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District Court for the Northern Mariana Islands.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff
v.
PACIFIC MICRONESIA CORPORATION, Asia Pacific Hotel, Inc., and Tan Holdings Corporation, all doing business as DAI-ICHI Hotel Saipan Beach, Defendants

No. Civ.A. 02-0015. | Oct. 10, 2003.

Attorneys and Law Firms

Gregory Baka, Assistant United States Attorney, United States Attorneys Office, Saipan, for Plaintiff.

Matthew Gregory, Steven P. Pixley, Saipan, for Defendants.

Opinion

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE JURY DEMAND and PLAINTIFF'S MOTION TO QUASH THE DEPOSITION SUBPOENA SERVED ON SUSAN McDUFFIE

MUNSON, J.

***1** THIS MATTER came before the court on Thursday, October 9, 2003, for hearing of plaintiff's motions to strike the jury demand and quash the deposition subpoena served on Ms. Susan McDuffie. Plaintiff appeared by and through its attorney, David F. Offen-Brown (by telephone); defendants Asia Pacific Corporation, Inc. and Tan Holdings Corporation appeared by and through their attorney, Colin M. Thompson; defendant Pacific Micronesia Corporation made no appearance.

THE COURT, having considered the written submissions and oral arguments of the parties, rules as follows:

Plaintiff's motion to strike the jury demand is granted. Prior to the 1991 amendments to 42 U.S.C. § 2000e *et seq.* ("Title VII"), juries were not available to the parties because the only relief provided by the statute was in equity. The 1991 amendments to Title VII provided a jury, but only if and when compensatory or punitive damages (*i.e.* "legal" damages) are sought: "In an action brought by a complaining party ... against a respondent who engaged in unlawful discrimination ..., the complaining party may recover compensatory and punitive damages ... in addition to any relief authorized by [42 U.S.C. § 2000e-5(g)]." Section 1981a(c) states explicitly that "if a complaining party seeks compensatory or punitive damages under this section-(1) any party may demand a trial by jury[.]" Section 2000e-5(g) provides that "if the court finds that the respondent has intentionally engaged in ... an unlawful employment practice ... the court may enjoin the respondent ... and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with our without back pay ... *or any* other *equitable relief* as the court may deem appropriate." (Emphasis added.) Accordingly, if plaintiff does not seek compensatory or punitive damages, the equitable remedies provided by Section 2000e-5(g) do not entitle any party to a jury trial. Because plaintiff has expressly disavowed any intention to seek compensatory or punitive damages, a jury is not allowed to either party.

Defendants Asia Pacific Hotel and Tan Holdings seek to depose Susan McDuffie, a now-retired EEOC District Director, in regards to their defense of laches on the ground that, in its answer to Interrogatory No. 7, the EEOC identified her as a witness who can support the contention that "all conditions precedent to the institution of this lawsuit has been fulfilled."

Plaintiff moves to quash the subpoena on three grounds: that Ms. McDuffie's testimony is protected by the "governmental deliberative process" privilege, that her knowledge of the proceedings is limited, and that to require a (now retired) District Director to testify places an undue burden on the EEOC. Plaintiff has offered to provide one of the investigators for deposition, but defendants have so far declined that alternative.

Fed.R.Civ.P. 45(c)(3)(A)(iii) provides that a court may quash or modify a subpoena if it finds that the subpoena "requires disclosure of privileged or other protected matter and no exception or waiver applies[.]" The U.S. Supreme Court has held that a federal agency's deliberative and decision-making process is privileged up to the point of the final determination. *N.L.R.B. v. Sears, Roebuck & Co.,* 421 U.S. 132, 150-154, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975). In a Freedom of Information Act lawsuit, the Ninth Circuit has recognized that the "governmental deliberative process" privilege helps encourages "frank and open discussions of ideas," thus improving the decision-making process. *National Wildlife Federation v. U.S.. Forest Service,* 861 F.2d 1114, 1117 (9th Cir.1988).

***2** The court finds that the information sought from Ms. McDuffie goes to the very heart of matters that the "governmental deliberative process" privilege was

designed to protect. If defendants seek information relevant to their defense of laches, deposing an investigator will perhaps significantly aid them in discovering the date from which they argue laches should run. From the information presently before the court, it does not seem unreasonable that seven months elapsed between the time the Regional Administrator received the investigator's final report and recommendations and the institution of this lawsuit. However, the court makes no ruling on that issue at this time.

FOR THE FOREGOING REASONS, plaintiff's motion to strike the jury demand is granted and plaintiff's motion to quash to subpoena of Susan McDuffie is granted.

IT IS SO ORDERED.