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United States District Court, S.D. New York.

Grace HAZELDINE, Plaintiff,

v.

BEVERAGE MEDIA, LTD.,
William Slone, Defendants.

No. 94 CIV. 3466(CSH).
|
June 27, 1997.

MEMORANDUM AND ORDER

HAIGHT, Senior District Judge.

***1** I have considered the most recent correspondence of counsel, concerning certain discovery disputes which have arisen between the parties, and resolve these disputes as follows.

Medical Authorizations for Ms. Penchuk and Dr. Wuhl
Defendants request that the Court order plaintiff to produce authorizations for two medical providers: Ms. Penchuk, a social worker, and Dr. Wuhl, a psychiatrist. Plaintiff objects to this request, arguing that discovery has closed and that these providers do not fall within the limited extension of discovery granted by this Court in a prior order. In response, defendants argue that these authorizations are relevant to their defense and within the scope of this Court's prior extension of discovery, since "[p]laintiff testified she was on prozac and was depressed as a result of her termination." I agree with plaintiff, and decline to order production of these authorizations.

Ms. Penchuk was deposed by defense counsel on August 4, 1995. During that deposition, Ms. Penchuk discussed plaintiff's emotional state following her termination from **Beverage Media**, and the fact that she had referred plaintiff to a psychiatrist, Dr. Wuhl, for treatment. Penchuk Dep. at 18–20. During the deposition, Ms. Penchuk's report on Ms. Hazeldine was marked as an exhibit. Penchuk Dep. at 6. That report also described Ms. Penchuk's evaluation of Ms. Hazeldine's emotional state following her termination, and again noted that plaintiff had been referred to Dr. Wuhl, who prescribed Prozac. Excerpts from Ms. Penchuk's deposition, as well as her report on Ms. Hazeldine, were attached as exhibits to plaintiff's opposition to **Beverage Media's** summary judgment motion. *See* Exs. C, H to Beranbaum Aff. dated Jan. 2, 1996.

Under these circumstances, defendants are not entitled to authorizations for Ms. Penchuk and Dr. Wuhl. Defendants were fully aware during the discovery period that plaintiff was treated by these health professionals for, *inter alia,* emotional distress following her termination from **Beverage Media** and that she was taking Prozac. Defendants could have pursued further discovery on this issue at that point in time. They may not do so now, two years after the close of discovery.

In addition, defendants' request is not within the scope of this Court's prior order extending discovery for certain limited purposes. Although the order, dated February 10, 1997, spoke in general terms of "expert discovery," this Court has twice clarified, at a conference on February 7, 1997 and again on March 21, 1997, that the extension permitted continued discovery only on the issues of plaintiff's morbid obesity and her income since the close of discovery. Accordingly, defendants' current request, which relates to plaintiff's emotional state and not her morbid obesity, is outside the scope of the discovery extension.

Financial Discovery
Plaintiff seeks financial information from the defendants for the purpose of establishing her punitive damages claims. From the individual defendant, William Slone (hereinafter "Slone") plaintiff requests: three years of tax returns; information regarding real estate holdings, motor vehicles, investments, and bank and brokerage accounts; documents regarding personal loans; and, documents reflecting net worth. Plaintiff also requests **Beverage Media's** financial statements for 1995–96, and states that she is willing to enter into a confidentiality agreement to protect the defendants' privacy. Since defendants have refused to produce this information under any circumstances, plaintiff's letter asks the Court to order production of the requested financial documents.

***2** Defendants object to these requests on four grounds: 1) there is no factual basis for punitive damages since there is no allegation of malice or similar conduct; 2) the requests are

premature until a judgment of liability is entered; 3) plaintiff has not established entitlement to tax returns, and; 4) the requests are overbroad. Although I agree with defendants that plaintiff's requests are overbroad, limited financial discovery will be allowed to proceed at this stage of the litigation, and the trial will be bifurcated between liability and damages.

Plaintiff seeks punitive damages on her Title VII claim against **Beverage Media**. Pursuant to 42 U.S.C. § 1981a, a plaintiff alleging employment discrimination may recover punitive damages against the defendant-employer if the plaintiff demonstrates that the defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *See also Luciano v. Olsten Corp.,* 110 F.3d 210, 219–20 (2d Cir.1997). Plaintiff also seeks punitive damages on her city sex and disability discrimination claims against **Beverage Media** and Slone, pursuant to the City of New York Administrative Code, § 8–502(a). Section 8–502(a) provides for punitive damages in any civil action under the Administrative Code by persons aggrieved by an unlawful discriminatory practice. *See also Borkowski v. Borkowski,* 39 N.Y.2d 982, 387 N.Y.S.2d 233, 355 N.E.2d 287 (1976) (holding that only gross, wanton or other morally culpable conduct of a sufficient degree warrants an award of punitive damages).

