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United States District Court, S.D. Ohio, Eastern Division.

UNITED STATES of America, Plaintiff,
v.
CITY OF COLUMBUS, Ohio, et al., Defendants.

No. CIV.A.2;99CV1097. | Aug. 3, 2000.

Attorneys and Law Firms

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Opinion

REPORT AND RECOMMENDATION

KING, Magistrate J.

***1** This is an action for injunctive and declaratory relief, instituted under the provisions of 42 U.S.C. § 14141, in which the United States alleges that officers of the Columbus Division of Police have engaged in a pattern or practice of conduct violative of federal law and that the defendant city has tolerated the alleged misconduct by failing to implement adequate policies, training, supervision, monitoring and incident investigation procedures. This matter is now before the Court on the motion to dismiss filed by the defendant city and on the motion for judgment on the pleadings filed by the defendant-intervenor, the Fraternal Order of Police, City Lodge No. 9 [referred to jointly as "movants"].

In their motions, the movants argue, first, that the Court is without subject matter jurisdiction over the claims asserted in the action because Congress exceeded its constitutional authority in promulgating the statute upon which the complaint is based, 42 U.S.C. § 14141. Movants argue, in the alternative, that the original complaint fails to state a claim upon which relief can be granted because it purports to impose vicarious liability on the defendant city, because it fails to allege with specificity the claimed wrongdoing of the defendant city or its police officers, and because its allegations are, in whole or in part, untimely. Although plaintiff has filed a motion for leave to amend the complaint in order to assert an additional claim of racially discriminatory conduct, that motion remains pending. The Court will therefore consider the movants' motions solely by reference to the original complaint.

I. STANDARD

Where the Court's subject matter jurisdiction is challenged under Fed.R.Civ.P. 12(b)(1), the plaintiff bears the burden of proving jurisdiction. *RMI Titanium Co. v. Westinghouse Elec. Corp.,* 78 F .3d 1125, 1134 (6th Cir.1996). When considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the Court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded material allegations in the complaint as true. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Roth Steel Products v. Sharon Steel Corporation,* 705 F.2d 134, 155 (6th Cir.1983). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957); *see also McClain v. Real Estate Bd. of New Orleans, Inc.,* 444 U.S. 232, (1980); *Windsor v. The Tennessean,* 719 F.2d 155, 158 (6th Cir.1983). Because a motion under Rule 12(b)(6) is directed solely to the complaint itself, *Roth Steel Products,* 705 F.2d at 155, the Court must focus on whether the plaintiff is entitled to offer evidence to support the claims, rather than whether the plaintiff will ultimately prevail. *Scheuer v. Rhodes,* 416 U.S. at 236.

In resolving a motion for judgment on the pleadings under F.R. Civ. P. 12(c), the Court must likewise accept all well-pleaded material allegations as true. *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 479 F.2d 478, 480 (6th Cir.1973). "The motion is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *United States v. Moriarty,* 8 F.3d 329, 332 (6th Cir.1993); *Paskvan v. City of Cleveland Civil Serv. Comm'n.,* 946 F.2d 1233, 1235 (6th Cir.1991). The Court need not, however, accept as true legal conclusions or unwarranted factual inferences. *Lewis v. ACB Business Serv., Inc.,* 135 F.3d 389, 405 (6th Cir.1998); *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir.1987). Where the motion for judgment on the pleadings raises the defense of failure to state a claim upon which relief can be granted, the standard of F.R. Civ. P. 12(b)(6) is applicable. *Nixon v. State of Ohio,* 193 F.3d 389, 399 (6th Cir.1999). *See also Romero v. Intl. Terminal Operating Co.,* 358 U.S. 354, 358 n. 4 (1959).

