

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

LINDSEY WHITNEY,

Plaintiff,

v.

No 1:09-cv-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 are (1) Defendant City of Milan's Motion for a Protective Order and/or Motion for Extension of Time to Respond to Requests for Admissions [D.E.42] and (2) Defendant City of Milan's Motion for Protective Order and/or Motion for Extension of Time to Respond to Interrogatories and Requests for Production of Documents [D.E.44], both filed January 26, 2010, as well as (3) Defendant City of Milan's Motion to Compel [D.E.50] filed February 2, 2010. Each of these directly relate to a discovery dispute between Defendant City of Milan and Plaintiff over audio recordings Plaintiff apparently secretly made.

Procedurally, it appears that Defendant City of Milan was first to begin discovery by serving interrogatories and requests for production of documents to Plaintiff on November 27, 2009 (Plaintiff began undertaking her discovery a month later). Plaintiff responded to Defendant City of Milan's document requests 2, 3, 4, 5 and 6 by asserting the exemption available in Fed. R. Civ. P. 26(a)(1)(A)(i) which permits non-disclosure of

witnesses intended for impeachment only. Plaintiff would have been correct in this assertion were this in the context of initial disclosures. However, Plaintiff cannot claim this exemption in the present circumstance, when Defendant City of Milan has sought discovery through specific interrogatories and requests for production of documents. The Sixth Circuit has established in a clear fashion that one party cannot unilaterally decide what evidence is useful only for impeachment when dealing with specific discovery requests. *See Varga v. Rockwell International Corp.*, 242 F.3d 693, 697 (6th Cir. 2001):

We take this occasion to emphasize what Rule 26(b) makes perfectly clear: the recipient of a properly propounded document request must produce all responsive non-privileged documents without regard to the recipient's view of how that information might be used at trial. A party may not, under any circumstances, hold back materials responsive to a proper discovery request because it prefers to use the evidence as surprise impeachment evidence at trial.

In Plaintiff's response to these motions [D.E.54], she now agrees with Defendant City of Milan that these recordings *can* be discovered through specific requests, but disagrees on the point of timing of disclosure. She suggests the better time to make this discovery would be ten (10) days after the depositions of defendants. This she believes would ensure no unfair surprise to Defendant City of Milan at trial, thus serving "the truth-seeking interest of the litigation process." Of course, the practical effect of this suggestion would be to permit Plaintiff to depose witnesses who have had their conversations secretly recorded, without first providing them access to their own statements.

This Court sees no reason to reorder the sequence of discovery, and determines that Plaintiff should respond fully to the discovery of Defendant City of Milan.

As to the *timing* of producing the recordings, the Sixth Circuit through *Varga* has affirmed open discovery and the principles in opposition to gamesmanship and surprises with information, all of which work against the efficiency of the courts. In addition, this Court notes its recent holding in a similar case:

Additionally, fairness and equity considerations weigh in favor of Plaintiff producing the recorded conversation prior to Mr. Land's deposition. The Supreme Court has observed that "[m]odern instruments of discovery . . . [and] pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958); [*4] see also *Rofail*, 227 F.R.D. at 58 ("Open discovery is the norm. Gamesmanship with information is discouraged and surprises are abhorred. Adherence to these principles assists the trier of fact and serves efficiency in the adjudication of disputes.").

Webb v. Windsor Republic Doors, 2009 WL 3757714, *1 (W.D. Tenn. June 25, 2009).

Consistent with precedent, Plaintiff must make these recordings available in response to Defendant City of Milan's discovery requests. Additionally, the Defendant City of Milan or any other person has a right to request a copy of the person's own statement in accordance with Rule 26(b)(3)(C)(ii).

Accordingly, it is ORDERED that Defendant City of Milan's Motion to Compel [D.E. 50] is GRANTED, requiring Plaintiff to identify and produce to Counsel for Defendant City of Milan, as required by Fed. R. Civ. P. 33 and 34, the "recordings" referenced in Plaintiff's responses to the Defendant City of Milan's First Set of Interrogatories and Requests for Production of Documents. Plaintiff must produce these recordings as soon as possible, no later than fifteen days from the date of this Order.

It is further ORDERED that Defendant City of Milan's Motion For A Protective Order and/or Motion for Extension of Time to Respond to Requests for Admissions [D.E. 42] and Motion for Protective Order and/or Motion for Extension of Time to Respond to Interrogatories and Requests for Production of Documents [D.E.44] are GRANTED, such that Defendant City of Milan's response to Plaintiff's Requests for Admissions, Interrogatories and Requests for Production of Documents and other discovery is stayed until thirty (30) days after such time as Plaintiff complies with the requirements pertaining to the "recordings" set forth in this Order.

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

Date: **April 14, 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.