

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION
C/A No.: 2:17-cv-01792-RMG

Matthew Heath,

Plaintiff,

v.

College of Charleston, Glenn F. McConnell,
President of the College of Charleston and
Matt Roberts, Director of Athletics, in their
official and individual capacities,

Defendants.

**DEFENDANTS’ RESPONSE TO
PLAINTIFF’S MOTION TO COMPEL
ADDITIONAL DISCOVERY [NEF DKT. #104]**

NOW COME the Defendants College of Charleston (“College”), Glenn F. McConnell, President of the College of Charleston (“President McConnell”) and Matt Roberts, Director of Athletics (“Roberts”), in their official and individual capacities (collectively the “Defendants”), by and through undersigned counsel, and respond to the allegations set forth in Plaintiff’s “Motion to Compel Additional Forensic Examination and Memorandum in Support” [NEF Dkt. #104].

In Plaintiff’s Motion, he alleges that “Defendants have continued to disregard their legal obligations to preserve evidence relevant to Plaintiff’s claims and have willfully violated an Order of this Court to prevent Plaintiff from uncovering evidence demonstrating that intentional spoliation.” [NEF Dkt. #104, p. 1]. These allegations are wholly without basis, are grounded on Plaintiff’s own misrepresentations to this Court, and have resulted in the Orwellian spectacle of Plaintiff attempting to drag Matt Roberts’ wife and small children into this proceeding.

In this response, the Defendants will set forth their significant efforts to comply with the applicable provisions of the Settlement Agreement, Court’s Orders, and other laws that bind the

proceeding, in the face of the bad faith of Plaintiff who, like a drowning man grasping for a life preserver, grasps at any perceivable method to shift the Court's attention from the material fact of this case – that faced with undeniable and horrifying evidence of Plaintiff's physical abuse of student-athletes in Plaintiff's charge, as confirmed by a thorough investigation by attorney David Dubberly, President McConnell was left with no alternative but to terminate Plaintiff's employment.

For these reasons, and those detailed below, Defendants respectfully request that the Court DENY Plaintiff's motion.

PLAINTIFF'S TERMINATION

Plaintiff filed this lawsuit following his termination from employment as Head Baseball Coach with the College of Charleston. Glenn McConnell, then President of the College of Charleston, fired Plaintiff from his position on June 30, 2017 for "just cause," primarily for abusing his players. [See Termination Notice, NEF Dkt #5-9]. President McConnell, and he alone, made the decision to fire Plaintiff. He did so following his review of initial inquiries made by the Athletic Department into complaints about Plaintiff's conduct, additional complaints that followed the initial inquiries, the findings of the investigation conducted by outside counsel David E. Dubberly, Esq., and evidence that Plaintiff presented on his own behalf. [NEF Dkt #5-9, pp. 5-10]. Indeed, some of the allegations made against Plaintiff were not denied in Plaintiff's response to President McConnell.

As stated in previous pleadings before this Court, for purposes of responding to Plaintiff's motion, it is important to note that President McConnell was the sole person who

made the decision to terminate Plaintiff's employment, and he did so using sources completely independent of Matt Roberts. [See Exs. 97-1, 97-2, 97-3, and 97-4].¹

THE SETTLEMENT AGREEMENT

This case has been litigated aggressively for over a year and has involved a large number of motions, including Plaintiff's unsuccessful Motion for Preliminary Injunction, Plaintiff's unsuccessful appeal to the Fourth Circuit Court of Appeals, and significant document production from the Defendants to Plaintiff.

Following extensive negotiations, the parties reached agreement regarding a final settlement of Plaintiff's claims on October 25, 2018. [NEF Dkt. #96-2]. As the Court is aware, the material and binding sections of the Settlement Agreement are as follows:

1. Dismissal of Lawsuit with Prejudice.
 - a. Upon execution of this Agreement, the parties agree to request that the Court issue a "Rubin Order" conditionally dismissing the claims in this case and providing up to sixty (60) days to consummate the settlement.
 - b. The parties have agreed that Abrams Cyber Law Forensics, LLC will be allowed to conduct a forensic examination so as to determine whether there is any forensic evidence which materially conflicts with the representations contained in paragraphs 4 and 5 of the Matt Roberts affidavit, which has been provided to Abrams Cyber Law Forensics, LLC. **On October 25, 2018, Matt Roberts will deliver his cell phone (using the number 214-418-1323) to Abrams Cyber Law Forensics, LLC for examination, along with such additional information as Abrams requires to conduct a proper forensic review of the cell phone and access the content of any backup for the phone.** Abrams Cyber Law Forensics, LLC will issue a report to Allan Holmes, Esq. and Eugene Matthews, Esq. which provides any evidence that would create an issue of fact regarding the

¹ Plaintiff has already formally admitted to the Court that the "**employment contract at issue here has not yet been breached by the Defendants.**" That is to say, it is undisputed that the procedures provided for in the contract for affecting Plaintiff's termination were actually followed. The Plaintiff received all the written notifications he was entitled to and submitted his objections and responses as the contract provided for." [NEF Dkt. #5-1, p. 26] (emphasis added).

representations in paragraphs 4 and 5 of the Matt Roberts affidavit,² and which specifically includes: (1) the content of any recovered texts between Holbrook and Roberts, and (2) any evidence of any deleted texts between Holbrook and Roberts and the contents of those deleted texts. **After receiving this report, Plaintiff shall have ten (10) days to file a motion to restore the case and set aside this Agreement on the ground that the forensic examination has provided evidence which materially conflicts with the representations in paragraphs 4 and 5 of the Matt Roberts affidavit.** The Court shall determine the merits on the motion, and Plaintiff waives appeal of any of the Court's findings/rulings on the motion.

- c. If no motion is filed, this Agreement shall become final immediately after the ten (10) day period the Plaintiff was provided to file his motion.
- d. If a motion is filed, and the Agreement is not set aside, it will become effective as of the date of the ruling by the Court on the motion.
- e. The parties agree that the sixty (60) day period provided by the Rubin Order is more than sufficient to allow the forensic examination and any appropriate motion.

[NEF Dkt. #96-2, ¶ 1] (emphasis added).

**FACTUAL BACKGROUND REGARDING
THE DEFENDANTS' PRESERVATION OF EVIDENCE**

As the Court is already aware, in the early stages of the litigation, the College of Charleston's General Counsel directed Matt Roberts to preserve documents of all kinds relating to Coach Heath, including communications that he had with Chad Holbrook or his representatives concerning the College of Charleston. [NEF Dkt. #97-5, ¶ 5]. Roberts took steps to preserve this information by reviewing his laptop, iPad, cell phone, and paper files and preserving all such files and documents concerning Matt Heath. In the process of doing so, Roberts did not uncover any e-mail, texts, or documents that evidenced his communications with

² The Roberts Affidavit referenced in the Settlement Agreement is in the record at NEF Dkt. #96-3.

Chad Holbrook, but would have preserved them if there had been any. [NEF Dkt. #97-5, ¶¶ 6-7].

Pursuant to the Settlement Agreement, Roberts timely provided his cell phone³ to Abrams Cyber Law Forensics, LLC and the information that Steven Abrams required to conduct a proper forensic review of the cell phone and access the content of any backup for the phone. [NEF Dkt. #96-4, ¶ 4].

Following his review, Abrams reported that he found no communications on Roberts's cell phone that contradicted the statements made in Paragraphs 4 and 5 of the Roberts affidavit referenced in the Settlement Agreement. [NEF Dkt. #96-4, ¶ 9]. Abrams further explained that the cell phone configuration retained text messages for 30 days, and that as a result, there were no intact messages on the cell for the period in question (January 1, 2017 to July 1, 2017). [NEF Dkt. #96-4, ¶¶ 6-8]. In fact, Matt Roberts did not use the cell phone to contact Chad Holbrook in the manner set forth in his affidavit, and could not preserve items that did not exist. [NEF Dkt. #97, ¶ 7].