Defendants' first argument in opposition to plaintiff's discovery requests is that there is no factual basis for an award of punitive damages. This argument is essentially a request for partial summary judgment on the issue of punitive damages. However, such a motion is arguably untimely and is not fully briefed by these letters from counsel. As such, I will not resolve the issue on the present record at this late stage of the litigation.

However there is caselaw, albeit somewhat conflicting, on the timing and scope of financial discovery relative to a punitive damages claim.

Timing of Punitive Damages Discovery

In *Tillery v. Lynn,* 607 F.Supp. 399, 402 (S.D.N.Y.1985), involving a state law claim for fraud, then Chief Judge Motley allowed the plaintiff to take discovery of defendant's personal assets prior to a determination of liability for punitive damages, reasoning that "[i]t would be unduly burdensome to plaintiff, and most particularly a jury and the court, to delay resolution of the issue as to the amount of punitive damages, if any, which should be awarded until discovery as to defendant's personal assets had been completed." However, to avoid any prejudice to the defendant, Judge Motley bifurcated the trial between liability and damages. In contrast, in *Davis v. Ross,* 107 F.R.D. 326, 327 (S.D.N.Y.1985), involving a state law claim for libel, Judge Carter relied on New York law and denied plaintiff's request for financial discovery prior to trial, holding that "[d]iscovery of defendant's net wealth will become necessary only in the event plaintiff obtains ... a special verdict [that she is entitled to punitive damages.]"

***3** The tension between these two cases was acknowledged by Eastern District Magistrate Judge Azrack in *Open Housing Center Inc. v. Kings Highway Realty,* 1993 U.S. Dist. LEXIS 15927 (E.D.N.Y.1993). In that case, Magistrate Judge Azrack found *Tillery* more persuasive, and allowed "pre-trial discovery of defendants' financial information even in the absence of a showing that punitive damages were warranted." *Id.* at *8; *but see Agudas Chasidei v. Gourary,* 1989 WL 38341 (E.D.N.Y.1989).

Although the caselaw provides little definitive guidance on this issue, I agree with Judge Motley that pre-trial financial discovery and a bifurcated trial is the more efficient method of managing a trial involving a punitive damages claim. In *Davis,* the district court, sitting in diversity, relied on New York state law, *see* 107 F.R.D. at 327, citing, *Rupert v. Sellers,* 48 A.D.2d 265, 368 N.Y.S.2d 904 (App.Div.1975), for the proposition that financial discovery must wait until there has been a finding of liability for punitive damages. However, the instant case is only partially a state law case, and in any event, matters of procedure in federal court, such as discovery, are governed by federal law. *Simpson v. Pittsburgh Corning Corp.,* 901 F.2d 277, 282–83 (2d Cir.1990); *see also Mid–Continent Cabinetry, Inc. v. George Koch Sons, Inc.,* 130 F.R.D. 149, 151 (D.Kan.1990) ("When a punitive damages claim has been asserted by the plaintiff, a majority of federal courts permit pretrial discovery of financial information of the defendant ... ."; criticizing the *Davis* court for relying on state, rather than federal, law to decide a question of discoverability).

Although the Second Circuit has cited *Rupert* with approval, *see, e.g., Smith v. Lightning Bolt Productions,* 861 F.2d 363, 374 (2d Cir.1988); *Brink's Inc. v. City of New York,* 717 F.2d 700, 707 (2d Cir.1983); *Doralee Estates v. Cities Service Oil Co.,* 569 F.2d 716, 723 n. 9 (2d Cir.1977), it has done so for the proposition that *evidence* of a defendant's wealth should not "be brought out *at trial* unless and until the jury has brought in a special verdict that the plaintiff is entitled to punitive

damages." *Brink's Inc.,* 717 f.2d at 707 (emphasis added). *Tillery* followed this preferred course by bifurcating the trial, *see Simpson,* 901 F.2d at 283, but allowing pre-trial financial discovery to proceed. Thus, Judge Motley's resolution of the issue is not contrary to prevailing law in this circuit; the Court of Appeals has not held that financial discovery may only be taken after liability for punitive damages has been determined.