II. THE ORIGINAL COMPLAINT

***2** The original complaint alleges that Columbus police officers have engaged in, and continue to engage in, a pattern or practice of using excessive force, *Complaint,* ¶ 6, falsely arresting individuals, *Id.,* ¶ 7, and falsifying official reports and conducting searches either without lawful authority or in an improper manner. *Id.,* ¶ 8(a),(b). The complaint further alleges that the City of Columbus has "tolerated the misconduct of individual officers," *Id.,* ¶ 9, by failing "to implement a policy on use of force that appropriately guides the actions of individual officers," *Id.,* ¶ 9(a), by failing to adequately "train," "supervise," and "monitor" officers, *Id.,* ¶ 9(b)—(d), and by failing to "establish a procedure whereby citizen complaints are adequately investigated," *Id.,* ¶ 9(e), "investigate adequately incidents in which a police officer uses lethal or non-lethal force," *Id.,* ¶ 9(f), "fairly and adequately adjudicate or review citizen complaints, and incidents in which an officer uses lethal or non-lethal force," *Id.,* ¶ 9(g), and "discipline adequately ... officers who engage in misconduct." *Id.,* ¶ 9(h). The complaint seeks a declaration that the city "is engaged in a pattern or practice by ... officers of depriving persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States," and asks that the Court enjoin the city "from engaging in any of the predicate acts forming the basis of the pattern or practice of conduct as described ..." and order the city "to adopt and implement policies, practices, and procedures to remedy the pattern or practice of conduct described ... and to prevent officers from depriving persons of rights, privileges or immunities secured or protected by the Constitution or laws of the United States...." *Id.,* at pp. 4–5.

III. THE STATUTE

The original complaint asserts claims under 42 U.S.C. § 14141. That statute, enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, reads in full as follows:

Cause of action

(a) Unlawful Conduct

> It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Civil action by Attorney General

> Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

***3** The parties agree that § 14141, which has no direct legislative history and which has never been construed by any court, is a successor to an earlier, nearly identical, provision of the Omnibus Crime Control Act of 1991, which was never actually promulgated.[1] *Defendant City's Motion to Dismiss,* at 9; *Motion for Judgment on Pleadings by the Fraternal Order of Police, City Lodge No. 9,* at 6; *The United States' Memorandum in Opposition to the City of Columbus' Motion to Dismiss and the Fraternal Order of Police's Motion for Judgment on the Pleadings,* at 6 [hereinafter "*Memorandum contra* "]. All parties also refer to the legislative history of that provision in their discussion of 42 U.S.C. § 14141. H.R.Rep. No. 102–242, 102nd Cong., 1st Sess., at 402, 1991 WL 206794 *399 (Leg.Hist.).

Like § 14141, the earlier statute was intended to confer standing on the United States Attorney General to obtain civil injunctive relief against governmental authorities for patterns or practices of unconstitutional police practices. In considering the need for such legislation, the House Subcommittee on Civil and Constitutional Rights held two days of hearings and, in its report, the Committee on the Judiciary specifically referred to the Rodney King incident in Los Angeles, and to alleged misconduct within the Boston, New York City and Reynoldsburg, Ohio, Police Departments. Although recognizing that police misconduct violates the United States Constitution and, under 18 U.S.C. §§ 241, 242, can give rise to federal criminal liability, the Committee also noted that, under *United States v. City of Philadelphia,* 644 F.2d 187 (3d Cir.1980), the United States had neither statutory nor constitutional authority to sue a police department itself "to correct the underlying policy." 1991 WL 206794 *404. The problem was compounded, the Committee concluded, by the Supreme Court's holding, in *Los Angeles v. Lyons,* 461 U.S. 95 (1983), that, although a private citizen victimized by police misconduct could recover monetary relief under 42 U.S.C. § 1983, future injunctive relief remained unavailable absent a showing of likely future harm to that particular plaintiff. The proposed statute, the committee stated in its report, "would close this gap in the law, authorizing the Attorney General ... to sue for injunctive relief against abusive police practices." *Id.,* at 406. Significantly, the Committee

went on to explain:

