

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,

Plaintiff

v.

SPRING BRANCH INDEPENDENT
SCHOOL DISTRICT, et al.,

Defendant.

C.A. No. H-84-2949

REPLY OF UNITED STATES PERTAINING TO ITS
MOTION TO COMPEL ANSWERS AND PRODUCTION IN
RESPONSE TO ITS SECOND SET OF INTERROGATORIES
AND ACCOMPANYING REQUEST FOR PRODUCTION OF DOCUMENTS

In its Response to the United States' Motion to Compel Answers and Production in Response to the United States' Second Set of Interrogatories and Accompanying Request for Production of Documents, defendant Spring Branch Independent School District ("SBISD") broadly asserts in response to each discovery request that the United States is seeking attorney work product. Relying on this perception, SBISD opposes each document request and virtually all of the interrogatories and seeks an order protecting the information and items sought from discovery. In further reliance on its perception that the United States seeks only work product, SBISD also seeks an

order imposing sanctions against the United States pursuant to Rules 11 and 26(c) of the Federal Rules of Civil Procedure. 1/

As an initial matter, SBISD's Response is premised in large part on the argument that a party may not discover the evidence that an opposing party intends to introduce at trial. Such information is broadly categorized by SBISD as protected attorney work product. SBISD states in its Response: "Rather than preparing its case in chief, or seeking facts, the Plaintiff is attempting to commit the Defendants' attorney to a

1/ In support of its Motion for Sanctions, SBISD asserts that the discovery sought is intended to "harass" and that the arguments set forth in the United States' Motion to Compel are "unwarranted by existing law or a good faith extension of such law." To the contrary, rather than seeking to harass, the discovery at issue is intended only to gather relevant facts, the knowledge of which is essential to proper litigation of this action. The reasons for each discovery request, as set forth in the United States' Motion to Compel, clearly demonstrate that the information and materials sought are essential to trial preparation in a pattern or practice employment discrimination case. To the degree that SBISD bases its Motion for Sanctions on the ground that the United States seeks only attorney work product, its argument must fail, as SBISD has not established that the information and materials sought constitute work product. In addition, as provided in Rule 26(b)(3), upon a proper showing, work product may be discoverable.

With regard to SBISD's contention that the arguments made in the Motion to Compel are "unwarranted", a review of the cases and rules cited for each argument indicates that there is sound authority for each position taken by the United States. SBISD's assertions to the contrary are baseless.

particular trial strategy months in advance of any trial by asking Defendant what their trial evidence is and who their trial witnesses will be."

The United States does not contest SBISD's characterization of the discovery requests at issue insofar as SBISD asserts that the requests are intended to determine what evidence defendants will rely on at trial. The United States does contest, however, SBISD's assertion that such a purpose is improper under the discovery provisions of the Federal Rules of Civil Procedure. Indeed, the very purpose of discovery is "for the parties to obtain the fullest possible knowledge of the issues and facts before trial." Hickman v. Taylor, 329 U.S. 495, 501 (1947). As stated by the Supreme Court in Hickman, the discovery sanctioned by the Rules "simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise." Id. at 507. While materials that will be offered as evidence at trial may, of course, be privileged and protected from discovery, such materials are not privileged per se simply because they will be offered as evidence. The objections raised in SBISD's Response, however, rest in large part on the flawed premise that items to be offered as evidence are attorney work product per se and are not discoverable. .

This premise is contrary to the very purpose of discovery, as described in Hickman v. Taylor, supra, and is particularly inappropriate in light of the amendments to the Federal Rules which explicitly require answers which involve an "opinion or contention that relates to fact or the application of law to fact." Rule 33(b), Fed. R. Civ. P. Thus, SBISD's specific objections to the interrogatories and requests for production at issue must be read in light of the erroneous basis from which they proceed.

1. SBISD should be required to identify any data base or output of any computerized recording and indicate each fact that it may seek to prove at trial through the use of such materials.

As explained in the United States' Motion to Compel, identification and production of computerized information is sought because data bases and computerized output are of critical importance in pattern or practice employment discrimination cases. 2/ Both the plaintiff and defendant in pattern or practice cases often rely on computer-accessible employment data bases and on computer-generated statistical analyses of employment practices based on such data. In view of the importance of statistical analysis in pattern or practice actions, the data on which any such analysis is based

2/ As explained in the United States' Motion to Compel, the present requests for computer information are distinguishable from those that were denied previously by Magistrate Botley. See United States' Motion to Compel, footnote 2.

clearly constitute highly relevant facts that should be discoverable in the absence of privilege.

In refusing to produce or even identify any computerized information, SBISD asserts: (1) the United States has access to the documents on which any computerized data base would be based; and (2) data put into computerized form is attorney work product. As a threshold matter, neither of SBISD's objections is responsive to Interrogatory No. 5, which seeks information concerning the existence and use of computer data. SBISD invokes Rule 26(b)(3) in objecting to providing information on the existence and use of computer information, but that Rule applies by its express terms only to documents and tangible things. In Interrogatory No. 5, the United States seeks only information and not a document or tangible thing, and SBISD's reliance on Rule 26(b)(3) is therefore misplaced. See 4 Moore's Federal Practice, §26.64[1] at 26-349 (1984).

SBISD's objections are also insufficient to excuse production of computer-related data. Access to personnel documents of successful and unsuccessful applicants does not necessarily provide the United States with the information that will be contained in a computerized data base. For example, personnel documents do not uniformly contain the race of an applicant, an item of information that is essential to a data base in a pattern or practice employment discrimination case.

In addition, access to documents only will not reflect the coding and keypunching processes required to compile a computerized data base, and these processes bear directly on the accuracy of the data. Thus, the need for computer-related information is not satisfied by the documents to which SBISD refers.

SBISD's assertion of the attorney work product privilege to protect computer-related information from discovery is also insufficient to excuse production of such materials. As argued in the United States' Motion to Compel, a general statement that material is "work product" is insufficient to raise successfully the privilege. See In re Shopping Carts Antitrust Litigation, 95 F.R.D. 299, 305 (S.D. N.Y. 1982); 4 Moore's Federal Practice, §26.65[2] (1984). Without knowledge of what SBISD claims is privileged, the United States is unable to respond specifically in opposition to the asserted privilege. See East Chicago Machine Tool Corp. v. Stone Container Corp., 15 F.R. Serv. 2d 1278 (N.D. Ill. 1972).

If SBISD had invoked properly the attorney work product privilege, it is likely that the computer output that the United States seeks would nevertheless be discoverable. See Fauteck v. Montgomery Ward & Co., 25 E.P.D. ¶31,648 (N.D. Ill. 1980) (computerized data base in pattern or practice case ordered to be produced over objection based on attorney work

product). Further, assuming arguendo that the attorney work product privilege does apply, as argued in the United States' Motion to Compel, the substantial need for the computer output and the inability to obtain it elsewhere are sufficient to overcome the privilege. See Fed. R. Civ. P. 26(b) (3).

2. The United States is entitled to discover the names of persons whom SBISD expects to call as witnesses at trial.

In Interrogatory No. 3, the United States seeks the name of each individual whom SBISD expects to call as a witness at trial, as well as the subject matter with respect to which each such person is expected to testify. As explained in the United States' Motion to Compel, this information is sought to permit the United States to depose those persons before expiration of the period for discovery, June 24, 1986.

In its Response, SBISD cites cases in which courts refused to order production of witness lists during the discovery period. 3/ The cases cited in the United States' Motion to Compel (pp. 11-12) hold to the contrary, indicating that courts are not in uniformity on this issue. In a case of this size and complexity, prompt identification of trial witnesses is

3/ In Wirtz v. Continental Finance & Loan Co., 326 F.2d 561 (5th Cir. 1964), cited by SBISD, the names of witnesses were sought "long before trial" and apparently before defensive pleadings had been served. Here, in contrast, the names of witnesses are sought shortly before the expiration of the period for discovery.

essential to effective trial preparation. The nature of this case, and of pattern or practice cases generally, is such that the number of persons with knowledge of the events surrounding the issues for trial is far too large to permit deposing all. This is especially true in the case of a large employer such as SBISD. Thus, prompt identification of persons to be called as witnesses at trial will permit effective trial preparation.

3. The information sought pertaining to expert witnesses is discoverable under Rule 26.

Although SBISD has stated that it has not retained an expert whom it intends to call as a witness at trial, it is clear from SBISD's Response that objection to Interrogatory No. 2 will be made when an expert is retained. To avoid future delay, it is therefore appropriate to rule now on SBISD's objections.

In its Response, SBISD does go beyond its original Answer to Interrogatory No. 2 in agreeing to provide the categories of information enumerated in Rule 26(b)(4)(A)(i). At the same time, however, SBISD appears to be objecting to providing any information that is not expressly required by Rule 26(b)(4)(A)(i). The obligation to provide information on an expert, however, is broader than SBISD represents.

In response to the United States' request for background information on an expert, SBISD agrees to provide: (a)

addresses of experts; (b) current occupation; and (c) particular specialty. As argued in the United States' Motion to Compel, background information on an expert, including education, employment history, and the identity of publications, is discoverable pursuant to the discovery provisions of Rule 26(b)(1) relating to ordinary witnesses. See 4 Moore's Federal Practice, supra, §26.66[2] at 26-408. Under the liberal discovery provisions of Rule 26(b)(1), the background information sought is clearly discoverable, as it bears directly on the credibility of any witness who may testify at trial.

To the degree that SBISD continues to object to providing the identity of documents upon which its expert may base or expect to base findings or opinions, its objection must fail. Rule 26(b)(4)(A)(i) expressly sanctions inquiry into the grounds in support of the conclusions of an expert. Seeking the identity of documents on which an expert may rely is an inquiry into the grounds in support of the expert's conclusions.

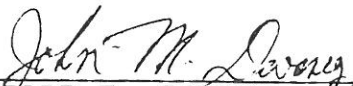
Finally, SBISD states as an additional ground for denial of the United States' Motion to Compel that the United States makes no offer to compensate SBISD's expert for the time and expense needed to respond to the discovery requests "notwithstanding the provisions of Rule 26." The information

sought from SBISD's expert, however, is sought pursuant to Rule 26(b)(4)(A)(i) interrogatories, and that Rule does not have a provision for payment of fees and expenses by the discovering party. When further discovery of an expert retained by SBISD is conducted, the United States will, of course, meet any obligation to pay fees and expenses.

CONCLUSION

For the reasons stated in this Reply and in the United States' Motion to Compel, the Motion to Compel should be granted.

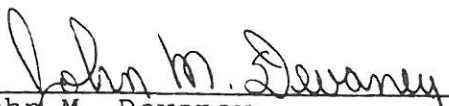
Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Plaintiff's Reply of United States Pertaining to its Motion to Compel Answers and Production in Response to its Second Set of Interrogatories and Accompanying Request for Production of Documents has been served upon counsel for the Defendants by U.S. mail, on this 4th day of April, 1986, at the following address:

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