

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DURWOOD L. CURRIER,)
)
 Plaintiff)
)
 v.)
)
 UNITED TECHNOLOGIES,)
 CORPORATION,)
)
 Defendant)

Civil No. 02-107-P-H

ORDER ON MOTION FOR SANCTIONS

I have before me Plaintiff Durwood Currier's Motion for Imposition of Sanctions Pursuant to F.R.Civ.P. 37 (b) & (c) (Docket No. 52). The motion is **GRANTED**, though the sanction is not as severe as the plaintiff requests.

Motion for Sanctions

Currier's motion for sanctions relates to the recent production of approximately 600 pages of documents bearing Bates Numbers UTC-DC-003133 through UTC-DC-003711. In its Rule 26 initial disclosure, Pratt & Whitney indicated five categories of documents it might use to support its claims or defenses:

1. Documents[,] including correspondence, contracts, performance reviews, personnel files, and miscellaneous related materials concerning the Plaintiff[']s employment with Pratt & Whitney, others similarly situated, and Plaintiff's termination.
2. Documents related to the Employee Assessment Guidelines, salary and merit pay increases.
3. Documents related to the Employee Assessment Matrix, the reduction in force, and the need for the reduction in force.
4. Documents related to the performance of Unit 81[00].

5. Pleadings/Submission[s] in the Maine Human Right[s] Commission litigation.

The documents at issue are now being categorized by Pratt & Whitney as follows:

- Employee weekly count reports for Unit 8100 (Bates 3133-3189);
- Cost performance reports for all Business Units for 1998-1999 (Bates 3419-3711);
- Other miscellaneous reports, such as Daily Load Reports, Manpower Requirement Reports, North Berwick Employee Count Reports, [which] provide analyses of the output requirements and required manpower to deliver output requirements (Bates 3190-3418).

(Def.'s Opp. to Pl.'s Mot. for Imposition of Sanctions, Docket No. 53, at 3 n.5.)

Pratt & Whitney maintains that all of the documents at issue were disclosed in its initial disclosure and were not produced only because Currier never specifically asked to see any of them during discovery. Pratt & Whitney argues that Currier's failure to request these documents should not preclude Pratt & Whitney from using them at trial. Currier, on the other hand, says that Pratt & Whitney's initial disclosure did not really disclose the documents, that Currier's document requests clearly called for the production of the documents and that Pratt & Whitney not only violated the rules of discovery by failing to produce them, but also this Court's October 24, 2002 order to produce documents responsive to Currier's requests.¹ Currier was not alerted to Pratt & Whitney's intent to use the documents until after the pretrial conference when the parties were required to actually exchange exhibits. In its pretrial memorandum Pratt & Whitney had identified such documents in only the most generic fashion and Currier reasonably assumed that the actual exhibits would be part of the materials he had already received. I address the three categories of documents independently.

¹ The October 24, 2002 order to produce arose from a discovery dispute aired by Currier because Pratt & Whitney, in response to certain requests, produced only documents found in Currier's personnel file, even though the scope of the document requests were clearly much broader than that.

1. The “employee weekly count reports for Unit 8100.”

In its initial disclosure UTC said it would rely on documents related to the performance of Unit 8100. Bates 3133-3189 would appear to fall directly within that disclosure. Thus, the question is whether Currier ever asked for those documents in the course of discovery and whether I ever ordered Pratt & Whitney to produce them. I cannot possibly envision what these documents might be except responsive to Currier’s First Request for Production of Documents Nos. 4 & 9, which asked, respectively, for “all documents related to the decision to select Mr. Currier for termination as part of the reduction in force” and “all documents that support [Pratt & Whitney’s] denial that it selected Mr. Currier for termination based on his age.” In an October 24, 2002 discovery order, issued following a Local Rule 26 discovery conference, I ordered that all such documents be produced. However, Pratt & Whitney did not produce these documents until after the pretrial conference in mid-September 2003.

I am not moved by Pratt & Whitney’s argument that Currier should have thought to request the Unit 8100 records more specifically. Currier clearly asked for all documents that Pratt & Whitney intended to use in support of its position that it had terminated Currier for some reason other than his age. It has long been apparent that Pratt & Whitney’s defense to Currier’s age discrimination claim is that Currier’s performance, including his past performance as Unit Manager in Unit 8100, placed him on the bottom of an “employee matrix” allegedly used by Pratt & Whitney to determine whom to terminate. As I indicated in my March 11, 2003, Recommended Decision on the summary judgment motions, the summary judgment record was devoid of any documentation supporting Pratt & Whitney’s contention that Currier failed to meet expectations when he was assigned to Unit 8100. Had Pratt & Whitney intended to rely on documentary evidence in support of its position that Currier performed so poorly in Unit 8100 as

to justify his termination, it should have been disclosed long before the recent exchange of exhibits, since Unit 8100 information had been identified in the initial disclosure and, more importantly, sought in the first requests for production and ordered produced by me. In my assessment, as of March 2003, at the latest, Pratt & Whitney was on notice that documents pertaining to the performance of Unit 8100, while it was under Currier's management, needed to be produced if Pratt & Whitney wanted to use such documents to justify the termination of Currier based on his performance as manager of Unit 8100. Based upon my review of the pending motion and the associated papers, the admission of these documents even if they were introduced exclusively for a reason other than to demonstrate the relative performance of Pratt & Whitney's business units,² would be unfair to Currier.