THE COURT'S ORDERS [NEF DKT. #99 AND #102]

In denying Plaintiff's earlier Motion for Sanctions without prejudice, this Court issued the following directives on December 10, 2018:

1. Matt Roberts and the College of Charleston are ordered to provide Steven Abrams with any computer, tablet or other electronic device that has been used to create a "backup" of Roberts's iPhone's (the "iPhone") data or that has any of the iMessages or MMS/SMS message data from the iPhone transferred onto the device, for a forensic examination to extract the iPhone's messaging data.
2. Matt Roberts is ordered to provide Steven Abrams with any Apple computer or iPad devices owned by Mr. Roberts, for a forensic examination to

³ Roberts purchased the cell phone himself while he was working in Texas several years ago. He does not recall changing any settings on the cell phone to delete or retain messages, and never instructed anyone else to do so. [NEF Dkt. #97-5, ¶ 3].

determine whether the iPhone's iMessages for the period of January 1, 2017 to July 1, 2017 were ever "synched" to the Apple device's "long term memory," thereby allowing for the extraction of the relevant messages from the device.

3. The College of Charleston is ordered to produce to Steven Abrams the cell phone of its employee Chad Holbrook, for a forensic examination of any communications with Matt Roberts during the period of January 1, 2017 to July 1, 2017.

[NEF Dkt. #99, pp. 4-5].

Defendants promptly responded to these directives. In fact, in addition to providing Roberts's iPad and Holbrook's cell phone to Abrams, Roberts also directly asked Abrams whether he wished to examine Roberts's laptop. At the time, Abrams declined to review the laptop, as Roberts indicated that he did not use the laptop to create a "backup" of his iPhone's (the "iPhone") data, or transfer any iMessages or MMS/SMS message data from the iPhone onto the device, or ever "synch" any of the iPhone's iMessages to the laptop's "long term memory." [*Third Affidavit of Matt Roberts, attached as Exhibit "A"*]. Forensic computer expert John Akerman confirmed, following his examination, that Roberts's assertions that he never made any backups or transfers from his iPhone to his computer were true. Akerman also found no evidence that any backups were ever made and deleted. [*Affidavit of John Akerman, attached as Exhibit "B," ¶¶ 8-12*].

Following an examination of Roberts's iPad, Abrams admitted that he found nothing. [NEF Dkt. #101-2, ¶ 10].

Abrams's examination of Chad Holbrook's cell phone did not locate any messages between Roberts and Holbrook during the time period in question. However, without Holbrook's permission, Abrams expanded his search beyond the Settlement Agreement and the Court's Order for other data and uncovered text messages between Holbrook and private third parties (who are not parties to this litigation), and publicized these third-party messages without

Holbrook's consent, such private third-party communications being publicly displayed by various media outlets⁴ to the general public. Defendants believe that these actions are in violation of the Court's Confidentiality Order.⁵

Following Abrams's report of these third-party messages, Holbrook's explanation of these messages was presented in the attached affidavit to Plaintiff's counsel. [*Affidavit of Chad Holbrook attached as Exhibit "C"*]. In it, Holbrook explained the personal nature and purpose of his communications with his elderly father, that he provided Roberts's contact information to third parties, and that he "never discussed anything with Matt Roberts regarding Matt Heath's position, performance, or future at the College of Charleston" during the period in question.

Thereafter, on New Year's Eve, December 31, 2018, Plaintiff filed a "Motion to Restore Action," in which Plaintiff claimed that Roberts refused to allow any examination of his laptop, despite Abrams's representing to Roberts that he did not wish to review it:

Yet now it appears that Defendant Roberts is able to make a better determination than a forensic expert as to what was, or was not, ever backed up on "his computer" by deciding not to produce it per this Court's clear Order. The recalcitrance shown by the Defendants in their production of electronic evidence continues to erode the confidence of the Plaintiff in the authenticity and completeness of their production.

[NEF Dkt. #101-1, p. 5]. Given the conflict of this assertion with Abrams's own representations to Roberts on December 11, 2018, this evidence should give the Court significant pause before crediting Abrams's (or Plaintiff's) assertions.

In any event, the Court responded promptly, on January 2, 2019, extending the *Rubin* order applicable to the case, and also ruling as follows:

⁴ Graham Maiden, previously identified by opposing counsel as "counsel to the Plaintiff," has previously boasted to the College of Charleston about his contacts with the Channel Five news. [*See E-mail dated July 12, 2018 attached as Exhibit "E"*].

⁵ This action alone belies Plaintiff's assertions that he or his expert can be trusted not to divulge FERPA-protected data, privileged material, or other sensitive data.

In his subsequent motion to restore this case to the docket, Plaintiff represents that Defendants delivered some, but not all, of the electronic devices to Mr. Abrams, who submitted a partial report to the parties on December 26, 2018. (Dkt. No. 101 at 5.) As noted in the Court's December 10th Order, a forensic examination of all electronic devices at issue may be relevant to the parties' claims and defenses, as well as to any possible arguments for sanctions.

[NEF Dkt. #102].

THE DEFENDANTS' RESPONSES TO THE COURT'S ORDERS

Notably, following the Court's Order of January 2, 2019, the Defendants first raised the issue concerning the forensic examination of "all electronic devices," contacting Plaintiffs' counsel on Tuesday, January 8, 2019, to identify any other electronic device relevant to the proceeding that "has not already been turned over." [*E-mail dated January 8, 2019, at 1:50 p.m.*].⁶ Thereafter, the chronology of events unfolded as follows:

- Wednesday, January 9, 2019 – the College confirmed that the Roberts laptop was available for review by Abrams. [*E-mail dated January 9, 2019, at 4:54 p.m.*].
- Thursday, January 10, 2019 – Abrams indicated that he had been "under the weather" and unable to work. [*E-mail dated January 10, 2019, at 3:15 p.m.*].
- Monday, January 14, 2019 – Because of the significant amount of FERPA-protected data on the laptop, and other privileged and sensitive data on the laptop, and Abrams' prior release of private third-party data from Holbrook's cell phone, which was released through media outlets to the general public, the College required Abrams to conduct his review of the laptop on-site at the College. By e-mail to counsel, Abrams reported that he is dissatisfied with performing the full inspection at the College, and with the laptop itself. [*E-mail dated January 14, 2019 at 3:18 p.m.*]. The College conducted a review of the laptop and confirms that it was the subject of a campus-wide implementation of an upgrade of computers from Windows 7 to Windows 10 in August 2018, and that Roberts's laptop was a part of this upgrade. The College begins the search to recover the original hard-drive from the laptop. [*Affidavit of Mark Staples, attached as Exhibit "D," p. 2*].
- Thursday, January 17, 2019 – The College located the original hard-drive from the laptop. [*Affidavit of Mark Staples*].

