

## Keyes v. Sessions

2017

Hon. John E. Jones III.

Presently pending before the Court are cross motions for summary judgment. (Docs. 80, 89). Both motions have been fully briefed (Docs. 81, 87, 97 att. 4, 98 att. 1) and are therefore ripe for our review. For the reasons that follow, we shall grant summary judgment in favor of the Plaintiff.

Plaintiff Michael Keyes is a former U.S. Air Force Airman 1st Class and former Master Trooper with the Pennsylvania State Police ("PSP"). (Doc. 82, ¶ 1). Keyes was involuntarily committed as an adult to Holy Spirit Hospital from August 25, 2006 to September 8, 2006 after consuming numerous alcoholic beverages and making suicidal statements following an emotional divorce. (*Id.*). As a result of his involuntary commitment, Plaintiff lost his federal and state private capacity firearm rights by operation of 18 Pa.C.S.A. § 6105(c)(4) and 18 U.S.C. § 922(g)(4).

Despite his loss of private capacity firearm rights, Keyes returned to the PSP after his hospitalization where he possessed and utilized firearms while on duty as a Master Trooper. (*Id.*, at ¶ 3). Keyes received performance evaluations of "outstanding" and qualified in the top of his class with several firearms, including a fully automatic AR-15 select fire rifle, a Remington 870 12 gauge shotgun, a Sig Sauer 227 handgun, and a Glock 37 handgun. (*Id.*).

On December 3, 2008, Keyes filed for restoration of his state private capacity firearm rights with the Perry County Court of Common Pleas, pursuant to 18 Pa.C.S. § 6105(f). (*Id.*, at ¶ 4). The court issued a memorandum and order, finding "that Petitioner has in fact met his burden of showing that he may possess a firearm without risk to himself or any other person under the applicable provisions of law." (*Id.*). The court therefore issued an order relieving Keyes of his state firearm disability. (Doc. 22, ¶ 26). Keyes had also requested expungement of his involuntary commitment so that his federal firearm disability would be relieved, but the court held that it did not have the power to do so. (*Id.*). Keyes appealed the denial of expungement to the Superior Court, which affirmed the ruling. *In re Keyes*, 83 A.3d 1016, 1024 (Pa. Super. Ct. 2013), *appeal denied*, 627 Pa. 766, 101 A.3d 104 (Pa. 2014). In his appeal, Keyes raised a Second Amendment challenge, arguing that 18 U.S.C. § 922(g)(4) violates the Second Amendment as applied to him. *Id.*, at 1021. The Superior Court rejected this argument. *Id.*, at 1028.

On March 5, 2015, Keyes . . . filed a Complaint with this Court alleging, among other things, that 18 U.S.C. § 922(g)(4) violates the Second Amendment as applied to [him]. . . .

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As discussed further *infra*, resolution of the cross motions for summary judgment requires the Court to analyze whether Keyes can present facts to distinguish himself from the historic class of persons who have been barred from firearm possession due to involuntary commitments. To this end, we must consider Keyes' medical history and commitment background. Defendants cite extensively to Exhibits 1 and 2, attached to their statement of undisputed material facts, in describing Keyes' mental health history to argue that he is not entitled to Second Amendment rights. (Doc. 885, Ex. 1, 2). Exhibits 1 and 2 are portions of Keyes' health records, obtained by Defendants through subpoenas in discovery and relied upon by Defendants in their briefings. Keyes objects to our consideration of these exhibits on five grounds, but thoughtfully submitted a protectionary response to Defendants' statement of undisputed material facts in the event that we do consider the exhibits. (Doc. 97, att. 1) (Doc. 100).

First, Keyes requests the Court to strike these exhibits due to Defendants' failure to comply with the protective order in this matter. (Doc. 91, att. 1). As background, we issued a protective order on February 6, 2017 governing the use of certain protectable information in this litigation. (Doc. 66). The protective order provides:

Three (3) days prior to the filing of any Protectable Information in this litigation, Defendants shall identify such information to Plaintiff Keyes. If Plaintiff Keyes objects to the use of such information, Defendants shall file such information under seal and highlight such information for the Court as "subject to discovery dispute." The parties shall then confer in good-faith effort to resolve the dispute, and, if unable to resolve the dispute, shall present their positions to the Court in an appropriate manner for judicial resolution.

(Doc. 66, ¶ 7(e)). Defendants "inadvertently erred" by not identifying Exhibits 1 and 2 to Keyes prior to filing, but did file the information under seal. (Doc. 98, att. 2, ¶ 5). Keyes requests that we do not consider the exhibits due to the failure to disclose. (Doc. 97, att. 1, ¶ 12). While we understand Keyes' frustration in not being able to respond with objections to specific, highlighted sections of the exhibits, we will deny his request to strike them outright. Instead, we will consider Keyes' remaining four evidentiary objections in light of each portion of the exhibits that we consider.

Second, Keyes argues that Exhibits 1 and 2 contain psychiatric relations and communications privileged and confidential pursuant to 42 Pa.C.S. § 5944. (Doc. 97, att. 1, ¶ 13(a)). This statute represents the psychiatrist-patient privilege under Pennsylvania law. However, Federal Rule of Evidence 501 explicitly states that federal common law privileges apply in cases arising under federal law. FED. R. EVID. 501. As this case arises under the Second Amendment to the United States Constitution, federal common law privileges apply and 42 Pa.C.S. § 5944 is inapplicable. Federal common law does indeed recognize a psychotherapist-patient privilege. *Jaffee v. Redmond*, 518 U.S. 1, 12, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996).

Nevertheless, "the patient may of course waive the protection." *Id.*, at 15, n.14, 116 S.Ct. 1923. Courts in our district have long held that "[w]hen a plaintiff puts [his] mental health at issue in a civil law suit... [he] impliedly waives the protection of the privilege." *Smith v. Cent. Dauphin Sch. Dist.*, 2007 WL 188569, at \*2 (M.D. Pa., Jan. 22, 2007). Keyes has certainly placed his mental health at issue in pursuit of his as-applied challenge to § 924(g)(4). Keyes is, of course, well aware of this reality, as he states in his brief that the reason for his challenge is "because there is no reasonable procedure pursuant to which an individual could regain their Second Amendment Rights *upon demonstrating their current mental and emotional fitness*." (Doc. 81, p. 2) (emphasis added). He argues that his "background is easily distinguishable from those who are *currently* mentally ill." (*Id.*, at p. 21). This claim puts Keyes' mental health at issue as we are tasked with determining its veracity. As such, Keyes has waived his psychotherapist-patient privilege.

Third, Keyes argues that Exhibits 1 and 2 constitute privileged information pursuant to the doctor-patient privilege codified at 42 Pa.C.S. § 5929. (Doc. 97, att. 1, ¶ 13(b)). Again, Pennsylvania privileges are not applicable in this matter, and "the federal common law does not recognize a more general physician-patient privilege." *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 131 (E.D. Pa. 1997) (citing *Whalen v. Roe*, 429 U.S. 589, 602 n. 28, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *U.S. v. Colletta*, 602 F.Supp. 1322, 1327 (E.D.Pa.), *aff'd*, 770 F.2d 1076 (3d Cir. 1985)). Moreover, even if we were to apply the Pennsylvania physician-patient privilege, we would hold that Keyes has waived this privilege for the same reason that he has waived his psychotherapist-patient privilege.