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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CLARICE LEOTA HARDY, Plaintiff, vs. CITY OF NOME, and JOHN PAPASODORA and NICHOLAS HARVEY in their individual capacities. Defendants.	Case No. 2:20-cv-00001-HRH

MEMORANDUM IN SUPPORT OF PARTIAL MOTION TO DISMISS COMPLAINT UNDER FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) & 12(b)(6)

I. BACKGROUND

Chief Papasodora and Lieutenant Harvey were, at all material times, Police Officers employed by the City of Nome. Ms. Hardy worked as police dispatcher for the City of Nome as well. (Complaint ¶¶ 8-9, 40) This cause arises out of allegations that Chief Papasodora and Lieutenant Harvey failed to investigate allegations made by Ms. Hardy. The Complaint alleges that one early morning in mid-March 2017, Ms. Hardy was sexually assaulted in her apartment by Donald

Johnson (a private citizen)—he had accompanied her home after they were socializing at a bar. (Complaint ¶ 41) Ms. Hardy alleges no memory of leaving the bar or how she arrived at her apartment, but she remembers she had been feeling "woozy" and believes she was drugged. (Complaint ¶ 42)

Ms. Hardy had no recollection of the alleged sexual assault but was told by friends they had seen a video of the alleged assault the following day (Complaint ¶ 43) Donald Johnson's girlfriend and her friend filmed the incident on a phone app and shared it with others in the community. (Complaint ¶ 44) Days after the assault, Ms. Hardy reported the incident to Lieutenant Harvey. (Complaint ¶ 45) Lieutenant Harvey assured Ms. Hardy he would conduct an investigation. (Complaint ¶ 46) At various points, Ms. Hardy followed up with Lieutenant Harvey about the status of the investigation. (Complaint ¶¶ 47-54) Ultimately, Lieutenant Harvey told Ms. Hardy that a warrant request had been denied and that he was unable to secure the video of the alleged assault. (Complaint ¶ 55)

Approximately one year after the alleged sexual assault, Ms. Hardy took a dispatch call from Donald Johnson, and this caused her distress. (Complaint ¶ 57) As a result of this incident, Chief Papasodora learned that Ms. Hardy's complaint had not been entered into the Police Department's database and she was instructed to submit another written report about the sexual assault. (Complaint ¶¶ 61-62) Chief Papasodora told Ms. Hardy that he believed the case should be referred to the Alaska State Troopers. (Complaint ¶ 62-63) Approximately six weeks later, Ms. Hardy contacted the Alaska State Troopers and was told that the Alaska State Troopers had no record of her complaint being forwarded by the Nome Police Department. (Complaint ¶¶ 63-66) Ms. Hardy asked Chief Papasodora about

whether he had forwarded the complaint to Alaska State Troopers and he stated, "he had been meaning to get to it." (Complaint ¶ 65)

Also in May 2018, Ms. Hardy alleges that Lieutenant Harvey retaliated against her by ignoring her at work, he intimidated her, and referred to community members that visited Nome Police Department to raise concerns about its failure to protect Alaska Native women as "cunts." (Complaint ¶¶ 68-69) Shocked by Lieutenant Harvey's conduct, Ms. Hardy requested administrative leave, which was granted by Chief Papasodora. (Complaint ¶ 71) Ms. Hardy was then on leave under the Family Medical Leave Act (FMLA) and the Alaska Family Leave Act (AFLA). (Complaint ¶ 75) After Ms. Hardy exhausted this leave, the City of Nome terminated her employment. (Complaint ¶ 77) Ms. Hardy further alleges that in 2019, an internal audit of the Nome Police Department showed that 76 of the 182 reports of sexual assault made to the Police Department were not fully investigated and over 68 of the inadequately reported cases involved Alaska Native women. (Complaint ¶¶ 21-22)

