

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

DREW ADAMS, a minor, by and through
his next friend and mother, ERICA
ADAMS KASPER,

Plaintiff,

v.

THE SCHOOL BOARD OF ST. JOHNS
COUNTY, FLORIDA,

Defendant.

Case No. 3:17-cv-00739-TJC-JBT

**PLAINTIFF'S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE AND/OR
ARGUMENT REGARDING PLAINTIFF'S SOCIAL MEDIA USE AND
SUPPORTING MEMORANDUM OF LAW**

Pursuant to Federal Rules of Evidence 401, 402, 403, 801, and 903, Plaintiff, Drew Adams, a minor, by and through his next friend and mother, Erica Adams Kasper (“Plaintiff”), and by and through their undersigned counsel, respectfully moves the Court to exclude evidence and argument related to Plaintiff’s social media accounts and postings as inadmissible. This evidence is irrelevant to the claims or defenses, is unfairly prejudicial, is rife with hearsay and cannot be authenticated. Moreover, even if admissible, such evidence would simply distract from the narrow issues to be presented, all of which relate to whether the Defendant’s policy is discriminatory. While Defendant may want to infuse the litigation with aspects of routine teenage social media activity, the only actual purpose could be a desire to taint the Plaintiff in this case, as these materials have no bearing on the actual issues to be presented.

Such efforts should be rejected as any probative value is outweighed by the prejudice including the waste in judicial resources. As detailed below, this evidence should therefore be excluded.

BACKGROUND

Plaintiff is now a 17-year-old honors student registered at Allen D. Nease High School (“Nease High School”) in Ponte Vedra, Florida. Drew is a boy, who is transgender, meaning that his sex assigned at birth was female, but his gender identity is male. In this case, Drew seeks a declaration that his exclusion from the boys’ restroom by Defendant The School Board of St. Johns County, Florida (“Defendant School Board” or “School Board”) violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* (“Title IX”). Drew also seeks injunctive relief enjoining Defendant from denying him equal access to the boys’ restroom pursuant to the Fourteenth Amendment to the U.S. Constitution and Title IX and garden variety non-economic damages.

The issue in this case is narrow, limited solely to whether Defendant’s policy prohibiting transgender students from using the restroom consistent with their gender identity is discriminatory and violates Title IX and the Equal Protection Clause of the United States Constitution. Here, the actual evidence adduced through discovery confirms that Drew is transgender and Defendant has not and cannot introduce evidence to dispute this fact. The same is true with respect to Drew’s diagnosis with gender dysphoria. Neither of Defendant’s experts or other witnesses has or can dispute these facts. There is likewise no dispute that Drew has already taken steps to socially and medically transition and, in fact, Dr. Josephson acknowledged in deposition that Drew is a boy and should be treated as such.

ARGUMENT

I. THE COURT HAS DISCRETION TO EXCLUDE IRRELEVANT AND PREJUDICIAL EVIDENCE IN ADVANCE OF TRIAL.

Federal district courts have authority to make *in limine* rulings pursuant to their authority to manage trials. *Luce v. United States*, 469 U.S. 38, 41 (1984); *see also Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1503 (11th Cir. 1985) (stating that consideration of a motion *in limine* is a matter within the discretion of the District Court); *Arnold v. Nobartis Pharm. Corp.*, 28 F. Supp. 3d 1268 (M.D. Fla. 2014) (ruling on an “omnibus motion *in limine*” and granting a series of evidentiary exclusions). The purpose of a motion *in limine* is “to exclude anticipated prejudicial evidence before the evidence is actually offered.” *Luce*, 469 U.S. at 40 n. 2 (1984); *see also Stewart v. Hooters of Am., Inc.*, 8:04-CV-40-T-17-MAP, 2007 WL 1752873, at *1 (M.D. Fla. June 18, 2007) (the purpose is to provide the Court notice of the movant’s position to avoid damaging evidence, “which may irretrievably affect the fairness of the trial.”). The court may exclude evidence if it is inadmissible. *Luce v. United States*, 469 U.S. 38, 41 (1984) (federal district courts have authority to make *in limine* rulings pursuant to their authority to manage trials). This includes prohibiting irrelevant and prejudicial arguments or references at trial. *Id.*

Relevant evidence is that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. “Irrelevant evidence is not admissible.” Fed. R. Evid. 402. “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R.

Evid. 403. “Unfair prejudice” within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” Fed. R. Evid. 403, Advisory Committee Note. “In balancing the probative value against unfair prejudice required by Rule 403, the trial judge has wide discretion.” *United States v. Dwyer*, 539 F.2d 924, 927 (2d Cir. 1976).

