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

WENDI C. THOMAS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 2:20-cv-02343-JTF-cgc**
	)	
CITY OF MEMPHIS, JIM STRICKLAND, in his individual capacity, and URSULA MADDEN, in her individual capacity,	)	
	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Before the Court is the Motion to Dismiss of Defendants City of Memphis; Jim Strickland, in his individual capacity; and Ursula Madden, in her individual capacity (collectively referred to as "Defendants"), filed on June 12, 2020. (ECF No. 11.) Plaintiff Wendi C. Thomas filed a Response in Opposition on July 9, 2020. (ECF No. 14.) Defendants filed a Reply on July 23, 2020. (ECF No. 15.) For the following reasons, Defendants' Motion to Dismiss is **GRANTED**.

FACTUAL BACKGROUND

Plaintiff Wendi C. Thomas ("Plaintiff") is the founder, editor, and publisher of *MLK50: Justice Through Journalism* ("MLK50"). (ECF No. 1, 1 ¶ 1.) An award-winning online news website based in Memphis, MLK50 focuses on the issues surrounding Dr. Martin Luther King Jr.'s life. (*Id.*) Plaintiff's Complaint focuses on Defendants' alleged refusal to add her contact information to "the Media Advisory List."

The City of Memphis maintains a Media Advisory List to alert members of the press, through electronic mail ("email"), about newsworthy events and activities involving the City. (*Id.*

at 4 ¶ 12.) The City's Office of Communications, led by Defendant Ursula Madden ("Defendant Madden"), manages this list. (*Id.* at 4 ¶ 13.) As of January 20, 2019, the Media Advisory List included email addresses for approximately 150 media organizations and individual reporters, including journalists at The Commercial Appeal, The Daily Memphian, the Memphis and Shelby County Film/TV Commission, the John Glover Insurance Agency, and choose901.com. (*Id.* at 5 ¶¶ 14–15.) Plaintiff alleges her "personal Gmail address" was included on the Media Advisory List through January 22, 2018. (*Id.* at 5 ¶ 16.) However, the City removed Plaintiff's email address from the list without notifying her. (*Id.*)

On May 13, 2019, Plaintiff sent an email to Defendant Madden requesting that three email addresses, all associated with MLK50, be added to the Media Advisory List. (*Id.* at 5 ¶ 17.) On May 14, 2019, a colleague of Defendant Madden assured Plaintiff, through her official MLK50 email, that all three email addresses would be added to the list. (*Id.* at 6 ¶ 18.) Plaintiff first realized that none of the MLK50 email addresses had been added to the Media Advisory List in October 2019. (*Id.* at 6 ¶ 19.) Since then, Plaintiff alleges she has repeatedly asked Defendants to add her email address to the Media Advisory List. (*Id.*) Defendants have allegedly provided no substantive response to any of Plaintiff's requests and have offered no explanation for their refusal to include Plaintiff's email address on the list. (*Id.*)

According to Plaintiff, her exclusion from the Media Advisory List "substantially disrupts and interferes with her ability to gather news and report on the City and Mayor Strickland." (*Id.* at 9 ¶ 29.) More recently, Plaintiff's exclusion from the list has "disrupted and interfered with her efforts to cover the COVID-19 crisis." (*Id.* at 9 ¶ 30.) Plaintiff states that the City is using its Media Advisory List to "distribute login information so that those on the [list] may attend and ask questions during daily virtual press conferences hosted by the Joint Task Force via Zoom." (*Id.* at

9 ¶ 31.) Plaintiff acknowledges that she has been able to "work around the City's refusal to add her to the Media Advisory List by specifically asking the County's Health Department each day for the login information for that day's Joint Task Force virtual press conference." (*Id.* at 10 ¶ 34.) However, Plaintiff does not believe "such a workaround" should be required. (*Id.*)

Plaintiff ultimately believes Defendants' refusal to include her email address on the Media Advisory List violates her First, Fifth, and Fourteenth Amendment rights under the United States Constitution, as well as her rights under Article 1, Section 19 of the Tennessee Constitution. (*Id.* at 13 ¶¶ 45–63.)

LEGAL STANDARD

Defendants challenge Plaintiff's claims under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Rule 12(b)(1) relates to lack of subject matter jurisdiction. When a complaint is challenged under this Rule, courts must construe it in the light more favorable to the plaintiff. *Henderson v. Sw. Tennessee Cmty. Coll.*, 282 F. Supp. 2d 804, 806 (W.D. Tenn. 2003). Because there exists a presumption against federal jurisdiction, the burden of establishing jurisdiction rests upon the party asserting it. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 1675 (1994). The court may review extra-complaint evidence and resolve factual disputes in its consideration of a 12(b)(1) motion to dismiss. *Rogers v. Stratton Indus., Inc*., 798 F.2d 913, 918 (6th Cir. 1986). If it is determined that subject-matter jurisdiction is lacking, the court is obligated to dismiss the case. Fed. R. Civ. P. 12(h)(3).

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a party to move to dismiss a complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). "Accepting all well-pleaded allegations in the complaint as true, the Court 'consider[s] the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief.'"

Williams v. Curtin, 631 F.3d 380, 383 (6th Cir. 2011) (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 61 (2009)). In determining whether to grant a 12(b)(6) motion to dismiss, the Court will construe the complaint in the light most favorable to the plaintiff. *League of United Latin Am. Citizens v. Bredsen*, 500 F.3d 523, 527 (6th Cir. 2007). While plaintiffs are not required to provide detailed factual allegations, plaintiffs must provide more than mere labels and conclusions because such recitations are not subject to the presumption of truth. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

ANALYSIS

Subject Matter Jurisdiction

Plaintiffs' Complaint centers around Defendants' Media Advisory List. Defendants, however, stopped using the Media Advisory List and adopted a new Media Relations Policy, becoming effective on May 26, 2020. (ECF No. 11-1, 4–5.) Therefore, Defendants argue there is no longer a "live" controversy and the case is moot, resulting in this Court's lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. (*Id.* at 4.) Plaintiff argues the case is not moot under the doctrine of voluntary cessation. (ECF No. 14, 5.)

"Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 595 (6th Cir. 2014) (citation omitted). To have Article III jurisdiction, "[t]here must be a live controversy 'at every stage of the litigation.'" *Id.* (citation omitted). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Voluntary cessation of a challenged practice does not automatically render a case moot. *See Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990). Rather, "the defendant [must] demonstrate that there is no reasonable expectation that the wrong will be repeated" for

voluntary cessation to moot a case. *Id.*; *see also Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019).

In the Sixth Circuit, there is an important distinction between voluntary cessation by a private party and voluntary cessation by the government. When a private party voluntarily ceases his conduct, "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). However, voluntary cessation of the government's challenged conduct is "treated with more solicitude by the courts than similar action by private parties" because government "self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine." *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981–82 (6th Cir. 2010) (citations omitted). "Where the government voluntarily ceases its actions by enacting new legislation or repealing the challenged legislation, that change will presumptively moot the case unless there are clear contraindications that the change is not genuine." *Schlissel*, 939 F.3d at 768. If the government's change is regulatory, "the degree of solicitude the voluntary cessation enjoys is based on whether the regulatory processes leading to the change involved legislative-like procedures or were ad hoc, discretionary, and easily reversible actions." *Id.* "Where regulatory changes are effected through formal, legislative-like procedures, [the Sixth Circuit] has found that to moot the case the government need not do much more than simply represent that it would not return to the challenged policies." *Id.* at 769.

Based upon the Parties' arguments, it appears to the Court that both Parties agree that the change from the Media Advisory List to the Media Relations Policy is regulatory, not legislative. (ECF No. 14, 9; ECF No. 11-1, 5.) Accordingly, the Court must determine whether the changes

were made pursuant to a legislative-like procedure or an ad hoc, discretionary, and reversible procedure. *See Schlissel*, 939 F.3d at 768.

On May 26, 2020, Defendants voluntarily "charted an entirely new course with its Media Relations Policy." (ECF No. 11-1, 5.) In enacting the new policy, the City undertook an internal review and obtained formal written approval from the City's Chief Legal Officer and Chief Human Resources Officer. (*Id.*; *see also* ECF No. 15, 4.) The new Media Relations Policy provides that "[m]edia advisories from the Mayor's Communication Office regarding news briefings, news conferences, and written statements will be posted on the City of Memphis website . . . and designated [City of Memphis] social media platforms." (ECF No. 11-3.) This means that "rather than sending media advisories to an email listserv, the City must now post all advisories to notify media of briefings and news conferences to the City's website and designated social media channels." (ECF No. 11-1, 5.) The City has also set up a Twitter account and purports to have posted all media advisories on its account since adopting the new Media Relations Policy. (*Id.* at 6.) Of note, the City has voluntarily ceased relying upon the Media Advisory List to disseminate media advisories. (*Id.*) This is the precise conduct Plaintiff challenges in her Complaint.

Despite this voluntary cessation, Plaintiff asserts that Defendants' policy change is ad hoc, discretionary, and easily reversible. (ECF No. 14, 9.) The "power to change the Media Relations Policy lies solely with the City's Chief Human Resources Officer, Alex Smith," and "the City expressly 'reserves the right to suspend, revise or revoke any of its policies, procedures, and/or practices at any time without notice,' which includes the Media Relations Policy." (*Id.* at 9–10.) However, Plaintiff acknowledges that in the case of the Media Relations Policy, the process to make the change included both Alex Smith and Jennifer Sink, who is Chief Legal Officer for the City of Memphis. (*Id.* at 10.) Plaintiff does not believe there is anything "'legislative-like' about

a mayor and his senior leadership team changing a city's policies through a unilateral decision, especially when they reserve 'the right to suspend, revise or revoke [the policy] at any time without notice.'" (*Id.* at 11.) Therefore, Plaintiff believes Defendants' enactment of the Media Relations Policy is an ad hoc, discretionary, and easily reversible decision. (*Id.* at 10.)

As the Sixth Circuit explained, "[i]f the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim." *Schlissel*, 939 F.3d at 768 (citations omitted). As Defendants explained, the City had to first obtain written approval from the City's Chief Legal Officer and Chief Human Resources Officer before making the policy change. Contrary to Plaintiff's position that any decision made by the Mayor and his senior leadership team constitutes a unilateral decision, the decision to change the City's media policy was not up to the discretion of one agency or one individual. Both the Chief Legal Officer and the Chief Human Resources Officer—two different individuals working in two different offices—approved the policy change in writing. Unlike the situation in *Schlissel* where the defendant-University failed to "point[] to any evidence suggesting that it would have to go through the same process or some other formal process to change the definitions again," Plaintiff has not pointed to any evidence suggesting that the process is any different for enacting other policy changes or that the City would not have to go through the same or similar formal process to make another media policy change. 939 F.3d at 769. Defendants' regulatory action is the result of implementing written policy and procedure. Thus, it is not ad hoc or discretionary.

Because this policy change was "effected through formal, legislative-like procedures," the next issue is whether Defendants have sufficiently represented that the City will not return to the challenged practice of disseminating information through the Media Advisory List. *See id.*

Defendants in this case explicitly stated that the City "has invested resources in effectuating this amended Media Relations Policy on its website and social media channels, and will not be disseminating any further media advisories through the Media Advisory List or any other media email listserv." (ECF No. 15, 5; ECF No. 11-2 ¶ 7.) Plaintiff posits this statement is "indistinguishable from the statements rejected by the Sixth Circuit in *Schlissel*." (ECF No. 14, 13.) In *Schlissel*, the Sixth Circuit explained:

> The University has not affirmatively stated that it does not intend to reenact the challenged definitions. The University cites to University Vice President for Student Affairs Royster Harper's testimony that the new definitions "'and no others' will govern the initiation and conduct of disciplinary proceedings." All this statement stands for, however, is that the new definitions are what the University intends to use presently. It does not indicate any future intentions. Although the University characterizes this construction of Harper's statement as "hair-splitting," it is simply not a meaningful guarantee that the definitions will remain the same in the future.

