IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	4:07-mc-19-RAW
Applicant,	)	
vs.	)	RULING AND ORDER ON APPLICATION FOR ORDER TO SHOW CAUSE WHY SUBPOENA SHOULD NOT BE ENFORCED
VON MAUR, INC.,	)	
Respondent.	)	

The Equal Employment Opportunity Commission (EEOC) seeks enforcement of an administrative Title VII subpoena issued pursuant to 42 U.S.C. § 2000e-9; 29 U.S.C. § 161. The procedural background is complicated and relevant to disposition of the matter.

In September 2004 Charles Smith, an African-American, applied for employment with Von Maur as a truck driver at Von Maur's Davenport, Iowa warehouse. He was not hired and on February 20, 2005 Mr. Smith filed a charge of discrimination with the EEOC alleging the failure to hire him was the product of race discrimination. Von Maur contends it did not hire Mr. Smith because of derogatory information in a credit report which Mr. Smith failed to adequately explain when given a chance to do so.

With leave of court, on June 14, 2005 Mr. Smith was permitted to join as a plaintiff in an action in this Court captioned Walkesheia Ward, et al., v. Von Maur, Inc., No. 3:04-cv-00159-RP-RAW, ("the Ward case"). The Ward case alleges that Von Maur has engaged in a pattern or practice of systematically excluding African-American applicants from employment. Mr. Smith

alleges the credit check was used as pretext to discriminate against him on the basis of his race in violation of 42 U.S.C. § 1981. (Ward Amended Complaint ¶ 42).

On April 19, 2006 the EEOC filed in this Court a Title VII class action captioned Equal Employment Opportunity Commission v. Von Maur, Inc., No. 4:06-cv-00182-RP-RAW ("the EEOC case") alleging Von Maur discriminated against three classes of African-American employment applicants in its hiring practices, one of which is a class of African-Americans who had applied for the position of truck driver. The EEOC did not base the truck driver claim on the charge filed by Mr. Smith, but it has identified Mr. Smith as a member of the truck driver class. (Resp. Ex. 4 at 2).

On May 15, 2006 Mr. Smith sought to intervene of right in the EEOC case as a "person[] aggrieved" under the authority of 42 U.S.C. § 2000e-5(f)(1). Fed. R. Civ. P. 24(a)(1). The enforcement provisions of Title VII give a person aggrieved a right to intervene in a civil action brought by the EEOC. Noting that a "'[p]erson aggrieved' has been held to also include a person who has a 'nearly identical' claim to a charging party even if the 'nearly identical' claimant has not previously filed a charge with the EEOC," the Court by order entered July 10, 2006 granted Mr. Smith's motion to intervene. In the same order the Court consolidated the EEOC and Ward cases for pretrial purposes.

On July 17, 2006 Mr. Smith with other intervenors filed an intervenors' complaint in the EEOC case in which he alleged that Von Maur discriminated against him on the basis of race in violation of Title VII when it did not hire him as a truck driver. Mr. Smith made the same allegation as he did in the Ward case that the credit check was a pretext for race discrimination. (EEOC Plaintiff-Intervenors' Complaint ¶ 56).

While all this has been going on the EEOC's investigation of Mr. Smith's charge has remained open. On January 10, 2007, as a part of its investigation of Mr. Smith's charge, the EEOC sent Von Maur a "Request for Information" ("RFI") seeking information and documents about applicants and hirees for "loss prevention" positions at five Von Maur locations in Illinois and Indiana for the period January 1, 2005 to January 1, 2007. Von Maur objected to the RFI and on February 15, 2007 the EEOC served the subpoena in issue. Von Maur sought to administratively revoke or modify the subpoena but was unsuccessful except in one particular. The present application followed.

Mr. Smith did not apply for a loss prevention job, he applied for a truck driver job. Nonetheless, the EEOC contends the subpoenaed information is relevant because, as with Smith, Von Maur seeks credit information concerning loss prevention applicants and uses that information in making hiring decisions.

Von Maur raises a threshold issue about the EEOC's continuing authority to continue to investigate Mr. Smith's charge after bringing the class action in which Smith has joined to assert his individual claims. In this regard it relies principally on the opinions in EEOC v. Hearst Corp., 103 F.3d 462 (5th Cir. 1997) and EEOC v. Federal Home Loan Mortgage Corp., 37 F. Supp. 2d 769 (E.D. Va. 1999) which followed the analysis in Hearst. But see EEOC v. McCormick & Schmick's, 2007 WL 1430004, *5 (N.D. Cal. 2007)(declining to follow Hearst).

In Hearst the Fifth Circuit held:

> . . . [I]n a case where the charging party has requested and received a right to sue notice and is engaged in a civil action that is based upon the conduct alleged in the charge filed with the EEOC, *that charge* no longer provides a basis for EEOC investigation.

103 F.3d at 469-70 (emphasis original). The Fifth Circuit did not restrict the EEOC from seeking the same information by subpoena based on the charge of a different individual or a Commissioner.

