24-3016-cv
Fay v. Barbera et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of June, two thousand twenty-five.

Present:

EUNICE C. LEE,
SARAH A. L. MERRIAM,
MARIA ARAÚJO KAHN,
Circuit Judges.

MEGAN E. FAY,

Plaintiff-Appellant,

v. No. 24-3016-cv

MARY BARBERA, THEODORE BROVARSKI, COUNTY OF ROCKLAND,

Defendants-Appellees.

For Plaintiff-Appellant: JONATHAN R. GOLDMAN (Michael H. Sussman, *on the brief*) Sussman & Associates, Goshen, NY.

For Defendants-Appellees: SVETLANA K. IVY, Lippes Mathias LLP, Rochester, NY.

Appeal from an October 18, 2024 order of the United States District Court for the Southern District of New York (Roman, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the district court is **AFFIRMED** in part, **VACATED** in part, and **REMANDED** for further proceedings.

Plaintiff-Appellant Megan E. Fay appeals an October 18, 2024 order of the district court dismissing, without prejudice, her complaint against the County of Rockland, Mary Barbera, Rockland County Undersheriff, and Theodore Brovarski, a chief in the Rockland County Sheriff's Department (collectively, "Defendants").[1] In her complaint, Fay, a part-time transport officer with the Rockland County Sheriff's Department, alleges that Barbera and Brovarski violated her equal protection rights by intentionally discriminating against her on the basis of gender when: (1) Barbera denied Fay's appointment to a full-time position in 2021 and again in 2022, and (2) Brovarski denied Fay's 2023 request to work only weekend shifts to accommodate her outside employment with the Town of Clarkstown.

In September 2023, Fay brought an action pursuant to 42 U.S.C. § 1983, suing Barbera and Brovarski in their individual capacities and naming the County of Rockland "as a party necessary to provide [Fay] make whole relief." Compl. ¶ 2, *Fay v. Barbera et al.*, No. 7:23-cv-08455 (NSR)

[1] The district court's October 18, 2024 dismissal order granted Fay leave to amend. *See Fay v. Barbera et al.*, No. 7:23-cv-08455 (NSR) (S.D.N.Y. Oct. 18, 2024), ECF No. 30. "A dismissal with leave to amend is a non-final order and not appealable. However, an appellant can render such a non-final order 'final' and appealable by disclaiming any intent to amend." *Slayton v. Am. Exp. Co.*, 460 F.3d 215, 224 (2d Cir. 2006) (citations omitted). On May 13, 2025, Appellant filed a letter notifying this Court that she disclaims any intent to amend her complaint. Accordingly, "we deem the jurisdictional defect cured." *Hanlin v. Mitchelson*, 794 F.2d 834, 837 (2d Cir. 1986).

(S.D.N.Y. Sept. 26, 2023), ECF No. 1. The district court granted Defendants' motion to dismiss, finding that the complaint failed to state a claim upon which relief may be granted. This appeal followed. We assume the parties' familiarity with the remaining underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision.

* * *

We review de novo a district court's dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6), "accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 61 (2d Cir. 2010) (quoting *Holmes v. Grubman*, 568 F.3d 329, 335 (2d Cir. 2009)). To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While we are "required to assume the truth of the well-pleaded factual allegations in the complaint, that obligation is inapplicable to legal conclusions, such as threadbare recitals of the elements of a cause of action that are supported by mere conclusory statements." *Sharikov v. Philips Med. Sys. MR, Inc.*, 103 F.4th 159, 166 (2d Cir. 2024) (alteration adopted) (internal quotation marks omitted).

I. Dismissal of Claims Against Barbera and Brovarski

On appeal, Fay argues that the district court erred in dismissing her § 1983 claims against the individual defendants, Barbera and Brovarski. To state a § 1983 claim, a plaintiff must plausibly allege: "(1) the violation of a right secured by the Constitution and laws of the United States, and (2) the alleged deprivation was committed by a person acting under color of state law."

Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 87–88 (2d Cir. 2015) (internal quotation marks omitted). "A plaintiff who claims sex discrimination in public employment in violation of the Fourteenth Amendment may bring suit pursuant to § 1983" against a defendant in their individual capacity. *Naumovski v. Norris*, 934 F.3d 200, 212 (2d Cir. 2019). A plaintiff claiming disparate treatment "must plausibly allege that she suffered an adverse employment action taken because of her sex." *Id.* (internal quotation marks omitted). Further, a prerequisite for § 1983 claims is the personal involvement of the defendant in the alleged constitutional deprivation. *See Brandon v. Kinter*, 938 F.3d 21, 36 (2d Cir. 2019). Personal involvement is established through "direct participation, or failure to remedy the alleged wrong after learning of it, or creation of a policy or custom under which unconstitutional practices occurred, or gross negligence in managing subordinates." *Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996).

The district court dismissed Fay's claims against the individual defendants after concluding that the complaint failed "to demonstrate that Barbera and Brovarski were making disparate decisions against Plaintiff on the basis of her gender." Joint App'x at 27. On appeal, Defendants further argue that, as it pertains to Barbera, the complaint failed to state a plausible claim because Fay failed to "allege that Barbera was the final policymaker and personally responsible for Plaintiff not being promoted." Appellees' Br. at 11–12. Upon *de novo* review, we conclude that the district court erred in dismissing the claim against Barbera.

