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# Discovery Requests in Employment Litigation After Amended Rules 26(b) and 34(b)

Drafting or Responding to Interrogatories, Requests for Production of Documents or Admission of Facts, and Third-Party Subpoenas

WEDNESDAY, JANUARY 19, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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# DISCOVERY REQUESTS IN EMPLOYMENT LITIGATION UNDER RULES 26(B) AND 34(B)

# Today's Focus

**Changes made in 2015 to Rule 26(b)**

- Discovery Scope and Limits
- Proportionality

**Changes made in Rule 34(b) and (c)**

- Requests for Production of Documents and Responses/Objections

**Impact of these changes on two particular types of matters**

- Sexual harassment in #MeToo era and restrictive covenant enforcement

# Rule 26(b)(1)

Discovery Scope and Limits – Scope in General

- Addition of proportionality to the scope of discovery under Rule 26(b)(1): "Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense ***and proportional to the needs of the case***, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."
- **Eliminates**: "Relevant information need not be admissible at the trial if the discovery appears ***reasonably calculated to lead to the discovery of admissible evidence***."

# Committee Notes reflect reasons for these changes to Rule 26

"Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition."

…

"The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available."

# Committee Notes reflect reasons for these changes to Rule 26 (continued)

- "The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation on the scope of discovery." The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision ..." The "reasonably calculated" phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery."

# Rule 34(b) and (c)

Responding and objecting to requests for production of documents

- "For each item or category, the response must either state that inspection and related activities will be permitted as request or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response."
- "An objection must state whether any responsive materials are being withheld on the basis of that objection."

# Committee Notes reflect reasons for these changes to Rule 34

- "The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad.

Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters 'withheld' anything beyond the scope of the search specified in the objection."

# *Popat v. Levy, 15-CV-1052 W(Sr)* (W.D.N.Y. Nov. 3, 2020)

- The rule was amended to encourage judges to be more aggressive in identifying and discouraging discovery overuse by emphasizing the need to analyze proportionality before ordering production of relevant information.

# *Gilead Sciences, Inc. v. Merck & Co, Inc.*, *Case No. 5:13-cv-04057-BLF* (N.D. Ca. Jan. 13, 2016)

- Court recognized that proportionality under the Federal Rules is nothing new
- "No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. … Instead, a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case."

# *Gilead Sciences, Inc. v. Merck & Co, Inc.*, *Case No. 5:13-cv-04057-BLF* (N.D. Ca. Jan. 13, 2016)

- Defendant filed a motion to compel information re compounds related to its patents
- Court reasoned that the requests were disproportionate under Rule 26(b)(1)
- If the requests were permissible, plaintiff would have to produce "discovery on all sorts of compounds that bear no indication of any nexus to the disputes in this case."
- Court analogized the situation to requiring GM to produce discovery on Buicks and Chevys in a patent case about Cadillacs simply because all three happen to be cars
- Court denied defendant's motion to compel given the relevant information already produced, the lack of any reason to doubt the proof already offered by plaintiff, and the cost and potential delay caused by the requested production

# *United States v. Real Prop. Located at 6107 Hogg Rd.*, Case No. 1:11-cv-00300-CWD (D. Idaho Jan. 13, 2017)

- "No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. In fact, the old language to that effect is gone. Instead, a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case."

# Proportionality Standard Expectations

- Courts expect that parties will focus on proportionality analyses in attempt to resolve discovery disputes
- These factors should be taken into account in preparing discovery requests, responses, and objections and during meet and confer sessions
- When raising discovery issues with the court, parties should provide specific, factual support for arguments regarding proportionality factors
- Courts appear willing to curtail otherwise "relevant" discovery after considering proportionality factors – think about whether discovery is likely to be marginally relevant, highly relevant, or somewhere in between

# *Smith v. Turbocombustor Tech., Inc., 338 F.R.D. 174, 176 (D. Mass 2021)*

- "Factors that must be considered in weighing proportionality include the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

- "The scope of the subpoenas themselves is problematic. In each of the subpoenas, the Company seeks 'all documents, electronic or otherwise,' regarding Smith's employment and separation, if applicable, including but not limited to six broad categories. They seek information from employers for whom Smith worked as far back as eleven years ago. Such requests are plainly overbroad and impermissible."

