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

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO STAY

The appeal of the denial of qualified immunity as to Plaintiffs' Due Process and Eighth Amendment claims by Defendants Harold Clarke, Randall Mathena, H. Scott Richeson, A. David Robinson, Henry Ponton, Marcus Elam, Denise Malone, Steve Herrick, Tori Raiford, Jeffrey Kiser, and Carl Manis (collectively, Individual Defendants) requires a stay of the case as to those claims. The status of the case—early in discovery with class certification not yet briefed—weighs heavily in favor of staying the case in its entirety pending the outcome of the appeal.

FACTS

Twelve inmates (Plaintiffs) filed this putative class action against the Individual Defendants in their individual and official capacities and the Virginia Department of Corrections (VDOC) (collectively, Defendants), claiming Defendants (1) breached a settlement agreement from the 1980s, (2) violated Plaintiffs' Due Process, Equal Protection, and Eighth Amendment rights by confining them in long-term segregated housing, and (3) violated the Americans with Disabilities Act (ADA) and Rehabilitation Act (RA) by discriminating against a subset of Plaintiffs on the basis of their disabilities. Defendants moved to dismiss the action on various grounds,

including that qualified immunity renders the Individual Defendants immune to Plaintiffs' Due Process, Equal Protection, and Eight Amendment claims.

In its Opinion and Order issued June 15, 2021 (Doc. No. 101, the June 15 Order), the Court (1) dismissed in their entirety Plaintiffs' claims for breach of the settlement agreement and violations of Plaintiffs' Equal Protection rights, (2) dismissed as to VDOC and the Individual Defendants in their official capacities Plaintiffs' Due Process and Eight Amendment claims, and (3) dismissed as to the Individual Defendants in their individual capacities Plaintiffs' ADA and RA claims. The Court denied the Individual Defendants' qualified immunity defense. (*Id.* at 21-27)

The case remains at an early stage. Under the Amended Scheduling Order (Doc. No. 103), Plaintiffs' Class Certification Motion is due August 16, 2021 with Defendants' Response due 30 days later and the close of non-expert fact discovery set for December 16, 2021. No party has served interrogatories or requests for admission; and no party has taken any depositions.

Before filing their Motion to Stay, Defendants filed a Notice of Appeal of that portion of the Court's June 15 Order denying them qualified immunity as to Plaintiff's Due Process, Equal Protection, and Eighth Amendment claims (Doc. No. 104).

ARGUMENT

A. Defendants' appeal of the denial of qualified immunity as to Plaintiffs' Due Process and Eight Amendment claims automatically stays further proceedings in this Court as to those claims.

"The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Accordingly, all events related to the matters involved in the appeal "that occur[] in the district court after the notice of appeal … are of no moment as a 'timely filed notice of appeal transfers jurisdiction

of a case to the court of appeals and strips a district court of jurisdiction to rule on any'" of those matters. *Clark v. Cartledge*, 829 F.3d 303, 305 (4th Cir. 2016) (quoting *Doe v. Public Citizen*, 749 F.3d 246, 258 (4th Cir. 2014)).

This rule warrants special consideration when, as here, qualified immunity provides the basis for the collateral-order appeal. "[Q]ualified immunity is 'an *immunity from suit* rather than a mere defense to liability; ... it is effectively lost if a case is erroneously permitted to go to trial.'" *Durham v. Horner*, 759 F.Supp.2d 810, 813 (W.D. Va. 2010) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Forcing Defendants to bear the significant burden of responding to Plaintiffs' discovery requests during the pendency of the appeal would greatly diminish the value of this protection from suit. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 *(*1993) ("benefit conferred by qualified immunity … for the most part lost as litigation proceeds past motion practice"); *Williamson v. U.S. Dep't of Agric.*, 815 F.2d 368, 382 (5th Cir. 1987) (protection of doctrines of absolute and qualified immunity "greatly depreciated" if it did not include protection from discovery).

Every federal circuit to consider the question has held that a defendant's collateral-order appeal on the ground of immunity from suit (whether qualified immunity or absolute immunity) divests the district court of jurisdiction to conduct a trial or further proceedings against that defendant. *See Rivera-Torres v. Ortiz Velez*, 341 F.3d 86, 97-98 (1st Cir. 2003); *Forsyth v. Kleindienst*, 700 F.2d 104, 105–06 (3d Cir. 1983); *BancPass, Inc. v. Hwy. Toll Admin, LLC*, 863 F.3d 391, 399–400 (5th Cir. 2017); *Williams v. Brooks*, 996 F.2d 728, 730 (5th Cir. 1993); *Apostol v. Gallion*, 870 F.2d 1335, 1338–40 (7th Cir. 1989); *Johnson v. Hay*, 931 F.2d 456, 459 n.2 (8th Cir. 1991); *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992); *Stewart v. Donges*, 915 F.2d 572, 579 (10th Cir. 1990); *Princz v. Fed. Republic of Germany*, 998 F.2d 1, 1 (D.C. Cir. 1993). "Once a notice of appeal on an appealable issue such as qualified immunity is filed, the status quo

is that the district court has lost jurisdiction to proceed." *Stewart*, 915 F.2d at 577. Such an appeal "divests a district court of the authority to order discovery or conduct other burdensome pretrial proceedings." *May v. Sheahan*, 226 F.3d 876, 880 (7th Cir. 2000). The plaintiff cannot even amend the complaint once the defendant files such an appeal. *Id*. at 881.

No reason exists to believe that the Fourth Circuit would reject this rule. The Supreme Court expressly endorsed the federal circuits' practice in *Behrens v. Pelletier*, 516 U.S. 299, 310-11 (1996) (favorably citing *Chuman*, *Stewart*, and *Apostol*). And the Fourth Circuit has cited the practice of sister circuits for the "unremarkable proposition that a trial may not be conducted from the time that an interlocutory or collateral order appeal is properly taken until the court of appeals returns jurisdiction to the district court." *United States v. Modanlo*, 762 F.3d 403, 411 (4th Cir. 2014).

This rule also comports with the Supreme Court's admonition in *Mitchell v. Forsyth* that "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal *before the commencement of discovery*." 472 U.S. 511, 526 (1985) (emphasis added). The Fourth Circuit has echoed that rule. *See Cloaninger v. McDevitt*, 555 F.3d 324, 330 (4th Cir. 2009) (describing qualified immunity as "*immunity from suit* rather than a mere defense to liability") (citations omitted); *Gray-Hopkins v. Prince George's Cty.*, 309 F.3d 224, 229 (4th Cir. 2002) ("qualified immunity is an immunity from having to litigate, as contrasted with an immunity from liability"); *O'Bar v. Pinion*, 953 F.2d 74, 85 (4th Cir. 1991) ("If the plaintiff is unable to allege a violation of clearly established law, the defendants who claim qualified immunity are entitled to dismissal before commencement of discovery, because this immunity protects government officials not only from liability but also from trial."). For instance, in *H.H. ex rel. H.F. v. Moffett*, 335 F. App'x 306 (4th Cir. 2009), the Fourth Circuit found a collateral-order appeal proper even though the district judge had only *deferred* ruling on the qualified-immunity defense pending discovery. The Court explained that it was improper to allow

"[a]ppellees to now force [defendants] into discovery, without recourse to appeal the district court's legal finding . . . ." *Id*. at 311.

Finally, at least one court in this circuit has held that a defendant's collateral-order appeal of the court's adverse immunity ruling on federal constitutional claims stayed all claims against her, including state-law claims not implicating the immunity defense. *Adams v. Naphcare, Inc.*, No. 2:16cv229, 2017 U.S. Dist. LEXIS 232690 (E.D. Va. May 5, 2017). Accordingly, the court held that the defendant's motion to stay was moot because all further proceedings against the defendant were stayed pending a decision on the appeal. *Id.*

B. The stay of Plaintiffs' Due Process and Eight Amendment claims at this stage of the case strongly militates in favor of staying the case in its entirety pending the outcome of Defendants' appeal.

Applying the *Adams* court's reasoning, the Individual Defendants' collateral-order appeal of the denial of their qualified immunity defense should stay all further proceedings against them in this case, including on the ADA and RA claims. Even if this Court were to reject that reasoning, however, good cause exists to stay all further proceedings against Defendants pending resolution of the interlocutory appeal.

"A district court has broad discretion to stay proceedings as part of its inherent power to control its own docket." *Innotec LLC v. Visiontech Sales, Inc.*, Civil Action No. 3:17CV00007, 2018 U.S. Dist. LEXIS 156793, at *6 (W.D. Va. Sep. 14, 2018) (quoting *United States ex rel. Harbor Constr. Co. v. T.H.R. Enters., Inc.*, 311 F. Supp. 3d 797, 805 (E.D. Va. 2018)). "In exercising such discretion, a court must weigh competing interests and maintain an even balance." *Id.* (internal quotations marks omitted). As an exercise of discretion, the propriety of issuing a stay "'is dependent upon the circumstances of the particular case.'" *Riggleman v. Clarke*, No. 5:17-cv-00063, 2019 U.S. Dist. LEXIS 78218, at *9-10 (W.D. Va. May 9, 2019) (granting motion to stay pending class certification appeal to preserve party and judicial resources).

Similar to the situation in *Riggleman*, the circumstances of this case warrant a stay of all further proceedings to preserve both party and judicial resources. Plaintiffs have 55 days remaining to file their Class Certification Motion. Defendants' Response to Class Certification Motion is due 30 days later. Based on their Complaint, Plaintiffs intend to seek certification of an "Injunction Class" and a "Damages Class" for their Due Process and Eighth Amendment claims, as well as an "Injunction Subclass" and a "Damages Subclass" for their ADA and RA claims. (Doc. No. 1 at ¶¶ 207, 214). This Court dismissed the Due Process and Eighth Amendment claims as to VDOC. With the case stayed as to the Individual Defendants on those claims, neither Plaintiffs nor Defendants can obtain discovery to support their briefs. Even if the parties filed the briefs, this Court could not properly certify the "Injunction Class" or "Damages Class;" it would lack the jurisdiction to do so. And it would be highly inefficient, if not impossible, to address the issue of an "Injunction Subclass" or "Damages Subclass" without knowing if an "Injunction Class" or "Damages Class" can be certified. Finally, discovery is at an early stage. Proceeding with discovery—both fact and expert—on a subset of claims will increase inefficiency and costs for both sides, as well as increasing the potential for disputes between the parties as to whether specific discovery requests are properly addressed to the claims over which the Court retains jurisdiction.

Proceeding with discovery would be particularly prejudicial to the Individual Defendants and other VDOC personnel. Permitting the case to proceed on a subset of Plaintiffs' claims creates a significant risk that Plaintiffs will seek to depose the Individual Defendants and at least some VDOC personnel multiple times—once to obtain discovery on Plaintiffs' ADA and RA claims and again were the Fourth Circuit to affirm this Court's order denying the Individual Defendants qualified immunity. The circumstances of this case do not warrant such inefficiency. *See, e.g., Davis v. Matagorda Cty.*, No. 3:18-CV-00188, 2019 WL 1924532, at *3 (S.D. Tex. Apr. 30, 2019)

(noting that "it defies common sense to allow wide-ranging and intrusive discovery when such discovery will simply have to be repeated" if the appellate court affirms the qualified immunity ruling.)

The risks of proceeding with that portion of the case not automatically stayed by Individual Defendants' appeal of the Courts' denial of their qualified immunity defense far outweigh any potential benefits of proceeding with the case piecemeal.

CONCLUSION

The Individual Defendants' appeal of the Courts' denial of their qualified immunity defense automatically stays at least those aspects of the case involved in the appeal. The circumstances of the case dictate that it should be stayed in its entirety. Accordingly, the Court should enter an order that the case is stayed pending disposition of the Individual Defendants' appeal.

June 22, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of June 2021, 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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