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 RESPONSE TO DEFENDANT HITCHENS IN OPPOSITION TO HITCHENS' MOTION FOR SUMMARY JUDGMENT

Plaintiff, James Camp, files this Response to Defendant Hitchens in Opposition to Hitchens' Motion for Summary Judgment.

Introduction

Hitchens moves for summary judgment on the ground that this case is moot. His contention is based on a last-minute hour change to a form that he filed after ten months of litigation and two appeals to the Eleventh Circuit Court of Appeals. A change of conduct undertaken solely to deprive the court of jurisdiction will not result in mootness.

Hitchens does not bother to address any substantive legal or factual matters, preferring to rely on his sole argument: mootness.

Argument

I. There is a Genuine Issue of Material Fact

Summary judgment is appropriate only when there is no genuine issue of material fact. Fed. R. Civ. P. 56. "A dispute about a material fact is 'genuine' if the 'evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Jeffery v. Sarasota White Sox, Inc.* 64 F.3d 590, 594 (11th Cir. 1995), quoting *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

There is a genuine issue of material fact for Hitchens' Motion. Hitchens claims in his Affidavit that he has distributed a new GFL application form (again) to all probate judges. Doc. 81-3, ¶ 18. Although Plaintiff has had a very limited time for investigation of Hitchens' most recent claim, and discovery has not yet begun, it is plain that several probate courts do not have and are not even aware of Hitchens' new form. *See* Declaration of Matt Knighten, ¶ 3; Declaration of Matthew Silva, ¶ 3; Declaration of Ben Garner, ¶ 3. A fourth declaration, the Declaration of Curtis W. McMichael III, shows

that the most populous county in the state is still using the old form that ***requires*** disclosure of the applicant's SSN and employment information.

Even more surprising, however, is the fact that Co-Defendant Cason ***appears not to have any knowledge that Defendant Hitchens has changed the GFL application form***. In her affidavit, she swears that the "present form makes an applicant's SSN and employment information optional." Doc. 83, ¶ 12. Nowhere in her filings does she even mention the latest changes Defendant Hitchens claims to have made.

This omission is significant because Cason is not only a defendant in this case, but she also is the President of the Council of Probate Judges of Georgia. If a co-defendant, Probate Judge, and President of the Council of Probate Judges of Georgia has not received the new form, or, indeed, appears to be unaware of the new form after the date on which Hitchens testified it is already in use, this certainly calls into question any claim of mootness based on dissemination of yet another last minute revision to the form.

When Hitchens revised the GFL application form in his ***first*** attempt to deprive this Court of jurisdiction, Plaintiff supplied two declarations rebutting Hitchens' claim that the new

form was in circulation. Docs. 28 and 30. The Eleventh Circuit ruled that those two declarations "if anything, create a material fact issue as to whether the original form remains in circulation or has been replaced." Doc. 75, p. 11. This Court adopted the judgment of the Circuit Court as its own. Doc. 77. Plaintiff once again has pointed out factual disputes, this time over whether Hitchens' ***second*** belated attempt to deprive this court of jurisdiction has been implemented.

II. Hitchens Does Not Refute the Merits of Plaintiff's Claims

Hitchens has not challenged the merits of Plaintiff's case. That is, he has not challenged Plaintiff's claim that he violated Section 7(a) and Section 7(b) of the Privacy Act. He does not challenge his violation of the Georgia Weapons and Firearms Act. Instead, he relies entirely on his ***third*** claim that this case is moot as grounds for his Motion. Accordingly, if his mootness argument fails, whether because of a factual dispute, as shown above, or because of a legal issue, as shown below, then Hitchens' entire motion for summary judgment fails.

III. The Case is Not Moot

Hitchens' mootness argument is based on another last-minute change to the GFL application form. In other words, once again Hitchens has waited until the last possible hour when he had to

respond, substantively, to Plaintiff's arguments, before filing a purported change in an attempt to deprive the court of jurisdiction. Hitchens claims in his affidavit that the revised form, without Social Security Account Number ("SSN") and employment information requested (even voluntarily), has been distributed via email to every probate court in Georgia sometime "in May 2007,"[1] with instructions to destroy all previous versions and begin using the new form immediately.

As noted above, it is not even clear that the new form has been distributed. Even assuming, *arguendo,* that the form has changed (yet again), *the case 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.*

[1] Presumably before his motion but obviously after his May 7, 2007 Answer defending the old form.

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]. It is not even clear that Hitchens has ceased the challenged practice of requested SSNs and employment information, let alone that the wrongful behavior could not reasonably be expected to recur.

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. He merely concludes 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. Hitchens does not even bother to include such a statement in his affidavit.

Moreover, a case does not become moot when a defendant changes behavior for the purpose of depriving the court of jurisdiction. "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) ("*National II*") [emphasis supplied]. The Court of Appeals, in *National II*, 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*"))[2].

