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United States District Court, N.D. Illinois, Eastern Division.

Francene HOLLEY, Sarah Hughes, Gladys Jeter, Nancy Morgan, Brenda Rigg, Janet Salkeld, Mary Elizabeth Grimm, Cheryl Treleaven, individually and on behalf of all others similarly situated, Plaintiffs,

v.

PANSOPHIC SYSTEMS INC., Computer Associates International Inc., David J. Eskra, Robert Fortelka, G. Gordon M. Large, Anthony Paoni, Douglas R. Percy, Defendants.

No. 90 C 7505. | Oct. 1, 1993.

Opinion

MEMORANDUM OPINION AND ORDER

GOTTSCHALL, United States Magistrate Judge.

*1 This matter is before the court on plaintiffs' motion to compel. For the reasons set forth below, the motion is granted.

BACKGROUND

The eight female plaintiffs in this action are former managerial level employees of defendant Pansophic Systems Inc. ("Pansophic").¹ Six of the plaintiffs complain of discrimination on account of sex when they were laid off during a May 1990 reduction in force. The other two plaintiffs, Cheryl Treleaven ("Treleaven") and May Elizabeth Grimm ("Grimm"), were terminated at a later date. Treleaven was laid off in May 1991, although she continued to work for Pansophic through September 1991. Grimm was discharged in June 1991. Of all the plaintiffs, Grimm reached the highest level position within Pansophic, having attained the title of Vice President and Treasurer before her termination. Treleaven and Grimm were added as plaintiffs in an amended complaint.

In Count II of their complaint, plaintiffs complain of sex discrimination and sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5. Besides bringing individual claims under Title VII, plaintiffs seek to represent "the class of female employees who have been subject to discrimination and retaliation by Defendants due to their sex or opposition to discrimination." Corrected Amended Complaint ("Cmplt."), ¶ 34. Plaintiffs allege numerous actions adverse to women in connection with the May 1990 layoffs, Cmplt., ¶ 26, and they allege numerous other discriminatory practices throughout the course of their employment. Cmplt., ¶ 23. Count I is a claim under the Equal Pay Act, 29 U.S.C. § 206(d)(1). In that count, plaintiffs complain that they were paid lower salaries and/or benefits than males performing similar jobs, the performance of which required equal skill, effort and responsibility. Count III complains of retaliation in violation of both Title VII and the Equal Pay Act.

Besides the above allegations under federal law, plaintiffs assert a claim of breach of contract in Count IV. The basis for this claim is Pansophic's affirmative action policy, embodied in a written plan disseminated to employees through a number of means, including managerial training classes. In Count V plaintiffs allege that the individual defendants induced Pansophic to breach the contract with them. Other state law claims assert liability for negligence and intentional interference with business expectancy. Notably, plaintiffs have not yet moved to certify a class. According to plaintiffs, a motion for class certification is not inevitable. Rather, they would analyze materials produced to determine whether to seek certification.

The central question raised on this motion to compel is the proper scope of discovery in a case where a small group of plaintiffs complain of widespread discrimination within a corporate employer. In this particular case, the six original plaintiffs brought suit after they lost their jobs in the May 1990 reduction in force. While the reduction in force clearly

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affected each of the original plaintiffs, not all of them specifically complain of other practices in the complaint. For instance, in ¶ 23 plaintiffs list 14 discriminatory practices against women without tying each practice to an incident involving one of the plaintiffs. While the generalized nature of these allegations leaves it unclear as to whether plaintiffs have standing to complain of all the practices listed in ¶ 23, some of the plaintiffs do specifically complain of some of those practices. Thus, in Count III, based on retaliation in violation of the Equal Pay Act and Title VII, five plaintiffs allege retaliation on account of their opposition to discriminatory conduct. Cmplt., ¶ 58. Looking to the allegation of sexual harassment, plaintiff Francene Holley was allegedly subjected to a supervisor's sexually demeaning comments. Cmplt., ¶ 32.

*2 This factor clearly impacts on the question of whether to certify a class, as the Supreme Court has instructed that "[t]he mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 159 n. 15 (1982). On the other hand, though, without discovery plaintiffs may be uncertain as to the appropriate parameters of their claims.

Concern about the proper scope of discovery where it is unclear from the complaint whether the named plaintiffs claim to have experienced the kinds of discrimination alleged, the court ordered supplemental briefing. In their Supplemental Filing in Support of Motion to Compel Discovery, plaintiffs provide a detailed description of the individual claim of each individual plaintiff. Having reviewed these descriptions, it is clear to the court that each of the discriminatory practices alleged in the complaint is encompassed within some individual plaintiff's claim. While it would seem desirable for plaintiffs' complaint to demonstrate the scope of each individual's claim, the court will rely on the Supplemental Filing for the limited purpose of determining what discovery will be allowed.²

DISCUSSION

Plaintiffs divide their unanswered requests for discovery into six categories. This memorandum commences with a discussion of the three issues as to which the parties have devoted most of their discussion.

Personnel Files, Salary Records and Data Bases

In plaintiffs' Document Request No. 7, they have requested production of the personnel files of all Pansophic employees holding the position of manager and above from January 1985 to the present. Plaintiffs estimate that there are approximately 300 files responsive to that request, and defendants do not take issue with that contention. According to plaintiffs, their expert would analyze this material to establish whether there is a pattern of action adverse to women, such as in the denial of promotions. In Document Request No. 15, plaintiffs seek complete salary history and wage records, payroll records, commission records and W-2 forms for all Pansophic employees holding the position of manager and above from January 1985 to the present. According to plaintiffs, Pansophic assigned salary grades to all positions within the company, with ranges set within each salary grade. Plaintiffs believe that Pansophic's practice was to place most women in the correct grade, but to assign them salaries at the low end of the range for that grade.

Besides the personnel files and compensation records, plaintiffs seek personnel records from four data bases maintained by Pansophic. Although it is not totally clear how these systems function and interrelate, they apparently contain data on employee qualifications and job classifications. According to plaintiffs, the information on the data bases would have been available to defendants at the time of their decisions concerning the reduction in force, had defendants chosen to use it. Plaintiffs also state a belief that the material could be analyzed to determine whether there was a pattern of occupational segregation. Three of the four data bases did not exist prior to 1988. Since defendants have not made separate objections to production of the data bases, this means that the material will have to be produced if it falls within the temporal and geographical bounds of the discovery now ordered.

*3 Defendants are willing to produce personnel files and information from the data bases for the following group of employees:

all persons employed at the Lisle office from 1988 through August 1990, who held supervisory or

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managerial positions *below* the level of Senior Vice President and similarly ranked executives (e.g., General Managers) whom [Defendants] will designate.

Production concerning this group would no doubt assist plaintiffs in their analysis, as it is undisputed that the bulk of the Pansophic work force was employed at the corporate headquarters in Lisle. However, limitations on production concerning higher level officers has generated objection. Since plaintiffs Hughes, Treleaven and Grimm held prestigious positions within the company at the director and officer levels, they might have been considered for top level positions.

In the case of the compensation records, defendants state that they are willing to produce comparative salary data for employees holding jobs similar to plaintiffs' former positions. Defendants would apparently make the determination as to similarity. Defendants resist discovery of any personnel information beyond the parameters they have set, however, characterizing plaintiffs' efforts as a "fishing expedition" into Pansophic's salary and employment practices. They also note that in an individual action, evidence of a pattern and practice can only be collateral to evidence of discrimination against the actual plaintiff. *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1252 (7th Cir.1990). The *Gilty* decision notes that the action there was not a class action. *Id.*

While defendants would rely on the above proposition to preclude discovery into instances of discrimination against other employees, plaintiffs in this case hope to certify a class. Also, even if only individual claims are brought, evidence of an employer's general practices may be used to establish intent in a disparate treatment case. *See, e.g., Scales v. J.C. Bradford and Co.*, 925 F.2d 901, 906 (6th Cir.1990); *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 84 (2d Cir.1990). *See also Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1423-1424 (7th Cir.1986); *Stumph v. Thomas and Skinner, Inc.*, 770 F.2d 93, 97-98 (7th Cir.1985). In cases of individual claims, discovery is often limited to the work unit or employing unit where the decision affecting a plaintiff was made. *See, e.g., Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1084 (11th Cir.1990); *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 592 (5th Cir.1978). This is not to say the principle is applied inflexibly. In appropriate circumstances, an aggrieved employee may be allowed discovery concerning practices in other work units. *See Hollander*, 895 F.2d at 84-85 (finding that lower court should not have denied request for company wide discovery on managerial employee's claim).

As this court sees it, the appropriate course of action would strike a balance between the needs of individual and class discovery. In making that determination, it is necessary to consider the goals and means of proving both a pattern and practice claim under Title VII and an Equal Pay Act claim.

