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COUNTY OF MAUI

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

NELDON MAMUAD,

Plaintiff,

vs.

COUNTY OF MAUI, a municipal corporation,

Defendant.

CIVIL NO. CV 14-00102 JMS BMK
[Civil Rights Action]

DEFENDANT COUNTY OF MAUI'S **MEMORANDUM IN OPPOSITION** TO PLAINTIFF NELDON MAMUAD'S MOTION FOR PRELIMINARY INJUNCTION, FILED ON MARCH 4, 2014 [DOC 5]; DECLARATION OF KEITH REGAN; EXHIBIT "A"; CERTIFICATE OF SERVICE

Hearing:
Date: May 12, 2014
Time: 10:00 a.m.
Judge: Honorable J. Michael Seabright

No Trial Date Set

DEFENDANT COUNTY OF MAUI'S MEMORANDUM IN OPPOSITION TO PLAINTIFF NELDON MAMUAD'S MOTION FOR PRELIMINARY INJUNCTION, FILED ON MARCH 4, 2014 [DOC 5],

I. INTRODUCTION

Defendant County of Maui ("Defendant" or the "County") hereby opposes ("Opposition") Plaintiff Neldon Mamuad's ("Plaintiff") Motion for Preliminary Injunction, filed on March 4, 2014[DOC 5] ("Motion ").

II. STATEMENT OF FACTS

For the purposes of this Opposition, the facts set forth in Plaintiff's Motion for the Preliminary Injunction establish the salient facts that led to the filing of the complaint in the Motion. Stripped to its essentials, Plaintiff alleges that he was engaging in protected speech in his role as a private citizen by establishing and maintaining a Facebook page targeting police officer Keith Taguma. Plaintiff's Declaration admitted that the Facebook page was established because he and his friends missed the fun they had when they were radio personalities. (Plaintiff's Dec. at ¶ 12). Nothing in Plaintiff's Declaration suggests that the Facebook page was established because of any concerns regarding the Maui Police Department in general or that Officer Taguma was acting improperly. Plaintiff admits he included information about Officer Taguma's personal life — information not relevant to Taguma's actions as a Police Officer (Plaintiff's Dec. at ¶ 16). Plaintiff concedes that "*most of the time, we were just poking fun* at him for

being so serious about his job for ticketing people for what seemed like petty things." (Plaintiff's Dec. at ¶ 16) (emphasis added).

There is no dispute that Officer Taguma filed a complaint under Defendant's Violence In The Workplace Action Plan as was his right to do. (Plaintiff's Dec Exh 1, 2). That complaint was investigated and on January 21, 2014, Plaintiff was advised that the complaint was substantiated and that he was required to attend the employee assistance program (EAP) (Plaintiffs Dec. at Ex. 3). Since the Motion was filed, the January 21, 2014 letter has now been rescinded by the County and Plaintiff has been issued a letter that the investigation is deemed closed and that no action will be taken. See Declaration of Keith Regan ("Regan Dec.") at Exh 1. Thus, the letter which Defendant believes led to the filing of the complaint and the present Motion has now been retracted. As discussed below, this makes Plaintiff's request for a preliminary injunction moot.

Regan's Declaration also establishes that there is currently not pending any other actions or investigation against Plaintiff relating to his Facebook page. Indeed, as Plaintiff must concede, the County did not take formal action against him for his Facebook page until it received a complaint from an employee under a policy which pre-existed the Facebook page. Thus currently Plaintiff faces no risk of sanction or discipline or any other action by the County for his Facebook page. The fact that Plaintiff changed the name from TAGUMAWatch to MAUI Watch

was voluntarily and Plaintiff has not stated he wishes to change the name back to TAGUMAWatch.

The extent that Plaintiff is self-regulating his postings on his Facebook page, that is his decision one not imposed by the County. The County did not take any action against Plaintiff for the Facebook page until the complaint was made by Officer Taguma who is the target of that page. Whether Plaintiff believes it is appropriate to moderate his postings or refrain from certain posting that does not constitute action by the County subject to being enjoined by this Court. The County is unaware of and has not received any other complaints and is not planning to take action against Plaintiff for any other actions relating to the Facebook page.

