IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LINDA HEINEN

Plaintiff,

vs.

KOHL'S DEPARTMENT STORES, INC. and HOLLY "RENEE" HENSON,

Defendants.

Case No. 18-2-00746-6

MOTION AND MEMORANDUM RE MOTION TO COMPEL 30B6 DEPOSITION TESTIMONY AND RESPONSE TO DEFENDANT'S MOTION TO QUASH TOPICS 1-6 AND 23 OF 30(B)(6) NOTICE

I. INTRODUCTION & SUMMARY OF ARGUMENT

During the 2016 timeframe Kohl's was in trouble. Its stock was dropping. It was losing market share to millennials.[1] Forbes Magazine reported that "Kohl's Has a Millennial Problem." *Id.* Kohl's needed a new strategy to attract young millennial shoppers. Kohl's called that strategy

[1] See Item 3 to the October 31, 2019, Declaration of Adam Pankratz in Support of Motion to Quash. Item 3 begins on page 36 of Mr. Pankratz's declaration. Item 3 is an article titled "Kohl's Has a Millennial Problem."

the "Greatness Agenda."[2] The "Greatness Agenda" contains five pillars, one of which is called "Personalized Connections" which means "understanding our customers deeply to build genuine, enduring relationships with them." *Id.* Kohl's CEO Michelle Gass told Fortune Magazine that younger women were the "quintessential Kohl's shopper we want to see in the future."[3] The Greatness Agenda worked. By 2018 Kohl's was on the mend: news media reported that "Kohl's gains solid footing as it chases millennials."[4] Kohl's stock increased from $47.24/share as of January 1, 2016 to $66.34/share as of January 1, 2019.[5] Taken together: Kohl's needed to get younger shoppers into its store, Kohl's launched a strategy to achieve that goal, that strategy required that Kohl's workers develop "personalized connections" with Kohl's millennial shoppers and it logically follows that a way to attract millennial shoppers is to employ younger millennial workers.

It was against this backdrop that Kohl's, on January 5, 2018, fired Ms. Heinen, a 61 year old District Manager who had worked at Kohl's for over nine years and who had never received a negative performance review or any written (or verbal) notice that her job was in jeopardy. (Amended Complaint ¶9, 10-14, 38, 39, 41) At the time of her firing Ms. Heinen's district ranked

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[2] See Item 2 to the October 31, 2019 Declaration of Adam Pankratz in Support of Motion to Quash. Item 2's explanation of the Greatness Agenda is on page 18 of the Pankratz declaration.

[3] See Item 6 to the October 31, 2019 Declaration of Adam Pankratz in Support of Motion to Quash. Item 6 begins on page 44 of the Pankratz declaration.

[4] See Item 3 to the October 31, 2019 Declaration of Adam Pankratz in Support of Motion to Quash. Item 3 begins on page 40 of the Pankratz declaration.

[5] *See* http://corporate.kohls.com/investors/stock-information/historical-price-lookup (last visited October 31, 2019).

7 out of Kohl's 80 districts in "comp sales." (Amended Complaint ¶38) And although Ms. Heinen's objective workplace performance was more than satisfactory, she was elderly, disabled, and had a history of taking extended medical leave. (Amended Complaint ¶15, 19, 41) Kohl's replaced Ms. Heinen with a millennial: Jenny Appleyard who is younger than 40. (Amended Complaint ¶43) Moreover, Ms. Heinen had (a month before her firing) opposed Kohl's discrimination against Michel Brumbles, a disabled Store Manager under Ms. Heinen's charge. (Amended Complaint ¶35-36) In addition to firing Ms. Heinen, Kohl's did not fire Danielle Maksic, Kohl's records show that Ms. Maksic and Ms. Heinen are peers[6], and records produced by Kohl's in discovery show that Ms. Maksic had been reprimanded for workplace misconduct whereas Ms. Heinen had not. (Crotty Decl at Ex. A)

This is an employment discrimination case. At trial Ms. Heinen will have the burden of proving that her age, disability, and/or activity opposing discrimination was a substantial factor in Kohl's decision to fire her. Since Kohl's asserts that Ms. Heinen's age, disability, and/or oppositional activity had nothing to do with its decision to fire her Ms. Heinen *must* rely on circumstantial evidence to prove her case. Such circumstantial evidence includes evidence regarding age related statements, a defendant's workplace culture, and comparator evidence. *See infra.*

To that end Ms. Heinen sought the corporate testimony of Kohl's under the auspices of Civil Rule 30(b) (6), including Topics 1-6 and 23. For the reasons stated below, Ms. Heinen's

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[6] See Item 24 to the October 31, 2019 Pankratz Declaration. Item 24 begins on page 56 of the Pankratz declaration.

motion to compel testimony regarding Topics 1-6 and 23 should be granted and Defendants' motion to quash testimony on those topics should be denied.

