

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

MICHELE FENGLER, *et al.*,

Plaintiffs,

Civ. Action No.

5:08-CV-1221 (DNH/DEP)

vs.

CROUSE HEALTH FOUNDATION, INC.,
et al.,

Defendants.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFFS:

DOLIN, THOMAS LAW FIRM
693 East Avenue
Rochester, NY 14607

J. NELSON THOMAS, ESQ.
PATRICK SOLOMON, ESQ.
JUSTIN M. CORDELLO, ESQ.
MICHAEL J. LINGLE, ESQ.
SARA E. ROOK, ESQ.

FOR DEFENDANTS:

BOND, SHOENECK & KING, PLLC
One Lincoln Center
Syracuse, NY 13202

JOHN GAAL, ESQ.
JOSEPH C. DOLE, ESQ.
LOUIS ORBACH, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in connection with this action are

two matters. The first concerns a request by the defendants that plaintiffs' counsel be required to provide them, for their review in advance, with copies of any mass written communications that plaintiffs' counsel intends to send to potential collective action plaintiffs prior to the end of the opt-in period. This issue is before me as a result of District Judge David N. Hurd's decision, dated May 27, 2009, vacating my prior March 16, 2008 order containing restrictions on such communications and remanding the matter to me, *inter alia*, "to conduct appropriate proceedings so that a carefully drawn order can be entered 'that limits speech as little as possible, consistent with the rights of the parties under the circumstances.'" See Dkt. No. 210, slip op. at p. 7 (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102, 104, 101, S. Ct. 2193, 2201, 2202 (1981)).

The second issue stems from plaintiffs' motion for a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure precluding defendants from seeking individualized discovery of the opt-in plaintiffs in this action. (Dkt. No. 208).

These two issues were the subject of a hearing conducted by the court on June 30, 2009. At the close of that hearing I issued an oral decision addressing both questions presented to the court. Based upon the foregoing and the court's bench decision, which is incorporated herein

by reference, it is hereby

ORDERED as follows:

1) Defendants' request for an order directing that the text of any written communications intended to be sent by plaintiffs' attorneys to potential plaintiffs during the opt-in period be forwarded, in advance, to the defendants' attorneys for review is DENIED, based upon the court's finding that defendants have failed to satisfy their burden of demonstrating actual or potential abuses sufficient to justify any restriction on free communications between plaintiffs' counsel and potential collective action plaintiffs.

2) In keeping with the letter and spirit of section 216(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), and the applicable guidelines for court supervision of the notice process during the opt-in period, however, and consistent with the court's duty under the FLSA to exercise control over that process, and in light of plaintiffs' acknowledgment that such communications are not privileged, the court hereby DIRECTS that the contents of any mass written communications sent by either side to potential collective action plaintiffs in this action during the opt-in period be disclosed to counsel for the opposing parties, contemporaneously with dissemination of any such communication.

3) Pending further order of the court, all discovery in this action is hereby STAYED.

4) Plaintiffs' application for a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure prohibiting defendants from seeking discovery from the individual, opt-in plaintiffs is DENIED, without prejudice.

5) All restrictions previously issued by this court limiting free communications between any parties or their representatives and potential opt-in plaintiffs, including though not limited to that set forth in my June 8, 2009 order (Dkt. No. 211) are hereby VACATED.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: July 1, 2009
Syracuse, NY