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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Pamela D. April, a single woman,)	No. CV-09-1707-PHX-LOA
)	
Plaintiff,)	ORDER
)	
vs.)	
)	
U.S. Airways, Inc., a Delaware)	
corporation,)	
)	
Defendant.)	
)	

This matter is before the Court on Plaintiff’s Motion to Quash Subpoena Duces Tecum. (docket # 32) Defendant has filed a response in opposition to the motion, docket # 36, to which Plaintiff has not replied and the deadline has passed. For the reasons set forth below, the Court will deny Plaintiff’s motion.

I. Background

Plaintiff commenced this action on August 18, 2009. (docket # 1) On September 8, 2009, she filed an Amended Complaint, asserting a violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq* (“ADA”). (docket # 8) Defendant filed its Answer on November 24, 2009. (docket # 12) Plaintiff’s claims arise out of the April 17, 2008 termination of her employment with Defendant, U.S. Airways. (docket # 8) Plaintiff was employed by Defendant as a part-time passenger service agent between 2006 and 2008. (dockets # 8, # 33) During her employment, Plaintiff took unpaid medical leaves of absence because her alleged disability - psoriasis - allegedly rendered her unable to work. Defendant contends that it terminated

1 Plaintiff's employment for job abandonment after she failed to return to work following a
2 lengthy medical absence. (docket # 33 at 2) Plaintiff alleges that her termination violated the
3 ADA. Plaintiff seeks back pay, front pay and compensatory damages, including "fringe benefits,
4 emotion [sic] pain and suffering, mental anguish, and loss of enjoyment of life," as well as
5 punitive damages. (docket # 8)

6 **II. Subpoenas Duces Tecum**

7 Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery
8 regarding any nonprivileged matter that is relevant to any party's claim or defense . . . Relevant
9 information need not be admissible at the trial if the discovery appears reasonably calculated
10 to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1).

11 In accordance with Fed.R.Civ.P. 45, on February 24, 2010, Defendant notified
12 Plaintiff that it intended to serve subpoenas *duces tecum* on Compass Bank, Americredit, and
13 Professional Nursing Staffing Services, third parties believed to have information relevant to
14 this case. (docket # 36, Exh. 1) Plaintiff did not raise any objections prior to service. However,
15 after the subpoenas were served, on March 12, 2010, Plaintiff moved to quash the three
16 subpoenas. (docket # 32) Plaintiff argues that the subpoenas should be quashed because they
17 seek to discover "after-acquired evidence" and were not relevant to a claim or defense in the
18 case as of March 12, 2010. Plaintiff based her on argument on the fact that, as of March 12,
19 2010, the Court had not ruled on Defendant's Motion to Amend Answer to Complaint to assert
20 a defense of after-acquired evidence.

21 On March 23, 2010, the Court granted Defendant leave to amend its answer to assert
22 an after-acquired-evidence defense. (docket # 37) The Court noted that "Defendant has engaged
23 in discovery directly related to Plaintiff's employment, source of income, and credibility, all of
24 which are relevant to her claims and to Defendant's defenses." (*Id.* at 4-5) As the Court has
25 previously noted, the after-acquired-evidence doctrine permits an employer to avoid some
26 liability by showing that it would have terminated an employee for wrongdoing discovered after
27 an alleged wrongful termination had the employer known of the wrongdoing prior to the
28 termination. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360-62 (1995);

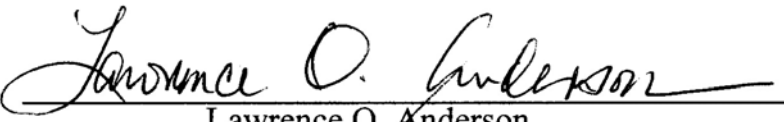
1 *Shnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1412 (9th Cir. 1996), *cert denied*, 519 U.S. 927
2 (1996); *O'Day v. McDonnell Douglas Helicopter Company*, 79 F3d 756, 759 (9th Cir. 1996).
3 To establish this defense, U.S. Airways must: (1) present after-acquired evidence of Plaintiff's
4 misconduct; and (2) prove by a preponderance of the evidence that it would have fired Plaintiff
5 for that misconduct. *O'Day*, 79 F3d at 761. The employer, U.S. Airways, has the burden of
6 showing that, if it had such evidence, it would have discharged the employee. *Id.* at 759 (citing
7 *McKennon*, 513 U.S. at 363-364).

8 The third-party discovery sought by Defendant is relevant to its defense of after-
9 acquired evidence, and thus, falls within the parameters of Rule 26(b)(1), FED.R.CIV.P. The
10 three subpoenas, directed at Plaintiff's creditors and former employers, seek information related
11 to whether Plaintiff worked outside U.S. Airways while on leave from U.S. Airways.
12 Additionally, records from Plaintiff's former employers and creditors may also reveal evidence
13 regarding Plaintiff's effort, or lack thereof, to mitigate her alleged damages. Records pertaining
14 to Plaintiff's previous employment are also relevant to Plaintiff's claims arising from her claim
15 of disability. In short, the third-party subpoenas seek information relevant both to Plaintiff's
16 claims and to Defendant's defenses.

17 Accordingly,

18 **IT IS ORDERED** that Plaintiff's Motion to Quash Subpoenas Duces Tecum, docket
19 # 32, is **DENIED**.

20 DATED this 1st day of April, 2010.

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23 Lawrence O. Anderson
24 United States Magistrate Judge
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