II. FACTS

1. On July 30, 2019, Ms. Heinen's lawyers sent Kohl's attorneys a copy of the 30(b) (6) notice. (Crotty Decl. Ex. B) That email contained attachments of the documents that Ms. Heinen wanted Kohl's to testify about. Kohl's attorney acknowledged receipt of that email. (Crotty Decl. Ex. C)

2. On October 14, 2019, Ms. Heinen re-sent the 30(b) (6) notice that she sent on July 30, 2019. (Crotty Decl. ¶4) The reason for re-sending the 30(b) (6) notice was that the parties agreed to a time and place for the 30(b) (6) deposition. *Id.* That 30(b) (6) notice contained the same topics that are at issue in this motion. *Id.* The October 30(b)(6) notice informed Kohl's that its deposition would take place on October 31, 2019, at 9:00 AM in Milwaukee, Wisconsin - - - the location that Kohl's chose for the deposition to take place. *Id.*

3. On October 21, 2019, Defendants objected to Topics 1-6 and 23 of the 30(b) (6) notice. (Crotty Decl. ¶5)

4. The CR 30(b) (6) deposition began at 9:00 AM on October 31, 2019 in Milwaukee. (Crotty Decl. ¶7) Kohl's attorney instructed its deponent, Brenda DeWeese, to not provide testimony regarding Topics 1-6 and 23. (Crotty Decl. ¶7)

5. Kohl's did not file a motion to quash regarding Topics 1-6 and 23 of the deposition until after the Milwaukee component of the October 31, 2019 30(b) (6) deposition occurred. (Crotty Decl. ¶8)

6. The parties met and conferred on the record at the October 31, 2019 deposition under CR 26(i). (Crotty Decl. ¶5,7)

III. ARGUMENT

A. Broad discovery is essential in employment discrimination cases.

The scope of discovery is broad in civil litigation matters. CR 26. This is especially so in employment discrimination cases where discovery is even more broad. *Sweat v. Miller Brewing Co.*, 708 F.2d 655, 658 (11th Cir.1983); *Sempier v. Johnson & Higgins,* 45 F.3d 724, 734 (3rd. Cir.1995) ("[I]n particular, we frown upon unnecessary discovery limitations in Title VII, and hence ADEA, cases."). Broad discovery is allowed in employment discrimination cases because "employers rarely leave a paper trail—or 'smoking gun'—attesting to discriminatory intent" and "disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence that cumulatively undercut the credibility of various explanations offered by the employer." *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85 (2nd Cir.1990); *U.S. Postal Serv. Bd. Of Governors v. Aikens,* 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

Such circumstantial evidence includes, in the age discrimination context, a statement from an entity's leader professing a desire to hire younger employees is circumstantial evidence probative of discriminatory intent. *See Scrivener v. Clark Coll.*, 181 Wn. 2d 439, 450 (2014)(Reversing trial court grant of summary judgment and holding '[w]hether or not these statements alone would be sufficient to show either pretext or that Scrivener's age was a substantially motivating factor, they are circumstantial evidence probative of discriminatory intent."). To that end, discovery as to Kohl's CEO's statements (Topic No. 6) regarding her desire

to attract millennial shoppers is reasonably calculated to lead to admissible evidence of whether Kohl's, via its Greatness Agenda (Topic 1, 2, and 4), sought to replace its older workers (61 year old Heinen) with younger workers (36 year old Appleyard) to achieve its stated goal (Topics 3 and 5) of attracting millennial shoppers. After all, a millennial is much more likely to buy something from a fellow millennial as opposed to a 60 year old.

Additionally, Topics 1-6 are reasonably calculated to lead to admissible evidence as to whether Kohl's corporate culture (of which the Greatness Agenda is a part) is one that favors the young and disfavors the old. Courts allow discovery of such corporate culture evidence. *Juell v. Forest Pharm., Inc.*, 456 F. Supp. 2d 1141, 1156, n.15 (E.D. Cal. 2006)("[P]laintiff also presents evidence supporting his contention that Forest had a corporate culture that is hostile to older workers."). In fact, not only do courts allow discovery of such corporate culture evidence, they have, in some instances, required it as a federal court adjudicating an ADEA claim granted summary judgment on the employer's behalf because the plaintiff failed to "produce evidence from which a reasonable trier of fact could conclude that there was a culture of...age discrimination." *Bowers v. McDonald*, 690 F. App'x 981, 982 (9th Cir. 2017) ("Dr. Bowers has not raised a triable issue of material fact as to pretext. She did not produce evidence from which a reasonable trier of fact could conclude that there was a culture of race and age discrimination within the anesthesia department.")

Lastly, Topic 23 (testimony regarding Danielle Maksic) is reasonably calculated to lead to admissible comparator evidence, i.e. evidence that Ms. Maksic (a Kohl's worker with documented poor workplace performance) was not fired whereas Ms. Heinen (an elderly disabled worker with a history of taking medical leave) was. Indeed, Ms. DeWeese testified on October 30, 2019 that

one of the reasons Ms. Heinen got fired was her alleged inability to get along with Ms. Maksic. (Crotty Decl. ¶6) Courts, in the context of age discrimination claims, define comparator evidence as follows:

> Other employees are similarly situated to the plaintiff when they have similar jobs and display similar conduct. The employees need not be identical, but must be similar in material respects. Materiality depends on the context and is a question of fact that cannot be mechanically resolved. The Seventh Circuit has noted that it is important not to lose sight of the common-sense aspect of the similarly situated inquiry. It is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees because one can always find distinctions in "performance histories or the nature of the alleged transgressions. *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1114–15 (9th Cir. 2011) (internal citations and quotations omitted).

That Ms. Maksic and Ms. Heinen did not work for the same supervisor is not dispositive. Kohl's documents (Item 24 to Mr. Pankratz's declaration) shows both individuals on the same performance certificate. Ms. DeWeese testified that Ms. Heinen (a worker with no findings of workplace misconduct) was fired, in part, because of her alleged inability to get along with Ms. Maksic (a worker with a documented history of workplace misconduct).

Simply put: Items 1-6 and Item 23 are proper 30(b) (6) deposition topics. Kohl's had two months' notice of those deposition topics, and Kohl's violated CR 30 by instructing Kohl's speaking agent to not offer any testimony regarding the above topics.

B. The Court should (a) find that Defendant's instruction that Kohl's corporate deponent not answer Topics 1-6 and 23 was improper and (b) compel Kohl's to provide that testimony and bear the fees and costs associated therewith.

Kohl's corporate speaking agent did not provide any testimony at the October 31, 2019, 30(b) (6) deposition. "[P]roducing an unprepared 30(b) (6) witness is tantamount to failing to appear and is sanctionable under Fed.R.Civ.P. 37(d). Similarly, inadequate preparation of a 30(b) (6) designee can be sanctioned, based on the lack of good faith, prejudice to the opposing side, and

disruption of the proceedings." *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 768 (2004) (citations omitted). Moreover, instructing a corporate deponent not to answer is also improper. To wit:

> Generally, evidence objected to shall be taken subject to objections. FRCP 30(c). As a rule, instructions not to answer questions at a deposition are improper. The only exception to Rule 30(c) is where serious harm would be caused. An answer to a deposition question revealing privileged material or other confidential material is considered to cause some serious harm. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3) (that the deposition is being conducted in bad faith or to annoy, embarrass or oppress the deponent or party.) FRCP 30(d) (3). *Detoy v. City & Cty. Of San Francisco*, 196 F.R.D. 362, 365–66 (N.D. Cal. 2000) (citations and quotations omitted).

Kohl's instruction that its corporate deponent not answer did not comply with CR 30 as no protective order had issued nor had any motion to quash been filed. Had Kohl's truly had issues with the above topics it could (and should) have moved for a protective order well before the *day of the 30(b) (6)* deposition. In an analogous case a court noted:

> FCC states it did not immediately move for a protective order because the parties were "attempting to resolve the matter outside of court intervention." While the court appreciates FCC's intentions, its actions did not comply with proper procedure. FCC should have immediately moved for a protective order to comply with Rule 30(d) (3), and continued to carry out its meet and confer efforts to attempt to resolve the dispute. If the dispute had been resolved via meet and confer efforts, FCC could have withdrawn its motion for the protective order. *F.C.C. v. Mizuho Medy Co.*, 257 F.R.D. 679, 683 (S.D. Cal. 2009) (citations omitted).

