THE HONORABLE RICARDO S. MARTINEZ

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JENNIFER STRANGE, MAGEN MORRIS, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

LES SCHWAB TIRE CENTERS OF OREGON, INC., et al.,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Plaintiff,

v.

LES SCHWAB TIRE CENTERS OF WASHINGTON, INC., et. al.,

Defendant.

CIVIL ACTION NO. 06-045-RSM

PLAINTIFF EEOC'S MOTION TO BIFURCATE TRIAL AND DISCOVERY

NOTE ON MOTION CALENDAR:

October 10, 2008

ORAL ARGUMENT REQUESTED

Pursuant to Fed. R. Civ. P. 42(b) and *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 361 (1977), Plaintiff U.S. Equal Employment Opportunity Commission ("EEOC") moves the Court to enter an Order bifurcating both the trial and discovery in this public enforcement action, and to set a schedule in this case consistent with the attached proposed

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Order. The EEOC also seeks an order deferring in-depth discovery regarding individual class member damages until after the liability trial is concluded based on the large number of putative class members. [1]

I. Procedural Background

The EEOC filed this suit on May 31, 2006, claiming that Les Schwab Tire Centers of Washington, Inc. had engaged in a pattern or practice of discrimination against Magen Morris, Jennifer Strange and a class of similarly situated female employees in violation of Title VII of the Civil Rights Act of 1964 when Defendant failed to train or promote them to management positions based on their sex.[2] The EEOC's suit also claims that Defendant engaged in a pattern or practice of discrimination against a class of similarly situated female applicants when Defendant failed to hire them for sales/service department positions because of their sex. On February 15, 2007, EEOC amended its complaint to include eight related Les Schwab corporations as co-defendants, *e.g.*, Les Schwab Tire Centers of Boise, Inc. (collectively, "Defendants"), and to clarify that Defendants had engaged in a pattern or practice of discrimination against Morris, Strange and similarly situated female employees, and similarly situated female applicants, in each of the seven states in which Defendants conduct business.

Defendants will not be prejudiced by the EEOC's motion to bifurcate trial and discovery in this case given its conduct of discovery to date.[3] In fact, Defendants' decision to provide select portions of its applicant flow and personnel data to the EEOC over the period December

[1] While EEOC uses the term "class members" as convenient shorthand to reference the aggrieved persons regarding whom it seeks victim-specific relief in this case, EEOC notes that its enforcement actions are not subject to Rule 23 certification requirements. *See, e.g., General Telephone Co. of Northwest, Inc. v. EEOC*, 446 U.S. 318, 324 (1980).

[2] The EEOC's suit covered Defendant's personnel actions starting on January 1, 2004.

[3] The EEOC notes that it did not have all of Defendants' applicant flow or personnel data when it filed the first joint status report with the Court in September 2006. (Court File Dkt. #29).

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2006 to April 25, 2008 has created the need for the instant bifurcation motion. While the EEOC chose not to seek sanctions against Defendants for its conduct of discovery, a brief review shows: (1) Defendants first provided useable electronic HR/payroll data ("Infinium") to the EEOC in December 2007, a year after the EEOC had first requested the data in October 2006, to confirm which applicants were actually hired for sales/service positions; (2) Defendants provided approximately 30,000 electronic applications ("Unicru") to the EEOC in November 2007, much of which was in hard to convert XML format that the EEOC was only recently able to convert into useable form after Defendants provided further clarification of the nature of the electronic data on June 27, 2008; and (3) Defendants provided an additional 43,825 application documents (comprising over 13,500 applications) to the EEOC on April 25, 2008, applicant flow data that the EEOC had requested on October 5, 2006. (*See* Declaration of Damien A. Lee in Support of Plaintiff EEOC's Motion to Bifurcate Trial and Discovery, ¶¶ 3 through 10, hereinafter, "Decl. of D. Lee"). Defendants' application dump of April 25, 2008 caused the EEOC significant hardship from a resource and staffing perspective. It also required the EEOC and its expert to redo many of our analyses.

