

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

and

EVA CRAWFORD,

Plaintiff/Intervenor,

vs.

Case No. 3:06-cv-862-J-32MCR

AUTOZONE, INC.,

Defendant.

ORDER

THIS CAUSE is before the Court on Plaintiff/Intervenor's Motion to Quash and/or Motion for Protective Order (Doc. 26) filed on November 8, 2007. Defendant filed a response (Doc. 32) on November 16, 2007. Accordingly, this matter is ripe for review.

I. BACKGROUND

Plaintiff, the EEOC, filed sexual harassment and retaliation claims against Defendant for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1). (Doc. 1). Plaintiff Crawford intervened in the case and filed her own claims for violation of Title VII and the Florida Civil Rights Act on the basis of sexual discrimination, harassment, and retaliation. (Doc. 9). On or about October 15, 2007, Defendant served Plaintiff Crawford's current employer, Discount Auto Parts, with a subpoena

requiring it to produce the “employment records of [Plaintiff Crawford], including but not limited to her, [sic] personnel file, payroll report(s), benefits file, and any and all performance evaluations, disciplinary actions, counselings, and records re termination and/or eligibility for rehire.” (Doc. 26-2). Defendant, however, failed to provide Plaintiffs with notice of the subpoena and thus, failed to provide Plaintiffs with an opportunity to object before serving the subpoena on Discount Auto Parts. On November 8, 2007, after receiving notice of the subpoena, Plaintiff Crawford filed this Motion, requesting the Court to quash the subpoena or alternatively, to issue a protective order. (Doc. 26). Prior to Plaintiff Crawford’s filing of this Motion, however, Discount Auto Parts provided a package of documents to Defendant in an apparent effort to comply with the subpoena. (Doc. 26, p. 12). Defendant has not yet inspected the documents and has agreed not to inspect them until resolution of this Motion. Id.

II. **ANALYSIS**

As an initial matter, Defendant argues Plaintiff Crawford lacks standing to object to the subpoena. (Doc. 32, pp. 2-3). Ordinarily a party does not have standing to quash a subpoena served on a third party unless the party seeks to quash based on a personal right or privilege relating to the documents being sought. See State of Fla. ex rel. Butterworth v. Jones Chemicals, Inc., 1993 WL 388645 at *2 (M.D.Fla. 1993) (“Generally, it is the person to whom a subpoena is directed who has standing to seek a motion to quash.”). When, however, a party alleges a “personal right or privilege,” courts may confer standing on a party. See Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc., 231 F.R.D. 426, 429 (M.D. Fla. 2005). “Personnel files and records and

[sic] are confidential in nature and . . . in most circumstances, they should be protected from wide dissemination. Williams v. Board of County Comm'rs, No. Civ. A. 98-2485-JTM, 2000 WL 133433, at *1 (D. Kan. Jan. 21, 2000) (citations omitted). When, however, a plaintiff brings a claim for discrimination and seeks damages for emotional distress, the plaintiff may have waived some of her privacy interests. See e.g., Brady v. Central Indiana Regional Blood Center, No. 1:99-MC-19, 1999 WL 33912610, *1 (N.D. Ind. Oct. 6, 1999) (stating that by bringing a Title VII claim of harassment or retaliatory discharge, the plaintiff waives most of her privacy interests). It is thus, arguable that Plaintiff Crawford may have waived some of her privacy interests when she asserted her claims against Defendant; however, because the Court cannot find as a matter of law that Plaintiff Crawford has waived all of her privacy interests, in addition to the fact that she has standing to bring a motion for a protective order under Federal Rule 26, the Court finds Plaintiff Crawford has standing to contest the subpoena.

