IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SHERYL ALBERS-ANDERS,

OPINION AND ORDER

Plaintiff,

11-cv-392-bbc

v.

MARK POCAN,

Defendant.

- -

Plaintiff Sheryl Albers-Anders is a former member of the Wisconsin Assembly who applied for employment as the committee clerk for the Joint Finance Committee after she had left the assembly. When she was not hired, she sued defendant Representative Mark Pocan, the decision maker, on the ground that he had denied her application for the clerk position because of her political affiliation, in violation of her rights under the First Amendment. Defendant contends that even if plaintiff can prove that he relied on her political affiliation in making his decision, plaintiff cannot proceed against him because the First Amendment did not prevent him from taking plaintiff's political affiliation into account when choosing a clerk who was also part of his own staff and, even if his act did violate the First Amendment, he is protected by the doctrine of qualified immunity from having to defend this suit further.

In an order entered on November 14, 2011, I granted defendant's motion to schedule summary judgment briefing on one issue only, whether defendant is protected from suit by

the doctrine of qualified immunity. I ordered a stay of all discovery on any unrelated matters. Dkt. #22. Defendant filed his motion for summary judgment, dkt. #25, which the parties agreed raised issues of fact, making it necessary for plaintiff to conduct some discovery. Dkt. #34. A month later, plaintiff moved to "set aside" defendant's motion for summary judgment and to open discovery, dkt. #35, and she filed her first set of discovery requests. Dkt. #37-2. Her requests for admission cover routine matters, such as the responsibilities of the Committee on Joint Finance clerk position, the history of the position and the clerk's relationship with the committee chair. Her interrogatories cover matters such as the responsibilities of past clerks, the qualifications of other applicants and defendant's list of interview questions.

Plaintiff seeks to strike defendant's summary judgment motion and lift the partial stay on discovery on the ground that defendant has not confined his summary judgment motion to his qualified immunity defense. In response, defendant has moved for a protective order directed to plaintiffs' new discovery requests. Dkt. #38. He seeks to quash plaintiff's discovery requests on the ground that the requests exceed the scope of the qualified immunity defense and he wants to be relieved of any obligation to respond to plaintiff's discovery requests until the court rules on his motion for summary judgment. He argues that plaintiff has not shown that her requests are tailored to identify evidence to challenge defendant's qualified immunity defense and, in the absence of such a showing, the requests impose an open-ended burden that is improper in light of the purposes of qualified immunity. He adds that the timing of plaintiff's contention interrogatories is improper.

I conclude that neither the summary judgment motion nor the discovery requests exceed the scope of the qualified immunity defense, as defendant has framed it. However, to clarify the scope of the permitted discovery and in an effort to avoid unnecessary interference with the affairs of the Wisconsin legislature, I will grant plaintiff's motion for relief from the motion for summary judgment in part and defendant's motion for a protective order, also in part, and direct the parties to limit their subsequent discovery and summary judgment briefing to their factual and legal dispute regarding the nature of the committee clerk position.

OPINION

The doctrine of qualified immunity protects government employees from being sued for monetary relief when they act in a manner that they reasonably believe to be lawful. Qualified immunity protects government defendants from the burden of "broad-ranging discovery" that can be "particularly disruptive of effective government." Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982). Accordingly, the Supreme Court has "emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation," and any necessary discovery about disputed factual issues "should be tailored specifically to the question of [the defendant's] qualified immunity." Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987) (citing Harlow, 457 U.S. at 817).

Once a governmental official raises the defense of qualified immunity, the plaintiff has the burden to show that(1) defendant's actions violated the plaintiff's federal rights and

(2) those rights were clearly established at the time of the alleged violation. Saucier v. Katz, 533 U.S. 194, 201 (2001). Although the plaintiff has the ultimate burden of showing that qualified immunity does not apply, when a defendant moves for summary judgment, it becomes his task to prove that the plaintiff cannot show either that the defendant took any act that violated the plaintiff's federal rights (first prong) or that a reasonable public official in the defendant's position would have known that his actions violated plaintiff's rights (second prong). Kerr v. Farrey, 95 F.3d 472, 480 (7th Cir. 1996) (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)). A defendant may establish this by citing case law showing that his conduct was not unlawful or that even if it was unlawful, it was not certain or apparent that his conduct was unlawful at the time. Doyle v. Camelot Care Centers, Inc., 305 F.3d 603, 620 (7th Cir. 2002).

