UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JANE DOE,

Plaintiff,

v.

COUNTY OF MILWAUKEE, DAVID A. CLARKE, JR., in his Official capacity, and XAVIER D. THICKLEN,

Case No. 14-CV-200

Defendants.

MILWAUKEE COUNTY AND SHERIFF DAVID A. CLARKE, JR.'S RESPONSE TO PLAINTIFF'S MOTION *IN LIMINE* NO. 1 TO ENFORCE SUBPOENA FOR DAVID A. CLARKE, JR.'S TRIAL TESTIMONY AND CROSS-MOTION FOR PROTECTIVE ORDER TO QUASH TRIAL SUBPOENA

"[T]he settled rule across the circuits is that absent extraordinary circumstances, high-ranking officials may not be subjected to depositions or called to testify regarding their official actions." *Coleman v. Schwarzenegger*, No. CIV W-90-0520 LKK JFM P, 2008 WL 4300437 at *2 (E.D. Cal. Sept. 15, 2008). Plaintiff explains that she intends to call Sheriff Clarke as a witness simply because he is a final policymaker and has personal knowledge of the policy of the Sheriff's Office regarding the use of restraints on prisoners transported outside the jail for medical reasons. This explanation is insufficient to demonstrate the necessity of Sheriff Clarke's testimony as a high-ranking government official. Moreover, Plaintiff can introduce this same evidence from lower ranking government witnesses with personal knowledge of these underlying facts without imposing an unnecessary burden on Sheriff Clarke. Accordingly, the Court should deny Plaintiff's motion and quash the trial subpoena issued for Sheriff Clarke.

BACKGROUND

On April 20, 2017, Plaintiff's counsel inquired as to whether counsel for Milwaukee County and David A. Clarke, Jr. (the "County Defendants") would accept service of trial subpoenas upon various Milwaukee County employees. (Posnanski Decl. ¶ 2.) On April 28, 2017, County Defendants' counsel informed Plaintiff's counsel that they would accept service on behalf of active Milwaukee County Sheriff's Office employees, including Sheriff Clarke, but specifically informed Plaintiff's counsel that they would oppose the Sheriff being called as a witness at trial. (*Id.* ¶ 3, Ex. A.) On May 2, 2017, during a telephone conference, counsel for the parties discussed the County Defendants' opposition to Sheriff Clarke being called as a witness at trial, and County Defendants' counsel asked Plaintiff's counsel to provide a specific explanation as to why Sheriff Clarke was a necessary witness. (*Id.* ¶ 4.) On May 3, 2016, Plaintiff's counsel served the trial subpoenas, including the trial subpoena issued to Sheriff Clarke, upon County Defendants' counsel. (*Id.* ¶ 5.)

On May 16, 2017, counsel once again discussed the necessity of Sheriff's Clarke's testimony, and County Defendants' counsel again asked for an explanation as to why the Sheriff was a necessary witness. (*Id.* ¶ 6.) The only explanation given during the May 16, 2017 telephone conference was that Sheriff Clarke "is the final policymaker" for the County with respect to the Plaintiff's claims. (*Id.*) When this was the extent of the explanation provided, County Defendants' counsel informed Plaintiff's counsel that the County Defendants intended to move for a protective order to quash the trial subpoena because the Plaintiff had failed to provide any specific explanation as to why Sheriff Clarke is a necessary witness. (*Id.*) Immediately following this conference, Plaintiff filed the present motion, preempting the unfiled motion to quash the trial subpoena.

ARGUMENT

Plaintiff has issued a trial subpoena to Sheriff Clarke. Fed. R. Civ. P. 45(c)(3)(A) provides that the "court for the district where compliance is required *must* quash … a subpoena that: … (iv) subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A)(iv)(emphasis added). Plaintiff contends she needs the trial testimony of Sheriff Clarke because he is a final policymaker and he "will explain *his* written policy and presumably will testify to its purported justification." (Dkt. No. 196 at 3-4.)(emphasis supplied). Plaintiff's trial subpoena issued to Sheriff Clarke imposes an undue burden upon him and should be quashed.

"[T]he settled rule across the circuits is that absent extraordinary circumstances, high-ranking officials may not be subjected to depositions or called to testify regarding their official actions." *Coleman*, 2008 WL 4300437 at *2. Highly placed government officials should not be forced to attend federal court proceedings absent extraordinary circumstances that justify that unusual action. *In re U.S.*, 197 F.3d 310, 310-16 (8th Cir. 1999). "The reason for requiring exigency before allowing the testimony of high officials is obvious. High ranking government officials have greater duties and time constraints than other witnesses." *In re U.S.*, 985 F.2d 510, 512 (11th Cir. 1993). If the Sheriff was asked to testify in every case involving the Milwaukee County Sheriff's Office in which a department policy was at issue, "his time would be monopolized by preparing and testifying in such cases." *Id.* "In order to protect officials from the constant distraction of testifying in lawsuits, courts have required that [parties] show a special need or situation compelling such testimony." *Id.* "Because of the time constraints and multiple responsibilities of high officials, courts discourage parties from calling them as witnesses and require exigent circumstances to justify a request for their testimony." *Id.* at 513.

