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 REPLY TO DEFENDANT HITCHENS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, James Camp, files this Reply to Defendant Hitchens in Support of Plaintiff's Motion for Summary Judgment.

Background

Plaintiff commenced this action after Defendant Cason, the judge of the Carroll County, Georgia, Probate Court, refused to issue him a Georgia firearms license ("GFL") unless he disclosed his Social Security Account Number ("SSN"). Defendant Cason would not bend from this requirement because she used a GFL application form developed by Defendant Hitchens, the Commissioner of the Georgia Department of Public Safety, and that form required the SSN. Plaintiff alleged violations of

Sections 7(a) and 7(b) of the Privacy Act, as well as violations of the Georgia Weapons and Firearms Act. Before the Court is Plaintiff's Motion for Summary Judgment.

Summary

Hitchens is claiming for the third time that this case is moot. He first claimed the case was moot when he alleged that he had changed the Georgia firearms license ("GFL") application form (in July 2006). Doc. 15. This Court rejected that theory. Doc. 47, pp. 7-8. The Eleventh Circuit also rejected that theory and the theory that the case was moot when Defendant Cason issued Plaintiff a temporary GFL. Doc. 75, pp. 9-11. This Court adopted the decision of the Court of Appeals as its own. Doc. 77. In a last, desperate attempt to moot this case at the eleventh hour,[1] Hitchens has changed the GFL application yet again. For the reasons discussed below, the tired, old claim of mootness, sounding no different the third time around, should be rejected.

Argument

I. Hitchens Does Not Challenges the Merits

As an initial matter, it is important to note that Hitchens has not challenged the merits of Plaintiff's case. That is, he

[1] Or the tenth month, as the case may be.

does not claim that he did not violate Section 7(a) of the Privacy Act. He does not claim that he did not violate Section 7(b) of the Privacy Act. He does not claim that he did not violate the Georgia Weapons and Firearms Act. Rather, Hitchens' brief assumes he did violate the law, but claims that such violations do not matter because he changed the application form after he lost in the Eleventh Circuit. Hitchens relies entirely on his ***third*** claim that this case is moot.

II. The Case is Not Moot

Hitchens' mootness argument relies solely on the fact that he alleges he changed the GFL application form again. Hitchens says in his affidavit that the revised form, without SSN and employment information requested (even voluntarily), has been distributed via email to every probate court in Georgia at an unspecified date "in May 2007,"[2] with instructions to destroy all previous versions and begin using the new form immediately.

As stated in the response to Hitchens' cross motion for summary judgment, it is not even clear that the new form has been distributed. *See, e.g.*, various declarations filed as evidence in opposition to Hitchens' Motion for Summary Judgment. Even more surprising is the fact that Co-Defendant Cason, the

[2] The Eleventh Circuit issued its opinion in March.

President of the Probate Judges Council, appears not to have any knowledge that Hitchens has changed the GFL application form, swearing the "present form makes an applicant's SSN and employment information optional." Doc. 83, ¶ 12.

Even assuming, *arguendo,* that the form has changed (yet again), the case still is not moot. "It 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." *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289, 102 S.Ct. 1070, 1074 (1982). "[I]f it did, the courts would be compelled to leave the defendant to return to his old ways." *Id.* [citations omitted]. "Where a defendant voluntarily ceases challenged conduct, the case is not moot because nothing would prevent the defendant from resuming its challenged action." *Sierra Club v. U.S. Environmental Protection Agency,* 315 F.3d 1295, 1303 (11th Cir 2002). "A case ***might*** become moot if subsequent events made it ***absolutely*** clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn.,* 393 U.S. 199, 203, 89 S.Ct. 361 (1968) [emphasis supplied].

Hitchens, as the party asserting mootness, must prove to this Court that the form will not change again. *Id.* Hitchens has offered no evidence that the practice will not recur, preferring instead to make an unsupported and conclusory statement that it will not. Doc. 80, p. 13. "Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon [the party asserting mootness]." *United States v. Concentrated Phosphate Export Assn.,* 393 U.S. 199 at 203.

Claiming to cease offensive conduct on the date that one files a motion, ten months into a case where the prior argument of mootness has already been denied on appeal, is nothing more that changing course to deprive the court of jurisdiction. "[V]oluntary 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) (*"National II"*) [emphasis supplied]. In *National II*, the court explained that, where a government agency changes its conduct, six weeks after a lawsuit is filed, and then tries to get the case dismissed on mootness grounds the next day, the Court is "sufficiently convinced" that the case should not be

dismissed as moot. *Id.* at 1334 (explaining its holding in *National Advertising Company v. City of Fort Lauderdale,* 934 F.2d 283 (11th Cir 1991) ("*National I*")). Hitchen's conduct is exactly the same as the City of Fort Lauderdale's, and therefore it is conduct that the Eleventh Circuit Court of Appeals has held ***will not moot a case.***

In the present case, Hitchens has pulled this last minute change of conduct not once, but twice, for the purpose of mooting the case, waiting until 58 minutes before he filed his motion to dismiss to change, ostensibly, his conduct last time. Doc. 17, p. 14. This time, Hitchens avoided informing the court and Plaintiff of the precise minute on which he made changes, Doc. 81-3, ¶ 18, but he made them in an obvious attempt to deprive this Court of jurisdiction.

