

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WINDHOVER, INC., and)	
JACQUELINE GRAY,)	
)	
Plaintiffs,)	
)	Cause No. 4:07CV00881-ERW
v.)	
)	
CITY OF VALLEY PARK, MO,)	
)	
Defendant.)	

DEFENDANT’S STATEMENT OF CONTROVERTED MATERIAL FACTS

On August 29, 2007, Plaintiffs filed a Statement of Uncontroverted Material Facts along with Plaintiffs’ Motion for Summary Judgment based on issue preclusion. Defendant City of Valley Park, Missouri, regards Plaintiffs’ Statement of Uncontroverted Material Facts to be misleading with respect to several references to the Transcript of the March 1, 2007, hearing before the Circuit Court of the County of St. Louis in the case of *Reynolds v. Valley Park*, 06-CC-3802. Defendant also regards Plaintiffs’ Statement of Uncontroverted Material Facts to be misleading with respect to references to the decision of the Circuit Court of the County of St. Louis in *Reynolds*. Specifically, Defendants consider paragraphs 27 and 33 of the Plaintiffs’ Statement of Uncontroverted Material Facts to be misleading. In addition, Defendant would like to present a number of additional facts that will assist the Court in resolving Plaintiffs’ Motion for Summary Judgment. Accordingly, Defendant hereby avers that the following material facts are true.

1. At the beginning of the March 1, 2007, hearing before the Circuit Court of the County of St. Louis in the case of *Reynolds v. Valley Park*, 06-CC-3802, the court stated that it was limiting its inquiry to Ordinances 1708 and 1715: “We’re going [to] today have a brief argument on whether or not the Court can consider if 1708 and 1715 are void or that the repeal of those two ordinances takes that issue out [of] the Court’s hands as being moot, and then we’re going move to Plaintiffs’ motion for judgment....”

Transcript of March 1, 2007, hearing (Plaintiffs' Exh. I attached to Pl. Statement of Uncont. Mat. Facts), at 5.

2. At the end of the March 1, 2007, hearing the court stated that it had informed counsel that it was only considering two substantive challenges to Ordinances 1708 and 1715: "All right. So to be clear then, the Court did let everyone know that I was concerned about the excessive fines part in 1708 and the more than 30 day—or less than 30 day notice to tenants contained in the 1715, or vice-versa, I'm not sure which. Your position is the Court can sever those out?" *Id.* at 87.

3. Counsel for *Reynolds* plaintiffs stated at the March 1, 2007, hearing: "But the law is clear that this court can and should decide the validity of the entirety of both Ordinances 1708 and No. 1715 on any ground that this court believes that it should be voided." *Id.* at 18.

4. Contrary to the implication paragraph 27 of Plaintiffs' Statement of Uncontroverted Material Facts, the only discussion of Ordinance 1722 at the March 1, 2007, hearing was in the context of:

- (a) formally presenting Ordinance 1722 to the court, Transcript of March 1, 2007, hearing, at 35, 37, 41, 44-46, 90,
- (b) stating that the City offered the *Reynolds* plaintiffs the opportunity to substitute Ordinance 1722 for Ordinances 1708 and 1715 and amend their petition accordingly, *id.* at 47,
- (c) describing the drafting and passage of the ordinance, *id.* at 50-51, 56-58,
- (d) noting its similarity to various state statutes, *id.* at 84, and
- (e) the City expressing the hope that the Court would review Ordinance 1722 at a future hearing, *id.* at 87.

5. At the March 1, 2007, hearing counsel for Defendant stated under oath the following:

Q: ...[D]id the City of Valley Park and the Defendants offer to substitute Ordinance 1721 and 1722 in place of 1708 and 1715 and have the Court's preliminary injunction apply to it?

A: Yes Sir.

...

Q: And that offer was not accepted?

A: That's correct.

Transcript of March 1, 2007, hearing, at 47-48.

6. At the end of the March 1, 2007, hearing, counsel for the City stated the following: "We frankly look forward to hopefully the Court having to deal with 1721, 1722. Plaintiff[s] said we can't

force them to take those ordinances on, but there's obviously a reason why they don't want to take them on." *Id.* at 87.

6. The *Reynolds* decision stated that the validity of Ordinance 1721 and Ordinance 1722 was not before the court. In the words of the court, "Defendant has represented to this Court that it recently repealed Ordinance No. 1715, and admitted into evidence the new ordinances *only for the purpose of its argument on mootness. Plaintiffs have not amended their pleadings to put the issue of the validity of the new ordinances before the Court.*" *Reynolds v. Valley Park*, No. 06-CC-3802, slip op. at 3 (¶10) (emphasis added) (*Reynolds* opinion may be found in Plaintiffs' Exh. J attached to Pl. Statement of Uncont. Mat. Facts).

7. The *Reynolds* decision stated that the following specific employment provision conflicted with state law: "Ordinance No. 1715¹ conflicts with Mo.R.Stat. § 79.470 in that it penalizes a violation of its provisions by ... forcing a business to forego a business permit, or renewal of a business permit, for a period of 'not less than five (5) years.'" *Reynolds v. Valley Park*, No. 06-CC-3802, slip op. at 6-7 (¶10).

8. There is no provision that includes the denial of a business permit for a period of "not less than five (5) years" in Ordinance 1722. Ordinance 1722 (Exhibit H attached to Pl. Statement of Uncont. Mat. Facts).

9. The *Reynolds* decision did not conclude that any provision of Ordinance 1722 was in violation of state law. *Reynolds v. Valley Park*, No. 06-CC-3802, *passim*.

10. The *Reynolds* decision did not enjoin Ordinance 1722 or declare it void in any respect. *Reynolds v. Valley Park*, No. 06-CC-3802, *passim*.

11. In contrast to the partial quotation offered by Plaintiffs in paragraph 33 of Plaintiffs' Statement of Uncontroverted Material Facts, the full text in the *Reynolds* opinion reads as follows:

Without deciding whether Defendant City of Valley Park has effectively repealed Ordinance No. 1708 and Ordinance No. 1715, *the Court finds and concludes under R.E.J., Inc. v. City of Sikeston, 142 S.W.3d 744 (Mo. banc. 2004), and Northeastern Florida Chapter of the Assoc. General Contractors of America v. City of Jacksonville,*

¹ The *Reynolds* court mistakenly indicated that the five-year provision was located in Ordinance 1715, when it was actually located in Ordinance 1708, section 2.

508 U.S. 656, 661-62 (1993), this case is not moot. When a party files suit seeking to void a local ordinance, a defendant cannot unilaterally moot the litigation by repealing the ordinance. *Id.* Furthermore, the Court finds the new ordinances are “sufficiently similar” to the old ordinances in that they are aimed at the same people and conduct and include some of the same penalties. Given that the substance of the new ordinances is the same, the Court concludes the challenged conduct will continue. *City of Jacksonville, supra*, 508 U.S. at 662-63 and n. 3.

Reynolds, slip op. at 5 (emphasis indicates text omitted by Plaintiffs).

12. Ordinance 1722 contains the word “knowingly” in Section 4.A: “It is unlawful for any business entity to *knowingly* recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or in part within the City.” The equivalent provision in Ordinance 1715 does not contain the word “knowingly.” Ordinance 1722 § 4.A; Ordinance 1715 § 4.A (Exhibit D attached to Pl. Statement of Uncont. Mat. Facts).

13. The text of Section 5 of Ordinance 1722, which is not found in Ordinance 1715, provides as follows:

- A. Prospective Application Only. The default presumption with respect to Ordinances of the City of Valley Park – that such Ordinances apply only prospectively – shall pertain to the provisions of this Ordinance, which shall apply only to employment contracts, agreements to perform service or work, and agreements to provide a certain product in exchange for valuable consideration that are entered into or renewed after the date that this Ordinance becomes effective and any judicial injunction prohibiting its implementation is removed.
- B. Correction of Violations–Employment of Unlawful Workers. The correction of a violation with respect to the employment of an unlawful worker shall include any of the following actions:
 - (1) The business entity terminates the unlawful worker's employment.
 - (2) The business entity, after acquiring additional information from the worker, requests a secondary or additional verification by the federal government of the worker's authorization, pursuant to the procedures of the Basic Pilot Program. While this verification is pending, the three business day period described in Section 4.B.(4) shall be tolled.
 - (3) The business entity attempts to terminate the unlawful worker's employment and such termination is challenged in a Court of the State of Missouri. While the business entity pursues the termination of the unlawful worker's employment in such forum, the three business day period described in Section 4.B(4) shall be tolled.

- C. Procedure if Verification is Delayed. If the federal government notifies the City of Valley Park that it is unable to verify whether an employee is authorized to work in the United States, the City of Valley Park shall take no further action on the complaint until a verification from the federal government concerning the status of the individual is received. At no point shall any city official attempt to make an independent determination of any alien's legal status, without verification from the federal government, pursuant to United States Code Title 8, Subsection 1373(c).

- D. Deference to Federal Determinations of Status. The determination of whether a tenant of a dwelling is lawfully present in the United States, and the termination of whether a worker is an unauthorized alien shall be made by the federal government, pursuant to United States Code Title 8, Subsection 1373(c). A determination of such status of an individual by the federal government shall create a rebuttal presumption as to that individual's status in any judicial proceedings brought pursuant to this Ordinance. The Court may take judicial notice of any verification of the individual previously provided by the federal government and may request the federal government to provide automated or testimonial verification pursuant to United States Code Title 8, Subsection 1373(c).

- E. Venue for Judicial Process. Any business entity subject to a complaint and subsequent enforcement under this Ordinance, or any employee of such a business entity, may challenge the enforcement of this Ordinance with respect to such entity or individual before the Board of Adjustment of the City of Valley Park, Missouri, subject to the right of appeal to the St. Louis County Circuit Court. Such an entity or individual may alternatively challenge the enforcement of this Ordinance with respect to such entity or individual in any other Court of competent jurisdiction in accordance with applicable law, subject to all rights of appeal.

Ordinance 1722 § 5.

14. The Defendants' Trial Brief of February 22, 2007, in the *Reynolds* litigation did not address the issue of whether the employment provisions of Ordinances 1708 and 1715 were consistent with state law. See Exhibit A attached to Def. Memo. in Opposition to Pl. Mtn. for Summ. J.

15. The Defendants' list of Citations for Defendants' Trial Brief of February 22, 2007, did not concern the validity of the employment provisions of Ordinances 1708 and 1715 under state law. See Exhibit B attached to Def. Memo. in Opposition to Pl. Mtn. for Summ. J.

16. The Defendants' Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Pleadings, of February 22, 2007, contains only a brief reference to the employment provisions of

Ordinances 1708 and 1715 at the bottom of page 2. See Exhibit C attached to Def. Memo. in Opposition to Pl. Mtn. for Summ. J.

Respectfully submitted by

/s/ Kris W. Kobach

KRIS W. KOBACH, Kansas 17280, Nebraska 23356
Professor of Law, UMKC School of Law
5100 Rockhill Road
Kansas City, MO 64110
913-638-5567
816-235-2390 (FAX)
kobachk@umkc.edu

/s/ Eric M. Martin

ERIC M. MARTIN, FBN 19885
109 Chesterfield Business Parkway
Chesterfield, MO 63005-1233
636-530-1515
636-530-1556 (FAX)
emartin772@aol.com

/s/ Michael Hethmon

MICHAEL HETHMON, Maryland Bar
General Counsel
Immigration Reform Law Institute
1666 Connecticut Ave. N.W., Suite 402
Washington DC 20009
202-232-5590
202-464-3590 (FAX)
mhethmon@irli.org

Attorneys for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on Plaintiffs' counsel of record, listed below, by operation of the Court's ECF/CM system, this 6th day of September, 2007:

Fernando Bermudez
Green Jacobson & Butsch P.C.
7733 Forsyth Blvd., Suite 700
St. Louis, MO 63105

Anthony E. Rothert
American Civil Liberties Union
of Eastern Missouri
454 Whittier Street
St. Louis, MO 63108

Jenner & Block LLP
Daniel J. Hurtado
Gabriel A. Fuentes
330 North Wabash Avenue
Chicago, IL 60611-7603

Omar C. Jadwat
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad St., 18th Fl.
New York, NY 10004

Jennifer C. Chang
American Civil Liberties Union Foundation
Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111

Ricardo Meza
Jennifer Nagda
Mexican American Legal Defense
and Educational Fund
11 E. Adams, Suite 700
Chicago, IL 60603

/s/ Kris W. Kobach

KRIS W. KOBACH