

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
DELTA DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF  
v. CIVIL ACTION NO. 2:04CV278-D-A  
RETZER RESOURCES, INC., d/b/a McDONALD'S, DEFENDANT

**ORDER**

Before the court is defendant's motion to compel the deposition of the individual whose allegations of discrimination led the Equal Employment Opportunity Commission ("EEOC") to file the instant lawsuit. "John Doe" filed a charge with the EEOC alleging defendant violated Title I of the Americans With Disabilities Act ("ADA") by unlawfully inquiring as to his medical condition in violation of 42 U.S.C. § 12112(d)(4)(A) and refusing to schedule him for work and ultimately terminating his employment because defendant perceived him as disabled. The EEOC filed this lawsuit pursuant to 42 U.S.C. § 12117(a), which incorporates sections of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, granting the EEOC and the Attorney General the same power to bring an action at law as a person who himself alleges discrimination on the basis of disability in violation of the ADA. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 285 (2002); *see E.E.O.C. v. Bay Ridge Toyota, Inc.*, 327 F. Supp. 2d 167, 173-74 (E.D. N.Y. 2004) (recognizing EEOC's "unique role in vindicating the public interest" in suits against discriminatory employers). In its complaint, the EEOC claims defendant engaged in unlawful employment practices against Mr. Doe, and the EEOC seeks injunctive relief and compensatory and punitive damages. The EEOC utilized a pseudonym to identify Doe in order to protect his rights and to conform with this court's Standard Operating Procedure Governing Protection of Personal and Sensitive Information, Civil No. 3:03mc11 (May 20, 2003).

In the instant motion, defendant recounts repeated efforts to have defendant make Doe sit for a deposition and execute HIPAA releases so defendant may discover specific information about communications alleged to have been made to Doe's medical providers. Counsel conversed and corresponded numerous times since the January 4, 2005 case management conference, but they have been unable to resolve among themselves how discovery should proceed in this case. In its response to the instant motion, the EEOC states that it has now provided Doe's last known address to defendant, but it advised defendant that Doe "has not been consistently living in his apartment," and letters sent to that address had neither been answered nor returned. (RESP. TO MOT. TO COMPEL ¶ 8.) Plaintiff's counsel also took defendant's proposed HIPAA releases to Doe's residence and placed them under the apartment door on May 13, 2005, but counsel is unaware whether Doe has actually received the documents to date. (RESP. TO MOT. TO COMPEL ¶ 10.) Defendant acknowledges the EEOC provided an address for Doe, but it does not indicate what attempts, if any, defendant's counsel has made to communicate with Doe at that address. (MOT. TO COMPEL ¶ 10.) Moreover, despite previously executed HIPAA releases that provided the EEOC access to Doe's medical information to investigate his claims, Doe's medical providers have balked at making their employees available for deposition without separate HIPAA releases from Doe. (MOT. TO COMPEL ¶ 6; Ex. G.)

The court appreciates the untenable situation in which defendant finds itself; however, the court cannot grant the relief requested in the instant motion to compel. Mr. Doe is not a party to this suit, therefore he is not subject to the discovery rules, and although his residence appears to lie within the subpoena power of this court, defendant has not served Doe with a subpoena with which the court can order compliance. The court harbors serious reservations about the EEOC's

ability to meet its burden of proof in this case if it does not present the evidence defendant seeks to discover from Mr. Doe and his health care providers, and defendant is hamstrung by its inability to obtain the information, creating just the sort of trial by ambush that the Federal Rules of Civil Procedure were designed to prevent. *Shelak v. White Motor Co.*, 581 F.2d 1155, 1159 (5<sup>th</sup> Cir. 1978) (citing *Hickman v. Taylor*, 329 U.S. 495 (1947) (“The rules are designed to narrow and clarify the issues and to give the parties mutual knowledge of all relevant facts, thereby preventing surprise”). Failure to disclose such information to the defendant makes plaintiff vulnerable to the full range of sanctions listed in FED. R. CIV. P. 37(b)(2), up to and including dismissal of its claims. If during the course of this litigation it develops that plaintiff was in any way dilatory or less than diligent in fulfilling its duties under the Federal Rules of Civil Procedure and the disclosure requirements of UNIF. LOC. R. 26.1, plaintiff risks the imposition of these sanctions, including an award of defendant’s costs and expenses associated with discovery or an order that plaintiff not be allowed to support designated claims or introduce certain matters into evidence pursuant to the authority given the court in Rule 37. However, the court cannot compel Mr. Doe to be deposed or to execute the medical releases.

It is, therefore, **ORDERED:**

That defendant’s motion to compel is denied.

SO ORDERED, this the 18<sup>th</sup> day of May 2005.

/s/ S. Allan Alexander  
UNITED STATES MAGISTRATE JUDGE