

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROXANA ORELLANA SANTOS

*

Plaintiff

*

v.

* Case No: BEL-09-CV-2978

FREDERICK COUNTY BOARD
OF COMMISSIONERS, et al.

*

*

Defendants

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
OR, IN THE ALTERNATIVE, TO BIFURCATE

Frederick County Board of Commissioners, one of the Defendants, by KARPINSKI, COLARESI & KARP and DANIEL KARP, its attorneys, files this Memorandum in support of its Motion to Dismiss or, in the alternative, to bifurcate, and states:

By Complaint filed on November 10, 2009, the Plaintiff filed suit against the Frederick County Board of Commissioners, Frederick County Sheriff Charles Jenkins in his official and individual capacities, Frederick County Deputy Sheriff Jeffrey Openshaw, and past and present federal officials, as a result of the detention of the Plaintiff on October 7, 2008. The Complaint alleges, in essence, that on the day of the incident, the Plaintiff was sitting on a curb near a food store eating her lunch, and not engaged in any unlawful or suspicious activity. Complaint, ¶¶41-42. At that time, a Frederick County Sheriff's Office patrol cruiser drove near the

Plaintiff. Deputy Openshaw and another, unnamed deputy, who were in the car stopped, got out of the vehicle, and approached the Plaintiff. Complaint, ¶43. The Plaintiff has alleged, in entirely conclusory terms, that the deputies stopped the car “solely because they intended to interrogate Ms. Orellana Santos about her immigration status based on her perceived race, ethnicity, and/or national origin.” In response to the deputies’ request for identification, the Plaintiff showed them a National Identification card. Shortly thereafter, when the Plaintiff tried to leave the scene, the deputies prevented her from doing so and then handcuffed her and transported her to the Frederick County Adult Detention Center. Complaint, ¶¶46-56. The Complaint adds that the Plaintiff was not charged by the Frederick County deputies with a violation of any law; that no incident or arrest report was file; and that the Plaintiff was transferred to the custody of U.S. Immigration and Customs Enforcement, which transferred her to the Dorchester County Jail before, about a month later, Plaintiff “was granted supervised release for humanitarian concerns.” Complaint, ¶¶2, 56-58.¹ The essence of the Complaint is that the deputies approached and interrogated the Plaintiff without reasonable, individualized and articulable suspicion of wrongdoing, that the deputies had no legitimate factual or legal basis to approach, interrogate, or detain the Plaintiff, and that the deputies were without authority to enforce federal civil immigration law.

¹ The Complaint neglects to mention the salient fact that the Plaintiff had an outstanding U.S. Immigration and Customs Enforcement (“ICE”) warrant for her immediate deportation.

The following counts have been asserted:

- Count I Unlawful arrest in violation of the Fourth Amendment, actionable under 42 U.S.C. Section 1983, against Deputy Openshaw in his official and individual capacities.²
- Count II Violation of Equal Protection clause of the Fourteenth Amendment, actionable under 42 U.S.C. Section 1983, against Deputy Openshaw in his official and individual capacities.
- Count III Unlawful seizure in violation of the Fourth and Fourteenth Amendments, actionable under 42 U.S.C. Section 1983, against Deputy Openshaw in his official and individual capacities.³
- Count IV Conspiracy in violation of the Fourteenth Amendment actionable under 42 U.S.C. Section 1985(3) against Deputy Openshaw in his official and individual capacities.
- Count V Supervisory liability actionable under 42 U.S.C. Section 1983 against Sheriff Jenkins in his official and individual capacities.
- Count VI Violation of Title VI of the Civil Rights Act of 1964, actionable under 42 U.S.C. Section 2000(d) against the Frederick County Board of Commissioners.
- Count VII Monell "entity liability" against the Frederick County Board of Commissioners.
- Count VIII Failure to supervise against the federal Defendants in their official and individual capacities.

² The Complaint also purports to sue the other, unidentified deputy, described as "John Doe." This individual has not been identified or served.

³ It is not clear what Plaintiff believes the difference is between the "unlawful arrest" claim asserted in Count I and the "unlawful seizure" claim asserted in Count III.

The Complaint fails to state a claim upon which relief may be granted against the Board of County Commissioners of Frederick County. That entity is identified in paragraph 6 of the Complaint as a Maryland commissioner county that “fully funds the FCSO [Frederick County Sheriff’s Office], which operates under a set of law enforcement policies, practices and customs directed and affected by Frederick County.” Count VI of the Complaint asserts that the Board of County Commissioners receives federal financial assistance and funding and that the Board of County Commissioners is liable for the alleged discrimination on the basis of race, color, or national origin by Sheriff Jenkins and Deputy Openshaw in any program or activity receiving federal financial assistance. Count VII purports to assert a Monell claim against the Board of County Commissioners for the Sheriff’s alleged unconstitutional policy, custom, or practice.

Preliminarily, the Board of County Commissioners adopts and incorporates by reference the motion to dismiss and supporting memorandum filed on behalf of Sheriff Jenkins. To the extent the Complaint fails to state a claim against either the Sheriff (or against Deputy Openshaw), it necessarily fails to state a claim against the Board of County Commissioners, whose agents the Sheriff and the Deputy Sheriff are alleged to be.

Plaintiff does not have standing to challenge any alleged “discrimination” due to the 287(g) program. Plaintiff has repeatedly plead that the Deputies were not 287(g) trained and were not participating in the program. *See e.g.* Cmplt., ¶¶ 26-27.

As such, any claimed injury under 42 U.S.C. § 2000d that Plaintiff has attributed to the 287(g) program must be dismissed. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (“The standing inquiry requires careful judicial examination of a complaint’s allegations to ascertain whether the *particular plaintiff* is entitled to an adjudication of the *particular claims* asserted” and “a plaintiff must demonstrate standing separately for each form of relief sought.”) (emphasis added and in original).

Additionally, Plaintiff’s 42 U.S.C. § 2000d claim regarding the Adult Detention Center Program must be dismissed. Section 2000d of Title 42 “prohibits only intentional discrimination, not ‘disparate impact’ practices.” *Peters v. Jenney*, 327 F.3d 307, 315 (4th Cir. 2003) (citing *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001)). Plaintiffs have not alleged any “intentional discrimination.” Instead, Plaintiffs have styled their Complaint as alleging nothing more than “disparate impact” discrimination.⁴ Plaintiffs ask this Court to infer that because a large percentage of Latinos end up at the FCSO Detention facility, that discrimination must take place. Cmplt., ¶ 40.⁵ Such pleading is not the “intentional discrimination” required under

⁴ Although Plaintiffs have attempted to plead “disparate impact” discrimination on the part of the FCSO and Sheriff Jenkins, Plaintiffs still have not successfully even pled that form of discrimination.

⁵ Additionally, Plaintiff has not even alleged that any “disparate impact” discrimination would be attributed to the FCSO Board in this case because their Complaint alleges that 90% of the individuals “arrested...and detained under the 287(g) MOA were of Latino descent.” Cmplt., ¶ 40. As explained, *supra*, Plaintiff does not have standing to make such a challenge because Plaintiff seems to allege that she was not arrested pursuant to the 287(g) agreement.

42 U.S.C. § 2000d claims.

The only “facts,” that attempt to plead “intentional discrimination” are a self-supporting belief that the officers approached the Plaintiff “based solely on her actual or perceived race, ethnicity, and/or national origin,” Cmplt., ¶ 116, and their belief that the FCSO deputies “were acting in accordance with the pattern and practice of discrimination on the basis of perceived race, ethnicity and/or national origin that had been established and tolerated within the FCSO.” Cmplt.¶ 117. *Twombly* does not give credit as fact to such bald assertions as the ones Plaintiff alleges which amount to no more than “labels and conclusions, and a formulaic recitation of the elements of a cause of action.” *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 555 (2007). For a § 2000d claim, Plaintiff must allege facts that show she “has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *W. States Paving Co. v. Wash. State DOT*, 2006 U.S. Dist. LEXIS 43058, *17 (D. Wash. 2006). As Plaintiff has not even attempted to do this, her 42 U.S.C. § 2000d claim must be dismissed.

Furthermore, the Board’s conduct must be shown to be “purposeful discrimination in violation of the Equal Protection guarantees of the U.S. Constitution.” *Thompson v. United States HUD*, 348 F. Supp.2d 398, 452 (D. Md. 2006). As explained in the Sheriff’s Brief, the conduct of the FCSO deputies did not violate the Equal Protection Clause and therefore, Plaintiff’s § 2000d claim must be dismissed for that reason as well.

