

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

MARTIN SHULMAN

PRESENT: _____ **J.S.C.**

PART 1

Index Number : 107154/2006

JOYNER, BRENDA

INDEX NO. 107154/06

vs

PLANNED PARENTHOOD FEDERATION

MOTION DATE: _____

Sequence Number : 001

MOTION SEQ. NO. 001

COMPEL DISCLOSURE

MOTION CAL. NO. _____

The papers numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits _____

Replying Affidavits _____

2

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the attached decision and order.*

FILED

JUN 08 2007

COUNTY CLERK'S OFFICE
NEW YORK

Dated: May 29, 2007

MARTIN SHULMAN

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
BRENDA JOYNER,

Plaintiff,

-against-

PLANNED PARENTHOOD FEDERATION OF
AMERICA, INC.,

Defendant.
-----X

HON. MARTIN SHULMAN, J.S.C.:

Plaintiff Brenda Joyner ("plaintiff" or "Joyner") moves, pursuant to CPLR 3124, to compel discovery. At issue here are plaintiff's interrogatories 24, 27, and 43, document demands 5, 6, 10, 12, 27 and 28 and requests for electronically maintained files.

Plaintiff was the Vice President for Diversity of defendant Planned Parenthood Federation of America, Inc. ("defendant" or "PPFA") from August 2004 until she was terminated, purportedly for cause, in or about February 2006. Her complaint alleges that she was terminated in retaliation for her efforts to document and to remedy pay disparities between white employees and others, and for her repeated complaints to defendant about a pattern and practice of discrimination on the basis of race and national origin.

At the outset, Joyner's motion is granted to the extent that it seeks to compel PPFA's response to interrogatory 43 and is denied to the extent that it seeks PPFA's compliance with document demands 6, 10 and 12. Interrogatory 43 seeks the identity of all those who participated in answering plaintiff's interrogatories. Contrary to defendant's argument, such information is not privileged. See *Erwin Pearl, Inc. v. Burroughs Corp.*, 95 Misc.2d 157, 407 N.Y.S.2d 101 (Sup. Ct., NY Cty., 1978) (citing federal cases).

Document demands 6 and 10 request, respectively, documents concerning "any and all of defendant's defenses" and "all communications and all documents ... concerning the allegations contained in the complaint." These requests are simultaneously overly vague and overbroad.

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Decision and Order

FILED

JUN 08 2007

COUNTY CLERK'S OFFICE
NEW YORK

Document demand 12 requests production of "all diaries, date books and calendars of [four party representatives of defendant]." Plaintiff's contention that these documents "may contain important information," acknowledges that this request is a fishing expedition into papers that are, for the most part, private.

Prior Racial Discrimination Complaints Against PPFA

Interrogatories 6 and 27 request, respectively, the identity of "all Persons with information and knowledge concerning any allegations of discrimination and/or retaliation against the defendant since January 1996," and "any and all complaints, formal or informal, brought ... against PPFA ... concerning race discrimination and/or retaliation." Plaintiff's document request 5 requests "any and all complaints of discrimination and/or retaliation against Planned Parenthood since 1996," and "any and all documents and all electronically memorialized information¹ created in connection with any investigation of complaints of discrimination and/or retaliation."

Defendant contends that plaintiff is not entitled to information concerning any events that may have occurred prior to her employment, and certainly not to information concerning events that may have occurred as much as eight years prior to that employment. For her part, Joyner offers no explanation as to why she seeks discovery dating back to 1996.

Nevertheless, in order to show that she was fired in retaliation for having complained about a pattern and practice of discrimination, plaintiff must show that her complaints had a reasonable basis. *Modiano v. Elliman*, 262 A.D.2d 223, 693 N.Y.S.2d 24 (1st Dept., 1999). Accordingly, plaintiff is entitled to discover information bearing on that issue. Inasmuch as she complained about a pattern and practice, rather than about an individual case, the relevant information is not limited to the period of her employment by defendant.

¹ See discussion *infra*.

Just as incidents of conduct constituting a hostile work environment that occurred outside a plaintiff's limitations period are pertinent to the claim (see *National R.R. Passenger Corp. v Morgan*, 536 U.S. 101 [2002]), so here, complaints of discrimination, filed prior to plaintiff's appointment, could be evidence of the reasonableness of her complaints. Unlike a claim of sexual harassment, to which other complaints of such harassment are usually irrelevant (see, e.g., *Neuschatz v. Societe Generale*, 176 A.D.2d 134, 574 N.Y.S.2d 21 [1st Dept., 1991]), a claim of retaliation on the basis of complaints about discrimination practiced against others necessarily depends on evidence from which plaintiff could have concluded that such discrimination occurred.

However, while discovery concerning complaints pre-dating plaintiff's employment with defendant is relevant, the time period should be limited to complaints dating from 2001.² Further, interrogatories 6 and 27, and document request 5 are overbroad for a different reason. Plaintiff alleges that she was fired for complaining about discrimination on the basis of race and national origin. Any complaints made to defendant about discrimination on other prohibited grounds (such as age or sex) would not show plaintiff's complaints to have been reasonably based. Accordingly, any such complaints would not be relevant to plaintiff's case.

PPFA Internal Reports on Disparate Pay

Interrogatory 24 requests the identity of persons whom defendant permitted to see an outside report on pay equity at PPFA. The complaint alleges that: in the fall of 2004, defendant's human resources department performed a statistical study, the Vickberg

² The complaint alleges that in 2004 PPFA's "Diversity Department worked in collaboration with the Human Resources Department to address alarming findings on the Great Places to Work ("GPTW") Trust Index Survey." Such findings allegedly indicated that, when surveyed, PPFA's "Black and Hispanic staff gave substantially lower ratings than white staff" when asked to respond to the statement "People here are treated fairly regardless of their race." A prior 2002 GPTW survey allegedly contained similar findings. Exh. A to motion at ¶¶ 17-19.

Report, which showed that defendant was systematically paying its staff persons of color significantly less than it was paying its white staff; defendant's top executives sought to recover all copies of the report; at a special meeting on pay equity, held on January 27, 2006, top executives stated that a new outside study showed that there was no inequity in defendant's pay structure; within a week of asking to see a copy of the second study, plaintiff was given a choice of resigning or being terminated; and at that time, Suzanne Vickberg, the author of the initial study, as well as all other senior managers and mid-level professional staff who had proprietary information about the findings of salary disparities impacting racial and ethnic minorities in the national organization had been either terminated or forced to resign.

Defendant objected to this interrogatory on the grounds that it seeks disclosure of information that is not material, and that is protected by attorney-client privilege or the work product doctrine. That the outside report was prepared at the request of defendant's counsel does not make the identity of those who were allowed to see it privileged. Moreover, defendant has offered to disclose a copy of the report itself, subject to a confidentiality order. Given the allegation that plaintiff, the former Vice President for Diversity, was fired within one week of asking to see the report, a list of those who were permitted to see it, together with such persons' work title and/or job responsibilities, might well be relevant to plaintiff's claim of retaliation.

PPFA Race/Ethnic Demographics

Document demand 27 requests:

All Documents and all Electronically Memorialize [sic] information reflecting and/or concerning all PPFA national staff race, ethnic, and gender demographics for every department, division and office for the period June 2004 to the present.

As noted above, gender demographics are irrelevant to plaintiff's complaint. For the rest, however, information responsive to this demand would be relevant, because, among other reasons, it could be used to validate the conclusions in the Vickberg Report. However,

defendant represents that it has more than 800 health centers in the United States, and numerous partnerships with other health and women's organizations. Consequently, while the court will order production of the information sought in this demand, the demand will be deemed limited, not only to race and ethnic information, but also to the geographical and organizational reach of the Vickberg Report, or of the later outside report, whichever range is larger.

Electronically Maintained Documents

Joyner's document demand 28 contains sub-parts (a) through (h) and primarily embodies her extensive requests for information contained in electronically maintained files regarding: 1) plaintiff's "separation of employment"; 2) the Vickberg Report; 3) pay equity at PPFA; and 4) race discrimination complaints (collectively the "relevant subjects"). Information pertaining to these four subjects is clearly relevant to plaintiff's complaint.

PPFA objects to document demand 28 as unlimited in time or scope (overly broad) and unduly burdensome inasmuch as it will require PPFA to incur significant costs in searching for and producing such materials. Plaintiff recognizes that she will have to pay the cost of production, but states that she wishes to know the cost in advance, so as to make decisions on the scope of production. Defendant indicates a willingness to work with plaintiff, having previously provided plaintiff with a diagram of its computer system, the identity of software applications used, the identity of the person who maintains the system and other information. Memorandum of Law in Opp. at pp. 4-5. However, PPFA has not provided Joyner with an estimated cost for its search and neither party provides the court with any information as to the feasibility of tailoring an appropriate search. To assist defendant in tailoring its search for electronically stored information, defendant requests that plaintiff first identify information of which she is aware that is stored on defendant's computer system which has not already been produced.

At the outset, the court must first determine whether the material sought is material and necessary to plaintiff's prosecution of this action. *Lipco Electrical Corp. v. ASG Consulting Corp.*, 4 Misc.3d 1019(A), 798 N.Y.S.2d 345 (Sup. Ct., Nassau Cty., 2004). As previously stated, the categories of information sought in document demand 28 are relevant. However, the demand is unlimited in terms of the relevant time period. While a finite time period can be readily identified with respect to Joyner's request for documentation of her separation of employment and the Vickberg report, the same cannot be said for her request for documentation regarding pay equity at PPFA and prior race discrimination complaints. Accordingly, material in these categories should be limited to the time period 2001 to date, for the same reasons discussed above with respect to interrogatories 6 and 27 and document demand 5.

Turning to the relevancy of each demand, document demand 28(a) seeks "[a]ll e-mail and information about e-mail (including message contents, header information and logs of e-mail system usage)" sent or received by nine identified PPFA employees (including Joyner) and "[a]ny other PPFA employees with information and/or knowledge of Joyner's separation of employment and/or the Vickberg Report and/or pay equity at PPF or complaints of race discrimination." This demand seeking all e-mails sent and received is overbroad and unduly burdensome in that it will result in the production of material not relevant to the subject matter of this action, including personal e-mails and potentially privileged and/or confidential information. Accordingly, document demand 28(a) is vacated.

Document demand 28(b) similarly seeks PPFA's production of e-mails, but is appropriately tailored to request only e-mails "containing information about or related to" the four relevant subjects. Joyner's motion to compel is granted with respect to document demand 28(b).

Document demand 28(c) seeks "[a]ll databases (including all records and fields and structural information in such databases), containing any reference to and/or information

about or related to” the four relevant subjects. Joyner’s motion fails to demonstrate any need for obtaining copies of the extensive information contained in entire databases and as such, the request is overbroad and vague and must be vacated.

Document demand 28(d) requests “[a]ll logs of activity (both in paper and electronic formats) on computer systems and networks that have or may have been used to process or store electronic data containing information about or related to” the relevant subjects. Plaintiff’s motion to compel is granted as to document demand 28(d). Production of such computer logs may arguably lead to relevant discovery and may also assist the parties in formulating specific requests and searches.

Document demand 28(e) seeks “[a]ll word processing files, including prior drafts, ‘deleted’ files, and file fragments, containing information about or related to” the relevant subjects. The motion to compel is granted with respect to files containing information about or related to Joyner’s separation of employment and the Vickberg report. However, with respect to prior discrimination complaints and pay equity issues, plaintiff has not established at this juncture that hard copies of documentation on these subjects are insufficient.³ Given the potential volume of material sought to be produced and the cost attendant thereto, the court cannot conclude that plaintiff’s need for such material and any probative value it might have outweighs the prejudice to defendant of searching for and providing duplicative word processing files, prior drafts and deleted files. Accordingly, the motion is granted in part and denied in part as to document demand 28(e).

Document demand 28(f) requests “[w]ith regard to electronic data created by application programs that process financial, accounting and billing information, all electronic

³ It should be further noted that this decision and order permits discovery on these subjects in the form of e-mails pertaining thereto as sought in document demand 28(b). As to prior discrimination complaints, the court also granted electronic discovery on the limited subject of investigations of such complaints as sought in document demand 5.

data files, including prior drafts, 'deleted' files, and file fragments, containing information about or related to" the relevant subjects. As with document demand 28(e), plaintiff has not established at this juncture that hard copies of the requested data are insufficient. Again, the court cannot conclude that plaintiff's need for such material in electronic form and any probative value it might have outweighs the prejudice to defendant of searching for and furnishing same to plaintiff.

Document demand 28(g) seeks "[a]ll files, including prior drafts, 'deleted' files, and file fragments, containing information from electronic calendars and scheduling programs regarding or related to" the relevant subjects. Plaintiff's motion to compel is denied and document demand 28(g) is vacated for the same reason stated above with respect to document demand 12.

Document demand 28(h) seeks "[a]ll electronic data files, including prior drafts, 'deleted,' files and file fragments about or related to" the relevant subjects. This request is overbroad and vague and must be vacated.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the extent that defendant is directed to provide answers to interrogatories 6, 24, 27 and 43, and documents in written form responsive to document demands 5, 27, 28(b) and 28(d) consistently with and as limited by the discussion above, on or before June 22, 2007; and it is further

ORDERED that the portion of plaintiff's motion seeking to compel defendant's compliance with document demands 6, 10, 12, 28(a), 28(c), 28(e), 28(g) and 28(h) is denied; and it is further

ORDERED that the portion of plaintiff's motion seeking to compel defendant's compliance with document demand 28(e) is granted in part consistently with and as limited by the discussion above and is otherwise denied; and it is further

ORDERED that, to the extent that this decision and order requires defendant to provide electronic discovery, defendant's counsel shall provide plaintiff's counsel with an estimate for conducting a computerized search for the items to be produced consistent herewith and for the reproduction of same on or before June 22, 2007; and it is further

ORDERED that counsel for the parties are directed to appear for a compliance conference in IAS Part 1, Room 1127B, 111 Centre Street, New York County on June 26, 2007 at 9:30 a.m.

This opinion constitutes this court's Decision and Order. Courtesy copies of same have been mailed to counsel for the parties.

DATED: New York, New York
May 29, 2007



HON. MARTIN SHULMAN, J.S.C.

FILED
JUN 18 2007
COUNTY CLERK'S OFFICE
NEW YORK