IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. REPUBLIC SERVICES, INC., REPUBLIC SILVER STATE DISPOSAL, INC., and DOES 1-10, inclusive, Defendants.	CV-S-04-1352-DAE-LRL Consolidated with CV-S-04-1479-DAE-LRL
ROBERT LAROCCA and WILLIAM LACY, Plaintiffs v. REPUBLIC SERVICES, INC., a Delaware corporation, REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada corporation, and DOES 1-25, Defendants.	

ORDER AFFIRMING MAGISTRATE JUDGE'S ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Pursuant to Nevada Local Rule 78-2, the Court finds this matter suitable for disposition without a hearing. After reviewing Republic Services, Inc.,

and Republic Silver State Disposal, Inc.'s ("Defendants") objections and motion for reconsideration of magistrate judge's order grating plaintiff's motion to compel responses to discovery, the Court AFFIRMS the Magistrate Judge's Order (Doc. # 154).

BACKGROUND

The Equal Employment Opportunity Commission ("EEOC") has brought suit, pursuant to the Age Discrimination in Employment Act ("ADEA"), on behalf of a class of individuals who were either terminated from employment or denied the opportunity to transfer allegedly based on their age of forty years or older. The EEOC propounded discovery requests and eventually filed a motion to compel (Doc. # 136). On September 13, 2007, Magistrate Judge Leavitt granted the EEOC's motion to compel (Doc. #154). Magistrate Judge Leavitt ordered Defendants to produce to the EEOC, no later than September 26, 2007, "the 'declining balance budget sheets' for each foreman at each of Defendants' facilities for the period of January 1, 2000 through December 31, 2006." (Id.) Magistrate Judge Leavitt also ordered the production of comparator personnel files of employees who were disciplined or fired for poor performance and for those who received traffic tickets or were involved in traffic accidents while on duty for the period of January 31, 2000 through December 31, 2006, as requested by the EEOC

in request numbers two through eight of its eighth set of requests for production of documents.

On September 21, 2007, Defendants filed Objections and Motion for Reconsideration by District Judge of Order Granting Plaintiff's Motion to Compel Responses to Discovery (Doc. #155). Defendants object to the portion of the order requiring them to produce documents in response to request number 22 of the EEOC's sixth set of requests for production regarding the "declining balance budget sheets", and request numbers 3, 5, 7, and 8, of the EEOC's eighth set of production requests regarding comparator personnel files. The EEOC filed a response on October 4, 2007 (Doc. # 159). Defendants filed a reply declaration on October 9, 2007 (Doc. # 160).

STANDARD OF REVIEW

Local Rule IB 3-1 provides that "[a] district judge may reconsider any pretrial matter referred to a magistrate judge in a civil . . . case . . . where it has been shown that the magistrate judge's ruling is clearly erroneous or contrary to law." LR IB 3-1. To find a magistrate judge's decision "clearly erroneous," the district court must have a "definite and firm conviction that a mistake has been committed." Burdick v. Comm'r Internal Revenue Serv., 979 F.2d 1369, 1370 (9th Cir. 1992) ("A finding of fact is clearly erroneous if we have a definite and firm

conviction that a mistake has been committed."). "A decision is 'contrary to law' if it applies an incorrect legal standard or fails to consider an element of the applicable standard." Conant v. McCoffey, No. C 97-0139, 1998 WL 164946, at *2 (N.D. Cal. March 16, 1998). "The reviewing court may not simply substitute its judgment for that of the deciding court." Grimes v. City and County of San Francisco, 951 F.2d 236, 241 (9th Cir. 1991).

DISCUSSION

Defendants argue that two parts of the Magistrate Judge's Order are clearly erroneous and contrary to law because the documents ordered to be produced are at most only minimally relevant and the production of some of the documentation is overly burdensome.