II. THE COURT SHOULD EXCLUDE ANY EVIDENCE OF OR ARGUMENTS RELATING TO PLAINTIFF’S USE OF SOCIAL MEDIA ACCOUNTS PURSUANT TO FEDERAL RULES OF EVIDENCE 401, 402 AND 403.

Despite the fact that Plaintiff’s claims stem from harm he suffered as a result of Defendant’s implementation of its discriminatory restroom policy, Plaintiff anticipates that Defendants will attempt to use Drew’s social media in an effort to improperly tarnish the character of Drew despite the fact that none of this information has any bearing on the issues in this case. Because social media, social media exchanges and social media “posts” do not make the existence of a fact of consequence more or less probable, evidence of and arguments related to Plaintiff’s social media should be excluded from trial. Fed. R. Evid. 401. Even if Plaintiff’s social media is determined to be of relevance, it nonetheless should be excluded from trial because it can only be used to mislead, confuse and waste this court’s time. Fed. R. Evid. 403.

The fact is, that Plaintiff’s social media use will create a trial within a trial regarding Plaintiff’s social life, his experiences regarding his transition, and his views on all manner of things including being an activist for LGBTQ issues. None of these materials are probative of whether Defendant’s discriminatory policy violates Plaintiff’s constitutional and civil rights, nor are they probative of the effect of Defendant’s discriminatory policy on Drew, as the social

media at issue do not address, mention, or deal with any such effects from the discriminatory policy.

The use of Plaintiff's social media accounts even as they relate to his medical treatment and transition to live in accordance with his authentic identity, i.e. in accordance with his gender identity, has no relevance to this case nor is it probative of the issues actually in dispute in this matter. There is no dispute that Plaintiff has taken social and medical steps to transition to live in accordance with his male gender identity. There is likewise no dispute that Plaintiff has been diagnosed with gender dysphoria by his providers. Although Defendant will predictably try to suggest that if Drew was comfortable in one social media post then he has not been harmed, but life does not work that way. There is no basis to glean or extrapolate from a single social media post on a single day whether the discriminatory policy at issue has impacted Drew. That is a quantum leap in logic that has no relationship to science or fact, and Defendant should not be permitted to misuse evidence, taken out of context and in a vacuum, particularly where, as here, none of the posts address the issue at hand: the discriminatory policy or the impact on Drew in using the gender neutral bathroom at Nease High School. By example, in one of the posts, Drew is seen discussing how he feels comfortable with his body and his transition, but that has nothing to do with what impact the use of gender neutral restrooms has on Drew. To try and conflate a single post having nothing to do with restroom usage into some argument that Drew has suffered harm is improper and a misuse of such evidence. This is worsened by the fact that Defendant's apparent intention is to use only one or two posts, out of context and sequence, and without regard to when the posts were made.

Any social media postings having to do with Drew's medical transition, his general thoughts about transgender issues, or his activism for LGBTQ equality are wholly irrelevant to this case, let alone probative of any issue to be decided by the Court. *See Thurmond v. Bowman*, No. 14-CV-6465W, 2016 WL 1295957, at *10 (W.D.N.Y. Mar. 31, 2016), *report and recommendation adopted*, 199 F. Supp. 3d 686 (W.D.N.Y. 2016) ("routine status updates and/or communications on social networking websites are not, as a general matter, relevant to a claim for emotional distress damages" (alterations omitted)).

In addition, the use of Plaintiff's social media would also cause unnecessary confusion. "As some courts have cautioned, the relationship of routine expressions of mood in a social media posting to a claim for emotional distress damages is much more tenuous than the relationship between a post reflecting engagement in a physical activity to a claim for physical injury damages." *Thurmond v. Bowman*, No. 14-CV-6465W, 2016 WL 1295957, at *10 (W.D.N.Y. Mar. 31, 2016), *report and recommendation adopted*, 199 F. Supp. 3d 686 (W.D.N.Y. 2016) (alterations and quotations removed) (citing *Giacchetto v. Patchogue–Medford Union Free Sch. Dist.*, 293 F.R.D. 112, 116 (S.D.N.Y. 2013), and Brown, Kathryn R., *The Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs*, 14 Vand. J. Ent. & Tech. L. 357, 365 (2012) ("Because social networking websites enable users to craft a desired image to display to others, social scientists have posited that outside observers can misinterpret that impression"))).

What is more, Defendants have failed to specify in their Rule 26(a)(3) disclosures (Dkt. 100) which social media posts they intend to use as exhibits. Indeed, they simply identify

social media postings and provide range of 737 pages of social media printouts. *See* Dkt. 100, Ex. No 231 at 24 (identifying bates range “PLTF2934-3671”).¹ And, although they identified some YouTube postings, these videos have nothing to do with the issues presented in this case, to wit: the discriminatory policy implemented by the Defendant and what impact that policy has had on Drew, Plaintiff’s social media postings (as well as those from his parents) are wholly irrelevant, let alone probative of the important issues that this Court will have to decide.