The complaint alleges under 42 U.S.C. § 1983 the City of Nome, Lieutenant Harvey, and Chief Papasodora failed to investigate Ms. Hardy's reported sexual assault because Ms. Hardy is an Alaskan Native woman. (Complaint ¶ 83) The complaint further alleges City of Nome, Lieutenant Harvey, and Chief Papasodora's failure to investigate was part of a widespread practice that was so permanent and well settled that it constituted a custom or practice. (Complaint ¶ 84) The complaint also alleges the City of Nome's "failure to train its law enforcement personnel to conduct sexual assault investigations…resulted in deliberate indifference to Ms. Hardy's rights and violated her right to equal

protection." (Complaint ¶¶ 85-86) Ms. Hardy also pled a violation of Article 1 Section 1 of the Alaska's Constitution. (Complaint ¶¶ 88-94)

II. STANDARDS APPLICABLE TO MOTION TO DISMISS

A. *Ashcroft v. Iqbal*

In considering a Motion to Dismiss for failure to state a claim under Rule 12, the district court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. That said, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-558 (2007), and two years later in *Ashcroft v. Iqbal,* 556 U.S. 662, 670 (2009), the U.S. Supreme Court specifically rejected blind adherence to the longstanding maxim that 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 his claim which would entitle him to relief. In *Twombly,* the Supreme Court held that Federal Rule of Civil Procedure 8(a) requires factual allegations sufficient "to raise a right to relief above the speculative level." *Twombly,* at 556. Further, the plaintiff must allege "enough facts to state a claim that is plausible on its face," *Twombly*, at 547.

A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference" that the plaintiff is entitled to relief. *Iqbal,* 556 U.S. 662 at 678. Plausibility "is not akin to a probability requirement;" rather plausibility requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Pleading a fact that is "merely consistent" with a defendant's liability does not satisfy the plausibility standard. *Id.*

The "plaintiff's obligation to provide the grounds of entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id*.

III. PLAINTIFF LACKS STANDING TO BRING THIS ACTION AGAINST THE DEFENDANTS

Article III of the U.S. Constitution restricts the jurisdiction of the federal courts to actual cases and controversies. The case or controversy requirement has been effectuated by several doctrines, the most important of which is standing. *Parkhurst v. Tabor*, 569 F. 3d 861, 865 (8th Cir. 2009), quoting *Allen v. Wright,* 468 U.S. 737, 750 (1984). To establish constitutional standing, the plaintiff must show that [she] has suffered an 'injury in fact' that is: concrete and particularized and actual or imminent, fairly traceable to the challenged action of the defendant; and likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Consistent with these principles, it has been long held that crime victims do not have standing to "contest the policies of the prosecuting authority when he or she is neither prosecuted nor threatened with prosecution." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). The courts have long recognized the distinction in "standing" between those prosecuted by the state and those who would urge the prosecution of others, even where the failure to prosecute was allegedly discriminatory. *Parkhurst*, at 866. In *Doe v. Pocomoke City*, 745 F. Supp. 1137 (D. Md. 1990) women who were victims of alleged sexual assault sued individuals in charge of a police department alleging that those parties deliberately failed to properly investigate and prosecute sex crimes.

The plaintiffs there contended that "…the defendants have followed a policy of discrimination against women for the purpose of protecting the reputation of Ocean City as a family beach resort." *Id*. at 1137. The district judge determined that the plaintiffs, despite their equal protection argument, lacked standing to bring actions against public officials conducting investigations. *Id*. at 1140. *See also Grant v. Prince George's County Department*, 2017 WL 3023341, * 4 (D. Maryland 2017) (accepting Plaintiff's allegations as true, she sustained a legally cognizable injury as a result of her sexual assault, but that injury is not fairly traceable to the police department's refusal to investigate). See *Cano v. Garcia*, 2021 WL 2582581, * 5 (W.D. Texas 2021) (held plaintiff lacked standing where case was premised on the theory that by failing to investigate his case and prosecute his assailants, the City deprived him of his rights to due process and equal protection under the law).

