Slabisak, M.D. v. The University of Texas Health Science Center at Tyler et al

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United States District Court

EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION SARA SLABISAK, M.D. v. THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT TYLER and CHRISTUS GOOD SHEPHERD MEDICAL CENTER.

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Civil Action No. 4:17-CV-597 Judge Mazzant

MEMORANDUM OPINION AND ORDER Pending before the Court is (Dkt. #104).

After considering the motions and relevant pleadings be denied (Dkt. #104).

BACKGROUND Plaintiff moves for sanctions against Defendant alleging three violations: (1) spoliation of interview notes; (2) the failure to produce interview notes; and (3) improper deposition conduct (Dkt. #104).

Donny Henry coordinator and David Conley interviewed Plaintiff on

harassment claim against Dr. Mohammad Makkouk (Dkt. #104 at p. 2). Henry and Conley then interviewed Dr. Makkouk on or about January 20, 2016 (Dkt. #104 at p. 2). During these interviews, Henry and Conley made handwritten notes (Dkt. #104 at p. 2). In his deposition, Henry testified that both his and shredded after he and

Conley created summaries of the notes (Dkt. #105 at pp. 5 6). Henry explained that he learned in a previous position at the Office of the Attorney General to shred handwritten notes after summarizing them (Dkt. #105 at pp. 5 6). Second, Henry also interviewed Dr. Ifeanyi E. Elueze, Tammy Mitchell, Neil Patel, Zehra Hussein, and Austin Ogwu in September 2016 (Dkt. #104 at p. 3). Henry testified that he did not destroy his handwritten notes from these interviews suggested that Henry should stop shredding his handwritten notes sometime between January

and September 2016 (Dkt. #105 at pp. 10 11). Plaintiff claims UTHSCT did not produce retained handwritten notes until after (Dkt. #104 at p. 3). Third, Vice Preisent for Legal Affairs and Chief

Legal Officer of UTHSCT (Dkt. #104

at p. 3). Plaintiff contends Witter unethically a testimony (Dkt. #104 at p. 9). Plaintiff filed the motion at issue on August 13, 2018 (Dkt. #104). UTHSCT filed its response to the motion on August 17, 2018 (Dkt. #106). Plaintiff did not file a reply to the motion.

LEGAL STANDARD [T]he judge [imposing sanctions] should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms. Whether deterrence or compensation is the goal, the punishment should be reasonably suited to the crime. Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 618 (S.D. Tex. 2010) (quoting Anderson v. Beatrice Foods Co., 900 F.2d 388, 395 (1st Cir. 1990)).

I. Spoliation Sanctions alteration of Guzman v. Jones, 804 F.3d 707, 713 (5th Cir. 2015) (quoting Rimkus, 688 F. Supp. 2d at 612). party has engaged in sanction- Smith v. Chrysler Grp., LLC, 1:15-CV-218,

2016 WL 7741735, at *3 (E.D. Tex. Aug. 31, 2016) (citing Ashton v. Knight Transp., Inc., 772 F. Supp. 2d 772, 789 (N.D. Tex. 2011); Rimkus, 688 F. Supp. 2d at 642). preserve evidence comes into being when the party has notice that the evidence is relevant to the

litigation or should have known that the evidence may be relevant. Guzman, 804 F.3d at 713 (quoting Rimkus, 688 F. Supp. 2d at 612). aga Condrey

v. SunTrust Bank of Ga., 431 F.3d 191, 203 (5th Cir. 2005); see also King v. Ill. Cent. R.R., 337 F.3d 550, 556 (5th Cir. 2003) Bad faith, in the context of spoliation, generally means destruction for the purpose of hiding adverse evidence. Guzman, 804 F.3d at 713 (citing Mathis v. John Morden Buick, Inc., 136 F.3d 1153, 1155 (7th Cir. 1998)). Ashton, 772 F. Supp. 2d at 800 (quoting Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335,

344 (M.D. La. 2006)). decision on a motion for sanctions for spoliation of Guzman, 804 F.3d at 713 (citing Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 569 (5th Cir. 1996)). II. Rule 37 Sanctions Untimely Production

Federal Rule of Civil Procedure 37 enables the Court to sanction a party for its failure to comply with a court order or disclose evidence. FED. R. CIV. P. 37(b) (c); Chilcutt v. United

