IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LINDA HEINEN

Plaintiff,

vs.

KOHL'S DEPARTMENT STORES, INC. and HOLLY "RENEE" HENSON,

Defendants.

Case No. 18-2-00746-6

MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO COMPEL & SANCTIONS

I. INTRODUCTION & SUMMARY OF ARGUMENT

Defendant Kohl's Department Stores, Inc. (Kohl's) instructed one of its witnesses to not bring documents to a deposition even though those documents were responsive to a subpoena directed at that witness. In fact, Kohl's tried to hide the existence of those documents. For it was only at the deposition that the witness testified to the existence of documents responsive to the subpoena and that Kohl's legal team told him not to bring those documents to the deposition because they were "Kohl's property." Indeed, although in receipt of the subpoena Kohl's neither objected to or moved to quash the subpoena. Ms. Heinen now moves to compel production of the

documents, for sanctions against Kohl's for its attempted concealment of those documents, and for and Order compelling Kohl's to pay for the re-noted deposition of Mr. Brumbles in the event the Court orders production of the withheld documents.

This is an employment discrimination case. Ms. Heinen worked for Kohl's for nearly nine years as a District Manager. (Amended Complaint. ("AC") ¶7, 9) Ms. Heinen alleges that she is an elderly disabled employee with a history of taking extended workplace medical leave and that Defendants fired her on account of those protected characteristics as well as her opposing Defendants' discriminatory treatment of one of her disabled Store Managers, Mike Brumbles. *See generally* Complaint. Defendants deny Ms. Heinen's allegations and claim that Ms. Heinen was fired because of "poor leadership." AC ¶40. Ms. Heinen, consistent with the burden she bears at trial, sought to test whether Kohl's "poor leadership" justification was a pretext, i.e. a fake reason designed cover up Kohl's discriminatory and/or retaliatory reason for firing her. To that end, Ms. Heinen subpoenaed Mr. Brumbles to see what type of leadership he was experiencing at the hands of Jenni Applyard, the younger-than-40-years-of-age District Manager with whom Kohl's replaced Ms. Heinen. AC ¶41-43.

Kohl's listed Mr. Brumbles as a witness but did not disclose Mr. Brumbles' phone number or address. (Crotty Decl. at Ex. A *citing* Kohl's Response to Plaintiff Interrogatory No. 2) Instead Kohl's stated that Mr. Brumbles was to be contacted "c/o Counsel for Defendants." *Id.* To that end, Ms. Heinen served Defendants' attorney with a subpoena duces tecum directed to Mr. Bumbles. (Crotty Decl. at Ex. B) Defendants' attorney accepted Mr. Brumbles' subpoena on August 6, 2019. (Crotty Decl. ¶3)

Mr. Brumbles' deposition occurred on August 26, 2019. At deposition Mr. Brumbles testified that (a) he spoke with an attorney from Kohl's before the deposition, (b) he intended to bring additional responsive documents to the deposition but that (c) he was told not to bring those documents. (Crotty Decl. Ex. C *citing* Brumbles Dep. 13:4-12; 14:5-10) To wit:

> Q. That's okay. Are there other documents that you intended to bring to the deposition today but were unable to do so?
> A. Yes. After reading the subpoena, my understanding was anything that was related was to be brought. We discussed my -- Kohl's lawyer and I, Matt, we discussed what was Kohl's property and what was something that I could bring as my own personal property, and that's what I brought. *Id.* at 13:4-12.

Mr. Brumbles testified that the Kohl's attorney told him not to bring the documents to the deposition because they were company property. (Brumbles Dep. 13:20-25; 14:1-4; 18:21-25; 19:1-7) All told, Mr. Brumbles withheld approximately 20 emails due to Kohl's legal team's instructions not to bring those documents to the deposition. *Id.* at 14:11-20. The emails that Kohl's legal team told Mr. Brumbles not to bring to the deposition were emails regarding complaints Mr. Brumbles made to Kohl's HR about Ms. Appleyard's poor treatment of him, about Mr. Brumbles' disability accommodation requests, about Mr. Brumbles' requests for medical leave, and about Kohl's denial of Mr. Brumbles' request for disability benefits. *Id.* 19:14-25; 20:1.

The documents Kohl's told Mr. Brumbles to not take to the deposition regarding Mr. Brumbles' complaints about Ms. Appleyard were responsive to items 3 and 4 of the subpoena. (Crotty Decl. Ex. B *citing* ¶III to Brumbles subpoena) Further, all of the documents withheld are reasonably calculated to lead to admissible evidence necessary to rebut Kohl's alleged "non-retaliatory/discriminatory" reason for firing Ms. Heinen: "leadership." If Ms. Appleyard (who is less than 40 years old and has no known record of a disability or workplace medical leave) is

allowed to bully workers (like Brumbles) with impunity and is not fired whereas Ms. Heinen (who was never counseled for her alleged "poor leadership" and never bullied Brumbles) was fired for "poor leadership" then a jury can infer that the "poor leadership" is a made up excuse designed to cover up Kohl's illegal animus. Further, the withheld documents regarding Mr. Brumbles' workplace medical leave, medical accommodations, and disability benefit denials are also reasonably calculated to lead to admissible evidence regarding "pattern and practice" evidence in support of Ms. Heinen's case theory. Given that Ms. Heinen alleges that Kohl's fired her because she was old, disabled, and a medical leave taker, Kohl's targeting of Mr. Brumbles, who shares similar protected characteristics is relevant to show that with Heinen out of the picture, Kohl's has now set its sights on Mr. Brumbles who, like Ms. Heinen, took long term medical leave, is over 40, is disabled, and who made a claim for disability benefits. AC ¶15-19, 41. Indeed, "[i]n employment discrimination suits, in which the inner mental motivations behind allegedly discriminatory acts are near impossible to prove, *'pattern and practice'* evidence is both discoverable and admissible to prove discriminatory intent." *Lauer v. Longevity Med. Clinic PLLC*, 2014 WL 5471983, at *4 (W.D. Wash. Oct. 29, 2014)(*citing U.S. Postal Serv. Bd. of Govs. v. Aikens,* 460 U.S. 711, 715–17 (1983); *Heyne v. Caruso,* 69 F.3d 1475, 1479–81 (9th Cir.1995).

Neither Kohl's nor Mr. Brumbles objected to the subpoena. (Crotty Decl. ¶5) Neither Kohl's nor Mr. Brumbles moved to quash the subpoena. (Crotty Decl. ¶5) The parties met and conferred regarding this discovery issue but were unable to reach an agreement. (Crotty Decl. ¶6)

For the reasons stated below, Ms. Heinen's motion should be granted.

II. ARGUMENT

A. Broad discovery is essential in employment discrimination cases.

The scope of discovery is broad in civil litigation matters. *See* CR 26. This is especially so in employment discrimination cases where discovery is even more broad. *Sweat v. Miller Brewing Co.*, 708 F.2d 655, 658 (11th Cir.1983); *Sempier v. Johnson & Higgins,* 45 F.3d 724, 734 (3rd. Cir.1995) ("[I]n particular, we frown upon unnecessary discovery limitations in Title VII, and hence ADEA, cases."). Broad discovery is allowed in employment discrimination cases because "employers rarely leave a paper trail—or 'smoking gun'—attesting to discriminatory intent" and "disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence that cumulatively undercut the credibility of various explanations offered by the employer." *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85 (2nd Cir.1990); *U.S. Postal Serv. Bd. Of Governors v. Aikens,* 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

B. The Court should compel Kohl's to produce the withheld documents because no objection was made to the subpoena and even if there was it would be baseless because there is no "company property" subpoena non-compliance exception.

A person served with a subpoena that commands document production must object to that subpoena with 14 days of being served with it or before compliance is required. CR 45(c)(2)(B). Once the objection is made the subpoenaing party cannot obtain the objected-to documents unless ordered by a court. *Id.* On a timely motion, a court must quash a subpoena that does not require reasonable time for compliance, seeks privileged information, or subjects a party to an undue burden. CR 45(c)(3)(A). On a timely motion, a court may modify a subpoena that seeks "confidential research, development, or commercial information" or an un-retained expert material. CR 45(c)(3)(B)(i)-(ii). Washington's subpoena rule contains no "company property" exception. *See id.*

Kohl's accepted the Brumbles subpoena on August 6, 2019. It did not object to the subpoena. Neither did instruct Mr. Brumbles to object to the subpoena or move to quash the same. Instead Kohl's legal team told Mr. Brumbles to not bring the above-referenced documents to the deposition. It was not until Mr. Brumbles' deposition started that Ms. Heinen's counsel learned that Kohl's lawyers instructed Mr. Brumbles to not bring (or reveal) the above-referenced documents. Accordingly, any objection to the subpoena was waived for failure to make a timely objection or move to quash.

C. Sanctions are appropriate.

Ms. Heinen seeks sanctions against Kohl's. She does not seek sanctions against Mr. Brumbles. The sanctions Ms. Heinen seeks against Kohl's are appropriate because:

- Kohl's, via its discovery responses, would not disclose Mr. Brumbles' contact information and instructed Ms. Heinen's counsel to contact Kohl's counsel if she wanted to contact Mr. Brumbles.
- Kohl's accepted the subpoena to Mr. Brumbles.
- Kohl's instructed Mr. Brumbles to not bring the documents to the deposition.
- Kohl's did not object to the production of the documents Mr. Brumbles deemed responsive to the subpoena even though it was capable of doing so.
- Kohl's did not move to quash the subpoena to protect the production of its "company property.'
- Mr. Brumbles (a current employee of Kohl's) had no meaningful choice to resist Kohl's legal team's demand that he not produce the documents.
- Kohl's legal team, who instructed Mr. Brumbles to not bring the documents to the deposition, did not tell Ms. Heinen's attorney of that instruction or the existence of the withheld documents.

There is no known Washington case addressing the issue of an attorney interfering with a third party subpoena. However, Washington courts look to federal court decisions when interpreting certain civil procedure rules. *See generally Casper v. Esteb Enters., Inc.*, 119 Wn.App. 759, 767 (2004). To that end, a federal court in Tennessee ruled as follows in a case where a party

attempted to prevent a subpoenaed party from producing documents that were subject to the subpoena:

> By interfering with American Apparel's subpoenas to the third-parties, [Plaintiff] has violated Federal Rules of Civil Procedures 45. As an initial matter, the docket reflects that [Plaintiff] is proceeding *pro se* and that [Attorney] is not [Plaintiff's] counsel in this matter. [Attorney] also verbally confirmed to [Defendant] that he did not prepare the "Objection to Disclosure of Documents," that was sent from [Plaintiff's] email address to Union University and the University of Tennessee.
>
> ...
>
> ***Even assuming that [Attorney] did indeed send or authorize the "Objection to Disclosure of Documents," to the third-parties, such an action is a clear violation of Rule 45***. Pursuant to Federal Rule of Civil Procedure 45(a)(1)(D), [Defendant] is permitted to subpoena a non-party to produce documents. The non-party may object, respond, or move to quash the subpoena. Fed.R.Civ.P. 45(d). An adversary to the party seeking information may also move to quash the subpoena provided that "the adversary has a personal right or privilege to the information sought." *Price v. Trans Union, LLC,* 847 F.Supp.2d 788, 794 (E.D.Pa.2012)(citing Fed.R.Civ.P. 45(d)(3)). ***Rule 45 does not contemplate that the adversary of the party seeking information may advise the non-party commanded by the subpoena to ignore the subpoena's command. See Fed.R.Civ.P. 45***; *Price,* 847 F.Supp.2d at 794. This is precisely what [Plaintiff] did when she sent emails asking the non-parties to "not prepare any documents, release any information, and [ ] not verify any information." Such an action is in "willful bad faith" because the emails were sent in direct violation of the procedure set out in Rule 45. *See Price,* 847 F.Supp.2d at 794–96 (sanctioning the attorney because by sending letters to subpoenaed third-parties, the attorney "took it upon himself to limit or attempt to quash the subpoenas" (internal quotation marks omitted)); *Fox Indus., Inc. v. Gurovich,* 2006 WL 2882580, at *8–10 (E.D.N.Y. Oct. 6, 2006)(sanctioning the attorney for sending letters to the subpoenaed third-parties and holding that the letters constituted an abuse of process).
>
> ***[Plaintiff's] conduct is a clear attempt to subvert the discovery process. If [Attorney] indeed authorized the letters sent via [Plaintiff's] email to the subpoenaed third-parties, he would be subject to sanctions.*** *Moses v. Am. Apparel Retail, Inc.*, 015 WL 4665968, at *12 -13 (W.D. Tenn. Aug. 6, 2015).

Here Kohl's attorney - - as opposed to the *pro se* plaintiff in *Moses v. Am Apparel* - - instructed Mr. Brumbles to not bring in excess of 20 emails to the deposition because they were

"Kohl's property." No objection or motion to quash was made. Neither CR 45 or its federal equivalent allow a party or its attorney to subvert the subpoena process in such a manner. Other courts are in accord holding "[n]owhere in [FRCP 45] is it contemplated that the adversary of the party seeking the information may advise, ***no matter the reasons***, the person commanded by the subpoena to produce the information to ignore the subpoena's command." *Price v. Trans Union, L.L.C.*, 847 F. Supp. 2d 788, 794 (E.D. Pa. 2012)(sanctioning attorney who sent letters to subpoenaed witnesses advising witnesses not to respond to subpoenas)(emphasis added). The same holds true for CR 45: there is simply no carve out that allows a party to advise a person commanded to produce documents pursuant to a subpoena not to produce documents called for under the subpoena.

Washington Court Rule 37(a)(3) allows a party to seek an order compelling discovery in the county where the case is pending when the party gives an evasive answer to a discovery request. Additionally, the Court has the inherent power to sanction attorneys for bad faith conduct. *Greenbank Beach & Boat Club, Inc. v. Bunney*, 168 Wash. App. 517, 525 (2012). Under either mechanism, CR 37 or the Court's inherent powers, sanctions against Kohl's is proper.

Ms. Heinen sought discovery, via subpoena, and Kohl's attorney instructed the subpoenaed party to not only not produce the responsive documents but, in essence, hide the existence of the non-produced documents. Simply put, Kohl's attorney interfered with the subpoena to Mr. Brumbles. Courts in closely analogous circumstances have found such conduct sanctionable and this Court should do the same. In the event the Court grants the motion then it, after opportunity for hearing, should require Kohl's to pay reasonable expenses incurred with obtaining the relief sought. CR 37(a)(4). Ms. Heinen requests attorneys' fees associated with

bringing this motion as well as the cost necessary to re-take the deposition of Mr. Brumbles in the event the Court orders the documents produced.

IV. CONCLUSION

Plaintiff's motion should be granted.

DATED this 10/3, 2019.

CROTTY & SON LAW FIRM, PLLC

By: _____

Matthew Z. Crotty, WSBA No. 39284
905 West Riverside Ave. Ste. 404
Spokane, Washington 99201
Telephone No. 509.850.7011

CERTIFICATE OF SERVICE

The undersigned hereby certifies on the date below written, I caused a true and correct copy of the foregoing document to be served on the following attorney, via the method indicated:

Adam Pankratz
Ogletree Deakins P.S.
1201 Third Avenue, Suite 5150
Seattle, WA 98101
Phone: 206-693-7051
Fax: 206-693-7058

Via Email (per agreement)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on 10-4-19, at Spokane, Washington.

Matt Crotty