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . . [or] reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b). Relevancy, for purposes of Rule 26(b), is a broad concept that is construed liberally. Rivera v. Nibco, Inc., 384 F.3d 822, 824 (9th Cir. 2004). In employment discrimination cases, "liberal civil discovery rules give plaintiffs broad access to document their claims." Sallis v. Univ. of Minn., 408 F.3d 470, 478 (8th Cir. 2005) (citing Onwuka v. Federal Express Corp., 178 F.R.D. 508 (D. Minn. 1997)) (internal

quotations omitted). Unnecessary limitations on discovery in discrimination cases should be avoided, as the proof "required to demonstrate unlawful discrimination may often be indirect or circumstantial." Miles v. Boeing Co., 154 F.R.D. 117, 119 (E.D. Pa. 1994). Indeed, the "Ninth Circuit has recognized a need to extend discovery past a Title VII plaintiff's employing unit where an individual plaintiff seeks statistics to demonstrate a pattern of discrimination or disparate treatment to support either her prima facie case or her argument that the defendant's articulated reason for the adverse employment decision was pretextual." Garcia v. Courtesy Ford, Inc., No. C06-855RSL, 2007 WL 1430196, at *3 (W. D. Wash. May 10, 2007) (citing Diaz v. Am. Tel. & Tel., 752 F.2d 1356, 1362-63 (9th Cir. 1985)).

The party resisting discovery has the burden of demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. Columbia Pictures, Inc. v. Bunnell, 245 F.R.D. 443, 451 (C.D. Cal. 2007) ("the burden was properly on Defendants to demonstrate why they should be relieved from producing relevant information."); Thompson v. Reg'l W. Med. Ctr., No. 8:06CV581, 2007 WL 3232603, at *2 (D. Neb. Oct. 31, 2007). "To meet this burden, the objecting party must specifically detail the reasons why each request is [unduly burdensome]." Koninklijke Philips Elec. N.V. v. KXD Tech., Inc., No. 2:05-cv-01532-RLH-GWF, 2007 WL 778153, at *4 (D. Nev. March 12, 2007).

"[T]he employer must show that compliance would unduly disrupt and seriously hinder normal operations of the business." EEOC v. Citicorp Diners Club, Inc., 985 F.2d 1036, 1040 (10th Cir. 1993) (citing EEOC v. Maryland Cup Corp., 785 F.2d 471, 479 (4th Cir. 1986)).

A. Declining Budget Sheets

With respect to the declining balance budget sheets, the Magistrate Judge found that such documents appeared to contain performance information and therefore may help to explain the reason for termination of the foremen class members. The Magistrate Judge ordered the production of such documents but limited the time period that the EEOC had originally requested. Defendants argue that the holding is clearly erroneous because the Order does not identify what performance information would be contained in the balance budget sheets and does not explain how such information could be relevant. Defendants do not argue that production of the declining balance sheets would be burdensome, and instead argue only that whether younger replacements for the terminated foremen obtained higher profits or better efficiencies is irrelevant because a judge cannot reevaluate business decisions made in good faith.

The EEOC asserts that the declining balance budget sheets show daily, weekly, and monthly performance by foremen in terms of whether they

operated their lines of business within their allowed operating budgets for truck maintenance costs, driver salaries, and overtime. The EEOC therefore argues that these documents are relevant because they pertain to job performance of the foremen. In addition, the EEOC contends that these documents are also responsive to a previous request for documents, which sought documents regarding anticipated financial gains and losses from the termination of the class members.

Here, the discovery rules allow for discovery of information that is reasonably calculated to lead to admissible evidence. It is undisputed that the declining balance budget sheets reflect job performance of the terminated foremen and/or those employees who were not transferred. Job performance is certainly relevant in an ADEA case where the employees are contesting terminations or the denial of a transfer. Indeed, it may be necessary to compare the balance budget sheets for various employees to determine whether the job performance of older employees was worse or better than the performance of younger employees who were not terminated or who were given a transfer. Therefore, the Magistrate Judge's decision to require production of the declining balance budget sheets was not contrary to law.

B. Compartor Personnel Files

Defendants argue that production of certain personnel files is overly burdensome.

Request number three of the eighth request for production seeks personnel files for each casual pitcher and/or driver who worked for the residential line at the Cheyenne Transfer Station in 2003 through 2005 and who was disciplined for various reasons. Request number five seeks personnel files for each driver who worked at the Sloan Transfer Station in 2003 to the present and who was disciplined for various reasons. Request number seven of the eighth request for production seeks personnel files for each driver from the Sloan Transfer Station who got into an accident or damaged property from 2003 to the present. Request number eight seeks personnel files for all drivers who received a letter of commitment from 2000 to the present.

Defendants contend that because there is no searchable human resources database, production would require a page by page review of hundreds of, and possibly more than 600, personnel files to determine which employees were disciplined, were involved in accidents or property damage, or received a letter of commitment. Defendants argue that such a production is overly burdensome in light of the fact that these requests relate to only seven members of Plaintiff's class

and Defendants will be producing or already have produced personnel files for employees in the same categories who were terminated (not just disciplined). Defendants do not argue that these files are completely irrelevant.[1]

Certainly, this type of information is relevant, and is more than minimally relevant. For example, comparing terminated employees to each other may not reveal any circumstantial evidence of age discrimination. However, comparing terminated employees to employees who may have received lesser discipline for the same conduct could provide circumstantial evidence of age discrimination. For example, it is possible that younger employees received lesser discipline for engaging in the same conduct that was the basis for termination of an older employee. Furthermore, the fact that these personnel files would relate to only several class members does not lessen the overall relevance of the documents sought. Indeed, if those several employees were the only plaintiffs in this case they would still be entitled to comparator files.

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[1]Defendants do argue that request number seven seeks irrelevant information because the types of property damage that are included in the request are not similar to the accident that resulted in employee Suazo's termination. Defendants are splitting hairs. As set forth above, the personnel files could reveal that other employees were involved in similar accidents and were not terminated or that other employees were involved in numerous smaller accidents but were not terminated. The point is that Plaintiff is entitled to discovery that is reasonably calculated to lead to the discovery of admissible evidence. This request meets that broad standard.

In addition, Defendants only make an argument that production would require review of more than 600 personnel files. Defendants did not provide a declaration to support such statement, nor did they explain how such review would impact their normal business operations, or the costs they would incur to make such production. See Carrillo-Gonzalez v. I.N.S., 353 F.3d 1077, 1079 (9th Cir. 2003) (argument by counsel is not evidence). At best, Defendants have shown that compliance would be inconvenient and require some time and expense. Accordingly, Defendants have not demonstrated that production would be overly burdensome. See Citicorp Diners Club, 985 F.2d at 1040 (requiring production even though it would entail hiring two full-time employees for approximately six months to reconstruct information by reviewing personnel files or interviewing past or present employees, of possibly 1,100 people, since the non-moving party failed to show that the production would disrupt their normal operations and provided no cost estimate).

Moreover, the fact that Defendants do not have a searchable database is an insufficient reason to deny a motion to compel production of relevant documents. See Wagner v. Dryvit Sys., Inc., 208 F.R.D. 606, 611 (D. Neb. 2001) ("The fact that a corporation has an unwieldy record keeping system which requires it to incur heavy expenditures of time and effort to produce requested

documents is an insufficient reason to prevent disclosure of otherwise discoverable information.") (citing cases).

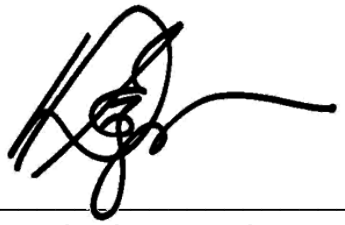
Finally, Defendants are not currently contending that request numbers three or seven are overly broad by seeking personnel files of employees in irrelevant departments. Defendants do contend, however, that request number five should be further limited by line of business at the Sloan Transfer Station and by the number of years, and that request number eight should be further limited to a specific transfer station and a shorter time frame. Although Plaintiff did not address these requests for further limitation, and the requested limitations appear to be reasonable, Defendants did not demonstrate that they made this argument to the Magistrate Judge. As such, Defendants may have waived such argument. Notwithstanding, this Court cannot substitute its judgment for that of the Magistrate Judge. The mere fact that the request is not further limited by two years or by line of business does not make the Magistrate Judge's order of production contrary to law.

CONCLUSION

For the reasons stated above, the Court AFFIRMS the Magistrate Judge's Order Granting Plaintiff's Motion to Compel Production of Documents.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, December 14, 2007.



DAVID ALAN EZRA
UNITED STATES DISTRICT JUDGE

EEOC v. Republic Services et al., CV-S-04-1352 DAE LRL; ORDER AFFIRMING MAGISTRATE JUDGE'S ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS