UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

CIVIL NO. 01-339-KKC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION — PLAINTIFF

vs: ORDER REGARDING PENDING DISCOVERY ISSUES

WAL-MART STORES, INC. — DEFENDANT

* * * * * *

The Court, upon referral, addresses the discovery issues raised at a July 24, 2006 status conference and/or reflected in the parties' cross-filings relative to Defendant's written discovery requests. The Court also addresses Defendant's access to proof via deposition.

Plaintiff Equal Employment Opportunity Commission (EEOC) and Defendant Wal-Mart Stores, Inc. (Wal-Mart Stores, Inc.) disagree over the proper scope of discovery in this now-bifurcated Title VII pattern and practice class action. At the July 24, 2006 Scheduling Conference, the parties disputed the number of class members Defendant may depose to prepare its defense at the liability stage of the trial. *See* Tr. at 7-22. The parties further disagreed as to whether Defendant may contact class members ex parte. The District Court took these issues under advisement. *See id*. at 20.

The Defendant also filed a Motion to Compel Plaintiff to respond to written discovery requests. *See* DE#86, 87. The EEOC submitted a response concerning the issues. *See* DE# 97, 98. The EEOC's response includes an analytically-related request to limit discovery in the first stage

of the case. *See* DE#98. Wal-Mart replied to the substance of the argument. *See* DE# 107. These filings all address the central matter of proper discovery scope for Stage 1 of the case.

The Court has considered all of the filings, which are extensive, in attempting to craft an appropriate resolution. At the outset, the Court notes the following principles that it applies in evaluating the discovery arguments.

First, the District Court has already set the broad contours for litigation of this case. The District Court denied the EEOC's motion to bifurcate discovery. *See* DE# 82. That motion would have deferred **all** discovery of individual claimants to Stage 2, *see* DE #64, at 1, and the Court rejected the request.

Further, in the March 2006 Order, the District Court expressly protected Defendant from unfair surprise, preserving an adequate discovery right tailored to the structure of the case. Among other things, the Court dismissed limiting Defendant to discovery of witnesses "hand selected" by Plaintiff, found the Defendant "entitled to know what it is up against in terms of class size and potential claimants," and noted Defendant's right "to know the full extent of the Commission's claims and the size of the potential class." *See* DE# 82, at 2-3.

On the other hand, the Court did bifurcate the trial into liability and damage phases.[1] That bifurcation necessarily and by design defers most of the individual proof issues to Stage 2, as the District Court noted. Further, bifurcation invites appropriate limits on Stage 1 discovery, "through this Court's supervision of the discovery process." *See id.*

---

[1] The Court will address the stage assignment for punitive damages by separate ruling.

Finally, Court discretion in discovery management exists in all cases, and particularly in a bifurcated action, per Rule 42(b), of this scope and potential magnitude. The Court exercises that discretion in an effort to preserve efficiency and judicial economy, while protecting both parties from prejudice. By this Order, the Court will 1) define the permitted deposition range and the proper scope of written class-member discovery; and 2) address Defendant's ex parte contact with class members not represented by the EEOC.

1. Deposition numerosity and written discovery

The chief discovery issue raised at the July 24, 2006 hearing involved the permissible number of class member depositions by Defendant. Wal-Mart contends that, at a minimum, it needs and is entitled to depose 10% of the class, or roughly 450 persons. *See* Tr. at 11. The EEOC replies that taking 450 depositions will undermine the efficiencies gained in bifurcating the trial and is grossly unnecessary since Stage 1 focuses on class-wide discrimination, not individual hiring decisions. The EEOC proposes that Defendant may depose the class members selected as witnesses by Plaintiff and an additional five to fifteen persons. Plaintiff suggests that such discovery limitations are customary for bifurcated pattern and practice discrimination cases.

Similar arguments attend the written discovery served by Defendant, which prompted a flurry of objections and cross-filings by the parties. Defendant characterizes its written discovery, which theoretically applies to the entire class, as seeking "routine information." The discovery does seek some general, identifying data (name, address, social security #), but the discovery also seeks extensive background information. The Court thus must sift through the requests and define the proper scope, taking into account all factors.

