IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MARILYN JOHNSON, et al.,

Plaintiffs,

v.

CITY OF MEMPHIS,

Defendant.

00 CV 2608 D/P

ORDER DENYING PLAINTIFFS' MOTION FOR A PROTECTIVE ORDER AND GRANTING MOTION FOR AN EXTENSION OF TIME TO RESPOND TO DEFENDANT'S DISCOVERY REQUESTS

Before the Court is Plaintiffs' Motion for a Protective Order from Responding to Defendant's Interrogatories and Request for Production and/or for an Extension of Time to Respond to Defendant's Discovery Requests, filed on April 15, 2004 (docket entry 191). On April 27, 2004, Defendant filed its response to this motion. The motion was referred to the United States Magistrate Judge for determination. For the reasons below, Plaintiffs' motion for protective order is DENIED. Plaintiffs' motion for an extension of time to respond to Defendant's discovery requests is GRANTED.

I. BACKGROUND

This case arises out of an invalid promotional process within

the Memphis Police Department ("MPD"). Plaintiffs are comprised of fifty-two police officers within the MPD who allege intentional racial discrimination by the City of Memphis ("City") and violations of Memphis city laws requiring the use of competitive job-related tests[1]. Of these fifty-two plaintiffs, twenty-three identify themselves as African-American, two as Hispanic, and twenty-seven as white.

In their Third Amended Complaint, Plaintiffs allege that in March 2000, the City circulated information regarding an upcoming promotion process for officers who wanted to become sergeants. The process would consist of multiple parts, with a written examination comprising 20% of one's total score and a "video based" practical application test comprising 50% of one's score. The remaining 30% would be calculated using performance evaluations from the previous two years (20%) and seniority (10%). The City would award promotions based on the rank order of the composite scores.

Plaintiffs assert that the City adopted a "cutoff" score of seventy which candidates had to meet in order to proceed to the practical test. After discovering that a cutoff score of seventy had an adverse impact on African-American candidates, Plaintiffs

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[1]In its response to Plaintiffs' motion, the City suggests there are fifty-one Plaintiffs, noting that one of the fifty-two individuals is not included in the introductory paragraph of the Third Amended Complaint or in a description of the parties. The Court makes no determination as to the number of Plaintiffs in this action.

contend the City lowered the cutoff score to sixty-six. Plaintiffs allege that the written exam and cutoff score had no correlation to successful job performance as a sergeant. Thus, Plaintiffs who did not reach the cutoff score allege that they were "unlawfully deprived of the opportunity to take the race neutral video based test." (Third Am. Compl. at 10.)

Plaintiffs further allege that prior to administering the practical tests, police officials and/or City employees "leaked" the practical test materials to selected African-American candidates. These individuals then allegedly distributed these materials to other African-American officers. Plaintiffs argue that the police director and other police administrators were aware that the validity of the test had been compromised. Plaintiffs contend, however, that these individuals denied this knowledge and continued to administer the test. The City only admitted the test had been compromised near the conclusion of the testing period, after news media members produced copies of the test materials.

As a result of this promotional process, Plaintiffs assert a number of claims against the City.[2] African-American Plaintiffs allege that the City has known since 1974 that written tests have more of an adverse impact on minorities than practical tests. The City, Plaintiffs contend, has continued to use written tests

[2]Plaintiffs have obtained partial summary judgment declaring the 2000 promotional process invalid.

despite this knowledge, and has failed to take action to correct the adverse impact of the written tests. Plaintiffs argue that in the 2000 promotion process the City tried to avoid this adverse impact to minorities by adjusting the cutoff score, even though it was aware that the test and cutoff score had no bearing on successful performance as a sergeant. Plaintiffs allege this intentional racial discrimination violates the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1981, and T.C.A. § 4-21-401.

Non-minority Plaintiffs also allege discrimination. These Plaintiffs contend that the City released the practical test to select African-Americans to increase their chances of promotion. This release, Plaintiffs argue, injured non-minorities' chances for promotion. Plaintiffs allege that this deprived the non-minority Plaintiffs of equal treatment in the promotion process and thus constitutes intentional racial discrimination.

Plaintiffs allege several other claims in their complaint. First, all Plaintiffs contend that the City violated its Charter and City Ordinances requiring competitive job-related examinations which fairly and accurately evaluate a candidate's ability to do the duties of the particular position.

Second, in addition to the above discrimination claims, all Plaintiffs, excluding Constance Young, assert racial discrimination claims under Title VII of the Civil Rights Act of 1964. Additionally, thirteen female Plaintiffs assert gender

discrimination claims under Title VII.[3] This sub-group appears to consist of both minorities and non-minorities.

Third, all Plaintiffs allege the City acted negligently in the 2000 promotion process. Fourth, eighteen minority and non-minority Plaintiffs also assert negligence claims for the City's failure to promote them in its January 2003 promotions. Of these eighteen, fifteen African-American Plaintiffs also allege that the City intentionally discriminated against them during this January 2003 promotion process.[4] Plaintiffs request the Court promote all Plaintiffs to the position of sergeant, as well as award backpay, benefits, and retroactive seniority.[5]

The matter presently before the Court is a discovery dispute over interrogatories and a request for production recently served upon Plaintiffs by the City. On March 15, 2004, the City served its Second Set of Interrogatories to Each and Every Plaintiff and its Second Request for the Production of Documents to Each and

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[3]Plaintiffs' Supplement to its Motion for a Protective Order suggests Plaintiffs will not pursue the gender discrimination claims.

[4]The City conducted testing for promotions to sergeant in 2003. A sub-group of African-American Plaintiffs contends that the 2003 test, because of the adverse impact the written test has historically had on African-American candidates, was invalid and racially discriminatory. Non-minority Plaintiffs asserting claims regarding the 2003 test contend the City breached its duty to administer a valid promotion process.

[5]In the Supplement to Plaintiffs' Motion for a Protective Order, Plaintiffs' counsel has indicated that Plaintiffs "will limit their claims for economic damages to back pay, not compensatory damages."

Every Plaintiff.[6] Each interrogatory and corresponding document request was identical for each Plaintiff. The City, however, expected individual answers to the interrogatories from each Plaintiff.[7] Plaintiffs thereafter filed the instant motion objecting to the discovery requests on several grounds, or alternatively, asking the Court for an extension of time to respond to Defendant's discovery requests.

First, Plaintiffs contend that the City has violated Federal Rule of Civil Procedure 33(a) by exceeding the limit of twenty-five interrogatories. Because all Plaintiffs join in one suit and are represented by one attorney, Plaintiffs request that the Court treat all Plaintiffs as one "party" for purposes of Rule 33(a). Thus, because the City has propounded interrogatories and requests for production on all fifty-two Plaintiffs, Plaintiffs argue the City has exceeded the number of interrogatories permitted by Rule 33.

Second, Plaintiffs argue that some of the City's interrogatories contain discrete subparts. Plaintiffs count twenty-eight discrete subparts contained within eight of the

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[6]The requests for production of documents asked for documents which corresponded with the questions raised in the interrogatories.

[7]Prior to filing this motion, Plaintiffs' counsel had asked the City to agree to a protective order limiting Defendant to one set of twenty-five interrogatories. The City declined, but offered to allow Plaintiffs to answer globally any questions contained in the interrogatories for which this manner of answering was available. Plaintiffs' counsel rejected this offer and now seeks a protective order.

eighteen interrogatories the City has served upon the Plaintiff. For this reason also, Plaintiffs allege the City has exceeded the interrogatory limits.[8]

Plaintiffs also request the Court limit the number of interrogatories and requests for production under the provisions of Federal Rule of Civil Procedure 26(b)(2). Plaintiffs contend that propounding the same interrogatories and requests for production on each of the fifty-two plaintiffs is unreasonably cumulative or duplicative. Plaintiffs also argue that because the City's agents have taken recorded statements from some of the Plaintiffs, the discovery sought is obtainable from another source. Finally, because Plaintiffs have already obtained summary judgment on one issue in this case, Plaintiffs contend that the burden of answering the City's discovery requests outweighs the likely benefits to be obtained by the discovery. For these reasons, Plaintiffs ask the Court to impose discovery limits in accordance with Rule 26(b)(2).

In its response, the City contends that the interrogatories and requests for production comply with the discovery rules. It argues that a literal reading of Rule 33(a) permits the City to serve upon each Plaintiff as many as twenty-five interrogatories. The City also notes that the responses to its discovery requests will vary by what sub-group of Plaintiffs the individuals are a part of and which claims they assert against the City. The City

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[8]Plaintiffs contend the total number of interrogatories they have been served with is 2392: 936 interrogatories and 1456 subparts.

argues that this warrants the need for individualized discovery.

The City also contends that only two of its interrogatories contain what could be considered "discrete subparts." Most subparts within the interrogatories are factually related to the primary question and should not be counted as discrete subparts, the City argues. Thus, the City believes it has not exceeded the limit of twenty-five interrogatories.

The City contends that imposing discovery limitations pursuant to Rule 26(b)(2) is not warranted. Noting that each individual will not likely have the same answer to the City's questions, especially if he or she is alleging different claims, the City argues that its discovery requests are not unreasonably duplicative or cumulative. The City also points out that its investigators previously took statements from only fourteen of the Plaintiffs. Additionally, they were only investigating information regarding the leaked test materials, not the racial discrimination claims asserted in this case. Thus, the City argues discovery is not obtainable from some other source.

Finally, the City argues that the burden and expense of responding to its discovery requests is outweighed by the benefit of the discovery. The City notes that even with summary judgment on one issue, it is still defending the remaining claims "vigorously", and its proposed discovery is necessary to adequately prepare for trial. As such, the City argues that the Court should not impose limitations on discovery pursuant to Rule 26(b)(2).

II. ANALYSIS

Federal Rule of Civil Procedure 33 states that "any party may serve upon *any other party* written interrogatories, not exceeding twenty-five in number including all discrete subparts, to be answered by the party served . . . ." Fed.R.Civ.P. 33(a) (emphasis added). The plain terms of Rule 33(a), therefore, allow a party to propound interrogatories upon any other named party. See St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP, 217 F.R.D. 288, 289 (D. Mass. 2003) (three defendants can each serve 25 interrogatories on the plaintiff); In re Folding Carton Antitrust Litig., 83 F.R.D. 260, 264 (N.D. Ill. 1979) (named plaintiffs are parties subject to discovery).

Plaintiffs contend that they should be treated as one party for purposes of Rule 33(a). The Court disagrees. First, such treatment would contravene the plain language of Rule 33(a). Second, the interrogatories are identical for all Plaintiffs, i.e. this is not a situation where one party has served a separate set of substantively different interrogatories on each and every Plaintiff. Third, Plaintiffs are comprised of different subgroups who bring a variety of claims, and thus, the answers to the interrogatories will likely differ among the Plaintiffs. For these reasons, the City has not exceeded the discovery limits under Rule 33(a) by serving all Plaintiffs with individual interrogatories and

requests for production.[9]

Plaintiffs also contend that the City has exceeded the limits in Rule 33(a) by including discrete subparts which raise the total number of interrogatories above twenty-five. The Advisory Committee Notes to Rule 33 describes what constitutes a "discrete subpart":

> Parties cannot evade this presumptive limitation [of twenty-five interrogatories] through the device of joining as "subparts" questions that seek information about discrete separate subjects. However, a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each communication.

Fed.R.Civ.P. 33 (1993 Committee Notes).

