

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

DAVID CLARK,)	
)	
Plaintiff,)	
)	
VS.)	No. 00-1011
)	
TENNESSEE VALLEY)	
ELECTRIC COOPERATIVE,)	
)	
Defendant.)	

ORDER DENYING PLAINTIFF’S MOTION TO ALLOW MUTUAL DISCOVERY
OR, IN THE ALTERNATIVE, LIMITED EXCEPTION TO MAGISTRATE’S REPORT
AND
ORDER ADOPTING MAGISTRATE’S REPORT AND RECOMMENDATION

Plaintiff filed suit against his former employer, Tennessee Valley Electric Cooperative, for allegedly terminating him from his employment on the basis of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., the Tennessee Human Rights Act, T.C.A. § 4-21-101 et seq., and the Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.. On December 26, 2001, Defendant filed a motion to dismiss or, in the alternative, motion to compel Plaintiff to produce certain documents and to reopen discovery. The matter was referred to Magistrate Judge J. Daniel Breen for a report and recommendation on December 31, 2001. Magistrate Judge Breen issued his report and recommendation on March 28, 2002.

Magistrate Judge Breen found that the documents sought by Defendant were relevant to the action and, thus discoverable. He recommended that Plaintiff “be directed to produce the documents in their entirety in accordance with Rule 34, Fed. R. Civ. P., and that discovery be reopened for a period of thirty (30) days thereafter in order to permit defendant to examine and inquire into the materials produced.” Magistrate’s Report and Recommendation at p. 4. Magistrate Judge Breen further recommended that Defendant’s motion to dismiss be denied and that Defendant’s “request for sanctions be held in abeyance until after the documents referred to herein have been produced and reviewed.” Id.

Congress provided for a “clearly erroneous or contrary to law” standard of review of a magistrate's disposition of certain non-dispositive pretrial matters in 28 U.S.C. § 636(b)(1)(A). See Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).¹ Section 636(b)(1)(A) provides as follows:

b)(1) Notwithstanding any provision of law to the contrary--
(A) a judge may designate a magistrate to hear and determine any pretrial

¹ Rule 72 of the Federal Rules of Civil Procedure provides as follows:

a) Nondispositive Matters. A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. 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.

A report and recommendation by a magistrate judge that is dispositive of a claim or defense of a party is subject to de novo review by the district court in light of specific objections filed by any party. 28 U.S.C. §§ 636(b)(1); Fed.R.Civ.P. 72(b);

matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. **A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.**

(emphasis added).

In its motion to dismiss or, in the alternative, motion to compel Plaintiff to produce certain documents and to re-open discovery, Defendant contended that Plaintiff had not provided copies of his “personal work files” during discovery. Plaintiff maintained that Defendant already had copies of these documents.

Plaintiff objects to the report and recommendation to the extent that Magistrate Judge Breen has recommended that “discovery be reopened for a period of thirty (30) days thereafter in order to permit defendant to examine and inquire into the materials produced.” Plaintiff asks that discovery be reopened for both parties. Plaintiff seeks to show, through the depositions of various TVEC board members, that Defendant did, in fact, have the documents in question in its possession.

Plaintiff relies, in part, on an affidavit which is attached to Defendant’s response. The affidavit of Charles Bevis states that Defendant’s board of directors did not retain copies of Plaintiff’s personal work folders, although they did receive monthly board meeting packets. Exhibit A, Defendant’s Response. According to Plaintiff, his “personal work folders” and the “monthly board meeting packets” are the same documents.

Bevis' affidavit was submitted to Magistrate Judge Breen in support of Defendant's reply to Plaintiff's response to the motion to dismiss or to compel. Consequently, the information contained therein was considered by him in making his report and recommendation. Because the report and recommendation is neither clearly erroneous nor contrary to law, the court finds that Plaintiff's limited exception is not well-taken and, is therefore, DENIED. For the same reason, the motion to allow mutual discovery is DENIED.

If Defendant determines that the documents produced by Plaintiff were already in its possession, then the court should be notified in Defendant's supplement to the request for sanctions.

Accordingly, the report and recommendation issued by Magistrate Judge J. Daniel Breen on April 26, 2002, is hereby ADOPTED in its entirety.

IT IS SO ORDERED.

JAMES D. TODD
UNITED STATES DISTRICT JUDGE

DATE