1997 WL 416423
United States District Court,
D. Nebraska.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
NEBCO EVANS DISTRIBUTION, Incorporated, a Nebraska corporation, Defendant.

No. 8:CV96-00644. | June 9, 1997.

Opinion

STROM, Senior Judge.

***1** This matter is before the Court on plaintiff's motion to bifurcate trial and discovery, limit discovery and preserve attorney client protection for class members (Filing No. 8). The motion raises three issues.

I. BIFURCATION OF TRIAL AND DISCOVERY

The first issue is whether the discovery and trial of this case should be bifurcated. The plaintiff seeks to bifurcate discovery and trial of this case into liability and remedial phases in order to promote economy for both the Court and the parties. While the defendant does not object to separating the trial into liability and remedial phases, the defendant proposes that the remedial phase, if necessary, immediately follow the liability phase so that the same jury can hear both phases. The defendant's proposal thereby requires that discovery for both phases be conducted concurrently.

The Federal Rules of Civil Procedure provide:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Fed.R.Civ.P. 42(b). The Court may, in its discretion, bifurcate issues for trial in order to dispose of issues in the most efficient and effective manner, "so long as a party is not prejudiced." *Rolscreen Co. v. Pella Prods. of St. Louis, Inc.,* 64 F.3d 1202, 1209 (8th Cir.1995). "When the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." *International Brotherhood of Teamsters v. United States,* [14 EPD ¶ 7,579] 431 U.S. 324, 361 (1977). In *Craik v. Minnesota State Univ. Bd.,* [33 EPD ¶ 34,252] 731 F.2d 465 (8th Cir.1984), a Title VII sex discrimination case, the Eighth Circuit stated:

> [F]or cases brought ... by the government on behalf of many employees, charging that an employer engages in discriminatory practices throughout most or all of its operations, the Supreme Court in *Franks v. Bowman Transportation Co.,* [11 EPD ¶ 10,777] 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), and *Teamsters, supra,* prescribed a different order of proof. The trial of class actions is usually bifurcated into a liability phase and a remedial phase.

Craik, 731 F.2d at 470.

It has been represented to the Court that the number of individual applicants affected by the defendant's alleged discriminatory pattern or practice is well over one hundred (100) individuals, possibly as high as 150 to 200 individuals.[1] "At the initial, 'liability' stage of a pattern-or-practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." *Teamsters,* 431 U.S. at 360. Rather, the government's initial burden is more narrow. The government must "demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers." *Id.* The government must establish a *prima facie* case that such a policy existed. *Id.*

[1] Plaintiff's Brief at 1–2.

***2** Based on the approximate number of individual applicants involved, the narrow issue to be determined at the liability phase and the foregoing authorities, the Court finds that in this potentially lengthy case the interests of

expedition and economy are best served by separating the issues of liability and remedies for trial. A verdict for the defendant on the liability issue is dispositive and would obviate the necessity for a remedial phase altogether. The Court, therefore, will bifurcate this case into two phases. The first phase will determine liability and injunctive relief. The second phase, if necessary, will determine relief for the individual applicants.

If a remedial phase is necessary, should it follow immediately after the liability phase? The defendant argues that it should so that the same jury will hear both phases. In addition, the defendant argues that with the same jury, evidence from the liability phase will not have to be repeated at the remedial phase which promotes efficiency. Also, certain witnesses would not be inconvenienced by testifying twice.

The court in *Arnold v. United Artists Theatre Circuit, Inc.,* 158 F.R.D. 439 (N.D.Cal.1994) was faced with the same issue. Arnold was an Americans with Disabilities Act (ADA) class action lawsuit. The court concluded to bifurcate the trial, emphasizing that the defendant and third-party defendants had failed to identify any substantive prejudice that would result from bifurcation. *Id.* at 459. The court continued:

> In the event that the parties exercise their right to jury trial for both stages of the case, the Court anticipates that separate juries will hear the two phases. It is constitutionally permissible for separate juries to hear the two phases of a bifurcated trial, (citations omitted), and the Court believes that structuring the trial of this case so as not to require that the two phases necessarily be tried back-to-back is sensible as it will afford the parties and the Court flexibility.

Id. at 460.

The Court agrees with the Arnold court that not trying the two phases back-to-back is the more sensible route. The Court is cognizant of the defendant's concern that if the damages phase is tried to a second jury at a later time, certain witnesses may have to testify at both phases of the trial which is inconvenient and inefficient. *See Flavel v. Svedala Indus., Inc.,* [64 EPD ¶ 43,027] 875 F.Supp. 550, 555 (E.D.Wis.1994). However, the defendant has not articulated any prejudice that it would suffer if the trial is conducted in such a manner. Therefore, in this case, the remedial phase, if necessary, will not immediately follow the liability phase.

Because the two phases will not be tried back-to-back, it follows that the discovery relating to the two issues should also be bifurcated. *See Cale v. Outboard Marine Corp.,* 48 F.R.D. 328, 329 (E.D.Wis.1969) ("Having concluded that the damages issue should be reserved for subsequent trial, it follows, in my opinion, that discovery on this topic should also be deferred"). "One purpose behind Rule 42(b) is the deferral of costly and potentially unnecessary discovery and trial preparation on other phases of the case pending resolution of preliminary dispositive issues." *Martin v. Bell Helicopter Co.,* 85 F.R.D. 654, 658 (D.Colo.1980). By limiting the scope of the first phase to liability, there is no need to conduct extensive discovery relating to the individual applicants' damages until the need for such evidence has proved necessary.

