UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ANNE MARIE VANDENWEGHE	*	
		CASE NO.: 2:11-cv-2128-CJB-ALC
Plaintiff	*	
		SECTION: "J" DIVISION: "5"
VERSUS	*	
		JUDGE: CARL J. BARBIER
THE PARISH OF JEFFERSON & STEVE J. THERIOT	*	**MAGISTRATE: ALMA L. CHASEZ**
	*	
Defendants		
	*	**JURY TRIAL REQUESTED**

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MEMORANDUM IN OPPOSITION OF DEFENDANT'S MOTION FOR A PROTECTIVE ORDER

MAY IT PLEASE THE COURT:

Plaintiff, Anne Marie Vandenweghe (hereafter "Vandenweghe"), offers this memorandum in opposition of defendants', Steve J. Theriot and Jefferson Parish's, Motion for Protective Order.

Facts

Plaintiff, Vandenweghe, was employed as an Assistant Parish Attorney for the Parish of Jefferson under the administrations of Aaron Broussard, Steve Theriot, and John Young. During her tenure, she was in charge of responding to requests for the production of public records. Beginning shortly after the awarding of the waste contract to River Birch, Vandenweghe became aware of many improprieties and irregularities in the awarding of that contract, employment issues involving Aaron Broussard's wife as a paralegal, contractual relationships between the CAO's private insurance business and governmental entities, and many other issues which have now resulted in guilty pleas from Aaron Broussard, his wife, Karen Parker Broussard, the CAO,

Tim Whitmer, and the Parish Attorney, Tom Wilkinson. Much of this illegal and improper conduct was reported by plaintiff to her supervisors in Parish government, to no avail, and the plaintiff cooperated extensively with the FBI in its investigation into the aforesaid criminal investigations and indictments.

Eventually, the plaintiff was terminated in November of 2010, by Parish President, John Young. Plaintiff has filed this suit against the Parish and Steve Theriot, who preceded John Young as Parish President, for her improper termination in retaliation for the plaintiff's whistleblowing activities. Plaintiff had filed other claims (e.g. defamation) against the defendants, but the Court dismissed those claims as being prescribed, to the extent that the underlying conduct of the defendants occurred prior to the filing of August 25, 2011.

Argument

In advance of depositions, the defendants seek to limit the subject matter of depositions, an almost unheard of proposition. Defendants, without knowing even what questions might be asked, wish to severely limit the broad scope of discovery which the Federal Rules of Procedure mandate. This is highly irregular and improper.

Plaintiff understands that the claims that remain in this suit are First Amendment retaliation claims and Louisiana whistleblower claims and will conduct discovery in accordance with these issues. However, plaintiff respectfully contends that defendants' Motion for a Protective Order is premature and overbroad; also, defendants have failed to show good cause for the issuance of a protective order.

Rule 26(c)(1) of the Federal Rules of Civil Procedure states that "a party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district

where the deposition will be taken." Fed. R. Civ. P. 26. Under the Rule, "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Id. Part D of this Rule allows a court to "[forbid] inquiry into certain matters, or [limit] the scope of disclosure or discovery to certain matters." Id.

In order to prove the necessity of a protective order, the burden is on the party requesting the order to show "good cause." Blanchard & Co., Inc. v. Barrick Gold Corp., 02-3721, 2004 WL 737485, at *4 (E.D. La. Apr. 5, 2004). The United States Court of Appeal for the Fifth Circuit has explained that in order to show good cause, the movant must show "the necessity of [the] issuance [of a protective order], which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." United States v. Garrett, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978). See also In re Terra Intern., Inc., 134 F.3d 302, 306 (5th Cir. 1998) (citing the Garrett language as the appropriate burden of proof for a litigant moving for a protective order). The moving party must show that "specific prejudice or harm will result if no protective order is granted." Volvo Truck N. Am., Inc. v. Crescent Ford Truck Sales, Inc., No. Civ.A.02-3398, 2005 WL 1400463, at *2 (E.D. La. June 1, 2005). See also Foret v. Transocean Offshore (USA), Inc., No. 09-4567, 2010 WL 2732332, at *3 (E.D. La. July 6, 2010) ("To make a showing of good cause, the movant has the burden of showing the injury 'with specificity.'"). At least one other court has stated that a protective order "should be sparingly used and cautiously granted." Medlin v. Andrew, 113 F.R.D. 650, 652 (M.D.N.C. 1987).

On its face, the defendants have not met their burden of showing "a particular and specific demonstration of fact" as required by Garrett, 571 F.2d at 1326 n.3, or that a protective order is necessary to prevent "specific prejudice or harm," as required by Volvo, 2005 WL 1400463, at *2. Defendants simply allege that without a protective order, plaintiff will allegedly

waste time during a deposition inquiring about details that are irrelevant to plaintiff's remaining causes of action. However, without knowing the details of what issues plaintiff plans to explore during the deposition, plaintiff believes that defendants have not, and cannot, show a "particular and specific demonstration of fact," and that defendants' request strays into the realm of a "stereotyped and conclusory statement."

