

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LANE

RURAL ORGANIZING PROJECT and
COMMUNITY ALLIANCE OF LANE COUNTY,

Plaintiffs,

vs.

The CITY OF COTTAGE GROVE and the
COTTAGE GROVE POLICE DEPARTMENT,

Defendants.

Case No.: 23CV07691

DEFENDANTS' RULE 21
MOTIONS – MOTIONS TO
DISMISS; TO MAKE PLAINTIFFS'
COMPLAINT MORE DEFINITE
AND CERTAIN; TO STRIKE; AND
TO DISMISS THE COTTAGE
GROVE POLICE DEPARTMENT
AS A PARTY

Oral Argument Requested

UTCRR 5.010 CONFERRAL

Pursuant to UTCRR 5.010, counsel for Defendants certifies that prior to filing this motion, counsel for Defendants made a good-faith effort to confer with counsel for Plaintiffs regarding the issues raised in this motion. The parties were unable to resolve the issues raised in this motion without the assistance of the court.

SUMMARY OF CLAIMS

Plaintiffs' Complaint states four separate claims for relief for VIOLATION OF OREGON SANCTUARY PROMISE ACT, ORS 180.805 and ORS 181A.820 et seq. (hereinafter SPA). Each of these claims for relief have a corresponding statutory provision that in essence allows any person to bring a civil action against a law enforcement agency or public body that violates a designated provision in the statute to

1 enjoin the violation. No direct standing or harm is required to qualify as “any person.”
2 Plaintiffs does not allege that the statutory violations occurred to Plaintiffs or to Plaintiffs’
3 shareholders or members. Plaintiffs do not allege that Plaintiffs are witnesses to
4 statutory violations, merely that they have a belief that the City has a custom of SPA
5 violations.

6 **FIRST MOTION**
7 **To Dismiss All Claims For Failure To State**
8 **Ultimate Facts Sufficient To Constitute A Claim**

9 Pursuant to ORCP 21 A(1)(h), Defendants move the court for an order
10 dismissing Plaintiffs’ Complaint for failure to state ultimate facts sufficient to constitute a
11 claim on the grounds that Plaintiffs’ Complaint fails to allege any instance of violation of
12 any of the four statutes which give rise to a statutory cause of action. Plaintiffs merely
13 allege Defendants violate the various statutes as a custom or practice.

14 **POINTS AND AUTHORITIES**

15
16 Plaintiffs bring four statutory claims, each of which allow “[a]ny person [to] bring a
17 civil action against a law enforcement agency that violates [specific statutory
18 prohibitions] of this section to enjoin the violation.” Each of the four statutes have
19 specific prohibitions. For instance, ORS 181A.820(2) prohibits using agency “moneys,
20 equipment, or personnel for the purpose of detecting or apprehending persons for the
21 purpose of enforcing federal immigration laws.” Plaintiffs’ allegation that Cottage Grove
22 has violated this statute is a mere a conclusion of law, not a factual allegation. To
23 properly plead a case, Plaintiffs minimally must allege instances of statutory violations,
24 to do otherwise is mere speculation and legal conclusions disguised as factual
25 allegations.
26

1 “Code pleading is designed to define the issues to be litigated and to set
2 substantially the limits of discovery. A pleading must contain ‘[a] plain and
3 concise statement of the ultimate facts constituting a claim for relief
without unnecessary repetition.’ ORCP 18 A (emphasis added). The staff
comment to ORCP 18 A states:

4 The Council [on Court Procedures] decided to retain fact
5 pleading as opposed to notice pleading, i.e., to retain a
6 requirement of fairly specific description of facts as opposed
7 to adopting the less specific fact description allowable in
8 federal courts. . . . The necessity of pleading ultimate facts
9 retains the present Oregon requirements of pleading facts at
a fairly specific level. Council on Court Procedures, Staff
Comment to Rule 18 (1977-79 biennium), <
www.counciloncourtprocedures.org >.

10 *****

11 Despite the liberal construction afforded pleadings (see § 5.1-9), plaintiffs
12 in Oregon state courts must still allege ultimate facts establishing each of
13 the elements of a prima facie case for a recognized claim for relief. ORCP
18 A; see, [citations omitted].

14 A pleading that does not allege ultimate facts going to each of the
15 elements of a prima facie case is deficient and is subject to a motion to
16 dismiss for failure to state a claim. ORCP 21 A(8). In Huang, 147 Or App
17 at 334, the court stated that ‘**mere recitation of the elements of a
particular claim for relief, without more, is not a statement of ultimate
facts sufficient to constitute that claim for relief.**’” (Emphasis
added).

18 Chapter § 5.1 Oregon Code Pleading (Oregon Civil Pleading and
19 Litigation (OSBar) (2020 Ed.))

20 Each of the four statutory claims for relief allow any person to bring a civil action
21 against a public body that violates a designated portion of the statute to remedy such
22 violation by injunctive relief. The essential element of each statutory claim is the
23 violation of statute. The mere recitation of this element in Plaintiffs’ Complaint, without
24 more, is not a statement of ultimate facts.
25
26

1 This requirement is particularly important in an action against a public body.
2 Plaintiffs have alleged compliance with the Oregon Tort Claims Act (OTCA), ORS
3 30.275 as a component of each claim for relief. In part, OTCA requires a formal notice
4 of claim defined in statute:

- 5 “4) Formal notice of claim is a written communication from a claimant or
6 representative of a claimant containing:
7 (a) A statement that a claim for damages is or will be asserted
8 against the public body or an officer, employee or agent of the
9 public body;
10 (b) A description of the time, place and circumstances giving rise to
11 the claim, so far as known to the claimant; and
12 (c) The name of the claimant and the mailing address to which
13 correspondence concerning the claim may be sent.” (Emphasis
14 added).

15 The requirement of providing the “time, place and circumstances giving rise to the
16 claim” necessitates a description of the conduct tied to a point in time. It is insufficient
17 to allege a belief that a possible violation occurred sometime within the 180-day tort
18 claim window. Plaintiffs bear the burden of proof of this element, and it is insufficiently
19 plead. The Court should dismiss this complaint for failure to state ultimate facts
20 sufficient to constitute a claim.

21 **SECOND MOTION**
22 **To Dismiss All Claims For Failure To State**
23 **Ultimate Facts Sufficient To Constitute A Claim**

24 Pursuant to ORCP 21 A(1)(h), Defendants move the court for an order
25 dismissing Plaintiffs’ Complaint for failure to state ultimate facts sufficient to constitute a
26 claim on the grounds that Plaintiffs’ Complaint fails to allege that the conduct to be
enjoined is probable or threatened.

POINTS AND AUTHORITIES

Plaintiffs' Complaint pleads four claims for injunctive relief. Injunctions are not regarded with judicial favor and are to be used only with caution and in cases of great necessity upon clear and convincing proof of irreparable harm and no adequate legal remedy.

“*** ‘An injunction is an extraordinary remedy, to be granted only on clear and convincing proof of irreparable harm when there is no adequate legal remedy.’ *Eagles Five*, 250 Or App at 422 (quoting *Knight v. Nyara*, 240 Or App 586, 597, 248 P3d 36 (2011)). **[T]o qualify for injunctive relief, it must be shown that the conduct to be enjoined is ‘probable or threatened.’** *Id.* (quoting *McCombs et al v. McClelland*, 223 Or 475, 485, 354 P2d 311 (1960)). [emphasis added]

“An injunction may not be granted ‘merely to allay the fears and apprehensions of an individual.’” *Id.* [emphasis added]

Howe v. Greenleaf, 260 Or App 692, 712 (2014). [quotations original]
Injunctive relief “depends upon broad principles of equity and may, in the discretion of the court, be granted or denied in accordance with the justice and equity of the case.” *Hickman v. Six Dimension Custom Homes, Inc.*, 273 Or 894, 898, 543 P2d 1043 (1975). “An injunction does not issue as a matter of absolute or unqualified right. [T]he court may refuse an injunction where the hardship to the defendant by a permanent injunction greatly outweighs the benefit resulting to the plaintiff[].” *Jewett*, 281 Or at 478. See *York v. Stallings*, 217 Or 13, 19, 341, P2d 529 (1959). Oregon Civil Pleading and Practice (2012 rev.), Chapter 34, Permanent Injunctions, Temporary Restraining Orders, and Preliminary Injunctions, §34.1.

A mandatory injunction compels affirmative action and changes the status quo. *Helms Groover & Dubber Co. v. Copenhagen*, 93 Or 410, 416, 177 P 935 (1919). “Mandatory injunctions are not regarded with judicial favor and are used only with caution and in cases of great necessity.” *Hickman v. Six Dimension Custom Homes, Inc.*, 273 Or 894, 898, 543 P2d 1043 (1975); see also *LeVasseur v. Armon*, 240 Or App 250, 255–256, 246 P3d 1171 (2010) (citing the *Hickman* case).

Oregon Civil Pleading and Practice (2012 rev.), Chapter 34, Permanent Injunctions, Temporary Restraining Orders, and Preliminary Injunctions, §34.2- 3(b).

Courts have explained the clear and convincing standard of proof as follows:

In *Cook v. Michael*, 214 Or. 513, 526-27, 330 P.2d 1026 (1958), this court stated that there are three standards of proof: “a preponderance,” “clear and convincing” and “beyond a reasonable doubt.” Proof by a “preponderance of the evidence” means that the jury must believe that the the (sic) facts asserted are more probably true than false. To be “clear and convincing,” evidence must establish that the truth of the facts asserted is “highly probable.” “Beyond a reasonable doubt” means that the facts asserted are almost certainly true. This part of the *Cook* opinion has been endorsed repeatedly by this court. [internal citations omitted] *Riley Hill General Contractor, Inc. v. Tandy Corp.*, 303 Or. 390, 402, 737 P.2d 595 (1987).

There is one final aspect of the clear and convincing standard that deserves the Court’s consideration. When the clear and convincing standard is applied to various areas of law, those areas begin with a presumption of validity, which must be overcome by clear and convincing evidence. For example, the presumption against fraud must be overcome by clear and convincing evidence. Likewise, are the following: the presumption of competency; the presumption of contract validity and against reformation; the presumption against punitive damages; the presumption against adverse possession; the presumption that a construction bid did not contain a mistake; the presumption of simultaneous death of co-tenants; and other similar areas of legal presumption. The reasoning behind this is explained by the extreme nature of the relief sought:

However, “[t]here are occasions where a statutory cause of action, although characterized as civil, requires proof by the higher clear and convincing standard,” because of the quasi-criminal sanctions attached.

McBride, 295 Or at 405. 11

In the present case, the Court should begin with the presumption that the actions by the City have been in compliance with the law. In order for relief to issue the Court

1 must be satisfied that Plaintiffs have proven the City violated the statutes by clear and
2 convincing evidence. While, the statutory action allowed by “any person” may relieve
3 Plaintiffs from proving irreparable, imminent harm to themselves, Plaintiffs remain
4 required to prove that the harm to be avoided (statutory violations), are “highly
5 probable.” That burden falls completely upon Plaintiffs without any obligation by
6 Defendants to present rebuttal evidence, unless the Court finds that Plaintiffs have
7 overcome that presumption.

8 Plaintiffs have not alleged any ultimate facts that the actions sought to be
9 enjoined are probable or threatened. Plaintiffs’ complaint should be dismissed for
10 failure to state ultimate facts sufficient to constitute a claim.
11

12 **THIRD MOTION**
13 **Alternate Motion to Make More Definite and Certain**
14 **To Describe the Acts Alleged to Violate**
15 **ORS 180.805; 181A.820; 181A.823; and 181A.826**

16 In the alternative, pursuant to ORCP 21 D, Defendants move the court for an
17 order requiring Plaintiffs to make Plaintiffs’ Complaint more definite and certain to allege
18 specific conduct of Defendants which violate the following statutes: ORS 180.805;
19 181A.820; 181A.823; and 181A.826.

