THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LISA HOOPER, BRANDIE OSBORNE, KAYLA WILLIS, REAVY WASHINGTON, individually and on behalf of a class of similarly situated individuals; THE EPISCOPAL DIOCESE OF OLYMPIA; TRINITY PARISH OF SEATTLE; REAL CHANGE,

Plaintiffs,

vs.

CITY OF SEATTLE, WASHINGTON; WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; ROGER MILLAR, SECRETARY OF TRANSPORTATION FOR WSDOT, in his official capacity,

Defendants.

No. 2:17-cv-00077-RSM

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING APPEAL

NOTED ON MOTION CALENDAR: NOVEMBER 17, 2017

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I. INTRODUCTION

In their Response, Defendants fail to present any evidence showing that they will be harmed if the Court stays the trial court proceedings pending Plaintiffs' appeal of this Court's class certification decision. Instead, Defendants argue that a stay will delay their ability to file a Rule 56 motion, which is hardly sufficient to tilt the balance of hardships in their favor. Further, a stay of the proceedings will permit Defendants to maintain the status quo, which has been their desired outcome throughout this litigation, without any additional litigation costs or use of resources. On the contrary, Plaintiffs will face substantial hardship if the stay is denied because the determination of class certification could fundamentally alter scope of discovery and ultimately affect the course of this litigation greatly. In addition to the fact that the balance of hardships weighs greatly in favor of granting a stay, Plaintiffs have provided sufficient evidence to demonstrate that their appeal raises serious and difficult questions of law, thus justifying a stay of the trial court proceedings. Plaintiffs, therefore, respectfully request that the Court grant their Motion to Stay Proceedings Pending Appeal.

II. ARGUMENT

A. The Standard For A Motion To Stay Is Not In Dispute

Defendants' lengthy discussion of the proper standard for a motion to stay, and their repeated assertions that Plaintiffs have applied the wrong standard, is nothing more than an attempt to distract the Court from the main issue before it. In fact, Defendants ultimately propose essentially the same set of considerations for the Court as those set forth by Plaintiffs, which are grounded in Ninth Circuit case law. *See* Defs.' Response at 4; Pltffs.' Mot. At 3 – 4, 9. Therefore, in determining whether to grant a stay of proceedings, the Court should consider (1) the probability of success on the merits or that "serious legal questions are raised," (2) the balance of hardships to the parties, and (3) where the public interest lies. *See* Defs.' Response at 4; Pltffs.' Mot. At 3 – 4, 9; *Finder v. Leprino Foods Co.*, 2017 WL 1355104, at *3 (E.D. Cal.

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Jan. 20, 2017) (citing *Leiva-Perez v. Holder*, 640 F.3d 962, 967-968 (9th Cir. 2011) (explaining that the proponent of a stay may satisfy the likelihood of success on the merits step by showing a "substantial case on the merits" or that "serious legal questions are raised")).

B. Plaintiffs Have Shown Substantial Harm If Stay Is Denied

Defendants mischaracterize Plaintiffs' argument and evidence in an effort to discredit Plaintiffs' claim that they would suffer substantial harm if the case is not stayed. First, Defendants' assertion that the scope of discovery in this case will not change if the class certification decision is reversed is unfounded and unconvincing. As explained in Plaintiffs' Motion, there is a stark difference between litigating claims brought by four individuals as compared with claims on behalf of a class of similarly situated individuals spread out across the city. This is especially true for Plaintiffs' claims regarding the as-applied challenges because the scope of those claims will change greatly if class certification is granted. If they are certified as a class, Plaintiffs will need to conduct discovery on a much broader scope of sweeps and on the effect the City's policies have on a much larger group of individuals. Requiring Plaintiffs to conduct discovery and potential pretrial motions practice on matters that could be greatly altered by a pending appeal constitutes sufficient hardship to justify a stay. *See Finder v. Leprino Foods Co.*, 2017 WL 1355104, at *4 (E.D. Cal. Jan. 20, 2017) (explaining that "forcing a party to conduct 'substantial, unrecoverable, and wasteful' discovery and pretrial motions practice on matters that could be mooted by a pending appeal may amount to hardship or inequity sufficient to justify a stay.").