2. *The "cost performance reports for all business units for 1998-1999."*

The first issue with this category of documents is determining whether they were adequately disclosed in Pratt & Whitney's initial disclosure. If they were, they were referenced in one of the following descriptions of documents: "miscellaneous . . . materials concerning the Plaintiff[s] employment with Pratt & Whitney, others similarly situated, and Plaintiff's termination," or "[d]ocuments related to the Employee Assessment Guidelines," or "Documents related to the Employee Assessment Matrix, the reduction in force, and the need for the reduction in force," or "[d]ocuments related to the performance of Unit 81[00]." (Def.'s Automatic Required Disclosure, Docket No. 53, Ex. A.) Of course, each of these categories

² Other uses might include explaining the performance of its North Berwick facility overall and how said performance related to the need for a reduction in force in 2000. However, I note that Currier does not dispute that Pratt & Whitney's financial situation warranted a reduction in force or even that it was appropriate to eliminate the New Business Development unit manager position he held in 2000.

relates in some way to employee assessment and Pratt & Whitney's grounds for terminating Currier, classes of documents sought by Currier during the discovery period

For the reasons already stated, the documents Pratt & Whitney identifies as cost performance reports for all units (Bates 3419-3711) should have been produced in response to Currier's document requests. Furthermore, as to these documents, I seriously question whether they were properly disclosed in the initial disclosure. According to Pratt & Whitney, Currier's performance as a unit manager was deficient in the area of cost performance. Thomas Mayes, Pratt & Whitney's operations manager from 1998-2000, personally reviewed Currier's performance in Unit 8100, where he worked throughout 1998 and where he remained until early 1999. Pratt & Whitney contends that Currier was selected for termination because, among other reasons, his performance in the area of costs was particularly poor as compared with his fellow unit managers. Thus, documentary evidence related to the cost performance of all units is directly related to Pratt & Whitney's "denial that it selected Mr. Currier for termination based on his age" or "the decision to select Mr. Currier for termination as part of the reduction in force." (First Req. for Prod. of Docs., Nos. 4 & 9.) Since this is the case, Currier's requests should have prompted Pratt & Whitney to produce these documents.

3. *The miscellaneous reports.*

The final batch of documents (Bates 3190-3418) is defined by Pratt & Whitney as "[o]ther miscellaneous reports, such as Daily Load Reports, Manpower Requirement Reports, North Berwick Employee Count Reports, [which] provide analyses of the output requirements and required manpower to deliver output requirements." It is not at all obvious what relevance these documents have to the proceedings or whether they were even disclosed in any of the categories listed in Pratt & Whitney's initial disclosure.

According to Pratt & Whitney, it intends to use the “employee weekly count reports” to rebut Currier’s argument that his efforts as Unit 8100’s manager in 1998 enhanced the financial performance of various other Units. (Id. at 8.) “In other words,” says Pratt & Whitney, it intends to rely upon the documents to rebut Currier’s “unsupported contentions regarding the relative profitability of the various Business Units, rather than for the purpose of demonstrating that Currier’s performance was inadequate.”³ (Id. at 8 n.12.) Beyond this specific reference, Pratt & Whitney offers that the other miscellaneous documents are just financial records that “show the financial condition of the facility.” (Id. at 8.)

Based on Pratt & Whitney’s argument, it appears that at least the employee weekly count reports should have been produced by Pratt & Whitney in response to the document request. Although Pratt & Whitney argues that it would offer these documents only to rebut⁴ one of Currier’s assertions about the units’ relative profitability, the issue of relative profitability is precisely one of the bases on which Pratt & Whitney relies for its position that Currier performed poorly as a manager of Unit 8100. In my view, there is no real distinction between saying that the documents rebut Currier’s critique of Pratt & Whitney’s performance review and saying that the documents directly support Pratt & Whitney’s performance review. If these documents do, in fact, support Pratt & Whitney’s position that Unit 8100 and Currier, by extension, performed poorly in 1998 in the area of costs, then the documents should have been produced in response to Currier’s request for documents that related to its “denial that it selected Mr. Currier for termination based on his age” or “the decision to select Mr. Currier for termination as part of the

³ At the summary judgment stage, Currier argued that the lackluster evaluation he received in 1998 for Unit 8100’s cost performance was based on misleading data because his unit routinely loaned out employees to other units, but their labor costs were still attributed to Unit 8100.

