

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

JOHN DOE, et al.,

Plaintiffs,

v.

MOUNT VERNON CITY SCHOOL
DISTRICT BOARD OF EDUCATION, et al.,

Defendants.

Case No. 2:08 CV 575

Judge Frost

Magistrate Judge King

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL
PRODUCTION OF DOCUMENTS AND FURTHER
DEPOSITION OF JOHN FRESHWATER**

I. INTRODUCTION

Defendant John Freshwater continues to abuse the discovery process for his own gain and at the Dennises' expense. Freshwater's counsel, R. Kelly Hamilton, contends that the Dennises' motion to compel is somehow now moot, but nothing could be further from the truth. The Dennises have been able to obtain some of the missing documents from the School Board's counsel (not from Freshwater's counsel) in the termination proceedings, but nowhere near all of the documents that Freshwater has testified he possesses but has failed to ever produce (either to the Dennises or the School Board). A whole host of other materials remain undisclosed, including Freshwater's own contemporaneous handwritten notes, a textbook with his own notes in it (that in his deposition in October he denied still having, but then in December marked portions of as an exhibit at his termination hearing), as well as "five armfuls" of other materials he removed from his classroom (and likewise never disclosed the existence of until recent testimony in the termination hearing). Any notion that the Dennises' motion is somehow moot is therefore wrong.

Freshwater's counsel also seems to suggest that these materials are protected by the work product doctrine, but that, too, is wrong. The requested materials are notes, affidavits, a textbook from a class he took, and other classroom materials, none of which could possibly be claimed to have been prepared in anticipation of litigation.

Because Freshwater provides no valid grounds for his lack of disclosure, this Court should grant the Dennises' Motion to Compel and also should permit further deposition of Freshwater on the undisclosed materials.

II. ARGUMENT

A. The Dennises' Motion To Compel Is In No Way Moot.

Despite Freshwater's unfounded assertions to the contrary, the Dennises' Motion to Compel is anything but moot. Although the Dennises were able to procure copies of some of the items in question from the School Board's counsel (after Freshwater marked them as exhibits at the termination hearing), they still do not possess most of the documents and other materials that form the basis of their Motion to Compel.

Freshwater has simply failed to provide responsive documents to the Dennises—documents that he did not produce in the discovery period in this case but that he instead hid the existence of until he chose last month to use some of them as exhibits in his termination hearing. In his testimony last month, Freshwater marked as exhibits some 15 affidavits that he claims to have prepared in May 2008, not one of which had ever been produced to the Dennises in discovery in this case (or to the School Board in the termination hearing until last month). The Dennises now have obtained those affidavits from the School Board's counsel, but they should not have had to do so—Freshwater was obligated to produce them to the Dennises but never did. Freshwater should now be ordered to produce electronic versions of these affidavits so the Dennises can determine whether they were, in fact, prepared in May 2008 or not. Based on

Freshwater's testimony, moreover, it is uncertain whether additional affidavits from Freshwater or from others exist that were not marked as exhibits at the termination hearing. These, too, should be produced.

Likewise, in his testimony last month, Freshwater also identified a number of other materials that have *never* been produced and which have never been marked as exhibits at the termination hearing. These yet un-produced documents include:

- Handwritten notes by Freshwater contemporaneous to various events at issue in this case. (Pls.' Mot. to Compel Produc. of Docs. and Further Dep. of John Freshwater at 2-3 (Doc. No. 67) (hereinafter "Pls.' Mot. to Compel"); *In the Matter of the Termination of Employment of John Freshwater* (hereinafter "Freshwater Termination Hearing"), John Freshwater Test., 12/30/09, at 4881-82 ("Q. Do Employee Exhibits 130 through 137 represent all of the notes that you made? A. No.") (attached as Ex. A); *id.* at 4907.)
- The personal copy of his *Finding Common Ground* textbook with handwritten marginalia (which Freshwater denied having during his deposition in this case but then a short time later marked limited portions of as an exhibit at his termination hearing). (*Id.*, 12/10/09, at 4393 (attached as Ex. B).)
- A folder of various media articles from his classroom that he claims to have recently found lodged behind the seat in an old pick-up truck at his home. (*Id.*, 12/29/09, at 4821-22 (attached as Ex. C).)
- Copies made at his church during the summer of 2008 of various materials from his classroom. (*Id.*, 12/30/09, at 4892-94, 4950-51.)
- Some five armloads of materials removed from Freshwater's classroom during the summer of 2008. (*Id.*, 12/29/09, at 4819-21; *id.*, 12/30/09, at 4897).
- Other religious materials that were removed from his classroom. (*Id.*, 12/10/09, at 4419-20)

As made clear through Freshwater's own testimony, these undisclosed materials include far more than the "wallet, keys, pictures of his family and maybe some cards" that Mr. Hamilton originally claimed Freshwater removed from his classroom. (Letter from R. Kelly Hamilton to Jessica Philemond, Jan. 30, 2009, Interrogatory Resp. 6 (attached as Ex. A to Counterclaimant/Def.'s Mem. in Opp. to Pls.' Mot. to Compel (Doc. No. 78) (hereinafter

“Hamilton Mem. in Opp.”)).) The Motion to Compel requests these and any as-yet unknown materials.

Freshwater cannot defend his non-disclosure by claiming a “negotiated practice with Plaintiff’s [sic] previous counsel” of having her obtain records from the court reporter. (*See* Hamilton Mem. in Opp. at 2.) The letter Mr. Hamilton attaches to his brief does not say that. Rather, it states that Mr. Hamilton committed to procure and provide copies of any exhibits to the Dennises’ counsel before the exhibits’ introduction. (Def./Counterclaimant’s Resp. to Pls.’ Second Req. for Produc. of Docs., Responses 18 & 20 (attached as Ex. B to Hamilton Mem. in Opp.)) Freshwater’s suggestion that the Dennises themselves are responsible for tracking down any exhibits he has introduced during the termination hearing is thus wrong and subjects the Dennises to unfair prejudice and surprise in the pleadings (something that has occurred already) and at trial. (*See* Pls.’ Reply in Support of Their Mot. for Partial Summ. J. at 41-45 (Doc No. 75) (discussing why Freshwater’s untimely exhibits unfairly prejudice the Dennises).) Because Freshwater continues to refuse to disclose documents directly responsive to the Dennises’ discovery requests, the Motion to Compel is not moot.

B. The Work Product Doctrine Does Not Apply To The Requested Materials.

Freshwater’s efforts to assert the work product privilege likewise do not save him from producing the requested documents. Not only are none of the requested documents work product, but even if they were, Freshwater has failed under the Federal Rules of Civil Procedure to properly invoke the work product doctrine.

A brief review of the requested materials quickly reveals that none is work product, and consequently, the work product doctrine does not apply. In their Motion to Compel, the Dennises sought this Court’s intervention to obtain Freshwater’s various affidavits, handwritten notes made contemporaneously with relevant events, his educational materials, and religious

materials from his classroom, among other things. (*See* Pls.’ Mot. to Compel at 2-5.) The affidavits—whether in hard copy or electronic format—are not work product; rather, they are actual statements that Freshwater made regarding the relevant facts of this case. *See Trustees of Plumbers and Steamfitters Local Union No. 43 Health and Welfare Fund v. Crawford*, 573 F. Supp. 2d 1023, 1028 (E.D. Tenn. 2008) (“[S]worn witness statements and affidavits are evidence; they are a witness’s own statement and are not protected by the work product doctrine.”) Similarly, the handwritten notes reflect Freshwater’s impressions related to the factual events leading up to and following his termination from his teaching position. *See id.* (noting that certain documents were not work product when not containing attorney notes, thoughts, or legal theories). And finally, the educational and religious materials, including Freshwater’s textbooks with marginalia and classroom postings, do not include materials prepared in anticipation of trial. Because Freshwater has not and cannot provide legal or factual justification as to why these relevant materials are work product, he must produce them.

Not only are the materials requested not covered by the work product doctrine, but Freshwater has failed to properly invoke that doctrine’s protection. In response to Document Request 20, for instance, Freshwater makes only a blanket claim of privilege, otherwise stating that he will produce all documents relevant to the claims made in the First Amended Complaint. (Def./Counterclaimant’s Resp. to Pls.’ Second Req. for Produc. of Docs. (attached as Ex. B to Hamilton Mem. in Opp.)) Under Rule 26(b)(5), this blanket assertion does not fulfill Freshwater’s obligations in claiming privilege because he must specifically “describe” the materials not produced “in a manner that . . . will enable other parties to assess the claim.” *See also United States v. Roxworthy*, 457 F.3d 590, 597 (6th Cir. 2006) (requiring specific and detailed bases that the documents are work product and refusing mere “conclusory statement[s]” (internal citations omitted)). In that regard, Freshwater has not provided the Dennises with a

privilege log setting forth the specific grounds on which any particular document is privileged. And as Freshwater correctly states in his Memorandum in Opposition, the burden rests with him to specifically assert the privilege. (*See* Hamilton Mem. in Opp. at 3.) He has failed to meet that burden.

C. The Dennises Should Be Permitted To Depose Freshwater On The Documents He Has Failed To Disclose.

Once the Dennises and their counsel have had time to review the undisclosed materials, they ask that this Court grant them leave to depose Freshwater for three additional hours regarding these documents. *See* Fed. R. Civ. P. 30(a)(2). In part, Freshwater and his counsel have stipulated to this extended deposition. (Hamilton Mem. in Opp. at 4 (stating that the scope should be limited to the materials in question); Def.'s Mem. in Opp. to Pls.' Mot. to Compel at 2 (Doc. No. 77) (stipulating to 2 additional hours, limited in scope to the materials in question).) The Dennises agree with Freshwater that any further deposition should be limited in scope to the materials at issue and the topics contained therein. As to the time of the extension, however, the Dennises respectfully request three, not two, additional hours, as the three-hour extension is a more appropriate accommodation in light of the many materials—some known and some still unknown to the Dennises—that have been withheld. The Dennises and their counsel will act in good faith to depose Freshwater regarding these materials in as little time as possible, not to exceed three hours.

III. CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court grant their Motion to Compel Production of Documents and Further Deposition of John Freshwater.

Respectfully submitted,

/s/Douglas M. Mansfield

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2010, I electronically filed the foregoing Reply In Support of Motion To Compel Production Of Documents And Further Deposition Of John Freshwater with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following at their e-mail address on file with the Court:

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