Team 1003P

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
WYNWOOD DIVISION

THEODORE McNALLY,	:	
	:	
Plaintiff,	:	CIVIL ACTION FILE
	:	NO. 10-X441-CIV-R
v.	:	
	:	
HOSTRAM, INC.,	:	
	:	
Defendant.	:	

PLAINTIFF'S BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER AND PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR EXPEDITED DISCOVERY AND SUMMARY JUDGMENT SCHEDULE

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STATEMENT OF JURISDICTION

Plaintiff, Theodore McNally ("McNally"), filed suit against Defendant, Hostram, Inc. ("Defendant"), asserting claims of discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et. seq*. (R. 2). Defendant is based in Tampa, Florida. (R. 2). Plaintiff invokes the jurisdiction of this Court pursuant to 29 U.S.C. § 621, *et. seq*. (1967) and 28 U.S.C. § 1331 (1948). Venue is proper in the Middle District of Florida, Wynnwood Division pursuant to 28 U.S.C. § 1391(b)(2) (1948) because the acts complained of herein took place in this district and Defendant's principal place of business is found here. (R. 2).

QUESTIONS PRESENTED

I. Whether this Court should grant McNally's Motion to Quash and Motion for Protective Order when McNally shows good cause because Defendant cannot utilize after-acquired evidence as a means to initiate discovery and application of the defense is not appropriate.

II. Whether this Court should deny Defendant's Motion for Expedited Discovery and Summary Judgment Schedule when Defendant fails to establish good cause, pursuant to Fed. R. Civ. P. 26, for accelerated discovery and for summary judgment schedule because McNally engaged in activity protected by the Age Discrimination Act of 1967 when he took the handwritten notes of Defendant's supervisor abandoned in a wastebasket and gave them to his attorney and when McNally's dissemination of information relating to Defendant's unlawful practice is reasonable.

STATEMENT OF FACTS

McNally is a former employee of Defendant being over the age of forty years. (R. 2). Defendant, engaged in the business of providing political consulting services, employed McNally as a lobbyist for ten years before his termination. Id.

Following McNally's termination from Defendant's employment, he was employed with Charleston Industries performing consulting duties similar to those he performed while employed with Defendant. Id. Charleston Industries is engaged in representing its agricultural clients' interests to state and federal legislatures. Id. McNally's employment with Charleston Industries ended by mutual agreement after approximately four months. Id.

SUMMARY OF THE ARGUMENT

If this Court allows Defendant to conduct unfettered, broad, and expedited discovery into McNally's confidential employment records, it will affect not only McNally, but will have a chilling effect on all employees opposing unlawful termination. Therefore, this Court must grant McNally's Motion to Quash and for Protective Order and deny Defendant's Motion for Expedited Discovery and Summary Judgment Schedule for two reasons.

First, Defendant's effort to raise the after-acquired evidence defense based on post-termination misconduct is not only insufficient to initiate discovery, but it is an attempt to stretch the application of the defense beyond its intended purpose. Defendant seeks to embark on a fishing expedition for evidence of post-termination misconduct; however, Federal Rule of Civil Procedure 26(b) prohibits this court from donating the fishing pole. Further, permitting Defendant to use the discovery process to search for after-acquired evidence would undercut Federal Rule of Civil Procedure 26 by reducing the threshold a party must meet from "reasonably calculated" to "hopeful."

Not only is the after-acquired evidence defense misplaced as a basis for discovery, its application to this case would offend the notions of justice. The after-acquired evidence defense is an equitable doctrine established to further fairness and equity where a plaintiff comes to court with unclean hands. It would

be a far cry from fair or equitable if McNally's remedy were to be reduced because of actions that took place subsequent to his employment with the Defendant.

Second, Defendant cannot meet its burden of showing good cause for expedited discovery and for summary judgment schedule because McNally engaged in protected activity. McNally discovered Defendant's handwritten notes left abandoned in a wastebasket. This Court should not punish McNally for resisting age discrimination when the opportunity to discover evidence presented itself and was "innocently acquired."

