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United States District Court, District of Columbia.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMISSION, Plaintiff
v.
SOL MEXICAN GRILL LLC, et al., Defendants

Civil Action No. 18-2227 (CKK)
|
Filed 06/11/2019

Attorneys and Law Firms

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ORDER

COLLEEN KOLLAR-KOTELLY, United States District Judge

***1** Currently before the Court is Plaintiff's [24] Motion for a Protective Order. Plaintiff moves under Federal Rule of Civil Procedure 26(c)(1) for the entry of a protective order barring Defendants from pursuing discovery related to the immigration and/or work authorization statuses of the charging parties, claimants, their family members, and any potential claimants or witnesses. Additionally, Plaintiff seeks to bar discovery related to the employment histories of the charging parties, claimants, their family members, and any potential claimants or witnesses. Pursuant to Rule 26(c), the Court may "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ... [by] forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters." Fed. R. Civ. P. 26(c)(1)(D). The Court concludes that, on the present record, Plaintiff has shown good cause for granting a protective order in this case.

As an initial matter, Defendants argue that Plaintiff has waived any objection to Defendants' discovery requests. Defs.' Mem. of Points and Authorities in Opp'n to the Pl.'s Mot. for Protective Order ("Defs.' Opp'n"), ECF No. 26, 2-3. Defendants contend that they delivered discovery requests related to these matters to Plaintiff on March 12, 2019. Under Federal Rule of Civil Procedure 33, a party has 30 days to serve an answer or objections to a discovery request. Fed. R. Civ. P. 33(b)(2). Plaintiff did not respond to Defendants' discovery request until April 12, 2019, or one day outside the 30-day time limitation. As such, Defendants contend that Plaintiff has waived its objections.

But, the Court may excuse waiver of an untimely objection for good cause. Fed. R. Civ. P. 33(b)(4). Here, within the 30-day limitation period for responding to a discovery request, Plaintiff made multiple attempts to confer with Defendants about the requests. On March 22, 2019, Plaintiff sent Defendants a five-page letter raising objections to the requests. *See* Ex. 1, ECF No. 24-2. And on April 4, 2019, Plaintiff, again, contacted Defendants to ascertain if Defendants were still seeking the objected to information. *See* Ex. 5, ECF No. 24-6. Based on Plaintiff's multiple attempts to find a consensus and avoid Court intervention, the Court finds that there is good cause to excuse Plaintiff's one-day-late objection to Defendants' discovery requests.

Defendants have asserted no grounds as to why this delay has prejudiced them, and Plaintiff does not have a pattern of late filings or misconduct. Accordingly, the Court concludes that Plaintiff did not waive its objections to Defendants' discovery requests. *See Klayman v. Judicial Watch, Inc.*, 06-cv-670-CKK-AK, 2008 WL 11394178, at *3 (D.D.C. Jan. 16, 2008) ("Courts have broad discretion to determine whether a party has waived its objections to discovery requests by filing those objections in an untimely manner"), *aff'd*, 06-cv-670-CKK, 2008 WL 11394172 (D.D.C. Apr. 2, 2008).

***2** Moving to the substantive issues before the Court, first, Defendants attempt to discover immigration status information relating to the charging parties, claimants, their families, and any potential claimants or witnesses. Defendants contend that this information is relevant because "[t]he major thrust of the defense in this case is fabrication." Defs.' Opp'n, ECF No. 26, 3. Defendants contend that they are seeking information regarding immigration statuses to determine whether or not participation in this litigation would have any bearing on those statuses and whether or not

the EEOC is assisting an effort to achieve more favorable immigration statuses. [1]

