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Tenth Circuit Affirms Summary Judgment in Favor of Federal Bureau of Prisons

The Tenth Circuit declined to apply the voluntary cessation exception to mootness for constitutional claims against the Federal Bureau of Prisons.

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In *Prison Legal News v. Federal Bureau of Prisons*, — F.3d. —, 2019 WL 6797494 (10th Cir. Dec. 13, 2019), the Tenth Circuit affirmed the entry of summary judgment in favor of the Federal Bureau of Prisons (BOP) on claims brought by Prison Legal News (PLN) that were rendered moot by BOP's post-complaint voluntary conduct.

BOPs Regulation of Publications to Inmates

BOP regulations permit distribution of publications to inmates unless a warden rejects them as “detrimental to the [facility's] security, good order, or discipline.” If the warden rejects any publication, the warden must “promptly notify the inmate in writing, provide the reasons, and identify the objectionable content” and must “provide the publisher with a copy of the rejection notice.”

Before PLN sued, officials in the Administrative Maximum Facility in Florence, Colorado (“ADX”) flagged for potential rejection any publications that contained “name-alone content”—in other words, content that referred to an ADX inmate or staff member.

ADX's Rejection of PLN's Publications

PLN publishes a monthly magazine to help inmates navigate the legal system, and it distributes that publication to ADX inmates. Between 2010 and 2014, the BOP rejected 11 different PLN publications based on name-alone content. For some of the rejections, the BOP provided additional reasons, such as identification of an inmate's gang affiliation, for its rejection of the publication.

PLN sued, alleging that the BOP's rejections (1) violated the First Amendment by censoring PLN's content in a manner not rationally related to any legitimate and neutral government purpose, (2) violated the Fifth Amendment's due process clause by failing to provide PLN with timely and adequate notice and an opportunity to contest the rejections, and (3) were arbitrary and capricious under the Administrative Procedure Act. PLN sought injunctive and declaratory relief for its claims. PLN later

acknowledged that all of its claims were as-applied challenges only.

ADX's Attempts To Moot PLN's Claims

After being sued, ADX officials began attempting to moot PLN's constitutional claims by changing their conduct and policies. Within a few months of being sued, ADX issued a supplement to its policies, requiring additional ADX personnel to review incoming publications and receive quarterly training on reviewing publications. Based on this policy change, the BOP moved to dismiss PLN's complaint as moot. The district court denied the motion, ruling that the review process had “change[d] very little” and that, in any event, “the voluntary cessation exception applied because the BOP's updated supplement was a ‘ploy’ to avoid its jurisdiction.”

About a year later, the BOP decided to distribute the 11 PLN publications that had originally been rejected. (The distribution of the 11 publications occurred a few months before the district court denied the BOP's motion to dismiss, but this apparently wasn't a factor at the motion to dismiss stage.)

A few months after losing its motion to dismiss, the BOP went one step further, issuing a new supplement prohibiting the rejection of a publication solely because it contained name-alone content and requiring a prompt notice sent to the inmate and the publisher of any rejected publication and the right to obtain independent review of the rejection.

All of these actions—together with a declaration from ADX's warden promising to follow the new standards and agreeing that the earlier rejection of the 11 publications was improper—allowed the BOP to successfully move for summary judgment on the basis that PLN's claims were finally moot.

Mootness Doctrine

Under Article III, federal courts are limited to deciding actual cases and controversies. U.S. Const. art. III, §2. When a claim is no longer live or the parties lack a legally cognizable interest in the outcome, the claim is moot. *Camfield v. City of Okla. City*, 248 F.3d 1214, 1223 (10th Cir. 2001). “Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction.” *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109 (10th Cir. 2010). In determining whether a claim is moot, the “crucial question” is whether granting the requested remedy “will have some effect in the real world.” *Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1213 (10th Cir. 2015). “An action becomes moot ‘[i]f an intervening circumstance deprives the plaintiff of a personal stake ... at any point.’” *Prison Legal Network*, — F.3d at —, 2019 WL 6797494, at *6 (citing *Brown v. Buhman*, 822 F.3d 1151, 1165 (10th Cir. 2016)).

Relevant to PLN's claims seeking injunctive relief, an injunction has real-world effect only if the plaintiff is “susceptib[le] to *continuing* injury.” *Jordan v. Sosa*, 654 F.3d 1012, 1024 (10th Cir. 2011) (emphasis in original). “[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing,

present adverse effects.” *Id.* (quoting *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)) (alterations removed). Additionally, “a plaintiff’s continuing injury must be reasonably certain,” as a court will not issue an injunction based on “speculation or conjecture.” *Id.*

Similarly, a declaratory judgment has real-world effect only if granting the declaration would settle “some dispute which affects the behavior of the defendant toward the plaintiff.” *Cox v. Phelps Dodge*, 43 F.3d 1345, 1348 (10th Cir. 1994) (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)), superseded on other grounds as recognized in *Cody Labs. v. Sebelius*, 446 Fed. App’x 964, 968 (10th Cir. 2011). Thus, a plaintiff must seek “more than a retrospective opinion that he was wrongly harmed by the defendant.” *Jordan*, 654 F.3d at 1025.

Voluntary Cessation Exception

The voluntarily cessation doctrine is an exception to mootness. Under this doctrine, a defendant cannot ordinarily moot a case or claim by voluntarily ending unlawful conduct after being sued. *Brown*, 822 F.3d at 1166. “The exception ‘exists to counteract the possibility of a defendant ceasing illegal action long enough to render a lawsuit moot and then resum[e] the illegal conduct.’” *Prison Legal Network*, — F.3d at —, 2019 WL 6797494, at *6 (quoting *Ind*, 801 F.3d at 1214).

But the voluntary cessation doctrine has been held inapplicable where a defendant, especially a governmental official, “carries ‘the formidable burden of showing that it is absolutely clear the alleged wrongful behavior could not reasonably be expected to recur.’” *Brown*, 822 F.3d at 1166. “This burden is ‘stringent’ and ‘heavy’” and “fact-specific.” *Prison Legal Network*, — F.3d at —, 2019 WL 6797494, at *7 (citations omitted). To satisfy this burden, a defendant must undertake “changes that are permanent in nature and that foreclose a reasonable chance of recurrence of the challenged conduct.” *Tandy v. City of Wichita*, 380 F.3d 1277, 1291 (10th Cir. 2004).

The BOP Satisfied Its Burden To Avoid the Voluntary Cessation Exception to Mootness

The Tenth Circuit in *Prison Legal Network* agreed with the district court that the BOP sufficiently carried its burden to avoid application of the voluntary cessation exception to mootness as to all of PLN’s claims. In so concluding, the Tenth Circuit looked in particular to the fact that: (1) the BOP delivered the 11 rejected publications; (2) ADX issued its second supplement prohibiting the rejection of a publication solely for name-alone content, requiring prompt notice of rejections, and retaining the earlier supplement’s training and review procedures; and (3) ADX’s warden declared, under penalty of perjury, that the second supplement would apply going forward and that the 11 previously rejected publications would not be rejected under the new standards.

Based on that post-complaint conduct, the Tenth Circuit held that all of PLN’s claims were moot. And because PLN had asserted only as-applied claims, the court declined to consider the potential rejection of future

publications not substantially similar to those at issue in the complaint.

In ruling in favor of the BOP, the Tenth Circuit put a thumb on the scale for the BOP because the voluntary cessation was done by government officials. It noted that “[c]ourts may accord ‘more solicitude’ to governmental officials’ claims that their voluntary conduct moots a case.” *Prison Legal Network*, — F.3d at —, 2019 WL 6797494, at *7 (citation omitted). It further explained, “[G]overnment self-correction provides a secure foundation for mootness so long as it seems genuine And absent evidence the voluntary cessation is a sham, the mere possibility that a successor official may shift course does not necessarily keep a case live.” *Id.* (citations omitted). Ultimately, the court concluded that the BOP’s “actions here represent the ‘genuine’ government self-correction that courts accord solicitude.” *Id.* at *9. And for that reason, the BOP successfully mooted—and fully avoided—PLN’s claims.

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