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

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DONALD W. AUSTIN,		*	
		*	4-01-CV-90404
P	laintiff,	*	
		*	
V.		*	
		*	
UNITED PARCEL SERVICE, INC.,		*	MEMORANDUM OPINION
	, ,	*	AND ORDER
Γ	efendant.	*	
		*	

The Court has before it Plaintiff's Objections filed July 22, 2002 to U.S. Magistrate Judge Shields' Order of July 8, 2002 denying Plaintiff's Motion to Compel and granting Plaintiff's Motion for Extension of Deadlines (the "Order"). The Order extended the deadline for discovery to July 31, 2002 and extended Plaintiff's deadline for the production of expert reports to August 9, 2002. The Order also granted Defendant's Motion to Compel Discovery Responses from Plaintiff, which Plaintiff has not objected to here. Plaintiff now urges the Court pursuant to Federal Rule of Civil Procedure 72(a) to modify or set aside the Order as "clearly erroneous or contrary to law." For the reasons set forth below, the Court declines to do so and upholds Magistrate Judge Shields' Order in its entirety.

I. Factual and Procedural Background

This case was removed to this Court on June 29, 2001 by Defendant. In this action, Plaintiff raises claims of race discrimination and retaliation in violation of Title VII, 42 U.S.C. § 2000e, discrimination in violation of 42 U.S.C. § 1981, discrimination and retaliation in violation of Iowa Code Chapter 216, and tortious violation of fair employment practices in violation of Iowa Code § 729.4. Under the scheduling order adopted by the Court and filed on August 8, 2001, discovery was to have

been completed by May 1, 2002, and a dispositive motion deadline was set for June 1, 2002. The case was set for trial during the two-week period commencing November 12, 2002, with a final pretrial conference scheduled for October 29, 2002.

A. Matters Concerning Discovery

On or about November 4, 2001, Defendant served its answers, objections, and/or responses to interrogatories and two sets of requests for production served upon it by Plaintiff between May 25, 2001 and July 3, 2001. As noted in the Order, as of the date of Plaintiff's Motion to Compel on March 29, 2002, Plaintiff had had Defendant's discovery responses and objections for nearly five months. During that time period, no discovery was conducted, including supplemental interrogatories, requests for production, or depositions, and Plaintiff did not seek intervention of the Court to correct perceived deficient discovery responses.

Upon motion by Plaintiff to extend deadlines, dated February 2, 2002, the Court extended Plaintiff's deadline for the designation of expert witnesses to April 1, 2002, expanded the time for Defendant to disclose expert witnesses and permitted discovery to conclude on or before June 30, 2002. The dispositive motion deadline was changed to July 12, 2002. These extensions were granted over Defendant's resistance.

At the July 8, 2002 hearing on the Motion to Compel, Plaintiff's counsel explained that Plaintiff's other counsel had undergone surgery "in the fall of 2001", that attempts at mediation had been made in this matter, that counsel's own schedule and caseload had been heavy, all of which interfered with pursuing the discovery problems. Plaintiff expanded this explanation in his Reply to Defendant's Response to Plaintiff's Objection to the Order at issue here. However, in his prior motion for an

extension of deadlines, Plaintiff's counsel made no mention of any extenuating circumstances that had hindered Plaintiff's ability to comply with discovery deadlines, but rather noted that "counsel for the parties has been diligent in procuring discovery" and that no depositions had yet been taken in this case.

B. Morgan Class Action

Also of relevance to this Opinion and Order is the class action of *Morgan, et al. v. United*Parcel Service, Inc., in which Plaintiff Donald W. Austin was a member of the plaintiff class. 143 F.

Supp. 2d 1143 (E.D. Mo. 2000). Two classes were certified in that action, one with respect to Title

VII claims for a period beginning December 20, 1991, and the other class with respect to a claim

brought pursuant to 42 U.S.C. § 1981 for full-time employees who were employed on or after June 17,

1989. After certification of the classes, summary judgment was entered in favor of defendant, and the

plaintiff classes have appealed to the United States Court of Appeals for the Eighth Circuit.

