

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

KAYLEIGH BELLISLE :
 :
 v. : C.A. No. 14-266M
 :
 LANDMARK MEDICAL :
 CENTER, et al. :

MEMORANDUM AND ORDER

Pending before me for determination (28 U.S.C. §§ 636(b)(1)(A)) is Defendant Landmark Medical Center’s Motion for Spoliation of Evidence, to Compel the Production of Evidence and Attorneys’ Fees pursuant to Rule 37, Fed. R. Civ. P. (Document No. 21). Plaintiff opposes the Motion. (Document No. 24). A hearing was held on October 2, 2015.

Background

This is an employment discrimination case. Plaintiff alleges that she was subject to a hostile work environment due to her sexual orientation and ultimately disciplined and discharged in retaliation for her complaints about such harassment and discriminatory treatment. She also alleges that her Union Representative, Defendant United Nurses & Allied Professionals, Inc., breached its duty to fairly represent her in connection with her discipline and discharge.

In the instant Motion, Landmark seeks sanctions including a spoliation instruction and attorneys’ fees due to Plaintiff’s alleged failure to preserve and produce certain electronically stored information. On February 17, 2015, a telephonic discovery conference was held before District Judge McConnell on Landmark’s request for Plaintiff to produce certain information including email communications, text messages and social networking postings referring or relating to the allegations

and defenses asserted in this case. After hearing, Judge McConnell issued an Order resolving the parties' disputes. (Document Nos. 18 and 20).

As to email communications, Judge McConnell ordered Plaintiff to produce "any and all email communications referring or related to the allegations contained in the Complaint." Id. at ¶ 2. Because Plaintiff claimed she no longer had access to the internet to retrieve such communications, Judge McConnell ordered Plaintiff to retrieve the relevant email communications by using the Internet at her attorney's office, a library or from another source. Id. As to social networking postings and text messages, Judge McConnell denied any relief to Landmark based, in part, on Plaintiff's representations that she deleted her Facebook account after her discharge, deleted any responsive text messages and no longer possessed the cell phone which sent and received such texts. Id., at ¶¶ 3-6.

Discussion

Landmark alleges that Plaintiff failed to comply with the Court's March 13, 2015 Order requiring her to produce relevant email communications and deleted relevant documents from her home computer after the Court issued such Order. Plaintiff denies "delet[ing] anything from her computer, as Landmark alleges here." (Document No. 24-1 at p. 5). She testified at her deposition that she "always delete[s] all of her emails" and that "[a]ll of [her] emails via Landmark were saved in Word, not in my e-mail." (Document No. 24-1 at p. 4; Document No. 22 at p. 7). Plaintiff also contends that she was having computer problems at the time of the discovery conference and ultimately had to reset her computer to factory settings because it was infected with a computer virus. She represents that "any documents that she had not printed out were lost when she reset her computer." (Document No. 24-1 at p. 13).

After thoroughly reviewing Landmark's argument and exhibits, it has not presently shown that Plaintiff intentionally failed to preserve and produce relevant documents. However, it is undisputed

that Plaintiff has not produced any email communications in response to Judge McConnell's Order. Plaintiff also represents that she was unsuccessful in accessing her "old" email accounts through the Internet and, as noted, that any emails saved in Word on her computer were lost when she reset her computer.

Plaintiff's counsel argues that his client is "not IBM, Cisco, Apple, or Microsoft...and does not have a team of technical support professionals on hand to address her computer woes...." Id. at p. 14. However, he does not identify any efforts made to determine if any relevant and responsive documents could be recovered from the reset computer. He also implies, but does not expressly represent, that the reset computer is "not reasonably accessible because of undue burden or cost." See Rule 26(b)(2)(B), Fed. R. Civ. P.

Putting aside all the rhetoric, a few things are clear. Judge McConnell ordered Plaintiff to retrieve and produce any relevant and responsive email communications. Plaintiff did not produce any such email communications. Plaintiff asserts that, although she deleted emails as a matter of course, she saved some in Word on her home computer. She represents that the computer had to be reset due to a virus and any saved emails were "lost" as a result. She reports no efforts to recover any such "lost" emails from the hard drive of the reset home computer.

Whether or not any responsive documents were even saved on the reset computer and are currently retrievable is not clear. Plaintiff's counsel argues that Plaintiff did not retain work-related documents on her computer. (Document No. 24-1 at p. 13). However, Judge McConnell's Order goes beyond "work-related documents" and requires production of "any and all email communications, referring or related to the allegations contained in the Complaint." (Document No. 18 at p. 2). Furthermore, Plaintiff's counsel does not report any efforts, either before or after the computer was reset, to search Plaintiff's home computer for responsive email communications. Thus, Plaintiff has

not definitively shown that there are no responsive email communications retrievable from the home computer. Likewise, Landmark has not definitively shown the contrary.

Plaintiff does not propose to embark on any retrieval efforts and has not expressly argued that any responsive email communications are not “reasonably accessible because of undue burden or cost.” On the other hand, Landmark contends that Plaintiff should produce the computer to a third party for forensic examination to determine (a) the precise reason the computer needed to be reset; (b) the exact date the computer was reset; and (c) whether any relevant and responsive evidence can be recovered from the computer. Landmark proposes a protocol to limit the intrusiveness of the inspection and the protection of Plaintiff’s privacy. Landmark also “agree[s] to pay the costs associated with the Computer’s inspection” and represents that it “intends to enter into an agreement with Plaintiff to ensure the protection of any non-relevant and/or attorney-client privileged communications that may be contained on the Computer.” (Document No. 22 at p. 25).

After considering the parties’ arguments and the unique circumstances at hand, I conclude that Landmark is entitled to attempt, at its expense, to recover any responsive email communications from Plaintiff’s “reset” home computer. See Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 652-654 (D. Minn. 2002). In particular, Plaintiff will be required to turn over her “reset” computer to an agreed-upon third-party vendor to create a mirror image of the hard drive for forensic examination at Landmark’s expense to attempt to determine (a) the reason the computer needed to be reset; (b) the date it was reset; and (c) whether any responsive email communications can presently be recovered from the computer. The parties shall promptly confer in good faith to reach agreement on a protocol for such examination that will appropriately protect Plaintiff’s privacy interest in nonrelevant information and attorney-client privileged communications. The protocol shall, inter alia, provide that any recovered email communications be kept confidential by the vendor and provided to Plaintiff’s

counsel for relevance and privilege review prior to production of any responsive email communications and a privilege log, if applicable, to Landmark's counsel. Within fourteen days, counsel shall submit a joint proposed protocol to the Court for review and entry as a Protective Order. In the event the parties cannot in good faith reach agreement, each side shall submit a proposed protocol for the Court's review.¹

As to Plaintiff's Facebook account, it appears from Judge McConnell's Order that he accepted Plaintiff's representation that she deleted her Facebook account after her separation from Landmark's employ and denied relief to Landmark on that basis. (See Document No. 18 at ¶¶ 3-4). However, subsequent to the Order, Plaintiff testified at her deposition that she created a new Facebook account at or around her separation date that was still in existence at least at that time. She was also questioned about a Facebook post independently located by Landmark and confirmed that she should have the post "somewhere." However, to date, Plaintiff has apparently not produced any responsive Facebook posts from either her new or deleted accounts. I am confident that if Judge McConnell understood at the time of his Order that Plaintiff had created a new Facebook account that was still active, he would have inquired further about Plaintiff's search of the new account for any responsive postings or other content and the status of production. Since I did not participate in the discovery conference that resulted in the March 23, 2015 Order, I do not know what was represented to Judge McConnell about the status of Plaintiff's Facebook account. However, since she subsequently acknowledged creating a new Facebook account, Plaintiff was obliged to conduct a reasonable search and produce any responsive content to Landmark. It is unclear if she has done so. Accordingly, Plaintiff is ORDERED to do so within twenty-one days and to produce any responsive content to Landmark and a privilege

¹ The Court will review the competing protocols and will enter the most reasonable version as a Protective Order, subject to any necessary revision.

log, if applicable. In addition, Plaintiff's counsel shall provide a letter to Landmark's counsel which outlines such efforts including search methods and results.

Conclusion

For the foregoing reasons, Defendant Landmark's Motion to Compel (Document No. 21) is GRANTED in part as specified herein. Also, Landmark's request for a spoliation instruction and other sanctions is DENIED without prejudice.

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
November 16, 2015