

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

**LISA R. KELLEY AND
SHARON PARKER,**

Plaintiffs,

v.

CASE NO. 5:13-CV-00451-ACC-PRL

TAXPREP1, INC.,

Defendant.

**DEFENDANT TAXPREP1, INC.'S
REPLY IN SUPPORT OF ITS MOTION FOR SANCTIONS**

Defendant TaxPrep1, Inc. (“TaxPrep1” or “Defendant”), by and through its undersigned counsel and pursuant to this Court’s Order granting TaxPrep1 leave to file a reply [Dkt. 82], hereby submits its Reply in support of its Motion For Sanctions Against Sharon Parker For Spoliation Of Critical Evidence (“Motion for Sanctions”) [Dkt. 71].

I.

PRELIMINARY STATEMENT

TaxPrep1’s Motion for Sanctions sets forth several grounds which warrant dismissal of Plaintiff Sharon Parker’s (“Parker”) Complaint and for attorneys’ fees and other appropriate relief based upon her intentional destruction of critical evidence in this case. This Reply addresses: (1) Parker’s alleged recent discovery and May 5, 2015 production of relevant, critical e-mails [Dkt. 77 at p. 9]; and (2) Parker’s misleading claim that TaxPrep1 “has access to all of her e-mails” [Dkt. 77 at pp. 10-12].

I.

ARGUMENT

A. Parker’s Failure To Diligently Search For And Disclose Critical, Relevant E-mails Is Sanctionable.

On May 5, 2015, months after the close of discovery on January 30, 2015, Parker produced over 200 pages of e-mails related to her unpaid wages claim. Moreover, Parker now claims that at some undisclosed time “since her deposition was taken, [she] found work e-mails on an old Yahoo account” [Dkt. 77 at p. 9]. However, Parker’s Yahoo account cannot accurately be described as an “old” Yahoo account. Significantly, Parker’s Yahoo account contains hundreds of e-mails directly related to this lawsuit dated as recently as March 2014, just months after this lawsuit was filed in October 2013.

Moreover, the e-mails in Parker’s purported “old” Yahoo account are directly responsive to both this Court’s October 3, 2013 Scheduling Order requiring Parker to serve on TaxPrep1 by October 23, 2013, “All documents in [P]arker’s possession, custody or control that pertain to the unpaid wages claim in the Complaint” [Dkt. at p. 1], and TaxPrep1’s December 16, 2014 First Request for Production of Documents to Parker (“First RFP”) requesting all documents relating to Parker’s communications pertaining to any of the facts or matters in the Complaint. Further, during her deposition on January 29, 2015, Parker specifically testified:

Ms. Molloy: Have you produced any e-mails or other documents in this case?

Ms. Parker: No.

Ms. Molloy: Do you have any e-mails or other documents?

Ms. Parker: If – not that I’ve kept, no.

[Parker: 7:22 – 8:1].¹

¹ See excerpt of Parker’s January 29, 2015 deposition transcript, attached hereto as Exhibit A.

Now, Parker's counsel asks the Court and TaxPrep1 to believe that on May 5, 2015, Parker suddenly had an epiphany and remembered the existence of hundreds of e-mails relevant to her unpaid wages claim. Even if it were true, it is only because Parker was not diligent in conducting a diligent and complete search for responsive documents in every e-mail account she owns. The Motion For Sanctions pending at the time may have convinced her to take her obligations to the Court more seriously. Parker's dilatory conduct during and following the discovery process is inexcusable and constitutes further evidence of her bad faith and sanctionable conduct. Parker's delinquent document production can only be seen as either an intentional effort to deprive TaxPrep1 of necessary evidence to support its defense, or the result of Parker's grossly negligent execution of her discovery obligations, and her cavalier attitude about this litigation.

The facts of this case show that Parker's conduct amounts to nothing less than a flagrant disregard and willful disobedience of the discovery rules. There were extensive communications between the parties specifically regarding the existence of e-mails, and in response to each inquiry, Parker unequivocally represented that she had no relevant e-mails in her possession. As we now know, Parker was at all times in possession of the recently produced e-mails, but she deliberately held them hostage. It could not be clearer that Parker's failure to produce her Yahoo account e-mails and her destruction of all of the other e-mails was neither inadvertent nor innocent. Rather, Parker's recent and belated document production reeks of gamesmanship and bad faith.

Moreover, Parker's willful failure to produce her Yahoo account e-mails severely harmed TaxPrep1. TaxPrep1 was denied access to Parker's Yahoo account e-mails until after the discovery period closed, summary judgment motions were filed and Parker's deposition was

completed. TaxPrep1 was also denied the full benefit of all relevant documents in preparation of its Motion for Partial Summary Judgment. *See Unique Industries, Inc. v. 965207 Alberta Ltd.*, 764 F.Supp.2d 191, 203 (D.D.C.2011) (finding plaintiff's late disclosure prejudiced the defendant, who had not been able to address the untimely disclosed evidence in its summary judgment motion). As a result of Parker's willful failure to search for and produce her Yahoo account e-mails, TaxPrep1 has been unfairly disadvantaged in this action.²

Accordingly, Parker's abusive and bad faith conduct warrants sanctions. *See Rabello v. Bell Helicopter Textron, Inc.*, 200 F.R.D. 484, 487 (S.D. Fla. 2001) (granting sanctions where defendant willfully failed to produce accident report to plaintiffs); *Martello v. Product Quest Mfg., LLC*, 2014 WL 2565194, at *3 (M.D. Fla. June 6, 2014) (dismissing complaint where the plaintiff "demonstrate[d] a pattern of dilatory and duplicitous litigation tactics as well as blatant disobedience of Court orders."); *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 846 F. Supp. 2d 1335, 1358, 1365 (N.D. Ga. 2012) (granting sanctions against defendant where defendant's untimely and dilatory document production violated the Court's deadlines); *Hill v. Morehouse Med. Associates, Inc.*, 236 F.R.D. 590, 595 (N.D. Ga. 2006) (granting sanctions against defendant who "came forward, more than five months after the close of discovery, to inform the court that there are yet more medical records that defendant needs to produce").

B. TaxPrep1 Does Not Have Feasible Access to Parker's E-mails On JHNet

In a desperate attempt to downplay her intentional destruction of critical, relevant evidence Parker asserts that TaxPrep1 "has access to all the e-mails that were ever sent or received by Parker while working for Defendant." [Dkt. 77 at p. 12]. Without more, Parker's assertion is misleading. Significantly, Parker fails to mention that TaxPrep1's e-mail system,

² In light of the destruction of a number of work-related, relevant e-mails, and the "late discovery" of the "old" Yahoo account, one is left to wonder what other sources of relevant evidence have yet to be disclosed.

JHNet, is not searchable by text. Therefore, in order to search JHNet for a specific e-mail Parker sent, TaxPrep1 would need both a sender and a date. *See* excerpt of TaxPrep1's corporate representative's January 29, 2015 deposition transcript, at 92:6-11, attached hereto as Exhibit B.³

As Parker well knows, because she destroyed her e-mails, and therefore has no way to provide TaxPrep1 with dates of e-mail transmissions, TaxPrep1 does not have the dates of Parker's e-mail communications necessary to effectuate a proper search in JHNet. Therefore, Parker's attempt to exculpate herself, and to convince this Court that "all the Defendant must do to gain access to these crucial documents is simply look the e-mails up by sender and date" is a classic exercise in misdirection.⁴ [Dkt. 77 at p. 12]. To the contrary, finding the e-mails that Parker destroyed would be far from "simple." Rather, TaxPrep1 would need to manually sift through years of e-mails sent or received during the period of Parker's employment. Such a search would not only be unreasonable but unduly burdensome.

II.

CONCLUSION

For the foregoing reasons, TaxPrep1 respectfully requests that this Court grant its Motion for Sanctions, dismiss Parker's lawsuit [Dkt. 71], and grant TaxPrep1 any other further relief this Court deems just and proper, including attorneys' fees and costs required to defend Parker's lawsuit and to pursue its Motion for Sanctions.

³ Mr. Talmadge: If I wanted to know every communication that mentioned the name Sharon Parker . . . for '11, '12, '13, the only way to do that it sounds like would be to go through every single e-mail for those dates?

Mr. Forness: By sender and date.

[Forness: 92:6-11]

⁴ Having worked for TaxPrep1 for over a decade, Parker is well aware that JHNet is not searchable without a specific date and sender.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May_18, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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