

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

GAVIN GRIMM,

Plaintiff,

v.

Case No. 4:15-cv-00054-RGD-TEM

GLOUCESTER COUNTY SCHOOL
BOARD,

Defendant.

**SCHOOL BOARD'S OPPOSITION TO MOTION TO VACATE
ORDER FOR SUPPLEMENTAL BRIEFING**

I. INTRODUCTION

On August 22, 2017, Plaintiff Gavin Grimm ("Grimm") filed an Amended Complaint seeking declaratory relief and "nominal damages" only. Gloucester County School Board ("School Board") moved to dismiss the Amended Complaint. On October 26, 2017, the Court entered an Order directing the parties "to file supplemental briefing on the question of mootness."

In an effort to address the issue of mootness, Grimm filed a notice of consent to dismiss his claims of prospective declaratory relief. Plaintiff then filed a Motion to Vacate the Court's October 26, 2017 Order, suggesting that the issue of mootness is no longer applicable. Grimm, however, has not eliminated the jurisdictional question of mootness. Indeed, recent case law holds that a claim for only nominal damages does not save a case from mootness when the accompanying claims for declaratory and injunctive relief are moot.

The issue of mootness in this case is real. Grimm's motion should be denied.

II. LAW AND ARGUMENT

In filing the Amended Complaint, Grimm admits that he is not seeking compensatory damages. Instead, he is requesting retrospective declaratory judgment and nominal damages in connection with the School Board's policy as applied to him while he was still a student. (ECF Doc. 113, Requests for Relief (A) and (B)). After filing the Amended Complaint and Motion to Dismiss, this Court ordered the parties to fully brief the issues of whether the Grimm's case is moot in light of (1) Grimm's status as an alumnus of Gloucester High School and (2) whether the School Board's bathroom policy applies to non-students, including but not limited to, alumni. (ECF Doc. 123).

Hoping to address the issue of mootness, Grimm filed a notice in which he consented to the dismissal of Requests for Relief (C) and (D) in his Amended Complaint, which seek a permanent injunction and prospective declaratory relief with respect to the bathroom policy's application to Grimm as an alumnus. (ECF Doc. 125). After consenting to the dismissal of his request for prospective relief, Grimm also filed a Motion to Vacate the Court's October 26, 2017 Order. (ECF Doc. 126).

Grimm contends that his case is not moot as a matter of law, because he still has a claim for nominal damages and his claim for "retrospective declaratory relief is intertwined with the damages claim." *Id.* at ¶ 10. Yet, when Grimm filed his Amended Complaint, the only damages he sought were nominal damages. (ECF Doc. 113 at p. 17). Grimm abandoned any request he may have had for compensatory damages. As such, the issue before the Court is whether a request for nominal damages only, in conjunction with retroactive declaratory relief, saves a claim from mootness. None of the authority cited by Grimm addressed that particular issue.

For example, in Rendelman v. Rouse, 569 F.3d 182 (4th Cir. 2009), the Fourth Circuit did not address the question of whether a claim for nominal damages only could save a claim from mootness. Relying on Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 429 n. 4 (4th Cir. 2007), the Court observed that “even if a plaintiff’s injunctive relief claim has been mooted, the action is not moot if the plaintiff may be ‘entitled to at least nominal damages.’” Rendelman, 569 F.3d at 187. The footnote in Covenant that Rendelman cited to shows that “Covenant sought compensatory *and* nominal damages.” 93 F.3d at 429 n. 4. (emphasis added). Thus, these cases stand only for the proposition that a claim is not moot when there is a claim for compensatory damages and nominal damages pending such that the plaintiff could at a minimum recover nominal damages. Id.

Grimm’s reliance on Lippoldt v. Cole, 468 F.3d 1204, 1217 (10th Cir. 2006) and Marks v. City Counsel of Chesapeake, 723 F.Supp. 1155, 1160 (E.D. Va. 1988), aff’d, 883 F.2d 308 (4th Cir. 1989) is also suspect. Again, the question of whether a request for only nominal damages saves a claim from mootness was not before those respective courts.

In Lippoldt, the Court held that the plaintiffs’ claims were not moot, because the plaintiffs’ challenge of the district court’s denial of compensatory damages presented “a live controversy.” Lippoldt, 468 F.3d at 1217. In Marks, the plaintiff sought compensatory damages, and the defendants conceded that the plaintiff’s damages were not necessarily rendered moot when injunctive and declaratory contentions had become moot. Marks, 723 F. Supp. at 1159.

There is, however, a case that is directly on point. In August of this year, the Eleventh Circuit held that a claim for nominal damages only does not save a claim from mootness when accompanying claims for declaratory and injunctive relief are moot. Flanigan's Enterprises, Inc.

of Georgia v. City of Sandy Springs, Georgia, 868 F.3d 1248, 1263 (11th Cir. 2017). The Court reasoned,

At this point in the litigation, the only redress we can offer Appellants is judicial validation, through nominal damages, of an outcome that has already been determined. Perhaps more than most, we have no doubt that these particular Appellants—having waged a years-long battle against the City—would enjoy seeing this Court vindicate their cause as a worthy one. They may truly believe that this purely psychic satisfaction would serve as an effective remedy for their complained-of injuries. However, as in the standing context, absent an accompanying practical effect on the legal rights or responsibilities of the parties before us, we are without jurisdiction to give them that satisfaction.

Id. at 1268.

By pursuing a claim only for nominal damages and a retroactive declaration that his rights were violated, Grimm’s purpose for continuing this litigation is clear. Grimm wants to have this Court vindicate him with a judicial stamp of approval. Such a finding would have no practical effect on either the rights of Grimm when he was a student or the responsibilities the School Board may have had. Thus, the issue of whether Grimm’s case presents a justiciable controversy is appropriately before the Court.

Based on the current posture of this case, it is the School Board’s position that Grimm’s case is now moot. As this Court noted, “[B]ecause constitutional mootness is a jurisdictional issue, the Court has a ‘special obligation’ to resolve the question satisfactorily and cannot proceed until it is assured that the case presents a live controversy.” (ECF Doc. 123.) Accordingly, the Court should deny Grimm’s motion to vacate the October 26, 2017 Order, and the parties should proceed to fully brief the issue of mootness in accordance with this Court’s Order.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, the Motion to Vacate the Order for supplemental briefing on the issue of mootness should be denied. The Court should require the parties to fully brief the issue of mootness in accordance with the October 27, 2017 Order.

**GLOUCESTER COUNTY SCHOOL
SCHOOL BOARD**

By Counsel

/s/

David P. Corrigan
VSB 26341
Jeremy D. Capps
VSB No. 43909
M. Scott Fisher, Jr.
VSB 78485
Attorney for Gloucester County School School Board
Harman, Claytor, Corrigan & Wellman
P.O. Box 70280
Richmond, Virginia 23255
804-747-5200 - Phone
804-747-6085 - Fax
dcorrigan@hccw.com
jcapps@hccw.com
sfisher@hccw.com

CERTIFICATE

I hereby certify that on the 16th day of November 2017, I filed a copy of the foregoing document with the Clerk of the Court using the CM/ECF system, which will automatically send a Notice of Electronic Filing to all counsel of record.

/s/

David P. Corrigan
VSB No. 26341
Attorney for Gloucester County School School
Board
Harman, Claytor, Corrigan & Wellman
P.O. Box 70280
Richmond, Virginia 23255
804-747-5200 - Phone
804-747-6085 - Fax
dcorrigan@hccw.com