

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 21-CV-176

GREGORY BOMBARD,
Plaintiff,

v.

JAY RIGGEN, Vermont State Police Trooper,
and STATE OF VERMONT
Defendants.

RULING ON MR. BOMBARD'S MOTION TO COMPEL DISCOVERY

This case was filed in February 2021, and the State's dismissal motion was denied the ensuing December. Despite the parties' efforts, discovery has not gone well since, resulting in palpable frustration on both sides and Mr. Bombard's motion to compel, which the court heard on November 1, 2022.

In short, Mr. Bombard promulgated a series of extremely broad interrogatories apparently intended to leave no stone unturned, much of it inquiring into the "atmosphere" of the police barracks years prior to the incident regardless of any clear connection to the parties or the disputed event in this case. The State has resisted that discovery, taking the positions that it is overbroad generally and that Officer Rigger's subjective motivations underlying his disputed conduct are substantively irrelevant. Counsels' discovery conferences have focused, among other things, on negotiating a list of keywords and records custodians to help craft the State's electronic search for documents in a manner that is both reasonable and responsive to Mr. Bombard's needs. Those negotiations have been unsuccessful.

The court declines to join the fray over the details of the dispute at this time. Instead, it provides the guidance below and expects counsel to make best efforts to move forward with discovery cooperatively and to confer as needed in the spirit of the rules.

The June 24 search

The State ran a keyword search, within certain parameters, on June 24 that returned 1,500 documents or pages that have been reviewed and are ready to be produced but have not yet been produced. These documents shall be produced forthwith.

Discovery into Rigger's subjective motivations

Part of the dispute arises out of the parties' disagreement over the substantive

nature Mr. Bombard's claims. The State's position is that Officer Rigger's subjective motivations are irrelevant. Mr. Bombard's position is that proof of subjective motivations is relevant and may be necessary to his claims or parts of them. The court declines to rule definitively on the specific elements of all of Mr. Bombard's claim. For present purposes, it is sufficient to clarify that the court fails to see how Officer Rigger's subjective motivations are completely irrelevant.

Several of Mr. Bombard's claims are subject to *Zullo v. State*, 2019 VT 1, 209 Vt. 298. This is straight from *Zullo*:

With these considerations in mind, we hold that a plaintiff seeking damages against the State directly under Article 11 based on a law enforcement officer's alleged violation of that constitutional provision must show that: (1) the officer violated Article 11; (2) there is no meaningful alternative remedy in the context of that particular case; and (3) the officer either knew or should have known that the officer was violating clearly established law *or the officer acted in bad faith. . . . [B]ad faith, which may exist even when the officer's conduct could be viewed as objectively reasonable, is characterized by ill will or wrongful motive, including discriminatory animus.*

The third element set forth above includes a potential alternative showing of bad faith that in some instances would require the factfinder to make an objective assessment of the officer's subjective motivations. We recognize that the U.S. Supreme Court has abandoned a subjectively based malice component that would defeat a qualified immunity defense, reasoning that a judicial inquiry into subjective motivation might entail broad-ranging discovery that is inherently incompatible with immunity from suit. We also recognize that plaintiff is suing the State, and that qualified immunity is generally recognized as a common law defense against government officials. We emphasize, however, that the third element set forth above, although akin to qualified immunity in some respects, is not an immunity from suit but rather an element that a plaintiff must prove to obtain damages in a civil action directly under Article 11 for alleged constitutional violations.

To the extent that the element is similar to qualified immunity, imposing such an element is appropriate not only for the reasons discussed above, but because a plaintiff's claims against the State in such circumstances will generally be derivative of a law enforcement officer's actions. *Moreover, we emphasize that although subjective motivation may often have to be resolved by the factfinder, a plaintiff cannot withstand summary judgment without producing colorable facts upon which a reasonable jury could find bad faith.*

Id. ¶¶ 55–57 (citations omitted). The State does not explain how subjective motivation may need to be determined by the finder of fact yet is irrelevant.

The parties dispute to what claims in this case *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019), properly applies, but *Nieves*—as far as it goes—simply imposes on the plaintiff a

threshold burden of proving an absence of probable cause for arrest. It does not otherwise modify the elements of the retaliation claim. While subjective motivations are irrelevant to that initial burden, the State has not explained how or why they would be irrelevant to the plaintiff's subsequent proof of retaliatory motive.

Riggen's subjective motivations are not irrelevant and thus they are within the reasonable scope of discovery.

Reasonable breadth of inquiry into motivations

The relevance of Officer Riggen's subjective motivations for his conduct on a single day does not authorize a fishing expedition of staggering breadth, spanning 8 years and encompassing 63 records custodians whose only connection to this case is that they worked in the same barracks at some point over the years.

In particular, the court notes that to the extent that Mr. Bombard seeks this discovery to learn whether a culture or atmosphere of relevant bias in the barracks existed, which then might reflect on Riggen's motivations—even if it did not involve him—the discovery is, currently, speculative in the extreme and is not reasonable. More focused inquiry into any such evidence more directly connected to Officer Riggen or Mr. Bombard or the specific events at issue in this case is reasonable. If those inquiries produce evidence that cause Mr. Bombard to see some need to inquire further, he can do so, then on a foundation that might support those requests. “Staging” electronic discovery is an ordinary way of promoting efficiency and proportionality while yielding relevant evidence and avoiding overbreadth. See Federal Judicial Center, Managing Discovery of Electronic Information (3d) at 22 (“To ensure that the proportionality requirement is met, . . . the lawyers [should] stage the discovery by first searching for the ESI associated with the most critical or key players, examining the results of that search, and using those results to refine subsequent searches.”).

Privilege log

Mr. Bombard represents that the State already has withheld certain records as privileged but has not yet produced a privilege log. The State objects that the parties never conferred over this matter, and Mr. Bombard is raising it prematurely. Whether privileged information has been withheld and a privilege log produced should not require the court's involvement and it is not clear that its involvement is necessary as to this issue at this time.

Attorney fees


Mr. Bombard's request for attorney fees is denied.

The parties are directed to meet and confer again *after* the State produces the 1,500 pages of discovery described above. The court encourages counsel to reset the thermostat and make best efforts to ensure that the balance of the discovery phase of this case better serves the overarching goal of the rules “to secure the just, speedy, and inexpensive determination of every action.” V.R.C.P. 1.

Order

As set forth above, Mr. Bombard's motion to compel is granted in part and denied in part.

SO ORDERED this 2nd day of November, 2022.


Robert A. Mello
Superior Judge