- Denied all records from prior and future employers.

# *Wagoner v. Lewis Gale Med. Ctr., LLC, Civil Action No. 7:15cv570* (W.D. Va. July 13, 2016)

- Wrongful termination case based on claims related to discrimination, retaliation, and failure to accommodate in violation of the Americans with Disabilities Act
- Plaintiff worked as a security guard for defendant for approximately two months
- Plaintiff filed motion seeking to compel defendant to conduct a search of its computer systems for ESI maintained by two custodians during a four-month time period
- Plaintiff also proposed search terms that included the plaintiff's name in conjunction with other sets of limiting terms like ADA or disabled or disability or security, etc.

# *Wagoner v. Lewis Gale Med. Ctr., LLC, Civil Action No. 7:15cv570* (W.D. Va. July 13, 2016)

- Defendant did not have the technical capability to perform the type of global search requested and obtained an estimate of more than $20,000 from a third party vendor to collect the requested ESI with an additional $24,000 estimated for review fees
- Defendant argued the discovery was not proportional because plaintiff worked as a security guard for only two months and his potential damages would be less than the cost to perform the ESI search
- Defendant already produced emails gathered manually by the custodians

# *Wagoner v. Lewis Gale Med. Ctr., LLC, Civil Action No. 7:15cv570* (W.D. Va. July 13, 2016)

- Court found that the burdens and costs of obtaining the ESI did not render it not reasonably accessible and that defendant failed to show that the discovery was not proportional
- Importantly, defendant failed to provide any information regarding how a more targeted search could reduce the ESI cost estimates
- Court also noted that it would be difficult to find an undue burden or disproportionate requests simply because defendant apparently chose to use a system that did not automatically preserve emails for more than three days and did not preserve emails in a readily searchable format, making it expensive to produce them

# *Wagoner v. Lewis Gale Med. Ctr., LLC, Civil Action No. 7:15cv570* (W.D. Va. July 13, 2016)

- If arguing requests are disproportionate, propose reasonable alternatives
  - "Proportionality consists of more than whether the particular discovery method is expensive"
  - "Here, defendant advances no other reasonable alternative to obtain the requested information"
  - The court found that the request was proportional to the needs of the case where the request was limited to two custodians, by search terms, and by time period

# *Continental Casualty Co. v. J.M. Huber Corp., Civil Action No. 13-4298 (D. N.J. Dec. 19, 2017)*

- Matter involved a motion by non-party to quash a Rule 30(b)(6) subpoena and for entry of a protective order
- Of note, court cites to pre-amendment language regarding relevancy to the subject matter of the action
- "Discovery sought via a subpoena issued pursuant to Rule 45 must fall within the scope of discovery permissible under Rule 26(b)."
- Party issuing subpoena "must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena" – Rule 45(d)(1)
- Non-party failed to state its objections with specificity or articulate any specific harm; accordingly, its motion to quash was denied, but the court did limit some of defendant's inquiries

# *Henry v. Morgan's Hotel Group,* 15-CV-1789 (ER)(JLC)(S.D.N.Y. Jan. 25, 2016)

- Applying the new "proportionality" standard, the Court quashed a subpoena served by a defendant in an employment action which sought the production of plaintiff's employment records from three former employers.
- In its ruling, the Court observed that the prior standard—"reasonably calculated to lead to the discovery of admissible evidence"—had been "long relied on by counsel to seek wide-ranging discovery," but that the new proportionality standard eliminated such tactics.
- Consider proportionality when preparing your document requests. What was once allowable may no longer be.

