UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

"K.B.",	)	
	)	
Plaintiff,	)	
	)	Case No. 1:19-cv-145
v.	)	
	)	Judge Mattice
CITY OF CHATTANOOGA,	)	Magistrate Judge Lee
	)	
Defendant.	)	
	)	

ORDER

Before the Court is Defendant City of Chattanooga's ("Defendant" or "the City") Motion to Dismiss. [Doc. 17]. The City maintains that Plaintiff K.B. ("Plaintiff" or "K.B.") has failed to state a claim relating to a rape perpetrated against her by an on-duty police officer and that this case must be dismissed under Federal Rule of Civil Procedure 12(b)(6). K.B. argues that under the standard of review applicable to a Rule 12(b)(6) motion, she has stated a claim upon which relief may be granted. For the reasons set forth herein, the City's Motion to Dismiss, [Doc. 17], will be **DENIED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

K.B.'s allegations may be summed up as follows: on June 11, 2018, Chattanooga Police Officer Desmond Logan ("Logan") arrested her on the way from a gas station bathroom to a private vehicle. [Doc. 16 ¶¶ 9-11]. He took her to his police car, threatened her with felony charges, and explained that she would have an opportunity to "talk her way out of it." [*Id.* ¶¶ 11-14]. Logan then drove K.B. to a parking lot, removed her from the car, told her the opportunity "to talk" had come, removed his penis from his pants, pushed her against the police car, and raped her. [*Id.* ¶¶ 16-19].

Logan then drove K.B. to the Hamilton County Jail. [*Id.* ¶ 20]. She attempted to report the rape but was ignored, strip searched, and booked 24 hours later. [*Id.* ¶¶ 21-24]. The day after booking, she was sent to Silverdale, where she demanded a rape kit. [*Id.* ¶¶ 25-26]. On June 14, 2018, she was taken to Erlanger, where a rape kit examination was performed. [*Id.* ¶ 27]. At Silverdale, K.B. again reported the rape, and on June 16, 2018, Chattanooga Police Department Chief David Roddy issued a public statement regarding her allegations. [*Id.* ¶ 28]. Roddy stated—untruthfully, according to K.B., [*id.* ¶ 33]—that the police department was unaware of the allegations until June 13, 2018 and that Logan had no previous allegations of sexual misconduct. [*Id.* ¶¶ 29-32].

K.B. then draws from reporting by the Chattanooga Times Free Press, which indicates that Logan had been accused of raping a different woman while on-duty in 2015. [*Id.* ¶ 34]. The article goes on to quote an anonymous police officer as saying that the assault against K.B. was one of at least two committed by Logan while on-duty and that "[t]hey [the police department] knowingly allowed a predator to keep that uniform on." [*Id.* ¶ 35]. The 2015 assault reportedly involved a pattern similar to that of the assault against K.B.; Logan allegedly arrested a different woman while she was walking home, drove her to a parking lot, threatened her with legal consequences, and raped her. [*Id.* ¶ 36]. He told her not to tell anyone and dropped her off at her brother's house, after which she contacted the police and went to the Partnership Rape Crisis Center. [*Id.*] She was examined and delivered a written account of the incident, which the Center indicated would be used to help with an investigation into the officer. [*Id.*]

K.B. also alleges that on January 4, 2016, Chattanooga Police Lieutenant John Boe received a report that Logan attempted to sexually harass a third woman while working with the University Police Department at the University of Tennessee at Chattanooga

("UTC"). [*Id.* ¶¶ 37-38]. Logan apparently offered to walk a female Aramark employee outside McKenzie Arena to her car, after which she offered him a ride to his car. [*Id.* ¶ 39]. He then pushed her gear shift into park, at which time she received a call; he told her to tell the caller that she was alone in the car. [*Id.* ¶¶ 40-41]. After the call, he pulled out his handcuffs and began twirling them, put his handcuffs away, pulled out his taser, and actuated the trigger, causing a shock in the woman's right thigh. [*Id.* ¶¶ 42-45]. She shouted and Logan left the vehicle. [*Id.* ¶¶ 45-46]. Logan was then relieved of his term service with the University Police Department. [*Id.* ¶ 47].

