United States of America v. Maricopa, County of et al Doc. 56

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. MARICOPA COUNTY, ARIZONA; MARICOPA COUNTY SHERIFF'S OFFICE; and JOSEPH M. ARPAIO, in his official capacity as Sheriff of Maricopa County, Arizona, Defendants.	Case No. 2:10-cv-01878-GMS **DEFENDANT MARICOPA COUNTY'S REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendant Maricopa County, Arizona ("Maricopa County") hereby replies in support of its Cross-Motion for Summary Judgment. Based on the uncontroverted material facts, Maricopa County is entitled to summary judgment and to the following judicial findings as a matter of law: (1) that Maricopa County has not violated its statutory and contractual obligations set forth in the pre-award assurances, the assurances of continuing compliance and Title VI; (2) that Plaintiff ("DOJ") has not taken the steps necessary pursuant to Title VI and its implementing regulations to make a finding of default as to Maricopa County; (3) the federal grant monies awarded to Maricopa County, and grants for which Maricopa County has applied, are not at risk of suspension or revocation as a result the alleged acts by the Maricopa County Sheriff's Office; and, (4) that the only relief available to DOJ in this

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matter are discovery orders.[1]

I. DOJ FAILS TO MEET ITS BURDEN

In its First Amended Complaint [doc. 17] (herein, "FAC"), DOJ seeks declaratory and injunctive relief "compelling the Defendants to provide access to all requested documents, staff, and facilities." Plaintiff's Reply to Maricopa County's Response to Motion for Summary Judgment and Response to Cross-Motion for Summary Judgment [doc. 47] (herein, "DOJ's Response") at 7. DOJ routinely fails to distinguish between the Sheriff and Maricopa County.

DOJ's Response reads like a press release. DOJ admits that it initially requested documents from the Sheriff in March 2009, and then dithered until August 2010 before involving the "primary recipient," Maricopa County. *Id.* DOJ's request for relief is overly-broad and erroneously conflates MCSO's alleged non-compliance with DOJ's requests with Maricopa County's status as a Title VI primary funding recipient. In order for DOJ to prevail on its claims against Maricopa County, it must prove that Maricopa County failed to permit DOJ access to information or facilities pertinent to DOJ's underlying Title VI investigation. *See* FAC at ¶13. Even accepting DOJ's chronology as true, DOJ cannot prove Title VI non-compliance by any non-MCSO Maricopa County entity. *See Board of Public Instruction of Taylor County, Fla. v. Finch*, 414 F.2d 1068 (5th Cir. 1969).

Maricopa County's underlying Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment [doc. 43] (herein, "Maricopa County's Motion") challenged DOJ to "point to a single instance when Maricopa County has refused to cooperate." *Id.* at 7. DOJ's Response cites no such instance; nor can it. Indeed, DOJ admits that Maricopa County has offered to exercise its subpoena power pursuant to A.R.S. § 11-218 to help resolve this matter, within days of Maricopa County receiving notice from DOJ in August 2010 of the impasse with the Sheriff. Plaintiff's Objections to Defendant Maricopa County's Statement of Facts in Support of Cross-Motion for Summary Judgment

[1] As described below, DOJ admitted in its Response brief that the proposed findings nos. 3 and 4 are appropriate in this matter. DOJ's Response at pg. 7.

[doc. 49] ("herein, "DOJ's Objections") at Objection to ¶77. DOJ did not and has not responded to Maricopa County's offer to invoke this subpoena authority. Rather, DOJ precipitously named Maricopa County in this case.

DOJ's extolling of the Sheriff's jail policymaking authority (DOJ's Response at 5-6) does nothing to advance its arguments. DOJ relies on *Monell v. New York City Dept. Of Social Servs.*, 436 U.S. 658 (1978). However, *Monell* stands for the proposition "that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." *Id.* at 691. *Monell* and its progeny require a plaintiff seeking to impose liability on a municipality "to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997). It is not enough to identify conduct properly attributable to the municipality. *Id.* at 404. Here, Maricopa County has clearly stated its policy of compliance with Title VI and its willingness to assist DOJ to the extent possible under Arizona law. Maricopa County's prompt offer of its subpoena powers in August 2010 proves that fact. DOJ fails to identify a Maricopa County "policy" or "custom" that is impeding its investigation.

II. DOJ DID NOT SERVE PROPER NOTICE ON MARICOPA COUNTY

In its Cross-Motion for Summary Judgment, Maricopa County acknowledges that DOJ initiated an investigation. *See* Maricopa County's Motion at 3. Maricopa County further acknowledges that during the course of DOJ's investigation, DOJ requested certain documents and information from MCSO and its representatives. However, it is undisputed that DOJ did not serve these requests properly (or otherwise) on Maricopa County. *See* A.R.S. § 11-622(A) ("A person having a claim against a county shall present to the board of supervisors of the county against which the demand is held an itemized claim executed by the person under penalties of perjury, stating minutely what the claim is for, specifying each item, the date and amount of each item and stating that the claim and each item of the claim is justly due."). See also, A.R.S. § 12-821 *et seq.*

