

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)
)
Plaintiff,)
)
and)
)
IDAHO HUMAN RIGHTS COMMISSION,)
)
Intervenor Plaintiff,)
)
v.)
)
THE BURRITO SHOPPE LLC, d/b/a)
SQUEEZERS GIANT BURGERS,)
and ALLIED FOOD SERVICE, INC.,)
d/b/a SQUEEZERS,)
)
Defendant and Intervenor Defendant.)
_____)

Case No. CV 05-329-S-LMB

ORDER

Currently pending before the Court are the City of Nampa Police Department’s Motion to Quash Subpoena and Protective Order (Docket No. 77) and Defendants’ Motion to Strike (Docket No. 84).¹ In the interest of avoiding delay, and because the Court conclusively finds that the decisional process on the pending motions would not be significantly aided by oral argument, the Court will address and resolve the motions without a hearing. Having carefully reviewed the record and otherwise being fully advised, the Court enters the following Order.

¹ Also pending is Plaintiffs’ Motion for Extension of Time to Complete Discovery (Docket No. 86), which is not yet ripe for decision.

I.

BACKGROUND

This is an action brought by the Equal Employment Opportunity Commission (“EEOC”) and the Idaho Human Rights Commission (“IHRC”) (collectively, “Plaintiffs”) against The Burrito Shoppe LLC, dba Squeezers Giant Burgers (“The Burrito Shoppe”) and Allied Food Service, Inc. dba Squeezers (collectively, “Defendants”). The EEOC filed its Complaint against The Burrito Shoppe on August 19, 2005 alleging sex discrimination in employment in violation of federal law. (Docket No. 1). The IHRC intervened to assert state law claims based on the same set of facts. (Docket No. 3).

On April 27, 2006, the EEOC and IHRC filed a joint Motion to Amend Complaints and Add Second Defendant (Docket No. 43). The Court granted the motion (Docket No. 58) and each Plaintiff added a second defendant, Allied Food Service, Inc. dba Squeezers, to its Complaint. (Docket Nos. 59, 60).

The EEOC and IHRC allege that The Burrito Shoppe subjected Audrey Powers “and a class of similarly situated females to discrimination when they subjected them to harassment on the basis of their sex.” *EEOC Amended Complaint and Jury Trial Demand* (Docket No. 60). Specifically, it is alleged that while working for The Burrito Shoppe, Ms. Powers was called names of a sexual nature, heard talk of a sexual nature, was touched on breasts and buttocks at the workplace, was pressured to expose herself to others at the workplace, and saw other employees expose themselves as part of games in the workplace. *IHRC Amended Complaint and Demand for Jury Trial* (Docket No. 59). In addition, it is alleged that Ms. Powers saw James Dorsey, her supervisor and a principal of The Burrito Shoppe, expose his penis in the workplace. *Id.* at ¶ 13.

On March 10, 2007, Plaintiff IHRC served a subpoena on the City of Nampa Police Department (“NPD”) seeking documents relating to: (1) Audrey Powers; (2) Audrey Powers’ complaint against James Dorsey; (3) a complaint filed by or on behalf of Danielle Andres²; and (4) “[a]ll police reports, recordings (video and/or audio), and notes relating to James Dorsey” (“Subpoena Document Requests”). See *Affidavit of Counsel in Support of Motion to Quash Subpoena and for Protective Order*, Ex. 1 (Docket No. 77-3). On March 21, 2007, the NPD filed a Motion to Quash Subpoena and Motion for Protective Order (Docket No. 77). The NPD seeks an order quashing the Subpoena Document Requests to the extent that they include information not relevant to the instant lawsuit and seeks a protective order to treat as confidential the information produced pursuant to the subpoena. *Memorandum in Support of Motion to Quash*, pp. 3-4 (Docket No. 77-2).

II.