20 **POINTS AND AUTHORITIES**

21 Plaintiffs have alleged compliance with the Oregon Tort Claims Act (OTCA), ORS
22 30.275. In part, OTCA requires a formal notice of claim defined in statute:

- 23 “4) Formal notice of claim is a written communication from a claimant or
24 representative of a claimant containing:
25 (a) A statement that a claim for damages is or will be asserted
26 against the public body or an officer, employee or agent of the
public body;
(b) A description of the time, place and circumstances giving rise to
the claim, so far as known to the claimant; and

1 (c) The name of the claimant and the mailing address to which
2 correspondence concerning the claim may be sent.”

3 The requirement of providing the “time, place and circumstances giving rise to
4 the claim” is a component of the validity of the tort claim notice and the timeliness of
5 both the notice and the filing of the complaint. Before the Defendants or the Court can
6 evaluate those issues, Plaintiffs must plead with enough specificity to allow that
7 evaluation.

8 The Court should order Plaintiffs to replead to specify factual occurrences which
9 form the basis of Plaintiffs’ Complaint, not in a general way, but aligning with each claim
10 for relief sought.

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12 **FOURTH MOTION**
13 **Motion to Make More Definite and Certain**
14 **Allegations Concerning Policy 428**

15 Pursuant to ORCP 21 D, Defendants move the court for an order requiring
16 Plaintiffs to make more definite and certain the allegation in Page 5, Paragraph 15 to
17 specify which portion(s) of Policy No. 428 “instruct officers to engage in activities that
18 constitute immigration enforcement and to use public resources to support and assist
19 federal agencies in their immigration enforcement activities” and what other policies, if
20 any, are included in Plaintiffs’ allegations.

21 **POINTS AND AUTHORITIES**

22 Plaintiffs fail to state whether the entirety of Policy 428 or only specific provisions
23 are alleged to instruct officers to engage in acts incongruent with Oregon statutes. This
24 is a legal analysis and Defendants are unable to conduct discovery into Plaintiffs’
25 attorneys thought process or advice to Plaintiffs. Defendants are left to divine Plaintiffs’
26

1 theory. Plaintiffs should be required to identify with specificity which policy provisions
2 form the basis of Plaintiffs' Complaint.

3 **FIFTH MOTION**
4 **Motion to Strike References to ORS Ch. 28**

5 Pursuant to ORCP 21 E, Defendants move the court for an order striking all
6 references to ORS 28.010, 28.020, 28.080, and 28.100 on the grounds that no claim for
7 relief for declaratory relief under ORS Ch. 28 has been plead, and these statutory
8 references are irrelevant to the four statutory claims for relief plead by Plaintiffs.

9 **POINTS AND AUTHORITIES**

10 There are two bases for striking ORS 28 references, one that a declaratory
11 action has not been plead, and two that a declaratory action could not be plead by
12 Plaintiffs under the jurisdictional allegations in the Complaint.

13
14 ORCP 21 E provides that the Court may order stricken irrelevant matters inserted
15 in a pleading or pleadings containing more than one claim not separately stated.
16 Plaintiffs' four claims for relief are statutory causes of action under ORS 180.805,
17 181A.820, 181A.823, and 181A.826. Each of these statutory causes of action sound in
18 injunctive relief based on a finding of violation of the statute. None sound as declaratory
19 relief, nor incorporate the UDJA.

20
21 Oregon adopted the Uniform Declaratory Judgments Act (UDJA) (Unif Law
22 Comm'n 1922). See ORS 28.010–28.160. While there are multiple components to
23 actions under the UDJA, the basic standing requirement is the same:

24 A plaintiff bringing a declaratory-judgment action must have some direct
25 involvement or interest in the controversy; that is, the plaintiff must be one
26 whose rights, status, or legal relations will be affected by the action. ORS
28.020; ORS 28.040; ORS 28.050; *Gortmaker v. Seaton*, 252 Or 440,
443, 450 P2d 547 (1969) ("In order to have standing to maintain

1 declaratory proceedings, one must allege a substantial interest in the
2 matter in controversy.”); *Eacret v. Holmes*, 215 Or 121, 125, 333 P2d 741
3 (1958) (“There is no case for declaratory relief where the ‘plaintiff seeks
4 merely to vindicate a public right to have the laws of the state properly
5 enforced and administered.” (quoting *McCarthy v. Hoan*, 221 Wis 344,
6 266 NW 916, 917 (1936), *overruled in part by Boerschinger v. Elkay
Enters., Inc.*, 26 Wis 2d 102, 132 NW2d 258 (1965))). It is not enough to
7 have some “abstract interest in the correct application or the validity of a
8 law.” *Budget Rent-A-Car of Washington-Oregon, Inc. v. Multnomah Cty.*,
9 287 Or 93, 95, 597 P2d 1232 (1979).

Chapter § 11.2 Oregon Uniform Declaratory Judgments Act (Oregon
Civil Pleading and Litigation (OSBar) (2020 Ed.))

10 Here, taking Plaintiffs’ allegations at face value, Plaintiffs cannot be one whose
11 rights, status, or legal relations will be affected by the action under the statute. Plaintiffs
12 seek to vindicate the rights of other persons in this case which is allowed under the
13 ORS 180 and 181A provisions, but not allowed under ORS 28.

14 **SIXTH MOTION**
15 **To Dismiss The Cottage Grove**
16 **Police Department As A Defendant**
17 **Or Substitute Defendant**

18 Pursuant to ORCP 21 A, Defendants move the court for an order of dismissal of
19 the Cottage Grove Police Department on the grounds that it is not an independent entity
20 which can be sued, but exists only as part of the City, fulfilling the City’s policing
21 functions.

22 **POINTS AND AUTHORITIES**

23 The City of Cottage Grove is an Oregon municipal corporation. The Cottage
24 Grove Police Department is not an entity that exists independently of the City of Cottage
25 Grove, but is merely a component of the City. A city police department is not a separate
26 entity from the city itself and thus is not amenable to suit. It can neither sue on its own

1 behalf, nor be sued. It is merely the vehicle through which the city fulfills its policing
2 functions. Suit must be brought against the City itself.

3 With regard to plaintiff's state law cause of action against the PPB, plaintiff
4 relies on the plain wording of ORS 30.260(4)(b), which defines a public
5 body as "[a]ny city, county, school district or other political subdivision or
6 municipal or public corporation and any instrumentality thereof." Plaintiff
7 claims that the PPB is an "instrumentality" of the City and is thus a proper
8 party under the Oregon Tort Claims Act. Defendants reply that the PPB is
9 a bureau within the City and not an instrumentality. Addressing this same
10 issue, Judge Jelderks has held that ORS 30.265 provides for liability
11 against public bodies but not against any bureaus, divisions, or
12 departments. Hinz, Civil No. 95-262-JE, Findings and Recommendations
13 dated August 10, 1995, at 6. This court agrees with Judge Jelderks that
14 the PPB is not a separate and distinct entity from the City. The PPB is a
15 bureau or part of the City because it fulfills the City's policing functions and
16 its officers are City employees. Therefore, the PPB should be dismissed
17 as a defendant on the state law cause of action as well.

18 *Keller v. City of Portland*, No. CV-98-263-ST, 1998 WL 1060222, at *4 (D.
19 Or. Nov. 13, 1998)

20 Citing *Keller* and broadly surveying 9th Circuit case law, the Court in *Updike v.*
21 *Clackamas County* reached the same conclusion:

22 Decisions in this and other jurisdictions counsel treating a county sheriff's
23 office and a county as the same entity. State law determines a local
24 entity's capacity for suit in federal court. Fed. R. Civ. P. 17(b). Oregon law
25 provides:

26 A suit or action may be maintained against any county and
against the State of Oregon by and through and in the name
of the appropriate state agency upon a contract made by the
county in its corporate character, or made by such agency
and within the scope of its authority; ... An action or suit may
be maintained against any other public corporation
mentioned in ORS 30.310 for an injury to the rights of the
plaintiff arising from some act or omission of such other
public corporation within the scope of its authority.

Or. Rev. Stat. ("ORS") § 30.320 (emphasis added). ORS § 30.310
mentions "the State of Oregon or any county, incorporated city, school
district or other public corporation of like character in this state."

Oregon appellate courts have not decided whether ORS §§ 30.310-30.320 allow for suit against a county sheriff's office separately and in addition to the county itself. Looking to these Oregon statutes, however, the Ninth Circuit has held that under Oregon law, a court in this district "properly dismissed Clackamas County Mental Health because that entity lacks the capacity to be sued." *Christman v. Oregon*, 32 Fed.Appx. 414, 415 (9th Cir. 2002). Another federal court in this district has noted that a sheriff's office "is not a separate legal entity subject to suit." *Bobo v. Plymouth Hous. Grp.*, 2014 WL 6085858, at *1 (D. Or. Nov. 7, 2014). Similarly, a court in this district found that the Portland Police Bureau is "part of the City because it fulfills the City's policing functions" and thus is not susceptible to suit separately from the City of Portland. *Keller v. City of Portland*, 1998 WL 1060222, at *4 (D. Or. Nov. 13, 1998). In Washington State, "in a legal action involving a county, the county itself is the only legal entity capable of suing and being sued." *Broyles v. Thurston Cnty.*, 147 Wash. App. 409, 427-28 (2008) (quoting *Nolan v. Snohomish Cnty.*, 59 Wash. App. 876, 883 (1990)). In *Melendres v. Arpaio*, the Ninth Circuit held that under Arizona state law, Maricopa County Sheriff's Office constituted a "non-jural entity," lacking separate legal status from the county and thus having no capacity to sue or be sued in the office's own name. 784 F.3d 1254, 1260 (9th Cir. 2015). The Ninth Circuit thus ordered that Maricopa County be substituted as a party in lieu of Maricopa County Sheriff's Office and that, on remand, the district court could consider dismissal of Sheriff Arpaio in his official capacity. *Id.*; but see *Streit v. Cnty. of Los Angeles*, 236 F.3d 552, 556 (9th Cir. 2001) (holding that under California law, as interpreted by the Ninth Circuit in previous decisions, Los Angeles Sheriff's Department is a "public entity" that is separately suable in federal court).

*4 The Court finds persuasive the decisions that have held that a plaintiff may not separately sue Oregon entities such as the Clackamas County Sheriff's Office. The Clackamas County Sheriff's Office is a department of the county and fulfills Clackamas County's policing functions.

Updike v. Clackamas Cnty., No. 3:15-CV-00723-SI, 2015 WL 7722410, at *3-4 (D. Or. Nov. 30, 2015)

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1 The Court should grant dismissal of the Cottage Grove Police Department as a
2 party to this action.

3 DATED this 14th day of April, 2023.
4

5 Respectfully submitted,

6 LOCAL GOVERNMENT LAW GROUP
7

8 By: s/ Truman A. Stone

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANTS' RULE 21 MOTIONS –
MOTIONS TO DISMISS; TO MAKE PLAINTIFFS' COMPLAINT MORE DEFINITE AND
CERTAIN; TO STRIKE; AND TO DISMISS THE COTTAGE GROVE POLICE
DEPARTMENT AS A PARTY on:

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Of Attorneys for Plaintiffs

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by transmitting full, true and correct copies thereof by electronic means to counsel
for Defendants at the attorney's last known e-mail addresses listed above through the
electronic filing system provided by the Oregon Judicial Department and by mailing a hard
copy to the above listed address on April 14, 2023.

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