

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

<hr/>		)
JOHN DOE,		)
		)
Plaintiff,		)
		)
v.		)
		)
AMHERST COLLEGE,		)
CAROLYN MARTIN, JAMES LARIMORE,	Civil Action No. 3:15-cv-30097	)
TORIN MOORE, SUSAN MITTON SHANNON,		)
and LAURIE FRANKL,		)
		)
Defendants.		)
<hr/>		)

**PLAINTIFF’S MOTION TO COMPEL (MEMORANDUM INCORPORATED)**

Plaintiff John Doe (“Doe”) hereby moves to compel Defendants to produce documents.

In support hereof, Plaintiff states as follows:

1. Plaintiff filed the initial Complaint in this action on May 29, 2015.
2. Defendants filed their answer on July 20, 2015.
3. Plaintiff commenced discovery by serving a request for production of documents from Amherst College (“Amherst” or the “College”) on August 27, 2015. *See Exhibit A* (document requests).
4. On September 10, 2015, the Court issued the Scheduling Order in this case, consistent with the joint request of the parties. *See Docket, Doc. No. 32.* The Scheduling Order does not provide for any delay in the commencement of discovery notwithstanding Defendants’ Rule 12(c) motion (as, in fact, Plaintiff would not agree to this and the parties did not request a

stay). The Scheduling Order requires fact discovery to be completed by May 2 of this year—less than two months from now.<sup>1</sup>

5. On October 30, 2015, Amherst served written responses to Plaintiff's document requests. *See Exhibit B*. No documents were produced at that time.

6. On November 10, 2015, Amherst made a document production. The cover letter did not indicate that it anticipated it would be producing additional documents. *See Exhibit C*. The production was slight, to be sure, but given the numerous (meritless) objections made by Amherst to Plaintiff's 29 document requests, this was not surprising. Further, since the College did not indicate which documents were responsive to which requests, Amherst gave Plaintiff absolutely no way of knowing that the College had in its possession additional documents which it intended to produce pursuant to its written responses.

7. Thereafter, Plaintiff responded to Amherst's Rule 34 document requests. Defense counsel followed up with Plaintiff to find out when documents would be produced, and Plaintiff completed his document production. *See Exhibit D*. Defense counsel did not indicate during this exchange that, in fact, *Amherst* had additional documents to produce but had not yet done so.

8. The parties agreed to go to mediation in December 2015. At that time, Plaintiff had been asked to complete his document production and had done so, and Plaintiff's counsel understood Amherst had produced all documents it was willing to produce without a motion to compel.

9. After mediation failed, Plaintiff's counsel communicated with defense counsel concerning a motion for leave to file an amended complaint, which counsel had prepared prior to mediation and held in abeyance pending mediation.

---

<sup>1</sup> The parties have conferred and expect to file a joint motion to extend the deadlines by four months, given that discovery was delayed when the parties agreed to mediate this dispute.

10. Specifically, on February 22, 2016, defense counsel reiterated that defendants would not object to the timeliness of the motion for leave to file an amended complaint provided Plaintiff did not wait until “discovery has progressed further” and Plaintiff’s counsel, again believing that Amherst College had completed its production pursuant to its written responses and objections, stated an intention to file the motion and proposed amendment that very week. *See Exhibit E* (emails).

11. On Tuesday, February 23, 2016, Plaintiff filed a motion for leave to file an amended complaint. The amended complaint added a claim for negligence against the individual defendants and bolstered the factual allegations underlying the Title IX and breach of contract claims, among other changes.

12. Later in the day on Tuesday, February 23, after Plaintiff filed the above-referenced motion through the ECF system, counsel conferred regarding the Scheduling Order. During that conversation, defense counsel stated for the first time that Amherst College had additional documents that it intended to produce pursuant to its responses to Plaintiff’s document requests.

13. Plaintiff subpoenaed the investigator, Allyson Kurker, to be deposed and had cooperatively scheduled her deposition for March 2, 2016. Ahead of that deposition, Plaintiff’s counsel asked when Amherst expected to supplement its production, and defense counsel responded that as concerned Ms. Kurker, counsel was “confident that the production is complete.” *See Exhibit F*. Nothing else was said about the supplemental production defense counsel had admitted would be forthcoming at some point.

14. Nonetheless, after 5 p.m. on March 1, 2016 – the day before Ms. Kurker’s deposition was scheduled to commence at 10 a.m., defense counsel left a voicemail for

Plaintiff's counsel and stated that Amherst was about to produce a "handful of documents." The accompanying cover letter was emailed to Plaintiff's counsel at 6:15 p.m. on March 1. *See Exhibit G* (email transmittal). The production included additional communications between Amherst College and the investigator.

15. Since that time, Amherst has made no further production and defense counsel have made no indication of when they intend to produce documents or how much volume to expect.