MOTION TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER

The NPD asks the Court to quash Subpoena Document Request Nos. 3 and 4 pursuant to Rule 45(c) to the extent they include documents not related to Audrey Powers or Danielle Andres and for a protective order pursuant to Rule 26(c) to treat as confidential all documents produced pursuant to the subpoena. *Id.* The NPD alleges that a protective order is necessary, because the materials subject to the Subpoena relate to sexual misconduct allegations and some of the individuals involved were minors at the time the NPD conducted its investigations. *Id.*

² The IHRC alleges that Audrey Powers saw James Dorsey expose his penis in the workplace when she walked in on him and Danielle Andres. See *Affidavit of Counsel, Jo-Ann L. Bowen*, ¶ 4 (Docket No. 81-2). Defendants argue that this statement should be stricken from the record as it is unsupported by any exhibits or supporting documentation. *Memorandum in Support of Motion to Strike*, p. 3 (Docket No. 85)

The NPD, a non-party in the instant lawsuit, is a Defendant in a lawsuit filed by The Burrito Shoppe, Allied Foodservice, dba Squeezers, and James Slade Dorsey in Idaho State Court, Third Judicial District, Canyon County, Case. No. CV06-135C. *Affidavit of Counsel in Support of Motion to Quash Subpoena and for Protective Order*, Ex. 4 (Docket No. 77-3). In the course of the state court litigation, Mr. Dorsey and The Burrito Shoppe served the NPD with discovery requests seeking certain records, including, in part, NPD investigations into Mr. Dorsey's alleged sexual misconduct with minor girls. *Id.* at ¶ 4. Because of the privacy rights and concerns of individuals mentioned in the requested documents, the NPD asked the state court for a protective order, which was entered on November 29, 2006. *Id.* at ¶ 6, Ex. 2. The NPD asks this Court to adopt a similar protective order in the instant federal court proceedings requiring that the records it produces be held confidential. *Memorandum in Support of Motion to Quash*, p. 3 (Docket No. 77-2).

Defendants advise the Court that they have obtained through the state court lawsuit some of the NPD information requested by Plaintiffs. *See Memorandum in Response to the City of Nampa Police Department's Motion to Quash Subpoena and Motion for Protective Order*, p. 2 (Docket No. 80). Defendants argue that the protective order entered in the state court proceeding is too broad, because it does not require "a privilege log relating to the documents that were to be subject to the Protective Order." *Id.* at 2. In addition, Defendants argue that they have seen the documents responsive to the subpoena and "[t]he CDs and DVDs of Audrey Powers, Juan Quintana, Torn Korn [sic] and James S. Dorsey, may relate to this case." *Id.* at 3. "However, the CDs and DVDs of Danielle Andres and Debra Hronis as well as documents and other information unrelated to the alleged sexual harassment of Audrey Powers . . . should not be released." *Id.*

The IHRC opposes the NPD's Motion to Quash Subpoena but states no opposition to entry of a protective order. *See Memorandum in Opposition to Motion to Quash Subpoena and Statement of No Opposition to Motion for Protective Order* (Docket No. 81). The IHRC argues that the NPD, a non-party to the instant proceeding, is in no position to determine what records might be relevant to this lawsuit. *Id.* at 3.

A. Motion to Quash

In support of its Motion to Quash, the NPD relies upon a provision of Rule 45(c) that provides, in relevant part, that, on timely motion, the Court shall quash or modify a subpoena if it “requires disclosure of privileged or other protected matter and no exception or waiver applies.” Fed. R. Civ. P. 45(c)(3)(A)(iii). The NPD seeks to quash the Subpoena to the extent it seeks documents that the NPD believes are not relevant to the instant lawsuit. *Memorandum in Support of Motion to Quash*, p. 3 (Docket No. 77-2). The NPD states that it “has accumulated a great number of documents and other items which relate to Mr. Dorsey and his Nampa restaurants. Many of these are unrelated to Audrey Powers and Danielle Andres, and are irrelevant to the federal litigation.” *Id.*

Pursuant to Federal Rule of Civil Procedure 26(b), “parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1). The definition of relevancy, for purposes of discovery, “has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350 (1978).

