

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

FILED  
00 JUN 19 PM 4:05

CLERK U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF ILLINOIS  
EAST ST. LOUIS OFFICE

U. S. EQUAL EMPLOYMENT )  
OPPORTUNITY COMMISSION, )  
 )  
Plaintiff, )  
 )  
and )  
 )  
LORI VAUGHN and BRENDA CONNELL, )  
 )  
Plaintiff-Intervenors, )  
 )  
vs. )  
 )  
KROGER FOOD STORES, INC., )  
 )  
Defendant. )

CASE NO. 99-4187-GPM

ORDER

Before the Court is Plaintiff EEOC's Motion to Compel Defendant Kroger Food Stores, Inc. to Answer Certain of EEOC's Interrogatories and Requests for Production of Documents (Doc. 47), filed April 17, 2000. Pursuant to Fed. R. Civ. P. 37 and Local Rule 37.1, EEOC moves the Court for an Order compelling Kroger to answer fully certain of EEOC's discovery requests.

On August 23, 1999, EEOC filed this action for sex-based and sexual harassment on behalf of a class of Kroger's female employees under **Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq.** EEOC alleges that, since at least 1988, Kroger engaged in a pattern and practice of discrimination against a class of female employees because of their sex, by subjecting them to a hostile and abusive work environment and by failing to take prompt remedial action to eliminate the harassment after Kroger became aware of such behavior. At the

time the Complaint was filed, EEOC was aware of allegations that harassment was committed by a department supervisor, Donald Underwood, at the Marion, Illinois, store from 1986 until May, 1997. Since filing the Complaint, EEOC states that it has learned that sexual harassment complaints were made to Kroger store management against at least four other male employees at that store, some of which were prior to the charges filed regarding Underwood.

A. EEOC's First Set of Written Discovery

Interrogatory No. 11 and Document Request Nos. 10 and 11 seek information relating to and facts and evidence supporting Kroger's affirmative defenses. EEOC states that Kroger was required to make a reasonable inquiry at the time it asserted its affirmative defenses and that EEOC is entitled to know the facts and evidence of which Kroger is currently aware to support those defenses.

Kroger responds that EEOC's motion to compel information regarding Kroger's affirmative defenses is premature. Kroger maintains that the substance of affirmative defenses becomes apparent during the course of discovery. EEOC has included in its answer to several of Kroger's discovery requests that "investigation continues." Therefore, it is not possible to set out the basis for all of Kroger's affirmative defenses. Kroger further states that it has provided the information it presently possesses for its affirmative defenses and will supplement as additional information becomes available.

**Rule 8(c) of the Federal Rules of Civil Procedure** provides as follows:

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively . . . [any] matter constituting an avoidance or affirmative defense.  
**Fed. R. Civ. P. 8(c).**

The purpose behind **Rule 8(c)** is to give plaintiffs adequate notice prior to trial of the defenses that the defendant intends to assert. *Ft. Howard Paper Co. v. Standard Havens, Inc.*,

**901 F.2d 1373, 1377 (7th Cir. 1990)**. Thus, **Rule 8(c)** requires that Kroger put the plaintiffs on notice that it intends to rely on a defense. While it is true that Kroger must make a reasonable inquiry at the time it asserts its affirmative defenses to ascertain evidentiary support for them, it is also true that the substance of affirmative defenses becomes apparent during the course of discovery. Since Kroger has provided all of the information it presently possesses for its affirmative defenses and has stated that it will supplement as additional information becomes available, the Federal Rules require nothing more. Consequently, the Court will deny EEOC's Motion as to Interrogatory No. 11 and Document Request Nos. 10 and 11.

Interrogatory Nos. 3 and 9 seek information regarding the identity of persons supervised by Donald Underwood and persons who Kroger believes may have knowledge or information regarding the claims asserted in this case. EEOC states that Kroger has provided the names and Social Security numbers of persons who worked under Underwood in the produce, floral and salad bar departments. However, Kroger has not produced addresses and telephone numbers for these persons. Further, EEOC maintains that Kroger has not answered Interrogatory No. 9 fully, as it has not identified Kroger employees whom it interviewed in Fall, 1999, as persons who may have knowledge or information about this case and described each person's knowledge. Kroger offers no reason for failing to provide this information, merely stating that it has never refused to provide it. Since Kroger was first obligated to identify the persons sought in these requests in Kroger's Rule 26(a) Initial Disclosures, which it produced to EEOC on December 16, 1999, Kroger's continued failure to provide the requested information amounts to refusal to provide it. Consequently, the Court will grant EEOC's Motion as to Interrogatory Nos. 3 and 9.

B. EEOC's Second Set of Written Discovery

Interrogatory No. 12 and Document Request Nos. 4 - 6 seek information regarding

Kroger's financial status. EEOC states that it is entitled to this information because Kroger's financial condition is at issue since EEOC seeks compensatory and punitive damages. Kroger responds that it did not refuse to provide the financial information requested but asserts that such requests were premature because EEOC has not fully answered Kroger's discovery requests regarding EEOC's calculation of damages. First, the Court agrees that, because EEOC seeks punitive damages, it is entitled to the requested financial information. Most federal courts which have addressed the issue have found the mere pleading of a punitive claim sufficient to entitle a plaintiff to information of a defendant's financial condition. *Mid Continent Cabinetry, Inc. v. George Koch Sons, Inc.*, 130 F.R.D. 149, 151 (D.Kan., 1990)(collecting cases). *See Wauchop v. Domino's Pizza*, 138 F.R.D. 539, 550 (N.D.Ind., 1991). That Kroger is not satisfied with EEOC and Plaintiff-Intervenors discovery responses does not excuse Kroger from promptly providing relevant discovery materials. Consequently, the Court will grant EEOC's Motion as to Interrogatory No. 12 and Document Request Nos. 4 - 6.

Interrogatory No. 13 seeks information regarding all employees of Kroger's Marion, Illinois, stores who were terminated from employment from January, 1995, to the present. EEOC states that this information is relevant to compare Underwood's conduct and resulting discipline with the conduct for which other employees at the Marion store were terminated. Further, EEOC wants to compare class member Robin Kostanek's conduct and termination with the conduct for which other employees at the Marion store were terminated. EEOC states that information regarding Ms. Kostanek's termination is relevant because she was terminated two days after she provided Kroger management with a written statement accusing Underwood of sexual harassment. Kroger responds that the Interrogatory is overbroad in both scope and time and seeks irrelevant information, particularly since there are no claims for backpay and no claim of

retaliation.

**Fed. R. Civ. P. 26(b)(1)** provides that discovery is allowed of any matter that is relevant to the subject matter involved in the pending action and is not privileged. “Relevant” has been defined as “any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.” *Oil, Chem. & Atomic Workers Local Union v. N.L.R.B.*, 711 F.2d 348, 360 (D.C. Cir. 1983). Inadmissible evidence is discoverable if it is “reasonably calculated to lead to the discovery of admissible evidence.” **Fed. R. Civ. P. 26(b)(1)**. Parties may obtain discovery of the identity and location of persons having knowledge of any discoverable matter. *Id.*

Given the broad scope of discovery provided for by the Federal Rules, the Court finds that the information sought in Interrogatory No. 13 is relevant and discoverable. Further, the Court believes that requesting information about employment terminations from a single Kroger store for a five-year period is appropriate in both scope and time. Consequently, the Court will grant EEOC’s Motion as to Interrogatory No. 13.

Interrogatory No. 15 seeks information regarding employees who worked in the produce, floral, salad bar, and nutrition departments at the Kroger store in West Frankfort, Illinois, from July 1, 1997, to August 31, 1999, and at the Kroger store in Carbondale East, Illinois, from August 1, 1999, to the present. EEOC states that it is entitled to contact employees who worked with Underwood at the stores to which he was transferred after the Marion store, to determine if the disciplinary measures Kroger took against him were sufficient. EEOC claims that this is necessary because Kroger has stated that it exercised reasonable care to prevent and correct any and all sexually harassing behavior. Kroger responds that EEOC’s Motion is premature and seeks irrelevant information. There have been no complaints of sexual harassment at the stores

indicated in the Interrogatory.

In Kroger's Seventh Affirmative Defense, Kroger states that it exercised reasonable care to prevent and correct any and all sexually harassing behavior and that the employees who alleged that they were subject to such behavior unreasonably failed to take advantage of the preventative and corrective opportunities provided by Kroger. Under the broad definition of relevance set forth in the Federal Rules, *supra*, the information sought in Interrogatory No. 15 is relevant to assessing Kroger's claim that it exercised reasonable care to prevent and correct any and all sexually harassing behavior. Consequently, the Court will grant EEOC's Motion as to Interrogatory No. 15.

Interrogatory No. 16 seeks information regarding the identity of all employees who worked in Kroger's Marion, Illinois, stores from January 1, 1986, to May 31, 1997. EEOC states that it served this Interrogatory only after it learned that some women who were not supervised by Underwood may have been harassed by him and that women at the Marion store complained to management about sexual harassment by at least four male employees, other than Underwood, who worked in various departments. EEOC states that counsel for Kroger indicated that it is difficult to identify complaints of discrimination and/or harassment at the Marion store because there is not a human resources staff or office at that location. Further, EEOC states that Kroger failed to identify a sexual harassment complaint made by two female employees and has been slow to identify another sexual harassment complaint made by a female employee against three other males. EEOC seeks to contact all persons who worked at the Marion store during this time period as they may be potential class members and/or witnesses. EEOC also desires to contact these employees to ascertain if any of them made additional complaints of sex discrimination and/or sex-based or sexual harassment. EEOC believes that it is entitled to verify Kroger's

statement that “there have been no other complaints of sexual harassment except as provided to the EEOC as of this date.” Kroger responds that said Interrogatory is overly broad, vague and not reasonably calculated to lead to the discovery of admissible evidence. Kroger states that the request encompasses two years prior to the employment of Underwood at Kroger’s Marion store in 1988.

Because EEOC has independently developed information regarding a sexual harassment complaint from interviewing a female employee and because Kroger has been slow to identify such complaints to the EEOC, the Court agrees with EEOC that it is entitled to verify the truth of Kroger’s statement by contacting employees. However, EEOC has failed to justify an eleven-year time frame, beginning two years prior to the employment of Underwood. Consequently, the Court will grant EEOC’s Motion as to Interrogatory No. 16 but will limit the time frame to January 1, 1988 to May 31, 1997.

Interrogatory No. 17 seeks information regarding all employees who worked in Kroger’s Carbondale East, Illinois, store from January 1, 1985, to December 31, 1986. EEOC contends that Kroger has known about Underwood’s unlawful conduct for many years and failed to take corrective action until May, 1997. EEOC states that it has already identified at least three women who were sexually harassed by Underwood at the Carbondale East store during the 1980s. EEOC states that it is entitled to contact persons who worked with Underwood during his last two years at the Carbondale store to inquire further about his conduct there. Kroger responds that EEOC’s request is premature, overly broad and vague. Kroger states that the EEOC’s own documents indicate that the earliest instance of alleged violations was May 26, 1997.

The EEOC states that it has identified three women at the Carbondale East store who were sexually harassed by Underwood during the 1980s. The Court agrees that EEOC is entitled

to follow the course of Underwood's employment to determine if Kroger has known of his unlawful conduct for many years and failed to take corrective action until May, 1997. Consequently, the Court will grant EEOC's Motion as to Interrogatory No. 17.

Interrogatory No. 18 seeks the complete factual basis for any response to EEOC's First Request for Admissions to Defendant that is not fully admitted by Kroger. EEOC states that its First Request for Admissions seeks information as to when Kroger provided training on sexual discrimination or sexual or sex-based harassment. EEOC states that Kroger denied all five requests stating only that they were "not accurate," without providing any factual basis. EEOC states that Kroger has previously refused to provide information on this issue, and whether, when and to whom Kroger provided training is relevant to the issue of whether Kroger took reasonable care to prevent and correct sexual harassment. Kroger responds that it denied EEOC's requests to admit because the requests were inaccurate statements.

Requests for Admission are governed by **Fed. R. Civ. P. 36**, which provides, "[A] denial shall fairly meet the substance of the requested admission, . . ." Thus, a denial must be specific, and the answering party must "make reasonable inquiry and secure such knowledge and information as are readily obtainable by him." **The Advisory Committee Note to Rule 36(a)**. Kroger's responses lack specificity and are, therefore, insufficient. Further, Kroger again makes the argument that deficiencies in EEOC's response to Kroger's requests to admit justify Kroger's failure to respond as required to EEOC's requests to admit. The Court refuses to entertain an argument for retaliatory discovery methods. Consequently, the Court will grant EEOC's Motion as to Interrogatory No. 18; Kroger shall respond with specificity to EEOC's Request for Admissions. Accordingly, the Court being fully advised in the premises,

IT IS THE ORDER of this COURT that Plaintiff EEOC's Motion to Compel Defendant



Kroger Food Stores, Inc. to Answer Certain of EEOC's Interrogatories and Requests for Production of Documents (Doc. 47) be GRANTED, in part, and DENIED, in part, as follows:

1. EEOC's Motion as to Interrogatory No. 11 and Document Request Nos. 10 and 11 is DENIED;
2. EEOC's Motion as to Interrogatory Nos. 3, 9, 12, 13, 15 and 17 is GRANTED;
3. EEOC's Motion as to Document Request Nos. 4 - 6 is GRANTED;
4. EEOC's Motion as to Interrogatory No. 16 is GRANTED, but the time frame is limited to January 1, 1988 to May 31, 1997; and
5. EEOC's Motion as to Interrogatory No. 18 is GRANTED; Kroger shall respond with specificity to EEOC's Request for Admissions.

IT IS SO ORDERED.

Dated this 19th day of June, 2000.

  
**GERALD B. COHN**  
**UNITED STATES MAGISTRATE JUDGE**