IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FAIR FIGHT ACTION, INC. et al.,	
Plaintiffs,	**CIVIL ACTION FILE**
v.	**No. 1:18-CV-05391-SCJ**
BRAD RAFFENSPERGER, et al.,	
Defendants.	

CORRECTED ORDER

(*This Order is reissued to correct a typographical error to delete footnote 10.)

This matter appears before the Court on Defendants' Brief Concerning Deposition Designations. Doc. No. [780].[1] Plaintiffs responded in opposition. Doc. No. [784].

"[A] trial judge sitting without a jury is entitled to even greater latitude concerning the admission or exclusion of evidence." Goodman v. Highlands Ins.

---

[1] All citations are to the electronic docket unless otherwise noted, and all page numbers are those imprinted by the Court's docketing software.

Co., 607 F.2d 665, 668 (5th Cir. 1979) (citing Wright v. Southwest Bank, 554 F.2d 661 (5th Cir. 1977));[2] see also Lee v. Russell Cnty. Bd. of Educ., 684 F.2d 769, 776 n.5 (11th Cir. 1982) (stating that the court has "broad discretion over the admission of evidence in a bench trial").

I. CAMPAIGN STATEMENTS

Defendants argue that Governor Kemp's campaign statements should be excluded because they are irrelevant under Fed. R. Evid. 401. Doc. No. [780], 4. Defendants also argue that campaign speech should be inadmissible because it will functionally chill free speech. Id. at 4–5.

Plaintiffs responded by arguing that Governor Kemp's campaign statements are relevant to show discriminatory intent because the statements were made while the Governor was serving as the Secretary of State. Doc. No. [784], 5–6. Plaintiffs also argue that the First Amendment does not prohibit the use of speech to prove motive or intent, especially in election cases. Id. at 8–9.

As the Court noted in its March 31, 2021 Summary Judgment Order,

---

[2] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions rendered prior to the close of business on September 30, 1981 by the United States Court of Appeals for the Fifth Circuit.

> [t]here does not appear to be a case on point that addresses the exact context that is presented in the case *sub judice*, as the cases cited by Defendants were not Fifteenth Amendment cases and the cited dissenting opinion is not binding authority. The Court also recognizes that in the non-voting rights class of cases/discrimination context, the Supreme Court has noted disagreement among the Justices as to whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, ___ U.S. ___, 138 S. Ct. 1719, 1730 (2018) (considering religious discrimination).[3] .... [T]he Supreme Court Justices' noted disagreements concerning lawmaker statements in the Masterpiece Cakeshop case, the Court perceives that the law is unsettled on consideration of statements, such as the one at issue involving campaign speech.

Doc. No. [617], 73–74.

In bench trials, the judge serves as the sole factfinder and weighs the evidence, evaluates the credibility of witnesses, and decides questions of fact and

---

[3] There is some Eleventh Circuit precedent on discriminatory statements in the Fifteenth Amendment context; however, the speech at issue in those cases was not campaign speech. See, e.g., Greater Birmingham Ministries, 966 F.3d at 1227 (indicating that the racist comments of the lawmaker, while not condoned under any circumstances, need to be "made about the law at issue in this case" to evidence discriminatory intent behind the law); NAACP v. Stallings, 829 F.2d 1547, 1552 (11th Cir. 1987) (concluding that the speech made by the sponsor of legislation during legislative session "was evidence of an intent to discriminate against black voters in any voting legislation before the General Assembly during that session, and that a finder of fact might well infer that such intent continued until 1951 when the bill was re-introduced under the same sponsorship").

issues of law. See Childrey v. Bennett, 997 F.2d 830, 834 (11th Cir. 1993) (holding that "it is the exclusive province of the judge in non-jury trials to assess the credibility of witnesses and to assign weight to their testimony"). Accordingly, the Court will allow Plaintiffs to introduce evidence of Governor Kemp's campaign statements. The Court will give said evidence the weight that it deems appropriate in the context of issuing its findings of fact and conclusions of law.

II. IMPUTING SETH HARP'S TESTIMONY TO THE STATE ELECTION BOARD

Defendants argue that Mr. Seth Harp's testimony should be excluded as inadmissible hearsay and should not be imputed to the State Election Board ("SEB"). Doc. No. [780], 7–10. Defendants argue that Mr. Harp is not a party to this action; therefore, his testimony is hearsay and is not exempted as a statement by a party opponent. Id. at 8–9. Second, Defendants argue that Mr. Harp's testimony cannot be imputed to the SEB because Mr. Harp was not deposed as a 30(b)(6) witness. Id. Third, Defendants argue that Mr. Harp's testimony cannot be imputed to the SEB because Mr. Harp could not control or direct the SEB. Id. at 9–10.

Plaintiffs respond by arguing that Mr. Harp's testimony is admissible under Federal Rule of Evidence 801(d)(2)(D) as a statement of a party opponent

and Federal Rule of Civil Procedure 32(a)(3). Doc. No. [784], 11–13. More specifically, Plaintiffs assert that Mr. Harp's deposition testimony is a statement by a party opponent because Mr. Harp was a member of the SEB (on October 16, 2019) when he was deposed, and his testimony was within the scope of his relationship with the SEB. Doc. No. [784], 11–13. Plaintiffs also argue that Mr. Harp's testimony can be imputed to the SEB because he "was a sitting member of the SEB at the time of his deposition, with voting powers that directly implicated the SEB's own decision-making powers." Id. at 12. Plaintiffs further state that "[h]e was thus involved in the SEB's decisions to issue (or not issue) rules related to voting and elections administration and in SEB investigations (or lack thereof) into voter complaints." Id. As for Rule 32(a)(3), Plaintiffs assert that Mr. Harp's testimony is admissible for much of the same reasons as their Rule 801(d)(2)(D) arguments. Id. at 14.

Pursuant to Federal Rule of Evidence 801(d)(2)(D), a statement is not hearsay when it "is offered against an opposing party and . . . was made by the party's agent or employee on a matter within the scope of the relationship and while it existed." Fed. R. Evid. 801(d)(2)(D). Rule 801(d)(2)(D) "simply requires that the statement be made by an individual who is an agent, that the statement

be made during the period of the agency, and that the matter be within the subject matter of the agency." Young v. James Green Mgmt., Inc., 327 F.3d 616, 622 (7th Cir. 2003) (citing Nekolny v. Painter, 653 F.2d 1164, 1171–72 (7th Cir. 1981)). "Generally, there is no requirement that the agent have specific authority to make a statement on the subject." Young, 327 F.3d at 622 n.2.[4] "[T]he [relevant] inquiry is whether [the deponent] was authorized to act for his principal . . . concerning the matter about which he allegedly spoke." Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1566 (11th Cir. 1990).

First, the Court finds that Mr. Harp was an agent of the SEB. While Rule 801(d)(2)(D) does not define the term "agent," the Eleventh Circuit has applied

---

[4] As stated by the Eleventh Circuit,

> We recognize, as suggested in the Notes of the Advisory Committee, that Rule 801(d)(2)(D) broadened the traditional view so that **it is no longer necessary to show that an employee or agent declarant possesses "speaking authority," tested by the usual standards of agency law, before a statement can be admitted against the principal.** See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(2)(D)[01], at 801–280–89 (1990); S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 727 (4th ed. 1986). **But it is necessary, in order to support admissibility, that the content of the declarant's statement concerned a matter within the scope of his agency.**

Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1565 (11th Cir. 1991) (emphasis added).

general common law principles of agency in this context. See City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 558 n.9 (11th Cir. 1998 ("Because Fed. R. Evid. 801(d)(2)(D) does not define the term 'agent,' we must assume that Congress intended to refer to general common law principles of agency when it used the term.");[5] cf. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989) ("In past cases of statutory interpretation, when we have concluded that Congress intended terms . . . to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms."); Harcros Chems., 158 F.3d at

---

[5] Defendants argue that Mr. Harp is not an agent of the SEB because he did not "on his own, have any ability to control or direct the [SEB] on any matter." Doc. No. [780], 9–10. Plaintiffs also applied the standard that defines an agent as someone "involved in the decisions at issue." Doc. No. [784], 11–12. It appears to the Court that the Eleventh Circuit has not utilized decision-maker/Rule 801(d)(2)(D) tests outside of the adverse employment action, which is not at issue in the case *sub judice*. See Kidd v. Mando Am. Corp., 731 f.3d 1196, 1209 (11th Cir. 2013) (citing Rowell v. Bell South, 433 F.3d 794, 801 (11th Cir. 2005)) ("for purposes of Rule 801(d)(2)(D), the record needs to reflect 'some kind of participation in the employment decision or policy of the employer.'"); see also Calvert v. Doe, 648 F. App'x 925, 928 (11th Cir. 2016) (holding that statements were inadmissible because "there is no evidence that [the declarant] was 'consulted by. . . management' or 'otherwise included in the decisionmaking process.'"). However, when the Eleventh Circuit evaluated the definition of "agent" outside of the employment context, the Court held that the general common law definition of "agent" applies. Harcros Chems., 158 F.3d at 558 n.9. Because this case does not involve an adverse employment action, the Court applies the "agency" test from Harcros Chems., not the decision-maker test from Kidd. Cf. Young, 327 F.3d at 622 n.2 (noting this same distinction in the Seventh Circuit's jurisprudence).

557 n.9 (quoting 2A C.J.S. *Agency* § 4 (1972)) ("An agent is . . . a person employed or authorized by another to act for him, or to transact business for him[, or] one entrusted with another's business . . . .").

Persuasive authority from which this Court draws guidance indicates that in other contexts, members of government (and other) boards were considered agents for purposes of Fed. R. Evid. 801(d)(2)(D). See Krause v. Kelahan, --- F. Supp. 3d ---, 2021 WL 5876678, at *5 (N.D.N.Y. Dec. 13, 2021) (finding that out-of-court statements made by members of the school board are admissible under Fed. R. Evid. 801(d)(2)(D) because the members were significant participants in the process of firing the plaintiff); McCants v. Metal Servs. LLC, No. 13-00393-KD-M, 2014 WL 5488824, at *6 (S.D. Ala. Oct. 29, 2014) (admitting board member's statements under Fed. R. Evid. 801(d)(2)(D) because a board member is an agent of defendant); Carl v. Fulton Cnty., No. 1:07-CV-1812-WBH-AJB, 2008 WL 11322929, at * 18 (N.D. Ga. Dec. 16, 2008) ("a board member[] is an agent of Fulton County[]"). Adopting and applying persuasive authority, the Court concludes that Mr. Harp's status as a member of the SEB makes him an agent of the SEB for purposes of consideration of his deposition testimony.

Second, the Court finds that Mr. Harp's deposition occurred during the period of agency. Plaintiffs have proffered that Mr. Harp was deposed on October 16, 2019 while serving as a member of the SEB. Doc. No. [755-2] (Harp Dep. Tr.), 2.[6] Because the deposition occurred during Mr. Harp's term on the SEB, the testimony occurred during the period of agency.

Finally, the Court concludes that Mr. Harp's testimony is within the scope of his relationship with the SEB.[7] "[T]he [relevant] inquiry is whether [the

---

[6] Plaintiffs cite Mr. Harp's Senate appointment resolution and reference the deposition testimony of Mr. Harp's replacement, Mr. Matthew Mashburn. Doc. No. [784], 11. Mr. Mashburn replaced Mr. Harp on February 3, 2020. Doc. No. [784], 11 (citing Doc. No. [784-2] (Mashburn Dep. Tr.), 20:18–24).

[7] The Official Code of Georgia lists the SEB's duties in relevant part as:

> (1) To promulgate rules and regulations so as to obtain uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials, as well as the legality and purity in all primaries and elections;
>
> (2) To formulate, adopt, and promulgate such rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct of primaries and elections; and, upon the adoption of each rule and regulation, the board shall promptly file certified copies thereof with the Secretary of State and each superintendent;
>
> . . . .

deponent] was authorized to act for his principal . . . concerning the matter about which he allegedly spoke." Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1566 (11th Cir. 1990). In determining whether an individual's statement was admissible as a statement by a party opponent, the Wilkinson court evaluated the individual's statement in relation to his job description. Id. at 1565–66. There, the court found that the declarant's statement concerned matters that were outside

---

> (5) To investigate, or authorize the Secretary of State to investigate, when necessary or advisable the administration of primary and election laws and frauds and irregularities in primaries and elections and to report violations of the primary and election laws either to the Attorney General or the appropriate district attorney who shall be responsible for further investigation and prosecution. Nothing in this paragraph shall be so construed as to require any complaining party to request an investigation by the board before such party might proceed to seek any other remedy available to that party under this chapter or any other provision of law; . . .
>
> (7) To promulgate rules and regulations to define uniform and nondiscriminatory standards concerning what constitutes a vote and what will be counted as a vote for each category of voting system used in this state; . . .
>
> (10) To take such other action, consistent with law, as the board may determine to be conducive to the fair, legal, and orderly conduct of primaries and elections.

O.C.G.A. § 21-2-31.

of his job duties; therefore, the statement did not fall within Fed. R. Evid. 801(d)(2)(D). Id. at 1566.

Here, the proffered testimony discusses Mr. Harp's training and preparation for his tenure on the SEB; familiarity with his obligations on the SEB; understanding of the SEB's obligations under Georgia law, and involvement in evaluating violations of voter rights. Doc. No. [784], 12–13. Mr. Harp's testimony about his duties within the SEB are admissible because it is testimony about the actions that Mr. Harp took while an agent of the SEB. The testimony about Mr. Harp's training and understanding of his responsibilities as a member of the SEB are admissible because Mr. Harp was charged with carrying out the duties of the SEB. Thus, the proffered testimony is within the scope of Mr. Harp's relationship as an agent of the SEB.

Accordingly, the Court finds that Mr. Harp's deposition testimony is not hearsay under Rule 801(d)(2)(D) and is admissible upon proper foundation.[8]

---

[8] "The party offering the admission is required 'to lay a foundation to show that an otherwise [excludable] statement relates to a matter within the scope of the agent's . . . employment.'" Robinson v. City of Atlanta, No. 1:10-CV-02036-AT-AJB, 2012 WL 12836657, at *6 (N.D. Ga. July 27, 2012), report and recommendation adopted, No. 1:10-CV-02036-AT, 2012 WL 12835876 (N.D. Ga. Aug. 31, 2012) (citing Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1566 (11th Cir. 1991). "An individual's

Because Mr. Harp's deposition testimony is admissible under Fed. R. Evid. 801(d)(2)(D), his testimony may be imputed to the SEB.[9] Cf. Smith v. Libr. Bd. of City of Homewood, No. 2:15-CV-02094-MHH, 2018 WL 2011026, at *4 n.4 (N.D. Ala. Apr. 30, 2018) (indicating that court may impute statements of the board's agent (made within an employment relationship) to the library board).

III. REMAINING DEPOSITION CONCERNS

Defendants also briefed the issues of soliciting legal conclusions from Governor Kemp, the rule of completeness, and speculation objections. Doc. No. [780], 2–4; 6–7; 10–12. Plaintiffs argue that Defendants intend to introduce all of Governor Kemp's campaign statements under Fed. R. Evid. 106. Doc. No. [784],

---

'statements 'are not alone sufficient to establish the declarant's authority under [Rule 801] subdivision . . . (D).'" Id. (citing United States v. Docampo, 573 F.3d 1091, 1097 (11th Cir. 2009)).

[9] "Depositions admissible under Fed. R. Evid. 801(d)(2) need not be separately analyzed under Fed. R. Civ. P. 32(a)." In re Reserve Fund Sec. & Derivative Litig., No. 09 CIV. 4346, 2012 WL 12354233, at *4 n.5 (S.D.N.Y. Oct. 3, 2012); see also MF Glob. Holding Ltd. v. PricewaterhouseCoopers LLP, 232 F. Supp. 3d 558, 574 (S.D.N.Y. 2017) ("Rule 801(d)(2)(D) provides an independent basis—separate from Rule 32(a)(3)—for admitting deposition testimony."); Carpenter v. Forest Meadows Owners Ass'n, No. 1:09-cv-01918-JLT, 2011 WL 3207778, at *5 (E.D. Cal. July 27, 2011) ("The Court agrees that the Federal Rules of Evidence provide an independent basis from Rule 32(a)(3) for admitting deposition testimony.")). Because Mr. Harp's testimony may be imputed to the SEB under Rule 801(d)(2)(D), the Court declines to address Plaintiffs' second argument concerning whether Mr. Harp's testimony may also be imputed to the SEB under Rule 32(a)(3).

9. Plaintiffs argue that Defendants should not be able to introduce the entire campaign statement because Defendants did not invoke the rule of completeness during the deposition. Id. at 10. The Court finds that Defendants may offer the campaign statements, in their entirety, under Fed. R. Evid. 106. Because the Parties intend to play a video of Governor Kemp's testimony and this is a bench trial, the Court will allow Defendants to introduce the complete campaign statements at the conclusion of the video. See Haney v. Mizell Memorial Hosp., 744 F.2d 1467, 1477 (11th Cir.1984) ("A trial court has the authority and responsibility to control the examination of witnesses and the presentation of evidence in order to achieve the objectives of ascertaining truth and avoiding needless consumption of time.").

The Court reserves ruling on the remaining evidentiary issues. As the Court stated in its April 7, 2022 Order, "the Court declines to issue pretrial rulings on the objections raised in each of the depositions referenced in the Pretrial Order." Doc. No. [771], 1. Additionally, the Court informed the Parties that "[t]o the extent necessary, the Court will provide detailed rulings on the objections [contained within the depositions] in the context of its Findings of Fact and

Conclusions of law." Id. at 1–2. Accordingly, the Court declines to give a pretrial ruling on these issues.

IV. CONCLUSION

As to the issues raised in Defendants' Brief Concerning Deposition Designations (Doc. No. [780]), for the foregoing reasons, the Court's rulings are as follows.

Defendants' objections to Governor Kemp's campaign speech are **OVERRULED**. Governor Kemp's campaign speech is admissible testimony at trial. Defendants' rule of completeness objection is **SUSTAINED.** Defendants may introduce the entirety of Governor Kemp's campaign statements *at the conclusion of* Plaintiffs' presentation of their designated portions of Governor Kemp's Deposition under Federal Rule of Evidence 106.

It is further **ORDERED** that Defendants' objections to Seth Harp's testimony are **OVERRULED**. Mr. Harp's testimony is admissible under Federal Rule of Evidence 801(d)(2)(D) upon proper foundation at trial. Mr. Harp's testimony (that meets the requirements of Rule 801(d)(2)(D)) may also be imputed to the State Election Board.

The Court **RESERVES** ruling on the remaining evidentiary issues.

IT IS SO ORDERED this 13th day of April, 2022.

HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE