

3. A decision from the U.S. District Court for the District of Connecticut addressing requests for “discovery on discovery,” including denying a request seeking to have the defendant catalog all of the devices containing responsive communications.

In *Doe v. Wesleyan University*, 2021 WL 4704852 (D. Conn. Oct. 8, 2021), Magistrate Judge Thomas O. Farrish granted in part and denied in part plaintiff’s motion to compel Wesleyan University (Wesleyan) to respond to requests seeking “discovery on discovery.”

This lawsuit centered around plaintiff’s allegations that Wesleyan broke its promise to conduct a fair disciplinary process before it expelled her for cheating on exams using the university’s learning management system, Moodle. A professor accused plaintiff of cheating on final exams by accessing Moodle while exams were being administered. These allegations prompted a university proceeding in August 2017, after which Wesleyan determined that plaintiff “more likely than not” cheated on her exams and expelled her. Plaintiff sued Wesleyan, alleging that Wesleyan broke its promise to provide a fair disciplinary process by failing to comply with its obligations, standards, policies, and procedures set forth in its Student Handbook.

Plaintiff served interrogatories and requests for production (RFPs) asking Wesleyan, among other things, to identify all electronic devices used to transmit documents and communications about the allegations in the complaint and all devices used in the administration of Moodle. Six of the RFPs concerned Moodle in various ways. Wesleyan objected to the interrogatories on the basis that the identities of its electronic devices bore no relevance to the issues of the case and would be unduly burdensome to assemble. Wesleyan objected to the six RFPs relating to Moodle on the basis that they were temporally overbroad, irrelevant, and unduly burdensome.

Plaintiff moved to compel Wesleyan to identify electronic devices and produce documents relating to the allegations in the complaint and the administration’s use of Moodle. Plaintiff filed her motion nearly a year after serving her discovery requests, with her counsel attributing the delay to a protracted meet-and-confer process. Wesleyan, however, argued that discovery showed that plaintiff clearly cheated on her exams and failed to preserve a forensic image of the phone she used to cheat and therefore was trying to “divert the Court’s attention from the evidence of cheating.”

Laying out the relevant principles of discovery under Rule 26, Magistrate Judge Farrish first emphasized the wide scope of discovery permitted under Rule 26(b)(1), including types of information not directly pertinent to the incident in suit such as “other incidents of the same type, or involving the same product.” *Id.* at *3 (quoting Fed. R. Civ. P. 26 advisory committee’s note to 2000 amendments). Additionally, information about organizational arrangements or filing systems of a party can be discoverable “if likely to yield or lead to the discovery of admissible information.” *Id.* at *3. The scope of discovery also included information about “the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.” *Id.* (quoting Fed. R. Civ. P. 26 advisory committee’s note to 2015 amendments).

Magistrate Judge Farrish then began an analysis of the two interrogatories at issue. The first, Interrogatory No. 3, asked Wesleyan to identify all electronic devices used by Wesleyan faculty members, staff members, administrators, and other employees to transmit documents and

communications relating or referring to the allegations stated in the complaint. *Id.* at *4. Wesleyan objected on the ground that the interrogatory was irrelevant to the issues at hand and that complying would “impose an enormous and unwarranted burden.” Wesleyan rejected plaintiff’s offer to limit the request to specific individuals plus any members of Wesleyan’s information technology services department then unknown to her.

The second, Interrogatory No. 4, asked Wesleyan to identify all electronic devices used by Wesleyan in the administration of Moodle during the summer of 2017. Wesleyan objected on similar grounds as to Interrogatory No. 3 and similarly rejected plaintiff’s offer to limit the request to the administration of Moodle for two courses for which she was accused of cheating.

Magistrate Judge Farrish stated that the two interrogatories did not seek information at the core of the concept of relevance and that plaintiff did not explain her assertion that the information sought would tend to make her claims and opposition to Wesleyan’s claims more probable. Specifically, plaintiff had “not identified any disputed issue of material fact that would be meaningfully informed by the question of whether, for example, a particular communication was conducted over a particular smartphone or laptop.”

Nonetheless, Magistrate Judge Farrish continued his analysis to determine whether these interrogatories sought “information that is within the permissible scope of discovery even if not directly relevant to a claim or defense.” *Id.* at *5. Magistrate Judge Farrish critiqued the timing of plaintiff’s motion, commenting that plaintiff “asked the Court to approach this question as if she had only recently filed her case, and only recently begun discovery.” Plaintiff explained that the information was relevant toward developing an ESI protocol and framing further discovery demands, and without it she could not pursue an effective discovery strategy. Magistrate Judge Farrish rejected this argument, pointing out that discovery had been ongoing for nearly two years. While plaintiff argued that she needed Wesleyan to list its devices to know where communications resided, she had already requested the communications themselves and Wesleyan had produced nearly 3,000 pages of responsive communications.

Treating these requests as “follow-up interrogatories to ensure that the production is complete,” Magistrate Judge Farrish stated that courts may order discovery designed to test the sufficiency of a party’s discovery efforts in order to capture additional relevant material. He added, however, that where a party seeks “discovery on discovery, that party must provide an adequate factual basis to justify the discovery, and the Court must closely scrutinize the request in light of the danger of extending the already costly and time-consuming discovery process *ad infinitum*.” *Id.* (quoting *Kaye v. N.Y. City Health & Hosps. Comm’n*, 2020 WL 283702, at *1 (S.D.N.Y. Jan. 21, 2020)).

Magistrate Judge Farrish found that the record did not provide an adequate factual basis for requiring Wesleyan to catalog all the devices containing responsive communications. *Id.* at *6. He reasoned that Wesleyan had represented it had produced all relevant documents and communications, and plaintiff provided no factual basis to suggest the production was incomplete. He noted that parties sometimes make a showing of documents they expected to receive but did not; when asked at oral argument, however, plaintiff’s counsel responded that he could not say for certain one way or another. Magistrate Judge Farrish therefore denied plaintiff’s motion for an

order compelling responses to these two interrogatories without prejudice to renewal if she developed an adequate factual basis.

Magistrate Judge Farrish next addressed plaintiff's document requests relating to Moodle. He stated that RFPs Nos. 6, 7, and 8 sought all documents and communications referring to the installation, implementation, and administration of Moodle. *Id.* at *8. RFP No. 9 sought documents and communications referring to Moodle training received by IT staff, and RFPs 10 and 11 sought job tickets and internal reports relating to Moodle. Wesleyan objected on the basis that these requests were overly broad and further that these requests were relevant only to plaintiff's negligence, and her negligence claims had been dismissed. *Id.* at *9.

Magistrate Judge Farrish stated that parties "ordinarily cannot pursue discovery on claims that have been dismissed." He stated that plaintiff did not identify any remaining allegation in her complaint to which her Moodle-related requests would be relevant but that she did argue that these requests would be relevant to one of Wesleyan's affirmative defenses: that plaintiff cheated on her exams. Plaintiff claimed that responsive documents would provide an alternative explanation to Wesleyan's claim that she cheated. Specifically, plaintiff argued that discovery into the installation, implementation, and administration of Moodle might reveal that the computer notations that Wesleyan regarded as evidence of cheating were actually products of the bugs alleged in her initial complaint.

Magistrate Judge Farrish stated that to justify plaintiff's requested relief, her theory "should be supported by more than pure speculation" under Rule 26(b)(1). In other words, "the party seeking discovery must make a *prima facie* showing that the discovery sought is more than merely a fishing expedition." *Id.* (quoting *Williams v. City of Hartford*, 2016 WL 3102001, at *2 (D. Conn. June 2, 2016)). Magistrate Judge Farrish stated that plaintiff did "not even theorize how Moodle's alleged bugs would affect the outcome of any relevant factual dispute." *Wesleyan*, 2021 WL 4704852, at *9.

Magistrate Judge Farrish noted one exception relating to Wesleyan's statements that it uncovered ironclad evidence of cheating by comparing plaintiff's iPhone web search history with Moodle's time stamps. *Id.* at *10. Plaintiff argued that her phone might have been set to Coordinated Universal time and some of the incriminating searches might have taken place earlier in the day. While Wesleyan's rebuttal was that the iPhone and Moodle logs correspond to the minute, plaintiff argued that this made discovery as to time zone settings critical. Magistrate Judge Farrish sided with plaintiff, considering her theories "sufficiently outside the realm of a 'fishing expedition' to support discovery." He determined that plaintiff was entitled to ascertain for herself, using discovery, whether it was true that her web search history and the Moodle logs reflected the same time zone.

Accordingly, Magistrate Judge Farrish granted plaintiff's motion in part, to the extent that Wesleyan was ordered to produce responsive documents relating to how Moodle recorded or logged time, including the time zone used in the Moodle logs. Magistrate Judge Farrish otherwise denied plaintiff's motion.