U.S. Department of Justice

Civil Rights Division

SHR:DM:MM:MP:CT:SF
207-58-2

Special Litigation Section
P.O. Box 66400
Washington, DC 20035-6400

August 25, 2000

US v. City of Columbus

PN-OH-001-016

via overnight mail

Clerk of Courts
United States District Court
85 Marconi Blvd., Second Floor
Columbus, Ohio 43215

Re: United States v. City of Columbus
CA No. C2-99-1097

Dear Clerk:

I enclose for filing the original and a copy of the United States' Response to the City of Columbus' Objections to the Report and Recommendation of the Magistrate Judge. Please deliver the courtesy copy to Judge Holschuh.

Thank you for your cooperation.

Sincerely,

James Eichner
Trial Attorney
Special Litigation Section
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Enclosures

cc: James Phillips (fax and regular mail)
Timothy Mangan (fax and regular mail)
Deborah F. Sanders (regular mail)

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.	)	
	)	

THE UNITED STATES' RESPONSE TO THE CITY OF COLUMBUS' OBJECTIONS TO THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

On August 3, 2000, Magistrate Judge King issued a Report and Recommendation (Report) in which she recommended, *inter alia*, that this Court find that 42 U.S.C. § 14141 (§ 14141) is a valid exercise of Congressional authority under § 5 of the Fourteenth Amendment (§ 5), and that Ohio statutes of limitation do not apply to suits brought by the United States under § 14141. Defendant City of Columbus (City) objects to both of these recommendations.[1]

As demonstrated in the United States' memoranda filed before Magistrate Judge King, and as further demonstrated below, this Court should accept the Report's recommendation on both of these issues. Section 14141 is a valid exercise of Congress' § 5 power to provide a judicial remedy for a violation of the Fourteenth

[1] The Report addressed defendants' dispositive motions directed at the United States' original Complaint. Pending before the Magistrate Judge is the United States' motion to file an amended complaint.

Amendment.[2] Moreover, because the United States brings actions under § 14141 in its sovereign capacity on behalf of the public interest, and because § 14141 does not explicitly impose a temporal limitation, statutes of limitation do not apply to § 14141.

I. SECTION 14141 IS A PROPER EXERCISE OF § 5 POWER

In Kimel v. Florida Board of Regents, 120 S.Ct. 631 (2000), the Supreme Court set forth the test for determining whether a statute is a proper exercise of § 5 power. Congress has the power to enact legislation that it deems necessary "to secure the guarantees of the Fourteenth Amendment and its conclusions are entitled to much deference." Id. at 644 (internal quotations and citations omitted). In addition, "Congress' power to enforce the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." Id. (internal quotations omitted). To determine whether such a prohibition on

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[2] The United States' original Complaint seeks only to remedy a pattern or practice of constitutional violations. Section 14141 also allows suit to be brought for a pattern or practice of federal statutory violations, and the United States' proposed amended complaint is premised on both statutory and constitutional violations. While § 14141 is constitutional as applied to either constitutional or statutory violations, the constitutionality of § 14141 as applied to suits redressing statutory violations is not before the Court at this time. Therefore, in this memorandum, the United States will address the constitutionality of § 14141 only in the context of seeking to remedy solely constitutional violations.

a "broader swath of conduct" is a proper exercise of § 5 power, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Id.

Because § 14141 does not alter the Fourteenth Amendment's meaning it is a valid exercise of § 5 power. Moreover, § 14141 provides a proportional and congruent remedy to the identified constitutional harm.

A. Section 14141 Is a Proper Exercise of § 5 Power Because it Does Not Alter the Fourteenth Amendment

In objecting to the Report's conclusion that § 14141 is a proper exercise of Congress' § 5 power, the City candidly admits that § 14141 does not alter the Fourteenth Amendment's meaning. City's Objections at 2 (stating "Under the first part of the two-part test, Congress may not define its own powers by altering the Fourteenth Amendment's meaning under the guise of enforcing the Constitution. There is no dispute on this part of the test as applied to §14141.")(internal citations and quotations omitted). However, the City fails to acknowledge that this admission refutes its argument that § 14141 is unconstitutional.

No court has struck down a statute under § 5 that -- like § 14141 -- neither redefines a constitutional right nor provides a prophylactic remedy by prohibiting conduct that does not itself violate the Constitution. In all the cases cited by the City in which the Supreme Court invalidated a statute as an improper exercise of § 5 power, the statute at issue either redefined a

constitutional right or provided a remedy in instances in which no constitutional violation occurred. See Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999) (striking down the Patent and Plant Variety Protection Remedy Clarification Act as unconstitutional because patent infringement itself is not unconstitutional); Kimel, 120 S. Ct. 631 (2000) (striking down the Age Discrimination in Employment Act as unconstitutional, as applied to the States, because discrimination based on age is constitutional in many instances); City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act because it sought to redefine the "Free Exercise" clause of the First Amendment).

The City urges this Court to consider whether the remedial scheme of § 14141 is proportionate and congruent even while admitting that the statute does not alter the scope of the Fourteenth Amendment. The Supreme Court has only applied the proportionate and congruent test, however, in cases in which it found that the statute prohibited a "broader swath of conduct" than prohibited by the Constitution. Therefore, the City's admission is itself sufficient to uphold the Report's conclusion that § 14141 is a proper exercise of Congress' § 5 power.

B. Section 14141 Is Proportional and Congruent

Even if this Court concludes that it must conduct further analysis regarding the statute's constitutionality, the Report

correctly concluded that § 14141 is proportional and congruent. In contesting this conclusion, the City reiterates the same arguments that were rejected by the Report: 1) that Congress failed to sufficiently demonstrate the need to enact § 14141; and 2) that the remedy provided for by § 14141 is not sufficiently tailored. These arguments are without merit.

1. Congress properly enacted § 14141 to address the pervasive problem of police misconduct

The City argues that § 14141 is not proportional and congruent because Congress did not sufficiently identify constitutional deprivations that would be remedied by the statute. This argument fails because it understates the Congressional findings contained in the legislative history, overstates the importance of these Congressional findings, and ignores the overwhelming evidence regarding police misconduct.

The House Report on the proposed Omnibus Crime Control Act of 1991, which both parties agree is the primary source of legislative history of § 14141, described or referenced numerous, egregious instances of recent patterns or practices of unconstitutional police misconduct. The Report summarized the findings of the Committee's Sub-Committee on Civil and Constitutional Rights, which had held hearings on police misconduct, and received evidence of systemic misconduct in law enforcement agencies, including:

* Testimony from various experts in policing concerning widespread police misconduct in American cities.

* Evidence that Boston police routinely conducted harassing stops and searches of minority individuals.

* Evidence that New York City police harassed witnesses to police misconduct.

* Evidence that a special unit in the Reynoldsburg, Ohio police department called itself the SNAT team, for "Special Nigger Arrest Team."

* Evidence that the Los Angeles police department had a policy of using "nun-chuks" on passive demonstrators.

H. Rep. No. 102-242, 102nd Cong., 1st Sess. 136 (1991).

This substantial record convinced Congress to act. For this Court to require more would violate the well-established principle that "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency does to accommodate judicial review." See Turner Broadcasting Sys., Inc. v. Federal Communication Commission, 520 U.S. 180, 213 (1997) (internal citations and quotations omitted).

Even if the legislative history is insufficient -- which it is not -- this Court is free to look beyond the legislative record and assess the evidence regarding whether Congress could have reasonably believed that § 14141 was necessary to remedy serious constitutional problems. See Kilcullen v. New York State Dep't of Labor, 205 F.3d 77, 80 (2d Cir. 2000); Amatel v. Reno, 156 F.3d 192, 200 n.6 (D.C. Cir. 1998), *cert. denied*, 119 S.Ct. 2392 (1999); Pease v. University of Cincinnati Medical Center, 6 F. Supp.2d 706, 712 (S.D. Ohio 1998), *aff'd.*, 187 F.3d 637 (6th Cir. 1999). The record available at the time of § 14141's enactment provided ample support for Congress to have concluded

that police misconduct was a pervasive and serious problem in this country.