Before addressing the parties' substantive arguments, the Court will consider Plaintiff Crawford's argument that the subpoena should be quashed because she was not given prior notice of Defendant's intent to serve the subpoena. (Doc. 26, p. 12). Rule 45(b)(1) of the Federal Rules of Civil Procedure requires "prior notice" of a subpoena; however, it does not define prior notice. Fed. R. Civ. P. 45(b)(1). Prior notice has been interpreted by some courts as a requirement that the party issuing the subpoena must provide notice to all opposing parties before it issues the subpoena to a non-party. Butler v. Biocore Medical Technologies, Inc., 348 F.3d 1163, 1173 (10th Cir. 2003) (finding that Rule 45(b)(1) requires notice to be given prior to service of a

subpoena). On the other hand, other courts have determined that as long as the subpoena is served simultaneously on both the opposing party and the non-party, Rule 45(b)(1)'s prior notice requirement is met. Florida Media, Inc. v. World Publications LLC, 236 F.R.D. 693, 694-95 (M.D. Fla. 2006) (noting that the Eleventh circuit has not interpreted "prior notice" under Rule 45(b)(1) and interpreting "prior notice" to mean simultaneously with the service of the subpoena) (internal citations omitted). Here, Defendant does not dispute that prior notice is required; rather, Defendant inadvertently failed to give any notice to Plaintiffs. Defendant argues, however, that because Plaintiffs had constructive notice of the subpoena and thus, had an opportunity to object, there was no harm caused by Defendant's inadvertent failure to give prior notice. (Doc. 32, p. 8). Moreover, Defendant points to the fact that it has not yet viewed the documents as further evidence that Plaintiff was not harmed by its failure to provide prior notice. Id.

Unfortunately, Discount Auto Parts learned of the subpoena and responded to it before Plaintiff Crawford had an opportunity to object. Notably, however, Plaintiff Crawford has not asserted that she has been harmed by the fact that Discount Auto Part was served with the subpoena. Because Plaintiffs had an opportunity to object to the subpoena, as evidenced by the instant Motion, and because Defendant has not yet viewed the documents provided by Discount Auto Parts, the Court will decline to quash the subpoena on the basis of notice.

Plaintiff Crawford makes several substantive arguments as to why the subpoena should be quashed and/or a protective order entered. Each of her arguments center

around her concerns that the documents are private and confidential or that they are irrelevant to her claims.¹ (Doc. 26, pp. 3-6, 8-8-9, 11-12). Notably, Plaintiff Crawford seeks to prevent Defendant from obtaining any of her employment records from Discount Auto Parts – her current employer. (Doc. 26,p. 13). Defendant, on the other hand, argues all of Plaintiff Crawford’s personnel records from Discount Auto Parts are relevant because she placed her employment with Discount Auto Parts at issue by filing a complaint alleging discrimination and retaliation and seeking damages including front pay, job search expenses, emotional pain and suffering, loss of enjoyment of life, and humiliation. (Doc. 32).

While Plaintiff Crawford has waived some of her privacy interests by bringing these claims against Defendant, the Court cannot summarily conclude that Plaintiff has waived all of her privacy interests in her personnel records from her current employment. Rather, it is incumbent upon this Court to determine if Plaintiff Crawford waived her privacy interest in the particular documents Defendant requested and whether such documents are relevant to Plaintiff’s claims.

As mentioned above, Defendant seeks Plaintiff Crawford’s entire personnel file, however, it has specifically requested her “payroll report(s), benefits file, and any and all

¹ Plaintiff also makes the argument that the after acquired evidence defense does not justify Defendant’s subpoenas. (Doc. 26, p. 9). Defendant, however, states it has not claimed it is seeking Plaintiff Crawford’s personnel file for “after-acquired evidence” purposes. (Doc. 32, p.7). Rather, Defendant has identified the specific personnel documents it seeks and explains why the documents are relevant to the claims and defenses in this case. Thus, the Court need not determine whether the after-acquired evidence doctrine applies in this case because its findings concerning relevance of the documents requested and Plaintiff’s privacy interests are dispositive of Plaintiff’s motion, despite whether or not the after-acquired evidence doctrine applies.

performance evaluations, disciplinary actions, counselings, and records re termination and/or eligibility for rehire.” (Doc. 26-2). Defendant argues that factors such as Plaintiff Crawford’s future in the position from which she was terminated, her work and life expectancy, her obligation to mitigate damages, the availability of comparable employment, and the time reasonably required to find substitute employment are relevant to the issue of whether Plaintiff Crawford is entitled to front pay. (Doc. 26, p. 4). Specifically, Defendant asserts a claim for front pay involves consideration of additional factors other than financial damages.

