IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
vs.	)	No. 99-2427-GV
RENTERS CHOICE, INC.,	)	
Defendant.	)	

ORDER ON PLAINTIFF'S MOTION FOR AN ORDER COMPELLING ENTRY UPON LAND, MOTION FOR AN ORDER COMPELLING 30(B)6 DEPOSITION DESIGNATION, PRODUCTION OF DOCUMENTS, AND SANCTIONS, AND MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND FOR SANCTIONS

The EEOC brought the present action against defendant Renters Choice pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* and Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, alleging that defendant terminated the employment of four female employees because of their sex and refused to hire other females because of their sex. Presently before the court are three motions of the EEOC which seek an order permitting the EEOC to enter upon defendant's premises and orders compelling defendant to designate a rule 30(b)(6) deponent and produce certain documents. The EEOC asks for sanctions in each of its motions. All three motions were referred to the United Magistrate Judge for a determination. For the reasons that follow,

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the EEOC's motion for an order compelling defendant to permit entry on its land is denied and the two motions to compel are granted in part.

I. BACKGROUND

Defendant is a "rent to own" company that rents a variety of items, including furniture, appliances, electronics, and accessories to individuals under rental purchase agreements that permit customers to own the items they have rented after a specified period of time. Generally, defendant delivers the rented items to the homes of its customers.[1]

In June 1998, defendant purchased four stores in Memphis, Tennessee, from Rentronics, another rent to own company. Defendant instituted its own management system in these stores and administered various tests to the current employees - a twelve-minute test for an account manager position and the Minnesota Multiphasic Personality Inventory and the Wonderlic Personnel tests for executive assistant management positions. The EEOC alleges that male employees who failed the tests were placed into positions as account managers, allowed to retake the tests, and then placed

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[1] For an extensive analysis of the "rent to own" industry in the United States, including the business position of defendant in the present case, see Susan Lorde Martin and Nancy White Huckins, *Consumer Advocates vs. the Rent-to-own Industry: Reaching a Reasonable Accommodation*, 34 Am. Bus. L.J. 385 (1997).

into assistant manager positions, but that four specific female employees - Sheila Herford, Tequila Burse, Edith Ruby, and LaDonna Fason - who failed the tests were not placed into positions as account managers after taking the tests, were not allowed to retake the tests, and were eventually discharged from employment for the stated reason that they could not lift 75 pounds without assistance. After the termination of the four female employees, defendant employed no women at its facilities in this region. The EEOC further claims that when females attempted to apply for positions at defendant's stores in this region, they were either not hired or discouraged from applying. (Complaint ¶¶ 10 and 11).

As part of the discovery process, the EEOC served the defendant with a Rule 34 request to inspect premises, a Rule 30(b)(6) deposition notice and accompanying request for production of documents, and a separate request for production of documents. Defendant has lodged objections to the requested discovery.

II. Analysis

A. The Motion to Compel Entry Upon Land

The EEOC first seeks an order pursuant to Fed. R. Civ. P. 34 permitting it to enter upon defendant's facilities[2] for the purpose

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[2] Defendant has more than ten facilities in Tennessee and Arkansas. The Rule 34 request sought inspection of facilities in Memphis, Nashville, and Little Rock. In its motion, the EEOC concedes that inspection of one store in Memphis would suffice.

of "inspecting the operations, reviewing and observing job tasks conducted at each facility, interviewing employees, and observing deliveries and repossessions." (Pl.'s Req. to Def. to Permit Entry Upon Land, Ex. 4 to Pl.'s Mem. in Support of Mot. for an Order Compelling Entry Upon Land.) The EEOC insists that it is necessary to enter the premises to determine whether lifting 75 pounds without assistance is, in fact, an essential function of employment, or merely a pretextual reason for terminating the four female employees.

The evidence the EEOC seeks to obtain by coming onto the premises is clearly relevant to defendant's proffered reason for terminating the four females. In a discrimination lawsuit alleging unlawful termination, the reason given by an employer for discharging an employee is an essential aspect of the burden shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Investigation of the employer's rationale thus is reasonably calculated to "lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

Relevance, however, is not the sole determining factor. To determine whether to permit entry upon land, the court must also balance "the degree to which the proposed inspection will aid in the search for truth" against "the burdens and dangers created by

the inspection." *Belcher v. Bassett Furniture Industries, Inc.*, 588 F.2d 904, 908 (4th Cir. 1978) (denying motion for onsite inspection and interviews in an employment discrimination case). In the present case, the EEOC's request for entry upon defendant's land is overbroad and creates unnecessary burdens and risks. The EEOC seeks not only to observe whether employees do in fact lift 75 pounds without assistance, but also to conduct, in essence, "roving depositions" by interviewing employees about their job experiences. The benefit to be gained from the onsite inspection is relatively slight. The interviews would not be under oath, the answers would not be recorded, and the defendant would not have any chance to cross-examine. Employees may or may not be moving 75 pounds items that particular day. Furthermore, the information the EEOC seeks to obtain by coming on the premises is readily available through traditional, less invasive and disruptive discovery techniques, such as depositions or interrogatories, without subjecting defendant to the burden and risks of having the EEOC wandering through its stores.

Moreover, as defendant correctly notes, the cases cited by the EEOC for the proposition that it is entitled to enter upon defendant's land are distinguishable from the present case. Two of the cases, *Minnesota Mining & Manufacturing Company, Inc. v. Nippon Carbide*, 171 F.R.D. 246 (D. Minn. 1997) and *Cuno, Inc. v. Pall*

Corp., 116 F.R.D. 279 (E.D.N.Y. 1987), involve patent disputes where the plaintiffs sought to inspect defendants' premises for the purpose of determining whether a particular piece of machinery installed in the defendants' factories violated plaintiffs' patents. Clearly, the entry upon land in these two cases was necessitated by the nature of the litigation; depositions and interrogatories, for example, would likely prove significantly less effective in establishing whether the machinery violated a patent than would an inspection of the actual machine at issue. Indeed, the *Cuno* court noted that "inspections are not an extraordinary means of discovery in patent suits." *Cuno*, 116 F.R.D. at 281.

The only discrimination case cited by the EEOC, *Eirhart v. Libbey-Owens-Ford Co.*, 93 F.R.D. 370 (N.D. Ill. 1981), is also distinguishable from the present case. At issue in *Eirhart* was the validity of certain height and weight restrictions placed on employees by defendant. Plaintiffs sought to observe a test production line specially established by defendant and its attorneys after the initiation of the lawsuit for the purpose of conducting an industrial physiological study. The court reasoned that because this was a special line established solely for analysis of the pending litigation that simply happened to be located on defendant's property, plaintiff had a "'substantial need' and an inability without undue hardship to obtain the . . ."

results. *Id.* at 372 (internal quotations omitted). In the present case, by contrast, the EEOC does not seek to observe a test conducted by defendant; rather, it seeks permission to enter defendant's property for a variety of broad and vague purposes. Because the EEOC can obtain any information it needs through more conventional and less burdensome methods, the EEOC's motion for an order permitting entry upon land is denied.

B. Motion to Compel Rule 30(b)(6) Deposition Designation and Production of Documents

The EEOC also seeks an order compelling defendant to designate a Rule 30(b)(6) deponent to testify as to seventeen specified subject areas pertaining to defendant's stores and operations in Tennessee and Arkansas[3] and to produce certain documents relating

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[3] The specific subjects referenced in the notice of deposition were:

1. Data and fields of data contained in defendant's computerized personnel, payroll and EEO databases for store managers, inside outside managers, inside and outside assistant managers, executive assistant, collection specialist, account managers and employees of defendant's facilities in Arkansas and Tennessee
2. Defendant's policies and procedure for retention of hardcopy and computerized personnel, payroll and EEO information for store managers, inside outside managers, inside and outside assistant managers, executive assistant, collection specialist, account managers and employees of defendant's facilities in Arkansas and Tennessee
3. Employer's Structure and Personnel
4. Regional/District Structure
5. Compensation

to these subject areas for the period of January 1, 1998, to the present.[4] Defendant agreed to produce a witness to testify to the

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6. Personnel Record keeping
7. Transfers/Reassignment/Promotions
8. Job Duties and responsibilities for store managers, account managers, inside/outside managers/assistant managers
9. Training of employees
10. Testing
11. Sales & Purchase Agreement
12. EEO-1 Reports
13. Defendant's 75 lb weight lifting requirement
14. Merchandise rented to customers
15. Personnel Policies and Practices
16. Hiring/Initial Job Assignment
17. Termination of Sheila Herford, Tequila Burse, and Edith Ruby

(Dep. Notice, Ex. 7 to Pl.'s Mem. in Support of Mot.)

[4] The 30(b)(6) deponent was directed to bring the following documents:

1. Computerized personnel databases that include information regarding the name, social security or other identifying number, job positions, job history, earnings, store or facility location, sex, job assignments, training, promotions, demotions, or other change in status, and other related or relevant job information for all of defendant's store managers, inside outside managers, inside and outside assistant managers, executive assistants, collection specialist, account managers, and employees of defendant's facilities in Arkansas and Tennessee.
2. All documents that explain, describe or otherwise pertain to defendant's methods and techniques for compiling, editing, modifying, and updating computer databases containing personnel information.
3. All documents that specify or describe fields of defendant's computerized personnel, payroll and EEO data.
4. All documents that define, describe, explain or otherwise pertain to defendant's retention and/or preservation of personnel, employment and human resources documents and/or data.

termination issues pertaining to the Memphis stores[5] but refused to designate a deponent to testify to matters concerning Renters Choice stores in Arkansas and refused to provide documents responsive to the nine document requests on the grounds that such requests were vague, ambiguous, overbroad, unduly burdensome, harassing, and exceeded the scope of the lawsuit by including stores in Arkansas. Defendant never sought a protective order from the court.

The EEOC has the authority to bring actions in its own name for violations of federal discrimination laws. Additionally, the EEOC is not bound by the normal class certification requirements of Fed. R. Civ. P. 23 in seeking relief for a class of individuals.

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5. All documents that list or inventory defendant's computer tapes and/or databases.
6. Any and all documents reflecting any and all changes in store operations after Rentronics was acquired by Defendant Renter's Choice or Tent-A Center in 1998 in Tennessee and Arkansas.
7. Any and all documents reflecting the personnel staff at the Rentronics stores in Tennessee and Arkansas before Defendant acquired the Rentronics stores in 1998 and assumed operations as Renter's Choice.
8. Any and all Sales and Purchase Agreements between Rentronics and Renter's Choice in 1998.
9. Any and all documents reflecting the development, institution, and the underlying research and bases for the 75 pounds lifting requirements employed in Renter's Choice and Rent-A-Center stores.

(Dep. Notice, Ex. 7 to Pl.'s Mem. in Support of Mot.)

[5] Defendant agreed to produce a witness to testify as to subjects 8, 12, 13, and 17.

See General Telephone Co. of Northwest v. EEOC, 446 U.S. 318 (1980). In its complaint, the EEOC sought relief on behalf of females as a class in the region of Tennessee and Arkansas on the theory that defendant's hiring and firing practices in those two states constituted gender discrimination. (Complaint, ¶¶ 9, 11.) The 30(b)(6) notice and requested documents are clearly relevant to the allegations in the complaint. To limit discovery to Tennessee would, in essence, be ruling on the sufficiency of the EEOC's allegations in its complaint in the context of a discovery motion. The discovery process is simply not the proper forum in which to challenge the sufficiency of a complaint. Other methods are available to defendant to challenge the sufficiency of the allegations, e.g., a motion for a more definite statement, a motion to dismiss, or a motion for partial summary judgment.

Moreover, contrary to its assertions, defendant was required to seek a protective order if it wished to object to any of the deposition topics. *See* Fed. R. Civ. P. 37(d). The Rules do not permit a party to escape a deposition by mere objection, but rather require that such objections be presented in the form of a motion for protective order. Rule 37(d) provides in pertinent part:

> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) . . . to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice . . . the court in

> which the action is pending on motion may make such orders in regard to the failure as are just . . . . *The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).*

Fed. R. Civ. P. 37(d) (emphasis added).

Additionally, the court finds that the topics designated in the deposition notice and the document request are reasonably calculated to lead to the discovery of admissible evidence, in that they pertain to the hiring, retention, and termination practices of the defendant, which are presently viable issues in the lawsuit, and that the requests are not vague, ambiguous, or overbroad, but are sufficiently limited in scope and description. Finally, defendant has not demonstrated that production of documents would constitute an undue burden in light of the EEOC's need for the documents in this litigation. Accordingly, defendant is directed to designate a Rule 30(b)(6) deponent within eleven days of the date of this order and to make the deponent and the requested documents available to the EEOC at a time mutually convenient to the parties.