Defendants also appear to argue that Plaintiffs' case will not be affected by the outcome of the appeal because the parties have completed discovery, but this is far from true. Plaintiffs have taken only five depositions thus far and intend to take several more, including at least one Fed. R. Civ. P. 30(b)(6) corporate representative deposition. Declaration of Todd Williams in Support of Plaintiffs' Reply in Support of Plaintiffs' Motion to Stay ("Williams Reply Decl.") at

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¶ 3. Plaintiffs also intend to conduct additional written discovery, especially in light of new evidence of conflict within the City about the accuracy of the City's recordkeeping relating to the sweeps. Specifically, a recent report from the Seattle Office of Civil Rights raised questions about the City's recordkeeping methods. According to the *Seattle Times*, there are discrepancies within the City regarding the accurate reporting of the number of individuals who either declined shelter or were ruled "ineligible." Ex. A to Williams Reply Decl. Plaintiffs have a right to conduct discovery on these issues and question the veracity of the City's representations about the sweeps. Additionally, Plaintiffs intend to conduct discovery on the last few months of sweeps, for which no documents have yet been produced.[1] Williams Reply Decl. at ¶5.

In further support of their argument that discovery has been completed, Defendants assert that they have already produced 260,000 pages of documents (Defs.' Response at 7-8). But Defendants fail to disclose that the City produced more than 20% of its documents (52,823 pages) to Plaintiffs less than 48 hours prior to the September 7, 2017 hearing and nearly 40% of the City's document production (almost 90,000 pages) was not made until August 11, 2017 or later, long after Plaintiffs had filed their motion for a preliminary injunction. Williams Reply Decl. at ¶6. Since evaluating these document productions, Plaintiffs have identified several additional document custodians and potential witnesses whose depositions may be necessary. Thus, despite Defendants' transparent efforts to rush to file their dispositive motion, discovery in this case is very much ongoing.

Because requiring Plaintiffs to proceed with discovery without clarification on class certification would be greatly inefficient and would substantially harm Plaintiffs, the Court should grant Plaintiffs' Motion to Stay.

[1] Plaintiffs also intend to request from the City updated and current schedules of future planned sweeps that will allow Plaintiffs to collect additional important evidence.

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C. Defendants Have Failed To Identify Any Harm That Would Result From A Stay

Despite their assertion that "a stay would unduly prejudice Defendants," Defendants have not identified even a single piece of evidence showing this alleged prejudice. Defendants have not provided any evidence or explanation of how a stay would increase litigation costs or cause them to spend any additional resources. And lastly, Defendants have not provided any evidence of how the resulting delay of their Rule 56 motion would create any sort of burden or harm. In actuality, Defendants will not suffer any harm because a stay will allow them to maintain the status quo and continue enforcing their policies, which is the same result Defendants have been arguing for in this litigation. Defendants' alleged "burden" of having to wait to file for summary judgment, without incurring any additional costs or spending any additional resources while maintaining their existing practices, is hardly sufficient to tip the balance of hardship in their favor. *See Finder v. Leprino Foods Co.*, 2017 WL 1355104, at *4 (E.D. Cal. Jan. 20, 2017) (explaining that the "the Ninth Circuit has specifically held that being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity.'").

Although Defendants argue that this case is "ripe for final resolution" and they should therefore be permitted to proceed with a dispositive motion without delay, this argument is also flawed. As explained above, Plaintiffs have not been afforded the opportunity to fully conduct discovery. Defendants claim that the parties have briefed Plaintiffs' claims on the merits several times, but this again inaccurately describes the course of litigation thus far. When Plaintiffs brought their Motion for Preliminary Injunction, they had not yet received over 40% of the City's documents (and did not receive over 20% of the City's documents until two days before the hearing) and therefore did not have the benefit of examining witnesses regarding these documents or including these materials in their briefing. As such, any argument that the issues in this case have been fully briefed or decided is misplaced. Because discovery is ongoing and

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Defendants' dispositive motion would be premature at this stage, Defendants will not be substantially harmed by the delay caused by a stay.