States, 4 F.3d 1313, 1319 20 (5th Cir. 1993); SynQor, Inc. v. Artesyn Techs., Inc., No. 2:07-CV-497-TJW-CE, 2011 WL 2683184, at *3 (E.D. Tex. July 11, 2011). ns why disclosure was not made; (2) the amount of prejudice to the

opposing party; (3) the feasibility of curing such prejudice with a continuance of the trial; and (4)

United States v. Dvorin, 817 F.3d 438, 453 (5th Cir. 2016) (quoting United States v. Garrett, 238 F.3d 293, 298 (5th Cir. 2000)); CQ, Inc. v. TXU Min. Co., L.P., 565 F.3d 268, 280 (5th Cir. 2009). Dvorin, 817 F.3d at

- Id. (citing Mercury Air Grp., Inc. v. Mansour, 237 F.3d 542, 548 (5th Cir. 2001)). However, the Chilcutt, 4 F.3d at 1320 (citing Marshall v. Segona, 621 F.2d 763, 767 (5th Cir. 1980); Emerick v. Fenick Indus., Inc., 539 F.2d 1379, 1381 (5th Cir. 1976)). 1 III. Deposition Interference

e underlying purpose of a deposition is to find out what a witness saw, heard, or did . . . . [T]here is s own lawyer to act as intermediary, interpreting questions, deciding which questions the witness should answer, and helping the 1. The Supreme Court has stated that the district court must be guided by the following considerations when determining whether to impose sanctions under Rule 37 Chilcutt, 4 F.3d at 1320 21 (quoting Ins. Corp. of Ir., Ltd. v. Compagnie Des Bauxites de Guinee, 456 U.S. 694, 697 (1982); Compaq Comput. Co. v. Ergonome, Inc., 387 F.3d 403, 413 14 (5th Cir. 2004)). Extreme sanctions ar Butler v. Cloud (per curiam) (quoting Batson v. Neal Spelce Assocs., Inc., 765 F.2d 511, 515 (5th Cir. 1985)). The Fifth Circuit has stated that extreme sanctions, such as dismissing a claim or default judgment, are proper when the discovery misconduct resulted from willfulness or bad faith, when the deterrent value of Rule 37 could not be substantially achieved by the use of less drastic sanctions, or when the discovery misconduct was plainly attributable to an Batson, 765 F.2d at 514.

witness to formulate answers. VirnetX Inc. v. Cisco Sys., Inc., 6:10-CV-417, 2012 WL 7997962, at *3 (E.D. Tex. Aug. 8, 2012) (quoting Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993)). Id. (citation

omitted). including the reasonable expenses s fees incurred by any party on a person who impedes, delays, or frustrates the FED. R. CIV. P. 30(d)(2). In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. FED. R. CIV. P. s note to 1993 amendment. sanctions available Nieman v. Hale, 3:12-CV-2433-L-BN, 2014 WL 4375669, at *5 (N.D. Tex. Sept. 4, 2014)

(quoting Howell v. Avante Servs., LLC, CIV.A. 12-293, 2013 WL 824715, at *5 (E.D. La. Mar. 6, 201 S. La. Ethanol, L.L.C. v. s Fund

Ins. Co., CIV.A. 11-2715, 2013 WL 1196604, at *8 (E.D. La. Mar. 22, 2013) (citations omitted).

ANALYSIS As an initial matter, t Plaintiff learned of the issues presented (Dkt. #105). The Court set the discovery deadline in this case for June 1, 2018, and the dispositive motions deadline for June 14, 2018 (Dkt. #34; Dkt. #69). Despite the passage of time and deadlines, Plaintiff did not raise the present issues until she filed her response to UT on July 23, 2018, and did not file her motion for sanctions until August 13, 2018 (Dkt. #93; Dkt.

#104). This Court has previously plaintiff first raised the argument in response to a Sizemore v. Dolgencorp of Tex., Inc., 4:10-CV-650, 2012 WL 1969951, at *1 (E.D. Tex. June 1,

The Plaintiff should have filed a discovery motion with the court prior to the conclusion of the fact discovery deadline in order to preserve this issue.). Further, if the parties would have notified the Court of the issues presented earlier, the Court likely could have resolved the issues through the discovery dispute process detailed in the Scheduling Order without the need to consider sanctions (Dkt. #34 at p. 4). Regardless be denied on its merits.