16. Defense counsel contacted Plaintiff's counsel by email on March 3 to ask for Plaintiff's assent to an extension of time to oppose Plaintiff's motion for leave to file an amended complaint to accommodate counsel's vacation schedule.

17. Max Stern, Plaintiff's lead counsel, and Scott Roberts, defendants' lead counsel, spoke on March 4. Mr. Stern agreed to give defense counsel more time to oppose the motion. In fact, Mr. Stern indicated that since Amherst College would be supplementing its production, which might warrant Plaintiff seeking to revise his complaint to make further factual allegations, Plaintiff would prefer that defendants hold an opposition until the production was complete. This would enable Plaintiff to determine if further amendment was appropriate, to supplement his pending motion with a new version of the amended complaint, and to avoid serial motion practice over the amendment. Mr. Roberts indicated he would speak to his client about this proposal and get back to Mr. Stern.

18. Mr. Roberts did not get back to Mr. Stern on this proposal. Instead, on March 4, 2016, defendants filed a motion for additional time to oppose Plaintiff's motion for leave to amend, indicating that counsel had conferred and plaintiff had not agreed to the extension. This was false. Mr. Stern had *agreed* to give counsel more time, but had suggested that Amherst

College take even *more* time than was proposed by Mr. Roberts, if necessary, to permit Amherst College to complete the supplemental production that had been promised first, Plaintiff could evaluate whether to seek to file a substitute proposed amended complaint, and serial amendments (and oppositions) could be avoided.

19. Briefing on the Rule 12(c) motion will shortly be completed upon the filing of Plaintiff's sur-reply memorandum. It is anticipated the Court will schedule oral argument on defendants' motion to occur in short order. It appears that Amherst is withholding its document production for only one reason: to prevent Plaintiff the opportunity of seeking to amend his complaint to include even further factual material in support of his claims. This is gamesmanship of the highest order and should not be condoned by the Court.

20. Plaintiff has good reason to believe the documents being withheld will be highly relevant to his claims and will only further demonstrate the impropriety of dismissal at this stage. Indeed, the deposition of the investigator, Allyson Kurker, just conducted on March 2, has revealed highly relevant, new facts which Plaintiff is now seeking to incorporate into his proposed amended complaint. Ms. Kurker has testified that in cases where a female complainant reports she did not immediately believe she was raped, Ms. Kurker does not bother to obtain prior accounts of the events because they are irrelevant. *See Exhibit H* (Kurker Dep.) at 78:6-12. Ms. Kurker does not gather evidence of the female complainant's contemporaneous reports unless they would support complainant's story that the sex was nonconsensual:

Q. Well, do you consider it important to find out about any such communications or writings that mention the incident?

A. To the extent that the incident is being described as nonconsensual, yes. ... What I'm saying is that if a complainant tells me, at the time I believed it was consensual, the time I told people I believed it was consensual, no. I would not feel the need to see writings that confirmed what the complainant already told me. (Ex. H (Kurker Dep.) at 79:4-19).

Q. So from what you've said, you do not have a regular practice...of asking the complainant to identify the persons that she had spoken to about the incident or the communications she had about the incident?

[Objections]

A. The – it depends on what you mean by the incident.

Q. Her claim of being assaulted.

[Objections]

A. If she claimed that she spoke to people and told them that she had been assaulted, then yes, I would want to talk to those people whom she confided in, assuming it was very close in time to when the assault happened. (Ex. H (Kurker Dep.) at 82:17-83:9).

Q. So the only e-mails that you were interested in were e-mails in which [Jones] said it was nonconsensual?

[Objection]

A. Those are the only e-mails that I would have found material. ...” (Ex. H (Kurker Dep.) at 192:20-193:1.

This is evidence of neglect and gender bias in the investigation process. The investigator ignores exculpatory evidence, namely, prior statements which might contradict the female complainant's account of what happened and whether or not it was consensual. The investigator is only interested in accounts which confirm or support the female complainant's story.

21. It is expected the documents being withheld by Amherst will similarly be highly relevant to and supportive of Plaintiff's claims. Amherst seeks to impair Plaintiff's ability to amend his complaint to allege pertinent facts by improperly withholding documents it has and acknowledges it must produce. This is improper.

22. Although the College's objections and responses were written in such a fashion as to obfuscate, rather than plainly disclose – *see, e.g.*, Ex. B (Amherst's written responses) at p. 3,

Response to Request No. 1 – what documents would be produced without motion practice, Amherst did agree to produce a handful of documents.

23. Prior to defense counsel’s admission that not all responsive documents that Amherst agreed to produce were, in fact, produced, Plaintiff had no idea whether there were other responsive documents that existed and had not yet been supplied. Now, Plaintiff understands that to be the case. There can be no legitimate reason for the College to continue to withhold discovery it has acknowledged must be given to the Plaintiff.

