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

GAVIN GRIMM, Plaintiff, v. GLOUCESTER COUNTY SCHOOL BOARD, Defendant.	)	Civil Case No. 4:15-cv-54

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO VACATE ORDER FOR SUPPLEMENTAL BRIEFING

Plaintiff Gavin Grimm respectfully submits this reply in further support of his motion to vacate the Court's October 26, 2017 order for supplemental briefing, ECF No. 123. Because Gavin has now consented to dismissal of his claims for prospective relief, the Court should vacate its order for supplemental briefing on the question of mootness and resolve his claims for retrospective relief pursuant to Federal Rule of Civil Procedure 12(b)(6).

As explained in Gavin's motion, ECF No. 126 at 2-3, his graduation cannot moot his claims for nominal damages based on the Board's past violations of his rights under Title IX and the Equal Protection Clause. Under settled Fourth Circuit precedent, "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 v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009) (quoting *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429 n.4 (4th Cir.2007)).

In its opposition, the Board attempts to limit this established principle to cases in which "there is a claim for compensatory damages *and* nominal damages." ECF No. 128 at 3 (emphasis added). But the Fourth Circuit and district courts within this Circuit have consistently held that

plaintiffs have standing to pursue their claims even when nominal damages are all that they seek. *See Mellen v. Bunting*, 327 F.3d 355, 363, 365 (4th Cir. 2003) (holding in a case where plaintiffs sought only nominal damages for school's past violation of the Establishment Clause that "[a]lthough the Plaintiffs' claims for declaratory and injunctive relief are moot, their damage claim continues to present a live controversy"); *Am. Humanist Ass'n v. Greenville Cty. Sch. Dist.*, 652 F. App'x 224, 231 (4th Cir. 2016) ("The plaintiffs' claim for nominal damages based on a prior constitutional violation is not moot because the plaintiffs' injury was complete at the time the violation occurred."); *Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 F. App'x 566, 571 (4th Cir. 2007) (proposition that a cause of action for damages saves a case from mootness applies even "where a plaintiff is only pursuing a claim for nominal damages").[1]

Instead of grounding its argument in Fourth Circuit precedent, the Board asks this Court to follow a recent 7-5 decision from the en banc Eleventh Circuit holding a plaintiff's challenge to a city ordinance was moot despite the plaintiff's request for nominal damages. *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, Georgia*, 868 F.3d 1248, 1263-64 (11th Cir. 2017) (en banc). The majority opinion creates a circuit split with every other Court of Appeals to

[1] *Accord McLean v. City of Alexandria*, 106 F. Supp. 3d 736, 738 (E.D. Va. 2015) ("[R]epealing the Ordinance does not moot McLean's as-applied challenge to the Ordinance for which he seeks nominal damages."); *Moss v. Spartanburg Cty. Sch. Dist. No. 7*, 775 F. Supp. 2d 858, 870 n.6 (D.S.C. 2011) ("[Plaintiff's] claim for declaratory relief is moot; however, her claim for nominal damages remains viable."), *aff'd sub nom. Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599 (4th Cir. 2012); *Ass'n of Cmty. Orgs. for Reform Now v. Dickerson*, No. CIV. AMD 07-92, 2008 WL 4056183, at *2 (D. Md. Aug. 28, 2008) ("It is clear that this case is not moot; plaintiffs seek 'nominal damages of one dollar' against each of the defendants in their individual capacity for the past interference with plaintiffs' constitutionally protected rights as described above."); *Stephens v. Cty. of Albemarle*, No. CIV.A.3:04CV00081, 2005 WL 3533428, at *9 (W.D. Va. Dec. 22, 2005) (despite "failing to allege actual damages resulting from the violation of the First Amendment" plaintiff "could still maintain an action for recovery of nominal damages").

consider the question. *See id.* at 1265 n.17 (collecting cases holding that claims for nominal damages defeat mootness); *id.* at 1271 (Wilson, J., dissenting) (collecting more cases). It also conflicts with *Carey v. Piphus*, 435 U.S. 247 (1978), which held that constitutional violations are "actionable for nominal damages without proof of actual injury." *Id.* at 266. And it conflicts with *Farrar v. Hobby*, 506 U.S. 103 (1992), which made clear that "[a] plaintiff may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages." *Id.* at 113.

Under the novel theory adopted by the majority opinion in *Flanigan's*, there is no live dispute for purposes of Article III unless a plaintiff seeks actual damages, but if a plaintiff seeks—and fails—to establish actual damages, "it is within [the court's] Article III powers to award nominal damages." *Flanigan's*, 868 F.3d at 1270 n.23. That makes no sense. As the five dissenting judges explained, if nominal damages were not sufficient to preserve Article III jurisdiction to decide the merits, then nominal damages would also be insufficient to preserve Article III jurisdiction to enter judgment, and the case would have to be dismissed as moot before judgment is entered: "[W]henever nominal damages are the last remedy still in play, no matter how late in the case, the case is moot, and there would be no cases where only nominal damages were awarded." *Id.* at 1273 (Wilson, J., dissenting).

In addition to this failure of logic, the majority opinion in *Flanigan's* also misunderstands the essential role of nominal damages in redressing intangible injuries. An award of nominal damages means that the plaintiff's injuries are difficult to quantify in monetary terms—not that no injury has been inflicted. Just last year, the Supreme Court reaffirmed that "the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), as revised (May 24, 2016)

(citing Restatement (First) of Torts §§ 569 (libel), 570 (slander per se) (1938)); *see Thomas v. FTS USA, LLC*, 193 F. Supp. 3d 623, 637 (E.D. Va. 2016) (explaining that standing to bring claims for nominal damages is based on "firmly-rooted principles of Anglo-American law, which has long allowed nominal damages where actual damages are too small or difficult to quantify"); *Flanigan's*, 868 F.3d at 1263 n.12 (conceding that plaintiffs may bring claims seeking only nominal damages in libel and trespass cases).

Nominal damages are particularly important in this case because—like many other victims of discrimination—Gavin has suffered dignitary injuries that cannot be quantified in terms of money. This "[s]tigmatizing injury" is "one of the most serious consequences of discriminatory government action" and gives rise to standing to "those persons who are personally denied equal treatment." *Allen v. Wright*, 468 U.S. 737, 755 (1984); *accord Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) ("[D]iscrimination itself, … by stigmatizing members of the disfavored group[,] … can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.").

Moreover, even if the *Flanigan's* decision were correct on its own terms, it does not apply to the facts of this case. *See Flanigan's*, 868 F.3d at 1263 n.12 (cautioning that "our holding here does not foreclose the exercise of jurisdiction in all cases where a plaintiff claims only nominal damages"). In *Flanigan's* the plaintiffs were challenging a town ordinance that had already been repealed and that "was never enforced during the years that it was in effect." *Id*. at 1254. In these circumstances, the Eleventh Circuit concluded that an award of nominal damages "would serve no purpose other than to affix a judicial seal of approval to an outcome that has already been realized." *Id.* at 1264; *see id.* at 1275 (Wilson, J., dissenting) ("The majority ignores

Plaintiffs' prayer for nominal damages because, in the majority's view, Plaintiffs have 'already won,' and 'there is simply nothing left for us to do.'").

Gavin's claims arise in a different posture. The Board has not repealed its policy or provided Gavin any of the relief he seeks. Unlike the ordinance in *Flanigan's*, which had never been enforced, the Board's policy was vigorously enforced against Gavin, humiliating him on a daily basis. And, unlike in *Flanigan's*, Gavin's claims for prospective relief have now become moot as a result of the Board's intransigence, not its voluntary cessation. Nominal damages are the only way to vindicate Gavin's claims to equal dignity under Title IX and the Fourteenth Amendment.

In any event, this Court is bound by Fourth Circuit precedent, and under that precedent, Gavin's claims for nominal damages and retrospective declaratory relief are not moot. For all these reasons, Plaintiff respectfully requests that the Court vacate the October 26, 2017 order for supplemental briefing and resolve the Board's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

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Dated: November 17, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 2017, I filed the foregoing memorandum with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

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