United States District Court,
S.D. Indiana,
Indianapolis Division.

Greg ALLEN, et. al., Plaintiffs,
v.
INTERNATIONAL TRUCK AND ENGINE CORPORATION f/k/a Navistar International Corporation, Defendant.

No. 1:02-cv-0902-RLY-TAB.
March 21, 2003.

Thomas A. Brodnik, Stark Doninger & Smith, Indianapolis, IN, Carol A. Jones, Robinson Curley & Clayton Pc, Chicago, IL, Lee D. Winston, Gordon Silberman Wiggins & Childs Pc, Birmingham, AL, for Plaintiffs.

David J Parsons, Littler Mendelson Pc, Chicago, IL, for Defendant.

ENTRY ON THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S MOTION TO QUASH DEFENDANT'S SUBPOENA AND FOR A PROTECTIVE ORDER

TIM A. BAKER, Magistrate District Judge.

I. Introduction

*1 Plaintiffs seek class certification in this Title VII and Section 1981 race discrimination case. In doing so, Plaintiffs rely in part on statistical data contained in an Investigative Memorandum compiled by the Equal Employment Opportunity Commission ("EEOC") in the course of its investigation. Defendant International Truck and Engine Corporation served a subpoena seeking the testimony of individuals from the EEOC responsible for drafting the Investigative Memorandum. The EEOC moves to quash the subpoena.

The EEOC, Plaintiffs, and Defendant all submitted briefs in support of their respective positions. The Court held a telephonic status conference on March 18 and heard supplemental arguments on the parties' respective positions. For the reasons set forth below, the EEOC's motion to quash subpoena and for a protective order is GRANTED.

II. Background

Plaintiffs are twenty-two current African-American employees, four former African-American employees, and one African-American applicant of Defendant. They bring this class action complaint on behalf of themselves and other similarly situated African American employees of Defendant for alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, and 42 U.S .C. § 1981 for discrimination based on race. [Second Am. Compl.]. On February 28, 2003, Plaintiff filed a motion for class certification. In doing so, Defendant alleges that Plaintiffs "rely upon a statistical analysis contained within an Investigative Memorandum prepared by the Equal Employment Opportunity Commission" produced to the parties through a Freedom of Information Act request. [Def.'s Resp. to EEOC's Mot. to Quash, p. 1].

On March 7, 2003, Defendant served on the non-party EEOC's District Director, Danny Harter, a subpoena duces tecum dated March 6. The subpoena requested that the EEOC designate and produce for deposition individuals with knowledge about the identity of persons who performed the statistical analysis contained in the EEOC's Investigative Memorandum, the data on which the analysis was based, the manner in which the data was collected, and the method of analysis. [*Id.* at p. 2; Def.'s Ex. 1]. The statistical information reflects overtime and hiring based on race at Defendant's Indianapolis facility. [Def.'s Ex. 1]. In response, on March 11, the EEOC filed a motion to quash the subpoena and moved for a protective order under Rules 26 and 45. The EEOC claims that the subpoena is over broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.[FN1] Defendant opposes this motion, stating that since Plaintiffs rely on the findings of the Investigative Memorandum in their motion for class certification, they are entitled to depose individuals responsible for compiling the information contained within it. [FN2]

FN1. Plaintiffs also object to the service of the subpoena on the independent grounds that, while they agreed to a thirty-day extension of time for Defendant to file an opposition to their motion for class certification, they did not agree to this extension in order for Defendant to gather additional discovery on class action issues. [Pl.'s Obj. ¶ 4]. Plaintiffs also contend that further class discovery is barred since it should have been completed by January 31, 2003 pursuant to the Court's order. [*Id.* at ¶ 7]. However, the Court need not reach these issues because the Court has granted the EEOC's motion to quash on other grounds.

FN2. In the March 18, 2003 status conference, the parties narrowed the issues to be decided by the Court in the instant motion. For example, the EEOC has abandoned its attorney-client privilege and deliberative process claims as they relate to the subpoena. In addition, there was an issue raised regarding an internal memorandum from EEOC counsel Bird to District Director Harter. The parties agree that neither this document nor any other is an issue in the instant motion. Rather, the focus here has been narrowed to the requested deposition testimony of EEOC personnel regarding the Investigative Memorandum.

III. Discussion

District courts have broad discretion in discovery matters. *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 646 (7th Cir.2001). "Although there is a strong public policy in favor of disclosure of relevant materials, Rule 26(b)(2) of the Federal Rules of Civil Procedure empowers district courts to limit the scope of discovery if 'the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.' " *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir.2002), *quoting* Rule 26(b)(2).

*2 In this case, the EEOC contends that the scope of the subpoena exceeds the scope of Rule 26(b) in that the information sought is not reasonably calculated to lead to the discovery of admissible evidence and is overly broad and unduly burdensome. [EEOC's Br., pp. 2-5]. Defendant states that Plaintiffs rely heavily on the findings of the Investigative Memorandum to support their class action allegations, and as a result, it contends it is entitled to depose agents of the EEOC who compiled this document based on factual matters. [Def.'s Resp. to EEOC's Mot. to Quash, p. 2].

The case of *Leyh v. Modicon, Inc.*, 881 F.Supp. 420 (S.D.Ind.1995) is dispositive of this issue. There, a plaintiff in a Title VII case served a subpoena duces tecum on the EEOC seeking the deposition testimony of the EEOC investigator who handled her case as well as documents from the investigation. *Id.* at 421. The EEOC moved to quash the subpoena, claiming that it exceeded the scope of Rule 26. In granting the EEOC's motion, Judge Hamilton observed:

... the court concludes that the discovery plaintiff seeks from [the EEOC's investigator] should not be permitted. In making this determination, the court has considered the factors in Rule 26 most pertinent here: whether the information sought is reasonably calculated to lead to the discovery of admissible evidence; whether the information is obtainable from another source that is more convenient or less burdensome; and whether the benefits of the proposed discovery outweigh its burdens, taking into account the needs of the case and the relative importance of the proposed discovery in resolving the issues.

*** * ***

Despite the generally permissive approach to discovery in the federal courts, the court does not believe that parties to an employment discrimination case should be able to depose EEOC investigators as a matter of course. Such depositions should not become a routine method to find a short-cut to evidence or to being given pre-packaged cases. It is beyond the scope of this case to catalog the exceptional circumstances that might warrant such discovery, but there are no such exceptional circumstances here. While such depositions might save private litigants some time and money, there is a larger public interest here. The EEOC has plenty of work to do investigating new complaints, and its principal responsibility is to serve the public as a whole, not to work for the benefit of particular litigants ... Accordingly, the court finds under Rule 26(b)(2) that plaintiff should not be permitted to depose [the EEOC investigator] on the facts that he turned up in his investigation of plaintiff's claims....

Id. at 424-25.

Similarly, in the case at bar, Defendant fails to demonstrate "exceptional circumstances" to justify deposing any EEOC personnel. Much of the information Defendant seeks through its subpoena is readily obtainable from a source other than the EEOC. In fact, a substantial amount of the statistical data contained in the Investigative Memorandum came from the Defendant itself through its company records produced to the EEOC in its investigation of Plaintiffs' charges. [*See* Def.'s Ex. 1]. The method used to analyze the data in the Investigative Memorandum is self explanatory and no mystery to Defendant since the statistics were generated based on the information Defendant provided to the EEOC. In any event, Defendant is free to retain its own expert witness to analyze statistical data to refute Plaintiffs' class action allegations. [FN3]

FN3. As Plaintiffs correctly noted at the Court's March 18 status conference, Defendant has had the Investigative Memorandum in its possession for more than one year.

*3 As the Court warned in *Leyh*, permitting routine depositions of EEOC investigators could materially alter the role of EEOC investigators. *See* *Leyh*, 881 F.Supp. at 424 ("the EEOC has obvious and well-founded concerns about having its investigators spend their time testifying about old investigations instead of conducting current ones"). Otherwise, the EEOC would become a tool of private litigators in obtaining discovery rather than fulfilling its primary purpose-investigating alleged discrimination in employment. *Id.* at 422, *quoting in part* *Exxon Shipping Co. v. U.S. Dept. of Interior*, 34 F.3d 774, 779 (9th Cir.1994) ("allowing private litigants unbridled discretion to call agency employees as witnesses could turn the federal government into a speakers' bureau for private litigants or into tax-supported pools of experts."). Therefore, the Court finds that in this instance, Defendant has not demonstrated exceptional circumstances to justify deposing the EEOC representative, and thus it would be unduly burdensome to permit the deposition to proceed.

Moreover, the testimony sought is not reasonably calculated to lead to the discovery of admissible evidence. "Testimony from [an EEOC employee] about the results of his investigation would not, as a general rule, be admissible in a trial of the underlying facts" since "that [person] is not a fact witness on plaintiff's claims." *Id.* at 424-25. In addition, as noted above, the value of deposing an EEOC employee regarding the statistical data in the Investigative Memorandum is low, considering the statistical data came from Defendant.

On a related note, the Court questions Plaintiffs' ability to rely on the Investigative Memorandum to demonstrate that class certification is appropriate. *See, e.g.,* *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 933 (7th Cir.2001) ("Litigants often try to introduce agency dispositions in suits under Title VII, but courts have concluded that neither a finding by the EEOC that discrimination occurred, nor a finding of no discrimination, has legal consequences or would promote accurate decisionmaking by juries."). As a result, the Court further finds that the testimony of an EEOC employee concerning the Investigative Memorandum would not be reasonably calculated to lead to the discovery of admissible evidence.

IV. Conclusion

Accordingly, the EEOC's motion to quash subpoena and for a protective order is GRANTED. The March 6, 2003 subpoena is quashed, and the Court issues a protective order prohibiting Defendant from taking the deposition sought by way of this subpoena.

So ordered.

S.D.Ind.,2003.
Allen v. International Truck and Engine Corp.
Not Reported in F.Supp.2d, 2003 WL 1522942 (S.D.Ind.), 91 Fair Empl.Prac.Cas. (BNA) 709