IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JANE DOE, JANE DOE NO. 2, and JANE DOE NO. 3 INDIVIDUALLY AND AS CLASS REPRESENTATIVES OF ALL OTHERS SIMILARLY SITUATED,	)	
Plaintiffs,	)	
v.	)	Case No. 2:13-cv-03002-JTF-cgc
CITY OF MEMPHIS,	)	
Defendant.	)	

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

Before the Court are the Defendant's, City of Memphis ("The City"), Motions for Summary Judgment against Jane Doe, Jane Doe 2, and Jane Doe 3 (collectively, the "Plaintiffs"). (ECF Nos. 89-91). The City filed a separate motion as to each Plaintiff on January 25, 2016. On February 22, 2016, the Plaintiffs each filed a Response to the City's Motion for Summary Judgment. (ECF Nos. 102-104). The City filed a reply to the Plaintiffs' responses on March 8, 2016. (ECF No. 115-117). For the following reasons, the City's Motions for Summary Judgment as to Jane Doe, Jane Doe 2, and Jane Doe 3 are GRANTED.

FACTUAL BACKGROUND

This action was commenced by three female Plaintiffs alleging the Defendant deliberately failed to submit for testing their Sexual Assault Kits ("SAKs") after reporting they were sexually assaulted. These three women allegedly represent a putative class of similarly situated sexually assaulted women in Memphis, Shelby County, Tennessee ("Class"). (ECF No. 11 ¶ 7). The Plaintiffs claim the Defendant's failure to properly submit the SAKs for testing,

"was consistent with an institutional practice and ongoing policy of the MPD." (*Id.* at ¶ 67). Thus, Plaintiffs allege 42 U.S.C. § 1983 sexual discrimination claims under the Equal Protection Clause of the Fourteenth Amendment. The specific factual allegations of each named class representative are outlined below.

The Second Amended Complaint alleges that on March 30, 2001, Jane Doe was sexually assaulted by a home intruder. (*Id.* at ¶ 31). Subsequent to the attack, Plaintiff, Jane Doe, called the Memphis Police Department ("MPD") to report the assault. (*Id*. at ¶ 33). As part of the investigation, the MPD directed her to the Rape Crisis Center for treatment and the collection of evidence. (*Id.* at ¶ 34). Evidence was collected and preserved in a SAK, which was then delivered to the MPD. (*Id.* at ¶ 36). Plaintiff alleges the City concealed the fact that her SAK was never submitted for testing. (*Id.* at ¶ 39). However, the City has shown that the SAK was received by the Tennessee Bureau of Investigation ("TBI") for testing on June 6, 2001. (ECF No. 89-2 ¶ 4).

In 2003, Plaintiff Jane Doe 2 was sexually assaulted by a home intruder. (ECF No. 37 ¶ 57-58). Subsequently, Jane Doe 2 reported the sexual assault to the MPD, and was transported to the Rape Crisis Center for treatment and collection of evidence. Evidence was collected and preserved in a SAK. (*Id.* at ¶ 59-61). The City has shown that Jane Doe 2's SAK was submitted for testing on November 26, 2013, and returned positive test results for comparison on February 27, 2014. (ECF No. 103-1 ¶ 8). Since the new test results were collected, MPD has reopened Jane Doe 2's sexual assault case. (*Id.* at ¶¶ 10-12).

In 1992, Plaintiff Jane Doe 3 was sexually assaulted by three strangers who offered to drive her to the store. (*Id.* at ¶ 70-71). Jane Doe 3 reported the sexual assault to the MPD, and was transported to the Rape Crisis Center for treatment and collection of evidence. Evidence

was collected and preserved in a SAK. (*Id.* at ¶ 72-74). However, the City has shown that Plaintiff's SAK was submitted for testing on January 10, 1995—three days after her assault. (ECF No. 91-2 ¶ 4).

On November 5, 2013, MPD Police Director, Toney Armstrong, advised the Memphis City Council that the MPD had over 12,000 untested SAKs. (ECF No. 37 ¶ 87). Over a period of twenty-five (25) years, the City of Memphis Police Department failed to submit over 15,000 SAKs for testing. (*Id.* at ¶ 89). Plaintiffs contend they are appropriate class representatives to pursue this claim against the City of Memphis in a representative capacity for those similarly situated. (*Id.* at ¶ 96-97).

PROCEDURAL POSTURE

In Plaintiffs' original Complaint filed on December 20, 2013, Plaintiffs allege the following causes of action: (1) procedural due process under the Due Process Clause through § 1983; (2) substantive due process under the Due Process Clause through § 1983; (3) sex discrimination under the Equal Protection Clause through § 1983; (4) conspiracy to violate equal protection rights under § 1985; and (5) comparable parts under the Tennessee Constitution. (ECF No. 1). The City's First Motion to Dismiss sought dismissal of all claims through Fed. R. Civ. P. 10, 12(b)(6) for failure to name a party and failure to state claims upon which relief can be granted. (ECF No. 9). Additionally, the City defended on grounds of statute of limitations. *Id.* In Plaintiff's first Amended Complaint filed on February 20, 2014, Plaintiff alleged additional causes of action: (6) race discrimination under the Equal Protection Clause through § 1983; (7) illegal search and seizure under the Fourth Amendment; (8) taking of property without just compensation under the Takings Clause; (9) intentional infliction of emotional distress; and (10) negligence. (ECF No. 11).

The City filed a Second Motion to Dismiss on January 21, 2014, seeking dismissal of the newly amended claims for failure to state a claim upon which relief can be granted. (ECF No. 13). Plaintiffs' filed their Second Amended Complaint on September 25, 2014, and added Jane Doe No. 2 and Jane Doe No. 3 as putative class representatives. (ECF No. 37). On December 10, 2014, this Court entered an Order Granting in Part and Denying in Part Defendant's Motions to Dismiss. (ECF No. 44.) The Court dismissed, with prejudice, all of Plaintiffs' claims except their Equal Protection claim which is based on alleged sex discrimination. *Id.*

LEGAL STANDARD

The party moving for summary judgment must prove by clear and convincing evidence that there is no genuine issue of material fact, and movant is entitled to judgment as a matter of law. Also, the Court must draw all reasonable inferences and view the case in the light most favorable to the non-moving party. Fed. R. Civ. P. 56(a); *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). The moving party can meet this burden by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his case. *See* Fed. R. Civ. P. 56(c)(2); *see also Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (internal quotation marks omitted) ("The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment.").

When confronted with a properly supported motion for summary judgment, the respondent must set forth specific facts showing that there is a genuine dispute for trial. *See* Fed. R. Civ. P. 56(c). A genuine dispute for trial exists if the evidence is such that a *reasonable* jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 248, 252 (1986) (emphasis added) (requiring more than the "mere existence of a scintilla of evidence"). The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (citing *DeLuca v. Atl. Refining Co.*, 176 F.2d 421, 423 (2d Cir. 1949)).

Furthermore, one may not oppose a properly supported summary judgment motion by mere reliance on the pleadings. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Instead, the non-movant must present "concrete evidence supporting [his] claims." *Cloverdale Equip. Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989) (citations omitted); *see* Fed. R. Civ. P. 56(c)(1). The district court does not have the duty to search the record for such evidence. *See* Fed. R. Civ. P. 56(c)(3); *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989). The non-movant has the duty to point out specific evidence in the record that would be sufficient to justify a jury decision in his favor. *See* Fed. R. Civ. P. 56(c)(1); *InterRoyal Corp*., 889 F.2d at 111. "'Credibility determinations, the weighing of evidence, and the drawing of legitimate inference from the facts are jury functions, not those of a judge.'" *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000) (quoting *Anderson*, 477 U.S. at 255)).

ANALYSIS

The City asserts that the Plaintiffs' equal protection claims for sex discrimination under 42 U.S.C § 1983 should be dismissed as a matter of law. Plaintiffs bear the burden of proving that (1) their SAKs were not tested; and (2) that the City's failure to test the SAKs was motivated by discriminatory animus based on their sex. Specifically, the City argues, "the undisputed facts show that [plaintiffs'] SAKs were indeed timely submitted for testing," proving Plaintiffs' constitutional rights were not violated. (ECF No. 89-1). Also, Plaintiffs have not shown that the

City's actions were based on unlawful sexual discrimination. The Court notes that Plaintiffs have failed to address the substance of the City's motion, choosing to argue their difficulty in obtaining sufficient discovery material from the City. Plaintiffs contend they have been unable to conduct full discovery, the evidence of handling and testing Plaintiffs' SAKs is inadmissible hearsay, and the dismissal of one named class member in a class action does not warrant dismissal of the entire action.

"The Equal Protection Clause prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference." *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 681-82 (6th Cir. 2011) (citing *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005)). For the Plaintiff to support a claim for sex discrimination under the Equal Protection Clause, Plaintiff must plausibly plead and prove that Defendant treated Plaintiff "disparately as compared to similarly situated persons." *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011); *see also Jones v. Union Cnty.*, 296 F.3d 417, at 426 (6th Cir. 2002) (citing *Boger v. Wayne Cnty.*, 950 F.2d 316, 325 (6th Cir. 1991)) ("Plaintiff must show that she is a member of a protected class and that she was intentionally and purposefully discriminated against because of her membership in that protected class."). For Plaintiff "[t]o demonstrate that the discrimination was purposeful and intentional, Plaintiff must show that it is the policy or custom of [Defendant] to provide less protection to victims of [sexual assaults] than those of other crimes, and that gender discrimination was the motivation for this disparate treatment." *Jones*, 296 F.3d at 426 (citing *Hynson v. Chester, Legal Dep't*, 864 F.2d 1026, 1031 (3d Cir. 1988)); *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) ("Discriminatory purpose . . . implies that the decision maker . . . selected or reaffirmed a

particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.") (internal quotation marks omitted). "'A discriminatory effect which is severe enough can provide sufficient evidence of discriminatory purpose,' [b]ut such a finding remains the exceedingly rare exception to the general rule." *United States v. Thorpe*, 471 F.3d 652, 661 (6th Cir. 2006) (citing *United States v. Tuitt*, 68 F. Supp. 2d 4, 10 (D. Mass. 1999)).

A. Admissibility of the City's Evidence

Plaintiffs contend the Affidavit of Major Don Crowe ("Crowe Affidavit") and TBI Official Serology/DNA Report ("TBI Report") are inadmissible hearsay evidence. Specifically, Plaintiffs assert the TBI report does not satisfy the business record exception under Fed. R. Evid. 803(6). As to the Crowe Affidavit, Plaintiff submits it is insufficient under Fed. R. Civ. P. 56(e) because it fails to explain how Major Crowe became familiar and had personal knowledge of the TBI report.

The business records exception under Fed. R. Evid. 803(6) only applies if the record was: (1) "made at or near the time by. . . . someone with knowledge"; (2) kept in the course of a regularly conducted activity of the organization; (3) a regular result of that activity; and (4) "made by a person with knowledge of the transaction or from information transmitted by a person with knowledge." *See* Fed. R. Evid. 803(6); *United States v. Laster*, 258 F.3d 525, 529 (6th Cir. 2001). All these elements must be "shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with state permitting certification." Fed. R. Evid. 803(6)(E). The individual laying the foundation for application of Fed. R. Evid. 803(6) must be familiar with the record keeping system." *Laster*, 258 F.3d at 529 (quoting *United States v. Hathaway*, 798 F.2d 902 (6th Cir. 1986)).

Fed. R. Civ. P. 56 outlines the requirements for an affidavit in support of a motion for Summary Judgment. Rule 56(c)(4) provides that affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Personal knowledge can be inferred from the content of statements if the basis for the facts in the affidavit is not explicitly stated. *See Reddy v. Good Samaritan Hosp. & Health Ctr.*, 137 F. Supp. 2d 948, 956 (S.D. Ohio 2000); *Peterson v. Kramer*, 2016 WL 680828 *9 (S.D. Ohio 2016). The requirements are mandatory, and deficient affidavits are subject to a motion to strike. *See Collazos-Cruz v. United States*, 117 F.3d 1420 (6th Cir. 1997) (*citing Dole v. Elliot Travel & Tours, Inc.*, 942 F.2d 962, 968-69 (6th Cir. 1991)).

Here, the City has provided a sufficient foundation to qualify the TBI Report as a business record. Major Crowe has been employed by the Memphis Police Department ("MPD") in the Special Victims Unit ("SVU") for the duration of this action. The SVU includes sex crimes investigations, which means Major Crowe should "be familiar with the record keeping system" for rape investigations. Moreover, under Rule 902(1), state seals on public documents are "self-authenticating; they require no extrinsic evidence of authenticity." Fed. R. Evid. 902(1)(A). The presence of the seal only bolsters the report's propensity for truthfulness.

Major Crowe's affidavit also satisfies the requirements of Fed. R. Civ. P. 56(e). While Plaintiffs challenge Major Crowe's admission that he was familiar with the TBI report, the affidavit clearly states he serves in the SVU. Plaintiffs argue that Major Crowe's statement in paragraph five that starts with, "to the best of my knowledge, information, and belief," is insufficient. However, Major Crowe stated at the beginning of his affidavit, "[I] have personal knowledge of the matters set forth." *Cf. Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*,

339 U.S. 827, 831 (1950) (finding an affidavit based on information and belief does not satisfy Rule 56(e)). It is clear from Major Crowe's position with SVU and the dates of his employment, that the facts in the affidavit are based upon personal knowledge. Therefore, the Court finds that Major Crowe's Affidavit and the TBI report are admissible under Fed. R. Evid. 803(6) and compliant with the requirements of Fed. R. Civ. P. 56(e).

