

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

**CHELSEY NELSON PHOTOGRAPHY
LLC and CHELSEY NELSON,**

Plaintiffs,

v.

**LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT, et al.,**

Defendants.

Case No. 3:19-cv-851-BJB-CHL

**DEFENDANTS' RESPONSE TO PLAINTIFFS'
MOTION FOR LEAVE TO SUPPLEMENT MOTION TO COMPEL**

Defendants Louisville/Jefferson County Metro Government, Louisville Metro Human Relations Commission – Enforcement, Louisville Metro Human Relations Commission – Advocacy (collectively, “HRC”), Verná Goatley, in her official capacity as Executive Director of the Louisville Metro Human Relations Commission, Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Leslie Faust, William Sutter, Ibrahim Syed, and Leonard Thomas, in their official capacities as members of the Louisville Metro Human Relations Commission-Enforcement (collectively, “Defendants”), by counsel, respond as follows to the Motion for Leave to Supplement Motion to Compel [Doc. No. 80] (“Motion to Supplement”) filed by Plaintiffs Chelsey Nelson Photography and Chelsey Nelson (collectively, “Plaintiffs”):

The Motion to Supplement should be denied as futile because nothing in Plaintiffs’ Supplement justifies granting Plaintiffs’ Motion to Compel the unprecedented scope of discovery Plaintiffs’ seek, *i.e.* all complaints of discrimination received by HRC and related investigative files dating back to 2004. Plaintiffs have still not produced any case law authority for such a

sweeping fishing expedition, which would contravene established concepts of relevance, burden, and proportionality, not to mention constitute violations of contract and federal and local confidentiality laws, as further explained in Defendants' Motion for Protective Order [Doc. No. 64] and Response to Plaintiffs' Motion to Compel [Doc. No. 66].

I. Individual Complaints of Discrimination Involving Non-Parties to this Litigation Are Not Relevant to Plaintiffs' Claims

With no hint of irony, Chelsy Nelson—an individual who filed this pre-enforcement challenge precisely so that she could be free to discriminate against individuals on the basis of their sexual orientation without fear of repercussion under Louisville's anti-discrimination law—suggests that Defendants have produced insufficient evidence that discrimination on the basis of sexual orientation has occurred and/or is still occurring such as would justify the ongoing enforcement of its anti-discrimination law. Defendants have produced evidence that:

- Before sexual orientation was added as a protected class in Louisville's anti-discrimination law, HRC started tracking receipt of complaints of discrimination on the basis of sexual orientation (*see, e.g.*, HRC Annual Report for 1990-91, filed as an exhibit to Plaintiffs' Supplement at Doc. No. 78-8, Page ID #2022);
- Before Louisville's legislators voted to add sexual orientation as a protected class, they heard testimony from numerous citizen witnesses, who testified both for and against passage of the Fairness Ordinance, including personal accounts from citizens who had experienced discrimination on the basis of sexual orientation (*see, e.g.*, Excerpts attached to Defendants' Response to Plaintiffs' Motion to Compel as Doc. No. 66-2);
- Since Louisville's Fairness Ordinance has been enacted, HRC has investigated numerous complaints of discrimination on the basis of sexual orientation, as reflected by publicly available statistics (*see, e.g.*, HRC Annual Report for 2015-2017, attached as exhibit to Defendants' Motion for Protective Order as Doc. No. 64-4, Page ID #1733).

Defendants' reliance on this evidence to establish that Louisville has a sufficiently important or compelling purpose to enact and enforce an anti-discrimination law that prohibits discrimination on the basis of sexual orientation does not make the details of any individual case of discrimination relevant to Chelsy Nelson's claims. Plaintiffs insist that they be able to rifle

through Louisville's enforcement files, but it is unclear to what end? Will Plaintiffs attempt to prove that Louisville is the one place in the world where individuals do not experience discrimination on the basis of sexual orientation (despite Plaintiffs' stated intention to discriminate)? Plaintiffs have repeatedly asked Defendants to identify a historical example of discrimination that would justify application of Louisville's Fairness Ordinance to Chelsey Nelson. Implicit in these requests is the suggestion that Defendants must identify discrimination exactly like the discrimination Chelsey Nelson intends to engage in, i.e. in the provision of wedding photography services, in order to justify applying the law to Chelsey Nelson. Plaintiffs have identified no case law authority that would require Defendants to engage in that exercise and Defendants are aware of none.

II. Plaintiffs' Rule 30(b)(6) Deposition Notice Did Not Include a Topic Requesting Testimony Regarding the Details of Individual Cases

Plaintiffs initially chose to postpone deposing Louisville/Jefferson County Metro Government's Rule 30(b)(6) designee until after the Court resolved the pending Motion to Compel and Motion for Protective Order. *See* Plaintiffs' Motion for Extension of Time to Complete Fact Discovery [Doc. No. 70], p. 6 (arguing that "Chelsey cannot effectively depose Louisville's witnesses until she receives the requested documents"). In May 2021, Plaintiffs changed their minds and decided to move forward with Defendants' depositions despite not yet having a ruling on the disputed discovery and knowing that Defendants objected to discovery regarding the confidential details of individual cases of discrimination for the reasons set forth in briefing on the pending motions. Plaintiffs served a fifth amended Rule 30(b)(6) deposition notice, pursuant to which the deposition of Louisville/Jefferson County Metro Government's Rule 30(b)(6) designee, Kendall Boyd, proceeded on May 25, 2021.

Despite the misleading characterizations in Plaintiffs' Supplement, there was no topic in

Plaintiffs' 30(b)(6) notice addressed to the details of individual cases of discrimination. Instead, Plaintiffs' notice included 11 topics regarding HRC's "rules, processes, policies, practices, and procedures" for receiving and investigating complaints of discrimination and otherwise enforcing the Fairness Ordinance. *See* Deposition Notice, attached to Plaintiffs' Supplement as Doc. No. 78-7, Topics 2-12. The only topic which identified individual cases was Topic 13, which requested testimony regarding the "rules, processes, policies, practices, and procedures identified in Topics 2-12 (as applicable) the Commission used or is currently using in the following cases: [list of 22 individual cases¹]." HRC used the same "rules, processes, policies, practices, and procedures" in the identified cases as it does in all other cases, therefore Topic 13 was duplicative of Topics 2-12. As such, Louisville/Jefferson County Metro Government's Rule 30(b)(6) designee had no obligation to review individual case files in order to prepare to offer the testimony requested by Plaintiff's Rule 30(b)(6) deposition notice. The designee was adequately prepared to testify regarding HRC's "rules, processes, policies, practices, and procedures" and, indeed, testified at length regarding HRC's "rules, processes, policies, practices, and procedures."

Because Plaintiffs did not include a Rule 30(b)(6) topic regarding the details of any individual complaint of discrimination, there are no grounds to re-open the deposition on that topic, even if the Court grants Plaintiffs' Motion to Compel.

III. Defendants Have Produced Ample Proof that Complying with Plaintiffs' Requests Would Impose Undue Burdens

In support of Defendants' argument that the burdens associated with complying with Plaintiffs' request for the production of the entirety of HRC's enforcement files dating back to December 2004 are undue and disproportionate to the relevance of the discovery sought,

¹ These cases were largely identified based on the publication of certain aspects of conciliation agreements in those cases, as authorized by Louisville Metro Ordinance 92.08(B)(7).

Defendants submitted an affidavit from HRC's Executive Director Verná Goatley. *See* Doc. No. 64-3 ("Goatley Aff."). At her recent deposition, Plaintiffs questioned Ms. Goatley regarding a few topics addressed by her affidavit and now contend that the entirety of Ms. Goatley's affidavit should be disregarded based on her deposition testimony, going so far as to argue Ms. Goatley's affidavit was a "sham." Plaintiffs are mischaracterizing Ms. Goatley's testimony in an attempt to mislead the Court.

With respect to undue burden, Defendants cited Ms. Goatley's affidavit as evidence of the following points:

HRC's case files are maintained in hard copy, paper format. Goatley Aff., ¶ 3. Ms. Goatley confirmed this point at her deposition, testifying that "Our files are in hard copy." *See* Excerpts from Deposition of Verná Goatley, attached to Plaintiffs' Supplement at Doc. No. 78-11 ("Goatley Tr."), 124:16. Ms. Goatley further testified that certain information regarding cases of employment and housing discrimination are uploaded to a software platform, as required by the federal agencies with which HRC partners on those cases, but that "All information that's in the hard copy file is not uploaded to the [software] systems." *Id.* at 124:21-125:3. Exports from the EEOC software platform have been produced to Plaintiffs to the extent permitted by applicable confidentiality laws. *See, e.g.*, Doc. No. 64-6. Other EEOC and HUD reports have been withheld pursuant to HRC's contractual and statutory confidentiality obligations, as further discussed in Defendants' Motion for Protective Order.

HRC does not maintain a separate file of complaints. Goatley Aff., ¶ 8. Plaintiffs did not question Ms. Goatley regarding this aspect of her affidavit.

The vast majority of complaints of discrimination received and/or investigated by HRC are resolved without any public hearing or trial. Goatley Aff., ¶ 5. Plaintiffs did not directly question

Ms. Goatley regarding this aspect of her affidavit, but her testimony was consistent with this point. *See* Goatley Tr. 123:21-24 (during Ms. Goatley’s time as Executive Director of HRC, no cases have gone to hearing).

HRC investigators maintain case files for cases they are actively investigating in their own offices. Goatley Aff., ¶ 4. Ms. Goatley confirmed this point at her deposition. *See* Goatley Tr. 125:24-126:2.

Once an investigation has concluded, case files are temporarily maintained in a central file at HRC’s offices before being sent to off-site archived storage, where they are kept for ten years. Goatley Aff., ¶ 6. Ms. Goatley confirmed these points at her deposition. *See* Goatley Tr. 126:11-24.

