HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DERRICK JOHNSON, et al.,

Plaintiff,

v.

U.S. BANCORP, et al.,

Defendants.

CASE NO. C11-02010 RAJ

ORDER GRANTING IN PART AND DENYING IN PART NON-PARTY CHRISTOPHER HEMAN AND DEFENDANTS' MOTION FOR A PROTECTIVE ORDER RE AT&T SUBPOENA

INTRODUCTION

This matter comes before the court on non-party Christopher Heman and defendants U.S. Bancorp, U.S. Bank National Association d.b.a. U.S. Bank, John Doe 1, John Doe 2, Jane Doe 1, and Jane Doe 2's ("Defendants" or "U.S. Bank")[1] motion for a protective order re AT&T subpoena. Dkt. # 49. Plaintiffs Derrick Johnson and Amy Johnson ("Plaintiffs") oppose the motion. Dkt. # 50.

Having reviewed the memoranda, exhibits, and the record herein, the court GRANTS in part and DENIES in part Defendants' motion for protective order.[2]

[1] For ease of use, the court will refer to the moving parties collectively as "Defendants," even though Mr. Heman is a non-party.

[2] Defendants request that the court strike the "hearsay statements" contained in Plaintiffs' briefing at "Dkt. 50, 3:9-18; 4:5-5:2; Dkt. 51, ¶¶ 4, 9 and 10 and Ex. 5, ¶ 2." Dkt. # 52 at 4 n.1.

BACKGROUND

In August 2007, U.S. Bank fired Mr. Johnson. Dkt. # 40 (AC) ¶ 3.3. He subsequently filed a claim with the Occupational Health and Safety Administration ("OSHA") of the United States Department of Labor ("DOL"). *Id.* In his OSHA complaint, Mr. Johnson alleged that his termination from U.S. Bank was unlawful under the whistleblower provisions of SOX, 18 U.S.C. § 1514A ("administrative case"). Dkt. ## 40 ¶ 3.3; 43-1 (Ex. A to RJN).

In April 2008, Mr. Johnson began employment with KeyBank. Dkt. # 40 ¶ 4.2.

On May 7, 2010, OSHA notified U.S. Bank that it intended to enter findings favorable to Mr. Johnson in the administrative case,[3] and on May 13, 2010, Plaintiffs filed a lawsuit against U.S. Bank that was ultimately removed to federal district court ("*Johnson I*").[4] Dkt. ## 40-2; 40 ¶ 3.3.

In May 2010, Mr. Johnson was called into a meeting with several KeyBank employees. Dkt. # 40 ¶ 4.3. At that meeting, the employees confronted Mr. Johnson

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The court is not deciding a motion for summary judgment. The court may consider hearsay on a motion for protective order. *See Becker v. Precor, Inc.*, Case No. C08-1755-RAJ, 2009 WL 3013656, at * 3 n.1 (W.D. Wash. Sept. 16, 2009); *Costanich v. Dep't of Soc. & Health Svcs.*, Case No. C05-0090-MJP, 2007 WL 3356774, at *1 (W.D. Wash. Nov. 7, 2007). The court therefore declines to strike these portions of Plaintiffs' briefing.

Defendants also ask that the court strike exhibit 4 of Plaintiffs' response, explaining that the document contained therein was filed under seal and remains sealed pursuant to a protective order in *Johnson et al. v. U.S. Bancorp et al.*, Case No. C10-960-RSM (*Johnson I*). Dkt. # 52 at 4 n.1. The court DENIES Defendants' request to strike this exhibit. If Defendants wish for this document to be sealed in the current case, they must file a motion to seal pursuant to Local Rules W.D. Wash. CR ("LCR") 5(g).

[3] Defendants appealed OSHA's ruling, and a hearing was held before a DOL administrative law judge ("ALJ") on April 30 through May 12, 2012. On October 29, 2012, the ALJ issued a decision and order in favor of Mr. Johnson. *In re: Derrick Johnson v. U.S. Bankorp[sic] et al.*, Case No. 2010-SOX-00037, *available at* http://www.oalj.dol.gov/.

[4] On July 15, 2011, Judge Martinez granted U.S. Bank's motion to dismiss. *Johnson I*, Case No. C10-960-RSM, Dkt. # 126. The Ninth Circuit Court of Appeals affirmed the dismissal with prejudice on August 21, 2012. *Johnson et al. v. U.S. Bancorp et al.*, 476 Fed. Appx. 148 (9th Cir. 2012) (unpub.).

regarding an anonymous complaint that had been lodged against him. *Id.* According to Mr. Johnson, "[t]he KeyBank employees indicated that they had information that Plaintiff Johnson was targeting elderly bank customers . . . . During the questioning, KeyBank employees asked Plaintiff Johnson about a previous customer of US Bank named 'Robert,' alleging that the 'anonymous complainant' indicated that Plaintiff Johnson had unlawfully taken money from and abused his relationship with this client." *Id.* KeyBank would not disclose who had made the allegations. *Id.* ¶ 4.4. Mr. Johnson asserts that these allegations were false, but that he was nevertheless "repeatedly targeted, harassed and retaliated against by KeyBank personnel" over the next few months. *Id.* ¶¶ 4.4-4.5.

On September 27, 2010, during a deposition in the administrative case, U.S. Bank's attorneys presented Mr. Johnson with an unsigned document dated January 2, 2008. *Id.* ¶ 4.6. The document contained allegations regarding Mr. Johnson's mistreatment of an elderly U.S. Bank client named "Robert"—the same allegations that KeyBank employees confronted Mr. Johnson with four months earlier. *Id.*

Plaintiffs filed the instant case on December 5, 2011. Dkt. # 1. On September 24, 2012, Plaintiffs' counsel issued a subpoena to AT&T requesting all of Mr. Heman's telephone records (incoming and outgoing calls) from January 1, 2007, through the present. Dkt. # 49-1 at 6. The subpoena indicated that the records were to be produced by October 3, 2012. *Id.*

ANALYSIS

A. Standing

Plaintiffs argue that Defendants have no standing to bring this motion on behalf of Mr. Heman, and that Defendants may seek to quash the subpoena issued to Mr. Heman only if U.S. Bank "asserts a legitimate privacy interest" in the cell phone records. Dkt. # 50 at 7 (citing *Abu v. Piramco Sea-Tac Inc.*, Case No. C08-1167-RSL, 2009 WL 279036, at *1 (W.D. Wash. Feb. 5, 2009)).

Although Defendants refer to Mr. Heman as a "non-party" in the caption of their motion, they go on to argue with regard to Mr. Heman that "a party has standing when he asserts a legitimate privacy interest in the material sought by a subpoena." Dkt. # 52 at 2. However, Defendants further argue that U.S. Bank itself has standing due to the fact that Mr. Heman is an officer of U.S. Bank and used his personal cell phone for U.S. Bank business calls, and therefore "U.S. Bank . . . has standing to protect its own confidential business information that may be revealed through disclosure of Mr. Heman's business phone calls." *Id.*

A party has standing to challenge a subpoena issued to third parties where its own interests may be implicated. *See, e.g., Koh v. S.C. Johnson & Son, Inc.*, Case No. C09-00927-RMW, 2011 WL 940227, at *2 (N.D. Cal. Feb. 18, 2011); *Adams v. United States*, Case No. C03-0049-E-BLW, 2010 WL 55550, at *3 (D. Idaho Jan. 5, 2010). The court finds that because Mr. Heman is an officer of U.S. Bank, and because U.S. Bank's own privacy interests may be implicated, Defendants have standing to bring this motion.

B. Meet and Confer Requirement

On August 21, 2012, counsel for Plaintiffs and Defendants met and conferred via telephone regarding a prior subpoena for cell phone records that Plaintiffs' counsel served on T-Mobile. Dkt. # 49 at 5. At that time defense counsel indicated that she objected to the subpoena on the grounds that it would invade the privacy of Mr. Heman and others. Dkt. # 49-1 at 2 ¶ 3. However, defense counsel subsequently determined that Mr. Heman did not have an account with T-Mobile and thus did not file a motion for a protective order. Dkt. # 49 at 6.

Plaintiffs then issued a subpoena to AT&T with a production date of October 3, 2012. Dkt. # 49-1 at 6. On September 30, 2012, counsel for Defendants sent counsel for Plaintiffs an email asking to meet and confer regarding the AT&T subpoena. *Id.* at 23. Alternatively, counsel requested that the response date be continued if Plaintiffs' counsel

was not available to speak prior to the production date. *Id.* Counsel for Plaintiffs did not respond,[5] and Defendants filed this motion on October 2, 2012. *Id.* at 3 ¶ 6.

C. Legal Standard

The Federal Rules of Civil Procedure allow for broad discovery. *See* Fed. R. Civ. P. 26(b)(1); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993). "[W]ide access to relevant facts serves the integrity and fairness of the judicial process by promoting the search for the truth." *Shoen*, 5 F.3d at 1292. However, discovery should not be used as a means to conduct a "fishing expedition," and must be "reasonably calculated to lead to the discovery of admissible evidence." *Rivera et al. v. Nibco, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004) (citation omitted); Fed. R. Civ. P. 26(b)(1). District courts have a great deal of discretion in controlling the discovery process. *See Empire Blue Cross & Blue Shield et al. v. Janet Greeson's A Place for Us Inc. et al.*, 62 F.3d 1217, 1219 (9th Cir. 1995). A court may "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). However, the party seeking such order must demonstrate good cause as to why the order should be granted, specifying the particularized prejudice or harm that will result if it is not. *See id.*; *Phillips v. General Motors Co.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002).

D. Legitimate Purpose

Defendants argue that the time scope of the AT&T subpoena is overly broad and "confirms that Plaintiffs have not even tried to tether it to the allegations in the Amended Complaint." Dkt. # 49 at 8. Defendants point out that U.S. Bank terminated Mr.

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[5] Plaintiffs' counsel uses her surreply to argue that she "saw no reason to have a second discussion as we had already conferred and there was no difference in the information requested." Dkt. # 54 at 2. The court first notes that this is an improper use of the surreply—argument is to be limited solely to the issue of Defendants' motion to strike. LCR 7(g)(2). Furthermore, this is an insufficient excuse for failing to comply with meet and confer requirement. Future violations of this rule will result in sanctions. *See* LCR 26(c)(1) ("If the court finds that counsel for any party . . . willfully refuses to confer, fails to confer in good faith, or fails to respond on a timely basis to a request to confer, the court may take action as stated in LCR 11 [of the Local Civil Rules]."

Johnson's employment in August 2007, Rachael Johnson wrote her letter in 2008, Mr. Johnson began his employment at KeyBank in April 2008, the alleged retaliation against Mr. Johnson began in May 2010, and Mr. Johnson resigned from KeyBank in October 2010. *Id.* at 9. Defendants argue that because Plaintiffs' lawsuit alleges causes of action occurring while Mr. Johnson was employed by KeyBank, any cell phone records outside of the time period of his employment are neither "directly relevant" nor "reasonably calculated to lead to the discovery of admissible evidence." *Id.* at 8-9 (citing Fed. R. Civ. P. 26([b])(1)).

Plaintiffs contend that they are seeking the cell phone records both "to show contact between Mr. Heman and KeyBank," and "to find other evidence relating to Mr. Heman's motives, animus intent and for impeachment purposes." Dkt. # 51 ¶ 13. Plaintiffs argue that "Mr. Heman's intentions and animus toward Mr. Johnson are relevant not only in relation to the time frame of the KeyBank incidents but those that occurred prior as well." Dkt. # 50 at 9. They further argue that "[w]ho [Mr. Heman] contacted" between January 2007 until the present is relevant because "it can be used for impeachment purposes" and "likely . . . goes to [his] state of mind." *Id.* at 8. Plaintiffs concede, however, that they have "no means of obtaining the content of his conversations." *Id.* at 9.

The court finds that the relevant timeframe during which Mr. Heman allegedly contacted KeyBank is April 2008 through October 2010, when Mr. Johnson was employed by KeyBank. Plaintiffs' request for Mr. Heman's cell phone records during this time period is "reasonably calculated" to lead to the discovery of this evidence. Conversely, the court finds that Plaintiffs have failed to adequately articulate the relevance of Mr. Heman's cell phone records beyond this timeframe.

E. Right to Privacy

Defendants argue that Mr. Heman "is entitled to a constitutional right of privacy," and cite article I, section 7 of the Washington constitution. Dkt. # 49 at 8. Defendants

cite no further authority supporting their argument that this constitutional provision applies in this particular situation. *Id.* Defendants further argue that production of the cell phone records will result in "embarrassment and harassment" to Mr. Heman and his "friends, family members, [and] business acquaintances." *Id.*; Dkt. # 49-2 ¶ 4. Defendants express particular concern about disclosure of the phone numbers of Mr. Heman's personal friends, children, and medical providers, and request that they "be permitted to redact all personal telephone numbers" if this court denies their motion in whole or in part. Dkt. # 49 at 8, 11; Dkt. # 49-2 ¶ 3.

Under the Federal Rules of Civil Procedure, "there is no generic 'privacy' privilege." *Tubar v. Clift*, Case No. C05-1154-JCC, 2007 WL 214260, at *3 (W.D. Wash. Jan. 25, 2007) (citing Fed. R. Civ. P. 26(c)). However, this district has assumed without deciding that "there could be some privacy interest cognizable under federal law" with regard to phone records, and has found that "any applicable privacy interests can be protected by limiting" both the scope of the records disclosed and "access to the information therein." *Id.* at *3-4.

The court finds that in addition to limiting the time scope of the records as discussed above, it is also appropriate to limit the scope of how they may be used. Plaintiffs may use the records solely for the purpose of identifying the names associated with the telephone numbers, as explained in Plaintiffs' response brief. Dkt. # 50 at 6. *Plaintiffs and anyone associated with Plaintiffs may not call any of the telephone numbers*. Additionally, the parties are ORDERED to enter a protective order pursuant to LCR 26(c) limiting disclosure of the phone records to counsel and persons necessary for and associated with this litigation.

F. Other Means of Obtaining Information

Defendants argue that even if the information contained within Mr. Heman's cell phone records is relevant, it can be obtained through other, less burdensome means. Dkt. # 49 at 10. Defendants argue that Plaintiffs have deposed Mr. Heman in previous

litigation and will likely do so again in this case, and thus Plaintiffs will have the opportunity to ask him questions regarding his contacts with KeyBank employees. *Id.* They further argue that the burden of this discovery outweighs the benefit, "considering the needs of the case and the importance of the discovery in resolving the issues." *Id.* (citing Fed. R. Civ. P. 26(b)(2)(C)(iii)).

The court is not persuaded that a deposition is an adequate substitute for the relevant phone records sought by Plaintiffs, nor that producing the phone records will be unduly burdensome on Defendants or on AT&T, the producing entity. "[T]he discovery of phone records is commonplace in litigation . . . ." *Perez-Farias et al. v. Global Horizons, Inc. et al.*, Case No. C-05-3061-MWL, 2007 WL 991747, at *3 (E.D. Wash. Mar. 30, 2007).

CONCLUSION

For all of the foregoing reasons, the court GRANTS in part and DENIES in part Defendants' motion as follows:

(1) Defendants' motion is GRANTED with regard to the AT&T subpoena for Mr. Heman's cell phone records from January 1, 2007, through March 31, 2008, and November 1, 2010, through the present.

(2) Defendants' motion is DENIED with regard to the AT&T subpoena for Mr. Heman's cell phone records from April 1, 2008, through October 31, 2010.

(3) Defendants' request to redact personal phone numbers is DENIED.

(4) The parties are ORDERED to file a protective order pursuant to LCR 26(c) no later than January 9, 2013.

(5) Within seven (7) days of the court's entry of the protective order, AT&T must produce responsive records subject to the court's limitations.

Dated this 26th day of December, 2012.

The Honorable Richard A. Jones
United States District Judge