

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
RACHEL TUDOR,)	
)	
Plaintiff-Intervenor,)	
v.)	CASE NO. 5:15-CV-00324-C
)	
SOUTHEASTERN OKLAHOMA)	
STATE UNIVERSITY, and)	
)	
THE REGIONAL UNIVERSITY)	
SYSTEM OF OKLAHOMA,)	
)	
Defendants.)	

**REPLY IN SUPPORT OF PLAINTIFF UNITED STATES OF AMERICA’S
MOTION TO COMPEL PRODUCTION OF ELECTRONICALLY STORED
INFORMATION**

I. Introduction

The United States has respectfully moved this Court to compel both Defendants to produce electronically stored information (“ESI”) that the United States requested months ago. Defendants’ response to the United States’ Motion represents the first time they have objected to those ESI requests in writing and contains objections to the scope of the ESI requests that they have never made before. The Court should grant the United States’ Motion because the Defendants’ objections have been waived and lack merit.

II. Argument

A. *Defendants Have Waived Their Objections*

For the reasons discussed below, the Defendants have waived their objections to the United States' requests for ESI because their objections were untimely, unwritten, non-specific, and procedurally deficient.

1. **The Defendants failed to timely object in writing**

The Federal Rules of Civil Procedure required the Defendants to object, in writing, to the United States' January 15, 2016 requests for production by February 14, 2016. Fed. R. Civ. P. 34(b)(2)(A) (requiring a party to respond to a request for production in writing within 30 days after being served); Fed. R. Civ. P. 34(b)(2)(B) and (C) (requiring objections to be stated with specificity and to identify whether any responsive materials are being withheld on the basis of the objection); and Fed. R. Civ. P. 26(g)(1) (requiring objections to be signed by attorney of record).¹ The Defendants did not comply with these rules. Indeed, the Defendants did not even provide written objections until they responded to the United States' motion to compel. A party who only objects to discovery requests in response to a motion to compel waives those objections. *See, e.g., Witt v. GC Servs. Ltd. P'ship*, 307 F.R.D. 554, 569 (D. Colo. 2014). The *Witt* decision, which the Defendants cited in their response to the United States' Motion (Defs.' Br. at 11),

¹ The Federal Rules of Civil Procedure cited here reflect the December 2015 amendments, which Defendants used in their response to the United States' motion as the governing standard. *See* ECF No. 59 ("Defs.' Br.") at 4. The requirements that a party respond timely to requests for production in writing and produce non-objectionable materials were in the Rules prior to the amendments.

highlights two district courts within the Tenth Circuit that reached the same conclusion. *Witt*, 307 F.R.D. at 569. In fact, the *Witt* court even ordered monetary sanctions where the defendant failed to provide responsive information upon the plaintiff's initial request and "[took] exception to the volume or types of information sought through [plaintiff's] written discovery" in response to a motion to compel where "those objections were never raised in counsel's *initial discovery response*." *Id.* (emphasis added).

The Defendants argue that it is not necessary to object to requests for production in writing (Defs'. Br. at 8-9) even though Rule 26(g)(1) clearly requires signed, *i.e.*, written, objections. "An attorney must sign every disclosure, discovery request, response or *objection* and that signature constitutes a certification that obliges the attorney to 'stop and think about the legitimacy of a discovery request, a response thereto, or an *objection*.'" *Howard v. Segway, Inc.*, No. 11-CV-688-GKF-PJC, 2013 WL 869955, *5 (N.D. Okla. Mar. 7, 2013) (emphasis added) (citing Rule 26(g)(1)). The Defendants did not object in writing and, thus, the Court should deem their objections waived.

2. The Defendants failed to properly object because their verbal "objections" lacked specificity and they failed to respond to the requests by producing non-objectionable documents.

The Defendants' verbal expressions of discontent with the United States' requests for production also cannot constitute valid objections because they were simply too vague and conclusory to permit counsel for the United States to attempt to address them. "[G]eneral or boilerplate objections, offered without explanation, may constitute a waiver of the responding party's right to object." *Howard*, 2013 WL 869955 at *3 (finding

vague objections waived even when served in writing). A party resisting discovery must demonstrate “specifically how, despite the broad and liberal construction afforded the federal discovery rules, each [request] is not relevant or how each question is overly broad, [unduly] burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.” *Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL, 2005 WL 731070, *4 (D. Kan. Mar. 30, 2005) (internal citation and quotation marks omitted).

