PATRICIA BABBITT, et al., Plaintiff(s), v. ALBERTSON'S INC., et al., Defendant(s).

No. C-92-1883 SBA (PJH)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1993 U.S. Dist. LEXIS 21491

OPINION

ORDER RE: DEFENDANT'S MOTION FOR A PROTECTIVE ORDER

Defendant's motion for a protective order was heard on February 26, 1993. Gary Siniscalco appeared on behalf of defendant. Sheila Thomas and Mari Mayeda appeared on behalf of plaintiffs. Having read the parties' briefs and heard their arguments, this court orders as follows.

I. BACKGROUND

Plaintiffs are six women who are seeking class certification for an unemployment [*2] discrimination suit under Title VII, 42 U.S.C. ß 2000e et seq. and California's Fair Employment and Housing Act (the FEHA) against defendant, Albertson's, a retail grocery chain. Specifically, they allege that defendant denied them employment opportunities on account of their sex. In addition, two of the named plaintiffs allege that defendant has implemented discriminatory policies and practices against them and other Hispanics on the basis of their national origin in violation of 42 U.S.C. ß 1981, Title VII and the FEHA.

So far, during the course of this action, this court has entertained two discovery motions brought by the parties. First, plaintiffs brought a motion to compel production of various documents and a list of the names, addresses, telephone and social security numbers of all of defendant's employees since 1985. The motion was granted and production ordered based upon a finding that plaintiffs were entitled to access to defendant's employees who were also potential class members.

Second, plaintiffs moved for a protective order (1) prohibiting defendant's attorneys from continuing to interview putative class members, (2) compelling defendant to provide plaintiffs with a list [*3] of its employees that had been interviewed, (3) prohibiting defendant and its agents from making statements or engaging in conduct that deters potential class members from communicating with class counsel and (4) compelling defendant's counsel to inform putative class members before the interview that counsel represents defendant in a class action suit in which they may be class members and that they may refuse to talk to counsel or any other agent of defendant about the current litigation. Defendant opposed the motion on the grounds that there was no evidence of abuses by or misconduct of its attorneys, and hence, no need for a protective order. The motion was in large part denied based upon a finding that defendant's attorneys had committed no abuses, that defendant had an equal right to access to its employees, and that plaintiffs' requested relief was too broad. The protective order that was entered simply prohibited defendant's agents from making statements and engaging in conduct that deterred potential class members from speaking with class counsel.

Defendant now brings the current motion for a protective order. In this motion, defendant takes issue with a letter and intake [*4] form sent by plaintiffs' counsel to current and former employees of defendant following discovery of their names and addresses pursuant to this court's order. The letter provides:

> [Firm Caption]
>
> January 15, 1993
>
> RE: Babbitt v. Albertson's, Inc.
>
> Dear Potential Class Member:

Our law firm has filed a statewide class action against Albertson's. The named plaintiffs, six of your co-workers, charge Albertson's with giving better training, jobs, hours and promotions to white males, while women and Hispanics get the lower-paid and dead-end departments and jobs.

If we win this suit, we expect to change Albertson's discriminatory practices, and get money damages for women and Hispanic employees. This firm recently won a similar lawsuit against Lucky stores in Northern California which resulted in more promotions and job opportunities for blacks and women.

The federal court ordered Albertson's to give us the addresses of everyone who might be included in this case. We are writing to you because you might have suffered from employment discrimination at Albertson's.

We would like to hear from you especially if you have been denied any of the following: training, full-time status, additional hours, [*5] favorable job assignments, night crew work, or promotion to any managerial positions like to night crew manager, key carrier, head clerk, receiving clerk, produce manager, grocery manager and store director. Also call if you, or anyone you know, was directed into a lower paying job like bakery hostess, GM clerk or deli and salad bar jobs.

If you have information regarding such discrimination, please fill out and return the enclosed questionnaire or call us at 1-800-568-7441. There will be no charge for consulting with us.

We would also like to hear from you if an Albertson's attorney or representative has contacted you about your discrimination claims. We advise you that you do not have to talk to Albertson's attorney's or other representatives about your claims of discrimination Albertson's may attempt to use your statements against you in this lawsuit. IT IS ILLEGAL FOR ALBERTSON'S TO RETALIATE AGAINST YOU.

Sincerely,

[plaintiffs' counsel]

A form entitled "intake form" was attached to the letter and (requested the recipient to fill in his/her name, address, telephone number, social security number, sex, race, date of hire, first position held, subsequent positions held, positions for [*6] which recipient applied and was rejected [1], reason for the rejection and whether defendant's agent had contacted recipient. Across the top of the intake form was typed "PRIVILEGED WORK-PRODUCT/ATTORNEY/CLIENT COMMUNICATION."

1 Plaintiff provides examples of such positions: "promotion to head clerk, training in stocking/ordering, additional hours, full-time status, transfers out of dead end departments."

Defendant contends that certain statements in the letter and intake form are misleading and/or deceptively incomplete with regard to (a) this court's purported role in the mass mailing, (b) the status of the current action and (c) the nature of the claims involved. As a result of these statements, defendant argues that it has suffered and will continue to suffer harm and that this harm outweighs any claimed interference with plaintiff's rights. Accordingly, defendant requests that this court (1) prohibit plaintiffs from transmitting the letter and providing a toll free number, (2) require plaintiffs to notify all recipients that the court does not endorse the contents of the letter and form and has not ruled on plaintiff's claims or on class certification, (3) require that plaintiff [*7] submit to the court and to defendant all completed intake forms and other information obtained in response to the letter and forms and (4) require that plaintiff submit any future written communications to putative class members or nonparties to this court for review and advance approval.

In addition to defendant's objections to the letter and intake form, at the hearing, this court noted its concerns with the communication. Specifically, the court noted that the letter and form are not neutral and objective in tone. [2] Moreover, plaintiffs do not state the purpose of the letter--to garner information in order to obtain class certification. Finally, they do not state that the recipient is not required to respond.

2 Defendant also indirectly raises this objection when it takes issue with certain advocacy language used in the letter and form.

In response to defendant's arguments and this court's concerns, plaintiffs argue that the statements in the letter and intake form to which defendant points are not misleading or deceptively incomplete. Case law does not require that communications to potential class members be objective and neutral. Furthermore, the purpose of the letter can be readily [*8] gleaned from the letter's content, and defendant cured any defect in the letter with regard to whether the recipient had to respond when defendant posted notices in its stores specifically stating that recipients were under no obligation to respond.

II. DISCUSSION

Preliminarily, this court notes that upon motion by a party and "for good cause shown," a court may make an order "which justice requires to protect a party from annoyance, embarrassment, oppression, undue burden or expense" and that such an order may disallow discovery, set terms and conditions for discovery or limit the scope of discovery. Fed. R. Civ. Pro. 26(c). The burden of establishing good cause rests with the moving party. Gray v. First Winthrop Corp., 133 F.R.D. 39, 40 (N.D. Cal. 1990). To meet its burden, the party must prove a particular and specific need. Id.

Additionally, Fed. R. Civ. Pro. 23(d) provides that, in class actions brought under this rule, a court may make an order requiring for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given to class members in such a manner as the court may direct and imposing conditions on the representative parties. [*9] Accordingly, a court may limit communications between parties and class members, may dictate the language used in communications or impose conditions on parties before communication is permitted.

Before issuing an order limiting communications, a court must weigh the need for a limitation against the potential interference with the rights of the parties. Gulf Oil Co. v. Bernard, 452 U.S. 89, 101, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981). In so doing, the court must identify the potential abuses creating the need for the limitation and make specific findings on the record. Id. If the court finds that the need outweighs the parties rights to uninhibited communication, the court must carefully draw an order that limits speech as little as possible, consistent with the rights of the parties under the circumstances. Id.

A. Grounds For A Protective Order:

1. Advocacy Language:

Because the language of the letter and intake form is clearly partisan, this court will first address the issue of whether communications to potential class members must be objective and neutral.

Plaintiffs rely on Gulf Oil Co. v. Bernard, id., and Domingo v. New England Fish, Co., 727 F.2d 1429 (9th Cir. 1984) for support that advocacy letters to potential [*10] class members are proper. While neither case directly stands for this proposition, implicit in decisions of both cases is that advocacy language may be utilized.

In Gulf Oil, Gulf entered into a conciliation agreement with the EEOC with regard to alleged discrimination against black and female employees at one of Gulf's refineries. Pursuant to the agreement, Gulf began to offer backpay to alleged victims of discrimination in return for a full release from all discrimination claims. Bernard and others then filed a class action suit against Gulf and others on behalf of all black present and former Gulf employees and rejected applicants of employment. Gulf then filed a motion for an order limiting communications from plaintiffs and their counsel to potential and actual class members. The district court granted the order, inter alia prohibiting all communications between plaintiffs or their counsel and any potential or actual class member who was not a formal party, without the court's prior approval. Plaintiffs then sought prior approval of a notice that they wanted to send to potential class members which urged members to talk to a lawyer before they signed the Gulf release and which [*11] informed members of the pending law suit against Gulf. The district court denied plaintiffs' motion. Plaintiffs appealed. The United States Supreme Court granted certiorari on the issue of whether the district court's order banning all communications between plaintiffs and class members without prior approval was constitutional. In its analysis, the Court did not directly address

the issue of whether the notice's use of advocacy language was proper. However, the Court recognized that the notice was intended to encourage employees to rely on the class action for relief, rather than to accept Gulf's offer and found that the solicitation of members in that case was appropriate.

In Domingo, the Ninth Circuit inter alia addressed the issue of whether the district court's ban on communications between plaintiff's counsel and members of a certified class was proper. Prior to the ban, plaintiff's counsel had communicated with class members and had zealously encouraged them to file claims for damages against defendant. In striking the ban on communications, the Ninth Circuit noted the district court's concern with counsel's overzealous pursuit of claims, but stated that such overzealousness [*12] can and should be corrected through the advocacy system, by responses from opposing counsel, and not by a ban on communications. Id. at 1441.

Defendant has not cited to, nor has this court found, any cases pertaining to pre-certification communications with potential class members in which a court has held that the communications must be objective and/or neutral. [3] Fed. R. Civ. Pro. 23(c)(2), which pertains to court-ordered notice to post-certification class members, has been interpreted to require that the language of the notice be objective and neutral. See 2 Herbert B. Newberg, Newberg on Class Actions, ß 8.39, at 175. However, the reason behind that requirement is that the class members are being notified that the court will exclude them from the class if they so request by a certain date, if they do not respond by this date, they will be included despite an unfavorable judgment, and if they are not excluded, they may enter an appearance through counsel. Thus, the notice is designed to ensure that the due process rights of members are upheld. See Notes of Advisory Committee On Rule 23(c)(2), 1966 Amendment (citing Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940) and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). [*13]

3 In its brief defendant cited to Hoffman v. United Telecommunications, Inc., 111 F.R.D. 332 (D. Kan. 1986). Hoffman, however, was not a class action suit brought under Fed. R. Civ. Pro. 23.

In the case at hand, the letter and intake form were not sent to potential class members in order to meet due process requirements, but rather to gather information necessary to certify a class. Accordingly, the need for neutral and objective language is not present. As a result, and, based on the aforementioned, this court holds that plaintiffs' use of advocacy language in the letter and form was not prohibited. Thus, defendant is not entitled to a protective order on this ground.

2. Misrepresentations/Misleading Statements

Next defendant contends that the letter and intake form contain misleading and/or deceptively incomplete statements with regard to (a) the court's role in the litigation, (b) the status of the current action and (c) the nature of the claims involved. [4]

4 In its brief, defendant refers to the statements in the letter and intake form as "misleading and/or deceptively incomplete." Yet, at the hearing, defendant referred to them as "misrepresentations." Because Black's Law Dictionary, [*14] Sixth Edition, provides that "a misleading statement" and "a misrepresentation" are synonymous, this court will use the terms interchangeably.

Preliminarily, this court notes that misrepresentations and misleading statements made to potential and actual class members clearly may harm the parties and the processes of the court. Zarate v. Younglove, 86 F.R.D. 80, 101 (C.D. Cal. 1980). Accordingly, a party has no legitimate interest in making such statements. Id.

(a) The Court's Role

Defendant first takes issue with the statement in the letter that "[t]he federal court ordered Albertson's to give us the addresses of everyone who might be included in this case." Defendant argues that this statement implies that the court authorized the mailing and endorsed the statements therein. For support, defendant cites to Woods v. New York Life Ins. Co., 686 F.2d 578 (7th Cir. 1982) and Hoffman v. United Telecommunications, Inc., 111 F.R.D. 332 (D. Kan. 1986). Defendant contends that the letter refers to "dead end jobs and departments" and suggests that the employees that were given these jobs were discriminated against. Thus, the citation to the court's authority, suggests that the court agrees with [*15] these statements, and thus, defendant is prejudiced in its ability to defend itself. Moreover, the reference to dead end jobs and departments hurts defendant's relationship with its employees who now feel that they were given these jobs as a result of discrimination. For support that the statements were misleading, defendant provides the declarations of several employees who state that they or others were confused by the reference to the court.

Plaintiffs argue that their characterization of the court order was not improper or misleading. While the court simply ordered that defendant produce the names and addresses of all employees of defendant since 1985, the court did so with knowledge that plaintiffs would utilize the information to contact employees who might be potential class members. Accordingly, plaintiff's characterization of "all people who might be included in this case" is a subset of what the court ordered. Moreover, the declarations that defendant produced to support its argument that the letter wrongly implies that the court endorsed the communication and its contents contain hearsay and multiple hearsay. Plaintiffs have produced the declarations of several employees [*16] who were not confused or misled by the letter.

The cases to which defendant cites for support that the reference to the court order misrepresents that the court endorsed the entire contents of the letter are distinguishable from the case at hand. In Woods, the notice to potential class members was sent on court letterhead and signed by the cleric of the court. (Furthermore, the notice specifically stated that the court authorized the sending of the notice. In Hoffman, the letter and questionnaire to potential class members were sent on EEOC letterhead and bore the official seal of that agency. The use of official letterhead more clearly implies court authorization of the contents than does the statement that the court ordered defendant to produce the names of all persons who might be included in this case.

Although defendant provides declarations of employees who state that they were confused by the court's role in the letter, plaintiff has provided declarations of employees who were not. Given the number of people that received the mailing, it is no surprise that some recipients would be confused and some would not. Therefore, this court will not take a subjective approach to determining [*17] whether the letter contained misleading statements, but rather, will view it objectively. See Reed, et al. v. American S.S. Co., 682 F. Supp. 333, 339 (E.D. Mich. 1988) (court evaluated text of brochure without regard to the subjective responses of its recipients).

The court finds that the statement with regard to the court order is not misleading. While the court order was simply that the defendant produce the names and addresses of its employees, the language used by plaintiffs does indeed refer to a subset of defendant's employees. Although the court does not approve of the liberties taken by plaintiffs, it does appear that plaintiffs have merely put their own "spin" on the court's order and have not actually misrepresented it. [5] Moreover, the court did order production with knowledge that defendant's employees would be contacted. In view of the finding that advocacy language is not prohibited, the court finds that this language as well as the use by plaintiffs of the term "dead end job" is permissible advocacy from which defendant is not entitled to protection.

5 The court cautions plaintiffs, however, that to avoid similar objections in the future, a statement regarding what the [*18] court ordered should state exactly what the court ordered in the language utilized by the court.

(b) The Status Of The Current Action

Next, defendant argues that plaintiffs misrepresent the status of the lawsuit by referring to the lawsuit as a "statewide class action," to the recipient as a "potential class member" and by labeling the intake form as "work product and attorney-client privilege." Defendant argues that these statements misrepresent that the class has been certified, when it has not been, and that plaintiffs' counsel represent the recipient, when they do not. Moreover, the use of the term "potential" is misleading because the mailing went to people outside of the class definition as stated in plaintiffs' amended complaint and because the recipient may believe that he/she has to respond in order to be considered a member of the class.

Plaintiffs argue that their use of the terms "statewide class action," "potential class member," and "attorney-client privilege" do not imply that a class has been certified, that a recipient must respond in order to be included within the class or that plaintiff's counsel represents the recipients. Further, plaintiffs argue that their labeling [*19] the intake form "privileged" was proper because the privilege attaches whenever a person consults an attorney for the purpose of obtaining legal advice, and if a class action is certified, all potential class members will be clients.

Again, this court finds that the statements are not misrepresentations. The underlying action is a statewide class action and the recipients, for the most part, are potential class members. Plaintiffs' counsel stated at the hearing that the mailing was directed to women and Hispanics only, the class as defined in the complaint, and that if anyone else received the mailing, it was an error. Additionally, the letter and form do not state that a class has been certified. The labeling of the intake form as privileged and plaintiff's advising the recipient that he/she does not have to talk with defendant's counsel and that to do so might lead to defendant's later using the communications against him/her does not imply that plaintiffs' counsel represents the recipient. The advice is clearly self-serving, but again this court finds that the language about which plaintiff complains are not misrepresentational and therefore, are not prohibited.

(c) The Nature Of [*20] The Claims Involved

Finally, defendant contends that the letter misrepresents the nature of the lawsuit. Specifically defendant takes issue with plaintiffs' describing the lawsuit as charging defendant "with giving better training jobs, hours and promotions to white males," comparing this current lawsuit with the case of Stender v. Lucky's and citing the remedies won in that case "for blacks and women." Defendant argues that these statements misrepresent that the current case involves class action claims of race discrimination and that, by making such statements, plaintiffs are attempting to solicit these types of claims.

Plaintiffs contend that their reference to white males, the Lucky Stores case and to the remedy obtained therein for blacks land women was not an attempt to solicit claims of race discrimination. The reference to white males was used to contrast those who were obtaining the better positions with those who were not--women and Hispanics. Further, they provided an accurate description of the Lucky stores case, and the letter explicitly stated that the current lawsuit involves women and Hispanics only. Moreover, the letter and form were sent only to women and Hispanics. [*21] If the letter was received by anyone not belonging to these two groups, it is defendant's fault because plaintiffs relied on defendant's race and sex codes.

This court agrees that plaintiffs' reference to white males and the remedies won for blacks and women in Stender v. Lucky's may have given the impression that the current case involved race discrimination claims. At the hearing, plaintiffs' counsel admitted as much. However, in the letter, plaintiffs twice state that they are pursuing claims of discrimination against women and Hispanics. Also the letter and form for the most part were sent only to women and Hispanics. Additionally, plaintiffs' counsel has represented to the court that they were not attempting to solicit race-based claims to pursue in this action. In view of these considerations, and because the statements are accurate, the court finds that defendant has failed to establish harm to its interests.

Having found that the language about which defendant objects is not prohibited and that the facts, while slanted, are not misrepresented, the court finds that defendant has not established the need or appropriateness for the broad relief sought. Thus, defendant's request [*22] for a protective order prohibiting plaintiffs from transmitting the letter and intake form, requiring plaintiffs to submit to the court and to defendant all completed intake forms, and requiring plaintiffs to submit to the court for advance approval any future communications to potential class members is DENIED.

The remaining question is whether the least restrictive relief sought, a corrective notice, is warranted. The parties' arguments have essentially focused on the harm to defendant's interests, or lack thereof. However, the court finds that it is equally appropriate under Gulf Oil and Fed. R. Civ. Pro. 23(d) to consider the interests of the potential class members.

The court is very concerned that the letter does not state its purpose--that plaintiffs are trying to obtain class certification and thus, are requesting information to assist with that goal. Nor does the letter state that the recipient is not required to respond. The latter omission is particularly troublesome given plaintiffs' earlier insistence that defendant be required to give such an admonishment regarding its contacts with potential class members. This court does not view the posting by defendant of such an [*23] admonishment in its stores to be a sufficient cure, particularly in view of the fact that plaintiffs' letter was sent to people who no longer work for defendant.

Without a clear statement of the purpose of the letter, the recipient is left to speculate and possibly conclude that a class was certified. Similarly, in the absence of notice that no response was required, the recipient may have concluded that a response was necessary to be included in or excluded from the suit. The letter does nothing to dispel either conclusion.

Accordingly, this court finds potential harm to the interests of the potential class because of these omissions. This court further finds that a corrective notice, which would not interfere with plaintiffs' right to communicate with potential class members, is the type of remedy that would be appropriate but for the passage of time.

The letter is dated January 15, 1993. [6] (Declaration of Gary Siniscalco, Exhibit A, January 27, 1993). A corrective notice could not be sent until April 1, 1993, the day after the date of this order and two and a half months after the initial letter. Given the passage of time, it is likely that the recipients have already either taken [*24] action in response to the letter or discarded it. Thus, this court finds that a corrective notice issued at this time is more likely to add to the confusion of potential class members than to dispel it.

6 The record contains other copies of the letter bearing a date of January 25, 1993. (See e.g. Declaration of Lester James Little, Exhibit 1, January 27, 1993). No explanation is apparent from the record.

The court is not unmindful of the effort expended by defendant to prevent this result. Indeed counsel for defendant expressed his concerns about the contents of the letter in a letter to the court on January 21, 1993. Plaintiff responded the following day with a suggestion that defendant file a motion for a protective order if it believed it had sufficient grounds to complain about the letter. The motion was filed on January 27, 1993 with a hearing date of March 12, 1993. Defendant moved for an order shortening time and requested that the motion be heard on February 5, 1993. Plaintiff opposed the motion on several grounds including its complexity and the need to have more than five days to respond. The court then advanced the hearing date to February 26, 1993. Unfortunately, because [*25] of the press of business, it has taken the court an additional thirty days to issue this order.

In view of these considerations, the court orders as follows:

1. No corrective notice need be sent to anyone to whom the letter has previously been sent.

2. Any future mailings of the same letter and intake form or similar solicitation letter shall include a statement as to the purpose of the letter and that the recipient is not required to respond.

3. Should defendant reasonably believe that letters in violation of this order are being sent, defendant shall bring it to the court's attention in writing and a hearing shall be held on five days' notice.

III. CONCLUSION

Defendant's motion for a protective order is DENIED, except that future solicitations shall contain the information cited in paragraph 2 above.

IT IS SO ORDERED.

Dated: March 31, 1993

PHYLLIS J. HAMILTON

United States Magistrate Judge