Front pay is often sought by plaintiffs in lieu of reinstatement of their previous job. Front pay is a monetary award designed to make the plaintiff whole for a reasonable future period, so that the plaintiff can reestablish her rightful place in the job market. Goss v. Exxon Office Systems Co., 747 F.2d 885, 889 (3rd Cir. 1984). In determining front pay awards, a court is obligated to determine when the cut off date for the award will be, and in making this determination a court should consider how long it will take or did take the plaintiff to secure comparable employment. Shore v. Federal Exp. Corp., 777 F.2d 1155, 1160 (6th Cir. 1985); see also American Jurisprudence, Second Edition, Job Discrimination §2649, 45 C. Am. Jur. 2d (2007). Defendant is correct that a claim for front pay involves consideration of other factors outside of financial damages; however, Defendant fails to sufficiently explain how the majority of Plaintiff Crawford’s personnel file is relevant to her claim for front pay. In fact, the Court does not deem the majority of this file relevant to Plaintiff’s request for front pay with the exception of Plaintiff Crawford’s payroll reports and benefits file.

Defendant next notes Plaintiff Crawford seeks damages for medical expenses, emotional pain and suffering, loss of enjoyment of life, and humiliation. (Doc. 32, p. 6). Defendant argues it is entitled to discover whether any other events or situations could have contributed to Plaintiff Crawford's mental state and to determine whether her emotional condition could have been exacerbated by her current emotional state. Id. Thus, Defendant argues Plaintiff Crawford's performance evaluations, disciplinary actions, counselings, and records regarding termination and/or eligibility for rehire are relevant and discoverable. The Court agrees. Plaintiff Crawford states, in the Intervenor's Complaint, that in addition to suffering pecuniary losses, "Defendant's discrimination and retaliation caused, continues to cause, and will cause [Plaintiff Crawford] to suffer substantial damages for . . . mental anguish, loss of enjoyment of life, and other non-pecuniary losses." (Doc. 9, p. 6). As such, Plaintiff Crawford has placed her emotional state at issue in this case. Because Plaintiff Crawford claims she suffers continuing emotional damages, the Court finds Defendant is entitled to discover Plaintiff Crawford's performance evaluations, disciplinary actions, counselings, and records regarding her termination and/or eligibility for rehire because Defendant should be provided an opportunity to determine if Plaintiff Crawford's mental state may be affected by events or situations pertaining to her current employment. Thus, the documents Defendant seeks are relevant to Plaintiff Crawford's claims and the damages she seeks.

Defendant also notes Plaintiff Crawford has made a claim for job search expenses and thus, Defendant argues it is entitled to obtain Plaintiff Crawford's

application to work and payroll documents because they will presumably contain information such as the date Plaintiff Crawford applied to work at Discount Auto Parts and when she actually began working. (Doc. 32, p. 5). The Court agrees. The Defendant is entitled to this information.

Finally, Defendant notes it is willing to agree to a protective order proscribing the document's distribution. (Doc. 32, p. 3). Thus, the parties should make every effort to come up with a mutually agreeable confidentiality agreement which will enable Plaintiff to protect her personal records from being distributed to persons outside this litigation.

Accordingly, after due consideration, it is hereby

ORDERED:

Plaintiff/Intervenor's Motion to Quash and/or Motion for Protective Order (Doc. 26) is **DENIED**. The parties are instructed, prior to viewing the information provided by Discount Auto Parts, to confer in good faith in an effort to mutually agree upon a confidentiality order to protect Plaintiff Crawford's personal records from being distributed to persons outside this litigation.

DONE AND ORDERED in Chambers in Jacksonville, Florida this 18th day of December, 2007.

Monte C. Richardson

MONTE C. RICHARDSON
UNITED STATES MAGISTRATE JUDGE

Copies to:

Counsel of Record