Further, McNally's conduct in disseminating the handwritten notes is reasonable. The information contained in the handwritten notes is only a listing of employees and years of service. Information that, if Defendant believed it to be propriety and confidential, should have been maintained accordingly. The information, while only containing a listing of employees' names and years of service, assists McNally in establishing a prima facie case of age discrimination involving himself and other potential co-litigants, and is extremely relevant here.

For this Court to enter an order denying protection to McNally, refusing to quash the subpoena, and expediting discovery, and setting a schedule for summary judgment would send a clear message to all employees that, their personal, confidential employment records are fair game and, if they discover information

useful to their age discrimination claims, they should not preserve evidence or do so at their peril.

ARGUMENT

I. THE COURT MUST GRANT MCNALLY'S MOTION TO QUASH AND ISSUE A PROTECTIVE ORDER BARRING DISCOVERY OF MCNALLY'S PERSONNEL FILE FROM CHARLESTON INDUSTRIES BECAUSE THE AFTER-ACQUIRED EVIDENCE DEFENSE IS NOT A SUFFICIENT BASIS TO INTIATE DISCOVERY AND IS NOT APPLICABLE TO THIS CASE.

The after-acquired evidence defense is not a sufficient basis to initiate discovery and is not applicable to this case. Federal Rule of Civil Procedure 26(b) permits parties to "obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense." While relevant information sought does not have to be admissible, it must "[appear] reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

"District courts need not condone the use of discovery to engage in 'fishing expedition[s].'" Liles v. Stuart Weisman, LLC, No. 09-61448-CIV, 2010 WL 1839339, *5 (S.D. Fl. 2010). Instead, courts can limit or prohibit discovery where the information sought is privileged or lacks relevancy, or where the information is available through less intrusive channels. Fed. R. Civ. P. 26(b)(2)(C). The limitations issued by a court may take the form of an order protecting a party or person from "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c).

Further, a party may obtain evidence from a third party through the issuance of a subpoena. Fed. R. Civ. P. 45. However, the information sought through a subpoena is limited in scope to the same degree as Fed. R. Civ. P. 26. Barrington v. Mortg. IT, Inc., No. 07-61304-CIV, 2007 WL 4370647, *1 (S.D. Fla. 2007).

McNally's Motions should be granted for two reasons. First, Defendant does not have sufficient basis to initiate discovery on Charleston Industries and Defendant has less intrusive discovery means available to it. Second, the after-acquired evidence defense is not appropriate where Defendant seeks to reduce the amount of damages due to post-termination conduct.

A. Defendant lacks sufficient basis to initiate discovery on Charleston Industries because the after-acquired evidence defense cannot be used to initiate discovery and Defendant has less intrusive means available to it for its mitigation defense**.**

The after-acquired evidence defense cannot be used to initiate discovery and Defendant has less intrusive discovery means available. The after-acquired evidence defense was prompted by the Court's recognition of the inequity presented where during the course of litigation an employer accused of discrimination discovers that the plaintiff has committed some wrong that would have lead to their termination had the defendant been aware of wrongful act. McKennon v. Nashville Banner Publ'g. Co., 513 U.S. 352, 362 (1995). In order to assert the after-acquired evidence defense the employer must first establish

that had the employer known of the misconduct it would have led to the termination of the employee. Id. at 362-63. In the absence of a pre-existing belief that after-acquired evidence exists, an employer cannot use the defense as an independent basis to initiate discovery. Maxwell v. Health Ctr. Of Lake City, Inc., No. 3:05-CV-1056-J-32MCR, 2006 WL 1627020, *5 (M.D. Fl. Cir. 2006).

This Court should not allow Defendant to use the after-acquired evidence defense as a basis to initiate discovery for two reasons. First, the purpose for which Defendant served the subpoena on Charleston Industries is not a sufficient basis to initiate discovery. Second, Defendant has already been provided with the information that is relevant through less intrusive means.

1. Defendant's Search for Information Supporting the After-Acquired Evidence Defense Cannot be used to Initiate Discovery.

Defendant's subpoena to Charleston Industries is exactly the type of fishing expedition that is insufficient to independently initiate discovery. In the absence of a pre-existing belief that after-acquired evidence exists, an employer cannot use the after-acquired evidence defense to initiate discovery. Maxwell, 2006 WL 1627020 at *5.

Courts have repeatedly limited employers' fishing expeditions for evidence to support the after-acquired evidence defense. For example, in Premer v. Corestaff, 232 F.R.D. 692 (M.D. Fl. 2005), even though the defendant argued that

the requested records may lead to evidence in support of its after-acquired evidence defense, the trial court held that the defendant had not provided enough supporting information that would substantiate the discovery. Id. at 693. The Premer court looked to the cautionary language expressed in McKennon in granting the plaintiff's Motion to Quash and for Protective Order.[1] The court explained that "several district courts have limited employers' fishing expedition style discovery based upon the Court's statements." Premer, 232 F.R.D. at 693.[2]

Defendant, like the defendant in Premer, admits that the subpoena is an attempt uncover evidence to support its after acquired evidence defense. (R. 6). The pre-existing belief that Defendant's claims to serve as a basis for discovery is based on nothing more than the length of McNally's tenure with Charleston and their skeptical interpretation of 'mutual decision' with respect to his departure from Charleston. This Court cannot allow Defendant to establish a basis for discovery by merely attempting to cast a shadow over the term 'mutual' when McNally explained his departure.

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[1] *See* McKennon, 513 U.S. at 363.

[2] *See also* Graham v. Casey's Gen. Stores, 206 F.R.D 251, 256 (S.D. Ind. 2002) (limiting defendant's third party subpoenas in search of after acquired evidence); Perry v. Best Lock Corp., No. IP 98-C-0936-H/G, 1999 WL 33494858, (S.D. Ind. 1999) ("The [McKennon] Court's concern for potential abuse clearly implies that discovery is not warranted for the sole purpose of developing a possible after acquired evidence defense.").

2. The Subpoena Should be Quashed and A Protective Order Granted Because There Exists Other, Less Intrusive, Alternative Means to Obtain Relevant Evidence to Defendant's Defense.

The relevant evidence pertaining to McNally's mitigation of damages is available through other means. Federal Rule of Civil Procedure 26(b)(2)(c) commands that the court limit the extent of discovery if it determines, *inter alia*, that the discovery can be obtained from some other source that is more convenient or less burdensome. Fed. R. Civ. P. 26(b)(2)(c).

McNally concedes that information relating to his income is relevant to a mitigation defense and has already agreed in a pretrial conference to provide Defendant with copies of his W-2s, benefit information, and job description, which was held by the Court to be sufficient discovery for the purpose of mitigation of damages. (R. 4). Accordingly, Defendant has the information needed for a mitigation defense, through less intrusive means of the discovery process, and this Court should quash the subpoena and issue a protective order.

B. <u>The After-Acquired Evidence Defense is Not Appropriate Where Defendant Seeks to Reduce the Amount of Damages Due to Post-Termination Misconduct.</u>

The object of compensation resulting from a discrimination claim is to restore the plaintiff to the position he or she would have been in had the discrimination not occurred. <u>McKennon,</u> 513 U.S. at 362. The after-acquired evidence defense is an equitable doctrine addressing the "extraordinary equitable

circumstances" that arise in a discrimination case where, after termination, the defendant discovers that the plaintiff engaged in some wrongdoing that would have led to termination had the defendant known of it. Id. The McKennon court reasoned that neither front pay nor reinstatement would be appropriate in such circumstances because "it would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds. Id.

McNally establishes that the after-acquired evidence doctrine should not be applied here for two reasons. First, the application of after-acquired evidence to post-termination misconduct cannot be squared with McKennon because the doctrine contemplates actions during employment. Second, it is too speculative to apply the after-acquired evidence defense to post-termination misconduct.

1. The application of after-acquired evidence to post-termination misconduct cannot be squared with McKennon because the doctrine contemplates actions during employment.

In order to assert the after-acquired evidence defense, an employer must first establish that, had the employer known of the misconduct, it would have led to the termination of the employee. McKennon, 513 U.S. at 361-62. The definition of after-acquired evidence presupposes that there was an employer-employee relationship at the time the misconduct occurred. Ryder v. Westinghouse Elec. Corp., 879 F. Supp. 534, 537 (W.D. Pa. 1995). Where the plaintiff's misconduct

occurs outside the employer-employee relationship, McKennon does not govern because the case was premised on employee misconduct occurring during employment. Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667, 682 (S.D.N.Y. 1995). Notably, the language used in McKennon referred to employee conduct in the past tense.

A number of courts have refused to extend the after-acquired evidence defense to post-termination misconduct reasoning that "there cannot be misconduct that the employer did not know about prior to making its adverse decision if the misconduct did not even occur until after the adverse decision was made." Ryder, 879 F. Supp. at 537; *See also* Nesselrotte v. Allegheny Energy Inc., No. 06-01390, 2007 WL 3147038, *5 (W.D. Pa. 2007) (rejecting after acquired evidence of plaintiff's misconduct directly affected the defendant).[3]

In the case at bar, McNally and Defendant were no longer in an employer-employee relationship, and Defendant fails to establish that McNally's alleged post-termination misconduct directly affected it. Unlike Ryder, Sigmon, and Nesselrotte, Defendant is not asking the court to apply the doctrine to post-termination misconduct directly affecting the Defendant. (R. 4). Instead, Defendant is asking the court to extend the doctrine to alleged misconduct that

[3] *Accord* Ryder, 879 F. Supp. at 534; Sigmon, 901 F. Supp. at 667; Nesselrotte, 2007 WL 3147038 at *3.

occurred within the work place of a subsequent employer without any facts to indicate that McNally engaged in any misconduct that affected Defendant. (R. 5). Accordingly, this Court should refuse to extend the after-acquired defense doctrine to subsequent alleged misconduct in which the Defendant suffers no harm and enter an order of protection and quashing the subpoena issued to Charleston Industries.

2. It is too speculative to apply the after-acquired evidence defense to post-termination misconduct.

The after-acquired evidence defense should not be applied because it is too speculative. Some courts have refused to apply the after-acquired evidence defense to post-termination conduct because it would allow an employer to say that they would have terminated the plaintiff for conduct that occurred in the future. Nesselrotte, 2007 WL 3147038 at *10; *See also* Carr v. Woodbury Co. Juv. Detention Ctr., 905 F. Supp. 619 (N.D. Iowa 1995) (rejecting the after-acquired evidence defense because defendant could not prove that had plaintiff remained employed she would have violated policy).

This case is like Carr because the defendant has not presented any evidence to show that, had McNally remained employed with Defendant, he would have engaged in misconduct that would justify termination. (R. 3). Instead, the only evidence before the Court is that McNally removed handwritten notes abandoned

by Defendant's supervisor. Id. There is nothing in the record to suggest McNally's actions were a terminable offense. Id.

Because Defendant's suggestion that McNally's post-termination conduct might be actionable, it is too speculative for consideration by this Court. Accordingly, this court should enter an order of protection and quashing the subpoena issued to Charleston Industries.

II. THIS COURT SHOULD DENY DEFENDANT'S MOTION FOR EXPEDIATED DISCOVERY AND SUMMARY JUDGMENT SCHEDULE BECAUSE DEFENDANT FAILS TO ESTABLISH GOOD CAUSE THAT IT HAS A NEED FOR MCNALLY'S EMPLOYMENT RECORDS WHEN MCNALLY ENGAGED IN ACTIVITY PROTECTED BY THE AGE DISCRIMINATION ACT OF 1967.

McNally engaged in protected activity when he removed the handwritten notes abandoned in a wastebasket, and McNally's subsequent action in disseminating the information was reasonable. "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1). Further, "for good cause shown, the court may order discovery of any matter relevant to the subject matter involved in the action." Id. The purpose of allowing discovery on any matter not privileged is to focus the parties and the court "on the actual claims and defenses involved in the action." Fed. R. Civ. P. 26 Advisory Committee's Note to 2000 amendment. Thus, whether a party seeking to obtain discovery is dependant upon whether the

party's requests are relevant to the claims and defenses asserted in the pleadings. UnitedHealth Group Inc. v. Dowdy, No. 8:06-CV-2111-T-23EAJ, 2007 WL 3202473, *1 (M.D. Fl. 2007).

