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Superior Court - Norfolk
Docket Number 2282CV01197

Docketed 5/4/2023

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. SUPERIOR COURT DEPARTMENT

DARLENE SMITH as the PERSONAL REPRESENTATIVE OF THE ESTATE OF SANDRA BIRCHMORE, Plaintiff	
v.	Docket No.: 2282CV1197
MATTHEW FARWELL, WILLIAM FARWELL, ROBERT DEVINE, And JOSHUA HEAL Individually, THE TOWN OF STOUGHTON, and THE STOUGHTON POLICE DEPARTMENT, Defendants	

PLAINTIFF'S OPPOSITION TO DEFENDANT TOWN OF STOUGHTON'S MOTION TO DISMISS UNDER RULE 12(b)(6)

Now comes the Plaintiff, Darlene Smith ("Plaintiff" or "Ms. Smith"), as the Personal Representative of the Estate of Sandra Birchmore, and hereby opposes Defendant Town of Stoughton's ("Defendant" or "Stoughton") Motion to Dismiss ("Motion"). In support hereof, the Plaintiff states the following:

INTRODUCTION

Darlene Smith, as the Personal Representative of the Estate of Sandra Birchmore brings this action against the Defendant Town of Stoughton, and defendants Matthew and William Farwell, Robert Devine, Joshua Heal, and the Stoughton Police Department ("PD") based on their collective actions in the sexual grooming and causal connection to the eventual death of

Sandra Birchmore (hereinafter the "Decedent" or "Ms. Birchmore"). The Plaintiff seeks to recover for the losses suffered as a result of the defendants' actions.

FACTS

In December of 2022, the Plaintiff, as Personal Representative of the Estate of Sandra Birchmore, commenced a civil action against the Town of Stoughton and its co-defendants in Norfolk Superior Court. On January 6, 2023, the Plaintiff filed an Amended Complaint. On January 23, 2023, Ms. Smith filed a motion to file a Second Amended Complaint, which was allowed and on February 2, 2023, Ms. Smith filed her Second Amended Complaint. Following Ms. Birchmore's death, the PD produced an Internal Investigation Report ("Report"). In the course of the investigation, video surveillance recovered showed M. Farwell leaving the Decedent's apartment four days prior to the discovery of her body. The same internal investigation also determined that M. Farwell was the last to see Ms. Birchmore alive.

The Second Amended Complaint references the Report prepared by the Stoughton Police Department on August 29, 2022. The Report states that Devine was the officer in charge of the Stoughton Police Department Explorer Program (hereinafter "the Program"), and that defendants M. Farwell and W. Farwell were his subordinates. The Program attempted to teach school children about police officers and the criminal justice system and what it is like to be a police officer.

Between the age of 13 and 18, Ms. Birchmore was an active participant in the Program, through her school, and the Report revealed that this is how M. Farwell was introduced to the Decedent. M. Farwell began a sexual relationship with her when she was a minor, just 15 years old. The Report also outlines defendants Devine, M. Farwell, W. Farwell's misconduct and

sexual interactions with Ms. Birchmore, both while she was a minor and thereafter. It also references defendant Heal's misconduct towards Ms. Birchmore while she was suffering abuse by the police officers.

Stoughton has long been involved in this situation, beginning from at least defendant Devine's hiring. The Report states that defendant Devine engaged in grooming activities with the Farwell brothers, who in turn, groomed Ms. Birchmore. Devine was involved in a well-known and very public scandal while a part of the Program. He was having an affair with a woman, and after it became public, he allegedly harassed her. Thereafter, Devine's role within the PD was modified. The then Stoughton Chief of Police gave the recommendation to the Stoughton Town Manager to terminate Devine's employment with the PD. The Town Manager decided, instead, to retain and demote Devine from Deputy Chief to patrolman. It is upon information and belief that the former Chief of Police resigned from the PD in protest of the decision by the Town Manager to retain Devine. Yet, at all relevant times, Devine was nonetheless the head of the Program, and defendants M. Farwell and W. Farwell worked within the Program as officers and educators. Upon information and belief, Robert Devine held the following positions within the PD including, but not limited to, Deputy Chief (second in command), spokesman, patrolman, and officer-in-charge of the Program.

These three police defendants used their positions of power and respect as police officers and educators in the Program to take advantage of Ms. Birchmore. The long-term abuse and grooming[1] Ms. Birchmore suffered as a minor at the hands of defendants Devine, M. Farwell,

[1] "Grooming is a method used by offenders that involves building trust with a child and the adults around a child in an effort to gain access to and time alone with her/him. In extreme cases, offenders may use threats and physical force to sexually assault or abuse a child. More common, though, are subtle approaches designed to build relationships with families. The offender may assume a caring role, befriend the child or even exploit their position of trust and authority to groom the child and/or the child's family. These individuals intentionally build relationships

and W. Farwell, and allowed by Stoughton and the PD, exacerbated her underlying mental health issues and ultimately led to her untimely death.

STANDARD OF REVIEW

In Massachusetts, the legal standard of review for a motion to dismiss for failure to state a claim is set forth in Mass. R. Civ. P. 12(b)(6). The standard of review for such a motion is whether the plaintiff's complaint, taken as true, alleges sufficient facts to state a claim upon which relief can be granted. In *Iannocchino v. Ford Motor Co.*, the Massachusetts Supreme Judicial Court (hereinafter "SJC") explained, "[a] court considering a motion to dismiss [for failure to state a claim] must accept as true the factual allegations in the plaintiff's complaint and draw all reasonable inferences in the plaintiff's favor." 451 Mass. 623, 636 (2008).

The court will then determine whether the facts alleged, together with all reasonable inferences, make out a claim that is legally sufficient. As the SJC further explained in *Iannocchino*, "a complaint must do more than allege the bare elements of the cause of action; the factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Id.* at 636-37. When deciding on a 12(b)(6) motion, the court will draw every reasonable inference in favor of the plaintiff. *Galiastro v. Mortg. Elec. Registration Sys., Inc.*, 467 Mass. 160, 164 (2014) (citing *Lopez v. Commonwealth*, 463 Mass. 696, 700 (2012)).

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with the adults around a child or seek out a child who is less supervised by adults in her/his life. This increases the likelihood that the offender's time with the child is welcomed and encouraged."
Understanding Sexual Grooming in Child Abuse Cases (americanbar.org)

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ARGUMENT

In Stoughton's Motion to Dismiss all claims against it, Defendant Town of Stoughton argues that pursuant to Mass. R. Civ. P. 12(b)(6), the Plaintiff has failed to properly state claims against it. Stoughton specifically argues that the Second Amended Complaint "fails to state any cognizable legal claims against the municipality." Stoughton fails to recognize the entirety of the Complaint, inferences drawn therefrom, the facts supported by the Report and its stated conclusions.

Stoughton ironically begins its Memorandum with a quote from Stoughton Chief of Police Donna McNamara, acknowledging that the acts of the Farwell brothers and Devine were a violation of their oath and office. In a press release on September 23, 2022, Chief McNamara stated, "What I am here to talk about today is her life and how she was failed by, manipulated by and used by people of authority that she admired and trusted right up until her final days."[2] Stoughton attempts to separate itself from the officers. By virtue of the fact that officers are overseen by the Police Department, which as Stoughton states, is a department within the Town of Stoughton, Stoughton is responsible for not only hiring decisions regarding officers, but the decisions its officers make. Stoughton knew and should have anticipated defendant Devine's patterns of misconduct and misbehavior. Stoughton cannot remove itself from the acts of its officers, especially when grooming and sexual abuse are commonplace and tolerated, as shown in the PD's own Report.

I. Negligent Hiring

By hiring and retaining defendant Devine, Stoughton encouraged the other defendants' misconduct. The Defendant raises the argument in its Motion that claims of Negligent Hiring

[2] https://www.enterprisenews.com/story/news/local/2022/09/23/stoughton-police-internal-investigation-matthew-william-farwell-robert-devine-sandra-birchmore/8090716001/

must fail, as Stoughton is insulated from liability under M.G.L. ch. 258 §10 (b), due to the discretionary function exception under the Massachusetts Tort Claims Act.

The Court has discussed this discretionary exception in several cases, establishing a two-factor test for such a discretionary exception in *Baptista v. Bristol County Sheriff's Department,* 100 Mass. App. Ct. 841 (2022) stating:

> "First, the court must decide 'whether the governmental actor had any discretion at all as to what course of conduct to follow.' *Harry Stoller & Co.* [*v. Lowell*], 412 Mass. [139,] 141 [587 N.E.2d 780 (1992)]. If the actor's conduct is prescribed by statute, regulation, or other readily ascertainable standard, the government has no discretion, and the exception does not apply. *Id.* If the first step does not resolve the issue, '[t]he second and far more difficult step is to determine whether the discretion that the actor had is that kind of discretion for which § 10 (b) provides immunity from liability.' *Id.* Although almost every act involves some degree of discretion, '[t]he discretionary function exception is narrow, 'providing immunity only for discretionary conduct that involves policy making or planning.'"

Greenwood v. Easton, 444 Mass. 467, 470 (2005), *Baptista v. Bristol County. Sheriff's Dep't*, 100 Mass. App. Ct. 841, 849–50 (2022).

Hiring an employee involves a high degree of discretion, as the Court acknowledged, the discretionary function exception is narrow and the Defendant's hiring decision clearly falls outside of the narrow exception when applying *Greenwood.* Here, the hiring of officers is highly discretionary and requires significant background research for each potential employee. Under the second prong in *Greenwood,* the type of discretion which the Defendant asserts is not that kind of discretion for which §10(b) is designed to provide immunity. The hiring of police officers does not involve direct municipal policy making or planning in its traditional sense. A municipal employer's duty to determine the fitness of potential employees prior to their contact with the public is not a discretionary function within the meaning of M.G.L. c. 258, § 10(b), a fact that is expounded in *Whitney,* as cited by the Defendant.

The Defendant asserts that *Alake v. City of Boston*, 40 Mass. App. Ct. 610 (1996) stands for the proposition that all decisions regarding personnel are somehow discretionary decisions for the purposes of M.G.L. ch. 258 § 10(b). The Defendant argues that *ALL* personnel decisions were protected as discretionary decisions for the purposes of the statute, rather than that in limited instances, the determination as to the provision of limited resources to provide adequate security (in this case, the allocation of an appropriate number chaperones to a large group of students) qualifies as a policy decision. However, the hiring of police officers, a personnel decision by its very nature and not a decision in the allocation of limited resources, is not protected by the discretionary function exception for policy and planning.

As the Defendant states in its Motion, "an employer whose employees are brought in contact with members of the public in the course of the employer's business has a duty to exercise reasonable care in the selection and retention of his employees." *Foster v. Loft, Inc.*, 26 Mass. App. Ct. 289, 294 (1988). *Foster* explains that "[a]n employer must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer." *Id.* at 290-91. "The employer's knowledge of past acts of impropriety, violence, or disorder on the part of the employee is generally considered sufficient to forewarn the employer who selects or retains such employee in his service that he may eventually commit an assault, although not every infirmity of character, such, for example, as dishonesty or querulousness, will lead to such result." *Id.* at 291. This is a fact specific question for the Jury. *Id.* at 293.

The Defendant further asserts that the only theory proffered for the negligent hiring is that Stoughton and PD were aware of the instances of misconduct by the Farwells in their days as teenagers. What the Defendant fails to acknowledge is that the Complaint itself asserts that

Stoughton and PD failed to adequately determine the scope of the misconduct both prior to and during the Program and continued to operate the Program and retain both the Farwells and Devine to operate the Program. It is this behavior *AND* the early life misconduct by the Farwells which are both asserted as the theories of negligent hiring and retention for the officers in question. It is anticipated that discovery during the course of this case will demonstrate that the actions of the defendant police officers should have been apparent to the PD and Defendant.

