

From: Valenta, Val
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Todd Carroll <Todd.Carroll@nelsonmullins.com>
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Phil.Porter@scdm.net <Phil.Porter@scdm.net>
Date: 1/22/2009 11:58:53 AM
Subject: RE: Summers v. Adams - Motion to Amend Complaint

Emory et al.,

For the record, James is correct that the DMV opposes the Motion to Amend the Complaint.

While I welcomed the substantive changes that would result in coverage by the IRF, I cannot throw Marcia Adams under the proverbial train by agreeing to the amendment of the caption, making her personally liable. As you all know, the DMV (along with the DOC) has been complaining all the way back to the 'Choose Life' suit that state agencies should not bear the expense of challenges to the constitutionality of legislation. Personal liability by agency heads for the constitutionality of legislation would be a travesty, not to mention creating a chilling effect for anyone ever wanting to take the job.

Val

-----Original Message-----

From: James Burns [mailto:James.Burns@nelsonmullins.com]
Sent: Wednesday, January 21, 2009 5:16 PM
To: Emory Smith; Val.Valenta@scdmv.net
Cc: Butch Bowers; Thad Westbrook; Todd Carroll
Subject: RE: Summers v. Adams - Motion to Amend Complaint

Emory,

I just spoke with Val, and DMV opposes the Motion to Amend the Complaint.

James

-----Original Message-----

From: Emory Smith [mailto:AGESMITH@scag.gov]
Sent: Sunday, January 18, 2009 11:21 AM
To: Val.Valenta@scdmv.net
Cc: Butch Bowers; James Burns; Thad Westbrook; Todd Carroll
Subject: Fwd: Summers v. Adams - Motion to Amend Complaint

Please let me know how you want counsel to respond to the Motion to Amend the Complaint. For your information, I attach an earlier email from Plaintiff's counsel with the Motion and the changes the proposed complaint would make in the current complaint. You probably already have seen that email. We never consented to the Motion, Plaintiffs filed the Motion and our Return is due 1/30. We could oppose, consent or file other responses such as "neither consent to nor oppose" or "not oppose" the amended complaint.

IRF has said that the proposed second amended complaint appears to be covered. Coverage would offer the advantage of paying any attys fees awarded for work on the second amended complaint such as on motions for summary judgment. The coverage would not extend to work undertaken in this case up until now. In the absence of coverage, fees could be awarded against the defendants if the Plaintiffs prevail in this case.

Initially, my thought was to consent or "not object" to the amendment b/c of the IRF coverage but I now have some concern about doing so. In particular, the proposed amended complaint would name the defendants in their individual capacities as well as in their official capacities. Although IRF has said that the complaint "appears" to be covered, if for any reason the scope of the suit changed again due to other amendments in the future, the defendants could be individually (personally) exposed to liability for fees or damages. Although only "nominal" damages are sought now, fees could be substantial in amount.

Therefore, I recommend that we oppose the Motion to Amend because Plaintiffs are changing the scope of the suit after it has already proceeded thru the preliminary injunction stage. They are, in effect, creating an ever changing legal landscape. This is the second version of their proposed Motion to file a Second Amended Complaint. We should only have to defend the First Amended Complaint.

Please let me know by Fri. 1/23, whether you want counsel for Ms. Adams to oppose the Motion, consent to it, or file another type of response noted above.

Please let me know if you have questions.

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