

**IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

Susan Doxtator, Arlie Doxtator, and
Sarah Wunderlich, as Special
Administrators of the Estate of Jonathon
C. Tubby,

Case No. 1:19-cv-00137-WCG

Plaintiffs,

**MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL AND
SANCTIONS**

vs.

Erik O'Brien, Andrew Smith, Todd J.
Delain, Heidi Michel, City of Green
Bay, Brown County, Joseph P. Mleziva,
Nathan K. Winisterfer, Thomas Zeigle,
Bradley A. Dernbach, and John Does 1-
5,

Defendants,

INTRODUCTION

This case concerns the shooting death of Jonathon Tubby ("Tubby"). Tubby was shot by a Green Bay police officer while he was in custody at the Brown County jail, unarmed, face down, on the ground, and engaged by a police canine. As a result of this fatal shooting, Plaintiffs assert a number of claims under 42 U.S.C. § 1983 and Wisconsin state law, including claims that (i) the Green Bay Police Department ("Department") has a custom and practice of using excessive force that is persistent and widespread, (ii) the Department inadequately supervises its officers, and (iii) the particular Green Bay police officer (Defendant Erik O'Brien) who shot Tubby did so in violation of the U.S. Constitution.

Department Officer Scott Salzmänn, an eye-witness to the fatal shooting of Mr. Tubby, was deposed on December 20, 2019. At his deposition, counsel for Plaintiffs observed that Officer Salzmänn had several tattoos of red dots within golden eagle feathers. It is commonly known that a tattoo of a golden eagle feather with a red dot in the interior signifies that the person with the tattoo has killed an enemy. Significantly, Officer Salzmänn has been the shooter in several officer-involved shootings. Accordingly, Plaintiffs' counsel asked Officer Salzmänn several questions about the meaning or significance behind his tattoos. Without any objections or instruction from his counsel, Officer Salzmänn refused to answer these questions beyond stating that the tattoos had "personal and symbolic meaning." Plaintiffs' counsel subsequently sought Defendant City of Green Bay's ("Green Bay") agreement to have Officer Salzmänn re-produced for a deposition in light of his refusal to answer these questions, and Green Bay refused.

Officer Salzmänn's refusal to answer deposition questions violates bedrock principals of the discovery process. The Court should issue an order compelling him to continue his deposition and answer questions regarding his tattoos. In addition, the Court should sanction Officer Salzmänn and Green Bay for their refusal to cooperate in the discovery process, and require them to pay Plaintiffs' costs and attorneys' fees associated with this motion and the continued deposition of Officer Salzmänn.

BACKGROUND

On October 19, 2018, Jonathon Tubby was shot and killed while in custody at the sally port of the Brown County Jail. 2d Am. Compl. ¶ 1. At the time he was shot, Mr. Tubby was unarmed, face-down on the ground, and engaged by a police canine. *Id.*

Plaintiffs have asserted claims in an individual capacity against the individual officer who shot Mr. Tubby, against the Chief of Police in his official capacity, and against the City of Green Bay itself. *Id.* at ¶¶ 28-34, 51-70. Plaintiffs' claims allege, *inter alia*, that the Department has a custom and practice of using excessive force that is persistent and widespread, that it inadequately supervises its officers, and that the particular Green Bay police officer (Officer Erik O'Brien) who shot Tubby did so in violation of the U.S. Constitution. *Id.*

Officer Salzmänn was a witness to the shooting and is a member of the Green Bay Police Department. *See, e.g.,* Tahdooahnippah Decl., Ex. B at 113:11-13. Plaintiffs deposed Officer Salzmänn on December 20, 2019. *Id.* ¶ 2. During the deposition, Plaintiffs and their counsel observed that Officer Salzmänn has tattoos on his forearm including a stylized American flag and golden eagle feathers each containing a red dot. *Id.* ¶ 4. The generally accepted significance of an eagle feather with a red dot is that the wearer killed a foe. *Id.* ¶ 5; *see also* Native American Legends, Myths, and Lore, Eagle Feather, Dec. 19, 2002, *available at* <http://www.angelfire.com/ca/Indian/EagleFeather.html> (last accessed January 9, 2020 at 10:07 a.m.).

Significantly, the documents produced by Green Bay in the course of this case show that Officer Salzmänn has killed several suspects while on duty as a Green Bay police officer. Tahdooahnippah Decl. ¶ 6. Also significantly, Officer Salzmänn did not have the tattoos at the time he joined the Green Bay Police Department, i.e., before Officer Salzmänn had shot and killed suspects while working for the Department. Tahdooahnippah Decl. Ex. C 132:18-25. Due to the proximity of the feathers to the tattoo of the American

flag on Officer Salzmänn's forearm, Plaintiffs' counsel first inquired whether the feathers were related to military service:

Q: Have you ever served in the military?

A: No.

Q: All right. And, you know, don't mean to pick on you, truly don't, but the only reason I ask that is because I saw that you had some tattoos on your forearm, like the American flag and some feathers and stuff.

A: Uh-huh.

Q: And so that's in my training and experience something that is often associated with people that are veterans, and particularly people that have killed someone in the line of duty. So is that the significance of those tattoos?

A: These tattoos, I'm very patriotic and they have personal symbolic reason or meaning to me, and that's all I'm going to tell you on that.

Tahdooahnippah Decl. Ex. B. 140:13—141:3.

The answer "I'm very patriotic" could potentially account for a tattoo of an American flag, but does not account for the golden eagle feathers containing red dots. The bald eagle, not the golden eagle, is the national symbol of the United States. Moreover, a red dot within a feather has no patriotic meaning. Therefore, in an effort to accommodate Officers Salzmänn's professed privacy interest, but still obtain information concerning whether the tattoos commemorated an experience in which he killed another person, Plaintiffs' counsel made the following inquiry:

Q: All right. I don't want to pry into your personal life, but I just want to -- does it mean you killed someone?

A: These tattoos have symbolic meaning to me that mean something personal, and that's all I can testify to.

Q: So you can't say whether or not it means that you killed someone?

A: I can. I won't.

Q: Okay. You refuse to answer the question?

- A: I'm answering that these tattoos have symbolic meaning to me that's personal in nature, and that's what I will tell you.
- Q: I'm not trying to pry into your personal life at all. I just want to know whether or not it means you killed someone.
- A: But you are.
- Q: Okay. But can you at least tell me whether or not it means you killed someone?
- A: These tattoos have some personal and symbolic meaning to me, and that's what they're at.
- Q: And you refuse to say anything beyond that?
- A: I'm not going to tell you any more than that.

Tahdooahnippah Decl. Ex. B 141:4-25.¹

Significantly, as evidenced by the deposition transcript, Officer Salzmänn's counsel did not lodge any objections, such as relevance or any privilege, to these questions, nor did he instruct Officer Salzmänn not to answer the questions.

By letter dated January 3, 2020, Plaintiffs' counsel sought Green Bay's agreement to reproduce Officer Salzmänn for a deposition so that he could answer these questions. In the letter, Plaintiffs' counsel noted the significance of the symbols tattooed on Officer Salzmänn's forearm and, in light of the commonly-understood meaning of those symbols, explained the justifiable need for Officer Salzmänn's response to the questions that were propounded but not answered at the deposition. As Plaintiffs' counsel explained, whether

¹ Following Officer Salzmänn's final refusal to answer the question regarding his tattoos, counsel for Plaintiffs proceeded to question Officer Salzmänn on other topics. Near the end of the deposition, Plaintiffs' counsel informed Officer Salzmänn's counsel that that he did not agree to adjourning the deposition unless he received the answers to the questions posed about Officer Salzmänn's tattoos. Tahdooahnippah Decl. Ex. B 144:10-16. Plaintiffs' counsel further placed Officer Salzmänn's counsel on notice of likelihood that he would seek an order to compel answers to the questions regarding Officer Salzmänn's tattoos. *Id.*

Officer Salzmann has celebrated his involvement in previous shootings in the line of duty is a matter of great significance to both his credibility in this case as well as the policies or customs of the Green Bay Police Department concerning supervision of officers and use of deadly force. By letter dated January 7, 2020, Green Bay refused to make Officer Salzmann available for another deposition.

ARGUMENT

A. Standard of Review

It is well-established that “a party may not simply refuse to answer questions” at a deposition. *Patterson v. Burge*, Case No. 03-cv-4433, 2007 U.S. Dist. LEXIS 33102, *12, 2007 WL 1317128 (N.D. Ill. May 4, 2007) (citing *Redwood v. Dobson*, 476 F.3d 462, 467-68, 469 (7th Cir. 2007)); *see also Williams v. Ortiz*, 2017 U.S. Dist. LEXIS 17049, *36, 2017 WL 499996 (Feb. 7, 2017 (“Rule 30(d)(3)(A) does not allow a deponent to refuse to answer a question because he is annoyed.”). Rather, “[d]eposition questions are to be answered notwithstanding an objection.” *Patterson*, 2007 U.S. Dist. LEXIS 33102 at *12.

Rule 37 states that if a party fails to answer a question in a deposition, the discovering party may move to compel an answer. Fed. R. Civ. P. 37(a)(3)(B)(i). Therefore, where a witness refuses, without justification, to answer questions posed in a deposition, courts routinely compel the refusing party to respond to the unanswered question upon motion by the propounding party. *Colon v. Town of Cicero*, 2015 U.S. Dist. LEXIS 101456, *2, 2015 WL 4625003 (N.D. Ill. Aug. 3, 2015) (ordering defendant police officer to “answer the questions with respect to the topics on which he declined to testify at his April 28, 2015 deposition”); *Patterson*, 2007 U.S. Dist. LEXIS 33102 at *13

(ordering plaintiff to “answer Defendants’ counsel’s questions” absent lawful basis for refusing to do so); *Nelson v. Nat’l Republic Bank*, 1984 U.S. Dist. LEXIS 18815, *6, Fed. Sec. L. Rep. (CCH) P91,448 (N.D. Ill. Mar. 7, 1984 (granting motion to compel answer and noting that “in this circuit absent a claim of privilege, it is improper to refuse to answer a question propounded at deposition”).

Rule 37 requires that “the Court award to the prevailing party reasonable expenses incurred in filing a motion to compel discovery, unless the opposing party’s position was ‘substantially justified’ or ‘other circumstances make an award of expenses unjust.’” *Teed v. JT Packard & Assocs.*, Case No. 10-misc-23, 2010 U.S. Dist. LEXIS 86113, *7-8, 2010 WL 2925902 (E.D. Wis. July 20, 2010); *see also* Fed. R. Civ. P. 37(a)(5). Under Rule 37(a)(5), reasonable expenses must be assessed against “the party or deponent whose conduct necessitated the motion, the party or attorney advising such conduct, or both [of them].”

B. The Court Should Compel Officer Salzmann to Appear for Deposition and Answer Questions Regarding his Tattoos.

Officer Salzmann flatly refused to answer the questions propounded by Plaintiffs’ counsel regarding the meaning of the tattoos on his forearm. Rather than stating any legal objection to the questions on the record, either on his own or through counsel, Officer Salzmann simply refused to respond based on his claim that his answer to the questions was “something personal” or “personal in nature.” Tahdooahnippah Decl. Ex. B 141:8-14. He then informed counsel for Plaintiffs that he was “not going to tell you any more than that.” Tahdooahnippah Decl. Ex. B 141:25. In other words, neither Officer Salzmann nor

his counsel claimed his non-response was justified to “preserve a privilege” or “to enforce a limitation ordered by the court” – the only two objections that justify a refusal to answer a deposition question. Fed. R. Civ. P. 30(c)(2).

Furthermore, Officer Salzmänn cannot claim that the questions were made in bad faith or to annoy or embarrass. Officer Salzmänn’s counsel failed to comply with the procedural requirements for pursuing such an objection by moving to limit the deposition pursuant to Rule 30(d)(3). Indeed, whether Officer Salzmänn has tattoos celebrating his participation in officer-involved shootings is plainly relevant to whether Green Bay has a custom of excessive force and whether Green Bay adequately supervises its officers. Furthermore, whether Officer Salzmänn’s tattoos celebrate the shooting of suspects is also plainly relevant to his possible bias as a witness to the fatal shooting of Mr. Tubby, and could serve as a basis for impeaching him during cross-examination. Thus, Officer Salzmänn and his counsel failed to offer any legally supportable basis for refusing to answer the questions regarding the meaning of his tattoos.

Colon v. Town of Cicero is particularly illustrative of the indefensibility of Officer Salzmänn’s refusal to answer the questions posed by Plaintiff’s counsel regarding the meaning of his tattoos. 2015 U.S. Dist. LEXIS 101456, 2015 WL 4625003 (N.D. Ill. Aug. 3, 2015). In that case, like the instant one, a police officer submitted to a deposition in a civil case involving an incident during which police officers shot and killed an individual. *Id.* at *2. The police officer, who was involved in the incident, refused to answer certain categories of questions based on the Fifth Amendment’s protection against self-incrimination and the contention that certain questions exceeded the scope of a previous

court order. *Id.* at *4. The court, in addressing Plaintiffs' motion to compel the police officer's answers, determined that neither of the purported bases for refusing to answer the questions was justifiable, and that Plaintiffs were therefore entitled to re-ask the questions previously refused by the police officer in a second deposition. *Id.* at *5-12.

Here, the circumstances of Officer Salzman's refusal to respond to Plaintiffs questions is even less defensible than the circumstances in *Colon*. During the December 20, 2019 deposition, Officer Salzman's attorney did not state *any objection* to the questions regarding the Salzman's tattoos. Nor did Officer Salzman or his counsel claim the responses to the questions were protected from disclosure by an applicable privilege or confidentiality obligation or previous court order. Blanket refusals to respond to questions in a deposition violate a party's obligations pursuant to Federal Rule of Civil Procedure 30, and warrant the imposition of an order compelling a response. Therefore, because Officer Salzman offered no supportable basis under the Federal Rules of Civil Procedure to refuse to answer the questions, much less even state a formal objection to the propounded question, Officer Salzman must be compelled to appear in a continued deposition and ordered by the Court to answer questions regarding his tattoos.

C. Plaintiffs are Entitled to Sanctions.

Plaintiffs are entitled to sanctions for costs incurred in preparing this motion. Rule 37 states that if a motion to compel is granted, "the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion . . . to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed R. Civ. P. 37(a)(5). Rule 37 offers only three exceptions to the general rule that

the resisting party must pay the discovering party's costs in a successful motion to compel. Specifically, "the court must not order this payment if: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust."

Here, none of the three exceptions apply. First, Plaintiffs attempted in good faith to obtain Officer Salzmann's responses to the questions regarding the meaning of his tattoos prior to filing this motion. Tahdooahnippah Decl. ¶ 8. Second, as set forth in Section II above, Officer Salzmann's refusal to answer the questions was not substantially justified. Officer Salzmann offered no basis to refuse to answer the questions, much less an arguable claim of privilege or court protection that would provide a justifiable basis for refusing to answer the questions. Third, the simple and straightforward nature of this dispute raises no compelling issues that weigh against the award of costs, or that would render the award of costs unjust. Plaintiffs' counsel respectfully propounded the questions to Officer Salzmann regarding the meaning of his tattoos at the deposition, calmly reiterated the questions numerous times to afford Officer Salzmann a reasonable opportunity to satisfy his obligations as a deponent, and attempted to accommodate Officer Salzmann's concerns about sharing personal information in response to the questions by recasting them in a way that would allow him to answer in a "yes" or "no" format. At each turn, Officer Salzmann refused to answer. Accordingly, no special factors weigh against the Court following the default rule awarding sanctions to the discovering party in a successful motion to compel.

Furthermore, the Court should also require Officer Salzmann and Green Bay to pay the costs associated with continuing the Salzmann deposition. Courts routinely award the costs associated with attending a second deposition in circumstances such as these. *Miles Distribs., Inc. v. Speciality Constr. Brands, Inc.*, Case No. 04-cv-561, 2005 U.S. Dist. LEXIS 11061, *8, 2005 WL 8170730 (N.D. Ind. June 3, 2005) (Rule 30(d)(3) “allows a court to impose sanctions, in the form of reasonable costs and attorney’s fees, upon a finding that any impediment or other conduct has frustrated the fair examination of the deponent.”); *Maxwell v. S. Bend Work Release Ctr.*, 2010 U.S. Dist. LEXIS 114462, *18, 2010 WL 4318800 (N.D. Ind. Oct 25, 2010) (“request for videographer and court reporter costs” for continued deposition is “normally [] award[ed]”); *Duncan v. Pierce*, Case No. 07-cv-4028, 2008 U.S. Dist. LEXIS 86872, *21, 2008 WL 4724281 (C.D. Ill. Oct. 24, 2008) (“the court will order the plaintiff to reimburse the defendants the cost of the second deposition”); *Whitewater West Indus. v. Pac. Surf Designs, Inc.*, 2018 U.S. Dist. LEXIS 96970, *21 (S.D. Cal. June 8, 2018) (because Plaintiff’s conduct at the first deposition “is the reason a second deposition is needed, Plaintiff is ordered to pay the costs of [the] follow-up deposition.”).

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs’ motion to compel, order that Officer Salzmann appear for a continued deposition on the limited topic of the meaning of the tattoos on his forearm, order Officer Salzmann to answer all questions on that topic, and award sanctions in favor of Plaintiffs for their costs and attorneys’ fees incurred in preparing this motion and in continuing Officer Salzmann’s deposition.

Dated: January 14, 2020.

By /s/ Forrest Tahdooahnippah

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