(2004)

PATRICIA ANN DIMMITT, Plaintiff,
v.
UTAH TRANSIT AUTHORITY, Defendant.

Case No: 2:03 CV 1016 TC.

United States District Court, D. Utah.

July 8, 2004.

ORDER GRANTING MOTION TO COMPEL

DAVID NUFFER, Magistrate Judge (Part-time).

This case was referred to the undersigned under 28 U.S.C. §636(b)(1)(A). The undersigned was directed to hear and determine any nondispositive pretrial matters pending before the Court. Plaintiff has filed a motion to compel[1] discovery, which is vigorously contested by Defendant.[2]

Plaintiff, a female, alleges that Defendant terminated her in retaliation for her exercise of rights protected under the Civil Rights Act of 1964.[3] Plaintiff claims she complained about disparate treatment of male and female UTA employees,[4] and was thereafter terminated for the stated reason of poor performance,[5] though this was pretextual.[6] Plaintiff claims she was told her performance was "superior"[7] and was never told, before her termination, that her performance was inadequate.[8]

One specific incident mentioned in the complaint is that Plaintiff informed a supervisor that another employee, Chris Shane, was doing personal work on UTA time for a supervisor, Carole Verschoor.[9] Plaintiff also recounts that she was assisted by another UTA employee, Jeanetta Williams, when Plaintiff complained to UTA's Civil Rights Department about disparate treatment on May 30, 2002. The disparate treatment complaint referred to preferences given Shane and another UTA employee, Kris McBride, both of whom are male.

The dispute focuses on Plaintiff's desire for certain files:

> a. UTA Civil Rights Department files on Plaintiff, Jeanetta Williams, Chris Shane, Kris McBride and Carole Verschoor; and
>
> b. UTA's personnel and Human Resources files on Chris Shane, Kris McBride and Carole Verschoor.

and for a complete audiotape and complete transcript of a management meeting July 10, 2004, at which Plaintiff's grievances were discussed, two days before she was terminated.[10]

UTA claims that Plaintiff narrowed her discovery requests to the files "relating to the so-called `complaint' made by Mrs. Dimmitt to Toby Alires on May 30, 2002."[11] This was the recited "understanding" of UTA's counsel, supposedly based on Plaintiff's letter of April 14, 2004. That letter actually stated Plaintiff is "interested in files which were created as a result of, *or which pertain to,* the complaint made by Patty Dimmitt and Jeanetta Williams to Toby Alires."[12] UTA's Memorandum did not quote the italicized portion of the preceding quotation. UTA's Memorandum also does not quote the next sentence of the April 14, 2004, letter which goes on to ask, "Did I correctly understand you to say that no such files exist ...? .... UTA contends that Ms. Dimmitt did not make a complaint of discrimination. These files would either substantiate or undermine such an assertion." UTA's counsel's "understanding" obviously ignores these portions of Plaintiff's counsel's letter. There was no agreement that the discovery requests were narrowed as UTA states.

UTA alleges that the files sought are not relevant,[13] pointing out that Plaintiff claims she was terminated in *retaliation for complaining* of disparate treatment, and that her complaint does not allege actual disparate treatment. Thus, UTA argues, the comparable or disparate treatment of Shane and McBride is not "relevant to a claim or defense of a party."[14]

> Whether Shane and McBride were treated differently is not relevant to Ms. Dimmitt's retaliatory discharge claim.[15]

This statement *may* be true in terms of ultimate *admissibility,* but the allegations of different treatment, the fact of different treatment and the records and reports of different treatment are *relevant* to Plaintiff's claim that UTA terminated her in retaliation for protected activities. "UTA's treatment of Mr. Shane and Mr. McBride ... is quire `relevant' to Mrs. Dimmitt's ... reasonable good faith belief that she was complaining about conduct that violated Title VII."[16]

UTA has provided the transcript and audiotape of that portion of the July 10th meeting dealing with Plaintiff's grievances[17] and claims the balance of the meeting minutes and tape are not relevant. UTA claims the right to make this judgment without disclosing the full context of the materials to Plaintiff or Plaintiff's counsel. When a portion of a document or statement is in evidence, the entirety may be introduced if fairness requires it.[18] This is a hollow right if the parties do not have equal access to entire documents and statements. The entirety of the tape and transcript should be available in discovery, subject to protections appropriate to such sensitive matters.

GRAMA Privilege

UTA objected[19] that many materials sought by Plaintiff are privileged under the Utah Government Records Access and Management Act (**GRAMA**).[20] UTA does not devote any argument, beyond one sentence, to this assertion.[21] Plaintiff claims that the **GRAMA** objection is not effective in a federal court proceeding[22] and cites a case holding that state records acts do not limit the federal courts.[23] Defendant did not argue the point. However, it does seem appropriate to impose conditions to prevent untoward dissemination of these materials.

The court finds the position of UTA was substantially justified in that "reasonable people could differ" on these issues.[24] Expenses of this motion will not be awarded.

ORDER

IT IS HEREBY ORDERED that the motion to compel[25] is GRANTED.

IT IS FURTHER ORDERED that defendant UTA shall produce for inspection and copying:

> a. UTA Civil Rights Department files on Plaintiff, Jeanetta Williams, Chris Shane, Kris McBride and Carole Verschoor;
>
> b. UTA's personnel and Human Resources files on Chris Shane, Kris McBride and Carole Verschoor; and
>
> c. a complete audiotape and complete transcript of the management meeting held July 10, 2004.

IT IS FURTHER ORDERED until the parties stipulate to a different form of protective order, Plaintiff and counsel are ordered not to disseminate the foregoing materials and shall hold such information in confidence, shall use the information only for purposes of this civil action and for no other action, and shall not use it for any business or other commercial purpose, and shall not disclose it to any other person, other than as reasonably required for purposes of this civil action. At the conclusion of this action, including through all appeals, any person receiving such records shall destroy or return to the Defendant all such records received and certify to the other party such destruction or return. Such return or destruction shall not relieve any person from any of the continuing obligations imposed upon by this order. If a person receiving such records is subpoenaed in another action or proceeding or served with a document or testimony demand or a court order, and such subpoena or demand or court order seeks information subject to this order, that party shall give prompt written notice to opposing counsel and allow opposing counsel an opportunity to oppose such subpoena or demand or court order prior to the deadline for complying with the subpoena or demand or court order. No compulsory disclosure to third parties of information subject to this order shall be deemed a waiver of any claim of confidentiality, except as expressly found by a court or judicial authority of competent jurisdiction. The court's jurisdiction to enforce this order will continue after the termination of this action.

Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.[26]

[1] Plaintiff's Motion for Order to Compel (Motion to Compel), docket no. 14, filed May 26, 2004.

[2] Defendant Utah Transit Authority's Memorandum in Opposition to Plaintiff's Motion for Order to Compel (UTA Memorandum), docket no. 20, filed June 18, 2004.

[3] Complaint, docket no. 1, filed November 19, 2003, ¶¶ 3, 30.

[4] *Id.* ¶¶ 11-14; 27-28.

[5] *Id.* ¶ 21.

[6] *Id.* ¶¶ 23, 29.

[7] *Id.* ¶ 7.

[8] *Id.* ¶¶ 8, 22.

[9] *Id.* ¶¶ 16, 17.

[10] Memorandum in Support of Plaintiffs' Motion for an Order to Compel, docket no. 15, filed May 26, 2004, at 2 -3.

[11] UTA Memorandum at 8, quoting letter from UTA's counsel to Plaintiff's counsel, April 27, 2004, attached as Exhibit H to the affidavit of Brett Johnson, attached to UTA's Memorandum as Exhibit 1.

[12] Letter from Plaintiff's counsel to UTA's counsel, April 14, 2004, attached as Exhibit F to the affidavit of Brett Johnson, attached to UTA Memorandum as Exhibit 1.

[13] UTA Memorandum at 11-13.

[14] Fed. R. Civ. P. 26(b).

[15] UTA Memorandum at 12.

[16] Reply Memorandum in Support of Plaintiff's Motion for Order to Compel, docket no. 21, filed June 28, 2004, at 4.

[17] UTA Memorandum at 5, ¶¶ 7, 8 and 10. The partial transcript of the meeting was not produced until after the Motion to Compel was filed.

[18] When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed. R. Evid. 106.

[19] UTA Memorandum ¶ 3 at 4.

[20] Utah Code Ann. § 63-2-101 *et. seq.*

[21] UTA Memorandum at 13.

[22] Plaintiff's Memorandum at 4-5.

[23] *Park v. City of Chicago*, 297 F.3d 606, 612 (7th Cir. 2003).

[24] *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

[25] Plaintiff's Motion for Order to Compel (Motion to Compel), docket no. 14, filed May 26, 2004.

[26] Fed. R. Civ. P. Rule 72(a).