In addition, it makes more sense to allow financial discovery to go forward now, so that if the defendants are found liable, both for the discrimination and for punitive damages, a second proceeding regarding the amount of damages can go forward immediately with the same jury. This option prevents prejudice to the defendant by keeping financial evidence out of the liability phase of the trial. In addition, allowing pre-trial discovery avoids the inefficiency of a discovery delay between the liability and damages phases of trial, as well as the need to assemble a second jury. Since defendants' legitimate privacy interests can be protected with a confidentiality order, I conclude that pre-trial financial discovery should proceed.

Scope of Discovery

***4** However, I also conclude that plaintiff's current requests for financial discovery are overbroad.

There are specific standards applicable to a request for tax returns. While tax returns are not privileged, a court should compel disclosure only if, on balance, the federal policy of liberal discovery outweighs the policy of maintaining the confidentiality of tax returns. *Tillman v. Lincoln Warehouse Corp.,* 1987 WL 7933, * 1 (S.D.N.Y.1987); *SEC v. Cymaticolor Corp.,* 106 F.R.D. 545, 547 (S.D.N.Y.1985). Accordingly, a two-prong test must be satisfied for a court to order disclosure: "first, the court must find that the returns are relevant to the subject matter of the action; and second, that there is a compelling need for the returns because the information contained therein is not otherwise readily obtainable." *Cymaticolor Corp.,* 106 F.R.D. at 547; *see also Russell v. Del Vecchio,* 764 F.Supp. 275 (E.D.N.Y.1991); *Tillman,* 1987 WL 7933, * 1.[1]

"In determining the amount and effectiveness of exemplary damages to be awarded against a defendant, the court may take into consideration the defendant's wealth or net worth." *Whitney v. Citibank, N.A.,* 782 F.2d 1106, 1119 (2d Cir.1986). Accordingly, Slone's wealth is clearly relevant to plaintiff's claim for punitive damages. However, it is not clear that the plaintiff has shown a compelling need for Slone's tax returns or the other types of private financial information requested.

First, "there is no suggestion that [plaintiff has] attempted to obtain the information through the use of any other less intrusive discovery device." *Russell,* 764 F.Supp. at 276; *Open Housing,* 1993 U.S. Dist. LEXIS 15927 at *17 (noting general rule that the need to discover tax returns is not compelling where financial information can be obtained through deposition or other documents within reach of the party seeking disclosure); *cf. Tillman,* 1987 WL 7933, *2 (affirming Magistrate Judge's order compelling production in part because plaintiff made attempt at adequate discovery through alternative resources).

Second, there is some force to the argument that plaintiff is only entitled to a general statement of the defendants' net worth. *See Open Housing,* 1993 U.S. Dist. LEXIS 15927, at * 11. "Since the purpose of presenting to the jury the amount of defendant's wealth is only to furnish to them a guide for suitable punishment, there is no need for a plaintiff to explore the details of a defendant's assets and liabilities. A mere statement of defendants' respective total net worth is sufficient." *Rupert,* 368 N.Y.S.2d at 913. Although the court in *Open Housing* approved much broader discovery than a general statement of the defendants' net worth, that decision was based in part on the fact that the defendants' previous statements regarding their financial condition were found to be unreliable. There is no such indication in this case.

While the "compelling need" test formally applies only to discovery of tax returns, Slone's legitimate privacy interests outweigh plaintiff's need for all the specific types of financial information requested. Accordingly, Slone need only produce a financial affidavit in the form of a personal balance sheet listing his assets and liabilities. This affidavit should also include a general statement of Slone's net worth. Equivalent information should be produced by **Beverage Media**. Plaintiff needs no more to establish her punitive damages claim. This information will be covered by a confidentiality stipulation and order, which the parties should execute and submit to the Court for approval.

Other Matters

***5** Defendant asks the Court to "provide for the scheduling of plaintiff's agreed upon independent medical exam...." The parties are directed to arrange a mutually convenient time, since there is no dispute that such an exam should take place.

All discovery must be completed by September 2, 1997. I also direct that this matter be referred to Magistrate Judge Grubin, who shall supervise the remaining discovery and resolve any further disputes that may arise. Magistrate Judge Grubin shall also have the authority to enlarge the discovery deadline, should she deem such an extension appropriate in the exercise of her discretion.

SO ORDERED.

All Citations

Not Reported in F.Supp., 1997 WL 362229

Footnotes

1 Disclosure of tax returns may also be warranted if the defendant places his income in issue. *Cymaticolor Corp.,* 106 F.R.D. at 548 n. 2; *Russell,* 764 F.Supp. at 276 (denying request to compel disclosure in part because "it does not appear that defendant in the case at bar has denied the ability to pay such an award.").