24. Specifically, Plaintiff believes Amherst agreed to produce the following documents which it has not yet produced<sup>2</sup>:

- Communications between the individual defendants and the hearing board members (Ex. B at Response to Request No. 5, p. 5);
- Notes prepared by any participants in the disciplinary hearing and notes prepared by any individual defendants concerning the disciplinary process (Ex. B at Response to Request No. 6, p. 6; Response to Request No. 7, p. 6));
- Training materials supplied to the individual defendants and/or hearing board panelists concerning Amherst College’s sexual misconduct policy or procedure (Ex. B at Response to Request No. 8, p. 7);
- Documents concerning Jones’s appeal of the disciplinary findings made against Doe (Ex. B at Response to Request No. 14, p. 12);
- Documents concerning the notice of the adverse finding as to Doe sent to the Amherst College community (Ex. B at Response to Request No. 14, p. 12); and
- Documents supplied to the U.S. Department of Education concerning Jones’s complaint (Ex B at Response to Request No. 15, p. 12)<sup>3</sup> and communications with the U.S.

---

<sup>2</sup> Although counsel conferred about Doe’s education record, and defense counsel agreed it would *not* be subject to the parties’ Confidentiality Agreement because Doe is entitled to those records by law, nonetheless the College has refused to produce those records in response to a Rule 34 document request by Doe’s attorneys, his agents, insisting Doe must personally sign a consent. This is nonsense and is advanced only to delay Doe’s access to documents he should have received long ago. *See* Ex. B at p. 4, Response to Request No. 3. Doe does not stand on ceremony and is providing the consent to eliminate the excuse offered for the delay of these documents.

<sup>3</sup> Amherst College’s production to date identifies two bates stamps—one for this case and another, non-sequential, which is believed to correspond to a production made to the U.S. Department of Education. Therefore, certain documents submitted to the Department have been produced, but it is unclear whether all documents Amherst

Department of Education concerning Jones's complaint (Ex. B at Response to Request No. 24, p. 17); and

- Amherst College sexual misconduct policies and procedures in effect at the College while Plaintiff was a student there (Ex. B at Response to Request No. 23, p. 16)<sup>4</sup>.

25. While reserving his rights as to the objections of Amherst, which are unfounded and frivolous in numerous respects, Plaintiff at this juncture asks the Court to compel Amherst to complete, immediately, its production of responsive documents it has already agreed to produce and indicated it intends to produce, so that Plaintiff may review that production and seek to file a replacement amended complaint ahead of the hearing on defendants' Rule 12(c) motion, if necessary.

26. The parties did not agree to stay discovery pending the Rule 12(c) motion and the Court's Scheduling Order provided that discovery should proceed. Amherst should not be able to obtain a *de facto* stay, unilaterally and in violation of what the Scheduling Order contemplates, by holding its production indefinitely.

27. Plaintiff asks that the Court award his costs and fees associated with the filing of this motion.

WHEREFORE, Plaintiff respectfully requests that the Court allow this motion and order Amherst to produce documents it has already agreed to produce within three (3) days of the entry of the Order allowing this motion and order Amherst to pay Plaintiff's fees and costs in connection with this motion.

---

agreed to produce in Response to Request No. 15 have been produced or not. Amherst has not indicated, in providing documents to the Plaintiff, whether the documents are produced in satisfaction of any particular request.

<sup>4</sup> As to these, Plaintiff attached to his Complaint the policy and procedure in effect at the time of his disciplinary hearing, but if any other procedures were in effect previously during his tenure at Amherst, they have not been produced.

Respectfully submitted,

JOHN DOE,

By his attorneys,

/s/ Max D. Stern

Max D. Stern (BBO# 479560)

mstern@toddweld.com

Megan C. Deluhery (BBO# 655564)

mdeluhery@toddweld.com

Hillary A. Lehmann (BBO# 683657)

hlehmann@toddweld.com

TODD & WELD LLP

One Federal St., 27<sup>th</sup> Floor

Boston, MA 01880

Tel. (617) 720-2626

Fax (617) 227-5777

Dated: March 17, 2016

**CERTIFICATION PURSUANT TO LOCAL RULE 7.1**

I, Megan C. Deluhery, hereby certify that on March 16, 2016 I contacted Tobias Crawford, counsel for defendants, by email, and on March 17, 2016, I contacted Mr. Crawford by leaving a voicemail and also contacted Mr. Crawford and Scott Roberts to seek a conference on this issue. As of the time of this filing, the dispute raised in this motion has not been resolved as defense counsel has not indicated when the supplemental production will be made.

/s/ Megan C. Deluhery

Megan C. Deluhery

**CERTIFICATE OF SERVICE**

I, Megan C. Deluhery, hereby certify that this document has been filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this date.

Date: March 17, 2016

/s/ Megan C. Deluhery

Megan C. Deluhery