IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

SYDNEY T. BACCHUS,

Plaintiff,

v. CASE NO. 4:07cv186-RH/WCS

HOLLY BENSON, etc., et al.,

Defendants.
_____/

ORDER DENYING MOTIONS TO DISMISS

At a county commission meeting and county planning and zoning board meeting, during the public comment period, the plaintiff, Dr. Sydney T. Bacchus, spoke in opposition to proposed sand mining activities that she believed would harm the environment. In response, the Florida Department of Business and Professional Regulation issued an order instructing Dr. Bacchus to cease and desist the unlicensed practice of geology. Dr. Bacchus brings this action under 42 U.S.C. §1983, seeking both an injunction (against the Secretary of DBPR in her official capacity) and an award of damages (against the DBPR employee who apparently authorized issuance of the cease and desist order, in his individual capacity). The

defendants have moved to dismiss on the ground that DBPR has withdrawn the cease and desist order so that, under the voluntary cessation doctrine, the action is moot. The individual defendant also invokes prosecutorial and qualified immunity. I deny the motions to dismiss.

I

According to the amended complaint, Dr. Bacchus holds a Ph.D. and claims expertise in hydroecology. She commonly addresses federal, state, and local governmental agencies on environmental issues, both as a citizen and as a representative of organizations or informal groups of interested persons.

In June and July 2005 Dr. Bacchus spoke in opposition to proposed sand mining activities during the public comment period of meetings of the Putnam County Commission and Putnam County Planning and Zoning Commission. In October 2005 a professional geologist employed by a proponent of the sand mining activities filed a complaint with DBPR. In February 2006 DBPR issued an order instructing Dr. Bacchus to "cease and desist from the practice of unlicensed" professional geology. Notice and Order To Cease and Desist (document 13-2 at 2). The order specifically cited Dr. Bacchus's remarks at the Putnam County public hearings.

In September 2006 DBPR filed an administrative complaint against Dr.

Bacchus seeking penalties including a fine of up to $5,000 and a reprimand. The complaint alleged that Dr. Bacchus

> had presented a physical groundwater model, geologic cross-sections and other geologic data. [She] also indicated an ability to predict sinkhole occurrences, misinterpreted a non-karst feature to be of karst origin and commented on the integrity of confining units. The geologic information and interpretation that [she] prepared and presented at the hearing should have been prepared, presented, signed and sealed by a licensed professional geologist.

Administrative Complaint (document 21-4 at 2-3).

In response to the complaint, Dr. Bacchus demanded an administrative hearing under the Florida Administrative Procedure Act. Instead of referring the complaint for a hearing, DBPR undertook to investigate further, including by retaining a private geologist.

In February 2007 DBPR issued a "closing order" concluding that there was probable cause to believe that Dr. Bacchus had indeed engaged in the unlicensed practice of geology by speaking at the Putnam County meetings, but concluding also that further prosecution was not warranted "*at this time*." Closing Order (document 21-5 at 2) (emphasis added). The closing order said further that the case was closed "pursuant to the Notice to Cease and Desist, *without prejudice to reopen*." *Id*. (emphasis added). The closing order was accompanied by a letter to Dr. Bacchus stating:

> In accordance with the Order to Cease and Desist issued February 15, 2006, please conduct your professional activities in a manner that does not intrude into the practice of professional geology.

Letter of February 12, 2007 (document 21-5 at 4).

Dr. Bacchus filed this action in April 2007 against DBPR Secretary Holly Benson in her official and individual capacities. By her amended complaint, Dr. Bacchus dropped the individual capacity claim against Ms. Benson and added instead an individual capacity claim against Charles F. Tunnicliff, a DBPR attorney who apparently approved (though he did not sign) the February 2006 cease and desist order and the September 2006 administrative complaint, and who signed the closing order and accompanying letter. Dr. Bacchus seeks injunctive relief against Ms. Benson (in her official capacity) and an award of damages against Mr. Tunnicliff (in his individual capacity). Each has moved to dismiss.

II

Under Florida Statutes §492.112(1)(a), "A person may not knowingly . . . [p]ractice professional geology unless the person is licensed under this chapter." Four statutory definitions apparently inform this provision. First, "'Professional geologist' means an individual who is licensed as a geologist" under Florida law. §492.102(6), Fla. Stat. (2006). Second,

> "Geologist" means an individual who, by reason of her or his knowledge of geology, soils, mathematics, and the physical and life

> sciences, acquired by education and practical experience, is capable of practicing the science of geology.

§492.102(4), Fla. Stat. Third,

> "Geology" means the science which includes the treatment of the earth and its origin and history, in general; the investigation of the earth's crust and interior and the solids and fluids, including all surface and underground waters, and gases which compose the earth; the study of the natural agents, forces, and processes which cause changes in the earth; and the utilization of this knowledge of the earth and its solids, fluids, and gases, and their collective properties and processes, for the benefit of humankind.

