UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIN JOHNSON, Plaintiff, - against - J. WALTER THOMPSON U.S.A., LLC, J. WALTER THOMPSON COMPANY, LLC, WPP PLC, and GUSTAVO MARTINEZ, Defendants.	16 Civ. 1805 (JPO)(JCF) MEMORANDUM AND ORDER

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

The plaintiff, Erin Johnson, brings this action against J. Walter Thompson U.S.A., LLC, J. Walter Thompson Company, LLC (together, "JWT"), WPP PLC (together with JWT, the "Corporate Defendants"), and Gustavo Martinez, alleging that the all defendants discriminated and retaliated against her on the basis of her gender in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq., and the New York City Homan Rights Law, Admin. Code of City of N.Y. § 8-107, and that the Corporate Defendants did so in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). The plaintiff further asserts that the defendants retaliated against her for opposing unlawful practices in violation of the Equal Pay Act, 29 U.S.C. §S 206(d) and 215(a)(3), and Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981.

The Corporate Defendants now move for an order compelling Ms.

Johnson to produce documents concerning her efforts to secure alternative employment. Concurrently, Mr. Martinez moves for an order permitting him to serve a non-party subpoena on a company with which the plaintiff previously communicated about potential employment. Both motions are granted.

Background[1]

Since 2009, Ms. Johnson has been the Chief Communications Officer of JWT, an international advertising agency based in New York. Johnson, 224 F. Supp. 3d at 301. In 2014, Mr. Martinez joined JWT as its Global President. (Second Amended Complaint ("SAC"), ¶ 35). When he became Chairman and CEO on January 1, 2015, the plaintiff began reporting directly to him. Johnson, 224 F. Supp. 3d at 302. According to Ms. Johnson, Mr. Martinez created a hostile work environment by making sexually suggestive remarks both directly to her and in her presence and by engaging in unwanted physical touching. Id. at 302-03. After the plaintiff raised concerns about this conduct to JWT's Chief Talent Officer, Mr. Martinez allegedly reduced her bonus, stopped inviting her to JWT Executive Committee meetings, cancelled the annual meeting of one of Ms. Johnson's programs, and began assigning away

[1] The factual background of this case is set forth in greater detail in the opinion of the Honorable J. Paul Oetken, U.S.D.J., denying the defendants' motions to dismiss, Johnson v. J. Walter Thompson U.S.A., LLC, 224 F. Supp. 3d 296 (S.D.N.Y. 2016), and will not be repeated here.

responsibilities that had been hers. Id. at 303-04.

On February 22, 2016, Ms. Johnson's attorneys sent a letter to the defendants indicating that she believed that she was a victim of discrimination and retaliation. Id. at 304. She was then placed on paid leave pending completion of an internal investigation. Id. at 304-05. On March 10, 2016, Ms. Johnson commenced this action. Thereafter, Mr. Martinez issued a statement through WPP asserting that "there is absolutely no truth to [plaintiff's] outlandish allegations." Id. at 305 (alteration in original). WPP sent a memorandum to its senior executives and clients and to the media stating that it had been investigating the plaintiff's allegations and had "found nothing." Id. JWT issued a press release stating that "Martinez has asserted that [the plaintiff's] allegations are false." Id.

In the meantime, Ms. Johnson had allegedly been contacted by TBWA Worldwide ("TBWA"), another advertising agency, about working there. Ultimately, that position was filled by Anaka Kobzev, one of the plaintiff's subordinates, and Ms. Johnson discussed this development with Mr. Martinez in a string of text messages on February 12, 2016. (Memorandum in Support of Defendants' Motion to Compel the Production of Information and Documents ("Corp. Def. Memo.") at 3 & n.2). In pertinent part, Ms. Johnson stated, "Hey. To brag a little. They came after me first for this role and I didn't go because I am loyal to you and what you are doing. I

felt like we had a good year together. So I hope I wasn't wrong to stay. Lol." (Memorandum of Law in Support of Defendant's Proposed Subpoena to Non-Party TBWA ("Martinez Memo."), Exh. A at JWTJOHNSON000000210).

