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United States District Court, D. Kansas.

Saul ZAPATA, et al., Plaintiffs,
v.
IBP, INC., Defendant.

Civ. A. No. 93-2366-EEO.

Nov. 10, 1994.

As Amended Nunc Pro Tunc Nov. 14, 1994.

Attorneys and Law Firms

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MEMORANDUM AND ORDER

RUSHFELT, United States Magistrate Judge.

*1 The court has for consideration the following motions:

(1) Plaintiff's Motion to Compel Discovery (doc. 68);

(2) Defendant's Motion for Protective Order as to Notices to Take Depositions and Subpoenas Duces Tecum (doc. 92);

(3) Motion for Oral Argument on All Pending Discovery Motions (Plaintiffs' Motion to Compel and Defendant's Motion for Protective Order); Motion for Pretrial Conference; and Motion for Reconsideration or, in the Alternative, Motion to Clarify the Court's Order Overruling Plaintiff's Motion for Extension of Time (doc. 111);

(4) IBP's Motion to Reopen Depositions and Compel Discovery (doc. 118);

(5) Defendant's Motion for Protective Order as to Certain Questions in the Deposition of Bruce Pautsch (doc. 123);

(6) Plaintiff's Motion to Strike or, in the Alternative, for Leave to File Surreply in Opposition to IBP's Motion to Reopen Depositions and Compel Discovery (doc. 129).

The court will first address Plaintiffs' Motion To Compel Discovery (doc 68). Pursuant to Fed.R.Civ.P. 37(a)(2)(B), plaintiffs seek to compel defendant to produce all documents and things responsive to requests 7, 8, 9, 11, and 32 of their First Request For Production of Documents and Things To Defendant IBP, Inc. The motion further asks that defendant be compelled to produce any documents and things it has withheld as privileged. It also would require defendant to provide a list of information it has withheld, pursuant to its general objections to the request for production. Defendant opposes the motion in its entirety.

As present and former employees of defendant, plaintiffs claim that it has discriminated against them and other similarly situated Mexicans and Mexican-Americans because of their national origin. They allege that discrimination in original job assignment, transfers, and promotions has resulted in their assignment to the least desirable and most dangerous jobs. They assert that the requested documents and other items all relate to certification of this case as a class action.

The court has deferred discovery on the merits of the case, until plaintiff has moved for certification. (See Scheduling Order of doc. 20.) Discovery to date, therefore, has focused on information relevant to certification. *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 349, 359 (1978). Notwithstanding this deferral, discovery pertinent to certification may well overlap with discovery upon the merits. "Facts relevant to the class action determination and definition may largely be the same as those relevant to the merits of the case." *Babbitt v.*

Albertson's Inc., No. C-92-1883 SBA (PJH), 1992 WL 605652, at *3, 1992 U.S. Dist. LEXIS 19091, at *7 (N.D. Cal. Nov. 30, 1992).

Plaintiffs seek class action certification under Fed.R.Civ.P. 23. Subsection (a) provides as follows:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all the members is impracticable, (2) there are questions of law and fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

***2** As one of the alternative bases for class actions, Rule 23(b)(3) would further require plaintiffs to demonstrate that

the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior for the fair and efficient adjudication of the controversy.

Issues upon the merits of the case, therefore, may also relate to class certification.

The court often notes that “[r]elevancy is broadly construed at the discovery stage of the litigation and a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action.” *Smith v. MCI Telecommunications Corp.*, 137 F.R.D. 25, 27 (D.Kan.1991). “[A] request for discovery ... should ordinarily be allowed unless it is clear that the information sought can have no possible bearing on the subject matter of the action.” *Snowden v. Connaught Lab. Inc.*, 137 F.R.D. 336, 341 (D.Kan.1991). With these

principles the court addresses the merits of the motion.

Computer Data and Dispensary Records

Items 7, 8 and 9 of the First Request for Production of Documents seek the following material:

7. A complete copy of all computer data, including but not limited to computer tapes, discs and hard copies of the computer data, containing personnel and/or employment files for all employees of the Garden City, Kansas and Emporia, Kansas plants employed during any period of time between January 1, 1988 to the present.

8. A list of all computer codes and decoders related to the computer data requested in request in request No. 7.

9. A complete copy of all dispensary records or documents including computer records, for all employees of the Garden City, Kansas and Emporia, Kansas plants employed during any period of time between January 1, 1988 to the present.

Defendant objected to requests 7, 8 and 9 upon several grounds: Personnel files and records of non-party employees are irrelevant and immaterial. The breadth and scope of the requests, furthermore, would impose an undue burden and expense upon defendant. It contends some of the documents, moreover, are privileged attorney-client communications or involve work product. Notwithstanding these objections, defendant also responded that it would produce personnel and medical files relating to the named plaintiffs, to the extent they were not privileged.

