

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**
Northern Division

BENJAMIN DAVIS,	*	
	*	
Plaintiff,	*	Case No. WDQ-08-3106
v.	*	
	*	
NANCY ROUSE, <i>et al.</i> ,	*	
	*	
Defendants.	*	
	*	
* * * * * * * * * * * * *		

MEMORANDUM AND ORDER

This Memorandum and Order addresses Plaintiff’s Motion to Compel, Paper No. 63, and Plaintiff’s Second Motion to Compel, Paper No. 61. I have reviewed the submissions from both parties and have held a telephonic hearing on the matter. For the reasons stated herein, Plaintiff’s Motions are GRANTED IN PART and DENIED IN PART. This Memorandum and Order disposes of Paper Nos. 63 and 61.

Plaintiff has sued three named Defendants: Nancy Rouse, the Warden of the Roxbury Correctional Institution (“RCI”), Joseph Harsh, a correctional officer at RCI, and Gary D. Maynard, the Secretary of Public Safety and Correctional Services. Plaintiff alleges, in essence (1) that Defendant Harsh committed battery against Plaintiff on two separate occasions while Plaintiff was incarcerated at RCI, Third Am. Compl. ¶¶ 10-15, 25-31, ECF No. 52; (2) that Defendant Rouse continued to allow contact between Defendant Harsh and Plaintiff following the alleged incidents, Third Am. Compl. ¶¶ 19-24, 46-50, ECF No. 52; (3) that Defendant Rouse inappropriately ordered that Plaintiff be transferred to a maximum security prison, Third Am.

Compl. ¶¶ 51, ECF No. 52; and (4) that Defendant Maynard is responsible under theories of respondeat superior and because of his failure to properly train and supervise Defendants Harsh and Rouse. Third Am. Compl. ¶¶ 79-94, ECF No. 52.

This appears to be a case in which, while both parties have engaged in a good faith effort to engage in discovery in a cooperative and timely manner, realities and limited resources have resulted in unavoidable delays that have understandably proved frustrating to Plaintiff's counsel. It appears that Defendants' counsel have made reasonable efforts, within parameters dictated by resource limitations, to fulfill Plaintiff's legitimate discovery needs. To the extent that a modest extension in the discovery deadline is necessary as a result of the unavoidable delays, such an extension can and should be sought by the parties.

The specific issues raised by the pending motions to compel are addressed seriatim below:

I. RCI Disciplinary History Since 2006 (Interrogatory 12 (Rouse) and Request for Production 22 (Maynard))

Plaintiff's Interrogatory 12 (Rouse) and Request for Production 22 (Maynard) request information about staff members at RCI who have been disciplined for excessive force from 2006 to the present. While it appears that Plaintiff can properly inquire as to whether an institutional problem existed at RCI during the time of the incidents alleged in the Complaint, Plaintiff's request requires limiting both as to time frame and as to the nature of the responsive information requested.

First, the relevant time period ends at the incidents alleged in the Complaint, because any incidents occurring after that time would not evidence a failure to train RCI employees before Plaintiff was allegedly harmed. Accordingly, Plaintiff's motion as to Interrogatory 12 (Rouse) is

GRANTED IN PART and should be answered, as limited in the next paragraph, for the time between January 1, 2006 and September 15, 2008 (the date of the last incident in question).

Plaintiff's motion as to Request for Production 22 (Maynard) is also GRANTED IN PART and should be answered, as limited in the next paragraph, for the time between January 1, 2006 and September 15, 2008.¹

Second, as to the nature of the responsive information requested, providing the information in the form requested by Plaintiff would essentially constitute the provision of personnel records for employees who are not tied, in any way, to Plaintiff's allegations. Under the balancing test this Court is required to perform, the privacy interests of those employees outweigh Plaintiff's need for the personnel records themselves. However, Plaintiff should be entitled to explore whether or not RCI had an unusual number of staff members disciplined for excessive force during the relevant time frame. As a result, Plaintiff's motion to compel is GRANTED IN PART. Defendants Rouse and Maynard are ordered to provide summary information regarding the number of excessive force incidents during the relevant time frame, the date(s) of such incidents, a brief summary of the conduct, and the name(s) of the officers who were disciplined. If the volume of incidents suggests an institutional problem at RCI and thus warrants further inquiry, the parties are directed to meet and confer about how Plaintiff can investigate this legitimate issue in a way least invasive to the current and former employees of RCI.

¹ Although Defendants' counsel suggested that any incidents prior to the named Defendants' terms of employment would be similarly irrelevant, Plaintiff's counsel has represented that Plaintiff is suing the Defendants in both their individual and official capacities. To the extent the named defendants are sued in their official capacities, the earlier records are in fact relevant.

II. Employee Personnel Files (Request for Production (Rouse) and Request for Production 11 (Maynard))

These two requests for production essentially seek personnel files of individuals who, with the exception of Defendants Harsh and Rouse, merely witnessed the alleged incidents. Plaintiff has not alleged that any of the individuals listed, other than the named defendants, committed any type of wrongdoing. Plaintiff has not articulated any specific item of evidence he believes might be obtained from a review of those personnel files, other than to state that Plaintiff wishes to “determine if any actions were taken in response to the incidents described in the Complaint.” Pl. Mot. To Compel at 8. Records pertaining to any such actions would have been produced in response to several other requests propounded by Plaintiff, and do not require review of the highly personal and sensitive material contained in personnel files. See, e.g., Doc. Req. 2 (Rouse) (“All Documents referring or relating to the incidents at issue and described in the Complaint . . .”), Doc. Req. 4 (Rouse) (“All documents referring or relating to any investigation conducted regarding the incidents at issue and described in the Complaint . . .”).

This Court is charged with a balancing the privacy interests of the employees against the Plaintiff’s need for the requested material. In this case, where no specific need for the requested material has been articulated, the privacy interests prevail, particularly in the sensitive context of prison employees. Plaintiff’s Motion to Compel these documents will be DENIED at this time, subject to reconsideration if Plaintiff obtains, during the course of discovery, specific information to support a request for personnel information about one or more of the listed individuals.

III. Global Analysis (Request for Production 23 (Maynard))

This request asked, in relevant part, for “all documents referring or relating to any global analysis by the State of Maryland Department of Public Safety and Correctional Services or

Roxbury Correctional Institution within the past ten years of complaints filed by prisoners.” In Defendants’ Opposition to the Motion to Compel at page 21, Defendant Maynard represents that no such global analysis took place. As a result, the Motion to Compel on that issue is DENIED AS MOOT.

IV. Former Complaints Regarding Use of Force or Misconduct (Interrogatory No. 3 (Harsh))

This request for information about prior formal or informal complaints of misconduct by Defendant Harsh appears to have been adequately addressed through the Defendants’ provision of: (1) Defendant Harsh’s amended response to Interrogatory No. 3, which details any IIU investigations against him; and (2) Defendant Harsh’s personnel file. The only other area of inquiry that has been proposed by Plaintiff is a search of the Administrative Remedy Procedures (ARP) files for informal complaints against Defendant Harsh. ARP files are maintained only in paper format and are filed by the name of the inmate making the complaint, not by the name of the officer against whom the complaint was made. Because informal complaints can be made by any inmate at any time, and because any complaints that resulted in an IIU investigation have already been provided, I find that the ARP records have limited relevance to this matter, and that the burden and expense of the discovery would outweigh its likely benefit. As a result, the Motion to Compel on that issue is DENIED.

