1992 WL 443561
United States District Court, E.D. California.

June BARNHART, et al., Plaintiffs,
v.
SAFEWAY STORES, INC., Defendants.

Civ. No. S–92–0803WBS JFM. | Dec. 14, 1992.

Attorneys and Law Firms

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Steven A. Brick, Orrick Herrington and Sutcliffe, San Francisco, CA, Trish M. Higgins, Orrick Herrington and Sutcliffe, Sacramento, CA, for defendant.

Opinion

ORDER

MOULDS, Chief United States Magistrate Judge.

***1** Plaintiffs' motion to compel came on regularly for hearing August 13, 1992 at 9:00 a.m. Jocelyn D. Larkin and David Borgen appeared for plaintiffs. Steven Brick and Trish M. Higgins appeared for defendant. Upon review of the motion, the parties' joint stipulation, supporting documents, and hearing the argument of counsel, and good cause appearing therefor, THE COURT FINDS AND ORDERS AS FOLLOWS:

BACKGROUND

Four female food clerks filed individual claims and a putative class action against defendant Safeway Stores, Inc. for alleged sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.,* and the Fair Employment and Housing Act, Cal. Gov't.Code § 12940, *et seq.* Each of the named plaintiffs is a full-time food clerk at a Safeway retail store. Plaintiffs allege that they are and have been, or in the future may be, "adversely affected by the continuing discriminatory policies and practices complained of herein, including but not limited to being denied promotions, including promotions to full time, night shift, work on the retail floor, and management positions at Safeway and being denied additional hours and desirable store, shift and department assignments at Safeway, and being denied adequate training opportunities at Safeway." Complaint ¶ 8.

On November 16, 1992, the district court granted defendant's motion for summary judgment on the claims of plaintiffs Marjorie Rankin and Heidi Kauzlarich. The court found Rankin and Kauzlarich's claims time-barred. The district court will hear plaintiffs' motion for class certification on April 12, 1993.

Plaintiffs move to compel production of documents requested in their First Request for Production of Documents. After meet and confer sessions, the parties narrowed their disputes to the following documents production requests: 1–4, 8–13, 17, 18, and 20–22. The parties submitted a stipulation pursuant to Local Rule 251 which categorizes their disputes as follows:

A. Safeway objects to production of the following:

1. Documents relating to the time-frame from 1982 through 1985;

2. Documents relating to all employees in the non-food departments in the Northern California retail stores;

3. Documents relating to all part-time employees in the Northern California retail stores;

4. Individual payroll earnings data for all employees in the Northern California retail stores;

5. Written requests by any employee in the Northern California retail stores for a promotional opportunity to full-time or management level positions, as well as any documents that record any such requests; and

6. Documents concerning sex discrimination administrative charges filed by any Safeway employee.

B. The parties have stipulated to a protective order but dispute the scope of one provision.

DISCUSSION

I. ***Legal Standards***

The overarching issue here is defining the scope of discovery prior to certification of a class. Many courts, including the Ninth Circuit, have recognized that discovery is often necessary to determine if a class is maintainable and to define the scope of the class. *See Doninger v. Pacific Northwest Bell, Inc.,* 564 F.2d 1304, 1312 (9th Cir.1977); *Pittman v. E.I. du Pont de Nemours & Co., Inc.,* 552 F.2d 149 (5th Cir.1977) (certain amount of discovery "essential" to class determination); *Rodriguez v. Banco Central,* 102 F.R.D. 897, 902 (D.P.R.1984) ("some discovery must be procured in order to determine whether the action may proceed as a class action").

***2** The Ninth Circuit has held that in certain circumstances it is reversible error to deny discovery prior to class certification:

> "Whether or not discovery will be permitted in a case of this nature lies within the sound discretion of the trial court. Rule 23(c)(1) provides that 'As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.' In determining whether to grant discovery the court must consider its need, the time required, and the probability of discovery resolving any factual issue necessary for the determination. The propriety of a class action cannot be determined in some cases without discovery, as for example, where discovery is necessary to determine the existence of a class or set of subclasses...." It is true that the better and more advisable practice for the District Court to follow is to afford the litigants an opportunity to present evidence as to whether a class action is maintainable. And, the necessary antecedent to the presentation of evidence is, in most cases, enough discovery to obtain the material, especially when the information is within the sole possession of the defendant.

