IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES CAMP, Plaintiff, v. BETTY B. CASON in her official capacity as Probate Judge for Carroll County, Georgia and BILL HITCHENS in his official capacity as the Commissioner of the Georgia Department of Public Safety, Defendants.	)	CIVIL ACTION FILE NO. 1:06-CV-1586-CAP

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT BETTY CASON'S MOTION TO DISMISS

Plaintiff, James Camp, files this Memorandum of Law in opposition to Defendant Betty Cason's ("Cason") Motion to Dismiss.

Cason asserts that "Plaintiff has received his requested relief from Defendant Betty Cason." That erroneous statement is the sole basis for Cason's Motion. The faulty underpinnings for Cason's Motion render her Motion untenable, so her Motion must be denied.

Cason filed her Motion [16] on July 26, 2006, contending that the action is moot. As will be shown below, this action is

not moot because Defendants continue to violate the Privacy Act of 1974, the relief requested by Plaintiff has not been fully addressed, and justiciable issues still exists between the parties.

Background

Plaintiff applied to Cason, the Probate Judge of Carroll County, Georgia, for a renewal GFL [6, ¶3]. Cason used the application form created by Defendant Bill Hitchens ("Hitchens"), the Commissioner of the Georgia Department of Public Safety. The application form required Plaintiff to disclose his Social Security Account Number ("SSN") and information about his employment. The form failed to state whether the disclosure of the SSN was mandatory or optional (although Defendants treated it as mandatory), failed to cite to a statute or other authority pursuant to which the SSN was solicited, and failed to disclose all uses contemplated for the SSN [7, Exh. A]. Plaintiff refused to disclose his SSN, and, as a result, Cason refused to process Plaintiff's application [6, ¶5].

In his Complaint[1], filed on July 5, 2006, Plaintiff seeks to remedy past and future violations of the Privacy Act of 1974 and Georgia's GFL application statute. Concurrent with the

complaint, Plaintiff filed a Motion for a Temporary Restraining Order or Preliminary Injunction [2]. A hearing on the motion was held July 11, 2006, and the court granted the motion over both Defendants' objections, ordering Defendants to process Plaintiff's renewal GFL application and temporary renewal GFL application without requiring disclosure of his SSN. [13].

On July 17, 2006, Hitchens filed a GFL application form with this court different from the one currently in use, in that it had two small-font, typed parentheticals as modifications. Hitchens did not, however, file any affidavits or other evidence to support his Motion. ***The revised form still requests employment information and SSN, but characterizes the requests as "optional."*** See Revised Application Forms. [14] Exhibit A.

The proposed GFL application form still violates the Privacy Act, and Cason has not remedied past wrongs, including her maintenance of the social security number and employment information in official records. She does not even make a representation that she intends to expunge this information or use a form that complies with the Privacy Act in the future.

ARGUMENT AND CITATION OF AUTHORITY

As will be discussed in more detail below, this case is not moot. A case or controversy still exists between the parties.

The violations of which Plaintiff complains have not been remedied, and issues remain for the court to decide.

I. Plaintiff Has Not Received All Relief Requested

Contrary to Cason's contention in her brief that "Plaintiff has received his requested relief from Defendant Betty Cason," he has not. Plaintiff sought and received an order requiring Cason to process his GFL application without requiring his SSN [13]. To date, that is the only substantive relief requested by Plaintiff that he has received. Cason suggests that the changes Hitchens proposed to the GFL application somehow grant Plaintiff additional relief. The proposed changes do not grant Plaintiff complete relief. Plaintiff also requested an order to expunge from Defendants' records any information relating to Plaintiff's SSN and employment information. Considering the proposed GFL application modifications in the light most favorable to Defendants, such changes do nothing to address the relief sought for past violations. Moreover, the modified GFL application form still requests the SSN, but it indicates that the SSN is not mandatory. Part of the relief sought by Plaintiff is the warning required by the Privacy Act whenever an SSN is requested, even when disclosing an applicant's SSN is voluntary.

The warning requirement will be addressed in more detail in the next section.

II. Defendants Still Are Violating the Privacy Act

The crux of Cason's Motion is that this case was mooted the moment she complied with the court's Temporary Restraining Order and Hitchens filed a modified GFL application form. As an initial matter, the filing of a form, without more, cannot be evidence in support of a motion. If Cason claims that the case is moot because of changed circumstances, she must at least file an affidavit or other competent evidence that the circumstances have changed and that the earlier circumstances will not resume. It is clear from her motion, however, that she intends to continue using a form that violates the Privacy Act.

Even assuming arguendo that Hitchens has changed the official GFL application form and has distributed it to all of the Georgia probate judges for immediate use, the revised form still violates § 7(b) of the Privacy Act:

> Any federal, state, or local government agency which requests an individual to disclose his Social Security Account Number shall inform that individual whether that disclosure is mandatory or voluntary, by which statutory or other authority such number is solicited, and what uses will be made of it.

From the forgoing statute, it is clear that state or local government must do three things to comply with Section 7(b):

(1) Inform the applicant whether the disclosure of a SSN is mandatory or voluntary;

(2) Provide the authority for requesting the applicant's SSN; and

(3) Warn the applicant of all uses contemplated for the SSN after the applicant discloses it.

Soliciting SSNs on a voluntary basis does not negate the other two requirements of Section 7(b).

(A) Voluntary Disclosure

At best, Hitchens' revised form addresses only the first requirement of Section 7(b), by stating that the disclosure of the SSN is optional. Because the form Hitchens proposes to utilize does not meet the remaining two requirements of Section 7(b), the request that an applicant disclose his SSN, even voluntarily, is still an unlawful request.

(B) Authority for the Request

The form does not purport to inform the applicant by what statutory or other authority the SSN is requested. That is because there is no such legal authority. "The forms must also indicate under what authority – whether statutory or otherwise –

such disclosure is sought." Schwier v. Cox, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005).

(C) All Uses to be Made of the Applicant's SSN

The revised form also fails to warn applicants of ***all*** the uses contemplated for the applicants' SSN. "[A]ll uses contemplated for the SSNs must be disclosed." Id. The revised form states that the SSN "will help prevent misidentification," but it does not indicate how it will be used (to accomplish that) and whether preventing misidentification is the only use contemplated for it. To comply with the Privacy Act, Defendant must warn potential applicants of all uses to be made of the SSN – e.g., what other state and federal agencies will have access to it, whether it will be disclosed by the probate court to law enforcement, and any other uses contemplated. "In redrafting, defendant may consider a more detailed instruction, such as that if the SSN is provided, it will remain confidential and subject to disclosure as provided for [by the applicable statute]." Id. In Schwier, the Georgia Secretary of State included a statement on the voter registration form indicating ***one*** use to which the SSN would be put (i.e., to verify identification). The court found, however, that the Secretary of State used the SSN for other purposes which had not been disclosed. Id. at 1275, n.9.

III. Plaintiff Should be Granted Additional Relief

As Cason notes, a case is moot "when the issues presented are no longer 'live' or the parties lack a cognizable interest in the outcome." United States Parole Commission v. Geraghty, 445 U.S. 388, 396, 100 S.Ct. 1202, 1208 (1980). The court in Geraghty described issues as "live" when the plaintiff still sought relief. The court equated a cognizable interest in the outcome with standing. Id. In the present case, Plaintiff still seeks relief that is in addition to and different in kind from the relief he actually has received by way of the TRO. There is no question that Plaintiff has standing.

In the Complaint, Plaintiff requested, in addition to the TRO, the following substantive relief:

1. A declaration that the GFL application form in use (at the time) by Defendants violates the Privacy Act
2. An injunction prohibiting Defendants from requiring disclosure of the SSN to obtain a GFL or renewal GFL.
3. An injunction requiring Defendants to set forth the mandatory warning in § 7(b) of the Privacy Act, if Defendants seek the SSN on an optional basis
4. An injunction requiring Defendants to expunge Plaintiff's SSN from their systems and records

5. A declaration that Defendants violated Plaintiff's rights under the Federal Privacy Act, the 14th Amendment to the United States Constitution, and Article I, Section I, ¶ VIII of the Georgia Constitution
6. A declaration that employment information is not pertinent nor relevant to eligibility for a GFL
7. An order prohibiting Defendants from requiring employment information as a precondition of obtaining a GFL
8. An order requiring Defendants to expunge Plaintiff's employment information from their records and systems
9. Attorneys fees and costs

Cason makes no claim in her Brief that items 3, 4, 5, and 9 are moot. Cason cannot reasonably claim that a proposed change in the application form going forward will remedy past wrongs. Cason has not proposed to expunge SSNs and employment information from existing records.