*4 To prove claims of disparate treatment by means of pattern and practice, a plaintiff or group of plaintiffs must prove that there is a regular, purposeful, less-favorable treatment of a protected group. *King v. General Electric Co.*, 960 F.2d 617, 623 (7th Cir.1992). By showing that an employer regularly and purposefully discriminates against the protected group, a plaintiff may shift the burden of proof to the employer to demonstrate that it did not discriminate against a particular member of that group. *Council 31, American Federation of State, County and Municipal Employees, AFL-CIO v. Ward*, 978 F.2d 373, 378 (7th Cir.1992).

There is a manifest difference between showing individual claims of discrimination and a class action alleging a general pattern or practice, however. *King*, 960 F.2d at 622. "Proving isolated or sporadic discriminatory acts by the employer is insufficient to a prima facie case of a pattern and practice of discrimination." *Id.* Rather, to show that discrimination against a group is the employer's "standard operating procedure," there must be significant evidence or substantial proof of a practice. *Id.* at 624. Normally, this proof takes the form of statistical evidence demonstrating substantial disparities in the application of employment actions as to the protected class buttressed by evidence of general policies or specific instances of discrimination. *See Equal Employment Opportunity Comm'n ("EEOC") v. Chicago Miniature Lamp Works*, 947 F.2d 292, 297 (7th Cir.1991). *See also Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1051 (7th Cir.1991) (often plaintiff classes make out pattern and practice showing through combination of strong statistical evidence of disparate impact coupled with anecdotal evidence of employer's intent to treat the protected class unequally). The ultimate goal is to establish a broad pattern or policy such that it is reasonable to infer that the employer intentionally discriminates. *See King*, 960 F.2d at 623.

While wage discrimination is one of the practices complained of in plaintiffs' Title VII claim, evidence as to that practice would also be relevant to their claim under the Equal Pay Act ("Act"). The Act requires that men and women receive equal pay for " 'equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.' " *EEOC v. Madison Community Unit School Dist. No. 12*, 818 F.2d 577, 580 (7th Cir.1987) (quoting 29 U.S.C. § 206(d)(1)). Estimating and comparing skill, effort, responsibility, and working conditions

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in two jobs are factual determinations. *Id.* at 581. Actual job performance and content, not titles, are key. *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 548 (7th Cir.1991). Differences in responsibility must also be substantial to be significant. *Id.*

While defendants argue that merely paying different wages for different jobs does not violate the Act, if an employer knows that a particular job is predominantly occupied by women, and it intentionally pays persons in that job less, the employer's conduct may be actionable under Title VII even if the women are doing a different kind of work than men. *See EEOC v. Madison School Dist.*, 818 F.2d at 587–588. Thus, notwithstanding that the individual plaintiffs in this case may ultimately have to prove they performed equal work in order to prevail on their Equal Pay Act claims, they could still have a wage discrimination claim under Title VII if the work performed were different. Plaintiffs' request for salary information is therefore reasonably calculated to lead to the discovery of evidence of intentional wage discrimination.

*5 Plaintiffs seek to use the personnel information and salary data requested here to assemble the statistical information needed in a pattern and practice case. However, other than to say that two years is not a long enough time-frame for their statistical analysis, they have not provided the court with any other details of their proposed analysis, such as minimal sample size. Nor have the parties cited authority providing hard and fast guidelines for determining the scope of discovery bearing on pattern and practice.

The parties cite two cases in which plaintiffs bringing individual claims of discrimination sought classwide discovery concerning an employer's practices. In the first of these decisions, a district court had refused to allow class discovery until the plaintiffs had established viable individual actions. *Ardrey v. United Parcel Service*, 798 F.2d 679, 681 (4th Cir.1986), *cert. denied*, 480 U.S. 934 (1987). In so doing, the district court relied on Supreme Court decisions finding that a class representative must possess the same interest and suffer the same injury as other class members. *See id.* Also, the district court had found the requested discovery burdensome. *Id.* at 684. Without necessarily endorsing the procedure followed by the district court, the Fourth Circuit found no abuse of discretion because the plaintiffs had been allowed discovery regarding other similarly-situated employees. *Id.* at 684. That discovery was sufficient to develop evidence, statistical and otherwise, as to whether discrimination was the employer's standard operating procedure. *Id.* at 685.

In the other decision, Judge Marshall of this district looked to the plaintiffs' EEOC charge and the scope of the ensuing EEOC investigation in determining what class discovery would be allowed. *McCray v. Standard Oil Co.*, 18 Fed.Empl.Cas. (BNA) 758 (N.D.Ill.1977). Looking to Seventh Circuit precedent and concluding that the court of appeals liberally interpreted the scope of a class suit growing out of an EEOC investigation, Judge Marshall determined that a plaintiff might bring a class claim of discriminatory practices that had been included in the EEOC charges or investigation. *See id.* at 761–762. To balance the plaintiff's reasonable discovery demands with the defendant's burden of production, though, Judge Marshall ordered the production requests at issue to be confined to the past five years and the corporate headquarters where the plaintiff was employed. *Id.* at 763–764. The request could be modified, though, if discovery were to reveal that discriminatory policies were pervasive on a corporate-wide level or that they had their roots further in the past. *Id.* at 764.