To assist parties on focusing on the actual claims and defenses, trial courts have broad discretion to control discovery. Commercial Union Ins. Co. v. Westrope, 730 F.2d 729, 731 (11th Cir. 1984). "There are, however, limits on a district court to accelerate pretrial discovery." Transamerica Computer Co. v. Int'l. Bus. Mach. Corp., 573 F.2d 646, 652 (9th Cir. 1978). Courts are split on the limitations on them to expedite discovery because Fed. R. Civ. P. 26 does not provide a legal standard for trial courts to use to determine when expedited discovery is appropriate. In Re Fannie Mae Derivative Litig., 227 F.R.D. 142, 142 (D.D.C. 2005).

Some circuits and district courts follow a heightened standard[4] that a party must meet in order to expedite discovery.[5] The Eleventh Circuit has not adopted a legal standard for expedited discovery; however, several Middle District of Florida

[4] The heightened standard articulated in Notaro v. Koch, 95 F.R.D. 403, 405 (S.D.N.Y. 1982), provides that a moving party must show: (1) irreparable injury, (2) some probability of success on the merits, (3) some connection between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted.

[5] *Accord* U.S. v. Benavidez, 558 F.2d 308, 310 (5th Cir. 1977); Centrifungal Acquisition Corp. v. Moon, 2009 WL 1249294 (E.D. Wis. 2009).

courts have adopted the lower standard of good cause.[6] Good cause requires the court to decide the request to expedite discovery on the "reasonableness of the request in light of all of the surrounding circumstances . . . ." Entm't Tech. Corp. v. Walt Disney Imagineering, No. CIV.A. 03-3546, 2003 WL 22519440,*3. (E.D. Pa. 2003); See also Merrill Lynch, Pierce, Fenner & Smith v. O'Connor, 194 F.R.D. 618, 623 (N.D. Ill. 2000). To determine reasonableness of a request for expedited discovery, courts consider several factors:

> (1)whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the [plaintiff] to comply with the requests; and (5) how far in advance of the typical discovery process the request was made.

Entm't Tech., 2003 WL 22519440, at *3-5.[7] To establish good cause the moving party must make some prima facie showing of the need for expedited discovery. O'Connor, 194 F.R.D. at 623.

Defendant cannot meet its burden of establishing a prima facie need for expedited discovery and for a summary judgment schedule under either standard for two reasons. First, McNally's action in taking the handwritten notes after they were abandoned in a wastebasket is protected activity. Second, McNally's

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[6] Platinum Mfg. Int'l., Inc. v. Uninet Imaging, Inc., 2008 WL 927558 (M.D. Fl. 2008) (denying a movant's request for expedited discovery under a good cause standard); Dowdy, 2007 WL 3202473, at *1.

[7] At the Court's direction, Plaintiff limits his argument to the purpose of Defendant's request for Plaintiff's confidential employment records. (R. 8).

dissemination of information relating to Defendant's unlawful employment practices against older workers is reasonable because the notes are not confidential and are relevant to age discrimination claims.

A. McNally's Action in Taking the Handwritten Notes of Defendant's Supervisor After They Were Abandoned In A Wastebasket Is Protected Activity Because They Were Innocently Acquired And Were Not Misused When McNally Provided Them to His Attorney.

The handwritten notes abandoned by Defendant's supervisor in a wastebasket were innocently acquired by McNally and later provided to his attorney, and, thus, McNally engaged in protected activity. The Age Discrimination in Employment Act provides in pertinent part that it is "unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful in this section . . . ." 29 U.S.C. § 623(d) (1967) ("ADEA"). This is true because, if retaliation against employees for resisting unlawful employment practices were allowed to go unchecked, "it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination . . . ." *Guidance on Investigating, Analyzing Retaliation Claim,* EEOC Compliance Manual § 8, No. 915.003 (EEOC May 20, 1998).

To oppose unlawful practice by an employer, an employee must "demonstrate a good faith, reasonable belief that the underlying challenged action violated the law." Wentz v. Maryland Cas. Co., 869 F.2d 1153, 1155 (8th Cir.

