

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 05-CV-1858-EWN-MJW

SEAN HARRINGTON,

Plaintiff,

v.

MADELINE WILSON AND THE :”LAW OFFICE OF MADELINE WILSON”,
CHRISTY RYAN,
BILL J. FYFE AND COLUMBINE COUNSELING CENTER, P.C.
LAURA ARCILISE in her personal capacity,
LOUISE CULBERSON-SMITH in her personal capacity,
JOHN GLEASON in his personal capacity and his official capacity (as Attorney Regulation
Counsel),
WENDELL PRYOR in his official capacity as Director of the Colorado Civil Rights
Division & Colorado Civil Rights Commission,
ROBERT EVANS in his official capacity as ADA Coordinator and Court Administrator for
the First Judicial District,
JEFFERSON COUNTY COMBINED COURT, through the Colorado Attorney General,
JOHN SUTHERS, (in his official capacity).

Defendants.

**STATE DEFENDANTS’ MOTION TO STAY DISCOVERY AND DISCLOSURES
PENDING DETERMINATION OF MOTION TO DISMISS
BASED ON IMMUNITY FROM SUIT**

Defendants Laura Arcilise, Louise Culberson-Smith, John Gleason, Wendell Pryor, Robert Evans, Jefferson County Combined Court and Colorado Attorney General John Suthers, (hereinafter collectively referred to as the “State Defendants”), (hereinafter “the State Defendants”), by and through their attorneys, the Office of the Colorado Attorney General and Assistant Attorney General Christine K. Wilkinson, hereby move to stay

discovery and disclosures required by Fed.R.Civ.P. 26(a), except as may be necessary to the determination of immunity motions, until determination of Defendants' Motion to Dismiss and state the following in support of this Motion:

Certification pursuant to D.Colo.LCivR 7.1(A): The undersigned certifies that she has conferred with Plaintiff and counsel for all other parties regarding the relief requested by this Motion. Plaintiff opposes this Motion. Counsel for the remaining Defendants do not oppose the relief requested by this Motion.

Argument

A. The State Defendants Request a Stay of Discovery

On December 1, 2005, State Defendants filed their Motion to Dismiss. The Motion raises defenses of absolute judicial immunity and qualified immunity of public officials performing discretionary functions. To carry out the purpose of the absolute and qualified immunity doctrines, federal law provides that disclosures and discovery should be stayed until this Court rules on the immunities raised in State Defendants' Motion.

In this case, the basis for the claims against the State Defendants are their attenuated roles in Plaintiff's state court custody case. As such, the State Defendants are entitled to absolute judicial immunity as to the claims lodged against them.

The State Defendants are also entitled to qualified immunity from suit for their acts or omissions in good faith. That is, without a showing that State Defendants should have

known that their actions would violate well-established federally protected rights of the Plaintiff, claims based on their actions are barred.

The United States Supreme Court has recognized that “[o]ne of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.” *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Therefore, public officials who assert absolute or qualified immunity are entitled to have such immunity determined as a threshold issue of law before incurring the burdens of litigation associated with discovery and trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). “The entitlement is an *immunity from suit* rather than a mere defense to liability.” *Id.* (italics in original).

The immunity from suit is irrevocably lost and the purpose of absolute and qualified immunity is frustrated if public employees are compelled to respond to discovery or to make disclosures under Rule 26(a). *See Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1998) (“[State’s] full enjoyment of its sovereign immunity is irrevocably lost once the [State] is compelled to endure the burdens of litigation”).

Therefore, Defendants asserting immunity from suit under the doctrine of qualified immunity should not be subjected to the burdens of discovery, and immunity issues should be determined before discovery commences. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). The purpose of protecting immune defendants from the burdens of pre-trial litigation is particularly important when those defendants are public agencies or officials. In such cases, the

public has a significant interest both in preserving public funds and in avoiding unnecessary interference with governmental activities and public services. Distraction of public officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service should be prevented. *Harlow*, at 816. All pretrial matters such as discovery should be avoided where possible because of their disruptive effect on government operations. *Id.* at 817.

Similarly, the Tenth Circuit has held that discovery and other litigation activities should be stayed or limited as necessary to determine issues regarding immunity. *E.g. Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992) (discovery should not be allowed until the court resolves the legal issues necessary to determine the defendant's right to qualified immunity).

The well-established rule that discovery should be stayed pending a determination of immunity issues applies as well to initial disclosures under Fed.R.Civ.P. 26(a). Disclosure requirements must be viewed within the ambit of pre-trial burdens, from which defendants asserting absolute and qualified immunity should be protected. Both discovery and disclosures are governed by Rule 26. Rule 26(a)(1) provides that initial disclosures must be timely made “unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan.” Fed.R.Civ.P. 26(a)(1). The duty to provide initial disclosures create many of the same burdens on litigants that are imposed by discovery. Like discovery, disclosures involve the production of information that causes distraction from governmental officials' duties, creates a deterrence

to public service, and expenditure of public funds. For the same reasons that formal discovery should be stayed, disclosure requirements should also be stayed because they are both forms of discovery and impose the same burdens. *See Harlow* at 817.

“A federal lawsuit is not a fishing expedition,” *Sawyer v. County of Clear Creek*, 908 F.2d 663, 668 (10th Cir. 1990), and plaintiffs are not permitted to conduct discovery in order to allege violation of a clearly established right because discovery without sufficient allegations to support a claim would defeat the purpose of qualified immunity. *Id.* The filing of this lawsuit presupposes that Plaintiffs’ counsel has conducted a Rule 11 investigation and has concluded in good faith that the §1983 claim is meritorious. Accordingly, Plaintiffs will not be prejudiced by a stay of disclosures and discovery. Nevertheless, Plaintiffs would be permitted to conduct discovery necessary to determine immunity motions, narrowly limited to immunity issues.

WHEREFORE, the State Defendants request that this Court enter its Order staying discovery and disclosures until determination of the State Defendants’ absolute and/or qualified immunity from suit.

RESPECTFULLY SUBMITTED this 1st day of December, 2005.

JOHN SUTHERS
Attorney General

/s/ Christine K. Wilkinson

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CERTIFICATE OF SERVICE

This is to certify that I served the foregoing **State Defendants' Motion To Stay Discovery And Disclosures Pending Determination Of Motion To Dismiss Based On Immunity From Suit** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 1st day of December, 2005, addressed as follows:

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s/ Linda L. Whitaker
