UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LAMONT A., AARON V., JIM M., TYLER C., DAVID P., JAMIE S., and MAIYSHA Y.,

Plaintiffs,

v.

Case No. 01-C-928

MILWAUKEE PUBLIC SCHOOLS, SPENCE KORTE, WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, ELIZABETH BURMASTER, and MILWAUKEE BOARD OF SCHOOL DIRECTORS,

Defendants.

U.S. DIST. COURT EAST DIST. WISC.
FILED
MAY - 3 2002
AT ____ O'CLOCK ____ M
SOFRON B. NEDILSKY

ORDER

On March 20, 2002, this court conducted a scheduling conference, pursuant to Rule 16 of the Federal Rules of Civil Procedure. In accordance with the briefing schedule established at that conference, the two motions discussed are now briefed and ready for resolution.

First, the Milwaukee Teachers' Education Association (MTEA) has filed a motion to intervene in this action, pursuant to Rule 24(a)(2) and (b) of the Federal Rules of Civil Procedure. In addition, in a letter dated March 19, 2002, MTEA requests notice of informal interviews and depositions. Second, the plaintiffs have filed a motion for a declaratory order, and have subsequently filed a motion to compel.

I. MTEA's Motion to Intervene

As a preliminary matter, the Executive Director of MTEA, Sam Carmen, represents that it is the duly certified collective bargaining representative, under § 111.70 Wis. Stat., for MPS regular and special education teachers, including teachers involved in particular aspects of diagnosis and special services such as diagnostic teachers, guidance counselors, school social workers, speech pathologists,

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occupational therapists and physical therapists, mobility and orientation specialists, and school nurses. Carmen Affid. ¶ 2. In addition, MTEA represents that it is the collective bargaining representative of educational assistants, some of whom assist teachers in delivering special education services. Id.

In its motion, MTEA argues that it is entitled to intervene both as of right and on a permissive basis, pursuant to Rule 24(a) and (b). MTEA seeks limited intervention, specifically in the remedial portion of this litigation as an undesignated intervenor. More particularly, the scope of intervention is to share its insight in addition to input at mediation or remedial phase since any potential remedial plan would affect the wages, hours, and working conditions of MTEA's members.

As grounds, MTEA submits that relief obtained either by mediation or ordered by this court will directly involve bargaining unit members' wages, hours, and working conditions. MTEA seeks intervention to ensure the collective bargaining rights of its members.

In support of intervention as of right, MTEA contends that the organization of delivery systems to fulfill the IDEA directly impact wages, hours, and working conditions of MTEA's bargaining unit members. Since the labor agreements between MPS and MTEA contain provisions in those areas and there is a duty to bargain over changes in educational policy that impact those areas, MTEA argues that it has an interest in the subject-matter of this action. Next, MTEA argues that its interest is not adequately represented by the parties currently involved in this case.

Alternatively, as regards permissive intervention, MTEA argues that it is appropriate because MTEA shares an interest in potential remedial measures. MTEA submits that it seeks an intervention in this case similar to that granted in the Milwaukee school desegregation case of the 1970's. See Armstrong v. O'Connell, 75 F.R.D. (E.D. Wis. 1977).

All of the parties have responded to MTEA's motion. The State defendants, i.e., the Department of Public Instruction and Elizabeth Burmaster, do not object to the motion to intervene for purposes of and under the conditions set forth in MTEA's motion.

Likewise, as to the motion to intervene, defendants Milwaukee Board of School Directors, Milwaukee Public Schools, and Spence Korte (collective the "MPS defendants") do not object to MTEA's motion for the purposes and under the conditions set forth in that motion.

Finally, the plaintiffs contend that MTEA does not have a right of intervention under Rule 24(a), i.e., intervention as of right. The plaintiffs assert that MTEA's ability to protect its interests will not be impaired absent its intervention because of the Milwaukee Public Schools' continuing bargaining duty with MTEA. Nonetheless, the plaintiffs believe that it may be expeditious to have MTEA participate in fashioning appropriate remedies. Thus, the plaintiffs agree to stipulate to permissive intervention under Rule 24(b) by MTEA, for the limited purpose of participation in the remedial portion.

At this juncture, intervention is premature for two reasons. First, this litigation is in its nascent stage. The remedial stage, assuming liability is found, is far into the future. At that point, persuasive arguments can be made for intervention. Second, this is a putative class action; i.e., the motion for class certification has not been brought, much less has a class been certified. Class certification, if granted, will change the dynamics of the litigation. In other words, at this time there are seven named plaintiffs, assuming liability and no class certification, how many educators would need to be involved in the remedial phase? Certainly, not a substantial portion of MTEA's members.

Although the court will deny the motion for intervention without prejudice, this ruling should not foreclose MTEA's informal involvement in the discovery issues. Now, the court will turn to those issues vis-a-vis MTEA's request for notice.

II. MTEA's Request for Notice

Although MTEA does not take a position with respect to the ethical issues raised by the plaintiff's motion for declaratory order, it requests specific notice of contemplated discovery, both formal and informal. As the basis for this request, MTEA submits it has a concern that statements given by MPS employees might adversely affect their employment.

More particularly, as regards informal discovery MTEA requests,

> that any procedures for informal discovery include three working days notice to the MTEA of any interviews plaintiffs seeks with a bargaining unit member and an opportunity for an MTEA representative to be present and provide advice, if necessary at such interview.

MTEA Letter to the Court, dated March 19, 2002.

With respect to formal discovery through depositions, MTEA requests that it receive "notice of depositions of its members either as intervenor, if that motion is granted, or by arrangements with counsel for the plaintiffs and MPS." Id.

The State defendants do not object the request in MTEA's letter of March 19, 2002. The MPS defendants respond that if there were an informal discovery program, they would not object to MTEA's involvement as proposed, subject to and conditioned on compliance with both Wisconsin and federal law regarding the confidentiality of pupil records. Finally, the plaintiffs agree to give MTEA three days advance notice of informal in-person interviews and formal depositions of bargaining unit members that they seek to interview or depose. However, the plaintiffs submit that it is unduly burdensome and time-consuming to give MTEA advance notice of brief initial discussions with bargaining unit members. The plaintiffs point to the situation where bargaining unit members initiate contact with plaintiffs' counsel.

The matter of notice regarding preliminary informal discovery will have to be worked out between plaintiffs' counsel and MTEA. Of course, nothing precludes MTEA from advising its members in advance that they may be contacted by plaintiffs' attorneys in regard to this litigation and requesting that MTEA attorneys be promptly notified.

As discussed above, MTEA's motion to intervene will be denied without prejudice, as premature.

III. Plaintiffs' Motion for a Declaratory Order

Pursuant to 28 U.S.C. § 2201(a), the plaintiff's have filed a motion for a declaratory order. In that motion, they seek an order "expressly permitting plaintiffs counsel to contact, interview, meet, or otherwise obtain information from current and former non-managerial employees of the defendant Milwaukee Public Schools (MPS), outside the presence of MPS counsel." Pl. Brief in Support of Decl. Mtn. at 11.

As a preliminary matter, the plaintiffs bring their motion pursuant to 28 U.S.C. § 2201(a). That statute concerns declaratory judgments, and it provides that any declaration by the court shall have "the force and effect of a final judgment or decree and shall be reviewable as such." § 2201(a). While it is true that the plaintiffs are requesting that this court provide them with declaratory guidance in order to avoid potential ethical and/or legal complaints, the matters with which they have concern are within the context of the management of discovery. As such, the court will entertain the plaintiffs' motion under its general supervision of discovery instead of pursuant to § 2201.

Addressing the underlying subject-matter of the motion, this district has adopted Wisconsin's ethical rules as its own rules of professional conduct, subject to modification by this court. General L.R. 83.10. Thus, Wisconsin SCR 20: 4.2 provides the framework for determining whether the contact the plaintiffs seek is permissible.

The text of that Rule provides,

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

SCR 20:4.2. Of import for the plaintiffs' motion is the second paragraph of the Comment to the Rule. In relevant part, that paragraph provides,

> In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

SCR 20:4.2, Comment.

Although this court has adopted the Wisconsin rules of professional conduct, "[o]nce the federal court adopts the text of the state rules, it has its own professional responsibility standards, and any interpretation it may wish to give is not binding in any sense on the [state] courts." Weibrecht v. Southern Illinois Transfer, Inc., 241 F.3d 875, 878-79 (7th Cir. 2001). In that case, the Seventh Circuit upheld the district court's interpretation of its local rule of professional responsibility that adopted the text of the Illinois state court rules, finding that the district court was within its discretion. Id. at 882. The Seventh Circuit noted that "even though in this case the district court has incorporated Illinois's rules by reference, nothing compelled the district court to adopt the same interpretation of those rules that has been adopted by an intermediate appellate court." Id. Moreover, parenthetically, the Seventh Circuit noted that,

> We see no indication in the materials accompanying the professional conduct rules of the Southern District of Illinois that the district court intended to bind itself to follow the Illinois Supreme Court's interpretation of the Illinois rules ...

Id.

Against this background, this court will now examine the plaintiffs' motion vis-a-vis the Eastern District of Wisconsin's ethical rules. The plaintiffs submit that there are three categories of individuals who are at issue in their motion, i.e., individuals whom plaintiffs' counsel seeks ex-parte contact to conduct informal discovery. More particularly these categories consist of: (1) MPS employees who have children in the putative class; (2) former MPS employees who do not have children in the putative class; and (3) current non-managerial employees who do not have children in the putative class.

At the Rule 16 conference, the court suggested a possible way to proceed. That suggestion was that plaintiffs' counsel may seek through informal discovery basic background information and also seek to ascertain who should be considered as a candidate for formal discovery procedures. This suggested informal discovery contained certain limitations regarding its subsequent use during the course of this litigation.

Despite the court's suggestion, the parties have been unable to resolve their differences, and court intervention is necessary. In their reply brief, the plaintiffs state that they do not object to the court's suggestion. Rather, they submit that

> [D]espite the court's request that the parties discuss the possibility of agreeing to allow the plaintiffs' attorneys to have ex parte communication with current and former MPS employees, but not allowing any statements obtained in such meetings to be used as admission against the MPS defendants, MPS apparently remains adamant about insisting on a blanket prohibition to any ex parte communications. For the record, although the plaintiff's do not think it is necessary to put into an order, the plaintiffs have no difficulty with the concept that they will be unable to use the statements of current and former MPS employees, obtained in an ex parte manner, as admissions in this litigation. Plaintiffs are well aware of the ethical and evidentiary rules proscribing such use. Plaintiffs are merely seeking through this motion, an expeditious way to obtain preliminary information so they can determine which current and former MPS employees should be deposed.

Pl. Reply at 2-3.

On the other hand, MPS counsel vigorously contest ex parte contact as to all three categories. As a preliminary matter, the MPS defendants submit that the plaintiffs' counsel has refused to discuss the option of conducting informal discovery, but with defense counsel present. Plaintiffs reject this proposal out of hand.

That option aside, in opposition to the plaintiffs' motion, the MPS defendants submit four reasons for denying the plaintiffs informal discovery. First, the defendants contend that the nature of MPS employees' duties and responsibilities under the IDEA, which is the central subject of this case, places many current and former employees in a position where their acts and/ or omissions may be used to impute liability to MPS. Second, the defendants submit that a carte blanche ordered permitting ex parte communications with innumerable current and former employees fails to provide MPS with a reasonable opportunity to anticipate or object to any specific ex parte contact until it is too late. Third, the defendants submit that MPS and its students will suffer irreparable harm if an employee inadvertently discloses confidential student information, in violation of § 118.125 Wis. Stat and the Family Educational Rights and Privacy Act ("FERPA"). Fourth, the defendants assert that the inability to clearly identify appropriate and inappropriate contacts will result in great conflict and copious disputes, all of which could be averted through the use of formal discovery methods.

The MPS defendants contend that the appropriate distinction drawn by the Comment to Wisconsin Supreme Court Rule 20:4.2 is whether an individual's acts or omissions in connection with the issues being litigated may be imputed to MPS or constitute an admission on behalf of MPS. Next, the MPS defendants present four arguments in support of its position that the plaintiffs' counsel should refrain from engaging in ex parte communications with MPS employees, regardless of status.

Citing 34 C.F.R. § 300.350, the MPS defendants argue that the full range of employees could potentially subject MPS to liability. In addition, the MPS defendants point to the possibility of liability under the theory of respondeat superior, citing Terra Int'l Inc. v. Mississippi Chemical Corp., 913 F.Supp 1306, 1322 (N.D. Iowa 1996).

Thus, the MPS defendants propose what they characterize as a simple solution to this dispute. In particular, they request that the plaintiffs be held accountable to the ethical rules and be prohibited from ex parte contact with any individuals whose acts or omissions in relation to this case could potentially subject MPS to liability. The defendants' proposed solution is really not so simple, for how would the plaintiffs know in advance of contact which individuals might subject MPS to liability?

The dispute between the parties must be resolved with a balanced approach. First, the court recognizes the plaintiffs' need for basic information in order to prosecute their case. Requiring the plaintiffs to proceed solely by means of formal discovery is not practical and is too expensive. It would needlessly disrupt the lives of numerous MPS employees. On the other hand, the defendants' concerns about being potentially exposed to liability without having counsel present when statements are obtained is legitimate. The court's previously proposed solution involves balancing the need for preliminary information that the plaintiffs are seeking against the defendants' liability concerns. It will hopefully provide a balance which will enable the parties to proceed with discovery without the "conflict and copious disputes" the defendants believe will emerge.

More particularly, the court will establish the following procedure. Plaintiffs' counsel may seek informal discovery, consisting of interviewing, meeting with, or otherwise obtaining information, from current and former non-managerial employees of MPS outside the presence of MPS counsel. Such informal discovery is subject to limitations on its subsequent use in this litigation. First, information obtained can only be used for the purpose of preliminary discovery; the plaintiffs are precluded from singularly or cumulatively using such information in an attempt to establish the defendants' liability. If the plaintiffs wish to use the information gathered informally in an attempt to impute same to the defendants, they must resort to formal discovery. This limitation does not foreclose plaintiffs' use of the informally gathered information in support of their motion for class certification. Second, plaintiffs' counsel must give adequate warnings to the individuals contacted prior to commencing the interview regarding privacy laws and regulations, i.e., § 118.125 Wis. Stat. and FERPA. These warnings should be provided both orally and in writing. Counsel should, of course, maintain copies of all written warnings.

As regards the class of MPS employees who have children in the putative class, including one of the named plaintiffs, Flora Y., plaintiffs' counsel may have unfettered contact with them in the normal course of the attorney-client relationship. This relationship, however, does not authorize any MPS employee to reveal confidential information relating to students that are not their children or minors over whom they are guardians.

IV. Plaintiff's Motion to Compel

As a preliminary matter, the plaintiffs have not complied with the "personal consultation" requirement of Civil Local Rule 37.1. Nonetheless, as the court indicated in its letter, dated April 10, 2002, the court decided to entertain that motion because it did not foresee the parties reaching an amicable solution on their own. The court's prescience is borne out in the plaintiff's reply brief.

Pursuant to Rule 37(a)(2)(B) of the Federal Rules of Civil Procedure, the plaintiffs seeks an order compelling the MPS defendants, i.e., Milwaukee Board of School Directors, Milwaukee Public Schools, and Spence Korte, to provide the plaintiff with documents responsive to Plaintiffs' First Request for Production of Documents, Request Number 16.

In particular, that item requests,

> All documents within your actual or constructive possession and created or modified on or after 3/1/00 and before 12/17/01 created or modified by, directed to or referring to counsel employed by Quarles & Brady LLP, including Gary M. Ruesch.

Pl.'s Mtn. to Compel, Ex. A at ¶ 16. The MPS defendants have responded,

> Object to this request. The documents described are attorney-client privileged and/or work product.

Pl.'s Mtn to Compel, Ex. B at ¶ 16.

In support of their motion, the plaintiffs submit that they do not seek privileged information. Although they initially contended that there was no confidential attorney-client privilege between Quarles & Brady and MPS, in reply, the plaintiffs concede that MPS and Quarles & Brady appear to have entered into an attorney client-relationship as of September 25, 2001. Accordingly, the plaintiffs modify their request to exclude documents produced on or after September 25, 2001. Despite this concession, the plaintiffs continue to argue that no such relationship existed prior to that time. Finally, the plaintiffs contend that even if a privilege exists, it was waived by reports that Quarles & Brady provide to the Department of Public Instruction ("DPI), one of the co-defendants in this case.

Responding, MPS maintains its objection on the basis of attorney-client privilege and/ or work-product doctrine. In support of this claim, MPS submits that Quarles & Brady and Attorney Ruesch have represented MPS in the past on various matters and it would have been ludicrous for Attorney Ruesch to have suggested otherwise. This assertion is supported by Ruesch's affidavit in support of MPS' response. <u>See</u> Ruesch Affid. at ¶ 3.

Further review of Ruesch's affidavit reveals that Ruesch told Attorney Jeffrey Spitzer-Resnick, plaintiffs' counsel, that neither he nor Quarles and Brady "was serving as litigation counsel" in this case. <u>Id.</u> at ¶ 6. Next, Ruesch avers that he and Quarles & Brady "did engage in legal advising and consultation with the City Defendants with the expectation, by all parties involved, that such consultation and advice was privileged." Id. at ¶ 7. Finally, Ruesch avers that "[a]t no time did I indicate to Mr. Spitzer-Resnick that Quarles & Brady LLP would not represent the City Defendants in this matter, nor did I ever misrepresent the status of our representation of the City Defendants with regard to this particular case." Id. at ¶ 9.

Next, MPS responds that the plaintiffs' reliance on DPI's payment of fees to Quarles and Brady, pointing to a letter attached as Exhibit A to MPS' brief. Specifically, that letter, dated December 4, 2000, from Gary M. Ruesch to Sheila C. Ellefson of the DPI, represents that,

> . . . we have been retained by MPS to assist it in developing, reviewing, and implementing its special education forms and procedures. In the course of our representation, **we have been advising MPS regarding the threatened litigation involving the Wisconsin Coalition for Advocacy since it substantially relates to many of the procedures followed by MPS in implementing state and federal special education law.** As we understand it, the Department of Public Instruction has made an arrangement with MPS to provide discretionary grant money for our services. **It has always been the understanding of Quarles & Brady that we represent MPS singularly.**

MPS' Resp., Ex. A (emphasis added). Thus, the relationship between DPI and Quarles & Brady is that DPI is providing the funding for the law firm to represent MPS. Moreover, the letter supports MPS' position that it had an attorney-client relationship with Quarles & Brady prior to September 25, 2001.

In summary, the court is satisfied that an attorney-client relationship existed prior to September 25, 2001, and covers the period in dispute. Therefore, in response to plaintiffs' discovery requests, MPS is required to prepare a privilege log, which will specifically indicate what information it believes is privileged. MPS submits that it is preparing such a log. If there are remaining disputes as to what is privileged, the parties should meet in a good faith effort to resolve the disputes; only then, should court intervention be sought.

As regards the plaintiffs' argument that the privilege was waived by sharing information with DPI, MPS contends that the plaintiffs have not submitted evidence regarding the existence of such sharing. Notwithstanding, MPS argues that even if information was shared, it and DPI have related functions and goals, akin to related companies, thus there is no waiver, citing Leybold-Heraes Tech., Inc. v. Midwest Instrument Co., Inc., 118 F.R.D. 609, 613 (E.D. Wis. 1987). In addition, MPS submits that it and DPI are co-defendants in this case, and argues that sharing of information in the course of preparing a joint defense does not constitute a waiver of privilege. In reply, the plaintiffs continue to assert that information was shared.

As a final matter, despite the parties' failure to adequately comply with the Local Rule, both parties imprudently seek sanctions. It is apparent that if the parties had sat down face-to-face, or at least talked by phone, rather than exchanging e-mails and voice mails, the matter in dispute, if not fully resolved, would have been limited at the outset. Thus, the cross-requests for sanctions will be denied. The very nature of this case requires that counsel for the parties work together to avoid needless time and effort, and cost to their respective clients. Counsel have demonstrated that such cooperative efforts are possible, without jeopardizing vigorous representation of their clients' positions, e.g. the joint stipulation for the protective order and their view regarding intervention by MTEA. Therefore, the parties are forewarned that this court will not consider any future discovery related motions that are not in strict compliance with both the Federal and Local Rules. Such motions will be summarily denied.

IT IS THEREFORE ORDERED that MTEA's motion to intervene (Docket #32) in **denied without prejudice.**

IT IS FURTHER ORDERED that the plaintiffs' motion for a declaratory order (Docket #26) is **denied** but the court establishes the informal discovery procedure set forth in this order at pages 9-10.

IT IS FURTHER ORDERED that the plaintiffs' motion to compel (Docket #38) is **denied**.

Dated at Milwaukee, Wisconsin, this 3rd day of May, 2002.

Aaron E. Goodstein

AARON E. GOODSTEIN
United States Magistrate Judge

This 3rd day of May, 2002, pursuant to Rule 77(d) Federal Rules of Civil Procedure, copies of this document were mailed by Nancy Monzingo to the following parties:

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