UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

CIVIL NO. 01-339-KKC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION — PLAINTIFF

VS: COMPREHENSIVE DISCOVERY ORDER AND STATUS REPORT

WAL-MART STORES, INC. — DEFENDANT

* * * * * *

The Court issues this order as both a Comprehensive Discovery Order and as a Status Report to the District Judge. The Order identifies all pending matters, resolves the discovery/procedural matters referred to the undersigned, and references the prospective procedural steps in the case. The Court anticipates that the parties will be filing proposed schedules for disposition of the case by August 27, 2007. *See* DE# 161 (minute order directing filing of proposed schedules). Those proposals should dovetail with this Order to provide an avenue for issuance of a final schedule for resolution of Stage I of this case.

The Court has carefully considered the parties' detailed briefing as to all issues, and the plenary status conference held on August 3, 2007 in London greatly assisted in clarifying and defining the matters pending.

Pending Motions/Matters

The following list identifies all currently pending items in this action. Listed matters 1 and 2 are for resolution by the District Judge.[1] The remainder of the list involves discovery and procedural matters, which the Court will address in the balance of this Order.

1. *Phase assignment for punitive damages*.

The parties have fully briefed and argued this issue, including recent supplemental filings. *See* DE## 64 (bifurcation motion); 65 (brief in support); 71 (Wal-Mart response); 72 (EEOC reply); 89 (transcript concerning phase-assignment argument); 95 (EEOC supplemental brief); 96 (Wal-Mart supplemental citations); 102 (Wal-Mart response to #95); 135 (Wal-Mart supplemental authority); and 137 (EEOC response to #135). The proper assignment of punitive damages in this bifurcated action is ripe for decision.

2. *Appeal of the January 18, 2007 discovery order*.

The undersigned issued a discovery order on January 18, 2007. *See* DE# 129. The EEOC filed objections to that order, and the matter stands briefed and submitted to the District Judge. *See* DE## 131 (EEOC objections); 132 (Wal-Mart responses).

3. *Wal-Mart's motion to strike Dr. Bielby as an EEOC expert*.

The briefing on this issue appears as follows. *See* DE## 133 & 134 (Wal-Mart motion to strike/brief); 136 (EEOC response); 138 (Wal-Mart reply).

---

[1] Issue 1 is not subject to a referral order, and it involves a critical issue concerning the structure of the Stage I trial. Issue 2, as an appeal of a prior discovery order, plainly is for Judge Caldwell's evaluation.

4. *The EEOC's motion to compel answers to 5th set of interrogatories.*

The briefing on this issue appears as follows. *See* DE## 139 (EEOC motion to compel/brief); 140 (Wal-Mart's response); 144 (EEOC reply).

5. *Wal-Mart's motion to extend expert deadlines*.

The briefing on this issue appears as follows. *See* DE## 141 (Wal-Mart motion/brief); 145 (EEOC response); 151 (Wal-Mart reply).

6. *Wal-Mart's motion to amend and enforce January 9, 2007 discovery order*.

The briefing on this issue appears as follows. *See* DE## 142 & 143 (Wal-Mart's motion/brief); 146 (EEOC response); 150 (Wal-Mart reply).

Resolution of Enumerated Discovery and Procedural Motions

Again referencing the enumeration provided above, the Court addresses the pending discovery and procedural motions.

3. *Wal-Mart's motion to strike Dr. Bielby as an EEOC expert &*
5. *Wal-Mart's motion to extend expert deadlines.*

The Court considers together Wal-Mart's motion to strike Dr. Bielby and Wal-Mart's motion to extend expert deadlines, because both motions implicate Wal-Mart's preparation and presentation of expert evidence in this case. Further, permitting or striking Bielby plainly impacts the time Wal-Mart reasonably requires to complete its expert proof.

