

McKeown v. Dartmouth Bookstore

CV-96-221-SD 02-05-97

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Judith S. McKeown

v.

Civil No. 96-221-SD

Dartmouth Bookstore, Inc.

O R D E R

This employment discrimination action is before the court on plaintiff's motion to compel. Documents 15, 17.¹ The defendant objects. Document 18.

Initially, plaintiff focuses on her Interrogatory No. 10 and Request for Production No. 5, which seek information concerning statements obtained by defendant "from any person regarding allegations made in the complaint, whether before, at the time of, or after the event alleged in the complaint."² However, it appears that no statements as such were taken, as defendant's attorneys simply made notes of their oral interviews with such witnesses. See Defendant's Answer to Interrogatory No. 10.

¹Document 15 is the actual motion to compel, with its supporting memo and attachments. Document 17 is the certification of plaintiff's counsel concerning his attempts to obtain concurrence in the motion.

²The interrogatories and requests for production are attached to plaintiff's motion; the language quoted is set forth in Interrogatory No. 10.

Defendant contends that in its answer to Interrogatory No. 2 it has identified each person of whom it is aware to have "knowledge of any facts related in any way to allegations, denials, defenses, or subject matter of this action. Id. And, although plaintiff complains of "directions" given internal witnesses by defendant's counsel, the defendant's answer to Interrogatory No. 6(b) contains no more than the usual instructions given a potential witness concerning his or her rights when approached by a representative of a party to litigation.

The "work product" doctrine is codified in Rule 26(b)(3), Fed. R. Civ. P. Upjohn Co. v. United States, 449 U.S. 383, 398 (1981). In relevant part, that rule requires a "showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case, and that the party is unable, without undue hardship, to obtain the substantial equivalent of the material by other means." Id. Here the plaintiff has been furnished with the names of the potential witnesses, and in turn may interview and/or depose such witnesses. There is, the court finds, no "undue hardship" attendant on such endeavor.

Moreover, Rule 26(b)(3), Fed. R. Civ. P., protects against "disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Id. Accordingly, the courts have repeatedly held that attorneys or investigators are not required

to disclose which witnesses they have interviewed. Laxalt v. McClatchy, 116 F.R.D. 438, 443 (D. Nev. 1987); Commonwealth of Mass. v. First Nat'l Supermarkets, Inc., 112 F.R.D. 149, 152-53 (D. Mass. 1986); Board of Educ. of Evanston Township v. Admiral Heating & Ventilation, Inc., 104 F.R.D. 23, 32 (N.D. Ill. 1984).

As plaintiff has been here advised of the identity of all witnesses with potential knowledge of this litigation, and as she is free to interview and/or depose such witnesses, the motion to compel, insofar as it seeks to compel further answer to Interrogatory No. 10 or response to Request for Production No. 5 must be denied.

Plaintiff's second claim is of greater merit. It seeks production of personnel files of certain of defendant's employees in response to defendant's Request for Production No. 8. Defendant asserts that production of such files will comprise invasion of privacy and, alternatively, suggests in camera examination by the court.

Plaintiff contends that in camera review is not feasible in light of the court's lack of knowledge of the background of the litigation and the scope of the information sought by plaintiff. The court believes that the information contained in the personnel files may well lead to the discovery of admissible information. Rule 26(b)(1), Fed. R. Civ. P. The court also agrees with plaintiff's suggestion that it would not, at this stage of the proceedings, have sufficient knowledge to know what to look for in the personnel files.

The court is sensitive to defendant's claim of privacy, but believes that the danger of unlawful disclosure can be obviated by making production of the personnel files subject to the terms and conditions of the confidentiality agreement which has already been executed by the parties.

Accordingly, the motion to compel is granted with respect to production of the personnel files sought in plaintiff's Request for Production No. 8 on condition that such files are made subject to the terms and conditions of the confidentiality agreement executed between the parties. These files are to be turned over to plaintiff's counsel within 10 days of the date of this order.

For reasons hereinabove outlined, the motion to compel has been denied in part and granted in part. Each party is accordingly to bear its own fees and costs concerning such motion.

SO ORDERED.

Shane Devine, Senior Judge
United States District Court

February 5, 1997

cc: William Edward Whittington IV, Esq.
Andrea K. Johnstone, Esq.