

**COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
CASE NO: 03-CI-181
JUDGE: JOHN POTTER**

JOHN DOE, et al.,

PLAINTIFFS

vs.

ROMAN CATHOLIC DIOCESE OF COVINGTON, et al.,

DEFENDANTS

**MOTION TO COMPEL SUPPLEMENTAL PRODUCTION OF RECORDS
RELATING TO COMPLAINTS OF CHILD SEXUAL ABUSE**

Now come Plaintiffs, pursuant to CR 37, and respectfully move the Court for an order compelling Defendants to make a supplemental production of all records relating to complaints of child sexual abuse.

MEMORANDUM IN SUPPORT OF MOTION TO COMPEL

Discovery in Kentucky is broad and open. Under CR 26.02(1):

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Kentucky's leading commentator has written that "[t]he discovery rules have been interpreted liberally to allow maximum discovery. ... 'Relevant' is to be interpreted very broadly to mean matter relevant to anything which is or may become an issue in the litigation. ... Discovery requests are to be interpreted liberally." Phillips' Kentucky Practice, Fifth Edition, West Publishing Co. 1995, pp. 468-469, and cases cited therein.

Kentucky Rule of Evidence 501 reflects this philosophy of liberal discovery and the restricted application of claimed privileges by its provision that no person may refuse to provide or produce evidence, objects or writings unless specifically allowed by statute, Constitution or court rules. “KRE 501 operates to reinforce the fundamental notion that there is a right to every person's evidence and to compulsory process for the production of evidence when needed.” Robert G. Lawson, Kentucky Evidence Law Handbook § 5.05, at 226 (3d ed. 1993). The Kentucky Supreme Court has noted “the importance of satisfying the ‘need’ for discovery information if a law suit is to be decided as a search for the truth, and the policy of the law to accommodate such need if the courts can do so . . .” *Riggs v. Schroering*, Ky., 822 S.W.2d 414 (1991).

Plaintiffs issued their First Set of Document Requests on February 20, 2003. (Exhibit A). Included were document requests for the following:

All documents that refer in any way to any priest who was the subject of a complaint regarding engaging in sexual talk or sexual conduct of any kind with any minor, any parishioner, or any employee during the time period. (Request 1);

All documents that refer in any way to any priest who was the subject of a complaint regarding engaging in consuming alcoholic beverages with a minor during the time period. (Request 2);

All documents that refer or relate to any complaint of any kind of sexual misconduct on the part of anyone employed by, or assigned to the Diocese, where the complaint was asserted on or after January 1, 1958. (Request 7);

All records contained in the Canon 489 Files or other secret archive files relating in any way to sexual misconduct by priests or individuals employed by or assigned to the Diocese. (Request 19);

(Exhibit A). These document requests included the following instruction regarding supplementation:

11. Pursuant to Rule 26.05 of the Kentucky Rules of Civil Procedure, these document requests are continuing and require supplementary responses whenever Defendant or its attorneys come into possession of additional documents that will augment or otherwise modify the responses now given. Such supplementary answers are to be served upon counsel for Plaintiff within fourteen days after receipt of such information. The date such additional information comes into Defendant's possession shall be specified as well as the identity of the person who furnished the additional information, along with a description of the circumstances as to why the information was not furnished at the time of the original response.

(Exhibit A, page 10, Instruction 11).

Eventually, in June 2003, Defendants produced the Diocese's secret Canon 489 files, purportedly containing all records relating to child sexual abuse complaints received "from 1958 to the present." (Exhibit B, Defendant's Answers to Plaintiffs' First Set of Document Requests, Answers to Requests 1, 2, 7, and 19.) Since that time, Defendants have received complaints on behalf of victims of child sexual abuse relating to historical incidents of child sexual abuse, including complaints by individuals who have opted out of this class action case and complaints by individuals who have settled individual cases that were filed prior to this case. These complaints, like those contained in the Canon 489 files produced, are directly relevant to establishing the Diocese's pattern of illegal conduct alleged in the Fourth Amended Complaint.

On several occasions, Plaintiffs have made extrajudicial efforts to obtain these records, to no avail. Despite their clear relevancy to this case, and despite the fact that no privilege is claimed, Defendants have refused to produce them.

As late as March 18, 2004, Defendants' attorney advised Class Counsel that she would not produce complaints made by victims who submitted opt out forms, on the ground that their attorneys "strenuously object to the release of any information regarding their clients." (Exhibit B, redacted email from Carrie Huff to Robert Steinberg). This concert of action between Defendants' attorneys and two private attorneys representing individuals who opted out of the case is obstructing Class Counsel's legitimate pursuit of discovery.

There are no privacy concerns regarding the records sought, because all identification of victims must be redacted pursuant to the Protective Order in this case. Any confidentiality issues are resolved by the severely restrictive protective order in place in this case. Thus, the only information that will be protected is the identities of abusive priests, the times and locations of the abuse, and information establishing the Diocese's complicity in the abuse.

The procedure of producing relevant records while still protecting privacy interests through a protective order limiting disclosure to a party's attorney is well settled. In the context of employment discrimination cases, the Supreme Court has held that plaintiffs are entitled to "broad access to employee records in an effort to document their claims." *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 657 (1989).

The Sixth Circuit has held that, even where plaintiffs are seeking records of persons who are not parties to the litigation and who have a recognized privacy interest in their files, it is not appropriate to attempt to protect privacy interests by denying the plaintiff access to relevant records. Rather, the Court

endorsed the procedure of permitting access to such records pursuant to the protective order limitation that the records may be viewed by counsel only. *Knoll v. AT&T*, 176 F.3d 359, 365 (6th Cir. 1999). In such cases, the individuals who possess a privacy interest are not notified and their approval of the process is not sought. In the instant case, the protective order provides an additional privacy safeguard: identifying information regarding the victim must be redacted. While this process gives the Diocese an unfair advantage over Class Counsel, we have agreed to it in order to obtain these relevant records.¹

This procedure for producing private records has been approved by many courts. See *Donald v. Rast*, 927 F.2d 379 (8th Cir. 1991); *Griffith v. Wal-Mart Stores, Inc.*, 163 F.R.D. 4 * 3-4 (E.D.Ky., July 3, 1995) (Wehrman, M.J.); *Willis v. Golden Rule Insurance Co.*, 56 F.E.P. 1451, 1991 WL 350038 (E.D.Tenn.1991); *Horizon of Hope Ministry v. Clark County, Ohio*, 115 F.R.D. 1 (S.D.Ohio 1986); *EEOC v. Avco New Idea Division*, 18 F.E.P. 311, 1978 WL 72 *4 (N.D.Ohio 1978).

CONCLUSION

For all the reasons stated above, Plaintiffs respectfully request the Court to order Defendants to supplement their production of child sexual abuse complaints by producing any and all records relating to child sexual abuse complaints up through the present date and by continuing to supplement this production throughout the litigation.

¹ Class Counsel reserve the right to seek Court permission to learn the names of these victims if that becomes necessary to the prosecution of this case.

NOTICE

Notice is hereby given that the foregoing motion will be heard before the Court on April 6, 2004 at 9:30 a.m., in Boone Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Motion was served by regular mail on March 23, 2004, to: Mark D. Guilfoyle, Esq., Deters, Benzinger & LaVelle, P.S.C., 2701 Turkeyfoot Road, Crestview Hills, KY 41017; Carrie K. Huff, Esq., Mayer, Brown, Rowe & Maw, LLP, 190 South LaSalle Street, Chicago, IL 60603; B. Dahlenburg Bonar, Esq., 3611 Decoursey Avenue, Covington, KY 41015; and Angela Ford, Esq., Chevy Chase Plaza, 836 Euclid Avenue, Suite 311, Lexington, KY 40502.

Robert A. Steinberg