UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
WYNNWOOD DIVISION

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Theodore McNally,

Plaintiff,

Civil Action No. 10-X441-CIV-R

v.

Hostram, Inc.,

Defendant.
_____/

Minute Order
August 16, 2010

On July 28, 2010, the parties appeared before the Court for a pre-trial conference concerning the status of discovery. Prior to the conference, both plaintiff Theodore McNally ("plaintiff" or "McNally") and defendant Hostram, Inc. ("defendant" or "Hostram") filed motions to compel and for protective orders; each party claiming that the other was responsible for the minimal discovery accomplished to date. During the conference, it became clear that neither counsel for plaintiff nor counsel for defendant had engaged in good faith discovery negotiations, in violation of Local Rule 3.01(g). Consequently, the Court hereby orders the parties to meet and confer concerning their discovery disputes, and the Court reminds the parties of their obligation to act reasonably and genuinely seek a mutual resolution. In anticipation of the parties' diligent efforts and success in this task, the Court hereby denies, without prejudice, the majority of the parties' discovery motions. The Court reserves decision on two issues that require supplemental briefing and factual submissions. The two remaining issues are the

following: (a) plaintiff's motion to quash and for a protective order to prevent defendant from obtaining plaintiff's personnel records from Charleston Industries, and (b) defendant's motion for expedited discovery and summary judgment schedule with respect to plaintiff's unauthorized taking of confidential company documents.

I. Background

Defendant is a lobbying firm based in Tampa, Florida, that offers political consulting services to industry and interest groups. Most of Hostram's clients are large, agricultural companies. Plaintiff worked as a lobbyist for Hostram for ten years until Hostram terminated his employment on February 8, 2010. On May 3, 2010, plaintiff filed this action against Hostram alleging that he was fired due to his age in violation of the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. ("ADEA").

After losing his job with Hostram, plaintiff obtained employment with Charleston Industries ("Charleston") performing lobbying duties similar to those he performed for defendant. Like Hostram, Charleston represents agricultural clients, presenting their interests to state and federal legislatures. In an interrogatory response, plaintiff admitted that his job at Charleston ended after just four months. The interrogatory response further stated that the cessation of plaintiff's employment with Charleston was a "mutual decision." Upon learning these facts, Hostram served a subpoena (the "Charleston Subpoena") on Charleston seeking plaintiff's entire personnel file and all other documents concerning the circumstances surrounding and reasons for the cessation of plaintiff's employment with Charleston. The subpoena further seeks to depose plaintiff's former supervisor at Charleston on those topics. Plaintiff filed a motion to quash this subpoena pursuant to Federal Rule of Civil Procedure

("FRCP") 45 and for a protective order pursuant to FRCP 26(c) barring discovery of information concerning his employment and cessation of employment, at Charleston.

In addition to the disputed Charleston Subpoena, the defendant revealed a new and significant concern during the pre-trial conference, alleging for the first time that plaintiff had removed confidential information from Hostram. Defendant had only just learned that, during his employment at Hostram, plaintiff somehow obtained a confidential document he was not authorized to access. According to defendant, the document contains personnel information about plaintiff and his co-workers. Defendant also alleges that plaintiff has since shared this document with an employee of Hostram, who is similarly unauthorized to access the document, in an effort to convince her to join his lawsuit. Defendant argues that plaintiff's removal and distribution of this document was wrongful and provides defendant with an affirmative defense to the majority of plaintiff's damages. Defendant therefore moves for expedited discovery and dispositive motions on this issue to narrow the scope of the litigation and encourage early settlement.

Plaintiff opposes the motion. According to plaintiff, the document contains handwritten notes by his supervisor, and these notes suggest the supervisor deliberately targeted older employees for termination. Plaintiff claims he found the document, with the original handwriting, in a trash bin in open view and took the document to preserve this evidence. Plaintiff further alleges that the "personnel" information contained in the document was merely a list of employee names and years of service. According to plaintiff, the handwritten notes suggest that the "years of service" data was used as a proxy for age—i.e., it seems to have been gathered to identify the older employees.

II. The Charleston Subpoena

As explained above, plaintiff worked for Charleston after his employment with Hostram ended, but his position with Charleston lasted only four months. During the pre-trial conference, the parties agreed that defendant is entitled to information about plaintiff's earnings at Charleston, in order to assess whether plaintiff is mitigating his damages. Thus, plaintiff agreed to provide copies of his W-2s, benefit information, and a job description, and the Court held that this was sufficient discovery for purposes of mitigation. The parties continue to disagree as to whether defendant is entitled to the additional subpoenaed information concerning the reasons for plaintiff's departure from Charleston.

Defendant argues that this subpoenaed information is relevant to its after-acquired evidence defense. The after-acquired evidence defense typically arises when an employer is sued for discriminatory termination, and, during the discovery process, it learns that the plaintiff/employee engaged in some misconduct of which the employer was previously unaware. *See e.g. McKennon v. Nashville Banner Publ'g. Co.,* 513 U.S. 352, 361–62 (1995) (discussing how the plaintiff revealed in her deposition that she had copied and removed some of the defendant's confidential financial records). If the defendant employer can show that the misconduct would have led to plaintiff's termination had the employer known of it, the employer may assert the after-acquired evidence defense. *Id*. at 362–63. This defense is not a defense to liability; rather, it limits the damages an employer must pay when it is found to have terminated an employee for a discriminatory reason. *Id.* at 361–62 (stating that the plaintiff was not eligible for reinstatement or front-pay, and that back pay was limited to time period from the discriminatory termination up to the date employer discovered plaintiff's wrongdoing).

In *McKennon* and other early cases establishing and developing the after-acquired evidence defense, the terminable offense was not discovered until the lawsuit, but it had actually occurred during the plaintiff's employment with the defendant. In contrast, Hostram is looking for wrongdoing by the plaintiff at Charleston. Thus, defendant here is looking for wrongdoing that happened outside of the parties' employment relationship, *after* that employment ended. Defendant seeks to justify this reach, arguing that Charleston may have fired plaintiff for conduct that is also a terminable offense at Hostram. Defendant argues that regardless of where and when it happened, if plaintiff engaged in conduct that would have justified his termination from Hostram, the company does not have to pay damages after the date of that event.

Thus, according to defendant, post-termination misconduct can be the basis for the after-acquired evidence defense. Defendant claims that it must be permitted to pursue this defense through discovery from Charleston concerning the reasons for plaintiff's termination. Plaintiff counter-argues that post-termination events are too disconnected from the employment relationship with the defendant to be eligible for the after-acquired evidence defense. Plaintiff therefore requests that the Court issue a protective order barring this discovery.

Courts are divided as to whether post-termination misconduct can be the basis for the after-acquired evidence defense. *See e.g. Sellers v. Mineta*, 348 F.3d 1058, 1064 (8th Cir. 2004) (providing that the after-acquired evidence defense was available based on post-termination conduct); *cf. Nesselrotte v. Allegheny Energy, Inc.*, No. 06-01390, 2007 U.S. Dist. LEXIS 79147 (W.D. Pa. Oct. 25, 2007) (stating that the defendant could not assert an after-acquired evidence defense based on post-termination conduct). The Eleventh Circuit has not ruled on

this issue. The Court therefore orders the parties to submit briefs addressing whether the after-acquired evidence should apply to post-termination conduct.

Even if the after-acquired evidence defense can apply here, a second issue arises. An employer seeking evidence in support of the after-acquired evidence defense cannot engage in a fishing expedition into plaintiff's entire life. Specifically, the after-acquired evidence defense cannot be an independent basis for discovery; the employer must have some existing grounds to believe evidence of wrongdoing exists before taking discovery of an otherwise irrelevant area. *See Maxwell v. Health Ctr. of Lake City, Inc.*, No. 3:05-cv-1056-J-32MCR, 2006 U.S. Dist. LEXIS 36774 (M.D. Fla. June 6, 2006); *Liles v. Stuart Weitzman, LLC*, No. 09-61448-CIV-COHN/SELTZER, 2010 U.S. Dist. LEXIS 53584 (S.D. Fla. May 6, 2010). Defendant argues that the brevity of plaintiff's employment at Charleston and the "mutuality" of the termination decision are sufficient basis to believe the termination may have resulted from plaintiff's misconduct. Thus, defendant claims a sufficient basis to pursue after-acquired evidence from Charleston. Plaintiff argues that this is not a sufficient basis in of itself to dig into his personnel records from a position he obtained after he was fired from Hostram.

In light of this controversy, and still reserving decision as to whether the after-acquired evidence defense applies to post-termination conduct, the Court further orders plaintiff to provide a preliminary affidavit that briefly identifies the reason (beyond a "mutual decision") for the cessation of his employment with Charleston. The purpose of this affidavit is to ascertain whether there is any basis for defendant to further explore the Charleston termination or whether the after-acquired evidence defense is so speculative that it should be stricken. However, if plaintiff's affidavit reveals any kind of misconduct, the inquiry is not over. Defendant must still prove it would have terminated plaintiff for this misconduct to invoke the

after-acquired evidence defense. *See McKennon*, 513 U.S. at 362–63 ("Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."). Consequently, after it receives plaintiff's affidavit, defendant must submit evidence that plaintiff's conduct would in fact be a terminable offense at Hostram.

III. Confidential Documents

As explained above, defendant has recently discovered another possible basis for the after-acquired evidence defense. Specifically, defendant alleges that plaintiff removed a confidential document from the company and shared that document with one of defendant's other employees in an effort to convince her to join plaintiff's lawsuit. Since this taking occurred during the course of plaintiff's employment, the above-described legal question is not an issue. Plaintiff argues, however, that the taking of employer documents is not necessarily a terminable offense. Courts have held that under certain circumstances, a discrimination plaintiff may be permitted to take materials from his employer in support of or in order to pursue his discrimination claims. *See e.g. Kempke v. Monstanto Co.*, 132 F.3d 442, 445 (8th Cir. 1998). According to plaintiff, the removal of documents may be a form of opposition to discrimination, *see id.*, and if so, it is not a lawful basis for termination under the anti-retaliation provisions of the discrimination laws. *See e.g.* 29 U.S.C. § 623(d) (2006) ("It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section . . . ."). Thus, plaintiff argues that because the documents were removed from the company for the purpose of pursing his discrimination claim, the removal cannot be a terminable offense.

Defendant urges this Court to address this question now, on its belief that the after-acquire evidence defense will apply to plaintiff's conduct and if this is established, the parties can avoid a significant portion of discovery and settlement prospects will improve. The Court agrees that early disposition of this question will be useful to managing the litigation. As with the Charleston documents, however, further legal briefing and factual submissions are required. The Court therefore orders the parties to brief the issue of whether and when an employee bringing a discrimination suit may remove materials that assist that employee's claims from the defendant company. Specifically, the briefs should identify the criteria and factors the Court must consider on this issue. Further, the Court orders plaintiff and defendant to submit affidavits further describing the relevant facts and circumstances of plaintiff's removal and distribution of Hostram materials and should include an appropriately redacted copy of the document itself.

IV. Conclusion

It is ORDERED, ADJUDGED, and DECREED that:

(1) The parties will submit to the Court, no later than _____, September __, 2010, a joint stipulation of all facts that the parties agree to be both undisputed and relevant to the pending motions;

(2) The parties will submit to the Court, no later than _____, September __, 2010, sworn evidence in affidavit form concerning the issues identified herein.

(3) The parties will submit to the Court, no later than 12:00 noon EST, September 17, 2010, briefs on the matters addressed in this Minute Order; and

(4) All documents are to be submitted as PDF files.

Done at Wynnwood, this 16th day of August, 2010.

/s/ Presiding Judge
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UNITED STATES DISTRICT JUDGE