In 1992, ten urban police chiefs issued a joint public assessment that "the problem of excessive force in American policing is real." Marshall Miller, Note, Police Brutality, 17 Yale L. & Pol'y Rev. 149, 151-52 (1998)). This conclusion is supported by the fact that from 1986 to 1990 the City of Los Angeles paid damages totaling $20 million in excessive force cases alone. Miller, at 156-57 (citing Paul Chevigny, Edge of the Knife: Police Violence in the Americas 52-53 (1995)).[3]

New York City paid over $50 million dollars in damages in cases of "police misconduct" from 1987 to 1992. Id. "Yet, in each city, the police department made no institutional or policy changes to respond to these suits . . .[and] despite the substantial sums of money involved, neither city bothered to monitor civil suits." Id.[4]

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[3] See also Paul Hoffman, The Feds, Lies and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America, 66 S. Cal. L. Rev. 1453 (1993).

[4] In the Reply Memorandum of Fraternal Order of Police, Capital City Lodge No. 9 ("FOP"), filed May 19, 2000, before the Magistrate Judge, the FOP challenges the relevancy of some of the evidence cited by the United States as supporting the enactment of § 14141, to the extent that this evidence was published after the statute's enactment. In Florida Prepaid Postsecondary Education Expense Board, however, the Supreme Court, in evaluating whether there was sufficient justification for the Patent Remedy Act, considered the statistics compiled by the Federal Circuit reporting the number of patent infringement suits that had been brought against states between 1880 and 1990, even though there is no indication that these statistics were either actually published, or considered by Congress, prior to the Act's enactment. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. at 2207. Therefore, all evidence upon which

The assessment of these police chiefs is further supported by a 1993 study quantifying police misconduct cases brought between 1978 and 1990. That study found 575 federal court decisions, nationwide, in cases for false arrest brought under 42 U.S.C. § 1983 (§ 1983). It reported that plaintiffs prevailed in 44% of the decisions issued, and received an average jury award of $91,631. Christopher A. Love, The Myth of Message-Sending: The Continuing Search for a True Deterrent to Police Misconduct, 12 J. Suffolk Acad. L. 45, 53 (1998) (citing Victor E. Kappeler, et al. A Content Analysis of Police Liability Cases: Decisions in the Federal District Courts, 1978-1990, 21 J. Crim. Just. 325, 335 (1993)).[5] The same study reported 369 federal district court decisions in cases alleging excessive force. Plaintiffs prevailed in 60% of the decisions issued and received an average jury award of $187,503. Id. at 54.

This evidence, documenting the problem of police misconduct that existed at the time of § 14141's enactment, demonstrates that constitutional violations by police officers plagued a wide range of municipalities. Given this evidence, § 14141 is a proper attempt to address a clear record of constitutional

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Congress could have based its decision to enact § 14141, such as the number of police misconduct cases in the years before § 14141's enactment, regardless of whether such evidence was either published before the statute's enactment or actually considered by Congress, supports § 14141's enactment.

[5] The success rates published in this study reflect "decisional success;" *i.e.*, a favorable ruling on a plaintiff's motion, or an unfavorable ruling on a defendant's motion.

violations that had yet to be remedied.

2. Section 14141 provides a tailored remedy

The City's argument that the relief provided by § 14141 is overbroad is similarly without merit. The text of § 14141 limits the remedy to "appropriate equitable and declaratory relief to eliminate the pattern or practice." See 42 U.S.C. §14141(b).[6] Thus, the relief available under § 14141 is confined to equitable and declaratory relief that eliminates the pattern or practice that "deprives persons of rights, privileges, or immunities secured or protected by the Constitution. . . ." 42 U.S.C. § 14141(a).[7] The scope of the § 14141 remedy is thereby limited to the scope of the violation -- the standard generally employed for remedies for constitutional violations in other substantive areas. See Milliken v. Bradley, 433 U.S. 267, 280 (1977) ("Equitable remedies . . . [are] to be determined by the nature and scope of the constitutional violations").[8]

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[6] To the extent that the City's argument is premised on the concern that this Court may craft a remedy that is not sufficiently tailored, its argument is premature. Until the Court imposes a remedy in this case, there is no basis for the City to be concerned that the Court will not correctly interpret § 14141(b). At such a time, the City would have the opportunity to make an appropriate motion or appeal.