§492.102(3), Fla. Stat. Fourth,

> "Practice of professional geology" means the performance of, or offer to perform, geological services, including, but not limited to, consultation, investigation, evaluation, planning, and geologic mapping, but not including mapping as prescribed in chapter 472, relating to geological work, except as specifically exempted by this chapter. Any person who practices any specialty branch of the profession of geology, or who by verbal claim, sign, advertisement, letterhead, card, or any other means represents herself or himself to be a professional geologist, or who through the use of some title implies that she or he is a professional geologist or that she or he is licensed under this chapter, or who holds herself or himself out as able to perform or does perform any geological services or work recognized as professional geology, shall be construed to be engaged in the practice of professional geology.

§492.102(7), Fla. Stat.

When it filed its administrative complaint, DBPR apparently took the position that speaking at a public hearing on topics within the domain of a geologist constituted the practice of professional geology and thus could be done

only by a person holding the required license. So far as this record reflects, DBPR has never attempted to square this view with the First Amendment. In support of the motions to dismiss, defendants take no issue with Dr. Bacchus's assertion that she had a First Amendment right to speak as she did. Defendants assert, instead, that this action must be dismissed even if Dr. Bacchus did indeed have such a right.

III

Defendants first assert that DBPR has voluntarily abandoned its allegedly unconstitutional position and that this action thus should be dismissed as moot. Under the "voluntary cessation" doctrine, a defendant's change of position moots an action for injunctive relief if and only if "there is no reasonable expectation that the voluntarily ceased activity will, in fact, actually recur after the termination of the suit." *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004) (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)). "[W]hen the defendant is not a private citizen but a government actor, there is a rebuttable presumption that the objectionable behavior will *not* recur." *Id.* (emphasis in original) (citing *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328-29 (11th Cir.2004)).

In asserting that the objectionable behavior in the case at bar will not recur, defendants rely on a letter Mr. Tunnicliff wrote to Dr. Bacchus on July 31, 2007,

several months after Dr. Bacchus filed this lawsuit. The letter said:

> The purpose of this letter is to inform you that the Department is no longer of the opinion that probable cause exists in the above-referenced matter. Consequently, the Notice to Cease and Desist issued on February 15, 2006, is hereby rescinded. You may give presentations of the type at issue in this case, and the Department will not prosecute charges against you. *Any future prosecution for the unlicensed practice of Professional Geology would arise if you represent yourself as a Professional Geologist.*

Letter of July 31, 2007 (document 12-2 at 2) (emphasis added).

For at least five reasons, this letter does not moot this action.

First, the letter is equivocal on its face. The letter explicitly warns Dr. Bacchus that she may be prosecuted again if she represents herself as a professional geologist. What that means remains unclear, especially in light of DBPR's apparent assertion, when it filed its original administrative complaint, that Dr. Bacchus had somehow represented herself as a professional geologist, even though she said she had not.

Second, DBPR has offered no explanation for its change of position. It has not said what it thought the statute meant originally, or what it thinks the statute means now, or what changed its mind. Absent an explanation, one cannot predict with any confidence where DBPR will go next—whether, that is, it will return to its original position.

Third, DBPR has incurred no expense, adopted no rule, and taken no official

action to confirm its change of position. This distinguishes this case from most of those in which challenges to discontinued government action have been found moot. *See, e.g., Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329 (11th Cir. 2005) (holding moot an action against a city that amended the objectionable ordinance and gave no indication it would reenact the earlier version); *Troiano*, 382 F.3d at 1286 (holding moot an action to compel the use of audio equipment at polls, "because the special audio equipment is now available and has been available in every precinct and we can see no reasonable possibility that it will be removed"). When an agency adopts an ordinance or rule or expends funds, there is more reason for confidence that it will not revert to the old way. Here, however, there was only a letter—and an equivocal letter at that—from a single government employee to a single alleged violator.

Fourth, DBPR's change of position came only on the courthouse steps, three months after Dr. Bacchus filed this action. There is little reason to believe—and indeed defendants apparently do not even contend—that the change of position was anything other than a response to this litigation. While not fatal to defendants' claim of mootness, this is a factor that cuts strongly the other way. *See, e.g.*, *Sheely v. MRI Radiology Network, P.A.*, No. 06-13791, 2007 WL 3087215 at *8 (11th Cir. Oct. 24, 2007) (noting, in an action involving a private defendant, that a

court is "more likely to find that cessation moots a case when cessation is motivated by a defendant's genuine change of heart rather than his desire to avoid liability") (collecting cases); *Nat'l Adver. Co.*, 402 F.3d at 1333 (noting, in a case involving a public defendant, that "voluntary cessation of offensive conduct will only moot litigation if it is clear that the defendant has not changed course simply to deprive the court of jurisdiction.").

Fifth, even if Mr. Tunnicliff's letter somehow were held to moot Dr. Bacchus's claim for injunctive relief, the same would not be true of the claim for damages. The voluntary cessation doctrine simply does not apply to a claim for damages. Far from moot, the damages claim is very much a live dispute—Dr. Bacchus says she is entitled to an award of damages against Mr. Tunnicliff, and he says she is not. He ultimately may prevail, but if he does, it will not be on grounds of mootness.

For all of these reasons, defendants' motion to dismiss this action as moot will be denied.

IV

Mr. Tunnicliff asserts that the claims against him should be dismissed based on absolute prosecutorial immunity.

In *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128

(1976), the Supreme Court held that absolutely immunity bars a §1983 claim against a prosecutor based on his or her role "in initiating a prosecution and in presenting the State's case." *Imbler*, 424 U.S. at 430. In *Butz v. Economou*, 438 U.S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978), the Supreme Court extended this holding to state authorities initiating administrative disciplinary proceedings:

> [A]gency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution.

Butz, 438 U.S. at 515.

These cases make clear that Mr. Tunnicliff is absolutely immune from any damages claim based on the decision to initiate and pursue disciplinary proceedings against Dr. Bacchus.

The same is not true, however, with respect to actions separate and apart from the prosecutorial function. Thus, for example, Mr. Tunnicliff allegedly approved issuance of an order instructing Dr. Bacchus to "cease and desist from the practice of unlicensed" professional geology. Notice and Order To Cease and Desist (document 13-2 at 2). The order looked forward, not back, and sought not to impose sanctions for past conduct, but to control future behavior. In addition, the order was not a prayer for action by another tribunal or authority—like a

criminal or administrative complaint—but a self-executing act that took effect without further involvement of anyone else. The same is true of Mr. Tunnicliff's letter instructing Dr. Bacchus to "conduct your professional activities in a manner that does not intrude into the practice of professional geology." Letter of February 12, 2007 (document 21-5 at 4).

Giving self-executing, forward-looking instructions of this type is not a prosecutorial function. And this is even more clearly so when the instruction is a prior restraint of speech. Telling members of the public what they may and may not say at public hearings is not the role of a prosecutor.

V

Finally, Mr. Tunnicliff asserts that the claims against him should be dismissed based on the qualified immunity available to all public officials, not just prosecutors. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Thus qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986); *see generally*

Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

The issue comes down to this. As of February 2006, was it clearly established that it was unconstitutional for a government official to issue a cease and desist order imposing a prior restraint on an individual's ability to speak during the public comment period of a public meeting on a matter of public concern? The answer is yes—such a prior restraint violated clearly established law (unless the restraint applied only to remarks already explicitly determined to be false or misleading).

Of the many cases that could be cited in support of this conclusion, two are particularly apt. First, in *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976), a state commission issued a cease and desist order precluding nonunion teachers from speaking during the public comment period of school board meetings. The Supreme Court unanimously held that this was a prior restraint on speech that violated the First Amendment. If, as the Supreme Court held in *City of Madison*, a person cannot be prohibited from speaking during the public comment period of a school board meeting because the person is not a union member, then a person cannot be prohibited from speaking during the public comment period of a county commission or zoning board meeting because the person is not a licensed

geologist.

Second, in *Weaver v. Bonner*, 309 F.3d 1312, 1323 (11th Cir. 2002), the Georgia Judicial Qualifications Commission found that a judicial candidate had made false and misleading statements about his opponent. The JQC issued a cease and desist order that prohibited not only any repetition of the same statements but also prohibited statements that, while similar, had not yet been found false or misleading. The Eleventh Circuit held that this was an unconstitutional prior restraint. The court emphasized the "heavy presumption" against the validity of such restraints:

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S. Ct. 631, 639, 9 L. Ed. 2d 584 (1963). "The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.' " *Alexander v. United States*, 509 U.S. 544, 550, 113 S. Ct. 2766, 2771, 125 L. Ed. 2d 441 (1993) (quoting M. Nimmer, *Nimmer on Freedom of Speech* § 4.03 (1984)).

Weaver, 309 F.3d at 1323. If, as the court held in *Weaver*, a person who has made false and misleading statements during a campaign may be restrained from repeating them but may *not* be restrained from making other statements not yet explicitly determined false or misleading, then a person who (like Dr. Bacchus) has spoken during the public comment period of a commission meeting—even if the

person's remarks could be deemed false or misleading—may not be restrained from making other statements not yet explicitly determined false or misleading.

This analysis is correct even though in *Weaver* the Eleventh Circuit held the defendants entitled to qualified immunity on the ground that, at the time of the events at issue there, the applicable law was not clearly established. The same reasoning does not apply here for two reasons. First, *Weaver* was decided before the events now at issue; *Weaver* itself thus is part of the clearly established law applicable in the case at bar. Second, *Weaver* involved issues unique to judicial elections on which, at that time, the law was not clearly established. The case at bar, in contrast, involves no issues of that type. Here, the Supreme Court's decision in *City of Madison* is sufficient standing alone to defeat the qualified immunity defense, and the decision on the merits in *Weaver* further supports that result.

In short, under *City of Madison* and *Weaver*, imposing the kind of prior restraint alleged in Dr. Bacchus's complaint violated clearly established law. The complaint cannot be dismissed based on qualified immunity.

VI

In sum, this action is not moot, and the damages claim is barred by neither prosecutorial nor qualified immunity. For these reasons,

IT IS ORDERED:

Defendants' motions to dismiss (documents 12 and 21) are DENIED.

SO ORDERED this 13th day of November, 2007.

s/Robert L. Hinkle
Chief United States District Judge