Hitchens' litigation attorneys are driving the application form revision process. "***Eddie Snelling of the AG's office has asked*** that we take another look at the application form in light of our recent litigation." Doc. 81-4, p. 19 (emphasis added). Hitchens made changes only because the Deputy Attorney General, representing him in this case, wanted him to do so, and even then he waited until the last possible moment in the litigation

to act, seeking not to comply with the law but to support a motion to deprive the Court of jurisdiction.

Hitchens argued for the legality of his form in his Answer on May 7, 2007 (nine days before responding to Plaintiff's motion). In his Answer, Hitchens denied that employment information is non-pertinent, irrelevant, and not designed to elicit information related to GFL eligibility, Doc. 78, ¶ 20, Doc. 1, ¶ 32, and that his first (or second) versions of the GFL application form failed to give a warning as required by Section 7(b) of the Privacy Act. Doc. 78, ¶ 21, Doc. 1, ¶ 33.

Hitchens relies on several cases to support his claim that the case at bar is moot. Each of these cases easily is distinguished from the instant case, and they are discussed in detail in Plaintiff's Response to Hitchens' Motion for Summary Judgment. None of those cases have anything close to with Hitchens' iterative, 10-month, litigation attorney-driven form modifications made for the sole purpose of mooting the case. Such delusive conduct contravenes one of the main purposes for the mootness doctrine noted by the Supreme Court: to conserve judicial resources. "To abandon the case at an advanced stage may prove more wasteful than frugal." *Friends of the Earth, Inc. v. Laidlaw Environmental Services,* 528 U.S. 167, 191-192,

120 S.Ct. 693, 710 (2000). This case has been the subject of two separate appeals to the Eleventh Circuit, as well as two motions to dismiss and two motions for summary judgment. These "sunk costs" weigh in favor of retaining this case. *Id.*

III. Plaintiff Withdraws His Request for Attorney's Fees Against Hitchens – For Now

Because Hitchen's argument is that the attorney fee issue is premature, Plaintiff is withdrawing his request for attorney fees and costs against Hitchens and will file a separate motion for attorney's fees against Hitchens at the appropriate time in this case.

IV. Hitchens Admits Plaintiff's Statement of Undisputed Facts

Hitchens' Response [Doc 80-2] to Plaintiff's Statement of Undisputed Facts [Doc. 39] merits a reply. Hitchens attempts to deny Statements of Fact Nos. 6, 7, 8, 9, 10, 12, and 18 on the grounds that he lacks information or knowledge sufficient to admit or deny their validity. Hitchens did not, however, state in an affidavit that he could not present facts essential to justify his opposition to such Statements of Fact, pursuant to Fed. R. Civ. P. 56(f).

Hitchens' tactic is disallowed by this Court's rules. "The response that a party has insufficient knowledge to admit or

deny is not an acceptable response unless the party has complied with the provisions of Fed. R. Civ. P. 56 (f). L.R. 56.1(B)(2)(a)(4). These facts are therefore deemed admitted by Hitchens.

Hitchens objects to the "characterization of the contents" of a letter in Plaintiff's Statement of Fact No. 13. Hitchens failed to "directly refute" this fact, and it is therefore deemed admitted by him. In any event, the letter is in the record.

Hitchens does not dispute the validity of Statement of Facts Nos. 14 and 17, but claims they are not material. Hitchens fails to explain why, but Plaintiff submits that they are material and observes that, if they are not material as to Hitchens, there is no harm in deeming them admitted.

Hitchens has admitted, or is deemed to have admitted, each of Plaintiff's Statement of Facts.

V. Plaintiff is Entitled to Summary Judgment

It is undisputed that Hitchens created a form that required Plaintiff to disclose his SSN and employment information. As a result of the form, and Plaintiff's election not to disclose his SSN, Plaintiff was denied a right, benefit or privilege, and such denial is directly attributable to Hitchens' form and its

requirements. It is clear Hitchens' form did not say 1) whether disclosure of the SSN was voluntary or mandatory; 2) by what statutory or other authority the SSN was requested; and 3) what uses would be made of the SSN. Finally, Hitchens has not alleged or shown that employment information is material or pertinent to GFL applications. It is clear that Hitchens' form violated Sections 7(a) and 7(b) of the federal Privacy Act and the Georgia Weapons and Firearms Act.

CONCLUSION

Hitchens does not refute the merits of Plaintiff's claims. He does not dispute that he violated Sections 7(a) and (b) of the Privacy Act or that he violated the Georgia Weapons and Firearms Act. He defends himself solely on the grounds that the case is moot because of his belated attempts to modify the GFL application form. The changes he made were made for the purpose of depriving this Court of jurisdiction, and this is not allowed. He has failed to satisfy his "heavy burden" of proving that there is "absolutely no possibility" that the wrongful conduct will recur. He also has waiting so long to make his second changes to the form that he has caused the judicial system to incur significant "sunk costs."

The case is not moot. Hitchens has not refuted Plaintiff's Statement of Undisputed Facts, and he has not defended himself on the merits at all. Plaintiff is entitled to summary judgment as a matter of law.

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Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing Reply to Defendant Hitchens in Support of Plaintiff's Motion for Summary Judgment 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 June 4, 2007, I electronically filed the foregoing Reply to Defendant Hitchens in Support of Plaintiff's Motion for Summary Judgment 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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