K.B.'s Amended Complaint then explains that after filing her first Complaint, the Chattanooga Times Free Press reported that "[i]nvestigations into former Chattanooga police officer Desmond Logan found two now-retired, high-ranking officers may have played a role in covering up years of rape allegations" against him. [*Id.* ¶¶ 48-49]. According to the paper, retired Assistant Police Chief Edwin McPherson and retired Captain Pedro Bacon are believed by officials to have been "involved in suppression of records" relating to Logan's misconduct, and even "emailed about their attempts to cover up the accusations" against him. [*Id.* ¶¶ 50-51]. Indeed, McPherson served as the Chattanooga Police Department's point of contact as related to Chattanooga police officers working at UTC and, according to K.B., suppressed any record of the accusation against Logan stemming from his time working as a liaison officer. [*Id.* ¶¶ 52-54]. The paper also reported that McPherson apparently interfered with a murder investigation in which his niece was a suspect, and that the department's five chiefs overturned an internal recommendation that he be disciplined for his interference. [*Id.* ¶ 55].

K.B. then recounts the City's response to misconduct by four other individuals. First, she explains that the City failed to fire Detective Karl Fields after falsely claiming

that he was carjacked to cover up an accident in which he drunkenly crashed his car while shooting his gun. [*Id.* ¶ 56(a)]. The City then fired him for allegedly raping a victim of sexual assault. [*Id.*] Second, in 2003 the City removed Captain Janet Crumley from supervising the police department's Internal Affairs Unit ("IAU") for allowing investigations to languish without conclusion. [*Id.* ¶ 56(b)]. Third, the City refused to discipline Captain Edwin McPherson for untruthfulness after investigators discovered that he interfered with a murder investigation in which his niece was a suspect. [*Id.*] Fourth, Mayor Ron Littlefield knew that Paul Page, director of the City's General Services, sexually harassed City employees and one non-employee but issued only a warning and required classes on sexual harassment. [*Id.* ¶ 56(d)]. The City then fired one of the women who took action against Page, after which the Equal Employment Opportunity Commission concluded that Page violated federal law. [*Id.*] The City still did not fire Page; eventually he resigned. [*Id.*]

On May 13, 2019, K.B. sued the City, arguing that it is liable under 42 U.S.C. § 1983 for its custom, tolerance, and acquiescence to repeated federal rights violations. [*See generally* Doc. 1]. On June 5, 2019, K.B. amended her complaint by adding some facts and the claim that Logan's June 11, 2018 rape against her was an unlawful "seizure" in contravention of the Fourth Amendment, which—in combination with a custom, toleration, an acquiescence to repeated federal rights violations—supports a municipal liability claim against the City under 42 U.S.C. § 1983. [Doc. 16]. The City now moves to dismiss, arguing that K.B. has not stated a claim on which relief can be granted. [Doc. 17].

II. STANDARD OF REVIEW

The Federal Rules of Civil Procedure provide, in relevant part, that all pleadings must contain "a short and plain statement of the claim showing that the pleader is entitled

to relief." See Fed. R. Civ. P. 8(a)(2). While Rule 8(a) does not require plaintiffs to set forth detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). At a minimum, Rule 8(a) requires the plaintiff to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" – that is, Rule 8(a)(2) "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 555 n.3 (2007). A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is thus not a challenge to the plaintiff's factual allegations, but rather, a "test of the plaintiff's cause of action as stated in the complaint." *Flanory v. Bonn*, 604 F.3d 249, 252 (6th Cir. 2010).

"[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly*, 550 U.S. at 556). The reviewing court must determine not whether the plaintiff will ultimately prevail, but whether the facts permit the court to infer "more than the mere possibility of misconduct," which is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679; *Twombly*, 550 U.S. at 570 (holding that a complaint is subject to dismissal where plaintiffs failed to "nudg[e] their claims across the line from conceivable to plausible"). Although the Court must take all of the factual allegations in the complaint as true, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and a plaintiff's legal conclusions couched as factual allegations need not be accepted as true. *Iqbal*, 556 U.S. at 678; *see Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010).

Therefore, to survive a motion to dismiss under Rule 12(b)(6), plaintiff's "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007) (citing *Twombly*, 550 U.S. at 555).

III. ANALYSIS

Section 1983 provides a federal cause of action against state or local officials who deprive a person of a federal right while acting under color of state law. 42 U.S.C. § 1983. A § 1983 claim against a municipality—often referred to as a *Monell* claim—requires the plaintiff to show that the federal rights violation occurred because of a municipal policy or custom. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). At least four variations of an illegal policy or custom may give rise to *Monell* liability: "(1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal rights violations." *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005).

The fourth path amounts to "a policy of tolerating federal rights violations [that] is unwritten but nevertheless entrenched." *Id.* It requires plaintiffs to show:

> (1) the existence of a clear and persistent pattern of [illegal activity];
> (2) notice or constructive notice on the part of the [defendant];
> (3) the [defendant's] tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and
> (4) that the [defendant's] custom was the "moving force" or direct causal link in the constitutional deprivation.

Id. (brackets original to *Thomas*) (quoting *Doe v. Claiborne Cty.*, 103 F.3d 495, 508 (6th Cir. 1996)). The causation requirement in particular "is necessary to avoid *de facto respondeat superior* liability" which is "explicitly prohibited by *Monell*." *Doe*, 103 F.3d at 508 (italics original). Moreover, "a custom-of-tolerance claim requires a showing that there was a pattern of inadequately investigating similar claims." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013).

The Parties dispute whether custom-of-tolerance claims require that a final policymaker knew about the rights violations and perpetuated a custom of tolerating them, or whether it is enough that the custom existed within the municipal entity. In fact, the former view undergirds most of the City's motion to dismiss, which claims that—even if Bacon and McPherson (and, to a lesser extent, Boe) did know about Logan's misconduct and suppressed it—no final policymaker knew of his misconduct and that the City therefore cannot be liable.[1]

The most instructive case from the United States Court of Appeals for the Sixth Circuit that the Court can identify on this question is *Memphis, Tennessee Area Local, American Postal Workers Union v. City of Memphis*, 361 F.3d 898 (6th Cir. 2004) [hereinafter *Postal Workers*]. Some of its language supports the City's view: "[a] municipal 'custom' may be established by proof of the knowledge of policymaking officials and their acquiescence in the established practice." *Id.* at 902. But the Sixth Circuit ultimately reversed the district court's grant of a Rule 12(b)(6) motion to dismiss because "[w]hile the [plaintiff] fails to specifically allege that there was knowledge on the part 'of policymaking officials,' a plaintiff need not anticipate every defense and ... need not plead

[1] For reasons that will become clear below, whether Bacon and McPherson are actually policymakers is, at this stage, simply irrelevant.

every response to a potential defense." *Id.* at 903. In fact, *Postal Workers* went on to say explicitly that "the [plaintiff] does not need to allege ... that there was knowledge on the part 'of policymaking officials.'" *Id.* at 904.

The Court therefore concludes that in the Sixth Circuit, pleading of specific knowledge by specific policymakers is unnecessary to survive a motion to dismiss where the plaintiff claims that a municipal defendant "knew or reasonably should have known that the actions of [its employees] were unlawful and in violation of federal laws and the Constitution." *Id.* (internal quotation marks omitted). Although K.B. does not use precisely this language, she does plead that Logan's repeated misconduct "gives rise to an inference that the municipality had notice of the conduct; and the municipality failed to take any remedial action in the face of an obvious need to act." [Doc. 16 ¶ 67]. Indeed, that inference is supported by the factual pleadings and overall gravamen of K.B.'s complaint—that Logan was a repeated sexual harasser, and that the City not only failed to act but even suppressed evidence of his misconduct—which must be taken as true. Doing so, the Court concludes that the City's Motion to Dismiss for failure to plead knowledge on the part of a identifiable policymaker must be denied. K.B.'s factual allegations—far from a conclusory, blanket assertion of liability—give rise to a reasonable inference that the City knew or should have known of Logan's repeated misconduct.