Prior to analyzing Defendants' arguments for relevance, the Court notes that "Tit[le] VII protects all individuals from unlawful discrimination, whether or not they are citizens of the United States." *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 95, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973). As such, discovery into the immigration status of the claimants has no bearing on Defendants' potential for liability under Title VII. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1069-70 (9th Cir. 2004) (finding that immigration-related discovery requests are "not relevant to determining whether [the defendant] has violated Title VII"). Defendants cite one Fourth Circuit case, *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998), in which the court found that an undocumented employee had no cause of action under Title VII. 153 F.3d at 188. However, that case goes against the weight of authority, and the Fourth Circuit has since appeared to limit its holding in *Egbuna*, explaining that the EEOC should be allowed to investigate claims of employment discrimination, even if those claims come from an undocumented worker. *EEOC v. Maritime Autowash, Inc.*, 820 F.3d 662, 668 (4th Cir. 2016). As the Fourth Circuit explained *in Maritime Autowash*, removing Title VII protections from undocumented workers would allow an employer to "impose all manner of harsh working conditions upon undocumented aliens, and no questions could be asked, no charges filed, and no agency investigation even so much as begun." *Id.*

Perhaps recognizing the difficulties with arguing that undocumented workers are not entitled to Title VII protection, Defendants instead contend that discovery of immigration status may bear on the charging parties' motivation for fabrication in this lawsuit. However, Defendants fail to address the chilling effect that allowing discovery on immigration status will have in employment discrimination cases. Forcing those who allege discrimination to reveal their immigration status in order to have access to the courts may cause those facing discrimination, both citizens and undocumented people, to "fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends." *Rivera*, 364 F.2d at 1065 (approving of the district court's protective order precluding discovery on immigration status). This chilling effect disadvantages all workers as it makes it less likely that discriminatory practices will come to light and be appropriately dealt with in a court of law. Based on the consequences of allowing discovery into immigration status, many courts have refused to allow such inquiries, finding good cause to prevent them. *See e.g., EEOC v. DiMare Ruskin, Inc.*, No. 2:11-cv-158, 2012 WL 12067868, at *5, 2012 U.S. Dist. LEXIS 24951, at *13 (M.D. Fla. Feb. 15, 2012) (entering a protective order on discovery into the claimants' immigration status because "[t]he EEOC's mission of protecting victims of employment discrimination would be hampered if potential victims are unwilling to come forward and cooperate because of fear of removal or other immigration consequences"); *Avila-Blum v. Casa de Cambio Delgado, Inc.*, 236 F.R.D. 190, 191-92 (S.D.N.Y. 2006) (approving of the magistrate judge's protective order prohibiting questions on immigration status during the plaintiff's deposition and explaining that such questions could chill employment discrimination cases); *EEOC v. Bice of Chicago*, 229 F.R.D. 581, 583 (N.D. Ill. July 18, 2005) (entering a protective order prohibiting discovery into immigration status because "questions about immigration status are oppressive, they constitute a substantial burden on the parties and on the public interest and they would have a chilling effect on victims of employment discrimination from coming forward to assert discrimination claims"); *EEOC v. First Wireless Grp., In.*, 255 F.R.D. 404, 405-407 (E.D.N.Y. 2004) (upholding protective order on discovery into immigration status because such inquiries "would significantly discourage employees from bringing actions against their employers who engage in discriminatory employment practices"). As such, the Court concludes that there is good cause to issue a protective order prohibiting discovery on the immigration statuses of the charging parties, claimants, their families, and any potential claimants or witnesses. Allowing such discovery would work to the public detriment by chilling litigation against employers who engage in discriminatory practices.

***3** The Court's conclusion that there is good cause to enter a protective order prohibiting discovery on immigration status is buttressed by Defendants' tenuous argument in support of the relevance of such discovery. Defendants contend that immigration status is relevant because it will show whether or not this litigation could have bearing on said immigration statuses and whether or not the EEOC may be assisting the claimants or others in obtaining more favorable statuses. But, beyond this conclusory statement, Defendants present only one example of how discovery into immigration status would be relevant. Defendants explain that "if one or more of the complainants was seeking a U Visa, pursuant to 8 U.S.C. § 1101(a)(15)(U), all of the information sought by the defendants would have a substantial bearing with

respect to the issue of motive." Defs.' Opp'n, ECF No. 26, 4. Under the U Visa program, temporary nonimmigrant status is offered to victims of certain offenses if the victims aid in the investigation into those alleged offenses. *See Carzola v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540, 545 (5th Cir. 2016) (explaining the U Visa program). Defendants contend that discovery into immigration status could reveal that one or more of the claimants is attempting to take advantage of the U Visa program and has a motivation to lie about employment discrimination.

However, Defendants fail to recognize that such information about participation in the U Visa program would be undiscoverable even absent a protective order. Pursuant to 8 U.S.C. § 1367, disclosure "of any information which relates to an alien who is the beneficiary of an application for relief" through the U Visa program is prohibited. 8 U.S.C. § 1367(a)(2). In *Carzola,* the EEOC brought claims of employment discrimination against a poultry processing plant on behalf of several Hispanic workers. 838 F.3d at 544. The defendant suspected the allegations were fabricated and sent discovery requests related to immigration status and any attempts to obtain U Visas. *Id.* at 546. The Fifth Circuit refused to allow inquiry into the U Visa application process through the EEOC, concluding that to do so would violate the prohibition on disclosure in 8 U.S.C. § 1367. *Id.* at 554. [2]

While the no court within this circuit has addressed the issue of whether or not discovery into the U Visa process is permissible, the Court is persuaded by analogous discovery requests for information the disclosure of which is statutorily prohibited. In *Balridge v. Shapiro*, 455 U.S. 345, 102 S.Ct. 1103, 71 L.Ed.2d 199 (1982), the United States Supreme Court concluded that discovery was not an unwritten exception to a statute that prohibited disclosure of information related to individualized census records. 455 U.S. at 360-61, 102 S.Ct. 1103. And, in *In re England*, 375 F.3d 1169 (D.C. Cir. 2004), the United States Circuit Court for the District of Columbia Circuit concluded that discovery was not an unwritten exception to a statute that prohibited the disclosure of information related to military promotion boards. 375 F.3d at 1177-82. The court explained that inferring an unwritten exception for discovery would undermine the legislature's purpose in creating the statute prohibiting disclosure. *Id.* at 1178. Based on the reasoning of both the Supreme Court and the D.C. Circuit, the Court finds no cause to believe that discovery would be an unwritten exception to the statute prohibiting the disclosure of U Visa information. *See* 8 U.S.C. § 1367(a)(2). As such, the Court finds that information about U Visa applications—the only specific information pertaining to immigration status which Defendants contend would have "a substantial bearing with respect to the issue of motive"—is not discoverable even absent a protective order. Defs.' Opp'n, ECF No. 26, 4.

***4** Moreover, even ignoring the prohibition on releasing U Visa information, Defendants' allegations supporting the relevance of such information are tenuous relevance. Defendants allege that the possibility of participating in the U Visa program may have encouraged the charging parties and claimants to make false claims of unlawful employment practices. But, "fabricating a claim to obtain a U-Visa requires an undocumented person to expose their unlawful immigration status to [the United States Citizenship and Immigration Services] in a process that requires not one, but two law enforcement agencies to review the claims made by the applicant." Pl.'s Reply, ECF No. 29, 14; *see* 8 C.F.R. § 214.14(c)(2)(ii) (explaining the evidence that must be provided). As such, the motive to create a false claim is weak. Such motive is far outweighed by the risks of abuse in forcing complainants to disclose their U Visa status, which is simply a proxy for immigration status.

Accordingly, on the present record, the Court finds there is good cause to issue a protective order prohibiting Defendants from seeking discovery on the immigration statuses of the charging parties, claimants, their families, and any potential claimants or witnesses. Defendants fail to provide any specific arguments as to why such information would be relevant. The only specific information that Defendants argue is relevant to motive pertains to U Visas. And, discovery into the U Visa application process is prohibited by statute regardless of the Court's protective order. As Defendants have failed to establish the relevance of inquiries into immigration status, the Court is convinced that there is good cause to prohibit the discovery of such information due to its potential to chill the resolve of those who seek to take advantage of the protections offered by Title VII.

Second, Plaintiff requests a protective order barring Defendants from seeking discovery on the work histories of the charging parties, claimants, their family members, and any potential claimants or witnesses. Defendants seek all information that "relate[s] to the employment history" of the charging parties and the claimants, including the name and addresses of all employers during the past decade and also the name and address of any spouse's current employer. *See* Ex. No. 2, ECF No. 24-3, Defs.' Interrogs. 4, 6, 8. The Court finds

that such information is not relevant to any damages claim or to Defendants' liability. Additionally, inquiry into such information could be used to harass and intimidate victims of discrimination. As such, the Court finds good cause to enter a protective order. [3]

As an initial matter, information about prior employment history is not relevant to any damages claim. Plaintiff has explained that it is not "seeking back pay, front pay, or reinstatement." Pl.'s Mot., ECF No. 24, 8. Instead, Plaintiff is seeking only compensatory and punitive damages. *Id.* Because Plaintiff is not seeking back pay, front pay, or reinstatement, Plaintiff contends that information concerning work history, such as inquiries into mitigation and interim earnings, is not relevant to damages.

Defendants do not appear to disagree with this general principle. Instead, Defendants insist that Plaintiff is, in fact, seeking back pay. Defendants cite to Paragraph D in the EEOC's Prayer for Relief. Compl., ECF No. 1, Prayer for Relief, D. In this section, Plaintiff requests that the Court "[o]rder Defendants to make whole Cruz-Gomez, Rodriguez, and a class of similarly situated female employees, including but not limited to Leiva, by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices complained of herein, which were incurred as a result of Defendants' unlawful conduct, in amounts to be determined at trial." *Id.* Relying on this section, Defendants insist that back pay is requested.

***5** However, Defendants misconstrue the relief requested. Rather than seeking back pay, front pay, or reinstatement, Plaintiff requests recovery of "non-wage pecuniary losses incurred by the Charging Parties and Claimant resulting from the unlawful employment practices identified in the Complaint." Reply, ECF No. 29, 18. For example, Plaintiff seeks damages, in the form of medical expenses and other non-wage pecuniary losses, for one charging party that Plaintiff alleges injured herself falling down stairs after her manager grabbed her from behind. Compl., ECF No. 1, ¶ 17(c). Because Plaintiff is not seeking back pay, front pay, or reinstatement, the Court concludes that information on work history is not relevant to any damages claim. *See, e.g., Williams v. Bd. Of Cty. Commr's of Unified Gov. of Wyandotte Cty. and Kan. City, Kan.*, 192 F.R.D. 698, 705 (D. Kan. 2000) (prohibiting discovery on work history where the plaintiff did not seek back pay); *Bice of Chicago*, 229 F.R.D. at 583 (refusing to compel disclosure of employment information before, during, and after employment with the defendant where back pay, front pay, and lost wages were not at issue).

In addition to Plaintiff's damages claim, Defendants also contend that information on work histories is relevant to Defendants' own potential liability. Defendants explain that "[t]he EEOC has made a claim that an adverse job consequence in this case is the reduced hours of the complainants, difficult shifts assigned to the complainants [at] issue, difficult job assignments given to the complainants and termination of their employment based upon reasons not associated with poor job performance." Defs.' Opp'n, ECF No. 26, 5. As such, Defendants argue that they should be able to "discover the hours worked at other jobs, the shifts worked at other jobs, the assignments that the complainants had at other jobs and the reasons that each of the complainants left their other jobs as well as their performance while on those other jobs." *Id.*

The Court disagrees. Plaintiff brings claims only for actions taken by Defendants while the charging parties and claimant were working for Defendants. Based on these claims, employment records related to the charging parties' and claimant's employment with Defendant are relevant. But, employment histories with other employers, who are not party to this suit, are not relevant. Such information is not relevant to whether or not the charging parties and claimant were subjected to unlawful employment practices while working for Defendants. And, even if the charging parties and claimant had suffered similar adverse employment actions at other jobs, such information would not tend to show whether or not unlawful practices caused them to suffer those same adverse employment actions while working for Defendants. Insofar as Defendants intend to argue that the charging parties and claimant suffered adverse employment actions due to their own poor performance, Defendants have access to the charging parties' and claimant's performance information. Work histories from other jobs are not relevant to the events which occurred while the charging parties and claimant worked for Defendants. And, Defendants cite no authority supporting their argument that such information would be relevant to Plaintiff's claims.

Moreover, any marginal relevance such information may pose is outweighed by the potential for harassment and intimidation. *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) ("When the potential for abuse of procedure is high, the Court can and should act within its discretion to limit the discovery process, even if relevancy is determined."). Courts have

recognized the chilling effect that inquiries into work histories can have on those bringing claims for unlawful employment practices. *See Centeno-Bernuy v. Becker Farms*, 219 F.R.D. 59, 60-62 (W.D.N.Y. 2003) (granting protective order and prohibiting inquiry into post-termination employment history due to the chilling effect); *David v. Signal Int'l, LLC*, 257 F.R.D. 114, 126 (E.D. La. 2009) (same). In these circumstances, the Court finds that there is a high risk that the charging parties and claimant could fear that Defendants are using discovery into their employment histories to deduce facts about their immigration statuses. *See Silva v. Campbell*, Case No. 17-cv-3215, 378 F.Supp.3d 928, 2018 WL 8263093, *4 (E.D. Wash. June 5, 2018) (prohibiting inquiry into the plaintiff's work history because the risk of the defendant using the information to discover the plaintiff's immigration status "outweighs any limited probative value such information may yield"). If victims of discrimination fear that bringing their claims to court will result in the discovery of information which could negatively impact their immigration status, those victims may well be chilled from bringing their claims. Because Defendants' arguments in support of the relevance of such information are, at best, tenuous, and the risks of requiring the disclosure of such information are high, the Court finds that there is good cause to prohibit the discovery of such information.

***6** Accordingly, on the present record, the Court finds there is good cause to issue a protective order prohibiting Defendants from seeking discovery on the employment histories of the charging parties, claimants, their families, and any potential claimants or witnesses. Such information is not relevant to any damages claim as Plaintiff does not request back pay, front pay, or reinstatement. And, any marginal relevance that such information would contribute to a finding of liability is outweighed by the chilling effect that allowing the discovery of such information would have on these and future parties.

In conclusion, based on the present record, the Court GRANTS Plaintiff's Motion for a Protective Order. Defendants are prohibited from the discovery of, or inquiry into the following categories of information as relating to the charging parties, the claimant, their family members, and any other claimants or witnesses in this lawsuit:

1. Information Related to Immigration and Residency Status, including but not limited to: past or current immigration or residency status, citizenship and naturalization, involvement in any immigration-related proceedings, travel to and from the United States, and sensitive personal identifiers that can relate to immigration and residency status, including but not limited to passports, social security numbers, social security cards, and taxpayer identification numbers; and

2. Work histories relating to any employer other than Defendants.

SO ORDERED.

All Citations

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Footnotes

1 The Court notes that Defendants' Opposition addresses only the discovery of immigration statuses for the complainants and their families. *See* Defs.' Opp'n, ECF No. 26, 3-4. Defendants failed to explain the relevance of such information as to witnesses. Moreover, the Court cannot ascertain the relevance of such information as to witnesses. As such, the Court considers the issue of the relevance of discovery into the immigration status of witnesses to be conceded.

2 The Fifth Circuit further concluded that 8 U.S.C. § 1367 does not bar discovery of U Visa records from the individual claimants. But, here, Defendants have directed their requests to the EEOC, not to the individual claimants. *See* Ex. 2, ECF No. 24-3. Additionally, on remand to devise an approach to U Visa discovery, the district court permitted discovery of U Visa information through the claimants under an anonymous framework where the U Visa information was not linked to any individual. *Carzola v. Loch Foods of Miss., LLC*, No. 10-cv-135, 2018 WL 1405297, at *1 (S.D. Miss. Mar. 20, 2018). However, the Court notes that such an approach would not protect confidentiality in this case where the number of charging parties and claimants is smaller.

3 The Court notes that Defendants' Opposition addressed only the discovery of work histories for the complainants. *See* Defs.' Opp'n, ECF No. 26, 4-6. Defendants failed to explain the relevance of such information as to the complainants' families or witnesses. Moreover, the Court cannot ascertain the relevance of such information as to the complainants' families or witnesses. As such, the Court considers the issue of the relevance of discovery into the work histories of complainants' families and witnesses to be conceded.

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