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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 08-7833 PA (PJWx)	Date	October 15, 2009
Title	Freedom From Religion Found., Inc. v. City of Rancho Cucamonga, et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Paul Songco	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
None	None	

Proceedings: IN CHAMBERS

Before the Court is a Motion for Summary Judgment filed by defendants City of Rancho Cucamonga (the "City") and Linda Daniels ("Daniels") (collectively "Defendants") (Docket No. 27). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument.[1/]

Plaintiff Freedom From Religion Foundation, Inc. ("Plaintiff") alleges that the City and Daniels violated its First Amendment rights by causing the removal of a billboard Plaintiff had installed. The billboard, which included the words "Imagine No Religion," was installed on a billboard within the City's boundaries operated by General Outdoor Advertising ("General Outdoor"). Plaintiff had contracted with General Outdoor to display the billboard for two months beginning on November 14, 2008.

Residents began complaining about the billboard soon after it was installed. Some of these complaints were directed to the City. The City Manager discussed the complaints with the City Attorney. The City Attorney then spoke with Daniels, the City's Redevelopment Director, because the Redevelopment Agency was at that time negotiating an agreement with General Outdoor concerning the relocation of General Outdoor's billboards within the City. At the City Attorney's direction, Daniels had Donna Vega ("Vega"), the Redevelopment Agency employee dealing with General Outdoor's billboard relocation application, contact General Outdoor to convey the citizen complaints about the billboard. In passing along complaints the City received to General Outdoor, Vega was acting pursuant to a City custom and practice of notifying local businesses of complaints the City receives from citizens about those businesses.

Vega called General Outdoor's Billy Wynn ("Wynn") by telephone at approximately 4:00 p.m. on November 19, 2008. According to both Vega and Wynn, Vega never expressed an objection to the

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[1/] To the extent the Court relies on the evidence to which the parties have objected, the Court has considered and overruled those objections. As to any remaining objections, the Court finds it is unnecessary to rule on those objections because the disputed evidence was not relied on by the Court.

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billboard or asked General Outdoor to take any action with respect to the billboard. Instead, Vega merely communicated that the City had been receiving complaints from residents who were offended by the billboard. Wynn talked to Tim Lynch ("Lynch"), General Outdoor's owner, on the morning of November 20, 2008 to discuss Wynn's conversation with Vega and the complaints the City had received about the billboard. General Outdoor had received some complaints directly from citizens. Before Wynn had even told Lynch how many complaints had been received, Lynch told Wynn to remove the billboard. According to his deposition testimony, Lynch made this decision for economic reasons rather than because of any pressure from the City. According to Lynch, the value of the contract between Plaintiff and General Outdoor was not sufficient to risk existing or future business or to allow the controversy to "taint" the sign location.

Wynn then called Vega to inform her that General Outdoor had decided to remove the billboard. At the time Wynn called Vega, she was preparing an e-mail to Wynn stating that the City had received approximately 15 to 20 complaints. The e-mail, which Vega was "just finishing up" when Wynn called, continued, "[o]n a lighter note," to inform Wynn that Vega had begun drafting the billboard relocation agreement and to explain that General Outdoor would need to submit a form and filing fee to the City's Planning Department. Vega sent another e-mail to Vega at 4:00 p.m. on November 20, 2008, "to follow-up" on their conversation. Vega's e-mail stated that the City had received 93 complaints from citizens during the previous two days, but that the City had begun telling the callers that the sign would be down by the end of the day.

Daniels was quoted in a newspaper article written later that day by Wendy Leung ("Leung"), a staff writer for the Inland Valley Daily Bulletin. In the article, Daniels is quoted as saying: "We contacted the sign company and asked if there was a way to get it removed." Although Daniels denies saying this, Plaintiff has submitted a declaration from Leung in which she confirms that Daniels made the statement. The article also quotes Daniels as saying: "We didn't say they had to (take it down), but they respected the concerns of residents."

General Outdoor removed the billboard and returned to Plaintiff the fee Plaintiff had paid to have the billboard erected. Plaintiff commenced this action on November 26, 2008, and filed a First Amended Complaint on February 11, 2009. The First Amended Complaint alleges that the City and Daniels violated Plaintiff's constitutional rights under the First Amendment's Free Speech and Establishment clauses. Plaintiff seeks damages and injunctive relief pursuant to 42 U.S.C. § 1983 and attorneys' fees under 42 U.S.C. § 1988. In their Motion for Summary Judgment, Defendants contend that they are entitled to judgment because the City's custom and practice of notifying local businesses when the City receives complaints did not cause, nor was it intended to cause, a violation of Plaintiff's First Amendment rights.[2/]

[2/] Although the Motion purports to be on behalf of both the City and Daniels, the briefing of the parties focuses almost entirely on the liability of the City. Because the potential liability of Daniels was barely addressed in the Motion, the Court requested supplemental briefing on whether a

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"In order for a person acting under color of state law to be liable under section 1983 there must be a showing of personal participation in the alleged rights deprivation: there is no respondeat superior liability under section 1983." Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002) (citing Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). To impose liability against a municipal or supervisorial defendant, Plaintiff must show: (1) that a municipal employee violated Plaintiff's rights; (2) that the municipality has customs or policies that amount to deliberate indifference (as that phrase is defined by City of Canton v. Harris, 489 U.S. 378, 387, 109 S. Ct. 1197, 1204, 103 L. Ed. 2d 412 (1989)); and (3) that these policies were the moving force behind the employee's violation of Plaintiff's constitutional rights, in the sense that the municipality could have prevented the violation with an appropriate policy. See Gibson v. County of Washoe, 290 F.3d 1175, 1193 (9th Cir. 2002). In other words, liability under Monell arises if there is a constitutional violation resulting from an official custom or policy of a public entity. See Monell, 436 U.S. at 690, 98 S. Ct. at 2035-36, 56 L. Ed. 2d 611. An official policy or custom cannot be established by random acts or isolated events. Thompson v. City of Los Angeles, 885 F.2d 1439, 1443-44 (9th Cir. 1989). "There are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under §1983." City of Canton, 489 U.S. at 387, 109 S. Ct. at 1204, 103 L. Ed. 2d 412. "[T]he inadequacy of a training policy may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." Id. at 388, 109 S. Ct. at 1204, 103 L. Ed. 2d 412.

To demonstrate a violation of the First Amendment's Free Speech Clause, a plaintiff must provide evidence showing that "'by his actions [the defendant] deterred or chilled [the plaintiff's] political speech and such deterrence was a substantial or motivating factor in [the defendant's] conduct." Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999) (quoting Sloman v. Tadlock, 21 F.3d 1462, 1469 (9th Cir. 1994)). "Because it would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity, we conclude that the proper inquiry asks 'whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.'" Id. (quoting Crawford-El v. Britton, 93 F.3d 813, 826 (D.C. Cir. 1996)). A plaintiff need not show that his or her speech was actually inhibited or suppressed, but only that the defendant intended to interfere with the plaintiff's First Amendment rights. Id.

Intent to inhibit speech can be demonstrated through either direct or circumstantial evidence. Id. at 1300-01. Further, questions regarding an individual's intent to violate a plaintiff's constitutional rights generally present "'factual issues inappropriate for resolution on summary judgment.'" Id. at 1302 (quoting Braxton-Secret v. Robins Co., 769 F.2d 528, 531 (9th Cir. 1985)). Accordingly, the Ninth Circuit has held that a plaintiff can establish "a genuine issue of material fact on the question of

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reasonable person in Daniels's position, implementing the advice of the City Attorney, would know that having a subordinate convey the complaints of citizens to a regulated business would violate the First Amendment.

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retaliatory motive when he or she produces, in addition to evidence that the defendant knew of the protected speech, at least (1) evidence of proximity in time between the protected speech and the allegedly retaliatory [action], (2) evidence that the defendant expressed opposition to the speech or (3) evidence that the defendant's proffered reason for the adverse action was false or pretextual." Pinard, 446 F.3d at 979 n.20; Keyser v. Sacramento County Unified Sch. Dist., 265 F.3d 741, 751-52 (9th Cir. 2001).