The Court does find that the EEOC failed to timely identify Dr. Bielby. The expert-disclosure deadline called for disclosure of reports by the EEOC in July of 2005, and the EEOC did not identify Dr. Bielby or disclose his report until March 1, 2007. The EEOC's efforts to construe prior orders as making the disclosure timely are not convincing. The delay permitted by the Court, as to the EEOC disclosure, related *only* to delay in the report concerning Part II of the application

periods at issue. *See* DE# 62 (initially bifurcating report into 1998-2001 period and 2002-2005 period); *see, e.g.*, DE# 115 (extending bifurcated date). The EEOC did not request, and the Court did not authorize, delayed identification of its expert or delayed disclosure of a global expert report. Further, the EEOC consistently referenced its expert in the singular, plainly indicating that it had one expert, already identified, and that the EEOC simply needed more time to complete Part II of the disclosure. *See* DE# 109 at ¶6 (referencing "his [the expert's] database").

The EEOC, while not formally requesting leave to make the Bielby disclosure late, does marshal arguments related to Wal-Mart's lack of prejudice. The EEOC also notes that the case does not yet have a discovery deadline or trial schedule, making it inequitable to hold the EEOC to a firm deadline that passed two years prior.

The Court agrees that the scope of the case, the lack of a fixed discovery and trial schedule, and the mutability of deadlines to date support allowance of Bielby's report. This is so primarily because the Court can reasonably avoid any prejudice to Wal-Mart without imposing the harsh sanction of excluding the EEOC's proffered expert. Although Wal-Mart generally complained that inclusion of Bielby would dramatically alter the case, counsel had difficulty articulating how prior discovery would have changed if Bielby, or his report, had been identified and disclosed in 2005 instead of in 2007. Further, and significantly, Wal-Mart has confronted and continues to deal with Dr. Bielby as an adversarial expert in comparable litigation pending in the Ninth Circuit. As such, Wal-Mart would have efficiencies in processing and rebutting Bielby's opinions that might not otherwise exist.

The Court is reluctant to excuse the EEOC's tardy disclosure, but the rules plainly require an evaluation of prejudice relative to a party's failure to disclose evidence in a timely fashion. *See*

Fed. R. Civ. P. 37(c)(requiring evaluation of harm, absent substantial justification for failure). Because of the current indeterminacy of the discovery and trial schedule, and the particular scenario involving Bielby, the Court simply cannot say that permitting the EEOC to utilize Bielby will harm Wal-Mart or affect the prospective disposition of the case.

Much of the harm analysis hinges on resolution of Wal-Mart's expert deadline request. As stated at the August 3, 2007 status conference, the EEOC is the recipient of not-insubstantial grace, as to Bielby, so its protests about additional time for Wal-Mart should be muted. The Court has considered Wal-Mart's request, in the context of its ruling regarding Dr. Bielby, and also has considered the extensive period the EEOC has enjoyed to finalize its disclosures and reports.

After discussion at the status conference, and based on the record, the Court orders the following concerning Wal-Mart's expert disclosures:

a) Wal-Mart shall identify its expert(s) responsive to Dr. Barnow's opinions by no later than November 5, 2007, and shall provide the full Rule 26(a)(2) report for such identified expert(s) by no later than January 7, 2008.

b) Wal-Mart shall identify its expert(s) responsive to Dr. Bielby's opinions by no later than January 7, 2008, and shall provide the full Rule 26(a)(2) report for such identified expert(s) by no later than March 4, 2008.

c) If Wal-Mart intends to use any expert(s) **not** within the categories a)-b) just listed, it shall identify them and provide the full Rule 26(a)(2) expert reports as to each by no later than November 5, 2007.

Wal-Mart shall make any expert reasonably available for deposition in the 60 (sixty) days following disclosure of such expert's report. Further, the EEOC shall make any supplemental Rule 26(a)(2)

report(s) that are in the nature of rebuttal within 75 (seventy-five) days of the date that Wal-Mart discloses the report prompting and subject to such rebuttal.

According to this schedule, all expert proof in the matter, as to Stage I of the case, should be fully concluded by mid-2008.

4. *The EEOC's motion to compel answers to 5th set of interrogatories.*

The EEOC seeks to compel disclosure, by interrogatory answer, of certain information related to witnesses. The Court has evaluated the full briefing, reviewed the EEOC's tendered "fifth set," and had the benefit of helpful argument at the August 3 status conference.

Plainly, the identification of *persons with knowledge* is a matter discoverable under the rules. *See* Fed. R. Civ. P. 26(b)(1)(listing as properly discoverable "the identity and location of persons having knowledge of any discoverable matter"). The scope of discovery extends to any non-privileged matter "relevant to the claim or defense of any party." *See id.* Direct knowledge impacting discriminatory animus, both pro and con, surely fits within that broad category in a Title VII gender case.

Rule 26(a) itself requires automatic–and periodic supplemental–disclosure and identification of "each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses . . . identifying the subjects of the information." Wal-Mart's protestations to the contrary, the attorney-client privilege or work-product doctrine does not traditionally block discovery of witness identification. *See, e.g., Mazur v. Lampert*, 2007 WL 917271, at *3 (S.D. Fla. March 25, 2007)("[U]nder the plain language of the operative Rule in this matter, a claim of work product protection in response to an interrogatory asking for the identity of specific witnesses . . . must fail.")(citing *Hickman v. Taylor*, 67 S. Ct. 385 (1947)); *see also* 8

Federal Practice & Procedure § 2013 (2007)(noting that "courts have repeatedly allowed discovery of the names and locations of persons with knowledge of the facts" and that work product objections "ordinarily provide no ground for refusing discovery").

The EEOC legitimately has asked Wal-Mart to identify unrepresented class members with direct information related to gender animus. The EEOC also has sought identification of "potential" trial witnesses and the provision of "updated" contact information for unrepresented class members.

Considering Interrogatories No. 3 & 4, the Court grants the EEOC's motion in part and on the specific terms outlined in this order. Wal-Mart shall respond to the interrogatories by providing, to the extent the information is available and known to Wal-Mart, the name and current contact information for any unrepresented class member that has knowledge or information **directly** relevant to Wal-Mart's alleged gender animus concerning the subject matter of this action. By this designation, the Court intends to encompass *only* those witnesses with personal or anecdotal knowledge that directly tends to prove or directly tends to disprove a gender animus by Wal-Mart during the period at issue in this case. Thus, witnesses that heard or heard about gender-specific comments, statements, or attitudes would be included, but witnesses with only inferentially relevant knowledge (*e.g.*, a witness with an ostensibly gender-neutral interview experience that might, through personal characteristics or history, fit a pro-defense or pro-plaintiff model of this case) would not be included. The former category–Has this person heard, personally or anecdotally, a gender-specific remark or seen a gender-specific attitude expressed?–reveals only factual knowledge, a subject of proper discovery. The latter category, which essentially would require counsel to reveal, on a witness-by-witness basis, whether a witness "helps" or "hurts" the case, would invade work product and not be a subject of proper discovery.

To be clear, the Court is not ordering and likely would not permit discovery of **true** work product, including the content of witness interviews or information beyond the generic and categorical identification ordered hereunder. Both parties should have access to the names of people that have direct knowledge, and that can be accomplished, as the rules envision, without invading work product or the mental impressions of counsel.

The Court does deny the motion as to Interrogatory No. 1. That interrogatory seeks updated contact information, in Wal-Mart's possession, of any unrepresented class member. This essentially would require Wal-Mart to divulge the scope and manner by which it has sampled, or sought to sample, the unrepresented class members. Providing the information in total would reveal counsel's mental impressions relative to the preparatory step of designing and managing class contact. *See E.E.O.C. v. Collegeville/Imagineering Ent.*, 2007 WL 1089712, at *1 (D. Az. April 10, 2007)("[D]iscovery designed to find witnesses with knowledge does not run afoul of the work product protection while discovery designed to trace the steps of opposing counsel does."). Remember, the EEOC still gets the contact information for any persons identified under the terms of this Order, but the Court is not willing to force Wal-Mart to answer Interrogatory No. 1. This is particularly true since both parties pursued the information through the same equally-available public avenues, based on representations of counsel at the status conference and in the briefing.

Finally, as to Interrogatory No. 2, the Court will not specifically require a Rule 26(a)(3) disclosure from Wal-Mart at this stage. That disclosure would require identification of witnesses Wal-Mart "may present at trial." Still, Wal-Mart and the EEOC remain subject to Rule 26(a)(1), which requires identification of individuals "likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment." The

structure of the rules makes it unlikely that a witness appearing on a Rule 26(a)(3) disclosure would not also properly have appeared on an earlier Rule 26(a)(1) listing. The Court would scrutinize closely, for surprise and prejudice to the EEOC, any initial appearances on Wal-Mart's ultimate Rule 26(a)(3) list.

6. *Wal-Mart's motion to amend and enforce January 9, 2007 discovery order*.

Wal-Mart seeks to expand the number of class member depositions that it may conduct in this case. The briefing and argument as to this issue demonstrates that an unexpected spike in the number of represented class members has diminished Wal-Mart's access to informal proof in the case. As such, and as a matter of fairness, the Court will modify, to some extent, the number of class member depositions permitted.

The class size now numbers about 4,000 members. When the Court issued its January 8, 2007 discovery order, the EEOC represented only about 113 class members. Although the EEOC initially tried to block Wal-Mart from contacting **any** class members ex parte, the Court permitted Wal-Mart to contact, in a fair manner, unrepresented class members. That opportunity was an important avenue for defense preparation and an alternative to the number of depos Wal-Mart originally sought. The Court did bar Wal-Mart from contacting represented class members. *See* DE# 126, at 13 (requiring identification of represented members and barring ex parte contact of represented members, but permitting ex parte contact, with safeguards, of unrepresented class members).

Now, the EEOC purports to represent over **1300** class members. The effect is to deny Wal-Mart informal access to these women, leaving Wal-Mart with no way, except via the limited depositions previously permitted, to sample a large segment of the class. Wal-Mart still can contact

the 2700 unrepresented members, but Wal-Mart now cannot informally seek discovery from over 30% of the class.

The Court will, based on this change in status, increase the deposition number in ¶ E of the January 9, 2007 from 75 (seventy-five) to 120 (one hundred twenty). When combined with the other permitted depositions–as specified in that January 9 order, which this Order otherwise does not affect–Wal-Mart will have access to over 10% of the represented class, if it chooses to spend its depositions entirely on that group. Wal-Mart can continue to contact informally the unrepresented class members. Thus, this provides Wal-Mart the functional equivalent of the entire access it originally sought when the EEOC balked at any ex parte contact and Wal-Mart sought permission to depose 10% of the class. All such depositions are subject to the scope limit provided in ¶ E. Further, the Court formally limits the length of any such deposition, under that paragraph, to 60 minutes of questions and answers, exclusive of objections or colloquy between counsel.[2]

As to the scope of the identification duty under ¶ C of the January 9 Order, the Court intends for that scope to be *coexistensive* with that defined in this Order addressing the EEOC's motion to compel, relative to persons with "knowledge or information directly relevant to Defendant's alleged gender animus concerning the subject matter of this action." This makes the duties and obligations as to identification of witnesses with knowledge equivalent and properly reciprocal.

---

[2] The EEOC argues that Stage I should not devolve into a collection of mini-trials, and the Court certainly agrees. As stated in the January 9 Order, however, Wal-Mart is to have a fair chance to learn about and gather anecdotal or individual proof, in an effort to respond to the EEOC's Stage I case. The Court continues attempting to preserve the efficiencies of bifurcation while meeting the requirement of mutual fairness.

The Court does note that the EEOC's potential number of individuals called at Stage I now apparently has grown to 31, double the prediction from last July. This suggests that individual proof will be an important component of both presentations at Stage I.

The Court issues this Order resolving non-dispositive pretrial matters under 28 U.S.C. § 636(b)(1)(A). Any party objecting to this Order should consult said statute and Rule 72(a) concerning its right of reconsideration before the District Court.

This the 14th day of August, 2007.

Signed By:
Robert E. Wier
United States Magistrate Judge