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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE 98 JAN 27 PM 3:38
WESTERN DIVISION

FOR THE WESTERN DISTRICT OF TENNESSEE
CLERK OF COURT
JAN 27 1999

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EQUAL EMPLOYMENT OPPORTUNITY	*	
COMMISSION,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	No. 98-2235-G/A
	*	
FEDERAL EXPRESS CORPORATION,	*	
	*	
Defendant.	*	
	*	

ORDER ON PLAINTIFF'S MOTION TO COMPEL (FILED JAN. 7, 1999)

Plaintiff Equal Employment Opportunity Commission (hereinafter "plaintiff" or "EEOC") served upon defendant Federal Express Corporation (hereinafter "defendant" or "FedEx") its First Set of Interrogatories, its Request for Production of Documents, and its request for leave to enter upon defendant's premises, and any other site where tests or other procedures constituting part of FedEx's application process for the purpose of videotaping and photographing defendant's application process for cargo handler positions. FedEx has resisted a number of these requests, and the EEOC has filed its motion to compel.

Request for Entry

The EEOC has requested that it be allowed to enter upon FedEx's premises, or any other site, where any tests or other procedures constituting part of FedEx's application process are performed for the purpose of videotaping and photographing FedEx's application process for cargo handler positions. FedEx has objected on grounds that this would not reasonably be calculated to lead to the discovery of admissible evidence; that it might disrupt normal business

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operations; that it might invade the privacy rights of applicants; that the request is not limited to any specific test for any specific position; that it involves physical abilities tests administered by a vender, and FedEx lacks the authority to authorize inspection of a vendor's location or any business entity that is not owned or operated by FedEx; and that the discovery sought might be better, less intrusively, and less expensively available through other discovery means.

The basic issue in this case is whether FedEx's procedures for taking applications from, and interviewing, persons (including persons with hearing disabilities) wishing to work as a cargo handler, violates the Americans With Disabilities Act of 1990 and Title I of the Civil Rights Act of 1991. It may be important for the court to determine whether the procedure used by FedEx in their application process is inherently discriminatory to persons with disabilities, and it may be important for the court to determine whether there are reasonable accommodations that FedEx could provide a person with a hearing handicap. Therefore, discovery of, and recording, the process used by FedEx now may very well lead to the discovery of admissible evidence. The test involved here is apparently related to the test supposedly used in the case of the original claimant Robert Cook, Jr. The claim of FedEx that it lacks authority to authorize such inspection, since certain tests are performed by "a vendor" is disingenuous. Such "vendor" will of course wish to continue handling FedEx's business, and would not refuse such a demand, if there were fears of losing FedEx's business.

FedEx has not shown how an unobtrusive camera (and camera person) recording the application procedure could "disrupt normal business operations". The privacy rights of the applicant can be protected by limiting access to the film or recording made thereof to counsel for both sides and their staffs (without further leave of court).

The EEOC is hereby AUTHORIZED to record by video, photograph, or other like

means two of FedEx's application processes, whether on FedEx's premises or upon their "vendor's" premises. Any videos, photographs, or other records of these two application processes, must be kept in the possession of counsel for plaintiff EEOC, or his/her staff, unless permission of the court to do otherwise is first obtained.

Interrogatories

1. Interrogatory number 1.

In Interrogatory number 1, the EEOC seeks the name and address of "each and every person having first hand knowledge of, or direct responsibility for, information obtained or compiled for (FedEx's) response to these Interrogatories and Requests for Production of Documents". The responses were signed by counsel for FedEx, and were "verified" under oath by Ms Tamara Kaye Turner, a paralegal with FedEx, who swore that she was "authorized to execute this Verification on behalf of the corporation".

FedEx objected to this Interrogatory, asserting that it was "overly broad, burdensome, and . . . not reasonably calculated to lead to the discovery of admissible evidence", and that "it seeks information protected from discovery under the attorney work product doctrine". The EEOC argues that, "since persons having first-hand knowledge of information relevant to the contested issues would be potential witnesses in this case, their identities would not be privileged or confidential".

This is a dispute where neither party presents itself in a favorable light. FedEx's claim that this request is overly broad and burdensome sounds instinctive, rather than intelligent, and raises questions in the court's mind as to whether the other objections are of the same nature. The EEOC's request that it be provided with the names of "each and every person" who "compiled" information for these responses also was not well thought out. Obviously, if counsel

for FedEx is competently doing his job, he or she will have “compiled”, or assisted in the “compilation” of the information for these responses, taking care not to disclose objectionable material.

A plaintiff in litigation is, however, entitled to obtain from a defendant identity information regarding anyone having “first hand knowledge” of, or “direct responsibility for”, information provided in response to discovery requests. These persons may indeed have other factual information which may lead to the discovery of admissible evidence, and indeed these persons may be witnesses. There is no basis for the claim that this interferes with attorney work product, since this doctrine does not justify the hiding behind its cloak of factual information or the identity of witnesses.

Therefore, with the proviso that FedEx need not provide information regarding those individuals “compiling” the information responsive to these discovery requests, FedEx must submit a further, more detailed response to Interrogatory number 1 within **TWENTY (20) DAYS** of the docketing of this order.

2. Interrogatory number 3.

In this Interrogatory, the EEOC seeks the number of employees hired by FedEx each month, from April 9, 1994, to the present, by or through the Hub Recruitment Center. FedEx objected to this Interrogatory on grounds that it seeks information “outside the scope fo the pending litigation because this case involves the application process”, and because the individual Robert Cook did not claim a failure to hire. The EEOC thereafter limited the scope of its request to the number of persons hired as Cargo Handlers through the Hub Recruitment Center from January 1, 1996, to January 1, 1999.

There is merit to the claim by FedEx that this Interrogatory (even as limited) is not

reasonably calculated to lead to the discovery of admissible evidence. The flagship victim of the alleged discriminatory practices of FedEx (Robert Cook) was not refused employment because of his disability. The claim is that the process for applying for employment, used at FedEx, discriminated against Cook and other hearing-impaired applicants, preventing them from applying for, and being considered for, employment. The number of persons (disabled or not) hired as Cargo Handlers, during the period as limited, would not be information that would lead to the discovery of admissible evidence. The claim by the EEOC that this provides “background information helpful to understanding the Cargo Handler position sought by Mr. Cook” is too vaporous and insubstantial to justify requiring FedEx to make the effort required in making this response.

Accordingly, FedEx will not be required to further respond to Interrogatory number 3.

3. Interrogatory number 4.

In Interrogatory number 4, the EEOC seeks information as to how many persons FedEx has hired as cargo handlers each month at the Memphis Hub,

For the reasons set forth hereinabove as to Interrogatory number 3, FedEx will not be required to further respond to Interrogatory number 4.

4. Interrogatory number 5.

In Interrogatory number 5, the EEOC seeks information as to how many deaf or severely hearing-impaired persons have applied for and been interviewed for jobs as Cargo Hnadlers at the Memphis Hub, for the period from January 1, 1996, to January 1, 1999.

It should be noted parenthetically that the EEOC has apparently made it a practice (at least in this case) of filing its motion to compel and then making certain concessions, resulting in the material amendment of its original discovery request. This violates the spirit, if not the letter,

of Fed. R. Civ. P. 37 (a) (2) (B). This rule presupposes that all of this negotiation should take place at the time of consultation, not at the time of filing of a motion to compel.

Such conduct by a party should not be rewarded.

For this reason, the EEOC's motion to compel FedEx to more fully respond to Interrogatory number 5 is **DENIED**.

5. Interrogatory number 6.

For the reasons hereinabove given, regarding Interrogatory number 5, the EEOC's motion to compel FedEx to more fully respond to Interrogatory number 6 is **DENIED**.

6. Interrogatory number 7.

Same as Interrogatory number 5.

7. Interrogatory number 8.

Same as Interrogatory number 5.

8. Interrogatory number 10.

In Interrogatory number 10, the EEOC has requested the identity of each and every person employed by FedEx at its Memphis Hub as of March 9, 1998, who is deaf or substantially hearing-impaired. FedEx (again instinctively) objects on grounds that this Interrogatory is "overly broad . (and) . unduly burdensome". As before, this court finds such an objection to be without merit.

FedEx also complains that this information is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

This information, on the contrary, is quite relevant to the issues in this case. If the proof shows that a number of deaf or substantially hearing-impaired individuals were hired, the EEOC's case would be severely damaged. On the other hand, if the proof shows that there were

no (or very few) deaf or substantially hearing-impaired individuals who were hired, this could be considered circumstantial evidence favorable to the claim of the EEOC.

Of course, FedEx is not obliged to personally ask employees whether they are deaf or substantially hearing-impaired, if these employees did not bring this to the attention of the ones handling the hiring process. FedEx need only disclose the names of those employees who made their hearing problems known to hiring officials, and whose employment documents reflect that fact.

With the foregoing provisos, FedEx is DIRECTED to provide a response to Interrogatory number 10 to the EEOC within **TWENTY (20) DAYS** of the docketing of this order.

9. Interrogatory number 11.

In Interrogatory number 11, the EEOC has requested the identity of each and every employee of FedEx at its Memphis facility who “has served as a sign language interpreter for (FedEx) on a routine basis or who is or was paid by (FedEx) to perform these services for (FedEx’s) deaf employees”, from July 26, 1992, to the present. FedEx has again instinctively objected on the basis of overbreadth and burdensomeness, and this objection is OVERRULED.

FedEx has objected on grounds that the terms “Memphis facility” and “routine basis” are “vague and ambiguous”. Surely the term “Memphis facility” cannot mislead FedEx into concluding that it must produce information regarding (for example) its “Chicago facility” (if it has such). The word “routine” is defined by The Compact Oxford English Dictionary as “of a customary or standard kind; usual, typical, standard”. This seems clear enough.

Finally, FedEx complains that this request is not limited to a time frame relevant to the pending litigation, and that the subject matter of the suit involves potential, not actual, employees.

But the EEOC has again waited until the filing of the motion to compel to limit its “time frame” to a period from January 1, 1996, to January 1, 1999. While previously in this order this court has denied the EEOC’s motion to compel for this very reason, in this situation it appears that the court must concentrate upon the substantive issues in the case, and this request could very well lead to the discovery of admissible evidence.

Finally, the complaint by FedEx that this relates to employees rather than applicants is not sufficiently persuasive to justify denying the information sought by the EEOC. If such sign language interpreters are available for employees, then they either might be available for applicants, or, if not, FedEx would need to explain why not. In either event, the information may very well be needed.

Accordingly, FedEx is given **TWENTY (20) DAYS** from the date of docketing of this order to more fully respond to Interrogatory number 11.

Requests for Production

1. Request for Production number 2.

The EEOC has requested that FedEx produce “an exemplar of each and every form used by or submitted to (FedEx) as part of its application process from April 1996 to the present that requires reading and writing skills of an applicant for a cargo handler position in Memphis”.

This information may very well be relevant, especially in response to defenses raised by FedEx regarding its application process. The Request is not, as FedEx complains, vague, ambiguous, and (predictably) overbroad. Further, it is difficult to understand how such documents may be “proprietary in nature”.

Accordingly, FedEx is **ORDERED** to more fully respond to Request for Production number 2 within **TWENTY (20) DAYS** of the docketing of this order.

2. Request for Production number 4.

In Request for Production number 4, the EEOC seeks manuals, etc., prepared for recruitment or human resource personnel and/or managers, that provide “procedures, policies, directions, instructions or advice for hiring persons with disabilities or accommodating persons with disabilities in (FedEx’s) application process”.

This request is, as FedEx indicates, much too overbroad. The request asks for policies, etc., regarding the hiring of persons “with disabilities”. This litigation is not about hiring persons with disabilities generally, but about the application practices as they relate to persons with hearing impairments. EEOC has no business rummaging in FedEx’s manuals regarding their practices as to all persons with disabilities.

Further, the request is limitless, both in time and in location.

Accordingly, FedEx will not be required to further respond to Request for Production number 4.

3. Request for Production number 5.

The EEOC has requested applicant flow logs reflecting recruitment activity for the Memphis Hub positions for April 1-5, 1996, and April 8-12, 1996. FedEx apparently has agreed to produce these. The EEOC has said it has not received any supplemental response to this request.

FedEx must therefore supplement its response to this Request within **TWENTY (20) DAYS** of the docketing of this order.

IT IS SO ORDERED.

ENTER THIS 26th DAY OF JANUARY, 1999.



JAMES H. ALLEN
UNITED STATES MAGISTRATE JUDGE