III. ARGUMENT

A. The Motion Is Moot

As set forth above, the County has rescinded the January 21, 2014 letter finding that Plaintiff violated the Workplace Action Plan and requiring him to attend EAP. That letter has been removed from his personnel file. This Court cannot issue an injunction for events which have already occurred. The fact that Plaintiff had to cooperate in an investigation is an event which already occurred and no further investigation is currently pending against Plaintiff. However, Plaintiff's primary concern as established in the Motion was the January 21 2014

letter, the fact the Plaintiff would have to attend EAP, and any permanent effect the letter may have on his employment record. All of those concerns were fully addressed when the letter was rescinded.

This Court has addressed the issue of when a request for preliminary injunction is moot in other cases. In *Kahea & Food & Water Watch, Inc. v. Nat'l Marine Fisheries Serv*., 2012 U.S. Dist. LEXIS 59244 *4 (D. Haw. 2012) (Order Granting Defendant's Motion For Summary Judgment And Denying Plaintiff's Motion For Summary Judgment), *affirmed in part and revs'd in part* 544 Fed. Appx. 675; 2013 U.S. App. LEXIS 22046 (9th Cir. 2013) Judge Mollway addressed the issue of when a request for a preliminary injunction is mooted by subsequent events. Judge Mollway noted:

> In determining whether a request for an injunction is moot, "the question is not whether the precise relief sought at the time the application for an injunction was filed is still available." *Or. Natural Res. Council v. U.S. Bureau of Land Management*, 470 F.3d 818, 820-21 (9th Cir. 2006) (citations omitted). Rather, "[t]he question is whether there can be any effective relief." Id. (quoting *Gordon*, 849 F.2d at 1244-45 (9th Cir. 1988)).

See also Prop. Rights Law Grp., P.C. v. Lynch, 2013 U.S. Dist. LEXIS 87112 (D. Haw. 2013) (Order Denying As Moot Motion For Temporary Restraining Order And Preliminary Injunction In Light Of Parties' Agreement,); *Marcus I. v. Department of Education*., 2012 U.S. Dist. LEXIS 120521, (D. Haw. 2012) (Order Denying (1) Defendant's Motion For A Preliminary Injunction And (2) Denying As

Moot Plaintiff's Motion For An Order To Show Cause Why Defendant Should Not Be Held In Contempt, Directing That A Garnishee Summons Issue, And Imposing Sanctions); *Kaanapali Tours, LLC v. Hawaii Dep't of Land & Natural Res.*, 2013 U.S. Dist. LEXIS 6986 (D. Haw., 2013)

The Ninth Circuit uses the *Oregon Natural Resources* standard to ascertain whether a request for injunctive relief is moot in other contexts. Thus, in *Doe v. Reed*, 697 F.3d 1235, 1238 (9th Cir. 2012) the court held that a request for injunctive relief was moot because of the subsequent actions by the State of Washington. In determining that the request for injunctive relief was moot the court added:

> A moot case cannot be revived by alleged future harm that is "so remote and speculative that there is no tangible prejudice to the existing interests of the parties." *Feldman*, 518 F.3d at 643 (internal quotation marks omitted) (holding a claim seeking the humane removal of feral pigs from an island became moot once monitoring indicated that all pigs had been killed).

697 F.3d at 1239

Plaintiff's request for injunctive relief was motivated by the January 21, 2014 letter. Plaintiff was concerned about the letter and the direction to attend EAP which has now been rescinded. The January 21, 2014 letter will not be part of his personnel file. There is nothing for this Court to enjoin and no effective relief can be obtained. The fact that Plaintiff may be subject to further

investigations under the Workplace Action Plan *if* another employee files complaint is simply too remote and speculative at this point for the Court to issue injunctive relief. Plaintiff is not currently subject to any actions by the County for maintaining his MAUIWatch Facebook page. Plaintiff is not faced with the threat of any injury much less irreparable injury.

To the extent that Plaintiff still requests that this Court issue injunctive relief specifically to either suspend the application of the Workplace Action Plan or to order it rescinded that relief is completely inappropriate. On its face the Workplace Action Plan is neutral with respect to conduct protected by the First Amendment. It applies to all employees of the County and allows them to make complaints if they are being harassed or otherwise subjected to improper conduct. Nothing on the face of the policy targets speech which is protected by the First Amendment. To the contrary, the Workplace Action Plan (Plaintiff's Dec. at Ex. 2) which was distributed in November 2006 applies to all County employees and establishes a zero tolerance policy of regarding "acts or threats of violence…..". The policy is designed to "ensure a safe working environment for all officers, employees and members of the public while on County of Maui premises and work sites." Such policies are very common in the workplace and indeed are almost required. The policy prohibits for example threats or acts of violence, use of a firearm, kidnapping, stalking, property damage, or harassment.

Plaintiff has no compelling argument to justify this Court ordering that the policy be rescinded. Indeed, there is no dispute that Plaintiff is both a member of the liquor commission and is an assistant to one of the members of the County Council. In those capacities, he is both protected by the policy and subject to it.

B. Courts Do Not Enter Vague Injunctions

The Motion requests this Court to enter an order requiring the County "to cease interfering with Plaintiff's right to speak freely." (Motion at 2). Most of the relief requested addressed the January 21, 2014 letter which has been rescinded. In his Motion, Plaintiff notes that the "Action Plan is essentially irrelevant." but goes on to suggest that the Court could find that the Workplace Action Plan is "vague and overbroad as applied to Plaintiff" and the Court could "strike the policy as unconstitutional" (Memorandum in Support of Motion at 17 n.5, *Id.*) It is unclear to the County what relief Plaintiff is now seeking. As noted, his primary request that he not be required to attend the employee assistance program has been granted. He will not be required to attend. The letter regarding the investigation has been rescinded. It will not be in his file and will not be a matter of record.

Relief beyond that request is unclear to the County because the Motion and accompanying memorandum are broad and vague whether Plaintiff is now seeking additional relief. As noted above, the Workplace Action Plan is a

valid exercise of the County's right to protect its employees and the public and nothing in the Workplace Action Plan which was promulgated almost 10 years before the events leading to this case began can be seen as facially invalid. Therefore, the Court should not agree as Plaintiff suggests that the Workplace Action Plan be found to be vague and overbroad and therefore unconstitutional. Each case under that Workplace Action Plan must be judged individually. The County has no way of knowing whether a situation that is the subject of the complaint involves protected speech until the complaint is made and investigation has been conducted.

The extent that Plaintiff wants an order enjoining the County from interfering with his protected speech that order too is inappropriate and must be denied. Plaintiff is asking this Court to issue an advisory ruling as to what he can and cannot say on his Facebook page. The Court cannot enjoin employees from making complaints under the Workplace Action Plan, that would essentially negate the plan and leave the County open to claims by employees that it is not appropriately protecting them from violence in the workplace. This Court could not enter an order that precisely advises Plaintiff what speech is protected and if it enters an order that in sweeping terms enjoins the County from interfering with protected speech that the County will be unable to comply with the order because it

will simply be unable to determine that except on a case-by-case basis. An injunction must be specific:

> Rule 65 of the Federal Rules of Civil Procedure requires an injunction to be "specific in terms; [and] describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." "[T]he scope of injunctive relief is dictated by the extent of the violation established...." The district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order An injunction fails to meet these standards when it is overbroad or vague.
>
> [T]he broadness of an injunction refers to the range of proscribed activity, while vagueness refers [to] the particularity with which the proscribed activity is described. "Vagueness" is a question of notice, i.e., procedural due process, and "broadness" is a matter of substantive law.

John Doe # 1 v. Veneman, 308 F.3d 807, 818 (5th Cir. 2004)

Entering an injunction that broadly for example enjoins the County from interfering with Plaintiff's free speech rights without any reference to specific activity would be improper. A similarly broad injunction was struck down by the Ninth Circuit in *Del Webb Cmtys., Inc. v. Partington*, 652 F.3d 1145 (9th Cir. 2011):

> *Rule 65(d)* requires an injunction to "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained." *Fed. R. Civ. P. 65(d)(1) (B)-(C)*. "The benchmark for clarity and fair notice is not lawyers and judges, who are schooled in the nuances of [the] law," but instead the "lay person, who is the target of the

> injunction." *Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1134 (9th Cir. 2006)*; *see also Schmidt v. Lessard, 414 U.S. 473, 476, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974)* ("[T]he specificity provisions of *Rule 65(d)* are no mere technical requirements. *The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood*.").
>
> The permanent injunction prohibits the defendants from "soliciting and/or performing residential inspections and/or providing inspection reports . . . by means of illegal, unlicensed and false practices." The order identifies three prohibited practices as examples -- "such as" -- of "illegal, unlicensed and false practices": (1) falsely representing that the defendants are "properly licensed under Nevada law to perform structural inspections; (2) properly licensed under Nevada law to . . . perform, provide or communicate inspection reports; and/or (3) are acting as representatives or agents or under the authority of Del Webb." *Even with these examples, the general prohibition against using "illegal, unlicensed and false practices" is too vague to be enforceable. The examples of prohibited past conduct do not sufficiently define what additional future conduct will be covered.*