None of the topics at issue in this motion seek "privileged" or "confidential" material. Neither of the topics identified were conducted in bad faith nor did they annoy, embarrass or oppress Kohl's. Indeed, the topics sought testimony about news articles regarding Kohl's, Kohl's documents regarding the Greatness Agenda, or discovery documents regarding Ms. Maksic. Kohl's had no grounds to instruct its representative to not testify on the topics at issue. Instead it produced

an unprepared deponent which, in turn, is sanctionable. In the event the Court grants this motion to compel then it, after opportunity for hearing, should require Kohl's to pay reasonable expenses incurred with obtaining the relief sought. CR 37(a) (4).

B. Kohl's Motion to Quash should be denied because Kohl's fails to establish the "good cause" necessary for that protective order to issue.

Civil Rule 26(c) allows a Court to, upon the finding of "good cause", issue a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[7] Establishing "good cause" for issuing a protective order requires (a) specific prejudice or harm will result if no protective order is issued (b) concrete examples to demonstrate specific facts showing harm (broad or conclusory allegations of potential harm are not be enough) and (c) the Court assessing the respective interests of the parties. *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn. App. 412, 423 (2009).

Regarding points (a) and (b), Kohl's motion fails because it consists of nothing more than "broad or conclusory allegations". Nowhere does Kohl's supply any evidence as to how it having to testify on any of the topics would cause it harm. No such evidence exists. Regarding topic 1, Kohl's can certainly supply someone who can say when and why the Greatness Agenda was created, its goals, and how Kohl's carries out its strategy. Topic 2 seeks authentication of a publicly available Kohl's document, the identity of who approved its dissemination to the public, and someone who can testify about the contents of a document Kohl's chose to release to the public.

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[7] A defendant's claim that requested information is "irrelevant" is not an enumerated CR 26(c) criteria.

This isn't harassing or burdensome. Topic 3 seeks information as to whether Kohl's received, read, and analyzed a single Forbes Magazine article. Since Kohl's is a Fortune 500 company[8] and since Forbes is a bi-weekly business magazine it follows that Kohl's reads and analyzes that magazine so as to keep abreast of issues (like failing to sell to millennials) that might affect its stock value and that it should be too difficult to find someone from Kohl's who is responsible for monitoring media reports on the company to testify on this topic. The same goes for topic 5, presumably Kohl's communicates with the media and it should not be difficult from finding someone from Kohl's who communicated with Retail Drive regarding that entity's publication regarding Kohl's success in attracting millennial shoppers. Regarding topic 4, Kohl's CEO publicly stated that millennials are its "quintessential" shopper (topic 6). It follows that Kohl's would have a strategy to attract those millennial shoppers and this topic seeks testimony as to how that strategy was implemented. Topic 6 seeks confirmation that Kohl's CEO indeed made the statements that she made in a November 2018 Fortune Magazine article. As stated above, testimony on topics 1-6 are reasonably calculated to lead to admissible evidence regarding Kohl's culture that is biased in favor of attracting younger shoppers at the expense of its elderly employees like Ms. Heinen. Lastly, providing testimony on topic 23, information regarding Ms. Maksic is not burdensome and very relevant to providing the comparator evidence necessary to prove Ms. Heinen's case.

Regarding point (c), employment discrimination cases are difficult to prove. *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn. 2d 516, 526 (2017). Accordingly, the information Ms. Heinen seeks in the topics is reasonably calculated to lead to the discovery of admissible

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[8] https://fortune.com/fortune500/kohls/ (last visited October 31, 2019).

circumstantial evidence needed to prove her discrimination and retaliation cases. Further, Kohl's is a large well-funded and sophisticated company defended by competent counsel and counsel's nationally recognized employment defense firm. Thus, Kohl's has the ability to provide the testimony at issue in these motions.

IV. CONCLUSION

Plaintiff's Motion to Compel should be granted. Defendants' motion to quash should be denied.

DATED this November 1, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on the date below written, I caused a true and correct copy of the foregoing document to be served on the following attorney, via the method indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on November 1, 2019, at Spokane, Washington.

Michael B. Love