DISCOVERY 101: THE STRATEGY AND PRACTICE OF INFORMATION GATHERING IN THE EMPLOYMENT LAWSUIT

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By:

Sheila Engelmeier, Esq.
Engelmeier & Umanah
12 South Sixth Street, Suite 1230
Minneapolis, Minnesota 55402
612-455-7723
SheilaE@E-ULaw.com

and

Susan Ellingstad
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, Minnesota 55401
(612) 339-6900

TABLE OF CONTENTS

I. DISCOVERY GENERALLY 1

II. IDENTIFY WHAT INFORMATION YOU NEED FOR YOUR CASE 1

A. Know the Element of the Claims at Issue 1

B. Make a List of Key Players 2

C. Make a List of Documents (paper and electronic) that might be relevant 2

D. Match key players to documents and inquire about further information 2

III. OPTIONS FOR GETTING INFORMATION 2

A. Informal Information Gathering 2

B. Formal Information Gathering 3

IV. LIMITATIONS ON DISCOVERY 10

A. Limitations on Inquiries by Employers 10

B. Limitations on Inquiries by Employees 10

C. Protective Orders 13

V. MOTIONS TO COMPEL 13

VI. CONSIDERATIONS ON SUMMARY JUDGMENT 13

A. Plaintiff's Deposition is Key 13

B. Affidavits v. Depositions v. Doing Nothing – The Employee's Witnesses 14

I. DISCOVERY GENERALLY

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the claim or defense of any party…" Minn. R. Civ. P. 26.02(a).

This rule was recently modified to parallel the Federal Rule of Civil Procedure 26(b). The modification of the rule was intended to narrow the scope of discovery and prevent "fishing expeditions," but in practice has not had a significant impact. *See, Sanyo v. Lazer Products, Inc. v. Arista Records, Inc.,* 214 F.R.D. 496, 500 (S.D. Ind. 2003). Under the amended rule, obtaining discovery regarding the "subject matter of the action" is still possible provided that a showing of good cause can be made. Rule 26 vests courts with considerably "wide discretion" in determining the scope and effect of discovery. *See, Craig v. Exxon*, 1998 WL 850812 (N.D. Ill.) *1, *citing, Amey, Inc. v. Gulf Abstract and Title, Inc.*, 758 F.2d 1486, 1505 (11th Cir. 1985), *cert. denied.*

Relevant information is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401; Fed. R. Evid. 401.

II. IDENTIFY WHAT INFORMATION YOU NEED FOR YOUR CASE

One of the most important things a lawyer can do at the beginning of an employment law dispute is imagine what the dispute before him or her will/could/should look like at the end of the case (while it is being presented to a fact finder) and work backwards to develop a plan for finding helpful information for your side of the case. Below are these authors' thoughts about the steps in that process.

A. Know the Elements of the Claims at Issue.

Look at the JIGs, the statute(s) at issue and case law for the elements of each claim and the elements of available defenses.

•As an employer's lawyer (ER), have a sample summary judgment motion in mind right from the beginning

•As an employee's lawyer (EE), have a sample summary judgment response, including possible supporting documents and affidavits, in mind right from the beginning

•Perform an objective evaluation of your case to help you address its weaknesses and build upon its strengths

•Anticipate the opposition based on past experience

B. Make a list of key players.

C. Make a list of documents (paper and electronic) that might be relevant.

Examples might include: employee handbook, personnel files, policies and procedures, investigation documentation, diaries, journals, calendars, emails, IM, text messages or spreadsheets.

D. Match key players to documents and inquire of key players about documents to see if there are other sources necessary to understand the documents and other information about the documents.

III. OPTIONS FOR GETTING INFORMATION

A. Informal Information Gathering:

1. Consider voluntary exchange of information

    a) Even pre-litigation – may assist in preempting lawsuit or resolving favorably

    b) Determine ground rules about what is going to happen with the information – confidentiality, return of information, expiration of offers discussed (if any) at the meeting

2. Interviews inside the company (ER)

3. Interviews of former employees (EE)

4. Interviews of existing rank and file employees at the company (EE)

    - Cannot contact current managers. Be mindful of Rule 4.2 of the Rules of Professional Responsibility

5. Background checks

    - Interview witnesses
    - Hire a private investigator?
      (Note: Do not violate the Fair Credit Reporting Act -- stick with public data)
    - (Also Note: Employee's lawyers and their investigators cannot run a credit report to see if employer has money to collect on the judgment)

B. Formal Information Gathering:

1. Third party sources

a) Via Subpoena - Sometimes getting information from third parties is much easier than from the opposing party because the third-party has less incentive to object to providing the information. This is often a good tactic, even if you are also asking for the same information in interrogatories directed to the opposing party.

- Rule 45 issues
  - Amendments to Minn. R. Civ. P. 45 allowing the issuance of subpoenas by attorneys and without requiring a deposition. Additionally, there is a requirement that lawyers subpoenaing information take care not to impose an undue burden or expense on the third party.
    Recent amendments make the Minnesota and Federal Rules regarding subpoenas very similar
  - You must pay those you subpoena for information that falls within their trade or profession and these arrangements for "reasonable compensation" must be made in advance of the deposition. Minn. R. Civ. P. 45.03(d)

b) Consider information from ex-spouses

c) Medical Records (ER)

d) Records from former employers (ER)

e) School transcripts (ER)

f) Freedom of Information Act/Minnesota Government Data Practices Act requests

- Example: information from the EEOC and MDHR or other agency who has conducted an investigation.