II. Rule 72(a) Standard of Review

Federal Rule of Civil Procedure 72(a) provides the standard of review by a district court of a magistrate judge's order on a nondispositive matter. Rule 72(a) states in relevant part as follows:

Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

Thus, this Court may not set aside or modify Magistrate Judge Shields' Order unless it is clearly erroneous or contrary to law.

III. Discussion

A. Motion to Compel

At issue in Plaintiff's Motion to Compel are Defendant's answers to certain interrogatories and Defendant's responses to certain document requests by Plaintiff. Plaintiff's primary contention is that the responses provided by Defendant were insufficiently constrained in time and geographic scope. Defendant has limited its responses to data from the Iowa District, and in some cases, the West Region, which includes Iowa, and four other Midwest states, and has limited certain of its responses to data since 1999 or 2000, and in other cases, to data since December 20, 1991. The permissible scope of discovery and the appropriate disposition of Plaintiff's motion turn on whether Plaintiff is collaterally estopped from claiming Defendant engaged in a pattern and practice of racial discrimination by the decision in the *Morgan* class action. In part relying on the preclusive effect of *Morgan*, Magistrate Judge Shields found that "the nature and extent of the further information requested by the Plaintiff at this juncture is not designed to lead to the discovery of admissible evidence under the legal framework existing in this case" (Order, at 7). The Court concurs.

Plaintiff alleges that UPS engaged in racial discrimination over a period of time beginning in 1991 by failing to promote him to a division-level manager position, that UPS engaged in a pattern and practice of racial discrimination in not promoting him, that UPS maintained a racially hostile work environment, and that UPS retaliated against him for his participation in the *Morgan* class action litigation. Under the recent ruling of the Supreme Court in *National Railroad Passenger Corporation* v. *Morgan*, "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." ___ U.S. ___, 122 S. Ct. 2061 (2002). The Supreme Court

also stated that "discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice'." *Id. See also High v. University of Minnesota*, 236 F.3d 909 (8th Cir. 2000). The Supreme Court also rejected the application of the "continuing violations" doctrine to "serial violations", where one act falls within the charge filing period and prior acts are sufficiently related to the timely filed charge. *Id.* The holding of *National Railroad* therefore directly rejects the position of the Plaintiff in reliance on *Hy-Vee Stores Inc. v. Iowa Civil Rights Commission*, 453 N.W.2d 512, 527-30 (Iowa 1990), that the existence of a series of failures to promote bring him within the continuing violations doctrine.

Therefore, this Court concludes that the failures to promote alleged by Plaintiff constitute discrete acts and are only actionable if they fall within 300 days prior to the filing of his charge of discrimination on May 5, 2000. Magistrate Judge Shield's Order is ambiguous with respect to whether the requested discovery is time-barred. Because the Court is in agreement with his ultimate conclusion in light of *Morgan*, the Court finds the Order not clearly erroneous or an error of law with regard to the statute of limitations issue.

Nonetheless, Plaintiff correctly states that *National Railroad* also held that an employee can use prior, untimely acts of discrimination, such as the prior instances of alleged failure to promote here, as evidence to support a timely Title VII claim. *National Railroad, supra* at 2072. If the analysis ended here, Plaintiff would potentially be entitled under *National Railroad* to information about *all* discriminatory instances of a failure to promote which could provide background evidence in support of his timely claims. Because hostile environment claims necessarily involve repeated conduct, *National*

Railroad, supra, Plaintiff would also not be barred by the statute of limitations from obtaining discovery relevant to such a claim.

However, the Court finds that Magistrate Judge Shields did not err in his finding that "underscoring the discovery issues in this case is the currently valid judgment in *Morgan v. UPS*," 143 F. Supp. 2d 1143 (E.D. Mo. 2000). The 8th Circuit has recognized the rule, well-established in the federal courts, that "the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo. In re Ewing, 852 F.2d 1057, 1060 (8th Cir. 1988), citing 1B J. Moore, Moore's Federal Practice para. 0.416[3], at 521-22 (2d. ed. 1982). See also Restatement (Second) of Judgments § 13(f) (1982); Hunt v. Liberty Lobby, Inc., 707 F.2d 1493, 1497-98 (D.C. Cir. 1983) (citing Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 188-89, 85 L. Ed. 725, 61 S. Ct. 513 (1941) (dictum); Reed v. Allen, 286 U.S. 191, 199, 76 L. Ed. 1054, 52 S. Ct. 532 (1932)). Unless and until the Eighth Circuit finds for the plaintiff class on appeal, the district court judgment is binding on the parties to the action. The district court in Morgan ruled against the plaintiff class on its pattern and practice claim and found no statistical evidence of a pattern and practice of race discrimination in promotions to division-level manager. Morgan, 143 F. Supp. 2d 1143. Since the issue of whether Defendant engaged in such a pattern and practice of discrimination has already been raised, litigated, and decided in Defendant's favor as an issue of ultimate fact by the court in *Morgan*, any evidence Plaintiff seeks for the purpose of establishing a pattern and practice of racial discrimination in promotions, even for the purpose of providing background evidence of motive in support of his timely failure to promote and retaliation

claims, is subject to issue preclusion on the basis of the currently valid judgment rendered in the *Morgan* class action. *See United States v. Brekke*, 97 F.3d 1043, 1049 (8th Cir. 1996), *cert. denied*, 520 U.S. 1132 (1997); *Milligan v. City of Red Oak*, 230 F.3d 355, 360-61 (8th Cir. 2000) (applying Iowa law). The Court therefore finds that Magistrate Judge Shields was not in error in relying on the preclusive effect of the *Morgan* judgment and in finding on that basis that the discovery sought by Plaintiff for the purpose of proving a pattern and practice of discrimination in promotions is not reasonably calculated to lead to the discovery of admissible evidence.

Based on its own review of Defendant's responses and answers to the disputed interrogatories and document requests, the Court also agrees with Magistrate Judge Shields that Defendant's discovery responses were responsive and do not require further supplementation.

Finally, the Court finds ample justification for Magistrate Judge Shield's determination that

Plaintiff has failed to diligently pursue discovery in this case, even after extensions of time were granted,
and has no desire to reward Plaintiff for doing so. Indeed, the Court shares Magistrate Judge Shields'
concern that granting Plaintiff's request would amount to "a wholesale reopening of discovery" only two
months prior to the scheduled trial date. As Magistrate Judge Shields correctly concluded, the delay of
Plaintiff in addressing discovery deficiencies, the substantial burden to Defendant of compelling further
disclosure and the impact of additional discovery on the timely resolution of this matter all weigh heavily
against granting Plaintiff's Motion to Compel.

B. Motion for Extension of Deadlines

Plaintiff's Motion for Extension of Deadlines requested an additional two months from the date it was filed, March 29, 2002, to designate expert witnesses. The Order extended the deadline for discovery to July 31, 2002 and the deadline for the production of expert reports until August 9, 2002. In light of the Court's conclusions with regard to the statute of limitations, the issue preclusive effect of the *Morgan* judgment, and the manner in which Plaintiff has made use of the prior extension of deadlines, as well as the fact that trial in this case is scheduled for November 12, 2002, the Court cannot find Magistrate Judge Shields' effort to provide a reasonable and fair extension of deadlines was in error.

IV. Order

The Court hereby rejects Plaintiff's Objections to the Order of Magistrate Judge Shields and therefore declines to modify or set aside the Order under Rule 72(a).

IT IS SO ORDERED.

Dated this 13th day of September, 2002.

ROBERT W. PRATT U.S. DISTRICT JUDGE

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