EEOC v. Bloomin' Apple Rockford I, LLC

United States District Court for the Northern District of Illinois, Western Division
January 24, 2006, Decided ; January 24, 2006, Filed
Case No. 04 C 50375

Reporter: 2006 U.S. Dist. LEXIS 2708
UNITED STATES EQUAL EMPLOYMENT, OPPORTUNITY COMMISSION, Plaintiff, SUSAN BRENNEKA, ERIN FOSTER, CHRISTINA JAVID, VICKI MINER, and TRACEY RANGEL, Plaintiffs-Interveners, v. THE BLOOMIN' APPLE ROCKFORD I, LLC, THE BLOOMIN' APPLE, LLC, and HEARTLAND APPLE, INC., Defendants.

Subsequent History: Motion denied by United States EEOC v. Bloomin' Apple Rockford I, LLC, 2006 U.S. Dist. LEXIS 5185 (N.D. Ill., Feb. 10, 2006)

Counsel: [*1] For -- U.S. Equal Employment Opportunity Commission, Plaintiff: Diane Ilene Smason, John C. Hendrickson, United States Equal Employment Opportunity Commission, Chicago, IL; Laurie S. Elkin, Deborah Lois Hamilton, Equal Employment Opportunity Commission, Chicago, IL.

For Susan Brennecka, Erin Foster, Christina Javid, Vickie Miner, Tracy Rangel, Petitioners: Rene Hernandez, Attorney at Law, Rockford, IL; Ryan M Holmes, Law office of Rene Hernandez, P.C., Rockford, IL.

For The Bloomin' Apple Rockford I, LLC, Bloomin' Apple LLC, Heartland Apple Inc, Defendants: Thomas Michael Wilde, Alison J Maki, Thomas G. Abram, Vedder, Price Kaufman & Kammholz, P.C., Chicago, IL.

Judges: P. MICHAEL MAHONEY, MAGISTRATE JUDGE.

Opinion by: P. MICHAEL MAHONEY

Opinion

MEMORANDUM OPINION AND ORDER

Magistrate Judge

P. Michael Mahoney

This matter is before the court on United States Equal Employment Opportunity Commission's ("EEOC") November 17, 2005 Motion to Compel Production of Documents and Interrogatory Responses. For the reasons stated below, most of EEOC's Motion is carried until the next hearing date of February 8, 2006. Counsels are to engage in a Local Rule 37.2 conference to further [*2] crystalize the issues before the court. Counsels should meet prior to February 8th and additionally meet in the federal courthouse on February 8th at 1:30 p.m. The court will meet with the parties at 2:30 p.m. on February 8, 2006. Counsels should be prepared to address each unresolved discovery request specifically. In order to aid counsels in narrowing the issues, the court will briefly address some of the general concerns raised by counsels during the briefing of EEOC's Motion.

I. Introduction

The court looks to EEOC's March 2, 2005 First Amended Complaint and Defendants' Answer thereto to help define the proper scope of discovery. EEOC's Complaint is brought under Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991. It alleges unlawful employment practices on the basis of sex and retaliation, adversely affecting a class of female employees. More specifically, the EEOC alleges that "Applebee's has engaged in unlawful employment practices at its restaurant located at 1675 East Riverside Boulevard in Rockford, Illinois" by: (1) subjecting female employees to a hostile work environment; (2) retaliating against some female employees by subjecting [*3] them to different terms and conditions of employment/termination; (3) constructively discharging some female employees; and (4) engaging in a pattern or practice of sex discrimination and retaliation. (Complaint, at 4).

Three Defendants are named in EEOC's Complaint: The Bloomin' Apple Rockford I, LLC, The Bloomin' Apple, LLC, and Heartland Apple, Inc. Each Defendant is alleged to be an employer within the context of Title VII. The Bloomin' Apple, LLC, was formed in 1998 by four individuals (Williams, Robertson, K. Allardice, and M. Allardice) and is the sole member of The Bloomin' Apple Rockford I, LLC, which owns the Applebee's restaurant located on East Riverside Drive that is referenced in EEOC's Complaint alleging unlawful employment practices. Heartland Apple, Inc. was incorporated by three individuals (Robertson, K. Allardice, and M. Allardice) in 2002, and it owns ten Applebee's restaurants located in central Illinois and Iowa. Defendants deny that The Bloomin' Apple, LLC and Heartland Apple, Inc. are "employers" within the meaning of Title VII, and deny that The Bloomin' Apple Rockford I, LLC, The Bloomin' Apple, LLC, and Heartland Apple, Inc. operate as a single employer.