C. The Motion to Compel Production of Documents

In its third motion to compel, the EEOC seeks documents responsive to specific requests in its First Request for Production of Documents. Defendant's objections fall into three broad

categories: (1) Time and geographic limitations; (2) Attorney-client and work product privileges; and (3) Relevancy and burdensomeness of information pertaining to other claims and lawsuits. The categories are addressed seriatim.

With respect to Requests Nos. 3, 4, 5, 6, 18, 24, 25, and 28, defendant has refused to produce documents pertaining to its Arkansas facilities and also maintains that the time frame specified in the request, June 1, 1998 to the present, is too broad. As discussed above, the complaint alleges discriminatory practices in both Arkansas and Tennessee, and defendant simply cannot arbitrarily limit the scope of the complaint by refusing to comply with the normal discovery process. Similarly, the time period specified in the requests is not overbroad. It encompasses the period of time the four named former employees worked for the defendant. With respect to Request No. 6, defendant represents that it does not maintain applications and resumes for store positions in Arkansas and Tennessee dating back to June 1, 1998. To the extent that defendant has not yet provided documents relating to its Arkansas stores or for the time period specified in Requests Nos. 3, 4, 5, 6, 18, 24, 25, and 28, it must to do so within eleven days of entry of this order. If no responsive documents exist, defendant shall supplement its response to so indicate.

As to Requests Nos. 1, 2, 23, and 29, defendant objected on the basis of various privileges without producing a privilege log. Defendant has now provided a privilege log, attached as Exhibit "A" to its response to plaintiff's motion to compel, and plaintiff's concerns as to documents 1, 2, 23, and 29 are therefore moot at this time. If, however, after reviewing the log, the EEOC believes that defendant has improperly invoked its privilege as to certain documents, it may, prior to the discovery deadline, refile its motion to compel.

Finally, defendant objected to Request No. 14 as overly broad, vague, unduly burdensome, and not calculated to produce admissible evidence. Request No. 14, seeks "any and all documents regarding any sex discrimination claims filed against Renters Choice in any federal or state court." As written, the court agrees with the defendant that the request is overbroad for a number of reasons. Defendant owns over 2,000 stores nationwide. Without doubt, the number of potential locations which would have to be searched would constitute a substantial and undue burden on defendant. The request seeks charges of all types of sexual discrimination and is not limited to issues involving sexual discrimination against females in hiring, retention, and firing. Responsive documents would likely involve documents protected by attorney-client privilege. In addition, court documents may be obtained by the

EEOC directly from the court. Moreover, there is no basis to extend the geographic scope of discovery beyond this region. Balanced against this is the relatively minor value that these documents would have in the present litigation. Given the breadth of the scope of the request, the court will limit the request to EEOC charges of sexual discrimination against females in hiring, retention, and termination in this region from June 1, 1998, to the present.

D. The EEOC's Requests for Sanctions

The EEOC seeks sanctions pursuant to Fed. R. Civ. P. 37(a)(4) for bringing the three present motions. That rule provides that:

> [I]f the motion [to compel discovery] is granted . . . the court shall, after affording an opportunity to be heard, require the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the . . . discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(4). In the present case, the EEOC attempted to secure defendant's cooperation in providing the requested discovery. Defendant's failure to designate a Rule 30(b)(6) witness and to produce a privilege log was not substantially justified. Defendant improperly used the discovery process to attempt to

narrow the scope of the complaint, rather than using the avenues available to it for that purpose under the Rules. On other matters, the onsite inspection and the overbroad request for other sexual harassments claims nationwide, defendant's failure to provide discovery was justified. Indeed, defendant offered to produce documents responsive to Request No. 14 if the EEOC would agree to narrow its request. Because both sides prevailed on these motions, the court declines to impose sanctions.

IT IS SO ORDERED.

Diane K. Vescovo

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE
Date: August 15, 2000

UNITED STATES DISTRICT COURT - WESTERN DISTRICT OF TENNESSEE

Notice of Distribution

This notice confirms a copy of the document docketed as number 55 in case 2:99-CV-02427 was distributed by fax, mail, or direct printing on August 16, 2000 to the parties listed.

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