Moreover, the Defendant cites to *Salvidar v. Pridgen,* 91 F. Supp. 3d 134 (D. Mass. 2015), alleging that the failure on the Plaintiff's part in *Salvidar* to identify a prior violation regarding sexual misconduct failed to put the Defendant on notice for the purposes of negligent hiring. Stoughton and the PD were on notice of defendant Devine's actions for the purposes of negligent hiring, as the Complaint and the Report clearly illustrate.

According to the Report, his grooming behavior was a theme throughout Devine's employment and throughout the PD. An additional incident was documented in the Report wherein a young girl wrote a letter exposing a romantic connection between herself and Devine, which the girl's mother discovered. "After her mother found the letter, she 'stormed over to the police station' to confront Devine." *Report p. 45.* The girl who wrote the letter was also part of the Program during the time Devine was the supervisor of the Program, and the Report determined that "she had been a police explorer in the earlier years of the program. She described that she had observed inappropriate behavior by Devine and the Farwell brothers while they served as instructors in the program. This young girl indicated that there had been some hugging, kissing, and inappropriate contact in a closet. She also stated that there were suggestive statements to the effect of "come back and see me after you turn 18 and other such activity that suggested a grooming environment." *Report p. 26.* At another time, "Devine admitted to

engaging in flirtatious behavior with a former police explorer and police intern." *Report p. 37.* Despite Devine displaying many instances of sexual misconduct that spanned his entire PD employment, defendant Devine was only demoted and suspended once, until the death of Ms. Birchmore, which finally and rightly concluded his employment.

On its face, it is unreasonable that Stoughton turned a blind eye to Devine's and the Farwell brother's misconduct and abuse of children. Instances were reported and the PD's response was remarkably inadequate. The reasonableness of the Defendant's actions as the employer herein is a decision to be left to the trier of fact and should not be diminished or dispelled on a Motion to Dismiss.

II. Negligent Supervision

To prove her claim of negligent supervision, Plaintiff must show (1) that the persons whose actions form the basis of the claim were agents and/or employees of the defendant employer; (2) that the agents and employees came into contact with members of the public in the course of their employer's business; (3) that the employer failed to use reasonable care in the selection, supervision and retention of the agents and employees; and (4) that the failure to use such reasonable care was the proximate cause of harm to the plaintiffs. *Limone v. United States*, 497 F. Supp. 2d 143, 233 (D. Mass. 2007), aff'd on other grounds, 579 F.3d 79 (1st Cir. 2009).

For the reasons outlined above, all of the elements, and in particular, the third element of the employer's failure to use reasonable care in the selection, supervision and retention of its employees herein is satisfied. As for the first prong of the test, the defendants were acting as officers of the Police Department, engaging in their day-to-day duties within the scope of their employment as both officers and educators within the Program and beyond the Program when

the conduct occurred. Their misconduct was facilitated by virtue of their employment with Stoughton and PD. Under the second prong, the officers frequently encountered the public as that is the entire purpose of an officer's employment, to wit, to protect, serve, and assist the public. These defendant officers were further charged with educating and nurturing the public, specifically a highly vulnerable sector, being children, through its Police Explorers Program. In applying the final prong of the test, it becomes evident that absent Stoughton's negligent supervision and retention of the officers, the ongoing sexual misconduct causing the physical, psychological, and emotional harm ultimately leading to the death of Ms. Birchmore would not have occurred as asserted in the Second Amended Complaint.

The Defendant also asserts that the claim fails as the failure to supervise Devine and the Farwells was not the "original cause", as is required under M.G.L. ch. 258 § 10 (j). The relevant portion of the statute states "(j) any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer." M.G.L. ch. 258, § 10. The Defendant fails to acknowledge that the Report makes note of multiple instances of sexual misconduct on the part of the defendant police officers, thus making the argument that Stoughton and PD did not know of any of defendant Devine, M. Farewell, or W. Farwell's propensities for misconduct notably ineffective.

Moreover, the defendant police officers in question at all relevant times were acting on behalf of the public employer as outlined in the Statute, as they were public employees, performing a public function within the scope of their employment with Stoughton and PD as educators and officers within the Program when the grooming, assault and abuse took place. The

Report outlines various instances in which the defendant officers facilitated sexual abuse and other misconduct while on duty.

Regarding the requirement that Stoughton perform some overt act rather than inaction, the Defendant's argument again falls short. The Defendant contends that it and the PD took no overt action that would lead to the "original cause" of the harm suffered by the Decedent. However, in this case, Stoughton and the PD took an overt action that was the "original cause". Stoughton and the PD knew of the previous instances of misconduct on the part of the officers in question, particularly that of defendant Devine. The Report cited by the Defendant in its Motion discusses the previous instances of sexual misconduct that were undertaken by the defendant officers. Specifically, the Report discusses the sexual misconduct of defendant Devine, who was put on administrative leave for his misconduct only to be reinstated, although demoted to patrol officer from his prior position as deputy chief. It was this action on the part of Stoughton and the PD that led to the resignation of the then Chief over the ordeal, and it was this action on the part of Stoughton and PD that ultimately led to the "original cause" of the harm suffered by the Decedent, by making the affirmative choice to reinstate defendant Devine. This action stands in stark contrast to the actions undertaken in *Claudio v. City of Chicopee* wherein, under a similar set of facts, an officer who had been accused of sexual misconduct "was then referred to the mayor, who was lawfully entitled to fire police officers. After a hearing on Claudio's accusation, the mayor terminated Mozeleski's employment with the city." *Claudio v. City of Chicopee,* 81 Mass. App. Ct. 544, 551 (2012). It was this action of Stoughton and the PD, the retention of defendant Devine in the face of sexual misconduct and recommendation that he be fired, which was the "original cause" of the harm here.

III. Negligent Infliction of Emotional Distress

To state a claim for negligent infliction of emotional distress, it must be shown that: (1) the defendant owed a duty of care; (2) the defendant breached that duty; (3) the person owed the duty suffered emotional distress as a result of the breach; and (4) the emotional distress was severe and could be anticipated by a reasonable person. *Payton v. Abbott Labs*, 383 Mass. 540 (1982).

The Defendant owed a duty of care to Ms. Birchmore which was breached by Stoughton negligently retaining the three officers and failing to adequately discipline the officers. Rehiring Devine after his demotion, as well as the resignation of the former Chief of Police in protest and allowing the officers to engage in abusive and grooming behaviors while Ms. Birchmore was a minor demonstrates negligence. The Second Amended Complaint asserts that Ms. Birchmore suffered sexual abuse and significant emotional and psychological distress caused by the negligence of the defendants. A minor suffering severe emotional distress as a result of a long period of sexual abuse at the hands of her authority figures could certainly be anticipated by a reasonable person. Therefore, the Complaint alleges sufficient facts to survive Stoughton's Motion to Dismiss for failure to state a claim.

IV. 42 U.S.C. Sec. 1983

The Defendant wrongly asserts that the claim arising under 42 U.S.C. Sec. 1983 must fail for the sole reason that Stoughton enjoys immunity under M.G.L. ch. 258 §10 (j). The relevant portion of the Statute states:

> (j) any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any

> other person acting on behalf of the public employer. This exclusion shall not apply to:
>
> (1) any claim based upon explicit and specific assurances of safety or assistance, beyond general representations that investigation or assistance will be or has been undertaken, made to the direct victim or a member of his family or household by a public employee, provided that the injury resulted in part from reliance on those assurances. A permit, certificate or report of findings of an investigation or inspection shall not constitute such assurances of safety or assistance; and
>
> (2) any claim based upon the intervention of a public employee which causes injury to the victim or places the victim in a worse position than he was in before the intervention; and
>
> (3) any claim based on negligent maintenance of public property; (4) any claim by or on behalf of a patient for negligent medical or other therapeutic treatment received by the patient from a public employee.

M.G.L. ch. 258, § 10

The Defendant wrongly applies the above statute, apparently implying that the other defendants, namely the police officers, are third parties under (j) rather than agents for Stoughton and PD acting as such in the performance of their duties. The Defendant readily admits that the PD is a department of Stoughton in its Motion. Moreover, the same Report referenced by the Defendant determined that not only were the officers operating within the confines of the Program, but that the inappropriate conduct occurred during the relevant period of the Program and that "Devine was the person who had organized the Stoughton Police Explorers class." *Report p. 25*. For these reasons, the police officers clearly fall into the category of persons acting on behalf of the public employer, in this case, Stoughton.

A. Statute of Limitations

The Defendant seeks to apply the incorrect statute of limitations, pointing to a three-year statute of limitations for the Sec. 1983 claim, under Mass.Gen.L. ch. 260, §5B. However, the underlying issue giving rise to the civil rights claim in this instance is one of the sexual assault and abuse of minor. Under a theory of sexual abuse of a minor, the applicable statute of

limitations for section 1983 would arise under Mass.Gen.L. ch. 260, §4C, rather than Mass.Gen.L. ch. 260, §5B. The relevant portion of Mass.Gen.L. ch. 260, §4C states:

> "Actions of tort alleging the defendant sexually abused a minor shall be commenced within 35 years of the acts alleged to have caused an injury or condition or within 7 years of the time the victim discovered or reasonably should have discovered that an emotional or psychological injury or condition was caused by said act."

M.G.L. ch. 260, §4C

In applying the above Statute, it becomes clear that the action is not barred by the statute of limitations as asserted by the Defendant. The above statute tolls until the minor reaches the age of majority, and the action here was brought prior to the 7 years from discovery following the age of majority as well as commenced within 35 years of the alleged acts. At the time of her death, the Decedent was 23 years of age, and the sexual conduct began occurring within the Program when the Decedent was 15 years old. Under either analysis pursuant to the Statute, the action was properly commenced within the relevant statute of limitations.

B. Constitutional Violation

To state a claim under Section 1983 of the Civil Rights Act of 1871, the Plaintiff must show: (1) the defendant was acting under the color of law; (2) the defendant's actions deprived the plaintiff [or the person the plaintiff is acting on behalf of] of a right, privilege, or immunity secured by the laws of the United States; and (3) the defendant's action caused damages. *Monroe v. Pape*, 365 U.S. 167 (1961). As was stated in the Complaint, at all relevant times, the defendants Devine, M. Farwell, and W. Farwell, were police officers employed by Stoughton and acting under the color of law. Pointedly, Ms. Smith's Complaint cites to *Almand v. Dekalb County*, (citing to *Parker v. Williams,* 862 F.2d 1471 (11th Cir. 1989)), wherein the Court found that instances of rape and sexual assault by state actors or officials can be violative of the Constitution and serve as the basis of a § 1983 claim. "The fact that rape is not a legitimate law

enforcement goal does not prevent the Sheriff's act from falling within his law enforcement function." *Bennett v. Pippin*, 74 F.3d 578, 586 (5th Cir. 1996).

C. Claim against Stoughton

The Defendant asserts that the Complaint is bereft of any allegations that implicate Stoughton in any constitutional violations that occurred against Ms. Birchmore. The Defendant additionally asserts the requirement of an applicable policy or custom in making a determination of liability under Sec. 1983. "When determining whether a municipality is liable under 42 U.S.C.S. § 1983 for unconstitutional actions shown to have been caused by a "policy or custom" of the government, a custom is a persistent and widespread practice that is not authorized by written law but is so permanent and well settled as to have the force of law." *Claudio v. City of Chicopee*, 81 Mass. App. Ct. 544, 544 (2012). The Court found "[t]o satisfy this standard, a plaintiff must show that (1) a policy or custom existed that was attributable to the municipality; and (2) the custom was the cause of the deprivation of the plaintiff's constitutional rights." *Id.* The Second Amended Complaint identifies a practice by the Stoughton Police Department of "a near decade long scheme of grooming" *Complaint ¶ 9.*

However, the Defendant fails to note that the theory of liability in this instance flows from the underlying constitutional violations of its officers rather than that of the municipality itself. ("a municipality cannot be held liable unless its agent actually violated the victim's constitutional rights," *Hayden v. Grayson*, 134 F.3d 449, 456 (1st Cir. 1998). See *Hayes vs. Dalton, D. Mass.*, No. 3:21-CV-30055-KAR (Nov. 23, 2022) ("The finding that [the individual officer] violated [the plaintiff's] constitutional rights is necessary for any finding that the City is liable, and thus causally, any basis for municipal liability must run through [the officer's] actions."). While the Defendant's Motion attempts to argue that there exists no theory of liability

that implicates Stoughton, it is the constitutional violations undertaken by its police officers that creates such liability.

The Defendant wrongly asserts that there is nothing within the Complaint or the accompanying documents, such as the referenced Report, that amounts to "deliberate indifference" on the part of Stoughton. Moreover, the Defendant asserts that there is no possibility of deliberate indifference, as there was an investigation ordered immediately and the officers in question were removed from duty. However, the Report and the Complaint itself reveals that the investigation may have begun immediately, but that the officers in question were not removed from duty, but rather, that all three officers effectively resigned, while refusing to cooperate with said investigation. No such action was taken on the part of the PD or Stoughton, upon beginning the investigation, and no punitive actions were taken until the officers were ultimately decertified at a significantly later date, after the officers had all resigned and taken other positions. The Defendant quotes a statement by Police Chief McNamara in the introduction of its Motion, made after the conclusion of the investigation (which lasted over a year), during which time all three officers had resigned. The "immediate" action claimed by the Defendant was both ineffective and unresponsive.

Here, the Defendant argues that there existed no scheme, policy or custom that can possibly be attributed to the municipality. However, as stated above, Devine was the supervisor of the Program. He specifically recruited the Farwells into the Program and sat on the hiring board. "The investigation shows evidence that grooming behavior took place between Matthew Farwell and Sandra Birchmore and that Robert Devine was engaged in the grooming of Matthew Farwell and William Farwell as his understudies." *Report p. 5.* The Complaint further explained the grooming scheme as "the defendants worked in concert with each other throughout the

duration of the Program to coerce and manipulate the Decedent into engaging in illicit sexual activities." *Complaint* ¶ *76*. This coercion and grooming on the part of the officers in question is a fact that is admitted to by the Defendants in their own introduction by and through the Chief of Police Donna McNamara and the statements made regarding the officers in the referenced press release. The Complaint asserts that the abuse, grooming, and sexual assault all took place and was facilitated by the officers' position as police officers and educators within the Program. The grooming scheme illustrates a practice and custom within the Stoughton Police Department to groom minors from within the Program. Chief of Police Donna McNamara stated in her press release, "The subsequent inquiries into her life and death revealed a deeply disturbing pattern of behavior toward her." Moreover, it shows a custom of acquiescence on the part of supervisory roles within the PD as not only was Devine second in command as a former deputy chief, but the hiring officer and supervisor of the Program itself. The inartful argument in the Motion that there is no inference that a Stoughton policy or custom caused a violation of a constitutional right is baseless. The Plaintiff has alleged sufficient facts to illustrate a policy or custom within the PD that ultimately caused the violation of the Decedent's constitutional rights, which, taken as true, states a claim on which relief could be granted.

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CONCLUSION

For the foregoing reasons, the Plaintiff, Darlene Smith, as Personal Representative of the Estate of Sandra Birchmore, respectfully requests that this Court DENY Defendant Town of Stoughton's Motion to Dismiss.

Date: April___, 2023

Respectfully Submitted,

DARLENE SMITH, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SANDRA BIRCHMORE,

By her Counsel,

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CERTIFICATE OF SERVICE

I, Richard A. Mestone, co-counsel for the Plaintiff, hereby certify that on March 10, 2023, pursuant to Rule 9A, a copy of the foregoing ***Plaintiff's Opposition to the Defendant Town of Stoughton's Motion to Dismiss*** was forwarded counsel for Defendant Town of Stoughton and to all other parties listed below by sending same to counsel of record for each Defendant via email and priority U.S. Mail, postage prepaid, as indicated below.

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