

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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DETRIA C. REED, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JESSE SANDLIN, individually )  
 and as an officer of the )  
 Memphis Police Department; )  
 JAMES KIRKWOOD, individually )  
 and as a Colonel of the )  
 Memphis Police Department; )  
 ANTHONY MULLINS, individually )  
 and as a Lieutenant of the )  
 Memphis Police Department; )  
 PRESTON MORTON, individually )  
 and as a Sergeant of the )  
 Memphis Police Department; )  
 GREGORY SANDERS, individually )  
 and as a Lieutenant Colonel of )  
 the Memphis Police Department; )  
 FRANK HANNAH, individually and )  
 as a Sergeant of the Memphis )  
 Police Department; and CITY OF )  
 MEMPHIS, TENNESSEE, )  
 )  
 Defendants. )

No. 2:15-cv-02448-STA-tmp

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ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF  
DISCOVERY AND DESIGNATION OF THE CITY'S RULE 30(b)(6) WITNESS

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Before the court by order of reference is plaintiff Detria C. Reed's Motion to Compel the City of Memphis to produce discovery in response to his Second Request for Production of Documents and to require the City to designate a Rule 30(b)(6) witness to testify on specified topics. (ECF No. 138.) In his motion, filed on August 4,

2016, Reed alleges that the City of Memphis ("City") failed to produce a set of texts and e-mails that the parties purportedly agreed upon following several months of negotiations over the proper scope of the Second Request and a related subpoena *duces tecum*. He also argues that the City has improperly failed to designate a Rule 30(b)(6) witness to testify as to the City's Answer to the Amended Complaint, his detention and treatment on July 9, 2014, the disciplinary action taken against him and Defendant Officer Jesse Sandlin by the Memphis Police Department ("MPD"), and the MPD's policies and training regarding probable cause, detention of suspects, physical restraint of detainees, and warrantless arrests.<sup>1</sup>

## I. PRODUCTION OF DOCUMENTS

### A. Reed's Second Request for Production of Documents

On May 10, 2016, Reed served on the City his Second Request for Production of Documents ("Second RFP"). In the Second RFP Reed sought production of the following seven categories of documents:

1. To the extent not already produced, all documents (including e-mails and text messages) in your possession, custody, and control relating to Plaintiff Detria Reed and Defendant Jessie Sandlin which were sent, received, produced,

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<sup>1</sup>On August 19, 2016, Reed filed a Reply to the City's Response to the Motion to Compel. As noted in subsection (j) of the Scheduling Order (ECF No. 51), pursuant to Local Rule 7.2(c), "[n]either party may file an additional reply to any motion, other than a motion filed pursuant to Fed.R.Civ.P 12(b) or 56 . . . . if a party believes that a reply is necessary, it shall file a motion for leave to file a reply accompanied by a memorandum setting forth the reasons for which a reply is required within seven days of service of the response." Given that Reed did not seek leave to file a Reply, the court will not consider the Reply in ruling on the instant motion.

and/or copied to the following persons between May 10, 2014 and October 31, 2014

- a. Colonel James Kirkwood
- b. Lt. Colonel Gregory Sanders
- c. Deputy Chief M. Rallings
- d. Dep. Dir. A. Berryhill
- e. Dep. Chief J. Harvey
- f. Lt. V. Van Buren
- g. Major J.K. White
- h. Officer E. Littlejohn
- i. Anthony Mullins
- j. Don R. Johnson
- k. Lt. Brad Newsom
- l. Mrs. Kenya Reed
- m. Carolyn Lazenby
- n. Byron Winsett
- o. Officer Jessie Sandlin
- p. Sgt. Frank Hannah
- q. Sgt. Andrew Cartwright
- r. Lt. Felicia Adams
- s. Detective M. Jones
- t. Det. K.J. Johnson
- u. Lt. Preston Morton
- v. Colonel M. Balee
- w. Lt. Colonel D. Sheffield
- x. Major M.D. Winters

2. To the extent not already produced, all documents (including e-mails and text messages) in your possession, custody, and control reflecting the approval by MPD Directors and Deputy Chiefs of the actions taken against Plaintiff Reed by MPD officers in 2014.

3. All documents (including e-mails and text messages) in your possession, custody, and control reflecting psychological counseling provided to Plaintiff Detria Reed by the MPD between July 10, 2014 and September 30, 2014.