[*4] All three Defendants also deny EEOC's allegations of unlawful employment practices (Answer, at 5) and raise additional affirmative defenses, including that "pursuant to its established sexual harassment policy and procedures, Defendants exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and that "Charging Parties' unreasonably failed to take advantage of those preventative and corrective opportunities." (Answer, at 6).

II. Discovery Requests at Issue

The court finds it will be necessary to work through the parties' discovery disputes one request at a time, rather than providing a blanket Order granting or denying EEOC's Motion to compel responses generally. The discovery requests that are the subject of this Motion were sent in two rounds. On February 8, 2005, nearly one year ago, Defendants were served with EEOC's First Request for Production of Documents (22 Requests) and First Set of Interrogatories (23 Interrogatories). EEOC served a Second Request for Production of Documents on October 17, 2005 (10 Requests). Defendants have responded to both rounds of discovery by EEOC. However, being unsatisfied by Defendants' Responses, the [*5] EEOC moved to compel full responses to both rounds of discovery on November 17, 2005. [1]

EEOC's Motion to Compel does not clearly delineate which Production Requests and Interrogatories it believes Defendants have failed to respond to sufficiently. Several discovery requests are discussed generally in EEOC's Motion, but the prayer for relief seems to compel responses to all propounded discovery. Argument offered in support of EEOC's Motion to Compel is also not very specific, failing to tie relevance to specific requests for documents or information.

The court has gleaned from its Motion that EEOC believes that Defendants have improperly denied it discovery regarding two main issues: (1) whether The Bloomin' Apple, LLC can be held liable for the discrimination at issue because it failed to train employees about anti-sexual harassment policy and, further, its employees failed to properly supervise the General Manager whose conduct is at issue in this [*6] case; and (2) whether it is appropriate to pierce the corporate veil between The Bloomin' Apple Rockford I, LLC and The Bloomin' Apple, LLC or Heartland Apple, Inc. Exactly how requests for items like "quarterly financial statements," "documents showing T.S.S.O. North, Inc. has signed a lease," and "a list of all employees of Defendants" relates to the above areas of discovery or the Complaint/Answer is less than clear.

The court cannot decide EEOC's Motion based on generalities. To decide EEOC's Motion, the court must have enough information to decide under *Fed. R. Civ. P. 26* and *37* if the discovery should be allowed. Generally, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. *Fed. R. Civ. P. 26*. Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. *Fed. R. Civ. P. 26(b)(1)*. However, the court has authority to limit discovery that is unreasonably cumulative [*7] or unduly burdensome or expensive. *SeeFed. R. Civ. P. 37*; *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681-82 (7th Cir. 2002). This requires the court to balance the potentiality of the requests leading to discoverable material with the burden of production. After input form the parties on February 8, 2006, if necessary, the court will be able to decide the balance of the Motion based on a balance of EEOC's need for requested items or information and the Defendants' burden of production.

III. Analysis

The court can offer the following opinions to aid the parties as they attempt to resolve their discovery disputes. First, the court will discuss the proper scope of discovery in light of EEOC's attempts to pierce an alleged corporate veil between The Bloomin' Apple Rockford I, LLC and The Bloomin' Apple, LLC or Heartland Apple, Inc. Second, the court will address the implications on discovery arising from EEOC's attempt to establish vicarious/affiliate liability and Defendants' assertion of the *Faragher/Ellerth* affirmative defense.

A. Piercing the corporate veil

In this case, EEOC has alleged that [*8] The Bloomin' Apple Rockford I, LLC, The Bloomin' Apple, LLC, and Heartland Apple, Inc. have operated as a single employer for purposes of Title VII. Defendants' have denied this allegation. Based on this alone, it seems that there has to be some discovery allowed as to the relationship between the three entities named as Defendants.

However, EEOC also appears to seek discovery about entities that are not named as Defendants. For example, EEOC seeks "a complete list of all of the individuals working at the restaurants in which the Bloomin' Apple LLC was the sole member." This request would require employee lists from the Bloomin' Apple Rockford II, the Bloomin' Apple Janesville, the Bloomin' Apple Freeport, the Bloomin' Apple Beloit, and the Bloomin' Apple Springfield.

In addition, EEOC seeks documents containing any agreements between the Defendants and Applebee's

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[1] Fact discovery closed in this case on December 30, 2005.

International and the corporate minutes, records, and filings from 2002 to present, *but* EEOC defines Defendants as "The Bloomin' Apple Rockford I, LLC, The Bloomin' Apple, LLC, and Heartland Apple, Inc., their subsidiaries or parent companies, any company for which any of the named entities serves as a stock holding [*9] company, their predecessors, and any current or former officers, directors, employees, agents, attorneys or other persons acting or purporting to act on any of the Defendant's behalf including T.S.S.O. North, Inc." (Pl.s' Mot., at Ex. 4, p.2).