As Wal-Mart contends, there are no strict limits on the types of evidence that employers may use to refute an inference of discrimination at the first stage of a pattern and practice case. *See Int'l Bhd. of Teamsters v. United States,* 97 S.Ct. 1843, 1867 n.46 (1977). To an extent, a defendant may rebut a plaintiff's prima facie showing by reliance on anecdotal or illustrative evidence relating to specific and individual charges of discrimination. *See E.E.O.C. v. Fed. Reserve Bank of St. Louis*, 84 F.R.D. 337, 341 (W.D. Tenn. 1979)(providing a defendant "must be afforded the opportunity to ... present evidence relating to specific charges of individual discrimination" to rebut a showing of discriminatory practices at the first stage); *E.E.O.C. v. McDonnell Douglas Corp.*, 960 F.Supp. 203, 205 (E.D. Mo. 1996)(stating that defendant may introduce anecdotal and illustrative evidence of individual dismissals that bears on the issue of whether a pattern of discrimination existed).

The Court notes that the plaintiff's mode and manner of proof in a case of this nature largely defines, or at least informs, a defendant's rebuttal options. Thus, the degree to which a plaintiff relies on anecdotal or individual proof necessarily expands a defendant's need to counter with anecdotal or individual proof. The courts recognize that "the strength of rebuttal evidence that the defendant must produce. . . depends, as in any case, on the strength of the plaintiffs' proof." *Flavel v. Svedala Indus., Inc*., 868 F. Supp. 1422, 1461 (E.D. Wis. 1994). Further, as the Supreme Court itself characterized, "The employer's defense must, of course, *be designed to meet* the prima facie case of the plaintiffs." *Teamsters*, 97 S. Ct. at 1867 n. 46 (emphasis added). In other words, "[D]efendants' rebuttal evidence is tailored to the plaintiffs' prima facie case." *Flavel*, 868 F. Supp. at 1461. In rebuttal, defendant may challenge the "source, accuracy, or probative force" of statistical proof; a defendant may also present competing statistics and "present anecdotal and other non-

statistical evidence tending to rebut the inference of discrimination." *See Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 159 (2d. Cir. 2001)(citation omitted).

Plaintiff, who expects to designate a 4500+ member class with a 10% "shortfall," forecasts relying on both expert, statistical proof and some level of individual testimony. *See* Tr. at 8 ("We expect we are talking about 15 to 20 women, maximum."). Defendant must have an adequate opportunity to develop its own corresponding proof relative to this expansive class, which could include anecdotal or contrary illustrative proof tailored to match testimony from the EEOC's representative witnesses.

The Court reminds the litigants that the ultimate proof issue–for **both** parties--relates to Defendant's alleged policy of discrimination, *i.e.*, whether Wal-Mart engaged in discrimination as a standard operating procedure. *See Teamsters*, 97 S. Ct. at 1855. "Isolated" or "sporadic discriminatory acts" will not suffice. *See id.* Still, limited resort to proof of individual treatment may, in a statistically-laden case, bring "cold numbers . . . to life." *See id.* at 1856. The Court and parties must manage the discovery and trial proof allowing for legitimate anecdotal or illustrative proof while keeping the ultimate liability question in focus.

The Court, of course, may reasonably control the amount of specific evidence on both sides. *See Robinson*, 267 F.3d at 168 ("[T]o ensure that the liability phase remains manageable, the district court may limit the anecdotal evidence as it deems appropriate."); *McDonnell Douglas Corp.*, 960 F.Supp. at 205 ("Defendant will not be able to present evidence regarding each individual termination at the liability trial."); *Sperling v. Hoffmann-La Roche, Inc.*, 924 F.Supp. 1346, 1354 (D.N.J. 1996)(noting that defendant cannot offer evidence, at stage one, that each individual plaintiff was lawfully discharged). Demonstrating whether *each* individual claimant was denied an

employment opportunity for lawful reasons is the employer's burden at the remedial stage. *See Teamsters*, 975 S.Ct. at 1868. Making that plenary inquiry at the liability stage would completely undermine the framework for pattern and practice cases designed by the Supreme Court in *Teamsters*. The District Court already has recognized this value, stating:

> This is not to suggest that the defendant will be able to counter each individual plaintiff brought forward by the Commission at trial . . . These individual determinations are Stage 2 questions and are not to be used to determine the initial liability.

