UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

WILFREDO GOLEZ

Plaintiff,

vs.

JOHN E. POTTER, POSTMASTER GENERAL; U.S. POSTAL SERVICE

Defendants.

CASE NO. 09-cv-965 AJB (WMc)

ORDER DENYING MOTION TO COMPEL [DOC. NO. 118.]

I. INTRODUCTION

On November 1, 2011, Plaintiff *pro se* Wilfredo A. Golez ("Golez") filed a motion to compel the work attendance records of two former co-workers who are not parties to the instant litigation. [Doc. No. 118, pp. 2-3.] Golez states he requires the employment records of his former co-workers to show other employees who were late were not terminated as he was, and therefore rebut Defendants' contention that his own attendance irregularities led to termination. *Id.* at 3. Plaintiff argues he was improperly terminated during FMLA protected absences. *Id.*

Defendants object to Plaintiff's motion to compel on the grounds of untimeliness, overbreadth and privacy protections under the Privacy Act of 1974. [Doc. No. 126, pp. 1-3.]

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 26(b)(1) states: "unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any **nonprivileged** matter that is relevant to any parties claim or defense-including the existence, description, nature,

custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Fed. R. Civ. P. 26(b)(1) (emphasis added.)

In this litigation, Defendants object to the production of non-party employee attendance records on privacy grounds as reflected by the Privacy Act of 1974 which provides:

> "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains."

See 5 U.S.C. §552a(b).

In addition to the rule set forth in the Privacy Act of 1974, federal courts generally recognize a privacy right that can be raised in response to discovery requests. *Johnson ex rel Johnson v. Thompson*, 971 F.2d 1487, 1497 (10th Cir. 1992) (denying discovery of names of participants in a medical study due to privacy interests of the individual participants). The party whose privacy is affected may object, as Defendants have done here, or seek a protective order. *Laxalt v. McClatchy*, 809 F.2d 885, 889 (D.C. Cir. 1987). Resolution of a privacy objection or request for protective order requires a balancing of the need for the particular information against the privacy right asserted. *Cook v. Yellow Freight System, Inc*., 132 F.R.D. 548, 550-551 (E.D. Cal. 1990) (balancing targeted individual's right of privacy against public's need for discovery in employment discrimination case.)

III. DISCUSSION

Defendants' Privacy Objection is Sustained

The exceptions allowed in the Privacy Act of 1974 are not applicable here as: (1) Plaintiff is not requesting his own time records, but the attendance records of non-parties, and (2) the persons whose records Plaintiff seeks have not given permission for their release. Accordingly, the Privacy Act of 1974 precludes the United States Postal Service from complying with Plaintiff's discovery request. Moreover, the Court has carefully balanced Plaintiff's stated need for the attendance records of his former co-workers with the privacy rights of employees in their personnel records and finds Plaintiff's need does not outweigh the privacy rights of the non-parties whose attendance records he seeks. Plaintiff has received his own time and attendance records as

well as his 3971 forms (Request for Notification of Absence) from Defendant which are relevant to his contention that he was improperly terminated during FMLA protected absences. The attendance records of Plaintiff's former co-workers who are not parties to this case are not relevant and not likely to lead to the discovery of admissible evidence. Fed. R. Civ. Proc. 26(b)(1). Therefore, Plaintiff cannot justify their disclosure in the face of recognized privacy rights.

IV. CONCLUSION AND ORDER THEREON

For the reasons articulated above, the Plaintiff's Motion to Compel is **DENIED**. Pursuant to Local Civil Rule 7.1 (d)(1), the Court has found Plaintiff's Motion to Compel suitable for decision without oral argument. Accordingly, the teleconference on Plaintiff's motion to compel currently scheduled for December 8, 2011 at 4:30 p.m. is **VACATED.**

IT IS SO ORDERED.

DATED: November 29, 2011

Hon. William McCurine, Jr.
U.S. Magistrate Judge
United States District Court