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

LESLIE K. JOHNSON, Plaintiff, v. LENOIR CITY, TENNESSEE, TONY R. AIKENS, DON WHITE, and W. DALE HURST, Defendants.	)	No. 3:13-cv-342

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSE AND ASSOCIATED FILINGS

The Defendants hereby appear, by and through counsel, and file this response to the Plaintiff's motion to strike one of their affirmative defenses and associated filings. The Plaintiff's efforts are woefully inadequate as a matter of law, and her motion should be denied.

For purposes of this response only, these Defendants generally concur with paragraphs 1 and 2 under the "Fact" section of the Plaintiff's memorandum in support of her motion. Noticeably absent from the Plaintiff's "Facts" is the actual basis for her termination, which was related to violations of certain city policies including abuse of city equipment. Surely the Plaintiff would not disagree that the exhibit at issue, taken from the city-owned cell phone used by the Plaintiff, is potential evidence in support of the defense that an abuse of city equipment occurred. (Exhibit A being the exhibit to these Defendants' Answer (See Docs. 7 and 8)).

The Plaintiff set out her allegations and issues against these Defendants and took over eighty (80) paragraphs to do so. She has asserted multiple allegations that these Defendants adamantly deny. These Defendants have asserted but a few affirmative defenses, one of which is the after-acquired evidence doctrine. The Plaintiff, apparently, has no problem making all sorts

of salacious and false allegations against these Defendants in her Complaint. Yet she is asking this Court to prevent these Defendants from defending themselves against her claims because, in her view, the defense has submitted evidence that is "immaterial, impertinent, and scandalous".

As will be discussed below, and as a matter of law, these Defendants should be allowed to pursue their affirmative defense(s), the trier of fact should be allowed to hear evidence in support of their affirmative defense(s), and the Plaintiff's motion should be denied. These Defendants submit the Plaintiff's efforts at striking evidence at this stage is premature, but they do acknowledge that, in time, a more proper forum for addressing evidence of this type might be in the form of a motion in limine after discovery has taken place. That is to say, this case is only in its earliest stages of discovery, and because it is still evolving in terms of evidence it would be premature to strike any evidence at this point.

A. Plaintiff's argument that these Defendants have not "adequately" alleged that she engaged in wrongdoing is without merit and should be denied.

A crucial issue in this case is whether or not the Plaintiff violated the equipment use policy of the City. Facts obtained by the defense before the Plaintiff's termination revealed that she violated the City's equipment use policy. After her termination it was discovered that city equipment, a cell phone assigned to the Plaintiff, contained images of an improper and inappropriate nature, violative of city practice and policy. Facts obtained by the defense after the Plaintiff's termination reveal she violated the City's equipment policy in reference to the city cell phone assigned to her. The Plaintiff has cited to McKinnon v. Nashville Banner Post and Co., 513 U.S. 352 (1995) in support of her argument. However, a review of McKinnon reveals it supports the defense on this issue. In McKinnon, the U.S. Supreme Court was dealing with a situation where a plaintiff was filing suit under the Age Discrimination and Employment Act (ADEA). The Plaintiff admitted to acts during the discovery process that resulted in the district

court granting summary judgment to the defense. The district court reasoned that the misconduct admitted to by the Plaintiff was grounds for her termination. The district court further reasoned that as a result neither back pay nor any other remedy was available to her under the ADEA. The Court of Appeals affirmed. The U.S. Supreme Court reversed that decision, not on grounds that the after-acquired evidence rule could not be used as an affirmative defense as the Plaintiff tries to argue, but on grounds that the after-acquired evidence doctrine does not necessarily apply to bar all potential remedies available to a plaintiff. The Court upheld use of the after-acquired evidence doctrine as a defense. Specifically, the court ruled that the after-acquired evidence doctrine could be used in context of limiting damages. (Id., 513 U.S. at 362-63).

The Plaintiff's reliance on and interpretation of McKinnon is misplaced. The McKinnon court did not state that there had to be known documented proof in advance of the original pleading in order to assert the after-acquired evidence defense. "When an employer seeks to rely upon after-acquired evidence wrongdoing, it must first establish that the wrongdoing in fact occurred, and the wrongdoing was of such a severity that the employee in fact would have been terminated." Wehr v. Ryan Family Steakhouses, Inc., 99 F.3d 1140, *3 (6th Cir. 1996). Whether the employer has made such a showing is a question of fact. Id. Here, the defense should be allowed to put forth proof of the Plaintiff's wrongdoing.

The Plaintiff submits that the affirmative defense of the after-acquired evidence doctrine was not sufficiently pled in their Answer. The same argument could result in a complete dismissal of the Plaintiff's Amended Complaint due to its lacking detail. A review of the Answer submitted by these Defendants clearly shows that the Plaintiff's assertions are inaccurate, and that all pleading requirements have been met by the defense. (See Doc. 7, ¶ 82). The Plaintiff, apparently, believes that improper and unprofessional images on city-owned equipment are not

"serious wrongdoing". To each their own seems to apply if these images were on the Plaintiff's own phone, but it is a matter of fact to be determined at trial whether or not the after-acquired evidence rule applies since the images were on a piece of city equipment. Accordingly, the defense should be allowed to assert that defense. Put another way, the trier of fact should be allowed to make a decision whether the images at issue are irrelevant because they are a part of normal job duties for employees as the Plaintiff is alleging, or if they are material, relevant, and entirely improper and unprofessional as these Defendants will be arguing at trial. The remainder of the Plaintiff's allegations on this specific issue deal solely with "he said/she said" type of arguments that neither side can win at this point.

In summary, the Plaintiff's assertions that from a legal standpoint the after-acquired evidence doctrine has not been properly pled, or that it does not apply in this matter is incorrect, or at the very least, is a premature argument to make. The Plaintiff's motion to strike should be denied accordingly.

B. The Plaintiff's claim that the evidence at issue is immaterial, impertinent, or scandalous flies in the face of the facts.

Keeping in mind that one of the reasons why the Plaintiff was terminated was for improper use of city equipment, her argument that city equipment she was assigned, which had unprofessional images on it, is somehow immaterial to the case at trial is illogical. The evidence at this point shows that the phone the Plaintiff used while she was at the City had images on it just as these Defendants alleged in paragraph 82 of their original Answer. The Plaintiff's claim that the evidence at issue in her motion to strike "is invasive of Ms. Johnson's privacy interests", significantly impairs her own argument. She seems to be arguing she has privacy interests that should allow her to maintain images of the type at issue on city equipment, irregardless of city customs and policies while she also argues that she should not have been terminated for abuses of

said equipment. The Plaintiff uses the term "impertinent and scandalous" related to these photographs, but it was on the Plaintiff's assigned city telephone where these images were found.

The Plaintiff tells this Court that a better process than asserting the after-acquired evidence rule and attaching exhibits supportive of that affirmative defense would have been "simply asking Ms. Johnson about the images in discovery or her deposition". Is there any doubt that had that evidence then come up and the defense then moved to amend their Answer, at that point likely beyond the deadline allowing for amended pleadings, that the Plaintiff would have immediately jumped up and objected to the amendment on timeliness grounds? The Plaintiff theorizes that the affirmative defense at issue was made to retaliate, embarrass, humiliate and harass her all in an effort to "chill, deter and dissuade her" from asserting or pursuing her protected rights, which presumably deal with her First Amendment rights. The Plaintiff is claiming on one hand that she is entitled to these free speech rights, while on the other she is claiming the defense is not entitled to defend itself against her claims.

These Defendants move that the Plaintiff's arguments are without merit, are, at the very least, premature and her motion should be denied.

C. Standard of Review.

Motions to strike are an extreme and disfavored measure. B.J.C. Health System v. Columbia Casualty Co., 478 F.3d 908, 917 (8th Cir. 2007). In considering a motion to strike, courts will generally apply the same test used to determine a Rule 12(b)(6) motion. Starnes Family Office, LLC v. McCuller, 765 F. Supp.2d 1036, 1047 (W.D. Tenn. 2011). Generally, "[a]n affirmative defense may be pleaded in general terms and will be held to be sufficient…as long as it gives plaintiff fair notice of the nature of the defense." Id., 765 F. Supp.2d at 1047. In this matter there is nothing that should result in the affirmative defense at issue being stricken.

As is evidenced by her brief, the Plaintiff is clearly on notice of the evidence at issue, what it contains and these Defendants' position related to that evidence. To strike this affirmative defense at this time would be unfairly prejudicial to the defense. As such, the Plaintiff's motion to strike should be denied.

RESPECTFULLY submitted this 16th day of August, 2013.

LENOIR CITY, TENNESSEE, TONY R. AIKENS, DON WHITE and W. DALE HURST

By: /s/ Benjamin K. Lauderback
BENJAMIN K. LAUDERBACK, BPR NO. 020855
WATSON, ROACH, BATSON,
ROWELL & LAUDERBACK, P.L.C.
P.O. Box 131
Knoxville, Tennessee 37901-0131
(865) 637-1700

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system:

Douglas B. Janney, III
2002 Richard Jones Rd Ste 200B
Nashville, TN 37215-2892

Dated this 16th day of August, 2013.

/s/ Benjamin K. Lauderback
BENJAMIN K. LAUDERBACK