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December 11, 2000

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Re: United States of America v. City of Columbus, Ohio, et al.
Civil No. C2-99-1097

Dear Counsel:

Enclosed please find a copy of the Reply of Defendant Fraternal Order of Police, Capital City Lodge No. 9, to United States' Response to the Memorandum of Amicus Curiae Grand Lodge of the Fraternal Order of Police which was filed today in the above court.

Sincerely,

Douglas L. Rogers

DLR/dmg
Enclosure

US v. City of Columbus
PN-OH-001-030

12/11/00 - 8777811

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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	**Civil No. C2-99-1097**
v.	**Judge Holschuh**
CITY OF COLUMBUS, OHIO, et al.,	**Magistrate Judge King**
Defendants.	

REPLY OF DEFENDANT FRATERNAL ORDER OF POLICE, CAPITAL CITY LODGE NO. 9, TO UNITED STATES' RESPONSE TO THE MEMORANDUM OF AMICUS CURIAE GRAND LODGE OF THE FRATERNAL ORDER OF POLICE

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I. INTRODUCTION

The Department of Justice ("DOJ") confuses (1) the power of Congress to give the DOJ standing when there is a case or controversy between a citizen and a defendant[1] with (2) the absence of power in Congress to declare a case or controversy under Article III and let the DOJ pick a fight against a municipality which has not violated, and is not violating, federal law.[2] Of course, in the present case, Congress did even not attempt to create vicarious liability under §14141.

Apparently recognizing that the text and legislative history do not support the DOJ's vicarious liability interpretation of §14141, the DOJ mistakenly travels for support back to England in the century the United States revolted against England.[3] That travel would be appropriate when considering a suit similar to suits which existed in England at the time of adoption of Article III of the Constitution. However, the practice in England at that time has no bearing on whether the Federal government can regulate the conduct of state and local governments based on vicarious liability. Achieving the appropriate balance between the central power and the states is the crux of federalism, a reason the colonies revolted, and not even an issue in England at the time.

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[1] See cases cited by DOJ at pp 4-5 of United States' Response to the Memorandum of Amicus Curiae Grand Lodge of the Fraternal Order of Police (the "DOJ Response") on giving the United States "standing to bring suit to remedy injuries suffered by its citizens."

[2] Bennett v. Spears, 520 U.S. 154, 162 (1997).

[3] See p. 13 of DOJ Response.

Title VII cases, moreover, do not support the DOJ's argument. They in fact show that even when Congress has defined "employer" to include "agents" of the employer, as it has under Title VII, the plaintiff must still allege a nexus between the employer and employee beyond simply the employer/employee relationship.

II. THE GRAND LODGE OF THE FRATERNAL ORDER OF POLICE (THE "GRAND LODGE") CORRECTLY ARGUES THAT THERE IS NO CASE OR CONTROVERSY AGAINST A MUNICIPALITY BASED ON ALLEGED MISCONDUCT BY INDIVIDUAL OFFICERS

The DOJ acknowledges that standing for purposes of Article III of the constitution has three elements: (1) injury in fact, that is, "harm that is both concrete and actual or imminent, not conjectural or hypothetical;" (2) "causation--a fairly ... trace [able] connection between the alleged injury in fact and the alleged conduct of the defendant;" and (3) "redressability--a substantial likelihood that the requested relief will remedy the alleged injury in fact." Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 120 S.Ct. 1858, 1862 (2000) (emphasis added; citations and internal quotation marks omitted). The DOJ, however, misapplies these requirements to the case at hand.[4]

In suggesting it is the "ultimate parens patriae," the DOJ appears to argue that its interests as a sovereign gives it standing even if a class of individuals

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[4] The Fraternal Order of Police, Capital City Lodge No., 9 (the "FOP") did not raise the case or controversy argument in its Briefs, since §14141 does not impose vicarious liability. However, the FOP agrees with the argument of the Grand Lodge that if §14141 were interpreted to impose vicarious liability, §14141 could not create a case or controversy against the City of Columbus,

would not have standing.[5] The question remains unanswered – standing against whom? Accepting for the sake of argument that the United States, as sovereign, is injured when the rights of a citizen are violated, nonetheless, a "pattern or practice" of misconduct does not commit itself. The DOJ's preferred social policies on "what steps might ... have the potential for prevention of future police misconduct,'" does not create a case or controversy within the meaning of Article III. Rizzo v. Goode, 423 U.S. 362, 371 (1976).

A. Causation Under Article III Requires A Sufficient Link To A Policy Or Practice Of The City, And This Link Is Not Provided By The Doctrine Of *Respondeat Superior*

The DOJ acknowledges[6] it is required to allege that any injury to its interests is "fairly traceable" to some specific act by the City, rather than "the result of the independent action of some third party not before the court." Bennett v. Spear, 520 U.S. 154, 167 (1997). The DOJ must allege more than a mere "failure to act in the face of a statistical pattern." Rizzo, 423 U.S. at 377. Instead, it must allege affirmative conduct by the governmental unit, such as injury produced by the "determinative or coercive effect" of government action "upon the action" of its employees. Bennett, 520 U.S. at 169.

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and the United States would not have standing within the meaning of Article III of the Constitution. This Reply only looks at some of the ways the DOJ misapplies the three elements.

[5] Pages 4-5 of DOJ Response. In Pennsylvania v. Porter, 659 F2d 306, 316-17 (3rd Cir. 1981), cert denied, 458 US 1121 (1982), the Third Circuit approved of a parens patriae suit by the Commonwealth, but warned that such suits may not be "resorted to as devices for the vindication of private rights that would not otherwise be within federal subject matter jurisdiction."

[6] Page 6 of DOJ Response.

The DOJ argues incorrectly that Rizzo had nothing to do with the issue of causation, only the existence of injury in fact, and merely found past injury insufficient to support standing when unaccompanied by allegations of ongoing harm.[7] In fact, in Rizzo, the Court held standing was lacking both because of the lack of allegations of ongoing harm to the class representatives and because the "claim to 'real and immediate' injury rest[ed] not upon what the named petitioners might do to them in the future ... but upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures." 423 U.S. at 372.

Similarly, the DOJ's gloss on City of Los Angeles v. Lyons, 461 U.S. 95 (1980),[8] overlooks the Court's statement indicating that standing would require allegations of official approval of illegal conduct. 461 U.S. at 110. ("Nothing in that policy, contained in a Police Department Manual, suggests that chokeholds ... are authorized absent some resistance or other provocation by the arrestee or other suspect"). Also, in Thomas, et al. v. County of Los Angeles, 978 F.2d 504, 507 (9th Cir. 1991), the Ninth Circuit held standing was present under Article III to sue local government, and not simply the individual officers when both (a) the members of the plaintiff class were suffering continued violations; and (b) the complaint alleged "a direct link between the department policy makers and the injuries suffered by the plaintiffs."

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[7] DOJ Response at p. 11.

In Pennsylvania v. Porter, 659 F.2d 306, 321 (3d Cir.1981), cert. denied, 458 U.S. 1121 (1982), the Third Circuit recognized that "as a statement of the appropriate scope of federal equitable relief," Rizzo required it to "focus on the degree to which" city officials and the council "participated in [the officer's] pattern of violation[s] by virtue of knowledge, acquiescence, support and encouragement." (citing Allee v. Medrano, 416 U.S. 802, 812 (1974)). The Porter court went on to state "the officials' misconduct cannot be merely a failure to act. Such officials must have played an affirmative role in the deprivation of the plaintiffs' rights, i.e., there must be a causal link between the actions of the responsible officials named and the challenged misconduct." Id. at 336.

Instead of allegations of such an "affirmative role," the DOJ relies on vicarious liability.[9] None of the cases cited by the DOJ, however, support the use of vicarious liability in the case of an injunction against a state or local government for a pattern or practice of violation of federal laws solely through the actions of some of its employees. The vast majority of the cases cited address the award of monetary damages and do not even address the issue of standing. City of Chicago v. Matchmaker Real Estate Center, Inc., 982 F.2d 1086 (7th Cir. 1993) does address standing, but standing against a private party, not standing to obtain an injunction for a pattern and practice of illegal conduct. The Seventh Circuit addressed the issue of whether the plaintiffs had been

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[8] DOJ Response at p. 5.

[9] See, e.g., p. 3, n.4 of DOJ Response.

injured in the past sufficient to warrant the award of compensatory damages against a private party. No issue of federalism was present.

It is telling that the DOJ holds out United States v. Parma, 661 F.2d 562 (6th Cir. 1981), as a model of what is required under Sixth Circuit law to sustain an injunction against a municipality.[10] Contrary to the DOJ's suggestion, however, the City of Parma was not subjected to a federal injunction based on "vicarious liability" for the "acts of its employees." Rather, the Sixth Circuit upheld an injunction entered against the City based on express findings that the City itself had engaged in a pattern and practice of discrimination against African Americans that was motivated by racial animus. The District Court there had found "Parma engaged in a pattern and practice of resistance to the full enjoyment of the rights granted by Sections 804(a) and 817 of the Fair Housing Act by following a consistent policy of making housing unavailable to black persons." Id. at 568. The District Court specifically found that a series of actions by the City government itself "individually and collectively, were motivated by a racially discriminatory and exclusionary intent." Id.[11]

There are no allegations made by the DOJ in this case that come close to this standard. The DOJ has not alleged that the City of Columbus has a policy or practice causing its police officers to violate the constitutional rights of its citizens. The DOJ has not alleged a series of decisions on the part of the City

[10] Page 3, n.4 of DOJ Response.

[11] The Sixth Circuit affirmed the findings of the District Court, reversing only the District Court's appointment of a special master. Id. at 576 and 578.

government motivated by an improper intent. The DOJ instead pins its hopes on vicarious liability. § 14141 does not authorize vicarious liability.

B. The Injury Alleged By the DOJ Is Not Redressable By This Court Within The Meaning Of Article III

In Rizzo, the Court stated that "[g]oing beyond considerations concerning the existence of a live controversy and threshold statutory liability," it also had to address "the additional and novel claim" that a right to equitable relief existed "when those in supervisory positions do not institute steps to reduce the incidence of unconstitutional police misconduct." 423 U.S. at 377-78. The Supreme Court rejected this claim as being "quite at odds with the settled rule that in federal equity cases 'the nature of the violation determines the scope of the remedy,'" and noted that, "important considerations of federalism are additional factors weighing against it." Id. The Supreme Court held that "[w]hen [the District Court] injected itself by injunctive decree into the internal disciplinary affairs of this state agency, the District Court departed from [controlling legal] precepts," such as "principles of federalism." Id. at 380.

Several conclusions arise from these passages in Rizzo. First, the DOJ is wrong when it asserts that the Supreme Court viewed its holdings on these issues as simply a question of "statutory liability,"[12] since the Supreme Court said it had to go beyond the issue of statutory liability. Second, the DOJ's argument that issues of federalism have nothing to do with the determination of whether it has

[12] Page 12 of DOJ Response.

standing to seek an injunction against an instrumentality of state government[13] is contrary to Rizzo. Third, as set forth below in more detail, Rizzo's discussion of the limits on a federal court's equitable power shows the DOJ's "redressabilty" argument is invalid.

The DOJ argues that because a structural injunction might have a salutary effect, ipso facto this Court has the jurisdiction to issue it.[14] Rizzo holds, however, that absent allegations the defendant had played an affirmative role in causing police misconduct, it is not within the scope of federal equitable power to enjoin that official in an attempt to "minimize" such misconduct in the future. In other words, that claim is not "redressable" by a federal court.

In arguing to the contrary, the DOJ engages in circular reasoning. DOJ attempts to negate the redressability requirement first by arguing that the causation and redressability requirements are essentially the same.[15] DOJ then argues that because injunctive relief (regardless of whether the court has the authority to grant such relief) against a city might lessen police misconduct, the causation requirement is also met, effectively eliminating the causation requirement.[16]

The fact that a "conceivable" remedy might exist if the limits on a court's authority were different does not negate those limits. Rizzo shows that one limit on federal judicial power in cases involving state and local government officials

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[13] Page 9, n6 of DOJ Response.
[14] Pages 8-9 of DOJ Response.
[15] Page 7 of DOJ Response.

is the requirement of something more than a mere failure to act when faced with misconduct by another party (or non-party). This limit is not based on an empirical assessment of the possible effects of a remedial order, but on a legal assessment of the "proper – and properly limited – role" of a federal court when asked to inject itself into the internal affairs of a state agency. Bennett, 520 U.S. at 162.

II. TITLE VII CASES DO NOT PROVIDE SUPPORT FOR THE FEDERAL GOVERNMENT TO IMPOSE VICARIOUS LIABILITY ON MUNICIPAL GOVERNMENTS UNDER §14141

Title VII expressly defines "employer" to include the employer's "agents,"[17] including employees, so of course courts treats employers and employees as the same under some Title VII cases. In contrast, in §14141,[18] Congress specifically separated the prohibition against actions of employees from the actions of local governmental units. However, under Title VII, even in an action by a private party against a private employer and the inclusion of "agent" within the definition of "employer," liability is not strict vicarious liability, liability imposed "because of the relationship between the two parties."[19] Instead, the courts have established tests short of strict vicarious liability.[20]

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[16] Page 9 of DOJ Response.
[17] 42 USC §2000e, attached as Exhibit A.
[18] 42 U.S.C. §14141, attached as Exhibit B.
[19] Cite Blacks' Law Dictionary.
[20] Meritor Savings Bank v. Vinson, 477 US 57, 72 (1986) ("we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors"); and EEOC v. Dinuba Medical Clinic, 222 F.3d 580, 586-7 (9th Cir. 2000) ("if the harassment is actionable and the harasser has supervisory authority over the victim, we presume that the employer is vicariously liable for the harassment .... The presumption of vicarious liability 'may be overcome...").

Moreover, when the Attorney General files a suit under Title VII, she must have a reasonable cause to believe there is a pattern or practice of violations.[21] Even though Title VII defines "employer" to include agents of the employer, simply alleging that agents of the employer engaged in a pattern and practice of illegal conduct is not sufficient. In order to prove an illegal pattern and practice under Title VII, the DOJ may not rely on an attenuated form of vicarious liability, but must show that the pattern and practice of violation of rights is the "standard operating procedure" of the defendant, not just repeated acts of the employees.[22]

The DOJ recites a truism and again puts the cart before the horse, saying "[w]hen an employer has engaged in a pattern and practice and practice of discrimination, courts have not only the power, but the duty, to enjoin discriminatory behavior."[23] The question is not the remedy, but what allegations must be made to allow the case to continue.

The DOJ cites two Title VII cases and claims that "courts have routinely held...public entities vicariously liable for the actions of their employees," citing

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[21] 42 USC §2000e-6, attached as Exhibit C.

[22] International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977). 42 U.S.C. §2000e-6 uses the term "engage," but since employer is defined to include agents of the employer, arguably acts of the agents would be deemed to be acts of the employer. The Supreme Court has rejected this argument in International Brotherhood of Teamsters. In §14141, local government units are treated separately from agents, and the reference to "engage" in §14141 must refer to acts constituting official policies or practices of the local government.

[23] Page 14 of DOJ Response. DOJ cites U.S. v. City of Chicago, 411 F.Supp. 218, 242 (N.D. Ill. 1976), which involved official policies and practices of the City of Chicago which discriminated on the basis of sex and race, such as the administration of tests to prospective employees, and formal height and weight requirements. It did not involve vicarious liability, nor did U.S. v. Roadway; Express, Inc., 457 F2d 854, 866 (6th Cir. 1972) , also cited by the DOJ at p. 15 of the DOJ Response.

Farragher v. City of Boca Raton, 524 U.S. 742, 755-56 (1998), and Allen v. Michigan Department of Corrections, 165 F.3d 405, 411 (6th Cir. 1999). Faragher and Allen are not applicable to the present case. First, Title VII defines "employer" to include agents of the employer. Second, although the Supreme Court in Faragher referred to vicarious liability, in fact that liability was subject to a condition: discriminatory action of a supervisor, who in the context of hiring and firing decisions would be deemed to be the policymaker. Third, Faragher did not involve a pattern or practice but a case filed by an individual asking for damages.[24] Finally, Title VII applies to both private and public employers and, unlike §14141, does not single out municipalities and control the actions of municipal employees toward private parties.

In Printz v. United States, 521 U.S. 898, 919-920 (1997), the Supreme Court held that the Brady Handgun Violence Prevention Act was unconstitutional, because it imposed duties on local governments in their contacts with private citizens. The Supreme Court noted that the Framers of the Constitution "rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and federal governments would exercise concurrent authority over the people." The Supreme Court added that the Tenth Amendment was not "the exclusive textual

[24] Allen was also not a pattern or practice case. In Allen there is no suggestion of vicarious liability with respect to the racial discrimination claim. With respect to the racial harassment claim, the Sixth Circuit said "MDOC may be subject to vicarious liability for Allen's claims regarding the actions of its supervisory employees, subject to its ability to raise the above-mentioned affirmative defenses." Id. at 412.

source of protection for principles of federalism. Our system of dual sovereignty is reflected in numerous constitutional provisions . . . and not only those, like the Tenth Amendment, that speak to the point explicitly." Id. at 923 n. 13.

In New York v. United States, 505 U.S. 144, 156 (1992), the Supreme Court said that if Congress had the authority to regulate private activity under the Commerce Clause, Congress could "offer States the choice of regulation that activity according to federal standards or having state law pre-empted by federal regulation." Id. at 167. The Court held that the Low Level Radioactive Waste Policy Amendments Act of 1985 was inconsistent with the Tenth Amendment and unconstitutional, because "the Act commandeers the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program. Id. at 176, quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981). See also Jett v. Dallas Independent School District, 491 U.S. 701, 728 (1989) ("Congress could not constitutionally 'insist that the states are bound to provide means to carry into effect the duties of the national government'").

The DOJ cites no Title VII case in which a court approved proceeding on a theory of vicarious liability against a municipality for a pattern and practice of violations of federal law by its employees. Indeed, it even misstates the holding of a Supreme Court case:

Allegation by DOJ	What the Court Said
Hazelwood School District v. United States, 433 U.S. 299 (1977): "(upholding order to cease racial discrimination, promulgate new hiring and recruitment procedure, and submit periodic progress reports to Government in pattern and practice case)" (p. 15 of DOJ Response)	"The **District Court ruled that the Government had failed to establish a pattern or practice of discrimination**....The Court of Appeals... reversed....the Court of Appeals erred in substituting its judgment for that of the District Court and holding that the Government had conclusively proved its 'pattern or practice lawsuit'....**the Court of Appeals....should have remanded the case to the District Court for further findings as to the relevant labor market area and for an ultimate determination of whether Hazelwood engaged in a pattern or practice of employment discrimination** after March 24, 1972. Accordingly, the **judgment is vacated**...." Id. at 304, 309 & 313 (emphasis added).
EEOC v. Wilson Metal Casket Company, 24 F3d 836 (6th Cir. 1994): "The broad equity power even extends to enjoining conduct that would otherwise be lawful," and also "(ordering supervisor to curtail conduct with female workers outside of office)." (Page 15 of DOJ Response.)	There is no suggestion that relief can be ordered against a defendant when that defendant has not violated the law: "'In fashioning **relief against a party who has transgressed the governing legal standard,** a court of equity is free to proscribe activities that standing along, would have been unassailable.'" Id. at p. 842. (emphasis added). In addition, the individual enjoined was not simply a supervisor, but the owner and operator of the corporation, who had personally and repeatedly harassed various female employees. Id. at 838 and 842.
EEOC v. Dinuba Medical Clinic, 222 F3d 580 (9th Cir. 2000): "The fact that an employer is vicariously rather than directly liable for the effects of discrimination does not prevent courts from imposing broad injunctive relief." (Page 15 of DOJ Response.)	**Suit was against a private company, and only referred to a presumption of vicarious liability, and then only if a supervisor was involved:** "Under the Faragher rule, 'if the harassment is actionable and the harasser has supervisory authority over the victim,

	we presume that the employer is vicariously liability for the harassment....The Faragher affirmative defense requires proof of two elements by a preponderance of the evidence: '(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.'" Id. at 586. (emphasis added)
Knox v. State of Indiana, 93 F3d 1327 (7th Cir. 1996): "(permanent injunction barring state from engaging in retaliatory conduct toward plaintiff and ordering state to post anti-retaliation policy)." (Page 15 of DOJ Response.)	""an employer can be held liable under Title VII for sexual harassment by an employee's co-workers **if the employer had actual or constructive knowledge of the harassment and failed to address the problem adequately**....there is nothing to indicate that the principle of employer responsibility does not extend equally to other Title VII claims, such as a claim of unlawful retaliation. In brief, there are two **questions: (1)is the right link established between the employer and the co-workers, so that the employer can be held responsible for their actions,** and (2) does the conduct complained of constitute something actionable under the statute...."Id. at 1334. (emphasis added)
Stafford v. State, 835 F.Supp. 1136 (W.D.Mo. 1993): "(state ordered to post antidiscrimination policy in vicarious liability sex harassment case)"(p. 15 of DOJ Response)	"To prevail on a hostile environment sexual harassment claim, plaintiff must establish that : 1) she belongs to protected group, 2) she was subject to unwelcome sexual harassment, 3) the harassment was based on sex, 4) the harassment affected a 'term, condition, or privilege of employment, and 5) the **employer knew or should**