The Hearst court began its discussion noting that unlike some other agencies, the EEOC's investigative authority is not plenary, but is triggered only by the filing of a formal charge by an aggrieved person or a Commissioner. 103 F.3d at 464. The court recognized that once a charge is filed the EEOC enjoys "broad investigative authority" the purpose of which is to enable the EEOC to "promptly and effectively . . . determine whether Title VII has

been violated, and to assist the agency in its efforts to resolve disputes without formal litigation." Id. at 469. If within 180 days from the filing of the charge the EEOC has not filed a civil action or reached a conciliation agreement with the respondent, the charging party may take the litigation decision out of the hands of the EEOC by requesting a right to sue letter and commencing suit. The Hearst court believed that once the charging party initiates a private lawsuit, the purpose served by the EEOC's investigation disappears and the EEOC should be left with the option of intervening in court and pursuing discovery or filing a Commissioner's charge. Id. at 469.

Mr. Smith has not requested or received a right to sue letter, nor has the EEOC initiated litigation on the basis of his administrative charge. Von Maur contends this is a distinction without a difference. Mr. Smith's charge of race discrimination is in litigation and there is no reason for the EEOC to investigate further.

Von Maur's argument gets some support from the structure of Title VII's enforcement provisions and considerations of fairness, but ultimately does not carry the day. The statute requires an investigation of a charge for the purpose of determining whether there is "reasonable cause" to believe the charge is true. 42 U.S.C. § 2000e-5(b). If there is no reasonable cause, the charge is to be dismissed by the EEOC. If there is

reasonable cause, the EEOC is to attempt to resolve it by conciliation or other informal methods with the discretion to sue if informal resolution is unsuccessful. Id. § 2000e-5(b), (f)(1). If the EEOC does not sue within 180 days from the time the charge is filed, the charging party may demand and receive a right to sue letter and initiate action in court. Id. § 2000e-5(f)(1). The statute has no time limit for completion of the EEOC's investigation, though the reasonable cause determination is to occur "as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." Id. § 2000e-5(b).

In the unusual circumstances of this case the EEOC's class action and Mr. Smith's intervention in it mean on the one hand that the EEOC has made a *de facto* determination of reasonable cause -- it has sued on behalf of Mr. Smith and others in his class of prospective employees -- and on the other that any notice to Mr. Smith of his right to sue would be a nullity because the class action and Mr. Smith's intervention deprive him of an independent cause of action. EEOC v. Waffle House, Inc., 534 U.S. 279, 291 (2002). As a consequence, the processing of his charge has become open-ended. To Von Maur it must seem as if Mr. Smith's administrative charge is being kept on life support by the EEOC long after the 120-day aspirational period as a means to continue an investigation, not to resolve Mr. Smith's complaint, but to drum

up another class of employment applicants (for loss prevention positions) to add to its class action. This while in Von Maur's view the exchange of information about Mr. Smith's allegations should now be confined to the discovery rules which apply in the judicial forum.

While it is clear the present state of affairs concerning Mr. Smith's charge is not what Title VII contemplates should be the ordinary course, the Court does not believe Title VII's language or structure supports an implication that the EEOC's authority to investigate a charge necessarily ends when the charge is rolled into class action litigation. To begin with, Title VII is a remedial statute. The Eighth Circuit has recently emphasized that "[i]n order to effectuate [its] purposes . . . the statutory provisions authorizing EEOC investigations must be read to give the EEOC broad investigatory power." EEOC v. Technocrest Systems, Inc., 448 F.3d 1035, 1038 (8th Cir. 2006)(quoting Emerson Elec. Co. v. Schlesinger, 609 F.2d 898, 905 (8th Cir. 1979)). The subpoena here "is not aimed merely at Smith's allegation that he should have been hired as a truck driver, but, rather, at [the EEOC's] broader concern that Von Maur has discriminated against African-Americans in hiring for any jobs, including loss prevention jobs, that involve reviews of the applicants' credit histories." (EEOC Reply at 2). "EEOC enforcement actions are not limited to the claims presented by the charging parties." General Tel. Co. of the

Northwest, Inc. v. EEOC, 446 U.S. 318, 331 (1980).[1] The EEOC may investigate the presence of other discrimination related to the charge. EEOC v. United Parcel Service, 2006 WL 3712941 (D. Minn. 2006). The Supreme Court has instructed "it is crucial that the [EEOC's] ability to investigate charges of systemic discrimination not be impaired." EEOC v. Shell Oil Co., 466 U.S. 54, 59 (1984). It follows the EEOC's investigation of a charge is not confined to the four corners of the charge so long as it is reasonably tethered by relevance to the charge and in good faith.

Recently, in Waffle House, supra, the Supreme Court held that an arbitration agreement between an employer and an employee did not bar the EEOC from pursuing specific judicial relief for the employee. In so holding, the Court took pains to highlight the independent role the EEOC plays in the investigation and conciliation of discrimination claims, 534 U.S. at 287-88 (citing Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 368 (1977)), and the importance of textual support for any asserted limitation on the EEOC's authority. Id. at 291. The Court stressed that "once a charge is filed . . . the EEOC is in command of the process," thus indicating the charging party does not control the EEOC's enforcement activities. Textually neither Title VII nor the EEOC's

[1] To the extent the Hearst opinion may be seen as assuming the purpose of the EEOC's investigation is confined to the circumstances of the charge, General Telephone would appear to indicate otherwise.

regulations set a bright-line point at which an investigation must end, in fact the regulations reserve the authority to continue to investigate a charge after a reasonable cause determination has been made or the charging party has been issued a right to sue letter.[2] The 120-day post-charge goal noted above is not a time limit. Cf. Occidental Life, 432 U.S. at 369 (1977)(Title VII does not "explicitly require[] the EEOC to conclude its conciliation efforts and bring an enforcement suit within any maximum period of time").

In the final analysis, to hold that the class action and Mr. Smith's intervention deprive the EEOC of authority to continue to investigate suspected systemic discrimination similar to that alleged in Mr. Smith's charge would be inconsistent with the expansive investigative authority conferred on the EEOC by Title VII and without clear textual support in the statute.

The EEOC's investigation is thus for a legitimate purpose and within its authority. See Technocrest Systems, 448 F.3d at 1038-39. Von Maur has not demonstrated enforcement of the subpoena would amount to an abuse of the Court's process. Id. at 1039. Von Maur argues, however, that the subpoena seeks irrelevant

[2] The EEOC's regulations permit it to reconsider a reasonable cause determination and presumably continue the investigation on which such determinations are based. 29 C.F.R. § 1601.21(b)(1). Issuance of a right to sue letter "terminate[s] further proceeding of any charge not a Commissioner charge" unless a decision is made by the responsible official to further process the charge. 29 C.F.R. § 1601.28(a)(3).

information concerning the hiring of loss prevention associates at stores in Illinois and Indiana because Mr. Smith's charge involves the failure to hire him as a truck driver in Davenport, Iowa, and the 2005-2007 time period is after Mr. Smith was denied employment in September 2004.

Relevancy in this context is "not especially constraining." Shell Oil, 466 U.S. at 68. "[C]ourts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer." Id. at 68-69; see Technocrest Systems, 448 F.3d at 1038 (quoting Shell Oil). The standard is one of reasonable relevance to the charge. Id. at 1040. The subpoena seeks information about the total number of applications for loss prevention positions at the Illinois and Indiana locations, and a list of the names of all successful and unsuccessful applicants for those positions during the specified time period.[3] This information might "cast light" on Mr. Smith's allegations against Von Maur. The Von Maur locations in Illinois and Indiana are separate employing units whose managers make independent hiring decisions. However, Von Maur's credit check procedure is funneled through its human resources director, Gayle Haun. Apparently credit checks are

[3] In response to Von Maur's administrative objection to the subpoena the Commission ruled that Von Maur did not have to identify the race of applicants because Von Maur does not ask for race information in its employment applications. (Resp. Ex. 12 at 7-8).

required for both truck driver and loss prevention applicants. Ms. Haun says that if the credit check reveals derogatory information, she sends the loss prevention applicant a letter inviting him or her to contact her and explain the information just as she did with Mr. Smith. (Aff. of Haun, Resp. Ex. 11 at 1-2). If a satisfactory explanation is given the applicant might not be disqualified from employment. If, on the other hand, the loss prevention applicant does not contact Haun or cannot adequately explain the derogatory credit information, the applicant is not hired for the position. (Id.) According to Ms. Haun, when Mr. Smith did not contact her after she wrote him about negative information in his credit history his application was not pursued further. (Id. at 2). Mr. Smith alleges he attempted to contact Von Maur in response to Ms. Haun's letter, but no one returned his calls. (Ward Amended Complaint at ¶ 42; EEOC Plaintiff-Intervernors' Complaint ¶ 56).

Information about the use of the same credit check procedure by the same human resources director to screen other applicants for employment is reasonably relevant to Mr. Smith's allegation that the procedure was a pretext for discrimination even though the information sought concerns a different job at different locations. If the credit check was a pretext for discrimination in Mr. Smith's case it is reasonable to believe the same pattern would evince itself elsewhere. The information about the loss prevention applicants might support or debunk the pretext allegation in Mr.

Smith's case, but it is relevant. That the subpoena seeks information about a time frame subsequent to Mr. Smith's application does not make the request irrelevant. A discriminatory practice, if it exists, would not be expected to stop with Mr. Smith's application. Subsequent conduct is also relevant.

Von Maur has alleged that the subpoena is also burdensome, but has not made any argument or produced evidence upon which the Court could find undue burden. The requests are narrow, precise and seek information Von Maur ought to have readily at hand.

The EEOC's request for the costs of litigating enforcement of the subpoena will be denied. Von Maur's objections were made in good faith, have some support in the case law, there are no cases on point in this circuit, and the context is unusual. It would be unjust to visit the entire cost of the enforcement proceeding on Von Maur.

Application [1] **granted**. Von Maur shall comply with EEOC Subpoena No. CHMK-034 as administratively modified within twenty days of the date hereof. No costs are awarded.

IT IS SO ORDERED.

Dated this 22d day of October, 2007.

ROSS A. WALTERS
UNITED STATES MAGISTRATE JUDGE