> The Act does not increase the responsibilities of police departments or impose any new standards of conduct on police officers. The standards of conduct under the Act are the same as those under the Constitution, presently enforced in damage actions under section 1983. The Act merely provides another tool for a court to use, after a police department is held responsible for a pattern or practice of misconduct that violates the Constitution or laws of the United States.
>
> Because the Act imposes no new standard of conduct on law enforcement agencies, it should not increase the amount of litigation against police departments. Individuals aggrieved by the use of excessive force already can and do sue under 42 U.S.C. § 1983 for monetary damages. With adoption of this section, such persons will be able to seek injunctive relief as well, if their injury is the product of a pattern or practice of misconduct.
>
> ***4** This provision may in fact decrease the number of lawsuits against police departments. Currently, changes in a police department's policy are prompted by successive criminal cases or damage actions; the cumulative weight of convictions or adverse monetary judgments may lead the police leadership to conclude that change is necessary. This is an inefficient way to enforce the Constitution and is not always effective. Some police departments have shown they are willing to absorb millions of dollars of damage payments per year without changing their policies. If there is a pattern of abuse, this section can bring it to an end with a single legal action.

Id., at *406–08.

The movants argue that 42 U.S.C. § 14141, either as drafted or as applied in the original complaint in this action, does not reflect a valid exercise of congressional authority. This Court, movants contend, therefore lacks jurisdiction to entertain the claims asserted under that statute.

IV. Congressional Authority to Promulgate § 14141

A

It has been long established that each act of Congress, which is a branch of a government of only enumerated powers, must find its ultimate authority in the United States Constitution. *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803). The parties only briefly address the broad congressional authority to regulate "Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8. The proper exercise of that authority permits Congress to regulate the channels of interstate commerce, *e.g., Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 256 (1964), the instrumentalities of interstate commerce or persons or things in interstate commerce, *e.g., Shreveport Rate Cases,* 234 U.S. 342 (1914), and those activities that "substantially affect interstate commerce," *e.g., NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37(137). *See generally United States v. Lopez,* 514 U.S. 549 (1995). The United States takes the position that Congress "had ample authority under the Commerce Clause to enact § 14141 given the substantial effect on interstate commerce of the consequences of police misconduct, ..." *Memorandum contra,* at 16 n. 5. There is no indication, however, that, in enacting § 14141, Congress intended the statute to effect a regulation of interstate commerce. More important, the United States Supreme Court has recently held that Congress may not regulate "non-economic [mis]conduct ... based solely on that conduct's aggregate effect on interstate commerce." *United States v. Morrison,* 120 S.Ct. 1740, 1754 (2000). This Court concludes that § 14141 cannot be justified as a valid exercise of congressional authority under the Commerce Clause.

In their memoranda, all parties also discuss, in comprehensive fashion, whether § 14141 reflects a valid exercise of congressional power under § 5 of the Fourteenth Amendment. The Fourteenth Amendment provides, in relevant part:

> ***5** Section 1.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV. Congressional power under § 5 to enforce the Fourteenth Amendment includes the authority both to remedy and to prevent the violation of rights guaranteed by the amendment. *North Carolina v. Katzenbach,* 383 U.S. 301, 326 (1966). However, it does not include the power "to decree the substance of the Fourteenth Amendment's restrictions on the states." *City of Boerne v. Flores,* 521 U.S. 507, 519 (1997). "Congress does not enforce a constitutional right by changing what the right is." *Id* . The limitations on the power of Congress to act, as reflected in both the language and purpose of the Fourteenth Amendment, "are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government." *United States v. Morrison,* 120 S.Ct. at 1755.