The Complaint against the Board of County Commissioners should be dismissed on another basis as well. It is clear and undisputed that Maryland Sheriffs and Deputy Sheriffs, when exercising their law enforcement functions, are state rather than county officials. Ritchie v. Donnelly, 324 Md. 344, 357-58, 597 A.2d 432, 438 (1991); Boyer v. State, 323 Md. 558, 594 A.2d 121 (1991); Rucker v. Harford County, 316 Md. 275, 558 A.2d 399 (1989); see also Maryland Code, State Government Article Section 12-101, et seq. The Board of County Commissioners does not exercise any authority over Sheriff Jenkins' law enforcement policies, procedures, or functions.

In the absence of a right of control, there is no basis upon which the Board of County Commissioners can be liable for the Sheriff's alleged misdeeds. Compare Dotson v. Chester, 937 F.2d 920, (4th Cir. 1991) (Dorchester County Board of Commissioners liable for unconstitutional condition of confinement in Dorchester County Jail because Board created unconstitutional conditions by refusing adequately to fund the operation of the jail). In addition, while there are no enhanced pleading requirements with respect to claims against municipalities, see Leatherman v. Tarrant County, 507 U.S. 163 (1993), it is clear that the Complaint in this case is barren of any factual allegations whatsoever from which it could be concluded that the alleged events of October 7, 2008 were the result of any act, omission, policy, custom, or practice of the Board of County Commissioners itself. If Deputy Openshaw committed a violation of federal law at all, and if the violation

was the result of an unlawful policy, custom or practice of the Sheriff's Office, the Plaintiff can recover full relief against the Deputy and the Sheriff. Under the circumstances, not only has no claim against the Board of County Commissioners been stated, but there is no reason why a claim against that entity should be recognized. See Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397 (1997); Cain v. Rock, 67 F.Supp. 2d 544, 549 (D.Md. 1999) (where plaintiff claims that a municipality itself has not caused the injury, but rather has caused an employee to violate federal law, rigorous standards of culpability and causation, and proof of deliberate indifference on the part of the municipal policy makers, must be applied to insure that the municipality is not held liable solely for the actions of the employee).

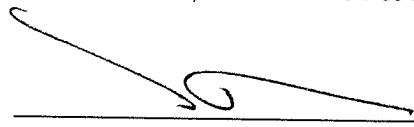
In the event the claims against the Board of County Commissioners are not dismissed outright, Defendant submits that they should be bifurcated, for purposes of discovery and trial, pursuant to this Court's well-established practice of bifurcating Monell-type claims against governmental entities. Marryshow v. Bladensburg, 139 F.R.D. 318 (D. Md. 1991); see also, Wright v. Town of Glenarden, 1986 U.S. App. LEXIS 15393 (4th Cir. Md. June 26, 1996); Gray v. Maryland, 228 F. Supp. 2d 628 (D. Md. 2002); Robertson v. Prince George's County, 2001 U.S.D. LEXIS 14586 (D. Md. May 23, 2001); Thompson v. Mayor and Town Council of LaPlata, 993 F. Supp. 495 (D. Md. 1997); Massey v. Prince George's County, 907 F. Supp. 138 (D. Md. 1995); Dawson v. Prince George's County, 896 F. Supp. 537 (D. Md. 1995).

Bifurcation will allow the Plaintiff to obtain all relevant discovery to which she is entitled from the individual officers, while avoiding the discovery disputes, and inevitable prejudice to the officers, which flow from attempting to explore and adjudicate Monell claims before there is a determination as to liability on the part of any individual officers. Inasmuch as Plaintiff cannot prevail on any claims against the Board of County Commissioners without first establishing liability on the part of at least one individual police officer, see e.g. Temkin v. Frederick County Commissioners, 945 F. 2d 716 (4th Cir. 1991); the Plaintiff will not be prejudiced in any fashion by such bifurcation. Thus, bifurcation will not only simplify the case and minimize discovery disputes, but will at the same time cause no prejudice to the Plaintiff.

For all of the foregoing reasons, the claims asserted against the Frederick County Board of Commissioners in Counts VI and VII should either be dismissed or bifurcated for all purposes of discovery and trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of January, 2010, a copy of the foregoing Memorandum in Support of Motion to Dismiss or, in the alternative, to Bifurcate, was electronically filed, with notice to:

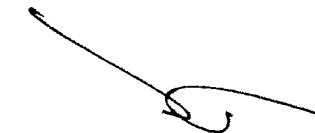
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