UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

AFT Michigan, Jane Doe 1 and Jane Doe 2,

Plaintiff,

Case No.
HON.
Magistrate

v.

The State of Michigan, The Michigan Department of State Police and the Michigan Department of Education,

Defendants.

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Brief in Support of Motion for Temporary Restraining Order and Temporary Injunction

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Introduction

Plaintiffs move for temporary relief to restrain an irreparable injury to their liberty interest. The Court should restrain the Defendants from releasing a list of persons who have allegedly been convicted of a crime because the list is wholly inaccurate. Without judicial intervention, a large number of individuals will lose employment or the opportunity to practice their profession.

The Parties

Plaintiff AFT Michigan is a labor organization. It is the Michigan affiliate of the American Federation of Teachers, AFL-CIO. AFT Michigan brings this action on behalf of its 35,000 members. Plaintiffs Jane Doe 1 and Jane Doe 2 are individuals. They are employees of a Michigan Board of Education. Each has been informed that their name appears on a list of persons allegedly convicted of serious crime. Neither Plaintiff has ever been convicted of any offense.

The Defendants are the State of Michigan and two Departments in the Executive Branch of the State, the Department of State Police and the Department of Education.

The Facts

A. 2005 PA 130

In 2005, the Michigan Legislature addressed what it believed to be a problem regarding the employment, in the public schools, of persons convicted of serious offenses. The Legislature adopted several bills which, together, required the immediate discharge of any school employee who had been convicted of an offense which would require their name to be posted on Michigan's Sex Offender Registration List pursuant to the Sex Offender Registration Act, MCL 28.722. In addition, the Legislature allowed, but did not require, the discharge of any

person who had been convicted of other felonies. Plaintiff AFT Michigan did not oppose the concept behind the legislation. However the execution of the law has proved to cause very serious harm never intended by the Legislature.

2005 PA 130 contains a provision requiring every Michigan Board of Education to request the Defendant Department of State Police to conduct a check of employees of that Board of Education to determine whether the employee had been convicted of a crime. In addition, the Department of Education is required, through the Superintendent of Public Instruction, to monitor such convictions.

The statute reads, in pertinent part:

> "*If the results received* by a school district, intermediate school district, public school academy, or nonpublic school under subsection (7) disclose that an individual has been convicted of a *listed offense*, then the school district, intermediate school district, public school academy, or nonpublic school *shall not employ* the individual in any capacity, as provided under section 1230c, and shall not allow the individual to regularly and continuously work under contract in any of its schools. If the results received by a school district, intermediate school district, public school academy, or nonpublic school under subsection (7) disclose that an individual has been convicted of a *felony other than a listed offense*, then the school district, intermediate school district, public school academy, or nonpublic school *shall not employ* the individual in any capacity or allow the individual to regularly and continuously work under contract in any of its schools *unless* the superintendent or chief administrator and the board or governing body of the school district, intermediate school district, public school academy, or nonpublic school each specifically approve the employment or work assignment in writing. As used in this subsection, 'listed offense' means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722."

The scheme of the law is this: a local Board of Education must, on receipt of the list, classify all its employees into three categories: those who are not on the list (requiring no action); those on the list convicted of SORA offenses (requiring immediate discharge) and those on the list convicted of other felonies (requiring a decision to retain or not retain).

B. The Erroneous List

As required by the law, the Department of State Police conducted a record search for all persons employed in public schools. The Department prepared a list. This list is rife with error. *It is filled with the names of persons who have never been convicted of any crime.*

A very large number of Michigan school employees have been confronted by their employers with the news that they have convictions of various sorts. Some have been told that they have been convicted of SORA offenses. For many of these people, the statement was shocking because it was, utterly, false. These individuals have a pristine personal record with no convictions save, in some cases, traffic tickets.

The statute was intended to extend only to persons who were actually convicted of serious offenses. However, as applied, the statute has jeopardized the employment of many persons who have never been convicted of anything. Further, the actual words of PA 130 make the termination of any person necessary *even if they are innocent.* The Act states the Board of Education must act based "on the results received." That means that some local boards will feel it necessary to discharge a person whose name appears on the list whether or not their inclusion is erroneous.

It is clear that the Department of State Police has promulgated a list that is outrageously inaccurate. One can concede that the same was not the Department's objective. But the result is the same. A large number of people face termination of their employment although they are guilty of nothing. As applied, 2005 PA 130 is unconstitutional because it deprives a large number of people of a liberty interest without due process of law.

C. The Irreparable Injury

A myriad of public employees face discharge unless the Court intervenes to require the Department of State Police to prepare a proper list. The Department of State Police and Department of Education have promulgated the list to the nearly 550 Michigan school districts. Local Boards of Education are considering the list as this is written.

Teachers and other school employees are faced with the probability that they will be branded, labeled as a felon, because their name appears on an inaccurate list. No amount of publicity after the fact can prevent this injury. Once labeled, a teacher may never be able to regain the confidence of students and parents.

Further, teachers and school employees are faced with the distinct possibility that they will be discharged because their name appears on an inaccurate list. 2005 PA 130, section 1230g(8), requires a local Board of Education to act on the list ("results received"), not on the truth. Therefore, a local school board is required to terminate a person whose name appears on the list whether or not they were actually convicted. Here, "actual innocence" is irrelevant. That may not have been the intent of the Michigan Legislature, but that is what was adopted and signed into law.

Argument

A. The Court Should Find 2005 PA 130 to be Unconstitutional as Applied

Michigan Public Act 130 of 2005 violates the substantive due process rights of public school employees who have been mistakenly included on the State Police list of sex offenders. The Act implicates the liberty and property interests of school employees who have been included on the list but who have not been convicted of an offense. The law infringes on liberty interests by stigmatizing those who are wrongfully included on the list. The law also infringes on the teachers' liberty and property interests in continued employment by requiring the public school employer to discharge those employees merely because their names appear on the list.

(1) The "Stigma Plus" Test

Under a test that has been nicknamed "stigma plus," the Court may find that an inaccurate labeling of a person as having been convicted of a crime violates the person's liberty interest if there is also a probable loss of a tangible interest.

It is clear that the truthful inclusion on a sexual offender registry list, alone, does not violate the offender's due process rights. Courts have rejected both procedural and substantive due process challenges to sex offender registration lists where the offender could not establish constitutional deprivation. Those decisions are, however, distinguishable from this complaint. However, here, Plaintiffs can demonstrate that they should not be included on the list and that their inclusion harms their reputation and threatens their employment.

In *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), Plaintiffs challenged a state law similar to Michigan's sex offender registry law. Plaintiffs asserted that they were deprived of their procedural due process because the Connecticut law did not provide for a current determination of their danger to society. The Court found that the Plaintiffs were

not entitled to procedural due process because the sex offender list merely stated the fact that the offenders had previously been convicted, not that they were currently dangerous.

In reaching its conclusion that the Connecticut law did not violate the due process rights of the convicted sex offenders, the Court held that a *injury to reputation alone* does not constitute a deprivation of a liberty interest. 538 U.S. at 6-7. The Court found it unnecessary to determine whether the law deprived the Plaintiff of a liberty interest because of its finding that no process was due. *Id.* at 7.

In *Fullmer v. State Police*, 360 F.3d 579 (6th Cir., 2004), the United States Court of Appeals for the Sixth Circuit explained that in order to demonstrate a due process violation, a Plaintiff must show both the stigma of damage to reputation and harm to another interest cognizable under the constitution. *Fullmer, supra*, 581.

The Court in *Connecticut Department of Public Safety*, expressly reserved the question whether inclusion on a sex offenders list would violate the offender's substantive due process. Previously, in *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir., 1999), the Sixth Circuit made clear that the mere listing sex offenders on a state registry does not violate their substantive due process absent additional impact on liberty or property interests.

In *Cutshall*, Plaintiff was a convicted sex offender subject to Tennessee's sex offender registry law. He, inter alia, claimed that the registry harmed his reputation and deprived him of employment. The Court, applying the stigma plus test, acknowledged that the combination of harm to his reputation and deprivation of employment would satisfy the stigma plus test. *Id.* at 479. The Court found that the list's propensity to make him less attractive to employers was not a deprivation of employment and denied his due process challenge. *Id.* at 480.

(2) Untruthful Information

In *Connecticut Department of Public Safety*, *Fullmer* and *Cutshall* there was no question whether the Plaintiffs had been convicted of a sex offense. That is not the case here and the fact that Plaintiffs here have not been convicted makes this dispute qualitatively different from those precedents.

In *Doe v. Sturdivant*, 2005 U.S. Dist. Lexis 25891 (E.D. Mich., 2005), Judge Nancy G. Edmunds found the truthfulness of the purported conviction to be very relevant. Although Judge Edmunds determined that youthful offenders who had been listed on the Michigan Sex Offenders list had not demonstrated a due process violation, she found significant that the complaint alleged that the Plaintiff had been listed but had not been convicted. *Id.* at 19. The Judge found prior case law would be distinguishable if "the state is not, technically, publishing truthful information, as Plaintiffs have not in fact been 'convicted' of sex offenses." The *Sturdivant* Plaintiffs, however, were asserting a constitutional right of privacy as their additional interest. The Court determined that Plaintiffs had no privacy right and did not reach the issue of the truthfulness of the reported conviction.

Where the State untruthfully lists a teacher as a sexual offender it violates that teacher's due process if inclusion on that list harms the teacher's reputation and harms another liberty or property interest.

(3) 2005 Public Act 130 is Unconstitutional as Applied

2005 Public Act 130, requires the Department of State Police to prepare a list of school employees whose names appear on the Michigan Sex Offenders Registration list. Each pubic school is required to review the list and discharge any teacher whose name appears on the list. The discharged teacher is immediately terminated.

Plaintiffs in this dispute are improperly listed as having been convicted of listed sex offense. These wrongly listed teachers are distinguishable from the convicted sex offenders in *Connecticut Department of Public Safety, supra*, and *Fullmer, supra*. The wrongly listed Plaintiffs have not been convicted of a listed offense.

Plaintiffs are distinguishable from the youthful offenders in *Sturdivant* because Plaintiffs here have suffer cognizable harm under the stigma plus test. Their inclusion on the background check list will have a dramatic impact on their reputations in their school districts. Additionally, they will suffer immediate discharge without an opportunity to prove innocence in a predischarge proceeding.

Clearly, deprivation of employment has been recognized as an constitutional interest under the stigma plus test. *Fullmer, supra*, 581, *Cutshall*, at 479-80. That deprivation must be more than hypothetical. Here, unlike *Cutshall*, the deprivation of employment is the act's requirement that a teacher be immediately discharged for appearing on the list.

As applied, 2005 PA 130 is unconstitutional to the extent that it requires the discharge of a public school employee who is not, in fact, guilty of any offense. Further, the distribution of the list creates such a stigma that the person may not be able to teach or work in a school. This combination of stigma and potential loss of employment is a deprivation of a critical right–the right to be protected from false light. None of the affected persons has been convicted of anything. But they face loss of employment nonetheless.

B. Alternately, the Court Should Issue a Writ of Mandamus

The Court may view 2005 PA 130 as unconstitutional. Or it may choose to avoid finding the law unconstitutional and instead read it to require the Department of State Police

to prepare a competent list. Exercising pendent jurisdiction, the Court may consider issuing a writ of mandamus to require the Department to do its job properly.

Under Michigan law, a writ of mandamus is proper where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial and involves no exercise of discretion or judgment, and (4) no other remedy exists, legal or equitable, that might achieve the same result. *Lickfeldt v. Department of Corrections,* 247 Mich. App. 299, 302 (2001).

Here the Plaintiff and persons represented by AFT Michigan have a clear right to expect that the Department of State Police will do its job competently and avoid creating a list which wrongly condemns innocent persons. The Department has a clear statutory duty to create the list. And the creating of the list is ministerial; it involves not judgment (judgment is required regarding the method of preparation but Plaintiffs do not seek to impose a specific method on Defendants, only one which will result in an accurate list). Finally, there is no other remedy to Plaintiffs; they will be branded by the list unless something is done.

C. An Injunction Should Issue

An injunction should be issued because, without intervention of the Court, a large number of people will be stigmatized and will wrongly lose their employment.

An injunction is an equitable remedy. The Supreme Court has repeatedly held that the basis for injunctive relief in the federal courts is irreparable injury and the inadequacy of legal remedies. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). In such cases, the court "balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Id* .

It is well established that there are four factors to be weighed in considering a request for injunctive relief. They are:

> "1. Whether the movant has shown a strong or substantial likelihood or probability of success on the merits.
>
> 2. Whether the movant has shown irreparable injury.
>
> 3. Whether the preliminary injunction could harm third parties.
>
> 4. Whether the public interest would be served by issuing the preliminary injunction."

See *Planned Parenthood Ass'n v. Cincinnati*, 822 F.2d 1390, 1400 (6th Cir., 1987)

(1) Likelihood of Success

In *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150 (6th Cir., 1991), the court noted that "the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury". However, the movant must show more than the mere "possibility" of success. Even if the balance of hardships decidedly favor the movant, he or she must still show "serious questions going to the merits." *Id.*

Here, the injury to be suffered is great. The releasing of the erroneous list will cause incredible harm that can never be remedied. Falsely branded as felons, teachers and other school employees may lose their jobs; even if they do not, they will never be able to recover their reputation.

Plaintiffs have a high likelihood of success because they can demonstrate that the publication of the inaccurate list will so harm them that the list, itself, is a deprivation of their liberty interest.

(2) Irreparable Injury and Harm to Third Parties

In evaluating the harm that might occur either to the movant or to third parties the court will generally look to three factors: "(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150 (6th Cir.,1991). Additionally, the court should consider whether the conduct the movant seeks to enjoin is truly necessary to serve the legitimate interests of the Defendant. In *Oil, Chemical and Atomic Workers International Union v. Amoco Oil*, 885 F.2d 697, 708 (10th Cir., 1989), the court held that:

> "the attenuation of the relationship between Amoco's legitimate interests in implementing a drug testing program and the actual scope of the program makes the potential invasion of privacy especially egregious."

In evaluating the degree of injury to the movant, the key word in this consideration is "irreparable." *Sampson v. Murray,* 415 U.S. 61 (1973). The fact that an individual may lose his income for some extended period of time does not result in irreparable harm, as there is a legal remedy in the form of back pay. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566 (6th Cir., 2002). The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs against a claim of irreparable harm. *Sampson v. Murray,* 415 U.S. 61 (1973). In addition, the harm alleged must be both certain and immediate, rather than speculative or theoretical. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150 (6th Cir., 1991).

In *Oil, Chemical and Atomic Workers International Union v. Amoco Oil*, 885 F.2d 697, 708 (10th Cir., 1989), the court held that the humiliation and invasion of privacy and damage to reputation caused by the company's drug testing program was precisely the type of irreparable harm that would warrant injunctive relief. The 6th Circuit has also made it clear that

a violation of First Amendment rights, even for a short time, causes irreparable harm. *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, (6th Cir.,2002). See also *Planned Parenthood Ass'n v. Cincinnati*, 822 F.2d 1390, 1400 (6th Cir., 1987) ("We agree with the district court, however, that there is potential irreparable injury in the form of a violation of constitutional rights.")

Under Michigan law, it is per se defamatory to falsely assert that a person has either committed a crime or has been found guilty of a crime. If the Defendants were not state actors (and thereby immune), Plaintiffs could sue any local Board of Education which published a false statement accusing them of an offense. Given that, it should appear clear that the accusation is per se an irreparable injury.

(3) Public Interest

The public interest clearly favors the prevention of unconstitutional harm, particularly since the Defendants legitimate interests in protecting school children are ill served by the actions that the Plaintiffs seek to enjoin. In *Planned Parenthood Ass'n v. Cincinnati*, 822 F.2d 1390, 1400 (6th Cir., 1987), the court held that since there was a likelihood that the Ordinance would be found unconstitutional, it was questionable whether the City had any "valid" interest in enforcing it. The public interest would be served by issuing an injunction "since the public is certainly interested in the prevention of enforcement of ordinances which may be unconstitutional."

Relief Sought

The Court should order the Defendants to refrain from releasing the current list to anyone and further require them to recall any copies that have been previously distributed. Defendant Department of Education has the authority to direct the destruction of the list or return of the list to it. The Court should issue such an order.

Pending a hearing on Plaintiffs' request for a temporary injunction, the Court should issue a temporary restraining order requiring the above relief. No harm will come to any Defendant nor will any local school district suffer any injury while this matter is pending. By contrast, unless the Court grants such relief, the Plaintiffs' claim will be moot; the damage will be done. Accordingly, the Court should act promptly to maintain the status quo until a hearing can be conducted.

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