IV. ALTERNATIVELY, MS. HARDY HAS NOT ESTABLISHED A CONSTITUTIONAL RIGHT TO AN INVESTIGATION

The gravamen of Ms. Hardy's complaint is that the Defendants failed to conduct an investigation. The jurisdiction of this court is asserted, and this action is brought pursuant to 42 U.S.C. § 1983. That statute states in pertinent part as follows:

> 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 …

Section 1983 does not create any substantive rights. It merely grants an avenue of relief to a plaintiff who has been deprived of an existing constitutional or federal statutory right by a person acting under color of State law. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005). Under 42 U.S.C. § 1983, the plaintiff must allege and prove that the actions complained of were done by a person acting under color of state law and that these actions deprived the plaintiffs of rights, privileges or immunities secured by the Constitution and laws of the U.S. *Gant v. Cty. of Los Angeles*, 772 F.3d 608, 617 (9th Cir. 2014). Ms. Hardy has sufficiently pled the actions complained of were done under the color of state law. But she has not sufficiently pled a constitutional deprivation.

Ms. Hardy has, among other things, the right to be free from the deprivation of life, liberty, and property which includes the right to be free from invasion of privacy and violation of bodily integrity. *Vazquez v. County of Kern*, 949 F.3d 1153, 1160 (9th Cir. 2020) Ms. Hardy cannot—and does not appear to—claim the Defendants are liable for Donald Johnson's alleged sexual assault, which predates all relevant events pled in the complaint. See *Bowers v. De Vito*, 686 F.2d 616, 618 (7th Cir.1982) (held there is no constitutional right, either in the due process clause or the equal protection clause, to be protected against being attacked by a member of the public.) Ms. Hardy does not contend that the police refused to protect her from a future assault by Donald Johnson. *Estate of Macias v. Ihde*, 219 F.3d 1018 (9th Cir. 2000).

A claim under § 1983 must be supported by an underlying constitutional injury. *See Plumeau v. Yamhill Cnty. Sch. Dist.*, 907 F. Supp. 1423, 1438-1439 (D.Or.1995) (held the failure to investigate cannot form the basis of a Section 1983

claim). Ms. Hardy claims the Defendants violated her equal protection right to a fair and adequate investigation. But Federal law clearly establishes there is no viable legal claim under 42 U.S.C. § 1983 for a law enforcement officer's inadequate investigation of an alleged crime. *Hageman v. Bates*, 2007 WL 927584, * 7 (D. Mont. 2007).

The Ninth Circuit has confirmed "there is no legal cause of action against law enforcement officers for their conduct in inadequately investigating alleged criminal conduct except in limited circumstances." *Gomez v. Whitney*, 757 F.2d 1005, 1006 (9th Cir.1985) (held there are no instances where the courts have recognized inadequate investigation as sufficient to state a civil rights claim unless there was another recognized constitutional right involved). Ms. Hardy has not stated a constitutional right in this instance and her case must be dismissed.

V. ASSUMING THAT THIS COURT RECOGNIZES MS. HARDY HAS A CONSTITUTIONAL RIGHT TO INVESTIGATION, SHE HAS NOT SUFFICIENTLY PLED SUCH A CONSTITUTIONAL DEPRIVATION

There is one instance where the Ninth Circuit allowed a plaintiff to argue they have an equal protection interest in an investigation. In *Elliot-Park v. Magnola*, the plaintiff claimed that Micronesian police officers failed to investigate a car accident involving a drunk Micronesian driver because the plaintiff was Korean—the plaintiff's theory was that Micronesian police officers hold biases towards Koreans and favor Micronesians. 592 F.3d 1003, 1006 (9th. Cir. 2010).

