

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
Harrisburg Division**

JOHN R. KABLER, JR.,

Plaintiff,

v.

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1776 KEYSTONE
STATE, *et al.*,

Defendants.

Case No. 1:19-CV-0395

(Hon. Sylvia H. Rambo)

--ELECTRONICALLY FILED--

**PLAINTIFF'S REPLY BRIEF TO RESPONSE BRIEF OF
COMMONWEALTH DEFENDANTS IN OPPOSITION TO PLAINTIFF'S
CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT**

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ARGUMENT

Commonwealth Defendants' opposition does not carry their heavy burden to show that any prospective relief is moot, so they cannot escape this lawsuit on an invocation of sovereign immunity. Mr. Kabler's motion for partial summary judgment should be granted.

The burden to demonstrate mootness, according to the Supreme Court, "is a heavy one." *L.A. Cty. v. Davis*, 440 U.S. 625, 631 (1979). Indeed, the Third Circuit has described the burden for the party alleging mootness as "'heavy,' even 'formidable.'" *DeJohn v. Temple Univ.*, 537 F.3d 301, 309 (3d Cir. 2008) (quoting *United States v. Gov't of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004)). "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" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citations omitted). In *DeJohn*, the Third Circuit concluded that a policy change made only while litigation was ongoing and a continuing defense of the constitutionality of the policy are "two factors significant" in establishing a "reasonable expectation" that the allegedly unconstitutional conduct will recur. *See DeJohn*, 537 F.3d at 309.

As to the prospective relief in the Complaint, Commonwealth Defendants cannot sustain the "heavy, even formidable" burden of establishing that there is no

reasonable expectation they will return to enforcing the maintenance of membership provision and violating Mr. Kabler's First Amendment rights. *DeJohn*, 537 F.3d at 309 (quotations omitted). Even "more important[]" to the mootness evaluation is Commonwealth Defendants' ongoing defense of the constitutionality of the wrongful actions at issue in this lawsuit. *See id.*; *see, e.g.*, Br. of Comm. Defs. in Support of Am. Mot. to Dismiss Pl.'s Compl. Pursuant to Fed. R. Civ. P. 12(b)(1) and (6) 16–17, ECF No. 20. Moreover, the fact that Commonwealth Defendants stopped participating in the unconstitutional action only after this case was filed, along with their ongoing defense of the challenged conduct, only confirms that this is a classic case of voluntary cessation and the case is not moot.¹

Commonwealth Defendants' contention that a new collective bargaining agreement will be stripped of all the unconstitutional provisions does not moot this case. Commonwealth Defendants rely on a single page that appears to be from a draft redlined document (one can only assume the purported "new collective bargaining agreement"). *See* Second Decl. of Andrew Gold, Ex. F, ECF No. 35-1. However, that

¹ Commonwealth Defendants cite the non-binding *Molina* decision in support of their position, Br. in Response to Pl.'s Cross Mot. for Summ. J. 4, ECF No. 49, but this matter can be distinguished from *Molina*, as significant underlying facts are different. For starters, Mr. Kabler is a current Commonwealth employee, immediately susceptible to unconstitutional actions by Defendants, unlike the plaintiff in the *Molina* case, who was not a current employee of the governmental entity by the time of the suit. *See Molina v. Pennsylvania Soc. Serv. Union*, No. 1:19-CV-00019, 2019 WL 3240170, at *8 (M.D. Pa. July 18, 2019), ECF No. 49-1.

certainly proves nothing and falls far short of a final, fully executed and effective collective bargaining agreement. Commonwealth Defendants' claim that all challenged provisions have been or will be removed from some new collective bargaining agreement, *see* Defs.' Joint Counter-Statement of Material Facts ¶¶ 12–13, ECF No. 53, does not meet their heavy burden to show that this case is moot. Furthermore, such a claim is one that Mr. Kabler has had no opportunity to verify. Decl. of Nathan J. McGrath, Esq., ECF No. 50-5.

Mr. Kabler does not seek damages against Commonwealth Defendants; his claims for relief against Commonwealth Defendants are only declaratory and injunctive claims. *See* Compl., Prayer for Relief, Sections A & B, ECF No. 1. Accordingly, sovereign immunity does not apply. As Commonwealth Defendants acknowledge, sovereign immunity does not bar Mr. Kabler's claims for prospective relief. *See* Response Br. of Comm. Defs. in Opp. to Pl.'s Cross Mot. for Partial Summ. J. 11, ECF No. 49. Unless and until the prospective claims in this case are resolved, Commonwealth Defendants remain proper parties. Because a sufficient connection exists between Commonwealth Defendants and their duty to enforce maintenance of membership under the collective bargaining agreement, Commonwealth Defendants have no claim to sovereign immunity.

CONCLUSION

Commonwealth Defendants have not carried their heavy burden to demonstrate that this case is moot, and they remain proper parties as to the

prospective and declaratory relief sought, in part, because Mr. Kabler's motion for partial summary judgment does not seek damages relief against the Commonwealth Defendants. Thus, his motion for partial summary judgment, on Count Two, and the relief sought therein, should be granted.

Dated: September 13, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, the undersigned, certify that the foregoing brief complies with the 25-page limit authorized by this Court. *See* Order ¶ 5, ECF No. 45.

s/ Nathan J. McGrath, Esq. _____

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on September 13, 2019, I electronically filed the foregoing with the Clerk of Court using the Court's CM/ECF system, which will send electronic notification of the filing to all counsel of record in this matter, who are ECF participants, and that constitutes service thereon pursuant to Local Rule 5.7.

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