Under *Fed. R. Civ. P. 26(b)*, discovery is limited to matters relevant to the claim or defense of any party. Discovery is not permitted as to potential additional claims or defenses absent a court order expanding discovery. [2] Because EEOC has not asserted any claims against Bloomin' Apple Rockford II, the Bloomin' Apple Janesville, the Bloomin' Apple Freeport, the Bloomin' Apple Beloit, the Bloomin' Apple Springfield, or T.S.S.O. North, Inc., it is difficult for the court to understand how ordering discovery related to these entities is proper with regard to piercing the corporate veil.

B. Affiliate/Vicarious [*10] **Liability & the *Faragher/Ellerth* Affirmative Defense**

EEOC seeks information and documents in support of its claim of vicarious/affiliate liability on the part of Bloomin' Apple, LLC. Depending on EEOC's success with piercing the corporate veil, EEOC may be required to demonstrate, under *Papa*, that Bloomin' Apple, LLC is responsible for the discrimination at issue because it "directed the discriminatory act, practice, or policy" at issue. *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 941 (7th Cir. 1999). EEOC claims that the Bloomin' Apple, LLC's failure to properly supervise the General Manager of the Bloomin' Apple Rockford I, and to train all employees about the restaurant's anti-sexual harassment policies, does constitute "directing" a discriminatory act, practice, or policy under *Papa*.

Though it is evident that EEOC seeks an order compelling information that could bolster a claim that Bloomin' Apple, LLC is vicariously liable due to ineffective anti-sexual harassment policies or practices, the court can leave aside whether or not this is an appropriate application of *Papa* for the time being. Defendants may have already opened the door to the same [*11] discovery Plaintiff seeks. To the extent that EEOC's propounded requests explore how the same supervisors that supervised the General Manager of the Bloomin' Apple Rockford I handled other restaurants' General Managers and sexual harassment issues, the discovery is relevant to Defendants' *Faragher/Ellerth* affirmative defense.

Defendants have raised the issue of the effectiveness of their harassment policies and practices by asserting as an affirmative defense that "pursuant to its established sexual harassment policy and procedures, Defendants exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and that "Charging Parties' unreasonably failed to take advantage of those preventative and corrective opportunities." (Def.s' Answer, at 6). This type of defense has been characterized as the *Faragher/Ellerth* affirmative defense. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998). [3] Under *Fed. R. Civ. P. 26*, parties are entitled to discovery regarding any matter, not privileged, that is relevant to the claim [*12] or *defense* of any party. Thus, the court finds that the proper scope of discovery in this case does include whether or not Defendants' policy was effective.

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[2] It is unlikely that the court would now expand the scope of discovery, especially given the fact that fact discovery is now closed.

[3] In *Faragher*, the Court held that an employer may be held "vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim." 524 U.S. at 780. In *Ellerth*, the Court held that:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such

[*13] The court also finds that EEOC has shown that discovery regarding the effectiveness of Defendants' policy should not be limited to only Bloomin' Apple Rockford I. There is comparative value in examining the effectiveness of the policies at other Bloomin' Apple restaurants given that: (1) all of the restaurants in which The Bloomin' Apple, LLC is the sole member have the same corporate and operational structure whereby a General Manager is supervised by an employee or employees of The Bloomin' Apple, LLC; (2) the same policy against harassment was in effect at all of the restaurants in which The Bloomin' Apple, LLC was the sole member; and (3) the employees of The Bloomin' Apple, LLC had the responsibility to monitor compliance with its anti-harassment policies.

C. Other Discovery Concerns

The court is not able to address other discovery concerns raised by the parties without more information. Armed with the above opinions of the court on the general discovery issues raised by Plaintiff and Defendants, the court is confident that counsels can work together to narrow or eliminate any remaining disputed discovery requests. The court will meet with the parties on any remaining [*14] *specific* discovery requests on February 8, 2006 at 2:30 p.m. The court requests that Plaintiff file a complete copy of the Document Requests, Interrogatories, and Responses that counsels continue to believe are in dispute by February 7, 2006.

IV. Conclusion

For the reasons stated above, EEOC's November 17, 2005 Motion to Compel Production of Documents and Interrogatory Responses is continued until the court can hold a Discovery Hearing set for 2:30 p.m., February 8, 2006. Plaintiff is to file a copy of disputed Document Requests, Interrogatories, and Responses by February 7, 2006. Counsel should make sure a hard copy of the same is in the court's hands by that same date.

ENTER:

P. MICHAEL MAHONEY, MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

DATE: January 24, 2006

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as discharge, demotion, or undesirable reassignment.524 U.S. at 765.