* NOTE: Use third party sources to check on the opposing party's truthfulness

2. Interrogatories

These are written questions presented to the opposing party that are answered after investigation and research on an issue. Unlike a deposition, the opposing party has the ability to

give considerable thought to the answers provided. Minn. R. Civ. P. 33. *See Attachments 1 and 2* are these authors' ideas about some template questions.

3. Document requests.

When making a formal request for the production of documents the party seeking discovery need only describe with reasonable particularity the documents to be produced and provide a reasonable time, place and manner for inspection. Objections to a request for production must be made within 30 days of service of the request and those objecting to discovery have the burden of demonstrating that discovery should not be allowed. *Hickman v. Taylor*, 329 U.S. 495, 500 (1947).

Objections to production include:

a) Non-existence of the documents requested
b) Documents requested are inadmissible and not calculated to lead to the discovery of admissible evidence
c) Party lacks possession, custody, control of requested documents
d) Privilege
e) Work Product or trial preparation materials that are non-discoverable
f) Production would be unduly burdensome

4. Depositions

a) Issues to Cover in Depositions:

- Prior medical history (ER)
- Employment history, past and current (ER)
- Job search efforts (ER)
- Prior complaints of discrimination/harassment (EE)
- Occurrences similar to those experienced by the employee (EE)
- Records about training or other prevention efforts (EE)

b) New rule on depositions – only 7 hours in Minnesota state court as well as federal court. Can only depose for greater than 7 hours where the "party seeking . . .to extend the examination, or otherwise alter limitations . . . show[s] good cause to justify such an order." Fed. R. Civ. P. 30(d) advisory committee note. (Examples of good cause include: a witness requiring an interpreter, the examination covers events occurring over a long period of time, there are multiple documents or parties involved, or the witness impedes or delays in the deposition.)

(1) ER: Plaintiff, other witnesses to the events (especially if you want to document their position)

(2) EE: Human Resources representative, alleged perpetrator (typically supervisor or manager), co-workers

(3) Rule 30(b)(6)

A party may, in the party's notice of taking deposition and in a subpoena, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (30 (b)(6)) does not preclude taking a deposition by any other procedure authorized in these rules. Fed. R. Civ. P. 30(b)6.

30(b)(6) depositions are useful for obtaining information from the employer regarding the following: policies and procedures; electronic discovery; retention of documents. A 30(b)(6) deposition forces the company to produce the person(s) knowledgeable on the subject matter you identify.

(4) Making and responding to objections.

Objections during a deposition "shall be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion…"

5. Requests for Admissions

Parties seek admissions for the purpose of narrowing the issues involved in the case and "to facilitate proof with respect to issues that cannot be eliminated from the case." Fed. R. Civ. P. 36, advisory committees note (1970).

- limited usefulness?
- lack of investigation is no excuse for denying requests
- failure to respond results in requests deemed admitted
- obligation to provide meaningful responses, including partial admissions
- Rule 36 & 37 provide for recovery of expenses incurred on successful motions about requests for admissions

6. Independent Medical Examination (IME)

Where the mental or physical condition of a person is at issue or in controversy, Minnesota Rule 35 permits an examination to be made. A court order is required for an examination to be made. This order only can be issued upon an attorney's affidavit that the issue is in controversy and that good cause exists for the examination to be ordered. Mere conclusory

allegations by the attorney are not enough to place the mental state of the person in controversy. *See, Schlagenhauf v. Holder*, 379 U.S. 104, 118-21 (1964); *Hill v. Hietala*, 268 Minn. 296, 128 N.W.2d 745 (1964); *Taylor v. Morris*, 62 S.W.3d 377 (Ky. 2001).

A trial court is vested with broad discretion to determine whether an examination is warranted. A court's determination is evaluated under a clear abuse of discretion standard. Those claiming error must make an affirmative showing of prejudice. *Krysco v. Rulli*, 432 N.W.2d 764, 770 (Minn. App. 1988); citing, *Hill v. Hietala*, 268 Minn. 296, 128 N.W.2d 745 (1964).

In *Blake v. U.S. Bank*, the court denied defendant's motion to compel plaintiff to submit to an Independent Medical Examination (IME) and provide a detailed medical history. *Blake v. U.S. Bank National Assoc.*, Civ. No. 03-6084 (D. Minn., March 22, 2003). In the complaint, the plaintiff alleged emotional distress and claimed to have sought the services of a therapist before, during, and after the alleged harassment. At issue was whether the plaintiff was placing her mental state "in controversy" in the case so as to allow a thorough review of her medical history and a Rule 35 examination. Despite noting that "'[i]f the plaintiff 'intended to seek anything more than nominal damages for any alleged emotional distress, then he is placing his mental condition at issue,'" *Id*. at 15, the District Court concluded that the "in controversy" requirement was not fulfilled in *Blake*, and defendant's motion was denied. On this issue, the Court outlined the various positions typically argued on this subject, as follows:

> 1. Standard of Review. As we have previously observed on a number of occasions, Rule 35 exists "as a forthright attempt to provide a 'level playing field' between the parties in their respective efforts to appraise the Plaintiff's psychological state." *O'Sullivan v. State of Minnesota*, 176 F.R.D. 325, 327 (D. Minn. 1997), [other citations omitted]. Nevertheless, when a plaintiff's mental condition has not been placed "in controversy," as that term is employed in Rule 35, the playing field is not uneven, and no leveling is required. In such a circumstance, "good cause" is not presented which warrants the plaintiff to undergo the invasive examination contemplated by the Rule. *See*, *O'Sullivan v. State of Minnesota, supra* at 327.
>
> In *O'Sullivan*, we noted that "the Complaint's bare and boilerplate allegations of 'mental anguish,' 'emotional distress,' and 'embarrassment and humiliation,' provide a legally insufficient basis for concluding that the Plaintiff's mental condition is 'genuinely in controversy,' or that 'good cause exists for ordering [the] examination.' *O'Sullivan v. State of Minn., supra* at 327; *see also, Schlagenhauf v. Holder*, 379 U.S. 104, 118-19 (1964). We are mindful that some Courts have concluded that – standing alone – a plaintiff's allegations of emotional pain and distress, suffered at the instance of the defendants, is sufficient to allow a finding that her mental state has been placed in controversy, *see*, *e.g., Jansen v. Packaging Corp. of America*, 158 F.R.D. 409 (N.D. Ill. 1994), but

we respectfully disagree. For example, in *Tomlin v. Holecek*, *supra* at 630, we determined that, as employed in Rule 35, "the term 'mental' refers to 'mental disorders and psychiatric aberrations,'" and that, "[t]o put his mental condition in controversy, a plaintiff must assert a claim of mental or psychiatric injury." In reaching that conclusion, we were persuaded by the reasoning in *Cody v. Marriott Corp.,* 103 F.R.D. 421 (D. Mass 1984), where the Court declined to find that the plaintiff had placed her mental condition in controversy solely on the basis of her allegation that she had suffered "physical and emotional distress" as a result of the defendants' conduct.

Moreover, our construction of the "in controversy" requirement is not novel, and has been enunciated by the other Courts which have found that a plaintiff places a mental condition in controversy when "'a claim of mental or psychiatric injury'" is alleged, *Turner v. Imperial Stores*, 161 F.R.D. 89, 93 (S.D. Cal. 1995), citing *Peters v. Nelson*, 153 F.R.D. 635, 638 (N.D. Iowa 1994), citing, in turn, *Tomlin v. Holecek*, supra at 630, and that mere allegations of "mental pain and anguish" do not suffice. *Bennett v. White Laboratories, Inc.*, 841 F. Supp. 1155, 1158 (M.D. Fla. 1993). In *Turner v. Imperial Stores*, *supra* at 95, after a comprehensive review of the pertinent authorities, the Court determined that Rule 35 Motions, which seek Court-ordered mental examinations, are typically granted when one or more of the following factors are present:

1. a cause of action of intentional or negligent infliction of emotional distress;

2. an allegation of a specific mental or psychiatric injury or disorder;

3. a claim of unusually severe emotional distress;

4. the plaintiff's offer of expert testimony to support a claim of emotional distress; and/or

5. the plaintiff's concession that her mental condition is "in controversy" within the meaning of Rule 35.

O'Sullivan v. State of Minnesota, *supra* at 328.

With respect to the facts at issue in *Blake*, the Court reasoned that the plaintiff employee had asserted a mere "garden variety" emotional distress claim, even though she saw a therapist regarding her emotional distress and was diagnosed with an adjustment disorder as a result of her alleged mistreatment by the employer. Because the plaintiff employee was not going to call her treating doctors or other expert witnesses regarding her emotional distress, was not going to

claim any ongoing psychiatric disorder as a result of the alleged mistreatment of her employer and did not testify about anything other than "garden variety" emotional distress at her deposition, she had not placed her psychological condition "in controversy" in the case. Interestingly, the Court found that her settlement demand for $150,000 for emotional distress did not make her claim for emotional distress something more than "garden variety." The Court did caution the plaintiff, as follows:

> We remind the Plaintiff, however, that, having elected not to place her medical condition in controversy, she is not at liberty to call any health care practitioners to testify at Trial about her medical condition, and she will not be permitted to testify, at Trial, to anything other than the types of distress which are common to the claims asserted here, or any of life's other stressors. She will not be permitted to advise of any medical treatment, or medications, which she may relate to the Defendant's conduct, as she has removed the issue of any medical or mental insult, attributable to the Defendant, from litigation. Moreover, we simply deny the Defendant's request to schedule a Rule 35 examination, and we do not limit, in advance, the Defendant's right to inquire as to the other potential stressors in the Plaintiff's life, to the extent that those stressors are relevant to her claim for damages.

In *Blake*, the Court also held that since the plaintiff employee had not placed the issue of her mental health "in controversy," it also would not order the plaintiff to produce authorizations for her medical records. On that issue, the Court outlines the applicable law, as follows:

> The Defendant asserts that those records are likely to contain information about the Plaintiff's emotional state, and that our Court of Appeals has determined that a defendant is entitled to a plaintiff's medical records, in a suit for sex discrimination, retaliation, and sexual harassment. *See*, *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000); *see also*, *Walker v. Northwest Airlines*, Civil No. 00-2604 at p. 9 (D. Minn., October 28, 2002) [citation omitted]. Finally, the Defendant notes that the Plaintiff has already executed authorizations for some of her medical providers, and has not asserted any basis for her refusal to provide the remainder.
>
> The Plaintiff argues that her medical records are privileged, and that she has not waived the privilege, because she has not placed her emotional condition in controversy. In addition, she asserts that *Schoffstall* and *Walker* are distinguishable, because in the former, the plaintiff had claimed extreme emotional distress, and in the latter, the plaintiff had identified three experts who might testify at Trial. Here, the Plaintiff reasserts that she will not call any expert witnesses to testify.

Walker seems remarkably similar to the case at bar. There, the plaintiff sought emotional distress damages as a result of adverse employment actions, and the defendant sought to compel the plaintiff's medical records, and argued that the plaintiff had placed his emotional well-being at issue, and that it was entitled to determine whether the plaintiff's emotional distress stemmed from causes unrelated to the alleged discrimination. Further, as with the Plaintiff in the case at bar, the plaintiff in *Walker* asserted that he did not "intend [to] present any expert testimony at trial regarding any physical or psychological illness, condition, or disorder," and that "he [did] not intend to use either medical records or medical testimony to prove his claim for emotional distress damages." *Walker v. Northwest Airlines*, *supra* at 7-8.

