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Scott M. McNair
Phoenix, Arizona

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

SCOTT M. MCNAIR
Plaintiff,

V.

County of Maricopa, et al,
Defendants,

No. CV-03-2119-PHX-NVW

**REPLY TO PLAINTIFF’S MOTION TO COMPEL
SEPARATION OF PARTIES**

Assigned to the Hon. Neil V. Wake

I. PLEA FOR LENIENCY AND WAIVER OF FORMAL REQUIREMENTS

In that the Plaintiff (McNair) is neither represented by counsel nor had any formal legal training, he does hereby request leniency from the Court for the form and content of this pleading, and does request the Court to waive and/or modify any formal procedural requirements in order to insure McNair due process and equitable justice, and to insure that a fair and just determination can be made. Moreover, as McNair is a pro se litigant and not an attorney, his pleadings must be considered without technicality. (“*Pro se litigants’ pleadings are not to be held to the same high standards of perfection as lawyers.*”¹)

¹ Haines V. Kerner, 92 S.Ct. 594; Jenkins V. McKeithen, 395 US 411, 421 (1969); Picking V. Penna. Rwy. Co. 151 F.2d 240; Puckett V. Cox, 456 F.2d 233.)

1 **II. MEMORANDUM AND POINTS OF AUTHORITY**

2 In defendants' response, they assert "*Pursuant to A.R.S. § 11-981, Maricopa County has adopted*
3 *The Restated Declaration of Trust for Maricopa County, Arizona Self-Insured Trust Fund*
4 *(Revised September 5, 2001).*"² Defendants' assert that under this statute they are free to act as a
5 self-insured entity, and, are provided with the opportunity to represent defendants Medlin, Peterson,
6 and Ramsey.

7 While the stated statute exists, defendants have failed to provide any direct evidence that they
8 have in fact taken the steps necessary to exercise any such privilege. Whereas defendants make a
9 vague assertion that they have a "*Restated Declaration of Trust*", they fail to produce a copy for
10 review, or more precisely, have deliberately withheld such from both plaintiff and this court. Since
11 the true terms and conditions of this "*declaration*" are unknown to this court (if one even does
12 exist), the court must therefore presume that no provision exists which would allow the County to
13 provide [free] legal representation to defendants Medlin, Peterson, or Ramsey. (A trier may infer that
14 testimony or evidence is unfavorable if the party who has the power to produce it fails to do so. See
15 *Graves v. United States*, 150 U.S. 118, 121 (1893).)

16 Defendant County is a government entity and therefore bound to investigate and prosecute those
17 accused of unlawful acts such as sexual harassment. As it is well established in this case that plaintiff
18 filed a whistleblower disclosure and sexual harassment complaint with Maricopa County officials, it
19 is therefore bound by statute and its own policy to investigate and prosecute defendants Medlin,
20 Peterson, and Ramsey.

21 In *Okeani*, the Court found that the Public Defender's Office's representation of a criminal
22 defendant was "directly adverse" to its simultaneous representation of the alleged victim on an

² See DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO COMPEL SEPARATION OF PARTIES, pg. 2 at 13.

1 unrelated matter, because one of its duties *might* include attempting to impeach the credibility of the
2 victim as a witness. (*Okeani v. Superior Court*, 178 Ariz. 180, 871 P.2d 727 (App. 1993)) The Court
3 went on to note that the conflict could not be alleviated by the fact that the defendant and the victim
4 would be represented by different lawyers in the Office because, under AZ-ER 1.10(a), while
5 lawyers are associated in a firm, none of them can knowingly represent a client when any one of
6 them practicing alone would be prohibited from doing so by AZ-ER 1.7.

7 Defendants so called internal “investigation” of plaintiff’s whistleblower disclosure and sexual
8 harassment complaint sent to County officials has already evidenced this conflict of interest. While
9 defendants have continually refused to provide full disclosure of all notes, recordings, or other
10 evidence from that investigation, what little they have provided is filled with hearsay and unfounded
11 statements clearly intended to *discredit* plaintiff. Thereby bringing the fears of conflicting interests
12 as outlined in *Okeani* to reality.

