

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

LINDSEY WHITNEY,

Plaintiff,

v.

No 1:09-1127-JDB-egb

THE CITY OF MILAN,
TENNESSEE, AND CHRIS
CRIDER in his individual
and official capacities,

Defendants.

ORDER

On referral to the Magistrate Judge for determination is the Defendant City of Milan's Motion for Attorney's Fees [D.E. 85]. Plaintiff has filed her response in opposition [D.E. 103], and Defendant has replied [D. E. 106]. For the reasons stated below this Motion is GRANTED.

Under Rule 37 of the Federal Rules of Civil Procedure, a party may be awarded reasonable attorney's fees as a result of having to obtain an order requiring the production of documents for inspection and for obtaining protective orders. Here the Defendant City of Milan ("Milan") filed a Motion to Compel production of audio recordings secretly made which had been withheld by Plaintiff from her response to Milan's First Set of Interrogatories and Requests for Production of Documents [D.E. 50]. Milan also filed two motions for protective orders [D.E. 42 and 44] and another motion to squash/third

motion for protective order [D.E. 73]. These protective orders resulted from Plaintiff seeking discovery from Milan through thirty-seven (37) requests for admissions, twenty-six (26) of which were directed to the accuracy of specific statements, presumably made by Milan officials and employees in these recordings. This was followed by other, written discovery from Plaintiff which also sought verification of the statements made by the Milan officials and employees.

The issue first presented to this Magistrate Court was **by when** must Plaintiff provide the surreptitious recordings to Milan. Plaintiff argued she was entitled to hold these for impeachment use during discovery and later would provide these for Milan's review in sufficient time to prepare for trial. Milan disagreed on this timing, stating Plaintiff must provide these recordings prior to written discovery and depositions. This Court agreed with Milan and ordered Plaintiff to provide the recordings, and granted protective orders prohibiting Plaintiff's discovery until Milan had adequate time to review these. On appeal, the District Court upheld this Magistrate Judge's determination that Plaintiff should make these recordings available prior to further discovery of Milan. The District Court also pointed out that Plaintiff did not request a protective order against producing the recordings and as such, waived her objection to providing them to Milan.

Because the requested relief was granted, Milan may recover reasonable attorney's fees and costs. In considering whether this Court should award these and to what extent, the Court looks to Fed. R. Civ. P. 37(a)(5)(A). This rule provides that the Court, after giving Plaintiff the opportunity to be heard, **must** require her to pay the attorney's fees and expenses incurred by Milan in making its motions. There are three exceptions permitted in this rule: (1) if Milan filed its motion for discovery or for

protective order before attempting in good faith to obtain this relief without court action, (2) if Plaintiff's actions complained of were substantially justified, or (3) if other circumstances make an award of expenses unjust.¹

In her response opposing this request for sanctions [D.E.103], Plaintiff says that the second exception applies, that her legal position was substantially justified. Plaintiff has not raised the other two exceptions. Counsel for Milan indicates in her Memorandum in Support of Defendant City of Milan's Motion for Attorney's Fees that she attempted in good faith to resolve this by sending a letter on January 20, 2010 and having an exchange of e-mails on January 21 and 22, 2010. Nor does Plaintiff raise the third exception of circumstances in this case that would make the award of expenses unjust.

The authority within the Sixth Circuit on timing of such disclosures as dealt with here, is *Varga v. Rockwell Int'l Corp.*, 242 F.3d 693 (6th Cir. 2001). This case confirmed that a party, after receiving a proper discovery request, cannot withhold documents on the basis of "usable solely for impeachment purpose." There, the Sixth Circuit clearly rejected a contention similar to what has been made here. The Court stated further in *Varga* that Plaintiff's case was "so devoid of merit as to be specious" and "patently wrong."

In the case at hand, Plaintiff's continued effort to withhold secret recordings of Milan officials and employees was contrary to the well-recognized open discovery rules, where gamesmanship with information is discouraged. Moreover, these recordings

¹ Additionally, Milan asserts that Rule 37(d)(3) would require this Court to order Plaintiff to pay the reasonable expenses and attorney's fees of Milan caused by Plaintiff's failure to respond to a Rule 34 request for inspection (the recordings). A requirement of this sanction is that there be a certification that movant, in good faith, conferred or attempted to confer with the opposition to obtain the answer or response without court action. .

should have been made available in accordance with Fed. R. Civ. P. 26(b)(3)(C)(ii), which permits a party or person to obtain their own previous statement about the action.

Finally, the District Court in this case also found that, when Plaintiff was confronted with what she felt was a valid basis for withholding the recordings, she did not assert an objection to the request or file a motion for protective order. *See* Fed. R. Civ. P. 33(b)(2), 34(b)(2). Since she did neither, there was an effective waiver of her objection to the Milan requests, and, therefore, Plaintiff was not entitled to withhold the recordings. Thus, this Court determines that Plaintiff's nondisclosure of the recordings was not substantially justified.

The final element of Rule 37(a)(5)(A)(iii), concerns possible circumstances which would make an award unjust. While not raised, the Court has considered this element of Rule 37 *sua sponte*. A review of documents provided in discovery, revealed information regarding Plaintiff's family and income, all of which convinces this Court that it would work an undue hardship on Plaintiff to award all requested costs against her. Neither does this Court find that this Plaintiff understood or appreciated how the failure to observe procedural rules affected her under these circumstances.

Plaintiff has not objected that the fees sought are unreasonable or excessive, and Defendant has submitted Affidavits from its attorneys detailing the expenses incurred. The Court finds that the fees and expenses of \$5,906.60 by Milan were reasonable and necessary. Based upon the Court's finding that such an amount against the Plaintiff would be unjust, this amount is reduced to \$2,953.30. Accordingly, the Court awards to Milan total costs and expenses of \$2,953.30 incurred as a result of Plaintiff's failure to

comply with Milan's discovery requests, to be assessed against Plaintiff and her counsel jointly.

IT IS SO ORDERED.

s/Edward G. Bryant
EDWARD G. BRYANT
UNITED STATES MAGISTRATE JUDGE

Date: **August 5, 2010**

ANY OBJECTIONS OR EXCEPTIONS TO THIS ORDER MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE ORDER. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.