⁶ E-mails referenced in this pleading are attached as ***Exhibit "F."***

- Thursday, January 17, 2019 through Saturday, January 19, 2019 – the College hired its own independent expert, Mr. John Akerman, to review data on both hard drives and to develop a protocol that will preserve protected, privileged, and confidential data from disclosure while permitting Abrams to determine whether Roberts (1) used his laptop to create a “backup” of his iPhone’s (the “iPhone”) data or deleted a backup, (2) transferred any of the iMessages or MMS/SMS message data from the iPhone transferred onto the laptop, or (3) ever “synched” to the Apple device’s “long term memory.” [*Protocol Letter dated January 19, 2019; Affidavit of John Akerman*]
- Monday, January 21, 2019 – MLK Day.
- Tuesday, January 22, 2019 – Protocol forwarded to Abrams. Both hard drives available to Abrams for inspection at the College. [*E-mail dated January 22, 2019 at 11:51 a.m.*].
- Thursday, January 24, 2019 – Akerman contacted Abrams directly to explain that he created the protocol and conducted the searches on the hard-drives in question to meet the requirements of the Court Order and to “protect privilege, FERPA, and other legally protected data.” [*E-mail dated January 24, 2019 at 8:28 p.m.*]. The College’s Chief Information Security Officer and Chief Privacy Officer were scheduled to meet with Abrams to perform the search protocol, but Abrams does not appear, nor does he reschedule. [*Affidavit of Mark Staples*].
- Friday, January 25, 2019 – Abrams responded to Akerman and posed questions regarding the protocol. [*E-mail dated January 25, 2019 at 8:29 a.m.*].
- Monday, January 28, 2019 – Akerman responded to Abrams, detailing the process and results of Akerman’s investigation. [*E-mail dated January 28, 2019 at 6:43 p.m.*].
- Tuesday, January 29, 2019 – Abrams responded to Akerman regarding Abrams’ desire to expand his search beyond the directives of the Settlement Agreement and the Court Orders. [*E-mail dated January 29, 2019 at 3:52 p.m.*].
- All days following – the College remains ready for Abrams to conduct the protocol to confirm or disprove Akerman’s findings that (1) the laptop and its hard drive(s) were not used to create a “back up” of Roberts’s iPhone, nor was a backup created and deleted, (2) there was no iMessage data from the iPhone on the laptop and its hard drive(s), and (3) there was no MMS/SMS message data from the iPhone transferred onto the laptop.

LEGAL ARGUMENT

I. PLAINTIFF’S MOTION GOES FAR BEYOND THE SETTLEMENT AGREEMENT AND THE COURT’S ORDERS REGARDING THE LIMITED DISCOVERY PERMITTED IN THESE DOCUMENTS.

Plaintiff’s motion calls for nothing less than a wholesale abandonment of the clear boundaries set forth in the Settlement Agreement and relies on omissions and half-truths to further an aim far beyond the directives of the Settlement Agreement and this Court. Further, the omissions of Plaintiff’s own expert, and his willingness to publicize private conversations related to third parties who are not parties to this litigation, without their authorization or consent, as well as the responsibilities of the College and the State to protect student data under FERPA as well as privileged information related to the case, all strongly suggest that the Court should deny Plaintiff’s motion.

The Settlement Agreement clearly contemplated and set forth parameters for the search of one item, and one only – Matt Roberts’s iPhone.

Moreover, the Court’s Orders [NEF #99 and #102] are written clearly. They direct:

(1) Matt Roberts and the College of Charleston to provide Steven Abrams with any computer, tablet or other electronic device that has been used to create a “backup” of Roberts’s iPhone’s (the “iPhone”) data or that has any of the iMessages or MMS/SMS message data from the iPhone transferred onto the device, for a forensic examination to extract the iPhone’s messaging data. No such computer exists, and the College’s independent expert’s own examination of the hard-drives of Roberts’s laptop confirms that no such back-up exists or ever existed, or that any iMessage or MMS/SMS message data was transferred onto the device. Further, the original hard-drive remains available to Abrams to review at the College using the protocol designed to meet the Court’s stated purpose while observing the College’s other state

and federal data protection requirements, obligations, and legal duties to others.

(2) Matt Roberts to provide Steven Abrams with any Apple computer or iPad devices owned by Mr. Roberts, for a forensic examination to determine whether the iPhone's iMessages for the period of January 1, 2017 to July 1, 2017 were ever "synched" to the Apple device's "long term memory," thereby allowing for the extraction of the relevant messages from the device. Abrams has completed his review of Roberts's iPad, and the College's independent expert's own examination of the hard-drives of Roberts's laptop confirms no iMessages were ever backed up or "synched" to the laptop's long-term memory.