DOJ's Response (at pgs. 3-4) references several discrete circumstances it argues provided "notice" to Maricopa County that certain Title VI responsibilities were going unfulfilled. The first circumstance DOJ claims provided notice to Maricopa County was in March 2009 when Maricopa became aware of the underlying Title VI investigation. However, the commencement of an investigation is obviously not notice of a problem with achieving access to investigatory information. Next, DOJ feebly asserts that service of the United States' First Request for Documents and Information on the Maricopa County Attorney's Office (as MCSO's legal counsel) constitutes notice to Maricopa County. Again, a request for documents cannot be notice of a dispute or alleged default at some later date. Also, as discussed above, this is plainly wrong. Arizona law provides that the Clerk of the Board of Supervisors must be served with claims against Maricopa County; not the County Attorney's Office. Importantly, the timing is critical. DOJ is acutely aware that by early 2009 the then Maricopa County Attorney, Andrew Thomas, in conjunction with and representing the Sheriff, was filing lawsuits against Maricopa County and its Board of Supervisors. See, *Daughton v. Romley*, 225 Ariz. 521, 241 P.3d 518 (App. 2010) (complaint filed December 30, 2008 with Andrew Thomas and Joe Arpaio as plaintiffs) and *Arpaio v. Maricopa County Board of Supervisors*, 225 Ariz. 358, 238 P.3d 626 (App. 2010) (complaint filed February 7, 2009 with Andrew Thomas and Joe Arpaio as plaintiffs). It is quite disingenuous for DOJ to suggest that providing something to Thomas involving the Sheriff is proper notice to Maricopa County.

Lastly, DOJ refers to a Sheriff's press conference in which the Sheriff voiced his concern about the Title VI investigation. It is ironic that the Sheriff's reported position at his press conference (i.e., failure to cooperate with DOJ) is cited by DOJ for the dubious legal proposition that the Sheriff's press conference substitutes for proper notice to Maricopa County of DOJ's claims. DOJ appears to want to bind itself to a concept that can be called "constructive notice by press conference." The DOJ's position is unsupported by any legal authority of which undersigned counsel is aware. Moreover, the concept that press conferences can provide legally recognized notice in a civil rights investigation should

be an anathema to DOJ. It also goes without saying that the huffing and puffing of a press conference may be a tactic that one cannot presume to indicate the full range of the legal situation. The press conference DOJ references, rather, provides absolute evidence of when DOJ should have engaged the primary recipient in the discussions. DOJ's choice to ignore the primary recipient prolonged the matter; DOJ cannot now ignore its own failures.

Even still, in spite of DOJ's failures with regard to notifying Maricopa County, Maricopa County has offered "to assist in any way that it can to resolve the dispute that resulted in this action being filed." Maricopa County's Motion at pg. 3 n. 1. Regrettably, rather than work with Maricopa County, DOJ is pursuing a course of unnecessary and expensive litigation against Maricopa County that stands only to give rise to acrimony and accomplishes nothing as to Maricopa County.

Maricopa County accepts DOJ's binding representation that "[t]he United States is not seeking termination of funds in this proceeding…." DOJ's Response at 7. However, because the undisputed facts demonstrate that: 1. Maricopa County has not violated its statutory and contractual obligations concerning Title VI compliance; and, 2. because DOJ has failed to even take the steps necessary pursuant to Title VI to make a finding of default as to Maricopa County (i.e., proper service of requests for information pursuant to A.R.S. § 11-622(A)), it is appropriate for this Court to enter a judgment in conformance with these undisputed facts.

IV. Conclusion: Maricopa County has Not Violated its Obligations.

Maricopa County agrees that it is required to cooperate in the DOJ investigation. However, DOJ's lawsuit against Maricopa County must not be allowed to continue based on the undisputed factual record. Maricopa County has satisfied its obligations pursuant to, *inter alia*, 28 C.F.R. § 42.106 (a), and will continue to do so. Maricopa County is encouraged by the recent efforts of DOJ and the Sheriff to produce documents, interview staff and inmates and tour facilities. Maricopa County will continue to encourage and facilitate the Sheriff and DOJ in this effort.

Based on the evidence presented, Maricopa County respectfully submits that the Court should enter Summary Judgment in favor of Maricopa County finding that: (1) Maricopa County has not violated its statutory and contractual obligations set forth in the pre-award assurances, the assurances of continuing compliance and Title VI; (2) that DOJ has not taken the steps necessary pursuant to Title VI and its implementing regulations to make a finding of default as to Maricopa County; (3) the federal grant monies awarded to Maricopa County, and grants for which Maricopa County has applied, are not at risk of suspension or revocation as a result the alleged acts by the Maricopa County Sheriff's Office; and, (4) that the only relief available to DOJ in this matter are discovery orders.[2]

A fundamental tenant of DOJs recent filings is that it is entitled to judgment against the Sheriff, and Maricopa County, due to the alleged failures which occurred prior to the filing of this action. Based upon the same principle, Maricopa County is entitled to summary judgment as prayed for due to its having never violated Title VI.

Dated this 26th day of April, 2011.

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[2] Notwithstanding Maricopa County's position concerning its compliance with Title VI, DOJ admitted that proposed findings nos. 3 and 4 are appropriate in this matter. DOJ's Response at pg. 7.

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2011 a true and correct copy of the foregoing was filed with the Court and distributed electronically through the ECF system to all individuals registered on ECF in this action:

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