UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

CIVIL NO. 01-339-KKC

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION PLAINTIFF

VS: ORDER

WAL-MART STORES, INC. DEFENDANT

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The Court addresses cross-filings related to the proper scope of deposition questions, precipitated by events at the deposition of Mike Giles, a manager for Defendant Wal-Mart Stores, Inc. *See* DE## 117, 119, & 125. The Court has considered an emergency motion and a motion to compel, along with related papers, filed by Plaintiff EEOC. The Court also has considered a motion for protective order, along with related documents, filed by Defendant.

The Court originally set this matter for a telephonic conference perceiving a fairly narrow issue. Since then, the filings have made it apparent that the parties disagree fundamentally about the scope of the liability phase of this case, at least from a temporal standpoint. The Court has attempted to process all of the relevant arguments, which are voluminous and invite reference to the entire record in the case.

The discovery dispute involves whether the EEOC should be permitted to inquire of defense witnesses concerning events occurring outside the time period of 1998 through February 2005. Wal-Mart contends that the parties have agreed to limit the scope of the case to that period, and that any deposition questions targeting events or occurrences outside that period should be forbidden in

discovery. Wal-Mart further objects to deposition questions concerning any distribution center other than DC 6097, maintaining that the Complaint at issue encompasses only hiring at the designated distribution center. The parties' positions reveal a critical dispute that involves not just the scope of discovery, but the scope of the overall liability question presented in this action.

The Court, as stated in the teleconference, cautions Wal-Mart that the option of instructing a witness not to answer a question is intended as a very limited and particularized remedy under Rule 30. Absent a privilege or prior court order, the Court expects any such instruction to result in an immediate and well-founded motion for a protective order.[1] The Court views the dispute as a legitimate one, particularly since it brought to the surface a critical debate regarding the scope of the liability case.

The Court believes that, on the record of this case, the parties effectively have limited the liability analysis to the period of 1998 through February of 2005 (referenced as "1998-2005"). The parties have represented to the Court that experts will substantially drive the liability proof. *See* DE# 89 (Transcript of July 2006 hearing), at 7 ("[A] lot of this case depends upon the expert report."). Further, the Court has ordered expert disclosures tied to the stipulated 1998-2005 time frame. *See* DE# 62 (July 2005 order directing Plaintiff's expert disclosure in two phases covering period from "1998 to 2001" and from "2002 through February 2005"). Finally, the parties have abided by a self-imposed demarcation tying applicant info to the period stated. For example, Wal-Mart has not provided information, such as applications, for any period after February of 2005. The

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[1] The Court is satisfied, in this instance, that Wal-Mart timely raised the scope issue via a motion for protective order. Although the EEOC properly questions the burden showing often inherent in the Rule 26(c)/30(d)(4) analysis, the Court finds that Wal-Mart's concern over the possible effect of the scope issues on discovery across the case warrants consideration by the Court.

parties chose that demarcation to permit preparation of a finite expert report. *See* Tr. at 5 ("The parties made the decision we would stop production [of applications] February of 2005, simply because if we continued production every month we would never get an expert report.").

The EEOC's expert report, now due March 1, 2007, will cover only the 1998-2005 period. The EEOC, which anticipates identifying all class members as a consequence or as a part of that report, *see* Tr. at 7, could, by definition, only identify class members from the pool of applications provided, a group that could not include applicants after the 2/2005 production cut off.

The EEOC suggests that it has held open the potential liability period by miscellaneous references to possible post-2/2005 claimants. Indeed, the EEOC has mentioned that it may seek a mechanism to account for alleged discrimination by Wal-Mart that occurred after 2/2005. The problem, to the Court, lies in the proof, the applicable liability standards, and the practical requirement that the class ultimately close. As the parties and Court have postured the case, the EEOC must prove that Wal-Mart intentionally discriminated under the *Teamsters* framework; if the EEOC prevails, in Stage 1, the "individual" stage of the case will apply that general finding to the circumstances of specific class members. If the EEOC has no applications, no expert report, and thus no proof applicable to discrimination between 2/2005 and trial–and it is clear that the EEOC does not have that proof based on the parties' statements–then there could be no basis for a jury to find liability as to that period and there could be no Stage 2 as to applicants during that period. The EEOC's reference to a "projection" and "exchange of applications" at the damage stage does not fit with the Court's understanding of how the proof and bifurcation will unfold.

This case now is almost six years old. For trial and ultimate resolution to occur, if ever it will, the class of potential claimants must be finite. Indeed, the District Court already ruled that the EEOC must, as a part of Stage 1 discovery, identify *all class members* to Wal-Mart. *See* DE #82. Holding possible class membership open would defeat the proof procedures in place in this case and would frustrate application of the *Teamsters* paradigm to this action.

This Court cannot, and does not, finally rule that the liability period is limited to the 1998-2005 period. Such a ruling would be in the nature of a dispositive finding, and the District Court has not referred such a matter to the undersigned. Still, for purposes of resolving the discovery dispute, which necessarily turns on defining what proof is relevant to the dispute, the Court references what it believes the proper and intended scope to be.

Although the Court does believe, as Wal-Mart contends, that the liability period is 1998-2005, the Court does not agree with the categorical discovery limitations that Wal-Mart derives from the defined period. The EEOC correctly argues that Wal-Mart's limitation is artificial. The Court finds, under the standards of Rule 26, that some inquiry into matters occurring outside the defined period, and indeed outside the geographic limitation of DC 6097, would be proper.

The permissible extra-temporal or geographic evidence would, in the Court's view, be such evidence as is relevant to the liability question *for the 1998-2005 period*. Thus, even though questions might implicate post-2/2005 events or might involve experiences at another DC, the questions would be legitimate if they are probative as to Wal-Mart's knowledge, awareness, or intent, related to gender animus, for the 1998-2005 period. Thus, the Court will permit the EEOC to inquire into the personal experiences of Wal-Mart's decision makers--experiences both at DC 6097 and elsewhere--to the extent those personal experiences rationally reflect on whether Wal-Mart

acted with a gender animus, as its standard operating procedure, at DC 6097 from 1998-2005. Further, the EEOC may inquire about events and instances since 2/2005 at DC 6097 that would be probative as to Wal-Mart's gender animus for the 1998-2005 period at DC 6097. Permitted topics would include changes in policy; training; actions indicating cognizance of prior discrimination; allegations of discrimination that surfaced post 2/2005 but related to the 1998-2005 period; and, allegations of bias, regardless of time frame, directly involving Wal-Mart's DC 6097 decision makers for the 1998-2005 period.

As the Court stated in conference, it expects the lawyers involved in this case, all of whom are highly skilled, to apply these parameters in good faith and with a reasonable view toward cooperatively completing discovery. The Court should not have to approve, by line-item, deposition questions. To guide the parties, however, the Court views almost all[2] of the objected-to questions as valid, under the terms of this Order. Further, based on the EEOC's estimate of limited further deposition proof, Wal-Mart should carefully evaluate whether to bar a witness from answering a question, under this Order, or whether to simply reserve objection for further resolution, if necessary.

Finally, the Court does not view Wal-Mart's conduct as warranting an imposition of fees or costs, under Rules 26(c) and 37. The Court does expect Wal-Mart to carry the economic burden of presenting Mr. Giles, at the EEOC's reasonable convenience, for the continuation of his deposition. If the parties can agree that the Giles deposition will conclude as part of an otherwise-

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[2] Matters outside the parameters, addressed in the listed questions, would be a) questions about empirical observations at another DC; and b) questions about post 2/2005 gender complaints, unless those complaints involved or implicated pre-2/2005 conduct at DC 6097 during the 1998-2005 period or involved decision makers for such period.

scheduled event in the case, then Wal-Mart shall produce him as agreed. If the parties cannot agree, then Wal-Mart must take such other steps as may be reasonable to produce Mr. Giles either at a place convenient to the EEOC or, if the EEOC agrees, by video conference as mentioned to the Court. To be clear, the EEOC is entitled to examine Mr. Giles concerning matters permissible within the scope of this Order, and it is Wal-Mart's burden to present Mr. Giles for conclusion of the deposition in a manner economically convenient to the EEOC.

The terms of this Order apply to the continuation of the Giles deposition and to such other depositions, including that of Andy Glover, as may occur. The motions for protective orders and motion to compel are denied in part and granted in part, in accordance with the terms of this Order.

IT IS SO ORDERED. The docketing clerk may terminate docket entries 117, 119 and 125.

The Court issues this Order resolving a non-dispositive pretrial matter under 28 U.S.C. § 636(b)(1)(A). Any party objecting to this Order should consult said statute concerning its right of reconsideration before the District Court.

This the 18th day of January, 2007.

Signed By:
Robert E. Wier
United States Magistrate Judge