In the course of discovery, the Corporate Defendants have sought information relating to Ms. Johnson's efforts to find new employment. In particular, they have made the following requests:

> Interrogatory No. 23: Identify all persons (including companies or employers) with knowledge or information, personal or otherwise, concerning Plaintiff's efforts to find work (including without limitation work to be performed as an employee, consultant or independent contractor) from June 25, 2014 to the present, including without limitation any applications of employment or contact with TBWA Worldwide.
>
> Document Request No. 17: All documents concerning Plaintiff's efforts to find new employment or any consulting, freelance or other paid work since January 1, 2014 to the present, including without limitation any contact she had with TBWA Worldwide.
>
> Document Request No. 18: All documents concerning Plaintiff's efforts to mitigate any damages she allegedly suffered as a result of the conduct alleged in the Complaint.

(Corp. Def. Memo. at 3 n.5). After the plaintiff objected to this discovery and the parties were unable to come to a resolution, the Corporate Defendants filed their motion.

Similarly, counsel for Mr. Martinez proposed to serve a subpoena on TBWA seeking:

> 1. All documents and tangible objects for the period June 1, 2014 to present in your custody or control pertaining to Erin Johnson (a/k/a Erin Oettinger or Erin

> Johnson Oettinger) in connection with the position "Global Head of Communications" at TBWA currently held by Anaka Kobzev, including but not limited to job applications, cover letters, resumes, portfolios, notes, emails, letters, correspondence, calendar invites, meeting schedules, interview notes, contracts, non-disclosure agreements, and written agreements.
>
> 2. All documents and tangible objects for the period June 1, 2014 to present in your custody or control pertaining to Erin Johnson (a/k/a Erin Oettinger or Erin Johnson Oettinger) in connection with any position of employment at TBWA, including but not limited to job applications, cover letters, resumes, portfolios, notes, emails, letters, correspondence, calendar invites, meeting schedules, interview notes, contracts, non-disclosure agreements, and other written agreements.

(Martinez Memo. at 2). When the plaintiff would not consent to service of such a subpoena, Mr. Martinez filed his motion.

Discussion

A. Legal Standard

A two-step analytical framework governs a motion to compel discovery. First, the moving party must demonstrate that the information sought is discoverable, including, among other things, that it is relevant. See Mason Tenders District Council of Greater New York v. Phase Construction Services, Inc., 318 F.R.D. 28, 36 (S.D.N.Y. 2016) (noting that "the burden of demonstrating relevance is on the party seeking discovery"); Allison v. Closette Too, LLC, No. 14 Civ. 1618, 2015 WL 136102, at *8 (S.D.N.Y. Jan. 9, 2015) (same); Mandell v. Maxon Co., No. 06 Civ. 460, 2007 WL 3022552, at *1 (S.D.N.Y. Oct. 16, 2007) (same). Second, "[o]nce relevance has been shown, it is up to the responding party to

justify curtailing discovery." Allison, 2015 WL 136102, at *8 (quoting Fireman's Fund Insurance Co. v. Great American Insurance Co. of New York, 284 F.R.D. 132, 134 (S.D.N.Y. 2012)).

Information is discoverable if it meets the requirements of Rule 26(b)(1) of the Federal Rules of Civil Procedure:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Thus, "[r]elevance is . . . 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on' any party's claim or defense." Mortgage Resolution Servicing, LLC v. JPMorgan Chase Bank, N.A., No. 15 Civ. 293, 2016 WL 3906712, at *3 (S.D.N.Y. July 14, 2016) (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)).

In order to justify withholding relevant information, the party resisting discovery must show "good cause," the standard for issuance of a protective order under Rule 26(c). See Gambale v. Deutsche Bank AG, 377 F.3d 133, 142 (2d Cir. 2004) (holding that

party opposing discovery has burden of demonstrating good cause); cf. State Farm Mutual Automobile Insurance Co. v. New Horizont, Inc., 254 F.R.D. 227, 233 n.4 (E.D. Pa. 2008) (treating motion to compel and motion for protective order as "mirror image[s]"); Imperial Chemical Industries, PLC v. Barr Laboratories, Inc., 126 F.R.D. 467, 472 (S.D.N.Y. 1989) (same). In order to meet this burden, the party opposing discovery must show "that disclosure will result in a clearly defined, specific and serious injury. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test. Moreover, the harm must be significant, not a mere trifle." Laugier v. City of New York, No. 13 Civ. 6171, 2014 WL 6655283, at *1 (S.D.N.Y. Nov. 24, 2014) (quoting Schiller v. City of New York, No. 04 Civ. 7922, 2007 WL 136149, at *5 (S.D.N.Y. Jan. 19, 2007)); see also Ghonda v. Time Warner Cable, Inc., No. 16 CV 2310, 2017 WL 395111, at *2 (E.D.N.Y. Jan. 27, 2017). Ultimately, "the appropriateness of protective relief from discovery depends upon a balancing of the litigation needs of the discovering party and any countervailing protectible interests of the party from whom discovery is sought." Mitchell v. Fishbein, 227 F.R.D. 239, 245 (S.D.N.Y. 2005) (quoting Apex Oil Co. v. DiMauro, 110 F.R.D. 490, 496 (S.D.N.Y. 1985)).

B. Corporate Defendants' Motion

The Corporate Defendants argue that information concerning

Ms. Johnson's efforts to secure alternative employment are relevant to (1) whether she believed that she was experiencing harassment or retaliation, (2) the extent to which she experienced emotional distress, and (3) her claims of damage to her reputation. (Corp. Def. Memo. at 1-2, 5-8).

A plaintiff can establish a claim of hostile work environment by showing that the environment of the workplace was "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so." Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998); accord Dash v. Board of Education of City School District of New York, __ F. Supp. __, __, 2017 WL 838226, at *6 (E.D.N.Y. 2017); Marques v. City of New York, No. 14 Civ. 8185, 2016 WL 4767577, at *8 (S.D.N.Y. Sept. 12, 2016). To be sure, "the subjective component of the test . . . does not require that [the plaintiff] quit or want to quit the employment in question." Davis v. United States Postal Service, 142 F.3d 1334, 1341 (10th Cir. 1998). Thus, the information that the Corporate Defendants seek would not be conclusive; but that does not mean that it is not relevant. Indeed, it could be quite persuasive. For example, in Arnold v. Reliant Bank, 932 F. Supp. 2d 840 (M.D. Tenn. 2013), the court found it "telling" that the plaintiff, who was alleging workplace harassment, nevertheless rejected a more lucrative offer from another employer. Id. at 855. The court

observed that this "suggests that, at least during the months immediately preceding her termination, the plaintiff did not perceive her work environment to be hostile." Id. Thus, the requested information is plainly relevant to the subjective prong of Ms. Johnson's hostile environment claim.

For similar reasons, it is also relevant to her claim for damages for emotional distress. Efforts that the plaintiff made to extricate herself from her position at JWT and find other work would be some evidence that she was experiencing distress. Indeed, if her search were unsuccessful, the resulting anxiety could itself be compensable. See Shannon v. Fireman's Fund Insurance Co., 156 F. Supp. 2d 279, 296 (S.D.N.Y. 2001) (finding that depression resulting from unsuccessful job search following termination justified award for emotional distress). Conversely, a fact finder could infer that the plaintiff felt little emotional distress if she took no action to find alternative employment or if she rejected offers of equivalent positions.

Insofar as the Corporate Defendants seek information about the plaintiff's employment search on the ground that it is relevant to her claim for reputational injury, that argument is moot. Ms. Johnson's only claim for reputational damages is based on publicity generated after she commenced this action. (Plaintiff's Memorandum of Law in Opposition to Corporate Defendants' Motion to Compel ("Pl. Opp. Corp. Memo.") at 9; Transcript of Status

Conference dated April 26, 2017, attached as Exh. 6 to Affidavit of Anne C. Vladeck dated May 23, 2017, at 22-23). And she has agreed to produce job search information for the period after she filed the original Complaint. (Pl. Opp. Corp. Memo. at 9 n.7). Nonetheless, the information that the Corporate Defendants seek is relevant to the other two issues they have identified.

2. Burden

The plaintiff contends that the requested discovery would be intrusive and burdensome because it would provide ammunition for the defendants to "target other potential employers" and "sabotage" Ms. Johnson's career. (Pl. Opp. Corp. Memo. at 11). This purported danger is too nebulous to justify denying discovery of relevant information. First, the plaintiff has not suggested that she is currently contemplating seeking new employment. See Ghonda, 2017 WL 395111, at *3 (declining to quash subpoena where plaintiff did not claim that she intended to apply for employment at target entity in foreseeable future). And, as noted above, she has agreed to produce data about any job search she conducted after she initiated this action. Certainly, her disclosure of the identity of employers that she contacted prior to filing the lawsuit could lead to those employers becoming aware of the litigation. But Ms. Johnson has repeatedly stressed how publicity generated by the defendants has already alerted the industry to the lawsuit and injured her reputation, so any additional

information disclosed through discovery would likely have little impact on a prospective employer. See id. (finding that "[p]laintiff's contention that the mere service of the challenged subpoena would cause her harm is conclusory and speculative").

The cases relied upon by the plaintiff are each inapposite. For example, in Gambale v. Deutsche Bank AG, No. 02 Civ. 4791, 2003 WL 115221 (S.D.N.Y. Jan. 10, 2003), the defendants served broad subpoenas on five executive search firms that the plaintiff had utilized. Id. at *1. The court quashed the subpoenas, finding:

> A search firm would probably find it an intrusive burden to produce its notes of all communications with plaintiff or with prospective employers on her behalf. Also, 2003 is a difficult time to be looking for a[n] executive position, and I cannot lightly dismiss plaintiff's worry about anything that might cause a search firm with a good "lead" to offer it to another client rather than to her.

Id. Thus, in Gambale, the court was concerned, at least in part, with the burden imposed on a non-party, an issue that has not yet arisen here. Furthermore, the defendants in that case speculated that the job search information might reveal that the plaintiff had misrepresented her qualifications. Id. at *2. The court concluded, "For me, the dispositive factor here is the weakness of the defendants' claims as to relevance." Id. By contrast, as discussed above, the defendants here are seeking highly relevant information.

Similarly, in U.S. Equal Employment Opportunity Commission v. AutoZone, Inc., No. 14 CV 3385, 2016 WL 7231576 (N.D. Ill. Dec. 14, 2016), the court quashed subpoenas served on the plaintiffs' current employers seeking the plaintiffs' entire personnel files, including employment applications, attendance histories, disciplinary records, performance evaluations, and interview notes. Id. at *6. Again, in contrast to this case, the court found little relevance in the requested information: "The Court is not convinced of the relevance of these records to AutoZone's defenses, and what relevance they may have, if any, does not outweigh the potential burdens on the third party employers and the Claimants." Id.

Finally, in Thompson v. Trident Seafoods Corp., No. C11-120, 2012 WL 293865 (W.D. Wash. Jan. 31, 2012), the court rejected the demand of the defendants for a broad array of information about the plaintiff's employment after she left the employ of the corporate defendant ("Trident"). According to the Court,

> [The defendants] argue that they should be permitted to contact plaintiff's post-Trident employers or prospective employers to find out how plaintiff has characterized her separation from Trident (i.e., whether she told anyone that she resigned her position) and how she has performed in her new position(s). While both of these topics are of interest to defendants and may lead to the discovery of admissible evidence, subjecting plaintiff's current and prospective employers to discovery and inviting an in-depth critique of plaintiff's job performance certainly poses a risk of annoyance, embarrassment, and oppression.

Id. at *1. The information demanded in that case was thus far more intrusive and far less relevant than the discovery sought by the Corporate Defendants here. Because Ms. Johnson's limited interest in preventing further disclosure of her dispute with JWT is outweighed by the Corporate Defendants' legitimate litigation needs, the Corporate Defendants' motion to compel is granted.

C. Individual Defendant's Motion

1. The Plaintiff's Standing

As a threshold matter, the individual defendant, Mr. Martinez, questions Ms. Johnson's standing to object to the subpoena that he proposes to serve on TBWA, a non-party. (Reply Memorandum in Further Support of Defendant's Proposed Subpoena to Non-Party TBWA at 2). Because Mr. Martinez raised this argument for the first time in his reply brief, I deem it waived. See, e.g., Sacchi v. Verizon Online LLC, No. 14 Civ. 423, 2015 WL 1729796, at *1 n.1 (S.D.N.Y. April 14, 2015) ("Generally, a court '[does] not consider issues raised in a reply brief for the first time because if a [party] raises a new argument in a reply brief [the opposing party] may not have an adequate opportunity to respond to it.'" (alterations in original) (quoting Evergreen National Indemnity Co. v. Capstone Building Corp., No. 3:07 cv 1189, 2008 WL 926520, at *2 (D. Conn. March 31, 2008))). Even if I were to consider this contention on the merits I would reject it. An employee has a privacy interest in her employment records

sufficient to give her standing to object to a subpoena for those records served on a non-party employer. See Roth v. County of Nassau, No. 15 CV 6358, 2017 WL 75753, at *2 (E.D.N.Y. Jan. 6, 2017); Allison, 2015 WL 136102, at *7 ("[C]ourts have repeatedly found that an individual possesses a privacy interest with respect to information contained in her employment records and therefore has standing to challenge subpoenas seeking such records."); Lev v. South Nassau Communities Hospital, No. 10 CV 5435, 2011 WL 3652282, at *1 (E.D.N.Y. Aug. 18, 2011) ("[T]he plaintiff has a privacy interest with respect to information contained in her employment records, and thus, can challenge the subpoenas [directed at a non-party]."); Warnke v. CVS Corp., 265 F.R.D. 64, 66 (E.D.N.Y. 2010) ("Plaintiff has a legitimate privacy interest in information regarding his subsequent employment and therefore has standing to bring the instant motion [to quash subpoena served upon non-party employers].").

2. Relevance

As with the Corporate Defendants' request for information about Ms. Johnson's search for alternative employment, Mr. Martinez's request for information specifically about the plaintiff's interactions with TBWA seeks relevant data. To the extent that Ms. Johnson received, but then declined, an offer for a higher paying job at TBWA, this information would be pertinent both to whether she subjectively believed that she was being

harassed at JWT and to her claim for emotional distress damages. See Arnold, 932 F. Supp. 2d 854-55; Smith v. Specialty Pool Contractors, No. 02:07-cv-1464, 2009 WL 799748, at *4 (W.D. Pa. March 25, 2009) ("Plaintiff will apparently be the only witness on his behalf who will be able to testify as to whether he suffered mental anguish or mental distress and whether he was subjectively offended by the work environment at Specialty Pool. Accordingly, the Court finds that Defendant will be entitled to inquire as to the reasons why Plaintiff continued his employment with Specialty Pool and did not seek alternative employment.").

2. Burden

Any argument that the plaintiff has with respect to the risk to her of taking discovery with respect to her employment contacts generally is even more attenuated when it comes to TBWA. Of course, TBWA already knows of any communications she previously had with that agency, and she has not contended that she intends to seek employment there in the future. See Annabelle K. Garrett, LLC v. Axiom International Investors, LLC, No. 3:07 cv 1341, 2008 WL 1848880, at *4 (D. Conn. April 25, 2008) (denying motion to quash subpoena of company that was not plaintiff's current employer and for which she never worked). Ms. Johnson does argue that her job prospects with other employers could be adversely affected because "TBWA is a subsidiary of Omnicom Group [] and thereby affiliated with numerous companies working within the advertising

and communications industry." (Plaintiff's Memorandum of Law in Opposition to Defendant Gustavo Martinez's Proposed Subpoena to Non-Party TBWA ("Pl. Opp. Martinez Memo.") at 6). Thus, she concludes, "Martinez's proposed subpoena may negatively affect plaintiff's employment prospects with any Omnicom-affiliated company, not just TBWA." (Pl. Opp. Martinez Memo. at 6). This perceived risk is far-fetched. One would have to surmise not only that TBWA would, unprompted, share data about one particular job applicant with other affiliated companies, but also that it would consist of negative information not already widely known as a result of the litigation itself. This rationale is too speculative to warrant denying Mr. Martinez the opportunity to serve the proposed subpoena.[2]

Conclusion

For the reasons discussed above, the Corporate Defendants' motion to compel (Docket no. 97) and Mr. Martinez motion for leave to serve a subpoena on TBWA (Docket no. 100) are each granted.

SO ORDERED.

James C. Francis IV

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
July 18, 2017

[2] This decision does not, of course, foreclose TBWA from objecting to the subpoena on any available grounds, once it is served.

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