In this case, Plaintiffs allege that Defendants subjected Ms. Powers and “other similarly situated females to discrimination when they subjected them to harassment on the basis of their sex.” *EEOC Amended Complaint and Jury Trial Demand* (Docket No. 60). Through the subpoena, the IHRC seeks information in the NPD’s custody or possession relating to (1) Audrey Powers; (2) Audrey Powers’ complaint against James Dorsey; (3) a complaint made on or behalf of Danielle Andres against James Dorsey; and (4) “[a]ll police reports, recordings (video and/or audio), and notes relating to James Dorsey.” *See Affidavit of Counsel in Support of Motion to Quash Subpoena and for Protective Order*, Ex. 1 (Docket No. 77-3). None of the parties dispute the relevancy of the first two categories of information. The disputes center on Subpoena Document Request Nos. 3 and 4.

After careful review of the various motions and submissions, the Motion to Quash will be granted in this limited manner: the NPD will be ordered to produce any documents or other information subject to Subpoena Document Request Nos. 3 and 4, provided that such information involves Mr. Dorsey’s employment or position with Defendants, including any information relevant to Mr. Dorsey’s sexual conduct with any other person employed by Defendants or any other reports or other documents relating to sexual conduct that may have occurred at Defendants’ facilities.

B. Protective Order

“Upon motion by a party or by the person from whom discovery is sought,” the Court is authorized to make “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense.” Fed. R. Civ. P. 26(c). “The Supreme Court has interpreted this language as conferring ‘broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is

required.” *Phillips ex. rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002) (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984)).

A protective order may issue, however, only “for good cause shown.” Fed. R. Civ. P. 26(c). “[I]f good cause is not shown, the discovery materials in question should not receive judicial protection.” *Phillips*, 307 F.3d at 1210.

The NPD has demonstrated the requisite good cause for issuance of a protective order, and has appropriately and sufficiently demonstrated that certain information responsive to the Subpoena includes allegations of sexual misconduct and involves minors. In light of the sensitive nature of such information, the Court will issue a separate protective order generally requiring the parties to treat all such information provided by the NPD as strictly confidential and protected.

III.

DEFENDANT’S MOTION TO STRIKE

On May 1, 2007, Defendants filed a Motion to Strike (Docket No. 84) portions of the Affidavit of Counsel, Jo-Ann L. Bowen, submitted in support of the IHRC’s Memorandum in Opposition to Motion to Quash Subpoena and Statement of No Opposition to Motion for Protective Order (Docket No. 81-2). In general, Defendants take issue with certain statements made in Ms. Bowen’s Affidavit, on the basis that they lack foundation or support. These statements include counsel’s assertion that “Defendants know, from the Commission’s initial disclosures, the further specifics of that allegation: Audrey Powers saw James Dorsey expose his penis in the workplace when she walked in on him and Danielle Andres.” *Affidavit of Counsel, Jo-Ann L. Bowen* at ¶ 4 (Docket No. 81-2). Because the Court did not rely on these statements,

or any other statements contained in the Affidavit of Counsel, in ruling to limit the scope of the Subpoena and to grant the Protective Order, the Motion to Strike is moot.

IV.

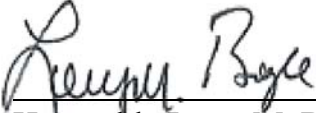
ORDER

In accordance with the foregoing, IT IS HEREBY ORDERED:

1. The City of Nampa Police Department's Motion to Quash Subpoena (Docket No. 77) is GRANTED to the extent that Subpoena Document Request Nos. 3 and 4 are limited to information involving Mr. Dorsey's employment or position with Defendants, including any information relevant to Mr. Dorsey's alleged sexual conduct with any other person employed by Defendants or any other sexual conduct that allegedly occurred at Defendants' facilities.
2. The City of Nampa Police Department's Motion for Protective Order (Docket No. 77) is GRANTED.
3. Defendant's Motion to Strike (Docket No. 84) is deemed MOOT.



DATED: **May 17, 2007.**



Honorable Larry M. Boyle
U. S. Magistrate Judge