"A subpart is discrete when it is logically or factually independent of the question posed by the basic interrogatory." Power and Tel. Supply Co., Inc. v. Suntrust Banks, Inc., No. 03-2217M1V, 2004 WL 784533, at *1 (W.D. Tenn. Mar. 15, 2004) (quoting Security Ins. Co. of Hartford v. Trustmark Insurance Co., No. Civ. 3:01CV2198(PCD), 2003 WL 22326563, at *1 (D. Conn. March 7, 2003)); see also Safeco of Am. v. Rawstron, 181 F.R.D. 441, 444-45 (C.D. Cal. 1998); Kendall v. GES Exposition Servs., Inc., 174 F.R.D. 684, 685 (D. Nev. 1997). Thus, an interrogatory containing subparts aimed at eliciting details concerning a single theme should be considered one question, while an interrogatory with subparts

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[9]Where appropriate, Plaintiffs may answer globally certain interrogatories (or cross reference co-plaintiffs' interrogatory responses) if the answers are identical for a particular subgroup of Plaintiffs.

inquiring into discrete areas should be counted as more than one. 8A Charles Alan Wright et al., Federal Practice and Procedure § 2168.1 (2d ed. 1994).

Plaintiffs' contention that there are discrete subparts within the City's interrogatories which should be counted as individual interrogatories is incorrect.[10] Other than the two interrogatories the City admits might contain discrete subparts, the Court finds that any subparts contained within the remaining interrogatories are factually related to the primary question of each interrogatory, and thus, should not be counted individually.[11] Thus, the City has not exceeded the limit of twenty-five interrogatories.

Plaintiffs have also moved the Court to limit discovery pursuant to Rule 26(b)(2). This rule provides that:

> The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of

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[10]Plaintiffs assert that there are twenty-eight subparts inquiring into discrete areas, but do not specifically identify which interrogatories they object to on these grounds, nor do they identify the discrete subparts used to reach this number.

[11]Defendants admit Interrogatories Three and Four might each contain subparts inquiring into discrete areas, raising the total number of interrogatories to twenty.

> the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Fed.R.Civ.P. 26(b)(2). Plaintiff has failed to demonstrate that such a limitation is warranted in this case. As the Court finds that the City may serve its interrogatories on each individual Plaintiff, the discovery sought is not unreasonably cumulative or duplicative. The City's investigators interviewed only fourteen of the Plaintiffs, and their investigation was confined to the limited issue of the leaked test materials. The City's proposed discovery seeks information beyond the scope of the leaked test materials. Thus, the proposed discovery is not obtainable from another source, nor has the City had ample opportunity by discovery in this action to obtain the information sought. Thus, the Court declines to impose limitations on discovery pursuant to Rule 26(b)(2).

III. CONCLUSION

Accordingly, Plaintiffs' motion for a Protective Order is DENIED. Plaintiffs' motion for an extension of time to respond to the discovery requests is GRANTED. Plaintiffs are instructed to provide their responses to the City's discovery requests within thirty (30) days from the date of this order.[12]

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[12]Plaintiffs' arguments loosely raise objections to the relevance of some of the City's interrogatories and requests for production. Plaintiffs object to the City's requests for information related to each Plaintiff's medical history in the past five years, as well as information pertaining to employment history and sources of income since January 1, 1998. Plaintiffs contend that this information is no longer relevant, since Plaintiffs have agreed to limit the economic damages they seek to back pay. Because they only seek back pay, Plaintiffs suggest the parties will be able to stipulate to the amount of

IT IS SO ORDERED.

[redacted]

TU M. PHAM
UNITED STATES MAGISTRATE JUDGE

6/17/04
DATE

recoverable damages prior to trial. At this time, the Court does not consider the merits of these arguments, but rather will consider these arguments if brought before the Court after Plaintiffs have responded to the discovery requests.

UNITED STATES DISTRICT COURT - WESTERN DISTRICT OF TENNESSEE

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