Even now, having had months to formulate responses, the Defendants marshal only conclusory arguments to support their failure to provide responses. For example, the Defendants purport that searches are “very time consuming,” Defs.’ Br. at 4, but provide no estimates of the amount of time needed to conduct such searches or the number of emails that may be responsive to those searches.² An attorney who receives a discovery request must perform a reasonable search so that he or she can determine what responsive documents are available and which of those, if any, will be produced. *Howard*, 2013 WL 869955 at *4 (citing cases in support). It appears that the Defendants have not conducted such reasonable searches. If they did, they should have provided information to the Court on the number of emails that the United States’ search requests yielded.

² While Defendants make much of the time they will spend redacting personal information from emails, there is an agreed protective order in this case that allows Defendants to avoid redacting such information. ECF No. 41 at 3.

When a party objects to a document request, it also must specify which part of the request it finds objectionable and produce responsive documents to the part it does not find objectionable. *Id.* at *2. The Defendants cannot possibly argue that neither a single search term nor a sliver of the timeframe in the United States' request for production had any hope of yielding responsive information; indeed, they appear to concede that certain years are fairly the subject of discovery. But rather than produce what was responsive and identify what was being withheld, the Defendants disregarded the United States' requests, produced no responsive documents, and only now, faced with a motion to compel, do they begin to specify their concerns about specific search terms. *See* Defs.' Br. at 7.

The requirement of specific, written objections is not merely a procedural technicality as the Defendants seem to suggest. Because the Defendants did not raise objections about specific requests or provide reasons for their objections, the United States could not judge the merits of the objections and determine whether it should narrow or amend its requests. The United States has always been willing to consider adjustments to the search terms if the Defendants found that they yielded a large number of irrelevant emails. *See* Exhibit 1 to Pl.'s Motion (ECF No. 52-1) at 1. The Defendants disingenuously claim that they tried to work with the United States to develop acceptable search terms prior to the instant motion practice. In fact, the Defendants ignored emails from the United States as it tried to reach an agreement with the Defendants on ESI discovery. *See* Exhibit 3 to Pl.'s Motion (ECF No. 52-3). Furthermore, the first time that

the Defendants raised concerns with any specific search terms was in their response to the United States' Motion. And the Defendants still have not indicated how many emails any search term yielded making it impossible to determine whether any of the search terms are overly broad.³

If the Defendants had objected properly to the United States' requests, the parties might have resolved this dispute without the necessity of this Motion. Because the Defendants failed to properly object, the Court should deem the Defendants' objections waived and compel production of the requested ESI.

B. *Even if They Had Not Been Waived, Defendants' Objections Lack Merit.*

For the reasons discussed below, even assuming *arguendo* that the Defendants did not waive their objections to the United States' ESI requests, their objections lack merit.

1. The Defendants' burden arguments are unsupported.

The Defendants cite the number of documents already produced in this case to imply that additional requests are unduly burdensome. However, "[a] party asserting an unduly burdensome objection to a discovery request has 'the burden to show facts justifying [its] objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome.'" *Ehrlich v. Union Pac. R.R.*

³ Defense counsel's recollection of what was said during the February 10, 2016, teleconference also does not square with the United States' recollection. The United States does not recall the Defendants asserting during that teleconference that the United States' ESI requests were "general and unfocused." Defs'. Br. at 8. Instead, the February 10 teleconference focused on shifting the burden of searching through ESI from the Defendants to the United States. It was not until the April 7, 2016, teleconference that counsel for the United States recalls the Defendants first raising vague concerns about the temporal scope of the United States' ESI requests.

Co., 302 F.R.D. 620, 625 (D. Kan. 2014) (defendant’s “undue burden” objection overruled because of lack of supporting evidence) (internal citation omitted). Defendants have provided no information on how much actual time or expense it would take to respond to the United States’ ESI request. This is essentially an admission that they never attempted to research, let alone conduct, the requested searches and, for that reason, cannot show that the searches are unduly burdensome.⁴

2. Rule 26 Proportionality Analysis Favors the United States.

The Defendants claim that the United States’ requests lack proportionality without analyzing many relevant factors. Rule 26 requires that proportionality be assessed, in part, by examining “the importance of the issues at stake in the action.” *Jones v. Halliburton Energy Servs., Inc.*, No. CIV-11-1322-M, 2016 WL 1179210, at *2 (W.D. Okla. Mar. 24, 2016). This case centers on discrimination against a transgender individual, an issue that is the focus of national attention both in social and legal contexts. It is not run-of-the-mill civil litigation, but a case brought by the United States in the public interest on an issue of great public importance. Against this backdrop and given the nature of its claims, the United States should have ample latitude in the scope of

⁴The Defendants suggest that the search term “tenure” is likely to return a large number of irrelevant emails. However, employees at Southeastern Oklahoma State University (“Southeastern”) often use shorthand to refer to the promotion and tenure process with terms like “P&T” instead of “promotion and tenure.” As such, it is unclear how many emails the search term “tenure” will yield. If the Defendants had run the requested searches and discovered that the term “tenure” yielded an inordinately large number of emails, the United States would have considered adjustments to the requested search. Unfortunately, the Defendants never did that.

discovery, and such latitude is completely consistent with Rule 26's proportionality requirement.