For purposes of the City's potential Monell liability, the only custom or practice identified by the parties is the City's practice of notifying local businesses when the City receives complaints from citizens about the activities of the business. The Court concludes that unless it is accompanied by a request that the business take any particular action, merely passing along citizen complaints would not "chill or silence a person of ordinary firmness from future First Amendment activities." Mendocino Envtl. Ctr., 192 F.3d at 1300. The City's practice of forwarding citizen complaints therefore does not violate the First Amendment's Free Speech Clause.

Plaintiff attempts to avoid this result by arguing that the policy's overbreadth violates the First Amendment. One problem with Plaintiff's overbreadth argument is that it was not alleged in the First Amended Complaint, which asserts a facial challenge to the City's actions. See Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004) ("A plaintiff may not amend her complaint through argument in a brief opposing summary judgment."). The more fundamental problem with Plaintiff's overbreadth argument is that the policy of passing along citizen complaints is not limited to complaints concerning speech. As the Supreme Court has noted: "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or conduct necessarily associated with speech (such as picketing or demonstrating)." Virginia v. Hicks, 539 U.S. 113, 124, 123 S. Ct. 2191, 2199, 156 L. Ed. 2d 148 (2003). Because the policy of forwarding complaints is not specifically addressed to speech, and has not in fact been exclusively applied to speech-related complaints, Plaintiff's overbreadth argument must fail.

Plaintiff additionally alleges that the City's policy violates the Establishment Clause by favoring religion over no religion. Courts "apply the three-part Lemon test to determine whether government conduct—either through endorsement of religion or hostility towards it—violates the Establishment Clause. Government action will pass muster if it '(1) has a secular purpose; (2) has a principal or primary effect that neither advances nor disapproves of religion; and (3) does not foster governmental entanglement with religion.'" Catholic League for Religious & Civil Rights v. City & County of San Francisco, 567 F.3d 595, 599 (9th Cir. 2009) (quoting Vasquez v. Los Angeles County, 487 F.3d 1246, 1255 (9th Cir. 2007)) (applying the test stated in Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971)). "Failure to satisfy any of these three inquiries condemns government conduct as unconstitutional." Id.

Because the City's policy of passing along complaints it receives from citizens promotes dialog between local businesses and residents, it has a secular purpose. Similarly, the policy, which is applied to complaints having nothing to do with religion, does not have as its primary effect either the

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advancement or disapproval of religion. Id. at 604 ("To ascertain effect, we ask whether 'it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion.'") (quoting Vernon v. City of Los Angeles, 27 F.3d 1385, 1398 (9th Cir. 1994)). Merely serving as a conduit for citizen complaints, without an expression on the part of the City of a desired result, could not reasonably be "construed as sending primarily a message of either endorsement or disapproval of religion." Id. at 599. Nor does such a policy foster excessive governmental entanglement with religion. Id. at 607 ("'Administrative entanglement typically involves comprehensive, discriminating, and continuing state surveillance of religion.'") (quoting Vernon, 27 F.3d at 1399).

Accordingly, the Court concludes that the City is entitled to summary judgment because the policy of notifying local businesses when it receives complaints from citizens does not violate either the Free Speech or Establishment Clauses. Plaintiff has therefore failed to establish Monell liability against the City.

Plaintiff's allegations against Daniels, however, introduce the possibility that she was personally involved in actions that went beyond the City's policy of neutrally forwarding citizen complaints to local businesses. Specifically, Plaintiff, relying on the statement Daniels purportedly gave to Leung as reported in the Inland Valley Daily Bulletin, contends that Daniels directed Vega to ask General Outdoor to remove Plaintiff's billboard. Although Vega, Wynn, and Daniels deny that any request to remove the billboard was made, Leung's Declaration creates a triable issue of fact concerning Daniels's personal involvement in an action that, if true, could be considered sufficiently chilling to violate the Free Speech Clause. Mendocino Envtl. Ctr., 192 F.3d at 1300. The Court similarly concludes that if Daniels was personally involved in asking General Outdoor to remove the billboard, that action could be considered sufficient government entanglement in religion to violate the second prong of the Lemon test. This triable issue of fact also prevents the application of the qualified immunity doctrine. The Court therefore concludes that Daniels is not entitled to summary judgment.

For all of the foregoing reasons, the Court grants the City's Motion for Summary Judgment. Daniels's Motion for Summary Judgment is denied.

IT IS SO ORDERED.

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Initials of Preparer _____