

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
AT LOUISVILLE

J. BARRETT HYMAN, M.D.

PLAINTIFF

v.

CIVIL ACTION NO. 3:99CV-597-S

THE CITY OF LOUISVILLE, et al.

DEFENDANTS

**MEMORANDUM OPINION**

This matter is before the court on motion of the plaintiff, J. Barrett Hyman, M.D., to supplement the record in this case. The plaintiff seeks to supplement the record with his affidavit which states, among other things, that he has begun the process of separating his medical practice from that of Dr. Perry Cassady, that in the course of interviewing applicants for a position within his practice he inquired into the applicants' sexual orientation, and that he has attempted to place an advertisement in *The Courier-Journal* which is allegedly discriminatory.

The City of Louisville, David Armstrong in his official capacity as Mayor of the City of Louisville, the Louisville and Jefferson County Human Relations Commission, and Phyllis Atiba Brown in her official capacity as Executive Director of the Louisville and Jefferson County Human Relations Commission (herein collectively, "the City Defendants"), contend that the plaintiff's affidavit is untimely filed and, therefore, oppose his motion.

Whether to allow the record to be supplemented by an untimely filed affidavit generally lies within the discretion of the district court. *See Hooks v. Hooks*, 771 F.2d 935, 946 (6<sup>th</sup> Cir. 1985) (citations omitted). In *Hooks*, the plaintiff filed a memorandum with supporting affidavit in opposition to the defendants' motion for summary judgment after the district court had entered an order granting the defendants' motion. *See id.* at 939. The defendants contended that because the plaintiff's affidavit was untimely filed, it could not be considered by the district court. *See Hooks*,

*supra*, at 939-40. After noting the general principle that it is within the district court's discretion whether to consider untimely filed affidavits, the court held that the plaintiff's affidavit was properly before the court based on the facts before it. *See id.*

While the circumstances facing this court differ from those with which the *Hooks* court was faced, we are, nonetheless, vested with the same discretion in determining whether to allow Dr. Hyman's affidavit to supplement the record in this matter. As discussed below, several considerations counsel in favor of allowing the plaintiff's affidavit to supplement the record.

First, allowing the plaintiff to supplement the record with his affidavit is consistent with the principles upon which Fed. R. Civ. P. 56 is based. In particular, the claims of both parties can still be adjudicated fairly and promptly. The factual record, as supplemented by the plaintiff's affidavit, merely reflects the current state of the plaintiff's business affairs as they relate to the substantive issues involved in this case. To decide the issues of this case, particularly those of ripeness and standing, on a stale factual record would render any order entered by this court hollow.

Also, the City Defendants do not allege that allowing the record to be supplemented would constitute unfair prejudice. Indeed, the City Defendants' response to the plaintiff's motion to supplement focuses solely on the issues of standing and ripeness assuming the plaintiff's motion is granted. There is no assertion by the City Defendants that they will be prejudiced in any way by a supplemented factual record. They have requested neither the opportunity to re-brief the ripeness and standing issues in light of the plaintiff's affidavit nor the chance to supplement discovery.

Finally, our interpretation of Fed. R. Civ. P. 6(d) ("Rule 6(d)") indicates that it is proper to allow the plaintiff to supplement the record with his affidavit. Rule 6(d) states that "[w]hen a motion is supported by affidavit, the affidavit shall be served with the motion . . . ." While at least one court has held that this language affords district courts little or no discretion with respect to affidavits filed subsequent to the filing of a motion, the prevailing view is that district courts retain

at least some discretion. *See* 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil §2719 (3d ed. 1998).

Even if we were to determine that Rule 6(d) affords district courts little or no discretion in considering affidavits filed subsequent to the motions they support, there is still support in Rule 6(d) for our conclusion that we may consider the plaintiff's affidavit. The rule goes on to say that "opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time." This language clearly contemplates the exercise of a district court's discretion in determining whether to consider untimely filed opposing affidavits as part of the record. The plaintiff's affidavit is a reflection of the current state of the plaintiff's business affairs which was filed in order to rebut the City Defendants' ripeness and standing arguments. *See* Pl.'s Am. Mem. in Supp. of Mot. to Supp. the Record at 3. As such, it is essentially an opposing affidavit which this court, in its discretion, may consider as part of the record.

Whether filed in support of the plaintiff's motion for summary judgment or in response to the summary judgment motion filed by the City Defendants, the plaintiff's affidavit, which merely reflects the current state of his business affairs, may supplement the record in this case without prejudice or surprise to the City Defendants. Therefore, the plaintiff's motion to supplement the record with his affidavit will be granted.

This \_\_\_\_ day of \_\_\_\_\_, 2000.

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CHARLES R. SIMPSON III, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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**ORDER**

Motion having been made and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the plaintiff's Motion to Supplement the Record is **GRANTED**.

This \_\_\_\_ day of \_\_\_\_\_, 2000.

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CHARLES R. SIMPSON III, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

cc: Counsel of Record