JOSEPHINE HAYNES, et al., Plaintiffs, v. SHONEY'S, INC., et al., Defendants.

Case No. 89-30093-RV

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION

September 27, 1991, Decided
September 27, 1991, Filed; September 30, 1992, Entered

DISPOSITION: [*1] Plaintiffs' emergency motion to strike is therefore DENIED as moot.

JUDGES: VINSON

OPINION BY: ROGER VINSON

OPINION

ORDER

A two-day hearing was held in this case, commencing on Wednesday, September 18, 1991. Present were Thomas A. Warren, Barry Goldstein, and Sam J. Smith on behalf of the plaintiffs, Donald H. Partington on behalf of defendant Raymond Danner, Rebecca S. Conlan on behalf of defendants Roger Danner and Robertson Investments, Inc. ("RIC"), and Peter W. Zinober, Charles G. Burr, Charles S. Powell III, and Stephen Tallent on behalf of Shoney's, Inc. ("Shoney's"). Also present were Benny Ball, a representative of defendant Shoney's, defendant Raymond L. Danner, and defendant Roger Danner. Members of the putative plaintiff class present were Josephine Haynes, Denise Riley, Buddy Bonsall, Henry and Billie Elliot, Lester Thomas, Leonard Charles Williams, Donna Mongoven-Hightower, Carolyn Cobb, Terrell Forte, Helen Jones, Melkannah Cochran, Elaine Miles, Arthur Mangio, Paula Dean, and Elizabeth Menchion.

Various discovery motions were argued and are discussed below. Additionally, I include my findings on the scope of the litigation, including both temporal limitations and those entities from [*2] whom discovery may be sought.

A) ***Plaintiff's Motion for Discovery Conference (doc. 543).*** This motion has been rendered unnecessary by the motions hearing held on September 18, 1991. Therefore, plaintiffs' motion is DENIED.

B) ***Shoney's Motion for a Protective Order (doc. 389).*** Defendant Shoney's seeks a protective order from the plaintiffs' fifth and sixth sets of interrogatories and impose specific limitations on the plaintiffs' future use of interrogatories. Shoney's contends that the six sets of 139 interrogatories consist of 486 subparts, well over the fifty permitted by Local Rule 7(c). Although I have on one occasion permitted the plaintiffs to file interrogatories exceeding the number permitted under Local Rule 7(c), I never intended to grant the plaintiffs unlimited discovery. However, rather than grant Shoney's a blanket protective order as to all interrogatories which exceed the specifications of Local Rule 7(c) and thereby add further delay, I will deal with these on an item-by-item basis.

The plaintiffs contend that because Shoney's motion for summary judgment makes sweeping allegations against Nelson, they are entitled to extensive discovery [*3] to rebut these allegations. However, in light of the addition of plaintiffs whose claims are similar to those raised by Nelson, I do not find that the defendant's motion for summary judgment justifies this departure from the limitations set out in Local Rule 7(c). Furthermore, as I explained in the hearing, I believe that the need for this discovery has been superseded by subsequent events. Therefore, defendant Shoney's motion for a protective order as to the fifth and sixth sets of interrogatories is GRANTED.

C) ***Defendant Shoney's Motion for Protective Order (doc. 499).*** Defendant Shoney's objects to the request for production of personal correspondence of certain officers and executives because none of the individuals are parties and because the requests are not limited to relevant subjects or a relevant time frame. Defendant Shoney's has argued that only parties may be served with requests for production under *Rule 34, Federal Rules of Civil Procedure.* Defendant Shoney's also argues that the requests are irrelevant because such correspondence may touch on every aspect of the employees' lives and are not limited to relevant issues. Finally, the defendant argues [*4] that the request constitutes an invasion of privacy, and that it is intended only to harass, embarrass, and intimidate witnesses.

Plaintiffs argue that the correspondence files are both relevant and discoverable. The fact that documents are "personal" does not make them immune from discovery. Plaintiffs seek no documents other than those prepared or received by Shoney's decision-makers while working at Shoney's and which are maintained by Shoney's. Plaintiffs argue that defendant Shoney's refusal to produce documents pertaining to the Lodging, Mike Rose Foods, and Commissary divisions is unfounded since Shoney's admittedly maintains control over these

divisions and is under court order to preserve employment records pertaining to these divisions. The plaintiffs argue that discovery of documents regarding practices prior to 1985 is justified under the continuing violation theory.

I find that the personal correspondence files, to the extent limited by the plaintiffs above, are relevant to the issues in this suit and should be produced. However, those files which are clearly marked personal and clearly do not contain business-related documents are not subject to the order to produce. [*5] As to the files of Mike Rose Foods, the Commissary, and the Lodging Division, I agree with the defendant that the scope of this litigation does not encompass documents pertaining to these entities. None of the named plaintiffs have filed charges against these entities, nor are they named in the complaint as defendants. All of the named plaintiffs have alleged discrimination by either Captain D's or Shoney's. No allegations of discrimination have been made with respect to these entities and I find, therefore, that the plaintiffs are not entitled to files pertaining to them.

An underlying and repeated conflict in many of the discovery motions concerns the temporal scope of the litigation. The plaintiffs have argued that they have presented "overwhelming" evidence of a continuing violation which justifies a court order granting discovery as far back as July 2, 1965, the effective date of Title VII. The defendants, on the other hand, argue that the temporal scope of the litigation should be limited to a point immediately prior to the period for which the plaintiffs are entitled to relief under Title VII, that is, to 1984 or 1985. Although I certainly agree that the plaintiffs are [*6] entitled to discovery sufficiently early to demonstrate a pattern and practice, I do not believe that the plaintiffs are entitled to the extensive time period they seek. Such an extended time period would result in discovery and document production of wholly unmanageable proportions and would clearly not be consistent with the interests of justice. [1]

> 1 Indeed, the defendants contend that as of this date, already in excess of one million documents have been produced, excluding the computer files, and that the plaintiffs have photocopied in excess of three hundred thousand of those documents.

Therefore, I am compelled to select a somewhat arbitrary date at which discovery should be cut off that will facilitate the complete development of the factual record in this case while not unduly delaying its disposition. Accordingly, the defendants are ordered to produced the required documents which arise in the calendar year 1980 or later. However, the defendant are not required to produce files regarding Mike Rose Foods, [*7] the Commissary, or the Lodging Division. To that extent, defendant Shoney's motion for protective order is GRANTED.

D) ***Shoney's Motion to Strike Plaintiffs' Doc. 521 (doc. 530).*** Defendant Shoney's has moved to strike the plaintiff's response to Shoney's motion for protective order (doc. 521), on the grounds that it fails to comply with the court's order limiting pages to fifteen (15) pages. Defendant Shoney's contends that one of the attachments to plaintiffs' memorandum in opposition, which is twenty (20) pages, is not relevant factual support, but rather a restatement of a brief previously filed. [2] Therefore, the memorandum is really thirty-five (35) pages long. [3]

> 2 Defendant Shoney's refers to exhibit 7, which is a copy of a portion of the plaintiffs' reply on class certification, discussing the continuing violation rule.
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> 3 Defendant also points at other "illegal" memoranda filed, but I do not address these, as they are not the subject of this motion to strike. Nor do I address plaintiffs' elaborate response to those portions.

[*8] I agree with defendant Shoney's that the memorandum does not comply with the my order limiting page lengths. However, I do not consider this a grievous violation which would justify striking the entire response. [4] Therefore, the defendant's motion is GRANTED to the extent that exhibit 7 shall be stricken from the record. The remainder of the response is unaffected.

> 4 Indeed, this order has only recently been strictly enforced, and I am confident that there are a number of objectionable memoranda in the record prior to the date on which I instructed the clerk's office to return noncomplying documents.

E) ***Plaintiff's Motion to Compel (doc. 424).*** To the extent that issues raised in plaintiffs' motion to compel are addressed in my order on defendant Shoney's motion for a protective order above (doc. 499), the motion is DENIED as moot. [5] However, my findings with respect to specific interrogatories are set out below.

> 5 This includes the issues regarding temporal scope and the individuals from whom the plaintiffs may legitimately seek discovery.

[*9] Interrogatory #11 of the June 20 set seeks data relied upon by defendant Shoney's to create its labor force analyses about the availability of black and non-black employees at Shoney's restaurants. Defendant Shoney's has represented that such information was obtained via census bureau statistics and general population data from private concerns. To the extent that defendant Shoney's has agreed to provide a full description of the underlying data and specifically identify its source, the motion is GRANTED; otherwise it is DENIED.

Interrogatory #13 seeks various types of information for each job position from 1985 to date. To the extent that this dispute has not been resolved by my ruling on the enterprise issue above, the plaintiffs' motion is

DENIED.

F) ***Plaintiffs' Motion to Compel Responses to November 15, 1990 Interrogatories (doc 453).*** The plaintiffs seek to compel defendant Shoney's to respond to interrogatories which concern a "covenant" entered into with the Southern Christian Leadership Conference by defendant Shoney's in August 1989. Defendant Shoney's has conceded that if it uses such documents as part of its defense in this action, the plaintiffs will be [*10] entitled to discovery. Because defendant Shoney's has indicated that it may use these documents and in light of the imminence of trial, I find that the plaintiffs are entitled to discovery now. Therefore, the plaintiffs' motion to compel is GRANTED.

G) ***Plaintiffs' Motion to Compel Shoney's to Respond to 12/21/90 Interrogatory (doc 508).*** The plaintiffs seeks to compel defendant Shoney's to respond to the single interrogatory of December 21, 1990, which requested that the defendant define what constitutes "employment-related documents." The plaintiffs have conceded the vagueness of this request, and I find that defendant Shoney's objection is justified. If the plaintiffs seek specific types of employment-related documents, the plaintiffs may specify or define those desired. Therefore, the plaintiffs' motion to compel is DENIED.

H) ***Plaintiffs' Motion for Order Requiring Shoney's to Answer Interrogatories and Produce Documents That Shoney's Had Committed to Answer and Produce (doc. 509).*** The plaintiffs contend that defendant Shoney's has failed to provide answers and documents to discovery requests despite the fact that it had pledged to do so no later [*11] than December 15, 1990 (which date was subsequently extended to December 21, 1990). During the hearing, the parties acknowledged that the predominant issues were that of temporal scope and the proper parties subject to discovery.

I have already limited the temporal scope of discovery to the calendar year 1980. This limitation applies with equal force to any interrogatories covered by this motion to compel. I have similarly limited the parties from whom discovery may properly be sought. Therefore, to the extent that interrogatories covered by this motion seek information prior to 1980 or from Mike Rose Foods, the Commissary, or the Lodging Division, they are DENIED; otherwise they are GRANTED.

As to interrogatories #11 and #12, which requests information regarding past disciplinary actions taken against employees for discriminatory behavior, and interrogatories #21 and #22, concerning past complaints of racial discrimination, the defendant will be required to produce such information, subject to the above limitations, to the extent that it has such information within its possession or control. In all other respects, the plaintiffs' motion to compel is DENIED as moot.

I) [*12] ***Shoney's Motion to Compel Plaintiffs to Answer Interrogatories and Produce Documents (doc. 568).*** Defendant Shoney's seeks discovery of certain hold harmless agreements entered into by plaintiffs with certain individuals in exchange for their agreement to give testimony. Plaintiffs have refused to identify these individuals (except the names of five expected to be witnesses) or to reveal the location of documents evidencing such agreements, claiming that they are protected work product. The document requests also seek copies of the agreements and any related documents, some of which were not prepared by plaintiffs' counsel.

The interrogatories request only facts, such as basic identification of the individuals who entered these agreements, which are not protected by the work product doctrine. Nor do I find that the hold harmless agreements are trial materials within the meaning of *Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947)* or *Rule 26(b)(3), Federal Rules of Civil Procedure.* Documents such as contracts with legal significance are not work product. These documents may be highly relevant to establishing [*13] bias on the part of some of plaintiffs' witnesses, [6] or, perhaps, witnesses upon whom the defendants intend to rely. Because I find that these documents are relevant and are not protected by the work product privilege, the defendant's motion to compel is GRANTED.

6 I also find these documents relevant in light of the allegations of *ex parte* communication made by defense counsel.

J) ***Plaintiff's Motion to Compel Shoney's to Produce Documents Pursuant to May 6, 1991, Request for Production (doc. 613).*** Plaintiffs contend that defendant Shoney's has refused to produce documents relating to B & C Associates ("B & C"), a minority-owned public relations firm which has been directly involved in representing defendant Shoney's on charges of racial discrimination and in negotiating and implementing a "covenant" purportedly designed to increase employment and other opportunities for blacks. Plaintiffs contend that these documents are relevant to the charges and other similar matters.

According to the plaintiffs, [*14] defendant Shoney's authorized B & C to deal directly with the EEOC on its behalf and to discuss specific charges of discrimination. Defendant Shoney's requested B & C to improve Shoney's image with the EEOC. B & C recommended or referred blacks for hire, responded to complaints of racial discrimination, advised Shoney's about responding to the media, and made suggestions regarding Shoney's image with black organizations. Plaintiffs further contend that Skelton's failure to recall matters regarding B & C at his deposition underscores the importance of these documents.

Defendant Shoney's argues that the information sought is wholly irrelevant to this case and is not calculated to lead to admissible evidence. The defendant contends that because the plaintiffs are unwilling to limit the request to relevant documents, the motion to compel should be denied or limited to legitimate subjects of

discovery. B & C was hired to combat some of the adverse publicity generated by the plaintiffs in this case. The plaintiffs' request seeks all documents, including bills, relating to Shoney's relationship with B & C. Although I agree with the plaintiffs that some of the information sought is [*15] relevant and discoverable, I find that information concerning any negotiations with the EEOC or conciliation of claims need not be produced. Furthermore, plaintiffs are not entitled to information relating to billing. Therefore, with the above limitations, the plaintiffs' motion to compel is GRANTED.

