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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

HARRY POLLAK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 22-CV-49-ABJ**
	)	
SUSAN WILSON, et al.	)	
	)	
Defendants.	)	

Defendants' Response in Opposition to Plaintiff's Motion
to Reconsider Magistrate Judge's Order Granting Motion to Compel

Defendants Susan Wilson et al. (referred to herein collectively as "SCSD2"), by and through their undersigned attorney, hereby respond in opposition to *Plaintiff's Motion to Reconsider Order Granting Motion to Compel*.

Background

1. Plaintiff Harry Pollak ("Pollak") attended a SCSD2 Board meeting and signed up to speak during the public comment portion of the meeting. After he began his comments with an allegation that the Superintendent had violated his constitutional rights, Pollak was instructed by the Chair that Board policy did not allow him to discuss personnel issues during public comment. Pollak was given the opportunity to discuss his allegations concerning the Superintendent with the Board during executive session or discuss another topic during his public comment. However, Pollak refused both options. Instead, he argued with the Board Chair about the legality of the

restriction against discussing personnel matters during public comment until the Board was forced to recess the meeting and ask law enforcement to remove him from the pulpit.

2. Pollak then brought suit against SCSD2 claiming that the school board violated his First Amendment right to free speech when it did not allow him to discuss personnel issues during the public comment. Pollak filed a motion for a preliminary injunction requesting that the court find the Board policy to be unconstitutional. This court entered an order denying Pollak's motion for an injunction (ECF No. 17). The Tenth Circuit affirmed the denial of the motion for an injunction and in so doing held that the Board policy at issue did not violate the Constitution. *See Pollak v. Wilson*, 2022 WL 17958787 (10th Cir. 2022).

3. After the case returned to the district court, Pollak filed an amended complaint and added "as-applied" and "pretext" claims to his original claims. (ECF No. 43). Pollak filed these additional claims even though the Tenth Circuit has previously held that Pollak had waived his "as-applied" argument and "pretext" argument and noted that even if not waived, such arguments would likely fail based on the undisputed facts in the record. *Pollak v. Wilson*, WL 17958787 at *9-11. In his amended complaint, Pollak makes a number of allegations concerning his intent and purpose in coming to speak at the board meetings. (*See e.g.*, Amended Complaint, ECF No. 43, ¶¶ 23, 25, 40).

4. On March 16, 2023, SCSD2 served Pollak with *Defendants' First Interrogatories to Plaintiff* and *Defendants' First Request for Production to Plaintiff*. Pollak objected to certain requests claiming that the information sought was protected by the First Amendment associational privilege because it involves communications with persons associated with the Free our Faces ("FOF") Facebook page. Pollak provided a Privilege Log describing the documents he was

refusing to provide. These documents consisted of Pollak's Facebook posts and messages, e-mails and text messages.

5. On May 10, 2023, counsel for the parties held a discovery conference with the Magistrate Judge pursuant to Local Rule 37.1(b) during which the parties presented their respective legal positions. During the scheduling conference, SCSD2 offered to stipulate to a reasonable protective order. SCSD2 also offered to accept the requested documents (Pollak bates # 0110-0156) with the names of third parties redacted, provided SCSD2 retained the right to address the matter further if any such persons are later identified as a material witness in this case. Despite these efforts, Pollak continued to refuse to provide the requested information.

6. After the discovery conference, the Magistrate Judge granted SCSD2 permission to file a motion to compel discovery. The motion to compel was filed on May 18, 2023. The parties subsequently proceeded with discovery, which included written discovery and depositions of the parties. Pollak was deposed on July 20, 2023, which was prior to the order granting the motion to compel. During his deposition, Pollak consistently refused to answer any questions pertaining to the requested information or the Free Our Faces Facebook page.

7. The Magistrate Judge entered its Order Granting Defendants' Motion to Compel on July 25, 2023. (ECF No. 50). In this order, Pollak was given thirty (30) days to provide the requested information. Pollak subsequently filed a motion for reconsideration of the order compelling disclosure and a motion to stay the Magistrate Judge's discovery order. (ECF No. 51 and ECF No. 52).

Legal Argument

8. It is well established that the district court will affirm a magistrate judge's nondispositive ruling unless the court finds that the ruling is "clearly erroneous or contrary to law."

Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A); *Residences at Olde Town Square Association v. Travelers Casualty Insurance Company of America*, 413 F.Supp.3d 1070, 1072 (D.Colo. 2019). The clearly erroneous standard "requires that the reviewing court affirm unless it on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* (citing *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988)). The contrary to law standard permits plenary review as to matters of law, however, the district court will set aside a magistrate judge's order only if it applied the wrong legal standard or applied the appropriate legal standard incorrectly. *Residences at Olde Town Square Association*, 413 F.Supp.3d at 1072.

9. In evaluating claims of associational privilege in the discovery context, the courts apply a burden-shifting analysis. *Wyoming v. USDA*, 239 F.Supp.2d 1219, 1236 (D.Wyo. 2002), *appeal dismissed as moot*, 414 F.3d 1207 (2005). First, the party asserting the privilege must make a prima facie showing that the privilege applies. To make this showing, the party must demonstrate an objectively reasonable probability that compelled disclosure will chill associational rights, i.e. that disclosure will deter membership due to fears of threats, harassment or reprisal from either government officials or private parties which may affect members' physical well-being, political activities or economic interests. *See NAACP v. State of Ala.*, 357 U.S. 449, 462–63, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

10. If the party asserting the privilege makes a prima facie showing, the burden shifts to the party issuing the discovery to demonstrate a compelling need for the requested information. *Id.* In the Tenth Circuit, to determine whether the requesting party has a compelling need, the Court considers the following factors (referred to as the *Silkwood* balancing test): (1) the relevance of the information sought; (2) the requesting party's need for the information; (3) whether the

information is available from other sources; (4) the nature of the information sought; and (5) whether the person from whom discovery is sought has placed the information in issue. *See Grandbouche v. Clancy*, 825 F.2d 1463, 1466–67 (10th Cir. 1987) (citing *Silkwood v. Kerr–McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977)).

