

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

MARCIA CROSSMAN,)	
)	
Plaintiff,)	
)	
v.)	CASE NO.: 3:19-cv-01081-BJD-PDB
)	
CARRINGTON MORTGAGE SERVICES,)	
LLC,)	
)	
Defendant.)	

**DEFENDANT’S MOTION TO COMPEL PLAINTIFF TO
RESPOND TO DISCOVERY REQUESTS**

Defendant Carrington Mortgage Services, LLC (“Carrington”), by counsel, and pursuant to Federal Rule of Civil Procedure 37(a) and Local Rule 3.04, submits this Motion to Compel Plaintiff to respond to discovery requests for production of documents. Specifically, Carrington seeks an order compelling Plaintiff to produce Plaintiff’s Facebook and Instagram accounts and to produce Plaintiff’s social media content bearing on Plaintiff’s mental and emotional states.

I. Defendant’s Discovery Requests Seeking Plaintiff’s Relevant Social Media Content.

Plaintiff brings this action alleging employment discrimination based on race and disability, as well as whistleblower retaliation, against her former employer Carrington. [Doc. 1-1 at 1]. Carrington served its first discovery requests to Plaintiff on October 17, 2019. [Ex. 1]. After granting multiple extensions to Plaintiff’s response deadline, Plaintiff served discovery responses on January 17, 2020. [Ex. 2]. Defendant noted numerous deficiencies in Plaintiff’s responses and sent a letter to Plaintiff’s counsel on January 27, 2020 pursuant to Fed. R. Civ. P. 37(a)(1) in a good faith effort to resolve discovery disputes. [Ex. 3]. In its letter, Defendant requested supplemental responses to discovery, including as to three requests for production of

documents related to Plaintiff's social media content, Request Numbers 46, 47, and 50. [*Id.* at 3-4]. These requests and Plaintiff's initial responses are reproduced here:

REQUEST NO. 46: Please produce a download of Plaintiff's complete Facebook Profile. To do so, go to the Account Settings page (arrow button located next to the "Home" button) and click the "Download Your Information" button (located at the bottom of the general settings page). Once the page loads, click the "Start My Archive" button. Once Facebook verifies Plaintiff's identity, an email will be sent to Plaintiff advising that a zip file is ready for download. Once the zip file is received, forward it to jackie.gessner@btlaw.com. Plaintiff is hereby put on notice that deleting anything from her account from this point forward (including, but not limited to, posts, status updates, mail messages, photographs, friends, links, etc.) is considered spoliation of evidence and Plaintiff's counsel has an ethical obligation to ensure that all evidence is preserved.

RESPONSE: Objection. This request is overly broad, invasive, and not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 47: Please produce a download of Plaintiff's Instagram account. To do so, use the following website: www.instagram.com/download/request. Once the request has been processed, Plaintiff will receive a link to a file with a copy of her Instagram account. Once the file is received, forward it to jackie.gessner@btlaw.com. Plaintiff is hereby put on notice that deleting anything from her account from this point forward (including, but not limited to, posts, status updates, mail messages, photographs, friends, links, etc.) is considered spoliation of evidence and Plaintiff's counsel has an ethical obligation to ensure that all evidence is preserved.

RESPONSE: Objection. This request is overly broad, invasive, and not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 50: Please produce copies of any and all online profiles, postings, messages (including, without limitation, tweets, replies, retweets, direct messages, status updates, wall comments, groups joined, activity streams and blog entries), photographs, videos, and online communications or emails that Plaintiff authored or otherwise contributed to that:

- (a) refer or relate to the allegations set forth in the Complaint;
- (b) reveal, refer or relate to any emotion, feeling, or mental state Plaintiff has experienced in the last five (5) years (e.g., reflect Plaintiff's happiness, sadness, anger, disappointment, etc.);

(c) relate to the Defendant, or any employees or former employees of Defendant; and

(d) reveal, refer or relate to events that could reasonably be expected to produce significant emotion, feeling, or mental state (e.g., a significant illness or surgery of Plaintiff, a family member, or friend; the passing of a friend, family member, or pet; divorce; the loss of a home/residence (by fire or otherwise); or other traumatic events; or, alternatively, marriage, childbirth, or other joyful events) and reflect any reaction to such events.

RESPONSE: This request is overly broad, vague, ambiguous, and not reasonably calculated to lead to the discovery of admissible evidence.

[Ex. 2 at 37-39].

In an effort to resolve discovery disputes, including with respect to the above requests, counsel held a phone conference on March 2, 2020 to discuss the items raised in Defendant's January 27, 2020 letter.¹ Defendant's counsel explained that Plaintiff has placed her mental and emotional state at issue by seeking emotional distress damages. Indeed, Plaintiff's Complaint alleges damages in the form of emotional distress, inconvenience, mental anguish, loss of enjoyment of life, and other pecuniary and non-pecuniary damages. [Doc. 1-1 at 5-6]. In response to discovery, Plaintiff further identified the following injuries due to alleged treatment by Defendant: "feeling nervous;" physical injuries including high blood pressure, anxiety, insomnia, and hyperventilating; and psychological injuries related to fear she experienced at Carrington. [Ex. 2 at 13-14]. Therefore, Defendant is entitled to conduct discovery into alternate sources of Plaintiff's alleged emotional distress and to explore evidence bearing on her contention that she has suffered loss of enjoyment of life. On the March 2, 2020 phone conference, Plaintiff's counsel agreed that Plaintiff's social media content would likely contain information relevant to Plaintiff's alleged emotional distress damages, and the parties discussed the option of producing responsive

¹ Defendant's counsel made numerous attempts to contact Plaintiff's counsel in February to request supplemental discovery in response to the January 27th letter. [See Ex. 4-8]

records pursuant to agreed confidentiality provisions. [See Ex. 9, 3/2/2020 Email to Pichoff Regarding 3/2/2020 Phone Conference].

Following the March 2, 2020 phone conference, Plaintiff provided supplemental discovery responses but failed to produce any of the information requested in Request Nos. 46, 47, and 50. [Ex. 10]. Instead, Plaintiff provided the below, revised responses:

Request No. 46, RESPONSE: This Response is being supplemented pursuant to Defendant's Rule 37 Letter. In response, Plaintiff submits a more specific objection to this request. The request for full download of Plaintiff's social media profile will result the production of several items that have no relevance, no materiality, and no bearing on any issue presented in this lawsuit. Plaintiff asserts that matters of alternative sources of alleged mental anguish/emotional distress can be sought via less invasive means, including interrogatories or via deposition.

Request No. 47, RESPONSE: This Response is being supplemented pursuant to Defendant's Rule 37 Letter. In response, Plaintiff submits a more specific objection to this request. The request for full download of Plaintiff's social media profile will result the production of several items that have no relevance, no materiality, and no bearing on any issue presented in this lawsuit. Plaintiff asserts that matters of alternative sources of alleged mental anguish/emotional distress can be sought via less invasive means, including interrogatories or via deposition.

Request No. 50, RESPONSE: This answer is being supplemented pursuant to Defendant's Rule 37 letter. Below are responses to each subsection of this Request:

(a) There are none.

(b) Plaintiff maintains and supplements her objections as follows: this Request for social media posts relating to "any emotion, feeling, or mental state" is far too nebulous and ambiguous description for the Plaintiff to comply with this request. Additionally, even if the Plaintiff were to speculate what posts fit this ambiguous qualification, the resulting production would include items with no relevance, no materiality, and no bearing on the issues in Complaint. It is therefore too invasive, and Plaintiff would assert there are more tailored, efficient ways to investigate potential alternative sources of mental anguish, such as interrogatories or via deposition.

(c) There are none.

(d) Plaintiff maintains and supplements her objections as follows: this Request for social media posts relating to “events that could reasonably be expected to produce significant emotion, feeling, or mental state” is far too nebulous and ambiguous description for the Plaintiff to comply with this request. Additionally, even if the Plaintiff were to speculate what posts fit this ambiguous qualification, the resulting production would include items with no relevance, no materiality, and no bearing on the issues in Complaint. It is therefore too invasive, and Plaintiff would assert there are more tailored, efficient ways to investigate potential alternative sources of mental anguish, such as interrogatories or via deposition.

[*Id.* at 8-11]. Upon receipt of these supplemental responses, Defendant’s counsel contacted Plaintiff’s counsel again on March 10, 2020, March 17, 2020, and March 24, 2020 to address Plaintiff’s failure to produce any documents responsive to Requests 46, 47, and 50. [Ex. 11-13]. Plaintiff’s counsel finally responded on March 24, 2020 and acknowledged that the parties remain in dispute, that Plaintiff did not use Facebook “for things described in the discovery,” and that Plaintiff would not agree to a protective order. [Ex. 14]. Plaintiff’s counsel further did not offer support or authority for Plaintiff’s refusal to respond to such requests. [*Id.*]. Accordingly, Defendant seeks the Court’s intervention to compel Plaintiff to provide responsive, relevant records.