13 Since sexual harassment and retaliation for reporting or opposing such is unlawful as defined by
14 Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. (“Title VII”) and
15 Title I of the Civil Rights Act of 1991, 42 U.S.C. 1981a, Defendants’ actions are clearly outside the
16 scope of their duty. Defendants own citation of *Mechem*³ highlights the folly of their stance on this
17 issue. Truly no court would consider the commission of unlawful acts by Medlin, Peterson, and
18 Ramsey to be acts done “*with a view to further the master's interest.*” Especially when the “*master*”
19 is a government entity charged with protecting the public (and its employees) against these same
20 unlawful acts. This conflict is further exasperated by the fact that defendant Ramsey is accused of
21 committing the *criminal* act of identity theft against plaintiff, and, that the Arizona Office of the
22 Attorney General has assigned that case to the Office of the Maricopa County Attorney for

³ See DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO COMPEL SEPARATION OF PARTIES, pg. 3 at 15

1 investigation and prosecution. Again bringing to reality the fears outlined in *Okeani*.

2 Furthermore, Arizona State Bar Ethics Rule 1.11 states,

3 a lawyer shall not represent a private client in connection with a matter in which the lawyer
4 participated personally and substantially as a public officer or employee, unless the
5 appropriate government agency gives its informed consent, confirmed in writing, to the
6 representation.

7 At no time has any duly authorized official of the County provided any informed consent,
8 confirmed in writing allowing the representation of Medlin, Peterson, or Ramsey.

9 The court should also recognize that counsel for defendants has asserted in other actions with
10 this same plaintiff that the costs of the legal defense will be billed to the Maricopa County
11 Department of Transportation (MCDOT). Since MCDOT is funded by Highway User Revenue
12 Funds (HURF), its use of those tax monies is restricted by Arizona statute. These restricted monies
13 may only be spent for the purposes prescribed in Article IX, § 14 of the Arizona Constitution. Courts
14 in other jurisdictions have held that funds similar to HURF may not be used to pay personal injury
15 judgments (*State ex rel. Varnado v. Louisiana Highway Comm'n*, 147 So. 361 (La. 1933)). As stated
16 in an opinion by the Arizona Attorney General⁴, HURF monies may not be used to pay liability
17 claims against the County or its employees. Likewise, those funds may not be used to pay premiums
18 related to a County's Self-Insurance Trust Fund Premiums. Since the costs associated with providing
19 a defense for Medlin, Peterson, and Ramsey must be billed to the department they work in
20 (MCDOT), it is unlawful for MCDOT to expended tax monies to defend them.

21 Lastly, the court must recognize that counsel for defendant County has never produced any
22 document from Medlin, Peterson, or Ramsey consenting or authorizing the County to appear on their
23 behalf. Without their written consent and authorization, and without a written retainer agreement for

⁴ Arizona Attorney General Opinion No. I05-003 (R04-011), Terry Goddard, May 23, 2005

1 reimbursement to the County for legal expenses incurred, the County is barred by ethics rules from
2 representing defendants Medlin, Peterson, or Ramsey. For all this court knows, the County is forcing
3 their representation upon these individual defendants against their will. To allow such would be a
4 violation of *their* right to due process.

5 **III. SUMMARY**

6 Counsel for defendant Maricopa County has failed to produce any evidence that is in fact self-
7 insured, failed to produce any evidence that is has any right to provide representation to defendants
8 Medlin, Peterson, and Ramsey, or that is has obtained any authority from the individuals to act as
9 their counsel.

10 It is a clear conflict of interest for Maricopa County to provide legal representation for
11 defendants Medlin, Peterson, and Ramsey (emphasis added).

12 Arizona statute expressly prohibits the use of tax dollars for legal expenses or payment of
13 judgments against employees of MCDOT, the agency which Medlin, Peterson, and Ramsey are
14 employed in.

15 **IV. CONCLUSION**

16 For all the points contained herein, the court must recognize that it is unlawful for defendant
17 Maricopa County (Department of Transportation) to provide defendants Medlin, Peterson, and
18 Ramsey with legal representation, and therefore issue an order against such and compelling the
19 separation of these parties.

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2 RESPECTFULLY SUBMITTED this 3rd day of OCTOBER 2005.

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4 By _____

5 Scott M. McNair, Plaintiff Pro Per

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8 ORIGINAL and COPY FILED with:

9 Clerk of the Court
10 United States District Court
11 District of Arizona
12 Sandra Day O'Connor U.S. Courthouse
13 401 W. Washington Street, Suite 130
14 Phoenix, AZ 85003-2118

15 COPY of the forgoing HAND-DELIVERED to:

16 Office of the Maricopa County Attorney
17 Attn: Dan Brenden
18 222 North Central Avenue, Suite 1100
19 Phoenix, Arizona 85004
20 (Counsel for Defendants: Maricopa County, Medlin, Peterson, & Ramsey)

21 COPY of the forgoing MAILED to

22 Jones, Skelton & Hochuli, P.L.C.
23 Attn: Eileen Dennis GilBride
24 2901 N. Central Avenue, Suite 800,
Phoenix, Arizona 85012,