It typically takes 2-4 weeks to retrieve a single archived file. Goatley Aff., ¶ 7. At her deposition, Ms. Goatley testified that it takes “a couple of days to a couple of weeks” to retrieve a file from archived storage. Goatley Tr. 127:10-13. Even taken at face value, this is hardly a glaring discrepancy. And Plaintiffs did not question Ms. Goatley regarding whether changes in staffing or other circumstances may have led to improvements in the time needed to retrieve archived files between the March 5, 2021 date of Ms. Goatley’s affidavit and the May 27, 2021 date of her deposition. More to the point, Plaintiffs are not requesting the retrieval of a single archived file. Complying with Plaintiffs’ discovery requests would require HRC to retrieve the entire repository of its case files from archived storage—something that has never been done.

In the rare case where a public hearing occurred, the documents associated with that public hearing would be intermingled with documents that must be kept confidential, requiring tedious and time-consuming manual review to extricate the files associated with the public hearing. Goatley Aff., ¶ 19. At her deposition, Ms. Goatley was asked “what documents are contained in

individual case files.” Goatley Tr. 129:10-11. Understandably, Ms. Goatley answered that she would have to ask her staff about “what documents are in what case files.” *Id.* 129:16-17. Ms. Goatley also testified that she did not know “what documents go in what place of the case files,” (*id.* 131:19-21), a matter that would be left to individual case investigators as they maintain working files in their own office before the files are sent to archives after a case is closed.

To the extent any further evidence is needed to support the point that extracting portions of archived case files is tedious and time-consuming, it is offered pursuant to the declaration of the undersigned counsel attached hereto as Exhibit 1. Counsel reviewed two case files retrieved from archived storage pursuant to the parties’ meet-and-confer regarding the pending discovery disputes. *Id.*, ¶ 3. These case files contained a total of 984 pages of documents including the complaints, documents setting forth HRC’s investigative plan and schedule, the investigator’s notes from witness interviews, documents submitted by the respondent during the confidential conciliation process, medical/counseling records and human resources files relating to the complainant, correspondence between and among HRC, the complainant, and respondent, discovery materials exchanged between the complainant and respondent, and documents associated with the public hearing. *Id.*, ¶ 4. Documents associated with the public hearing were intermingled with the other files, requiring tedious and time-consuming manual review to extricate the 127 pages of documents filed with the hearing officer for production to Plaintiffs. *Id.*, ¶ 5. This manual review process of just two archived files took approximately 3-4 hours of attorney time.²

Id.

Put simply, nothing that occurred at Ms. Goatley’s deposition calls into serious question

² The documents produced from these archived files are completely irrelevant to Plaintiffs’ claims. They were reviewed and produced as part of Defendants’ good faith effort to strike a compromise on Defendants’ burdensome discovery requests.

any aspect of her affidavit. As further argued in Defendants' Motion for Protective Order and Response to Plaintiffs' Motion to Compel, because of the marginal-at-best relevance of the discovery sought, the burdens associated with complying with Plaintiffs' requests for the production of the entirety of HRC's enforcement files are not proportional to Plaintiffs' need for the discovery and are therefore undue.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' Motion for Protective Order [Doc. No. 64] and Defendants' Response to Plaintiffs' Motion to Compel [Doc. No. 66], Defendants respectfully request that the Court deny Plaintiffs' Motion for Leave to Supplement Motion to Compel as futile, and deny Plaintiffs' motion to compel and grant Defendants' motion for protective order with respect to the disputed discovery.

Respectfully submitted,

/s/ Casey L. Hinkle

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2021, the foregoing was filed via the Court's electronic filing system, which will automatically send notice of such filing to all counsel of record.

/s/ Casey L. Hinkle
Counsel for Defendants

Exhibit 1

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

<p>CHELSEY NELSON PHOTOGRAPHY LLC and CHELSEY NELSON,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT, et al.,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. 3:19-cv-851-BJB-CHL</p>
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DECLARATION OF CASEY L. HINKLE

I, Casey L. Hinkle, hereby declare as follows:

1. I am a member in good standing of the bar of the Commonwealth of Kentucky and one of the attorneys of record for the Defendants in the above-captioned action. I have personal knowledge of the facts set forth herein, and if called as a witness, would testify competently thereto.
2. I make this declaration in support of Defendants' Response to Plaintiffs' Motion for Leave to Supplement Motion to Compel.
3. I reviewed two case files retrieved from archived storage pursuant to the parties' meet-and-confer regarding the pending discovery disputes.
4. These case files contained a total of 984 pages of documents including the complaints, documents setting forth Louisville Metro's Human Relations Commission's ("HRC") investigative plan and schedule, the investigator's notes from witness interviews, documents submitted by the respondent during the confidential conciliation process, medical/counseling

records and human resources files relating to the complainant, correspondence between and among HRC, the complainant, and respondent, discovery materials exchanged between the complainant and respondent, and documents associated with the public hearing.

5. Documents associated with the public hearing were intermingled with the other files, requiring tedious and time-consuming manual review to extricate the 127 pages of documents filed with the hearing officer for production to Plaintiffs. This manual review process of just two archived files took me approximately 3-4 hours.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 2nd day of July, 2021 in Louisville, Kentucky.

/s/ Casey L. Hinkle

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