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

ROBERT CREELY	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	NO. 04-CV-0679
	:	
GENESIS HEALTH VENTURES, INC., ET AL.	:	

SURRICK, J. **FEBRUARY7, 2005**

MEMORANDUM & ORDER

Presently before the Court is Plaintiff Robert Creely's "Motion To Compel Discovery Document Requests And Interrogatory Answers" (Doc. No. 11) and Defendant Genesis Health Ventures, Inc.'s Response (Doc. No. 19). For the following reasons, Plaintiff's Motion will be granted in part and denied in part.

The instant case is a race discrimination lawsuit that was filed on February 17, 2004. Plaintiff alleges that Marvin Kirkland ("Kirkland") interviewed him and did not hire him due to discriminatory animus. Fact discovery ended on November 1, 2004. (Doc. No. 8.) Plaintiff served Defendant with his Second Set of Document Requests and Second Set of Interrogatories on or about September 23, 2004. (*Id*.) Defendant responded on November 1, 2004, by objecting to Plaintiff's Requests. (*Id*.)

I. Legal Standard

"'It is well-established that the scope and conduct of discovery are within the sound discretion of the trial court.'" *Gaul v. Zep Mfg. Co.*, Civ. A. No. 03-2439, 2004 U.S. Dist.

LEXIS 1990, at *2-3 (E.D. Pa. Feb. 5, 2004) (quoting *Marroquin-Manriquez v. INS*, 699 F.2d 129, 134 (3d Cir. 1983)). Pursuant to Federal Rule of Civil Procedure 26(b)(1), a party may seek 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 trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

Rule 37 "authorizes a party who has received evasive or incomplete answers to discovery authorized by . . . Rule 26(a) to bring a motion to compel disclosure of materials sought." *Northern v. City of Phila., Fire Dep't.*, Civ. A. No. 98-6517, 2000 U.S. Dist. LEXIS 4278, at *3 (E.D. Pa. Apr. 4, 2000). Once a party opposes a discovery request, the party seeking the discovery must demonstrate the relevancy of the information sought. *Id.* at *5.

A. Document Requests

Plaintiff's Requests are a follow-up to the deposition of Morton Ginhart ("Ginhart"), the current Director of Nursing at Crestview. (Doc. No. 19 at 1.) Plaintiff requested Ginhart's personnel file, and any and all statements by Ginhart or Kirkland "where [Ginhart] was involved or alleged to be involved in patient neglect and/or failing to report a patient was rapidly breathing who later developed pneumonia." (Doc. No. 11 at 6.) Defendant refused to respond to Plaintiff's Requests because it claimed that the subject matter is irrelevant. (Doc. No. 19 at 3.) Plaintiff asserts that he "learned of substantial information that Morton Ginhart was one of several Caucasian employees that Mr. Kirkland attempted to have fired for pretextual reasons." (Doc. No. 11 at 7.) Plaintiff offers no evidence in support of this assertion. Defendant provides Ginhart's Affidavit, wherein Ginhart averred that any allegation that Kirkland sought to

terminate him because of his race "is flat out false and wrong." (Doc. No. 19 Ex. A ¶¶ 4-5.) Ginhart added, "[Kirkland] took issue with the way in which I handled a particular patient. He believed that I did not assess a patient's condition properly and failed to send the patient to the hospital in a timely fashion. The patient had pneumonia and Kirkland thought that I failed to identify the problem." (*Id.* ¶ 5.)

Defendant argues that evidence regarding Ginhart is irrelevant and therefore non-discoverable. While circumstantial evidence regarding discriminatory animus may be relevant and discoverable,[1] in this case, Ginhart has emphatically stated that he did not suffer any discriminatory treatment. Federal Rule of Evidence 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Federal Rule of Evidence 402 states that "all relevant evidence is admissible." Fed. R. Evid. 402. In this case, evidence regarding Ginhart does not have any tendency to make the existence of any fact that is of consequence to the determination of this action more probable or less probable than it would be without the evidence in accordance with Rule 401. Accordingly, Defendant's objection regarding evidence related to Ginhart is sustained.

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[1] The Third Circuit has repeatedly held that "discriminatory comments by nondecision makers, or statements temporally remote from the decision at issue, may properly be used to build a circumstantial case of discrimination." *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995); *see also Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 521 (3d Cir. 1997) ("Stray remarks by nondecisionmakers may be properly used by litigants as circumstantial evidence of discrimination."); *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 333 (3d Cir. 1995) ("[A] supervisor's statement about the employer's employment practices or managerial policy is relevant to show the corporate culture in which a company makes its employment decisions, and may be used to build a circumstantial case of discrimination."); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir. 1989) (holding stray remark by major company executive admissible).

B. Second Set of Interrogatories

Plaintiff's Second Set of Interrogatories contains seven (7) questions. (Doc. No. 11 at 10-11.) The first six seek information related to Gail Bourne and her position as Staff Development Coordinator. (*Id*.) Defendant asserts that this information is not reasonably calculated to lead to the discovery of admissible evidence. (Doc. No. 19 at 4-5.) Defendant argues that in reality Plaintiff is attempting to circumvent the discovery deadline in another case before us, *Waters v. Genesis Health Ventures, Inc*., No. 03-CV-2909 (filed May 2, 2003), a case involving the same Defendant and the same counsel for Plaintiff and Defendant. (Doc. No. 19 at 4.)

We first note that Interrogatory No. 7 requests that Defendant "provide all written documents that were produced by any supervisor or manager of Defendant as a result of Marvin Kirkland alleging that Morton Ginhart negligently handled a patient." (Doc. No. 11 at 11.) In light of the discussion above, Defendant's objection to this request is sustained.

Interrogatories 1 through 6 concern Kirkland's hiring practices for the position of Staff Development Coordinator. (*Id.*) Circumstantial evidence of any discriminatory animus exhibited by Kirkland is relevant and discoverable. The Supreme Court has noted that "[a]ll courts have recognized that the question facing the triers of fact in discrimination cases is both sensitive and difficult. . . . There will seldom be 'eyewitness' testimony as to the employer's mental processes." *U.S. Postal Serv. v. Aikens*, 460 U.S. 711, 716 (1983). "It is the rare situation when direct evidence of discrimination is readily available, thus victims of employment discrimination are permitted to establish their cases through inferential and circumstantial proof." *Kline v. Tenn. Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997). Therefore, "we must be mindful not to cripple a plaintiff's ability to prove discrimination indirectly and circumstantially 'by

evidentiary rulings that keep out probative evidence because of crabbed notions of relevance. . . .'" *Robinson v. Runyon*, 149 F.3d 507, 513 (6th Cir. 1998) (citation omitted).

As stated above, "discriminatory comments by nondecision makers, or statements temporally remote from the decision at issue, may properly be used to build a circumstantial case of discrimination." *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995); *see also Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 521 (3d Cir. 1997) ("Stray remarks by nondecisionmakers may be properly used by litigants as circumstantial evidence of discrimination."); *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 333 (3d Cir. 1995) ("[A] supervisor's statement about the employer's employment practices or managerial policy is relevant to show the corporate culture in which a company makes its employment decisions, and may be used to build a circumstantial case of discrimination."); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir. 1989) (holding stray remark by major company executive admissible). The aforementioned cases conclude that stray remarks by nondecisionmakers are relevant. In the instant case, the circumstantial evidence with which we are concerned is the alleged discriminatory conduct by Kirkland, the same individual that Creely has alleged discriminated against him.

Defendant argues that Kirkland's discriminatory treatment of Waters is not relevant to his treatment of Creely because Waters was terminated while Creely was applying for a position. When faced with this same type of argument during discovery in the *Waters* lawsuit, we stated:

> In Defendant's Memorandum in Opposition to the Document Requests, Defendant draws a distinction between Plaintiff and some of the other employees who have been hired and/or terminated by Kirkland. Defendant states: "[I]nformation concerning hiring of certified nurses aides and nurse assistants who had no certification . . . is immaterial and irrelevant to this matter" because Plaintiff was

> not in a comparable hiring category. We disagree. While it is undisputed that Plaintiff was in a hiring category apart from the Certified Nurse's Assistants ("CNAs"), a group for which there is statistical information available, this distinction does not foreclose the possibility that Plaintiff's use of the requested information could lead to admissible evidence.

Waters v. Genesis Health Ventures, Inc., No. 03-CV-2909, 2004 WL 870694, at *2 (E.D. Pa. Apr. 22, 2004.) Accordingly, we are compelled to conclude Defendant's objections to Interrogatories 1 through 6 must be overruled.

We will not, however, allow Plaintiff to circumvent our discovery deadline in *Waters.* We caution Plaintiff that any evidence discovered after the *Waters* discovery deadline is not admissible during the *Waters* trial.

For the foregoing reasons, Plaintiff's Motion is granted in part and denied in part.

An appropriate Order follows.

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ORDER

AND NOW, this 7th day of February, 2005, upon consideration of Plaintiff Robert Creely's "Motion to Compel Discovery Document Requests And Interrogatory Answers" (Doc. No. 11, 04-CV-0679) and Defendant's Response (Doc. No. 19, 04-CV-0679), it is ORDERED that Plaintiff's Motion is GRANTED in part and DENIED in part.

Defendant shall immediately respond to Interrogatories 1 through 6 of Plaintiff's Second Set of Interrogatories.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge