UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

POLLY OLSEN
Plaintiff,
v. Case No. 18-CV-1366

NORTHEAST WISCONSIN TECHNICAL COLLEGE, et al.
Defendants.

PLAINTIFF, POLLY OLSEN'S MEMORANDUM IN OPPOSITION TO NWTC'S MOTION FOR LEAVE TO FILE A SURREPLY

In deciding whether to permit Defendants, ("NWTC") to file its surreply brief, this Court should consider the relevant equities, and in particular how NWTC has conducted itself in this litigation so far. In February of 2019 – after Ms. Olsen was prohibited from distributing Valentines on NWTC's campus, and after she filed this lawsuit, and after she moved for summary judgement – NWTC repealed its Public Assembly Policy and replaced it with a new policy. Although these actions occurred *before* NWTC filed its brief in opposition to Ms. Olsen's motion for summary judgment, such that NWTC could easily have informed Ms. Olsen and the Court that it had adopted a new policy, NWTC did not do so. Instead, it argued to this Court in its opposition brief that Ms. Olsen's facial claims were mooted because of the repeal of its old policy, **without ever disclosing to the Court that it had adopted a new policy.**[1]

As the case law in Ms. Olsen's reply brief makes clear, (Pl.'s Reply Br. 2-5, Dkt. #22), whether an action is mooted by the repeal of a challenged policy (as NWTC argued) depends in large part on whether the policy has been replaced by a sufficiently similar one. NWTC argued

[1] NWTC now asserts in its motion that "in its summary judgment response, NWTC noted that the February 2018 Policy was recently replaced by a new policy." (Def's Mot. for Leave to File a Surreply 2, Dkt. #25.) Counsel for Ms. Olsen has scoured NWTC's summary judgment filings for any mention of the new policy to no avail. Notably, NWTC provides no specific record citation for its assertion, instead simply citing its entire brief.

mootness without disclosing the new policy. Ms. Olsen then, on her own, searched for and discovered the new policy online, put it into the record, and pointed out that the case was not moot because the new policy suffered from the same flaws as the old policy. NWTC now informs the Court that it is entitled to file a surreply because Ms. Olsen allegedly raised new arguments in her reply brief when all she did was rebut NWTC's mootness argument. This Court should deny NWTC's motion to file an additional brief for the following three reasons.

First, Ms. Olsen's supposedly "new" arguments were in fact arguments addressed in reply to one of the principal arguments that NWTC made in its response brief: that Ms. Olsen's facial claims were moot because NWTC repealed its old policy. Ms. Olsen properly sought to rebut NWTC's claim in her reply brief by setting forth the law that where a challenged policy is replaced with a "substantially similar" policy, the case is not moot. (Pl.'s Reply Br. 2, Dkt. #22 (quoting *Smith v. Exec. Dir. of Indiana War Memorials Comm'n*, 742 F.3d 282, 284 (7th Cir. 2014)). Making this argument in reply required Ms. Olsen to show both the existence of the new policy and how it violates her rights in the same way as the old one. These arguments are hardly "new."

Second, NWTC should not be rewarded for its own gamesmanship. Had NWTC timely and forthrightly acknowledged to Ms. Olsen and the Court (as was its obligation) that it had amended its old policy, and had it placed its new policy in the record, NWTC could have explained in its response brief why it believed the new policy was materially different from the previous policy and made all of the arguments that it now makes in its proposed surreply brief. That it did not do so was its own tactical choice. NWTC now seeks to recover the opportunity to address the new policy that it voluntarily relinquished by failing to disclose the new policy in its opposition brief. There is no reason for the Court to relieve NWTC from its tactical choices.

Third, NWTC does not actually use its surreply brief to defend its new policy on the merits. (*See* Defs.' Surreply Br. 1-2, Dkt. #25-1 ("NWTC does not directly address the constitutionality of the New Policy. . . . [T]he New Policy passes First Amendment muster for the same reasons as did the Public Assembly Policy."). Instead, it seeks to reply to Ms. Olsen's reply to NWTC's mootness argument, which as the non-movant it has no right to do, then adds a *new* ripeness defense.

This Court should thus deny NWTC's motion to file a surreply brief. But if this Court disagrees, it should not give NWTC the added benefit of having the final word in this case. Ms. Olsen should be permitted to file a response to NWTC's surreply brief of a length equal to NWTC's surreply (10 pages).[2]

Submitted this 17th day of April, 2019.

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[2] NWTC's claim that Ms. Olsen violated Civil Local Rule 15(b) by asking for leave to amend her pleadings without filing a copy of those pleadings is baseless. (Def's Mot. for Leave to File a Surreply 2 n.1, Dkt. #25.) Ms. Olsen did not amend her complaint but only preserved her right to do so by asking for leave to amend "[t]o the extent this Court believes it is necessary." (Pl.'s Reply Br. n.4, Dkt. #22.) She would do so if required but Supreme Court case law suggests that in circumstances such as these amended pleadings are not always necessary. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 & n.3 (1993) (concluding that repeal and replacement of challenged ordinance did not moot case, then proceeding to address question it had accepted for review over dissent's complaint that the petitioner needed to amend its pleadings); *see id.* at 675 (O'Connor, J., dissenting).