

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

CIVIL NO. 01-339-KKC

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

PLAINTIFF

vs:

ORDER

WAL-MART STORES, INC.

DEFENDANT

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The Court considers Plaintiff EEOC's motion for a protective order. *See* DE #192/193. The specific matter involves the manner by which Defendant Wal-Mart has contacted and will prospectively contact unrepresented class members in this gender discrimination class action. The matter is fully briefed, and the parties presented argument to the Court at a January 31, 2008 hearing. *See* DE ##196 Wal-Mart Response, 197 Wal-Mart *in camera* proffer, 203 EEOC Reply.

Part of the issue involves the proper balance between Wal-Mart's general right to contact unrepresented persons and the persons' right to fair notice of the posture and purpose of such contact. The Court already addressed that balance, setting a protocol for contact. *See* DE # 126 at 13. Wal-Mart's *in camera* submissions demonstrate that Wal-Mart is properly following the Court's order.

The specific genesis for the current motion comes from Wal-Mart's inadvertent contact with a *represented* class member. That contact resulted from confusion or misinformation about the person's name and difficulty in status verification from the represented party list(s) provided by the EEOC. Again, it is the EEOC's duty to fairly notify Wal-Mart of women identified as "off limits"

to ex parte contact. If such a person has a name change due to marriage, divorce, or other reasons, the EEOC would need to notify Wal-Mart reasonably of the relevant change(s).

The Court will not grant a protective order, finding inadequate cause under Rule 26(c). However, the Court clarifies its prior ruling as to class member contact, in light of the unexpected event leading to this motion.

Wal-Mart may not knowingly contact a class member the EEOC represents, and Wal-Mart shall continue to consult diligently the EEOC disclosure(s) of represented class members prior to contacting any class member. When contacting an apparently unrepresented class member, Wal-Mart shall, *prior* to any substantive questioning about that person's relevant knowledge and as *early* in any contact as it reasonably can, ask the person whether the Equal Employment Opportunity Commission is currently representing her in a claim against Wal-Mart, including whether she considers the EEOC to be "her lawyer." If the person confirms that the EEOC represents her, or indicates that she considers the EEOC as "her lawyer," the contact by Wal-Mart shall immediately end. If the person communicates that the EEOC does not represent her and does not act as "her lawyer," Wal-Mart may continue the contact so long as it complies with the Court's prior protocol order. Of course, it goes without saying that the Rules of Professional Conduct likewise apply in this and every contact scenario.

The foregoing clarification aside, the Court DENIES the motion for a protective order. This order resolves a nondispositive pre-trial matter, per 28 U.S.C. § 636(b)(1)(A). The parties should consult said statute and Rule 72(a) for applicable appeal rights and mechanics.

This the 19th day of February, 2008.



Signed By:

Robert E. Wier *REW*

United States Magistrate Judge