

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
**Senior Judge Wiley Y. Daniel**

Civil Action No. 18-cv-02074-WYD-STV

MASTERPIECE CAKESHOP INCORPORATED, a Colorado corporation; and  
JACK PHILLIPS,

Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities;  
ANTHONY ARAGON, as member of the Colorado Civil Rights Commission, in his official capacity;  
MIGUEL "MICHAEL" RENE ELIAS, as member of the Colorado Civil Rights Commission, in his official capacity;  
CAROL FABRIZIO, as member of the Colorado Civil Rights Commission, in her official capacity;  
CHARLES GARCIA, as member of the Colorado Civil Rights Commission, in his official capacity;  
RITA LEWIS, as member of the Colorado Civil Rights Commission, in her official capacity;  
JESSICA POCOCK, as member of the Colorado Civil Rights Commission, in her official capacity;  
AJAY MENON, as member of the Colorado Civil Rights Commission, in his official capacity; and  
PHILIP WEISER, Colorado Attorney General, in his official capacity,

Defendants.

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**ORDER OVERRULING OBJECTIONS**

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THIS MATTER is before the Court on Plaintiffs' Fed. R. Civ. P. 72(a) Objection to Magistrate Judge's Order Forbidding Depositions of Defendant Commissioners ("Objection"). (ECF No. 120). For the reasons stated below, Plaintiffs' Objection is overruled and Magistrate Judge Scott T. Varholak's order is affirmed.

## **BACKGROUND**

At a discovery hearing held on February 5, 2019, Magistrate Judge Varholak denied without prejudice Plaintiffs' request to depose the Defendant Commissioners and denied with prejudice Plaintiffs' request to depose the Defendant Commissioners about their "personal feelings about religion, gay rights, and the topics that underlie the competing First Amendment and Fourteenth Amendment issues" in this case. (ECF No. 112). Magistrate Judge Varholak allowed Plaintiffs to conduct a deposition pursuant to Federal Rule of Civil Procedure 30(b)(6) "that goes into the rationale for the decision that was made and any conversations that the commissioners had with each other outside of open meetings and exclusive of attorney client communications. (*Id.*).

Plaintiffs argue Magistrate Judge Varholak's order is clearly erroneous. They argue the order clearly erred in denying their request to depose the Defendant Commissioners because (1) absolute immunity does not bar the Defendant Commissioners' depositions; (2) deliberative-process and mental-process privileges do not bar the Defendant Commissioners' depositions; and (3) a Rule 30(b)(6) deposition is not a substitute for deposing the Defendant Commissioners. Plaintiffs also argue the order clearly erred in denying their request to inquire into the Defendant Commissioners' subjective views on religion, gay rights, and the First and Fourteenth Amendments in depositions.

## **STANDARD OF REVIEW**

Since Defendants' Objection to Magistrate Judge Varholak's nondispositive order is timely, I review the order to determine whether it is "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). "An order is clearly erroneous when the reviewing court on

the entire evidence is left with the definite and firm conviction that a mistake has been made.” *Cook v. Rockwell Int’l Corp.*, 147 F.R.D. 237, 243 (D. Colo. 1993). “The clearly erroneous standard . . . requires that the reviewing court affirm unless it ‘on the entire evidence is left with the firm and definite conviction that a mistake has been committed.’” *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1996) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Review under the “clearly erroneous” standard is “significantly deferential.” *United States v. Gallegos*, 314 F.3d 456, 462 n.3 (10th Cir. 2002) (quotation marks omitted).

## ANALYSIS

### I. Absolute Immunity

Plaintiffs first argue that Magistrate Judge Varholak clearly erred by relying on absolute immunity to prevent them from deposing the Defendant Commissioners. (ECF No. 120 at 12-15). I disagree because, in general, prosecutorial immunity can be grounds to limit discovery of the immune official. *See, e.g., Chang v. United States*, 246 F.R.D. 372, 373 (D.D.C. 2007). Magistrate Judge Varholak found

there needs to be some level of discovery that occurs to know why the State made its decision, but I think some of the protections at least, or some of the rationale for why the immunity doctrine is there to begin with, which is to allow – and why discovery is stayed when the immunity is raised, which is that these are governmental officials and discovery can be [disruptive], I think that that rationale still holds to some extent.

(ECF No. 120-2 at 49:20-50:3). His decision attempted to balance “two competing concerns, which is to protect officials from disruptive discovery and to still allow discovery into the rationale of the State’s decision.” (*Id.* at 50:4-7; *see also id.* at 52:22-25). Plaintiffs do not cite any cases showing that Magistrate Judge Varholak’s ruling was clearly erroneous. Instead, they cite to cases establishing that absolute immunity only

applies to damages claims, but none of these cases condemns the propriety of limiting depositions of public officials. (ECF No. 120 at 12 n.1). Plaintiffs also cite policy reasons for why the limits on discovery in cases of absolute immunity should not apply here. (*Id.* at 14-15). Without any cases demonstrating Magistrate Judge Varholak legally erred by placing boundaries on the Defendant Commissioners' depositions, and because Magistrate Judge Varholak reasonably relied on the rationale to tailor depositions in cases of absolute immunity to limit Plaintiffs' ability to depose the Defendant Commissioners, I cannot find that his order on this issue is clearly erroneous or contrary to law.

## **II. Deliberative-Process and Mental-Process Privileges**

Plaintiffs next argue that Magistrate Judge Varholak clearly erred by limiting their ability to depose the Defendant Commissioners even though he believed the deliberative-process and mental-process privileges may have been qualified by Plaintiffs' bad faith allegations. (ECF No. 120 at 15-16; ECF No. 120-2 at 50:8-16). Here too, however, Magistrate Judge Varholak simply balanced the interests of the parties to craft reasonable restrictions on discovery. (ECF No. 121 at 51:11-15). Magistrate Judge Varholak denied the request without prejudice pending the outcome of the document discovery and the Rule 30(b)(6) deposition so that he could determine at that time whether there was an actual need to depose the Defendant Commissioners. (See ECF No. 120-2 at 54:13-55:8, 56:10-19). This was not clearly erroneous or contrary to law.

## **III. Rule 30(b)(6) Deposition**

Plaintiffs next argue that "[a]llowing a Rule 30(b)(6) deposition of the Commission does not rectify the clear error of barring Plaintiffs from deposing the individual Commissioners." (ECF No. 120 at 17). They claim that allowing only a Rule 30(b)(6)

deposition is clear error because (1) they are “effectively” prevented from deposing the Defendant Commissioners before the preliminary injunction hearing; (2) credibility determinations are relevant to Plaintiffs’ religious hostility and bad-faith arguments, but Rule 30(b)(6) depositions are a “poor vehicle for testing the credibility of individuals” who are not under oath; (3) a Rule 30(b)(6) organization representative cannot know all the discussions each Defendant Commissioner had concerning the decision to prosecute Plaintiffs; and (4) a Colorado legislator recently told Plaintiffs’ counsel where one of the Defendant Commissioners expressed the belief that there is an anti-religious bias on the Commission. (*Id.* at 17-18).

Magistrate Judge Varholak acted well within his discretion to reasonably reduce any unnecessary burden on the Defendant Commissioners by conditioning their depositions on the substance of the Rule 30(b)(6) deposition. *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 598-99 (1998) (noting a trial judge’s “broad discretion to tailor discovery narrowly and to dictate the sequence of discovery” against public officials). Magistrate Judge Varholak also allowed Plaintiffs to inquire into “the rationale for the decision that was made and any conversations that the commissioners had with each other outside of open meetings and exclusive of attorney/client communication,” encouraged the 30(b)(6) deponent to be prepared to answer questions about third party communications, and presumed the deponent would speak with each of the Defendant Commissioners. (ECF No. 120-2 at 9:21-10:3, 53:6-10, 54:8-12).

Plaintiffs’ reliance on the Colorado legislator’s affidavit does not change my opinion because it was executed after Magistrate Judge Varholak held the discovery hearing. And Magistrate Judge Varholak may allow Plaintiffs to depose the Defendant

Commissioners based on his assessment of the need to do so after the Rule 30(b)(6) deposition. Accordingly, Magistrate Varholak's order on this issue was not clearly erroneous or contrary to law.

#### **IV. Subjective Views of Defendant Commissioners**

Finally, Plaintiffs argue Magistrate Judge Varholak clearly erred when he denied their request to inquire into the subjective views of the Defendant Commissioners on topics that may be relevant to this case. Magistrate Judge Varholak denied the request because he found there was not a "clear showing . . . that these commissioners . . . have a personal animosity or personal belief that is so strong that it could not be overcome in making a decision in this case." (ECF No. 120-2 at 52:4-9). I cannot find that Magistrate Judge Varholak's ruling on this issue was clearly erroneous or contrary to law based on the record before him.

#### **CONCLUSION**

Based on the foregoing, it is

ORDERED that Plaintiffs' Fed. R. Civ. P. 72(a) Objection to Magistrate Judge's Order Forbidding Depositions of Defendant Commissioners (ECF No. 120) is **OVERRULED**. Accordingly, Magistrate Judge Varholak's Order (ECF No. 112), entered on February 5, 2019, is **AFFIRMED**.

Dated: February 28, 2019.

BY THE COURT:

*s/ Wiley Y. Daniel*  
WILEY Y. DANIEL,  
SENIOR UNITED STATES DISTRICT JUDGE