IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

THE BOEING COMPANY, a Delaware corporation,

Defendant.

No. CV-05-3034-PHX-FJM

ORDER

The court has before it the EEOC's motion to compel (doc. 64), EEOC's second motion to compel (doc. 65), Boeing's combined response (doc. 78), and EEOC's reply (doc. 83). Also before the court is EEOC's motion to extend discovery and dispositive motion deadlines (doc. 66), Boeing's response (doc. 76), and EEOC's reply (doc. 82).

I.

The EEOC wants e-mails in 2002 and 2003 regarding claimant Wrede and her RIF and claimant Castron and her RIF. Boeing states that it provided the EEOC with all the e-mails responsive to EEOC's request and has repeatedly asked personnel to provide any e-mails not already disclosed. Some further e-mails have been produced. Boeing claims there are no further documents responsive to the EEOC's request. Boeing further states that only e-mails that still existed as of December 2004 could potentially be recovered because the backup tapes for periods before 2004 were erased before the issuance of a litigation freeze. Boeing further contends that it would cost $55,000.00 to restore the subject backup tapes and that the EEOC has pointed to nothing specifically that would justify such an expense.

The EEOC contends that Boeing should have placed a freeze on its e-mails back in 2002 when the claimants filed internal complaints within Boeing. Boeing asserts that the evolving law in this area did not even exist in 2002. The EEOC also contends that Boeings' assertion that it would cost $55,000.00 to retrieve the inactive data is "self-serving."

II.

The Federal Rules of Civil Procedure were amended effective December 1, 2006 to address this problem. Under Rule 26(b)(2)(B), "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or costs." Once a motion to compel is filed the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. Even if that showing is made, the court may order discovery if the requesting party shows good cause considering the limitations of Rule 26(b)(2)(C).

The Rule 26(b)(2)(C) proportionality analysis is influenced by the kind of data that is being sought. The production of active data (available in the ordinary course of business), is likely to satisfy the proportionality test. On the other hand, backup tapes (what we have here) and off-line archival records may involve substantial costs and time. We have no reason to doubt Boeing's cost estimate of $55,000.00. Thus, we find that Boeing has made the showing that the information sought is not reasonably accessible because of undue burden or costs.

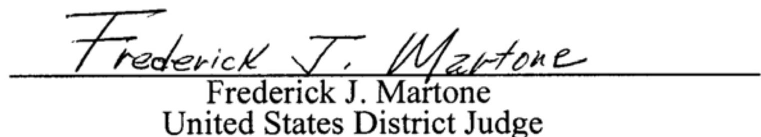
Under Rule 26(b)(2)(B), even if it is determined that a source of electronically stored information is not reasonably accessible, the requesting party may obtain discovery by showing good cause subject to the limitations of Rule 26(b)(2)(C). Of particular interest here is whether the burden or expense of the proposed discovery outweighs its likely benefit "taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Rule 26(b)(2)(C). The requests here are very broad. They seek all e-mails in a two year period containing any reference to the claimants and ten

other people. The requests are not very specific. They are in the nature of a broad investigation rather than a narrowly tailored discovery request. The Comittee Note to Rule 26(b)(2)(C) suggests we consider these factors as well as the importance of the issues at stake in the litigation.

This is an employment case brought by two claimants. It seems to us that the expenditure of $55,000.00 based solely on the *possibility* that there might be something relevant does not survive a proportionality analysis under Rule 26(b)(2)(C). Nor has the EEOC shown "good cause" within the meaning of Rule 26(b)(2)(B) to justify this expense. If the EEOC really thought the exercise would be worth the expenditure, we would have expected it to, in the alternative, offer to pay for it. It has not done so.

Accordingly, IT IS ORDERED DENYING the EEOC's motion to compel (doc. 64) and its second motion to compel (doc. 65). IT IS FURTHER ORDERED DENYING the EEOC's motion to extend discovery and dispositive motion deadlines on grounds of mootness (doc. 66).

DATED this 2nd day of March, 2007.



Frederick J. Martone
United States District Judge