4. To the extent not already produced, all documents (including e-mails and text messages) in your possession, custody, and control reflecting disciplinary action imposed on MPS officers and officials for violation of DR 101 between January 1, 2012 and December 31, 2015.

5. To the extent not already produced, all documents (including e-mails and text messages) in your possession, custody, and control reflecting disciplinary actions imposed on MPD officers and officials for violating DR 104 between January 1, 2012 and December 31, 2015.

6. All documents (including e-mails and text messages) in your possession, custody, and control reflecting the detention and shacking [sic] of MPD police officers or officials at any time between January 1, 2010 and December 31, 2015.

7. The personnel files of Colonel James Kirkwood, Lt. Colonel Anthony Mullins, Lt. Preston Morton, Sargent Curtis Price, Lt. Colonel Gregory Sanders, and Sargent Frank Hannah.

**B. The Revised Subpoena *Duces Tecum***

The City was served with a subpoena *duces tecum* on May 19, 2016, and subsequently with a revised subpoena *duces tecum* ("Revised Subpoena"), accompanying a 30(b)(6) deposition notice. The Revised Subpoena sought production of the following twelve categories of documents:

1. Documents (including e-mails and text messages) relating to each paragraph of the City's Answer denying various allegations of the Amended Complaint.

2. E-mails and Text Messages by and between any officer or official in the chain of command of the Memphis Police Department ("MPD) between May 25, 2014 and July 30, 2014, relating to the matter(s) for which Officer Detria Reed was disciplined by the MPD in 2014. These officers or officials include, without limitation:

- a. Lt. Colonel Sanders
- b. Deputy Chief M. Rallings
- c. Dep. Dir. A. Berryhill
- d. Dep. Chief J. Harvey
- e. Lt. V. Van Buren
- f. Major J.K. White
- g. Officer E. Littlejohn
- h. Anthony Mullins
- i. Don R. Johnson
- j. Lt. Brad Newsome
- k. Mrs. Kenya Reed
- l. Byron Winsett
- m. Officer Jesse Sandlin
- n. Sgt. Frank Hannah
- o. Sgt. Andrew Cartwright
- p. Lt. Felicia Adams
- q. Det. M. Jones
- r. Det. K.J. Johnson

- s. Lt. Preston Morton
- t. Colonel M. Balee
- u. Lt. Colonel Sheffield
- v. Major M.D. Waters

3. E-mails and text messages by and between any officer or official in the chain of command of the Memphis Police Department ("MPD") between May 25 and July 30, 2014, relating to the Officer Duty Employment violation for which Officer Sandlin was disciplined in 2014.

4. The City's records reflecting Officer Sandlin's bankruptcy.

5. Documents (including e-mails and text messages) reflecting inquiries and responses concerning Officer Jesse Sandlin's status as a licensed contractor under Tennessee Law in 2014.

6. E-mails and text messages reflecting the processing, handling, and treatment of Plaintiff Detria Reed as a detainee or arrestee of the MPD on July 9, 2014.

7. Aside from its written policy, any and all reasons which justified the handcuffing and leg irons placed on Plaintiff Detria Reed by the MPD on July 9, 2014.

8. Documents (including e-mails and text messages) reflecting the notification and approval/rejection of the July 9, 2014, actions of Defendants James Kirkwood, Anthony Mullins, Preston Morton, and Curtis Price related to Plaintiff Detria Reed.

9. All documents (including e-mails and text messages) in your possession, custody, and control reflecting psychological counseling provided to Plaintiff Detria Reed by the MPD between July 10-September 30, 2014.

10. All documents (including e-mails and texts) reflecting the detention, arrests, handcuffing, and placement of leg irons on active MPD police officers while on duty at any time between January 1, 2010 and December 31, 2015.

11. The personnel files of Col. James Kirkwood, Lt. Col. Anthony Mullins, Lt. Preston Morton, Sgt. Curtis Price, Lt. Col. Gregory Sanders, and Sgt. Frank Hannah, pursuant to Tennessee law.

12. Disciplinary actions taken by the MPD against its officers/officials for violations of DR 101 and DR 104 between January 1, 2014-December 31, 2014.