# *Agerbrink v. Model Serv. LLC,*
## 14-CV-7841 (JPO) (JCF) (S.D.N.Y. Mar. 8, 2017)

- Requests for any and all documents on a broad topic are presumptively improper.
- "all documents reflecting, containing, or constituting any agreement or contract (whether written or oral, formal or informal) between Defendants and any or all MSA Fit Model(s), including any agreement concerning the provision of fit modeling services, management, management agreement, model management agreement, compensation, talent management agreement, or concerning the full or partial release, waiver, or limitation of rights or claims (including all documents concerning any associated payment related thereto)."

# *Agerbrink v. Model Serv. LLC,*
## 14-CV-7841 (JPO) (JCF) (S.D.N.Y. Mar. 8, 2017)

- The benefits of the discovery plainly outweighs the burden.
- The factor of relative access to relevant information likewise favors the additional discovery.

# *In Black v. Buffalo Meat Service, Inc.*, No. 15-cv-1789, 2016 U.S. Dist. WL 4363506, (W.D. NY, August 16, 2016)

- The court rejected overbroad document requests by a plaintiff in a single-plaintiff employment discrimination case.
- Defendant had already produced documents from the EEOC file and stated their intention to produce additional materials related to salaries/earnings for comparable subjects.
- Plaintiff sought to compel the production of, among other things, "all documents concerning statements of racial, ethnic or sexual references," "all documents regarding any employee being absent from work," and "all documents concerning complaints about ten employees."

# *In Black v. Buffalo Meat Service, Inc.*, No. 15-cv-1789, 2016 U.S. Dist. WL 4363506, (W.D. NY, August 16, 2016)

- Plaintiff did not indicate whether the documents Defendant had already produced were sufficient for the needs of the case. Instead, Plaintiff argued that her request was proportional because they sought information that was "relevant to her claims."

- The Court found that defendant's production was sufficient and proportionate given the nature and scope of this action.

# *After Amendments to Rule 26(b), Ask . . .*

- Are the requests sufficiently limited to seek relevant matter? Consider whether similar information has already been produced. Have support based on claims or defenses as to why the information is relevant
- What are the likely burdens associated with the requests? Consider whether information can be located in a less burdensome manner
- Can the requests be limited? Meet and confer with opposing parties to attempt to limit requests based on custodians, geography, time period, search terms

# Objecting and Responding to Discovery Requests

**Key Points:**

- Develop an early understanding of the client's possible sources of information, including IT infrastructure and physical document storage systems
- Understand the facts of the case and the applicable law so that you can state objections with the required degree of specificity

*You need to be able to tell the story behind your objections and responses.*

# Objections: Rules 33 and 34

Fed. R. Civ. P. 33(b)(4) (Objections to Interrogatories)

- "The grounds for objecting to an interrogatory must be stated with specificity."

Fed. R. Civ. P. 34(b)(2)(B) and (C) (Objections to Requests for Production)

- "… For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons…"
- "… An objection must state whether any responsive materials are being withheld on the basis of that objection…"

# Stating Objections with Specificity

Fed. R. Civ. P. 26(b)(1): "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is [1] **relevant to any party's claim or defense** and [2] **proportional to the needs of the case**, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit…"

The Rule *does not* provide that requests are appropriate if they are "reasonably calculated to lead to the discovery of admissible evidence." That language was removed in the 2015 amendments, but many still (wrongly) use it to defend against objections.

# Stating Objections with Specificity: Relevance

Need to be able to *tell the story* of why a request is seeking irrelevant information:

- Requires knowing (as much as you can) about the facts of the case and the underlying law

As we saw in *McCort*, failure to describe even well-founded objections with the required specificity can lead to waiver of the objection.

# Stating Objections with Specificity: Relevance

*Hay v. ALH Administrative Serv's*, 2017 WL 10058555 (M.D. Fla. Feb. 24, 2017)

- Plaintiff filed suit alleging he was retaliated against for trying to take FMLA leave.
- Defendant served RFPs seeking all "documentation, correspondence, and communications" relating to his subsequent employment with three other companies.
- Plaintiff agreed to produce his tax records for subsequent years in order to show damages, but objected that the requests were otherwise irrelevant because they had no bearing on whether the defendant retaliated against him for trying to take FMLA leave.
- The court agreed, though noted that the objections *arguably* failed to contain the requisite specificity and cautioned plaintiff that failure to adequately state his objections in the future could result in waiver.

