

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

Case No. 8:14-mc-41-T-30AEP

KB STAFFING, LLC,

Defendant.

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REPORT AND RECOMMENDATION

This cause came before the Court for a hearing upon a motion filed by the United States Equal Employment Opportunity Commission (“EEOC”) requesting issuance of an order to show cause as to why the Court should not enforce an administrative subpoena against KB Staffing, LLC (“KB Staffing”) and seeking to compel KB Staffing’s compliance with the administrative subpoena (Doc. 1). As part of an ongoing investigation of alleged unlawful employment practices committed by KB Staffing, the EEOC issued an administrative subpoena seeking documents from KB Staffing. The EEOC’s investigation stemmed from a charge of disability discrimination under the Americans with Disabilities Act (“ADA”) filed against KB Staffing (Doc. 1, Ex. A). Namely, the charge focused on KB Staffing’s use of a pre-offer health questionnaire (*see* Doc. 1, Ex. M), which KB Staffing admittedly required applicants to fill out prior to placement in any position, but which KB Staffing has since ceased to use. Prior to the issuance of the administrative subpoena, the EEOC sent a letter to KB Staffing requesting documents pertaining to KB Staffing’s use of such health questionnaire for a period starting three years prior to the

filing of the charge against KB Staffing (Doc. 1, Ex. B). Upon receipt of the EEOC's letter, KB Staffing objected to the requests, asserting that the requests were overbroad, sought information unrelated to the Charging Party's charge, sought information surrounding individuals for which the time frame lapsed for bringing a claim, and sought information regarding individuals placed for employment by KB Staffing with customers seeking temporary help rather than individuals, like the Charging Party, who applied for a position individually with KB Staffing (Doc. 1, Exs. C, E).¹

Following KB Staffing's objections, the EEOC issued its administrative subpoena seeking (1) a copy of the health questionnaires for any and all applicants for the three years preceding the charge and (2) health questionnaires for any and all current employees (Doc. 1, Ex. F). In response, KB Staffing submitted a petition seeking to revoke the administrative subpoena (Doc. 1, Ex. G). In doing so, KB Staffing argued that the administrative subpoena greatly exceeded the scope of the charge and, even if the potential claims of applicants who filled out the health questionnaire were similar to those brought by the Charging Party, the request for health questionnaires for a period of three years was too broad as it extended beyond the statute of limitations for the claims of many of those applicants (Doc. 1, Ex. G). After consideration, the EEOC denied KB Staffing's petition to revoke the administrative subpoena because, in its opinion, the administrative subpoena "requests materials relevant to a valid charge of

¹ As to the first and fourth requests, KB Staffing also asserted that it did not maintain either applicant flow logs or information regarding applicants referred but rejected. KB Staffing further stated that it never provided the health questionnaires to any customer nor discussed the health questionnaires in any way (*id.*). These issues were not addressed in the administrative subpoena.

discrimination under investigation during an appropriate time frame” (Doc. 1, Ex. H). Although KB Staffing received notice of the EEOC’s denial of the petition to revoke the administrative subpoena (Doc. 1, Exs. I, J), KB Staffing did not comply with the administrative subpoena and, to date, has not responded to the administrative subpoena. By the instant motion, therefore, the EEOC seeks enforcement of its administrative subpoena and, in turn, to compel KB Staffing to comply with the administrative subpoena.

In response, KB Staffing contends that the administrative subpoena is overbroad and greatly exceeds the EEOC’s jurisdictional powers to request documents, as the underlying claim serving as the basis for the EEOC’s investigation has been resolved and KB Staffing ceased use of the alleged discriminatory practice. Additionally, KB Staffing contends that no other applicants or employees complained of discrimination and the Charging Party did not assert her claim on behalf of a class, so the documents requested by the EEOC bear no relevance to the claim identified in the charge. Furthermore, to the extent that any related claims exist to the claim set forth in the charge under investigation, KB Staffing contends that the administrative subpoena is overbroad as it seeks information beyond the statute of limitations for claims of many of those applicants or employees. As a result, KB Staffing asserts that the Court should deny the EEOC’s request to enforce its administrative subpoena.

“It is well-settled that the role of a district court in a proceeding to enforce an administrative subpoena is sharply limited; inquiry is appropriate only into whether the evidence sought is material and relevant to a lawful purpose of the agency.” *E.E.O.C. v. Kloster Cruise Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991). In such proceedings, the court may inquire as to

whether (1) the administrative investigation is within the agency's authority, (2) the agency's demand is too indefinite, and (3) the information sought is reasonably relevant. *U.S. E.E.O.C. v. Tire Kingdom, Inc.*, 80 F.3d 449, 450 (11th Cir. 1996). In this instance, the EEOC established that it possesses the requisite authority to investigate the allegations against KB Staffing, the requested information in the administrative subpoena adequately describes the information sought and is not too indefinite, and the information it seeks to obtain is reasonably relevant to its investigation of KB Staffing.