⁴ I am not sure if Pratt & Whitney is suggesting that it may want to use the documents solely for impeachment purposes, which would mean that they did not have to be part of its initial disclosure pursuant to Rule 26(a)(1)(B). However, that appears unlikely, since Pratt & Whitney’s opening salvo is that the documents were disclosed by the initial disclosures served on Currier on June 17, 2002. (Def.’s Opp. at 4; Docket No. 53.)

reduction in force.” Moreover, even if I accept that the “employee weekly count reports” only became relevant in rebuttal, their relevance to Pratt & Whitney’s defense should have become apparent at the summary judgment stage, which concluded on April 30, 2003, with Judge Hornby’s Order accepting my Recommended Decision on Pratt & Whitney’s summary judgment motion. If these documents had been produced at that time, plaintiff would have had months rather than a few days to study them prior to trial.⁵

The remaining miscellaneous reports cannot be evaluated in a meaningful way given the lack of explanation of how they might come to be used. In any event, these documents should not be permitted to be used in a manner that serves to illustrate the relative performance of each business unit in the critical years of 1998 and 1999 because Pratt & Whitney’s defense in this case is directly connected to the performance of Currier as manager of Unit 8100 in 1998-1999, in relation to the managers of the other units in that time period.

Pratt & Whitney cautions that if the Court construes the scope of Currier’s requests to reach these “financial records,” then “every business, financial or time-keeping record in Pratt’s possession, custody or control [would have been] responsive to [Currier’s] request.” (Docket No. 53 at 6.) That is well overstated. Presumably, if I accept that Pratt’s initial disclosure included these documents because it considered them to be relevant and material to its defense, *i.e.*, that Currier was not subjected to age discrimination but was, rather, terminated as part of a reduction in force based on his performance, as compared with other unit managers then in Pratt & Whitney’s employ, the act of disclosing these documents, in itself, demonstrated the relatedness of these documents to Pratt & Whitney’s defense, regardless of however else Pratt & Whitney wants to categorize them at this juncture. In my assessment, Currier’s request for all

⁵ I recognize that the parties’ protection requests and the fact that this motion has not yet been resolved have resulted in another postponement of this trial, but that fact does not in any way change the 11th hour nature of the production of these documents.

documents related to Pratt & Whitney's basis for selecting Currier for termination encompassed the "financial records" that Pratt & Whitney now seeks to use as trial exhibits. Although the document request did not classify the documents at issue in the precise manner that Pratt & Whitney says it did in its initial disclosure, it is incumbent upon the recipient of a document request to consider the reasonable scope of the request, not to pretend that a request cannot reach certain documents unless the requesting party words its request precisely as the responding party would describe the documents. Moreover, it is incumbent upon the recipient of a document request to continuously reevaluate the scope of a request as the case develops. Fed. R. Civ. P. 26(e)(1)&(2). Thus, even if we credit Pratt & Whitney's contention that it could not initially conclude that the document requests reached the documents at issue, certainly it should have become clear to Pratt & Whitney in the course of the summary judgment proceedings that the documents at issue would be responsive to Currier's requests. Any way one looks at it, it becomes apparent that Pratt & Whitney's production of these documents did not comply with the rules of discovery. Either the documents were not contained within the initial disclosure, were not produced in response to a request for production, were not produced after I ordered their production in response to a discovery dispute, or were not timely produced when the need to supplement initial disclosures and/or document requests became readily apparent during the summary judgment process.

Conclusion

The motion for sanctions is **GRANTED**. According to Pratt & Whitney's own statement, one of the purposes of using the objected to documents is to "address the overall performance of each of Pratt's Business Units." (Docket No. 53 at 7.) Although use of these documents to illustrate the poor performance of the plant overall may not be objectionable under

the Rule 37(c)(1) “harmless” standard, use that would illustrate the relative performance of each business unit would be in contravention of the rules of discovery because such use bears directly on Pratt & Whitney’s defense to the age discrimination claim, Currier clearly requested all documents related to Pratt & Whitney’s defense, the Court previously ordered Pratt & Whitney to produce all documents related to its defense, and Pratt & Whitney failed to produce the documents within the applicable deadline or any other reasonable timeframe. To produce for the first time some 600 pages of presumably complex financial documents on the eve of trial has no “substantial justification” (Fed. R. Civ. P. 37(c)(1)), especially in a case where plaintiff has diligently pursued discovery and the issue has been highlighted for months. For this reason, I order that the documents should not be introduced at trial for purposes of illustrating the relative performance of Pratt & Whitney’s North Berwick business units in 1998 and 1999.

CERTIFICATE

- A. The Clerk shall submit forthwith copies of this Order to counsel in this case.
- B. Counsel shall submit any objections to this Order to the clerk in accordance with Fed. R. Civ. P. 72.

So Ordered.

Dated November 21, 2003

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

**U.S. District Court
District of Maine (Portland)
CIVIL DOCKET FOR CASE #: 2:02-cv-00107-DBH
Internal Use Only**

CURRIER v. UNITED TECHNOLOGIES
Assigned to: JUDGE D. BROCK HORNBY
Referred to:
Demand: \$0
Lead Docket: None

Date Filed: 05/10/02
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: Federal Question

Related Cases: None
Case in other court: None
Cause: 29:621 Job Discrimination (Age)

Plaintiff

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