A problem here is that the EEOC apparently issued notices of right to sue to these plaintiffs without having had the opportunity to complete its processing of these charges. Since there conceivably was no investigation into plaintiffs' charges, this court cannot look to the scope of the EEOC's investigation in setting geographic and temporal parameters for discovery. In this court's view, the *Ardrey* decision, with its allowance of discovery as to similarly-situated employees, sets a minimum level of discovery, rather than an optimal formula. This court will allow some discovery above and beyond those jobs defendants consider sufficiently similar to those of the named plaintiffs.

*6 Defendants propose discovery from the beginning of 1988 through August 1990, several months after the reduction in force. If that period were expanded to November 1991, when CA purchased Pansophic, discovery would cover almost four years. Plaintiffs having failed to specify what their needs are respecting sample size, this court believes that a temporal limitation from January 1988 to November 1991 provides a reasonable starting point for discovery concerning pattern and practice. Looking to geographic scope, defendants have not taken issue with plaintiffs' contention that nationwide the group of managerial employees since 1985 encompasses approximately 300 persons. The number of files not being unduly large, and because decisions on managerial staffing apparently emanate from common decisionmakers at Lisle, this court will allow discovery concerning all persons holding supervisory or managerial positions from January 1988 to the present. Records concerning senior vice presidents and "similarly ranked executives" are included.

Summing up, defendants are directed to respond to plaintiffs' Document Requests Nos. 7 and 15 with respect to all Pansophic employees holding the position of manager and above from January 1988 to November 1991. Data bases covering this period are also to be produced.

Affirmative Action Plan

In plaintiffs' Interrogatory No. 17, they ask Pansophic to identify its affirmative action policy ("AAP"), as well as persons hired or offered positions under the policy and efforts made to recruit qualified women and minorities for management positions. Plaintiffs further seek production of documents pertaining to affirmative action policies, including but not limited to federal contracts. Besides noting the relevancy of the AAP to their state law claims, plaintiffs cite authority that dismal performance on an affirmative action plan is probative of discriminatory intent. *See Mozee v. American Commercial Marine Serv. Co.*, 940 F.2d 1036, 1051 (7th Cir.1992) (citing *Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 412, 415 (7th Cir.1988)).

Defendants argue that plaintiffs' request for the AAP and information about compliance with the AAP is overbroad insofar as the information requested relates to minorities and hiring practices. They do not, however, deny that some of the information relates to practices affecting women. Nor do they renew their objection that compliance with this request would be burdensome.

This court concludes that the requested information is relevant or reasonably calculated to lead to the discovery of admissible evidence, although it agrees that defendants should not be required to produce the critical self-analysis portion of Pansophic's AAP. The prevailing view is that the self-critical portions of an employer's affirmative action plan are protected by a qualified privilege. *Coates v. Johnson and Johnson*, 756 F.2d 524, 551-552 (7th Cir.1985). The privilege is waived, however, where the employer relies on its affirmative action plan as proof of nondiscrimination. *Id.* at 552. Also, an evaluation made voluntarily, in a document not required by the government, is not privileged. *Roberts v. Carrier Corp.*, 107 F.R.D. 678, 684 (N.D.Ind.1985). Further, any privilege extends only to subjective, evaluative materials; it does not extend to objective data in the same reports. *Resnick v. American Dental Ass'n*, 95 F.R.D. 372, 374 (N.D.Ill.1982).

*7 On the present record, it is not clear whether all of defendants' affirmative action materials were prepared in order to meet the requirements of government contracts or whether there were any plans or studies voluntarily made. If voluntarily made, critical self-evaluative materials cannot be withheld. If prepared for mandatory government reports, self critical analyses may be redacted from the copies of defendants' affirmative action materials turned over to plaintiffs. In conformity with the discussion above, defendants are to respond to Interrogatory No. 17 and any related discovery requests. At the same time, this court denies plaintiffs' request for an order precluding defendants from relying on any evidence of Pansophic's affirmative action plan as part of their defense. That objection, along with arguments concerning waiver, may be made later, should the need arise.

Butler National Golf Club Expenses

In Document Requests Nos. 32 and 33, plaintiffs seek copies of any expense reports or requests for reimbursement of amounts paid Butler National Golf Club ("Butler"), as well as documents relating to employee membership fees at Butler. Butler excludes women from golf privileges at the club.

Plaintiffs state that they would use the information requested to show that similar networking opportunities were not made available to female employees. Plaintiffs also believe that participation in activities from which women were excluded is evidence of an environment conducive to sexual discrimination. Defendants resist this discovery, noting that there is no evidence that any of plaintiffs played golf or sought to participate in such activities. Regarding plaintiffs' charge that defendants' relationship with Butler is evidence that Pansophic condoned discrimination against women, defendants state that they should not be penalized for Butler's choice of policies.

The named plaintiffs in this action were managerial employees, who would normally be expected to enjoy certain privileges such as invitations to social events and outings. Since comparable level male employees may have been afforded the privilege of golf at the company's expense while plaintiffs were not, the information requested is relevant to plaintiffs' disparate treatment claims. This court also agrees with plaintiffs that continued financial support of an institution that excludes women or minorities is evidence of tacit approval of those policies.

Sanchez and Paoni Severance Agreements

Plaintiff Grimm was terminated in June 1991, approximately six weeks before the announcement that Pansophic would be sold. Grimm alleges that at or around the time of her termination, Vince Sanchez (“Sanchez”), another vice-president, received an unfavorable performance review. When Sanchez opted to leave the company rather than accept a less favorable position, he was allegedly told to resign effective September 1991. Because Sanchez did not resign in June, he allegedly received hundreds of thousands of dollars in connection with the acquisition of Pansophic by CA. Similarly, Tony Paoni (“Paoni”) was told that he was involuntarily terminated, but then retained until the acquisition. Paoni also allegedly received hundreds of thousands of dollars in connection with the acquisition. Since both Paoni and Sanchez were friends of Pansophic’s chief officer, plaintiffs point to the two men’s retention as evidence that Pansophic knew in June 1991 that an acquisition was likely. Plaintiffs would use Paoni’s and Sanchez’ severance agreements as evidence that Grimm received less favorable treatment upon her termination.

*8 Defendants counter that yet another vice president, a male, was terminated for poor performance at the same time as Grimm and they disclaim any intention to have accelerated Grimm’s termination so as to avoid a larger severance package in connection with the acquisition. As defendants see it, the two requested severance agreements are relevant only to the question of Grimm’s damages. Since Grimm already propounded interrogatories asking defendants to list the benefits she would have received if retained until the acquisition, defendants see the request for Paoni’s and Sanchez’ severance agreements as duplicative. Defendants do not contend in their brief that the requested information is confidential.

Normally, a request of this nature raises concern for the privacy of third parties such as Paoni and Sanchez. Any reluctance to allow the request is further increased by the suggestion from the evidence that the alleged preferential treatment given Paoni and Sanchez could have been as much motivated by personal friendship as by an intention to treat male employees more favorably. Also, the amount of benefits received is not necessarily indicative of discrimination. Arguably, disparate treatment of male vice presidents may be established through the mere fact of their retention until the acquisition, without discovery of the details of their severance packages.

At the same time, the court realizes that Grimm’s damages interrogatories seek a hypothetical answer, since defendants cannot say how much Grimm would have received at the time of the acquisition unless all vice presidents were paid the same amount or granted benefits according to some fixed schedule or formula. Since defendants have presented no basis to conclude that they can fully respond to Grimm’s interrogatory—in their brief they state only that they are preparing an answer, not that they actually had given or would give an answer—Grimm may have to prove damages by comparison to other employees. This court therefore concludes that the two severance agreements are relevant to damages. Defendant are directed to respond to plaintiffs’ requests, subject to an appropriate confidentiality agreement.

CONCLUSION

For the reasons set forth above, plaintiffs’ motion to compel is granted. Compliance is to be within 30 days of this order.

Footnotes

¹ In November 1991 Pansophic was acquired by Computer Associates International Inc. (“CA”), also named as a defendant in this action. The other defendants were supervisory employees of Pansophic at the time of the events complained of in this lawsuit. The discovery requests at issue on this motion are directed at defendants jointly, who are all represented by the same counsel. This being so, this memorandum refers to defendants collectively, although the requests at issue here are for information that Pansophic would have compiled prior to its acquisition by CA.

² Defendants have argued that discovery to date demonstrates that plaintiffs cannot prove what they allege and further discovery should be disallowed. This is not a basis for barring discovery, but may at some point provide a basis for a motion for summary judgment.

