

1998 WL 785322 (E.D.Mo.)
United States District Court, E.D. Missouri, Eastern Division.

LESLIE MORGAN, et al., Plaintiffs
v.
UNITED PARCEL SERVICE OF AMERICA, INC., and UNITED PARCEL SERVICE, INC., Defendants

No. 4:94-CV-1184 (CEJ). | Oct. 16, 1998.

Attorneys and Law Firms

Virginia O’Leary and Darlene Robinson, Oakland City, Ind., for plaintiffs.

Robert G. Johnson and Donna L. Harper, Philadelphia, Pa., for intervenor EEOC.

William H. Brown, Philadelphia, Pa., and Robert Kaiser and Daniel O’Toole, St. Louis, Mo., for defendants.

Opinion

CAROL E. JACKSON, District Judge

*1 This matter is before the Court on plaintiffs’ motion for a protective order prohibiting defendants from deposing absent class members and for sanctions. *See* Fed. R. Civ. P. 26.

Plaintiffs bring this action pursuant to the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (“Title VII”), and 42 U.S.C. §1981, alleging individual and class claims of employment discrimination. The Court has certified four classes of present and former United Parcel Service, Inc. (“UPS”) employees.

Plaintiffs have moved the Court to enter a protective order prohibiting defendants from deposing absent class members and for sanctions based on defendants’ allegedly improper contact with seven absent class members. Discovery of absent class members is neither prohibited nor sanctioned by the Federal Rules nor the law in the Eighth Circuit. There is an inevitable tension in the discovery of absent class members because of the conflict between “ ‘the competing interests of the absent class members in remaining passive and the defendant in having the ability to ascertain necessary information for its defense.’ ” *Redmond v. Moody’s Investor Service*, No. 92 CIV. 9161 (WK), 1995 WL 276150 (S.D.N.Y. May 10, 1995) (*citing Robertson v. National Basketball Ass’n*, 67 F.R.D. 691, 699 (S.D.N.Y. 1975)). Clearly absent class members should not be required to submit to discovery as a matter of course. *Town of New Castle v. Yonkers Contracting Company, Inc.*, No. 88 Civ. 2952 (CES), 1991 WL 159848 (S.D.N.Y. Aug. 13, 1991). Discovery of absent class members is appropriate when necessary and helpful to the proper presentation and correct adjudication of the principal suit. *Id.* However, a “strong showing” is required before discovery of absent class members is compelled. *Id.*

The most important relevant circumstances are that the party seeking the discovery must demonstrate [first] its need for the discovery for purposes of trial of the issues common to the class, [second] that the discovery not be undertaken with the purpose or effect of harassment of absent class members or of altering the membership of the opposing class, and [third] that the . . . [discovery] be restricted to information directly relevant to the issues to be tried by the Court with respect to the class action aspects of the case.

United States v. Trucking Employers, Inc., 72 F.R.D. 101, 104 [13 FEP Cases 379] (D.C.D.C. 1976). Defendants’ burden is heavy to justify asking questions by interrogatories and even heavier to justify depositions. *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 341 (7th Cir. 1974).

Defendants contend that they satisfy the first prong to the *Trucking Employers* test because plaintiffs will need significant anecdotal testimony from absent class members which defendants have a right to discover. While it may be true that plaintiffs will need significant anecdotal testimony from absent class members, that does not give the defendants a right to randomly depose absent class members. Defendants have not identified the absent class members they wish to depose and have made no showing that any such prospective deponent has knowledge about classwide issues superior to that of the named plaintiffs.

Morgan v. UPS, 1998 WL 785322 (1998)

Redmond v. Moody's Investor Service, No. 92 CIV. 9161 (WK), 1995 WL 276150 (S.D.N.Y. May 10, 1995). Therefore, defendants have not met their "heavier" burden to justify taking depositions of absent class members.

Of course, if the defendants can satisfy their burden in the future it may be that depositions of absent class members will be permitted. The Court disagrees with plaintiffs' assertion that the defendants are restricted to deposing only the anecdotal witnesses identified by plaintiffs.

Finally, although the depositions of absent class members will not go forward at this time, the Court does not find that the defendants improperly communicated with these individuals so as to warrant imposition of sanctions.

Accordingly,

IT IS HEREBY ORDERED that plaintiffs' motion for a protective order prohibiting defendants from deposing absent class members is **granted**. Defendants shall not depose any absent class members at this time.

IT IS FURTHER ORDERED that plaintiffs' motion for sanctions is **denied**.

Parallel Citations

78 Fair Empl. Prac. Cas. (BNA) 316, 74 Empl. Prac. Dec. P 45,557