

Honorable Sean O'Donnell
Trial Date: March 7, 2016
Hearing Date: March 16, 2015

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

GEORGE E. ENGSTROM, an individual, and
JOHN E. STOCKWELL, an individual,

Plaintiffs,

vs.

MICROSOFT CORPORATION, a Washington
corporation,

Defendant.

No. 15-2-04785-0 SEA

**PLAINTIFFS' MOTION TO
ENFORCE NOTICE OF
UNAVAILABILITY AND TO
REQUIRE DEFENDANT TO
FOLLOW CIVIL RULES**

(CLERK'S ACTION REQUIRED)

I. RELIEF REQUESTED

This case involves wrongful discharge of high-level Microsoft managers for refusing to sign off on thousands of dollars claimed in a subordinate's expense reports for restaurant bills charged by the subordinate to South Korea **hostess bars**, because the plaintiffs were concerned that the money was actually paying for prostitutes for potential Microsoft customers in South Korea. In conversations today Microsoft has threatened to ignore a Notice of Unavailability filed by the plaintiffs' counsel, and to file motions while their counsel is in an upcoming two-week jury trial unless the plaintiffs file sworn statements on a collateral issue in contravention of the Civil Rules.

PLAINTIFFS' MOTION TO ENFORCE NOTICE
OF UNAVAILABILITY AND TO REQUIRE
DEFENDANT TO FOLLOW CIVIL RULES - 1

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1 This motion asks the Court to require Microsoft to honor the Notice of Unavailability
2 filed in this case, and to protect plaintiffs' counsel from harassment and bullying by Microsoft
3 so that he can try unmolested a two-week jury trial beginning in Thurston County on March 16,
4 2015, and prepare for and attend a summary judgment oral argument hearing on March 20,
5 2015, here in King County.

6 **II. STATEMENT OF FACTS**

7 The following is a summary of the complaint, which was filed on February 25, 2015.

8 Former Microsoft Managers Eric Engstrom and Ted Stockwell allege that they were
9 wrongfully discharged in violation of public policy for refusing to sign off on expense reports
10 submitted by a subordinate because they believed that money allegedly being billed for dinners
11 included improper payments for hostess bars, and potentially for prostitutes, to benefit
12 potential Microsoft customers in Korea. Management asked Engstrom and Stockwell to drop
13 the complaint, they would not, and they got laid off.

14 Engstrom worked for Microsoft since the 1990s, and is credited with being one of three
15 inventors of DirectX, which are the application programming interfaces upon which Xbox is
16 based. Engstrom was in charge of creating technology for Windows that allows software
17 developers to incorporate audio, video, and animation into their programs. He was a "partner"
18 level employee meaning he was in the top 1% of Microsoft employees for compensation.
19

20 Stockwell worked for Microsoft since the 1980s, and became a high-level program
21 manager. He was a "principal" level employee meaning he was in the top 3% of Microsoft
22 employees for compensation.
23

24 The complaint alleges that in early 2011, Stockwell became concerned with vaguely
25 described "entertainment expenses," some for thousands of dollars, that a subordinate

1 submitted for reimbursement. The subordinate told Stockwell that he was meeting with
2 customers at “*hostess bars*,” Stockwell asked the subordinate if he was “expensing prostitution
3 services of hostesses,” which the subordinate denied.

4 Stockwell notified Engstrom, his manager, about the amounts of the expense reports
5 and told him that he believed the subordinate was “expensing hostess bars” and potentially
6 prostitution. Stockwell and Engstrom were both aware that in Korea and other parts of Asia,
7 “hostess bars” often provide sexual services to their customers.
8

9 Engstrom reported to his boss, Corporate Vice President Erik Jorgensen, of their
10 concerns. Stockwell gave the subordinate a low performance evaluation as a result. Jorgensen
11 referred Engstrom and Stockwell to Human Resources Manager Jeff Williams, who received
12 the same report from Plaintiffs,
13

14 The complaint alleges that Williams called Stockwell at home after hours and asked
15 him to drop the complaint against the subordinate and to raise his performance rating.

16 Stockwell responded that he would do as requested, but only if Jorgenson sent him an
17 email asking that he agree to the plan and confirming what was being requested. HR Director
18 Williams responded, “Oh, wow” and dropped the request.

19 The Complaint alleges that after this incident, the plaintiffs’ careers went off track and
20 they were laid off in late 2013 and early 2014.
21

22 Plaintiffs’ counsel, Jack Sheridan, became involved in the case in September 2014 after
23 he was approached by the plaintiffs following a failed mediation with Microsoft, who are
24 represented by Rob Maguire at Davis Wright. Sheridan Dec.