# Stating Objections with Specificity: Relevance

*Walsh v. Doner Int'l. Ltd., Inc.*, 336 F.R.D. 139 (E.D. Mich. 2020)

- Plaintiff filed suit alleging she was terminated due to her age. Defendant contended that plaintiff was terminated as a result of necessary cost-cutting measures due to decline in revenues from her department.
- Plaintiff sought discovery of a list of *all* employees terminated or laid off during a four-year period (2015-2019). Defendant objected that this was irrelevant, contending that only terminations within plaintiff's department were relevant.
- Based on evidence that the decision to terminate plaintiff was made, in part, by the CEO and was not "just a unit decision" made by the supervisor of plaintiff's department, the court held that the requested list was relevant and discoverable because the evidence suggested plaintiff's termination was connected to a company-wide, rather than "unit"-wide policy or practice.

# Stating Objections with Specificity: Proportionality

Proportionality factors from FRCP 26(b)(1):

1. The importance of the issues at stake in the action
2. The amount in controversy
3. The Parties' relative access to relevant information
4. The parties' resources
5. The importance of the discovery in resolving the issues
6. Whether the burden or expense of the proposed discovery outweighs its likely benefit

"[A] party seeking to resist discovery on [proportionality] grounds [] bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by Rule 26(b) by coming forward with specific information to address – insofar as that information is available to it – [these factors]." *Mir v. L-3 Comm's Integrated Sys., L.P.*, 319 F.R.D. 220 (N.D. Tex. 2016)

# Stating Objections with Specificity: Proportionality

*Metcalf v. Yale University*, 2017 WL 627423 (D. Conn. Feb. 15, 2017)

- Plaintiff sued alleging he was terminated because of his age. Defendant claimed that plaintiff was terminated for sexual harassment and related inappropriate misconduct
- Plaintiff sought production of "all documents" relating to 29 complaints of sexual harassment (only one of which was against the plaintiff) arguing that they were relevant to show that plaintiff was treated differently than other similarly situated employees
- Defendant objected that the request was disproportionate to the needs of the case, noting that, in another similar case, "all documents" relating to *just one* complaint required collection and review of 20.8 GB of material, totaling over 2,000,000 pages, and that responding to the request would likely require collection from at least 90 separate custodians.
- The court upheld the proportionality objection, and ordered a more limited production of materials.

# Stating Objections with Specificity: Proportionality

*Duggan v. Towne Properties Group Health Plan*, 2016 WL 11269776 (S.D. Ohio July 27, 2016)

- Putative class action ERISA suit against former employer and group health plan administrator alleging failure to provide proper notice of adverse benefit determinations.
- In an effort to justify class certification, Plaintiff sought to require the plan administrator to produce a sample of all benefit determinations and associated records made to 400 people over a 7-year period.
- Plan administrator objected that this was disproportional to the needs of the case, noting that the request would include records having to do with the *propriety* of the adverse benefit determinations and not just whether they were given, and that it would require at least 300 hours of employee time to compile the necessary records.
- Court agreed, and ordered a more limited production of records pertaining to only 200 people.

# Stating Objections with Specificity: Failure Can Result in Waiver

*Holcombe v. Advanced Integration Technology*, 2018 WL 3819974 (E.D. Tex. Aug. 10, 2018)

- Plaintiff sued former employer for age discrimination.
- Court overruled defendant's "boilerplate" and non-specific objections to nearly every request and deemed them waived.
- With limited exceptions, the court did not even bother *assessing* the propriety of the requests.
- As a result, defendant had to respond to nearly all of the requests in full.

# Stating Objections with Specificity: Failure Can Result in Waiver

*McCort v. ADS Clinics*, 2021 WL 3194989 (M.D. Fla. March 23, 2021)

- Plaintiff filed suit alleging tortious interference and breach of employment agreement.
- Defendant served *extremely* broad discovery requests (lots of "any and all" requests) covering a nearly two-year period.
- Plaintiff responded with repeated "boilerplate" objections: "Objection. This request is irrelevant, vague, overbroad, unduly burdensome, and not proportional to the needs of the case."
- On Defendant's motion to compel, the court overruled all of the objections without even evaluating the merits, holding that they were waived due to the lack of specificity.
- This was "[d]espite Plaintiff's attempt to provide further clarity to his objections in his response to the motion and in his sur-reply."

# Whether Responsive Documents Are Being Withheld

Rule 34 requires that parties state whether they are withholding documents in response to their objections.

- Committee comments note that this requirement was added to "end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections."
- Committee comments also note that "[a]n objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been 'withheld'."

In most cases, courts will just require parties to supplement their responses.

# Objecting and Responding to Early Requests

How to object and respond to early requests *before* you have all the information?

- Gather the information as quickly as possible to formulate your objections and responses (the “work harder and faster” approach)
- “Investigation continues” and other qualifiers

# "Reasonable Time" to Respond

Fed. R. Civ. P. 34(b)(2)(B): "… The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response."

The court may set a time if you don't:

- In *Maiorano v. Home Depot, USA, Inc.*, 2017 WL 4792380 (Oct. 24, 2017), the court faulted Home Depot for failing to set forth a specific time, and ordered production within 14 days

What counts as a "reasonable time"?

- As with many things, it depends. But this is not something courts often address directly.

# *Applicability in #MeToo Era*

- Other harassment or discrimination complaints discoverable?
  - Against defendant?
    - Similar conduct/allegations?
    - Different conduct/allegations?
  - Against others in organization?

Three cases shed some light on this analysis…

# *Banks v. Baraboo School District* (W.D. Wis. 2020) 2020 WL 5751415

- Baraboo High School: "It was the pre-prom picture that went around the world," taken May 5, 2018, went viral in November 2018.


*A screenshot taken Monday, Nov. 12, 2018 of a tweet from Jules Suzdaltsev that shares the image of the group of Baraboo High School boys giving the Nazi salute.*

# *Banks v. Baraboo School District, continued*

- Black female student Banks alleged
  - School district know its educational environment was racially hostile and took no meaningful action to address it, and
  - She was racially harassed and sexually harassed and assaulted by other students while there, final year enrolled was 2017-2018 academic year.

- Banks sought all complaints made by or on behalf of a student between 2014 and June 2018 related to race harassment and sexual harassment or assault.

- District agreed only to produce Banks' complaints as well as complaints against two individual students she alleged were known to the district to have engaged in prior or repeated instances of harassment.

# *Banks v. Baraboo School District, continued*

- Banks' allegations that the district was aware of and tolerated a racist culture so Magistrate Judge Crocker held, "Banks is entitled to explore the extent to which BSD received prior complaints about racial harassment and any actions that it took in response," including complaints about students wearing or displaying the Confederate flag on school grounds. Documented complaints or investigations of racial harassment or racially offensive behavior at the high school between June 30, 2016 and May 22, 2018 were within proper scope of discovery.

- Banks' allegations that she was sexually assaulted by student CS and that the district was aware of similar misconduct by CS in the past. Magistrate Judge Crocker held, "complaints brought by other students are too far removed from Banks's allegations unless they involved CS."

# *Sanchez v. City of Fort Wayne* (N.D. Ind. 2019) 2019 WL 6696295

- Black female Sanchez was employed as Director of Citizen Service and responsible for Fort Wayne's 311 call center---alleged the City discriminated against her on basis of her race and gender.
- Sanchez claimed the City mishandled an internal investigation prompted by anonymous complaint against her and treated her differently than similarly situated white managers.
- Sanchez sought all complaints "based on race, complaints of harassment, and any complaints of unfair mistreatment made against" four white City employees to show she was treated differently than white employees in similar circumstances.
- Magistrate Judge Collins agreed that such complaints "are sufficiently similar to the complaints allegedly raised against Plaintiff to allow for a meaningful comparison."
- Temporal scope limited to five years.

# *Walls v. Sterling Jewelers, Inc.* (W.D. Tenn. 2020) 2020 WL 7327326

- Walls, age 49, was terminated from his position as a GM at a Kay Jewelers store and replaced by 25-year-old female Gordon-Fortune.
- Walls sued for age discrimination, claimed his supervisor Smith undertook a campaign to eliminate older workers.
- Several female employees including Gordon-Fortune and Worley accused Smith of sexual harassment and Sterling of retaliation after their complaints.
- Gordon-Fortune moved to intervene in Walls' lawsuit, which was denied.

# *Walls v. Sterling Jewelers, Inc., continued*

- Walls sought
  - Supporting evidence to Gordon-Fortune's complaint, and
  - Additional deposition testimony from Sterling's HR investigator about his knowledge of sexual harassment complaints against Smith.

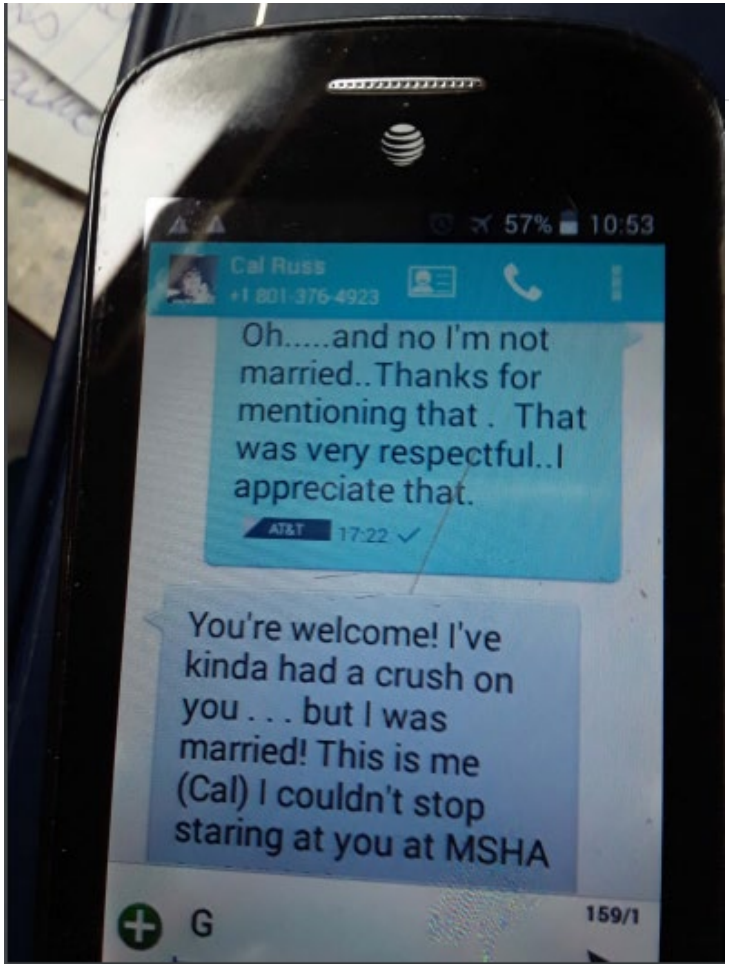
- Magistrate Judge Pham denied the request, noting, "Smith's alleged history of sexual misconduct is not relevant to whether he terminated Walls because of his age, and discovery therein 'would lead to a slippery slope' of overproduction of information that is disproportionate to the needs of this case."

- Walls also sought a copy of Worley's sexual harassment complaint, which was made via its anonymous complaint telephone line. The only document was the investigator's report.

- Magistrate Judge Pham ordered Sterling to produce "an unredacted version of the anonymous complaint…to the extent that any … redactions only conceal [the investigator's] investigation into the complaint."