DE# 82, at 2.

Similarly, lower courts find that a defendant's right to present *some* evidence of individual circumstances at the liability stage is not a license to conduct unlimited discovery of each plaintiff. *See E.E.O.C. v. Rent-a-Center, Inc.*, No. 99-2427, 2002 WL 1482534, at *2 (W.D. Tenn. 2002)(finding the depositions of seventy additional class members should be deferred until after the liability stage of a bifurcated trial); *EEOC v. Nebco Evans Distrib.*, No. 96-00644, 1997 WL 416423, at *3 (D. Neb. 1997)("[T]here is no need for the defendant to depose each of the individual applicants and prepare for the remedial phase before liability has been determined."). By limiting the scope of the first stage, it is unnecessary for Defendant to engage in extensive discovery by deposing each plaintiff until liability has been determined. *See Nebco Evans Distrib.*, 1997 WL 416423, at *2-*3. One of the primary purposes of trial bifurcation is to defer such costly and potentially unnecessary discovery and trail preparation. *See* Fed. R. Civ. P. 42(b); *see also Ellingson Timber Co. v. Great N. Ry. Co.*, 424 F.2d 497, 499 (9th Cir. 1970).

Nebco Evans involved an alleged pattern and practice of hiring discrimination involving roughly 150-200 claimants. At the liability stage, the court in *Nebco Evans* permitted the defendant to depose only fifteen individuals, in addition to those appearing as witnesses at the first stage for

the EEOC. *See Nebco Evans Distrib.*, 1997 WL 416423, at *3. The court determined that such a limitation did not prejudice the defendant at the first stage because the defendant could determine from the employment applications, in its possession, which individuals to depose to rebut an inference of discrimination. *See id.*

With respect to the written discovery, the Court has taken into account the District Court's statements concerning scope, the bifurcation and its effects, and the requests actually made by Defendant. The Court does believe that Wal-Mart already possesses much of what it seeks. After all, this is an intentional discrimination action. The basis for any hiring decision surely rests, primarily, with the hiring actor.[2] As such, much of the discovery seems duplicative or not warranted, as a practical matter. Further, Wal-Mart will, as described in part 2 hereof, have some access to class members ex parte, which would permit extensive development of information independent of the EEOC.

Upon review, therefore, the Court hereby orders the following with respect to further Stage 1 proceedings:

Written Discovery

As to Stage 1,

---

[2] The *Teamsters* Court recognized that "the employer was in the best position to show why an individual employee was denied an employment opportunity." Company records "were the most relevant item of proof" and the company "knew best what those [hiring factors] were." *Teamsters*, 97 S. Ct. at 1867 n.45.

A) Plaintiff shall provide the following information for *all* class members:

-full name;

-social security number;

-last address and telephone number known to the EEOC.

B) *If* Defendant identifies particular class member(s) that Defendant contends it did not hire because of falsity by the applicant or a discrepancy in qualifications surfacing during and at the time of the application process, then Plaintiff shall be required to provide individual information about the identified member related to Wal-Mart's stated basis for nonhiring. Further, if Defendant disputes whether a person named a class member actually applied to Wal-Mart, Plaintiff must provide written discovery calculated to develop the issue of applicant identity.

C) Finally, to the extent Plaintiff is (or at any time prior to trial becomes) aware that a class member(s) has knowledge or information directly relevant to Defendant's alleged gender animus concerning the subject matter of this action, Plaintiff must identify the class member(s) to Defendant and detail that knowledge. In other words, Plaintiff must specifically notify Defendant of any class member(s), known to Plaintiff, that possesses tangible evidence and/or has knowledge directly related to the allegation of intentional discrimination by Defendant that **is at issue in this case**.[3]

---

[3] This does not require the EEOC to contact every class member. Rather, the EEOC must identify class members with knowledge *if* the EEOC knows or becomes aware of such a class member during the litigation of this action.

Class member depositions

As to Stage 1,

D) Defendant shall be permitted to depose all class members identified by the EEOC as likely Stage 1 witnesses, and the EEOC shall identify such potential witnesses as promptly as practicable.

E) Defendant further may identify and depose an additional seventy-five (75) class members.[4] The Defendant will limit each such deposition, in this subpart E, to an examination of the witness's personal experience related to applying for employment with Wal-Mart at DC 6097 and any anecdotal or other knowledge the witness may have directly related to the allegation of intentional discrimination by Defendant that is at issue in this case.

F) Defendant also may depose, and access the tangible proof of, any class member identified by the EEOC, per this Order in Subpart C.

* * *

The Court denies the remainder of the motion to compel and, except as to the ex parte contact discussed further, correspondingly grants the remainder of the motion to limit discovery. Damage discovery properly applies only to Stage 2. Evidence of an individual claimant's background and education would matter only if something about those categories actually affected

[4] This is a figure the Court has struggled to designate. Though far less than the 10% of the entire class sought by Wal-Mart, the figure, when combined with depositions of EEOC witnesses and others identified as having direct knowledge gives Wal-Mart access to approximately 100 class members, by deposition. That range is nearly the total amount of class members the EEOC has contacted and seems a strong basis for Wal-Mart to survey the class for anecdotal or illustrative proof. That level of access to information certainly compares favorably with the Plaintiff's discovery opportunity, particularly given the Court's ruling on ex parte contact.

Wal-Mart's employment decision at the time of the decision. The Court preserves Wal-Mart's opportunity to identify those scenarios, per subpart B, and thus access additional, relevant information.

Wal-Mart's mastery of the hiring process and possession of the relevant application documents greatly undercuts the need for blanket written discovery. The requirement that the EEOC identify the full class, disclose any witnesses with direct knowledge, and provide further information where directly relevant to the hiring process protects Wal-Mart from surprise and permits it to prepare a defense. Further, the deposition range ensures that Wal-Mart will access all witnesses with direct knowledge and all EEOC trial witnesses, and further gives Wal-Mart a chance to survey a broad section of the class for further proof germane to Stage 1.

2. Scope of Contact Between Defendant and Class Members

Defendant contends that it is entitled to informally contact class members not officially represented by the EEOC. *See* Tr. at 10, 17-18. The EEOC suggests that any ex parte communication with potential class members by Wal-Mart would be unethical or raise privilege concerns. *See* DE#97, Pl. Response to Def. Motion to Compel at 24-25. The EEOC believes that a "quasi attorney-client privilege" exists between it and all potential class members, even if those class members are unaware of the EEOC and its lawsuit. *See id*.[5]

The issue of privilege, however, is not nearly as clear as the EEOC contends. *See E.E.O.C.*

---

[5] The parties do not clearly designate whether this is as an attorney-client privilege issue or an ex parte contact issue under Model Rule 4.2 (or its state counterpart, SCR 3.130 (4.2)). In Kentucky, a lawyer may not, without permission, communicate about a matter with a person the lawyer knows to be represented as to that matter. Kentucky law construes this provision narrowly. *See, e.g., Humco, Inc. v. Noble*, 31 S.W.3d 916, 920 (Ky. 2000)(defining contours of rule with respect to contact with former employees of represented company and limiting application, in context, to "prevent[ing] disruption of the attorney-client relationship").

v. Morgan Stanley & Co., 206 F.Supp.2d 559, 561-62 (S.D.N.Y. 2002). The privilege attachment and analysis may depend on the statutory basis for the action, the amount of contact between the EEOC and the class members, and/or the relationship of the class members to the defendant-employer.

Generally, courts require that class members consent to or *at least* contact the EEOC about representation before any privilege attaches in Title VII enforcement actions. *See E.E.O.C. v. TIC*, No. 01-1776, 2002 WL 31654977, at *4-*5 (E.D. La. 2002). As the court in *Nebco Evans* explains, the Title VII action, by itself, does not create a privilege relationship because persons meeting the class definition are not precluded by the EEOC lawsuit from bringing separate actions.[6] *See EEOC v. Nebco Evans Distrib.*, No. 96-00644, 1997 WL 416423, at *4 (D. Neb. 1997); *see also TIC*, 2002 WL 31654977, at *2-*3.

