UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CITIZENS for RESPONSIBILITY and ETHICS
in WASHINGTON (CREW) and
PUBLIC EMPLOYEES for
ENVIRONMENTAL RESPONSIBILITY
(PEERS), et al.

Plaintiffs

v. Civil Action 18-406

SCOTT PRUITT, et al.,

Defendants

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Washington, D.C
Tuesday, August 28, 2018
10:00 a.m.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JAMES E. BOASBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Anne L. Weismann, Esq.
Conor M. Shaw, Esq.
CREW
455 Massachusetts Avenue, NW, 6th Floor
Washington, DC 20001
(202) 408-5565

For the Defendants: Steven A. Myers, Esq.
U.S. DEPT. OF JUSTICE
Civil Division, Federal Programs Branch
20 Masachusetts Avenue, NW
Washington, DC 20530
(202) 305-8648

Court Reporter: Lisa Walker Griffith, RPR
U.S. District Courthouse, Room 6507
Washington, D.C. 20001
(202) 354-3247

P R O C E E D I N G S

THE DEPUTY CLERK: This is Civil Action 18-406. Citizens for Responsibility and Ethics in Washington and Public Employees for Environmental Responsibility versus Scott Pruitt, et al.

Counsel, please approach the lectern and identify yourselves for the record.

MS. WEISMANN: Good morning, Your Honor. Anne Weismann on behalf of the plaintiffs. With me also at counsel table is Conor Shaw with CREW and Paula Dinerstein with PEER, the Public Employees for Environmental Responsibility. I do also want to note that our summer law clerk, Jaimie Davidson is here as well.

THE COURT: Okay. Thank you. Welcome.

MR. MYERS: Good morning, Your Honor. Steven Myers for the Justice Department, on behalf of defendants.

THE COURT: Thank you. Good morning to you.

So part of this, the central piece of the status is where do you want to go from here. This is not an ordinary kind of case.

So, Ms. Weismann, why don't you tell me how you wish to proceed first.

MS. WEISMANN: Thank you, Your Honor.

I submit that the plaintiffs in this case are similarly situated to essentially every other plaintiff in

a civil lawsuit. Having survived the government's motion to dismiss, the next logical step discovery. Of course, rule 26(b) of the Federal Rules of Procedure entitles the plaintiffs to obtain discovery regarding any non-privileged matter that is relevant. It is pretty broad.

We think that discovery is particularly appropriate here, given the nature of our claims. As you know, we have two claims. One goes to the adequacy of the agency's recordkeeping policies and the extent to which they have put effective controls in place. But the second claim goes to -- we allege that top agency officials affirmatively elected not to create records of their actions and they directed others within the agency not to create records in violation of the Federal Records Act.

Just the very nature of that claim means that there are a lot of facts at issue. And beyond that, these are facts that are not readily obtainable through paper because we're alleging there is no record. These were directives given orally and the end result was that paper was not created. So we think discovery, and in particular depositions, really are the only way to get to the heart of this issue.

Now I must say, I had a conversation, government counsel approached us yesterday. Of course, they're more than fully adequate to speak for themselves. But I know

that what they will propose, my understanding is an opportunity to file yet another motion, also to avoid having to file an answer. I would submit that both procedurally and substantively that approach is impermissible.

Rule 12(g) is very clear that you are supposed to bring all your issues in one motion. And so to the extent any motion they now wish to file would rely on information or documents that were available to them earlier and that they elected not to include, it would be impermissible.

I think instead that counsel has suggested that they're going to argue the case as moot because they have now issued some kind of interim agency guidance that, by his representation, includes the regulatory language that we submit it was absent.

Even if that's the case, Your Honor, the law is clear that voluntary cessation of a legal action does not moot a case. The Supreme Court has made clear --

THE COURT: I'm not going to rule on --

MS. WEISMANN: I did just want to highlight for the Court that we do think there are both procedural and substantive problems with what we believe the government is about to propose.

But to go back to what we want, we submit that we can conduct targeted discovery, aimed at what is at issue

here. And that the most effective way to do that, we do anticipate that we would want some documents, especially documents that would provide the Court with a complete picture about what the policies and guidance are, not just documents that are sort of selectively chosen by the government. And also depositions.