In the complaint, Fay alleges that in 2021, she applied for the position of Patrol Officer and, despite being qualified for the position, she was not offered an interview or ultimately hired for the role. Fay alleges that two superiors within the Rockland County Sheriff's Department, one of whom was Barbera's husband, informed her that Barbera does not appoint women to the

role of patrol officer and that Fay was "too pretty" to be appointed. Compl. ¶¶ 27–28. The complaint further alleges that Fay contacted Barbera in 2022 to inquire as to what she could do to improve her chance of being promoted after Fay was denied the position of Deputy Sheriff in the civil division. According to the complaint, Barbera informed Fay that she was under no obligation to interview Fay and that she had selected a male candidate who, like Fay, was an internal candidate previously assigned to the transport unit but who, unlike Fay, had been inactive in the unit prior to his appointment as Deputy Sheriff.

The complaint plausibly states a § 1983 discrimination claim against Barbera. The complaint alleges facts from which one could reasonably infer that Barbera was personally involved in the decisions not to promote Fay and that these adverse actions were taken because of Fay's gender—an inference that can be drawn based on the 2021 statements of the two superiors, together with Barbera's 2022 decision to appoint as the Deputy Sheriff a male who the complaint suggests was similarly situated to Fay, but less qualified than her. For these reasons, we vacate the district court's dismissal of Fay's claim against Barbera and remand for further proceedings.

However, we affirm the dismissal of the claim against Brovarski. In the complaint, Fay alleges that in the summer of 2023, Brovarski, in contravention of "longstanding department practice," would not permit her to work only weekend shifts unless she committed to working four shifts per two-week pay period; if Fay was unwilling to do so, she would be required to resign. *Id.* ¶¶ 43, 47, 51. The complaint alleges that this requirement was only applied to Fay and did not extend to at least one similarly situated male who Brovarski permitted to continue to work as a transport officer taking only weekend shifts. But the allegation that Fay was treated differently from a similarly situated male is conclusory and lacking sufficient detail. The complaint fails to

allege facts showing that Fay and this (unidentified) male were similarly situated in all relevant respects such that it may be reasonably inferred that any disparate treatment was because of sex. The complaint does not otherwise contain allegations plausibly supporting Fay's claim that Brovarski discriminated against her because of her gender. Accordingly, the district court's dismissal of Fay's § 1983 claim against Brovarski is affirmed.

II. Dismissal of Rockland County

Fay also challenges the district court's dismissal of her claim against Rockland County. "A municipality is liable under section 1983 only if the deprivation of the plaintiff's rights under federal law is caused by governmental custom, policy, or usage of the municipality." *Matusick v. Erie Cnty. Water Auth.*, 757 F.3d 31, 62 (2d Cir. 2014). Municipal liability may be imposed where "the decision to adopt [a] particular course of action is properly made by th[e] government's authorized decisionmaker[]" and the decisionmaker "possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481–82 (1986). Isolated acts of non-policymaking individuals may not form the basis of liability unless "they were done pursuant to municipal policy, or were sufficiently widespread and persistent to support a finding that they constituted a custom, policy, or usage of which supervisory authorities must have been aware." *Jones v. Town of E. Haven*, 691 F.3d 72, 81 (2d Cir. 2012).

On appeal, Fay concedes that she was not discriminated against pursuant to a particular policy or practice but argues that Rockland County may nevertheless be held liable because "the County delegated policy-making authority over critical employment decisions to [Barbera and

Brovarski], who exercised this authority to implement gender discrimination." Appellant's Br. at 18. The complaint alleges that Barbera, as Undersheriff, determines or has significant influence over certain hiring decisions in the Sheriff's Department and that Brovarski, as chief, has operational authority over transport officers and was the decision-maker who prevented Fay from working only on weekends. However, the fact that Barbera and Brovarski allegedly have the authority to make certain employment decisions does not suffice, without more, to plausibly allege that they "possess[] *final* authority to establish municipal policy with respect to the [particular] action ordered." *Pembaur*, 475 U.S. at 481 (emphasis added). Indeed, as noted above, the complaint alleges that Brovarski's action "contravened long-standing department practice," but does not allege that Brovarski had the authority to change this policy or establish a contrary municipal policy. Compl. ¶ 47. Thus, the actions complained of appear to have been committed by non-policymaking municipal employees; and though Fay alleges that she was subject to disparate treatment because of gender, she does not allege that such gender discrimination was sufficiently widespread and persistent to constitute a policy or custom. Accordingly, Fay has failed to plausibly allege a § 1983 claim against Rockland County, and therefore, the district court did not err in dismissing any claim against the County.

To avoid dismissal of the County as a defendant, Fay argues that even if she "has not alleged that the County, as opposed to [Barbera and Brovarski], engaged in constitutional wrongdoing," Rockland County may nevertheless be joined to the suit pursuant to Federal Rule of Civil Procedure 19(a)(1)(A), because the County is necessary for the effectuation of one of the complaint's prayers for relief: Fay's retroactive appointment to the position of Patrol Officer. Appellant's Reply at 9–10. Fay cites no authority to support her proposition that in the absence

of any plausible claim of liability, a defendant may be made a party to suit simply by virtue of an asserted prayer for relief untethered to a cognizable cause of action. Moreover, Fay cannot plausibly claim that the County is a necessary party to the instant lawsuit when all the allegations in the complaint pertain to the conduct of Barbera and Brovarski, whom Fay chose to sue only in their individual capacities. *See MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 385 (2d Cir. 2006) (noting that "[a] party is necessary . . . only if in that party's absence complete relief cannot be accorded" as between the other parties). That Fay seeks a particular form of relief that only the County can provide is of no importance to her action against Barbera and Brovarski in their individual capacities.

* * *

For the foregoing reasons, we **AFFIRM** the district court's order dismissing the claims against Defendants Brovarski and the County of Rockland, **VACATE** the dismissal of claims against Defendant Barbera, and **REMAND** for further proceedings.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court