

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LUCAS CALIXTO, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 18-1551 (PLF)
)	
U.S. DEPARTMENT OF THE ARMY, <i>et. al.</i> ,)	
)	
Defendants.)	
)	

LOCAL CIVIL RULE 16.3 JOINT REPORT

Pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, Local Civil Rule 16.3, and the Court’s Minute Order of August 9, 2021, Plaintiffs and Defendants hereby respectfully submit this Joint Report. As required by the August 9, 2021 Minute Order, the parties have set forth their joint statement of the case below. Descriptions of the parties’ positions as to each issue enumerated in Local Civil Rule 16.3(c) are set forth below.

At the conference required by this Rule, the parties met and discussed the following matters:

(1) Whether the case is likely to be disposed of by dispositive motion; and whether, if a dispositive motion has already been filed, the parties should recommend to the Court that discovery or other matters should await a decision on the motion.

The parties agree that this case, or at minimum, significant portions of it, are likely to be disposed of by motions for summary judgment or partial motions for summary judgment.

Plaintiffs submit that, since this Court already has denied Defendants’ Motion to Dismiss as well as Defendants’ Opposition to Plaintiffs’ Motion for Leave to File a Third Amended Complaint, the matter should proceed without further delay to (1) discovery on the claims that cannot be decided on review of the administrative record, (2) production of the administrative record for Defendants’ MAVNI soldier discharge policies (and supplementation as may be necessary), and (3) class certification (including any necessary discovery relevant to class certification). Any dispositive motions should be adjudicated based on a fully developed factual record.

Defendants submit that the Court should decide this case based upon dispositive motions. To the degree that any issues remain after the Court’s decision, the Court can determine whether discovery and/or class certification is appropriate on those issues. Defendants further submit that given the expansive nature of Third Amended Complaint and the disparate individual and class

allegations outlined therein, in contrast to Plaintiff's proposed definition of the putative class, the Court should seek to certify the issues before it prior to any discovery or certification of a class. Dispositive motion practice would greatly aid the Court in this endeavor and ultimately streamline resolution of the underlying claims.

(2) The date by which any other parties shall be joined, or the pleadings amended, and whether some or all the factual and legal issues can be agreed upon or narrowed.

Plaintiffs have filed a motion for class certification, and Defendants have filed an opposition. Plaintiffs intend to file a reply brief in support of class certification.

Plaintiffs request 60 days after the Court rules on the class certification motion to amend the complaint to add additional parties.

(3) Whether the case should be assigned to a magistrate judge for all purposes, including trial.

The parties agree to assignment of the case to a Magistrate Judge solely for purposes of a mediation as discussed in section (4) below.

Defendants' position is that the litigation should be stayed pending mediation. Plaintiffs object to any stay of litigation pending mediation, but are willing to consider brief extensions of certain deadlines if mediation is able to proceed soon and in an expedited manner. Plaintiffs already have agreed to multiple extensions of Defendants' deadlines in this matter in an attempt to reach a resolution, but given the lack of progress during this period, Plaintiffs cannot agree to further wholesale or lengthy litigation delays.

Plaintiffs do not consent to the case being assigned to a Magistrate Judge for all purposes.

Defendants request assignment of the case to a Magistrate Judge for certification of the issues before the Court and, should they arise, any disputes over the contents of the Administrative Record or Discovery (if ordered).

(4) Whether there is a realistic possibility of settling the case.

The parties request the Court assign the case to a Magistrate Judge solely for purposes of a mediation in an expedited manner because the parties believe that there is a realistic possibility of settling the case. As the Court is aware from the parties' recent "extension" requests, the parties have engaged in significant settlement discussions but have been unable to reach a resolution.

(5) Whether the case could benefit from the Court's alternative dispute resolution (ADR) procedures (or some other form of ADR); what related steps should be taken to facilitate such ADR; and whether counsel have discussed ADR and their response to this provision with their clients. In assessing the above, counsel shall consider:

- (i) the client's goals in bringing or defending the litigation;
- (ii) whether settlement talks have already occurred and, if so, why they did not produce an agreement
- (iii) the point during the litigation when ADR would be most appropriate, with special consideration given to: (aa) whether ADR should take place after the informal exchange or production through discovery of specific items of information; and (bb) whether ADR should take place before or after the judicial resolution of key legal issues;
- (iv) whether the parties would benefit from a neutral evaluation of their case, which could include suggestions regarding the focus of discovery, the legal merits of the claim, an assessment of damages and/or the potential settlement value of the case; and
- (v) whether cost savings or any other practical advantages would flow from a stay of discovery or of other pre-trial proceedings while an ADR process is pending.

The parties request the Court assign the case to a Magistrate Judge for mediation. For the reasons explained above, in addition to the ongoing harm to Plaintiffs due to delayed relief, Plaintiffs' position is that discovery proceed simultaneous with any mediation. Defendants' position is that discovery should be stayed pending mediation, certification of the issues before the Court, summary judgment motions practice and the Court's decision, and, if necessary, resolution of the motions regarding class certification. The parties have considered and discussed all of the other issues above.

(6) Whether the case can be resolved by summary judgment or motion to dismiss; dates for filing dispositive motions and/or cross-motions, oppositions, and replies; and proposed dates for a decision on the motions.

Plaintiffs recommend the following schedule:

1. Defendants' Production of Certified Administrative Record: March 1, 2022
2. Initial Disclosures pursuant to Rule 26: Within 14 days of entry of the Rule 16 Conference Order
3. Supplementation of and Resolution of Other Disputes Regarding the Administrative Record (as necessary): August 29, 2022
4. Fact discovery (including any necessary class certification discovery) cut-off : August 29, 2022
5. Expert discovery period: August 30, 2022 – October 11, 2022
6. Summary Judgment Motion deadline: November 11, 2022

Defendants recommend the following schedule:

1. Administrative Record Review and Certification: March 8, 2022

2. Joint Certification of Issues: March 15, 2022
3. Supplementation of and Resolution of Any Disputes Regarding the Administrative Record (if necessary): April 15, 2022
4. Plaintiffs' Motion for Summary Judgment: May 17, 2022
5. Defendants' Cross Motion for Summary Judgment and Opposition: June 17, 2021
6. Plaintiffs' Opposition and Reply: July 15, 2022
7. Defendants' Reply: August 2, 2022
8. Joint Appendix of the Administrative Record: August 12, 2022
9. Supplemental Briefing on Class Certification and Discovery (if necessary): Court's Decision on Summary Judgment Plus 30 Days

(7) Whether the parties should stipulate to dispense with the initial disclosures required by Fed. R. Civ. P. 26(a)(1), and if not, what if any changes should be made in the scope, form or timing of those disclosures.

Plaintiffs' Position: The parties should make initial disclosures within 14 days of entry of the Conference Order. Plaintiffs' claims, including constitutional equal protection claims, are not limited to those that can be resolved through review solely of an administrative record, as Judge Huvelle previously recognized in this case.

Defendants' Position: Administrative record cases are typically exempt from the disclosure requirements of Rule 26(a)(1). Defendants have provided the draft administrative record to Plaintiffs for review and comment. Based on those discussions, Defendant is adding additional documents to the record. Defendants will attempt to resolve with Plaintiffs any requests for inclusion or alleged deficiencies within the draft administrative record prior to certification. To the degree the Court certifies issues or orders discovery that extends beyond the administrative record, Defendants request a minimum of 30 days to supplement the Administrative Record or otherwise provide initial disclosures.

(8) The anticipated extent of discovery, how long discovery should take, what limits should be placed on discovery; whether a protective order is appropriate; and a date for the completion of all discovery, including answers to interrogatories, document production, requests for admissions, and depositions.

Plaintiffs' Position: The causes of action in this matter include both Administrative Procedure Act ("APA") claims and constitutional claims, including equal protection claims. With respect to certain of the APA claims, Defendants must produce the Certified Administrative Record with respect to the MAVNI discharge policies/practices at issue in the Third Amended Complaint. In addition, Plaintiffs will be seeking discovery from Defendants and third parties relevant to the claims that are not dependent solely on the administrative record. As set forth above, Plaintiffs propose approximately six months for fact discovery, followed by approximately six weeks for expert discovery.

Defendants' Position: Defendants assert that each claim should be decided based on the information contained in the administrative record. The scope and time for providing discovery will depend upon the nature of the discovery sought by Plaintiffs and whether the Court orders discovery that extends beyond the administrative record.

(9) Any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced.

At this time, the parties have not identified any ripe issues concerning disclosure, or discovery, of ESI. However, Plaintiffs have concerns that Defendants have not instituted appropriate litigation holds, which could impact ESI discovery, and Defendants have committed to evaluating those concerns.

(10) Any issues about claims of privilege or of protection as trial-preparation materials, including- if the parties agree on a procedure to assert these claims after production- whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.

The parties agree that a protective order is appropriate in this case. The parties are not aware of any issues of privilege ripe at this time, although issues may arise, including with respect to Defendants' anticipated claims of "deliberative process" protection.

(11) Whether the requirement of exchange of expert witness reports and information pursuant to Fed. R. Civ. P. 26(a)(2), should be modified, and whether and when depositions of experts should occur.

The parties are considering the use of experts. The parties do not request the modification of Fed. R. Civ. P. 26(a)(2) at this time. Plaintiffs are proposing a six-week period for expert discovery following the close of fact discovery.

(12) In class actions, appropriate procedures for dealing with Rule 23, Fed .R. Civ. P. proceedings, including the need for discovery and the timing thereof, dates for filing a Rule 23 motion, and opposition and reply, and for oral argument and/or an evidentiary hearing on the motion and a proposed date for decision.

The Court already has set a schedule for appropriate procedures regarding Rule 23, Fed. R. Civ. P. as part of Plaintiffs' class certification motion.

Plaintiffs submit that, unless discovery is necessary to establish facts supporting class certification, the Court should rule on Plaintiffs' motion for class certification as soon as convenient for the Court following the close of briefing and any hearing on that motion.

Defendants assert that the parties should brief, and the Court should decide, the merits of the issues in this case prior to discovery or certification of a class. Additionally, Defendants believe that joint certification of the issues will streamline resolution of this case.

(13) Whether the trial and/or discovery should be bifurcated or managed in phases, and a specific proposal for such bifurcation.

The parties agree that the case should not be bifurcated.

(14) The date for the pretrial conference (understanding that a trial will take place 30 to 60 days thereafter).

The parties are conferring on the schedule beyond the dates proposed for the briefing schedule.

(15) Whether the Court should set a firm trial date at the first scheduling conference or should provide that a trial date will be set at the pretrial conference from 30 to 60 days after that conference.

The parties agree that the Court should not set a firm trial date at this time.

(16) Such other matters that the parties believe may be appropriate for inclusion in a scheduling order.

The parties are not aware of other matters that should be included in the scheduling order.

* * *

Dated: February 15, 2022
Washington, DC

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