**C. The Parties' Negotiations Over the Scope of the Second RFP and Revised Subpoena**

On May 20, counsel for the City, Ms. Florence Johnson, sent Reed's counsel, Mr. U.W. Clemon, a written response objecting to the scope of the Second RFP and the original subpoena *duces tecum*, and to the short notice given as to the date of the Rule 30(b)(6) deposition.<sup>2</sup> Mr. Clemon responded to those objections in writing on June 6. On June 30, Ms. Johnson notified Mr. Clemon by e-mail that she was serving Reed with the City's response to the Second RFP. As best as the court can discern from the e-mail correspondence attached as exhibits to the motions in the pending matter, in its June 30 response the City refused to submit the documents as listed in the Second Request and the revised Subpoena.

After Reed expressed dissatisfaction with the City's June 30, 2016 production, counsel continued negotiating over the scope of the Second RFP and Revised Subpoena. Following a telephone conference on July 5, Mr. Clemon e-mailed Ms. Johnson and other defense counsel the following amended list of persons whose e-mails and texts relating to Reed and Sandlin the plaintiff sought from the City:

- |                                |                           |
|--------------------------------|---------------------------|
| 1. Colonel James Kirkwood      | June 14-July 31, 2014     |
| 2. Lt. Colonel Gregory Sanders | July 9-September 30, 2014 |
| 3. Deputy Chief M. Rallings    | July 5-September 30, 2014 |
| 4. Dep. Chief J. Harvey        | July 1-July 15, 1014      |
| 5. Anthony Mullins             | July 8-July 31, 2014      |
| 6. Don R. Johnson              | July 8-July 10, 2015      |

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<sup>2</sup>Reed served the Revised Subpoena *Duces Tecum* on the City partially in response to the objections made in Ms. Johnson's May 20 letter.

7. Lt. Brad Newsome	June 1-July 31, 2014
8. Kenya Reed	May 30-July 31, 2014
9. Carolyn Lazenby	May 30-July 31, 2014
10. Byron Winsett	May 30-July 15, 2014
11. Jesse Sandlin	May 30-September 30, 2014
12. Sgt. Frank Hannah	July 25-August 1, 2014
13. Sgt. Audrey Cartwright	May 30-July 15, 2014
14. Lt. Felicia Adams	June 15-July, 2014
15. Det. M. Jones	July 8-July 15, 2014
16. Det. K.J. Johnson	June 15-August 15, 2014
17. Lt. Preston Morton	July 8-July 15, 2014
18. Colonel M. Balee	July 8-July 13, 2014
19. Lt. Colonel Sheffield	July 8-July 13, 2014
20. Major M.D. Waters	July 1-July 31, 2014.

In the same e-mail Mr. Clemon indicated that counsel had not discussed the other disputed areas in the Second RFP and Subpoena.

Following another conference between counsel on July 18, Mr. Clemon sent Ms. Johnson an e-mail, copied to other defense counsel, which purported to list the documents that the parties agreed the City would produce in response to the Second RFP and Revised Subpoena. The e-mail indicated the City would produce the e-mails and texts listed in Mr. Clemon's July 5 e-mail, and Reed would correspondingly withdraw item one of the Second RFP. Mr. Clemon further indicated that because the City indicated it had no documents related to item two of the Second RFP, he would seek a request for admission as to those facts. As to items three, four, and five of the Second RFP, Mr. Clemon indicated he was expecting a response from the City by the end of the day as to whether it intended to produce those documents, and that he agreed to substitute "placement in leg irons" for "shackling" in item number five. Mr. Clemon also noted that the City agreed to produce the personnel files sought in item seven.

As to the documents sought in the Revised Subpoena, Mr. Clemon stated that he would serve requests for admissions as to items one and seven and that he would withdraw items two through six, and eight. He further indicated that the City had agreed to permit him to view the documents in item eleven in the City's offices, and he was expecting the City's response as to items ten and twelve by the end of the day.

There is no indication in the record that counsel for the City responded to Mr. Clemon as to whether the City objected to producing the documents listed in items three, four, and five of the Second RFP and items ten and twelve of the Revised Subpoena. On Friday, July 22, co-counsel for the City, Mr. Zayid Saleem, e-mailed Mr. Clemon that the City anticipated being ready to produce the requested material by the end of the next week. Mr. Clemon responded on July 25 by asking to be notified immediately if the City did not plan to produce the agreed-upon documents by Friday, July 29.

**D. Reed's Motion to Compel and the City's Production of Documents**

On August 4, 2016, Reed filed his Motion to Compel, asserting that the City had failed to produce the documents agreed upon by the parties and memorialized in Mr. Clemon's e-mails of July 5 and July 18. On August 8, the City produced a set of approximately 700 documents. In its response in opposition to the Motion to Compel, filed on August 16, the City asserts that it has met its discovery obligations and explicitly quotes Mr. Clemon's July 18 e-mail (which in turn references the list of names in the July 5 e-mail)



as evidence of Reed's understanding that the City was attempting to comply in good faith.

The deadline for written discovery in this case is quickly approaching. The record does not reflect that the City objected or substantively responded to the parties' agreement as set forth in Mr. Clemon's July 5 and July 18 e-mails - the same e-mails the City relies upon in support of its argument that it has complied with its discovery obligations. The court finds that the discovery sought in the Second RFP and Revised Subpoena as modified by the previously referenced e-mails is appropriate, and must be produced by the City. Specifically, the City must produce the documents described in: (1) the revised list of names and dates in the July 5 e-mail; (2) items two through seven of the Second RFP; and (3) items one, seven, nine, ten, and twelve of the Revised Subpoena, with plaintiff's counsel being permitted to view the documents listed in item eleven of the Revised at the City's office.

The court notes that because the City's August 8 production occurred after the Motion to Compel was filed, it is possible that the City has already complied, in whole or in part, with the court's order. To the extent that the City has not produced all of the documents required by this order, it is ORDERED to do so by no later than Friday, August 26, 2016.

## **II. RULE 30(B)(6) DEPOSITION**

The issue of the City's Rule 30(b)(6) witness in this case has been the subject of some confusion. Reed originally served the City with notice of a Rule 30(b)(6) deposition for May 24, 2016,

which was revised to June 15 after the City objected. The deposition did not occur on either of those dates and the e-mail correspondence included in the exhibits indicates that the parties discussed the matter intermittently throughout June and July 2016. On July 13, 2016, Ms. Johnson notified Mr. Clemon in writing that the City would designate Lt. Kendra Lockhart as its Rule 30(b)(6) witness, and both parties acknowledged this designation in their written arguments relating to the instant motion.<sup>3</sup>

In his motion Reed seeks to compel Lt. Lockhart, as the City's Rule 30(b)(6) witness, to be subject to deposition on:

- 1) [the City's] Answer to the plaintiff's Amended Complaint;
- 2) the detention, arrest, handcuffing, and leg irons placed on him on July 9, 2014;
- 3) the disciplinary actions imposed on him and Defendant Sandlin in 2014; and
- 4) the City's written and unwritten policies and procedures with respect to probable cause, detention of suspects, warrantless arrests, and physical restraints placed on detainees (including handcuffing and leg irons).<sup>4</sup>

In its response to the motion, the City agreed that Lt. Lockhart could be deposed as to the MPD policies regarding warrantless arrests and the training of officers with respect to those policies. It argues, however, that Reed should not be permitted to depose her on the City's Answer, the events of July 9, 2014 and the subsequent disciplinary actions against Reed and Sandlin.

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<sup>3</sup>Although Reed served the City with a subpoena scheduling the deposition of Lt. Lockhart for August 17, the deposition did not go forward on that date.

<sup>4</sup>The scope of testimony listed on the August 4, 2016 subpoena refers to "all policies of the City with respect to warrantless arrests; and training of officers on such policies."

**A. The City's Answer**

The City objects to allowing Reed to depose the 30(b)(6) witness as to the City's Answer to the Amended Complaint on the grounds that this line of inquiry would require the witness to testify to legal conclusions and affirmative defenses that are protected by the attorney-client privilege and work product doctrine. There is substantial precedent permitting a plaintiff to depose a defendant's Rule 30(b)(6) witnesses about the factual basis for the defendant's pleadings. See, e.g., Smith v. Gen. Mills, Inc., No. C2 04-705, 2006 WL 7276959, at \*3-4 (S.D. Ohio Apr. 13, 2006) ("numerous courts have ruled that a Rule 30(b)(6) notice of deposition that seeks the factual bases for another party's claims or defenses is proper."); Security Ins. Co. of Hartford v. Trustmark Ins. Co., 218 F.R.D. 29, 33-35 (D. Conn. 2003) (requiring a third-party defendant to designate a Rule 30(b)(6) witness to testify as to its denials of factual allegations in the third-party complaint); Protective Nat. Ins. Co. of Omaha v. Commonwealth Ins. Co., 137 F.R.D. 267, 282 (D. Neb. 1989) ("There is simply is no doubt that [the plaintiff] is entitled to . . . the factual basis for the contentions contained in the counterclaim and answer.").

The attorney-client privilege protects communications, not the underlying facts communicated. Upjohn Co. v. United States, 449 U.S. 383, 395 (1981). Accordingly, a Rule 30(b)(6) witness's knowledge of the factual basis for an admission or denial in the party's answer is not privileged simply because the witness learned

those facts through discussion with counsel. See Smith, 2006 WL7276959, at \*4.

As to work product, the City is correct to the extent that questions posed to the City's witness as to legal theories would intrude upon subject matter that is protected by the work product doctrine. The City's counsel could properly object to such questions. It is also possible that certain questions regarding the City's Answer could cross the line from seeking facts to attempting to elicit the mental impressions or legal strategy of counsel. See id; see generally Hickman v. Taylor, 329 U.S. 495, 508-10 (1947); Am. Nat. Red Cross v. Travelers Indem. Co. of Rhode Island, 896 F. Supp. 8, 12-14 (D. D.C. 1995) (reasoning that, given the more than 200,000 documents produced in discovery, requiring the defendant's Rule 30(b)(6) witness to identify specific documents and facts supporting each affirmative defense would give the opposing party the type of insight into the attorney's strategy that was protected by the work product privilege).

The great weight of the relevant case law permits questioning of a Rule 30(b)(6) witness about the factual basis of the party's pleadings. As the court in Smith reasoned, a party's Rule 30(b)(6) witness must "to the extent that he or she is able, [] be prepared to recite the facts upon which [the party] relies to support the allegations in [its pleadings] which are not purely legal, even though those facts may have been provided to her by . . . [the party's] lawyers." See Smith, 2006 WL7276959, at \*4; see also Protective, 137 F.R.D. at 282 ("Undoubtedly there is some danger

that the mental impressions of [the party's] lawyers will be disclosed by answers to such questions . . . but this is always the case." ). The court therefore ORDERS that the City produce a Rule 30(b)(6) witness who can testify as to the factual basis for the City's Answer, but cautions Reed to refrain from asking questions intended to elicit responses that would reveal privileged communications or work product.

**B. The Detention of Reed on July 9, 2014 and the Subsequent Disciplinary Actions Taken Against Reed and Sandlin**

The City argues that, while the detention of Reed on July 9, 2014 and the disciplinary actions taken against Reed and Sandlin are relevant to Reed's claims, requiring its Rule 30(b)(6) witness to testify as to these subjects would be cumulative and duplicative because Reed has already deposed all of the witnesses who have knowledge of these events. Although the City may be correct that other witnesses have already testified as to these facts, a Rule 30(b)(6) witness differs importantly from other fact witnesses in that she is the city's designated representative, authorized to speak on its behalf on the subjects at issue. See, e.g., United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C.) (opinion of Magistrate Judge), aff'd, 166 F.R.D. 367 (M.D.N.C. 1996). Moreover, Rule 30(b)(6) gives the plaintiff the right to elicit responses from the City's official representative as to relevant factual inquiries regardless of whether other witnesses have already testified as to the underlying facts. See Smith, 2006 WL 7276959, at \*5 ("reject[ing] [the] argument that prior deposition testimony

from individual fact witnesses relieves a [defendant entity] from designating a [] spokesperson in response to a Rule 30(b)(6) notice of deposition.”). Accordingly, the City must produce a Rule 30(b)(6) who can testify as to the events referenced above.

### III. CONCLUSION

For the reasons stated above, Plaintiff’s Motion to Compel is GRANTED. To the extent it has not already done so, the City is ORDERED to produce the documents agreed upon by the parties and described above no later than Friday, August 26, 2016. The court further ORDERS that the City’s produce a Rule 30(b)(6) witness who can testify to: 1) the factual basis for City’s Answer to the Amended Complaint; 2) the detention, arrest, and handcuffing of Reed on July 9, 2014 and the leg irons placed on him; 3) the disciplinary actions imposed on Reed and Defendant Sandlin in 2014; and 4) the City’s written and unwritten policies and procedures with respect to probable cause, detention of suspects, warrantless arrests, and physical restraints placed on detainees, including handcuffing and leg irons. Finally, the court finds that an award of sanctions is not warranted on the current record.

IT IS SO ORDERED.

s/ Tu M. Pham  
TU M. PHAM  
United States Magistrate Judge

August 19, 2016  
Date