

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
JESSE W. WILLIAMS, SHERIFF)
OF PATRICK COUNTY, a Consti-)
tutional Officer of the)
Commonwealth of Virginia)
and elected under the laws)
of the Commonwealth,)
)
Defendant.)
_____)

CIVIL ACTION
NO. 83-0094-D

MEMORANDUM OF PLAINTIFF UNITED STATES
IN OPPOSITION TO THE MOTION OF DEFENDANT
JESSE W. WILLIAMS, SHERIFF OF PATRICK
COUNTY, FOR A PROTECTIVE ORDER,
PURSUANT TO RULE 26 (c), F.R.CIV.P.

INTRODUCTION AND BACKGROUND

At the request of counsel for the United States, counsel for defendant Jesse W. Williams, Sheriff of Patrick County, agreed on July 5, 1983, to make Sheriff Williams and four employees of the Patrick County Sheriff's Department available for depositions by the United States, commencing at 9:00 a.m. on August 11, 1983 (see Attachment A hereto).

In accordance with this agreement, the United States, on July 20, 1983, served and filed a notice of depositions, noticing such depositions to commence on August 11, 1983, as well as an

attachment to the notice which identified various materials that Sheriff Williams is to produce at his deposition pursuant to subpoena duces tecum issued by the Clerk of Court (see Attachment B hereto).

On August 1, 1983, the undersigned counsel for the United States received a copy of a letter to the Court dated July 21, 1983 from counsel for Sheriff Williams, in which counsel stated, inter alia, that it was his intention to cancel the depositions scheduled to commence on August 11, 1983, and that "in the absence of a Court Order to the contrary ... [defendant] will assume that these depositions will be continued until after the Court's ruling on [defendant's Rule 12(b)(6)] Motion" to dismiss (see Attachment C hereto).

On August 2, 1982, the undersigned counsel for the United States telephoned counsel for Sheriff Williams, and advised him that, absent the issuance of a protective order, the United States intended to take the depositions as noticed and previously agreed upon (see Attachment D hereto). The undersigned counsel for the United States further suggested to opposing counsel that the parties seek a hearing before the Court on this matter.

The undersigned counsel for the United States has been advised by counsel for defendant Jesse W. Williams that the defendant intends to file a motion, pursuant to Rule 26(c), F.R.Civ.P., for a protective order prohibiting discovery by the United States before this Court rules upon the defendant's motion to dismiss, and that the Court has agreed to hear argument by counsel on this matter on August 9, 1983 at 9:30 a.m.

ARGUMENT

Rule 26(c), F.R.Civ.P., provides, in relevant part, that:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... (1) that discovery not be had...

The filing of a motion to dismiss pursuant to Rule 12(b)(6), F.R.Civ.P., provides no basis for the postponement of discovery. This is especially true where, as here, the defendant is seeking that such motion be treated as one for summary judgment under Rule 56, F.R.Civ.P. In this regard, defendant Jesse W. Williams has attached to his motion to dismiss an affidavit executed by him in support of his motion.

To deny plaintiff its right to conduct discovery would, we believe, deny to plaintiff its fundamental right of due process. See, e.g., Washington v. Cameron, 411 F.2d 705 (D.C. Cir. 1969). Further, as the Court of Appeals for this Circuit instructed in Phoenix Savings and Loan, Inc. v. Aetna Casualty and Surety Co., 381 F.2d 245 (4th Cir. 1967), "summary judgment ... should be granted only where it is perfectly clear that no issue of fact is involved" (Id. at 249), and should be denied where the factual

record before the court is, as here, incomplete. Id. at 252.*/
These established principles were applied by District Judge Williams in his recent decision in an employment discrimination suit brought by a woman on the basis of sex against the Sheriff of Wythe County, Virginia, Brewster v. Shockley, 554 F. Supp. 365 (W.D. Va. 1983). In Brewster, the Court overruled defendants' Rule 12(b)(6) motion to dismiss - which, like the instant motion, contended that deputy sheriffs are not employees under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. The Court pointed out that consideration of that issue required a full development of all of the evidence; and the court, thus, set the case for trial. So also in our case, we believe that a full development of all of the evidence is in order.


*/ In considering defendant's motion to postpone discovery here, the Court may wish to consider the rigorous standard uniformly applied by the courts to motions for summary judgment. As the Court in Phoenix Savings, supra, 381 F.2d at 249, instructed:

It is well established that summary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances. Neither should summary judgment be granted if the evidence is such that conflicting inferences may be drawn therefrom, or if reasonable men might reach different conclusions [citations omitted]. Burden is upon party moving for summary judgment to demonstrate clearly that there is no genuine issue of fact, and any doubt as to the existence of such an issue is resolved against him [citations omitted].

CONCLUSION

For the foregoing reasons, this Court properly should enter an Order denying defendant Jesse W. Williams' motion for a protective order and direct that discovery proceed as scheduled. A proposed Order is attached.

Respectfully submitted,



JOHN M. GADZICHOWSKI
Senior Trial Attorney
MELISSA P. MARSHALL
Trial Attorney
Department of Justice
Civil Rights Division
Washington, D.C. 20530
(202) 633-2188

Counsel for Plaintiff United
States of America