

Kari Butler

From: Thomas Mew <TMew@buckleybeal.com>
Sent: Wednesday, January 12, 2022 6:21 PM
To: Kari Butler; bbuechner_fmglaw.com
Cc: Ed Buckley; Rachel Berlin Benjamin; Andrew Beal; Jack Hancock; Michael M. Hill
Subject: RE: [EXTERNAL] RE: Conference Request 1:16-cv-1460 (Bostock v. Clayton County)
Attachments: Doc 85 - CONSENT PROTECTIVE ORDER. Signed by Magistrate Judge Walter E. Johnson on 9.10.21.pdf; EX043 - CLAYTON_014192 - 014203 - Teske Journal.pdf

CAUTION - EXTERNAL:

Ms. Butler: Plaintiff's position is set forth in this email along with 2 attachments. Defendant may, of course, also wish to submit a statement of its position but given the current hour and tomorrow's 9 am call, I wanted to go ahead and send this to the Court. Thank you – Tom Mew

Plaintiff's position --

This dispute involves whether diary excerpts from the decision maker in Plaintiff's termination that directly reference Plaintiff, his sexuality, and his termination, may be designated "confidential" by Defendant under the Protective Order in this case and thus, presumably kept out of the public record. For the reasons set forth below, Defendant's confidential designation is at odds with the Protective Order, controlling case law, and the rules of this Court. The Court should order Defendant to withdraw the confidential designation.

Factual Background

The Court previously approved and entered the parties' Consent Protective Order in this case. (Doc. 85.) For ease of reference we have attached a copy of the Protective Order to this email.

Following the entry of the Protective Order, Defendant produced and marked "confidential" excerpts from a diary prepared by Steven Teske, the decisionmaker for Plaintiff's termination. (A copy of these excerpts is attached hereto). Based upon Plaintiff's review, this is the only document Defendant marked as confidential in its entire production.

A number of entries in the diary directly reference Plaintiff, Plaintiff's sexuality, and the decision to terminate Plaintiff. See pages with Bates Nos. CLAYTON 14193, 14197, 14199, 141200, 14201, 14202. These entries concerning Plaintiff are directly relevant to the core issue in the case: whether Defendant discriminated against Plaintiff based on his sexual orientation.

Argument

First, Defendant's designation of the excerpts as "confidential" is contrary to the terms of the Protective Order. Under the Order, the parties agreed to "designate as 'confidential' only those documents which truly contain private and highly sensitive information..." (Doc. 85 at ¶ 4). The Consent Protective Order does not define the phrase "private and highly sensitive information," but courts that have applied similar terms have typically included things like medical information, financial information, and/or family matters. *See Brown v. Vivint Solar, Inc.*, 2020 WL 3250191, at *3 (M.D. Fla. Apr. 28, 2020) (financial information); *U.S. v. Bradley*, 2007 WL 1703232, at *1 (S.D. Ga. June 11, 2007) (noting that "courts routinely enter protective orders for personal medical information"); *In re Jolly Roger Cruises & Tours, S.A.*, 2011 WL 1467172, at *3 (S.D. Fla. Apr. 18, 2011) (stating that "the sensitive nature of" records concerning "psychological counseling sessions related to personal family relationships" was plain).

Here, the diary – in addition to its discussions of Plaintiff, Plaintiff’s sexuality, and Plaintiff’s termination - simply recounts daily events and gives some comments on those events. Examples include:

- recounting a trip to theatre shows or movies;
- mentioning that it snowed and that school was cancelled;
- recounting or planning out-of-town trips;
- mentioning participation in a mock trial;
- recounting yard work done;
- recounting getting a sandwich for his spouse; and
- recounting works tasks that needed to be completed

This is not “private and highly sensitive information.” There is no discussion of issues such as financial information, medical information, or sensitive family matters that might be "private and highly sensitive information." Portions of the diary are already redacted and/or omitted, and an additional confidentiality designation is not warranted on the portions that have been produced. Moreover, the pages Bates Stamped CLAYTON 141200, 141201, 141202, 141203 discuss the thought processes of the decisionmaker regarding plaintiff’s termination, referencing the fact that he is gay or using the term gay with respect to his activities no fewer than seven times on those pages alone. That information, which concerns the pivotal issue in the case, cannot be confidential.

Plaintiff’s position is supported by Eleventh Circuit and Supreme Court caselaw. It is clearly established that the general public possesses a common-law right to access judicial records and that judicial records are presumed to be public documents. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *see also Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001). This is so because “[o]nce a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case.” *See Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992).

Similarly, under the Northern District of Georgia’s Local Rules, documents filed in court are presumptively public. (NDGA Rules App. H – at A 18.) And Standing Order 04-02 describes the following limited categories of information to be redacted: Social Security Numbers, names of minor children, dates of birth, financial account numbers and home addresses. *See also* Judge Ross’ Standing Order at page 6 stating that “[a]s a general matter, this Court will seal only those items enumerated in the Court’s Standing Order 04-02 regarding sensitive information and public access to electronic case files.” None of the journal entries designated “confidential” fall into these categories.

Moreover, Defendant has not designated deposition testimony specifically discussing the diary excerpts as confidential and it is now too late to do so. The excerpts have been used as an exhibit at a number of depositions and are discussed at length in certain deposition testimony, including the testimony of the decisionmaker. Under the Protective Order, a party may designate as “confidential” any portion of a deposition transcript or exhibit which such party believes contains Confidential Information either on the record at the deposition or within 10 days after receipt of the transcript. Defendant has not designated any deposition testimony regarding the diaries as confidential within the timeline set forth in the Protective Order. It has waived the ability to do so and thus, any such testimony is already going to be a matter of public record if cited in any filings before the Court.

Although Defendant clearly wants to wrap the diary excerpts and any briefs or other filings citing them in a “plain brown wrapper,” that position is at odds with controlling caselaw and the plain language of the protective order. Plaintiff respectfully requests that the Court order that the designated material is not confidential or order Defendant to withdraw the confidential designation.

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He | Him

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