(3) The College of Charleston to produce to Steven Abrams the cell phone of its employee Chad Holbrook, for a forensic examination of any communications with Matt Roberts during the period of January 1, 2017 to July 1, 2017. This has been completed. The College's independent expert's own examination of the Holbrook cell phone indicated that there was no evidence of iPhone or any other messaging between Roberts and Holbrook during the time period in question.

As to Plaintiff's specific demands:

A. THE LAPTOP HARD-DRIVE

The original hard-drive on Roberts's laptop remains available for Abrams to review at the College. Given Akerman's findings and protocol, the College's requirements to protect data under federal and state law, and Abrams' previous unauthorized disclosures of other third-party data which were broadcast by the media to the general public, the College believes that the Court should find the protocol – and availability at the College for Abrams to conduct a search for the information referenced in the Court's own Order – amply satisfies the College's responsibilities under the Order.

B. SECOND EXAMINATION OF CHAD HOLBROOK'S CELL PHONE

Because Abrams has already examined Holbrook's cell phone, Defendants do not understand the basis for the Court to permit a second, unlimited, wholesale, and unsupervised examination of Holbrook's cell phone. Aside from the proverbial "fishing expedition" that Plaintiff seeks, there is simply no basis in either the Settlement Agreement or the Court's Orders to support such a departure. As with his other demands, it also appears designed to divert the Court's attention from the true and material matter at hand – Plaintiff's physical and other abuse of the student-athletes under his charge. Mr. Akerman's own review of the Holbrook cell phone indicated no iPhone or other text message communications between Holbrook and Roberts during the period in question. Further, the attempts by Abrams to rely on opinion, suspicion, and innuendo, and his unauthorized disclosures, are far beyond the scope of the Settlement Agreement and Court Orders.

C. EXAMINATION OF OTHER ELECTRONIC DEVICES OWNED BY HOLBROOK OR ROBERTS.

This is perhaps the most disturbing and Orwellian of Plaintiff's demands. He makes these assertions based on the alleged use of computers and computer-like devices by the Roberts' small children, and actually uses and publishes photographs of the Roberts' small children to support his Motion. [NEF Dkt. #104-5]. Or, perhaps Plaintiff wishes to fish through the personal devices of Roberts's wife and small children to satisfy the remote depths of his curiosity, and if so, why stop there? Under Plaintiff's theory, should the Court also consider any device used by Holbrook's spouse or children? Or parents or grandparents? Or friends and neighbors of the Holbrook and Roberts families? Or fans and well-wishers of College of Charleston or USC baseball? There is absolutely no basis for this wholesale, absurd, and disturbing expansion of the Settlement Agreement and the Court's Orders.

D. EXAMINATION OF THE COLLEGE'S SERVERS.

This is likewise a breathtaking and transparent attempt to stretch far beyond the clear language and limitations of the Settlement Agreement and the Court's own Orders. Nothing in either the Settlement Agreement or the Court's own Orders contemplates such a wholesale expansion contained within Plaintiff's most recent and outrageous sets of demands. There are simply no grounds that support exposing the College's servers, and the private and privileged data of third parties which it must protect under federal and state law, to Plaintiff or his expert.

CONCLUSION

For the many reasons outlined above, along with the Court's inherent authority to manage the litigation process under its purview, the Defendants College of Charleston, Glenn F. McConnell, President of the College of Charleston and Matt Roberts, Director of Athletics, in their official and individual capacities, respectfully request that this Court DENY Plaintiff's Motion and award any other relief as the Court deems just and proper.

Dated this the 19th day of February, 2019.

Respectfully submitted,

RICHARDSON PLOWDEN & ROBINSON, P.A.

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