

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BLAKE J. ROBBINS, et al.,	:	Civil Action
	:	
Plaintiffs	:	No. 10-0665-JD
	:	
v.	:	
	:	
LOWER MERION SCHOOL DISTRICT,	:	
et al.,	:	
	:	
Defendants	:	

**MEMORANDUM OF LAW OF CAROL CAFIERO IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SANCTIONS FOR FAILURE TO COMPLY WITH
COURT ORDER DATED APRIL 1, 2010 (DOC. NO. 35)**

I. INTRODUCTION

There is no basis in the law or the record for the plaintiffs' motion for sanctions against Carol Cafiero for failure to comply with Court Order dated April 1, 2010.

There is absolutely nothing in the record supporting plaintiffs' assertion that there is reason to believe there is evidence on Mrs. Cafiero's personal home computer of the downloading of pictures from the Lower Merion School District's LanRev webcam technology. In fact there are no such pictures or any documents relating to this case on Mrs. Cafiero's personal home computer. As Mrs. Cafiero's personal home computer contains no relevant information the Court should not permit the plaintiffs to seize it and view and copy all of its contents.

Mrs. Cafiero has not failed to comply with the Court's April 1, 2010 Order. That Order expressly recognized Mrs. Cafiero's right to assert the Fifth Amendment at her deposition. Mrs. Cafiero attended the deposition in compliance with the Order. She did not refuse to produce any documents or things at the deposition, as plaintiffs' counsel did not raise that subject. Mrs. Cafiero will, however, produce to plaintiffs' counsel copies of

all documents and/or computer printouts relating to this case which she obtained from the District's computers or files and retained in her possession.

The Court should reject the plaintiffs' motion.

II. STATEMENT OF FACTS

This action was brought by plaintiffs Blake J. Robbins, a minor, by his parents and natural guardians Michael E. and Holly S. Robbins, individually and on behalf of all similarly situated persons. The defendants in the action are the Lower Merion School District (the "District"), the Board of Directors of the District and the Superintendent of the District. Mrs. Cafiero, who is not a party, is employed by the District on its technology staff as information systems coordinator.¹

The plaintiffs asserted in the complaint filed on February 16, 2010 that the defendants have been spying on the activities of the plaintiffs and class members by use of and ability to remotely activate the webcams incorporated into each laptop issued to students by the District, without the knowledge or consent of the plaintiffs or the members of the class. [Complaint, ¶ 2.] The plaintiffs asserted that the defendants invaded the plaintiffs' privacy and violated the Electronic Communications Privacy Act, the Computer Fraud Abuse Act, the Stored Communications Act, Section 1983 of the Civil Rights Act, the Fourth Amendment of the United States Constitution, the Pennsylvania Wiretapping and Electronic Surveillance Act and Pennsylvania common law. [Complaint, ¶¶ 1, 3.]

In early March counsel for the plaintiffs emailed to counsel for Mrs. Cafiero, and counsel for Mrs. Cafiero accepted service of, a subpoena commanding Mrs. Cafiero to

¹ The District placed Mrs. Cafiero on paid administrative leave as of February 24, 2010 without any explanation of the reasons for doing so.

testify at a deposition at the offices of plaintiffs' counsel on March 16, 2010 and to bring certain documents specified on an attached schedule of requested documents. The schedule attached to the subpoena specifies twenty categories of documents to be produced.

Counsel for Mrs. Cafiero notified counsel for the plaintiffs that he and Mrs. Cafiero would not be available for a deposition on the date set forth in the subpoena. On March 11, 2010, counsel for the plaintiffs sent an email to counsel for Mrs. Cafiero stating that the deposition of Mrs. Cafiero would occur on April 7, 8 or 9. Subsequently counsel for the plaintiffs notified Mrs. Cafiero's counsel that the deposition would take place on April 9.

On March 18, 2010, Mrs. Cafiero filed a motion to quash the subpoena issued by the plaintiffs, accompanied by a memorandum of law. On the same day, the plaintiffs filed a motion to compel Mrs. Cafiero's appearance at a deposition, without any accompanying memorandum of law. On March 29, 2010, Mrs. Cafiero filed a response and memorandum of law in opposition to the plaintiffs' motion to compel. On March 30, 2010, the plaintiffs filed a memorandum of law in opposition to Mrs. Cafiero's motion to quash.

On April 1, 2010, the Court issued an Order which granted the plaintiffs' motion to compel the appearance of Mrs. Cafiero and denied Mrs. Cafiero's motion to quash. The Court's Order expressly provided that it was "without prejudice to Cafiero's right to assert the Fifth Amendment at her deposition." [4/1/10 Order, at 3.]

On April 9, 2010, Mrs. Cafiero appeared for her deposition, pursuant to the Court's Order. At the deposition, Mrs. Cafiero asserted her Fifth Amendment rights,

pursuant to her attorney's direction on the record, in response to all questions relating to the subject matter of this lawsuit.

At the deposition plaintiffs' counsel did not request that Mrs. Cafiero or her counsel produce any of the documents or things listed in the schedule of Documents to be Produced which is attached to the subpoena. Mrs. Cafiero will, however, produce to the plaintiffs' counsel copies of all printouts and/or documents relating to the plaintiffs' claims in this action which she obtained from the District's computers or files and retained in her possession.

On April 15, 2010, the plaintiffs filed a motion for sanctions against Mrs. Cafiero for failure to comply with the Court's April 1, 2010 Order. On April 16, 2010, the Court directed that Mrs. Cafiero file a response to this motion by the close of business on April 20, 2010.

The document request at issue in the plaintiffs' motion is No. 15, which seeks production of "all home or personal computers either owned by you [Mrs. Cafiero] or a member of your household for the time period from September 2008 to the present." There are no non-privileged documents relating to the plaintiffs' claims in this action located on any computer in Mrs. Cafiero's home. The only documents relating to this case contained on Mrs. Cafiero's personal computer located at her home are privileged and confidential communications with her attorney in connection with this matter.

III. ARGUMENT

The plaintiffs have requested in their motion for sanctions that the Court: (1) direct Mrs. Cafiero to permit the plaintiffs to enter her home, take possession of any and all computers located in her home, and copy the hard drives of such computers before

returning them to Mrs. Cafiero's home; and (2) sanction Mrs. Cafiero \$2,500.00. The plaintiffs are not entitled to such relief. The Court should deny the plaintiffs' motion.

The plaintiffs' motion is based on an assertion that there is reason to believe that Mrs. Cafiero's personal home computer contains pictures downloaded from the District's LanRev webcam technology. That assertion is baseless. It also is totally false.

There is no reason to believe, based on discovery to date in this action, that Mrs. Cafiero's personal home computer contains pictures downloaded from the District's LanRev technology or any evidence that such downloading took place. Contrary to the plaintiffs' assertions, neither Mrs. Cafiero's assertion of the Fifth Amendment at her deposition nor the email snippets selectively quoted in the plaintiffs' motion demonstrate in any way that Mrs. Cafiero downloaded pictures from the District's LanRev webcam technology onto her personal home computer.

At her deposition Mrs. Cafiero asserted her right under the Fifth Amendment to the United States Constitution against self-incrimination in response to all questions relating to the subject matter of this action. That fact, however, does not in any way give rise to an inference that Mrs. Cafiero had ever downloaded pictures from the District's LanRev webcam technology to her own personal home computer.² Moreover, Mrs. Cafiero's assertion of the Fifth Amendment at her deposition was entirely consistent with the Court's Order expressly providing that she was entitled to do so.

In addition, there is no basis for the plaintiffs' assertion that emails in discovery demonstrate that Mrs. Cafiero is a "voyeur". According to dictionary.com, a voyeur is "[a] person who derives sexual gratification from observing the naked bodies or sexual

² See, e.g., *Securities and Exchange Commission v. Leach*, 156 F.Supp.2d 491, 495 (E.D. Pa. 2001) (in civil cases negative inference may be drawn against one asserting Fifth Amendment only where "there is independent evidence beyond the invocation of the privilege to support the negative inferences").

acts of others, especially from a secret vantage point” or “[a]n obsessive observer of sordid or sensational subjects” (citing *The American Heritage Dictionary of the English Language*, Fourth Edition). This scandalous, malicious and abusive attack on Mrs. Cafiero’s character, in essence labeling her a sexual deviant, is false, outrageous and without any basis.

The email snippets the plaintiffs quoted in their motion to support this assertion are taken completely out of context. The email thread began when the District’s technology staff was asked to respond to a report by four students that they just realized that their laptops, which had been left unattended at the school on September 19, 2008 (when the technology was new to the District), were missing. Mrs. Cafiero’s expression of enthusiasm in this email thread was clearly a response regarding the efficacy of the District’s new technology system, including cameras in the school, in rapidly responding to this possible theft situation. The email in no way, shape or form even remotely suggests that Mrs. Cafiero downloaded any pictures from the District’s LanRev webcam technology system to her personal home computer because she was a “voyeur”.

The plaintiffs’ assertion that Mrs. Cafiero’s personal home computer contains evidence of the downloading of the pictures obtained from the District’s LanRev webcam technology not only is without any basis in the record, it is false. There are no pictures which were downloaded from the District’s webcam technology on Mrs. Cafiero’s personal home computer. She never downloaded any such pictures onto her personal home computer. Nor are there any other documents on her personal home computer (or the computers at her home purchased by her husband’s employer³) relating to this case –

³ Moreover, these computers also are beyond the scope of the subpoena directed to Mrs. Cafiero as they are owned by her husband’s employer and therefore not in her possession.

except for privileged communications between Mrs. Cafiero and her attorney.

There is no basis for the plaintiffs' request that this Court permit them to seize Mrs. Cafiero's personal home computer(s) and copy all of the information on them. As there are no documents on Mrs. Cafiero's personal home computer relating to this case, the plaintiffs' demand that they be permitted to seize the computer and copy all contents should be rejected because there is no relevant information on the computer.⁴

Further, the Court should not permit the plaintiffs to seize Mrs. Cafiero's personal computer and view and copy all of the information on the computer because that would violate Mrs. Cafiero's attorney-client privilege with respect to her confidential communications with her attorney contained on the computer. If the Court wishes to conduct an in camera inspection of Mrs. Cafiero's personal home computer to verify that there are no documents or information relating to this case contained therein (with the assistance of the District's forensic computer consultant to the extent necessary) Mrs. Cafiero would not object, so long as all information contained on the computer remained confidential and was not disclosed to anyone other than the Court and Mrs. Cafiero's attorney-client privilege was not deemed waived as a result.

The plaintiffs' assertion that Mrs. Cafiero waived any right to object to the request for production of her personal home computer is contradicted by the record. Mrs. Cafiero specifically objected to the requested production of her and her family's personal home computers. See Mrs. Cafiero's Memorandum in Opposition to the Plaintiffs' Motion to

⁴ See, e.g., Municipal Revenue Services Inc. v. Xspand, Inc., 2007 WL 1074140, *4 (M.D.Pa. 2007) ("A subpoena may also be quashed or modified if the court determines that the documents to be produced are irrelevant or otherwise protected matter to which no exception or waiver applies."); see also, e.g., Integrated Service Solutions, Inc. v. Rodman, No. 07-3591 (E.D. Pa. Nov. 3, 2008), 2008 WL 4791654 (E.D. Pa.), *3-4 (determining that declaration by counsel for respondent to subpoena that responsive documents identified on respondent's computer by independent analysis were irrelevant was sufficient).

Compel her Appearance, at 7-8; 4/1/2010 Order, at 2.

The plaintiffs' request that the Court sanction Mrs. Cafiero in the amount of \$2500 for failure to comply with the Court's April 1, 2010 Order also is without merit. Mrs. Cafiero has not in any respect failed to comply with the Court's Order.

Mrs. Cafiero attended the deposition on April 9, 2010, as required by the Court's Order. The Order of April 1, 2010 expressly stated that Mrs. Cafiero was free to assert the Fifth Amendment at her deposition. Mrs. Cafiero also did not refuse to produce any documents or things at her deposition. At the deposition Mrs. Cafiero's counsel had copies of documents ready to be produced upon request, but plaintiffs' counsel never asked Mrs. Cafiero to produce anything. Mrs. Cafiero will produce to plaintiffs' counsel copies of all documents and/or printouts she obtained from the District's computers or files and retained in her possession.

IV. CONCLUSION

For the foregoing reasons, Mrs. Cafiero respectfully requests that the Court deny the plaintiffs' motion for sanctions for failure to comply with Court Order dated April 1, 2010 (Doc. No. 35).

Respectfully submitted,

/s/ Charles D. Mandracchia
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Attorneys for respondent Carol Cafiero