Plaintiff understands that under Rule 26(b)(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Fed. R. Civ. P. 26. The Supreme Court has stated that whether an issue is relevant should be "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). The purpose of discovery rules is to "adequately [inform] litigants in civil trials;" they are therefore "accorded a broad and liberal treatment." Volvo, 2005 WL 1400463, at *3.

In regard to the case at hand, plaintiff anticipates that defendant will object to any questions that relate to conduct that occurred prior to August 25, 2010. However, it is clear that that the conduct of the defendants that took place prior to that date may be covered at the deposition to the extent that this conduct may show the facts, communications, or conditions progressing to the eventual termination of the plaintiff for her whistleblowing. The termination which occurred in November of 2010, cannot be viewed in a vacuum, but rather, the jury must be apprised of the entire context in which the termination took place, not viewed through the window of some small, isolated time period. This evidence is clearly relevant to plaintiff's remaining whistleblower claims. For example, in Boe v. AlliedSignal, Inc., 131 F. Supp. 2d 1197, 1204 (D. Kan. 2001), the court explained that if a "close temporal proximity … between

the whistleblowing activity and the discharge" does not exist, "a plaintiff still may withstand a summary judgment motion by demonstrating a pattern of retaliatory conduct stretching from the whistleblowing activity to the termination." See also Miller v. Stifel, Nicolaus & Co., 812 F. Supp. 2d 975, 985 (D. Minn. 2011) (stating that to establish hostile work environment under the Sarbanes-Oxley Act's whistleblower provision, "the plaintiff must establish more than the occurrence of isolated or sporadic acts of intentional discrimination, but instead a persistent, ongoing pattern."); Mann v. Olsten Certified Healthcare Corp., 49 F. Supp. 2d 1307, 1318-20 (M.D. Ala. 1999) (suggesting that, while not effectively proven in this particular case, a "pattern of retaliatory discrimination" may be established to support a whistleblower claim).

Likewise, in the instant case, it may be necessary for plaintiff to demonstrate a pattern, which would require plaintiff to inquire into defendants' conduct prior to August 25, 2010. Thus, while defendants may argue that these types of inquiries are relevant only to claims that are dismissed, plaintiff asserts that there is a legitimate reason for exploring these issues that is well within the boundaries of what is relevant under Rule 26(b)(1).

Plaintiff further understands that "it is proper to deny discovery of matters relevant only to claims that have been stricken, or to events that have occurred before an applicable limitations period." Oppenheimer, 437 U.S. at 352. However, plaintiff notes that at least one other court—in fact, in a case cited by defendant as support for the Motions—has emphasized that it is "discovery requests that are relevant *only* to dismissed claims" that should be denied. Chan v. City of Chicago, No. 91 C 4671, 1992 WL 170561, at *3 (N.D. Ill. July 16, 1992) (emphasis in original). Further, in Chan, the court stated that it was the burden of the discovery opponent "to establish why ***each*** of [the opposing party's] requests [were] irrelevant to the remaining counts of his complaint." Id. (emphasis added).

The aforementioned case law suggests that courts do not hastily issue motions for protective orders that are as broad as what defendants seek. Without a specific inquiry to analyze, plaintiff believes that the issuance of a protective order would require the Court to act in response to an abstract, nebulous request. While defendants may argue that an inquiry is irrelevant, Supreme Court language states that discovery may be denied if it is relevant ***only*** to a claim that has been dismissed. Oppenheimer, 437 U.S. at 352. Plaintiff respectfully asserts that it is not defendants' place to decide whether discovery is relevant only to a claim that has been dismissed; it is the place of the Court to rule on this issue. By issuing a protective order, this Court would essentially be granting defendant the authority to make that determination during the course of Mr. Theriot's deposition or during any other deposition in the case. While the parties may disagree on the relevance of a certain inquiry to the remaining claims in this lawsuit, it is the place of the Court, not defendants, to make that determination. In essence, should this Honorable Court grant the Motion for Protective Order, it would be akin to giving the defendants *carte blanche* to decide, during the course of the depositions, whether a question offends the Court's supposed ruling. This is not how discovery is conducted in our judicial system – on fear and speculation of what might be asked.