V. Email Production Issues

On December 9, 2010, Plaintiff served Requests for Production of Documents on each Defendant. Responses were served, by agreement of the parties, on January 21, 2011. On March 3, 2011, Plaintiff’s counsel wrote three letters to counsel for Defendants outlining perceived deficiencies in the discovery responses. The parties engaged in telephone conferences on March 10, 2011 and March 11, 2011 regarding these issues, and Defendants’ counsel agreed

that emails would be produced on March 30, 2011.² Because of technological issues, Defendants requested an extension until April 8, 2011. On April 6, 2011, Defendants' counsel informed Plaintiffs' counsel that she anticipated receiving the responsive emails that afternoon. On April 7, 2011, the parties conferred by telephone regarding formatting issues and Defendants' counsel stated that she would be able to produce the documents as originally agreed on April 8, 2011 if Plaintiff's counsel would agree to hold the emails as Attorneys' Eyes Only for one week to allow designation of certain emails as confidential. After speaking with the service charged with formatting the email production, Defendants' counsel learned of the volume of pages contained in the production. She wrote a new letter to Plaintiff's counsel asking for an additional six weeks to review the emails, later modifying that request to an additional four weeks. In response, Plaintiff filed a motion to compel production of the responsive emails. That motion is GRANTED IN PART and DENIED IN PART.

Although it appears that both parties bear some fault for not being as responsive as possible in addressing the email production issues in this case, it appears that counsel for both parties have been reasonably diligent in attempting to conduct discovery. External factors have caused lengthy delays in the production, including the lack of a searchable email system prior to February 28, 2011 and difficulties in obtaining the responsive documents, but not as a result of intentional delay or stalling on the part of Defendants or their counsel. Moreover, it does not appear that the compromise solutions proposed by Defendants' counsel constituted an improper attempt to invade the province of attorney-client privilege or attorney work product. Defendants' counsel simply sought a practical means to expedite the production.

² It is worth noting that the Department of Public Safety and Correctional Services (DPSCS) only obtained a program that could search emails by term within a reasonable time frame on February 28, 2011, just days before the parties engaged in discussions on these issues. See Affidavit of Arthur C. Ray III, ECF No. 63-20.

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Proposed Search Parameters for E-mails

PART 1: Search the following E-mail accounts:

1. Correctional Officer Joseph Harsh
2. Warden Nancy Rouse
3. Secretary Gary Maynard
4. Correctional Officer A. Brumage
5. Paul Kradel, Ed. D
6. Dionne Smith, MD
7. Correctional Officer or Lt. M. Gonzalez
8. Pamela L. Needham, RN
9. Lieutenant E. Stigle
10. Lieutenant G. Winters
11. Correctional Officer M. Patey
12. Correctional Officer D. Conner
13. T.C. Trumpower
14. Lieutenant K. Alexander
15. Correctional Officer N. Rizer
16. Correctional Officer K. Ebersole
17. Correctional Officer R. Thomas
18. Correctional Officer B. Buss
19. Nurse McCoy
20. W. Crist

21. Correctional Officer Rice
22. Correctional Officer Young
23. Detective Forrest
24. Dr. Cristal Swecker
25. Denise Gelsing
26. Robert Miller
27. Robert Johnson – DPSCS Chief of Staff
28. George Hall – DPSCS Office of Planning, Policy, Regulation and Statistics
29. Jon P. Galley, DOC Assistant Commissioner
30. Kendall Gifford, DOC Director of Case Management
31. Angel Savage-Price, Director of Office of Policy Development, Analysis and Management
32. Kathy Casper, RCI Administrative Aide
33. Shawn Shockey, case management supervisor
34. Brian D. France
35. Paul O’Flaherty
36. Jesse Ballard
37. Scott Oakley
38. Captain Tony Mills
39. Lt. Ronald Dickens
40. Josette Brewer

PART 2. Search ALL of the above accounts with ALL of the following search terms:

1. “Benjamin Davis” (this exact phrase)
2. “Ben Davis” (this exact phrase)

3. 292-280
4. 292280
5. #292-280
6. #292280

PART 3: Complete the follow specific searches

1. Search Defendant Harsh's e-mail for the following:
 - (a) Assault
 - (b) "Excessive Force"
 - (c) disciplin (with root expander)
 - (d) All e-mails sent and received on September 15 and 16, 2008
2. Search the e-mail accounts all those directly or indirectly supervising CO II Harsh for the following terms:
 - (a) Harsh and
 - (b) assault
 - (c) violat*
 - (d) disciplin
 - (e) fail*
 - (f) excessive