25 Over the following months, Mr. Sheridan drafted a complaint for use in the case, and

1 the firm considered various legal theories. Sheridan Dec. Mr. Sheridan decided that owing to
2 the high-level positions held by the plaintiffs, it made sense to send a draft of the complaint to
3 Mr. Maguire to ensure that nothing contained in the complaint could be considered highly
4 sensitive business, confidential information, or trade secrets. Sheridan Dec. On November 24,
5 2014, Mr. Sheridan sent a copy of the draft complaint to Mr. Maguire, who reviewed the draft
6 and sent back a marked-up copy on December 4, 2014. Sheridan Dec. In the final complaint,
7 Mr. Sheridan deleted words in accordance with Mr. Maguire's stated concerns. Sheridan Dec.

9 Mr. Sheridan also learned that Microsoft has its employees sign employment
10 agreements that require the return of all documents to Microsoft upon separation. Sheridan
11 Dec. His investigation revealed that Microsoft has no process to obtain such documents from
12 departing employees, and learned that Microsoft does not even provide copies of the
13 employment agreements to departing employees at the time of departure. Sheridan Dec.
14 Nevertheless, to avoid possible counter-claims, plaintiffs' counsel had the plaintiffs assemble
15 all Microsoft documents and delete any copies. Sheridan Dec. This was accomplished over the
16 next several weeks. Sheridan Dec. Those documents were put on DVDs and on a portable
17 hard drive and stored under lock and key at Mr. Sheridan's law firm. Sheridan Dec.

19 Mr. Sheridan also learned that Plaintiff Engstrom had made a few audio recordings
20 while at work, which Mr. Sheridan viewed as possibly in violation of RCW 9.73.030, which
21 prohibits the audio recording of private conversations. Sheridan Dec. Mr. Sheridan did not
22 listen to the recordings, and thus could not evaluate whether they met the standard, but felt that
23 they should be safeguarded and deposited with the court. Sheridan Dec.

25 On February 6, 2015, plaintiffs' counsel delivered the entire body of Microsoft

1 documents to Mr. Maguire and advised him of the existence of the audio recordings. Sheridan
2 Dec. In the letter transmitting the documents, Mr. Sheridan wrote:

3 We have been getting organized in preparation for filing the lawsuit. In an abundance
4 of caution, because there is a prior employment agreement with confidentiality
5 provisions stating that documents and emails created during employment are
6 Microsoft's property to be returned upon termination, we are returning all Microsoft
7 documents held in the possession of our clients at the time of their termination.
8 Enclosed herein are thirty (30) DVDs, which represent two copies of the documents,
9 along with an external hard drive #0629901771. There may be attorney client
10 privileged documents in the stack, which we have not reviewed. Do not destroy or
11 otherwise modify the documents on the DVDs or external drive, since they may contain
12 information relevant to the lawsuit. However, if there are ACP documents in the stack,
13 they may be deleted. I am hopeful that we can talk about having those DVDs returned
14 once they are reviewed and any ACP files are removed. It will simplify discovery.

15 Also, there are a few audio files, which came into our possession. We intend to deposit
16 those with the court once the lawsuit is filed. They are also on DVDs. I'm thinking it
17 makes sense for the parties to stipulate that the court is the proper repository for the
18 files.

19 Let's meet and talk about that.

20 Our clients have taken steps to ensure that no other copies of the Microsoft documents
21 and audio files are kept. Please acknowledge receipt.

22 Sheridan Dec., Ex. 1.

23 Mr. Maguire made no inquiry about the audio files for the next month. Sheridan Dec.

24 Mr. Sheridan left on vacation in February, and the case was filed after his return. Sheridan

25 Dec. The filing was covered by local, national, and international press. Sheridan Dec.

On February 27, 2015, after the media coverage, Mr. Maguire contacted Mr. Sheridan
and indicated that he wanted to come and listen to the tapes. Sheridan Dec. Mr. Sheridan was
at a hearing in Thurston County that morning and did not return to the office. Sheridan Dec.

He was the only person with a key to the locked file cabinet storing the audio recordings.

Sheridan Dec. Mr. Maguire indicated that he was against storing the audio recordings with the

Court because they may not be secure. Sheridan Dec. He suggested that they be given to a

1 third party, and he identified Eric Blank, an attorney in Mount Vernon. Sheridan Dec. Mr.
2 Sheridan agreed, and retained Mr. Blank. Sheridan Dec., Ex. 2. The contract provides that he
3 will secure the recordings, and make a copy for Mr. Maguire. Sheridan Dec. The audio
4 recordings were picked up on March 2, 2015, and a copy was provided to Mr. Maguire the
5 same day. Sheridan Dec.

6
7 On March 5, 2015, Mr. Sheridan filed a notice of unavailability, which is a typical
8 filing in King County, and which, in Mr. Sheridan's experience, is honored by attorneys
9 practicing in Seattle. Sheridan Dec. Mr. Maguire sent a letter the same day, and spoke with
10 Mr. Sheridan on March 6, 2015, by telephone. Sheridan Dec.

11 In the phone call Mr. Maguire indicated that Microsoft insisted that the plaintiffs sign
12 declarations indicating what was contained in his letter:

13
14 As I previously requested, Microsoft needs prompt assurances under oath concerning
15 its information and now also the recordings of its employees. Please provide by
16 Sunday, March 8th, sworn declarations from your clients stating, if true:

- 17 • Your clients did not record private conversations of any other Microsoft
18 employees;
- 19 • Your clients do not possess any recordings of private conversations involving
20 Microsoft employees;
- 21 • Your clients have not provided copies of recordings of private conversations
22 involving Microsoft employees to anyone other than Eric Blank;
- 23 Your clients have not played for anyone any recordings of private conversations
24 involving Microsoft employees;
- 25 • Your clients have returned all Microsoft information, including all electronic
and hard copy documents without retaining any copies or providing any copies
to anyone else;
- and
- Your clients did not use or disclose any Microsoft information since their
employment with Microsoft ended.

If your clients will not provide sworn statements, Microsoft anticipates seeking
assistance from the court to ensure protection of its information and employees.

1 Sheridan Dec.

2 Plaintiffs' counsel indicated that his past conduct (consulting about the complaint,
3 securing and returning the documents, and securing the audio recordings) demonstrated that
4 Microsoft has nothing to worry about, and that Microsoft had no basis for claiming an
5 emergency to justify going outside the Civil Rules. Sheridan Dec. Mr. Sheridan indicated that
6 this was normal discovery, and that Microsoft was behaving like a bully, and should not be
7 filing anything during the Thurston County trial. Sheridan Dec. Mr. Sheridan challenged Mr.
8 Maguire to state who would submit a declaration under oath showing that there was any risk.
9 Sheridan Dec. Mr. Maguire had no response, but Mr. Maguire would not agree to refrain from
10 filing motions during the trial. Sheridan Dec. An impasse was reached, and this motion
11 follows so the issues are resolved before trial. Sheridan Dec.

12 **II. EVIDENCE RELIED UPON**

13 Plaintiffs rely on the Sheridan declaration and the pleadings filed in this case.

14 **III. ARGUMENT**

15 The purpose of the Civil Rules is "to secure the just, speedy, and inexpensive
16 determination of every action." CR 1. The defendant is free to depose the plaintiffs, or to file
17 written discovery, or requests for admissions. CR 30, 33,34, 36. The defendant has not even
18 filed an answer, and has made no case for having any valid concerns about the destruction of
19 evidence or the improper dissemination of evidence. The record shows that the plaintiffs have
20 acted with extraordinary care to preserve and secure evidence. Microsoft has no facts to the
21 contrary.

22 Microsoft is simply being a bully. Rather than addressing why its managers retaliated
23 against plaintiffs for refusing to sign off on large expense reports showing that thousands of
24 dollars were being spent on "entertainment expenses," because they were concerned that the
25 expenses were for prostitution (which violates policies underlying the Foreign Corrupt Practice

1 Act), Microsoft understandably wants to change the narrative by claiming that their documents
2 and secrets are at risk. The problem is that Microsoft has no such evidence, and no cause for
3 concern.

4 In King County, lawyers recognize and accommodate notices of unavailability. It is
5 astonishing that Microsoft will not.

6 **IV. CONCLUSION**

7 The Court should rule that any motion filed before March 30, 2014, will be considered
8 to have a filing date of March 30th, so any such filing does not interfere with Mr. Sheridan's
9 trial.

10 DATED this 6th day of March, 2015.

11 THE SHERIDAN LAW FIRM, P.S.

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13 By: s/John P. Sheridan
14 John P. Sheridan, WSBA # 21473
15 Attorneys for Plaintiffs
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1 CERTIFICATE OF SERVICE

2 I certify that on the below date I electronically filed the foregoing document
3 via the Court's CM/ECF system, which will send notification of such filing to the
4 following persons:

5 Rob Maguire
6 DAVIS WRIGHT TREMAINE LLP
7 1201 Third Avenue, Suite 2200
8 Seattle, WA 98101
9 Phone: (206) 757-8094
10 Email: robmaguire@dwt.com

11 DATED this 6th day of March, 2015, at Seattle, Washington.

12 s/Patti Lane
13 Patti Lane, Legal Assistant