

IN THE SUPERIOR COURT OF HALL COUNTY  
STATE OF GEORGIA

**ANTHONY HENDRIX,**

**Plaintiff,**

**v.**

**LEE HIGHSMITH, FRANK HARBIN,  
WILLIE MITCHELL, KELVIN  
SIMMONS, and DAVID SYFAN in their  
official capacities as members of the Board  
of Education for Gainesville City Schools,  
STEVEN BALLOWE in his official  
capacity as Superintendent of the  
Gainesville City School System,  
CURTIS BIBB in his official capacity as  
Assistant Superintendent of the Gainesville  
City School System, and  
GLEN VIS,**

**Defendants.**

**CIVIL ACTION FILE  
NO. 07 CV 1290 B**

**ORDER**

On April 28, 2008, this Court held a hearing on Plaintiff's Motion to Compel Disclosure of Information and Documents Obtained in Gathering and Dissemination of News (hereinafter referred to as "Motion to Compel Newsgathering Information") seeking documents from a non-party television station (hereinafter referred to as "FOX 5") and its investigative reporter, Randy Travis (hereinafter referred to as "Travis"). Because Plaintiff failed to defeat the privilege afforded to reporters and televisions stations under O.C.G.A. § 24-9-30 (hereinafter "Georgia's Reporter Shield Law"), this Court denies Plaintiff's Motion to Compel.

## FINDINGS OF FACT

The underlying lawsuit arises from Plaintiff's forced resignation from the Gainesville City School System after a document evidencing a failed drug test was leaked to Travis, an investigative reporter for FOX 5's I-Team. Travis received copies of the drug test via facsimile from an *anonymous* source. After the broadcast of a FOX 5 investigative report, Plaintiff filed a five-count Complaint against eight Defendants – five members of the Gainesville City Schools Board of Education, the Gainesville City Schools superintendent, assistant superintendent, and another school system employee. See Complaint, ¶¶ 19-39. In support of his claim for intentional infliction of emotional distress, Plaintiff alleged Defendant Glenda Vis “acted willfully and with malice when she revealed Plaintiff’s personal, confidential personnel information to a television investigative reporter.” Id. at ¶ 37. Defendant Vis has denied, under oath, that she leaked the drug test. See G. Vis Affidavit, ¶ 3. Counsel for Plaintiff, in response to a motion for summary judgment filed by Vis, testified that there was circumstantial evidence available to him from other sources showing that Defendant Vis released the drug test. See D. Fox Affidavit, ¶ 4.

On December 5, 2007, this Court entered a Protective Order as a sanction against Plaintiff. Thereafter, arguing he could not obtain discovery directly from Vis due to the Court’s Protective Order, Plaintiff sought to compel the discovery of documents and information from Travis and FOX 5. In particular, Plaintiff sought to obtain the actual facsimile sent to FOX 5 with hopes it *may* have some identifying information about who sent the facsimile – such as the date or time of the transmission. Yet, Plaintiff conceded that the same facsimile sought from FOX 5 *could* be in the possession of the Gainesville City School System. Plaintiff has, in his discovery responses, identified six individuals – plus additional members of the Board of Education – who purportedly have information that (1) Defendants Bibb, Ballowe and Vis were

the only individuals with access to Plaintiff's personnel file; (2) representatives of Defendants advised Plaintiff that Vis had released the drug test; and (3) Vis had a motive to release the drug test. See Plaintiff's Answers to Glenda Vis' Interrogatories, ¶ 9. Additionally, Plaintiff conceded that Defendants Vis, Bibb and Ballowe could testify as to Travis' receipt of the drug test and that at least eleven individuals could testify "concerning facts which preceded the release of [Plaintiff's] confidential information, including Ms. Vis' personal motive as a result of her demotion." Id. at ¶ 22. It is pertinent that, rather than pursuing these possible alternative sources for this information, Plaintiff agreed with counsel for Defendants *not* to pursue discovery until *after* the Court ruled upon Plaintiff's Motion to Compel Newsgathering Information from FOX 5 and Travis. Despite numerous alternative sources from whom Plaintiff might well ascertain when and how the failed drug test was leaked, Plaintiff has never deposed any one in this case.

#### FINDINGS OF LAW

Pursuant to Georgia's Reporter Shield Law, a party must satisfy three conditions before a reporter may be compelled to produce newsgathering information. Specifically, the statute provides that the newsgathering information is privileged unless the requestor shows that the information: (1) is material and relevant; (2) cannot be reasonably obtained by alternative means; *and* (3) is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item. O.C.G.A. § 24-9-30. A party seeking to compel the disclosure of documents or materials obtained by a non-party reporter in the newsgathering process has a high burden to meet. See, e.g., In re Paul, 270 Ga. 680 (holding that, even in a criminal murder case, the state could not obtain the identity of confidential sources or information regarding a defendant's confession to a reporter without *first* seeking to obtain the same information from other potential witnesses); see also Stripling v. The State, 261 Ga. 1, 8-9 (1991) (affirming trial court's protection of reporter's confidential sources under the privilege in a death penalty case

where the reporter refused to disclose the identity of former sheriff's department employees who informed her of a "systematic policy of eavesdropping" on attorney-client conversations at a county jail) (opinion withdrawn on other grounds); see also Carey v. Hume, 492 F.2d 631, 639 (D.C. Cir. 1974) (approving of the depositions of 60 witnesses as prerequisite to compelled disclosure from a reporter).

Plaintiff has failed to satisfy any of the three requisite conditions necessary to overcome the privilege afforded by Georgia's Reporter Shield Law. Courts construing Georgia's Reporter Shield Law have required the party seeking to compel discovery to make an evidentiary showing that the party has "exhaust[ed] non-media sources from which the information *might* be obtained." Miller v. Greer, 20 Med. L. Rep. 1061, 1062 (DeKalb County Superior Court, 1992) (emphasis provided). Here, Plaintiff conceded he has not interviewed, much less deposed, any of the numerous witnesses who might be able to testify as to who released the drug test. Accordingly, Plaintiff has failed to show that the newsgathering information sought from FOX 5 cannot be reasonably obtained through alternative means. See Miller, 10 Med. L. Rptr. at 1062 (holding plaintiff had not overcome burden even where he had deposed all party defendants and several other possible sources).

Although Plaintiff stated he would like to obtain the actual facsimile sent to FOX 5, he has failed to show how the document is material, relevant or necessary to the proper preparation or presentation of his case. The facsimile is not necessary to prove that the drug test was leaked. That fact is undisputed and could be a matter easily stipulated by the parties. Furthermore, Plaintiff has not shown that the facsimile will provide any evidence as to the source of the leak. It is undisputed that the source was anonymous, and Plaintiff is speculating that the facsimile actually contains any information identifying the source of the leak. Setting aside the heightened protection of confidential sources generally, speculation that there could be potential

circumstantial evidence that could help identify the source of the leak is far from sufficient to justify compelling FOX 5 and Travis to produce their privileged newsgathering materials. See, e.g., Shoen v. Shoen, 48 F.3d 412, 416 (noting that “there must be a showing of actual relevance; a showing of potential relevance will not suffice”).

Additionally, even if the facsimile did contain source-identifying information, it may well be cumulative of other evidence as there is other circumstantial evidence available for Plaintiff to prove the identity of the person who leaked the drug test. See e.g., Riley v. City of Chester, 612 F.2d 708, 717 (3<sup>rd</sup> Cir. 1979); In Re Shuman, 552 A.2d 602, 609 (N.J. 1989) cited with approval in In re Paul, 270 Ga. at 687 (refusing to compel reporter to testify concerning confession published in the newspaper because similar evidence could be obtained through other sources). In other words, regardless of Plaintiff’s desire to uncover *all* possible facts and evidence, this is not a sufficient reason to justify the forced disclosure of a reporter’s newsgathering materials. See In re Paul, 270 Ga. at 687 (reversing a trial court order compelling a reporter to testify even though the trial court found the reporter’s jailhouse interview constituted a confession); see also United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986) (affirming a district court’s refusal to require a reporter to testify as to his source for a news report in a grand jury case because the record already contained circumstantial evidence as to the source of the allegations so that it was not necessary to undertake inquiry as to any evidence held by the particular reporter).

Finally, this Court concludes that even if all of these factors could be shown, the motion to compel was premature. Before ruling on such a motion, Plaintiff needs to show his claims are viable and that disclosure of the information would be critical to the prosecution of his case. See Atlanta Journal-Constitution v. Jewell, 251 Ga. App. 808, 813 (2001) (“[I]f [the plaintiff] cannot succeed on a specific allegation ... as a matter of law, or if [he] is able to prove his specific

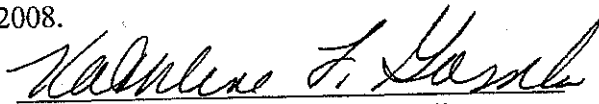
allegation through the use of available alternative means, then the trial court's balancing test should favor non-disclosure of confidential sources.").

The Court will not reopen discovery at this time. Yet, if this Court subsequently denies the pending dispositive motions and determines that further discovery is required to resolve the issue, it will consider a motion by Plaintiff to lift the Protective Order previously granted as to Defendant Vis. This Court will not entertain motions seeking to compel newsgathering information unless, consistent with this Order, Plaintiff shows that: (1) all other possible sources have been exhausted; (2) the newsgathering information being sought is material and relevant and (3) is necessary to the proper presentation of the Plaintiff's case.

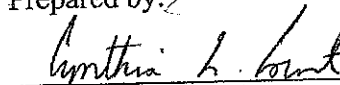
#### CONCLUSION

Because Plaintiff has failed to defeat the privilege afforded to reporters and televisions stations under O.C.G.A. § 24-9-30, it is hereby ORDERED and ADJUDGED that Plaintiff's Motion to Compel be denied.

DATED this 9<sup>th</sup> day of May, 2008.

  
The Honorable Kathlene F. Gosselin  
Judge Hall County Superior Court

Prepared by:

  
Cynthia L. Counts, Esq.  
Georgia Bar No. 190280  
Benjamin C. Bartlett, Esq.  
Georgia Bar. No. 371518

Counts & Associates  
1384 Lanier Place  
Atlanta, Georgia 30306  
Telephone: (404)876-1785  
Facsimile: (404)249-9897  
Email: [ccounts@lawcounts.com](mailto:ccounts@lawcounts.com)