

2022 WL 1406734

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United States District Court, W.D. Louisiana,
Lafayette Division.

Claude BOUDREAUX, et al.

v.

SCHOOL BOARD OF ST. MARY PARISH, et al.

Civil Action No. 6:65-11351

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Signed 05/03/2022

Attorneys and Law Firms

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CAROL B. WHITEHURST, UNITED STATES
MAGISTRATE JUDGE

*1 Pending before the undersigned magistrate judge is the Motion to Amend Protective Order and Stay Discovery Deadlines [Doc. 107] filed by the defendant, St. Mary Parish School Board (the “Board”). The motion is opposed by the Plaintiff Class (“plaintiffs”) [Doc. 111], and the Board filed a reply brief [Doc. 116]. The United States of America also filed an amicus brief in opposition to the Board’s motion [Doc. 112]. For the following reasons, the motion is GRANTED IN PART AND DENIED IN PART.

Protective Order

Cognizant that discovery in this school desegregation lawsuit could involve the exchange of student and educator records and other highly sensitive information, the parties to this lawsuit negotiated the terms of a Protective Order. In the words of the parties themselves, this Protective Order was drafted to “facilitate the production, exchange, and discovery of highly sensitive documents and information, including but not limited to information protected by the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g; 34 C.F.R. Part 99, and Louisiana’s School Employees Personnel Files Act (“SEPPFA”), LA. REV. STAT. § 17:1237(A).”¹ It is apparent from the briefs that the parties began negotiating the terms of the Protective Order on May 14, 2021; it was filed into the record on June 1, 2021 [Doc. 79].

The Protective Order contains the following relevant provisions:

“Interested Person Information” shall include the names of educators, class members, and community members who have reached out to counsel for the plaintiff class or the United States seeking assistance or providing information in connection with this Litigation. Interested Person Information shall also include other information that, alone or in combination, would allow a reasonable person in the community to identify such people with reasonable certainty.

[...]

The Parties shall produce to each other unredacted versions of Interested Person Information if responsive to a Party’s discovery request or a question posed at a

deposition or during an examination in court. Nothing herein shall be deemed a waiver of a party's right to object to a discovery request or question on any other ground (e.g., on the basis of relevance, burden, privilege). Further, nothing herein shall prevent a party from redacting information in a document that a party reasonably believes is subject to attorney-client privilege, work product privilege, or another privilege or immunity from disclosure. Documents produced or information provided that contains Interested Person Information shall be marked "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY – SUBJECT TO COURT'S PROTECTIVE ORDER," or, in the case of answers given at a deposition or hearing, so designated on the record. The Parties shall limit the production and redisclosure of Interested Person Information to only the persons described in categories c, d, e, f, and g of paragraph 3.

[...]

c. Counsel for any party in this Litigation and their associated and temporary attorneys, paralegals, and other professional personnel (including support staff);

***2** d. Service vendors (including outside copying and litigation support services) who are directly assisting counsel for any party in the conduct of this Litigation, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligations hereunder;

e. Expert witnesses or consultants who have been consulted for the purpose of being retained, or who have been retained by the Parties or their counsel to furnish assistance, technical or expert services in connection with this Litigation or to give testimony with respect to the subject matter of this Litigation, and the employees of such experts or consultants when working in connection with this Litigation under the direct supervision of said persons;

f. The Court and court personnel;

g. An officer before whom a deposition is taken, testimony is given, or a hearing is conducted, including stenographic reporters and any necessary secretarial, clerical, or other personnel of such officer, if furnished, shown or disclosed in accordance with this Order or further order of this Court[.]²

This Protective Order has been in full force and effect since June 2021, during which time discovery has progressed between the parties.

In the instant motion, the Board seeks to amend the Protective Order to allow the Board's counsel to communicate with its executive-level administrators (Superintendent, Assistant Superintendent, Central Office Directors, and Central Office Supervisors) certain identifying information concerning "Interested Persons" in this litigation. The Board argues that the plaintiffs interpret the Protective Order as prohibiting the disclosure of such information, which includes the identities of thirty-three (33) potential witnesses, to the Board or its officers in any way. The Board also argues that the plaintiffs have refused to allow Board representatives to be present in depositions when questions regarding "Interested Persons" are asked and have instructed deponents not to answer such questions. The Board argues that such strict construction of the Protective Order prevents a reasonable investigation by the Board and its counsel into claims and would potentially thereby cause violations of the Louisiana Rules of Professional Conduct. Finally, the Board requests a stay of all current discovery and, accordingly, other deadlines currently set in the applicable plan of work in order to allow adequate time for the Board to conduct discovery, investigate allegations, and any necessary follow-up. Alternatively, the Board requests that current deadlines be extended by at least 60 days which would allow for sufficient time to finish depositions, conduct necessary fact investigations, and related activities.

The contours of the Protective Order have been disputed by the parties on at least one previous occasion. On February 10, 2022, the undersigned magistrate judge conducted a telephone conference with counsel to discuss a deposition dispute between the parties relating to the scope of the Protective Order, and specifically, who can be present in the room when a deponent is being questioned about education records, employee records, and personally identifiable information.³ At that time, the School Board made the same argument it makes in the instant motion, that is, the Board should be permitted to ask about Interested Person Information during depositions. The plaintiffs agreed that such information was discoverable but objected to the presence of a District Representative in the room during such questioning, arguing for a strict interpretation of the Protective Order and noting that District Representatives are not listed in Paragraph 3 of the Protective Order as persons who are permitted to have that information.

***3** Noting the express language of the Protective Order, which had been in effect in this litigation for approximately nine months at that time, the Court ruled that the Protective Order limits the people who can have access to the information in question to the classification of people outlined in Paragraph 3, and that District

Representatives are not included in that classification. The Court specifically explained that, without modification of that provision of the Protective Order, District Representatives cannot be present in the room during depositions where that information is being shared.

The parties essentially reiterate their February 10, 2022 arguments in the subject briefing. The Board argues that its ability to provide a defense has been hamstrung, because it has been unable to adequately conduct discovery, and has not had any participation by executive level administrators in the investigations of whistleblowers' claims. The Board adds one additional argument, that by restricting disclosure of Interested Persons' identities to attorneys only, the Louisiana Rules of Professional Conduct are violated, because counsel for the Board would be required to investigate complaints without disclosing names to the School District, which violates lawyer-witness rules and prevents the District from giving informed consent on litigation decisions.

The Board's arguments are unavailing. As this Court explained in *Coburn v. Soc'y of Roman Cath. Church of Diocese of Lafayette*, 2021 WL 4006171, at *1 (W.D. La. Sept. 1, 2021), a district court retains discretion to modify or vacate a protective order once it has been entered. *Dean v. Texas Tech Univ. Health Scis. Ctr.*, 2017 WL 9901155, at *7 (N.D. Tex. Sept. 25, 2017). *See also United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (citation omitted); *In re United States' Motion to Modify Sealing Orders*, 2004 WL 5584146, at *2 (E.D. Tex. June 8, 2004). Courts have looked to four factors to guide consideration of whether a modification is appropriate, including: "(1) the nature of the protective order; (2) the foreseeability, at the time of issuance of the order, of the modification requested; (3) the reliance on the order; and (4) whether good cause exists for the modification." *Dean*, 2017 WL 9901155 at *7, *citing Murata Mfg. Co., Ltd. v. Bel Fuse, Inc.*, 234 F.R.D. 175, 179 (N.D. Ill. 2006) (citation omitted); *accord In re Enron Corp. Secs., Derivative & ERISA Litig.*, 2009 WL 3247432, at *3 (S.D. Tex. Sep. 29, 2009). Courts have held that "a party seeking to modify an agreed protective order bears the burden of demonstrating good cause exists to modify the order." *United States ex rel. Long v. GSD&M Idea City LLC*, 2014 WL 12648520, at *2 (N.D. Tex. Jan. 3, 2014) (citing *Orthoflex*, 2013 WL 3095106, at *3).

Here, the Protective Order is not a "blanket" order allowing the parties to designate as confidential large swaths of otherwise fully discoverable information. Rather, the Order is specific: Only the names and other personally identifying information about whistleblowers may be designated as attorneys'-eyes-only. Any other

information, such as the underlying facts of complaints raised by whistleblowers, is not protected at all. That the Protective Order extends its protections only to specific, narrowly-drawn categories of information militates against modification. *See, e.g., Peoples v. Aldine Indep. Sch. Dist.*, 2008 WL 2571900, at *2 (S.D. Tex. June 19, 2008) ("Orders covering 'a specific type of identified information' are narrowly defined 'and so are more difficult to modify.'").

*4 Furthermore, as the plaintiffs argue, the protection of individuals' identities was clearly foreseeable and part of the reason for the entry of the Protective Order in the first place. That the individuals' identities in this case would be protected is evidenced by the negotiations between the parties and the conduct of counsel throughout discovery in this matter. The record shows that the Board actively participated in the drafting of the Protective Order and provided additional language for the reasons why Interested Persons information requires protection during the drafting and editing process.⁴ These factors weigh against modification of the Order.

Importantly, potential witnesses in this matter – and Plaintiff Class Representatives -- have relied on the protections of the Order for approximately 11 months, a fact which weighs strongly against modification of the Order in this case. The plaintiffs have persuasively demonstrated that community members fear retaliation if their identities are exposed as having participated in the litigation. To revoke these protections now could expose those individuals who justifiably relied on the parties' agreement to retaliation. The Board has asserted that retaliation is not a "factual concern" in this litigation. However, the Board appeared to understand the need for the protection of Interested Persons when it drafted the Protective Order in May 2021, and this Court is reluctant to undermine the community's confidence in the judicial system by exposing potential witnesses in important civil rights litigation by failing to protect their identities after such protection was promised and agreed to by all parties.

For all of these reasons, the Court concludes that the Board has not shown good cause to modify the Protective Order in this case. The Board's argument that the Order "could be" modified under its express terms simply does not demonstrate good cause for its modification. Furthermore, the Board's argument that the Louisiana Rules of Professional Conduct proscribe the use of attorneys'-eyes-only designations lacks merit. Courts in Louisiana regularly enter protective orders allowing parties to designate even broader categories of information as attorneys' eyes only. *See, e.g., McCoy v. SC Tiger Manor, LLC*, 2020 WL 5549153, at *7–*8 (M.D. La. Sept. 16, 2020) (entering protective order

allowing any party to designate as attorneys'-eyes-only any documents it "believes in good faith ... [pose] a substantial risk of identifiable harm" if disclosed to other parties); *Adm'rs. of Tulane Educ. Fund v. Cytogel Pharma, LLC*, 2018 WL 2010138, at *3 (E.D. La. Apr. 30, 2018) (noting stipulated protective order that allowed any party to designate materials as attorneys'-eyes-only any material that "is likely to cause significant harm to an individual"); *Kline v. Neilsen & Hiebert Sys., Inc.*, 2013 WL 12182140, at *1 (W.D. La. May 15, 2013) (noting stipulated protective order authorizing attorneys'-eyes-only designation of all "highly sensitive, trade secret, competitive, confidential and proprietary material").

Finally, the Plaintiff Class offered to assist the District's counsel with their investigation of any and all complaints by providing search terms, custodians, and other parameters by which counsel could review any and all documentation related to any complaint, and the District apparently rejected this offer. This Court notes, as did the plaintiffs, that the Protective Order is not a blanket order; the underlying facts of complaints are not protected. While the work required to find this subject matter may take additional time, it is certainly capable of being found.

discovery to take place or, in the alternative, that all current deadlines be extended by at least 60 days. The plaintiffs oppose a stay of discovery or any attempt by the District to re-open discovery with respect to whistleblowers it has known about for many months, but does not oppose a 60 day extension of all remaining case deadlines to enable the completion of the previously-scheduled depositions before proceeding with subsequent stages of this action.

Considering the lack of opposition from the plaintiffs, the Court concludes that a 60 day extension of all deadlines in this matter is warranted. This extension has no bearing on the limited stay that is in place in connection with the Board's appeal of this Court's February 9, 2022 Order [Doc. 105].

Considering the foregoing, the Motion to Amend Protective Order and Stay Discovery Deadlines [Doc. 107] filed by the St. Mary Parish School Board is GRANTED IN PART AND DENIED IN PART. The motion to modify the Protective Order is DENIED, and the motion to extend all deadlines in the existing Plan of Work is GRANTED. All deadlines in the parties' Plan of Work are hereby EXTENDED by 60 days.

All Citations

Slip Copy, 2022 WL 1406734

Discovery

*5 The Board requests that the current deadlines in the Plan of Work be stayed while allowing additional

Footnotes

¹ See Joint Motion for Protective Order, Doc. 75, § 2.

² See Protective Order, Doc. 79 at §§ 2(d); 3(c)-(g); 4.

³ Doc. 106.

⁴ See Affidavit of Michael N. Turnage Young, attached as Exhibit 1 to plaintiff's opposition brief, Doc. 111, and emails attached as Exhibit 6.

