

D.C. Federal Court Vindicates Key Arguments for Quashing Subpoenas to the Media in Associated Press Case

By Matthew E. Kelley and Leslie Minora

A Washington, D.C. federal judge has granted a motion to quash by an Associated Press (“AP”) reporter on the basis of reporters’ privilege, rejecting several often-heard arguments from the proponent of the subpoena.

In the course of his ruling from the bench (via Zoom), the Honorable Amit P. Mehta rejected arguments that (1) deposing a reporter is necessary to determine whether a confidential source, by virtue of being a source, is a limited purpose public figure, (2) deposing a reporter is appropriate to determine whether it was, in fact, a plaintiff who initiated the media coverage, and (3) a deposition subpoena that is narrowed to highly targeted questions eliminates undue burden to the reporter. [*Vasquez v. Whole Foods*](#), No. 17-112 (Nov. 5, 2021).

Background

In *Vasquez* nine former store team leaders of Whole Foods Market locations in the Washington, D.C. area allege that Whole Foods fired them after they accused their employer of manipulating employee bonuses through the company’s employee profit-sharing program. They further allege that the corporate spokeswoman for Whole Foods, Brooke Buchanan, issued statements to the media falsely asserting that it was in fact the plaintiffs who manipulated the store’s bonus program to *their* benefit. They assert, *inter alia*, that Whole Foods is liable for defaming them and casting them in a false light via Buchanan’s statements.

They base these claims on statements attributed to Buchanan in the AP’s December 13, 2016 article titled “Whole Foods fires 9 store managers over bonus manipulation.” The article states that Whole Foods “fired nine store managers in the mid-Atlantic region for manipulating a bonus program to their benefit . . . [and] engag[ing] in a policy infraction that allowed the managers to benefit from a profit-sharing program at the expense of store employees.” Matthew Barakat, who has served as the AP’s Northern Virginia correspondent for over twenty years, wrote the article.

In June 2021, counsel for Whole Foods contacted counsel for Barakat to negotiate a deposition. After the parties could not reach an agreement, counsel for Whole Foods issued a deposition subpoena to Barakat. Not long after, a deposition subpoena from the plaintiffs followed. Whole Foods subsequently withdrew the original subpoena and served in its place a new deposition subpoena, this time listing eight written questions pursuant to Rule 31. The plaintiffs withdrew their subpoena after Barakat filed his motion to quash and accompanying declaration, discussed below.

Arguments For and Against Quashing Whole Foods' Subpoena to Barakat

Barakat moved to quash the subpoena from Whole Foods, asserting that (1) the parties cannot overcome the District of Columbia's statutory reporters' privilege and the First Amendment privilege recognized by federal courts and (2) the discovery requested in the subpoenas was unnecessary and unduly burdensome.

Reporters' Privilege. Barakat argued that the subpoena sought testimony regarding the identities of sources and other unpublished newsgathering information protected by the reporters' privilege against compelled disclosure under both D.C. law and the First Amendment. Regarding the questions that merely sought authentication of a copy of the article and confirmation that Barakat wrote it, he included that information in a sworn declaration that accompanied his motion to quash. Barakat stated that, other than Buchanan, who was quoted by name in the article, he had not divulged the name of any source for the article in question to anyone outside the AP.

Barakat argued that the subpoena sought testimony regarding the identities of sources and other unpublished newsgathering information protected by the reporters' privilege.

Barakat first argued that the subpoena should be quashed under the D.C. Free Flow of Information Act. The Act prohibits inquiry into the identities of any news sources, confidential or not, *id.* § 16-4702(1), and is absolute *id.* § 16-4703(b). It also applies to any unpublished information the journalist obtained in the course of newsgathering, *id.* § 16-4702(2), although that aspect of the privilege is qualified, *id.* § 16-4703(a).

Barakat next argued in the alternative that the reporter's privilege recognized in the D.C. Circuit under the First Amendment also shields him from testifying. Under *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981), a civil litigant cannot compel a journalist to disclose information received in the course of newsgathering absent extraordinary circumstances. A party must show that a journalist's testimony goes to "the heart of the matter" in order to overcome the privilege, which applies to both confidential information, such as the identity of confidential sources, and non-confidential newsgathering information. *Id.* at 712.

Here, the underlying case is about whether Whole Foods made false and defamatory statements about plaintiffs when it said they violated company policy to enrich themselves. Barakat argued that the case does not turn on how he learned that plaintiffs had been fired, nor does Barakat have any first-hand knowledge of dispositive material.

Whole Foods argued that Virginia law, rather than D.C. law, should apply because Barakat reported and wrote the article in Virginia, whose common-law reporters' privilege is significantly less protective than D.C.'s statutory privilege. Whole Foods further argued that the subpoena was appropriate even under D.C. law and federal common law under *Zerilli* – but conceded that, if D.C. law were found to apply, they would need to withdraw the question asking Barakat to name his confidential sources. Whole Foods argued that parties are permitted

to question reporters about the accuracy of the information in an article, that certain questions were purely foundational and not privileged, and that other questions spoke to the heart of the case (and sought information subject to a qualified privilege, at most).

Undue burden. Barakat further argued that his testimony was unnecessary because Whole Foods sought information about his professional activities as a journalist, which would bear upon ancillary issues at best. He further argued that his declaration, which accompanied his motion to quash, set forth all of the non-privileged information Whole Foods sought. Mandating his testimony would therefore be unnecessary and disproportionate to the needs of the case.

Whole Foods responded that, by limiting the scope of their subpoena to eight questions that would take an estimated fifteen minutes for Barakat to answer via Zoom, they had tailored their request to avoid making it unduly burdensome.

The Court's Ruling

At a discovery hearing on November 5, 2021, Judge Mehta addressed Barakat's motion to quash, among other discovery matters. He noted at the outset that Whole Foods' subpoena, save for two questions "confirming that [Barakat] wrote the article and that he spoke with Ms. Buchanan," sought "to determine whether Mr. Barakat spoke to any of the Vasquez Plaintiffs before he spoke to Ms. Buchanan, and to identify who those sources might be."

Judge Mehta held that "Whole Foods' demand to question Mr. Barakat fails under the qualified First Amendment privilege that's recognized in this Circuit under *Zerilli v. Smith*." In relying on *Zerilli*, Judge Mehta avoided addressing the choice of state law issue raised by Whole Foods.

Judge Mehta quoted *Zerilli*: "Information from a reporter can only be compelled if the information sought goes to the 'heart of the matter,' and stated simply that Whole Foods "fails that test."

He went on to address Whole Foods' two primary arguments: (1) that "it needs to determine, from Mr. Barakat, whether the plaintiffs in this case, or any one of them, by speaking to the media, made themselves limited public figures" and (2) "that if a Vasquez Plaintiff was a source for Mr. Barakat, then ... 'they cannot complain that Whole Foods, in reacting to Mr. Barakat's inquiries, somehow caused them to be exposed to public attention.'"

He rejected both arguments. First, Judge Mehta noted that if any of the plaintiffs spoke with Barakat, they did so on a confidential basis. He stated that he was unaware of any authority stating that a confidential source, by speaking to the media, becomes a limited purpose public figure. He held that a deposition is thus not warranted for this purpose.

Secondly, he noted that "it doesn't follow" that if the plaintiffs initiated the media coverage they cannot now assert their claims. "[E]ven if somebody spoke to [the press] on background,

[it] doesn't mean they invited defamatory statements. Whole Foods cannot use the fact that any Vasquez Plaintiff might have spoken to Mr. Barakat as an affirmative defense of defamation, nor does it, in my view, mitigate any harm that might have occurred by virtue of a defamatory statement [by Buchanan]." For these reasons, he held that the subpoena did not pass muster under *Zerilli*.

With that, Judge Mehta plainly rejected two of the arguments that arise frequently in discovery disputes involving journalists. As an afterthought, or perhaps as a bonus, he further held that the subpoena was unnecessary and unduly burdensome because some of the information it sought had been provided in Barakat's declaration and any further compulsion to testify is "not warranted under *Zerilli*." To the extent a deposition would be beneficial, he concluded, it would be "outweighed by the burden that would be placed upon Mr. Barakat."

Non-party journalist for the AP, Matthew Barakat, was represented by Brian Barrett of The Associated Press and Jay Ward Brown and Matthew E. Kelley of Ballard Spahr LLP. Whole Foods Market Group, Inc. and Whole Foods Market Services, Inc., the proponents of the subpoena, were represented by Gregory J. Casas and David Sellinger of Greenberg Traurig, LLP and by John H. Hempfling, Vice President and Associate General Counsel of Litigation for Whole Foods Market Services, Inc.



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