2007 WL 5067903 (S.D.Fla.) (Trial Motion, Memorandum and Affidavit)
United States District Court, S.D. Florida, Fort Pierce Division.

Melanie BECKFORD, Susan Black, Tita de la Cruz, Charlene Fontneau, Linda Jones, Paula Lacroix, Joyce Meyer, Sushma Parekh, Donna Pixley, Vesna Poirier, Michelle Pollock, Lourdes Silvagnoli, Janet Smith, and Lee Wascher, Plaintiffs,
v.
DEPARTMENT OF CORRECTIONS, State of Florida, Defendant.

No. 06-14324-CIV-MARTINEZ-LYNCH.
August 31, 2007.

Defendant's Motion for Protective Order / Directive Regarding PlLintiffs' Electronic Discovery Requests

Respectfully submitted, Lee E. Muschott, Florida Bar No. 0175107, Attorney E-mail address: petemuschott@aol.com, Law Office of Lee E. Muschott, Laurel Professional Park, 2940 South 25th Street (34981-5605), Post Office Box 2520 (34954), Ft. Pierce, Florida, Telephone: (772) 461-2891, Facsimile: (772) 461-3591, Edwin R. Hudson, Florida Bar No. 0355798, Attorney E-mail address: ehudson@henryblaw.com, Henry, Buchanan, Hudson, Suber & Carter, P.A., 2508 Barrington Circle (32308), Post Office Box 14079 (32317-4079), Tallahassee, Florida, Telephone: (850) 222-2920, Facsimile: (850) 224-0034, Laura Beth Faragasso, Florida Bar No. 654604, Attorney E-mail address: lbfaragasso @henryblaw.com, Henry, Buchanan, Hudson, Suber & Carter, P.A., 2508 Barrington Circle (32308), Post Office Box 14079 (32317-4079), Tallahassee, Florida, Telephone: (850) 222-2920, Facsimile: (850) 224-0034, Attorneys for Defendant.

Defendant, FLORIDA DEPARTMENT OF CORRECTIONS (DOC), pursuant to Fed. R. Civ. P. 26(b)(2) and (c), moves the Court for the entry of a protective order and/or order directing the course of electronic discovery, including the establishment of appropriate time frames for response, and in support thereof, states:

1. Plaintiffs have served to DOC the request for production of electronic data which is attached hereto as *Exhibit A.*

2. In summary, the request seeks all e-mail, attachments to e-mail, and other non-email electronic data within DOC from June 1, 1996 to date,[1] which address any aspect of close management inmate "gunning" or masturbation; any aspect of hiring non-security female staff from any private staffing agency for work at any all-male prisons within DOC's Region IV; any mention of the names of such employees who worked at close management all-male prisons in Region IV,[2] and any litigation hold directives to preserve the requested data.

3. The parties met by telephone conference call on Tuesday, August 28, 2007, to discuss the content and scope of the discovery request; the feasibility of DOC providing the data requested; and the burden to DOC of doing so - i.e., the time, expense, and staffing required to comply with the request. Present for the conference call were counsel for Plaintiffs and DOC; DOC's e-mail administrator, Mr. Jerry Williams, and Plaintiffs technology expert, Mr. Adam Sharp.

4. The parties agreed that Plaintiffs' request l(d) and 2 (d), all e-mails or other electronic data mentioning the names of non-security female nurses supplied by outside staffing agencies, would have to be narrowed to searches for the names of the individual plaintiffs and the staffing agencies, as it would be impossible to search for names of unknown or unspecified employees.

5. Mr. Williams explained to Plaintiffs the manner in which e-mails and other DOC data are archived, deferring to another DOC employee, Mr. Michael Maddox, for more specific information regarding non-email electronic data; the steps required for the searches requested by Plaintiffs; and opined that it would take months and a tremendous amount of staff resources to run the searches requested.

6. Specific information regarding the feasibility, process and burden of these searches is provided in the sworn statements of Mr. Williams and Mr. Maddox, attached hereto as *Exhibits B and C,* respectively, and may be supplemented with additional information.

7. In the course of the meeting, Mr. Williams explained that although instructed to the contrary, some DOC employees may not save all data to a server, but rather, may save only to the hard drive of their personal computer or laptop computer, thus requiring a manual instead of an automated search of each of DOC's 12,000* computers.

8. In response to this information, Plaintiffs have now additionally requested an inventory of all computers on which the requested data might reside. It is obviously impossible to know which computer might contain such information without first searching the computers.

9. Plaintiffs' counsel have opined that the burden and expense to DOC of the electronic data discovery is irrelevant and immaterial. In Plaintiffs view, DOC has an absolute duty to produce as requested, regardless of the breadth and burden of the request.

10. DOC has not begun to conduct the requested searches and is therefore unable to provide a privilege log at this time. However, DOC hereby preserves its right to assert any privilege cognizable at law which attaches to any of the data sought by Plaintiffs, including without limitation, the work product privilege, the attorney-client privilege, the ongoing criminal investigation privilege, the confidentiality of in formation such as home addresses and social security numbers of DOC personnel, and privileges related to the potential compromise of security within DOC's institutions.

11. While possible to undertake the discovery efforts requested by Plaintiffs, the Plaintiffs' request for more than 11 years worth of electronic data asks for information which is inaccessible within the definition of Rule 26(b)(2)(B) because of the undue burden and cost associated with its production.

12. DOC seeks an order from the Court, following an evidentiary hearing if necessary, narrowing the scope and temporal boundaries of Plaintiffs' request, shifting the cost of production to Plaintiffs, and extending the time for response to the narrowed discovery request to that which is reasonable for such a massive undertaking.

MEMORANDUM OF LAW

DOC recognizes that as with paper discovery, the presumption in electronic discovery is that the responding party will bear the reasonable costs of production. *Zubulake v. UBS Warburg. LLC,* 217 F.R.D. 309 (S.D. NY 2003). However, both decisional authority and Rule 26 recognize that it is within the court's discretion to shift the costs of discovery when the requested data is not reasonably accessible, either because it is literally impossible to retrieve or because of undue burden or cost. Rule 26(b)(2)(B) and (C); *Zubulake, supra.* Rule 26(b)(2)(C) provides that the burden or expense of discovery is "undue" when it "outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." The Advisory Committee comments to the December 1, 2006, Rule 26 amendment which addresses electronic discovery suggest seven factors for consideration in balancing the costs and benefits of desired discovery:

(1) the specificity of the discovery request;

(2) the quantity of information available from other and more easily accessed sources;

(3) the failure to produce relevant information that seems unlikely to have existed but is no longer available on the more easily accessed sources;

(4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;

(5) predictions as to the importance and usefulness of the further information;

(6) the importance of the issues at stake in the litigation; and

(7) the parties' resources.

See also, Zubulake v. UBS Warburg. LLC, 216 F.R.D. 280, 284 (S.D. NY 2003).

One court has cogently addressed the particular burdens and difficulties encountered by governmental entities which must respond to voluminous electronic data requests. In *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D. DC 2001), the court opined as follows in a case involving a demand for searches of backup systems:

> [A] a strict cost-based approach ignores the fact that a government agency is not a profit-producing entity and it cannot be said that paying costs in this case would yield the same "profit" that other foregone economic activity would yield. Additionally, the government, which has no fewer rights than anyone else, has to insist that its employees do the restoration lest confidential information be seen by someone not employed by the government you has no right to see it. The reality, therefore, is that a government employee will be diverted from his ordinary duties to search backup tapes. When employees are thus diverted from their ordinary duties, the function of the agency suffers to the detriment of the taxpayers. Moreover, if government agencies are consistently required to pay for the restoration of backup tapes, they may be sorely tempted not to have such systems.

The same rationale applies to DOC as to the Department of Justice, the defendant in the *McPeek* case.

CONFERENCE WITH COUNSEL

In accordance with Local Rule 7.1, the undersigned certifies that she conferred with Plaintiffs' counsel regarding the subject matter of the this motion on Tuesday, August 28, 2007. Although the parties were successful in cooperatively narrowing and refining the search terms to a limited extent, Plaintiffs' counsel advised that the expense and burden of responding to the electronic discovery request was one which DOC must exclusively bear. The parties are therefore unable to agree regarding the cost-shifting concerns raised in this motion.

WHEREFORE, in the Defendant, Florida Department of Corrections, respectfully request the Court to enter an order narrowing the scope or temporal boundaries of Plaintiffs' request, shifting the cost of production to Plaintiffs, and extending the time for response to the narrowed discovery request to that which is reasonable for such a massive undertaking.

Respectfully submitted,

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Appendix not available.

Footnotes

[1] Plaintiffs' action focuses on the behavior of close management inmates at Martin Correctional Institution (MCI), all of whom were removed from MCI in 2002.

[2] MCI is but one of 16 correctional institutions in Region IV.