***3** The defendant argues that it will be prejudiced if discovery is bifurcated because it will not be able to proffer testimony of individual applicants at the liability phase of the trial which thereby diminishes the defendant's ability to defend itself.[2] Some of the defendant's concerns will be alleviated because, as discussed in the next section of this opinion, the defendant can depose up to fifteen people in addition to the witnesses designated by the plaintiff as trial witnesses. Further, as is evident in the defendant's argument,[3] the defendant has within its possession the employment applications of the individuals from which it can determine if an individual was qualified or had even applied for a truck driving position. With that evidence, the defendant would be able to rebut the validity of any statistical evidence proffered by the plaintiff. Further, as discussed previously, the issue to be determined at the liability phase is a narrow issue. Based on the foregoing, the Court finds that discovery should also be bifurcated into a liability and remedial phase.

2 Defendant's Brief at 5–8.

3 Defendant's Brief at 7 and Filing No. 13.

II. LIMITATIONS ON DISCOVERY

The second issue before the Court is whether it should impose limitations on depositions. This issue is related to the previous issue in that there is no need for the defendant to depose each of the individual applicants and prepare for the remedial phase before liability has been determined. Therefore, the Court will allow the defendant

to depose fifteen people in addition to any witness designated by the plaintiff as a trial witness. The defendant also seeks to obtain unlimited records depositions in order to obtain employment and other records of each class member. As defendant has its own records regarding the application, hiring and employment history of each person who has applied for employment, it appears that any additional records are only relevant to the remedial phase, not the liability phase. Therefore, prior to a determination of liability, the defendant will not be allowed to take the proposed records depositions absent a showing of necessity.

III. LIMITATIONS ON COMMUNICATIONS

The last issue before the Court is whether it should prohibit counsel for the defendant from engaging in informal communications with individual applicants. The plaintiff contends that any such communications are *ex parte* communications which violate ethical rules. The defendant argues that the communications would not violate any ethical rules and are a less costly method of interviewing the individual applicants.

The Nebraska Code of Professional Responsibility provides in part:

> During the course of his or her representation of a client, a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer in that matter unless he or she has the prior consent of the lawyer representing such other person or is authorized by law to do so.

***4** DR 7–104(A)(1). To resolve the issue before it, the Court must determine if counsel for the EEOC represents the individual applicants.

In support of its contention that no representative relationship exists, the defendant relies upon *General Tel. Co. of the Northwest: v. Equal Employment Opportunity Comm'n.* [22 EPD ¶ 30,861] 446 U.S. 318 (1980). *General Telephone* was a Title VII sex discrimination case brought by the EEOC under 42 U.S.C. § 2000e–5(f)(1). The issue before the Court was whether the EEOC needed to comply with the class representative certification requirements of Rule 23. In its opinion, the Supreme Court, looking to the enforcement provisions of Title VII, stated that the private action rights contained in the enforcement provisions "suggest that the EEOC is not merely a proxy for the victims of discrimination and that the EEOC's enforcement suits should not be considered representative actions subject to Rule 23." 446 U.S. at 326.

General Telephone is not controlling in this case. While the ADEA adopted Title VII's substantive prohibitions, the ADEA's enforcement procedures are those of the Fair Labor Standards Act (FLSA). 29 U.S.C. § 626(b); *Lorillard v. Pons,* [16 EPD ¶ 8134] 434 U.S. 575, 584–85 (1978); *Equal Employment Opportunity Comm'n v. Wackenhut Corp.,* [57 EPD ¶ 40,954] 939 F.2d 241, 242 (5th Cir.1991). Unlike the Title VII enforcement provisions, under the ADEA, the right of an individual to bring a private action "shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter." 29 U.S.C. § 626(c)(1). Further, "while Title VII explicitly provides for intervention by both the EEOC and the aggrieved party, the ADEA makes no mention of intervention whatsoever." *Wackenhut Corp.* 939 F.Supp. at 244.

The Court agrees with the rationale of the court in *E.E.O.C. v. U.S. Steel Corp.,* [55 EPD ¶ 40,448] 921 F.2d 489 (3rd Cir.1990). In *U.S. Steel Corp,* the court found that because Congress created a private right of action under the ADEA but cut it off once the EEOC begins its action, "the conclusion that the EEOC is the individual's representative in ADEA suits ... seems inescapable." 921 F.2d at 495. The Court also agrees that "[w]hile there does not appear to be any formal attorney-client relationship, the EEOC, through its attorneys, are essentially acting as *de facto* counsel for the [individuals]." *Bauman v. Jacobs Suchard, Inc,* [56 EPD ¶ 40,621] 136 F.R.D. 460, 461 (N.D.Ill.1990).

In this case, the Court is satisfied that the EEOC is serving as the applicants' representative because it has filed suit for individual relief on their behalf and thereby cut off the applicants' private right of action for that relief. Because of the representative relationship, informal interviews by the defendant with an applicant without the prior consent of counsel for the EEOC would violate Nebraska's ethical rules. As a result, such communications will be prohibited. Accordingly,

***5** IT IS ORDERED:

1) Plaintiff's motion to bifurcate (Filing No. 8) is *granted.* Discovery of this case will be bifurcated into liability and remedial phases. Discovery relevant to the remedial phase shall begin, if necessary, after the trial of the liability phase;

2) Trial of this case will be bifurcated into liability and remedial phases. The liability phase will determine liability and injunctive relief. The remedial phase, if necessary, will determine individual relief and will be heard by a second jury;

3) The defendant is permitted to depose fifteen people in addition to any witness designated by the plaintiff as a trial witness; and

4) The defendant is prohibited from informally communicating with any individual applicant without the prior consent of counsel for the EEOC.

Parallel Citations

70 Empl. Prac. Dec. P 44,756