

FACTS AND PROCEDURAL HISTORY

Discovery Requests

This case commenced on September 9, 2005. Defendants served their Initial Disclosure under Rule 26(a)(1) on November 15, 2007. Ex. B.¹ Pursuant to Rule 26(a)(1), defendants were required to identify “each individual likely to have discoverable information that [they] may use to support [their] claims or defendants....” Defendants identified 18 individuals in response. Ex. B, pg. 2-4.

Plaintiffs also requested the names of relevant individuals in a set of Interrogatories served on January 20, 2006. Specifically, plaintiffs requested the “names of the teachers [at Maple Grove High School (“MGSH”)] who teach or taught” classes claimed by defendants to be relevant to the case.² Ex. C, pg. 4. Defendants refused to provide these names, objecting that the interrogatory called for them to disclose “private personnel data,” protected by the Minnesota Government Data Practices Act, Minn. Stat. § 13.43. Ex. D, pg. 6.

In the same set of Interrogatories, plaintiffs also requested information regarding “each person who provided information which helped form the basis for Defendants’ Answers or Responses to any discovery request.” Ex. C, pg. 4-5. Defendants identified

¹ Exhibits attached to the accompanying Affidavit of Genevieve M. Zimmerman in Support of Plaintiffs’ Motion to Strike Witnesses are identified herein as “Ex. ___.”

² Specifically, a central issue in the case is whether each of a number of student groups the school is “curriculum-related,” within the meaning of the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, and subsequent case law. For each group claimed by them to be “curriculum-related,” defendants were asked to identify the related class, as well as the teacher. Ex. C at 4.

10 individuals in response, Ex. D, pg. 7; all had previously been identified in defendants' Rule 26 disclosure. Ex. B, pg. 2-4.

In February 2006, plaintiffs noticed a 30(b)(6) deposition, seeking information regarding (among other things) "all information relevant to Defendants' Answers to each and every Interrogatory served by Plaintiffs." Ex. E, pg. 2. In response, defendants identified two individuals, Dr. Kate Maguire and principal Wendy Loberg, each of whom was identified on defendants' Initial Rule 26 Disclosure. Ex. B, pg. 2.

In the course of discovery, plaintiffs repeatedly requested that defendants produce all discoverable evidence as soon as possible. *See* Ex. F, G. In March 2006, plaintiffs received confirmation that defendants "consider[ed] their responses to all of Plaintiffs' discovery requests to be complete."³ Ex. H.

Discovery was initially scheduled to close on April 1, 2006. Defendants failed to produce a considerable volume of requested discovery during this timeframe, however, and the Court granted several motions to compel filed by plaintiffs, eventually giving defendants until July 3, 2006 to comply. *See* Ex. I (April 28, 2006 Order), J (June 21, 2006 Order). Following a pretrial conference in February 2007, discovery was re-opened

³ In fact, nearly a year ago, defendants objected to plaintiffs' motion to compel discovery, noting in relevant part: "Plaintiffs have had full opportunity to engage in discovery prior to the [then existing] April 1, 2006 discovery deadline. The School District has designated various individuals as Rule 30(b)(6) deponents on a variety of topics relating to this litigation. These individuals have been deposed at length. The School District has produced, by way of Answers to Interrogatories, its Response to Plaintiffs' Request for Production of Documents, and Plaintiffs' numerous informal discovery requests, extensive documentation relating to the record." Ex. M. Defendants should not be allowed to represent to this Court on one hand that plaintiffs have had full opportunity to conduct discovery, and over a year later identify 36 new witnesses who may offer probative testimony at trial of this matter.

yet again, with a scheduled close of April 1, 2007. *See* Ex. K (Feb. 28, 2007 Order). At this pretrial conference, defendants made no mention of any forthcoming surge in witnesses; the parties agreed that trial would likely last about three days.

Sudden Post-Discovery Disclosures

Concurrent with the new April 1, 2007 close of discovery, the parties were required to submit witness lists. The list submitted by defendants on April 2 contained 55 names. Ex. A. Thirty-six of these – nearly two-thirds – had never been identified previously in this case.⁴

The same day, defendants amended their Initial Disclosure under Rule 26(a)(1), for the first time. Ex. L. The list of 18 individuals previously identified by defendants as “likely to have discoverable information” had suddenly ballooned three-fold, to 55.

In April 2006, this Court issued a preliminary injunction barring defendants from discriminating against plaintiff Straights and Gays for Equality (SAGE) in the access afforded to it to MGSF facilities. The injunction, which was based on an analysis of the treatment afforded to the cheerleading and synchronized swimming groups at the school, was upheld by the U.S. Court of Appeals for the Eighth Circuit in December 2006.

⁴ For the Court’s convenience, these individuals are: all witnesses included on page 2 of Ex. A., including Craig Hansen, Darby Carlson, Cindy Bodine, Melinda Silbernack, Sharon Peters-Harden, Rosalind Bakion, Kim Berling, Fern Keniston, Heidi Schaupp, Bart Becker, Beth Carpenter, Matt Achor, Rick Arvidson, Ann Boline, Gary Gerst, Carolyn Tischer, Dorothy Scott, Pat Sheehan and Kathy Nelson; all but four witnesses on page 3 of Ex. A, including Tim Gove, Beth Hellstedt, Matt Caron, Eric Bitterman, Anne Johnson, Jon Brady, Janelle Gillis, Ramona Stately, Robert Bremseth, Dan Wroblecki, Kay Gregory, Pam Richards, Don McClung, Darwin Kreft and Donna Crewe; and all but one of the witnesses listed on page 4 of Ex. A, including Krista Brenno and Jennifer Farrell.