D. Plaintiffs Have Satisfied The "Likelihood Of Success On The Merits" Element

Defendants mischaracterize the "likelihood of success on the merits" element by essentially arguing that Plaintiffs must establish a certainty of success on the merits, but this is not the standard. "[T]here are many ways to articulate the minimum quantum of likely success necessary to justify a stay—be it a 'reasonable probability' or 'fair prospect,' ... 'a substantial case on the merits,' or that 'serious legal questions are raised. . . these formulations are essentially interchangeable, and none of them demand a showing that success is more likely than not." *Lieva–Perez v. Holder*, 640 F.3d 962, 967 – 968 (9th Cir.2011). Because Plaintiffs have provided sufficient evidence showing that their appeal raises several serious and difficult questions of law, Plaintiffs have met the burden necessary to justify a stay.

Defendants' argument that the Ninth Circuit is not likely to grant review because of the "familiar and almost routine issues" presented ignores the fact that this case presents novel issues without clear precedent. As explained in Plaintiffs' Motion, Plaintiffs' Petition raises several serious and difficult questions of law, including whether the "significant proof" standard applies to satisfy commonality outside of the employment discrimination context. This issue is, at a minimum, unclear and should be resolved by the Court of Appeals. The Ninth Circuit in *Parsons*, explicitly refused to rule on when "significant proof" of a policy or practice is required to satisfy commonality outside of the discrimination context, nor what evidence is required to meet this burden. *Parsons v. Ryan*, 754 F.3d 657, 684 n. 29 (9th Cir. 2014). Defendants, in their Response to Plaintiffs' Petition do not cite a single Ninth Circuit opinion since *Parsons* that applies the significant proof standard to a Rule 23(b)(2) case challenging unconstitutional state action. Plaintiffs also seek review of the typicality, commonality, and adequacy standards applied by the Court.

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The remainder of Defendants' argument on the "likelihood of success on the merits" element presents nothing more than conclusory assertions as to the merits of Plaintiffs' claims and a recitation of this Court's Order on the class certification issue. However, because Plaintiffs "need not demonstrate that it is more likely than not that they will win on the merits" to justify a stay, and because Plaintiffs have established that their appeal raises serious questions of law, Defendants' arguments are unpersuasive and Plaintiffs' Motion to Stay should be granted. *See Leiva-Perez*, 640 F.3d at 966 (9th Cir. 2011).

E. Granting The Stay Will Further Public Interest

As explained in Plaintiffs' Motion, granting the stay will further judicial efficiency because it will prevent wasteful and burdensome discovery efforts. Additionally, allowing Defendants to proceed with a dispositive motion while Plaintiffs' class certification appeal is pending would be extraordinarily inefficient. Even if Defendants prevail on a dispositive motion at this stage, which they will not do, Plaintiffs will be free to refile their case as a class if the Ninth Circuit grants their class certification. *See Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984) (explaining that a judgment on dispositive motion applies only to named plaintiffs and does not have res judicata as to other individual plaintiffs or other members of any class that may be certified). Thus, staying the case will avoid the risk of duplicative efforts by Plaintiffs, Defendants, and the Court. When granting the stay would not cause any harm or inefficiency, it does not make sense to waste judicial resources continuing this litigation when there is a real possibility of having to re-litigate many of the same issues just months from now.

III. CONCLUSION

For these reasons and the reasons stated in Plaintiffs' Motion to Stay, Plaintiffs respectfully request that the Court grant their Motion to Stay Proceedings Pending Appeal.

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DATED this 17th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on **November 17, 2017**, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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