

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Dec 15, 2017

SEAN F. MCAVOY, CLERK

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JENNIFER JANEQUA SWAY,

Plaintiff,

v.

SPOKANE PARATRANSIT;
SPOKANE TRANSIT AUTHORITY;
ALLISON MITCHEL; E. SUSAN
MEYER, CEO; LANCE DURBIN;
DENISE MARCHIORO; and SUSAN
MILLBANK,

Defendants.

NO: 2:16-CV-310-RMP

ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS FOR FAILURE TO
STATE A CLAIM

BEFORE THE COURT is a motion to dismiss for failure to state a claim, pursuant to Fed. R. Civ. P. Rule 12(b)(6), ECF No. 20, by all Defendants for dismissal of Plaintiff Jennifer Janequa Sway's third amended complaint, ECF No. 9. The Court has reviewed the parties' filings, including the affidavit and exhibits that Ms. Sway attached to her response to Defendants' motion, has researched the relevant law, and is fully informed.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM ~ 1

1 **BACKGROUND**

2 Plaintiff’s third amended complaint, ECF No. 9, raises claims under 42 U.S.C.
3 § 1983, for alleged constitutional violations, and Title II of the Americans with
4 Disabilities Act (“ADA”), 42 U.S.C. §§ 12141–12143. Ms. Sway names as
5 Defendants Spokane Paratransit, the Spokane Transit Authority (“STA”), Denise
6 Marchioro, Allison Mitchell, Lance Durbin, Susan Millbank, and E. Susan Meyers.
7 ECF No. 9. The Court notes that STA provides paratransit services as an on-demand
8 transportation option for certain riders, but “Spokane Paratransit” does not exist as
9 an independent entity. ECF No. 20 at 1. Ms. Sway does not specify whether she is
10 suing the individual Defendants in their personal or official capacity.

11 Ms. Sway alleges that Defendants wrongfully: refused to provide paratransit
12 rides for her to a medical appointment and back to her apartment in February 2016;
13 prohibited her from using STA’s paratransit service for twenty days in June 2016 for
14 exceeding the allowable number of “no-shows”; cancelled Plaintiff’s prior-
15 scheduled paratransit ride to a medical appointment in October 2016; and treated her
16 differently, as an African-American passenger, from another passenger in February
17 2017. Plaintiff also alleges that, in conducting STA’s administrative review of her
18 complaints to the transit administration, STA staff did not adhere to STA’s Rule of
19 Conduct 44 regarding suspension of paratransit service following no-shows, and
20 relied on personal belief rather than facts to make decisions in her case, thus
21 violating her rights under the Fourteenth Amendment to the U.S. Constitution.

1 Ms. Sway alleges that the decision by an STA paratransit driver to call a
2 “snow no-show,” meaning that the driver cancelled the trip upon determining that
3 Ms. Sway could not safely be picked up, on February 4, 2017, was erroneous and
4 motivated by racial bias. ECF No. 9-1 at 1-3. In support of her allegation, Plaintiff
5 describes a passenger pickup that she heard being discussed over dispatch radio
6 while she was riding on an STA paratransit vehicle approximately two days after her
7 snow no-show. On that day, Ms. Sway recalls hearing a paratransit driver inform
8 dispatch that he could not find a safe place to pick up his passenger, and the
9 dispatcher asked if the driver wanted her to call the passenger to request that the
10 passenger “come out and meet the van.” ECF No. 9-1 at 3. The driver allegedly
11 declined her offer to call because the passenger already had emerged and was
12 waiting in a location where the van could “go around and get him.” *Id.* Ms. Sway
13 alleges that she is familiar with the passenger at issue in the radio conversation and
14 knows that he is not African-American.

15 The Court assumes Ms. Sway’s factual allegations to be true for purposes of
16 this Motion. *See Zimmerman v. Oregon Dep’t of Justice*, 170 F.3d 1169, 1171 (9th
17 Cir. 1999), *cert. denied*, 121 S. Ct. 1186 (U.S. 1999) (for purposes of Fed. R. Civ. P.
18 Rule 12(b)(6), courts “accept as true the facts alleged in the complaint”).

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1 **APPLICABLE LAW**

2 ***Motions to Dismiss for Failure to State a Claim under Federal Rule of Civil***

3 ***Procedure 12(b)(6)***

4 A defendant may move to dismiss a complaint for failure to state a claim
5 upon which relief may be granted. Fed. R. Civ. P. Rule 12(b)(6). To survive a
6 Rule 12(b)(6) motion to dismiss, the plaintiff must plead “enough facts to state a
7 claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S.
8 544, 570 (2007). A claim is plausible when the plaintiff pleads “factual content
9 that allows the court to draw the reasonable inference that the defendant is liable
10 for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

11 In deciding a Rule 12(b)(6) motion to dismiss, a court “accept[s] factual
12 allegations in the complaint as true and construe[s] the pleadings in the light most
13 favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*,
14 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required, however, to “assume
15 the truth of legal conclusions merely because they are cast in the form of factual
16 allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam)
17 (internal quotation omitted). “[C]onclusory allegations of law and unwarranted
18 inferences are insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355
19 F.3d 1179, 1183 (9th Cir. 2004).

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1 ***Violation of Title II of the ADA***

2 A plaintiff bringing a case under Section 202 of Title II of the ADA, which
3 covers discrimination in the provision of public services, must show that:

4 (1) she is an individual with a disability; (2) she is otherwise qualified
5 to participate in or receive the benefit of a public entity's services,
6 programs or activities; (3) she was either excluded from participation
7 in or denied the benefits of the public entity's services, programs or
8 activities or was otherwise discriminated against by the public entity;
9 and (4) such exclusion, denial of benefits or discrimination was by
10 reason of her disability.

11 *Sheehan v. City & County of San Francisco*, 743 F.3d 1211, 1232 (9th Cir.
12 2014) (discussing requirements of a claim brought under 42 U.S.C. § 12132), *rev'd*
13 *in part on other grounds, cert. dismissed in part*, 135 S. Ct. 1765 (2015).

14 Claims against public entities that provide public transportation are
15 specifically addressed by 42 U.S.C. § 12143, which makes it discriminatory for:

16 a public entity which operates a fixed route system . . . to fail to provide
17 with respect to the operations of its fixed route system . . . paratransit
18 and other special transportation services to individuals with disabilities,
19 . . . that are sufficient to provide to such individuals a level of service
20 which is comparable to the level of designated public transportation
21 services provided to individuals without disabilities using such system
22

41 U.S.C. § 12143(a)(1). *See also* 42 U.S.C. § 12141(3) (defining “fixed route
system” as “a system of providing designated public transportation on which a
vehicle is operated along a prescribed route according to a fixed schedule.”).

The same statute directs the Secretary of Transportation to enact regulations
governing the operation of a paratransit service. 41 U.S.C. § 12143(b); *see* 49

1 C.F.R. § 37.121, *et seq.* One of the implementing regulations permits a transit
2 authority to “establish an administrative process to suspend, for a reasonable
3 period of time, the provision of complementary paratransit service to ADA eligible
4 individuals who establish a pattern or practice of missing scheduled trips.” 49
5 C.F.R. § 37.125(h). The transit authority also must provide an administrative
6 process for paratransit applicants or riders who want to appeal the transit
7 authority’s adverse determinations. 49 C.F.R. § 37.125(g).

8 ***Violation of Equal Protection under 42 U.S.C. § 1983***

9 To state a claim under 42 U.S.C. § 1983, a plaintiff must prove that a
10 defendant, while acting under color of law, deprived her of rights protected by the
11 Constitution or laws of the United States. *West v. Atkins*, 487 U.S. 42, 48 (1988).
12 A municipality cannot be held liable solely because it employs a wrongdoer.
13 *Monell v. Dep’t of Soc. Servs. of the City of New York*, 436 U.S. 658, 691 (1978).
14 However, a “municipality may be held liable ‘when execution of a government’s
15 *policy or custom . . . inflicts the injury.*” *Los Angeles Cnty., California v.*
16 *Humphries*, 562 U.S. 29, 36 (2010) (quoting *Monell*, 436 U.S. at 694) (emphasis
17 and omissions in original). “Official municipal policy includes the decisions of a
18 government's lawmakers, the acts of its policymaking officials, and practices so
19 persistent and widespread as to practically have the force of law.” *Connick v.*
20 *Thompson*, 563 U.S. 51, 61 (2011).

1 An individual deprives a person “of a constitutional right, within the
2 meaning of section 1983, if he [or she] does an affirmative act, participates in
3 another’s affirmative acts, or omits to perform an act which he [or she] is legally
4 required to do that causes the deprivation of which [the plaintiff complains].”
5 *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Causation is an essential
6 element of a section 1983 claim. *Estate of Brooks v. United States*, 197 F.3d 1245
7 (9th Cir. 1999). Causation must be determined separately for each individual
8 defendant, focusing on “the duties and responsibilities of each individual defendant
9 whose acts or omissions are alleged to have caused a constitutional deprivation.”
10 *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).

11 A plaintiff alleging a violation of the Equal Protection Clause of the
12 Fourteenth Amendment “must show that the defendants acted with an intent or
13 purpose to discriminate against the plaintiff based upon membership in a protected
14 class.” *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001) (quoting
15 *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)). Race is a protected
16 class. *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 948–49 (9th Cir. 2003).

17 DISCUSSION

18 *Title II of the ADA*

19 Plaintiff asserts in her disability discrimination claim that Defendants violated
20 Title II of the ADA when they imposed a 20-day suspension of her access to
21 paratransit services based on a pattern of no-shows, when they administered the

1 appeal process related to that suspension, and when they provided a number of rides
2 to Plaintiff that allegedly were problematic on a variety of grounds.

3 Defendants do not move to dismiss Plaintiffs' ADA claim in its entirety, *see*
4 ECF Nos. 20 and 23. Rather, Defendants argue that Plaintiff cannot raise an ADA
5 claim of discrimination in the provision of public transit services against the
6 individual Defendants. ECF No. 20 at 8.

7 The Court agrees that Plaintiff may not sue the Defendants individually for
8 discriminatory provision of paratransit services. *See Miranda B. v. Kitzhaber*, 328
9 F.3d 1181, 1188, note 7 (9th Cir. 2003) (recognizing caselaw that officials cannot be
10 sued in their individual capacities under the ADA). Nonetheless, the Court reads
11 Plaintiff's third amended complaint as stating a plausible claim under 42 U.S.C. §
12 12143 of the ADA against Defendant STA, assuming the truth of Plaintiff's
13 allegations at this stage. Namely, Plaintiff's third amended complaint, broadly
14 interpreted, states a plausible claim that the paratransit service she received is not
15 comparable to the level of service provided to individuals without disabilities and
16 that the STA did not appropriately determine the amount of access Plaintiff would
17 have to paratransit services.

18 ***Section 1983 Equal Protection Claim***

19 To prevail on her section 1983 claim against any of the individual Defendants,
20 Ms. Sway would need to show that they were personally involved in activities that
21 deprived her of a constitutional right. *See Johnson*, 588 F.2d at 743. To succeed on

1 her section 1983 claim against STA, Ms. Sway must demonstrate a policy or
2 practice of the entity that routinely causes a constitutional violation or a policy of
3 inaction that amounts to a failure to protect constitutional rights. *See Monell*, 436
4 U.S. at 694.

5 Ms. Sway does not allege any facts supporting that a practice or policy of
6 STA violates her constitutional right to equal protection. Nor does Ms. Sway allege
7 any facts describing decisions or acts of policymaking officials with STA that were
8 “so persistent and widespread as to practically have the force of law.” *See Connick*,
9 563 U.S. at 61.

10 Rather, Ms. Sway alleges against STA generally, and with respect to each of
11 the individual Defendants, that she was “discriminated against based on race.” ECF
12 No. 9 at 6; *see also* ECF No. 9 at 7–13 (reciting allegations such as, “Susan
13 Millbank discriminated against [P]laintiff based on race as all non-black paratransit
14 clients are treated with fairness and justice”). Likewise, Ms. Sway alleges in her
15 response to Defendants’ motion to dismiss, with respect to her 20-day suspension
16 from service and a problematic drop-off location by a paratransit driver on at least
17 one trip, that “this has never been done to any non-African American paratransit
18 customer,” ECF No. 22 at 5. However, such conclusory allegations are insufficient
19 to state a section 1983 equal protection claim. *See Iqbal*, 556 U.S. at 680–81.

20 The single instance in which Ms. Sway specifies disparate treatment from
21 non-African-American riders is the snow no-show that she describes on February 4,

1 2017, contrasted with the pickup in snowy conditions that she heard described over
2 paratransit dispatch radio on February 6, 2017. However, this instance does not
3 attribute personal involvement to any of the individual Defendants. Moreover, there
4 is no factual allegation upon which the Court could conclude that the allegedly
5 different treatment of Ms. Sway from the other paratransit rider was motivated by
6 racial bias, particularly where Ms. Sway herself describes many other differences in
7 the circumstances surrounding her snow no-show and the other passenger's pickup.
8 In particular, there is a key distinction between Ms. Sway remaining in her
9 apartment and the other passenger approaching the paratransit vehicle on his own
10 initiative, which Defendants describe as assuming the risk of the unsafe route
11 himself.

12 ***Leave to Replead***

13 Plaintiffs whose claims are dismissed for failure to state a claim should be
14 given leave to amend "if it appears at all possible that the plaintiff can correct the
15 defect." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). However, "[a] district
16 court may dismiss a complaint without leave to amend if amendment would be
17 futile." *Airs Aromatics, LLC v. Opinion Victoria's Secret Stores Brand Mgmt., Inc.*,
18 744 F.3d 595, 600 (9th Cir. 2014). A court also may deny further amendment due to
19 repeated failure to cure deficiencies by amendments that were previously allowed.
20 *See Leadsinger, Inc. v. BMG Music Publishing*, 512 F.3d 522, 532 (9th Cir. 2008).

1 Ms. Sway could not plead any additional facts that would allow her to pursue
2 her ADA discrimination claim against any of the individual Defendants. *See*
3 *Miranda B.*, 328 F.3d at 1188, note 7. Suits against officers of a local government
4 entity in their official capacity generally are considered to be suits against the entity
5 of which the named officer is an agent. *Monell*, 436 U.S. at 690, note 55.
6 Therefore, courts may dismiss a plaintiff's claims against individuals in their official
7 capacity as duplicative. *See Clements v. Airport Authority of Washoe Cty.*, 69 F.3d
8 321, 337 (9th Cir. 1995).

9 As to Plaintiff's civil rights claims, Ms. Sway has filed four complaints in this
10 matter, and the Court has screened two of those complaints through the screening
11 process mandated by 28 U.S.C. § 1915(e)(2)(B). Through that process, Ms. Sway
12 has been afforded multiple opportunities to remedy the deficiencies of her factual
13 allegations regarding her section 1983 claims. However, throughout all of her
14 amendments, Ms. Sway has not offered any additional facts supporting that any
15 Defendant's actions toward her amounted to unfavorable treatment compared to
16 other similarly situated paratransit riders based upon Ms. Sway being African-
17 American. Therefore, the Court finds that further amendment is not appropriate.

18 Accordingly, **IT IS HEREBY ORDERED:**

- 19 1. Defendants' Motion to Dismiss for Failure to State a Claim, **ECF No. 20**,
20 is **GRANTED**.

1 2. Plaintiff's claims pursuant to 42 U.S.C. § 1983 are **dismissed with**
2 **prejudice.**

3 3. Plaintiff's claims pursuant to 42 U.S.C. § 12143 of the ADA against
4 Defendants Allison Mitchel, E. Susan Meyer, Lance Durbin, Denise
5 Marchioro, and Susan Millbank are **dismissed with prejudice.**

6 4. Spokane Paratransit shall be removed as a Defendant in the caption for this
7 matter because there is no such entity.

8 5. Plaintiff's claims pursuant to 42 U.S.C. § 12143 of the ADA against
9 Defendant STA, which were not part of Defendants' motion to dismiss,
10 may proceed at this time.

11 6. A scheduling conference order shall be issued separately to set a
12 conference to determine a trial date and accompanying pretrial deadlines.

13 The District Court Clerk is directed to enter this Order, enter Judgment
14 accordingly, terminate **Defendants Allison Mitchel, E. Susan Meyer, Lance**
15 **Durbin, Denise Marchioro, and Susan Millbank** and provide copies of this Order
16 to Plaintiff Ms. Sway and to counsel.

17 **DATED** December 15, 2017.

18 *s/ Rosanna Malouf Peterson*
19 ROSANNA MALOUF PETERSON
20 United States District Judge
21