EEOC v. Nebco Evans Distrib.

United States District Court for the District of Nebraska
October 26, 1998, Decided ; October 26, 1998, Filed
8:96CV644

Reporter: 1998 U.S. Dist. LEXIS 18449
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, vs. NEBCO EVANS DISTRIBUTION, INC., A Nebraska Corporation, Defendant.

Disposition: [*1] Defendant's objections to the magistrate judge's rulings during the pretrial conference (filing 139) overruled.

Counsel: For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, plaintiff: John M. Baird, Merrily S. Archer, Denver, CO.

For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, plaintiff: C. Gregory Stewart, Rosalind D. Gray, EEOC, Office of General Counsel, Washington, DC.

For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, plaintiff: Mia E. Bitterman, EEOC, Denver, CO.

For NEBCO EVANS DISTRIBUTION, INC., defendant: Charles F. Gotch, Daniel J. Duffy, David A. Blagg, CASSEM, TIERNEY LAW FIRM, Omaha, NE.

Judges: JOSEPH F. BATAILLON, JUDGE, UNITED STATES DISTRICT COURT.

Opinion by: JOSEPH F. BATAILLON

Opinion

MEMORANDUM AND ORDER

This matter comes before the Court on the defendant's appeal of the magistrate judge's rulings during the pretrial conference (filing 139). Specifically, the defendant objects to the magistrate judge's rulings to strike defendant's statement of the issue in paragraph (C)1 of the Order on Final Pretrial Conference (filing 136). The defendant further objects to the magistrate judge's overruling the defendant's assertions that the plaintiff may not raise a claim of disparate impact at this state in the proceedings (filing 136). After carefully reviewing the complaint, briefs and relevant case law, the Court shall overrule the defendant's objections.

Standard of Review

Pursuant to *28 U.S.C. § 636 (b)(1)(A)*, the district court is authorized to reconsider any pretrial matter where it is shown that the magistrate judge's ruling is clearly erroneous or contrary to law.

Discussion

In objecting to the magistrate judge's rulings during the final pretrial [*2] conference, the defendant claims the magistrate judge erred by striking the defendant's statement of the issue in paragraph (C)(1). The only difference in the plaintiff's and defendant's proposed statements of issue under this paragraph is the plaintiff's inclusion of the words "age 40 and over". The Court finds no controlling case law to suggest that the inclusion of this specific language describing the protected class in paragraph (C)(1) of the final pretrial conference order constitutes error. According, the Court overrules the defendant's objection.

The defendant also objects to the magistrate judge's overruling the defendant's assertion that the EEOC is precluded from raising a claim of disparate impact at this stage in the proceedings. The United States Court of Appeals for the Eighth Circuit has recognized that a plaintiff may state a viable claim of disparate impact under the Age Discrimination in Employment Act ("ADEA") [1]. *See Lewis v. Aerospace Community Credit Union*, 114 F.3d 745 (8th Cir. 1997), and *Smith v. City of Des Moines, Iowa*, 99 F.3d 1466, 1470 (8th Cir. 1996). Disparate impact claims are those employment practices, procedures and policies that are facially [*3] neutral but fall more harshly upon one protected group and cannot be justified on the basis of business necessity. *Webb v. Derwinski*, 868 F. Supp. 1184 (E.D. Mo. 1994), *aff'd68 F.3d 479 (8th Cir. 1995)*. To establish a prima face case of disparate impact under the ADEA, "plaintiff must demonstrate that a

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[1] The Court notes that the United States Supreme Court has "never decided whether a disparate impact theory of liability is available under the ADEA." *Hazen Paper v. Biggins*, 507 U.S. 604, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993). The circuit courts are sharply divided over the issue. Nonetheless, in pre- and post-Hazen decisions, the Eighth Circuit has held that disparate impact claims are cognizable under the ADEA. Therefore, this Court shall assume such a claim remains viable.

specific employment practice or policy has a significant discriminatory impact on a protected group. As a general rule, such a showing is made by the use of statistics." *Webb*, 868 F. Supp. at 1190.

In its statement [*4] of claims, the plaintiff contended that the defendant had engaged in a pattern and practice of refusing to hire applicants age 40 and older for truck driver positions. The plaintiff contended that this employment pattern or practice had the effect of depriving a **"class of individuals, age 40 and over,** of equal employment opportunities," **and "deprived the individuals** of equal employment opportunities . . . because of their age." (Filing 1 at PP 7-9) (emphasis added). The Court finds that the plaintiff's complaint provided the defendant with sufficient notice of both disparate impact and disparate treatment theories of liability under the ADEA. Moreover, the plaintiff completed interrogatories submitted by the defendant requesting all facts supporting the plaintiff's theory of disparate impact. Because the Court finds no clear error on the magistrate judge's ruling, the Court affirms the ruling and overrules the defendant's objection to liability under the ADEA based on a disparate impact theory.

IT IS HEREBY ORDERED that the defendant's objections to the magistrate judge's rulings during the pretrial conference (filing 139) are overruled.

Dated this 26 day of [*5] October, 1998.

BY THE COURT:

JOSEPH F. BATAILLON, JUDGE

UNITED STATES DISTRICT COURT