UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

SAMANTHA TURNER,	:	
Plaintiff,	:	
v.	:	Case No. 2:02-CV-251
VERMONT CENTER FOR THE DEAF & HARD OF HEARING, INC. d/b/a THE AUSTINE SCHOOL FOR THE DEAF,	:	
Defendant.	:	

OPINION AND ORDER

Defendant Vermont Center for the Deaf and Hard of Hearing, Inc. d/b/a The Austine School for the Deaf ("Austine") appeals an order of the Magistrate Judge (Niedermeier, J.) compelling Austine to produce certain financial information and several personnel files and ordering Austine to pay Plaintiff Samantha Turner ("Turner") costs and reasonable attorney's fees associated with her motion to compel. For the reasons described below, the Court affirms the order of the Magistrate Judge in all respects with regard to the analysis of the discovery issues, but reverses with regard to imposition of sanctions.

I. Background

Turner alleges that while a student at Austine she was sexually harassed and molested by an Austine staff person. She brought this suit for damages based on theories of negligence, vicarious liability, and violation of Title IX of the Education

Amendments of 1972, 20 U.S.C. § 1681(a). She seeks both compensatory and punitive damages. With regard to punitive damages, Turner alleges that Austine knew or should have known of the staff person's predilection for sexual abuse; that it "railroaded" her during the investigation of her 1997 sexual harassment complaint against the staff person, causing her to change her story; that it conducted a "sham" investigation of her complaint; and that it attempted to cover up her allegations, all out of a desire to protect its reputation. She also alleges that subsequent to her 1997 complaint the staff person sexually harassed and molested her. In support of her claim for punitive damages, Turner seeks production of information related to Austine's net worth. She also seeks production of certain personnel files of current and former employees of Austine which she contends are relevant to both liability and damages.

Austine opposed these requests to produce. First, Austine argued that Turner had failed to make a *prima facie* case for punitive damages and that such a showing was necessary in light of recent Vermont case law employing a stringent standard for punitive damages claims in the institutional context. See Brueckner v. Norwich Univ., 169 Vt. 118, 130-31, 730 A.2d 1086, 1096 (1999) (to meet requirement of actual malice in punitive damages claim, plaintiffs must show more than institution's inaction or inattention to actions of its employees). Austine

also argued that Vermont law did not permit production of the personnel files, and that in any case the files did not contain relevant information. The Magistrate Judge rejected these arguments, finding that both issues were governed by the Federal Rules of Civil Procedure, specifically Rule 26. He held that all the documents requested were relevant and thus discoverable pursuant to Rule 26. He also noted that under Christy v. Ashkin, 972 F. Supp. 253 (D. Vt. 1997), "information regarding a defendant's financial status is discoverable even before a claim for punitive damages has been clearly established." Turner v. Vt. Ctr. for the Deaf & Hard of Hearing, No. 2:02-CV-251, slip op. at 3 (D. Vt. Feb. 25, 2003) (order granting motion to compel). Finally, the Magistrate Judge granted Turner's request for costs and reasonable attorney's fees pursuant to Rule 37(a), finding that Austine's objections to the motion to compel were not substantially justified.

Austine timely filed an appeal of the order pursuant to Rule 72(a). On appeal Austine contends that its opposition to production of all the documents was substantially justified. With regard to the financial documents, Austine argues that a *prima facie* showing should be required and that Turner cannot make such a showing. In the alternative, it requests a protective order preventing dissemination of or reference to the information prior to trial. With regard to the personnel files,

Austine argues that the Magistrate Judge should have applied a Vermont statute delineating procedures for discovery of personnel files and that the personnel files are privileged from discovery in Vermont. Alternatively, Austine contends that the personnel files requested are not relevant.[1]

II. Standard of Review

The Magistrate Judge was designated authority over pretrial matters in this case pursuant to 28 U.S.C. § 636(b), under which he may issue orders regarding nondispositive pretrial motions. 28 U.S.C.A. § 636(b)(1)(A) (West Supp. 2003); Fed. R. Civ. P. 72(a); Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 525 (2d Cir. 1990). Discovery matters, including the imposition monetary sanctions pursuant to Rule 37, are generally considered nondispositive. Thomas E. Hoar, 900 F.2d at 525. The Court may modify or set aside any portion of such an order that it finds to be clearly erroneous or contrary to law. 28 U.S.C.A. § 636(b)(1)(A); Fed. R. Civ. P. 72(a).