The plaintiff further claimed that one of the officers fully investigated another drunk driving accident that same evening where the victim was Micronesian, but the drunk driver was not. *Id*. Writing for the Court, Justice

Kozinski reasoned "while the officers' discretion in deciding whom to arrest is certainly broad, it cannot be exercised in a racially discriminatory fashion. For example, a police officer can't investigate and arrest blacks but not whites, or Asians but not Hispanics." *Id*. at 1006. [1] The *Elliot-Park* decision has been distinguished since, on occasions where the plaintiff fails to allege disparate treatment. See *Todd v. Bevins*, 2012 WL 4511384, *5 (E.D. Cal 2012) (distinguished *Elliot-Park* where plaintiff failed to allege specific facts, beyond mere speculation, that defendants treated him differently from similarly situated persons); *Jones v. City of Oakland*, 2019 WL 3387968, * 3 (N.D. Cal. 2019) (dismissed complaint where plaintiff failed to allege the officer more thoroughly investigated similar crimes that were not racially motivated).

Even if Ms. Hardy can proceed under *Elliot-Park*, she has not alleged the Defendants investigated one class of people over another—she has failed to assert she was treated differently from similarly situated persons who were not Alaska Native or female. The statistics proffered by the Plaintiff in ¶¶ 21-22 of the complaint, without more, are not minimally sufficient to survive a motion to dismiss. *See Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 213 (5th Cir.2009) (holding that Plaintiffs' statistics, even combined with allegations that the defendants used racial epithets, did not allege sufficient facts to survive a motion to dismiss its § 1983 claims); *See also*, *Bagley v. City of Sunnyvale*, WL 3021030, *2 (N.D. Cal. 2017)

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[1] In a brief recently filed by Justice Kozinski in a separate case, the *Elliot-Park v. Manglona* decision was distinguished for not addressing the crime victim's standing. *Lefebure v. D'Aquilla*, 15 F.4th 650, 657 (5th Cir. 2021).

citing Hocking v. City of Roseville, 2008 WL 1808250, * 5 (E.D. Cal. 2008)(granting motion to dismiss *Monell* claim and holding that statistics of unsustained complaints of excessive force and other police misconduct, without any evidence that those complaints had merit, does not suffice to establish municipal liability under § 1983).

Because Ms. Hardy has failed to sufficiently plead a failure to investigate equal protection claim under Ninth Circuit precedent, the Court should dismiss her claim.

VI. MS. HARDY'S *MONELL* CLAIM FOR FAILURE TO TRAIN ITS OFFICERS MUST ALSO BE DISMISSED

Plaintiff alleges that the City of Nome failed to adequately train or supervise its police officers, resulting in a violation of Plaintiffs' civil rights. (Complaint ¶¶ 85-86) Absent a constitutional deprivation, however, a *Monell* claim necessarily fails. See *Jones v. City of Oakland*, 2019 WL 3387968, * 3 (N.D. Cal. 2019) *citing City of L.A. v. Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point"). Because Ms. Hardy did not sufficiently allege a constitutional deprivation, it follows that Plaintiff failed to state a *Monell* claim against the City of Nome.

VII. MS. HARDY'S NONMONETARY ARTICLE 1, SECTION 1 CLAIMS SHOULD BE DISMISSED

Ms. Hardy pled an equal protection claim under the Alaska State Constitution. (Complaint ¶¶ 88-94; Prayer For Relief ¶ 4). Article I, Section 1, of

the Alaska Constitution guarantees equal protection, providing that "all persons are equal and entitled to equal rights, opportunities, and protection under the law." The Alaska Constitution's equal protection clause affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment. *State, Dep'ts of Transp. & Labor v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 631 (Alaska 1989). However, the Alaska Supreme Court does not allow a constitutional claim for damages [under the Alaska Constitution], "except in cases of flagrant constitutional violations where little or no alternative remedies are available." *DeRemer v. Turnbull*, 453 P.3d 193, 198 (Alaska 2019).

