

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

IN RE: C. R. BARD, INC.
PELVIC REPAIR SYSTEMS
PRODUCT LIABILITY LITIGATION

MDL No. 2187

THIS DOCUMENT RELATES TO
ALL CIVIL CASES

PRETRIAL ORDER #143
(Motion to Compel Production of Personnel Files)

Pending before the court is Plaintiffs' Motion to Compel Defendant C. R. Bard to Produce Personnel Files for Keith Dorsey, Ronny Bracken, and Dan Lafever, and for All Bard Employees Who Are Deposed. (ECF No. 1059). Defendant C. R. Bard ("Bard") filed a response in opposition to the motion, (ECF No. 1077), and the parties argued their positions to the court on October 24, 2014. (ECF No. 1143). Having fully considered the arguments, the court **DENIES** Plaintiffs' motion to compel.

This multidistrict litigation ("MDL") includes a variety of product liability claims arising from Bard's design, manufacture, and distribution of pelvic mesh products. Discovery has been ongoing for several years, and throughout that period, Plaintiffs have deposed a number of Bard employees. In the past, Bard voluntarily produced the personnel files of its employees prior to their depositions. However, Bard recently changed legal counsel, and its new counsel refuses to supply personnel files, arguing that the files are not discoverable. Consequently, Plaintiffs move to compel production of the personnel files of all Bard employees scheduled for deposition. Plaintiffs argue

that the files should be produced because (1) they contain relevant information; (2) they are not privileged; (3) the Plaintiffs' need for the discovery outweighs the privacy interests of the employees given that the most sensitive information in the files can be redacted; and (4) Bard waived its right to object to the production of personnel files by previously producing them.

In response, Bard argues that a strong public policy favors the protection of personnel files from disclosure. Not only do personnel files contain the most private information about an employee within the possession of an employer, but these files also contain confidential performance evaluations and other similar data. If personnel files are routinely produced in discovery, employers and employees will hesitate to share information necessary to improve industry standards. Bard further contends that the documents in its employees' files have only marginal relevance to the issues in this case; particularly, as the MDL involves products lines rather than the specific actions or inactions of Bard's employees. Bard emphasizes that every example cited by Plaintiffs of materials discovered in a personnel file involved information that could have been readily obtained in another, less intrusive manner. Finally, Bard challenges the logic of Plaintiffs' waiver argument, pointing out that each employee has an individual privacy interest in his or her personnel file. Therefore, production of one employee's file simply cannot act as a waiver of the privacy right that attaches to another employee's file.

Although the scope of discovery in federal court is broad, it is not without bounds. Two overarching principles provide the framework. First, discovery must seek relevant information that is not privileged. For purposes of discovery, information is relevant, and thus discoverable, if it "bears on, or ... reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case. While "the

pleadings are the starting point from which relevancy and discovery are determined ... [r]elevancy is not limited by the exact issues identified in the pleadings, the merits of the case, or the admissibility of discovered information.” *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 193, 199 (N.D.W.Va. 2000) (internal citations omitted). Depending upon the needs of the particular case, “the general subject matter of the litigation governs the scope of relevant information for discovery purposes.” *Id.* Second, the discovery must be proportional to the case, when weighing all of the competing needs and interests. *Lynn v. Monarch Recovery Management, Inc.*, 285 F.R.D. 350, 355 (D. Md. 2012) (quoting *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010)). To insure that discovery is sufficient, yet reasonable, district courts have considerable discretion when determining the boundaries of discovery. *See Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 64 (4th Cir. 1993).

Courts in this circuit frequently have been unwilling to require the production of personnel files without a compelling reason. This is true even though the files contain documents that are arguably relevant and are not, in their entirety, privileged or otherwise specially protected. *See, e.g., Weller v. Am. Home Assurance Co.*, No. 3:05–cv–90, 2007 WL 1097883, at *6 (N.D.W.Va. Apr. 10, 2007) (personnel files should not be subject to discovery except in “limited circumstances” given that “personal privacy and accurate employee evaluations are important public policy concerns”); *Marlow v. Chesterfield Cnty. Sch. Bd.*, No. 3:10-cv-18–DWD, 2010 WL 3660770, at *5 (E.D.Va. Sept. 15, 2010) (holding that to obtain personnel files, plaintiffs “must still make a showing that the personnel files sought are relevant to the subject matter involved in the case,” and “it [is] proper for the trial court to balance the privacy interests of the employees against the plaintiff’s need for the requested material”); *Bennett v. CSX*

Transp., Inc., No. 5:10-cv-00493-BO, 2011 WL 4527430, at *9 (E.D.N.C. Sept.26, 2011) (personnel files are discoverable when “(1) [the] material is clearly relevant; and (2) the need for disclosure is compelling because the information sought is not otherwise readily available”); *United States EEOC v. McCormick & Schmick's Seafood Rests.*, No. DKC-11-2695, 2012 WL 3563877, at *4 (D.Md. Aug. 16, 2012) (holding that portions of the personnel file of an employee whose action or inaction had a direct bearing on the issues in dispute may be discoverable, but not the entire file); *Halim v. Baltimore City Bd. of Sch. Comm'rs*, No. WMN-11-2265, 2012 WL 2366338, at *2 (D.Md. June 20, 2012) (holding that “[b]ecause personnel files contain very sensitive private information about non-parties to this litigation, this Court must weigh the significant privacy interests at stake against the need for the information contained in the personnel files”). When resolving a motion to compel production of a personnel file, the court must weigh the employee’s privacy right, and the public policy concern of encouraging candid employment evaluations, against the moving party’s need for the information. Non-disclosure is generally favored, except in “‘limited circumstances,’ such as when the need for disclosure is compelling because the information sought is not otherwise readily available.” *Hemphill v. ARAMARK Corp.*, Civil No. ELH-12-1584, 2013 WL 1662963, at *2 (D.Md. Apr. 15, 2013) (citations omitted). The more essential the employee’s acts, omissions, or characteristics are to the claims or defenses in the case, the greater the need is for his or her records, and the more likely the records are to be compelled.

