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May 23, 2019

VIA ECF

Hon. Gabriel W. Gorenstein
Chief U.S. Magistrate Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
Courtroom 6B
New York, New York 10007-1312

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Re: *Angel Hernandez v. The Office of the Commissioner of Baseball, et al.*
18 Civ. 9035 (JPO) (GWG)

Dear Judge Gorenstein:

We represent Defendants The Office of the Commissioner of Baseball and MLB Baseball Blue, Inc. (together, "MLB") in the above-referenced matter. Pursuant to Your Honor's Individual Practice 2(A), MLB respectfully requests a court conference, or in the alternative an order, directing Plaintiff to provide testimony and produce documents concerning his communications with his union, the Major League Baseball Umpires Association ("MLBUA"), regarding issues relating to claims in this lawsuit.¹ As set forth in further detail below, Plaintiff's counsel instructed him not to respond to questions concerning his communications with the MLBUA at his April 26, 2019 deposition and has refused to produce responsive documents concerning Plaintiff's communications with the MLBUA on the basis of a so-called "union relations privilege" that does not exist. Because that asserted ground does not provide a legally cognizable basis to withhold responsive documents or testimony, MLB respectfully requests that Plaintiff be ordered to testify regarding his communications with the MLBUA and produce responsive documents that have thus far been withheld.

A. Background

Plaintiff is a Major League Baseball umpire and a member of the MLBUA. He alleges in this lawsuit that since 2011, MLB has not selected him for a World Series assignment or for the position of crew chief, allegedly because he is Latino. In his First Amended Complaint, he brings claims of race, color, and/or national origin discrimination under Title VII of the Civil Rights Act

¹ The MLBUA was formerly known as the World Umpires Association.



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of 1964, 42 U.S.C. § 1981, the New York City and State Human Rights Laws, and the Ohio Civil Rights Act, and for a declaratory judgment.² (Dkt. 35.)

With respect to documents, Plaintiff has withheld responsive documents concerning his communications with the MLBUA on the basis of a “union-relations privilege”.³ *See* Exhibit A (Plaintiff’s Amended Privilege Log). The parties have met and conferred via telephone regarding Plaintiff’s failure to produce documents on this basis, as well as about other discovery issues, on February 13, 2019 for approximately 2.5 hours and the following attorneys participated: Neil Abramson, Rachel Phillion, and Rachel Fischer for MLB, and Nicholas Gregg for Plaintiff. The parties met and conferred again on February 22, 2019 for approximately 1.5 hours and the following attorneys participated: Neil Abramson and Rachel Phillion for MLB, and Kevin Murphy and Nicholas Gregg for Plaintiff.⁴ The parties did not resolve the issue concerning Plaintiff’s asserted “union relations privilege” during the meet and confer process.

In an effort to bring only a fully ripe issue before the Court, MLB deposed Plaintiff on April 26, 2019 in order to ascertain whether he had any other relevant communications with the MLBUA regarding issues he has raised in this litigation, in addition to the documents reflected on his privilege log. At Plaintiff’s deposition, Plaintiff’s counsel Kevin Murphy instructed him not to answer questions concerning:

- Whether Plaintiff has communicated with any union official about filing a grievance on his behalf with respect to not being selected as a crew chief. (Pl. Tr.⁵ 51:11-52:17.)
- Whether Plaintiff has communicated with any union official about commencing an arbitration with respect to not being selected as a crew chief. (*Id.* 52:18-24.)
- Whether any union official has dissuaded or attempted to dissuade Plaintiff from filing a grievance with respect to not being selected as a crew chief or for World Series assignments (*Id.* 53:4-8.)

² MLB’s motion to dismiss Plaintiff’s claim under the Ohio Civil Rights Act is pending. *See* Dkt. 38. Plaintiff’s “motion for a declaratory judgment” is pending as well. *See* Dkt. 51.

³ In addition to communications between Plaintiff and union representatives, Plaintiff’s privilege log also identifies certain communications in which union officials and his own attorneys appear to have been included on the same communication. Any attorney-client privilege with respect to those documents has been waived and they must be produced.

⁴ The parties successfully resolved their other discovery issues at that time as part of the meet and confer process.

⁵ “Pl. Tr.” refers to the transcript of the April 26, 2019 deposition of Plaintiff, cited excerpts of which are attached as Exhibit B.



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- The substance of communications Plaintiff testified he had with MLBUA Secretary Phil Janssen concerning his disagreements with MLB about his written performance evaluations. (*Id.* 127:21-128:14, 139:17-24, 140:18-141:6, 199:9-200:8.)
- Whether Plaintiff has made any claims to the MLBUA with respect to alleged discrimination by MLB. (*Id.* 223:23-224:8.)

Plaintiff's counsel asserted that the ground for his instruction was that "those types of conversations are not discoverable and are privileged...if you want to talk about talking about official union business, I don't think that's a proper line of questioning." (*Id.* 51:19-52:1.) We informed Plaintiff at his deposition we would seek direction from the Court concerning his instructions to his client not to answer questions. (*Id.* 52:16-17, 255:14-19.) Present at Plaintiff's deposition were Neil Abramson and Rachel Philion for MLB and Kevin Murphy and Nicholas Gregg for Plaintiff.

Following Plaintiff's deposition, we informed Plaintiff's counsel in writing that we believed that we were at an impasse concerning his asserted "union relations privilege" after the parties' meet and confer teleconferences and based on Mr. Murphy's instructions to his client during Plaintiff's deposition. We expressed our intent to file a pre-motion letter with the Court unless he believed further meet and confer efforts would be fruitful. Plaintiff's counsel responded that his position has not changed, confirming the parties' impasse on this issue.

B. Plaintiff Should Be Ordered to Testify and Produce Documents Concerning His Communications with the MLBUA

The parties' dispute concerns a pure legal issue: whether Plaintiff may withhold testimony and responsive documents on the basis of a purported "union-relations privilege." Plaintiff's assertion that communications between him and union officials is not discoverable in this lawsuit lacks legal support. No such privilege exists and Plaintiff should therefore be ordered to testify and produce documents and communications with the MLBUA about issues germane to the claims in this lawsuit, including his performance as a Major League Baseball umpire, his treatment by MLB (whether favorable or unfavorable), Plaintiff not being selected as a crew chief or for World Series assignments, diversity issues, and any claims of alleged mistreatment and/or discrimination by MLB.

Federal common law applies to privilege issues in cases pending in federal court. *See* Fed. R. Evid. 501; *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987) (when evidence pertains to federal and state claims pending in federal court, "courts consistently have held that the asserted privileges are governed by the principles of federal law"). There is no union privilege recognized under federal law, and courts have routinely rejected its application. For example, in *In re Grand Jury Subpoenas Dated Jan. 20, 1998*, 995 F. Supp. 332 (E.D.N.Y. 1998), a court in this circuit "decline[d] to recognize a common law privilege shielding conversations between union officials and members on matters of union concern." *Id.* at 334. The court denied a motion to preclude the testimony of union officials concerning communications with police



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officers who were members of the union and who had hired private counsel in connection with a legal proceeding. *Id.* at 340. In declining to recognize a union privilege, the court paid particular attention to the fact that New York has attempted to “codify some form of union privilege,” but had not been successful in doing so. The court noted that “[t]he inability of New York’s executive and legislative branches to reach agreement on the costs and benefits of a union privilege strongly cautions against this court finding that such a privilege should now be enshrined in common law.” *Id.* at 335-36.

Indeed, federal courts throughout the country have rejected any so-called “union privilege” in employment related lawsuits specifically. For example, a federal district court in Ohio rejected the application of any such privilege in a discrimination lawsuit in which the defendant-employer served a subpoena on the plaintiff’s union for documents and communications with or concerning plaintiff and the issues underlying his allegations in the lawsuit. *NetJets Aviation, Inc. v. NetJets Ass’n of Shared Aircraft Pilots*, No. 17 MC 00038 (GCS), 2017 WL 3484101, at *4 (S.D. Ohio Aug. 15, 2017) (noting that the defendant “offers no binding case law to support its assertion that a union-union member privilege exists and protects against disclosure” and that “the vast majority of courts to consider this issue have rejected [that] such a privilege exists”). *See also Curry v. Contra Costa Cty.*, No. 12 03940 (DMR), 2013 WL 4605454, at *3 (N.D. Cal. Aug. 28, 2013) (ordering plaintiff to produce communications with her union in employment discrimination lawsuit and concluding that no privilege protected union-employee communications); *Parra v. Bashas’ Inc.*, No. 02 Civ. 591 (RCB), 2003 WL 25781409, at *4 (D. Ariz. Oct. 2, 2003) (denying union’s motion to quash defendant’s subpoena seeking union’s communications with named plaintiffs in discrimination class action; finding no authority for the existence of a privilege for union-employee communications); *Boyer v. Rock Twp. Ambulance Dist.*, No. 10 Civ. 02344 (AGF), 2012 WL 1033007, at *3 (E.D. Mo. Mar. 27, 2012) (granting in relevant part motion to compel communications between plaintiff and union representative in employee whistleblower retaliation action).

Plaintiff’s counsel’s instruction to his client to withhold testimony based on a privilege that does not exist is particularly prejudicial to MLB given the subject matter of the communications at issue. As the umpires’ collective bargaining representative, the MLBUA is responsible for negotiating, enforcing and administering the terms and conditions of employment for all Major League Baseball umpires, including Plaintiff. The terms and conditions of Plaintiff’s employment are central to the claims and defenses in this lawsuit. To the extent Plaintiff was communicating with his collective bargaining representative concerning his terms and conditions of employment, those communications are indisputably relevant, whether those communications concern his performance on the field, his qualifications to serve as a crew chief, selection for World Series games, or the decision to request that Plaintiff seek counseling following his inability to get passed a missed call. In short, he should be required to testify about all communications with the MLBUA concerning any aspect of his employment as a Major League Baseball umpire.

In support of his specious assertion of a union privilege, Plaintiff has cited to MLB two state court cases that should be rejected out of hand because they do not address the issue of whether a purported “union relations privilege” bars relevant evidence in federal proceedings.



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Each case is also limited to its facts, which are wholly distinguishable from the issue presented here. In *In re City of Newburgh v. Newman*, 70 A.D.2d 362, 364-365 (3d Dep't 1979), the Appellate Division determined that "[u]nder the limited scope of judicial review" it was not legal error for an administrative agency to determine that a public employer committed an unfair labor practice when it interfered with a union member's opportunity to counsel with his union about charges brought against him in a disciplinary proceeding. The court specifically rejected the proposition that the administrative agency's decision created any broad common law "privilege," noting that the decision "is strictly limited to communications between a union member and an officer of the union, and operates *only as against the public employer*[]" *Id.* at 366 (emphasis added). Similarly, *In re Seelig v. Shepard*, 152 Misc. 2d 699 (Sup. Ct., N.Y. Cty. 1991) concerned a public employer and relied on *Newburgh*. Neither case created a federal "union-relations" privilege applicable to private employers. In fact, both cases on which Plaintiff relies were considered and distinguished by a federal district court in this circuit, which rejected application of any such privilege. *See In re Grand Jury Subpoenas*, 995 F. Supp. at 336.

There is simply no relevant authority that supports Plaintiff's position on this issue. Accordingly, Plaintiff has no basis to withhold testimony or documents concerning his communications with the MLBUA. MLB respectfully requests that the Court order Plaintiff to appear for and respond to questioning concerning his communications with the MLBUA and produce responsive documents concerning his communications with the MLBUA about his performance as a Major League Baseball umpire, his treatment by MLB (whether favorable or unfavorable), Plaintiff not being selected as a crew chief or for World Series assignments, diversity issues, and any claims of alleged mistreatment and/or discrimination by MLB. MLB also respectfully requests that the Court order Plaintiff to grant MLB its fees and costs incurred in connection with deposing Plaintiff for a second time in connection with these issues.

Respectfully submitted,

/s/ Neil H. Abramson
Neil H. Abramson

Attachments

cc: All counsel (via ECF)