

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, *et al.*,

Plaintiffs,

v.

CASE NO.: 8:03-CV-568-T-24MAP

CHECKERS DRIVE-IN RESTAURANTS, INC.,

Defendants.

ORDER

Stephanie Credit, intervening Plaintiff, seeks to depose Lisa Despota, the wife of her alleged harasser. Defendant filed the instant motion for protective order, asserting that Mrs. Despota has “virtually no relevant information regarding Plaintiff’s claims,” that her testimony is sought “only for the purpose of embarrassment, harassment and annoyance,” and any conversations between Mr. and Mrs. Despota are confidential under the marital communications privilege. The Intervenor Plaintiff maintains Mr. Despota waived any applicable marital communications privilege during his deposition and in conversations with Ms. Credit and that Mrs. Despota’s testimony is needed to impeach Mr. Despota’s testimony. After consideration, I find the Defendant’s motion should be granted.

Before turning to the discovery issue, the Intervenor Plaintiff argues that the Defendant lacks standing to seek entry of a protective order on behalf of Mrs. Despota, a non-party. I find, however, that Checkers has standing to seek a protective order since Rule 26(c) allows either a party or the person from whom discovery is sought to seek a protective order. Other federal courts facing similar objections have interpreted the rule’s language to

allow a party to seek entry of a protective order on a non-party's behalf. *See generally United States v. Operation Rescue*, 112 F.Supp.2d 696, 704 (S.D. Ohio 1999); *Fleet Business Credit Corp. v. Hill City Oil Company, Inc.*, 2002 WL 1483879, *2 (W.D. Tenn. 2002).

Without reaching the issue of the applicability of the marital communications privilege and whether the privilege is waived, I find that deposing Mrs. Despota runs afoul of the relevancy standard set forth in Fed.R.Civ.P. 26(b)(1). In 2000, the rule was amended to limit discovery to matters relevant to the claim or defense of any party. The prior version of the rule permitted discovery into the subject matter of a claim or defense. Despite this change, the 2000 rule instructed courts that they retained authority to order discovery of any matter relevant to the subject matter involved in the action upon a showing of good cause. For example, the advisory committee note states that "information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses might be properly discoverable." Importantly, the amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery, and the determination of whether a particular discovery request is appropriate is left to the court after considering the circumstances of the pending action. Fed.R.Civ.P. 26, Advisory Committee Notes (2004). Against Rule 26's standards, the Intervenor Plaintiff has not shown Mrs. Despota has information relevant to the claims or defenses presented here. Nor has the Intervenor Plaintiff shown good cause for the discovery. The impeachment evidence, if it qualifies as such, is only remotely relevant to the issues in this action and any relevance is likely objectionable under Fed.R.Evid. 403.

Further, while Rule 26(c) articulates a single standard for ruling on a motion for a protective order, federal courts have superimposed a somewhat more demanding balancing of the interests approach to the rule whereby a district court balances the movant's interest in obtaining the information sought against the opposing party's interest in withholding the information. *Farnsworth v. Proctor & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985). This court must balance the non-party's legitimate interest in privacy against the Intervenor Plaintiff's need to inquire into the non-party's sexual conduct with her husband in hopes of obtaining information she may use to impeach Mr. Despota. In doing so I conclude that Mrs. Despota's interest in maintaining privacy outweighs the Intervenor Plaintiff's interest in invading it.

Accordingly, it is

ORDERED:

1. Defendant's Motion for Protective Order (doc. 69) is GRANTED.
2. The deposition of Mrs. Despota shall be cancelled for the reasons set forth in this

Order.

DONE and ORDERED at Tampa, Florida on October 15, 2004.



MARK A. PIZZO
UNITED STATES MAGISTRATE JUDGE