The distinction between remedial measures properly taken by Congress pursuant to § 5 and substantive changes to the Fourteenth Amendment forbidden to Congress is, as the Supreme Court has recognized, "not easy to discern." *City of Boerne,* 521 U.S. at 519. Critical to the distinction is the existence of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.,* at 520. Legislation purportedly promulgated pursuant to § 5 of the Fourteenth Amendment, but which lacks such "congruence and proportionality, may become substantive in operation and effect" and is prohibited. *Id.* Although lapses in the legislative history are not necessarily fatal, *Kimel v. Florida Bd. of Regents,* 120 S.Ct. 631, 649–50 (2000); *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank,* 119 S.Ct 2199, 2210 (1999); *City of Boerne,* 521 U.S. at 531, Congress must nevertheless "identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid,* 119 S.Ct. at 2207. Moreover, where congressional action would prohibit conduct not otherwise unconstitutional, it cannot be said, in the absence of a significant pattern of unconstitutional misconduct by state officials, that the action is congruent and proportional to the authority conferred upon Congress by § 5 of the Fourteenth Amendment. *Kimel,* 120 S.Ct. at 650. Where legislation "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior," the statute may be characterized as attempting to effect "a substantive change in Constitutional protections." *City of Boerne,* 521 U.S. at 532. "Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Florida Prepaid,* 119 S.Ct. at 2157 (quoting *South Carolina v. Katzenbach,* 383 U.S. 301, 308 (1966)).

***6** With these standards in mind, the Court will consider whether § 14141 reflects a valid exercise of congressional power under § 5 of the Fourteenth Amendment.

B

Without doubt, the Fourteenth Amendment offers substantive protection from various forms of misconduct on the part of state law enforcement officials. *See, e.g., Graham v. Connor,* 490 U.S. 386 (1989) [excessive force]; *Dietrich v. Burrows,* 167 F.3d 1007 (6th Cir.1999) [arrest without probable cause]; *cf. Malley v. Briggs,* 475 U.S. 335 (1986); *Pierson v. Ray,* 386 U.S. 547 (1967) [false arrest]; *Albright v. Oliver,* 510 U.S. 266, 271n.4 (1994); *Knowles v. Iowa,* 525 U.S. 113 (1998) [unlawful searches]; *cf. Klina v. Fletcher,* 522 U.S. 118 (1997) [false affidavits in support of application for arrest warrant]. Moreover, the legislative history referred to by all parties in this action makes clear that the House Committee perceived the problem of police misconduct in constitutional terms and described the problem in its report as "serious," "real," and "not limited to Los Angeles." This Court has no doubt that, in enacting § 14141, Congress intended to respond, by both remedial and preventative measures, to a widespread pattern of violations of the Fourteenth Amendment by police officials acting under color of state law. The first test of the "congruence and proportionality" test, addressed in *Florida Prepaid* and *Kimel,* has been met.

The movants argue that any remedy under § 14141, and particularly the far-reaching relief sought by plaintiff in this action, is disproportionate to any claimed Fourteenth Amendment violations in light of the availability of private civil actions under § 1983 and the possibility of criminal prosecutions under 18 U.S.C. §§ 241, 242. However, as the House Committee report noted, some forms of unconstitutional police misconduct will, by operation of current judicial law, fall beyond the reach of private litigants and the possibility of remedy. The fact that Congress has previously promulgated 42 U.S.C. § 1983 and 18 U.S.C. §§ 241,242 does not transform § 14141 into an incongruent and disproportionate method of enforcing Fourteenth Amendment violations.

Once a Fourteenth Amendment violation has been identified, Congress is entitled to "much deference" in determining "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *City of Boerne,* 521 U.S. at 536; *Katzenbach v. Morgan,* 384 U.S. 641, 651 (1966). That the method of enforcement selected by Congress in the lawful exercise of its authority under § 5 may be unprecedented and even severe does not necessarily militate a finding of incongruity and disproportionality. *City of Boerne,* 521 U.S. at 526. As the United States Supreme Court has cautioned, "Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation." *Kimel,* 120 S.Ct. at 648.

C

***7** In a jurisdictional argument that overlaps an argument made in support of the motion to dismiss for failure to state a claim for relief, the movants disagree with the plaintiff's interpretation of the language of the statute and the remedy actually created by it. The United States contends that the statute authorizes "appropriate equitable and declaratory relief," 42 U.S.C. § 14141, even where the defendant governmental authority has not itself caused

the pattern or practice of constitutional violations. In other words, the plaintiff argues, the statute authorizes vicarious liability as a predicate for relief. The movants contend that to impose liability on the City of Columbus for—not its own misconduct—but the alleged misconduct of police officers,[2] is neither congruent nor proportional to the claimed constitutional violations. They argue that, if § 14141 is construed to effect such a result, either on its face or as applied in this action, the statute is disproportional to the perceived harm and cannot be justified as a lawful exercise of authority under § 5 of the Fourteenth Amendment.

In determining whether or not § 14141, either on its face or as applied in this action, is congruent and proportional to the authority conferred upon Congress under § 5 of the Fourteenth Amendment, it becomes necessary to construe the actual language of the statute. The United States contends that § 14141 is unambiguous in its authorization of liability based upon vicarious liability. This Court does not agree. Rather, the awkwardness of the language and grammatical structure of the statute renders it difficult to construe and interpret. Thus, in construing § 14141, the Court will be guided by the time-honored tenet of statutory interpretation which requires that a Court "interpret the text of one statute in the light of text of surrounding statutes ...," *Vermont Agency of Natural Resources v. United States,* 120 S.Ct. 1858, 1860 n. 17 (2000), as well as by the corollary that, "if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Id.* at 1860. Finally, the Court is mindful that statutes should be construed so as to avoid difficult constitutional questions.

As the House Committee report makes clear, and as all parties to this action appear to concede, the grant of authority to the Attorney General reflected in both the Police Accountability Act of 1991 and in § 14141 was drafted in light of and was intended to remedy the inadequacies of 42 U.S.C. § 1983. That statute provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

***8** Section 1983 does not impose vicarious liability solely on the basis of an employment relationship between a governmental agency and a tortfeasor. *Rizzo v. Goode,* 423 U.S. 362 (1976). Before a city can be held liable under § 1983, some "action pursuant to official municipal policy of some nature [must have] caused a constitutional tort." *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 691 (1978). Simply put, cities are not subject to liability under § 1983 on a theory of *respondeat superior. Id.*

That having been said, cities can nevertheless be held liable under § 1983 for more than just the most direct and egregious violations of an individual's Fourteenth Amendment rights. For example, if the constitutional violation is the result of inadequate police training, the city may be held liable under § 1983 if "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton, Ohio v. Harris,* 489 U.S. 378, 388 (1989). Liability under § 1983 can be imposed on a municipality where " 'a deliberate choice to follow a course of action is made from among various alternatives' by city policy makers." *Id.,* at 389 (quoting *Pembaur v. Cincinnati,* 475 U.S. 469, 483–84 (1986)).

> [I]t may happen that in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of Constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Id., at 390 (footnotes omitted).[3]

The Supreme Court based its relatively narrow construction of § 1983 on the express language of the statute, its legislative history, *Monell,* 436 U.S. at 691, and "perceived constitutional difficulties" on the part of the drafters of the statute. *Id.* at 694. Moreover, the Supreme Court noted in *Rizzo v. Goode* that important principles of federalism "militate against the proposition ... that federal equity power should fashion prophylactic procedures designed to minimize misconduct by a handful of state employees...." *Rizzo v. Goode,* 423 U.S. at 362. In *City of Canton, Ohio v. Harris,* the Supreme Court

reaffirmed its rejection of liability under § 1983 based on a theory of vicarious liability because federal courts "are ill-suited to undertake" the resultant wholesale supervision of municipal employment practices; to do so, moreover, "would implicate serious questions of federalism." *Id.,* at 392.