I. Spoliation Sanctions

Plaintiff does not demonstrate that Henry acted in bad faith when he shredded his handwritten notes from his interviews with Plaintiff and Dr. Makkouk. Guzman,

804 F.3d at 713 (citing Mathis, 136 F.3d at 1155). Ashton, 772 F. Supp. 2d

at 800 (quoting Consol. Aluminum Corp., Inc., 244 F.R.D. at 344).

Henry testified that it was his procedure to destroy his handwritten notes after summarizing them (Dkt. #105 at p. 6). Henry claims he learned this procedure from his previous employment with the Office of the Attorney General (Dkt. #105 at p. 6). Henry also testified ief of Police recommend that he should not shred his handwritten notes, Henry ceased to do so (Dkt. #105 at p. 11). This

incredible rationale is sufficient to impute a willful or intentional destruction to prevent use of the notes in litigation. This is bad faith. (Dkt. #104 at p. 6).

The Court finds that the evidence presented does not show that Henry held a fraudulent intent and desire to suppress the truth for the purpose of hiding adverse evidence. Henry provided the summaries of his shredded notes to counsel, who produced the summaries to (Dkt. #105 at p. 6; Dkt. #106 at p. 2). Certainly, if Henry desired to suppress the truth or hide adverse evidence, he would have shredded the summaries of his notes as well. See Smith altering of evidence, however, does not necessarily mean that a party has engaged in sanction- ; Tex. Instruments, Inc. v. Hyundai Elecs. Indus. Co., Ltd., 190 F.R.D. 413, 419 (E.D. Tex. 1999) disposal of his handwritten notes is not spoliation when other notes exist). Reviewing all the evidence presented, Plaintiff does not present sufficient evidence that Henry acted in bad faith when he destroyed his handwritten notes to warrant spoliation sanctions. Accordingly, the Court DENIES (Dkt. #104).

II. Rule 37 Sanctions Untimely Production

Plaintiff next moves for sanctions against UTHSCT pursuant to Federal Rule of Civil Procedure 37 because UTHSCT did not his interviews with Dr. Elueze, Tammy Mitchell, Neil Patel, Zehra

Hussein, and Austin Ogwu (Dkt. #104 at pp. 7 9). The mandatory disclo witness statements, and tangible things in the possession, custody, or control of the disclosing (Dkt. #19 at p. 4).

request, information in addition to that required by FED. R. CIV. P. 26, including names of

persons likely to have, and documents containing, in (Dkt. #34 at p. 3). Additionally, on March 8, 2018, Plaintiff served her first

requests for production on UTHSCT specifically requesting notes taken by employees of UTHSCT concerning Plaintiff (Dkt. #104-2 at p. 4).

(Dkt. #104 at p. 8; Dkt. #104-5). Plaintiff It is unconscionable that . . . [UTHSCT] would not be aware of the relevance of handwritten notes of interviews taken during the course of a sexual harassment investigation. (Dkt. #104 at p. 8). As a result, Plaintiff requests a oppos . (Dkt. #104 at p. 8).

explanation for its (Dkt. #106).

of prejudice to the opposing party; (3) the feasibility of curing such prejudice with a continuance

Dvorin, 817 F.3d at 453 (quoting Garrett, 238 F.3d at 298); CQ, Inc., 565 F.3d at 280. The Court addresses each factor in turn.

First, UTHSCT does not provide a (Dkt. #106). Accordingly, this factor weighs in favor of sanctions.

Second, Plaintiff does not explain how prejudices Plaintiff (Dkt. #104 at pp. 7 9). The Court will not Case 4:17-cv-00597-ALM Document 114 Filed 10/04/18 Page 8 of 13 PageID #: 2546 requested by Plaintiff without a demonstration that Plaintiff was substantially prejudiced (Dkt. #104 at p. 8). Without a showing of prejudice, this factor weighs against sanctions.

Third, the Court cannot determine whether a continuance could cure any prejudice because Plaintiff does not identify any prejudice (Dkt. #104 at pp. 7 9). Assuming prejudice to Plaintiff exists, the Court again notes that such prejudice could likely have been cured had Plaintiff notified the Court of this issue earlier.

Fourth, the Court considers its discovery policy as a relevant circumstance. The Court allows parties to conduct discovery including the taking of depositions past the discovery deadline. If Plaintiff believes she was prejudiced by UTHSCT s not he Court suggests the parties conduct a brief, second

deposition of Henry with UTHSCT shouldering t policy should enable the parties to cure any prejudice caused by UTHSCT s late production of

Considering the factors examined above, the Court finds sanctions inappropriate for UTHSCT s failur Therefore, the Court DENIES for sanctions with r argument (Dkt. #104).

III. Deposition Interference

(Dkt.

walked over to Henry, and pointed out to Henry sections of the document he was being questione te sanctions for conduct would include: on and deposing p. address (Dkt. #106).

re looking for? Q. What I was wanting you to look for in your report is any reference to the fact Dr. Slabisak was using her sexual harassment complaint to delay any other investigation she might have been involved in. A. That was the perception.

MR. HUFF: Objection; nonresponsive. Q. My question was if you would look and see if you see anything in the report. A. I will look.

MR. HUFF: Okay. Ms. Witter, you need to go sit down and not be giving your MS. WITTER: Excuse me, sir.

MR. HUFF: -- giving your witness a document. You know improper to walk up and give your witness a record in this case. MS. WITTER: I am counsel of record.

MS. WITTER: Yes, sir, I am. I have been since the beginning. MR. have a chance to explain that to the Court, because you s improper deposition, but not today. A. s the third paragraph. Q. Okay. What does it say there?

might entail, how this might affect her staying in the program and proceeded to address the other allegations that were presented to the program

to you when she walked over and gave you that, right?

MR. Hs clear, the document went on the table, I grabbed it as soon as it hit the table, Mr. Henry did not look at the document and then you went on a tirade against Ms. Witter. So, no, he did not t get anything pointed out to h t like to videotape.

MR. re free to videotape anytime you want to. . . . . MR. HUDSO to [videotape the deposition], but you keep making comments on the record apparently in an attempt to, I suppose, build something that you can throw at the wall. Nothing here indicates Mr. Henry has looked at anything improper other than your exhibit. (Dkt. #105 at p. 12). A review of the Docket indicates that Witter is not counsel of record for UTHSCT. Regardless of Witter s alleged conduct, an attorney who is not

counsel of record should not actively participate in a deposition. If Witter wishes to represent UTHSCT in this case, she should make a formal appearance. Otherwise, Witter must not actively participate in future depositions or claim to be counsel of record in this case. Concerning Plaintiff s sanction request, the Court notes that the deposition testimony supports two versions of events: (1) Plaintiff s claim that Witter approached Henry, handed him a document, and pointed to a portion of the document and (2) UTHSCT s objection that Henry

did not review a document or have any information directed to his attention. If the Court accepted only Plaintiff s claim, the Court would find Witter s conduct inappropriate, but not sanctionable. Rule 30(d)(2) sanctions are reserved for conduct that impedes, delays, or frustrates the fair examination of the deponent, not necessarily for single inappropriate acts. Compare Carter v. Burlington N. Santa, LLC, 4:15-CV-366-O, 2016 WL 3388707, at *3 (N.D. Tex. Feb. 8, 2016) (sanctions appropriate when plaintiff made untruthful statements regarding the contents of a folder, and counsel instructed plaintiff not to answer questions relating to the contents of the folder); Howell, 2013 WL 824715, at *6 (sanctions appropriate when counsel informed onger represent deponent, causing deponent to incur the costs of representing himself at his deposition); and VirnetX Inc., 2012 WL 7997962, at *3 (sanctions appropriate when counsel terminated a deposition because counsel merely disagreed with a line of questioning); with Kasparov v. Ambit Tex., LLC, 3:16-CV-3206-G-BN, 2017 WL 4842350, at *6 9 (N.D. Tex. Oct. 26, 2017) (sanctions inappropriate when defense counsel asked the same questions multiple times believing the witness did not give a responsive answer and to the form of the questions). Therefore, even if Witter engaged in inappropriate deposition conduct, the Court finds such conduct would not rise to a sanctionable level. The Court reminds the parties of their duties and ethical obligations under the Federal and Local Rules as well as the . However, the Court DENIES motion for sanctions with respect to Plai (Dkt. #104).

CONCLUSION Due to the preceding discussion, the Court DENIES Against Defendant UTHSCT (Dkt. #104).