2006 WL 2520922
United States District Court,
W.D. Tennessee, Western Division.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
CLEVELAND CONSTRUCTION, INC., Defendant.

No. 04-2730 MA/P. | June 9, 2006.

Attorneys and Law Firms

Robbin W. Hutton, Weintraub Stock & Grisham, Memphis, TN, Lead Attorney, Attorney to be Noticed, for Cleveland Construction, Inc. (Defendant).

Katharine W. Kores, Equal Employment Opportunity Commission, Memphis, TN, Lead Attorney, Attorney to be Noticed, for Equal Employment Opportunity Commission, (Plaintiff).

Adele Rapport, Equal Employment Opportunity Commission, Memphis, TN, Lead Attorney, Attorney to be Noticed, for Equal Employment Opportunity Commission, (Plaintiff).

Darin B. Tuggle, Equal Employment Opportunity CommissionMemphis, Memphis, TN, Lead Attorney, Attorney to be Noticed, for Equal Employment Opportunity Commission, (Plaintiff).

Jeff Weintraub, Weintraub Stock & Grisham, Memphis, TN, Lead Attorney, Attorney to be Noticed, for Cleveland Construction, Inc., (Defendant).

Opinion

ORDER GRANTING PLAINTIFF'S MOTION TO QUASH AND DENYING DEFENDANT'S MOTION SEEKING PERMISSION TO SUBPOENA DOCUMENTS FROM THIRD PARTIES

PHAM, Magistrate J.

***1** Before the court is plaintiff Equal Employment Opportunity Commission's ("the Commission") Motion to Quash or for a Protective Order, filed June 1, 2006 (dkt # 86). Defendant Cleveland Construction ("Cleveland") filed a Motion Seeking Permission to Subpoena Documents From Third Party and Response in Opposition to EEOC's Motion to Quash or for a Protective Order, on June 5, 2006 (dkt # 90). These motions were referred to the Magistrate Judge for determination. For the reasons below, plaintiff's motion to quash is GRANTED and defendant's motion to subpoena documents is DENIED.

I. BACKGROUND

The Commission filed this lawsuit on September 15, 2004, alleging Cleveland violated Title VII of the Civil Rights Act of 1964, 42 U.S .C. § 2000 *et. seq.* and Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 1981. The Commission asserts that during construction of the FedEx Forum Arena in Memphis, Cleveland terminated the employment of a class of African American employees because of their race and replaced them with Hispanic workers. A jury trial in this case is set for July 17, 2006.

On November 7, 2005, the court entered an amended scheduling order setting the deadline for completing discovery for January 31, 2006. On February 2, 2006, the court granted the parties an extension of the discovery deadline until February 22, 2006. On that date, the court again extended the discovery deadline to March 3, 2006.

During discovery, Cleveland deposed each member of the class, completing its last deposition on February 16, 2006. Through plaintiff's responses to Cleveland's interrogatories and the class members' deposition testimony, Cleveland was provided the names of the employers for whom the class members worked following their allegedly discriminatory termination. Cleveland also sought employer files, which detail the class members' work history and wages, and income tax records from each member of the class. The class members indicated that they had provided all of their available materials to the Commission.

In its present Motion Seeking Permission to Subpoena Documents From Third Party, Cleveland seeks to issue subpoenas to the class members' employers to obtain information concerning the time period each class member worked for their respective employer and the wages received by each member of the class. Cleveland argues that these subpoenas are not governed by the March 3 discovery deadline because Cleveland is not seeking "new information," but rather is trying to confirm or supplement information provided in plaintiff's interrogatory responses and learned during the class members' depositions. Cleveland also apparently argues that because these subpoenas are directed to third parties pursuant to Federal Rule of Civil Procedure 45, they do not fall under the scheduling order.

