STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**

STATE OF WISCONSIN,

PLAINTIFF

VS.

ABBOTT LABORATORIES, INC., *ET AL.*,

DEFENDANTS

DECISION ON DEFENDANTS' MOTION TO COMPEL PRODUCTION OF E-MAIL
JUNE 25, 2008

CASE NO. 04 CV 1709

Appearances

Attys. William M. Conley, Matthew Lee, Jeffrey A. Simmons and Steven F. Barley, for Defendants
Atty. Frank D. Remington, Assistant Attorney General, for Plaintiff

Discussion

Defendants seek an order compelling the State to search for and produce e-mail messages from several of its employees in response to their Second Set of Document Requests. They claim that the State has consistently refused to undertake a comprehensive production of the employee e-mails, and they seek an order "compelling Plaintiff to respond fully to Defendants' … Request by searching e-mail of individuals identified … as having responsive documents, *using the search terms provided to the State by the Defendants.*" (Emphasis added)

The State argues that the nature of its e-mail system makes it incompatible with many searching systems and contends that, in any event, its "old-fashioned" reliance on record custodians to locate relevant documents (including e-mails) should be considered adequate. The State also maintains that Defendants do not have the right to dictate the manner in which it responds to their discovery requests. Finally, the State contends that

(a) the "law of the case"—*e.g.*, a ruling by Judge Niess on a related matter—is that Defendants' second document request is overbroad, and that I should reach the same result here; and (b) that the request is "overburdensome" and not likely to lead to the discovery of relevant evidence.

In a separate but related motion,[1] the State seeks to quash the Defendants' notice of a deposition regarding electronic mail messages and to strike the accompanying affidavit of a computer consultant, Mathew Ray, relating to the State's ability (or inability) to electronically search its e-mail records. Because Defendants have not persuaded me that the order they seek in the instant proceedings requiring the State to employ search methods and software dictated by Defendants should issue, it follows that [a] Defendants' deposition notice regarding the State's e-mails should be quashed, and [b] any dispute over the Ray affidavit has become moot. I will delay issuing an order to that effect until July 7, 2008, to permit counsel to file any comments they may have with respect to entry of such an order.

Defendants served their second document request in February, 2006. The State's response, in Defendant's view, was deficient in several respects, "including the fact that the production contained relatively few e-mails." Believing that, of necessity, given the prevalence of electronic communication in the 21st Century, there must be many more e-mails in existence, Defendants provided the State in January, 2007, with a list of suggested search terms for searching e-mail, Word and Excel files. The State objected to the request—primarily on grounds that it was too burdensome a task—and the parties met and conferred several times in succeeding months. At some point, Defendants sought to have the State use commercial search software ("Guava" and "ISYS"), on a cost-sharing basis, to conduct the search. The State declined, stating that the manner in which documents are stored in its e-mail system was incompatible with such programs, and that to attempt such a search would be unduly burdensome, if not impossible. When there appeared to be no solution to the stalemate, Defendants filed the instant motion.

[1] The State's Motion to Quash Defendants' Notice of a Deposition to State of Wisconsin Concerning Electronic Mail Messages, and to Strike the Affidavit of Mathew Ray, filed on or about October 5, 2007.

The State asserts that it was relying on individual employees to search for and produce hard and electronic documents, as well as any relevant e-mail messages, and that it has already produced more than 1,400 pages of e-mails in response to Defendants' request.

There seems to be little question that electronic documents, including e-mail, are discoverable. *See*, for example, ***Wiginton v. CB Richard Ellis, Inc.***, 229 F.R.D. 568, 572 (N.D. Ill. 2004); ***Anti-Monopoly, Inc. v. Hasbro, Inc.***, 1995 WL 649934 (S.D.N.Y. 1995); ***Bills v. Kennecott Corp.***, 108 F.R.D. 459, 463-64 (D.Utah 1985). *See, also,* Fed. R. Civ. P. 26, which approves the discovery of "electronically stored information."

The dispute here, however, is not whether the State may be compelled to produce employee e-mails, but whether Defendants' request for an order compelling the State to use search terms and/or search methods proposed by Defendants is appropriate.

In arguing that it is, Defendants point out that at least some courts have recognized the shortcomings inherent in using a "typical search" to locate electronically stored information, and have noted that, in some instances, responding parties may be required to use "computer forensic technologist[s]" to retrieve e-mails from complex computer systems.. *See*, for example, ***Zubulake v. UBS Warburg LLC***, 217 F.R.D. 309, 317 (S.D.N.Y.); ***Peskoff v. Faber***, *supra*; ***United States v. Triumph Capital Group, Inc.***, 211 F.R.D. 31, 46, n.7 (D. Conn. 2002)

I note in addition that the adequacy of a search is measured by a standard of reasonableness in consideration of the particular circumstances of each case. ***Truitt v. Dep't of State*** 897 F.2d 540, 542 (D.C. Cir. 1990). The question is not whether other responsive documents may exist, but whether the search itself was adequate. ***Steinberg v. United States Dep't of Justice***, 23 F.3d 548, 551 (D.C. Cir. 1994). *See, also,* ***Kean v. National Aeronautics and Space Admin.***, 480 F.Supp. 150, 156 (D.D.C. 2007), where

the court held that government agencies must respond to FOIA requests by conduct a search that is "reasonably calculated to uncover all relevant evidence."

The State takes the position that it, not the Defendants, has the right to select the means of complying with the document requests. It says, for example, that there is no authority, statutory or otherwise, that would "give Defendants the right to demand that Plaintiff not rely on State record custodians to produce responsive documents … [or that] … the Plaintiff buy, load, reconfigure and run some kind of commercially available computer software [to search for] interesting e-mails." In simplest terms, the State says: "Defendants cannot dictate the process by which the Plaintiff assumes and discharges its discovery obligation…"

That comes pretty close to the heart of the matter for it appears that what Defendants are really seeking here is a order requiring the State to acquire (albeit with some cost-sharing) commercially-available software to search its electronic records for employee e-mails—requiring the State, in other words, to use specific software and search terms provided by Defendants, to search for the e-mails. Again, this seems to me to be pretty much as the State has characterized it: an attempt by Defendants to direct the methods by which the State is to search for, locate and produce the e-mails. And I agree with the State that Defendants have offered no authority justifying entry of such an order—at least in the absence of any showing that the search methods being implemented by the State (which the State believes to be most consistent with the unique nature of its e-mail server) are resulting in non-responsive production. All Defendants have done is to suggest that, given the prevalence of e-mail communication today, and its acknowledged use in government offices, the number of e-mails located and produced by the State through its "old-fashioned" search methods, seems small.

If the e-mails exist (and are relevant), they are discoverable. The State has the names of the employees whose e-mails Defendants seek, and it has a legal obligation to produce them. If it has failed, or is failing, to do so—and if Defendants can reasonably establish that as a fact—appropriate statutory sanctions may be pursued.

As the authority offered by Defendants suggests, the underlying question is whether the search itself was adequate. ***Steinberg v. United States Dep't of Justice***, *supra*; and Defendants have not persuaded me to the contrary.[2]

Conclusion

For the reasons stated:

[1] The Defendants' Motion to Compel Production of E-mail, dated September 14, 2007, is denied;

[2] The parties may have until July 7, 2008, to file any comments they may have to the proposed order granting the State's Motion to Quash Defendants' Notice of a Deposition to State of Wisconsin Concerning Electronic Mail Messages, and to Strike the Affidavit of Mathew Ray, filed on or about October 5, 2007.

Dated at Madison, Wisconsin, this 25th day of June, 2008

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William Eich
Special Discovery Master

[2] Because I so conclude, it becomes unnecessary to consider the other issues raised in the parties' motion papers.