UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

IN THE MATTER OF MOTION TO QUASH SUBPOENA ISSUED BY DEFENDANT IN THE CASE OF STEINBUCH V. CUTLER (DISTRICT COURT OF THE DISTRICT OF COLUMBIA, 01:05-CV-00970)

INDEX NO. 4:06-MC-0028-WRW

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO QUASH AND FOR PROTECTIVE ORDER

Defendant invaded Plaintiff's privacy over two years ago by posting private and false information about Plaintiff on the internet. Now Defendant seeks to further harm Plaintiff by harassing him at his new place of employment, which is wholly unrelated to the injuries he suffered from Defendant, and to further invade his privacy by seeking personal and private information unrelated to the case. Defendant's purpose is to harass Plaintiff to try to pressure him to drop his case, given Defendant's repeated lack of success in its repeated dispositive motions. Indeed, Defendant's Counsel has repeatedly sent letters and emails to Counsel for the Plaintiff telling him that he must drop the case. Given Defendant's failure to bully Plaintiff into dropping the case, Defendant is now trying to bully Plaintiff by interfering with his new employment.

Plaintiff requests that this Court quash Defendant's improper third-party discovery requests served on his current employer, the University of Arkansas at Little Rock School of Law, and issue a protective order to prevent Defendants further attempts to harass, embarrass, and interfere with the current employment of Plaintiff. The Administration of the University of Arkansas at Little Rock School of Law agrees that Defendant's discovery is improper and should not be permitted.

Defendant's requests for all records relating to Plaintiff Law Professor Robert Steinbuch and every e-mail sent to and from the Plaintiff, without any limitation, are not reasonable and not designed to elicit discoverable evidence.[1] Plaintiff has consistently set forth three damages resulting from Defendant's tortious activity: (1) emotional distress; (2) lost employment opportunities prior to joining the Faculty of the University of Arkansas at Little Rock School of Law; and (3) loss of a friend. All of these damages occurred and were completed before Plaintiff took his current employment at the University of Arkansas at Little Rock School of Law. Plaintiff has never contended, and explicitly denies, any harm caused by Defendant's internet blog at his current employer. Accordingly, there is no basis for Defendant's subpoena of his current employer.[2]

Defendant's repeated personal invective and intentional introduction, and mischaracterization, of wholly unrelated cases that either the undersigned attorney or Plaintiff was a party to, demonstrate that Defendant's true motive is to attempt to harass and intimidate Plaintiff and Counsel. Indeed, Defendant's Counsel sent a letter to Plaintiff's Counsel with language including "in cold blood." This behavior by Counsel for the Defendant is unfortunate, inappropriate, and deserving of rebuke.

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[1] Interestingly, Plaintiff has just received Defendant's responses to two sets of document requests and interrogatories. Defendant refused to produce even a single document and objected to virtually every discovery request on the grounds that the discovery requests – which, unlike Defendant's subpoena, were focused and concern the very matters at issue in the case – were harassing.

[2] Defendant mistakenly asserts that it is not bound by Plaintiff's identification of his damages. In fact, the Defendant is exactly so restricted. If a Plaintiff describes his damages, the Defendant may not claim that the Plaintiff actually suffered greater injury so as to seek discovery as to damages that Plaintiff never claimed.