# *Wright v. Rio Tinto America* (D. Utah. 2021) 2021 WL 5417037

- Plaintiff Donna Wright alleged Cal Russ sexual harassed her, including unwanted advances, which supposedly occurred at least in part via text messages.
- Defendant served a request for production of documents for, among others, text messages. Plaintiff produced "some" blurry screen shots of text messages without additional information, such as the date for the text messages, the order for messages, and incomplete messages.


57% 10:53
Cal Russ
+1 801-376-4923
Oh.....and no I'm not married..Thanks for mentioning that . That was very respectful..I appreciate that.
AT&T 17:22
You're welcome! I've kinda had a crush on you . . . but I was married! This is me (Cal) I couldn't stop staring at you at MSHA
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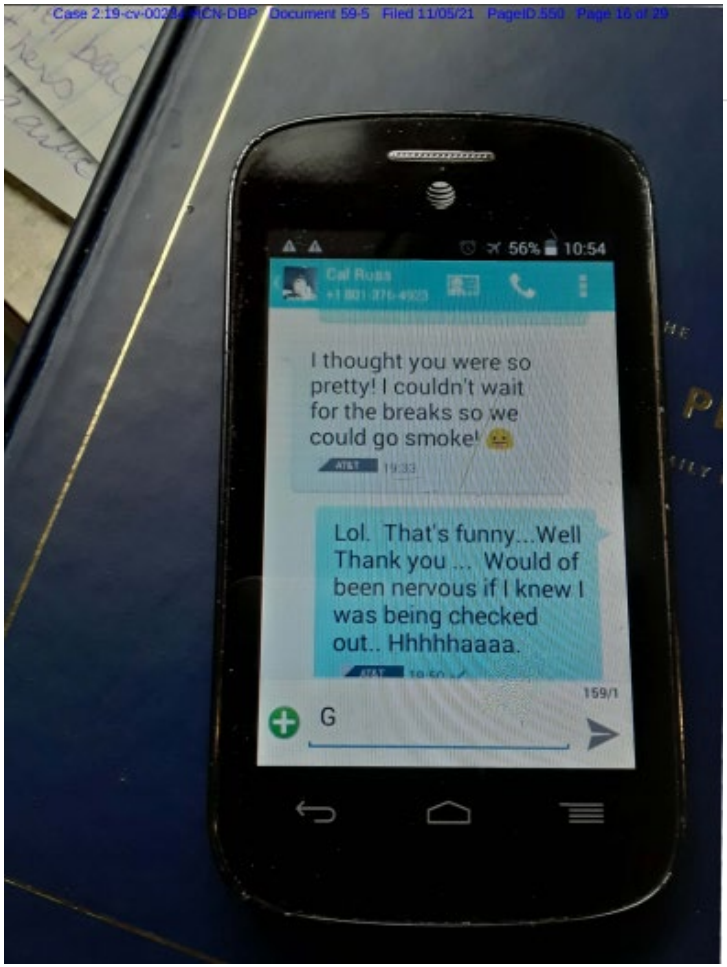
159/1


Case 2:19-cv-00284-TCN-DBP Document 59-5 Filed 11/05/21 PageID.550 Page 16 of 29
56% 10:54
I thought you were so pretty! I couldn't wait for the breaks so we could go smoke!
AT&T 19:33
Lol. That's funny...Well Thank you ... Would of been nervous if I knew I was being checked out.. Hhhhhaaaa.
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# *Wright v. Rio Tinto America, continued*

- Defendant sought all texts with Mr. Russ, which the court ordered, which the court found to be "relevant and proportional to the needs of this case."
- However, Defendant's request for a forensic imaging of Plaintiff's cell phone was denied because "Plaintiff's cell phone likely contains information, such as other text messages, phone logs, and photographs that are not relevant to the claims or defenses in this case."
- Online apps permit downloads of all text conversations as PDFs with relevant information included. No endorsements but the following have worked for our clients:
  - From Android phones, Droid Transfer, available here.
  - From iOS/iPhones, Decipher TextMessage, available here.

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