Sheriff Clarke is a high ranking governmental official.[1] *See, e.g., Jameson v. Oakland County*, No. 10-10366, 2011 WL 219555, at *1 (E.D. Mich. Jan. 24, 2011) (Sheriff is a high ranking-governmental official); *Jarbo v. County of Orange*, No. SACV 05-00202, 2010 WL 3584440, at *2 (C.D. Cal. Aug. 30, 2010) (same); *Gray v. Kohl*, No. 07-10024-Civ., 2008 WL 1803643, at 1 (S.D. Fla. Apr. 21, 2008) (same); *Avalos v. Baca*, No. 05-07602, 2006 WL 6220447, at *1-2 (C.D. Cal. Oct. 16, 2006) (same). As such, Plaintiff must establish that Sheriff Clarke possesses first-hand knowledge essential to her case which is not obtainable from another source. *In re U.S.*, 197 F.3d at 315 (citing *In re U.S.*, 985 F.2d at 512-13; *In re FDIC* 58 F.3d 1055, 1062 (5th Cir. 1995) ("We think it will be the rarest of cases ... in which exceptional circumstances can be shown where the testimony is available from an alternate witness."); *see also Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007)). This requirement means ***both*** that the evidence is relevant and necessary ***and*** that it cannot otherwise be obtained. *Id*. (citing *In re U.S.*, 985 F.2d at 512-13) (emphasis added). "Without establishing this foundation, 'exceptional circumstances' cannot be shown to justify a subpoena." *Id*.

Plaintiff only pursues claims against Sheriff Clarke in his official capacity, and has not demonstrated that Sheriff Clarke has firsthand knowledge of any of the facts related to her claims. Indeed, Plaintiff concedes that Sheriff Clarke lacks personal knowledge of the use on restraints on her. (Dkt. No. 196 at 4.) Essentially, Plaintiff's argument relies exclusively on Sheriff Clarke's official position as a final decision-maker with respect to the Milwaukee County Sheriff's Office policies and her apparent desire to call him to testify at trial. But, putting aside

[1] Since the present motion was filed and subsequent to the parties' discussions, it was publicly announced that Sheriff Clarke had accepted a position as an assistant secretary in the United States Department of Homeland Security. *See* www.jsonline.com/story/news/local/milwaukee/2017/05/17/sheriff-david-clarke-accepts-job-department-homeland-security/328342001. (Last visited May 19, 2017). This presents another reason the Sheriff (potentially the former Sheriff by the time of trial) should not be called to testify in this matter.

this generalized assertion, Plaintiff has shown no urgent need for the testimony of Sheriff Clarke, and Plaintiff does not advance any compelling arguments in support of her desire to call Sheriff Clarke as a witness.

For instance, Plaintiff contends that Sheriff Clarke should testify at trial because the "Defendants listed Sheriff Clarke on their Federal Rule 26(a)(1) disclosures, acknowledging that his testimony on shackling is relevant." (Dkt. No. 196 at 4.) This argument misrepresents the County Defendants' Fed. R. Civ. P. 26(a)(1). In the County Defendants' January 22, 2015 Rule 26(a)(1) disclosures, Sheriff Clarke is identified as an individual likely to have discoverable information "regarding the policies of the Milwaukee County Sheriff's Department ***regarding sexual misconduct of officers***." (Dkt. No. 196-2 at 2.) Plaintiff also ignores the purpose of Rule 26(a)(1) disclosures, which requires all parties to identify all individuals likely to have discoverable information – along with the subjects of that information – that the party may use to support its claims or defenses, not to identify witnesses who should be called at trial. Additionally, these disclosures were made while the Plaintiff was still pursuing claims against Sheriff Clarke in his individual capacity, rather than just his official capacity. The County Defendants' initial Rule 26(a)(1) disclosures do not somehow constitute a concession that Sheriff Clarke can or should be called as a witness at trial.

Further, the Plaintiff does not even address why alternate witnesses, including former Inspector Edward Bailey, Deputy Inspector James Cox, and former Deputy Inspector Kevin Nyklewicz, each of whom have been identified and disclosed, and each of whom are in position to testify regarding the policy and the reasons underlying the policy, and each of whom will likely be called by one or both parties at trial, are not suitable to obtain the testimony she claims she needs from Sheriff Clarke. For example, the County Defendants specifically identified former Inspector Bailey in their Supplemental Rule 26 disclosures as a witness who may testify

"regarding the policies and procedures of the Milwaukee County Sheriff's Office as they relate to the issues presented by plaintiff's claims in this case, including but not limited to the duties and responsibilities of Jail officers, the training of Jail officers, the prohibition against sexual and other inappropriate contact between Jail officers and inmates, ***and the use of restraints on inmates transported outside the Jail for medical care***." The Plaintiff has not established that Inspector Bailey, Deputy Inspector Cox, and Deputy Inspector Nyklewicz are not appropriate alternate witnesses.

