IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA
Big Stone Gap Division

WILLIAM THORPE, *et al.*, Plaintiffs, v. VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*, Defendants.	)	Case No. 2:20-cv-00007-JPJ-PMS

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED SUMMARY JUDGMENT MATERIALS

Eight weeks after filing their Partial Motion for Summary Judgment and two weeks before oral argument on that motion, Plaintiffs move to amend their briefing a second time selectively to cite to different evidence in support of their arguments. Defendants do not oppose the changes Plaintiffs propose to the Declaration[1] but oppose the changes Plaintiffs propose to the Memorandum of Law they filed in support of their Motion for Summary Judgment. Plaintiffs' Motion for Leave to amend their Memorandum of Law is untimely and should be denied.

As Plaintiffs acknowledge, both parties, after filing their summary judgment motions, agreed to the filing of amended materials to correct clerical errors in the original filings. ECF No. 423 at ¶ 2. Both parties, with the Court's consent, filed amended materials to correct the clerical errors three days after the initial filing deadline.

Plaintiffs now assert that, "during the course of reply briefing," they discovered additional errors. *Id.* at ¶ 4. In other words, having had time fully to assess Defendants' opposition to their summary judgment arguments, Plaintiffs now move the Court to allow them to cite different

[1] The changes proposed by Plaintiffs to the Declaration do not substantively affect their summary judgment arguments. The changes they propose to their Memorandum of Law do.

support for those arguments. Plaintiffs seek to change ***45*** citations in their Memorandum of Law. Plaintiffs do not—because they cannot—dispute that these citation corrections substantively change the evidence they assert supports their various arguments. Moreover, some of these citations are far more than "mere instances in which the cited paragraph was offset by one or two positions" as Plaintiffs assert—some are "offset" by tens of "positions" (*see, e.g.*, ECF No. 423-4 at 6 [purporting to change a citation from ¶ 148 to 138]; 36 [purporting to change a citation from ¶¶ 99-104 to 86-92]; 36, footnote 8 [purporting to change a citation from ¶ 13 to ¶ 81]), and at least one is an entirely new citation (see ECF No. 423-4 at 12 [purporting to add ¶ 259]).

Defendants cannot agree that such changes constitute mere clerical errors in the same way that the parties' amended materials shortly after filing their original motions did. Defendants had a full and fair opportunity to address the support for Plaintiffs' arguments when the initial amended materials were filed. Defendants do not have such an opportunity with the latest amendments. How Defendants were supposed to ascertain these citation errors in Plaintiffs' Memorandum of Law is a mystery to Defendants—one that Plaintiffs do not address. Indeed, Plaintiffs curiously fault Defendants for not discerning Plaintiffs' citation errors when reviewing Plaintiffs' Memorandum of Law even though Plaintiffs themselves apparently did not discern them until preparing their reply brief, ECF No. 423 at ¶ 3. *i.e.,* after reviewing Defendants' response to their arguments. Nor should the burden be placed on Defendants to address Plaintiffs' latest amendments as the parties are preparing for oral argument on multiple motions.[2]

[2] Allowing Defendants an opportunity to submit a revised brief in opposition to a "corrected" version of Plaintiffs' Memorandum of Law does not cure this situation. Rather, it only adds to the burden Plaintiffs seek to impose on Defendants as they spend time preparing for the November 17 hearing—preparation that would be significantly interrupted were Defendants required to prepare a revised opposition brief. And Plaintiffs surely would want to file a reply to that revised opposition brief; it is unclear how that could occur before the November 17 hearing.

Defendants informed Plaintiffs of Defendants' opposition to Plaintiffs' filing more than a week before Plaintiffs filed their Motion for Leave. ECF No. 423-5 at 5. Rather than file their motion at that time, Plaintiffs spent a week developing an argument in response to Defendants' position that they sent the night of November 1 and to which they gave Defendants until noon the next day to respond, knowing that they would attach that email, with corrections that they "no longer [would] be seeking to make," to their brief to the Court. *Id.* at 2, 4. Defendants declined to attempt to meet Plaintiffs' artificial deadline.

Both parties already filed amended materials to address clerical errors in their summary judgment materials. Defendants should not be placed at a disadvantage because Plaintiffs failed carefully to review their briefing and address any errors in time for Defendants to have an opportunity to respond to whatever support Plaintiffs intended to cite for their arguments.

For the reasons stated, this Court should deny Plaintiffs' Motion as it applies to submitting an second amended version of their Memorandum of Law.

November 7, 2023

Respectfully submitted,

/s/ Maya M. Eckstein

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2023 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all CM/ECF participants.

By: */s/ Maya M. Eckstein*

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