II. ANALYSIS

Federal Rule of Civil Procedure 16 authorizes the court to enter a scheduling order which limits the time a party has to join parties, amend pleadings, file motions, and complete discovery. Rule 16 further provides that a scheduling order "shall not be modified except upon a showing of good cause...." Fed.R.Civ.P. 16(b). Good cause exists when a deadline "cannot reasonably be met despite the diligence of the party seeking the extension." Fed.R.Civ.P. 16 advisory committee notes (1983). In deciding whether the moving party has demonstrated sufficient good cause to modify the scheduling order, the court considers two factors: the movant's "diligence in attempting to meet the case management order's requirements" and "whether the opposing party will suffer prejudice by virtue of the amendment." *Leary,* 349 F.3d at 906 (citations omitted).

***2** Here, both factors weigh against permitting the additional discovery in this case. By February 16, Cleveland had received plaintiff's discovery responses and completed the last deposition of class members, and thus was on notice that each member of the class had provided the Commission with all of their work history and tax information that was available.[1] By that time, Cleveland had in its possession information about the identity of each employer that it now seeks to subpoena. Thus, Cleveland had ample opportunity to issue subpoenas before the discovery deadline passed. In its motion/response, Cleveland has not provided the court with a sufficient explanation for its delay in issuing these subpoenas.

[1] Cleveland argues in its motion that at the class members' depositions, counsel for defendant learned that certain class members may have provided some additional work history information to plaintiff's counsel, and that plaintiff was asked to provide defendant with any such supplemental information. This information was never provided to defendant, apparently because the class members do not have these employment records. However, during the time that defendant was waiting for the production of these records, defendant could have simultaneously issued the subpoenas to the employers.

Moreover, the court finds that the Commission will suffer prejudice if Cleveland is permitted to conduct additional discovery. Trial is set for July 17. Permitting additional discovery will force the Commission to divert resources and time away from trial preparation to address Cleveland's subpoena requests. The court, therefore, concludes that Cleveland has not established good cause to allow additional discovery past the deadline as set forth in the amended scheduling order.

Finally, Cleveland argues that because it is seeking information from a third party via subpoena, its subpoenas are not governed by the amended scheduling order. The court disagrees. "Rule 45 subpoenas are 'discovery' under Rules 16 and 26 of the Federal Rules of Civil Procedure, and are subject to the same deadlines as other forms of discovery." *DAG Enters. v. Exxon Mobil Corp.,* 226 F.R.D. 95, 104 (D.D.C.2005) (quashing subpoena where plaintiffs issued subpoenas after the discovery deadline and failed to establish "good cause" necessary to amend scheduling order); *see also Integra Lifesciences I, Ltd. v. Merck KGaA,* 190 F.R.D. 556, 561 (S.D.Cal.1999) ("Case law establishes that subpoenas under Rule 45 are discovery, and must be utilized within the time period permitted for discovery in a case."); *Rice v. United States,* 164 F.R.D. 556, 558 (N.D.Okla.1995) ("After careful consideration, the Court finds that the Rule 45 subpoenas duces tecum in this case constitute discovery."). The Sixth Circuit has held that an order quashing a subpoena is appropriate where the subpoena is issued to a third party after the discovery cut-off date. *See Buhrmaster v. Overnite Transportation Co.,* 61 F.3d 461, 464 (6th Cir.1995), *cert. denied,* 516 U.S. 1078 (1996) (affirming district court's decision to quash subpoenas of material that could have been produced through normal discovery where plaintiff used subpoena to circumvent discovery deadline); *Ghandi v. Police Dept. of City of Detroit,* 747 F.2d 338, 354-55 (6th Cir.1984) (affirming district court's decision to quash subpoena issued on the eve of trial seeking documents available during discovery). Cleveland's subpoenas are therefore governed by the amended scheduling order in this case and subject to Rule 16's "good cause" requirement. As discussed above, Cleveland has not established good cause to modify the discovery deadline.

III. CONCLUSION

***3** For the reasons above, plaintiff's Motion to Quash or for a Protective Order is GRANTED. Defendant's Motion Seeking Permission to Subpoena Documents From Third Party is DENIED.

IT IS SO ORDERED.

Parallel Citations

88 Empl. Prac. Dec. P 42,457