Based on the voluminous applicant flow information Defendants provided as recently as April 25, 2008, EEOC presently estimates that the potential class for its failure-to-hire case may approach 1,800 females. EEOC also seeks back pay, and compensatory and punitive damages awards for this class of females who Defendants did not hire for sales/service jobs, as well as other injunctive and other non-monetary remedies, and seeks back pay, and compensatory and punitive damages awards for Morris, Strange and a class of female employees who were not trained or promoted to managerial positions.

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Given the foregoing, EEOC seeks an order bifurcating trial and discovery in this case as prescribed by the Supreme Court in *Teamsters*: (1) Stage I, to first determine liability for the alleged pattern or practice; and (2) Stage II to separately determine damages for each individual class member. If the plaintiff prevails at the Stage I liability trial, the individual class members are then entitled to a presumption that the employer has discriminated against them at the Stage II proceedings. *Teamsters*, 431 U.S. at 361; *Thiessen v. Gen'l Elec. Capital Corp.*, 267 F.3d 1095, 1106 (10th Cir. 2001), *cert. denied*, 536 U.S. 934 (2002). Because of this legal presumption, bifurcation according to the *Teamsters* model is the customary and most efficient way of proceeding in a pattern-or-practice case, to avoid jury confusion and to conserve the Court's and the parties' resources. *Thiessen.*, 267 F.3d at 1106 ("pattern-or-practice cases are typically tried in two or more stages"); *Hill v. Western Electric Co.*, 672 F.2d 381 (4th Cir. 1982) ("[b]ifurcation of Title VII class action proceedings on liability and damages is now commonplace"); *see also* B*erger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111, 1124 (D.C. Cir. 1999); *Sledge v. J.P. Stevens & Co., Inc.*, 585 F.2d 625, 637 (4th Cir. 1978); *U.S. v. United States Steel Corp.*, 520 F.2d 1043, 1053-54 (5th Cir. 1975); *EEOC v. Monarch Machine Tool Co.*, 737 F.2d 1444, 1449-50 (6th Cir. 1980); *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 469-70 (8th Cir. 1984). Additionally, the EEOC will need a slight modification of the schedule for the contemplated Stage I discovery to contact potential class members identified as a result of the 43,825 additional application documents that Defendants provided on April 25, 2008. EEOC also seeks an order deferring in-depth discovery regarding individual claimant damages until after the Stage I trial has concluded based on the large number of putative class

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members. The EEOC recommends that the schedule regarding Stage II proceedings not be set until after Stage I proceedings have been concluded.

II. Argument

A. The EEOC Has Broad Enforcement Powers to Bring Pattern or Practice Cases on Behalf of the Public

The EEOC has broad enforcement power which is not constrained by the limits of Fed.R.Civ.Pro. 23. *Gen'l. Telephone v. EEOC,* 446 U.S. 318, 329 (1980); *see also, EEOC v. Mitsubishi Motor Mfg. Inc.*, 990 F.Supp. 1059, 1069-70 (C.D. Ill. 1998). In protecting the public from ongoing discriminatory practices, the EEOC may expand an individual charge to a class-wide complaint based on unlawful conduct uncovered during the investigation. *EEOC v. UPS,* 860 F.2d 372, 374-5 (10th Cir. 1988). Courts have consistently affirmed that the EEOC has unique power to prosecute unlawful employment practices on behalf of broadly-defined classes. *See, In re Bemis Co.*, 279 F.3d 419 (7th Cir. 2002). As the Supreme Court recognized in *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002), the "EEOC is master of its own case" and "does not stand in the employee's shoes."

B. Bifurcation of Pattern–or-Practice Claims Is Presumptively Appropriate

Rule 42(b) provides that a court may order separate trials of any separate issue "in furtherance of convenience or to avoid prejudice, or when separate trials will be "conducive to expedition and economy." Fed. R. Civ. P. 42(b). Bifurcating liability and relief issues is an obvious use of Rule 42(b). C. Wright and A. Miller, 9 *Federal Practice and Procedure* § 2390 (2d ed. 1994). The *Manual for Complex Litigation*, § 33.54 (2d ed.) states that "***[a]bsent unusual circumstances***, the trial of an employment discrimination class action should be

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conducted in separate stages under Fed. R. Civ. P. 42(b)." (emphasis supplied). In *Teamsters*, the Supreme Court endorsed bifurcating liability and relief issues in pattern-or-practice suits brought under Title VII, stating:

> The Plaintiff in a pattern-or-practice action is the Government, and its initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers. [Citation omitted.] At the initial, "liability" stage of a pattern-or-practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the government's proof is either inaccurate or insignificant. . . .
>
> If an employer fails to rebut the inference that arises from the Government's prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. Without any further evidence from the Government, a court's finding of a pattern or practice justifies an award of prospective relief . . . .
> . . . [T]he question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial stage of the trial . . . .
> When the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief . . . .
>
> The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of proved discrimination . . . . [T]he burden then rests on the employer to demonstrate that the individual applicant was denied employment for lawful reasons.

Id. at 360-62. Bifurcation of liability and individual remedies issues is particularly appropriate where, as here, a class of females has been injured by the same policy or course of conduct, but

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the individual remedies differ. S*ee, e.g., Fujita v. Sumitomo Bank of California*, 70 F.R.D. 406, 411 (N.D. Cal. 1975); *In re Master Key Antitrust Litigation*, 70 F.R.D. 23, 28 (D. Conn. 1975).

Moreover, bifurcated discovery is a logical corollary to a bifurcated trial. *See Ellingson Timber Co. v. Great Northern Railway Co.*, 424 F.2d 497, 499 (9th Cir. 1970)(courts have authority to require separate discovery of different issues and noting one purpose of Rule 42(b) "is to permit deferral of costly and possibly unnecessary discovery proceedings pending resolution of potentially dispositive preliminary issues."); 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2040 AT 523 (2D ED. 1994); 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2387 AT 472-73 (2D ED. 1994). Bifurcated discovery will help the parties conserve valuable resources and enable the liability trial to proceed expeditiously. The Federal Judicial Center's Manual For Complex Litigation (Third) recommends deferral of most class member discovery until after liability is established:

> Court approval should usually be required before any discovery from class members is undertaken, and the judge should limit such discovery to that which is genuinely needed and ensure that it is not used to harass either the members or the representatives of the class. . . . In some cases, limited discovery from class members may be conducted before a stage I trial on liability to the class, with the rest deferred. Each party should ordinarily be permitted to depose any class member whom the other party plans to call as a witness, and discovery may also be appropriate of a class member whose employment history will be used as evidence showing the existence (or non-existence) of the alleged discrimination. Whether anecdotal experiences of individual class members are relevant at a stage I trial will depend on the circumstances of the particular case. If such evidence will become relevant at subsequent proceedings only if liability to the class is established at the stage I trial, discovery from those class members may be deferred until after the first trial.

FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (THIRD), § 33.53 AT 354 (1995).

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C. Bifurcation is Especially Appropriate in the Present Case

EEOC seeks bifurcation of the trial and discovery into two separate phases, with appropriate adjustments to the schedule consistent with the needs of the case and the bifurcated framework. The two proposed phases are described in greater detail in the attached proposed Order. Stage I consists of discovery and trial of: (a) Defendants' liability for its pattern or practice of discriminating against female applicants for sales/service positions; (b) Defendants' liability for its pattern or practice of discriminating against female employees by denying them training and promotions to managerial positions; and (c) certain remedial issues, such as punitive damages, that can only be properly adjudicated by a jury that has heard all of the pattern or practice liability evidence in the case. Contemplated Stage I discovery would include document production; depositions of witnesses to prove or disprove the pattern or practice liability claim, *e.g.*, store, zone or district managers of Defendants, and class members whose testimony the EEOC intends to present to establish pattern or practice liability, and expert and other witnesses; and other liability-related evidence. [4] After the Stage I trial is concluded, all discrimination liability issues and the class' entitlement to punitive damages will be resolved.