In *Walker*, the Court noted that, "regardless of whether Plaintiff's mental or emotional condition is in controversy, his medical records may be nonetheless relevant if they shed light on other contributing causes of Plaintiff's emotional distress claims." Id. at 8. Finding that medical records may be discoverable even if the "in controversy" requirement of Rule 35 is not met, the Court went on to hold that if the plaintiff "intend[ed] to seek anything more than nominal damages for any alleged emotional distress, then he is placing his mental condition at issue in this case, and [the defendant] is entitled to explore any evidence including Plaintiff's medical records, which may be relevant to such a claim." *Id.* at 9, *citing Scholffstall v. Henderson*, *supra* at 823. Finally, the Court held that, "regardless of whether Plaintiff intends to introduce his medical records or offer medical testimony to prove his alleged emotional distress, [the defendant] is entitled to determine whether Plaintiff's relevant medical history indicates that his alleged emotional distress was caused in part by events and circumstances independent of [the defendant's] allegedly adverse employment action." *Id*. at 11. However, the court limited the release of medical information to those records which pertained "to the treatment or diagnosis of a mental, emotional, or psychological condition," and ordered the defendant to modify its medical authorization accordingly. *Id*. at 12, 15.

However, as the Plaintiff argues, *Walker* is distinguishable because of the proposed introduction of expert witnesses, which is absent in the case at bar. Furthermore, *Walker* does not address the considerations which prompted our holding in *O'Sullivan*, or our heavy reliance upon the Supreme Court's reasoning, in *Schlagenhauf*, in framing that holding. We continue in the view that, absent some specific, particularized showing, the production of medical records are governed by the "in controversy" requirement of Rule 35. As a consequence, we deny the

> Defendant's Motion to compel the Plaintiff to produce authorizations for the release of her medical records.

The *Blake* holding is quite interesting in that it effectively limited the employer's ability to find out independent information about the employee's other life stressors, yet found that it could present evidence on those other life stressors at trial. Other courts have limited access to medical records to a limited time period. *See, e.g., Jensen v. Astrazeneca*, 2004 WL 2066837 (D. Minn.) (limiting discovery of medical records to approximately a five-year time period [significantly less than the time period the employee worked for the employer]); *see also, Manessis v. New York City Dep't of Transp.,* 2002 WL 31115032, at *2 (S.D.N.Y.) (limiting discovery and noting that a claim of emotional distress is not "a license to rummage through all aspects of the plaintiff's life in search of a possible source of stress or distress" (quotation omitted)); *Garrett v. Sprint PCS,* 2002 WL 181364, at *3 (D. Kan.) (finding three year range of discovery appropriate); *Doe v. City of Chula Vista,* 196 F.R.D. 562, 570 (S.D. Cal. 1999) (restricting discovery to five years of records and directing that all records be submitted in the first instance to court for in camera review as to relevance).

As either an employee's lawyer or an employer's lawyer, you must assess whether you need a medical expert for your particular case. From the employee's side, this will depend on the history of the employee with regard to mental health issues, the prior treatment for those issues and the value you assign to the employee's claim for emotional distress damages. From the employer's side, this will depend in large part on budget, the nature of damages claimed, and whether the employee plaintiff plans to introduce the treating physician or some other psychological or medical expert as a witness in the case.

IV. LIMITATIONS ON DISCOVERY

A. Limitations on Inquiries by Employers

1. How far back in history of employee can you go?

2. Unrelated medical issues (i.e., gynecological) (see discussion above)

3. Prior employment claims by Employee – any restriction?

    a) Rule 403 considerations

    b) For impeachment

B. Limitations on inquiries by Employees

1. How far back in company's history can the employee inquire?

Courts have limited the amount of time a plaintiff can go back to discover information to the time period in which the person was actually employed. The Eighth Circuit has similarly limited discovery to the period of the plaintiff's employment. *O'Neil v. Riceland Foods*, 684 F.2d 577, 581 (1982). The Northern District of Ohio denied a plaintiff's request for information

dating back to 1965 when the alleged discrimination was claimed to have taken place between 1977 and 1979. *Williams v. United Parcel Service, Inc.*, 34 F.E.P. Cas. 1655 (N.D. Ohio 1982).

Other courts have come to a similar conclusion. In *Broderick v. Shad*, the plaintiff was not permitted to discover information and documents that were created prior to her employment. *Broderick v. Shad*, 117 F.R.D. 306, 312 (D.D.C. 1987). The *Broderick* court did, however, permit the employee to discover records created subsequent to her employment. For long time employees, however, they may not be able to obtain records relating to the entire period of their employment. Employers often rely upon the D.C. District Court's conclusion that discovery which seeks personnel information relative to other employees should be limited to a time frame which has a relationship to the allegations in the case. *See, Hardrick v. Legal Services Corp.*, 96 F.R.D. 617, 618-19 (D.D.C. 1983) (claims of highly individualized allegations of discrimination should be limited to the time frame of the alleged discrimination), *see also, Craig v. Exxon*, 1998 WL 850812.

2. About what work groups can the employee inquire?

Many companies have a variety of departments, offices, and divisions. In an employment law case it is not unusual for a plaintiff to seek discovery over the length and breadth of the employer's operations. Courts often find these requests to be unduly burdensome, overbroad, and not reasonably calculated to lead to the discovery of admissible evidence. Most often plaintiff's discovery will be "limited to employment units, departments and sections in which employees similarly situated to plaintiff(s) are employed." *Obiajulu v. City of Rochester, Department of Law*, 166 F.R.D. 293 (W.D. N.Y. 1996); *see also*, *Scales v. J.C. Bradford and Co.*, 925 F.2d 901, 907 (6th Cir. 1991); *Burns v. Hy-Vee, Inc.,* 2002 WL 31718432, at * 2 (D. Minn.) (noting limitation on discovery to information related to prior claims involving the practices and classes at issue in the particular case, the facility and the people implicated in the allegations, and to a reasonable time period around the alleged discriminatory actions).

This argument is easier for defendants to make when there is a larger employer involved. *See, Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 792 (8th Cir. 1997); *see also, Burns v. Hy-Vee*, 2002 WL 31718432 (D. Minn.). In *Carman*, the plaintiff sought discovery of a variety of McDonnell Douglas' employment records to establish pretext in an employment discrimination claim. The Eighth Circuit found this request overbroad as employment decisions in this company were made at different division levels with varying standards and decision makers involved.

In an employment discrimination case against Wal-Mart, the plaintiff made a blanket request for the personnel files of any potential witness or other employees mentioned in the discovery request. *Haselhorst v. Wal-Mart Stores, Inc.*, 163 F.R.D. 10, 11 (D. Kan. 1995). The Kansas Federal District Court found that this was an overbroad and burdensome request. "The mere fact that a person may be a witness in a case does not automatically warrant access to their personnel file." *Id*. The plaintiff also made a request for the "names, addresses, etc. of any person ever employed by Wal-Mart in Hays, Kansas." *Id*. The court quickly concluded that this request was unduly burdensome and overly broad on its face. The court stated that "in employment discrimination cases, discovery is usually limited to information about employees in the same department or office absent a showing of a more particularized need for…broader

information," a conclusion reached by a variety of other jurisdictions as well. *Id., citing, Early v. Champion International Corp.*, 9078 F.2d 1077, 1084-85 (11th Cir. 1990); *James v. Newspaper Agency Corp.*, 591 F.2d 579, 582 (10th Cir. 1979); *Serina v. Albertson's, Inc.*, 128 F.R.D. 290, 291-92 (M.D. Fla. 1989); *Prouty v. National Railroad Passenger Corp.*, 99 F.R.D. 545, 547 (D.D.C. 1983); *Marshall v. Westinghouse Electric Corporation*, 576 F.2d 588, 59 (5th Cir. 1978); *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 805 (9th Cir. 1987).

In contrast, the court in the U.S District Court for the District of Minnesota recently has permitted broad discovery of company-wide complaints. *See*, *Jensen v. Astrazeneca*, 2004 WL 2066837 (D. Minn). In this sexual harassment, retaliation and whistle blower case, the plaintiff brought a motion to compel discovery of all company documents relating to "any complaint, claim, charge, administrative proceeding, and/or lawsuit or litigation alleging harassment, discrimination and/or retaliation of any type or kind . . . in any jurisdiction in the United States . . . from January 1, 1998 until the present date." *Id*. at *2. Magistrate Judge Noel ruled, and Judge Tunheim affirmed, that this discovery should be allowed. The Court reasoned that the discovery was relevant since the documents were limited in time, going back to 1998, and were being used to establish "the appropriateness of punitive damages." *Id*. The Court also noted that broad information from which statistical data can be drawn is relevant to a showing of pretext. *Id.* (*citing Cardenas v. The Prudential Ins. Co. of America*, 2003 WL 244640, at *2 (D. Minn.)). Conversely, the Court concluded that defendant's motion to compel broad production of plaintiffs medical records, pre-dating 1998, was inappropriate. *Id*. at 5.

Discovery of information about other facilities of the employer has also been permitted where employees across the corporation are similarly situated. *See, Hollander v. American Cyanamid Co.*, 895 F.2d 80 (2nd Cir. 1990). Similarly, in another sexual harassment case, the Northern District of Illinois permitted discovery of information about the defendant's other facility sites because that information was relevant to assessing the adequacy of the company's policy. *Butta-Brinkman v. FCA International*, 69 FEP Cases 1276, 1277 (N.D. Ill. 1995). The Court did limit discovery of other offices of the company, however, because "complaints about sexual harassment in other offices would not be relevant to show that the plaintiff herself endured a hostile work environment." *Id*.

Employees have had greater success where they have been able to show coordination between different divisions and offices of an employer. Where a common decision maker can be shown, for example a home office or some regional management center, the likelihood of discovery of information across a number of facilities increases. *See Western District Xerox Litigation*, 140 F.R.D. 264 (W.D. N.Y. 1991). *See also, Flanagan v. Traveler's Insurance Co.*, 111 F.R.D. 42, 45 (W.D.N.Y. 1986); *Henderson v. National R.R. Passenger Corp.*, 113 F.R.D. 502, 506 (N.D. Ill. 1986).

3. About what types of alleged bad behavior can the employee inquire?

Plaintiff, in a race harassment case, was permitted to discover past instances of the employer's discrimination which were the same as his claim, but was not permitted to discover other forms of discrimination, such as discrimination based on gender or religion, alleged against the employer. *Collins v. Nichols Co.*, 56 Fair Empl. Prac. Cas. (BNA) 1713, 1991 WL 186999, at

*2 (W.D. Mo. 1991). In contrast, employee's counsel can argue that a hostile work environment is measured by the "totality of the circumstances" and, therefore, discovery of other types of discrimination and harassment claims is relevant. A narrow request relating to information about all discrimination and harassment claims in the work group in which the plaintiff employee works may succeed.

C. Protective Orders

Courts may impose orders limiting discovery, for good cause shown, to protect a person from: annoyance, embarrassment, oppression, or undue burden or expense. Minn. R. Civ. P. 26.03. A protective order can come in a variety of forms, including barring discovery, limiting the issues to be discussed, or providing for a different method of discovery. Courts may also permit discovery but limit the persons who may have access to the information or require that confidentiality of the information be maintained. *See, Griffith v. Wal-Mart Stores, Inc.*, 163 F.R.D. 4, 4-5 (E.D. Ky. 1995); *see also, Welsch v. Board of Directors of Wildwood Golf Club*, 146 F.R.D. 131, 141 (W.D. Pa. 1993).

V. MOTIONS TO COMPEL

When a party resists a discovery request, the only way to obtain the information may be through the use of a motion to compel. Fed. R. Civ. P. 37(a); Minn. R. Civ. P. 37.01. A motion to compel carries with it more than just the threat of having to produce the information sought -- the prevailing party may be awarded reasonable costs and attorneys' fees or other sanctions, including claim or defense preclusion. *See* Fed. R. Civ. P. 37(a)(4); Minn. R. Civ. P. 37.01(d). It is not uncommon for parties to negotiate protective orders to avoid the need to bring a motion to compel. Before a motion to compel can be brought, the party bringing the motion must make a reasonable effort to confer with opposing counsel and resolve the issue. *See e.g. Minn. Gen. R. Practice 115.10.* Failure to do so may result in the motion being dismissed. *Haselhorst v. Wal-Mart Stores, Inc.*, 163 F.R.D. 10,11 (D. Kan. 1995).

VI. CONSIDERATIONS ON SUMMARY JUDGMENT

****NOTE: Everything you do in discovery and information gathering is about winning summary judgment.**

A. Plaintiff's Deposition is Key

- Remember the elements of the employee's claim and the employer's defenses

- Remember to get all relevant information - "is there anything else on which you base your claim?"

B. Affidavits v. Deposition v. Doing Nothing – The Employee's Witnesses

Ask yourself:

- Will the affidavit testimony of former employees create a genuine issue of material fact precluding summary judgment?

- As an employer's lawyer, is it better to depose those former employees to "box them in" and possibly impeach them or show lack of foundation. Or, is it better not to create more of a record of negative testimony if you believe you know what they're going to say?

- As an employer's lawyer, is it worth deposing witnesses identified by the employee if there is a good chance that those witnesses will not submit an affidavit on behalf of the employee?

- As an employee's lawyer, do you show all of your cards at summary judgment, by submitting affidavits, or do you "save" some information for trial. And, should you have already revealed statements/affidavits from those supportive witnesses long before summary judgment?

ATTACHMENT 2

SAMPLE INTERROGATORIES -- EMPLOYER TO EMPLOYEE

1. Identify each employer, including self-employment, by whom you have been employed within ten years prior to your employment with Defendant and by whom you have been employed subsequent to your separation of employment from Defendant. As to each, identify the employer and state the dates of employment, the terms of your compensation, including benefits, the name(s) of your supervisor(s), a description of your job responsibilities, the date of termination, and the reasons why your employment ended.

2. Identify all employment you applied for during your employment with Defendant and subsequent to your separation from Defendant. As to each, identify the employer and the date on which you applied for employment, the job you applied for, the compensation and benefits offered and requested by you, the date on which you received an offer of employment, if any, and the date on which you accepted or declined an offer of employment, if any.

3. Describe in detail all income or benefit loss you allege you have suffered as a result of the conduct alleged in your Complaint and any efforts you have made to mitigate any of your alleged damages.

4. Describe in detail the emotional distress you allege in your Complaint. In particular,

   a. Describe in detail the nature and symptoms of the emotional distress you allege to have suffered;

   b. Identify the name and address of each physician or health care professional, including all doctors, therapists, counselors, psychiatrists, and psychologists, who has treated you from January 1, 1989 through the present, and the dates on which you were treated by each physician or health care professional;

   c. Identify each hospital or other facility in which you received in-patient treatment, the dates upon which you were admitted and released and the physician or health care professional by whom you were treated; and

d. Identify all medical records relating to any treatment you have received from any doctor, counselor, therapist, psychiatrist, psychologist or other health care provider, for the period January 1,1989 through the present.

6. Identify each and every person believed by you to have knowledge relative to the allegations made in your Complaint or in Defendants' Answer, including each person's address and telephone number, and describe in detail the substance of that knowledge.

7. State the name, address and telephone number of each person whom you expect to call as a witness at trial. For each such person, state the subject matter and substance of the facts to which he/she is expected to testify at trial.

8. State the name, address and telephone number of each person, including but not limited to current or former employees of Defendant (and their representatives) and friends or family members, with whom you have discussed this matter and the allegations you have made in this case. For each such person, state the date, place and substance of each conversation you have had and provide any statements this person has made to you or otherwise with respect to this matter or any allegations you have made in this case.

9. State the name, job title, place of employment, business address and field of expertise of each expert witness whom you have contacted with regard to this matter. For each such person named, state the expert's qualifications, the purpose of the contact, and the subject matter and substance of the facts to which he/she is expected to testify at trial.

10. Identify each document you intend to rely upon at trial or which supports the allegations in your Complaint.

11. Describe and identify with specificity each and every instance or occurrence during your employment with Defendant where you believe that you were discriminated against based on your sex and state the basis for that belief.

12. Describe and identify with specificity each and every instance or occurrence during your employment with Defendant where you believe that you were retaliated against and state the basis for that belief.

ATTACHMENT 2

SAMPLE INTERROGATORIES FROM EMPLOYEE TO EMPLOYER

Sally Smith

Plaintiff,

PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANTS

vs.

XYZ Corporation, Tom Jones and Robert Blue,

Defendants.

TO: DEFENDANTS ABOVE NAMED AND THEIR ATTORNEYS (ASSUME REPRESENTED BY ONE LAWYER, OR THE INTERROGATORIES WOULD BE SEPARATE)

PLEASE TAKE NOTICE that in accordance with Rule 33 of the Rules of Civil Procedure, Plaintiff Sally Smith requests that Defendants XYZ Corporation, Tom Jones and Robert Blue, answer under oath the following interrogatories within thirty (30) days of the date of service hereof. These interrogatories are to be deemed continuing so as to require supplemental answers if additional information is obtained by or becomes known to Defendants or anyone acting on Defendants' behalf, such additional information to be provided immediately.

DEFINITIONS AND INSTRUCTIONS

The following interrogatories are to be read, interpreted, and answered with reference to the following definitions and instructions:

1. "You" or "your" means and refers to Defendants XYZ Corporation, Tom Jones and Robert Blue and all of their agents, employees, employers, representatives, insurers, attorneys, and all other persons or entities acting on their behalf.

2. "Person" means a natural person, corporation, partnership, government (or any agency thereof), quasi-public entity, proprietorship, joint venture, trust or estate, and any other form of legal entity.

3. "Representative" means a present and/or former director, officer, employee, agent, attorney, accountant, and any other person acting on behalf of the designated person.

4. "Source" means each document and each person from whom you gained or obtained your facts or information, or on which you base your belief.

5. The term "document" has the broadest meaning that can be ascribed to it pursuant to the Rules of Civil Procedure. Among other things, the term "document" refers to and includes the final form and all drafts and revisions of any type of written or graphic matter, original or reproduced, and all copies thereof which are different in any way from the original, regardless of whether designated "confidential," "privileged," or otherwise restricted. Without limiting the generality of the foregoing, the term "document" includes books, papers, letters, telegrams, memoranda, communications, minutes, notes, e-mail, electronic mail, voice mail, electronic bulletin board postings, electronic records of any sort including metadata concerning such records, schedules, tabulations, vouchers, accounts, statements, affidavits, reports, abstracts, agreements, contracts, diaries, calendars, plans, specifications, drawings, sketches, photostats, photographs, charts, graphs and other similar objects, and any kind of transcript, transcription or recording of any conversation, discussion or oral presentation of any kind, and any information stored on, and reproducible in documentary form from a computer or other electronic, magnetic, optical or laser based information storage device, including but not limited to floppy disks, hard disks, zip drives, tapes, or CD-ROM.

6. "Identify," when used with respect to a person, means to give the person's name, present or last known address and telephone number, and the position and business affiliation of the person at the time of this action and at the time of the matters alleged in this action.

7. "Identify," when used with respect to a corporation or other form of business organization, means to state the name of such corporation or business organization, the address

of its principal place of business, its state of incorporation or formation, and the identity of all individuals who acted on its behalf in connection with the matters alleged in this action.

8. "Identify," when used with regard to a document or writing, means to give the type of document or writing (for example, letter, memorandum, telegram, chart, report), date originated and/or identifying symbol to identify the author, addressee, and each recipient of such document or writing.

9. "Describe," when used with respect to a communication, a meeting, an act or conduct, means to give, state, or identify the following:

9.1. The date of the communication, meeting, act or conduct, where it took place, the identity of each participant and the identity of each person who was present;

9.2. If a communication or meeting, the identity of the person making the particular statement so listed, the mode of communication (for example, in writing, telephone, or in person), and the location of each of the participants; or

9.3. If an act or conduct, the details of the act or conduct being described and what each person participating in such act or conduct did.

10. If any information, whether or not written, is responsive to any of the following interrogatories, and is withheld based on any claims of privilege, describe generally the substance or subject matter of the information, communication or document withheld, state the date of the communication or document, state the privilege being relied upon or claimed and the basis therefor, identify the persons involved, and identify all persons or entities who have had access to such information, communication or document.

11. The request for identification of information includes any information within the files of attorneys, accountants, and other agents.

12. If the answer to any interrogatory is that you lack knowledge of the requested information, describe all efforts that you have made to obtain the information necessary to answer the interrogatories.

CONTINUING NATURE OF INTERROGATORIES

Each of the following interrogatories is a continuing one. If subsequent to serving an answer to any interrogatory you obtain or become aware of further information pertaining to the subject matter of the interrogatory, you are required to serve amended answers upon Plaintiff setting forth such information.

INTERROGATORIES

1. Identify each person who assisted in the preparation of the answers to these Interrogatories and for each, identify which interrogatory number(s) that person provided assistance.

2. Identify any witnesses you intend to call at trial in this matter and state in summary form the content of their expected testimony. This Interrogatory is specifically deemed to be continuing to date of trial. Plaintiff will object to any witnesses produced and not listed in your response or supplementary response.

3. Identify all persons with knowledge of the facts and allegations set forth in the Complaint and/or Defendants' Answer or with knowledge of any allegations or events referred to therein and describe in summary form the nature of that knowledge.

4. For each person named in your Answer to Interrogatory No. 3, state:
   a. Employer and current job title;
   b. If such person was ever employed by Defendant XYZ Corporation, the starting and ending date(s) of employment;
   c. Whether the person has been interviewed by Defendants as a witness to any of the matters or events referenced either in the Complaint or Defendants' Answer;
   d. Whether any notes were taken during said interview by Defendants;
   e. Whether a written or recorded statement has been given by said witness, and if so, provide a copy of the statement.

5. Identify each and every person who has participated in any kind of investigation on behalf of Defendants of the incidents complained of by Plaintiff in this case and describe the facts learned through such investigation.

6. From 2000 to the present, identify and describe in detail each complaint made to or received by Defendants involving gender discrimination, sexual harassment, retaliation (a/k/a reprisal) and/or age discrimination including the date each complaint was made, the identity of the alleged perpetrator, the steps taken (if any) by Defendants to investigate the complaint, the remedial action taken (if any) by Defendants to respond to the complaint, and the manner in which said complaint was resolved. For purposes of this interrogatory, the term "complaint" means any lawsuit, administrative charge or

complaint filed with the Equal Employment Opportunity Commission, Minnesota Department of Human Rights or any other state or local human rights or civil rights commission or agency, any demand letter alleging age discrimination, gender discrimination, sexual harassment or retaliation (a/k/a reprisal) and/or any internal complaint of age discrimination, gender discrimination, sexual harassment or retaliation (a/k/a reprisal) that was submitted either informally or pursuant to company policies or procedures.

7. Describe in detail any charges or complaints (if any) made against Plaintiff at any time during her employment with Defendant XYZ Corporation, including the specific nature of the charge or complaint, the date it was made, the identity of the complainant, the individual receiving the complaint, the action taken (if any) by Defendants to investigate the complaint, the remedial action taken (if any) by Defendants to respond to the complaint and the manner in which it was resolved.

8. Identify and describe with particularity and in detail any and all communications and/or discussions during Plaintiff 's employment with Defendant XYZ Corporation relating to Plaintiff's performance, discipline and/or termination and identify any and all persons involved in those communications.

9. Describe in detail any and all disciplinary measures taken by Defendants, including but not limited to written and oral warnings, informal discussions, reprimands and suspensions against Tom Jones and/or Robert Blue at any time during their employment with XYZ Corporation. Include in your answer the dates and the reasons for such disciplinary measures, and describe what type of corrective action was taken (if any) by Defendant XYZ Corporation and/or warning(s) were provided by Defendants XYZ Corporation to either Tom Jones or Robert Blue. If the employment of either Defendant Jones or Blue has been terminated, describe the facts relating to the basis for the termination of employment and identify all persons who participated in the decision related to termination.

10. Excluding Plaintiff, identify each and every person from 1990 to the present who was employed at XYZ Corporation as a creative technician,[1] or who performed any of the duties of a creative technician, the dates of employment and whether that person was a full time, part time or free lance creative technician. As to creative technicians who were employed at XYZ Corporation at any time between 1995 and the present provide the reason for termination of employment.

11. For each person identified in your Answer to Interrogatory No. 10 who was employed by Defendant XYZ Corporation at any time from 1995 to the present:

    a. Identify each person's position and job responsibilities including, if applicable, the projects they worked on as a creative technician;

[1] We are assuming the position Plaintiff Sally Smith held was creative technician. Typically, it would be best to have a separate definition in the definition section of the Interrogatories specifically defining the term "creative technician," including describing job duties of a person who holds that position.

b. If changes occurred as to the person's job responsibilities, or the projects to which the person was assigned, identify each such change, the dates of each changes and the person responsible for the change; and
c. Identify any and all performance deficiencies documented by Defendants as to that employee's performance, personality or other issues.

12. For each person who was employed by Defendant XYZ Corporation as a creative technician at any time from 1995 to the present:

a. Identify and describe the rate of compensation paid to the creative technician for each year 1995 to the present.
b. Identify and describe the total compensation paid to the creative technician for each year 1995 to the present.
d. The total revenue generated for Defendant XYZ Corporation by each creative technician for each year from 1995 to the present.

13. State whether Defendant XYZ Corporation has provided supervisors with policies, procedures, training or guidelines for evaluating employees at XYZ Corporation at any time since 1990 and identify and describe all policies, procedures, training programs or guidelines Defendant XYZ Corporation maintained concerning the evaluation of its employees.

14. Identify any and all instances and individuals involved, at any time, where Defendant XYZ Corporation has terminated an employee for personality clashes or a lack of effective interpersonal skills.

15. Identify and describe in detail all company policies in force at XYZ Corporation from 1990 through the present concerning job performance, ratings, and/or personality or interpersonal skills requirements for work.

16. Identify and describe in detail any and all performance or personality or interpersonal skills deficiencies of Plaintiff (whether or not reflected in her personnel file), their substance, and the persons responsible for recording, reporting and/or responding to such deficiencies.

17. Identify and describe in detail all statements which were made by Defendants and/or to Defendant XYZ Corporation's personnel regarding the termination of Plaintiff's employment, and by whom and to whom these statements were made.

18. Identify and describe in detail all statements which were made by Defendants, or any of Defendant XYZ Corporation's employees, to any other person regarding the termination of Plaintiff, and by whom and to whom these statements were made.

19. Describe in detail the job description and essential functions of all jobs held by Plaintiff at Defendant XYZ Corporation, and the corresponding dates thereof.

20. Identify and describe, including the premium or payments or other compensation paid by the employer, for health, dental, retirement, disability insurance, life insurance, 401K plan, profit sharing or other benefits that Plaintiff received in connection with her employment, for the years from 1995 to her termination date.

21. Identify and describe, including the premium or payments or other compensation paid by the employer, the health, dental, retirement, disability insurance, life insurance, 401K plan, profit sharing or other benefits provided by the employer and/or made available to creative technicians other than Plaintiff employed by Defendant at the XYZ Corporation, in the ten year time period prior to the date of the termination of Plaintiff's employment.

22. DON'T FORGET ABOUT CONTENTION INTERROGATORIES, SUCH AS "Identify and decribe the factual basis for Defendants' denial in Paragraph 1 of its Answer that . . . . "