649 F.3d at 1149-50 (Emphasis added) (footnote omitted)

See also Johnson v. Jassi Dhillon, Inc., 2012 U.S. Dist. LEXIS 103244* at 1-2 (E.D. Cal., July 24, 2012):

> Rule 65(d) requires an injunction to "state its terms specifically." Fed. R. Civ. P. 65(d)(1)(B). The injunction must "describe in reasonable detail -- and not by referring to the complaint or other document -- the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(C). The Supreme Court put it this way:
>
> the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to

> prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood. ... Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.
>
> *Schmidt v. Lessard*, 414 U.S. 473, 476, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974) (per curiam) (internal citations omitted).
>
> "[T]hose against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits." *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1086-87 (9th Cir. 2004). [*3] The District Court does not have to state "how to enforce the injunction" but the court must describe in reasonable detail the act or acts to be restrained. Id. at 1087 (emphasis in text). "'The benchmark for clarity and fair notice is not lawyers and judges, who are schooled in the nuances of [the] law,' but instead the 'lay person, who is the target of the injunction.'" *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1149-50 (9th Cir. 2011), quoting *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1134 (9th Cir. 2006).

The County acknowledges that in his role as a private citizen Plaintiff enjoys certain First Amendment rights and that under well-established precedent one of the threshold issues will be whether Plaintiff is speaking in his capacity as a County employee or as a private citizen. It appears Plaintiff seeks a broad order giving him unlimited rights in his role as a County employee. Regardless, it would be inappropriate for this Court to grant any injunctive relief at this time, especially a sweeping order that is not concrete and would leave the County guessing how to

comply with an order that does not set forth specific behavior that is prohibited. Moreover, such an order at this time would neither preserve the status quo nor prevent any irreparable injury which are the two purposes of a preliminary injunction. *Sierra On-Line v. Phoenix Software*, 739 F. 2d 1415, 1422 (9th Cir. 1984). A preliminary injunction is "an extraordinary remedy". *Winter v. NRDC*, 555 U.S. 724 (2008).

There is currently nothing pending against Plaintiff which would interfere with his protected speech. Since the purpose of a preliminary injunction is either to preserve the status quo or to prevent irreparable injury those goals would not be furthered by injunctive relief. Plaintiff cannot currently show that there is anything threatened that would constitute injury let alone irreparable injury. The fact that as a County employee Plaintiff is subject to the Workplace Action Plan places him in no different a position than any other County employee. The fact that he cannot in his capacity as a County employee threaten or harass other employees is no different than any other employees. If Plaintiff truly believes that the Workplace Action Plan is overly broad in general then a preliminary injunction is not the proper motion to have that determined. Plaintiff can do so either at trial on the merits or in a dispositive motion. But injunctions are meant for extraordinary circumstances where immediate relief is required. That is not the situation here.

Currently, Plaintiff continues to post on his Facebook page and no action is being threatened by the County. The County is not in a position to provide Plaintiff with such express instructions as to what he may post. The County will simply continue to respond to complaints made under the Workplace Action Plan if they are in fact made. The County is very cognizant of the fact that when Plaintiff acts as a private citizen, he is not subject to the Workplace Action Plan unless he does something which would subject him to action under another law, for example if a private citizen were to threaten a County employee then the private citizen may be subject to legal action outside of the action plan.

The Court should now require Plaintiff to provide a clear and concise statement of the basis, if any, for injunctive relief in light of the rescission of the January 2014 letter. A general injunction to prevent the County from interfering with Plaintiff's First Amendment rights is neither warranted nor appropriate in the absence of specific detailed information that the County is intending to interfere with those rights. There is no reason whatsoever for the Court to consider this Motion in light of the fact that the alleged harm that Plaintiff was about to suffer has been retracted. There is no current threat to him of any harm and any relief he seeks appears to be speculative and advisory.

IV. CONCLUSION

For the foregoing reasons, the County of Maui respectfully requests that the Court deny Plaintiff's Motion For Preliminary Injunction.

DATED: Honolulu, Hawaii, April 21, 2014.

/s/ *Richard M. Rand*
RICHARD M. RAND

Attorney for Defendant
COUNTY OF MAUI