Should the jury find liability regarding the pattern or practice claims, the Court would determine appropriate class-wide injunctive remedies and Stage II discovery will commence, followed by a Stage II trial or set of mini-trials. Stage II will consist of discovery and trial(s) of issues pertaining to each individual class member, *e.g.*, whether Defendant can overcome each class members' presumptive entitlement to remedies based on the jury's Stage I pattern or

[4] EEOC currently expects to present the testimony of no more than 15-30 of the anticipated failure-to-hire class members at the pattern or practice liability stage of this case as a representative sample of Defendants' hiring practices, with the remaining class members' testimony presented at the remedial stage.

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practice liability finding and, if so, the amount of such remedies, including back pay, front pay, and compensatory damages. Stage II discovery would include depositions of each individual class member not already deposed during Stage I (the overwhelming majority of the class), other witness depositions, related document discovery and other Stage II-related discovery.

b. Bifurcation of Trial and Discovery Conserve Judicial Resources and the Parties' Resources

District courts have authority to bifurcate proceedings in furtherance of convenience, to avoid prejudice, or when separate trials will be conducive to expedition and economy. *See, e.g.*, Fed. R. Civ. P. 42(b). A court must consider four factors: convenience, prejudice, expedition and economy, and the interests of justice. *See, e.g.*, 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2388 AT 479 (2D ED. 1994). Bifurcation of trial and discovery is justified in this case based on the framework for adjudicating pattern or practice cases, the size and scope of this case, and the factors identified under Fed. R. Civ. P. 42(b).

Courts have frequently ordered the bifurcation of pattern or practice employment discrimination cases because of the significant savings of judicial and litigant time and resources, and the efficiency which results from the procedure. Liability can usually be determined in a reasonable period of time through a manageable trial. "The focus of the stage I trial, whether to the court or the jury, will frequently be on statistical evidence and expert testimony." *Id.* at 356. Although individual fact witness testimony is used to bring "the cold numbers convincingly to life," such testimony ordinarily involves far fewer witnesses than the number to be expected in the second stage of pattern or practice proceedings. *See Teamsters*, 431 U.S. at 339. Liability can be decided based on the testimony of a few expert witnesses and a manageable number of

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anecdotal witnesses. If no liability is found, then there is no need for the remedial phase of the trial and the very large number of witnesses that the remedial phase would require. If there is a finding of liability, settlement is reached in most cases without the need for a Stage II trial. At present, the EEOC anticipates that presentation of individual remedial evidence at Stage II would likely require in excess of ten weeks of trial time based on the expected number of class members.[5] The jury's deliberations would also be quite lengthy. Thus, bifurcation of the trial offers the potential of substantial time and other resource savings.

Moreover, the same efficiency considerations also favor bifurcation of discovery. Deferring a second period of discovery about remedial issues until after the Stage I trial may conserve valuable judicial resources and those of the parties if: (a) the stage II discovery is precluded by a finding of no liability; or (b) a stage I liability finding may encourage the parties to settle. The evidence regarding Defendants' liability is largely unrelated to that concerning back pay, and compensatory damages for individual class members.[6] Although the EEOC

[5] The EEOC did not have Defendants' applicant flow or personnel data back in September 2006 when the parties filed their first joint status report. EEOC's revised estimate of the trial length is based in large part on Defendants' revelation of significantly more applicants in November 2007 (about 30,000 Unicru applicants, which the EEOC was only recently able to convert to a useable format) and as recently as April 25, 2008 (another 13,500 applicants).

