

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

MATHEW FLOETER

Plaintiff,

vs.

Case No.:6:05-CV-400-ORL-22KRS

THE CITY OF ORLANDO

Defendant

_____ /

**PLAINTIFF'S COMBINED MOTION TO COMPEL PRODUCTION OF DOCUMENTS
AND MOTION TO COMPEL ENTRY UPON LAND BE PERMITTED FOR
INSPECTION AND MEMORANDUM OF LAW
IN SUPPORT THEROF**

Plaintiff, MATHEW FLOETER, pursuant to Local Rule 3.01(g) and 3.04 and the applicable Federal Rules of Civil Procedure, by and through his undersigned counsel, files this, his Motion to Compel Defendant, THE CITY OF ORLANDO, to produce documents responsive to Plaintiff's Request to Produce dated December 16, 2005 and Motion to Compel Defendant to permit Entry Upon Land for the purposes of inspecting certain computers to obtain pornographic emails and materials in accordance with Plaintiff's Request For Entry Upon Land dated December 16, 2005 and Memorandum of Law in Support thereof and states:

1. This is a sexual harassment, sexually hostile work environment and retaliation case filed by Plaintiff FLOETER against The City of Orlando. During his employment with The City of Orlando and Orlando Police Department as an undercover detective, FLOETER was subjected to ongoing and continuous sexual harassment by his supervisor Barbara Jones. Additionally, FLOETER was subjected to sexually charged and sexually pervasive environment which permeated his work environment as a result of the dissemination of sexually explicit emails and photographic material in the form of emails by superiors whom he reported to (See

Amended Complaint Doc No. 19).¹

2. On December 15, 2005, Defendant's attorneys took the deposition of MATHEW FLOETER. At his deposition, FLOETER testified about, among other things, of a plethora of sexually explicit emails and pornographic materials, such as those which have been filed under seal as Plaintiff's Composite Exhibit "A", which were being sent from the computers of commanders, specifically, that of Lt. Victor Uvalle to the computers of Shawn Hayden and others in his unit. Additionally, FLOETER testified when he would enter Uvalle's office to discuss police business he would see Uvalle on the computer viewing pornographic and sexually explicit material to which Uvalle would attempt to show to FLOETER and the others in his unit. Also, Uvalle sent pornographic and sexually explicit material to civilians during work hours. In fact, FLOETER testified that the reason he and the other Plaintiffs were initially afraid to complain about JONES and the sexually explicit and pornographic material around the workplace was because the people he was supposed to complain to were the very ones engaged in the violative conduct and behavior.

3. On December 16, 2005, Plaintiff propounded Plaintiff's First Request to Produce and Plaintiff's Request to Entry Upon Land For Inspection on Defendant. The following represents Plaintiff's request and Defendant's responses:

**PLAINTIFF MATHEW FLOETER'S FIRST REQUEST TO PRODUCE
TO DEFENDANT THE CITY OF ORLANDO**

¹ This case originally included four (4) other Plaintiffs, SHAWN HAYDEN, KEVIN EASTERLING, ALEX FABERLIE and ANTHONY MORESCHI all of whom worked with FLOETER under Barbara Jones. However, the Court severed these other four (4) Plaintiffs whom have all filed separate actions alleging the same allegations as FLOETER.

Plaintiff MATHEW FLOETER, pursuant to applicable Federal Rules of Civil Procedure hereby propounds his First Request for Production of certain documents, material or other tangible items upon Defendant THE CITY OF ORLANDO to be produced within thirty (30) days from the date of service hereof. **This Request to Produce does not seek privileged documents.**

1. Any and all correspondence, notes, memoranda or other documents reflecting or referring to complaints, charges or lawsuits claiming sexual harassment, retaliation, hostile work environment by anyone at The Orlando Police Department (“OPD”) from 2000 to the present.

Response:

This request is objected to on the grounds that it is vague, overbroad, burdensome and not reasonable calculated to lead to the discovery of admissible evidence. Notwithstanding and without waiving any such objections, documents responsive to this request which reflect or refer to complaints, charges or lawsuits claiming sexual harassment or hostile work environment based on sex or retaliation resulting or related to such claims by anyone at the Orlando Police Department from 2000 to the present have been requested and to the extent that such documents exist, will be provided upon receipt.

9. Any and all documents reflecting or referring to OPD’s response to any complaints of sexual harassment, retaliation and/or hostile work environment which allege any employment violation, filed by anyone against OPD from 2000 to the present.

Response:

This request is objected to on the grounds that it is vague, overbroad, burdensome and not reasonably calculated to lead to the discovery of admissible evidence. In addition, such request may call for confidential documents and/or documents which infringe upon the attorney-client privilege

11. Any and all notes, memoranda, recordings or minutes memorializing or recording any training classes, meetings or discussion between management and employees addressing sexual harassment, retaliation and hostile work environment at OPD from 2000 to the present.

Response:

This request is objected to on the grounds that it is vague, overbroad, burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

12. A copy of all correspondence, including any and all statements provided by anyone, between The City of Orlando or OPD and the EEOC and/or the FCHR regarding allegations of sexual harassment, retaliation and/or hostile work environment of any kind from 2000 to present.

Response:

This request is objected to on the grounds that it is vague, overbroad, burdensome and not reasonably calculated to lead to the discovery of admissible evidence. In addition, such documents may include confidential information, information which intrudes upon third party privacy rights and/or information protected by attorney client-privilege.

15. A copy of all emails with sexually explicit or pornographic materials emailed from the computer of Lt. Uvalle to anyone from 2000 to present.

Response:

This request is objected to on the grounds that it is vague, overbroad, burdensome, and

not reasonably calculated to lead to the discovery of admissible evidence.

16. A copy of the computer printout of all emails emailed from the computer of Lt. Uvalle to anyone from 2000 to the present.

Response:

This request is objected to on the grounds that it is vague, overbroad, burdensome and not reasonably calculated to lead to the discovery of admissible evidence. In addition, such documents may include confidential information, information which intrudes upon third party privacy rights and/or information protected by attorney client-privilege

17. A copy of all documents related to the sexual harassment allegations by Officer Bruce Locke made against Barbara Jones.

Response:

Documents responsive to this request are not in the possession of Defendant.

18. A copy of all emails with sexually explicit or pornographic materials emailed from and received at any computer of anyone employed at OPD from 2000 to the present.

Response:

This request is objected to on the grounds that it is vague, overbroad, burdensome, not reasonably calculated to lead to the discovery of admissible evidence.

**PLAINTIFF'S MATHEW FLOETER'S FIRST REQUEST TO PRODUCE TO
DEFENDANT THE CITY OF ORLANDO FOR ENTRY UPON THE LAND FOR THE
INSPECTION**

Plaintiff MATHEW FLOETER, pursuant to Federal Rule of Civil Procedure 34, hereby propounds his First Request for Entry Upon Land (Orlando Police Department) for the inspection of the computer hard drive of Lt. Uvalle, which was in use at all times material to the allegations of Plaintiff's complaint and the computer hard drive of Shawn Haydn at all times material to Plaintiff's

complaint to be permitted within thirty (30) days from the date of service hereof. **This Request does not seek privileged documents.**

Response:

This request is object to on the grounds that it is vague, overbroad and not reasonably calculated to lead to the discovery of admissible evidence. In addition, the defendant objects to such request in that it is likely that the computer “hard drives” at issue contains active criminal intelligence information and identifying information regarding confidential information, confidential sources, undercover personnel and/or other confidential information. In addition, the computer “hard drive” at issue may contain medical information of City of Orlando employees.

MEMORANDUM OF LAW

The information sought by Plaintiff is clearly relevant to this case. As to requests numbers 1 and 9, evidence of prior complaints of sexually harassment and retaliation and the manner in which those complaints have been responded to and addressed have always been admissible as evidence against a Defendant, particularly to a Faragher/ Ellerth Defense as asserted by Defendant in this case. In Washington v. The School Board of Miami Dade County, 2002 WL 31056088 (S.D. Fla.) and in Griffen v. City of Opa-Locka, 261 F.3d 1295 (11th Cir. 2001), both sexual harassment cases, both courts held that evidence of prior complaints and prior claims of sexual harassment were relevant and admissible . In fact, the Washington Court specifically held, such evidence is admissible under Fed.R.Evid. 404(b) to show plan, motive, opportunity, knowledge, intent and a pattern of sexual harassment. The information requested by Plaintiff was unambiguous and was for a limited about of time. Also, the responses to third-parties investigative or administrative agencies such as the EEOC or Florida Human Relations Commission (“FCHR”) are not subject to attorney-client privilege, but are public record.

As to request 11, evidence of training, seminars, classes or meetings, if any were held, on sexual harassment and hostile work environment is admissible and goes to the remedial, corrective and preventive elements of Defendant's Faragher/ Ellerth Defense. Also, this request was unambiguous and for a limited amount of time.

As to Request 12, any response to other complaints by OPD or the City of Orlando for sexual harassment claims at OPD is not protected by attorney-client privilege or any third-party privacy privileges as these documents were provided to a third-party, governmental investigative agency or entity, or filed in Court. Also, other complaints of sexual harassment are relevant and admissible under Fed.R.Evid. 404(b). To this end, complaints of sexual harassment are handled by Human Resources or Internal Affairs. Since Plaintiff complaint was also handled and investigated by these departments, Plaintiff is entitled to ascertain the manner in which these complaints were investigated and handled to see if Defendant takes sexual harassment claims seriously. See Hurley v. Atlantic City Police Dept., 174 F.3d 95, 111 (3rd Cir. 1999) ("Evidence of other acts of harassment is extremely probative as to whether the harassment was sexually discriminatory and whether Defendant know or should have known that sexual harassment was occurring despite the existence of an anti-harassment policy").

As to Request 15, this request goes to some of the very issues of this case; therefore, it is inconceivable that Defendant claims "sexually explicit emails or pornographic materials" from Uvalle's computer, Plaintiff's commander and member of his "chain of command" is not calculated to lead to the discovery of admissible evidence. Additionally, this request was straightforward and unambiguous and thus, Defendant's objection is wholly without merit.

As to Request 16, again, FLOETER testified that Uvalle was sending and disseminating sexually explicit emails and pornographic material from his computer, and showing such

materials which were highly offensive. Yet, Defendant objects to this request, which was for a limited and specific period of time as “vague, overbroad and burdensome and not reasonably calculated to lead to the discovery of admissible evidence”. Clearly, the printout of emails from the computer of Lt. Uvalle is highly relevant and probative. This is probative of the pervasiveness and severity, for the purposes of a hostile environment claim, of the totality of the circumstances surrounding the general work environment. Cardin v. Via Tropical Fruites, Inc., 1993 WL 945324, *10 (S.D. Fla. 1993). Also, as far as the privacy, privilege or confidential issue raised by Defendant, under this request Plaintiff did not request the emails themselves and therefore would not be looking at the contents of any emails. Plaintiff sought the topic of the emails and the recipients to track the voluminous amount of pornographic and sexually explicit emails which were being sent from Uvalle’s computer.

As to Request 17, Plaintiff testified of another incident where Jones sexually harassed another subordinate named Bruce Locke. Plaintiff testified that according to Locke a complaint was filed and supposedly placed in Jones’ personnel file. However, notwithstanding the existence of the documents relative to this complaint, Defendant disingenuously claims it “is not in possession of these documents”.

As to Request 18, again, this request goes to many of the very issues and allegations of Plaintiff’s claim, therefore, it is shocking that Defendant claims “sexually explicit emails or pornographic materials from and to computers of employees at OPD” is not calculated to lead to the discovery of admissible evidence. This evidence addresses the pervasiveness of the sexually charged environment as well as whether Defendant prevents, corrects and remedies sexual harassment or a sexually hostile work environment. Also, this request was clear and unambiguous and was for a limited duration of time.

As to Plaintiff's Request to Enter the Land for the Inspection of computer hard drives, neither Plaintiff, nor Plaintiff's expert, nor Plaintiff's attorneys are interested in viewing or looking at any confidential or privileged information. Based on the emails and material attached hereto as well as from the testimony of FLOETER, the other Plaintiffs and individuals whom received pornographic emails from Uvalle, undoubtedly the "hard drives" should have "ghosts" of pornographic emails, websites, and materials. In fact, the Court could perform an *in camera inspection* of the relevant computer hard drives with Plaintiff's expert(s). To this end, Plaintiff should not be precluded from gathering highly relevant and probative evidence simply because Uvalle and other employees choose to use their computers to disseminate and view pornographic and sexually explicit material while at work.

The undersigned made numerous attempts to resolve these issues without judicial intervention. There is no "good faith" basis, legal or otherwise, for Defense Counsel and Defendant THE CITY OF ORLANDO to fail to and continue to refuse to comply with the Rules of Discovery and provide responses to Plaintiff's discovery requests. In fact, notwithstanding these requests are relevant, admissible and probative to Plaintiff and the other Plaintiffs' claims, Defendant seeks to depose the other Plaintiffs without disclosing any of the information. Insofar as Plaintiff's Counsel has incurred substantial expense in filing this motion and attempting to amicably resolve these matters prior to being required to file this motion, Plaintiff counsel respectfully requests this court to permit him to submit timesheets for the time and effort spent to research, draft and file this motions and to award him a reasonable attorneys' fee under Rule 37.

IN ACCORDANCE with Middle District Local Rule 3.01(g), I certify that the parties have conferred regarding the issues herein and have been unable to resolve the matters argued in this motion.

WHEREFORE, Plaintiff requests this Court to Compel Defendant, THE CITY OF ORLANDO, to provide prompt responses to Plaintiff's discovery request and to order Defendant to cease engaging in conduct employed for the purpose of precluding Plaintiff from obtaining discoverable information as well as award Plaintiff a reasonable attorneys' fee upon production of an affidavit and attached timesheets pursuant to Rule 37.

I CERTIFY THAT a true and correct copy of the forgoing was furnished by this the 27th day of March 2006.

/s/ Frank T. Allen
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