IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

LESLIE K. JOHNSON,	)	
	)	
Plaintiff,	)	**No. 3:13-cv-342**
	)	
v.	)	**Judge Collier**
	)	**Magistrate Judge Guyton**
LENOIR CITY, TENNESSEE, et al.,	)	
	)	**Jury Demand**
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE
AFFIRMATIVE DEFENSE AND ASSOCIATED FILINGS

Plaintiff Leslie K. Johnson files this Memorandum in support of her Motion to Strike Defendants' alleged affirmative defense contained in paragraph number 82 of their Answer (ECF No. 7 at 14) and associated Notice of Manual Filing (ECF No. 8) and manually filed CD labeled as Exhibit A to their Answer. In support, Ms. Johnson states as follows:

I. FACTS

1. On June 14, 2013, Ms. Johnson filed a Complaint for violations of her civil rights and unlawful employment practices under 42 U.S.C. § 1983; the Tennessee Public Employee Political Freedom Act, Tenn. Code Ann. § 8-50-601 *et seq.* (PEPFA); and the Tennessee Public Protection Act, Tenn. Code Ann. § 50-1-304 (TPPA). (ECF No. 1). Ms. Johnson contends that Defendants retaliated against her for speaking out on matters of public concern, communicating with elected public officials, and opposing and refusing to remain silent about or participate in illegal activity.

2. Defendants Lenoir City, Tennessee, and Tony R. Aikens, Don White, and W. Dale Hurst, officially and individually (collectively "Defendants"), filed their Answer to the Complaint on July 30, 2013 (ECF No. 7), a Notice of Manual Filing (ECF No. 8), and a

manually filed CD that has been labeled as Exhibit A to their Answer containing digital images. In their Answer Defendants assert several alleged affirmative defenses (ECF No. 7 at 12-14). One of those, contained within paragraph 82 of the Answer, along with its referenced Notice of Manual Filing and manually filed CD, are the subject of Ms. Johnson's Motion to Strike. Specifically, Defendants assert that:

> A city-owned cell phone assigned to and used by the Plaintiff in the course and scope of her employment contained improper, unprofessional, and pornographic images on it that, had the City been aware prior to her termination, would have played a significant role in the employment status of the Plaintiff insofar as those images are in direct violation of portions of the Plaintiff's employment agreement. Relevant images can be found on a disk labeled as Exhibit A that will be manually filed.

(ECF No. 7 at 14, ¶ 82).

3. Ms. Johnson moves to strike and/or dismiss this alleged affirmative defense and the associated Notice of Manual Filing and manually filed CD.

II. STANDARD OF REVIEW

Rule 12(f) of the Federal Rules of Civil Procedure permits a district court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" either "on its own" or "on motion made by a party . . . ." Fed. R. Civ. P. 12(f). A Rule 12(f) motion serves as "the primary procedure for objecting to an insufficient defense." 5C Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 1380 (3d ed. 2004). With respect to affirmative defenses, in general "'(1) the matter must be properly pleaded as an affirmative defense; (2) the matter must be adequately pleaded under the requirements of Federal Rules of Civil Procedure 8 and 9; and (3) the matter must withstand a Rule 12(b)(6) challenge – in other words, if it is impossible for defendants to prove a set of facts in support of the affirmative defense that would defeat the complaint, the matter must be stricken as legally

insufficient.'" *Sloan Valve Co. v. Zurn Indus., Inc*., 712 F. Supp. 2d 743, 749 (N.D. Ill 2010) (citation omitted); *Starnes Family Office, LLC v. McCullar*, 765 F. Supp. 2d 1036, 1047-50 (W.D. Tenn. 2011) (striking affirmative defenses as legally insufficient).

As with a Rule 12(b)(6) motion, the Court deems as admitted the non-moving party's well-pleaded facts in support of an affirmative defense, but does not accept as true its legal conclusions. *U.S. v. Rohm and Haas Co*., 939 F. Supp. 1142, 1151 (D.N.J. 1996). Inadequately pleaded defenses may be stricken. *Sloan*, 712 F. Supp. 2d at 749. The Court may strike any defense that is legally insufficient under the controlling substantive law. *SEC v. Cuban*, 798 F. Supp. 2d 783, 787 (N.D. Tex. 2011). A defense that is invalid under the facts alleged in support of it, or that would confuse the issues in the case, should be stricken. *Allapattah Servs., Inc. v. Exxon Corp*., 372 F. Supp. 2d 668, 670 (S.D. Fla. 2005).

"Immaterial" and "impertinent" allegations include statements or filings of "unnecessary" particulars or that are unnecessary to the issues in dispute. *Whittlestone, Inc. v. Handicraft Co*., 618 F.3d 970, 974 (9th Cir. 2010); *Aoki v. Benihana, Inc*., 839 F.Supp.2d 759, 764 (D. Del. 2012). "Scandalous" matter improperly casts a person in a derogatory light. *Aoki*, 839 F. Supp. 2d at 764. It includes matter that "unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court." *Florance v. Buchmeyer*, 500 F. Supp. 2d 618, 645 (N.D. Tex. 2007). Even "relevant" allegations or matter may be stricken if they contain or go into unnecessary detail. *Begay v. Public Serv. Co. of N.M.*, 710 F. Supp. 3d 1161, 1185 (D.N.M. 2010). The decision to grant or deny a motion to strike is within the Court's sound discretion. *Aoki*, 839 F.Supp.2d at 764.

III. ARGUMENT

A. Defendants' Affirmative Defense Is Legally Insufficient Under the After-Acquired Evidence Doctrine Because Defendants Have Not Adequately Alleged that Ms. Johnson Engaged in Wrongdoing for Which They Would Have Discharged Her

Defendants' alleged "after-acquired evidence" affirmative defense and associated filings should be stricken because Defendants have not adequately pleaded facts that would enable them to prove the affirmative defense. Their bare legal conclusions without factual allegations that would establish that Ms. Johnson – as opposed to some third party – actually "engaged in wrongdoing" of such severity that they "would have terminated" her render their attempt to assert the defense insufficient as a matter of law.

The Supreme Court recognized the "after-acquired evidence" doctrine in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995). The Court held, "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of discharge." *Id*. at 362-363.

Defendants have not adequately pleaded facts in paragraph 82 of their Answer showing that Ms. Johnson actually engaged in serious wrongdoing. This is because she did not do so and Defendants have no evidence to the contrary. They merely allege that "A city-owned cell phone assigned to and used by the Plaintiff [at one time in the past] in the course and scope of her employment **contained** improper, unprofessional, and pornographic images on it." (ECF No. 7 at 14, ¶ 82) (emphasis added). Defendants do not allege, nor can they prove, that Ms. Johnson was responsible for the "improper, unprofessional, and pornographic images" or that she in any way "used" the images or any phone in violation of any city policy. To be sure, Defendants' own

manually filed CD contains a "text date and time" image (attached hereto as Exhibit 1) showing that the two images were sent "**To"** an old city-issued cell phone, the number of which was once assigned to Ms. Johnson (phone number 865-242-6303) **"From" a third party** (third party phone number 865-696-5621) after business hours and over one year before her January 25, 2013, discharge from employment (on December 14, 2011) (Exhibit 1). It is undisputed that the two images at issue were sent to a phone formerly assigned to Ms. Johnson by a third party – not the other way around. Ms. Johnson did not transmit, share, or use the images. Defendants have not asserted otherwise.

Moreover, Ms. Johnson had deleted all information and data from her city-issued phone at the time that she turned it back in to Defendants. Thus, Defendants have not alleged, nor can they prove, that Ms. Johnson actually "engaged in wrongdoing" that "was of such severity that [she] in fact would have been terminated" for it. *McKennon*, 513 U.S. at 362-63. Accordingly, their alleged after-acquired evidence defense in paragraph 82 of their Answer – along with the salacious images that they filed in the public record in this case – should be stricken.

B. Defendants' Affirmative Defense and Associated Filings Reference and Contain Immaterial, Impertinent, and Scandalous Matter

Defendants' alleged after-acquired evidence defense and incorporated Notice of Manual Filing and manually filed CD should also be stricken because they contain immaterial, impertinent, and scandalous matter. Indeed, paragraph 82 of the Answer and the CD referenced in it and labeled as Exhibit A to the Answer contain "unnecessary" particulars, including alleged "pornographic images" and references to Ms. Johnson that inaccurately and inappropriately cast her in a derogatory light and invade the privacy interests of the third party who transmitted them, whose authorization was never obtained by Defendants before they filed such matter in the public record. Further, the filing of this material with the Court is invasive of Ms. Johnson's

privacy interests and substantially prejudices her and confuses the real issues in the case, particularly where Defendants have not adequately alleged and cannot prove that she engaged in any wrongdoing with respect to any phone or images that was of such severity that they would have terminated her employment for it. Accordingly, the Court should strike Defendants' legally insufficient after-acquired evidence defense and the immaterial, impertinent, unnecessary and scandalous matter referenced in and filed along with it.

It has become clear to Ms. Johnson that what Defendants have done in response to her protected activity of asserting and pursuing her rights is gone back through deleted cellular telephone data (associated with a phone number formerly assigned to her) that was somehow preserved on a city or its agent's server or backup system in an effort to dredge up purported "after-acquired evidence" that it might use against her. This constitutes an abuse of the *McKennon* rule that the Court has the authority to deter. *See McKennon*, 513 U.S. at 360-63. In addition to taking affirmative steps to unearth alleged after-acquired evidence, and instead of simply asking Ms. Johnson about the images in discovery or at her deposition, Defendants filed the salacious images in the public record. They have set forth no legitimate reason or necessity for doing so, rendering it apparent that they engaged in such conduct to further retaliate against and embarrass, humiliate and harass Ms. Johnson and to chill, deter and dissuade her and other employees from asserting or pursing their protected rights. It is upon these grounds that Ms. Johnson brings an additional retaliation claim against Defendants in her First Amended Complaint filed contemporaneously herewith.

IV. CONCLUSION

For these reasons, Ms. Johnson requests that the Court strike from the record Defendants' alleged affirmative defense contained in paragraph 82 of their Answer and their Notice of Manual Filing and manually filed CD labeled as Exhibit A to their Answer.

Respectfully submitted,

s/Douglas B. Janney III
Douglas B. Janney III (BPR No. 19112)
2002 Richard Jones Road
Suite B-200
Nashville, Tennessee 37215
(615) 742-5900

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I certify that I electronically filed and served this Memorandum in Support of Motion to Strike Affirmative Defense and Associated Filings using the Court's CM/ECF system upon Benjamin K. Lauderback, Watson, Roach, Batson, Rowell & Lauderback, PLC, P.O. Box 131, Knoxville, Tennessee 37901-0131 on August 7, 2013.

s/Douglas B. Janney III
Douglas B. Janney III