

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EQUAL EMPLOYMENT	)	CV. NO. 09-02023 DAE
OPPORTUNITY COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CREATIVE NETWORKS, L.L.C.,	)	
an Arizona corporation,	)	
	)	
Defendant.	)	
_____	)	

ORDER: (1) GRANTING CREATIVE NETWORKS' RULE 56(d) REQUEST;
(2) DENYING WITHOUT PREJUDICE THE EEOC'S MOTION FOR
PARTIAL SUMMARY JUDGMENT; (3) SETTING RULE 16
SCHEDULING CONFERENCE

In accordance with Local Rule 7.2(f), the Court finds this matter suitable for disposition without a hearing. After reviewing the motion and the supporting and opposing memoranda, the Court GRANTS Creative Networks' Rule 56(d) Request (Doc. # 105) and DENIES WITHOUT PREJUDICE the EEOC's Motion for Partial Summary Judgment (Doc. # 100). The Court also SETS a Rule 16 Scheduling Conference.

On September 28, 2009, the Equal Employment Opportunity Commission (the "EEOC") filed a Complaint against Defendant Creative

Networks, L.L.C. (“Creative Networks”), pursuant to Title I and Title V of the Americans with Disabilities Act of 1990 (the “ADA”) and Title I of the Civil Rights Act of 1991. (Doc. # 1.) The EEOC brought this lawsuit “to correct unlawful employment practices on the basis of disability and to provide appropriate relief to Rochelle Duran . . . and a class of similarly situated individuals who were adversely affected by such practices.” (Id.) The EEOC asserts that, since at least 2005, Creative Networks has required applicants for the position of Caregiver, Caretaker, and/or Direct Support Professional to complete twenty-four or more hours of pre-employment orientation and training. (Id. ¶ 11.) Despite this, the EEOC asserts that, since this same time, Creative Networks has had a “policy or practice of denying accommodations costing greater than \$200 for interpreting services for hearing impaired applicants,” such as Rochelle Duran (“Duran”), to complete this training. (Id. ¶ 12.)

As a result, the EEOC contends that Creative Networks has engaged in the following unlawful employment practices:

- A. Failure to reasonably accommodate and failure to hire . . . Duran and the class because of [Creative Networks’] rigid policy or practice of limiting accommodation to \$200
- B. Failure to hire . . . Duran and a class of similarly situated individuals because of their disability, hearing impairment

- C. Maintaining a policy that is a per se violation of the ADA and has the impact of not hiring or excluding hearing impaired applicants

(Id. ¶ 13.)

On January 14, 2011, the EEOC filed a Motion for Partial Summary Judgment on its failure to hire and failure to accommodate claims for Duran and on its claim that the alleged policy limiting sign language interpreter services to \$200 is unlawful. (Doc. # 100.) The EEOC also filed a Statement of Facts in support of its motion. (Doc. # 101.)

On February 16, 2011, Creative Networks filed a request that the Court deny the Motion for Partial Summary Judgment without prejudice pursuant to Federal Rules of Civil Procedure (“Rule”) 56(d) (the “Rule 56(d) Request”) on the basis that the parties require more time to conduct “class discovery.”¹ (“Rule 56(d) Req.,” Doc. # 105.) The EEOC filed an Opposition to the Rule 56(d) Request on March 7, 2011. (“Opp’n,” Doc. # 107.) Creative Networks filed a Reply on March 17, 2011. (“Reply,” Doc. # 110.)

¹ Such a request was previously within the purview of Rule 56(f). The 2010 Amendments to Rule 56, effective December 1, 2010, moved the provisions of subdivision (f) to subdivision (d) without substantial change. See Fed. R. Civ. P. 56 advisory committee’s note to 2010 Amendments.

A party requesting a continuance, denial, or other order under Rule 56(d) must demonstrate: “(1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment.” Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp., 525 F.3d 822, 827 (9th Cir. 2008) (citing California v. Campbell, 138 F.3d 772, 779 (9th Cir. 1998)); Fed. R. Civ. P. 56(d). “The burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists, and that it would prevent summary judgment.” Chance v. Pac-Tel Teletrac Inc., 242 F.3d 1151, 1161 n.6 (9th Cir. 2001); see also Tatum v. City & Cnty. of S.F., 441 F.3d 1090, 1100 (9th Cir. 2006). The moving party must also show that it was diligent in pursuing its previous discovery opportunities. See Qualls v. Blue Cross of Cal., Inc., 22 F.3d 839, 844 (9th Cir. 1994). Failing to meet this burden “is grounds for the denial” of a Rule 56(d) motion. Pfingston v. Ronan Eng. Co., 284 F.3d 999, 1005 (9th Cir. 2002).

The instant Rule 56(d) Request stems, at least in part, from the parties’ dispute regarding the logistics of sending out a mailing to identify potential class members. On June 14, 2010, U.S. District Judge Susan R. Bolton directed counsel for the EEOC to submit to defense counsel a proposed letter that would be

mailed to prior Creative Networks applicants, in an attempt to identify other class members. (Doc. # 45.) On July 19, 2010, Judge Bolton instructed counsel to confer and prepare an agreed-upon letter. (Doc. # 52.) On November 8, 2010, Judge Bolton ordered each party to file their proposed applicant letter with the Court (Doc. # 94), and on November 10, 2010, Judge Bolton selected the EEOC's proposed letter and ordered that it be sent to the prior applicants (Doc. # 95). Thereafter, the EEOC mailed the letter, and on January 31, 2011, the EEOC disclosed to Creative Networks the names of six class members. (Doc. # 104.) Meanwhile, the EEOC filed its Motion for Partial Summary Judgment on January 14, 2011, in accordance with the Court's Rule 16 Scheduling Order, which set January 14, 2011 as the deadline for filing dispositive motions. (Doc. # 27 ¶ L.)

The EEOC urges the Court to deny the Rule 56(d) Request, and emphasizes that, although it asserts failure to hire and failure to accommodate claims on behalf of Duran and a class of similarly situated individuals, it moves for summary judgment only as to Duran on these claims. (Opp'n at 7–8.) According to the EEOC, there is no need for additional discovery on the issues in the Motion for Partial Summary Judgment.

Conversely, Creative Networks stresses that, in addition to its failure to hire and failure to accommodate claims for Duran, the EEOC also moved for

summary judgment on its claim that Creative Networks had a “rigid” policy limiting accommodations to \$200 in violation of the ADA. (Rule 56(d) Req. Ex. 2, Declaration of N. Todd McKay (“McKay Decl.”); Reply at 5–6.) Creative Networks asserts that “fundamental questions and issues” exist as to whether it ever had such a policy, and whether this purported policy affected other applicants. (Reply at 6.) In his declaration, Creative Networks’ counsel explains that the disclosure of six potential class members could lead to discoverable information on this issue. (McKay Decl. ¶¶ 5–6.)

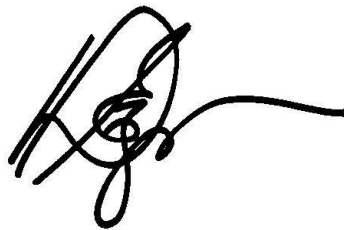
Based on these facts, and because Creative Networks has complied with the requirements of Rule 56(d), the Court is inclined to deny the EEOC’s Motion for Partial Summary Judgment without prejudice so that the parties may conduct additional discovery. Contrary to the EEOC’s contention, the circumstances surrounding the six identified class members could be highly relevant to the issue of whether Creative Networks indeed had a policy limiting accommodations to \$200. Because of the delay in mailing the letter to the prior applicants, which resulted through no fault of either party, the names of these six class members were only recently disclosed. Although the Court recognizes the EEOC’s effort to comply with the Scheduling Order, and its diligence in disclosing the class members’ names, the Motion for Partial Summary Judgment is simply

premature at this time. The Court in its discretion is denying this motion without prejudice under Rule 56(d), rather than providing Creative Networks more time to respond, because as a result of additional discovery, the EEOC may wish to file a new or different motion or it may decide to not file one at all.

Accordingly, for good cause shown, the Court GRANTS Creative Networks' Rule 56(d) Request (Doc. # 105) and DENIES WITHOUT PREJUDICE the EEOC's Motion for Partial Summary Judgment (Doc. # 100). Additionally, in accordance with the parties' request, the Court SETS a Rule 16 Scheduling Conference, as well as a status conference, at the Sandra Day O'Connor U.S. Courthouse in Phoenix, Arizona on May 3, 2011 at 9:45am MST.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 8, 2011.

A handwritten signature in black ink, appearing to read 'David Alan Ezra', with a long horizontal line extending to the right.

David Alan Ezra
United States District Judge

Equal Employment Opportunity Commission v. Creative Networks, L.L.C., Cv. No. 09-02023 DAE; ORDER: (1) GRANTING CREATIVE NETWORKS' RULE 56(d) REQUEST; (2) DENYING WITHOUT PREJUDICE THE EEOC'S MOTION FOR PARTIAL SUMMARY JUDGMENT; (3) SETTING RULE 16 SCHEDULING CONFERENCE