Initially, the EEOC demonstrated that its administrative investigation falls within the agency's authority as the federal agency tasked with the administration, interpretation, and enforcement of the ADA. *See* 42 U.S.C. § 12117(a) (incorporating 42 U.S.C. § 2000e-5(b), which states that “[w]henver a charge is filed by or on behalf of a person claiming to be aggrieved ... alleging that an employer ... has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge ... on such employer ... and shall make an investigation thereof.”). To that end, 42 U.S.C. § 12117 expressly incorporates the “powers, remedies and procedures” and investigatory authority set forth in Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-8 and 2000e-9, which, in turn, incorporates the investigative powers of the National Labor Relations Act, 29 U.S.C. § 161. *See* 42 U.S.C. § 12117(a). Pursuant to that authority, the EEOC “shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices ... and is relevant to the charge under investigation.” 42 U.S.C. § 2000e-8; *see* 29 U.S.C. § 161(1) (providing further authority for the

EEOC to “at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question.”).

Here, the Charging Party submitted her charge against KB Staffing alleging that KB Staffing required applicants to respond to pre-offer health questionnaires in violation of the ADA. In submitting her charge, the Charging Party stated that “[t]he policy of asking medical history questions unrelated to the job, prior to any job offer, could affect numerous applicants” (Doc. 1, Ex. A). As a result, the EEOC instituted its investigation, pursuant to the authority bestowed upon it by Congress, into KB Staffing’s use of the pre-offer health questionnaire with respect to the Charging Party, other applicants for employment with KB Staffing, and current employees of KB Staffing. As outlined above, such an investigation arises out of the Charging Party’s charge and falls squarely within the EEOC’s investigative authority.

Notwithstanding, KB Staffing contends that the EEOC exceeded its authority in issuing the administrative subpoena in this matter because the Charging Party agreed to resolve her claims with KB Staffing, including withdrawal of her charge from the EEOC, and KB Staffing ceased use of the pre-offer health questionnaires as part of its business operations as of December, 2012 (Doc. 3). KB Staffing argues further that, since no other individuals complained of discrimination at the hands of KB Staffing, the EEOC need not continue its investigation. The EEOC maintains discretion to seek relief on behalf of an individual, such as the Charging Party, but, contrary to KB Staffing’s assertions, also maintains discretion to vindicate the public interest in combating systemic discrimination. Accordingly, the claims that the EEOC may assert are not

merely derivative of those asserted by a charging party. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002) (“Moreover, it simply does not follow from the cases holding that the employee’s conduct may affect the EEOC’s recovery that the EEOC’s claim is merely derivative. We have recognized several situations in which the EEOC does not stand in the employee’s shoes.” (citations omitted)). As the Supreme Court determined,

[W]e are persuaded that, pursuant to Title VII and the ADA, whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief. To hold otherwise would undermine the detailed enforcement scheme created by Congress simply to give greater effect to an agreement between private parties that does not even contemplate the EEOC’s statutory function.

Id. at 295-96 (footnote omitted). Indeed, “it is crucial that the [EEOC]’s ability to investigate charges of systemic discrimination not be impaired.” *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 69 (1984). As such, the EEOC maintains the authority to investigate whether KB Staffing engaged in systemic discrimination when it used a pre-offer health questionnaire during its application process, despite the victim-specific relief it could pursue on the Charging Party’s behalf and despite KB Staffing’s assertion that it ceased use of the health questionnaire as of December, 2012.²

Furthermore, the fact that the Charging Party seeks to withdraw her charge does not extinguish the EEOC’s authority to investigate the claims asserted therein. As an initial matter, a charge may be filed with the EEOC by or on behalf of an aggrieved individual or by a member

² As noted above, this is especially true given the Charging Party’s statement in her charge that “[t]he policy of asking medical history questions unrelated to the job, prior to any job offer, could affect numerous applicants” (Doc. 1, Ex. A).

of the EEOC. 29 C.F.R. §§ 1601.7(a), 1601.11(a). In this instance, the Charging Party filed a charge on her own behalf and subsequently sought withdrawal of her charge once she resolved her claim with KB Staffing. Withdrawal of a charge differs from the filing of a charge in one important respect, however. Withdrawal of a charge filed by or on behalf of a person claiming to be aggrieved may be withdrawn by such person but *only* with the consent of the EEOC. 29 C.F.R. § 1601.10. Where withdrawal is sought by or on behalf of such person, the EEOC will only grant consent to withdraw a charge “where the withdrawal of the charge will not defeat the purposes of [T]itle VII, the ADA, or GINA.” *Id.* Based upon this record, the EEOC clearly determined that withdrawal of the charge might defeat the purposes of the ADA in combating disability discrimination in the workplace and therefore chose to continue its investigation into KB Staffing’s hiring practices related to the use of the pre-offer health questionnaires. Such a determination falls within the authority bestowed upon the EEOC. Accordingly, and as detailed above, the EEOC demonstrated that it maintains authority to investigate the claims set forth by the Charging Party against KB Staffing and to continue its investigation into KB Staffing’s use of the pre-offer health questionnaires.

The EEOC further demonstrated that its demand in the administrative subpoena was not too indefinite. Indeed, the administrative subpoena requests only two groups of narrowly tailored documents. Both requests relate to the allegations set forth by the Charging Party in her charge and thus directly relate to the EEOC’s investigation. Specifically, the administrative subpoena requests (1) a copy of the health questionnaires for any and all applicants for the three years preceding the charge and (2) health questionnaires for any and all current employees (Doc. 1, Ex.

F). As the EEOC contends, the requests identify, with specificity, the documents sought and the time frame for which the documents are sought. In fact, KB Staffing does not argue to the contrary. Accordingly, the EEOC properly demonstrated that the administrative subpoena adequately describes the information sought and is therefore not too indefinite.

Finally, the EEOC demonstrated that the limited information sought by the administrative subpoena is relevant to its investigation. With respect to relevance, a district court must enforce an administrative subpoena where the information sought is “not plainly incompetent or irrelevant to any lawful purpose of the agency.” *Kloster Cruise*, 939 F.2d at 922 (internal quotation and citations omitted). As the EEOC explained more fully, the administrative subpoena seeks information relevant to a potential pattern or practice of hiring discrimination by KB Staffing on the basis of disability or perceived disability. Given the Charging Party’s statements in the charge and KB Staffing’s admission that it required all candidates for employment to complete a health questionnaire prior to employment, the requested documents are relevant to the EEOC’s investigation and may shed light upon systemic discrimination employed by KB Staffing in its hiring decisions during the relevant time period.³ The information sought by the subpoena is,

³ As noted, KB Staffing contends that the administrative subpoena is overbroad in that it seeks information for three years prior to the charge, which extends beyond the one-year statute of limitations for the claims that many of the individual applicants would be permitted to pursue if filing a claim on their own behalf. Such an argument is unavailing during the investigative process instituted by the EEOC and will not preclude enforcement of an otherwise effective administrative subpoena but rather may be asserted as a defense following initiation of a court action. *See Equal Employment Opportunity Comm’n v. U.S. Steel Corp.*, 534 F. Supp. 416, 418 (S.D. W. Va. 1982) (“The law does not require that EEOC factually demonstrate that it has a case impervious to assault by means of a motion to dismiss on a statute of limitations basis before an agency subpoena will be enforced.”); *see also E.E.O.C. v. Am. Express Centurion Bank*, 758 F. Supp. 217, 222 (D. Del. 1991) (“In general, a party may (continued...)”).

therefore, neither plainly incompetent nor irrelevant to any lawful purpose of the EEOC.

Given the foregoing, it is hereby

RECOMMENDED:

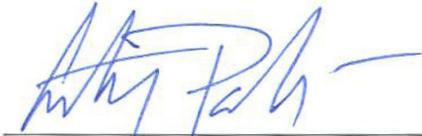
1. The EEOC's Application for an Order to Show Cause Why an Administrative Subpoena Should Not be Enforced (Doc. 1) be GRANTED IN PART AND DENIED IN PART as follows:

a. Within thirty (30) days of disposition of the instant motion, KB Staffing be required to comply with the administrative subpoena issued by the EEOC (Doc. 1, Ex. F).

b. In all other respects, the motion be denied.

2. Following disposition, the Clerk be directed to close the case.

IT IS SO REPORTED in Tampa, Florida, this 28th day of August, 2014.



ANTHONY E. PORCELLI
United States Magistrate Judge

(...continued)

not defeat an agency's authority to investigate by raising what could be a defense if the agency subsequently decides to bring an action against the party" (citation omitted)).

NOTICE TO PARTIES

Failure to file and serve written objections to the proposed findings and recommendations contained in this report within fourteen (14) days from the date it is served on the parties shall bar an aggrieved party from a *de novo* determination by the District Court of issues covered in the report, and shall bar the party from attacking on appeal factual findings in the report accepted or adopted on appeal by the District Court except upon grounds of plain error or manifest injustice. 28 U.S.C. § 636(b)(1)(C); M.D. Fla. R. 6.02; *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (*en banc*).

cc: Hon. James S. Moody, Jr.
Counsel of Record