939 F.3d at 769. The statement at issue in *Schlissel*, however, is distinguishable from Defendants' statement. Defendants affirmatively stated that they will not be using the Media Advisory List or any other email listserv, which is different than simply saying that the Media Relations Policy "'and no others'" will govern the City's approach to media. The Court is satisfied that Defendants have sufficiently represented that the City will not return to the challenged practice of disseminating information through the Media Advisory List.

Because the City "need not do much more than simply represent that it would not return to the challenged policies," the Court finds Plaintiff's claims challenging the Media Advisory List to be moot and the Court thus lacks subject matter jurisdiction.[1] Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

[1] Plaintiff requests limited discovery, in the event the Court finds the case moot, to "explore if the Defendants are circumventing their promulgated policy to provide preferential treatment to favored media entities in contravention of what Defendants claim here." (ECF No. 14, 16.) Plaintiff cites no legal reason for such additional discovery. Rather, Plaintiff bases her request on pure speculation. Plaintiff's request is accordingly **DENIED**.

Failure to State a Claim

Defendants argue Plaintiff's claims against Defendant Mayor Strickland and Defendant Madden fail to state a claim upon which relief may be granted for two reasons. First, Plaintiff's claim against Defendant Mayor Strickland, in his individual capacity, and Defendant Madden, in her individual capacity, must fail because Plaintiff's requested injunctive and declaratory relief may only be obtained from Defendants in their official capacities. (ECF No. 11-1, 7.) Second, Plaintiff's claims against Defendant Mayor Strickland are barred by the doctrine of qualified immunity. (*Id.* at 8.)

The Court will first address Defendants' argument that Plaintiff cannot sue Defendant Mayor Strickland and Defendant Madden in their individual capacities for injunctive and declaratory relief. (ECF No. 11-1, 7.) Plaintiff believes "Defendants' position that neither Mayor Strickland nor Ms. Madden may be sued for equitable relief in their individual capacity . . . is contrary to the plain language of Section 1983 . . . ." (ECF No. 14, 16.)

The Sixth Circuit has held that "[j]ust as a plaintiff cannot sue a defendant in his official capacity for money damages, a plaintiff should not be able to sue a defendant in his individual capacity for an injunction in situations in which the injunction relates only to the official's job, *i.e.*, his official capacity." *Cmty. Mental Health Servs. of Belmont v. Mental Health & Recovery Bd.*, 150 F. App'x 389, 401 (6th Cir. 2005). Here, the policy—the Media Advisory List—that Plaintiff is challenging belongs to the City of Memphis, and the Media Advisory List was implemented by Defendants pursuant to their official capacities. *See Milligan v. United States*, 2008 U.S. Dist. LEXIS 36635, at *52 (M.D. Tenn. May 2, 2008) ("[T]he policy that the plaintiffs are challenging is that of the United States Marshals Service, and it was implemented by the defendant U.S. Marshals pursuant to their official job capacities."). Because the challenged policy

occurred during official capacity duties, any injunctive or declaratory relief may only be obtained from Defendant Mayor Strickland and Defendant Madden in their *official* capacities. *Id.*; *see also Constantino v. Mich. Dep't of State Police*, 707 F. Supp. 3d (W.D. Mich. 2010). Defendant Mayor Strickland and Defendant Madden, in their individual capacities, are improperly named in all claims for injunctive or declaratory relief. Accordingly, Defendants' Motion to Dismiss the claims against Defendant Mayor Strickland and Defendant Madden pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is **GRANTED**. The Court need not decide whether Defendant Mayor Strickland is entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the Court finds that Defendants' Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure is **GRANTED**.

IT IS SO ORDERED this 16th day of September, 2020.

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge