UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-12258-civ-MOORE/SIMONTON

MARISSA FEIG, an individual,

Plaintiff,

v.

THE APPLE ORGANIZATION, INC., a Florida corporation,

Defendant.
_____/

PLAINTIFF'S MOTION TO COMPEL MORE COMPLETE DISCOVERY RESPONSES AND DOCUMENTS AND SUPPORTING MEMORANDUM OF LAW

Plaintiff, Marissa Feig ("Feig"), by and through her undersigned counsel, files this, her Motion to Compel More Complete Discovery Responses and Documents and Supporting Memorandum of Law, and states as follows:

1. On November 14, 2009, Plaintiff filed her Complaint seeking declaratory, injunctive and equitable relief, compensatory and punitive damages, and costs and attorney's fees for the sex discrimination and retaliation suffered by Plaintiff as perpetrated upon her by Defendant as a direct and proximate result of her sex (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (hereinafter referred to as "Title VII"); the Florida Civil Rights Act of 1992, ("FCRA"), as amended, chapter 760, Florida Statutes (2003); and the Family and Medical Leave Act of 1993, Pub.L.No. 103-3, 107 Stat. 6, codified at 29 U.S.C. § 2601, *et seq.*, ("FMLA").

2. Plaintiff is suing Defendant because she complained about sexual harassment of another employee by the CFO (and corporate representative) Joe Powell and was told her

termination was due to these complaints. Plaintiff is also suing because she was terminated one day after she announced she was pregnant, even though one month earlier she received a card from the owner of the company lauding her performance and ten days earlier she was given additional responsibilities.

3. On January 9, 2009, Plaintiff propounded her first Request for Production.

4. On March 2, 2009, Defendant served its written response to Plaintiff's first Request for Production.

5. On or about March 26, 2009, Defendant served the documents responsive to its written response to Plaintiff's first Request for Production.

6. Defendant's production did not contain certain responsive and necessary documents.

7. On April 21, 2009, Plaintiff's counsel prepared a good faith letter setting forth the deficiencies in the production. On May 1, 2009, Defendant provided a response correspondence.

8. Subsequently, Defendant has supplemented some of its responses and agreed to further supplement others. However, Defendant has refused to supplement Requests 39, 49 and 50.

9. As fully discussed *infra.*, these requests seek correspondence to and from Plaintiff, or about Plaintiff. Defendant contends, contrary to its corporate representative's own testimony, that the information is too voluminous and Plaintiff is on a "fishing expedition." Defendant's contentions are without merit.

10. Defendant's corporate representative testified that he is in possession of emails that are responsive to the requests. Instead of simply producing the emails, the corporate

representative picked only those emails he wanted to produce. The documents produced, however, seemed to mostly benefit Defendant's claim. An example of this is Defendant's failure to produce the email sent by Defendant's corporate representative informing the employer's remaining employees that Plaintiff had been terminated.

11. Additionally, e-mails to and from Plaintiff, or those about Plaintiff are clearly reasonably calculated to lead to the discovery of admissible evidence. Plaintiff is entitled to e-mails sent to her praising her work, describing the accounts that she worked on (which all of Defendant's witnesses have failed to identify), show whether Plaintiff was ever warned, disciplined, congratulated, a description of the additional accounts that were transferred to Plaintiff a mere ten (10) days prior to her termination, etc. Emails about Plaintiff would show whether or not Defendant was contemplating terminating Plaintiff's employment prior to her announcing that she was pregnant as Defendant claims, evidence of whether there were discussions regarding Plaintiff's work performance, Plaintiff's interaction with clients and staff, evidence of discussions regarding Plaintiff's complaints regarding sexual harassment, any investigation into said complaints; etc.

12. Plaintiff has made multiple good faith efforts to resolve the issue, but Defendant continues to refuse to produce the relevant documents.

WHEREFORE, Plaintiff, Marissa Feig, respectfully requests that this Court: (1) Grant Plaintiff's Motion to Compel More Complete Discovery Responses and Documents; (2) enter and order awarding Plaintiff her fees and costs incurred in preparing this motion; and (3) granting such other relief this Court deems just and proper.

MEMORANDUM OF LAW

A. Standard

"The scope of discovery under the federal rules is broad and … discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues." Gomez v. Martin Marietta Corp., 50 F.3d 1511, 1520 (10th Cir. 1995) (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). "The overall purpose of discovery under the Federal Rules is to require the disclosure of all relevant information so that the ultimate resolution of disputed issues in any civil action may be based on a full and accurate understanding of the true facts, and therefore embody a fair and just result. See United States v. Procter & Gamble Co., 356 U.S. 677, 682, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958)." Oliver v. City of Orlando, 2007 U.S. Dist. LEXIS 80552 (M.D. Fla. 2007).

B. Request for Production Numbers 39, 49 and 50

In Plaintiff's Request for Production, she sought:

> 39. All documents relating to any meetings, discussions, encounters, and/or conversations, whether public or private, that Defendant or any agents or employees of the Defendant had with Plaintiff for the last three (3) years.
>
> 49. All documents relating to Defendant's communications, including correspondence, emails, faxes etc. to and from the Plaintiff.
>
> 50. All documents relating to Defendant's communications, including correspondence, emails, faxes etc. regarding the Plaintiff.

Defendant responded:

> 39. Defendant objects to this request as overbroad and unduly burdensome.
>
> 49. Defendant objects to this request as overbroad in time and scope and unduly burdensome.

> 50. Defendant objects to this request as overbroad in time and scope, unduly burdensome, and to the extent this Request seeks disclosure of information protected under the attorney/client and work product privileges.

Defendant claims that the requests are "overbroad", "immaterial", "oppressive" and "unreasonable." Defendant's "canned" objections are without merit and fails to provide a *detailed* explanation or legal justification as to why this request is objectionable. In order to adequately make this showing, Defendant must file affidavits or provide other evidence which demonstrates that an undue burden exists. See e.g. Chubb Integrated Systems v. National Bank of Washington, 103 F.R.D. 52, 58 (D.D.C. 1984). Otherwise, the court cannot adequately rule on the validity of the objections. Id. at 58; accord Panola Land Buyers Ass'n v. Shuman, 762 F.2d 1550, 1559 (11th Cir. 1985) (holding that a party objecting to discovery must specifically show how each discovery request is overly broad or burdensome in order for the court to understand why the discovery requests are objectionable). Accordingly, Defendant's objections are clearly insufficient and the infirm "canned" objections and are without merit.

On April 21, 2009, Plaintiff made a good faith effort to resolve the issue, stating:

> **5. Request Number 39: All documents relating to any meetings, discussions, encounters, and/or conversations, whether public or private, that Defendant or any agents or employees of the Defendant had with Plaintiff for the last three (3) years.**
>
> In response, Apple objected to the request as "overboard and unduly burdensome." Initially, the grounds for these objections lack the specificity required by under Local Rule 26.1(G)(3). Authority from the Eleventh Circuit further confirms that in order to assert such objections, a party must specifically explain how a particular request is overly broad and unduly burdensome. Panola Land Buyers Ass'n, 762 F.2d 1550, 1559 (11th Cir. 1985) (holding that a party objecting to discovery must specifically show how each discovery request is overly broad or burdensome in order for the court to understand why the discovery requests are objectionable). Furthermore, as evidenced by the documents produced by Apple, Ms. Feig was only employed by Apple for approximately, eleven (11) months. Given the limited time period in which Feig was retained by the company,

the task of producing such documents would not constitute a burden on Apple. Accordingly, we respectfully request that Apple produce documents in response to this request.

6. Request for Production Number 49: All documents relating to Defendant's communications, including correspondence, emails, faxes etc. to and from the Plaintiff.

Apple's responded by raising the objection that the request was "overbroad in time and scope and unduly burdensome." Much like Apple's objection asserted in response to Request for Production Number 39, this objection lacks the specificity required by federal case law and the Southern District's local rules. Furthermore, this request is not overbroad in time and scope, as Ms. Feig was only employed by Apple—excluding her initial few months of employment during the years 2000 and 2001—for eleven months. Additionally, this request would not be overly burdensome to Apple, as it has already produced several e-mails amongst Ms. Feig and other employees (including an email sent from her personal email address) and even an instant message conversation to which Ms. Feig was purportedly a party to, from around the time Ms. Feig was employed by Apple. Therefore, it would not be a burden for Apple to produce all documents relating to communications between Apple and Ms. Feig, instead of merely the few handpicked emails which cast a negative light on Ms. Feig's character.

7. Request for Production Number 50: All documents relating to Defendant's communications, including correspondence, emails, faxes etc. regarding the Plaintiff.

Apple objected to this request by stating that it is "overbroad in time and scope, unduly burdensome, and to the extent that this Request seeks disclosure of information protected under the attorney/client and work product privileges." With regard to Apple's objections that this request is overbroad and unduly burdensome, please refer to Numbers 5 and 6 of this correspondence. Furthermore, Apple is still required to produce all responsive documents that are not covered by the attorney/client and work product privileges, and any documents withheld must be listed in a privilege log. Accordingly, kindly produce all documents that are responsive to this request.

See April 21, 2009 good faith letter attached hereto as Exhibit "A". On May 1, 2009, Defendant responded:

> 5. Request No. 39:
> Despite Plaintiff's contention that due to the relatively limited time period in which Plaintiff was employed by Apple, approximately (11) months, Defendant maintains that its objection, that the request is overbroad and unduly burdensome is appropriate in that Plaintiff's request encompasses a voluminous amount of information and the documents with out [sic] regard to the relevancy in this case. Plaintiff's request appears to be seeking any information which may fruitful [sic] in its claims. The rules of discovery do not permit a party to go on a "fishing expedition." *Porter v. Ray*, 461 F.3d 1315, 1324 (11th Cir. 2006); *see also, Corines v. Broward County Sheriff's Department*, 2009 WL 990530, *4 (11th Cir. 2009).

See May 1, 2009 Response to good faith letter attached hereto as Exhibit "B". On May 12, 2009, Plaintiff's counsel stated via email:

> I reviewed the deficiency letter. For responses 8 and 12, if you have produced all documents as your represent then that is fine. As to Request 28, you have no legal right to redact the portion of the policy. There is no privilege, the policy is clearly responsive and must be fully produced. As to request 33, you have no standing to object to the personnel files of the employees. They need to be produced. As to Requests 39, 49 and 50, Joe Powell testified that he could readily ascertain these documents. Further, contending that correspondence to and about Plaintiff is a fishing expedition is obviously without merit.
>
> Please provide the documents by Friday. Thanks.

See May 12, 2009 email, attached hereto as Exhibit "C". Defendant produced Joe Powell as its corporate representative. Joe Powell testified that he had access to all of Plaintiff's emails, whether received by her or sent by her. Additionally, Joe Powell testified that he reviewed **all of Plaintiff's emails** and decided which emails he would produce. Therefore, Defendant's objection that the document request is too voluminous is clearly not supported by its own witnesses. This is especially true as it pertains to emails sent to and from Plaintiff. Joe Powell testified:

> Q. How were you able to print this e-mail?

> A. After Marissa was terminated, I exported her e-mails and attached it to my e-mail account so that I would be able to pull information to provide you based on the questions and documentation that was required.
> Q. When you did this exporting, did you get e-mails that she sent as well as e-mails that she received.
> A. Yes.

Powell Deposition at 32-33, attached hereto as Exhibit "D". Powell further testified:

> Q. We were last looking at Composite Exhibit 5, the e-mails, and you mentioned that you were able to access these e-mails because you had Ms. Feig's e-mail account merged onto yours?
> A. Yes.
> Q. **And you were able to look at all of the e-mails she received as an employee of Apple?**
> **A. Yes.**
> Q. And all of the e-mails she sent out as an employee of Apple?
> A. Yes.

Id. at 39-40. Joe Powell further testified:

> Q. Did you make a thorough sweep of all of the e-mails that were in her inbox?
> A. **I went through all of her e-mails** looking for information that was requested for this case. There was [sic] many e-mails, and I did a through a job as I could.
> Q. And the ones that were printed were the ones that you felt were responsive?
> A. **The ones I printed were ones I felt answered questions that were either requested on this case or provided insight to our position in this case.**

Id. at 40. Defendant's corporate representative, Powell, is in possession of all of Plaintiff's emails. Powell has viewed **all** of the emails, Powell was able to export Plaintiff's email account to his own, yet Defendant's contend, without any actual support or evidence, that the documents are too voluminous to produce. This is simply a misrepresentation of the facts and is contravention of Defendant's corporate representative's testimony. Further, the person determining what documents should be produced or not produced is Powell, Defendant's corporate representative. Powell is a layman without the proper training as to what emails are

actually responsive to Plaintiff's request for production. Further, Powell has a clear bias with regards to the documents produced. Defendant should not be able to simply produce documents that in their opinion should be produced. This is not the purpose of the discovery process. Plaintiff is clearly entitled to the e-mails sent to her or sent by her. Additionally, e-mails to and from Plaintiff, or those about Plaintiff are clearly reasonably calculated to lead to the discovery of admissible evidence. Plaintiff is entitled to view the e-mails sent to her praising her work, describing the accounts that she worked on (which all of Defendant's witnesses have failed to identify), show whether Plaintiff was ever warned or disciplined, show accounts that were undisputedly transferred to her ten (10) days prior to her termination, etc. Accordingly, this Motion to Compel should be granted.

Further, Powell testified that he was in possession of software that could filter out certain e-mails, and thus, would clearly be able to produce e-mails that pertain to Plaintiff. Powell testified that the company had software that could even track instant message writing. Id. at 33. Powell further testified that "[w]e have in our employment handbook with Apple, there are several places where it says that we have the right to review any information that is transmitted through the computers and that we routinely do go over and check that…" Id. Additionally, most e-mail programs have a simple "find" prompt which simply allows a person to search e-mails for a keyword, in this case "Marissa Feig." Defendant does not articulate what steps were taken to obtain the information sought in Plaintiff's Request for Production. However, instead of producing the e-mails, Defendant relies on Powell's testimony that he produced all responsive documents. However, this is belied by his own testimony, wherein he testified: "For Marissa's termination, there was an e-mail sent out to all of the employees." Id. at 6. This document was

never produced. It is not clear how the e-mail sent out by Defendant regarding Plaintiff's termination is not responsive or relevant.

E-mails about Plaintiff are relevant as they would show whether or not Defendant was contemplating terminating Plaintiff's employment prior to her announcing that she was pregnant as Defendant claims, evidence of whether there were discussions regarding Plaintiff's work performance, Plaintiff's interaction with clients and staff, evidence of discussions regarding Plaintiff's complaints regarding sexual harassment, any investigation into said complaints; etc.

CONCLUSION

For the foregoing reasons, Plaintiff, Marissa Feig, respectfully requests that this Court grant her Motion to Compel More Complete Discovery Responses and Documents, as well as fees and costs for filing the instant motion.

Dated: May 20, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20 day of May, 2009, I electronically filed the forgoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing is being served this day upon all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

Respectfully submitted,

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SERVICE LIST

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