1989). Further, the ADEA requires that: (1) the employee engaged in ADEA-protected activity, (2) the employer took adverse employment action the employee, and (3) there was a causal connection between the two. Kempcke v. Monsanto Co., 132 F.3d 442, 445 (8th Cir. 1998). When determining if an employee engaged in ADEA-protected activity, Courts employ a balancing test between the purposes of the [ADEA] in allowing employees to oppose unlawful discrimination and Congress' desire not to tie the hands of employers. O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 763 (9th Cir. 1996).

An employee engages in ADEA protected activity when he innocently acquires confidential information and does not misuse it. An employee in Kempcke was provided with a computer that was previously used by another employee containing documents inadvertently left on the hard drive, which the employee believed established discrimination. The Kempcke employee was ordered to return the documents, but, instead, produced them to his attorney and was terminated for insubordination. Kempcke, 132 F.3d at 444. The Eighth Circuit held that, because the documents were "innocently acquired" and there was no evidence of improper dissemination of the material to anyone other than the plaintiff's attorney, summary judgment was improper. Kempcke, 132 F.3d at 446-47. The Eighth Circuit opined that, when a document has been innocently acquired, and not subsequently misused, there has not been sufficient employee

misconduct that would justify withdrawing the normal protections afforded to employees who protest discrimination. Id. at 446.

However, an employee does not engage in ADEA protected activity when he does not innocently acquire confidential employment records and subsequently misuses it. An employee in O'Day rummaged through a supervisor's desk in search of documents that might assist him in his discrimination claim. O'Day, 79 F.3d at 758. The court found in favor of the employer because the plaintiff committed a serious breach of trust by not only rummaging though his supervisor's desk, but showing the documents to a co-worker. Id. at 764; See also Watkins v. Ford Motor Co., No. C-1-03-033, 2005 WL 3448036, *6 (S.D. Ohio 2005) (finding that an employee who copied confidential documents contained in a binder in a personnel office and provided them to his attorney in furtherance of a discrimination claim was not protected activity).

McNally engaged in ADEA protected activity when he stumbled upon the handwritten notes left abandoned in a wastebasket and provides them to his attorney. Unlike the O'Day and Watkins employees, McNally did not commit a serious breach of trust because he did not rummage through Defendant's supervisor's desk, nor did he copy confidential documents kept in a binder in a personnel office. (R. 3). Rather, McNally's action is akin to the Kempcke employee because McNally innocently acquired the original, handwritten notes left

abandoned in a wastebasket and then provided them to his attorney in anticipation of litigation. (R. 3).

Further, Defendant invited McNally to take the records by leaving them in a wastebasket and McNally committed no serious breach of trust when he took them. Accordingly, McNally establishes a good faith, reasonable belief that his conduct opposes Defendant's unlawful behavior and this Court should deny Defendant's Motion.

B. McNally's Dissemination of Information Relating to Defendant's Unlawful Age Discrimination is Reasonable Because The Handwritten Notes Are Not Confidential and They Are Extremely Relevant to the Age Discrimination Litigation.

McNally engages in protected activity when he disseminates Defendant's supervisor's handwritten notes to a co-worker because they are not confidential and are extremely relevant to anticipated litigation. To determine if an employee engages in opposition to unlawful employment practices by disseminating information, courts balance ". . . the employer's recognized, legitimate need to maintain an orderly workplace and to protect confidential business and client information, and the equally compelling need of employees to be properly safeguarded against retaliatory actions." Niswander v. The Cincinnati Ins. Co., 529 F.3d 714, 722 (6th Cir. 2008). Opposition to unlawful employer conduct takes the form of, *inter ali*, "complaining to anyone (management, unions, *other employees*, or newspapers) about allegedly unlawful practices . . . ." Johnson v.

Univ. of Cincinnati, 215 F.3d 561, 579 (6th Cir.2000) (emphasis added). The critical focus, however, is whether or not the employee's dissemination of confidential documents was reasonable under the circumstances. Niswander, 529 F.3d at 722.

In order to determine the reasonableness of an employee's action, the Niswander court articulated several factors:

> (1) how the documents were obtained; (2) to whom the documents were produced; (3) the content of the documents, both in terms of the need to keep the information confidential and its relevance to the employee's claim of unlawful conduct; (4) why the documents were produced, including whether the production was in direct response to a discovery request; (5) the scope of the employer's privacy policy; and (6) the ability of the employee to preserve the evidence in a manner that did not violate the employer's privacy policy.

Id. at 726.

McNally's assertion that the handwritten notes were obtained lawfully when Defendant's supervisor abandoned them in a wastebasket is unrebutted. (R. 3). McNally acknowledges he shared the handwritten notes with his co-worker, but there is a lack of evidence in the record that such action by McNally harmed Defendant. Id. Therefore, McNally's dissemination of the handwritten notes is reasonable for two reasons. First, the handwritten notes are not confidential. Second, the handwritten notes are extremely relevant to McNally's age discrimination case.

1. Defendant's Supervisor's Handwritten Notes Are Not Confidential.

Black's Law Dictionary defines confidential as information meant to be kept secret. Black's Law Dictionary (8th ed. 2004). In the employment context, confidential information takes the form trade secrets, which encompass

> information, including a formula, pattern, compilation, program, device, method, technique, or process that . . . derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

Fl. St. Ann. § 688.002(4)(a) (1987). Examples of trade secrets include, *inter alia*, information about clients, pricing, employee training and business operations, that employee learned during his employment. Proudfoot Consulting Co. v. Gordon, 576 F.3d 1223, 1231 (11th Cir. 2009).

The handwritten notes are not confidential trade or business secrets in which Defendant has an interest or something which derives economic value to Defendant. Rather, the handwritten notes contain a list of employees and their years of service. (R. 6). In fact, the only relevance to the handwritten notes is that they help to establish McNally's prima facie case of age discrimination. Further, information such as the length of time an employee

works for Defendant is not something that would be unknown to other co-workers.

Because the handwritten notes do not contain confidential information, McNally's dissemination of them is reasonable. As such, Defendant fails to establish good cause why this Court should expedite discovery and schedule summary judgment.

2. An Inference May Be Drawn From The Handwritten Notes That Employees Are Being Singled Out Using Their "Years of Service" As Unlawful Criteria.

An inference may be drawn from the handwritten notes that Defendant is engaging in age discrimination using "years of service" to single out older employees for termination. To establish a prima facie case of age discrimination, a plaintiff must prove

> (1) that he is a member of the protected group; (2) that adverse employment action was taken against him, e.g. discharge, demotion, failure to hire; (3) he was replaced by a person outside the protected group; and (4) he was qualified for the position for which he was rejected.

Pace v. S. R.R. Sys., 701 F.2d 1383, 1385 (11th Cir. 1983). Further, a plaintiff must establish a prima facie case by offering evidence ". . . of a 'legally mandatory, rebuttable presumption' rather than to the presentation of 'enough evidence to permit the trier of fact to infer the fact at issue.'" Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

The issue turns on "whether plaintiff has presented sufficient evidence to provide a basis for an inference that age was a factor in the employment decision." Pace, 701 F.2d at 1385.

Here, an inference may be drawn from the handwritten notes that Defendant was using "years of service" as criteria in which to evaluate employees on the basis of their age because the list contained names of employees and years of service. (R. 6). The singling out of older workers impacts not just McNally, but co-workers, whom potentially face the same discrimination actions by Defendant. Therefore, the handwritten notes are relevant to McNally's burden of establishing a prima facie case of discrimination and McNally's dissemination of them to a co-worker is reasonable. Because McNally's actions are reasonable, Defendant fails to establish good cause for expedited discovery and for scheduling summary judgment.

CONCLUSION

Based on the foregoing reasons, McNally respectfully requests this Court grant his Motion to Quash and Motion for Protective Order and deny Defendant's Motion for Expedited Discovery and Summary Judgment Schedule.

Respectfully submitted this 17th day of September, 2010.

Respectfully submitted
_/S/_Team 1003P
ATTORNEYS FOR PLAINTIFF