Put simply, the materials and information related to Drew’s social media accounts have no relevance to the narrow issue of whether Defendant’s actions were discriminatory. Rather, it seems that Defendant hopes to utilize these materials to somehow disparage or taint this Plaintiff, a minor and typical teenage boy, when there is simply no rational relationship to the claims or issues here.

II. THE COURT SHOULD EXCLUDE ANY EVIDENCE AND ARGUMENTS THAT MAKE REFERENCE TO PLAINTIFF’S USE OF SOCIAL MEDIA ACCOUNTS PURSUANT TO FEDERAL RULES OF EVIDENCE 801 AND 903.

Evidence and argument relating to Plaintiff’s social media should likewise be excluded because it is hearsay and cannot be properly authenticated. Plaintiff’s social media is hearsay because it is mostly rife with Plaintiff sharing others’ postings and news stories, exchanges between individuals who are not part of this case, and in many instances, is part of ongoing

¹ By failing to identify the social media posts they intend to use as evidence, Defendant makes a detailed inquiry by Plaintiff and this Court on which posts should be excluded based on relevance, prejudicial effect, or probative value practically impossible. To allow Defendant to simply mark as an exhibit the entirety of Plaintiff’s social media produced in discovery, amounting to 737 pages, fails to comply with the letter and spirit of Rule 23(a).

dialogues between various individuals. Such evidence is mostly inadmissible hearsay that cannot be properly authenticated.

“To be admissible, social media and similar online postings must be authenticated under Rule 901 of the Federal Rules of Evidence or must meet Rule 902’s requirements for self-authenticating business records, which requires a certification of the records custodian.” *Linscheid v. Natus Med. Inc.*, No. 3:12-CV-67-TCB, 2015 WL 1470122, at *6 (N.D. Ga. Mar. 30, 2015) (cleaned up); *see also United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014); *United States v. Vayner*, 769 F.3d 125, 127 (2d Cir. 2014) (reversing admission of social-media profile that was not properly authenticated); *Randazza v. Cox*, No. 2:12-cv-2040, 2014 WL 1407378, at *4 (D. Nev. Apr.10, 2014). The sharing of a post or news story on Facebook or the retweet of someone else’s tweet cannot make the content of such posts attributable to Plaintiff. Such posts can only be attributed and authenticated by the original author, and in this case, as noted above, Defendant has failed to identify which posts it intends to utilize at trial much less taken the steps to properly authenticate the information.

Further, while Defendants could theoretically argue that Plaintiff’s statement is not hearsay because it is an admission by a party opponent, that rule should not apply here. *See United States v. Brinson*, 772 F.3d 1314, 1320 (10th Cir. 2014). The general rule is that social media constitutes inadmissible hearsay. *See Monotype Imaging, Inc. v. Bitstream, Inc.*, 376 F. Supp. 2d 877 (N. D. Ill. 2005) (internet printouts were hearsay and inadmissible to prove truth of the matter asserted).² And to the extent Defendant wants to use such evidence, they should

² However, the documents may be admissible to show what was on the websites if Defendants can lay a proper foundation, which they cannot.

identify which posts they want to attribute to Plaintiff versus the posts or messages from others. Here, most of the social media includes statements, posts, and messages from individuals not involved with this case, and even for the exchanges of communications between Plaintiff and others, the accompanying statements and exchanges involving individuals other than the Plaintiff are inextricably intertwined with Plaintiff's posts. The result is hearsay that permeates social media evidence in a way that precludes its use.

Defendants have not listed or otherwise perpetuated testimony to authenticate the social media that they would seek to introduce. Plaintiff's testimony alone cannot fill that void. Accordingly, evidence and argument related to Plaintiff's social media should be excluded pursuant to Federal Rules of Evidence 801 and 903.

CONCLUSION

WHEREFORE, based on the foregoing reasons, Plaintiff respectfully requests that the Court grant the instant motion *in limine* in full and preclude Defendant from offering any evidence or argument related to Plaintiff's social media accounts at trial.

CERTIFICATE OF CONFERENCE PURSUANT TO LOCAL RULE 3.01(g)

Pursuant to 3.01(g) of the Local Rules of the Middle District of Florida, the undersigned certifies that he has conferred with the attorneys representing Defendant regarding the relief requested in the motion. The parties were unable to reach a resolution and Defendant's counsel does not consent to the relief requested.

Dated this 29th of November, 2017

Respectfully submitted,

/s/ Omar Gonzalez-Pagan

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2017, the foregoing motion was filed electronically using the Court's ECF system, which will provide electronic notice to all counsel of record, including:

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