In this case, Plaintiffs point to a variety of information they discovered through reviewing the personnel records of employees. For example, they learned of other projects and product lines involving mesh; compensation arrangements based upon the

sale of certain devices; audits and inspections; employee benchmarks; corporate goals; employee publications, revenue targets, contacts, and physician recruitment; and the movement of employees from one project to the next or from one department to another. According to Plaintiffs, without access to the files, they would not have been prepared to question the witnesses about these and many other topics. Plaintiffs argue that access to the files allows them to be more efficient when deposing Bard's employees, saving the parties and the witnesses significant time and expense. Finally, Plaintiffs contend that they are not interested in personal data, or even specific performance evaluations; therefore, much of the private information can be redacted.

Nonetheless, Plaintiffs' arguments are not persuasive for several reasons. First, Bard's employees, in general, do not play a key role in the claims or defenses in this MDL. Plaintiffs do not allege that any particular employee acted negligently or improperly; instead, they argue that Bard's mesh products were defectively designed, manufactured, and marketed over a period of many years. The employees were merely cogs in a behemoth wheel. Second, the vast majority of the information discovered by Plaintiffs in the personnel records is readily available from other, less intrusive sources. Third, while it may be true that without access to personnel records Plaintiffs will take longer questioning employees about their work histories, disallowing production of the files will not increase the overall discovery burden. For one thing, there will be a savings of time on the preparation end, as Plaintiffs will have less documentation to review prior to taking the depositions. In addition, Bard will be spared the task of having to review and redact every employee's personnel file. From the standpoint of proportionality, Plaintiffs' motion should be denied for the simple reason that the burden and expense to Bard of the proposed discovery outweigh the anticipated benefits to Plaintiffs. Indeed,

Bard stressed at the hearing that in its prior experience with the employees whose files had been produced, “very, very rarely were any documents in the personnel files even used” at the depositions. (ECF No. 1143 at 25). Therefore, when weighing Plaintiffs’ need for the personnel files, which appears to be negligible, against the employees’ right to privacy and the public policy concerns, and then further considering that Plaintiffs can obtain the relevant information from other sources without requiring Bard to expend the effort to sort through and redact private and confidential records, the court finds little merit to Plaintiffs’ motion to compel.

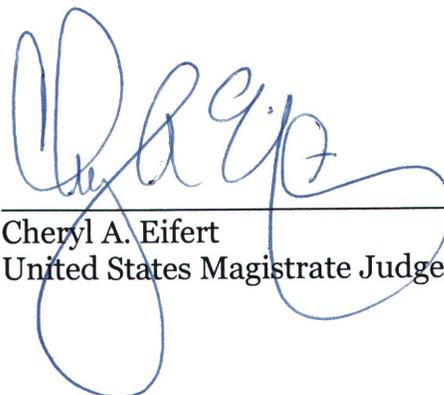
Certainly, that is not to say that Plaintiffs may never be able to present compelling reasons for the production of a specific employee’s personnel file. There may a particular employee who played a unique role in this case, or whose actions or inactions are especially relevant to a certain claim or defense. In that case, Plaintiffs are free to serve Bard with a request for production of documents, assuming the discovery deadline has not expired, and to follow up with a motion to compel, if necessary. However, Plaintiffs have not presented the court with a factual foundation that would justify compelling production of any specific employee’s personnel record in the present motion, and the undersigned finds no basis for granting a blanket order compelling production of all deponents’ personnel files.

Plaintiffs’ contention that Bard waived its right to object to producing personnel files is equally unavailing. Plaintiffs offer no *applicable* law in support of their position. “The constitutional right to privacy protects ‘[p]ersonal, private information in which an individual has a reasonable expectation of confidentiality.’” *Senior Executives Ass’n v. United States*, 891 F.Supp.2d 745, 750 (D.Md. 2012) (quoting *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990)). Given that the right to privacy is an

individual right, the undersigned agrees with Bard that a separate right attaches to the information contained in each individual personnel file. Therefore, assuming for argument's sake that Bard has the authority to waive its employees' right to privacy, and that Bard's prior productions constituted waivers, those productions served only to waive the privacy rights that attached to the files that were produced, not to the files that remain unproduced. Furthermore, Plaintiffs' position ignores the public policy concerns that underlie the protection of personnel records. Therefore, the court rejects Plaintiffs' waiver argument.

The court **DIRECTS** the Clerk to file a copy of this order in 2:10-md-2187 and it shall apply to each member related case previously transferred to, removed to, or filed in this district, which includes counsel in all member cases up to and including civil action number 2:14-cv-27449. In cases subsequently filed in this district, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action at the time of filing of the complaint. In cases subsequently removed or transferred to this court, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action upon removal or transfer. It shall be the responsibility of the parties to review and abide by all pretrial orders previously entered by the court. The orders may be accessed through the CM/ECF system or the court's website at <http://www.wvsd.uscourts.gov>.

ENTERED: October 31, 2014



Cheryl A. Eifert
United States Magistrate Judge