II. Plaintiff’s Objections Are Misplaced, and Defendant Is Entitled To Conduct Discovery Regarding Plaintiff’s Social Media Content.

“[C]ourts are required to accord discovery a broad and liberal scope in order to provide parties with information essential to the proper litigation of all relevant facts, to eliminate surprise and to promote settlement.” *Brown v. Nocco*, No. 8:16-CV-3155-T-17-MAP, 2018 WL 8370065, at *1 (M.D. Fla. Apr. 11, 2018). “Rule 26(b)(1) provides that a party “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case” *Pittsburgh Logistics Sys., Inc. v. GlobalTranz Enterprises, Inc.*, No. 3:17-CV-8-J-32-PDB, 2018 WL 2388557, at *1 (M.D. Fla. May 25, 2018). “Rule 37(a) provides that a party may move for an order compelling disclosure of discovery, including if a party fails to

respond or provides evasive or incomplete responses to interrogatories or requests for production.” *Id.* at *2. Further, Rule 34 governing requests for production provides, “An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.” *Id.* (citing Fed. R. Civ. P. 34(b)(2)(C)).

Defendant’s requests for social media records seek information relevant to Plaintiff’s alleged emotional distress damages. On this point, *Anderson v. City of Fort Pierce*, No. 14-14095-CIV, 2015 WL 11251963, at *2 (S.D. Fla. Feb. 12, 2015), is instructive. In *Anderson*, the plaintiff was a former employee who alleged discrimination and harassment based on sex, as well as retaliation. *Id.* She asserted impaired mental health and damages for “emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.” *Id.* Accordingly, the employer alleged the plaintiff had placed her quality of life at issue and sought social media content in discovery (specifically, social media photos). *Id.* Reviewing case law regarding the discoverability of a litigant’s social media information, the court explained that the “survey of case law shows that social media content is generally discoverable.” *Id.* Finding the broad scope of discovery to encompass the social media photos, the court agreed that the employee had placed her mental health and quality of life in issue and granted the employer’s motion to compel. *Id.*

Plaintiff has similarly placed her mental and emotional health and quality of life at issue, and her social media content sought in discovery is relevant thereto. As part of her alleged damages, Plaintiff asserts in her Complaint that she has suffered emotional distress, inconvenience, mental anguish, loss of enjoyment of life, and other pecuniary and non-pecuniary damages. [Doc. 1-1 at 5-6]. Plaintiff’s discovery responses further allege that Plaintiff has suffered various mental

and emotional injuries due to Defendant's actions: feeling nervous and stressed; physical injuries including high blood pressure, anxiety, insomnia, and hyperventilating; and psychological injuries related to fear she experienced at Carrington. [Ex. 2 at 13-14]. Plaintiff further asserts that she was told by her doctor that her stress levels were too high and that she needed to reduce her stress. [Id.]. Plaintiff's Facebook and Instagram accounts and social media content are likely to include information about Plaintiff's daily life, significant life events (both positive and negative), and Plaintiff's emotions, feelings, and mental states related thereto. In other words, Defendant seeks information related to Plaintiff's quality of life and potential alternate sources of alleged emotional and mental distress. *See, e.g., Nucci v. Target Corp.*, 162 So. 3d 146, 152 (Fla. Dist. Ct. App. 2015) (explaining that social media content can offer a portrayal of what a party's life was like and finding that Facebook photos were "powerfully relevant to the damage issues in the lawsuit").

Plaintiff's blanket objections to such requests are improper. Plaintiff's initial responses objected to the requests on the grounds they are overly broad, invasive, vague, ambiguous, and not reasonably calculated to lead to the discovery of admissible evidence. [Ex. 2 at 37-39]. The responses fail to offer any explanation for the basis for the objections. "When objecting to a discovery request, the "[p]arties are not permitted to assert . . . conclusory, boilerplate objections that fail to explain the precise grounds that make the request objectionable." *Am. Home Assurance Co., v. Weaver Aggregate Transp., Inc.*, No. 5:10-CV-329-OC-10-PRL, 2017 WL 2721510, at *4 (M.D. Fla. June 23, 2017) (quoting *Martin v. Zale Delaware, Inc.*, No. 8:08-CV-47-T-27-EAJ, 2008 WL 5255555, at *1 (M.D. Fla. Dec. 15, 2008)). "Such generalized statements are usually deemed meaningless and are rejected." *Id.* (citing *Martin*, 2008 WL 5255555, at *1). Plaintiff's responses provide no explanation of the grounds for the objections and merely state the objections in a conclusory manner. Thus, these objections must be rejected.

Plaintiff's supplemental responses further fail to support her objections. Plaintiff first refuses to provide any of her social media content on the grounds that providing responsive social media content would include information that has no relevance. [Ex. 10 at 8-11]. However, this objection implies that the requested information would at least include some relevant documents. Plaintiff may not refuse to produce any documents on the grounds that some responsive documents would not be relevant. "Objections to portions of a document request do not excuse the responding party from producing those documents to which there is no objection." *Whetstone Indus., Inc. v. Yowie Grp., Ltd.*, No. 3:17-CV-1286-J-20-PDB, 2019 WL 5102817, at *4 (M.D. Fla. Oct. 11, 2019) (quoting the Middle District of Florida Discovery Handbook). Thus, notwithstanding this objection, Plaintiff must produce responsive, relevant portions of her social media accounts.

Plaintiff further objects on the grounds that there are "less invasive" means of conducting this discovery, including by interrogatories or deposition. However, Defendant has already affirmed that it would agree to confidentiality terms regarding Plaintiff's social media content. Defendant is unaware how it could obtain Plaintiff's social media records via interrogatories. Further, Defendant would be prejudiced were it not able to review responsive records prior to taking Plaintiff's deposition or to question Plaintiff regarding such content.

Indeed, courts have repeatedly held that social media content bearing on a party's mental or emotional state are relevant and discoverable where the party has placed her mental or emotional health at issue, as Plaintiff has done here. *See Anderson v. Centraarchy Rest. Mgmt. Co.*, No. 1:14-CV-539-WSD, 2016 WL 316851, at *1 (N.D. Ga. Jan. 26, 2016) (granting motion to compel and ordering discrimination plaintiff to provide user names for social media accounts as well as all responsive information and documents contained in her social media accounts, including Twitter, Instagram, and Facebook accounts); *Higgins v. Koch Dev. Corp.*, No. 3:11-CV-81-RLY-WGH,

2013 WL 3366278, at *3 (S.D. Ind. July 5, 2013) (granting motion to compel Facebook archives); *Anderson*, 2015 WL 11251963, at *2 (granting motion to compel production of social media content). Accordingly, the requests seek relevant social media content bearing on Plaintiff's mental and emotional states, and Plaintiff cannot refuse to produce such records.

III. Conclusion.

For the foregoing reasons, Defendant respectfully requests the Court enter an Order: 1) compelling Plaintiff to produce a download of Plaintiff's Facebook account within seven days of the Order; 2) compelling Plaintiff to produce a download of Plaintiff's Instagram account within seven days of the Order; and 3) compelling Plaintiff to produce her social media content (including online profiles, postings, and messages) related to any emotion, feeling or mental state Plaintiff experience in the last five years or any events that reasonably could be expected to produce significant emotion, feelings, or mental state within seven days of the Order. Further, Defendant requests that Plaintiff be ordered to reimburse Defendant for the costs and fees incurred in seeking this Order, and any other relief the Court deems appropriate.

CERTIFICATE OF GOOD FAITH CONFERENCE

Pursuant to Local Rule 3.01(g), I hereby certify that, on March 2, 2020, counsel for the movant conferred in good faith, during a telephone conference with Damon Pichoff, Esq., counsel for Plaintiff, regarding Defendant's Requests for Production 46, 47, and 50, in an effort to resolve the issues, but was unable to resolve the issues. Following the conference and subsequent email communications, Mr. Pichoff confirmed in writing that the discovery dispute remains unresolved. I further certify that I attempted to contact Mr. Pichoff a final time by phone and email on April 9, 2020 and April 10, 2020 prior to filing the instant Motion. Mr. Pichoff was unable to confer by phone. To avoid further delay, Defendant files the instant Motion and will continue to contact opposing counsel after filing and supplement this Motion if the parties are able to resolve their disputes.

Dated: April 10, 2020

s/Jackie S. Gessner

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