UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT BARLEY, JOHN PACCIONE, MADELINE PACCIONE, DAMARIE AQUINO, MARVA HARRISON, RALPH RAIA, MARIA NEE, CHERIE JOHN, NANCY CARIDE,

Consolidated Plaintiffs,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CORRECTIONS, BERNARD B. KERIK, GARY M. LANIGAN, WILLIAM J. FRASER, MARTIN F. HORN, JOHN J. ANTONELLI, DORA B. SCHRIRO, and CITY OF NEW YORK DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Defendants.

11 Civ. 1300 (LAP)
11 Civ. 1301 (LAP)
11 Civ. 2149 (LAP)
11 Civ. 2150 (LAP)
11 Civ. 2697 (LAP)
11 Civ. 3277 (LAP)
11 Civ. 4780 (LAP)
11 Civ. 5043 (LAP)

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 3/28/12

INGRID MITCHELL as administratrix of the estate of Anthony Mitchell and in her individual capacity,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CORRECTIONS, BERNARD B. KERIK, GARY M. LANIGAN, WILLIAM J. FRASER, MARTIN F. HORN, JOHN J. ANTONELLI, DORA B. SCHRIRO, and CITY OF NEW YORK DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Defendants.

11 Civ. 6296 (LAP)

TINA BARTHOLOMEW, Plaintiff, -against- THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CORRECTIONS, BERNARD B. KERIK, GARY M. LANIGAN, WILLIAM J. FRASER, MARTIN F. HORN, JOHN J. ANTONELLI, DORA B. SCHRIRO, and CITY OF NEW YORK DEPARTMENT OF HEALTH AND MENTAL HYGIENE, Defendants.	11 Civ. 6297 (LAP)
ROBERT SCHWARTZ, Plaintiff, -against- THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CORRECTIONS, BERNARD B. KERIK, GARY M. LANIGAN, WILLIAM J. FRASER, MARTIN F. HORN, JOHN J. ANTONELLI, DORA B. SCHRIRO, and CITY OF NEW YORK DEPARTMENT OF HEALTH AND MENTAL HYGIENE, Defendants.	11 Civ. 8626 (LAP)
DENNIS KELLY, Plaintiff, -against- THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CORRECTIONS, BERNARD B. KERIK, GARY M. LANIGAN, WILLIAM J. FRASER, MARTIN F. HORN, JOHN J. ANTONELLI, DORA B. SCHRIRO, and CITY	11 Civ. 8627 (LAP)

OF NEW YORK DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Defendants.

JOYCE MOORE,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CORRECTIONS, BERNARD B. KERIK, GARY M. LANIGAN, WILLIAM J. FRASER, MARTIN F. HORN, JOHN J. ANTONELLI, DORA B. SCHRIRO, and CITY OF NEW YORK DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Defendants.

11 Civ. 8956 (LAP)

MEMORANDUM AND ORDER

LORETTA A. PRESKA, Chief United States District Judge:

In each of the captioned cases, a former employee of Riker Island Correctional Facility (the "Facility") claims to have developed cancer as a result of exposure to toxins and carcinogens allegedly present in the land fill used to expand Rikers Island from 90 acres in 1932 to 415 acres today. Plaintiffs sue for damages under 42 U.S.C. § 1983. Named Defendants are the City of New York (the "City")[1], as well as six

[1] Plaintiffs improperly also name the New York City Department of Correction and the Department of Health and Mental Hygiene. These city agencies may not be sued, and their identification is redundant as the City is already named as a Defendant. See, e.g., Walker v. Shaw, No. 08 Civ. 10043, 2010 U.S. Dist. LEXIS

past commissioners of the New York City Department of Correction, in their individual and official capacities.

Defendants have moved for judgment on the pleadings in the consolidated earlier-filed cases. Plaintiffs in these cases have cross-moved to amend the original complaints to recite a "Government/State Endangerment theory of recovery," as set forth in the later-filed complaints.

Because this Court finds that no Plaintiff has stated facts that would entitle him or her to relief under section 1983, whether under a state endangerment theory or otherwise, Defendants' motion is GRANTED as to the eight consolidated cases, and all cross-motions are DENIED as moot. The actions filed by Plaintiffs BARLEY, JOHN PACCIONE, MADELINE PACCIONE, AQUINO, HARRISON, RAIA, NEE, JOHN, and CARIDE are dismissed, and Plaintiffs MITCHELL, BARTHOLOMEW, SCHWARTZ, KELLY, and MOORE are ordered to show cause within thirty (30) days of this order why their complaints should not also be dismissed for failure to state a claim.