[7] In keeping with the text of § 14141(b), the United States seeks "an order requiring the City to adopt and implement policies, practices and procedures to remedy the pattern or practice." Complaint ¶ 11.

[8] As discussed in more detail at page 9 of the United States' Supplemental Memorandum in Opposition to the Fraternal Order of Police's Motion for Judgment on the Pleadings, filed before the Magistrate Judge on May 11, § 14141 is proportional

The City cites Rizzo v. Goode, 423 U.S. 362 (1976), to argue that the kind of injunctive relief provided for by § 14141 raises serious federalism concerns. In Rizzo, however, the Court merely found that the district court had erred in imposing a broad injunction on the municipality, because that remedy was neither explicitly provided for by Congress, nor justified by the constitutional violations proved by the plaintiffs. Rizzo, 423 U.S. at 378. Rizzo does not address the issue of whether Congress, rather than a Court, can, as it did in enacting § 14141, provide a tailored remedy against governmental agencies who have been proven to engage in a pattern or practice of unconstitutional conduct. As discussed above, that issue is governed by the standards applicable to an exercise of Congressional power under § 5.

Under this test, § 14141 is a valid exercise of § 5 power. Congress identified the widespread problem of police misconduct, and enacted a tailored remedy that is both proportional and congruent. Therefore, § 14141 is constitutional.

II. NO STATUTES OF LIMITATION APPLY TO SUITS BROUGHT BY THE UNITED STATES UNDER §14141

The City also objects to the Report's refusal to apply to § 14141 Ohio's two-year statute of limitations for personal injury claims. In addition to repeating the arguments rejected by the Magistrate Judge, the City argues that the Report's

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and congruent under any liability standard.

decision to apply the § 1983 municipal liability standard to § 14141 also dictates applying the statute of limitations found in § 1983.

This argument for dismissal must fail. The Supreme Court and lower federal courts have held repeatedly that when, as here, the United States sues in its sovereign capacity, it is not subject to state statutes of limitation unless a federal statute contains or references such a statute. See Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977); United States v. John Hancock Mutual Life Ins. Co., 364 U.S. 301, 306 (1960); Board of County Commissioners v. United States, 308 U.S. 343, 351 (1939); E.I. Dupont De Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924). Section 14141 contains no statute of limitations.

Contrary to the City's argument, this rule is not limited to cases involving administrative claims originating before the Equal Employment Opportunity Commission. It has been applied to "pattern or practice" suits, brought by the Attorney General on behalf of the United States, alleging housing or employment civil rights violations. See United States v. City of Parma, 494 F. Supp. 1049, 1094, n.63 (N.D. Ohio), aff'd 661 F.2d 562, 573 (6th Cir. 1981); United States v. Marsten Apartments, Inc. 175 F.R.D. 257, 262 (E.D. Mich. 1997); United States v. City of Yonkers, 592 F. Supp. 570, 586-89 (S.D.N.Y. 1984); United States v. McHenry County, 1994 WL 447419 (N.D. Ill. 1994).

That the Report applied § 1983's liability standard to

§ 14141 does not effect this analysis.[9] Section 1983 suits are brought by private entities, not the United States in its sovereign capacity. The Report rejected the imposition of a statute of limitations on suits brought under § 14141 by the United States because of significant sovereignty implications. Such sovereignty implications are absent when a court imposes a statute of limitations on a private party bringing suit under § 1983. Thus, the Report correctly concluded that no statute of limitations applies to suits brought under § 14141.

[9] The United States disagrees with the Report's finding as to the applicable liability standard under § 14141, and has filed Objections to that conclusion.

CONCLUSION

For the foregoing reasons, the City's objections to the Report should be rejected in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the United States' Response to the City of Columbus' Objections to the Report and Recommendation of the Magistrate Judge was served by overnight mail on August 25th, 2000, on the following:

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