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 RESPONSE TO PLAINTIFF'S COMBINED MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND MOTION TO COMPEL ENTRY UPON LAND BE PERMITTED FOR INSPECTION

I. Plaintiff's Motion to Compel Production of Documents

By way of background, on February 14, 2005, the Plaintiff, MATTHEW FLOETER ("Floeter" or "Plaintiff"),[1] filed a Complaint based on his claims of sexual harassment, hostile work environment, and retaliation. More specifically, Floeter alleges that at all times relevant to the Complaint, he was employed by Defendant, the CITY OF ORLANDO ("City" or "Defendant"), as an undercover police officer, and that Barbara Jones became his supervisor or manager starting in approximately October 2003. Floeter alleges that upon her arrival, Jones would constantly make sexually explicit jokes and comments, stare provocatively at Plaintiff's private parts or buttocks, touch Plaintiff's buttocks, grope him, grab his groin, and attempt to grab his testicles. Complaint at paragraph 9. Floeter also alleges that Jones would simulate lap dancing and "hump" his leg. Plaintiff also alleges that he constantly complained to Jones about

[1] The original Complaint was filed by Plaintiffs Matthew Floeter, Shawn Hayden, Kevin Easterling, Alex Faberlle and Anthony Moreschi. The Court has since ordered that each of these individuals file separate Complaints. Therefore, the Motion at issue is only related to the filings of Plaintiff Matthew Floeter, Case Number 6:05-CV-400-ORL-22-KRS.

her conduct and complained to other members of management. Complaint at paragraph 11. After making these complaints, Plaintiff alleges that he was retaliated against by management. This retaliation included, according to the Plaintiff, threats of undesirable reassignment, insults, and threats. Plaintiff also claims that he was subjected to a sexually charged work environment which included the dissemination of sexually provocative and pornographic materials to his computer (e-mails) from supervisors and around the workplace. Complaint at paragraph 18.

Consistent with the allegations contained in the Complaint, Floeter testified in his deposition that Barbara Jones sexually harassed him in a variety of ways including hugging, groping, grabbing, humping, and staring. Floeter testified that he complained to Jones about this behavior and ultimately to Jones' Supervisors. Immediately after Floeter reported this alleged harassment to upper management, the harassing behavior ceased. As part of his testimony, Floeter stated that Jones reported to Lt. Uvalle and that on occasion he stopped by Uvalle's office, only to witness Uvalle looking at pornographic materials on his computer.

In written discovery, Plaintiff made certain requests for documents. The City objected to several of these requests on the grounds that they were overbroad, vague, burdensome, and/or not reasonably calculated to lead to the discovery of admissible evidence. In addition, the City objected to select requests because such requests would necessarily reveal confidential undercover police informant information, potential medical information of police officers, and other information which should be protected from discovery.

More specifically, in Request for Production 1, Plaintiff asks for "all correspondence, notes, memoranda or other documents reflecting or referring to complaints, charges or lawsuits claiming sexual harassment, *retaliation*, or hostile work environment by anyone at The Orlando Police Department ("OPD") from 2000 to the present." The City objected to this Request on the

grounds that such a request is vague, overbroad, burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. These objections are largely based on Plaintiff's wording of his Request.

While it would seem appropriate that Plaintiff would seek production of complaints based on sex, Request for Production 1 is not confined to sex-related complaints. Plaintiff did not ask for documents related to a claim of retaliation based on an employee's complaints about sexual harassment or hostile work environment stemming from sexual harassment. Rather, this Request calls for documents based on any claim ranging from workers' compensation retaliation to retaliation based on complaints regarding national origin discrimination. Plaintiff is thus asking the City to delve extensively into numerous current and former employees' files and other files which may have serious implications regarding those employees' privacy. See CAC-Ramsey Health Plans, Inc. v. Johnson, 641 So.2d 434 (Fla. 3d DCA 1994) (where the Third District held that the request for production of personnel files that clearly did not contain information relevant to the plaintiff's claim was overbroad, and required that upon remand, the trial court "fashion a more narrowly tailored discovery order"). This is also true for Plaintiff's claim of hostile work environment. Defendant therefore contends that Plaintiff's Request is vague, overbroad, and burdensome.

In addition, this request is neither relevant to Plaintiff's Complaint, nor is it reasonably calculated to lead to the discovery of relevant evidence as worded. Plaintiff as the party seeking discovery has the burden of "showing clearly that the information sought is relevant to the subject matter of the action and would lead to admissible evidence." Storch v. IPCO Safety Products Co. of Penn., Inc., 1997 WL 401589, 1 (E.D.Pa. 1997). Plaintiff has not pled sufficiently to make such a showing. Defendant would be willing to produce documents if

Plaintiff's Request were related in some way to the allegations in his Complaint. More specifically, the City would be willing to provide Plaintiff with complaints, charges, etc., claiming sexual harassment, a hostile work environment based on sexual harassment, or retaliation based on sexual harassment complaints. However, Plaintiff has not tailored his Request in order to elicit such information. See CAC-Ramsey, 641 So.2d at 435-36. Rather, Floeter's Request is wide-ranging and may cover charges, complaints, or lawsuits which are wholly unrelated to his charges and is in no way reasonably calculated to lead to admissible evidence. Therefore Request for Production 1 should be denied.

Plaintiff makes a similar demand in Request for Production 9. In this Request, Floeter asks for all documents reflecting or referring to the Orlando Police Department's response to any complaints of sexual harassment, retaliation, and/or hostile work environment filed by anyone since 2000. Again, Defendant objects to this Request on the grounds that it was vague, overbroad, burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. As with Request for Production 1, the City's effort to comply would likely involve disclosing confidential information of former and current employees, many of whose complaints may have been responded to and settled without litigation or within the confines of a collective bargaining agreement. Plaintiff as the party seeking discovery of this confidential information "must make a showing of necessity which outweighs the countervailing interest in maintaining the confidentiality of such information." Higgs v. Kampgrounds of Am., 526 So.2d 980, 981 (Fla. 3d DCA 1988). Plaintiff should be held to a rigorous standard in balancing these interests, particularly because disclosure of many of these documents would infringe upon the attorney-client privilege, and should therefore be deemed undiscoverable. In addition, this Request will necessarily reveal information that is confidential and protected from discovery pursuant to Fla.

Stat. § 112, *et seq.* Such a broad request may reveal documents from previous litigation or complaints that were redacted, withheld from production, or filed in camera. Researching, evaluating, analyzing, and identifying such documents would be exceptionally time-consuming, burdensome, and expensive for Defendant. For the reasons stated above, Defendant contends that such a request is vague, overbroad, burdensome, and unrelated in any way to Plaintiff's claims in that Plaintiff has not sufficiently tailored his request to protect the interests of others and to those complaints that are related to his, namely, sexual harassment, hostile work environment stemming from sexual harassment, and retaliation based on a sexual harassment complaint.

In Request for Production 12, Plaintiff asks for "[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 FCHR regarding allegations of sexual harassment, retaliation, and/or hostile work environment." Once again, the City made the same objections as stated above. The City restates that such a request for materials related to any retaliation or hostile work environment claim are clearly overbroad, burdensome, and irrelevant to Plaintiff's claims for the same reasons the City objects to Request for Production 1.

In Request for Production 11, Plaintiff asks for "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." Defendant again objected to this Request on the grounds that it was vague, overbroad, burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's demand for all notes, memoranda, recordings or minutes, memorializing any training classes, meeting or discussions between management

employees over the past six years would necessarily require Defendant to spend hundreds of hours researching and compiling such data. In addition, any meeting or discussion that management had with employees regarding sexual harassment or retaliation would have little to do with Plaintiff's own claim, and notes regarding such meetings could also reveal confidential information that an employee chose to share with management. Although notes of such events may perhaps be redacted for purposes of fulfilling Plaintiff's Request, the cost in time, effort, and money to employ an individual to process each document is not justified by the tenuous connection that such documents would have to Plaintiff's ability to establish his case. See Byrd v. PECO Energy Co., 1999 WL 89711 (E.D.Pa. 1999) (where the Court denied a plaintiff's request for production of certain data on the grounds that the burden to the defendant outweighed any benefit to the plaintiff). Such a request is therefore clearly overbroad and burdensome.

As to Plaintiff's Request for Production 17, the City continues to maintain that it is not in possession of any documents that are "related to the sexual harassment allegations by Officer Bruce Locke made against Barbara Jones," and therefore, cannot produce them. Despite Plaintiff's claim that Officer Locke filed a complaint that was supposedly placed in Sgt. Barbara Jones' personnel file, the City has found no evidence of such a complaint having ever been filed. In fact, the City has provided the complete personnel file of Sgt. Jones. Further, Defendant has made an honest effort to investigate the possibility that the alleged complaint was filed elsewhere, but to no avail. Clearly, the City cannot be compelled to proffer discovery that it simply does not possess. Therefore, Request for Production 17 should be denied.

In Requests for Production 15, 16, and 18, Plaintiff plainly seeks to obtain a mass of documents and materials that is fully entrenched in the Orlando Police Department's massive computer system. In determining whether material is "discoverable," the court should consider

not only whether the material actually exists, but also the burdens and expenses involved in obtaining the material. Fennell v. First Step Designs, Ltd., 83 F.3d 526, 532 (1st Cir. 1996); See Fed. R. Civ. P. 26(b)(2). The City has objected to all three Requests on the grounds that they were vague, overbroad, burdensome, and not reasonably calculated to the discovery of admissible evidence. The City has also objected to Request for Production 16 on the grounds that the documents may include confidential information which intrudes upon third party privacy rights and/or information protected by attorney-client privilege. The burdens and expenses entailed in obtaining Plaintiff's requested information far outweigh any possibility of discovering appropriate information in this matter, particularly since Plaintiff's claims center around the behavior of Sgt. Jones, and not either Lt. Victor Uvalle or any other member of the Orlando Police Department.

In Request for Production 15, Plaintiff requests a copy of "all e-mails with sexually explicit or pornographic materials e-mailed from the computer of Lt. Uvalle to anyone from 2000 to present." Plaintiff has claimed that Lt. Uvalle keeps a significantly large amount of pornographic materials on his (Lt. Uvalle's) computer. Plaintiff's Deposition at pages 54-55. However, that purported amount undoubtedly pales in comparison to the sheer volume of other data that Lt. Uvalle's computer contains, all of which someone would have to sift through in order to find the alleged materials that Plaintiff seeks. While it is true that Rule 26(b) of the Federal Rules of Civil Procedure permits parties to obtain relevant discovery, it is also true that the scope of discovery is "by no means limitless." Innomed Labs, LLC v. Alza Corp., 2002 WL 31012165, 1 (S.D.N.Y. 2002). The breadth of Plaintiff's request is considerable: he seeks the production of information going back six years. Complying with this demand is particularly difficult since Lt. Uvalle has most likely changed computers several times throughout his tenure

at the Orlando Police Department, and it is unlikely that the City has maintained accurate records of every time an employee has received a new computer. Further, even if every one of Lt. Uvalle's computers could somehow be identified, it would take thousands of hours for a City employee to mine all the data in the computer hard drives and come up with the alleged information that Plaintiff seeks.

Moreover, Plaintiff has yet to truly articulate why the information from Lt. Uvalle's computer is relevant to establishing a prima facie case for his sexual harassment and retaliation claims, in which the only harasser he names is Sgt. Jones. To establish a case of hostile work environment sexual harassment, Plaintiff must establish: 1) he is a member of a protected group; 2) he was the subject of unwelcome sexual harassment; 3) the harassment occurred because of his sex; and 4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of his employment. Breda v. Wolf Camera & Video, 222 F.3d 886, 889, n. 3 (11th Cir. 2000). Additionally, Plaintiff must demonstrate that "the employer knew or should have known of the harassment and failed to take remedial action." Castleberry v. Edward M. Chadbourne, Inc., 810 So.2d 1028, 1029-30 (Fla. 1st DCA 2002). First, Plaintiff has not alleged that he was sexually harassed by Lt. Uvalle in any way (in which case Lt. Uvalle's computer files may be relevant). Second, the existence of any pornographic or sexual material on Lt. Uvalle's computer would not establish that the City, Plaintiff's employer, knew or should have known of the alleged harassment of Plaintiff by Sgt. Barbara Jones.

The existence of such material does not support Plaintiff's retaliation claim either. In order to establish a prima facie claim for retaliation under Title VII, Plaintiff must demonstrate that: 1) he engaged in statutorily protected activity; 2) he suffered an adverse employment action; and 3) there is a causal relation between the two events. Harper v. Blockbuster Entm't Corp.,

139 F.3d 1385 (11th Cir. 1998). The connection between any alleged pornographic material on Lt. Uvalle's computer and Plaintiff's complaint of retaliation is feeble at best. Thus, permitting any search for this kind of information would involve merely a "'fishing expedition' without any particularized likelihood of discovering appropriate information." Fennell, 83 F.3d at 532. See Marshall v. Westinghouse Elec. Corp., 576 F.2d 588 (5th Cir. 1978). These facts, coupled with the countless hours and high financial costs of producing Plaintiff's request, should move this Court to deny Request 15 in Plaintiff's Motion.

Request for Production 16 suffers from similar pitfalls, albeit the breadth of this Request is even broader. Plaintiff wants "[a] copy of the computer printout of all e-mails e-mailed from the computer of Lt. Uvalle to anyone from 2000 to the present." Clearly, the burden to the City in producing this kind of discovery outweighs any benefit to Plaintiff. See Byrd v. PECO Energy Co., 1999 WL 89711 (E.D.Pa. 1999).; Fed. R. Civ. P. 26(b)(1). Lt. Uvalle is an officer of the Orlando Police Department and has likely hundreds and hundreds of e-mails on several different computers. Further, he has addressed each to any number of individuals, many of whom would suffer from the disclosure of any confidential or even classified information contained in the messages. Plaintiff assumes that the City is simply trying to keep the information away from him; on the contrary, the City is attempting to protect the information from anybody. Regardless of how easy the Plaintiff believes producing an e-mail printout to be, it is clear that someone hired by the City will have to examine each e-mail that Lt. Uvalle, and potentially other employees, authorized to come up with such a list. The cost of such an effort should be obvious. As with Request for Production 15, the undertaking would involve identifying every computer that Lt. Uvalle has used in the past six years, sifting through all the data contained therein (including data placed in the computer by other unknown individuals and

officers), and listing each and every e-mail that Lt. Uvalle has written in the past six years. The burdens and expenses of this production more than speak for themselves.

Furthermore, any amount of information in Lt. Uvalle's e-mails regarding Plaintiff's claims would be negligible in comparison to other, irrelevant information contained in these messages. When one considers the hundreds of law enforcement cases in which Lt. Uvalle has been involved, along with the administrative duties of his position, it is not difficult to discern how irrelevant the majority of his e-mails would prove to be in judging the validity of any of Plaintiff's allegations. Plaintiff's request for just a printout of all the e-mails should not diminish the e-mail contents' irrelevance. Additionally, even if some e-mails did exist that had anything to do with Plaintiff's claims, those messages would still be irrelevant as to establish any element of either sexual harassment or retaliation under Title VII. A printout of those e-mails would support Plaintiff's allegations even less. Therefore, Request for Production 16 in Plaintiff's Motion should also be denied.

Finally, Plaintiff's Request for Production 18 for a copy of "all e-mails with sexually explicit or pornographic materials e-mailed from and received at any computer of anyone employed at OPD from 2000 to present" is unquestionably the most burdensome and expensive of all. To begin, Plaintiff did not even work at the Orlando Police Department headquarters, but rather, at an undisclosed satellite which solely dealt with drug law enforcement. There is simply no basis for Plaintiff to request that every computer at the Orlando Police Department be in effect audited for pornographic materials. Further, the City employs approximately one thousand (1,000) individuals at the Orlando Police Department, and maintains roughly the same amount of computers – to state that harvesting each individual computer in an effort to comply with Plaintiff's request would be difficult and time-consuming is at best an understatement. In fact,

the City would have to devote a full-time employee to the sole purpose of complying with this discovery request. Upon scrutinizing Plaintiff's discovery demand, it is easy to see that multiplying almost any reasonable amount to gather the requested data from one computer by the one thousand (1,000) computers the Orlando Police Department uses could lead to an expenditure upwards of one million dollars or more.

This request is particularly absurd, because the bounds of this search are potentially endless. More than one hundred (100) employees have entered and left the organization within the past six years. Sifting through every e-mail that every current and former employee wrote within this time frame to identify those with any pornographic or sexual content could take the better part of a year, that is, if it can be done at all, given the inevitable reformatting and other such acts that the computers have undergone within the past several years. Although courts have traditionally defined the scope of discovery to be quite broad, it is certainly not this "boundless." Wertheim Schroder & Co., Inc., 1995 WL 6259, 2 (S.D.N.Y. 1995). It is incontestable that boundless discovery is exactly what Plaintiff is seeking from this Court.

Furthermore, Plaintiff as the party seeking discovery has the burden of "showing clearly that the information sought is relevant to the subject matter of the action and would lead to admissible evidence." Storch, 1997 WL 401589 at 1. Evidence that Orlando Police Department employees of varying rank, training, experience, and seniority have some pornographic materials, even if such materials exist, have absolutely no bearing on Plaintiff's case.

Again, Plaintiff is seeking to establish a case for sexual harassment and retaliation against the City itself, and is doing so based on the actions of one employee, Sgt. Barbara Jones, in one location, an undisclosed Orlando Police Department satellite office. In addressing the topic of discovery in a discrimination claim, the Eleventh Circuit has subscribed to the principle that "'in

the context of investigating an individual complaint the most natural focus is upon the source of the complained of discrimination – the employing unit or work unit." Earley v. Champion International Corp., 907 F.2d 1077, 1084 (11th Cir. 1990) (citing Marshall, 576 F.2d at 588). Therefore, "a vague possibility that loose and sweeping discovery might turn up something" does not demonstrate sufficient relevance to justify "moving discovery beyond the natural focus of the inquiry." Id.; See Joslin Dry Goods Co. v. EEOC, 483 F.2d 178 (10th Cir. 1973). Plaintiff has not presented a single theory which would warrant moving discovery beyond his own workplace.

In addition, Plaintiff's mere speculation that other employees' computer systems may contain pertinent information to his complaints does not warrant the "compelled inspection of a computer system that contains voluminous information" about topics other than his claim. Bethea v. Comcast, 218 F.R.D. 328, 330 (D.D.C. 2003). Given the sensitive information that a computer within any police department would contain, Plaintiff cannot deny that there is risk in revealing this information to any outsiders, even if those outsiders are in fact employed by the City. Further, in addition to containing personal information about the officers to whom they are issued, the City's computers undoubtedly contain information regarding a myriad of concerns, including ongoing cases, confidential informants, health information, and other confidential types of information. Because Request for Production 18 in Plaintiff's Motion calls for such a vast and costly undertaking with potentially very little to show for it in terms of relevant and admissible evidence, it too should be denied.

As a final point, this Court is asked to consider what Plaintiff is truly asking in Requests for Production 15, 16, and 18. Plaintiff states in his Motion to Compel that he, his expert, and his counsel are not "interested in viewing or looking at any confidential or privileged information." However, whether Plaintiff is interested in viewing such information is hardly the

point. Although Plaintiff may deserve to have his Complaint adjudicated, this should not be at the mercy of the entire Orlando Police Department and other third parties. Whether Plaintiff is granted restricted access or not, the City vigorously maintains that its computers contain information, which if revealed, would not only compromise ongoing law enforcement operations, but also the lives of many individuals, including undercover officers and confidential informants. Further, the Orlando Police Department fosters vital relationships with the Florida Department of Law Enforcement (FDLE) and federal authorities, such as the Federal Bureau of Investigations, in its law enforcement efforts. These relationships would clearly be compromised if the Orlando Police Department had to surrender every computer it had to examination by Plaintiff. Balancing Plaintiff's interest against the lives of law enforcement officers and informants makes it abundantly clear that Requests 15, 16, and 18 must be denied. Therefore, this Court should find that Plaintiffs' Requests are far too burdensome, not only in their financial costs, but also in the potentially grave consequences, they could involve if fulfilled.

II. Plaintiff's Motion to Compel Entry Upon Land

In Plaintiff's Request for Production for Entry Upon Land, he seeks to inspect the computer hard drive of Lt. Uvalle, which Plaintiff alleges was in use at all times material to the allegations of his Complaint, along with the hard drive of Shawn Hayden. The City objects on the grounds that this Request is also vague, overbroad, and not reasonably calculated to lead to the discovery of admissible evidence. In addition, the City also objects to the Request, because it is likely that the computer hard drives contain active criminal intelligence information, identifying information in relation to confidential information and confidential sources, identifying information of undercover personnel, and other types of confidential information. In addition, the drives may also contain medical information of City employees.

Again, as the party seeking to compel discovery, Floeter has the burden of demonstrating the relevance of the information to the lawsuit and that it would lead to admissible evidence. Storch, 1997 WL 401589 at 1. Further, "[i]n the context of computer systems and computer records, inspection or seizure is not permitted unless the moving party can 'demonstrate that the documents they seek to compel do, in fact, exist and are being unlawfully withheld.'" Bethea, 218 F.R.D. at 329-30 (citing Alexander v. FBI, 218 F.R.D. 305, 311 (D.D.C. 2000)). Plaintiff states in his Motion to Compel that the City has "continue[d] to refuse to comply with the Rules of Discovery and provide responses to Plaintiff's discovery requests," and implies that Defendant has done so in bad faith. However, a plaintiff's mere speculation that a defendant is withholding information is not sufficient to merit a compelled search. In Bethea, the District Court held that "a party's suspicion that another party has failed to respond to document requests fully and completely does not justify compelled inspection of its computer systems." 218 F.R.D. at 330. The Court went on to deny the plaintiff's request for "appropriate discovery information," stating that plaintiff was "speculating, and such conjecture does not warrant the compelled inspection of a computer system that contains voluminous information relating to many topics other than plaintiff's employment discrimination claim." Id. Plaintiff can provide no evidence that the City is somehow holding out discovery in "bad faith" aside from his own speculation.

Furthermore, the City must again point out the serious ramifications of any leak of confidential information that is contained in the Orlando Police Department's computers. The Orlando Police Department has several security measures in place just to keep such information away from its own employees, not to mention any outsiders. The existence of these measures clearly demonstrates how important it is to protect the information in the computer hard drives

that Plaintiff seeks to invade. Again, not only will any disclosure – accidental or otherwise – risk the ongoing investigations of the Orlando Police Department, but also the lives of many individuals. Therefore, Plaintiff's Motion to Compel Entry Upon Land should be denied.

For the reasons stated herein, the City respectfully requests this Court to deny Plaintiff's Combined Motion to Compel Production of Documents and Motion to Compel Entry Upon Land.

Respectfully submitted,

/S/ Wayne L. Helsby
Wayne L. Helsby
Florida Bar No. 362492
Robert E. Blanchfield
Florida Bar No. 0361800
ALLEN, NORTON & BLUE, P.A.
1477 West Fairbanks Ave., Ste. 100
Winter Park, Florida 32789
(407) 571-2152 (O) (407) 571-1496 (F)
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **6th day of April, 2006**, the foregoing document was filed with the Clerk of the Court via the CM/ECF System, which will send a notice of electronic filing to: Frank T. Allen, The Allen Firm, P.A., 605 East Robinson Street, Suite 130, Orlando, Florida 32801 and Michael H. LaFay, Nejame, Harrington, Barker et al., One South Orange Avenue, Suite 304, Orlando, Florida 32801.

/S/ Wayne L. Helsby
Wayne L. Helsby

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