Before both this Court and the Court of Appeals, defendants argued against the injunction by citing the school's physical education courses and athletics. Nevertheless, a number of the individuals only recently identified are claimed to have knowledge of these topics; indeed, one is cited as having direct knowledge of synchronized swimming.⁵

On April 9, 2007, plaintiffs' counsel Genevieve Zimmerman spoke with defendants' counsel Larry Hayes. Ms. Zimmerman requested clarification of defendants' intent regarding these witnesses. She also asked that defendants voluntarily strike those witnesses who were unidentified when discovery closed. Mr. Hayes, on behalf of defendants, refused to do so. Ms. Zimmerman confirmed this refusal by letter dated April 23, 2007. Ex. M. The current motion follows this failed "meet and confer."

ARGUMENT

Federal Rule of Civil Procedure 26 required defendants, in their initial disclosures, to identify those witnesses with knowledge relevant to the claims at issue in this litigation. Rule 26(a)(1)(A). Furthermore, subsection (e) of the Rule required defendants to supplement these initial disclosures, as well as any and all discovery responses, at any time they know

that in some material respect the information [previously] disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

⁵ The four individuals are Craig Hansen, Darby Carlson, Cindy Bodine, and Melinda Silbernack. Ex. A at 2. Silbernack is cited as having "knowledge regarding synchronized swimming."

Rule 26(e)(1), (2). Defendants filed such a supplemental disclosure, containing three times as many names as on their initial disclosure, just *after* the close of discovery in April 2007.

Defendants have made no claim that they were unaware of these new witnesses previously. Indeed, all appear to be employees of defendant Osseo Area Schools – District 279.⁶ Defendants argue that they need so many witnesses “in order to respond to plaintiffs’ claims” regarding the groups at MGS. Ex. M. This argument cannot excuse their prior failure to disclose; during more than a year and a half of litigation, plaintiffs’ claims have not changed.

Defendants’ failure to identify so many witnesses until after the close of discovery has significantly prejudiced plaintiffs, who would now have no opportunity to depose them or make any other inquiry into the knowledge held by them. Defendants have refused to provide any other justification for the long delay and its conveniently-timed ending.⁷ Plaintiffs’ trial preparations would be severely hampered, with more than two-thirds of defendants’ witnesses being unknown. Even now, only the most basic information about these witnesses has been provided by defendants: names, titles, and a

⁶ Making matters worse, nearly all of the new witnesses are teachers at the school. Defendants had previously refused to identify the teachers of classes relevant to the case, arguing that these names are non-disclosable “private personnel data” under the Minnesota Government Data Practices Act, § 13.43. They have failed to explain how the two positions could be consistent.

⁷ Defendants’ gamesmanship with discovery obligations is further evidenced by a box of several hundred pages of additional documents plaintiffs’ counsel received on April 30, 2007 – again, long after the close of discovery. At this late juncture, plaintiffs have not yet had opportunity to review these documents and/or determine whether a motion to exclude certain portions thereof may be necessary.

short sentence fragment noting the general area of anticipated testimony.⁸

Before April 2, 2007, defendants apparently were satisfied with the 19 witnesses they had previously identified. By defendants' own statements in their recently-filed Witness List, these 19 possess broad knowledge about:

- the curriculum at MGSB, including areas such as physical education (Kathleen Omberg), social studies (Vicky Swedenberg), science (Todd Martin), English (Janet Johnson), and counseling/guidance and student support groups (Ann Kern);
- the classification of student groups at MGSB (Conn McCarten, Dr. Kate Maguire, Wendy Loberg); and
- the plaintiffs' claims (Dr. Maguire, Ms. Loberg, Sue Hein).

Ex. A. In addition, the group of 19 previously identified witnesses includes both of the individuals presented by defendants in response to plaintiffs' Rule 30(b)(6) deposition (Dr. Maguire and Ms. Loberg). Ex. A. In short, restricting defendants to these 19 would not hamper them in presenting their case. In contrast, allowing their testimony would severely prejudice the plaintiffs.

Federal Rule of Civil Procedure 16(f) empowers this Court to sanction a party which fails to obey a scheduling order. The Court is authorized to "make such orders with regard thereto as are just." F.R.C.P. 16(f). The rule explicitly incorporates the sanction provisions under Rule 37(b)(2)(B), (C) and (D). These provisions give the

⁸ For example: "Melinda Silbernack, Physical Education Teacher, Maple Grove Junior High School; has knowledge regarding synchronized swimming." Ex. A, pg. 2.

Court the power to prohibit the defaulting party from introducing designated matters into evidence, striking out of pleadings, and holding the defaulting part in contempt. In addition, Rule 37(c) provides that a party which fails to disclose the information required under Rule 26(a) “is not . . . permitted to use as evidence at trial . . . any witness or information not so disclosed.” F.R.C.P. 37(c).

CONCLUSION

This case has been ongoing for well over a year and a half. It has traveled to the Eighth Circuit and back. This Court has heard and granted plaintiffs’ motion for preliminary injunction and has heard and denied defendants’ motion for summary judgment. It has ordered defendants to comply with plaintiffs’ discovery requests. Discovery has been extended several times. Clearly, defendants had an obligation to identify these witnesses previously and have prejudiced plaintiffs through their failure to do so.

Plaintiffs respectfully request an order barring defendants from offering testimony from any of the newly identified witnesses at trial. In the alternative, plaintiffs request that the Court re-open discovery yet again so that plaintiffs can have an opportunity to discover the information purportedly known by these recently identified witnesses. Plaintiffs also request an award of their reasonable expenses, including attorneys’ fees, incurred in bringing this motion, pursuant to Rule 37(b).

Dated this 1st day of May, 2007.

s/ Genevieve M. Zimmerman

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