In his motion for summary judgment, defendant argues that when the facts are taken in the light most favorable to plaintiff, they show that he did not violate plaintiff's constitutional rights and that even if the court should find that he did, the rights he allegedly violated were not clearly established. According to defendant, the undisputed facts show that he chose not to hire plaintiff as the committee clerk because he believed that her history of overtly partisan conduct would prevent her from being viewed as a neutral clerk by her former colleagues. He contends that this action did not violate the First Amendment and that no clearly established law holds otherwise. United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548 (1973) (First Amendment does not prevent federal government from banning partisan activity by federal government

employees). Defendant argues also that it was proper for him to consider plaintiff's Republican party affiliation because the Joint Committee on Finance clerk is also a legislative aide on defendant's personal staff and defendant is a Democratic representative. Branti v. Finkel, 445 U.S. 507, 517-18 (1980) (holding that government violates First Amendment rights of its employees if it takes into consideration their private political beliefs in firing him, but noting that some government jobs, such as assistants to governor, "cannot be performed effectively unless those persons share [the governor's] political beliefs and party commitments").

When I granted defendant's motion to file an early summary judgment brief on qualified immunity and for a partial stay of discovery, I anticipated that defendant would limit his brief and proposed findings of fact to the nature of the clerk position. For the purposes of this motion, I expected that defendant would not deny that he considered plaintiff's affiliation as a Republican, her active, partisan political involvement with legislators who are still on the committee and her well-known positions on issues likely to arise again in the committee. He could then argue that it was not unlawful to consider those matters given the nature of the committee clerk position, because the clerk is a member of his personal staff, Branti, 445 U.S. at 517-18, and because her well known political affiliation and political positions would make it difficult for her to act in the neutral capacity required by the clerk positions. Letter Carriers, 412 U.S. at 556.

Instead, many of defendant's proposed facts concern his reasons for choosing the person he did. For example, defendant asserts that he believed the chosen applicant was the

best candidate; no other applicants were a good fit; plaintiff's personality was inappropriate for the position; plaintiff did not have a stable employment history; and plaintiff was overqualified. To support these facts, he submitted affidavits of his own, his legislative aide and the chief clerk for the Assembly. This approach is problematic because it raises factual issues that are bound to be disputed by plaintiff and about which plaintiff is entitled to discovery.

By expanding the scope of his defense to include other reasons for not acting on plaintiff's application, defendant has given plaintiff good reason to believe that she needs evidence on these other reasons, as well as on the nature of the clerk's position. Obviously, plaintiff cannot dispute these proposed facts without conducting some discovery. Defendant is asking this court to resolve these factual disputes about his hiring process and his motivations, but at the same time, he has moved for a protective order denying plaintiff any discovery that might uncover evidence to dispute his assertions. Defendant's motion has set the scope of his qualified immunity defense. If his hiring process and subjective motivations are material to his motion for summary judgment, discovery requests about these issues are also properly within its scope.

Nevertheless, both the Supreme Court and the Court of Appeals for the Seventh Circuit have instructed the district courts that it is appropriate to limit discovery when qualified immunity is at stake in order to avoid interference with legislators' ability to govern. Elected representatives need substantial leeway to select legislative aides without the threat of burdensome discovery. Hudson v. Burke, 913 F.2d 427, 432-34 (7th Cir. 1990).

It appears that a clarification of the job responsibilities of the joint committee clerk will resolve both prongs of the qualified immunity defense. If publicly known political affiliation or past political activities are inappropriate for persons seeking the clerk's position, then defendant's subjective motivations become irrelevant. In the interest of resolving this matter with as little intrusion into the legislative process as possible, I will grant both parties' motions in part and place parallel limits on the summary judgment motion and discovery.

Further briefing on the summary judgment motion should be restricted to whether the "inherent duties" of the clerk for the Joint Committee on Finance make it inappropriate under Branti, 445 U.S. 507, National Association of Letter Carriers, 413 U.S. 548, Riley v. Blagojevich, 425 F.3d 357, 359 (7th Cir. 2005); or Hudson, 913 F.2d 427, to place restrictions on publicly known political affiliation or past political activities when hiring for the position, and if so, whether a reasonable legislator in defendant's shoes should have known that the law was against him. Further discovery should be restricted to objective facts about the clerk position. For the time being, the parties will not need discovery relating either to defendant's reasons for not considering plaintiff as an applicant or about defendant's hiring process. Plaintiff may have seven days to reformulate her discovery requests to comply with this limitation. If, after resolution of this threshold issue, I determine that it is necessary to reach the remaining elements of plaintiff's qualified immunity defense, I will revisit this discovery order at that time.

It is necessary to address two final points raised by the parties. First, defendant objects to plaintiff's filing any contention interrogatories and to the timing of her contention

interrogatories. Although "[c]ontention interrogatories are designed to help defendants discern the basis for the claims against them, Menominee Indian Tribe of Wisconsin v. Thompson, 943 F.Supp. 999, 1007 (W.D. Wis. 1996); Orthmann v. Apple River Campground, Inc., 757 F.2d 909, 915 (7th Cir. 1985), nothing in the federal rules prohibits a plaintiff from filing contention interrogatories. Fed. R. Civ. P. 33 applies to both parties without distinction. A court may direct that interrogatories "need not be answered until designated discovery is complete, or until a pre-trial conference or some other time," Fed. R. Civ. P. 33(a)(2), and courts may delay responses for reasons of judicial economy and fairness. Fed. R. Civ. P. 33(a)(2) Advisor Committee Notes (1970 Amendments) (listing several reasons for delay); Medical Assurance Co., Inc. v. Weinberger 2011 WL 2471898 at *4-5 (N.D. Ind. 2011) (discussing reasons for delay and for prompt answers). Targeted contention interrogatories from a plaintiff may be appropriate in this context, in which defendant's qualified immunity theory is driving the litigation and plaintiff is required to defend against a summary judgment motion fairly early in the litigation process. Although I am not ruling on the propriety of particular interrogatories because the parties did not raise objections to specific interrogatories, I will not quash plaintiff's interrogatories in general.

Second, defendant has filed an affidavit from Barry Anderson in which Anderson offers expert testimony about the need for non-partisan legislative services and the typical hiring practices among legislative service agencies. Plaintiff objects to the testimony for not being disclosed properly under the procedures contemplated by Fed. R. Civ. P. 26(a)(2)(D), which requires that "[i]n the absence of other directions from the court or stipulation by the

parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial." In this case, there is no relevant court order, the parties have not stipulated to a disclosure schedule and trial has not been scheduled. Unless defendant advises the court and plaintiff before April 6, 2012, that it is not relying on Anderson's report for this stage of the litigation, plaintiff will be entitled to challenge his opinions. The discovery order will give her a reasonable time to name a rebuttal expert witness and depose defendant's proposed expert, if she desires.

ORDER

IT IS ORDERED that

1. Defendant Mark Pocan's motion for protective order, dkt. #38, is GRANTED IN PART and DENIED IN PART, as follows:

a. Defendant should not respond to plaintiff Sheryl Albers-Anders' first discovery requests, dated Friday, January 6, 2012;

b. Plaintiff has until April 3, 2012, to serve revised discovery requests consistent with this opinion;

c. Plaintiff has until April 17, 2012, to submit a rebuttal expert affidavit, if she chooses to do so;

d. Plaintiff has until May 1, 2012, to depose defendant's expert witness;

e. Defendant has until May 8, 2012, to depose plaintiff's rebuttal expert; and

2. Plaintiff's motion for relief from defendant's motion for summary judgment

restricted to qualified immunity, dkt. #35, is GRANTED IN PART and DENIED IN PART, as follows:

a. Any portions of the summary judgment motion relating to defendant's mental states or hiring processes are stayed; plaintiff is not required to respond to any factual allegations relating to defendant's mental state or hiring process;

b. The briefing schedule, dkt. #24, is amended as follows: plaintiff's response to defendant's motion for summary judgment, dkt. #25, is due May 8, 2012; Defendant's reply brief is due May 22, 2012.

Entered this 28th day of March, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge