

4. In *Robinson v. Moskus*, 2020 WL 5939774 (C.D. Ill. Oct. 1, 2020), Magistrate Judge Jonathan E. Hawley denied a plaintiff's motion to compel production of documents where the documents at issue were not in the possession, custody, or control of the defendants, as defined in Fed. R. Civ. P. 34(a)(1). *Id.* at *1.

Plaintiff, a former inmate in the Illinois Department of Correction's (IDOC) Decatur Correctional Facility, brought a § 1983 action against defendants, including the warden, the jail food service manager, and the internal affairs investigator, alleging that the food services manager sexually harassed and assaulted her. During discovery, plaintiff served several requests for production of documents related to, among other things, previous instances of sexual harassment or assault at the Decatur Correctional Facility. Defendants lodged numerous objections and, after the parties attempted unsuccessfully to resolve their disagreements, plaintiff was granted leave to file a motion to compel.

The primary issue in dispute was whether the documents plaintiff requested were in the defendants' possession, custody, or control as defined by Federal Rule of Civil Procedure 34(a)(1). According to plaintiff, "the relationship between the Defendants and the IDOC is such that they can obtain all documents in the possession of the IDOC." *Id.* at *2. Specifically, because "the interests of the IDOC and these Defendants [were] completely aligned," the documents in possession of the IDOC [were] within the 'possession, custody, or control' of the Defendants." In support of her position, plaintiff relied on the facts that (1) defendants were being provided legal representation in this case by the State of Illinois pursuant to Illinois statute, (2) the Attorney General of Illinois was providing their legal defense, and (3) Illinois would indemnify the defendants if they lost. Defendants, by contrast, argued that because the documents plaintiff requested were in the physical possession of the IDOC, and to produce them defendants would first need to obtain them from the IDOC, plaintiff should seek these documents via a third-party subpoena. *Id.* at *1.

Magistrate Judge Hawley began by explaining that in considering "whether a party has possession, custody, or control of a document in the hands of a third-party" and "[w]here a party and non-party are not corporate affiliates," courts should inquire "whether the party has a legal right to control or obtain the documents requested; a party's practical ability to obtain documents is irrelevant absent a legal right to do so." *Id.* at *5 (internal quotation marks omitted). Here, Magistrate Judge Hawley concluded, while defendants unquestionably had the practical ability to obtain the requested documents from the IDOC, plaintiff failed to establish that the defendants had any "legal right to control or obtain" the requested documents. *Id.* (internal quotation marks omitted). Specifically, the Magistrate Judge stated, "nothing in the statute cited by [plaintiff] confers a right upon an IDOC employee to demand documents from the IDOC." Further, while the Attorney General represented the defendants and would also represent the IDOC if it challenged a third-party subpoena seeking the same documents, "a party who has the same counsel as a non-party does not have the legal right to control or obtain documents from that third-party." Accordingly, Magistrate Judge Hawley ruled that because the requested documents were not in defendants' possession, custody, or control, they could not be compelled to produce those documents. *Id.* at *6.

In concluding his opinion, Magistrate Judge Hawley recognized that "the consequences of this Order may have a significant impact on the manner in which litigation against IDOC employees

must be conducted.” While in the past it was common practice for plaintiffs in prisoner litigation to request documents from defendants even if they were in the possession, custody, or control of IDOC, and IDOC typically provided documents upon request to defendants’ counsel, because the Attorney General seemingly had abandoned this practice, the Magistrate Judge stated that plaintiffs in these cases must now subpoena IDOC directly under Fed. R. Civ. P. 45. *Id.* at *7. In the Magistrate Judge’s view, this new procedure, specifically contemplated under the Federal Rules of Civil Procedure, was preferable to the previous “informal procedure” as IDOC would now be unquestionably subject to the court’s contempt power under Rule 45(g) if it ever failed to comply with a subpoena. Under the previous procedure, by contrast, it was unclear whether the IDOC, as a nonparty, would be subject to any sanctions or potential remedies for false representations it made to a party’s counsel regarding, for example, the completeness of its search and production.