In the present case, Hitchens has tried not once, but twice, to change his illegal practices for the sole purpose of mooting the case. The first time, he waited until 58 minutes before the time he filed a motion to dismiss on the grounds of mootness to make a change in the form. Doc. 17, p. 14. In addition, Hitchens' litigation attorneys were directing the revisions. *Id.* This time, after assiduously avoiding any change to the form until he had to file a response to a motion,

[2] To clarify, the Court in *National II* was discussing *National I*, but the *National II* Court does not repeat the facts of *National I.* It is necessary to read *National I* to learn that the defendant amended its ordinance six weeks after the lawsuit was filed. 934 F.2d at 284.

Hitchens carefully avoided informing the court and Plaintiff of ***exactly*** when he made the changes to the form (saying only that it was sometime in May 2007). Doc. 81-3, ¶ 18.

It is clear from Hitchens' filings, however, that his litigation attorneys continue to drive the application form revision process. Hitchens filed an email dated March 21, 2007, from his Deputy Director of Legal Services to Cason, in which the Deputy Director says that "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. Despite what he would have the Court believe, Hitchens did not investigate the legality of the GFL application form out of concern for having it comply with the law. He did so solely because the attorney general, representing him in this case, wanted him to do so.

Moreover, Hitchens' inch-by-inch changes to the form belie his motivation. Hitchens' forms have been requesting SSNs for years. Doc. 83, p. 5, ¶ 11. Not until Plaintiff commenced this case did Hitchens become concerned about complying with the Privacy Act. Then, in an attempt to moot the case, Hitchens claims to have made the request for SSNs and employment information optional. After waiting ten months through

litigation in this court and the Eleventh Circuit, to see if that would work (it did not), he changed the form again (at the urging of his litigation counsel). He denied ***as recently as May 7, 2007***, when he filed his Answer, that employment information is non-pertinent, irrelevant, and not designed to elicit information related to GFL eligibility. Doc. 78, ¶ 20, Doc. 1, ¶ 32. He also denied in that same Answer 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.

Now Hitchens claims that between May 7, 2007, when he filed his Answer insisting that his form complied with the law, and May 16, 2007, when he filed his motion for summary judgment, he has decided that he should change his form ***again*** to comply with the law. An epiphany occurring almost a year into the case during a narrow window of nine days in May is unconvincing. He was not attempting to comply with the law with which he has ***insisted for ten months*** he already was in compliance.

The Eleventh Circuit has held that waiting six weeks after a lawsuit is filed to change a challenged practice, and then filing a suggestion of mootness the next day suggests a purpose ***to deprive the Court of jurisdiction***, and a change in practice

with this motivation will not operate to moot a case. *National II*, 402 F.3d at 1333, *citing National I,* 934 F.2d at 284. Hitchens has attempted to do the very same thing not once, but twice.

IV. Hitchens' Cases Do Not Support a Finding of Mootness

Hitchens relies on several cases to support his claim that the case at bar is moot. Each of these cases is easily distinguished from the case at bar. None of those cases cited involve 10-month delays and challenged practice modifications driven by the litigation attorney for the sole purpose of mooting the case.

Brooks v. Georgia State Board of Elections, 59 F.3d 1114 (11th Cir 1995), Hitchens' first case, is not even a case about government's voluntary changes to a challenged practice. Instead, it is about a lapse of time making the dates being appealed no longer justiciable. 59 F.3d at 1119. It does not support Hitchen's repeated claim of mootness in this case.

Hitchens' second case, In *Jews for Jesus v. Hillsborough County Aviation Authority*, 162 F.3d 627 (11th Cir. 1998), the challenged practice was a prohibition on the distribution of literature at an airport. The defendant abandoned the prohibition one month after filing of the lawsuit, and the

prohibition remained repealed for three years thereafter. *Id*. at 629. We have no such record of lengthy compliance with the law in this case. In fact, nine days before Hitchens filed the instant Motion, he was contending that his practice was fine the way it was. Moreover, even while Hitchens is contending there has been a change to the challenged practice, the President of the Probate Judge's Council remained unaware of such a change, contending that the case was moot because of events that occurred in the summer of 2006.

In *Troiano v. Supervisor of Elections*, 382 F.3d 1276 (11th Cir. 2004), the next case relied upon by Hitchens, the challenged practice was the failure to make audible voting instructions available to the visually impaired. Sixteen months ***before*** the lawsuit was filed, the defendant placed an order for equipment to enable such a system, *Id*. at 1278, And, after a variety of difficulties using the equipment, *Id*. at 1280, the systems were fully functional in every voting precinct one day ***before*** the defendant was served with a lawsuit. *Id*. at 1281. Compare that situation to the present case, in which Hitchens argues that a form change ten months after the initiation of the lawsuit, rather than sixteen months before the lawsuit, should moot the case.