III. Discussion

At issue in this appeal is whether the Magistrate Judge's application of federal law in resolving the discovery requests

[1] Finally, Austine argues that even if its opposition to the motion to compel was not substantially justified, Turner's attorney's fee request is unreasonable. However, given the Court's decision it need not reach this objection, as discussed below.

and his imposition of sanctions was clearly erroneous or contrary to law. As discussed below, the Court finds that the Magistrate Judge's order that the financial information and personnel files be produced was not clearly erroneous or contrary to law, but that an award of costs and reasonable attorney's fees to Turner was not warranted.

A. Financial Information

As a preliminary matter, it is not clear whether on appeal Austine is asserting that state law, as opposed to federal law, should govern the timing of the production of financial information. The Court has supplemental jurisdiction over Turner's state law claims pursuant to 28 U.S.C. § 1367(a) and must apply Vermont's substantive law in ruling on these claims. Rounseville v. Zahl, 13 F.3d 625, 629 n.1 (2d Cir. 1994) (district courts are "bound to apply [substantive] state law when ruling on a pendent state claim."). The practice of discovery in federal court generally is a procedural matter governed by the Federal Rules of Civil Procedure, specifically Rule 26. See 8 Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, Federal Practice and Procedure § 2005 (2d ed. 1994) ("State law is of very little relevance to discovery in a federal action."). Moreover, the Vermont Supreme Court in Brueckner addressed the elements of a punitive damages claim against an institution, but did not impose a timing requirement for the production of

financial information sought in support of such a punitive damages claim. 169 Vt. at 130-31, 730 A.2d at 1096. Thus, there is no conflict between state and federal law on this issue. See Hanna v. Plumer, 380 U.S. 460, 469-71 (1965) (describing analysis to be undertaken in evaluating whether conflicting state or federal rule should be applied to state law claims); cf. Oakes v. Halvorsen Marine Ltd., 179 F.R.D. 281, 285-86 (C.D. Cal. 1998) (holding that state statute restricting when and how evidence of defendant's financial information is obtained was clearly procedural and applying Rule 26). Accordingly, Rule 26 controls the question of the discoverability of the financial information.

Rule 26 is broad in scope: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26. See also Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("[T]he deposition-discovery rules are to be accorded a broad and liberal treatment."); Ameristar Jet Charter, Inc. v. Signal Composites, Inc., 244 F.3d 189, 192 (1st Cir. 2001) (same)); Pacitti v. Macy's, 193 F.3d 766, 777 (3d Cir. 1999) ("It is well recognized that the federal rules allow broad and liberal discovery."). In this case there is no dispute that Austine's net worth fits within the relevancy requirement of Rule 26 with regard to Turner's state law claim for punitive damages. See Christy, 972 F. Supp. at 254 (under Vermont law financial status of the

defendant may be taken into account in deciding punitive damages claim). Instead, Austine's position seems to be that the Court's 1997 decision in Christy, 972 F. Supp at 253, holding such financial information to be discoverable under Rule 26, either did not foreclose the possibility of requiring a prior *prima facie*, or if it did, the ruling should be reconsidered in light of the Vermont Supreme Court's decision in Brueckner, 169 Vt. at 130-31, 730 A.2d at 1096.

Christy recognized that although no Circuit Court has decided the question of the discoverability of financial information before a claim for punitive damages has been clearly established, most federal district courts considering the issue have determined that such information is discoverable. 972 F. Supp. at 253-54. The Court chose to follow this majority and ordered that the financial information sought be disclosed without a *prima facie* showing. A review of subsequent case law indicates that the majority of federal district courts continue to follow this practice, see, e.g., United States v. Matusoff Rental Co., 204 F.R.D. 396, 399 (S.D. Ohio 2001) (collecting cases), although a minority of federal district courts and several states have required some kind of preliminary showing of liability, see John Does I-VI v. Yogi, 110 F.R.D. 629, 633 (D.D.C. 1986); Rupe v. Fourman, 532 F. Supp. 344, 350-51 (S.D. Ohio 1981); Fla. Stat. Ann. § 768.72(1) (West 2003); Iowa Code

Ann. § 668A.1(3) (West 2002); 2003 Or. Laws 552(3)(a) (amending Or. Rev. Stat. § 18.535(3)). In the latter jurisdictions, the plaintiff's burden has ranged from demonstrating a reasonable basis for the claim, see Fla. Stat. Ann. § 768.72(1), or likely survival of a directed verdict, see Or. Laws 552(3)(a), through use of pretrial proffers or evidentiary hearings, to actual demonstration of liability following a trier of fact's determination in a bifurcated trial, see Rupe, 532 F. Supp. at 350-51; Rupert v. Sellers, 368 N.Y.S.2d 901, 912 (App. Div. 1975). Even courts that have declined to require a *prima facie* showing, however, have stated that the pleadings must present sufficient factual allegations to demonstrate that the claim is not spurious. See CEH, Inc. v. FV Seafarer, 153 F.R.D. 491, 498 (D.R.I. 1994); Mid Continent Cabinetry, Inc. v. George Koch Sons, Inc., 130 F.R.D. 149 (D. Kan. 1990); Vollert v. Summa Corp., 389 F. Supp. 1348, 1351-52 (D. Hawaii 1975).

The Court continues to agree with the majority of federal district courts that a punitive damages claim need not be clearly established through a *prima facie* showing before financial information can be discovered. Not only would such a requirement be contrary to the liberal discovery policy set out in Rule 26, it would be likely to lengthen litigation both by hindering settlement, as knowledge of defendants' net worth may allow for realistic appraisal of the case, and by delaying and complicating

trial, where disclosure is required only after liability is proven. CEH, Inc., 153 F.R.D. at 499; Mid Continent Cabinetry, 130 F.R.D. at 152; see Fed. R. Civ. P. 1 (the federal rules "shall be construed and administered to secure the just, speedy, and inexpensive determination" of claims). The Court recognizes, that such financial information is sensitive and that defendants may legitimately desire that it remain confidential. In most cases, however, a protective order will provide more than sufficient protection to the defendant. CEH, Inc., 153 F.R.D. at 499; Vollert, 389 F. Supp. at 1351; see Caruso v. Coleman Co., 157 F.R.D. 344, 349 (E.D. Pa. 1994) (requiring disclosure of financial data, but requiring it to be filed as an "impounded" document to keep it from the public record).

Although the Court finds that no *prima facie* showing is necessary, a plaintiff seeking such sensitive information must offer more than vague or conclusory statements in a complaint before the Court will require production. Sufficient facts must be alleged to demonstrate that the claim is not spurious. This requirement is not a rigorous one and is intended to prevent discovery only where the punitive damages claim at issue is clearly frivolous. Where, as in this case, the punitive damages claim arises under Vermont law, Vermont's standard of "actual malice" applies in evaluating whether a claim for punitive

damages against an institution such as Austine can be considered to be spurious.

Turner has met this burden. Her pleadings allege that Austine, knew or should have known of the staff person's predilection to molest, but that out of concern for its reputation, it "railroaded" Turner during the investigation of her complaint, conducted a "sham" investigation, attempted to cover up her allegations, and allowed the staff person to remain at the school. These factual allegations are sufficient to demonstrate for discovery purposes that the conduct of Austine's administration involved reckless or wanton disregard of Turner's rights, and not mere inaction or inattention to the actions of its employees. See Brueckner, 169 Vt. at 130-31; 730 A.2d at 1096 (to meet requirement of actual malice in punitive damages claim, plaintiffs must show more than institution's inaction or inattention to actions of its employees).[2]

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[2] Austine argues that the outcome of a similar suit brought by a different Austine student is relevant to the Court's evaluation of the discoverability of the financial information. See Noella Kolash v. The Vt. Ctr. for the Deaf & Hard of Hearing, Inc., No. 01CV12351 (D. Mass. May 2, 2003). In that case, the court determined that the plaintiff's evidence was not sufficient to support an award of punitive damages under the Brueckner standard, and it refused to charge the jury on that claim. That court's decision at trial has no effect on the discovery issue in this case, however. As discussed above, the Court declines to require a *prima facie* showing for discovery purposes, beyond the limited showing that the punitive damages claim is not spurious.

In the alternative, Austine requests that the Court issue a protective order preventing dissemination of or reference to the information prior to trial. The Magistrate Judge did not address this request, however, and it appears that Austine raised it only in its sur-reply memorandum. Def.'s Surreply at 5 (Doc. 30). As the Magistrate Judge has not yet considered the issue, and given the competing concerns each side has raised regarding the merits of granting such a protective order, the Court declines to reach it here. Austine should pursue issuance of a protective order with the Magistrate Judge.

B. Personnel Files

With regard to the issue of the discoverability of the personnel files, Austine argues that the Magistrate Judge erred in failing to apply Vt. Stat. Ann. tit. 12, § 1691a (Lexis 2002). This statute states that it is the policy of Vermont that an employee be given prior notice and an opportunity to object to production of his or her personnel records, and outlines procedures for doing so. Vt. Stat. Ann. tit. 12, § 1691a(c)-(f). Although it requires courts to provide the affected employee an opportunity to object, the statute does not prohibit a court from requiring production after hearing the objection. Id. § 1691a(g)-(h). Austine contends that the personnel files are not discoverable in this action because Turner failed to follow the § 1691a employee notice and objection procedures and because the

files are privileged from discovery, apparently by § 1691a.[3] In the alternative, Austine argues that the files are not relevant under Rule 26.

Austine argues that § 1691a's procedures must be followed in order to satisfy the twin aims of the Erie doctrine: prevention of forum shopping and promotion of the equitable administration of justice. See Erie R. Co. v. Tompkins, 304 U.S. 64, 73-74 (1938); see also Hanna, 380 U.S. at 467-68. However, the Court need not reach the issue of whether state law or Rule 26 controls this situation. As the Magistrate Judge held, by its own terms § 1691a applies only to civil actions commenced pursuant to Rule 3 of the Vermont Rules of Civil Procedure. § 1691a(b)(1). Turner's complaint was filed in this court, pursuant to the Federal Rules of Civil Procedure, not in Vermont state court pursuant to the Vermont Rules of Civil Procedure. The Magistrate Judge's conclusion that Rule 26, and not the procedural requirements of § 1691a, govern discovery of the personal files is not clearly erroneous, nor contrary to law.

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[3] Austine does not suggest that a privilege for personnel files has been created by a different Vermont statute or by court decisions. Notably, in Vermont, "[b]ecause of their interference with truthseeking, privileges are strongly disfavored." Douglas v. Windham Superior Court, 157 Vt. 34, 40, 597 A.2d 774, 777 (1991) (while recognizing that government investigatory files may be privileged, declining to find the files at issue privileged because there was insufficient evidence that disclosure would be harmful to the public interest). Thus, the Court assumes that the basis for privilege in this case is § 1691a alone.

