IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Richard Duncan, :

Plaintiff, :

v. :

Secretary of State Jon A. Husted,

Defendant. :

Case No. 2:13-cv-1157

JUDGE ALGENON L. MARBLEY

Magistrate Judge Kemp

OPINION AND ORDER

Plaintiff Richard Duncan, who is representing himself in this matter, is a resident of Ohio who has run for United States President in the last three elections. He has brought this action against Defendant Secretary of State Jon Husted to challenge the constitutionality and legality of amendments to Ohio Rev. C. §§3513.262 & 3513.263. The amendments that he is challenging reduce the time period in which an individual who wishes to run in an Ohio election as an independent candidate may gather nominating-petition signatures.

In connection with this case, Mr. Duncan has noticed the deposition of Defendant Husted and has served subpoenas on three non-party individuals. Defendant Husted filed a motion for a protective order (Doc. 23), and non-party State Senator John Eklund, non-party State Senator Bill Seitz, non-party Director of the Cuyahoga County Board of Elections Patrick McDonald have each filed a motion to quash the subpoenas issued to them by Plaintiff (Docs. 24, 25 & 30). Each argues that as a high-ranking government official, he cannot be deposed unless a sufficient showing of need is made to overcome the presumption that the deposition has not been noticed for a proper purpose. Mr. Duncan has also filed a Motion for an Extension of Time to Complete Discovery (Doc. 27) and a Motion for a Ruling on Several Pending Motions (Doc. 35), and Defendant Husted has filed a Motion to

Extend Time for Filing Summary Judgment Motions (Doc. 36). This Opinion and Order resolves all of those motions.

I. Background

Mr. Duncan is suing Defendant Husted in his official capacity for declaratory and injunctive relief. In particular, he brings this action pursuant to 42 U.S.C. §1983 for violations of the First and Fourteenth Amendment to the United States Constitution. He argues that the amendments to ORC §3513.263 impair his ability to have votes cast for him and to have citizens associate politically around his beliefs, and that the amendments cannot be justified by a sufficient state interest.

II. Motion for Protective Order

Rule 26(c) governs motions for protective orders. It provides that courts may "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including several types of orders precluding discovery or limiting or otherwise specifying how discovery may take place. Fed. R. Civ. P. 26(c). The Court of Appeals cited Wright & Miller approvingly to articulate what might constitute unreasonable oppression:

> To justify restricting discovery, the harassment or oppression should be unreasonable, but "discovery has limits and ... these limits grow more formidable as the showing of need decreases." 8A Charles Alan Wright & Arthur R. Miller et al., Federal Practice and Procedure § 2036 (3d ed. 2012). "Thus even very slight inconvenience may be unreasonable if there is no occasion for the inquiry and it cannot benefit the party making it." Id.

Serrano v. Cintas Corp., 699 F.3d 884, 901 (6th Cir. 2012).

In Serrano, the Court of Appeals also held that courts in this Circuit may not rely on the "apex doctrine," a doctrine which assumes that harassment and abuse are inherent in depositions of high-level executives and which requires a showing

of "unique personal knowledge" of relevant facts before a deposition of such an executive may be permitted. Id. at 900-02. Consequently, in this Circuit, it is not sufficient for a party seeking a protective order prohibiting the deposition of a high-ranking government or corporate official to demonstrate that the official lacks knowledge. Rather, the party seeking a protective order must also demonstrate the harm the deponent would suffer by submitting to the deposition. Serrano, 699 F.3d at 902; see also Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc., 936 F.2d 889, 894 (6th Cir. 1991).

Here, Defendant Husted submits a declaration by Matthew Damschroder, who served alternately in the position of Director and Deputy Director from June of 2003 to January 2011 and who was then appointed by Defendant Husted to be Deputy Assistant Secretary of State and State Elections Director in the Elections Division of the Ohio Secretary of State's Office. Mr. Damschroder states that he is familiar with Defendant Husted's schedule and "[g]iven his numerous official responsibilities, it would be difficult and burdensome for him to be deposed in this matter." (Doc. 23-13). While this is evidence of some general burden, it is not necessarily evidence of an unreasonable burden, nor is it the type of "particular and specific demonstration of fact" required to justify a protective order. Serrano, 699 F.3d at 901 (quoting Nemir v. Mitsubishi Motors Corp., 381 F.3d 540, 550 (6th Cir. 2004) (internal quotations and additional citation omitted)); see also Hutchison v. Parent, 3:12CV00320, 2012 WL 6029141, *1 (N.D. Ohio Dec. 4, 2012) (quoting Serrano and citing Moore's Federal Practice § 26.104[1] for the proposition that "[g]ood cause is not established via inconvenience and expense"); but cf. Nix v. Sword, 11 F. App'x 498, 500 (6th Cir. 2001) (upholding district court's issuance of protective order where the deponent submitted an affidavit stating that it would be

difficult for him to schedule a deposition because of his legislative duties, and specifically stating the areas in which he had no personal knowledge or connection to the activities alleged). The factual evidence of "unreasonable burden" is especially insufficient here where Defendant has provided no affidavit or other evidence demonstrating that he lacks personal knowledge, and where Mr. Duncan argues that he intends to ask Defendant Husted questions about the application and interpretation of certain election laws. Whether or not the answers to such questions are admissible themselves, they could lead to admissible evidence, and Defendant Husted has not argued otherwise.

Furthermore, the Court may permit the burden of a deposition from becoming an unreasonable burden by imposing some of the limitations specified in Rule 26(c)(1). In light of the potential burden on Defendant Husted and the limited range of topics that Mr. Duncan has identified as topics for the deposition, the Court will limit the deposition to one hour and directs that the deposition be held in Defendant Husted's office unless the parties are able to agree to another location. The Court notes that it is customary in this District for parties to agree to a date and time for a deposition that is mutually convenient to the parties, and encourages the parties here to follow that practice.

The parties have also raised some issues about the manner in which any deposition may be conducted. Fed.R.Civ.P. 30(b)(5) provides, "[u]nless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28." Fed. R. Civ. P. 30(b)(5) (emphasis supplied). The parties here have not stipulated otherwise. Therefore, the deposition must be conducted before a person who is authorized under Rule 28 to administer oaths and take testimony.

The next question is whether Mr. Duncan may operate audio recording equipment, which is how he has proposed to record the deposition. The Advisory Committee Notes to Rule 30 provide that revised paragraph 5 (which at the time was paragraph 4) "requires that all depositions be recorded by an officer designated or appointed under Rule 28 and contains special provisions designed to provide basic safeguards to assure the utility and integrity of recordings taken other than stenographically." Fed. R. Civ. P. 30, Advisory Committee Notes, 1993 Amendments, cited in Morris v. Long, 2012 WL 3276938 (E.D. Cal. Aug. 9, 2012) clarified on denial of reconsideration, 2012 WL 3528015 (E.D. Cal. Aug. 14, 2012). These concerns are particularly applicable "where the party himself seeks to take the deposition and record the deposition." Meacham v. Church, 2010 WL 1576711, *4 (D. Utah 2010). While there are cases that do not follow the Advisory Committee Notes and permit someone other than a Rule 28 official to record the deposition, those cases involved a proposal that a party's attorney record the deposition, rather than the party doing so. See, e.g., Anderson v. Dobson, 627 F. Supp. 2d 619, 624 (W.D.N.C. 2007) ("the use of a party attorney to record a deposition is not a per se violation of the Rules"); Ott v. Stipe Law Firm, 169 F.R.D. 380, 381 (E.D. Okla. 1996) (stating that having counsel for plaintiff run the video equipment was not the preferred method, but did not violate the rules). There are other cases that have permitted a party's attorney to operate the recording equipment when the depositions were simultaneously being recorded by traditional stenographic means. See, e.g., Hearn v. Wilkins Twp., Pa., 2007 WL 2155573 (W.D. Pa. July 25, 2007) (permitting plaintiff's employee to operate recording equipment at a deposition while it is being simultaneously recorded by stenographic means by a Rule 28 officer). In light of the Advisory Committee Notes and in light of the fact that Mr.

Duncan, rather than an attorney, is the proposed recorder - and given that there would be no other means of recording - the Court concludes that, unless the parties stipulate otherwise, a Rule 28 Officer must operate the recording equipment.

Finally, as the party who has noticed the deposition, Mr. Duncan is responsible for paying for the Rule 28 Officer to conduct the deposition and for arranging for that Rule 28 Officer to operate the recording equipment specified in his notice of deposition. See, e.g., Kean v. Van Dyken, 2006 WL 374502 (W.D. Mich. Feb. 16, 2006) ("The fact that plaintiff is proceeding in forma pauperis does not relieve him of any of [the Rule 30 or Rule 45] obligations"). Regarding transcription, the Advisory Committee Notes provide as follows: "A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required by Rule 26(a)(3)(B) and Rule 32(c) if the deposition is later to be offered as evidence at trial or on a dispositive motion under Rule 56." Furthermore, Defendant Husted is entitled pay for and designate an additional method for recording the testimony if he chooses, so long as he provides prior notice in accordance with Rule 30(b)(3).

III. Motions to Quash

Motions to quash are governed by Rule 45(d)(3), which provides, inter alia, that a court "must quash or modify a subpoena that . . . (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3). In addition, while the Rule itself does not list irrelevance or overbreadth as reasons for granting a motion to quash, "[c]ourts ... have held that the scope of discovery under a subpoena is the same as the scope of discovery under Rule 26." Hendricks v. Total Quality Logistics, LLC, 275 F.R.D. 251, 253 (S.D. Ohio 2011) (quoting Barrington v. Mortage IT, Inc., 2007 WL

4370647 (S.D. Fla. Dec. 10, 2007)); see also Advisory Committee Note to the 1970 Amendment of Rule 45(d)(1) (the 1970 amendments "make it clear that the scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules."); 9A Charles A. Wright and Arthur R. Miller, Fed. Prac. & Proc. Civ. §2459 (3d ed.) ("Although a subpoena may be quashed if it calls for clearly irrelevant matter, the district judge need not pass on the admissibility of the documents sought in advance of trial nor quash a subpoena demanding their production if there is any ground on which they might be relevant. . . . This discovery relevancy standard has been applied to subpoenas in many cases.").

Regarding the burden of proof for a motion to quash, the Rule is silent and the case law generally states that the burden is on the party seeking to quash. However, some cases make an exception when relevancy is not apparent on the face of the request:

> The party seeking to quash a subpoena bears the ultimate burden of proof. See, e.g., White Mule Co. v. ATC Leasing Co. LLC, 2008 WL 2680273, at *4 (N.D. Ohio June 25, 2008). If the discovery sought appears "relevant on its face, the party resisting the discovery has the burden to establish the lack of relevance" but "when relevancy is not apparent on the face of the request, the party seeking the discovery has the burden to show the relevancy of the request." Transcor, Inc. [v. Furney Charters, Inc.], 212 F.R.D. [588] at 591 [(D. Kan. 2003)].

Hendricks v. Total Quality Logistics, LLC, 275 F.R.D. 251, 253 (S.D. Ohio 2011).

The first two motions to quash were filed by non-party state senators John Eklund and Bill Seitz ("the Senators"). (Docs. 24 & 25). The Senators have moved to quash on the grounds of undue burden because state senators are high-level officials, because Mr. Duncan has not demonstrated that the Senators' testimony is

relevant, and because the subpoenas seek testimony and documents protected by the legislative privilege. In his opposing memorandum, Mr. Duncan argues that he seeks to depose Senators Eklund and Seitz because they sponsored the legislation that he contends is unconstitutional. He seeks to demonstrate that there was no purpose for the amendments, and/or that the legislature passed the amendments in order to keep Mr. Duncan off the 2016 Presidential ballot as an independent.

The first question before the Court is whether Mr. Duncan seeks information that is relevant to any claim or defense and that appears to be reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1). First, whether Senators Eklund and Seitz, or any other legislators, had a bad motive or any motive for the amendments is irrelevant to any claims and defenses present in this case. United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive"); see also Bailey v. Callaghan, 715 F.3d 956, 960 (6th Cir. 2013) (quoting O'Brien and stating that its "principle binds us here; and thus . . . we will not 'peer[ ] past' the text of Public Act 53 'to infer some invidious legislative intention.'" (citation omitted)); Cleveland Area Bd. of Realtors v. City of Euclid, 88 F.3d 382, 388 (6th Cir. 1996) (concluding that the district court erred in relying on record evidence of the motivations for the ordinances at issue and stating "[w]e therefore decline to invalidate the ordinances on the basis of their asserted lack of content-neutrality, based in turn on the motives of the council members that enacted those ordinances"). In light of the fact that the subpoena for testimony is outside of the scope of discovery authorized by Rule 26(b), the Senators' motions to quash will be granted as to their

depositions.

Regarding the documents subpoenaed, both of the Senators state that they have produced some responsive documents. They argue that any additional documents are protected by the legislative privilege. However, the documents that the Senators seek to withhold as privileged appear to have been requested in order to inquire into the same motives of the Senators that are irrelevant to the claims at issue here. Mr. Duncan's response does not address the subpoenaed documents at all. Accordingly, it appears that the Senators have already complied with the portion of the subpoena's request for documents that is within the scope of Rule 26(b).

The remaining motion to quash was filed by non-party Patrick McDonald, Director of the Cuyahoga County Board of Elections. He first argues that the subpoena seeking his testimony should be quashed because it was served after the close of discovery. The Court's February 4, 2014 Order states that "All discovery shall be completed by July 31, 2014." (Doc. 10). While the subpoena was served within the discovery period, the date upon which the subpoena commanded Mr. McDonald to appear was August 5, 2014, which was after the close of discovery. However, Mr. Duncan filed a motion for an extension of time to complete discovery before the discovery period closed, and that motion is still pending. (Doc. 27). That motion specifically sought to postpone the scheduled depositions until after the Court rules on Defendant Husted's motion for a protective order. Defendant Husted does not oppose postponing the depositions which were scheduled before the close of discovery until after the Court has ruled on the pending motion for a protective order, but he does object to any other discovery after July 31, 2014. On August 11, 2014, Mr. Duncan filed an affidavit in support of his pending motion for extension of time to complete discovery, stating that

the reason he subpoenaed Mr. McDonald for August 5, 2014 was so that he could first depose Defendant Husted and be more precise in his line of questioning of Mr. McDonald. (Doc. 34). Taken together with the other reasons advanced in Mr. Duncan's motion for an extension, the Court concludes that the motion is meritorious and will grant the motion to extend time to complete the depositions that are permitted to go forward. In light of that extension, the Court will also grant Defendant's requested extension regarding the time for filing summary judgment motions (Doc. 36).

In light of the extension of the discovery deadline, the fact that Mr. McDonald's deposition was scheduled to occur after July 31, 2014, is not enough to justify granting the motion to quash. However, Mr. Duncan has not filed an opposition to Mr. McDonald's motion to quash. The absence of any response in opposition to the motion to quash and the corresponding absence of any showing of need for the deposition or relevance of the testimony subpoenaed supports a finding, based on Mr. McDonald's having raised that issue in his motion, that subjecting Mr. McDonald to such a deposition would place an undue burden upon him. Accordingly, the Court grants non-party Patrick McDonald's motion to quash the subpoena for his testimony. Because the Court has granted the motion to quash, there is no need for an additional protective order regarding the testimony of Mr. McDonald.

IV. Conclusion

For the foregoing reasons, Defendant Husted's motion for a protective order (Doc. 23) is granted in part and denied in part. It is granted in that the Court requires that the deposition be limited to one hour and that the deposition be held in Defendant Husted's office unless the parties are able to agree to another location. Plaintiff is responsible for paying for a Rule 28

Officer to conduct the deposition and for arranging for that Rule 28 Officer to operate the recording equipment specified in his notice of deposition. The remainder of Defendant Husted's motion for a protective order is denied.

The motions to quash of non-party State Senator John Eklund (Doc. 24) and non-party State Senator Bill Seitz (Doc. 25) are granted in part and denied in part. They are granted insofar as they seek to preclude the deposition of the Senators. They are denied as to the documents sought in the subpoena, but appear to be moot in that regard because responsive documents have been produced.

The motion to quash of non-party Director of the Cuyahoga County Board of Elections Patrick McDonald (Doc. 30) is granted. To the extent that the motion also seeks a protective order, that request is denied.

Plaintiff's Motion for an Extension of Time to Complete Discovery (Doc. 27) is granted insofar as the time for deposing Defendant Husted is extended until 30 days from the date of this Order.

Plaintiff's Motion for a Ruling on Several Pending Motions (Doc. 35) is denied as moot.

Defendant's Motion to Extend Time for Filing Summary Judgment Motions (Doc. 36) is granted. The parties shall have 44 days from the date of this Order to file motions for summary judgment.

V. Procedure for Reconsideration

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to

objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

/s/ Terence P. Kemp
United States Magistrate Judge