In *National II,* the challenged practices were various restrictions on outdoor advertising. The case was dismissed by the district court on the grounds that the plaintiff did not have standing to bring the case in the first place. 402 F.3d at 1331. By the time the district court entered its order granting summary judgment to the defendant (on standing grounds), the ordinance at issue had been repealed for 17 months. *Id*. at 1330. By the time the Eleventh Circuit reversed with instructions to dismiss the case on mootness grounds, the ordinance had been repealed for over three years. *Id.* This result is somewhat reminiscent of the *Jews for Jesus* case. But there is a very important test articulated in *National II*. "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***." *402 F.3d* at 1333 [emphasis supplied]. There was no evidence in the record that the City of Miami simply amended its code on the same day its response to a summary judgment motion was due, as in Hitchens' twice repeated conduct in this case. Hitchens' conduct is more like that in *National I*, when the City of Fort Lauderdale amended its Code the day before filing a motion to dismiss for mootness. The court rejected that motion.

In *Access 4 All, Inc. v. Casa Marina Owner, LLC,* 458 F.Supp.2d 1359 (S.D. Fla 2006), Hitchens' final case, the challenged practice was the failure of a private property owner to make his facility compliant with the Americans with Disabilities Act. The defendant, contemporaneously with purchasing the property nine months **before** the case was filed, had the building redesigned to comply with the ADA, and budgeted $38 million on renovations. The court found that, not only was the case moot, but that plaintiff should be liable for defendant's attorney's fees for failure to investigate his claims before bringing them. 458 F.Supp.2d at 1368.

Thus, all the cases cited by Hitchens to support his claim that the case at bar is moot bear one or more of the following characteristics not shared here: 1) the challenged practice was abandoned before, or shortly after, filing the case; 2) the challenged practice was abandoned for several years without reverting to the improper conduct; 3) there was no challenged practice, but instead a lapse of time when the relief sought was time sensitive; and 4) the challenged lack of access was planned to be remedied nine months before the case was brought. In the case at bar, 1) Hitchens cannot show that he abandoned his illegal forms before, or shortly after, the case was filed (he

still used them 10 months later); 2) Hitchens cannot show several years' worth of abandoned practice (he has attempted to show only that he abandoned his illegal practice when he filed his motion for summary judgment); 3) there is no time-sensitive settlement agreement for the Court to approve; and 4) Hitchens cannot show that he planned to remedy the violations nine months before the case was brought. Hitchens has not cited a single case to support his claim of mootness after belated, grudging, last-minute changes taken only because a response to a motion for summary judgment could not any longer be put off.

The Supreme Court has noted that a purpose in the mootness doctrine is to conserve judicial resources, and "[t]o 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). Here, the 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 a case, unless "one or both of the parties plainly lack a continuing interest." *Id.* The Eleventh Circuit already has ruled that Camp has a continuing interest in this case. Doc. 75, p. 9.

V. Plaintiff Has Standing

Hitchens also claims that Plaintiff lacks standing "with regard to claims of harm in the future." Doc. 80, p. 14. This claim need not be given detailed discussion, as the doctrine of standing does not apply to any of Hitchens arguments.

Standing is the "requisite personal interest that must exist at the commencement of the litigation…." *United States Parole Commission v. Geraghty,* 445 U.S. 388, 397, 100 S.Ct. 1202, 1209 (1980). Hitchens does not argue against standing in this context. Instead, he seems to think Plaintiff has ***lost*** standing because Plaintiff obtained a GFL and because Hitchens changed the GFL application form. In other words, Hitchens claims Plaintiff ***lost*** standing because of events that occurred after the case began.

What Hitchens claims is not possible. As noted above, standing is a state of affairs ***at the commencement of the litigation.*** It does not change as the litigation progresses. What Hitchens actually describes is mootness, which has been discussed extensively above.

Hitchens does cite some cases dealing with standing, but each of them found lack of standing based on allegations in the

complaint. That is, they all address the status of the parties ***at the commencement of the litigation***.

Because Hitchens' claim of lack of standing is based solely on events occurring ***after*** the commencement of litigation, it must fail.

CONCLUSION

There is a genuine issue of material fact, as Plaintiff has shown that several probate courts do not have Hitchens' new form. 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 relies solely on the ground that the case is moot because of his second attempt to modify the GFL applications form at the last possible minute when filing a motion.

Defendant Hitchens has now tried twice to deprive this Court of jurisdiction through last minute changes to the form made just in time to file a motion relating to mootness. This Court should be "sufficiently convinced" the second time around that he made these multiple last minute changes for the purpose of depriving this Court of jurisdiction. As such, 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 waited 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' Motion for Summary Judgment must be denied.

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Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing Response to Defendant Hitchens in Opposition to Hitchens' 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 PLAINTIFF'S RESPONSE TO DEFENDANT HITCHENS IN OPPOSITION TO HITCHENS' 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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