This action is a civil rights case under 42 U.S.C. § 1983, and "the prevailing party should ordinarily recover an attorneys' fee… The discretion to deny attorneys' fees to a prevailing plaintiff under § 1988 is 'exceedingly narrow'." Doss v. Long, 624 F.Supp. 1078, 1080 (N.D. Ga. 1985). It is well established that "a party may be considered to be 'prevailing'

if the litigation successfully terminates by … mooting of the case where the plaintiff has vindicated his right. This is true even where the remedial action moots the lawsuit before trial and the plaintiff voluntarily dismisses the suit. [citation omitted]" Martin v. Heckler, 773 F.2d 1145 (11th Cir. 1985), *abrogated on other grounds*, 489 U.S. 782. Here, Plaintiff already received, over the objection of both Defendants, an injunction requiring Defendants to allow Plaintiff to apply for a GFL without providing his SSN, and Cason concedes in her Brief that Plaintiff has "received . . . requested relief." Plaintiff is not moving for fee under § 1988 for attorneys' fees at this time, but shows that there is additional relief to be granted by the court. It is, therefore, premature to declare the entire case moot.

IV. Defendants' Alleged Voluntary Cessation Does Not Moot the Case

"[T]he mere voluntary cessation of a challenged practice does not render a case moot." Jews for Jesus, Inc. v. Hillsborough County Aviation Authority, 162 F.3d 627, 629 (11th Cir. 1998), citing County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979). In this case, it is not even clear that Defendants have voluntarily ceased the

challenged practice merely because Hitchens filed a revised application form.

In her Motion, Cason contends that her acceptance of the application pursuant to this court's order requiring her to do so and Hitchens' filing with this court of a proposed change in the document renders this case moot. "The test for mootness, however, is a stringent one . . ." National Advertising Company v. City of Fort Lauderdale, 934 F.2d 283, 286 (11th Cir. 1991) (involving a government defendant). "[I]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." Id. (citing City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289, 102 S. Ct. 1070, 1074-75 (1982) (also involving a government defendant)). In Fort Lauderdale, the Eleventh Circuit reversed the District Court's holding that an amendment to Fort Lauderdale's code, prompted by litigation, mooted the litigation over the code.

"For a defendant's voluntary cessation to moot any legal questions presented and deprive the court of jurisdiction, it must be absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur. In other words, voluntary cessation of offensive conduct will only moot

litigation if it is clear that the defendant has not changed course ***simply to deprive the court of jurisdiction***." National Advertising Company v. City of Miami, 402 F.3d 1329, 1333 (11th Cir. 2005) (emphasis added) (citations and punctuation omitted). In the present case, it is clear that the wrongful behavior has not stopped, as the currently proposed GFL application form still violates Section 7(b). Moreover, neither Defendant has made even a representation to this Court that the wrongful behavior will cease.

This Court has had occasion to consider situation where a plaintiff receives some, but not all, the relief he was seeking. In Turner v. Habersham County, Georgia, 290 F. Supp. 2d 1362 (N.D. Ga. 2003), the defendant took voluntary action in an attempt to ameliorate the civil rights violation to plaintiff. This Court distinguished the facts of that case from cases where mootness was found by noting that "the defendant's change of policy gave plaintiffs exactly what they were seeking," thus mooting the case. Id. at 1368 (emphasis added). In Turner (as in the instant case), the defendant took ***some*** action, but the action taken did not give the plaintiff the relief he was seeking. Accordingly, the case was not moot. Id.

Conclusion

Plaintiff has shown that the premise for Cason's Motion, that Plaintiff has received his requested relief, is faulty. Cason does not address all the relief to which Plaintiff is entitled. Cason has not presented competent evidence indicating that circumstances have changed. The actual form in use today by Cason is the very same form being used prior to this litigation, but even if Cason is using Hitchens' modified form, the proposed modification to the GFL application form still violates the Privacy Act, and thus the case is not moot. For the foregoing reasons, this case is not moot, and a justiciable controversy still exists between the parties. Cason's Motion must therefore be denied.

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Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing Memorandum of Law was prepared using Courier New 12 point, a font and point selection approved in LR 5.1B.

_____/s/ John R. Monroe_____
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CERTIFICATE OF SERVICE

I hereby certify that on July 27 2006, I electronically filed the foregoing PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT HITCHENS' PRE ANSWER MOTION TO DISMISS with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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