

EEOC v. Nebco Evans Distrib.

United States District Court for the District of Nebraska
September 4, 1998, Decided ; September 4, 1998, Filed
8:96CV644

Reporter: 1998 U.S. Dist. LEXIS 18450
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff, vs. NEBCO EVANS DISTRIBUTION, INC., A
Nebraska Corporation, Defendant.

Disposition: [*1] Magistrate judge's order denying the plaintiff's motion to amend the Rule 26(a)(2) disclosure deadline for rebuttal experts affirmed. Plaintiff's appeal of the magistrate judge's order dated July 8, 1998, (filing 110) denied; and plaintiff's motion in limine (filing 123) denied without prejudice.

Counsel: For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, plaintiff: John M. Baird, Merrily S. Archer, Denver, CO.

For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, plaintiff: C. Gregory Stewart, Rosalind D. Gray, EEOC, Office of General Counsel, Washington, DC.

For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, plaintiff: Mia E. Bitterman, EEOC, Denver, CO.

For NEBCO EVANS DISTRIBUTION, INC., defendant: Charles F. Gotch, Daniel J. Duffy, David A. Blagg, CASSEM, TIERNEY LAW FIRM, Omaha, NE.

Judges: JOSEPH F. BATAILLON, JUDGE, UNITED STATES DISTRICT COURT.

Opinion by: JOSEPH F. BATAILLON

Opinion

MEMORANDUM & ORDER

This matter comes before the Court on the plaintiff's appeal of the magistrate judge's order (filing 110) and plaintiff's motion in limine to exclude expert witness testimony (filing 123). Both parties have filed evidence in support of and in opposition to the motion in limine (exhibits attached to filing 123 and filing 131). The defendant opposes both motions. Upon careful consideration, the Court shall affirm the magistrate judge's order denying the plaintiff's motion to amend the Rule 26(a)(2) disclosure deadline for rebuttal experts. The Court shall deny the plaintiff's motion in limine to exclude two expert witnesses.

I. Appeal of Magistrate Judge's Order

On July 8, 1998, United States Magistrate Judge Thomas Thalken entered an order denying the plaintiff's motion [*2] to amend the deadline for disclosing Rule 26(a)(2) information for rebuttal experts (filing 104 at p. 11). Judge Thalken ruled that the plaintiff had failed to comply with Rule 7.1 (i) of the Nebraska Local Rules which mandate that before the Court will consider any discovery motions moving counsel must provide written documentation that counsel have consulted personally and have sincerely attempted to resolve differences. NELR 7.1(i). The record reflects that the plaintiff attempted to contact the defendant via facsimile and written correspondence. However, the plaintiff made no effort to meet and confer personally with defendant. The magistrate judge found that the plaintiff's written correspondence fell short of the local rule requirement. The Court must agree.

Furthermore, the magistrate judge's earlier order dated April 17, 1998 (filing 82), granted the plaintiff's motion for an extension of time to disclose a rebuttal expert report (filing 66). The order directed that the plaintiff must serve its expert reports until May 15, 1998, and the defendant must serve its expert reports until June 8, 1998 (filing 82 at p. 24). The order specifically stated: "No subsequent expert reports [*3] will be permitted." *Id.* The plaintiff did not appeal this order.

Now, the plaintiff argues that the April 17, 1998, order applies only to expert reports, not rebuttal reports. This argument is without merit. The order specifically addressed the plaintiff's motion for an extension of time to disclose a rebuttal expert report. Moreover, the discovery deadline in this case was July 30, 1998. The plaintiff has requested a specific trial setting (filing 120), which the defendant does not object to so long as the case can be tried this year. Granting the plaintiff a further extension of time to file a rebuttal expert witness report will require re-opening discovery and postponing trial until 1999. Accordingly, the Court must deny the plaintiff's appeal and affirm the magistrate judge's order.

II. Motion in Limine

The plaintiff has also filed a motion in limine to exclude the testimony of two defense expert witnesses (filing 123). The plaintiff argues that the proposed testimony of George

Neumann, a labor economist, and Patricia Conway, a rehabilitation consultant, do not meet the standards for admissibility under Rules 402, 403, 702 and 703 of the Federal Rules of Evidence and [*4] by the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). After reviewing the evidence and briefs, the Court denies the plaintiff's motion in limine. Based on the limited record before the Court, it appears that the plaintiff's objections and concerns relate to what weight, if any, a fact finder should attribute to the testimony of defense experts and not to the threshold issue of admissibility. The Court's ruling is, however, a preliminary ruling and is without prejudice to the plaintiff. Come time of trial plaintiff's counsel may conduct a voir dire examination of defense experts and may renew its evidentiary objections at trial.

IT IS HEREBY ORDERED:

1. The plaintiff's appeal of the magistrate judge's order dated July 8, 1998, (filing 110) is denied; and
2. The plaintiff's motion in limine (filing 123) is denied without prejudice to renew at time of trial.

Dated this the 4 day of September, 1998.

BY THE COURT:

JOSEPH F. BATAILLON, JUDGE

UNITED STATES DISTRICT COURT