2004 WL 1307915
Only the Westlaw citation is currently available.
United States District Court,
D. Oregon.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
and
Wendy BAKER, Christine Thompson, Laurie Dametz, and Donna Emerson, Intervenors,
v.
UNITED STATES BAKERY, Defendant.

No. Civ. 03–64–HA. | Feb. 4, 2004.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER

HAGGERTY, Chief J.

***1** The Equal Employment Opportunity Commission (EEOC) filed this action on January 16, 2003, alleging unlawful employment practices by defendant United States Bakery (USB) in violation of 42 U.S.C. §§ 2000e–2(a) and 3(a) (Title VII). The EEOC asserts that employees of the defendant sexually harassed Wendy Baker, Donna Emerson, Laurie DaMetz, and Christine Thompson. On June 18, 2003, these four individuals filed a Motion to Intervene in the federal claims, which this court granted on July 15, 2003. On December 3, 2003, the EEOC filed a Motion to Compel Entry Upon Land for Inspection. On December 23, 2003, plaintiff intervenors also filed a Motion to Compel Entry Upon Land for Inspection. For the following reasons, plaintiffs' motions are denied.

BACKGROUND

Plaintiffs allege that one or more of defendant's employees sexually harassed plaintiff intervenors Dametz, Baker, Emerson, and Thompson via verbal comments and gestures of a sexual nature. The alleged harassment occurred at the workplace.

In August 2003, EEOC attorneys notified defendant that they were interested in inspecting defendant's premises. Defendant responded that the EEOC should submit a formal request under Fed.R.Civ.P. 34. The parties dispute whether defendant advised the EEOC that it would only allow the EEOC attorneys to attend the inspection.

On October 6, 2003, the EEOC and plaintiff intervenors sent a formal inspection request to defendant. Plaintiffs' request stated that the EEOC, plaintiff intervenors and their attorney, an expert, and a videographer would conduct an inspection of defendant's premises. Plaintiffs intended to videotape defendant's bakery production and shipping areas, the human resources department, break and lunch rooms, and other areas where plaintiff intervenors worked. Defendant contends that the EEOC knew from earlier conversations that defendant would refuse its request.

On November 5, 2003, defendant served its objections to plaintiffs' request, arguing that it was "overbroad, vague, oppressive, unduly burdensome, and not relevant nor reasonably calculated to lead to admissible evidence." Def.'s Objections to Pls.' Req. to Permit Entry Upon Land for Inspection, at 1. Defendant asserts that plaintiffs' request seeks discovery that is unreasonably cumulative, available from other sources, and is an attempt to discovery legally protected trade secrets and other confidential information. *Id.* at 2. On November 21, 2003, defendant reiterated its objections to permitting plaintiff intervenors, an expert, and a videographer to accompany the EEOC on the inspection.

The EEOC argues that the plaintiffs' expert and attorneys need an understanding of the layout and operations of the facilities and where the incidents of alleged harassment and discrimination took place. The EEOC claims that the plaintiff intervenors are the only witnesses with such knowledge. The EEOC further claims that a videographer is necessary for visual documentation, that will later assist the jury. Defendant informed the EEOC in its objections that it would not permit an unlimited inspection of its premises and that defendant prohibits photographs from being taken on the premises to protect its trade secrets.

STANDARDS

***2** Fed.R.Civ.P. 26(b) is interpreted to allow liberal discovery of all information reasonably calculated to lead

to the discovery of admissible evidence, although the discoverable information itself need not be admissible at trial. *Shoen v. Shoen,* 5 F.3d 1289, 1292 (9th Cir.1993). Courts are generous in providing broad discovery parameters and refusing to allow "procedural technicalities [to] impede the full vindication of guaranteed rights ." *Trevino v. Celanese Corp.,* 701 F.2d 397, 405 (5th Cir.1983).

A party is permitted to enter upon designated land or property that is in the possession or control of another party "for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)." Fed.R.Civ.P. 34. The scope of this entry is limited to discoverable material. Discoverable material includes "any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." Fed.R.Civ.P. 26(b)(1). The court may further limit any discovery that "is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive...." Fed.R.Civ.P. 26(b)(2).

Because entry upon a party's premises may engender greater burdens and risks than mere production of documents or deposing witnesses, at least one Circuit has recognized the need for a more searching inquiry into the necessity for inspection. *See Belcher v. Bassett Furniture Indus. Inc.,* 588 F.2d 904, 908 (4th Cir.1978). In this respect, the degree to which the proposed inspection will assist the moving party and the search for truth must be weighed against the concordant hardships and hazards created by the inspection. *Id.; see also Hickman v. Taylor,* 329 U.S. 495, 497 (1947).

If during discovery a party refuses to permit requested discovery that is *relevant* and not otherwise subject to privilege, the requesting party may seek an order compelling discovery. Fed.R.Civ.P. 34; 37(a)(2)(B) (emphasis added). In response to such an order, the party resisting discovery has a heavy burden of showing why discovery should be denied. *Blankenship v. Hearst Corp.,* 519 F.2d 418, 429 (9th Cir.1975); *Cable and Computer Tech. Inc. v. Lockheed Saunders, Inc.,* 175 F.R.D. 646, 650 (C.D.Calif., 1997) (the party resisting discovery must clarify, explain, and support its objections). If the information sought is deemed by the court to be irrelevant, the court should restrict discovery to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense...." Fed.R.Civ.P. 26(c); *see also Herbert v. Lando,* 441 U.S. 153, 177 (1979).

ANALYSIS

***3** Fed.R.Civ.P. 26 was amended in 2000. The Advisory Committee Notes make clear that the revisions to the Rule narrowed the scope of discovery. A district court "has the authority to confine discovery to the claims and defenses asserted in the pleadings" and define the actual scope of discovery to the reasonable needs of the action. *See* Notes of the Advisory Committee (2000), Fed.R.Civ.P. 26(b)(1).

Plaintiffs claim the purpose of the inspection is to assist plaintiffs' attorneys and expert in obtaining a more complete understanding of the conditions under which plaintiff intervenors worked while employed by defendant. In addition, plaintiffs contend that the proposed inspection will allow the expert to observe the specific areas where the alleged harassment occurred, the physical proximity of the employees to each other, and the level of interaction between employees and supervisors. Plaintiffs claim these observations are important to the expert's opinion regarding the nature and effects of the alleged harassment. Thus, plaintiffs assert that plaintiff intervenors should be allowed to accompany their attorneys and the expert on the inspection because they are the only parties that can point out where the alleged incidents of harassment occurred. Finally, plaintiffs request that a videographer be allowed to attend the inspection in order to create visual documentation.

In the context of a sexual harassment case, few courts have considered whether a request for entry upon land for inspection is permissible. Plaintiffs cite *Belcher* in support of their argument. However, *Belcher* recognizes that entries upon land for inspection are disfavored in sexual harassment cases where defendant's premises are not at issue.

In *Belcher,* a class of plaintiffs alleged race and sex discrimination against their employer. 588 F.2d at 906. The issue before the court was whether the district court abused its discretion in granting a discovery motion pursuant to Fed.R.Civ.P. 34. *Id.* The plaintiffs sought discovery of the five facilities that were in issue to be conducted over a period of five days by an expert, a tour guide, an unspecified number of plaintiffs' attorneys, a paralegal, and two plaintiffs. *Id.* The district court granted the inspection, finding that plaintiffs' allegations that African–American employees were being relegated to lower paying and less attractive jobs placed the defendant's physical premises at issue and that inspection could reveal pertinent information that would not be available through an inspection of documents. *Id.* at 907.

The Fourth Circuit reversed this decision, holding that the district court abused its discretion by permitting the inspection. *Id.* at 909–10. The court reasoned that because entry upon a party's land may impose greater burdens than a production of documents, it is necessary to conduct a more probing inquiry into the necessity for the

inspection. *Id.* at 908. In addition to noting that a request for an inspection of premises is atypical in an employment discrimination case, the court found that plaintiffs had not demonstrated why other means of discovery would not yield similar reliable results without imposing as great a burden on defendant's operations. *Id.* at 909–10. Thus, the minimal utility of the proposed inspection was outweighed by the confusion and disruption to the defendant's business. *Id.* at 909–10.

***4** The EEOC argues that the purpose of the inspection is to assist plaintiffs' attorneys and expert in gaining a better understanding of plaintiff intervenors' work conditions, allow the expert to observe the specific areas of defendant's premises where the alleged harassment occurred, and that a videographer is necessary to create a visual record that will assist the trier of fact. The court is unpersuaded by these arguments. Plaintiffs' needs are easily addressed by interrogatories, depositions, and production of documents regarding the nature of the facility. These options are more convenient and less burdensome than an inspection of defendant's premises.

The only issue in this case is whether defendant subjected plaintiffs to sexual harassment and/or retaliation. The inspection of the premises is not relevant to plaintiffs' sexual harassment claims and plaintiffs' allegations do not assert that the physical aspects or features of defendant's facilities contributed to the alleged harassment. Thus, neither the overall conditions under which the plaintiff intervenors worked nor the physical layout of defendant's premises is at issue in this case. *Cf. New York State Ass'n for Retarded Children v. Carey,* 706 F.2d 956 (2d Cir.1983) and *Eirhart v. Libbey–Owens–Ford Co.,* 93 F.R.D. 370 (N.D. Ill 1981) (in both cases the courts allowed physical inspection of the premises because the defendants' physical premises were at issue). To permit the EEOC and its entourage to inspect defendant's premises including production, shipping, the human resources department, and break and lunch rooms would likely unnecessarily disrupt defendant's operations and its employees. The EEOC has plenary and unrestricted access to the plaintiff intervenors who are able to describe their working conditions to the EEOC, its attorneys and the expert. They can describe the physical proximity of the floor employees to one another and the level of employee interaction without burdening the defendant. Therefore, a physical inspection of the premises in this case is unwarranted.

CONCLUSION

For the foregoing reasons, plaintiffs' Motions to Compel Entry Upon Land for Inspection (Docs.# 39, 54) are DENIED.

IT IS SO ORDERED.