

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRANCE S. INGRAM and : CIVIL ACTION
ZARRY R. PONDER :
 :
v. :
 :
THE HOME DEPOT, U.S.A., INC. and :
ROYCE HOWE : NO. 97-8060

MEMORANDUM AND ORDER

HUTTON, J.

February 18, 1999

Presently before the Court are Plaintiffs Terrance S. Ingram and Zarry R. Ponder's Amended Motion to Compel (Docket No. 13) and the Defendants Home Depot and Royce Howe's response thereto (Docket No. 17). For the following reasons, the Motion is granted in part and denied in part.

I. BACKGROUND

On April 23, 1990, Defendant Home Depot, U.S.A., Inc. ("Home Depot") hired Plaintiff Zarry Ponder. Ponder, an African-American, worked as a sales associate in the Lakewood, New Jersey Home Depot store. On July 26, 1993, Home Depot promoted Ponder to assistant store manager at the Lakewood store. After two transfers to other stores, Home Depot transferred Ponder to the Cheltenham store on August 18, 1995. Ponder continued to serve as assistant store manager at the Cheltenham store. On March 31, 1996, however, Home Depot demoted him to sales associate and transferred him to the King of Prussia store. There, Ponder worked until August 12,

1996 when Home Depot terminated his employment for alleged job abandonment.

On October 11, 1995, Home Depot hired Plaintiff Ingram to work as a sales associate in the Cheltenham store. Ingram, an African-American, worked at the Cheltenham store until January 12, 1997 when Home Depot transferred him to the Willow Grove store. On June 27, 1997, Home Depot discharged Ingram for alleged poor performance.

On December 29, 1997, Plaintiffs filed a complaint against Home Depot and Royce Howe, the Plaintiffs' supervisor at the Cheltenham store. Eventually, they filed an amended complaint asserting the following claims: (1) employment discrimination under Title VII; (2) employment discrimination under the Pennsylvania Human Relations Act; (3) violations of the Civil Rights Act of 1871 (§ 1981 and § 1985); (4) intentional infliction of emotional distress; and (5) assault and battery. Plaintiffs allege that they were subjected to a hostile work environment and disparate treatment because of their race while employed at the Cheltenham store. Plaintiffs also allege that Home Depot and Royce Howe conspired to deprive them of employment opportunities because of their race.

On November 30, 1998, Plaintiffs served the Defendants with numerous requests for document production. On January 6, 1999, Plaintiffs filed a motion to compel because Defendants had

only identified the documents for inspection and not provided copies of the documents to the Plaintiffs. On January 25, 1999, this Court denied that motion as moot because the parties filed a stipulation indicating that the Defendants had complied with some of their discovery requests and that the Plaintiff would file an amended motion narrowing the issues for the Court. On January 25, 1999, the Plaintiffs filed the amended motion to compel. According to the parties, there are six categories of documents in dispute.

II. STANDARD OF REVIEW

A. Relevance

Under the Federal Rules of Civil Procedure and in the United States Court of Appeals for the Third Circuit, district courts have broad discretion to manage discovery. See Sempier v. Johnson, 45 F.3d 724, 734 (3d Cir. 1995). Pursuant to Rule 26(b)(1), a party is entitled to discovery of "any matter, not privileged, which is relevant to the subject matter in the pending action." Fed. R. Civ. P. 26(b)(1). "The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Id.

As this Court has noted, "[r]elevance is broadly construed and determined in relation to the facts and circumstances of each case." Hall v. Harleysville Ins. Co., 164 F.R.D. 406, 407 (E.D. Pa. 1996). Once the party opposing discovery raises its

objection, the party seeking discovery must demonstrate the relevancy of the requested information. See Momah v. Albert Einstein Med. Ctr., 164 F.R.D. 412, 417 (E.D. Pa. 1996). The burden then shifts back to the objecting party, once this showing is made, to show why the discovery should not be permitted. See id. Relevancy and burdensomeness are the principal inquiries in ruling upon objections to interrogatories and requests for production. See McCain v. Mack Trucks, Inc., 85 F.R.D. 53, 57 (E.D. Pa. 1979).

B. Vagueness

The Third Circuit has stated that the mere statement by a party that the interrogatory was overly broad, burdensome, oppressive, vague, and irrelevant is "not adequate to voice a successful objection to an interrogatory." Josephs v. Harris Corp., 677 F.2d 985, 992 (3d Cir. 1982). A showing of how each interrogatory is not relevant or how each question is overly broad, burdensome, vague, or oppressive is required. See id. The standards governing responses to production requests have been held to be identical to those governing responses to interrogatories. See Albert Einstein Med. Care Found. v. National Ben. Fund for Hosp. & Health Care Employees, No. CIV.A.89-5931, 1990 WL 186975, at *3 (E.D. Pa. Nov. 27, 1990).

III. DISCUSSION

A. Market Studies - Document Request 59

Defendants first object to producing market studies because it is irrelevant to Plaintiffs' claims of hostile working environment and disparate treatment. Plaintiffs contends that these studies are essential to their case because their complaint alleges that Home Depot has a discriminatory practice of hiring, transferring, and promoting based upon the racial demographics of the community where the store is located. Defendants respond that this is not discrimination because they simply hire from the community where the store is located.

This Court finds that the market studies are relevant. First, these studies are essential to the Plaintiffs because they seek to prove that Home Depot does not allow non-white individuals in certain stores and positions because the white customer base wants white employees. The Defendants objection, that they are not discriminating because they are simply hiring from within the community which happens to be white, is not really an objection but a legitimate, non-discriminatory reasons to be proven at trial. Thus, because the market studies may be reasonably calculated to lead to the discovery of admissible evidence, the Court finds that Request for Production of Documents 59 is relevant. Accordingly, the Defendants shall provide full and complete responses to

Plaintiffs' Request for Production of Documents 59 within thirty (30) days of the date of this Order.

B. Thomas Gisondi Documents- Document Requests 17-26 and 28

Defendants next object to producing any documents relating to Thomas Gisondi. Gisondi worked at the Cheltenham Home Depot store. In 1998, Home Depot conducted investigations concerning whether he engaged in racist behavior. Defendants object to producing any personnel documents on Gisondi because the Plaintiffs were terminated before 1998.

This Court rejects Defendants' relevancy objection. As Plaintiffs' correctly point out, Gisondi worked with them at the Cheltenham store. Plaintiffs allege that Defendants failed to remedy a hostile working environment. Even though Gisondi was not a decision maker during this period, he may have been involved in creating this alleged hostile working environment that Home Depot failed to remedy. Thus, the Court finds that these files may reasonably lead to the discovery of admissible evidence concerning Gisondi's behavior towards the Plaintiffs while at the Cheltenham store. Accordingly, the Defendants shall provide a full and complete response to Requests for Production of Documents 17-26 and 28.

**C. Discharge, Promotion and Demotion of Non-Whites
Documents - Document Requests 60-62**

Defendants object to producing documents relating to the discharge, promotion, and demotion of non-whites at their stores. Defendants maintain that these document requests are irrelevant and overbroad. Plaintiffs respond that this evidence is relevant to their theory that different reasons were used for terminating white employees and African-American employees.

This Court rejects the Defendants' objections to Request for Production of Documents 60-62. These requests are relevant because Plaintiffs allege that their demotions and ultimate terminations were racially motivated. This evidence may be reasonably calculated to lead to the discovery of admissible evidence, i.e., evidence of similarly treated employees at Home Depot. Therefore, the Defendants shall provide a full and complete response to Request for Production of Documents 60-62 within thirty (30) days of the date of this Order.

**D. Lists of Names and Addresses of Employees Discharged for
Job Abandonment or Poor Performance - Document Requests
65 and 66**

Defendant further object to producing lists of the names and addresses of employees discharged for job abandonment or poor performance. The Defendants concede that evidence of similarly situated employees may be relevant. Nevertheless, Defendants object to this request because they do not maintain these lists in

the ordinary course of business and, therefore, cannot be required to produce this information under Federal Rule of Civil Procedure 34.

This Court agrees. A defendant in a civil action cannot be compelled to create, upon the request of the plaintiff, documentary evidence which is not already in existence in some form. See Rockwell Int'l Corp. v. H. Wolfe Iron & Metal Co., 576 F. Supp. 511, 513 (W.D. Pa. 1983). Rule 34(a) of the Federal Rules of Civil Procedure is limited in its scope to documents "which are in the possession, custody or control of the party upon whom the request is served." Fed. R. Civ. P. 34(a). "'Rule 34 cannot be used to require the adverse party to prepare, or cause to be prepared, a writing to be produced for inspection, but can be used only to require the production of things in existence.'" Rockwell Int'l Corp., 576 F. Supp. at 513 (quoting Soetaert v. Kansas City Coca Cola Bottling Co., 16 F.R.D. 1, 2 (W.D. Mo. 1954)).

In this case, the Plaintiffs cannot require the Defendants to produce lists which they do not maintain in the ordinary course of business. Use of interrogatories under Rule 33 of the Federal Rules of Civil Procedure would be the better avenue for pursuing this information. Accordingly, the Court denies this aspect of the Plaintiffs' motion.

E. Demographic Information - Document Requests 67 and 68

Defendants also object to producing any further information under Requests for Production of Documents 67 and 68 because these requests were vague. These requests seek demographic information gathered by Home Depot with respect to employees at the numerous stores in the Pennsylvania area. Despite their objection due to vagueness, the Defendants produced Form EEO-1 reports for several stores which contain a breakdown of the race and gender of employees at those stores. Defendants state that it is unclear what other documents the Plaintiffs seek by these requests.

The Court finds that the Defendants' responses to these requests were proper. These requests were indeed vague. Furthermore, in their motion, the Plaintiffs fail to state what other documents they seek in these requests. Therefore, the Court denies the Plaintiffs' motion in this respect.

F. Lists of Names and Addresses of Employees Under Michael McCabe's Supervision - Document Requests 75-78

Lastly, Defendants object to producing a list of the names and addresses of white and non-white employees with a job title of store manager or higher under Michael McCabe's supervision in Requests for Production of Documents 75-78. McCabe is the Regional Vice President of Home Depot. Defendants argue that these requests are irrelevant because Plaintiffs do not allege any wrongdoing by McCabe.

This Court must agree. The Plaintiffs do not state in their motion how this information is at all relevant to the instant action. Rather, Plaintiffs discuss McCabe's involvement in a termination of a white assistant manager which is totally unrelated to this case. The Court cannot understand how this information could be reasonably calculated to lead to the discovery of admissible evidence even under the liberal standards of the Federal Rules of Civil Procedure. Therefore, the Court denies the Plaintiffs' motion in this respect.

An appropriate Order follows.

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O R D E R

AND NOW, this 18th day of February, 1999, upon consideration of the Plaintiffs' Amended Motion to Compel (Docket No. 13), IT IS HEREBY ORDERED that the Motion is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that:

(1) The Defendants **SHALL** provide a full and complete response to Plaintiffs' Request for Production of Documents 59 within thirty (30) days of the date of this Order;

(2) The Defendants **SHALL** provide a full and complete response to Plaintiffs' Requests for Production of Documents 17-26 and 28; and

(3) The Defendants **SHALL** provide a full and complete response to Request for Production of Documents 60-62 within thirty (30) days of the date of this Order.

BY THE COURT:

HERBERT J. HUTTON, J.