Doninger, 564 F.2d at 1312–13 (quoting *Kamm v. California City Development Co.,* 509 F.2d 205, 210 (9th Cir.1975)) (citations omitted). The Ninth Circuit has further explained that a district court does not abuse its discretion in denying discovery where the plaintiff has not met the "burden of advancing a prima facie showing that the class action requirements of Fed.R.Civ.P. 23 are satisfied or that discovery is likely to produce substantiation of the class allegations." *Mantolete v. Bolger,* 767 F.2d 1416, 1424 (9th Cir.1985) (citing *Doninger,* 564 F.2d at 1313).

Defendant repeatedly relies on the rule enunciated by the Ninth Circuit and Supreme Court that the determination on a class certification motion "does not permit or require a preliminary inquiry into the merits." *Blackie v. Barrack,* 524 F.2d 891, 901 (9th Cir.1975) (citing *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177–78 (1974)), *cert. denied,* 429 U.S. 816 (1976). However, *Blackie* and *Eisen* do not address the issue of pre-class certification discovery. Rather, both cases involve the extent of the district court's inquiry into the merits when determining whether to certify a class. In *Blackie* the court noted that the district court may not inquire into the merits at the class certification stage and therefore must necessarily engage in some speculation in determining whether a common question exists among class members. 524 F.2d at 901. In *Eisen* the Supreme Court held that the district court improperly imposed part of the class notice costs on the defendants after determining that the plaintiff was likely to prevail on the merits. 417 U.S. at 177–78.

Consequently, *Blackie* and *Eisen* do not stand for the proposition that discovery on the merits is impermissible prior to the class certification determination. However, some courts have held that pre-class certification discovery should be limited to the class certification issues. *See Nash v. City of Oakland,* 90 F.R.D. 633, 636–37 (S.D. Ohio 1981); *Plummer v. Chicago Journeyman Plumbers' Local Union No. 130,* 77 F.R.D. 399 (N.D. Ill.1977). Other courts have simply noted that discovery

on the merits need not and should not be completed prior to the class certification determination. *See National Organization for Women v. Sperry Rand Corp.,* 88 F.R.D. 272, 277 (D.Conn.1980). The district court in *Plummer* relied on a recommendation by the 1977 edition of the *Manual for Complex Litigation* to hold that a "bifurcated approach to discovery is the proper and most efficient way to administer this class action." 77 F.R.D. at 402. Interestingly, the 1985 edition of the *Manual* rejects this approach. The 1985 *Manual* recognizes that consideration of the merits, to a certain extent, is usually inextricably bound up with the Rule 23 requirements of commonality and typicality[1].

> ***3** Sometimes the initial discovery should be limited to the requirements of Fed.R.Civ.P. 23(a) and (b) that are in dispute.... Often, however, bifurcating discovery in this manner will be counterproductive. Discovery relating to "class issues" is not always distinguishable from other discovery. Moreover, the key question in class certification is often the similarity or dissimilarity of the claims of the representative parties to those of the class members—an inquiry that may require some discovery on the "merits" and development of the basic issues.

Manual for Complex Litigation, Second at 211 (1985) (footnote omitted); *see also Doctor v. Seaboard Coast Line Railroad Co.,* 540 F.2d 699, 708 (4th Cir.1976) (the merits may be inextricably bound up with the class action determination of whether the named plaintiffs have an appropriate nexus with the class); *Gray v. First Winthrop Corp.,* 133 F.R.D. 39, 41 (N.D.Cal.1990) ("An order restricting discovery to class issues would be impracticable because of the closely linked issues, and inefficient because it would be certain to require ongoing supervision of discovery.").

In ruling on this motion, this court keeps in mind two important considerations. First, this is not the time to determine whether a class will be certified. The district court has set a hearing on that issue for April 12, 1993. Second, and most importantly, this court will not be the one ruling on class certification. Therefore, it is particularly inappropriate for this court to limit discovery, as defendant requests, based on this court's determination of the proper scope of a potential class. It is this court's duty to permit the parties to give the district court *all* information that the district court *might* find relevant in making a class action determination. Furthermore, to the extent any discovery involves only class issues, defendant may seek recovery of the costs of this discovery if plaintiffs do not succeed in certifying a class. *See Rich v. Martin Marietta Corp.,* 522 F.2d 333, 343 (10th Cir.1975).

II. *Issues*

A. *Time period from 1982 through 1985*

In their motion, plaintiffs seek discovery for the five years prior to the beginning of the liability period of September 28, 1987. Initially, the court notes that the liability period has changed. After the hearing on this discovery matter, the district court dismissed the claims of plaintiffs Marjorie Rankin and Heidi Kauzlarich. The September 1987 liability period was based on Rankin's charge, the earliest of the four named plaintiffs' charges. On November 18, 1992, defendant's counsel filed a letter brief informing the court that the dismissal of Rankin and Kauzlarich means the liability period moves forward to January 1, 1989. Since the earliest remaining EEOC charge was filed January 1990, this assessment appears correct. Plaintiffs' counsel has made no attempt to inform the court otherwise. Since plaintiffs seek discovery for the five years prior to the liability period, the court now considers this motion to request discovery for information related to the years 1984 and 1985.

***4** Apparently recognizing the potential relevance of such information, defendant has been willing to produce information prior to the liability period. When the parties believed the liability period began in 1987, defendant produced documents from January 1986 to the present. *See* Amended Stipulation Re Discovery Disagreements at 5:2–4. The question is only how far back plaintiffs' discovery should be permitted to go.

Plaintiffs seek this information to ascertain the origin of policies and practices which now exist within the retail stores. *Id.* at 8:13–16. While this information is obviously relevant to the merits of plaintiffs' action, whether it goes forward with two individual plaintiffs or a class, it may also prove relevant to class certification issues. Development of basic issues such as this one may be necessary for plaintiffs to show that class members' claims share common questions of law and fact and to show that the named plaintiffs' claims are typical of those of other class members. *See Manual for Complex Litigation, Second* at 211 (1985). The court also notes that this discovery is now half as burdensome as first thought since the discovery period goes back to 1984 rather than 1982. Defendant shall produce all requested documents from January 1, 1984, to the present with any limitations specified herein.

B. ***Non-food department employees***
Plaintiffs seek information relating to all employees in the non-food departments of Northern California Safeway retail stores. Defendant argues that plaintiffs, who are all employed in the food departments, have not shown a sufficient nexus between the food and non-food positions. Defendant further argues that plaintiffs should be required to show a provisional certification for food department employees before they may seek to expand the class to other departments' employees.

Initially, the court cannot accept defendant's contention that some sort of two-stage class certification procedure is appropriate here. That is a decision for the district court. The district court has given no indication that it intends to determine class certification in the manner suggested by defendants. Further, this court cannot limit discovery in a way that would preclude a potential class. *See Shannon v. Hess Oil Virgin Islands Corp.,* 96 F.R.D. 236 (D.V.I.1982) (citing *Karan v. Nabisco, Inc.,* 78 F.R.D. 388, 407 (W.D.Pa.1978)).

The question, then, is whether the case law clearly prohibits establishment of a class containing both food and non-food employees. If it may be possible to include non-food employees in the class, this court will not deny plaintiffs the opportunity to make that showing.

In *Barefield v. Chevron U.S.A., Inc.,* 44 Fair Empl.Prac.Cas. (BNA) 1885 (N.D.Cal.1987), the court explained that the commonality requirement of Rule 23 does not mean that every question of law and fact must be common to every class member. Similarly, the typicality requirement "requires only that the claims emanate from the same legal or remedial theory." *Id.* (citing *Wofford v. Safeway Stores, Inc.,* 18 Fair Empl.Prac.Cas. (BNA) 1645, 1666 (N.D.Cal.1978)). Courts have held that employees with different types of claims than the named plaintiffs and those in different positions than the named plaintiffs may comprise a class.

***5** In *Stender v. Lucky Stores, Inc.,* 53 Fair Empl.Prac.Cas. (BNA) 1607, 1990 WL 192734 (N.D.Cal.1990), the named plaintiffs, who were food department employees, contested denial of hours, job assignments, training, and promotional opportunities. While the defendant had stipulated to include those non-food department employees in the class of persons with similar claims, it resisted plaintiffs' attempt to include non-food department employees who contested their initial assignments. The court noted that plaintiffs complained generally about the lack of promotional opportunities to management positions, and that women initially assigned to non-food positions would be less able to pursue store management positions because the non-food promotional track was, like the track in this case, different than the food department track. 1990 WL 192734 at p. 4. The court also focused on plaintiff's claims that the decision making process for both initial assignments and all other post-hiring decisions was subjective. *Id.* at 5. The court concluded that concerns of fairness and efficiency thus permitted plaintiffs to represent initial assignment claims.

Similarly, the United States Supreme Court has recognized that a class could be composed of those in dissimilar positions. In *General Telephone Co. of the Southwest v. Falcon,* 457 U.S. 147, 159 n. 15 (1982), the Court observed that:

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.

In *Shannon v. Hess Oil Virgin Islands Corp.,* 96 F.R.D. 236, 242 (D.V.I.1982), the court felt that this quoted language from *Falcon* provided the *Shannon* plaintiffs, who were rejected applicants, with the basis for conducting discovery of current employees. *See also Duke v. University of Texas,* 729 F.2d 994, 996–97 (5th Cir.) (plaintiff permitted to do discovery of other University departments where method of making employment decisions in plaintiff's department was "fairly representative" of method used in University as a whole), *cert. denied,* 469 U.S. 982 (1984).

Here, plaintiffs allege that defendant has a general policy of relying on "unweighted subjective and arbitrary criteria in making assignment, training and promotional decisions." First Amended Complaint at 16:11–17. According to the collective bargaining agreement, while non-food employees are on a different promotional track, they are evaluated for promotions under the same standards used for food employees. *See* Higgins Declaration in Support of Stipulation Re Discovery Disagreements, Exhibit 2 at ¶¶ 1.3.9, 4.3.1. Under *Stender* and *Falcon* these allegations, if proven, would be weighted toward inclusion of non-food employees in the class. Plaintiffs should therefore have the opportunity to conduct discovery of non-food employees. *See Shannon,* 96 F.R.D. at 242.

***6** While there is case law supporting the inclusion of non-food department employees in the plaintiff class, there is, not surprisingly, case law to the contrary. *See Zahorik v. Cornell University,* 98 F.R.D. 27, 31 (N.D.N.Y.1983); *National Organization for Women v. Sperry Rand Corp.,* 88 F.R.D. 272, 278 (D.Conn.1980) (discovery regarding individual employees limited to those at management level); *Johnson v. Southern Railway Co.,* 25 Fair Empl.Prac.Cas. (BNA) 714 (N.D.Ga.1977) (discovery limited to positions with which named plaintiff somehow connected); *Thornberry v. Delta Air Lines,* 30 Fair Empl.Prac.Cas. (BNA) 520, 527 (N.D.Cal.1978) (class limited to those in departments in which plaintiffs worked). It should be noted that in the cited cases involving limits on discovery the district court was willing to make an initial determination that the plaintiff could not adequately represent employees in certain other positions. This court is not the one to make that decision in this case. Given the possibility that plaintiffs can meet the Rule 23 requirements for employees in the non-food departments, this court will not limit discovery to the food department.

C. ***Part-time employees***

The issues regarding discovery of information regarding part-time employees (named plaintiffs are full-time) are similar to those discussed above in section B. Again, some courts have limited discovery to information regarding employees with the same type of employment as that of the named plaintiff. *See Wright v. Olin Corp.,* 24 Fair Empl.Prac.Cas. (BNA) 1615 (W.D.N.C.1979) (court limits discovery to hourly employees based on unidentified "underlying charges" and burden of discovery); *Cutner v. Atlantic Richfield Co.,* 16 Fair Empl.Prac.Cas. (BNA) 743, 744 (E.D.Pa.1977) (court refuses to permit, at this time, discovery of hourly employees where named plaintiff was salaried employee)[2]. However, a number of issues may be similar to both groups, particularly because it appears likely that promotional decisions are made by the same decision maker in each Safeway store for both part-time and full-time employees in each department. Furthermore, as discussed above, plaintiffs allegations of a general policy of subjective decision making with respect to job assignments and promotions may be adequate to include part-time employees in the class. Therefore, this court finds discovery of information regarding part-time employees permissible at this time.

D. ***Individual Earnings Data***

Defendant points out that document production request no. 17 asked for documents "identifying employees' job titles and/or pay levels from date of hire to the present." Defendant argues that "pay levels" means an employee's rate of pay and does not include, as plaintiffs suggest, information that would show whether an employee received discretionary hours, step-up pay, or other premium pay in certain circumstances. Plaintiffs do not address this argument. Without ruling on the discoverability of such "individual earnings data," the court agrees with defendant that it need only provide documents regarding employees' rate of pay.

E. ***Requests for full-time or management level positions***

***7** Plaintiffs' request for all documents reflecting an employee's request for full-time or management positions is, as defendants contend, particularly burdensome. According to defendant, the request will require the manual review of all relevant employees' personnel files, manager's files, and affirmative action records. Nonetheless, this information will certainly aid plaintiffs in identifying class members and in establishing commonality and typicality under Rule 23.

Plaintiffs have expressed a willingness to receive a sampling of the requested information. *See* Amended Stipulation Re Discovery Disagreements at 48 n. 25. Safeway states that it is currently consulting with an expert to determine whether a valid sampling is possible. *Id.* at 49 n. 26. A sampling is a reasonable compromise here. Of course, the parties must first determine how to take a sampling. To that end, the court orders defendant to submit a proposed sampling method to plaintiffs' counsel within 20 days of the filed date of this order. Within 10 days of receipt of that proposal, plaintiffs' counsel shall inform defendant's counsel whether or not the proposal is acceptable. If it is not, plaintiffs' counsel shall make suggestions for a sampling method. If the parties are unable to reach an agreement on the sampling method, they shall inform the court by filing a stipulation as described in Local Rule 251. At the parties' request, the court will hear the dispute on its next regularly scheduled law and motion calendar at least three days after the stipulation is filed.

With respect to defendants' privacy concerns, the court finds that these concerns are adequately met by the protective order described below.

F. ***Other Administrative Charges of Sex Discrimination***

In document request no. 13, plaintiffs seek "all documents relating to charges filed with the EEOC, DFEH, OFCCP, or Department of Labor alleging sex discrimination relating to promotions, hours, training or assignments at Safeway retail facilities." The requested material may lead to the discovery of information relevant to identifying class members and establishing commonality and typicality under Rule 23. Defendant is wise to focus solely on its objection that these documents are protected by privacy considerations. *See* Amended Stipulation Re Discovery Disagreements at 54–56.

While the requested documents appear to be entitled to protection to assure the charging parties' privacy, *see Guruwaya v. Montgomery Ward, Inc.,* 119 F.R.D. 36, 39 (N.D.Cal.1988), the protective order described below will adequately accomplish that goal. The cases cited by defendant in which courts have denied discovery did not examine the possibility of a protective order. Furthermore, statutory law bars only the EEOC's dissemination of such information. *See* 42 U.S.C. §§ 2000e–5(b), 2000e–8(e).

G. ***Protective Order***

The parties have stipulated to a proposed protective order but request the court's aid in resolving one provision. The proposed order limits access to the confidential information to counsel, experts, consultants, and court personnel. Greenblatt Declaration in Support of Stipulation Re Discovery Disagreements, Exhibit D at pp. 4–5. The parties dispute the extent of any further disclosure of the information. Defendant's draft of the proposed order includes the following paragraph:

> ***8** During the course of a deposition in the case, authors or recipients of the Confidential Information and current and former employees of Safeway, provided the deponent has signed a stipulation, in the form set forth in Exhibit A [to the Protective Order], reflecting an agreement to abide by the terms of this protective order.

Id. at p. 5. Plaintiffs wish to delete the limitation to depositions so that they may reveal the protected information to the authors or recipients and to any current or former Safeway employee, provided the person signs the appropriate stipulation.

Protective orders issued by this court generally provide for a limitation on the dissemination of the protected information to the parties and their attorneys, experts, and consultants. Plaintiffs seek to expand this to include witnesses, as well as putative class members. As defendant points out, documents to be produced will include sensitive information such as employee pay levels, psychiatric records, and administrative sex discrimination charges. Permitting plaintiffs to widely disseminate this information defeats the primary purpose of the protective order—keeping confidential information confidential.

Restricting the use of the confidential information as defendant suggests should not unduly burden plaintiffs' ability to conduct informal fact-finding. Plaintiffs are free to conduct investigations based on the confidential information; they simply may not reveal that information to potential witnesses and class members. However, the court is willing to recognize the possibility that it may be necessary for plaintiffs to reveal some confidential information to a putative class member for purposes of meeting the Rule 23 requirements. Plaintiffs may seek relief from this protective order in certain specific instances. The court is willing to hear such requests on shortened time, if necessary.

Particularly at this precertification stage of the proceedings, essentially unlimited revelation of sensitive information to those who *may* be class members is unwarranted. Therefore, the court adopts the proposed protective order attached as Exhibit D to the Greenblatt Declaration in Support of Stipulation Re Discovery Disagreements. Within five (5) days from the filed date of this order, counsel shall lodge an original copy of the protective order, signed by counsel for all parties, for the court's signature.

ORDERS

For the foregoing reasons, the COURT MAKES THE FOLLOWING ORDERS:

1. Within thirty (30) days from the filed date of this order, defendant shall produce the documents identified in request nos. 1–4, 8, 9, 11–13, 17, 18, 20–22 of plaintiffs' First Request for Production of Documents in accordance with this order.

2. With respect to document request no. 10, defendant's counsel shall submit a proposed sampling method to plaintiffs' counsel within twenty (20) days of the filed date of this order. Within ten (10) days of receipt of that proposal, plaintiffs' counsel shall inform defendant's counsel whether or not the proposal is acceptable. If it is not, plaintiffs' counsel shall make suggestions for a sampling method. If the parties are unable to reach an agreement on the sampling method, they shall inform the court by filing a stipulation as described in Local Rule 251. At the parties' request, the court will hear the dispute on its next regularly scheduled law and motion calendar at least three days after the stipulation is filed.

***9** 3. The court adopts the proposed protective order attached as exhibit D to the Greenblatt Declaration in Support of Stipulation Re Discovery Disagreements. Within five (5) days from the filed date of this order, counsel shall lodge an original copy of the protective order, signed by counsel for all parties, for the court's signature.

Parallel Citations

60 Fair Empl.Prac.Cas. (BNA) 751, 25 Fed.R.Serv.3d 35

Footnotes

[1] According to Fed.R.Civ.P. 23(a), the party seeking class certification must demonstrate that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[2] In *Cutner* the court strenuously denied plaintiff's broad discovery requests. The court suggested that plaintiff first attempt depositions of appropriate officials or a few limited interrogatories to gain sufficient information to seek more specific discovery. It is difficult to imagine just how plaintiffs in the present case could similarly limit their initial discovery. Defendant has made no suggestions for doing so.