B. Length of Discovery and Substitution of a Class Representative

Plaintiffs contend the City's summary judgment motion is premature because they have failed to comply with Plaintiffs' discovery requests. Specifically, Plaintiffs argue Rule 56 mandates, "adequate time for discovery." Pursuant to Fed. R. Civ. P. 56(f), Plaintiffs' counsel has provided an affidavit attempting to justify the need for more discovery. The affidavit states there are thousands of unproduced documents that will expose sexist and discriminatory practices regarding the Defendant's testing of the SAKs. Conversely, Defendant contends discovery has persisted for two years, and the affidavit contains only general and vague assumptions.

Additional discovery requests are governed by Fed. R. Civ. P. 56(f). Courts must afford parties adequate time for discovery based on the circumstances of the case. *See Plott v. General Motors Corp., Packard Elec. Div.*, 71 F.3d 1190, 1196 (6th Cir. 1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). It is within the trial court's discretion to grant a party's request for additional discovery time. *See Egerer v. Woodland Reality, Inc.*, 556 F.3d 415, 426 (6th Cir. 2009) (emphasis added) ("[T]he court *may* order a continuance to allow discovery to be undertaken."). A request under Fed. R. Civ. P. 56(d) should be denied where the requesting party "makes only conclusory and general statements [in the supporting affidavit or declaration] regarding the need for more discovery. . . ." *Ball v. Union Carbide Corp.*, 385 F.3d 713, 720 (6th Cir. 2004) (citing *Ironside v. Simi Valley Hosp.*, 188 F.3d 350, 354 (6th Cir. 1999)). Moreover,

the affidavit cannot "lack any details or specificity." *Emmons v. Mclaughlin*, 874 F.2d 351, 357 (6th Cir. 1989) ("The fundamental failure in the affidavit . . . was its inability to substantiate Plaintiff allegations of harassment with any details."). Even if time for discovery has been insufficient, the court can deny a request for additional time if "further discovery would not have changed the legal and factual deficiencies." *Maki v. Laakko*, 88 F.3d 361, 367 (6th Cir. 1996), *cert denied*, 519 U.S. 1114.

"To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff 'disparately as compared to similarly situated person and that such a disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (citation omitted). As to the named Plaintiffs, the City has shown that their SAKs were submitted for testing.[1] Therefore, Plaintiffs have failed to establish that their SAKs were not tested based on the City's alleged discriminatory animus towards women in violation of the Equal Protection Clause. Accordingly, the City's Motions for Summary Judgment as to the three named Plaintiffs are **GRANTED**.

Moreover, Plaintiffs aver that if the three named class representatives' claims are dismissed, the Court should "require the city to complete discovery so that a sufficient class representative can replace Jane Doe." (ECF No. 102 at 12). Plaintiffs purportedly rely on the Court's promise to, "allow Plaintiff a reasonable time period to investigate the Defendant's claim and to remedy any remaining deficiencies." Additionally, Plaintiffs cite *Tate v. Hartsville/Trousdale County*, No. 3:09-0201, 2010 WL 4054141 (M.D. Tenn. 2010) to support their position that dismissing a class representative's claim, "does not inexorably require

[1] *See* (ECF Nos. 89-2 ¶ 4, 91-2 ¶ 4, & 91-2 ¶ 4).

dismissal of the class action." *Tate* 2010 WL 4054141, *9. The City argues that the Plaintiffs' have misapplied *Tate*, and the entire case should be dismissed.

A class action may continue after dismissal of named plaintiffs' claims, "if the class has been certified and at least one class member has a live claim." *See Crosby v. Bowater Inc.*, 382 F.3d 587, 597 (6th Cir.2004) (citing *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991)). Here, there is no class certification, and the City has filed a motion to strike the class allegations. Accordingly, the Court will further address this issue in its Order on the City's Motion to Strike Class Allegations.

CONCLUSION

For the foregoing reasons, the City's Motions for Summary Judgment as to Jane Doe 1, Jane Doe 2, and Jane Doe 3 are **GRANTED**.

IT IS SO ORDERED on this 9th day of March, 2017.

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
UNITED STATES DISTRICT JUDGE