I. BACKGROUND

Plaintiffs' complaints (all of which use nearly identical language) are surprisingly short on facts. Each

---

62664, at *11 (S.D.N.Y. June 23, 2010) ("Plaintiff cannot sue an agency of the City of New York; he must sue the City." (citing N.Y. City Charter Ch. 17, § 396)).

complaint states that a Plaintiff worked at the Facility at some point between 1990 and today, and that he or she has been diagnosed with one of a number of forms of cancer.[2] Although each complaint alleges that the landfill used to expand Riker's Island "was comprised of various toxins and carcinogens," no

[2] Plaintiff Robert Barley was a cook at the Facility from October of 1993 through September of 2007, and was diagnosed with thyroid cancer on March 1, 2008. Plaintiff John Paccione was a plumber at the Facility from 1990 through the present, and was diagnosed with brain cancer on January 7, 2010; his wife Madeline Paccione is also named as a plaintiff for her loss-of-consortium claim. Plaintiff Damarie Aquino was a corrections officer at the Facility from 2005 through the present, and was diagnosed with breast cancer in February of 2010. Plaintiff Marva Harrison was a Public Health Educator at the Facility from 1999 through the present, and was diagnosed with breast cancer in June of 2008. Plaintiff Ralph Raia was a corrections officer at the Facility from 1989 to 2003, and was diagnosed with renal cancer on February 19, 2008. Plaintiff Maria Nee was a corrections officer at the Facility from 1991 to 2008, and was diagnosed with breast cancer on February 22, 2010. Plaintiff Cherie John was a corrections officer at the Facility from 1973 to 1985, and was diagnosed with breast cancer on July 31, 2008. Plaintiff Nancy Caride was a Secretary/Program Specialist at the Facility from February 16, 1988 to the present, and was diagnosed with breast cancer on August 1, 2008. Plaintiff Ingrid Mitchell sues as administratrix of the estate of her husband Anthony Mitchell, who was a corrections officer at the Facility from June of 1987 to April of 2007, was diagnosed with bladder cancer on January 3, 2008, and died on September 14, 2008; Ingrid Mitchell also sues for a loss-of-consortium claim. Plaintiff Tina Bartholomew was a corrections officer at the Facility from May of 1990 to December of 2008, and was diagnosed with breast cancer on October 1, 2008. Plaintiff Robert Schwartz was a corrections officer at the Facility from 2001 to 2011, and was diagnosed with prostate cancer on December 30, 2008. Plaintiff Dennis Kelly was a corrections officer at the Facility from 1986 to 2008, and was diagnosed with colon cancer on December 22, 2008. Plaintiff Joyce Moore was a corrections officer at the Facility from 1970 to 1980, and again from 1984 to 1985, and was diagnosed with breast cancer in 1998 and stomach cancer in 2009.

particular carcinogens are named. (E.g., Mitchell Compl. ¶ 33 [Dkt. No. 1 in 11 Civ. 6296].) While the complaints state that each Plaintiff was "told by his [or her] supervisors that there were not any toxic, hazardous or cancer causing toxins located on Riker's Island," no particular statement or supervisor is identified. (E.g., id. ¶ 38.) And while the complaints state that each Plaintiff had been "provided internal memorandum [sic] indicating that it was safe to work at Riker's Island" because "no carcinogens [were] present" there, no memoranda are identified by date or author. (E.g., id. ¶¶ 39-40.)

Cases no. 11 Civ. 1300, 11 Civ. 1301, 11 Civ. 2149, and 11 Civ. 2150 were each originally filed in the Supreme Court of the State of New York and subsequently removed to this Court because each Plaintiff had alleged, inter alia, violations of 42 U.S.C. § 1983, over which this Court has original jurisdiction. The remaining captioned cases were filed in this Court and assigned to the same judge as related.

On June 8, 2011, Defendants moved for judgment on the pleadings in the six consolidated cases pending on that date: 11 Civ. 1300, 11 Civ. 1301, 11 Civ. 2149, 11 Civ. 2150, 11 Civ. 2697, and 11 Civ. 3277. Defendants argue that Plaintiffs' claims of exposure to workplace toxins sound only in negligence and tort, and that, under Collins v. City of Harker Heights, 503 U.S. 115 (1992) and Murray v. Connetquot Central School District

of Islip, 54 F. App'x 18 (2d Cir. 2002), cert. denied, 2003 U.S. LEXIS 5557 (Oct. 6, 2003), such state-law claims do not constitute a constitutional violation under section 1983, even when undertaken by a municipal employer. Defendants also argue that whether or not a constitutional violation occurred, the individual Defendants are immune from suit under Pearson v. Callahan, 555 U.S. 223, 227 (2009) because the alleged constitutional rights were not "clearly established" when the violations occurred.