This Court concludes that § 14141 is properly construed to similar effect. Its language does not unambiguously contemplate the possibility of vicarious liability and such legislative history as exists manifests a congressional intent to conform its substantive provisions to the standards of § 1983. For example, the House Committee report contemplates civil actions by the Justice Department "to change the *policy* of a police department that tolerates officers beating citizens on the street," 1991 WL 206794 *404(emphasis added), and commented that the standards of conduct under the act "are the same as those under the constitution, presently enforced in damage actions under Section 1983." *Id.,* at *406. Moreover, to eliminate the restriction placed on municipal liability under § 1983 by *Rizzo, Monell* and *City of Canton, Ohio,* would, contrary to congressional expectations, result in a dramatic expansion of liability and potential for litigation against local governments. Under these circumstances, the Court cannot conclude that Congress, which is presumed to alter the usual constitutional balance between states and the federal government only in unmistakable terms, intended to do so here. The Court therefore construes § 14141 to require the same level of proof as is required against municipalities and local governments in actions under § 1983.

***9** As so construed, the Court concludes that § 14141 is a valid and proper exercise of congressional authority under § 5 of the Fourteenth Amendment.[4] As the House Committee report makes clear, the authority conferred on the Attorney General by § 14141 was intended to "close [the] gap in the law" as it had developed in litigation under § 1983 by providing the remedy of broad injunctive relief where "appropriate." The remedy authorized by § 14141 is clearly responsive to the constitutional harm identified in the House Committee report and is no more expansive than is necessary to address that harm. The statute therefore reflects a valid exercise of Congress' constitutional mandate to identify, remedy and even prevent substantive violations of the Fourteenth Amendment. As so construed, § 14141 is neither incongruent nor disproportionate to Congress' constitutional prerogative and responsibility.

To the extent that the complaint seeks to posit liability against the City of Columbus on a theory of *respondeat superior,* the original complaint is deficient. However, the United States asks that, in such event, "the Court grant the United States sufficient time to amend the complaint to remedy any identified deficiency." *Memorandum contra,* at 35. The Court will grant that request. Plaintiff may file its amended complaint within ten (10) days of the later of the resolution of its motion for leave to amend the complaint to assert an additional claim, and Judge Holschuh's final disposition of the movants' motions.[5]

V. SUFFICIENCY OF THE ORIGINAL COMPLAINT

The movants also take the position that, wholly apart from the contentions addressed *supra,* the allegations contained in the original complaint are not sufficiently detailed to state a claim upon which relief can be granted. Ordinarily, a complaint is sufficient if it contains "(1) a short and plain statement of the grounds upon which the court's jurisdiction depends ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." F.R. Civ. P. 8(a). The original complaint meets this standard. The city argues that, in order to avoid the constitutional issues addressed *supra,* the Court should impose heightened pleading requirements on the United States in this action. For its part, the defendant intervener contends that *Veney v. Hogan,* 70 F.3d 917, 921 (6th Cir.1995), requires heightened pleading in this case. Neither position has merit. The United States Supreme Court has expressly rejected a requirement of heightened pleading standards in § 1983 actions against municipalities. *Leatherman v. Tarrant Cy. Narcotics Intelligence and Coordination Unit,* 507 U.S. 163 (1993). Moreover, the heightened pleading required by *Veney* applies only in response to a defense of qualified immunity. The defendant city in this action cannot, of course, invoke that defense. *See Owens v. City of Independence,* 445 U.S. 622 (1980). Setting aside the deficiency in the complaint identified *supra,* the complaint is not inadequate for its failure to include factual or evidentiary detail best left to the discovery process.

VI. STATUTE OF LIMITATIONS

***10** Claims under 42 U.S.C. § 1983 must be brought within the time period established by the relevant state statute of limitations governing personal injury actions. *Owens v. Okure,* 488 U.S. 235, 249–50 (1989). In Ohio, that period is two years. *Browning v. Pendleton,* 869 F.2d 989, 992 (6th Cir.1989). Both movants contend that the two-year statute of limitations applicable to claims under § 1983 is likewise applicable to this action under § 14141. It follows, they argue, that plaintiff cannot base any aspect of its claims on allegations of police misconduct that occurred more than two years prior to the filing of the complaint on October 21, 1999.

