Orlowski v. Dominick's Finer Foods

United States District Court for the Northern District of Illinois, Eastern Division
January 15, 1998, Decided ; January 16, 1998, Docketed
Case No. 95 C 1666

Reporter: 1998 U.S. Dist. LEXIS 526; 1998 WL 26171
HELENE ORLOWSKI, MELBA J. KOCH, MARGARET MROZOWSKI, CAROL ANN SCHMALL, ALMA L. AGUIRRE, ROANN D. KEATY, GEORGINE ARVANITES, JANET M. TRIPP, and MAUREEN GLEIXNER, on behalf of themselves and all other persons similarly situated, Plaintiffs, v. DOMINICK'S FINER FOODS, INC., Defendant.

Disposition: [*1] Judge Keys' order affirmed.

Counsel: For HELENE ORLOWSKI, MELBA J KOCH, MARGARET MROZOWSKI, CAROL ANN SCHMALL, ALMA L AGUIRRE, ROANN D KEATY, plaintiffs: Paul L. Strauss, Jeffrey Irvine Cummings, Miner Barnhill & Galland, Chicago, IL.

For HELENE ORLOWSKI, MELBA J KOCH, MARGARET MROZOWSKI, CAROL ANN SCHMALL, ALMA L AGUIRRE, ROANN D KEATY, plaintiffs: Brian R Holman, Jeffrey Mark Friedman, Friedman & Holman, Chicago, IL.

For MAUREEN GLEIXNER, plaintiff: Ian Howard Fisher, Latham & Watkins, Chicago, IL.

For DOMINICK'S FINER FOODS, INC., defendant: John P. Lynch, Mark Steven Mester, Timothy Bunker Hardwicke, Sylvia A. Stein, Latham & Watkins, Chicago, IL.

Judges: Elaine E. Bucklo, United States District Judge.

Opinion by: Elaine E. Bucklo

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiffs request the production of one thousand employee personnel files from Dominick's. Plaintiffs seek this discovery to support one of their basic contentions; "that it has been common at Dominick's to refer to jobs and employees in ways that label jobs by sex." (Pl. Response at 5). In a limited review of employee personnel files, plaintiffs found information that refers to one female employee as a "G.M. [*2] girl" [1] and to another as a "check out girl." Plaintiffs believe that a random sampling of one thousand personnel files will prove Dominick's used such gender-oriented labels on a routine basis.

Dominick's argues that many of the members of the 15,000 person class are not interested in helping the plaintiffs. Dominick's, in a twist it considers terribly ironic, believes it is forced to protect the privacy rights of the employees that actually make up the class. Since class members have neither received notice nor been given an opportunity to opt-out, Dominick's believes employee privacy rights are being violated. To this end, Dominick's argues that turning over employee personnel files would violate the Illinois Personnel Record Review Act ("Review Act"), 820 ILCS 40 *et seq.*, and the constitutional right to privacy. Dominick's argues that class members should be notified of the interest in their personnel files and should be given an option to refuse access to their files.

[*3] Magistrate Judge Keys considered these arguments and found that the relevancy of the proposed discovery outweighed the privacy arguments forwarded by Dominick's. He ruled plaintiffs could have access to the employee personnel files. To safeguard the information in the files, Judge Keys limited access to the files to plaintiffs' counsel, staff, and experts.

Judge Keys' order may only be set aside if it is "clearly erroneous or contrary to law." Fed. R. Civ. Pro. 72(a). The federal rules provide for liberal discovery, particularly in Title VII cases. *Sweat v. Miller Brewing Co.*, 708 F.2d 655, 658 (11th Cir. 1983). Certainly, the information the plaintiffs request is relevant to showing that Dominick's had a policy of labeling certain jobs as female-oriented positions. Such circumstantial evidence is often necessary to prove a Title VII claim. Dominick's argues that production of the files violates the Review Act and may subject it to contempt, criminal sanctions, and compensatory damages. 820 ILCS 40/12(c) & (d). Dominick's is particularly worried about turning over disciplinary reports, credit reports, and medical information.

While there is a strong policy of comity for state [*4] privileges, the Seventh Circuit has dealt with a situation where a party felt caught between a state law that prohibited disclosure of hospital disciplinary proceedings

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[1] General Merchandise girl.

and an order granting discovery. *Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981).

> As to the Hospital's claim that this conflict between state and federal law places him "on the horns of an insoluble dilemma," we view this dilemma as wholly illusory when considered in light of the Supremacy Clause of the United States Constitution. To the extent Illinois' Medical Studies Act could be construed to exclude evidence relevant to a claim based on federal law in an action brought in federal court, it is rendered void and of no effect by that provision, and any state prosecution of the Hospital based on the law would be barred.*Id.* at 1063-64 (citation omitted). This reasoning is directly applicable to the instant case and Dominick's has not presented a persuasive argument as to why the Seventh Circuit's approach should not apply. Dominick's primarily argues against a "mechanical and unnecessary" application of federal discovery rules. *Id.* at 1061 (quotation omitted). To [*5] the extent Dominick's fears liability under the Review Act, the Supremacy Clause indicates an order granting discovery would bar a state suit against Dominick's.

Dominick's second ground for barring discovery of personnel files is the right to privacy found in the United States Constitution. Dominick's cites *Whalen v. Roe*, 429 U.S. 589, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977), for the proposition that employees have a privacy interest in avoiding disclosure of personal information. In *Whalen*, the Court dealt with a New York statute that required names of individuals be submitted to the state health department if they received prescription drugs classified as controlled substances. Against a right to privacy challenge, the Court upheld the statute. In dicta, the Court noted individuals have an "interest in avoiding disclosure of personal matters…." *Id.* at 599. It does not follow, even from the Court's dicta, that all personal information is protected by a right to privacy. The Third Circuit has interpreted *Whalen* to provide a "a limited right to privacy in [individual's] medical records." *Doe v. Southeastern Penn. Transp. Auth. (SEPTA)*, 72 F.3d 1133, 1137 (3d. [*6] Cir. 1995).

Dominick's has not presented persuasive authority to indicate there is a constitutional right to privacy in an employee's personnel file. Thus, Judge Keys' decision is not clearly erroneous. Medical information in employee personnel files does not appear to be relevant and may be removed. Dominick's argues that notice or an opt-out option should be presented to those employees whose files will be opened. However, that would not prevent disclosure of the files. Accordingly, Judge Keys' order is affirmed.

ENTER ORDER:

Elaine E. Bucklo

United States District Judge

Dated: January 15, 1998