[6] However, the evidence establishing liability and that relevant to assessment of punitive damages - such as evidence showing malice or reckless disregard for federal rights and the reprehensibility of the discriminatory conduct at issue - is inextricably intertwined such that trial of the punitive damages issue during Stage II proceedings would result in duplicative presentation of voluminous evidence to separate juries. Accordingly, the EEOC proposes trial of Defendants' liability for punitive damages and assessment of the class-wide amount of such damages during Stage I proceedings. *See* proposed Order regarding Plaintiff EEOC's Motion To Bifurcate Trial And Discovery at 4. Courts have repeatedly recognized the need for class-wide adjudication of punitive damages to avoid the legal and resource problems associated with presentation of largely duplicative evidence to multiple fact-finders. *See, e.g., Buchanan v. Consolidated Stores Corp.*, 217 F.R.D. 178, 188-89 (D. Md. 2003)(Chasanow, J.); *Hilao v. Estate of Marcos*, 103 F.3d 767, 780-81 (9th Cir. 1996); *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269, 280-82 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir.1986); *In re Shell Oil Refinery*, 136 F.R.D. 588, 593-95 (E.D. La. 1991), *aff'd*, 979 F.2d 1014 (5th Cir. 1992); *EEOC v. Dial Corp.*, 259 F. Supp.2d 710, 712-15 (N.D. Ill. 2003). The Court would apportion any punitive damages award among the class members at the conclusion of Stage II proceedings, taking into account the degree of actual harm suffered by each class member and the statutory damages cap set forth in 42 U.S.C. § 1981a(b)(3)((D).

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presently anticipates that perhaps 15-30 of its class members will likely be among its Stage I liability witnesses (whose testimony will then also be presented to support their individual remedy claims during Stage II proceedings), this number will be far smaller than the putative class which could approach 1,800 individuals.

C Bifurcation Ensures Just Adjudication of the Liability Determination While Preventing Jury Confusion

Another consideration when deciding whether to bifurcate proceedings is whether separate proceedings are more likely to produce a just result. *See, e.g.*, 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2388 AT 482 (2D ED. 1994)(citing cases). Bifurcation of this case will allow for a streamlined trial on the issue of liability alone. In that trial, the EEOC's burden will be "to establish by a preponderance of the evidence that . . . discrimination was the company's standard operating procedure -- the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336. The EEOC will proffer statistical evidence and related expert testimony, the testimony of Defendants' current and former staff, testimony of a limited number of female class members (for both the EEOC's failure to hire and failure to train and promote claims), documentary and other evidence. The burden will then shift to the Defendants "to defeat the *prima faci*e showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant." *Id.*

The trial of pattern or practice liability described above should not be complicated by testimony and legal instructions regarding issues pertinent only to individual class members. An omnibus trial on both liability and relief is likely result in a long and cumbersome proceeding for the parties, the Court and the jury given the amount of trial time required. The EEOC estimates that a trial of all liability and individual remedial issues would exceed three months.

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Equally important, bifurcation will minimize the likelihood of jury confusion. Otherwise, a jury must simultaneously apply instructions regarding the burden shifting framework of *Teamsters* while also evaluating liability evidence and a host of individual issues pertaining to back pay, mitigation of damages, timing of applications and other individual circumstances regarding several hundred class members. The potential for such error in the absence of bifurcation is significant. Conversely, bifurcation allows for a second stage proceeding that is relatively uncluttered by proof supporting pattern or practice liability. Bifurcation under Rule 42(b) would help to minimize jury confusion in this regard. Bifurcation, therefore, will more likely produce a just result.

III. The Proposed Schedule

The EEOC has attached a proposed Order to the instant motion regarding bifurcation and scheduling, which provides for bifurcation of both the trial and discovery in this action and sets forth a new schedule for discovery regarding Stage I proceedings.

CONCLUSION

For the reasons set forth above, the EEOC respectfully requests that the Court enter the proposed Order Regarding Bifurcation and Scheduling.

RESPECTFULLY SUBMITTED:

DATED this 25th day of September, 2008.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2008, I electronically filed the foregoing "Plaintiff EEOC's Motion to Bifurcate Trial and Discovery" with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following individuals listed below:

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by the following indicated method:

- by **e-mailing** a copy thereof in a pdf format to the attorney(s) listed above on the date set forth below.

DATED this 25th day of September, 2008.

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