On the other hand, the court in *Morgan Stanley* recognized that all persons who meet the class definition of a Title VII action are represented by the EEOC "to some degree." *Morgan Stanley & Co.*, 206 F.Supp.2d at 561. In that case, however, the defendant attempted to engage in ex parte communications with its current employees before they consented to join the EEOC's lawsuit. Recognizing an "inherent" possibility of coercion by the defendant-employer, the court imposed certain restrictions on the defendant's freedom to discuss the case with its employees. *See*

---

[6] Compare this result to enforcement actions under the ADEA where the EEOC is held to represent class members from the time the ADEA suit is initiated. *See E.E.O.C. v. United States Steel Corp.*, 921 F.2d 489, 495 (3rd Cir. 1990). This is because, unlike Title VII, the right to bring a private action under the ADEA terminates upon the commencement of a lawsuit by the EEOC. *See E.E.O.C. v. TIC*, No. 01-1776, 2002 WL 31654977, at *2-*3 (E.D. La. 2002). Thus, "the conclusion that the EEOC is the individual's representative in ADEA suits ... seems inescapable." *United States Steel Corp.*, 921 F.2d at 495.

id. at 564.

Notably, the reasoning in *Morgan Stanley* does not extend attorney-client protection to a significant number of individuals in this case who were not hired, and thus are not employed, by Wal-Mart. *See TIC*, 2002 WL 31654977, at *5-*6. For the same reason, the court in *TIC* permitted the defendant-employer, in a pattern and practice hiring discrimination case, to engage in ex parte communications with potential and unidentified claimant-applicants because they were not in contact with the EEOC and were not employed by the defendant. *See id*. at *6. Moreover, as a fairness measure, the court in *TIC* addressed the "unusual and difficult circumstances ... [that the potential and unidentified] class members have not had the opportunity to request representation by the EEOC because they are unaware" of the lawsuit, as raised by Plaintiff in its response. *See* DE#97, Pl. Response to Def. Motion to Compel at 25. In this respect, the court required the defendant-employer to inform potential class members of the pending lawsuit, their right to join the action, and to contact the EEOC for further information.[7] *See TIC*, 2002 WL 31654977, at *6.

[7] Although *TIC* is unreported, it is persuasive to this Court on the issue of privilege due to the factual similarities between the two cases. TIC involved an alleged pattern and practice of hiring discrimination. *See TIC*, 2002 WL 31654977, at *1. Thus, the potential claimants were not employed by the defendant. *See id*. at *6. In addition, many of the potential claimants remained unidentified, and as a result, were unaware of the lawsuit. *See id*. at *1. The defendant-employer desired to engage in ex parte communications with potential claimants. *See id*. The EEOC replied by invoking privilege on behalf of all potential and unidentified claimants. *See id*. Other than the five individuals who filed charges with the EEOC, the court found no authority to stop the defendant from contacting and discussing the case with the remaining claimants, until those claimants consented to the EEOC's representation. *See id*. at *5-*6. Since potential claimants may have been unaware of the lawsuit and their right to join, however, the court required the defendant to apprise potential claimants of that information. *See id*. at *6.

In sum, this case involves a Title VII enforcement action. It appears that the vast majority of potential class members have neither consented to EEOC representation or had contact with the EEOC. Indeed, the EEOC admits that most class members are unaware of the case. *See* July 24, 2006 Scheduling Conference at 13 (stating the EEOC has spoken with 113 of the estimated 4,500 class members). Under these circumstances, this Court concludes that there is no current attorney-client relationship precluding Wal-Mart from contacting other potential class members. The EEOC shall promptly identify, and regularly **continue** to identify, those class members that have consented to the EEOC's representation. Defendant shall not ex parte contact any class member so identified by Plaintiff.

In order to protect the potential class member's rights, Defendant shall, for any such contact:

1. Clearly identify the reason for contact and the identity, role, and defense-relationship of the person making such contact;
2. Inform any person contacted that the EEOC has initiated suit, summarize the nature of the claims involved, identify each claimant's right to join the action, and instruct such persons to contact the EEOC for additional information; and
3. Furthermore, Defendant may only discuss facts relevant to the particular witness or the class allegations, and Defendant may not attempt to influence a decision to contact the EEOC, join this action, or bring a separate suit.

See TIC, 2002 WL 31654977, at *7.

IT IS SO ORDERED. The docketing clerk may term Docket Entries 86, 95, and 98.

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 9th day of January, 2007.

Signed By:
Robert E. Wier
United States Magistrate Judge