K) ***Plaintiff's Motion to Compel a Full Response to Plaintiffs' June 20, 1990, and May 1, 1991, Requests for Production (doc. 622).*** Plaintiffs seek production of the complete personnel files, including compensation documents, for fifteen employees. The plaintiffs contend that the witnesses may have a financial interest on the litigation and that they are entitled to discover its extent in order to demonstrate bias. Thus, plaintiffs seek information relating to salaries, stock options, special "ownership opportunities," and bonuses. Shoney's argues that the requested information is irrelevant and calculated to embarrass. Defendant Shoney's also argues that the plaintiffs' argument of bias confuses the fact of one's compensation with that of one's employment. I agree with defendant Shoney's that the fact of employment alone is sufficient to demonstrate bias. The salary [*16] amounts do not add anything, and are entitled to privacy and confidence. Therefore, the plaintiff's motion to compel is DENIED.

L) ***Defendants' Emergency Motions for Protective Order (docs. 85, 104).*** The defendants allege that attorney Warren has engaged in *ex parte* communications and other misconduct and requests that the plaintiffs be compelled to (1) disclose all current employees with whom the litigation has been discussed; (2) produce work product relating to communications with managerial employees or those who may have made corporate admission; (3) determine if current employees have managerial responsibilities; and (4) if so, cease communicating with those employees about the litigation. Defendants also request that the court preclude the introduction of evidence obtain via these *ex parte* communications and order all future communications between plaintiff and unnamed class members be pre-authorized by the court. Shoney's has also requested an evidentiary hearing. *See* doc. 285.

Defendant Shoney's contends that Warren engaged in *ex parte* contacts with unnamed class members which were coercive, misleading, or disruptive of Shoney's business operations. [*17] These unnamed class members included Tanya Catani, Eric Ashford, Kim Brazzell, and Wanda Twombly. According to Shoney's, these communications also violated Rule 4-4.2 of *The Rules Regulating The Florida Bar* and involved threats, solicitations, misrepresentations, and disruptive activities. RIC contends that attorney Warren contacted and undertook representation of one of RIC's current managers.

I view these allegations as serious, both in light of ethical implications and the immediate potential for a grave conflict of interest between attorney Warren and the putative plaintiff class. However, I do not believe that a comprehensive gag order at this stage in the litigation would serve the interests of justice. For that reason, the defendants' motions for protective order are DENIED. However, counsel for the plaintiffs are hereby ordered to refrain from any and all contact with current managerial employees of any of the named defendants. Failure to comply with this order may result in severe sanctions. In addition, attorney Warren has indicated that he will immediately withdraw from further representation of the RIC store manager, a particularly vexing situation. Furthermore, [*18] I believe that it may become necessary to closely scrutinize these matters in order to evaluate the adequacy of class representation. [7] I defer further ruling until the time of the class certification hearing.

7 Counsel for the defendants has indicated their intention to present these issues during the class certification hearing scheduled for November 20, 1991.

M) ***Plaintiff's Motion to File a Fourth Amended Complaint [doc. 653].*** The plaintiffs seek to amend the complaint to add Elizabeth Menchion, who was allegedly not hired because of race, in violation of Title VII. I fail to see any justification at this late date for filing an additional complaint, which will only serve to delay these proceedings. The plaintiffs have presented no real justification apart from their obvious concern regarding the merits of their Section 1981 claims, in light of current appellate authority following *Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)*. [*19] Plaintiffs were aware of the potential preclusive effect of *Patterson* at the January 3, 1991, hearing, at which time I granted leave to "take their best shot" and file a third amended complaint. In light of the absence of adequate justification and the potential prejudice to the defendants posed by yet another complaint, the plaintiffs' motion for leave to amend is DENIED.

N) ***Plaintiffs' Emergency Motion to Strike Shoney's Replies to Plaintiffs' Opposition to Shoney's Motions for Summary Judgment as to Claims of Nelson and Riley (doc. 454).*** Plaintiffs contend that Shoney's reply regarding Nelson was filed almost three months after plaintiffs filed their responses, and that Shoney's reply regarding Riley was filed almost two months after plaintiffs' response. Shoney's has not responded to the emergency motion to strike. Plaintiffs consider it moot or granted *sub silencio* by the court's supplemental order on discovery of August 8, 1989 (doc. 130). I agree. Plaintiffs' emergency motion to strike is therefore DENIED as moot.

DONE AND ORDERED this 27th day of September, 1991.

United States District Judge

ROGER VINSON