I. Defendant Seeks Discovery That Has No Relation to the Case

Defendant seeks all records relating to Plaintiff Law Professor Robert Steinbuch and every e-mail sent to and from the Plaintiff, without any limitation. None of this is remotely relevant, as Plaintiff has never claimed damages at his current employer. *See EEOC v. United Air Lines, Inc.* 287 F.3d 643, 653 (7th Cir. 2002) (subpoena should not be enforced when the information sought does not "throw light" upon issues raised in the complaint but rather is a "fishing expedition" and reflects an "idle hope" that something will be discovered). All damages ended well prior to Plaintiff taking his current job, and Defendant knows this. Moreover, even had Plaintiff asserted damages at his current employer, which he does not, Defendant would have to make a reasonable request for relevant material. *See Hofer v. Mack Trucks, Inc.* 981 F.2d 377, 380 (8th Cir. 1992) ("While the standard of relevance in the context of discovery is broader than in the context of admissibility, . . . this often intoned legal tenet should not be misapplied so as to allow fishing expeditions in discovery. Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues of the case."); *Hager v. Csx Transp.,* 2005 U.S. Dist. LEXIS 33770 at *6 (N.D. I.N. 2005) ("[Even if the] records may have a possibility of leading to evidence, a slight possibility does not meet even the most liberal discovery standards. If Defendant wishes to test Plaintiff's veracity, as Defendant claims, it may do so by conducting a deposition."); *McArthur v. Robinson*, 1983 U.S. Dist. LEXIS 10275 at *6 (E.D. A.R. 1983) (court denied defendant's motion to compel plaintiff to produce telephone records, appointment calendars, time tickets, and time logs "since these records do not even conceivably have

anything to do with this lawsuit other than the loss of income issue"); *Theofel v. Farey-Jones*, 359 F.3d 1066, 1071 (9th Cir. 2004) ("One might have thought[] that the subpoena would request only e-mail related to the subject matter of the litigation, or maybe messages sent during some relevant time period, or at the very least those sent to or from employees in some way connected to the litigation. But [defendant] ordered production of 'all copies of emails sent or received by anyone' at [plaintiff's business], with no limitation as to time or scope."). Indeed, the Administration of the University of Arkansas at Little Rock School of Law agrees that Defendant's discovery is improper and inappropriate. John M. Dipippa, the Associate Dean for Academic Affairs and Distinguished Professor of Law and Public Policy[3] at the University of Arkansas at Little Rock School of Law stated:

> I talked to Jeff Bell and Sarah James [legal counsel to the school] about the subpoena. Besides the subpoena being overbroad from your perspective, I think the law school has an independent interest to keep teacher evaluations out of court because we don't have any way to verify the reliability - or even the truth - of the written student comments. The law school's evaluation process is supposed to be a frank and confidential way to mentor new faculty. We have never disseminated anonymous student evaluations and I don't want to start now.

Exhibit A. In addition, Plaintiff's files include, inter alia, personal information, tax identification information, and immigration status documents. None of this is relevant or likely to lead to admissible evidence, particularly given that Plaintiff has never claimed damages at his current employment.

In addition, Defendant seeks all of Plaintiff's email, which contains highly sensitive and private information including: past and future Law School exam questions

[3] Associate Dean for Academic Affairs and Distinguished Professor of Law and Public Policy John M. Dipippa at the University of Arkansas at Little Rock School of Law was the Acting Dean of the Law School during this time, as the Dean of the Law School was on vacation.

and answers from Plaintiff Law Professor and other faculty at University of Arkansas at Little Rock School of Law and other Law Schools; confidential student information; grading information; faculty hiring information; student discipline and academic performance; secret passwords for various on-line services, comments to other faculty about their work, and other confidential information wholly unrelated to this case. Moreover, as a Law Professor and litigant, Plaintiff's emails contain Privileged Information and Attorney Work Product. *See In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977) (work product privilege not limited to documents prepared for the case in which discovery is sought). Plaintiff Law Professor is routinely contacted by people seeking legal information. These emails contain privileged information from third parties who fully expect that information to remain confidential. And, in referring people to counsel, Plaintiff further communicates this privileged information. By not serving the discovery on Plaintiff, Defendant attempts to by-pass Plaintiff's ability to protect this information. Defendant's subpoena is the archetype of improper, overly broad and harassing discovery designed to interfere with and affect Plaintiff's current employment. Defendant's whole argument is that it could find a "wealth of information" in Plaintiff's email, but Defendant never says how or what. *See Freeport v. Mullen*, 2004 U.S. Dist. LEXIS 6015 at *14-23 (E.D. La. 2004) ("[T]he Court is of the opinion that [defendant] has not met its burden in demonstrating that the information is relevant and necessary to its defense. . . . Courts have also recognized that 'the legal tenet that relevancy in the discovery context . . . should not be misapplied so as to allow fishing expeditions in discovery.' . . . [T]he documents are not probative of damages. . . . [The defendant] has referred the Court to no law in this district or circuit which supports its attempts to conduct such broad-based

discovery. After reviewing all of the documents submitted to the Court regarding this issue, it seems that [defendant] is really fishing in very deep waters.").

Indeed, in a case with facts similar to the issues here, the Court in *Lewis v. Chicago Housing Authority*, 1991 U.S. Dist. LEXIS 12239 at *4 (N.D. Ill. 1991) held:

> After reviewing all of the materials, we find that the original subpoena of the Illinois Bell Telephone Company records was overly broad and an invasion of privacy. The defendant has no need of the phone numbers of the plaintiff's family and friends. Moreover, we fail to see the relevance of the information concerning the plaintiff's credit, billing, and special services. Only calls made to prospective or present employers appear to have any relevance to the issues presented in this case. We find that the plaintiff's privacy interests, and those of his family and friends, outweigh the defendant's concern that the plaintiff might delete phone calls to present employers from his phone bill.

Again, Plaintiff has never claimed that he suffered any injuries from Defendant's actions of writing on the internet about him. Defendant's attempts to claim otherwise are simply unavailing. Indeed, Defendant's argument is so strained, that Defendant actually claims that if Plaintiff suffered emotional distress from Defendant's internet invasion of privacy, then the damage from Defendant's actions must have impacted Plaintiff at his current employment. Defendant cannot have it both ways. It cannot deny injury, and then assert for Plaintiff how long the injury it denies endured. Plaintiff never contended that Defendant's internet invasion of privacy impacted his current employment.

Defendant incorrectly suggests that e-mail is public. This is simply wrong. All of the cases that Defendant cites demonstrate that employers have certain rights to access employee emails – not third parties. Moreover, Defendant confuses the Freedom of Information Act with discovery. The former offers very limited access to records such as email, and Court decisions based thereon simply do not relate to discovery issues.

Indeed, Defendant has not sought this information through the Freedom of Information Act, Defendant has served a subpoena. Defendant cannot have it both ways.

II. Defendant's Stated Bases for the Subpoena Do Not Withstand Scrutiny

Defendant asserts two reasons for the subpoena: (1) that Plaintiff stated that Defendant's blog came up in all of his interviews for employment after working as a Counsel on the United States Senate Judiciary Committee, and (2) the fact that Plaintiff couldn't write a book review for a new book.

If Defendant's first assertion were to be believed, then Defendant could have restricted its request to those records at Plaintiff's current employer (the University of Arkansas at Little Rock School of Law) that reference Defendant's privacy-invading internet site and it's effect on Plaintiff's hiring. That is not at all what Defendant requests with its subpoena.

Secondly, Defendant mischaracterizes the affidavit of Alyssa Eidelberg Rosen. Eidelberg Rosen discussed the effect of Defendant's blog on her, not on the Plaintiff. Plaintiff offered to write a review squib for inclusion in Eidelberg Rosen's book and advertising. Eidelberg Rosen's publisher explicitly declined as a consequence of Defendant's privacy-invading blog on the internet about Plaintiff. This showed the effect on others of Defendant's statements on the internet about Plaintiff, and has nothing to do with Plaintiff's current employment. Moreover, it's not even a damage suffered by Plaintiff. He gets no benefit out of writing a comment for the jacket of Eidelberg Rosen's book. This was done as a courtesy, but the publisher's reaction shows the effect of Defendant's actions on others.

III. Defendant Intentionally Bypassed the Proper Route for Discovery of Plaintiff

Defendant could have served Plaintiff with tailored document requests, which could include some information in Plaintiff's email. Instead, Defendant seeks to bypass normal discovery and discovery time frames and to obstruct Plaintiff's current employment. Such actions are improper. *See Trammell v. Anderson College*, 2006 WL 1997425 at *1 (D.S.C. 2006).

Defendant purposely did not serve a discovery request on the Plaintiff in order to bypass Plaintiff's ability to respond and object appropriately. Interestingly, Defendant claims that it did not have to do so, but then paradoxically claims that it did so by sending an email to Plaintiff's Counsel making outrageous demands. Of course, this does not constitute a discovery request and does not afford Plaintiff the opportunity to raise objections and provide responses.

Moreover, Defendant's assertion that it acted properly is belied by Defendant's own actions. Defendant sought Plaintiff's emails from his previous employer -- the United States Senate Judiciary Committee -- directly from Plaintiff through normal discovery, not by subpoenaing his previous employer. Paradoxically, however, Defendant seeks his current emails directly from his employer through a subpoena not normal discovery --- so as to harass Plaintiff at his current employment. If Defendant traveled under the same theory of discovery, Defendant would acted consistently and requested the document with a formal discovery request, served upon the Plaintiff. Obviously, this highlights the real and true motives of this request upon the Plaintiff's employer, this is to interfere as much as possible with his current employer, and to embarrass and harass the Plaintiff.

IV. Defendant's Counsel's Attempts to Throw Mud at Plaintiff and His Counsel Demonstrate His True Motive to Harass and Are Intentional Misstatements of Fact

Defendant quotes deposition testimony of a wholly unrelated and completed case that Plaintiff won. Moreover, Defendant intentionally misstates Plaintiff's statements. In that case, Plaintiff specifically described the damages and treatment resulting from that injury, which wholly preceded this matter. Defendant's Counsel conveniently omits the previous questioning that demonstrates such. Indeed, in the very quote that Defendant cites, refers to "such emotional distress." Defendant's Counsel apparently believes that Plaintiff could not have suffered an injury before he met Defendant, even though the Court in the previous action found exactly that as a matter of law.

Similarly, Defendant resorts to personal attacks on Counsel for Plaintiff, which are unprofessional, not relevant to this matter, and inaccurate. He cites to a matter that Counsel for Plaintiff is a party and has absolutely no bearing on this action and also mischaracterizes that case, which also is in a favorable posture.

Indeed, Counsel for Defendant questions whether Plaintiff's Counsel really didn't receive Defendant's document, even though the exact same thing happened to Defendant's Counsel in an unrelated case. *Mitchel v. Catepillar*, 1:03-CV-0868 (N.D. Ga. 2004), Objection to Unauthorized Surreply. Defendant admits that the issue is moot. There is no reason for raising this issue other than to harass Counsel for Plaintiff and is an example of Defendant's continuing pattern of harassment.

VI. Plaintiff Does Not Object to Transferring this Matter to the District for the District of Columbia

Defendant raised the fact that this case emanates from the District Court for the District of Columbia and that this Motion was originally filed there. Plaintiff does not object to this matter being transferred to the Court that is hearing the underlying case. Defendant has repeatedly claimed that that Court looks favorably on its assertions. As such, that Court appears to be the proper forum to evaluate the illegitimacy of Defendant's current actions.

CONCLUSION

This Court should quash Defendant's improper discovery or transfer this matter to the Court hearing the underlying action – the District for the District of Columbia.

Dated: September 15, 2006

Respectfully Submitted,

/s/ Jonathan Rosen
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CERTIFICATE OF SERVICE

I caused the attached copy of Plaintiff's Reply to be served on Matt Billips, 730 Peachtree Rd, Atlanta, GA 30308, by placing it in a US Mail Box today, September 18, 2006.

/s/ Jonathan Rosen
Jonathan Rosen, Esq.