In *State, Department of Corrections v. Heisey*, the Alaska Supreme Court further explained that alternative remedies, such as claims under 42 U.S.C. § 1983, provide plaintiffs an avenue for damages where the Alaska Constitution does not. 271 P.3d 1082, 1096 (Alaska 2012). By matching her state constitutional claims to federal constitutional claims, Ms. Hardy implicitly acknowledges that federal claims would, in fact, provide a remedy comparable to her state constitutional claims—the Alaska Supreme Court views this as sufficient. *Id* at 1097. Accordingly, the Court should dismiss Ms. Hardy's Article 1 Section 1 claim, at least to the extent she seeks damages under this theory.

Ms. Hardy cannot claim Article 1 Section 1 damages in this case. But more importantly, she does not have standing to pursue such a claim in the first instance. To have standing in Alaska, plaintiffs must show they have a "sufficient personal stake" in the outcome of the controversy. *Keller v. French*, 205 P.3d 299, 304 (Alaska 2009). There is no indication Alaska Courts would provide standing to a plaintiff on the theory that by failing to investigate their case, a municipality

and its police officers have deprived them of equal protection. In *Wongittilin v. State*, the Court noted that monetary claims attached to law enforcement's failure to adequately investigate would invariably lead to the diversion of resources from other projects and investigations—the Court further held that decisions regarding the allocation of limited resources are better left to the executive branch. 36 P.3d 678, 684-685 (Alaska 2001). *See also Waskey v. Municipality of Anchorage*, 909 P.2d 342, 344 (Alaska 1996) (declined to recognize the duty to conduct criminal investigations in a non-negligent manner); *Dore v. City of Fairbanks*, 31 P.3d 788, 796 (Alaska 2001) (held that a city owes no duty to son of a person injured by police failure to protect).

Assuming Ms. Hardy has standing, her constitutional claim still must be supported by an underlying constitutional injury. See *Plumeau v. Yamhill Cnty. Sch. Dist.*, 907 F. Supp. 1423, 1438-1439 (D.Or.1995). Ms. Hardy claims injury as a result of the Defendant's failure to adequately investigate her case. (Complaint ¶¶ 90-93) However, Ms. Hardy fails to recognize that this is not a constitutional right which exists in Alaska. Granted, the Alaska Courts are under a duty to develop additional constitutional rights and privileges under the Alaska Constitution if the Alaska Courts find such fundamental rights and privileges to be within the intention and spirit of local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. *Baker v. City of Fairbanks*, 471 P.2d 386, 401–02 (Alaska 1970). Given the Alaska Supreme Court's decision in *Wongittilin v. State*—where the Court recognized that the allocation of limited investigative resources is better left to the

executive branch—it's unlikely that Alaska Courts would establish the constitutional right requested in this case. 36 P.3d 678, 684-685 (Alaska 2001).

Even if this Court grants standing *and* establishes a new constitutional right—we ask that it does neither—Ms. Hardy's complaint does not state the class of individuals treated differently by the Defendants. The Alaska Constitution's equal protection clause requires "equal treatment of those similarly situated." *Planned Parenthood of the Great Northwest v. State* 375 P.3d 1122, 1135 (Alaska 2016). When equal protection claims are raised, the court must first decide which classes are being compared. *Id*. Like her federal claim, she has not asserted she was treated differently from similarly situated persons who were not Alaska Native or female. This is fatal to her Federal equal protection claim and should be fatal to her state equal protection claim as well. Accordingly, this Court should dismiss Ms. Hardy's Article 1, Section 1 claim outright.

VIII. CONCLUSION

For the reasons set forth above, Plaintiff's claim under 42 U.S.C. § 1983 should be dismissed. The Court should rule that Ms. Hardy cannot obtain damages under her Alaska Constitution Article 1, Section 1 claim, and that Plaintiff's Article 1, Section 1 claim be dismissed. The City of Nome will file a motion for summary judgment related to Ms. Hardy's state law claims in a separate filing.

DATED this 21st day of January, 2022 at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically via CM/ECF this 21st day of January, 2022 to:

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