Plaintiffs note that defendant has produced some of the requested computer data. They complain, however, that such production has excluded “employee historical information.” Testimony by deposition has shown this information to be part of the computer data. Plaintiffs also state that defendant has produced data only for hourly and not other, salaried employees. They assert the need for all the withheld information, in order to show that putative class members have been victims of a pattern and practice of discrimination in job placement and promotion. They propose to use it to develop statistical evidence that the claims of the plaintiffs are common to and typical of the potential claims of other Mexicans and Mexican-Americans who may be class members.

***3** Defendant asserts several objections against producing the computerized work history for its employees. It argues

that for salaried employees the information is irrelevant to certification of a class action. As to all employees it also contends that such production would be very time consuming and unduly burdensome, particularly when balanced against the only tangential relevancy such information could have.

The court finds that the requested information about work history of other than hourly employees is relevant to the issue of class certification. Plaintiffs have alleged discriminatory practices as to job assignments, transfers, and promotions. To determine the existence of a certifiable class based upon such discrimination, plaintiffs may use such information to show whether defendant has unfairly assigned, transferred or promoted to salaried positions persons who are not Mexican or Mexican-American. Defendant has provided no facts to suggest otherwise. It has merely offered conclusions that the requests are irrelevant because all the plaintiffs are hourly workers.

Information relating only to hourly employees does not necessarily reveal the entire array of possible discrimination for the proposed class. To determine certification, relevancy encompasses not only what plaintiffs are and have been, but also what they might be in the absence of the alleged discrimination. Relevancy to the merits, if it exists, does not preclude its relevancy also to certification. For the foregoing reasons the court overrules the objection of irrelevancy to the employee histories of employees of defendant at its Garden City and Emporia plants.

The court also overrules the objection that production of the computer data for employee histories is unduly burdensome. As the party resisting the discovery, defendant has the burden to show facts to justify the objection. It has not carried that burden. It has asserted the objection as a conclusion in its response to the requests for production and its memorandum responsive to the motion. It has not demonstrated by affidavit or anything else of record that the discovery will be unduly burdensome. All discovery, of course, is to some extent burdensome.

Request 9 requests the dispensary records and documents for all employees of the Garden City and Emporia plants from January 1, 1988, to present. Plaintiffs propose to use such information to show a certifiable class of Mexican and Mexican-American employees who are victims of discrimination in treatment after injuries, in work assignments contrary to their medical restrictions, and by a pattern or practice of requiring them to work in the most dangerous and physically demanding jobs which the employment requires.

Defendant again objects to production of these medical records on grounds that those which relate to salaried employees are irrelevant to class certification. It also asserts that this discovery would be unduly burdensome and that the nature of the burden outweighs any tangential relevancy it may have. Defendant argues that the many documents it has produced suffice for purposes of class determination. These include risk-analysis comparisons, OSHA reports and logs, workers compensation reports of accidents, and injury logs.

***4** The court overrules the objections. It finds the request for the dispensary records relevant to the issue of class certification. Again the court finds no basis for distinguishing between hourly and salaried employees in determining relevancy. Any differential treatment of employees with respect to their medical and bodily needs may indeed transcend practices as to how they are paid or distinctions based on the nature of their work. Again bearing the burden to show irrelevancy, defendant has not done so. Nor does its past production of many pages necessarily moot the issue. Great quantities of one kind of record does not necessarily supplant the need for another type of record. Those restricted to injuries and job safety do not necessarily reflect all the physical and medical needs of an employee. They may not reflect illnesses or all requests for medical attention and relief. Defendant has also failed to substantiate in any way its objection that this production will be unduly burdensome.

In addressing request 9, defendant also objects to production of medical records which identify the employee to which it applies. It argues that such information is confidential. It maintains, moreover, that the contents of medical files are protected from disclosure by the Americans with Disabilities Act (ADA).

It demands, moreover, that plaintiffs advance the costs of such production. Despite this demand, the court will not order plaintiffs to bear the costs of the initial production of these documents. "In the absence of extraordinary circumstances ... a respondent is expected to accept the initial expense of producing its own documents, answering interrogatories and submitting to depositions." *Commander Properties, Corp. v. Beech Aircraft Corp.*, No. 88-2202-O, unpublished op. at 7 (D.Kan. Oct. 13, 1989). Defendant has made no showing that the cost of production would be unduly burdensome. It has asserted burdensomeness in its memo simply as a conclusion, without any factual support either by affidavit or anything of record.

The court finds no merit in the objection that the medical records are confidential and protected by the ADA.

Defendant did not assert such objection, moreover, in its response to request 9. The failure to do so waives the objection. The court finds nothing in any event to support the suggestion that the ADA would thwart legitimate discovery in pending litigation. The protective order already entered by the court should provide protection against any improper disclosure of confidential or sensitive materials.

IBP Affirmative Action Plans

Plaintiffs have also requested affirmative action plans of defendant in effect from January 1, 1985 to the present. They argue that such plans are important to show the historical treatment upon which they are based. Defendant argues, on the other hand, that a self-critical analysis privilege protects the plans against discovery. Plaintiffs counter that any such privilege was waived when defendant failed to assert it by proper objection, as required by Fed.R.Civ.P. 34(b).

***5** The court agrees that defendant has waived any self-critical analysis privilege for the requested affirmative action plans and reports. It did not assert such a privilege in its responsive objection to the request for production. Aside its waiver, however, the court will address the objection upon its merits.

Neither the United States Supreme Court nor the Tenth Circuit Court of Appeals has recognized a privilege for affirmative action plans, based upon self-critical analysis. A number of district courts have considered the privilege with varying results. The court finds no clear consensus that such a privilege should apply in Title VII cases.

Bredice v. Doctors' Hosp., Inc., 50 F.R.D. 249 (D.C.Cir.1970) early recognized a self-critical analysis privilege. In that case the court held that a plaintiff was not entitled to discovery of the minutes and reports of a hospital peer-review committee. Some courts later applied such a privilege for affirmative action reports in Title VII cases. See *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D.Ga.1971). Courts have traditionally used the privilege to shield from discovery subjective materials which show the critical analysis of an employer. They have reasoned that disclosure of subjective "self-evaluation" information would have a chilling effect on an employer's voluntary compliance with equal opportunity laws. Courts applying the privilege suggest that employers might be reluctant to frankly discuss issues, if their deliberations could be used against them in litigation. The privilege would thus foster and protect

frank and open analysis of equal opportunity issues by the employer. See *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211, 217 (D.Mass.1980); *Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431, 434 (E.D.Pa.1978).

This court considered the self-critical analysis privilege in *Hoffman v. United Telecommunications*, 117 F.R.D. 440 (D.Kan.1987). It found that the privilege should protect the self-critical portions of EEO-1 reports which the employer by law filed with the government. *Id.* at 443. More recently in the District of Kansas, United States Magistrate Judge Ronald C. Newman declined to recognize the privilege. See *Aramburu v. Boeing*, No. 93-4064-SAC, unpublished op. at 10 (D.Kan. Sept. 21, 1994).

In *Aramburu* the defendant objected to producing its affirmative action plans. It contended they were protected by the self-critical analysis privilege. The court relied on *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1989). The Supreme Court there refused to recognize such a privilege for peer-review materials. *Aramburu* noted, therefore, that "[t]he [Supreme] Court expressed reluctance to recognize a privilege 'in an area where it appears that Congress has considered the relevant competing concerns but has not provided for the privilege itself.'" *Aramburu*, at 7 (quoting *University of Pennsylvania*, 493 U.S. at 189).

***6** Based on this language, Judge Newman declined to apply a self-critical analysis privilege to cases involving affirmative action plans where "Congress itself has not seen fit to create [a privilege] after almost 30 years of implementation of the Civil Rights Act of 1964." He also stressed that the EEOC, in its rule-making functions, had never provided for a privilege for affirmative action plans.

The well-reasoned and persuasive opinion of Judge Newman should apply to this case. The earlier decision in *Hoffman* preceded *University of Pennsylvania* and *Aramburu*. The court, accordingly, declines to recognize the privilege as to IBP's affirmative action plans and reports. The court sees no reason to further assume a privilege that has no "historical, constitutional or statutory grounding." *Aramburu*, at 8. Defendant shall produce all requested affirmative action plans or reports from January, 1985 to the present, as item 11 of the request for production requests.

Reports of Plant Productivity

Item 32 of the request for production asks for the

following documents:

32. All reports concerning plant productivity, including but not limited to all documents which indicate chain speed, at the Garden City, Kansas and Emporia, Kansas plants from January 1, 1985 to the present.

Plaintiffs argue that this information is “relevant to show that the chain speed at the defendant’s plants disproportionately affects” the putative class. More specifically it contends that, when viewed with statistics about job assignments, such reports are “relevant to show that the chain speed at defendant’s plants disproportionately affects the difficulty and safety of the positions to which plaintiffs are assigned.”

IBP has objected to request 32 on two grounds. It contends the requested information is irrelevant. It further objects that plant productivity and chain speed are sensitive, privileged trade secrets.

By their designation as documents concerning “plant productivity” and the absence of any other helpful description, the court assumes that the requested records show numerical quantities and perhaps quality of product for given periods of time in any given plant. The parties assume the documents contain some reference to “chain speed.” The court has found no definition of the latter term. The memoranda of the parties imply some reference to a rate of movement for converting live animals to meat.

In any event plaintiffs have failed to persuade the court that request 32 is reasonably calculated to lead to the discovery of admissible evidence within the meaning of Fed.R.Civ.P. 26(b). Practices of discrimination arguably may affect plant productivity. Plaintiffs have not shown and the court does not otherwise understand, however, how records of such productivity can reasonably be expected to show such discrimination in any meaningful way. One would expect such records to show total numbers, reflecting an aggregate of many factors having nothing to do with discrimination. Examples of such factors include motivation, incentive, physical strength, attitude, work experience, and intrinsic abilities and productivity of each employee; employee absence for any reason; quality of employee supervision; employee morale; market demand for product; any layoffs or shutdowns; nature and age of plant equipment and fixtures; production costs other than for labor; mechanical

breakdowns; production goals; applicable laws and governmental regulations; and governmental inspections and mandates. “Chain speed,” whatever it is, may similarly reflect these and perhaps many other factors. Whether plant productivity and chain speed be high, low, fast or slow, the court finds nothing to suggest any meaningful process by which facts relevant to alleged discrimination could somehow be abstracted except by sheer speculation from such a conglomerate of factors. For these reasons the court sustains the objection to the production of these documents. Defendant need not produce them.

Other Privileged Documents

*7 Plaintiffs have also requested the court to compel defendant to produce “any documents or things withheld as privileged.” They claim it has waived any privileges it may have had due to its failure to respond to the request for production by identifying the specific privileges and providing a list of privileged documents.

Defendant maintains that it correctly asserted its claim of privilege both in its response and in numerous communications between the parties. It characterizes a request by plaintiffs for a list of all privileged documents as “ludicrous.” It contends that creating such a list in a complicated case like this would be unduly burdensome.

The court will sustain the motion to the extent it relates to documents covered by items 7, 8, 9 and 11 of Plaintiffs’ First Request for Production of Documents and Things to Defendant IBP, Inc. The court is ordering production of these documents. Although the response of defendant did refer to privileges for other documents, it has not provided the information required by Fed.R.Civ.P. 26(b)(5). That rule provides as follows:

(5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information

itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Defendant has not argued, and the court does not otherwise find, any compliance with this rule, at least with respect to the documents to be produced pursuant to this order. The court has overruled the privilege asserted for the Affirmative Action Plans. Defendant has otherwise waived any privilege it may have with respect to items 7, 8, 9 and 11 of the first request for production. Accordingly, the order that it produce documents responsive to them includes those for which it would otherwise assert some privilege.

The court will also sustain the motion to compel defendant to produce any documents it may have withheld as privileged in response to items 29, 30 and 31 of Plaintiffs' First Request for Production of Documents and Things to Defendant IBP, Inc. Request 29 asks for copies of all annual reports to shareholders from January 1, 1985, to the present. Item 30 asks for all documents which concern or relate to job availability at the Garden City and Emporia plants from January 1, 1988, to the present. Request 31 seeks copies of all documents which concern or relate to compensation rates or salaries at these two plants from January 1, 1988, to the present.

To these three requests defendant responded that, "Responded documents, not privileged, will be produced at a date, time, and location convenient to the parties." Defendant has not shown and the court does not otherwise find the assertion of any privilege for any of these documents. Nor does it find any compliance by defendant with Rule 26(b)(5), if indeed it intended to assert any privilege for them.

***8** The court will otherwise overrule the motion for production of any other documents and things withheld as privileged. Defendant has objected to the remaining categories of the first request for production upon grounds other than privilege. Plaintiffs have not moved to compel their production over the additional objections. They have not challenged the merits of those objections.

Identification of Documents Withheld Pursuant to Other Objections

Plaintiffs further ask the court to compel defendant to identify documents withheld pursuant to its general

objections. They argue that they "have been left to guess whether documents are actually being withheld under these objections." The court assumes plaintiffs here refer to the objections discretely posited against the various parts of their first request for production. It finds no other "general objections." In response to the motion defendant states it has produced all non-privileged documents of which it is aware.

As already noted, Fed.R.Civ.P. 26(b)(5) requires a party to identify otherwise discoverable documents which are withheld from discovery upon grounds of privilege or protection as trial preparation materials. If defendant contemplates that it has any right to withhold further production upon such grounds, the court finds no valid reason to withhold their identification. The motion asks for less than the rule itself requires. Consequently, the court will sustain it to the extent of requiring defendant to identify all otherwise discoverable documents, if any, which it has withheld as privileged.

The court will overrule the motion with respect to identifying any other withheld documents. It will not require defendant to identify documents withheld from discovery upon objections only for reasons other than privilege or trial preparation materials. Plaintiffs have not yet addressed the merits of the objections to the remaining parts of their first request for production. The court knows of no rule, other than Rule 26(b)(5), which requires a party to identify documents it has withheld because of objection and which the court has not ordered to be produced. To the contrary, the request itself should identify the documents which are the subject of the objection.

The court next addresses Defendant's Motion for Protective Order as to Notices to Take Depositions and Subpoenae Duces Tecum (doc. 92). Pursuant to Fed.R.Civ.P. 26, the motion for protective order asks the Court to protect defendant against depositions of the following witnesses: Ken Melbroth; Mike Fiehler; Tom Christianson; Ken Melbroth; David Hixson; and Orlando Kenney. It contends that plaintiffs filed their Notices of Deposition after July 1, 1994, the deadline for discovery relating to certification of this case as a class action. It also suggests that discovery on the merits of the case has otherwise been stayed until the court has determined the motion for certification.

Plaintiffs oppose the motion. They contend it is untimely and otherwise unwarranted. Their opposition also assumes the court would sustain their separate motion to extend discovery pertinent to certification as a class action. The court, however, has overruled that motion.

***9** Plaintiffs have filed no motion to certify this case as a class action. Because the deadline for such a motion has expired, the court could simply find that any prior stay has ended. For reasons explained elsewhere in this order, however, it will re-open and extend the deadline for discovery related to class certification. In any event the occasion for the requested protective order no longer exists. Accordingly, the court will overrule Defendant's Motion for Protective Order as to Notices to Take Depositions and Subpoenas Duces Tecum (doc. 92).

The court finds an award of sanctions is not justified. Defendant filed its motion on July 29, 1994, prior to the deadline for motions for certification. Had that deadline not expired or had plaintiffs moved for certification, the court might have sustained the motion for protective order against the depositions.

The court will next address the Motion for Oral Argument on All Pending Discovery Motions (Plaintiff's Motion to Compel and Defendant's Motion for Protective Order); Motion for Pretrial Conference; and Motion for Reconsideration or, in the Alternative, Motion to Clarify the Court's Order Overruling Plaintiffs' Motion for Extension of Time (doc. 111). Plaintiffs have moved for oral argument on all pending discovery motions. Defendant opposes the request for oral argument. The court finds no need for it. Counsel have thoroughly briefed the discovery motions. With this order the court is resolving them. Accordingly, it will deny the motion for oral argument.

Pursuant to Fed.R.Civ.P. 16(a) and (c), plaintiffs have also moved for a pretrial conference. Defendant does not oppose the request. It does question its necessity and purpose. The motion addresses the discretion of the court. In this case it finds that such a conference should be helpful to determine the future course of discovery, given the problems reflected by the various motions and scheduling in this case. The court will sustain the motion for a pretrial conference.

Plaintiffs have further moved for reconsideration or alternatively for clarification of the order of August 16, 1994. The court thereby overruled Plaintiff's Motion for Extension of Time for the reasons defendant had stated in an opposing memorandum. The motion for extension had requested that the deadline for plaintiffs both to move for certification as a class action and to complete discovery pertinent to it be extended for 120 days after the court would rule on their motion to compel. Plaintiffs filed the motion for extension on June 24, 1994. Three days earlier they had filed their motion to compel.

Whether to grant or deny a motion for reconsideration is

committed to the court's discretion. *Hancock v. City of Oklahoma City*, 857 F.2d 1394, 1395 (10th Cir.1988). In exercising that discretion, courts in general have recognized three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *Estate of Pidcock v. Sunnyland America, Inc.*, 726 F.Supp. 1322, 1333 (S.D.Ga.1989); see *Major v. Benton*, 647 F.2d 110, 112 (10th Cir.1981).

***10** Motions to extend deadlines set by a scheduling order address the discretion of the court. Fed.R.Civ.P. 16(b) provides that, "A schedule shall not be modified except upon a showing of good cause and by leave" of court. When parties agree to reasonable extensions, the court has often found that good cause does exist. When they do not agree, the court must otherwise determine if it does exist. The moving party bears the burden to show good cause.

Plaintiffs here filed their complaint September 3, 1993. They asserted their claims as part of an anticipated class action. Defendant answered on October 12, 1993. On December 13, 1994, the court entered an order, setting April 1, 1994, as the deadline to move for class certification. On December 14, 1993, after conferring with counsel, the court entered a Scheduling Order. It set April 1, 1994, as the deadline for discovery relevant to certification, as well as for the motion to certify. Upon the motion of plaintiffs the court on April 8, 1994, extended these deadlines to July 1, 1994. It also ordered that briefing on certification be complete by August 1, 1994. On June 24, 1994, plaintiffs moved to extend further these deadlines for discovery and the motion to certify. They specifically requested an additional 120 days, to commence when the court would rule on their motion to compel.

The motion for extension contained little of substance to justify any finding of good cause for the requested extension. Besides reciting proposed deadlines, it summarily characterized the status of the law suit to suggest the following: (1) Discovery was incomplete. (2) Disputes remained unresolved. (3) Plaintiffs anticipated additional discovery. (4) They had filed a motion to compel. The motion provided no reason or rationale why the discovery for class certification could not have been completed within the period of eight to nine months after defendant had answered the complaint.

Defendant opposed the motion for extension. It argued that plaintiffs had had ample time to complete discovery related to class certification. It noted discovery which plaintiffs had pursued, including depositions and requests for documents. Plaintiffs filed a reply memorandum.

Accompanied by 25 exhibits, it contended that defendant had stalled the discovery and had not yet produced relevant documents.

After reviewing the motion and memoranda of the parties, the court concluded that plaintiffs had not carried their burden to show good cause for additional time for discovery relating to class certification. On December 23, 1993, defendant had responded to their request for production. Certainly to their credit plaintiffs had negotiated with defendant to resolve objections to production. Yet they continued to negotiate for six months, before bringing any motion to compel. They filed it only as discovery was about to end. They then sought not a brief extension, but without adequate explanation another four months beyond the prospective and uncertain ruling of the court on the motion to compel.

***11** The court further found no persuasive explanation of need for all the material plaintiffs were seeking, particularly as prerequisite to a motion to certify. Notwithstanding their conclusions that it relates to class certification, some of it appeared irrelevant to that purpose. A party may support a motion for certification, moreover, with affidavits. Discovery does not provide a *sine qua non* for such purpose.

In all events the rules of civil procedure contemplate a reasonable time to pursue discovery. Plaintiffs have cited no rule or principle, and the court otherwise knows of none, which creates a right to exhaust every title of discovery which may conceivably exist. At some point they must move ahead with whatever they have.

Fed.R.Civ.P. 23(c)(1) provides, moreover, that “As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.” D.Kan.Rule 209(b) contemplates that motions for such determination be filed within 90 days after the complaint, unless the period be extended. In this case the court granted plaintiffs more than six months. It then extended that period by another three months.

Plaintiffs have argued none of the criteria which the court considers upon a motion for reconsideration. They have merely repeated and embellished the same argument they asserted in their reply memorandum upon the motion for extension. The court finds no intervening change in controlling law or new evidence since its order of August 16. The ruling of that order does not constitute clear error. Nor does it work manifest injustice. Plaintiffs have had ample opportunity to pursue discovery related to class certification. They may pursue their individual claims, of course, whether or not this case proceeds as a class action.

For the foregoing reasons the court will overrule the motion for reconsideration. The court will also overrule the alternative motion to clarify its order of August 16, 1994. It finds no lack of clarity. Quite the opposite, it clearly overrules the requests for extension of the deadlines. Consequently, the deadlines remain what they always have been. The separate request for a pretrial conference more appropriately addresses any needs for further scheduling and management of this case.

Reconsideration aside, the court finds good cause now to grant some additional time for a motion to certify this case as a class action and to pursue some additional discovery to that end. This will allow plaintiffs the benefit of items yet to be produced in response to the ruling upon their motion to compel. In its memorandum responsive to the motion to extend the deadlines defendant itself conceded the propriety for such additional discovery. Its own motion to reopen depositions and compel discovery, filed September 14, 1994, indicates an assumption that the issue of class certification is yet to be resolved. For the foregoing reasons and upon its own motion, therefore, the court will extend to and including December 30, 1994, the deadlines for discovery related to certification and for a motion to certify this as a class action.

***12** The court next addresses IBP’s Motion to Reopen Depositions and Compel Discovery (doc. 118). It asks the court to direct the reopening of depositions of the following plaintiffs as class representatives and compel them to answer questions relating to their financial ability to bear the costs of this as a class action: Saul Zapata; Antonio Martinez; Pedro Lira; Jose Luis Velasquez; and Olga Cabral. Upon instruction of their counsel they refused to testify about their financial responsibility and ability to pay such costs and answer incidental questions about the nature of their individual assets. Plaintiffs claimed the information is subject to the attorney-client privilege and, therefore, protected against discovery. Fed.R.Civ.P. 37(a) governs this motion to compel.

As a prerequisite to certification as a class action, Fed.R.Civ.P. 23(a)(4) imposes upon plaintiffs the duty to show that as class representatives they will “fairly and adequately protect the interests of the class.” The parties have directed their arguments to the question of relevancy of the requested information to this statutory prerequisite. They have addressed the applicability of *Sanderson v. Winner*, 507 F.2d 477 (10th Cir.1974), *cert. denied*, 421 U.S. 914 (1975). In that case the court held as irrelevant current financial statements, income tax returns, other documents reflecting the ability of the plaintiffs to finance the class action, and agreements with their attorneys for the financing of the costs of the litigation.

In support of its motion, defendant here asks the court either to distinguish *Sanderson* or to determine that it is no longer good law; inasmuch as the Tenth Circuit has not revisited its ruling in twenty years. Defendant cites cases from other jurisdictions, holding the financial ability of plaintiffs relevant and thus discoverable upon the issue of certification. It cites no other controlling cases either of the Tenth Circuit or of the District of Kansas. The court otherwise finds none. Plaintiffs cite cases from other jurisdictions which follow or approve *Sanderson*.

The court finds *Sanderson* does control the issue of relevancy here. The request for production in *Sanderson* sought, besides financial statements and tax returns, “any other writings or documents reflecting plaintiffs’ ability to finance the expenses that may be involved in this purported class action litigation.” Holding all of these items irrelevant to the issue of class certification, the Tenth Circuit Court stated as follows:

Defendants considered it important to ascertain whether plaintiffs were able to pay *all* of the costs in the litigation including extensive depositions. We fail to see relevancy in these inquiries particularly with respect to *in limine* inquiry as to whether a class action is to be allowed. Ordinarily courts do not inquire into the financial responsibility of litigants. We generally eschew the question whether litigants are rich or poor. Instead, we address ourselves to the merits of the litigation. We recognize that the class action is unique and we see the necessity for the court to be satisfied that the plaintiff or plaintiffs can pay the notice costs, and we also agree fully with the Court’s ruling in *Eisen* that due process requires decent notice. But we do not read *Eisen* as creating a presumption against finding a class action. Nor does it approve oppressive discovery as a means of discouraging a private antitrust action which, if meritorious, advances an important interest of the government.

***13** We are aware that some lower court decisions have considered the plaintiff’s ability to pay as relevant and proper in the present context. See *P.D.Q. Inc. of Miami v. Nissan Motor Corp. in U.S.A.*, 61 F.R.D. 372 (S.D.Fla.1973); *Ralston v. Volkswagenwerk, A.G.*, 61 F.R.D. 427 (W.D.Mo.1973). However, in both of these cases in which antitrust violations were alleged, the plaintiffs sought to represent a class of all new car purchasers in the United States. Thus, there was legitimate concern about the ability of the plaintiffs to successfully lead a class of this magnitude. Also, the court in *Ralston* was concerned about its ability to manage the class. The mentioned considerations are not present here.

507 F.2d at 479, 480 (footnotes omitted).

Defendant suggests this court decline to apply *Sanderson*. It has cited no ruling either by the Tenth Circuit or the District of Kansas to justify ignoring it or otherwise assuming it is stale and inapplicable. The court otherwise knows of no such ruling. The age of *Sanderson* does not constitute a valid reason for this court to reject it. Although it sought documents, rather than testimony, the court finds the subject matter of the discovery in this case and in *Sanderson* to be essentially the same: financial information about plaintiffs to determine their qualifications to be class representatives.

Defendant has also proposed that the court distinguish *Sanderson* and, accordingly, hold it inapplicable. Citing two other decisions which had allowed similar discovery, *Sanderson* hinted at some possible exceptions to its ruling. These would include the case of an extremely large class, such as all purchasers of new cars in the United States. The need for financial information to aid the court in management of the action might also justify the discovery. These examples provide no sufficient reason to depart from *Sanderson* in the present case.

For the foregoing reasons the court will overrule IBP’s Motion to Reopen Depositions and Compel Discovery (doc. 118). This ruling moots Plaintiffs’ Motion to Strike or, in the Alternative, for Leave to File Surreply in Opposition to IBP’s Motion to Reopen Depositions and Compel Discovery (doc. 129).

The court next addresses Defendant’s Motion for Protective Order as to Certain Questions in the Deposition of Bruce Pautsch (doc. 123). Pursuant to Fed.R.Civ.P. 26, defendant seeks an order to protect itself and the witness against answering upon deposition questions about a corporate policy to avoid labor unions within its plants. As assistant vice president for labor relations for defendant, the deponent Bruce Pautsch has the responsibility of dealing with unions who represent workers at the various plants. None of the plaintiffs in this case belong to or are represented by a union.

Plaintiffs took the deposition of Mr. Pautsch as a witness of the defendant. It proceeded to interrogation about a corporate policy of defendant to avoid unions in its plants. The inquiry would have addressed policies regarding the importance and benefit to defendant of avoiding and keeping out unions and a plant ombudsman. Defense counsel objected to the interrogation on grounds of irrelevancy under the scheduling order. It limits current discovery to matters relevant to class certification. He instructed the witness not to answer this interrogation. Defendant seeks an order to protect itself and its witness

against allegedly unreasonable annoyance, embarrassment or oppression created by the interrogation.

***14** Defendant primarily argues irrelevancy of the interrogation to class certification. Secondly it suggests that relations with labor unions are governed by the National Labor Relations Act, providing for an exclusive forum for labor relations. From this premise it would infer that the interrogation here exceeds the scope of relevancy. Defendant further emphasizes, however, that its objections are directed only to questions about overall corporate policy and philosophy. It agreed, on the other hand, to inquiry about the two plants specifically involved in this case.

Plaintiffs allege that their proposed class consists of all employees of the Garden City and Emporia plants against whom defendant has engaged in discriminatory employment practices because of their Mexican or Mexican-American national origin. Their amended complaint further alleges such discrimination to include differentiation from other employees in job assignments, promotion, firing, compensation, transfer, verbal abuse and name-calling, refusal of necessary medical care, denial of necessary rest-room breaks, failure to accommodate medical restrictions in work assignments, failure to provide adequate communication and to post personnel policies, disciplinary actions and promotional opportunities in Spanish, and fabricated disciplinary actions. The business of a labor union would include addressing many or all of these complaints as employee grievances. Were the employer wanting to avoid confronting these problems, one can reasonably assume it might adopt a policy to discourage or hinder the establishment of a labor union within its plants. Such a policy, if it exists, could lead to discriminatory practices against employees thus impeded from seeking redress to their grievances.

A corporate policy of this nature, if it exists, would also tend to support the contention that there is a class of employees of Mexican and Mexican-American origin who are peculiarly victimized by it. Their inability to communicate in a language other than Spanish and any consequent limitations for obtaining employment could leave them easily vulnerable to intimidation and acceptance of oppressive working conditions in order to keep their jobs. If such a corporate policy exists in this case, therefore, that fact would tend to support the allegation that defendant has discriminated against this particular class of employees by exploiting weaknesses common to hourly workers of Mexican and Mexican-American origin.

By itself evidence of any corporate policy or

predisposition to discourage union organization so as to maintain oppressive working conditions in its plants would not prove that defendant has in fact discriminated against anyone. Proving intent or motive does not of itself prove wrongful action. Proof of corporate intent or motive as expressed through a company policy, however, may tend to corroborate other disputed evidence that the alleged misconduct in fact occurred. Fed.R.Evid. 401 defines relevant evidence as "evidence having 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." The trial judge would determine, of course, whether any evidence of corporate policy for avoiding unions is indeed admissible to show a certifiable class of employees having similar claims of employment discrimination. Fed.R.Civ.P. 26(b)(1) authorizes liberal discovery to include any matter which might lead to the discovery of admissible evidence.

***15** The court finds no merit whatsoever in the suggestion that the National Labor Relations Act somehow restricts the inquiry here. This case contains no claim for relief for violations of that act. Nor does it preclude in this case the relevancy of evidence of discriminatory conduct, whether or not it might also prove in some other suit violations of the National Labor Relations Act.

For the foregoing reasons the court finds the proposed interrogation of Bruce Pautsch about corporate policies of the defendant as to the importance and benefit of avoiding unions and ombudsmen in its plants to be relevant to the issue of class certification. It overrules the motion for protective order. Defendant shall produce the deponent for his continued deposition, at which he shall answer the interrogation about the corporate policies.

In summary the court rules upon the pending motions as follows: It sustains in part and overrules in part, as herein set forth, Plaintiffs' Motion to Compel Discovery (doc. 68). Within fifteen days of the date of this order defendant shall have produced for inspection and copying by plaintiffs all documents requested by items 7, 8, 9, 11, 29, 30 and 31 of Plaintiffs' First Request for Production of Documents and Things to Defendant IBP, Inc. and for all other items of the request for production a list of any documents, otherwise discoverable, withheld as privileged. Defendant shall also designate on such list the specific privilege(s) which it asserts for each such document. The production shall take place at the offices of counsel for defendant or at such other place as the parties may agree. The court otherwise overrules the motion.

The court overrules Defendant's Motion for Protective

Order as to Notices to Take Depositions and Subpoenae Duces Tecum (doc. 92). It sustains in part and overrules in part the Motion for Oral Argument on All Pending Discovery Motions (Plaintiffs' Motion to Compel and Defendant's Motion for Protective Order); Motion for Pretrial Conference; and Motion for Reconsideration or, in the Alternative, Motion to Clarify the Court's Order Overruling Plaintiffs' Motion for Extension of Time (doc. 111) by sustaining the motion for a pretrial conference and otherwise overruling these motions. Pursuant to Fed.R.Civ.P. 16(a) and (c), the court sets the case for a preliminary pretrial conference in the courtroom of the Magistrate Judge in Kansas City, Kansas, at 10 a.m. on the 19th day of December, 1994. Upon its own motion it also sets December 30, 1994, as a deadline for any motion to certify this as a class action and further discovery relevant to that motion.

The court also overrules IBP's Motion to Reopen Depositions and Compel Discovery (doc. 117) and Defendant's Motion for Protective Order as to Certain Questions in the Deposition of Bruce Pautsch (doc. 123). The court deems moot and therefore overrules Plaintiffs' Motion to Strike or, in the Alternative, for Leave to File Surreply in Opposition to IBP's Motion to Reopen Depositions and Compel Discovery (doc. 129).

***16 IS SO ORDERED.**

All Citations

Not Reported in F.Supp., 1994 WL 649322