Plaintiff's reliance on Sheriff Clarke's deposition testimony is similarly misplaced. In fact, Sheriff Clarke's deposition testimony actually establishes that his Inspectors and Deputy Inspectors are appropriate and qualified alternate witnesses. Sheriff Clarke testified that: (a) he relies upon his Inspectors to formulate and carry out policies, orders and directives; (b) his Inspectors have the authority to implement and make policies; and (c) he gives them "wide latitude to make policy, implement policy." (Dkt. No. 196-3 at 14:15 – 15:22.) The Plaintiff has made absolutely no showing that the testimony she seeks from Sheriff Clarke regarding the Sheriff's Office restraint policy and its purported justifications cannot be obtained from former Inspector Bailey, Deputy Inspector Cox, and/or former Deputy Inspector Nyklewicz or another alternate qualified witness.

Further, the Plaintiff references the "hospital shackling policy," and specifically "that women in labor must be shackled by one wrist and one leg iron throughout their labor, potentially including actual delivery of the child, for security reasons." (Dkt. No. 196 at 4.) There is no such specific policy. The policy at issue was a general policy that all inmates transported to the hospital under the jurisdiction of the Milwaukee County Jail would be restrained to the bed. (Dkt. No. 196-3 at 29:24-30:9.) Similarly, though the Plaintiff repeatedly refers to the hospital shackling policy as "his" policy, in reference to Sheriff Clarke, there is no

evidence that the Sheriff is in possession of unique information as to this policy. Other witnesses, who will be called at trial, clearly are in position to testify regarding the County's policy and the reasons why it exists.

Sheriff Clarke has been named more than 40 times[2] in cases filed in this District Court since the Plaintiff commenced this suit. If Sheriff Clarke were expected to testify in even a substantial number of those cases, it would clearly interfere with his duties. *Slone v. Judd*, No. 09-CV-1175, 2011 WL 1584421, *1 (M.D. Fla. Apr. 26, 2011.) Further, even if Plaintiff could demonstrate that the testimony of Sheriff Clarke was relevant and necessary, the testimony sought from Sheriff Clarke is available from alternate witnesses. Therefore, the Plaintiff cannot demonstrate exceptional circumstances to justify the trial subpoena issued to Sheriff Clarke. The Court should quash the trial subpoena.

Finally, the cases relied upon by Plaintiff are inapposite. *United States v. Nixon*, 418 U.S. 683 (1974), involved an indictment following the violation of federal statutes by staff members of President Nixon's White House and the production of tape recordings of conversations directly involving the President as direct relevant evidence in a criminal proceeding. *Nixon*, 418 U.S. at 700-701 and 713. *Clinton v. Jones*, 520 U.S. 681 (1997), involved direct allegations against President Clinton for personal, private unofficial acts committed before he was President. In *Hobley v. Burge*, the Court ordered Mayor Daley to sit for a discovery deposition regarding his conduct while acting as the State's Attorney where the record demonstrated that Mayor Daley may have personal information that "could well lead to potentially admissible evidence." *Hobley v. Burge*, No. 03C3678, 2007 WL 551569, at *3 (N.D. Ill. Feb. 22, 2007). *Wantanabe Realty Corp. v. City of New York* dealt with the repercussions of

[2] This number does not include cases filed against the Milwaukee County Sheriff's Office or Milwaukee County where Sheriff Clarke was not separately named as a party.

Mayor Rudolph Giuliani simply walking out of a deposition when he did not like the questions posed by plaintiff's counsel. *Wantanabe Realty Corp. v. City of New York*, No. 1-CIV-10137, 2002 WL 31075822, *1-2 (S.D.N.Y. Sept. 18, 2002). *Tye v. City of Jacksonville, Fla.* actually supports the County Defendants. In *Tye*, the Court specifically noted that the deposition of an executive official is proper only "when the official possesses particular information essential to plaintiff's case which cannot reasonably be obtained by another discovery mechanism." *Tye*, 707 Supp. 1298, 1300 (M.D. Fla. 1989). The court in *Tye* further remarked that the Mayor is only faces discovery "when he is alleged to be an active participant" in the underlying conduct. *Id*. With respect to Plaintiff's citation to *Spalding v. City of Chicago*, it is difficult to gather much information supporting the Court's decision, but on the face of the Docket Entry filed by Plaintiff, it appears that Mayor Emmanuel was required to attend trial because he had made comments relevant to the issues in dispute, a factor which is not present here. (Dkt. No. 195.) Accordingly, the case law relied upon by Plaintiff does not support her position that Sheriff Clarke should be required to give trial testimony in this case.

CONCLUSION

For the reasons set forth herein, the County Defendants respectfully request that the Court deny Plaintiff's Motion to Enforce the Trial Subpoena issued to Sheriff Clarke and quash the trial subpoena issued to Sheriff David A. Clarke, Jr. pursuant to Fed. R. Civ. P. 45(d)(3)(A).

Dated this 19th day of May, 2017.

s/Timothy H. Posnanski

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