And we are mindful of not unduly complicating the case. I would ask, however, for a period of 120 days to conduct discovery, just given the sort of scheduling issues that I anticipate.

We're in the process of identifying with more certainty the deponents we would like. But I would highlight for the Court that they would include former EPA administrator, Scott Pruitt, and the current acting administrator, Andrew Wheeler, because I think they're both clearly people who have relevant information and it's information that we can't get from other sources. But they're by no means the only deponents that we would seek. So we're prepared to proceed with discovery. And as I said, I think while we want to accomplish it as quickly as possible, I think a realistic timeframe is 120 days.

THE COURT: Okay. Thank you very much.

Mr. Myers, your position on how we should next proceed.

MR. MYERS: Thank you, Your Honor. So we do

unsurprisingly have a very different view of how the case should proceed. If you look at the claims that are left in this case, they really both boil down to an allegation that there is a policy, whether formal or informal, of not complying with the records creation requirements of the FRA.

Obviously the government's EPA disputes that it was ever in violation of what the FRA requires. But our proposal would be to file a motion to dismiss this case as moot, or in the alternative, for summary judgment, focusing in large part on things that have happened since Your Honor ruled on the motion to dismiss.

As Ms. Weismann noted, she is correct, the EPA has adopted a new interim records policy. This is the formal policy that specifically and clear culls out the obligation to keep records of substantive decisions reached orally. The agency is currently determining exactly the way in which it's going to broadcast that new policy on an agency-wide basis. But we do expect that to happen.

Finally, of course, plaintiff's allegations really all focus on former administrator Pruitt who is now the former administrator. We think this case is similar in a lot of ways to the case that Your Honor handled a few years back, CREW versus SEC, where there was briefing on a motion to dismiss as moot and ultimately a finding that a

number of claims were moot, because the agency had abandoned the policy that it was alleged to have had.

So again, we propose to file a motion essentially showing, A, we never had this policy, relying on some of the documents that Your Honor declined to consider in the last round of briefing. And second, showing that even if that weren't the case, we clearly don't have that policy now.

I don't think 12 B. is implicated. We can raise a mootness challenge at any time. There is ample Supreme Court authority that says that. To the extent we want to rely on documents properly before the Court in a summary judgment context--

THE COURT: Have the policies been implemented since briefing completed on the prior motion to dismiss?

MR. MYERS: Yes, Your Honor. The interim records policy, I believe the date is August 22.

THE COURT: Just issued.

MR. MYERS: Just recently, yes. So again, this is ultimately -- this is an APA case. That's what has the D.C. Circuit said in Armstrong. Plaintiffs don't get to challenge a policy that is no longer in effect, assuming it was ever in effect. So we think we're entitled to show that, even if it was in effect, which we again would dispute, it is not today.

THE COURT: I know this is, the case is in a little bit of an unusual posture. It is an FRA case which, and although it feels like an APA case in many particulars, there are certainly issues that it would seem that the plaintiff may be able to get discovery on as opposed to the straight APA case. I'm not so ruling. But an FRA is a different variant from I think your run-of-the-mill APA case.

Let me ask --

Thank you. I'll be back to you, Mr. Myers.

Ms. Weismann, first of all, do you dispute that they do have a new policy?

MS. WEISMANN: Well, we have no reason to know one way or the other. But I would submit, Your Honor, that--

THE COURT: They haven't sent it to you?

MS. WEISMANN: No, they have not.

THE COURT: So Mr. Myers, is that something that you can -- is there any reason why you can't make that promptly available to the plaintiff?

MR. MYERS: Your Honor, I would like to do so as soon as possible. We've had some wires crossed at EPA because my primary agency contact is out of the office for the next few weeks but I would like to do so as soon as I can.

THE COURT: Let's assume, I have no reason to doubt Mr. Myers, that he sends you the new policy. So, isn't there a reasonable argument that the claim that there is no proper records management policy would be mooted?

MS. WEISMANN: There is a potential. I still think, especially given that, to date, we've been given piecemeal parts of whatever policy and guidance is in place, that we would want an opportunity to explore whether there, there is other guidance that exists, is it in conflict. So I don't think that just that policy alone would provide a sufficient record for this Court to rule on that claim.

THE COURT: But are we still waiting for the archivist's decision?

MS. WEISMANN: As far as I know. Of course, you've dismissed them from the case. We have not heard anything further from either the archivist or EPA. EPA is probably in a better position to advise the Court if there is any update there.

But I certainly disagree with the government's characterization of all of our claims as simply involving a policy. I think if you look at our complaint, especially paragraph 26, it makes it clear that what we are challenging under the Administrative Procedure Act is a failure to act.

And the case law is clear that that is one of the exceptions where discovery is in fact appropriate and often necessary because the very point is there is no decision that you have the parameters outlined and you know what you're dealing with and the agency can fill in the blanks through the record that's created.

THE COURT: I understand that. Okay.

So Mr. Myers, a couple of questions to you.

First, any update on the archivist action because I dismissed that claim because I said there was no finding.

MR. MYERS: I'm not aware.

THE COURT: Even if there was a new policy, how does that moot the fact that their claim that there was a flouting of the FRA by failure to create records as opposed to just having a policy?

MR. MYERS: Your Honor, I think there is some significant daylight between what plaintiffs would like to argue under claim two and what Your Honor held is cognizable under claim two. Your Honor said in the motion to dismiss ruling that they can't demand judicial review of isolated acts. That they can only review, quote, policies and regulations, what records an agency must create. We understand Your Honor's ruling to mean, no review of isolated acts.

THE COURT: Understood. But I don't think

they're saying once this happened. I think they're saying there was a policy, unwritten, to not memorialize oral decisions, right? So why wouldn't that claim still proceed?

MR. MYERS: So we would propose flushing this out in the motion that we propose to file. But I think what we would argue is that the steps that EPA will take and has taken to adopt this new policy and publicize it broadly would essentially represent the termination of any alleged policy . Again, we dispute there ever was such a policy. But assuming it existed, what we propose to argue is that, as of the date of these actions, the new policy, the agency-wide communications, that policy no longer exists.

With respect to Ms. Weisman's point about the need for discovery because she can't be sure, plaintiffs can't be sure that we've put everything in front of the Court, I think the most logical and efficient way to proceed would be for us to file the motion and attach everything that we propose for the Court to look at.

Then if plaintiffs want to respond that motion by saying they need discovery at that point, we would then respond to that in the ordinary course and we would hash it out in writing.

THE COURT: Is your proposal to file summary judgment motion on mootness or to file a motion -- it

wouldn't be a motion on the pleadings because you have new information. So I assume it would be some Motion for Summary Judgment variant.

MR. MYERS: I think we could caption it that way. I have seen this done a number of ways. But I think, it would argue sort in the alternative, A, on summary judgment they never have a claim. And B, as a matter of subject jurisdiction, mootness.

THE COURT: Okay. Thank you.

So, Ms. Weismann, part of your suit it seems is, part of your aim is to say look, EPA, you need a policy because you can't be making oral decisions that are not memorialized. Their response to that is, we don't say we were doing that then, but okay, we're doing what you want us to do now.

So, to the extent that's the case, you certainly achieved something concrete by this suit. But it seems short-sighted of me to say, I don't care what you have done recently, we're going to move to discovery now. It seems that the most reasonable path is to let them brief this and maybe some of your case ends up being moot or maybe it doesn't. Then we can figure out what is left and then whether discovery is appropriate and what is left. But to ignore what they have done now doesn't seem to make sense. How do you respond to that?

MS. WEISMANN: I'm not asking the Court to ignore what they have done. And certainly the Court could bifurcate the claims and could allow briefing to go forward on the second claim about having an adequate policy in place.

But in terms of efficiency, I think the better course is to allow us to have discovery on the first claim. The reason I think it is so critical is the first claim is not a matter of having an adequate policy in place. If we prevail in proofing our claims, we've asked for declaratory and injunctive relief. And for this Court to be able to evaluate what is the appropriate relief, what should it cover, you have to know the full scope of conduct at issue. We don't have that now. We have a very truncated record.

THE COURT: I'm certainly not saying you are not getting discovery and you are never getting discovery. I think it is an interesting question about discovery in FRA cases. I haven't seen it before. But I think most FRA cases end up going off the motion to dismiss, so I think you may have a very good argument that discovery is appropriate.

I still think though that we need to figure out exactly what claims we're talking about in discovery and what is left. So I think it is appropriate for them to file their motion. And then if and when any of your case

is left, then we'll come back and figure out how we're going to proceed at that point.

I agree with Mr. Myers' proposal that, in responding to their motion, you can use a 56-D affidavit or something else and say, we can't respond because we don't have this discovery. And I'm delighted to take a look.

MS. WEISMANN: Your Honor, I'm going to have a number of concerns about that approach. One is, of course, that as time goes on, memories fade. And as I said, we think the heart of any discovery would be oral depositions. And they would involve at least one former official. So we have a concern about any further delay.

I guess I continue to believe that bifurcation may be the most appropriate approach. The government can move to dismiss Count II -- Not dismiss, for summary judgment. If we believe we still need discovery, we can file a 56-D.

THE COURT: Perhaps this can accommodate your concerns. If their motion is, if granted, does not dispose of the entire case, then I'll let you file a motion for discovery on what they don't seek judgment or dismissal on.

So in other words, so we're clear, Mr. Myers, I want you to be clear on this, too, that even assuming you won your motion, if there is still part of the case left on which you think you want or can get discovery, then I'll

have you submit a motion to me saying why you should get discovery in an FRA type case and generally what type of discovery you would seek.

Then Mr. Myers, you can oppose that. So that would be some type of bifurcation or two track approach.

MS. WEISMANN: Yeah, I think it is pretty clear from what counsel says today, however, their view would be that their motion disposes of the case in its entirety.

THE COURT: Then it is hard for me to order discovery without essentially pre-judging the motion and say you're going to lose.

MS. WEISMANN: Finally Your Honor, I think at a minimum we would ask that the Court order the government to file an answer. We don't even have an answer at this point. I think, my sense is that they're going through great lengths to avoid responding to the specific factual allegations. I think that also would go a long way towards assisting the Court and the parties to determine what if anything is left after they file their motion.

THE COURT: All right.

So Mr. Myers, any objection to filing an answer in this case? Then filing this Motion for Summary Judgment in part or Motion to Dismiss on subject matter jurisdiction for mootness?

MR. MYERS: Your Honor, I don't think we have a

deep-seeded objection to filing an answer. My experience is cases like this is, an answer often does not help the parties or the Court all that much. Considering that we are proposing to describe various facts that have occurred since the complaint was filed, frankly from the perspective of efficiency and moving this case along, that was our only reason for suggesting that we not file an answer.

With respect to efficiency and moving this case along, I do want to flag that my primary agency contact, as I was mentioning, is out of the office through September 17. She is the person that has been working on this case, the person at EPA that has the most experience and knowledge about FRA related issues.

My request is we get maybe a week after she is back in the office to file that.

THE COURT: I'll say that your answer and motion are due September 24.

Ms. Weismann, how long would you like to oppose? You are the one who understandably wants this case to move along, so I'll give you as long as you like because you have the incentive to do it quickly.

MS. WEISMANN: I think three weeks, Your Honor.

THE COURT: Okay. That's October 15.

Then I'll give you October 29 to reply, Mr. Myers.

Again, Ms. Weismann, that can be -- if they don't seek dismissal or judgment on the entire case, you may move for discovery at any point after the filing of their motion.

MS. WEISMANN: Thank you, Your Honor.

THE COURT: Anything else? Mr. Myers?

MR. MYERS: No, Your Honor.

THE COURT: Ms. Weismann?

MS. WEISMANN: No, Your Honor.

THE COURT: Okay. Thank you all very much. I'll issue an order memorializing this.

(Whereupon, at 10:17 a.m., the hearing concluded.)

CERTIFICATE OF REPORTER

I, Lisa Walker Griffith, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Lisa Walker Griffith, RPR 9-9-18
Date