To be sure, the Parties' respective resources, and whether the burden of discovery outweighs the benefit, also should be considered in assessing proportionality. However, the Court should take into account that the United States is willing to assume the lion's share of the work under a Fed. R. Evid. 502 Order—an approach that the Defendants once favored. Thus, the Defendants' generalized concerns about lack of IT staff (again, unsupported by requisite evidence, *see Ehrlich*, 302 F.R.D. at 625) required to perform searches carry little weight.

Under the Fed. R. Evid. 502 Order submitted with the United States' Motion, the only work that the Defendants' IT personnel would need to perform involves basic searches and then the transfer of search results to a hard drive or other media.⁵ The United States would take on all the other searching and review of documents. Defense counsel then need only review the smaller subset of emails the United States identifies for use in the case. Even if the Court only orders conventional production and does not enter the United States' proposed Fed. R. Evid. 502 Order, the Defendants cannot escape the requirement that documents, including ESI, be produced either in the form specified, or a timely objection to that form must be made. Fed. R. Civ. P. 34(b)(2)(A) and (b)(2)(E)(ii).

⁵ The Regional University System of Oklahoma's ("RUSO") email platform permits all accounts to be accessed with a single search. This renders the burden of searching all RUSO email accounts minimal and it should be simpler to conduct than searches requested for the more limited number of users at Southeastern, which uses a different email platform.

Rule 26 proportionality analysis also requires an assessment of relative access to relevant information and a look to the needs of the case. That is simple here: the Defendants have unfettered access to the materials in question, and the United States has none. Discovery to date has shown that the witnesses in this case utilized email in discussion of Dr. Tudor. High-level administrators of Southeastern were involved in every event alleged. The only emails the Defendants have produced so far have been a limited number of paper printouts related to Dr. Tudor and the emails from the “test search” of Drs. Mischo’s and Prus’ email accounts. It would be very surprising, indeed, suspicious, if the United States’ requested searches yielded no additional emails between witnesses about Dr. Tudor’s gender transition, promotion and tenure application, discrimination complaints, or other relevant events related to Dr. Tudor. The Defendants have also produced very few emails related to comparators and, as discussed below, the United States has alleged that the Defendants treated Dr. Tudor differently than similarly situated comparators. For these reasons, the United States’ requested email searches satisfy Rule 26’s proportionality requirement.⁶

⁶ Defendants argue that the “test search” of Drs. Mischo’s and Prus’ email accounts yielded no relevant information. Defs’. Br. at 3. In so arguing, they ignore the fact that the “test search” was intended, in part, to permit the United States to craft search terms that would be more likely to return relevant evidence. Furthermore, the “test search” returned emails that the United States deems relevant and it has used some of them as deposition exhibits.

3. The Defendants' time-limitations and subject-matter-relevance arguments lack merit.

In contending that the United States' request for production is temporally overbroad and not tailored to seek emails related to Dr. Tudor (Defs' Br. at 5-8), the Defendants ignore one of the central allegations in this lawsuit: that the Defendants treated Dr. Tudor differently than similarly situated professors who sought promotion and/or tenure over a period of several years. *See e.g.*, Compl. at ¶¶ 37, 46, 48, and 51. The United States seeks information not just about Dr. Tudor, but also about her comparators. That is why a broader date range and searches geared toward obtaining information about professors other than Dr. Tudor is wholly appropriate. *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 649, 653 (D. Kan. 2004) (permitting discovery of comparator evidence).

III. Conclusion

The Defendants are months too late in asserting written objections to the United States' discovery requests and the objections they raised in their response to the United States' Motion are still deficient. Though the United States has tried, over months, to obtain the requested information, Defendants have shrugged off those efforts. For all of the foregoing reasons, and the reasons stated in its Motion, the United States respectfully requests that the Court grant its Motion.

Date: May 23, 2016

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CERTIFICATE OF SERVICE

I certify that I served this document on all counsel of record through the Court's electronic filing system on the date below.

Date: May 23, 2016

/s/ Allan K. Townsend