Austine also seems to argue that § 1691a creates an evidentiary privilege prohibiting discovery of personnel files. Evidentiary privilege is determined in accordance with state law where the claim at issue is governed by the state rule of decision, Fed. R. Evid. 501, and such privilege is a valid objection to discovery under Rule 26, see Fed. R. Civ. P. 26(b)(1). See also Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555 n.2 (2d Cir. 1967) (state rules of privilege are substantive rules that should be followed in federal proceedings). Nothing in § 1691a creates a privilege for discovery purposes, however. Under the statute discovery may be compelled, denied, or limited by a protective order at the court's discretion. § 1691a(h). Instead of privileging such materials, the statute merely creates a process for considering any objections an employee might have to production of the files. Cf. Vt. Stat. Ann. tit. 12, § 1614(b) (Lexis 2002) (explicitly stating that communications from a victim to a crisis worker are privileged from disclosure). As a result, production of the files is not prohibited pursuant to § 1691a on the basis of privilege.

Alternatively, Austine argues that the personnel files requested do not meet the relevancy requirement of Rule 26. The files are those of employees who were, or who Turner alleges should have been, involved in the investigation of her 1997

complaint. The Magistrate Judge concluded that this information was relevant because it "speaks to the level of the notice Austine may have had." Turner, No. 2:02-CV-251, slip op. at 5. This conclusion was not clearly erroneous or contrary to law. If Austine has concerns about the privacy impacts of complete disclosure of the personnel files, it should seek a protective order from the Magistrate Judge to ameliorate any such impacts.

C. Sanctions

Finally, Austine appeals the Magistrate Judge's decision to sanction it for opposing Turner's motion to compel discovery. Although the Magistrate Judge did not err in granting Turner's motion to compel, the Court agrees with Austine that the award of sanctions in this case was clearly erroneous and contrary to law.

Rule 37(a) provides that where a party's opposition to a motion to compel discovery was not "substantially justified," the court must impose costs and reasonable attorney's fees on the opposing party or attorney. Fed. R. Civ. P. 37(a)(4)(A). Opposition is substantially justified when the dispute about the matter was "genuine." Id. advisory committee's note (1970). Under this objective standard of reasonableness, it is not enough to demonstrate that the opposing party has acted in good faith. Pierce v. Underwood, 487 U.S. 552, 565 (1988); Bowne of New York City, Inc. v. AmBase Corp., 161 F.R.D. 258, 262 (S.D.N.Y. 1995). The standard is a lenient one, however, and does not require that

the opposing party's position be "justified to a high degree." Pierce, 487 U.S. at 565. In particular, where the parties' interpretations of the governing law differ, the opposing party should be sanctioned only where that party propounds "an unreasonable, frivolous or completely unsupportable reading of the law." Bowne, 161 F.R.D. at 265 This leniency is necessary because, "[c]ourts must be careful not to chill the imaginative use of advocacy in pursuit of changing the law." Id., 161 F.R.D. at 265 (citing Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985)).

In this case, the Magistrate Judge sanctioned Austine because he found that Austine's refusal to turn over its financial information was not substantially justified in light of this court's decision in Christy, and that Austine's reliance on § 1691a was not substantially justified in light of the statute's limited application to state civil actions. These arguments did not involve an unreasonable, frivolous, or completely unsupported reading of the law. No Second Circuit or other Court of Appeals authority exists on the issue of the timing of disclosure of financial information and there is a split in district court and state authority. In addition, the Christy decision provides little analysis of the question and did not address the requirement of showing that a punitive damages claim is not spurious. Finally, there are policy reasons cutting both for and

against delayed discovery of such information. In light of Vermont's subsequent case law making more rigorous plaintiffs' showing for punitive damages claims in the institutional context, Austine's position that the issue should be re-visited was substantially justified. With regard to the personnel files, although the Court agrees with the Magistrate Judge's determination that § 1691a does not by its terms apply to this particular case, Austine's contention that this state procedural process should be evaluated under the doctrine of Erie and its progeny was not unreasonable. This is particularly true given that the statute expressly espouses a state policy. Accordingly, the Magistrate Judge's award of sanctions pursuant to Rule 37(a) is reversed.

IV. Conclusion

Wherefore, the Magistrate Judge's order is affirmed with regard to the analysis of the discovery issues, but is reversed with regard to the imposition of sanctions.

Dated at Burlington, Vermont this _____ day of September, 2003.

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William K. Sessions III
Chief Judge, U.S. District Court