	have known of the harassment in question and failed to take proper remedial action....To prevail on any disparate treatment Title VII claim, plaintiff must establish that the defendant intentionally discriminated against her. St. Mary's Honor Center v. Hicks, __ U.S. ___,___, 113 S.Ct. 2742, 2745...(1993).)." Id. at 1149-50 (emphasis added)

Title VII cases, in short, do not suggest that Congress imposed vicarious liability in §14141. Even if Congress had attempted to impose vicarious liability in §14141, moreover, it would have exceeded its authority under section 5 of the Fourteenth Amendment. See Section D of the Response of the Fraternal Order of Police, Capital City Lodge No. 9, to DOJ Objections to Report and Recommendations of Magistrate Judge King.

IV. CONCLUSION

Section 14141 does not expand the standing of the DOJ to obtain an injunction against a municipality under Article III based on vicarious liability. DOJ's vicarious liability argument would allow it to inject itself into the internal policies of a state or municipal government whenever it disagreed with the manner in which such agencies conducted their business. These policy preferences cannot take the place of the case or controversy requirement of Article III.

The DOJ wants to impose vicarious liability on the City of Columbus, but §14141 does not authorize the imposition of vicarious liability. §14141 instead

distinguishes local governments from their employees , in contrast to Title VII, and prohibits actions by local government and separately prohibits actions by their agents. Title VII is inapplicable. For the reasons set forth in this Reply and the other briefs it has filed in this matter, the FOP respectfully requests that this Court approve the Report and Recommendation of Magistrate Judge King.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I served a copy of this Response of Defendant Fraternal Order of Police, Capital City Lodge No. 9, to Brief of Amicus Curiae in Support of the United States' Objections to Magistrate Judge's Report upon Mark Masling, Steven H. Rosenbaum, Mark A. Posner and James Eichner, Special Litigation Section, Civil Rights Division, United States Department of Justice, P.O. Box 66400, Washington, D.C. 20035-6400; Sharon J. Zealey, United States Attorney, Two Nationwide Plaza, 280 North High Street, Columbus, Ohio 43215; Timothy J. Mangan, Senior Litigation Attorney, Andrea Peeples and Joshua T. Cox, Assistant City Attorneys, Office of the Columbus City Attorney, 50 West Broad Street, Suite 1425, Columbus, Ohio 43215; Samuel R. Bagenstos, 1545 Massachusetts Avenue, A 127, Cambridge, Massachusetts 02138, and Margo Schlanger, 1525 Massachusetts Avenue, G301, Cambridge, Massachusetts, 02138 by facsimile and first-class U.S. mail on December 11, 2000.

Douglas L. Rogers (0008126)

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TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 21--CIVIL RIGHTS

SUBCHAPTER VI--EQUAL EMPLOYMENT OPPORTUNITIES

Sec. 2000e. Definitions

For the purposes of this subchapter--

(a) The term ``person'' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term ``employer'' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term ``employment agency'' means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term ``labor organization'' means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45

EXHIBIT
A

U.S.C. 151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term ``employee'' means an individual employed by an employer, except that the term ``employee'' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term ``commerce'' means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term ``industry affecting commerce'' means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry ``affecting commerce'' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term ``State'' includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term ``religion'' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms ``because of sex'' or ``on the basis of sex'' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or

inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term ``complaining party'' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term ``demonstrates'' means meets the burdens of production and persuasion.

(n) The term ``respondent'' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

(Pub. L. 88-352, title VII, Sec. 701, July 2, 1964, 78 Stat. 253; Pub. L. 89-554, Sec. 8(a), Sept. 6, 1966, 80 Stat. 662; Pub. L. 92-261, Sec. 2, Mar. 24, 1972, 86 Stat. 103; Pub. L. 95-555, Sec. 1, Oct. 31, 1978, 92 Stat. 2076; Pub. L. 95-598, title III, Sec. 330, Nov. 6, 1978, 92 Stat. 2679; Pub. L. 99-514, Sec. 2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 102-166, title I, Secs. 104, 109(a), Nov. 21, 1991, 105 Stat. 1074, 1077.)

References in Text

The National Labor Relations Act, as amended, referred to in subsec. (e)(1), is act July 5, 1935, ch. 372, 49 Stat. 449, as amended, which is classified generally to subchapter II (Sec. 151 et seq.) of chapter 7 of Title 29, Labor. For complete classification of this Act to the Code, see section 167 of Title 29 and Tables.

The Railway Labor Act, referred to in subsec. (e)(1), is act May 20, 1926, ch. 347, 44 Stat. 577, as amended, which is classified principally to chapter 8 (Sec. 151 et seq.) of Title 45, Railroads. For complete classification of this Act to the Code, see section 151 of Title 45 and Tables.

The Labor-Management Reporting and Disclosure Act of 1959, referred to in subsec. (h), is Pub. L. 86-257, Sept. 14, 1959, 73 Stat. 519, as amended, which is classified principally to chapter 11 (Sec. 401 et seq.) of Title 29, Labor. For complete classification of this Act to the Code, see Short Title note set out under section 401 of Title 29 and Tables.

For definition of Canal Zone, referred to in subsec. (i), see section 3602(b) of Title 22, Foreign Relations and Intercourse.

The Outer Continental Shelf Lands Act, referred to in subsec. (i), is act Aug. 7, 1953, ch. 345, 67 Stat. 462, as amended, which is classified generally to subchapter III (Sec. 1331 et seq.) of chapter 29 of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1331 of Title 43 and Tables.

Amendments

1991--Subsec. (f). Pub. L. 102-166, Sec. 109(a), inserted at end ``With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.''

Subsecs. (l) to (n). Pub. L. 102-166, Sec. 104, added subsecs. (l) to (n).

1986--Subsec. (b). Pub. L. 99-514 substituted ``Internal Revenue Code of 1986'' for ``Internal Revenue Code of 1954'', which for purposes

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 136--VIOLENT CRIME CONTROL AND LAW ENFORCEMENT
SUBCHAPTER IX--STATE AND LOCAL LAW ENFORCEMENT
PART B--POLICE PATTERN OR PRACTICE

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Current through P.L. 106-274, approved 9-22-2000

§ 14141. Cause of action

(a) Unlawful conduct

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Civil action by Attorney General

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

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(Pub.L. 103-322, Title XXI, § 210401, Sept. 13, 1994, 108 Stat. 2071.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1994 Acts. House Report Nos. 103-324 and 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

LIBRARY REFERENCES

American Digest System

Liability of federal officers or agents for official acts; criminal responsibility, see United States ⚖ 46 et seq., 50 et seq., 52.

Powers and duties of attorney general; power to bring action on proceeding, see Attorney General ⚖ 5 et seq., 9.

Encyclopedias

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EXHIBIT
B

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUBCHAPTER VI--EQUAL EMPLOYMENT OPPORTUNITIES

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Current through P.L. 106-274, approved 9-22-2000

§ 2000e-6. Civil actions by the Attorney General

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; three-judge district court for cases of general public importance: hearing, determination, expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of action

The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at

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C

the earliest practicable date and to cause the case to be in every way expedited.

(c) Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission

Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of *transfer*

Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

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(Pub.L. 88-352, Title VII, § 707, July 2, 1964, 78 Stat. 261; Pub.L. 92-261, § 5, Mar. 24, 1972, 86 Stat. 107.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1964 Acts. Senate Report No. 872 and House Report No. 914, see 1964 U.S. Code Cong. and Adm. News, p. 2355.

1972 Acts. House Report No. 92-238 and Conference Report No. 92-899, see 1972 U.S. Code Cong. and Adm. News, p. 2137.

Amendments

1972 Amendments. Subsecs. (c) to (e). Pub.L. 92-261 added subsecs. (c) to (e).

Effective and Applicability Provisions

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