Section 14141 does not include an express limitation on the period of time during which the Attorney General

must act. Congress may create a cause of action without restricting the period of time within which the claim may be asserted. *Occidental Life Ins. Co. v. Equal Employment Opportunity Comm'n.,* 432 U.S. 355 (1977). Moreover, in actions brought in its sovereign capacity on behalf of the public interest, the United States is not bound by any limitations period, nor is it subject to the defense of laches, unless Congress explicitly provides otherwise. *United States v. Summerlin,* 310 U.S. 414 (1940); *Guaranty Trust Co. v. United States,* 304 U.S. 126 (1938). *See also United States v. Peoples Household Furnishings, Inc.,* 75 F.3d 252, 254 (6th Cir.), *cert. denied,* 519 U.S. 964 (1996). Even assuming, without deciding, that principles of equity are available to protect the movants from demonstrated prejudice caused by any delay in instituting this action, *see Equal Employment Opportunity Comm'n. v. AT & T,* 36 F .Supp.2d 994, 997 (S.D.Ohio 1998), the motions to dismiss and for judgment on the pleadings, which call into question only the allegations contained in the original complaint, do not provide the proper vehicle for invoking such principles. The motions are without merit in this regard.

To summarize, the Court concludes that, when construed to impose liability on a municipality only upon a showing that the municipality itself has engaged in a constitutional violation, as municipal liability under 42 U.S.C. § 1983 has been authoritatively defined by the United States Supreme Court in *Monell* and its progeny, 42 U.S.C. § 14141 represents a proper exercise of congressional authority under § 5 of the Fourteenth Amendment. Because the allegations of the original complaint do not conform to this construction, the United States may amend the complaint to do so. That amendment must be filed within ten (10) days of the later of the resolution of its pending motion for leave to amend the complaint to assert an additional claim, and Judge Holschuh's final disposition of the motions to dismiss and for judgment on the pleadings.

IT IS THEREFORE RECOMMENDED that the motions to dismiss and for judgment on the pleadings be DENIED on the condition that the United States amend the complaint accordingly.

***11** If any party seeks review by the District Judge of this *Report and Recommendation,* that party may, within ten (10) days, file and serve on all parties objections to the *Report and Recommendation,* specifically designating this *Report and Recommendation,* and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation. See Thomas v. Arn,* 474 U.S. 140 (1985); *Smith v. Detroit Federation of Teaches, Local 231 etc.,* 829 F.2d 1370 (6th Cir.1987); *United States v. Walters,* 638 F.2d 947 (6th Cir.1981).

Footnotes

1 This provision, § 1202 of the Police Accountability Act of 1991, was incorporated into H.R. 3371, the Omnibus Crime Control Act of 1991. The bill passed the House of Representatives and was forwarded to the Senate, which "failed to achieve cloture on the Conference Report. In the second session, the Senate again failed to achieve cloture, and the Conference Report on H.R. 3371 was never approved by the Senate." H.R. No. 102–1085, 102nd Cong., 2nd Sess.1992, 1992 WL 396419 *154 (Leg.Hist.)

2 Neither movant concedes that any constitutional violations have in fact occurred.

3 Indeed, the Supreme Court anticipated municipal liability under § 1983 where "the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policy makers who, nevertheless, are 'deliberately indifferent' to the need." *Id.,* at 390 n. 10.

4 In reaching this conclusion, the Court expresses no opinion on whether or not Congress could, consistent with its authority under § 5 of the Fourteenth Amendment, choose to expressly base liability under 42 U.S.C. § 14141 on a theory of *respondeat superior.* The Court merely concludes that Congress has not done so.

5 The movants also contend that, to impose liability on the defendant city under § 14141 would violate the Tenth Amendment, which reserves to the states all powers not delegated by the constitution to the federal government. However, the Tenth Amendment is not implicated by the proper enforcement of the provisions of the Fourteenth Amendment. *See Monell v. Department of Social Services,* 436 U.S. at 691 n. 54. *See also City of Rome v. United States,* 446 U.S. 156, 179 (1980) [the Thirteenth, Fourteenth and Fifteenth Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty."] The motions are without merit in this regard.