2007 WL 5067904 (S.D.Fla.) (Trial Motion, Memorandum and Affidavit)
United States District Court, S.D. Florida.

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. 2:06-CV-14324-JEM.
September 19, 2007.

Plaintiffs' Opposition to Defendant's Motion for Protective Order

Respectfully submitted: C. Wes Pittman (Florida Bar Number: 220507), Attorney E-mail Address: wes@pittmanfirm.com, Pittman & Perry, 432 McKenzie Avenue, Panama City, FL 32401, (850) 784-9000, (850) 872-1969 (fax), John C. Davis (Florida Bar Number: 827770), Attorney E-mail Address: jdavis623 @ earthlink.net, Law Office of John C. Davis, 623 Beard Street, Tallahassee, FL 32303, (850) 222-4770, (850) 222-3119 (fax), Attorneys for Plaintiffs Beckford et al.

Plaintiffs oppose Defendant's Motion for Protective Order as follows:

This case was originally filed by 29 plaintiffs with the EEOC and Florida Commission on Human Relations in August 2001 and with the circuit court in Washington County, Florida, in April 2002. The 14 Plaintiffs in this case (nurses and a classification officer - all non-security personnel) charge the Department of Corrections ("DOC") with tolerating and fostering a sexually hostile environment under Title VII and the Florida Civil Rights Act of 1992. The Plaintiffs have alleged that the Defendant has allowed a sexually hostile environment to exist by failing to remedy the practice of male close management and confinement inmates masturbating at ("gunning" in the prison slang used by the Defendant, its employees and the inmates) and making sexually harassing comments and gestures toward the Plaintiff each time they make their daily rounds in the close management and confinement units at the prison. The case was previously certified as a class action in the state court in Washington County. It was removed in early 2006 to the federal court in the Northern District of Florida, which decertified the class and transferred the cases of the 14 Plaintiffs to this Court.

The Plaintiffs have propounded requests for production of electronic discovery on the DOC. The discovery requests are attached to the Defendant's motion for protective order. The request are limited to e-mails and other documents which specifically mention the terms "masturbation," "gunning," and any other term the DOC or its employees use synonymously with masturbation. The request is further limited in that it seeks this information only for Region IV (in which each of the Plaintiffs worked) and then only with respect to "gunning" at prison facilities in Region IV that house close management inmates. According to an affidavit submitted by the DOC in case there are only 5 prisons in Region IV that have housed close management inmates: Martin CI, Everglades CI, Charlotte CI, Okeechobee CI, Hardee CI. See affidavit of Rusty McLaughlin attached as Exhibit B. Thus, the request only seeks these narrowly defined documents for 5 prisons in Region IV.

The request also seeks any litigation hold directives that may have been issued by the DOC. Such directives would be required under the common law of spoliation as well as § 60Y-5.001(10), Florida Administrative Code, which requires employers to maintain and preserve all records pertaining to a discrimination complaint once it is filed.

The DOC contends that responding to request is too burdensome in that it would "take months and a tremendous amount of staff resources to run the searches requested." In support of this contention it has submitted two affidavits of DOC employees. Based upon this it seeks a protective order limiting the scope of the requests, shifting the cost of producing the discovery to the Plaintiffs, and extending the time for it to respond. It also contends the documents have confidential and privileged information.

The DOC does not anywhere dispute the relevance of this discovery obviously because it is patently relevant. An element of a sexual harassment claim based on direct liability is whether the employer knew of the harassment and failed to take reasonable corrective action to remedy it. *Miller v. Kenworth of Alabama,* 277 F.3d 1269, 1287 (11th Cir. 2002). In the case of indirect or vicarious liability, the employer can also defend based on whether the employer took reasonable measures to correct the harassment. *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275 at 2292-93 (1998); *Frederick v. Sprint/United Management Co.,* 246 F.3d 1305, 1313-14 (11th Cir. 2001). The DOC defended against the claims of 13 other plaintiffs, also nurses like the Plaintiffs in this case, in the Northern District on this basis. That case was tried in January 2007 and the jury returned a verdict and the court entered judgment for all of the Plaintiffs in the total amount of $990,000, which the district court upheld against the DOC's Rule 50 motion. The case subsequently settled for the amount of $1,300,000.

For the following reasons and based upon the affidavit of Adam Sharp attached hereto, the Court should reject these arguments and order the Defendant to respond to the discovery at its own cost.

1. Electronic Discovery Under the Federal Rules of Civil Procedure

Under the Federal Rule of Civil Procedure the presumption is that the responding party bears the expense of complying with discovery requests. *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340 (1978). The courts have developed a two step process in considering electronic discovery requests. First, the court must determine whether the data sought is accessible. *Peskoff v. Faber,* 240 F.R.D. 26, 31 (D.D.C. 2007). *Id.* If it is accessible, then the responding party must produce the data at its expense. Id.; Fed.R.Civ.P. 26(b)(2)(B). As state in *Peskoff,* "[i]t cannot be argued that a party should ever be relieved of its obligation to produce accessible data merely because it may take time and effort to find what is necessary. *Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280, 283-84 (S.D.N.Y.2003)." *Id.* If the court determines the data is inaccessible, the responding party is still not relieved of the burden and cost of producing it unless it can show undue burden and expense. *Id.* In this second step of determining whether the responding party has shown undue burden and expense and who should ultimately bear the burden of producing the discovery, the courts have balanced the costs and benefits of the discovery. *Id.* The Advisory Committee Notes to Rule 26 list the several factors to be balanced: "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."

2. The Discovery Should Be Produced Because the Data Is Accessible

The DOC must produce the data requested and bear the burden of doing so in this case because it is accessible. Attached as Exhibit B is the affidavit of Adam Sharp, the principal of E-Hounds, Inc., which specializes in computer forensic services, including e-discovery and computer data recovery. Mr. Sharp attended the telephone conference alluded to in the DOC's motion and questioned Mr. Williams, whose affidavit is submitted by the DOC in support of its motion. As stated in Mr. Sharp's affidavit, the data at issue is "live data," which means that, while the data may not be in use, it can be easily accessed by the DOC. Mr. Williams' affidavit does not dispute this. Mr. Sharp goes on to describe in detail the relative ease with which the data can be searched for the specific e-mails requested. As he demonstrates and contrary to the DOC's representations that it would take tremendous time and effort to search the data, the actual man-hours needed to perform the search would be 1 hour and 10 minutes. All of the additional time would be machine hours. These machine hours could be drastically reduced by employing multiple computers to conduct the searches. The review of the data for privileged information would only need to be undertaken after the searches were complete and responsive documents were identified. Moreover, there is a confidentiality order in place in the Northern District case, which Plaintiffs are willing to have applied to this case. The DOC has previously produced confidential documents under this order without any problems.

Finally, as to data that is accessible on portable and personal computers, the DOC claims that its employees defied its own policies and procedures by failing to its server e-mails that may exists on portable computers. This is a species of the argument of the parricidal criminal defendant who throws himself on the mercy of the court as an orphan. The DOC should not be rewarded and the Plaintiffs punished for the DOC's failure to police and enforce its own policies and procedures. Further, as Mr. Sharp opines the specter of 1200 computers needing to be searched is a red herring. There is no reason why key systems could be identified that would limit the scope to be searched to a manageable level.

3. Even If the Data Were Inaccessible (Which It Is Not), Balancing the Costs and Benefits, the DOC Should Bear the Cost of Production

As noted above and not disputed by the DOC, the data is accessible. However, even it were found to "inaccessible," a balancing of the costs and benefits of discovery weighs strongly in favor of the DOC, not the Plaintiffs, bearing the cost of producing the discovery.

a. *The Needs of the Case:* The information is clearly of substantial relevance to the case and discovery closes in December. Production of the information will help advance the case and the potential for settlement. This factor weighs in favor of the DOC's bearing the cost of production.

b. *The Amount in Controversy:* As shown by the verdict, judgment and settlement in the Northern District case, which involved one fewer plaintiff, the amount in controversy is substantial. This factor weighs heavily in favor of the DOC's bearing the cost of production.

c. *The Parties' Resources:* The Plaintiffs are individual nurses (LPNs and RNs) and one former classification officer. The DOC is one of the largest, if not the largest, state agency. Clearly, this factor weighs heavily in favor of the DOC's bearing the cost of production.[1]

d. *The Importance of the Issues at Stake in the Action:* The DOC is one of the largest, if not the largest, state agency. It employs thousands of citizens across the state, many of whom are women. Its health care professionals, in particular nurses, are largely women. The issue of sexual harassment is of substantial public importance. This factor weighs in favor of the DOC bearing the cost of production.

e. *The Importance of the Discovery in Resolving the Issues:* As noted in (a) above the discovery is of substantial relevance. It goes to proving an element of the Plaintiffs' claims as well as refuting and/or establishing a defense of the DOC's. Knowledge of the practice of "gunning" by the DOC personnel and whether the DOC and its personnel took any action to correct it or even took it seriously goes to the heart of the Plaintiffs' case. This evidence will bear directly on these issues. This factor weighs heavily in favor of the DOC's bearing the cost of production.

Based upon the foregoing, the Court should deny the DOC's motion and require the DOC to produce the discovery requested at its own costs and expense.

Respectfully submitted:

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Appendix not available.

Footnotes

[1] The DOC cites *McPeek v. Ashcroft,* 202 F.R.D. 31 (D.D.C 2001), in support of treating governmental defendants differently from other litigants. First, as explained in Mr. Sharp's affidavit, unlike *McPeek,* the DOC does not have to restore backup tapes. The data at issue is accessible, "live data." Moreover, as noted by the very same court in *Peskoff v. Faber, McPeek* is distinguishable from this case because, unlike it, this is not a case "where the anticipated cost of doing the forensic search will dwarf the final recovery." *Peskoff v. Faber,* --- F.R.D. ---, 2007 WL 2416119 *6 (D.D.C. Aug. 27, 2007). Finally, to the extent *McPeek* treats governmental litigants any differently than other litigants, it should be rejected. Governmental litigants stand equal before the law as all other persons. *See e.g.,* Eleventh Circuit Pattern Jury Instructions (Civil), Basic Instruction 2.3.