On August 9, 2011, the then-consolidated Plaintiffs filed an affirmation opposing the motion[3] in which they do not contest Defendants' argument that their claims are invalid under section 1983 as originally filed. Instead, they attempt to recast the complaints as seeking municipal and individual liability for "misrepresentations that Defendants made to Plaintiffs regarding their safety on Riker's Island" under the "Government/State Endangerment theory of recovery," which renders a government official "liable for third-party injury where the government official affirmatively acts to create or enhance the danger that ultimately results in the individual's harm." (Opp. Aff. ¶¶ 6, 12, 13.) To this end, Plaintiffs also

[3] Affirmation of Christopher J. Donadio, Esq. in Opposition to Defendants' Motion for Judgment on the Pleadings, dated August 8, 2011 ("Opp. Aff.").

cross-moved to amend their complaints to set forth this new cause of action.

On August 15, intervening-filed actions 11 Civ. 4780 and 11 Civ. 5043 were consolidated with the six originally-filed actions for all purposes. No party objected to this consolidation.

Defendants filed a reply memorandum on September 9, 2011 in the eight then-consolidated cases (11 Civ. 1300, 11 Civ. 1301, 11 Civ. 2149, 11 Civ. 2150, 11 Civ. 2697, 11 Civ. 3277, 11 Civ. 4780, and 11 Civ. 5043), challenging Plaintiffs' cross-motion as futile. The reply argues that Plaintiffs' proposed amended pleadings fail to set forth sufficient factual matter, even if accepted as true, to "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The reply also notes that no case in this circuit has allowed a workplace safety claim to proceed under the State Endangerment theory of liability.

Five additional complaints have been filed since Defendants filed their reply: 11 Civ. 6296, 11 Civ. 6297, 11 Civ. 8626, 11 Civ. 8627, and 11 Civ. 8956. Each names a new Plaintiff and the same Defendants. Each seeks relief under the same Government/State Endangerment theory.

II. DISCUSSION

A. Legal Standard

1. Motion for Judgment on the Pleadings

"The standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion for failure to state a claim." Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir. 2001). On a motion to dismiss under Fed. R. Civ. P. 12(b)(6) the Court accepts as true all factual allegations in the complaint and draws all reasonable inferences in the plaintiff's favor. In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 692 (2d Cir. 2009). However, "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." Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009). Rather, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570). "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." Iqbal, 129 S.Ct. at 1949. "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. (quoting Twombly, 550 U.S. at 557).

2. Liability Under Section 1983

42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia" violates the constitutional rights of another may be held liable to the injured party. To state a claim for relief under section 1983 against an individual defendant, a plaintiff must allege the personal involvement of the defendant in the alleged constitutional deprivation. Farid v. Ellen, 593 F.3d 233, 249 (2d Cir. 2010).

Cities are considered persons under section 1983 and thus may also be held liable thereunder. Vives v. City of New York, 524 F.3d 346, 350 (2d Cir. 2008). Nonetheless, "a municipality cannot be held liable solely because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the

government as an entity is responsible under 1983." Id. at 694; see also Shomo v. City of N.Y., 579 F.3d 176, 184 (2d Cir. 2009) ("To ultimately prevail on his municipal liability claim against the City, [a plaintiff] must establish that violations of his constitutional rights were precipitated by a municipal policy or custom."). Thus, for a city to be liable under section 1983 for the unconstitutional actions of its employees, "'a plaintiff is required to plead and prove three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right.'" Wray v. City of N.Y., 490 F.3d 189, 195 (2d Cir. 2007) (quoting Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983)).

B. Analysis

Plaintiffs claim violations of their substantive due process rights under the Fifth Amendment of the United States Constitution. The substantive component of due process encompasses, among other things, an individual's right to bodily integrity free from unjustifiable governmental interference. See Washington v. Glucksberg, 521 U.S. 702, 720 (1997). However, government action resulting in bodily harm is not a substantive due process violation unless "the government action was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" Pena v. DePrisco, 432 F.3d

98, 112 (2d Cir.2005) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998)).

The Court of Appeals has held that section 1983 does not support a due process claim for "denial of a minimal level of workplace safety in public employment" or for deliberate indifference to the safety of municipal employees. Murray, 54 Fed. App'x at 19 (citing Collins, 503 U.S. at 127-30); see also Lombardi v. Whitman, 485 F.3d 73, 79 (2d Cir. 2007) ("Only an affirmative act can amount to a violation of substantive due process, because the Due Process Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. . . . It is not enough to allege that a government actor failed to protect an individual from a known danger of bodily harm or failed to warn the individual of that danger." (internal quotation marks and citations omitted)).

As noted above, Defendants raise Murray and Collins in their motion papers, and Plaintiffs do not contest their application to their original filings. Instead, Plaintiffs attempt to frame their new and proposed complaints in terms of affirmative misrepresentations regarding safety at the Facility. The parties disagree as to whether such a "State Endangerment" claim is cognizable in the context of a municipal workplace, but

the Court need not reach this question.[4] Even if a state employer's misrepresentation of safety conditions could be so egregious as to give rise to a constitutional offense, Plaintiffs' allegations in these cases are the very sort of "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" that courts need not accept as true after Twombly and Iqbal. Iqbal, 129 S.Ct. at 1949; see also, e.g., Benzman v. Whitman, 523 F.3d 119, 129 (2d Cir. 2008) ("[A] bare allegation that the head of a Government agency . . . knew that her statements were false and 'knowingly' issued false press releases is not plausible in the absence of some supporting facts.").

Plaintiffs nowhere identify an actual statement or memorandum by any state supervisor or official denying the presence of carcinogens on Rikers Island. Without the origin or content of these alleged statements, the Court cannot merely assume their existence, let alone in sufficient number to support an "official policy or custom." The Court cannot even determine whether the alleged misrepresentations were made while

[4] Contrary to Plaintiffs' suggestion, the Court of Appeals for the Second Circuit has not recognized the State Endangerment theory as set forth in Briscoe v. Potter, 355 F. Supp. 2d 30 (D.D.C. 2004) (finding that postal workers stated a valid claim against their supervisors for deliberate misrepresentations regarding the safety of their facility after it had been infected with anthrax), aff'd, 171 F. App'x 850 (D.C. Cir. 2005), but instead has reserved the question of whether Briscoe was correctly decided. See Lombardi, 485 F.3d at 84.

a given Plaintiff was employed at the Facility and thus whether that Plaintiff could have conceivably relied on them to his or her detriment. Plaintiffs do not allege who made the statements, when they were made, whether testing was done before they were made, or whether the supervisors knew the test results at the time they made the statements. Accordingly, the Court cannot determine whether the content of the alleged misrepresentations gives rise to more than mere tort liability. The Due Process Clause "does not transform every tort committed by a state actor into a constitutional violation." DeShaney, 489 U.S. at 202. Given the Court of Appeals' warning in Lombardi against allowing substantive due process liability "to inhibit or control policy decisions of government agencies, even if some decisions could be made to seem gravely erroneous in retrospect," 485 F.3d at 84, the context and content of the alleged misrepresentations are critically important, and their absence is fatal to Plaintiffs' claims.

Additionally, while the "body integrity" underlying Plaintiffs' claims is presumably a freedom from cancer, Plaintiffs' complaints offer no facts connecting their cancer to their employment at the Facility other than the conclusory allegation that unidentified "carcinogens" are present in the ground beneath it. Plaintiffs have not shown that cancer rates are higher at the Facility than elsewhere in the city or state

or that their particular forms of cancer (of which Plaintiffs collectively list seven) are affected by environmental contamination, of which no particular type is alleged.

In sum, the complaints in 11 Civ. 1300, 11 Civ. 1301, 11 Civ. 2149, 11 Civ. 2150, 11 Civ. 2697, and 11 Civ. 3277 all recite state-law tort claims that are improper under section 1983 in view of Collins and Murray, while the proposed amended complaints and the seven most recently filed complaints provide no facts making entitlement to relief from the City under a State Endangerment theory plausible, rather than possible. As such, all claims against the City must be dismissed, and Plaintiffs' cross-motion to amend must be denied as moot.

Moreover, because Plaintiffs have not identified any misstatements by a named supervisor, the claims against these Defendants in their individual and official capacities must also be dismissed. See Farid, 593 F.3d at 249; see Iqbal, 129 S. Ct. at 1948 ("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.").

III. CONCLUSION

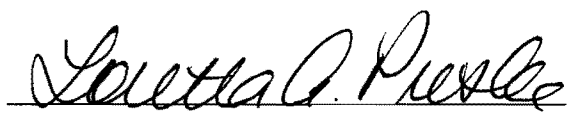
For the reasons above, Defendants' motion for judgment on the pleadings is GRANTED as to consolidated cases 11 Civ.

1300 [Dkt. No. 14], 11 Civ. 1301 [Dkt. No. 14], 11 Civ. 2149 [Dkt. No. 13], 11 Civ. 2150 [Dkt. No. 13], 11 Civ. 2697 [Dkt. No. 11], 11 Civ. 3277 [Dkt. No. 9], 11 Civ. 4780, and 11 Civ. 5043, and all cross-motions [Dkt. No. 22 in 11 Civ. 1300] are DENIED as moot.

Plaintiffs MITCHELL, BARTHOLOMEW, SCHWARTZ, KELLY, and MOORE shall show cause within thirty (30) days of the date hereof why their complaints should not also be dismissed for failure to state a claim.

SO ORDERED.

Dated: New York, New York
March 28, 2012



UNITED STATES DISTRICT JUDGE