11. The Magistrate Judge correctly applied this well-established law. There was no evidence showing an objectively reasonable probability that the compelled disclosure would chill associational rights pertaining to FOF. Pollak argues that the Magistrate Judge failed to acknowledge a social media post that referred to "terrorist[s]." (ECF No. 48-1, ¶ 3). However, it is clear from the order granting the motion to compel that the Magistrate Judge did consider this evidence and found it unpersuasive because the comment did not reference FOF or any specific person. (ECF No. 50, p. 8). Pollak also points to a September 29, 2021 NSBA letter to the President of the United States that he says compares parent protests to "domestic terrorism" and a May 11, 2022 letter from a congressional committee to the Department of Justice that generally addresses protests at school board meetings. However, these letters do not even reference FOF, or anything related to Sheridan, Wyoming. Pollak's speculation with respect to these letters and his attempts to make them applicable to this situation are insufficient to demonstrate an actual objectively reasonable probability that the compelled disclosure would chill associational rights pertaining to FOF.

12. Pollak also refers extensively to his own unsupported declaration to satisfy his initial burden. However, even his own declaration fails to allege any specific facts or instances where there has been any actual threat, harassment or reprisal directed to members of FOF. (ECF No. 48-1). It is apparent that the "fears" stated in his declaration are not supported by evidence, but rather, are based only on his own self-serving and unsubstantiated speculation. Pollak cites to

a concurring opinion in *In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470 (10th Cir. 2011) as support for his argument that his own declaration is sufficient. However, even this concurring opinion refers to "available evidence" from members of the association. *Id.* at 492-93. The Magistrate Judge did not clearly err in concluding that Pollak did not carry his initial burden of showing the privilege applied to this situation.

Balancing Test

13. The Magistrate Judge correctly determined that even if Pollak did carry his burden of showing the freedom of association privilege was applicable, disclosure is required under the factors of the *Silkwood* balancing test (which balances the relevance of the information sought, the requesting parties' need for the information, whether the information is available from other sources, the nature of the information sought, and whether the party asserting the privilege has placed the information in issue).

14. Pollak focuses his argument on his contention that the requested information will not be relevant. In his amended complaint, Pollak makes a number of allegations concerning his intent and purposes in coming to speak at the board meetings. To the extent his Facebook, e-mail and text correspondence refute those stated intentions, the correspondence is certainly relevant. However, Pollak now asserts that his intent is wholly irrelevant to the issues that will be before the court. Pollak's position is untenable. Pollak cannot on one hand argue that he came to the school board meetings with legitimate purposes and then on the other hand claim that any evidence to the contrary is irrelevant. Further, Pollak should not be allowed to unilaterally determine what evidence is relevant. The Magistrate Judge noted that without the requested information, Pollak

would be able to "provide a one-sided narrative without the ability to compare it to his prior statements." (ECF No. 50, at 11).[1]

15. The information being sought in discovery is not otherwise available to SCSD2. The Magistrate Judge aptly recognized that any attempt to obtain the requested information from another source would likely be met with a similar claim of privilege. Pollak suggests that SCSD2 can obtain the requested information from Trustee Shelta Rambur, who was substituted as a defendant after being elected to the Board of Trustees in November of 2022. However, Trustee Rambur is only a defendant in her official capacity as a board member, which is in essence a suit against the school district. *See Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 3105 (1985). SCSD2 does not have any control over her personal email communications or her communications as an administrator of the FOF Facebook page.

16. The final factor in the balancing test considers whether the party asserting the privilege has placed the information in issue. In this situation, it is obvious that Pollak has placed

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[1] It is important to note that Pollak's reasons for attending and speaking at the board meetings are relevant because of the allegations Pollak has made in his amended complaint. SCSD2 does not contend that Pollak's intent and purposes in attending the board meetings will present issues of fact that must be decided by the court or jury. Rather, SCSD2 contends the undisputed facts and the Tenth Circuit's decision with respect to the substance of the claims alleged in Pollak's amended complaint are such that this case should be decided on a motion for summary judgment that SCSD2 intends to file. However, the parties are currently in the discovery phase of this litigation, which ends September 1, 2023, and this is the only opportunity SCSD2 will have to conduct discovery and prepare to defend against Pollak's allegations should the case go to trial.

the requested information at issue. The Magistrate Judge noted that while this is not dispositive in the Tenth Circuit it certainly weighs heavily in favor of disclosure. (ECF No. 50, pp. 5, 12).

17. The decision of the Magistrate Judge was not clearly erroneous or contrary to law. The Magistrate Judge applied the appropriate legal standards and carefully reviewed the arguments submitted by the parties.

Wherefore, SCSD2 respectfully requests that the district court deny Pollak's motion to reconsider the Magistrate Judge's Order Granting Motion to Compel.

Dated this 16th day of August, 2023.

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Certificate of Service

I, Kendal R. Hoopes, hereby certify that on August 16, 2023, I served a true and correct copy of the above and foregoing through the Case Management/Electronic Case Filing (CM/ECF) system for the United States Federal Court for the District of Wyoming.

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