Other courts have considered similar requests and deemed the issuance of a protective order premature. For example, in B.E. Meyers & Co. v. United States, 47 Fed. Cl. 375, 380-81 (Fed. Cl. 2000), Insight, a non-party, moved for a protective order that would preclude plaintiff from inquiring about alleged trade secret violations in oral or written discovery. Insight argued that plaintiff should not be allowed to inquire about its own trade secrets for the sake of comparison, because the evidence is irrelevant and it would "open the door to extensive and burdensome inquiry by the plaintiff into the proprietary technical aspects of Insight's

[products]." Id. The court stated that it was "sympathetic to some of Insight's concerns regarding the undefined nature and scope of plaintiff's potential discovery," but it denied Insight's motion for a protective order because Insight did not "[indicate] any specific discovery request or subpoena to which it objects." Id. at 381. According to the court, "a preemptive protective order granting Insight *carte blanche* to ignore any discovery request that it felt impinged on whatever it defined as a trade secret would likely hinder plaintiff's legitimate efforts to compare the asserted patent claims with the features of the accused devices." Id. See also John Doe v. Mulcahy, Inc., CIV.08-306 DWF/SRN, 2008 WL 4572515, at *2 (D. Minn. Oct. 14, 2008) ("[D]efendants have yet to serve requests for admissions and interrogatories or to depose Plaintiffs. Without information gained from such discovery procedures, the Court cannot evaluate whether Defendants' requests satisfy Rule 26(b)'s relevancy requirement or whether Plaintiffs have established "good cause" under Rule 26 to justify the issuance of a protective order . . . .").

While plaintiff agrees with defendant that there is a benefit to resolving issues such as the relevance of discovery inquiries in advance, plaintiff believes that in this particular scenario, the manner by which defendants seek to preemptively settle these disputes is overbroad. As an aside, while defendant states that "the very reason that the Federal Rules provide for protective orders is to resolve such issues in advance," it appears that not one case provided by defendant as support involves a situation where the court granted a protective order before discovery was propounded or prior to the taking of a deposition. Over the course of John Young's deposition, or any others for that matter, it is possible that questions may be asked that appear to the defendants to be irrelevant but are necessary for plaintiff to gather information and that lead to evidence relevant to the remaining claims. Plaintiff has no intention of asking questions that

relate to dismissed claims or questions that are premised upon the argument that plaintiff sustained damages from conduct occurring prior to August 25, 2010. However, plaintiff contends that it may be necessary to inquire into events that occurred prior to August 25, 2010 in order to allow plaintiff to gain the necessary facts to establish a pattern of conduct and successfully argue a Louisiana whistleblower claim. In this situation, plaintiff asserts that the harm caused to plaintiff by broad constraints on the ability to adequately depose the witnesses who were employed by the Parish of Jefferson and who were engaged in the conduct leading to her eventual termination outweighs the benefits of resolving discovery issues in advance. As a result, plaintiff respectfully requests that the court deny defendants' Motion for Protective Order under Rule 26(c), as it is overbroad and premature.

Furthermore, in order for plaintiff to establish her State whistleblower claim, plaintiff must meet certain proof requirements, which necessarily requires plaintiff to put forth evidence of criminal conduct which occurred during her employment, including prior to August 2010. La. R.S. 23:967 mandates that an employer may not retaliate against an employee who has notified it of a workplace practice in violation of law and who either refuses to participate in the practice or who threatens to publicize the practice. Hale v. Touro Infirmary, 886 So. 2d 1210, 1215 (La. App. 4th Cir. 2004) writ denied, 896 So. 2d 1036 (La. 2005). Moreover, the language of the statute leads mandates the conclusion that a violation of law must be established by a plaintiff under the Whistleblower Statute in order to prevail on the merits of the case. Id.

If the defendants' Motions were granted, the plaintiff would be hamstrung in proving her State whistleblower claims which eventually lead to her termination. As previously set forth in the factual recitation, the plaintiff became aware of the illegal conduct, inter alia, which has lead to the guilty pleas of numerous high-ranking Parish officials. She reported this to her supervisor,

to no avail. And, it is her contention that she was subjected to reprisals and eventual termination from her position to silence her and to end her cooperation with the FBI. The predicate criminal conduct of these Parish officials is fertile ground in depositions and is a necessary area of inquiry of deponents. Yet, the defendants wish to silence the plaintiff, yet again, in her quest to prove her claims. It is patently unfair to ask this Honorable Court to rule, in advance, that certain questions may not be posed, when the defendants have not even made out a prima facie case as to how they might be prejudiced by these same questions.

Conclusion

The defendants have asked this Honorable Court for the unprecedented relief of a ruling, even in advance of a deposition, for a broad brush limitation on discovery. It is inconceivable how the defendants could anticipate what questions might even be asked of the witnesses by plaintiff's counsel, but considering the broad scope of discovery, it is entirely inappropriate for counsel to be muzzled and handcuffed, in advance of even the first deposition, to prove the plaintiff's claims. Indeed, the statutes and case law permit and require the plaintiff to obtain information leading to the reprisal against her.

The defendants completely misread the Court's prior ruling dismissing certain claims of the plaintiff. That ruling does not, though, preclude the plaintiff from obtaining basic information about the communications and decisions made by Parish leaders in the silencing of the plaintiff and her eventual termination. For these reasons, the Motion for Protective Order filed by the defendants must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been duly served on all counsel of record by depositing same into the U.S. Mail, postage pre-paid, and/or by hand and/or by facsimile, and/or by electronic means, on the 11th day of October, 2012.

S/Jack E. Truitt