

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

MATTHEW FLOETER,

Plaintiff,

vs.

CASE NO.: 6:05-cv-400-ORL-22KRS

THE CITY OF ORLANDO

Defendant.

**DEFENDANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS
AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

COMES NOW, Defendant THE CITY OF ORLANDO ("City"), by and through its undersigned counsel and pursuant to Federal Rule of Civil Procedure 37(a) and Local Rule 3.04(a), hereby files its Motion to Compel Production of Documents and states the following in support thereof:

1. Pursuant to Federal Rule of Civil Procedure 34, the City served its First Request for Production of Documents ("Discovery Request") on Plaintiff MATTHEW FLOETER ("Plaintiff") on August 15, 2006.

2. Pursuant to Local Rule 3.04(a), the City hereby quotes in full each request for production to which this Motion to Compel is addressed and the objection and grounds to each request as stated by Plaintiff:

Request for Production 1:

Any and all documents in Plaintiff's possession which support or may support his claims that he was subject to a hostile work environment, including but not limited to: e-mails, recordings, videos, and any other type of correspondence.

Response:

Plaintiff objects to this request for production to the extent that the information was disclosed at the August 15, 2006, mediation and is therefore, confidential and privileged as work-product. Additionally, in accordance with the applicable Federal Rules of Civil Procedure and Local Rules regarding information disclosed at mediation, the information requested remains confidential.

Request for Production 2:

Any and all documents in Plaintiff's possession which support his claims that he was subject to retaliation after complaining to Sergeant Barbara Jones ("Jones"), Captain Robert Gregory ("Gregory"), and/or the Internal Affairs division of the Orlando Police Department ("I.A."), regarding Jones's alleged sexual harassment, including but not limited to:

- (a) Any and all documents related to any reassignment of tasks and/or cases after Plaintiff complained to Jones, Gregory, and/or I.A.;
- (b) Any and all documents related to Defendant's policy on overtime before and after Plaintiff complained to Jones, Gregory, and/or I.A.;
- (c) Any and all documents addressed specifically to Plaintiff regarding his ability to work overtime;
- (d) All of Plaintiff's tax records, including copies of tax returns, W-2's, 1099s, all forms, worksheets, and/or documents submitted with your tax returns, and other documents reflecting any compensation of any sort received, for the years 2003, 2004, and 2005;
- (e) Any and all documents related to Plaintiff's request for sick leave following his shoulder surgery in or around February 2004; and

- (f) Any and all written reprimands and/or other documents related to Plaintiff's being disciplined after Plaintiff complained to Jones, Gregory, and/or I.A.

Response:

Plaintiff objects to this request for production 2 (a-f) to the extent that the information was disclosed at the August 15, 2006, mediation and is therefore, confidential and privileged as work-product. Additionally, in accordance with the applicable Federal Rules of Civil Procedure and Local Rules regarding information disclosed at mediation, the information requested remains confidential.

3. Requests for Production 1 and 2 clearly seek documents which Plaintiff may or likely will use to support his claims of sexual harassment and retaliation. As such, these documents are not only highly discoverable, but also should have been disclosed during the initial phase of the parties' discovery.

WHEREFORE, the City respectfully moves this Court to compel Plaintiff to produce documents in response to its Discovery Request, and further, to award the City its costs and attorneys' fees in pursuing this Motion to Compel.

MEMORANDUM OF LAW

Federal Rule of Civil Procedure 26(b)(1) states, in pertinent part, "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." Further, "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

By way of its Discovery Request, the City seeks material which is clearly relevant to the issues in this case. Plaintiff himself does not object to the Discovery Request on the grounds that the sought-after documents are not relevant to resolving his own claims. Rather, Plaintiff

inappropriately objects on the grounds that the documents the City seeks were somehow disclosed at the mediation of this case, and therefore, assumed some shield of protection against disclosure.

In citing the Local Rules in his objections to Requests for Production 1 and 2, Plaintiff presumably refers to Local Rule 9.07, which states in relevant part, “All proceedings of the mediation conference, including statements made by any party, attorney or other participant are privileged in all respects. The proceedings may not be reported, recorded, placed into evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest.” However, a party’s scope of discovery can stretch far beyond information and materials which may be made known to a trial court or jury; as long as the information is relevant and “appears reasonably calculated to lead to the discovery of admissible evidence,” Plaintiff must respond to the City’s Discovery Request. Fed. R. Civ. P. 26(b)(1).

Moreover, the materials that the City seeks were required to be disclosed prior to the August 15, 2006, mediation. In accordance with Federal Rule of Civil Procedure 26(a)(1)(B), Plaintiff was required to disclose, without awaiting a discovery request, “a copy of, or a description by category and location of, all documents, data compilations, and tangible things that [were] in the possession, custody, or control of [Plaintiff] and that [Plaintiff] may use to support [his] claims or defenses, unless solely for impeachment.” Further, the concept of “use” is defined broadly and includes any use at a pretrial conference, to support a motion, or at trial. *Law Enforcement Alliance of America, Inc. v. USA Direct, Inc.*, 61 Fed.Appx. 822, 829 (4th Cir. 2003).

The City seeks documents which are directly related to Plaintiff’s claims of hostile work environment sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended. Plaintiff was required to disclose those documents which he thought he may use to support these claims in his initial disclosures. In addition, Federal Rule of Civil Procedure

26(e)(1) expressly enforces a duty upon Plaintiff to supplement his disclosures if he “learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.” *See Thames v. City of Pensacola*, ___ F.Supp. ___, 4 (N.D.Fla. 2005). Plaintiff has clearly failed to abide by this Rule. His objections to the City’s Discovery Request is tantamount to an admission that he has documents in his control and possession which he plans to use in adjudicating his sexual harassment and retaliation causes. Plaintiff’s objections, if granted, would engender senseless ramifications: parties could easily avoid disclosing discoverable materials prior to mediation and then shield them from ever being disclosed by bringing them to mediation and invoking some sort of privilege.

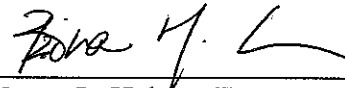
The City submitted its Discovery Request to Plaintiff in a proper and timely manner. However, the deadline for discovery is fast approaching, and it is imperative that the City receive any documents responsive to its Discovery Request in the time allotted when it was sent to Plaintiff. The City therefore respectfully requests this Court to compel Plaintiff to produce the documents which are sought in the City’s Discovery Request. In addition, if this Motion to Compel is granted, an award of expenses to the City is mandatory unless Plaintiff can demonstrate that his conduct was “substantially justified,” or if other circumstances render an award of expenses “unjust.” Fed. R. Civ. P. 37(a)(4); *Rickels v. City of South Bend, Ind.*, 33 F.3d 785 (7th Cir. 1994). This case does not present one of those extraordinary circumstances where an award of expenses would be unjust. The City made a lawful and timely Discovery Request, and Plaintiff attempted to evade its obligation to fulfill it by objecting on meritless grounds.

CERTIFICATE OF GOOD FAITH COMPLIANCE

Pursuant to Local Rule 3.01(g), counsel for the City certify that a good faith effort has been made to resolve the pending issue with opposing counsel, and that opposing counsel has indicated that he opposes the City's Motion to Compel Production of Documents.

WHEREFORE, the City respectfully requests this Court to grant its Motion to Compel Production of Documents and to award the City its costs and attorneys' fees in filing the Motion.

Respectfully submitted,

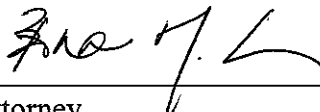


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September, 2006, I electronically filed the foregoing Motion to Compel Production of Documents with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to the following: Frank T. Allen, Esq., The Allen Firm, P.A., 605 East Robinson Street, Suite 130, Orlando, Florida 32801, and Michael H.

Lefay, Esq., Nejame, Harrington, Barker, et al., 1 South Orange Avenue, Suite 304, Orlando, Florida
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Attorney