It could be argued that the plausibility standard set forth in the Supreme Court's *Twombly* and *Iqbal* decisions calls into question the Sixth Circuit's decision in *Postal Workers*. To the extent that *Monell* plaintiffs must now plead plausible claims instead of merely conceivable ones, that may be right. But the Sixth Circuit's explanation that plaintiffs need not allege knowledge of specific, identified policymakers where they allege facts showing knowledge on the part of the municipality reads as a substantive

interpretation of *Monell*'s requirements, not a pleading standard susceptible of abrogation by *Twombly* and *Iqbal*. Indeed, a discussion of who specifically (if anyone) must know what and when in order to satisfy *Monell* explains for *what* the plaintiff must plead a factual basis, not with *what degree of plausibility* the factual basis must be pleaded. Moreover, even if *Twombly* and *Iqbal* do require a more nuanced understanding of *Postal Workers*, the Court notes that K.B.'s Complaint is replete with factual content which, taken as true, shows or gives rise to a reasonable inference that the City knew of—and may have even suppressed—Logan's repeated misconduct. Under *Postal Workers*, this is enough to survive a Rule 12(b)(6) motion to dismiss.

The City cites various other Sixth Circuit cases in support of the proposition that K.B. must identify "a City policymaker [who] is responsible either for the policy or, through acquiescence, for the custom that resulted in a § 1983 violation": *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013), *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005), and *Doe v. Claiborne Cty.*, 103 F.3d 495, 507 (6th Cir. 1996). [*See* Doc. 18, at 8]. But *Burgess*—the most recent case—does not contradict *Postal Workers* and, if anything, implicitly undercuts the City's position. It considers a custom-of-tolerance claim alongside failure-to-train and single-act theories of *Monell* liability and explains that while "a custom-of-tolerance claim requires a showing that there was a pattern of inadequately investigating similar claims," for single-act liability "a plaintiff would not need to establish a pattern of past misconduct where the actor was a policymaker." *Burgess*, 735 F.3d at 479 (emphasis added). To identify explicitly the need for a policymaker under one theory but omit any such discussion from the other when analyzing a motion for summary judgment suggests that K.B.'s pleading is sufficient.

Similarly, *Thomas* does not contradict *Postal Workers* and its reasoning undercuts the City. It analyzed a motion for summary judgment and upon considering evidence of an unofficial custom or policy, framed the question as "whether there was some sort of policy, custom, or practice in the Chattanooga Police Department of condoning [unlawful activity] ... [where] such a policy must be shown by a clear and persistent pattern." *Thomas*, 398 F.3d at 432. Tellingly, *Thomas* did not frame the question as one about whether a Chattanooga Police Department *policymaker* condoned the custom, but only whether the *Chattanooga Police Department itself* condoned the custom.

Doe provides perhaps the strongest basis for the City's argument because it rejected *Monell* liability on summary judgment in part due to a lack of evidence that the "[defendant] School Board, as an official policymaking body, had a 'custom' that reflected a deliberate, intentional indifference to the sexual abuse of its students." *Doe*, 103 F.3d at 508. But *Doe* was decided more than seven years prior to *Postal Workers*. While the Court sincerely doubts that *Postal Workers* (or, for that matter, *Thomas* or *Burgess*) meant to call into question the reasoning of *Doe* on this issue, *Postal Workers* is more on-point because it dealt with a Rule 12(b)(6) motion to dismiss and post-dates *Doe*. Moreover, *Thomas*—which discusses *Doe* at length and with approval—considered the Chattanooga Police Department itself and framed the second custom-of-tolerance element as being whether "*the Department* knew or should have known about" a clear and persistent pattern of illegal activity, not whether identified policymakers within it knew or should have known. *Thomas*, 398 F.3d at 433.[2]

[2] The City cites a few other cases in its opening and reply, but for the reasons set forth—and especially insofar as *Postal Workers* dealt with a Rule 12(b)(6) motion to dismiss predicated on grounds similar to this one—the Court concludes that K.B. has sufficiently pleaded her claim.

The City also asserts that K.B.'s identification of four other City employees who engaged in misconduct fails to plead a clear and persistent pattern of illegal activity. Whatever the import of those four cases, however, K.B. has alleged that the City was aware of at least two prior cases of sexual harassment or attempted sexual harassment by Logan himself. The City downplays the UTC incident by claiming that his actions were not overtly sexual but "ambiguous and open to varying interpretations." [Doc. 18, at 3]. But factual ambiguity at this stage must be resolved in K.B.'s favor. Allegations of multiple discrete prior incidents of sexual misconduct by an officer, followed by inaction or even active suppression rather than adequate investigation, is enough for a custom-of-tolerance claim to survive a motion to dismiss. *C.f. Fluker v. Cuyahoga Cty.*, No. 1:19-cv-0318, 2019 WL 3718619, at *5-*6 (N.D. Ohio Aug. 7, 2019) (denying motion to dismiss custom-of-tolerance claim where inmate's allegations of unconstitutionally unsanitary conditions relating to moldy food trays and discolored water was based on "his own limited experiences" because nothing negated "the permissible inference that the particular conditions he alleges ... would neither have developed overnight nor have been a one-time occurrence").

The Court is sensitive to the City's contention that establishing a "custom" under *Monell* is challenging and that even repeated negligence or recklessness will not suffice. But K.B. has pleaded that the City knew about and suppressed multiple similar accusations against Logan. At this stage and bearing the relevant standards in mind, it simply cannot be said that she has failed to state a custom-of-tolerance claim.

The City also argues that K.B. has not pleaded a direct causal connection between the custom and the illegal conduct such that the custom was the "moving force" behind it. [Doc. 18, at 18-19]. But here as elsewhere in its brief, the City collapses this argument into

the assertion that no "facts have been pled regarding any acts or omissions by a City final decision maker or policy maker." [*Id.*] As explained, *Postal Workers* makes clear that this argument cannot serve as a basis for dismissal under Rule 12(b)(6).

Finally, the City argues that K.B. improperly relied upon newspaper reporting to plead the facts in her complaint and that they can only be considered for the fact of their publication. "When a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat. Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

The City's best citation is to a 2005, unpublished Sixth Circuit opinion stating that in the 12(b)(6) context "a court generally may not consider any facts outside the complaint and exhibits attached thereto." *Passa v. City of Columbus*, 123 F. App'x 694, 697 (6th Cir. 2005). In support of that proposition, however, *Passa* cites a published case explaining that "exhibits attached to the complaint[] also may be taken into account." *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001). Indeed, in *Passa*, the lower court went beyond the pleadings sua sponte, necessitating vacatur; such is not the case here. Nor do the City's other cases, which wrestle with judicial notice, adequately support its assertion. The Court therefore concludes that it may properly consider factual material in K.B.'s complaint that hails from newspaper reporting. It would be strange indeed for the City to prevail in this respect; it would suggest that the very same factual allegations could be entitled to truth when no quotation marks or citation are present but not entitled to truth when the quotation marks and citation are removed.

IV. CONCLUSION

For the reasons set forth herein, the City's Motion to Dismiss, [Doc. 17], is hereby **DENIED**.

SO ORDERED this 5th day of December, 2019.

/s/ Harry S. Mattice, Jr.
HARRY S. MATTICE, JR.
UNITED STATES DISTRICT JUDGE