shall have the exclusive control of the expenditure of all moneys collected to the credit of the library fund, and . . . of the supervision, care and custody of the grounds, rooms or buildings constructed . . . for that purpose." Mo. Rev. Stat. § 182.200.4 (WL 2012).

Both Section 182.170 and Section 182.200.4 show the legislature's intent to cede control of the library to the board of trustees and to keep separate any involvement of a city. Section 182.170 dictates that no member of city government be a member of the board that controls the library, and Section 182.200.4 mandates that all library funds be kept separate from other city funds and vests exclusive control of library funds to the trustees. Had the legislature intended to leave any control with cities, it would have said so.

Plaintiff further alleges that the City retains control over the library because the statutes allow the City to pass and enforce ordinances to impose penalties on library patrons pursuant to Section 182.240. See PMIO p. 5. However, Section 182.240 states that cities "may pass ordinances imposing suitable penalties" for property damage and the failure to return books. Mo. Rev. Stat. § 182.240 (WL 2012). The statute conveys no "control" to cities, but simply allows cities to impose penalties for property damage and theft. Accordingly, no reasonable inference can be drawn that the City maintains any control over the operation of the library. As such, Plaintiff's claims against the City should be dismissed.

III. Plaintiff's complaint fails to allege any conduct by the City.

Even if Plaintiff has sufficiently alleged that the City retains some degree of control over the library, the Complaint's factual allegations provide no basis for the inference that the City is liable for any alleged conduct, because it does not allege any deliberate conduct by the City. In Monell v. New York Dept. of Social Servs., 436 U.S. 658, 689 (1978), the United States Supreme Court held that a municipality is a "person" under § 1983, but recognized that a city may not be held liable under the statute solely because one of its employees is a tortfeasor. Id. Monell and its progeny require a plaintiff seeking to recover from a governmental entity under § 1983 to identify a "policy" or "custom" that caused the injury alleged. Monell, 436 U.S. at 694; Pembaur, 475 U.S. at 480-81; Canton v. Harris, 489 U.S. 378, 389 (1989).

> [I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Bd. Of County Comm'rs of Bryan County, Okla. v. Brown, 520 U.S. 397, 404 (1997) (emphasis in original). 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 v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009). In order to survive a motion to dismiss, a plaintiff must identify a course of action taken by an authority with final authority to establish policy. Harmon v. St. Louis County, 4:08CV226SNLJ, 2009 WL 880024 *7 (E.D. Mo. Mar. 30, 2009).

Here, Plaintiff has not even alleged any conduct attributable to the City, much less any deliberate conduct by the City that could be the "moving force" behind any injury. The Complaint fails to allege any municipal action of the City taken with any degree of culpability,

and fails to demonstrate any causal link between any action by the City and any deprivation of Plaintiff's rights. Furthermore, nothing in the Complaint alleges any course of action by the City to establish any policy. Plaintiff's argument that she has stated a claim against the City because the City retains some control over the library is nothing more than an attempt to hold the City liable for the actions of an employee of the library. Efforts to impose vicarious liability on a municipality under the theory of *respondeat superior* have repeatedly been rejected by the United States Supreme Court. Bd. Of County Comm'rs of Bryan County, Okla. v. Brown, 520 U.S. 397, 403 (1997). Here, the effort to impose liability on the City for the actions of Wofford is a step past *respondeat superior*, as Wofford is not an employee of the City, but of the library.

Furthermore, Plaintiff's legal conclusions are not entitled to an assumption of truth. See Iqbal, 129 S.Ct. at 1949-51. Paragraphs 64 and 65 allege that Defendants' policies, practices, and customs of blocking certain websites are content- and viewpoint-based restrictions on protected speech that are not narrowly tailored to serve a compelling state interest. See Complaint, ¶¶ 64-65. Paragraphs 67, 68, and 69 allege that Defendants' policies, practices, and customs have injured Plaintiff by placing upon her a substantial burden on Plaintiff's access to protected speech. See Complaint, ¶¶ 67-69. Paragraphs 72, 73, and 74 allege that Defendants' blocking of certain websites does not serve a legitimate secular purpose and has the principal effect of promoting and favoring some religious viewpoints over others, which constitutes an endorsement of some religious faiths and viewpoints over others. See Complaint, ¶¶ 72-74.

Under Iqbal, these paragraphs are not entitled to an assumption of truth because they are merely conclusory statements of the elements of a cause of action that are not further enhanced by factual allegations. While the "Factual Allegations" portion of the Complaint alleges conduct by Wofford and the Board, the City is never specifically referenced, and the conduct complained

of is specifically attributed to Wofford and the Board. See Complaint, ¶¶ 12-62. Lumping the City in as "Defendants" and stating that its policies, practices, and customs are not narrowly tailored to serve a compelling state interest, that they constituted a substantial burden on Plaintiff's access to protected speech, that they operated as an endorsement of some religious viewpoints over others, and that they served no secular purpose is merely a recitation of the elements of free speech causes of action. These allegations are nothing more than legal conclusions regarding the City supported by no other factual allegations against the City. Accordingly, those allegations are not entitled to an assumption of truth.

The remaining paragraphs of the Complaint that reference the City, even if assumed true, do not state a facially plausible claim of entitlement to relief. The allegations fail to state a facially plausible claim because the alleged facts are insufficient to allow the Court to draw a reasonable inference that any conduct by the City caused injury to Plaintiff. In her Complaint, Plaintiff herself states that the Board and Wofford are the policymakers who determine what content is blocked from library access. Complaint, ¶ 50. The only time the City is specifically mentioned in the Complaint is in the case caption and in the description of the parties. See Complaint, ¶¶ 6-8. Otherwise, the City is merely lumped in with the Board and Wofford as "Defendants." See, e.g., Complaint, ¶¶ 51-52, 64-65, 72-74. Even when lumped together as "Defendants," Plaintiff has not alleged a plausible claim for relief against the City because she has simply stated naked assertions regarding the City that are devoid of further factual enhancement. See Iqbal, 129 S.Ct. at 1949.

In paragraphs 51, 52, and 55, Plaintiff alleges that "Defendants" had a policy, practice, and custom of blocking websites categorized as "occult," and that "Defendants" know that the category "overblocks" websites, which results in content- and viewpoint-based discrimination.

See Complaint, ¶¶ 51, 52, and 55. Paragraphs 58, 59, and 62 contain similar allegations regarding websites categorized as "criminal skills." See Complaint, ¶¶ 58, 59, and 62. Paragraph 75 alleges that Defendants' policies, practices, and customs injured Plaintiff because she was prevented from accessing content related to her faith while receiving messages that content regarding other faiths would be treated more favorably. See Complaint, ¶ 75.

The above cited paragraphs contain the only allegations against the City, which notably is only impliedly referenced by being lumped together with Wofford and the Board as "Defendants." With regard to the City, these allegations are simply conclusory statements that are not further enhanced by any factual allegations. These allegations against the City, whose inclusion is only implied from the term "Defendants," are threadbare recitals of elements of a cause of action supported only by conclusory statements. While the allegations in the Complaint may be consistent with the City's liability, they fall short of the line between possibility and plausibility of entitlement to relief.

Respectfully submitted,

BAIRD, LIGHTNER, MILLSAP & HARPOOL, P.C.

By: /s/ Matthew D. Wilson

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which provided a copy of same, and (_____) mailed, via the United States Postal Service, postage pre-paid, (_____) faxed, the foregoing document to the below listed counsel of record:

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