

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

SOLOMON SMITH, JR.,

Plaintiff,

vs.

Case No. 2015-1967-CB

FAURECIA AUTOMOTIVE SEATING,
LLC,

Defendant.

OPINION AND ORDER

Defendant has filed a motion to quash subpoena and for protective order. Plaintiff has filed a response and requests that the motion be denied.

I. Factual and Procedural History

Plaintiff's amended complaint includes a claim for racial discrimination in which Plaintiff alleges that he was discriminated against by Defendant's failure to offer him a severance. On September 16, 2015, Plaintiff issued a subpoena to Defendant in an attempt to obtain documents relating to 2010 terminations of three Caucasian employees.

On October 5, 2015, Defendant filed its instant motion to quash Plaintiff's September 16, 2015 subpoena and for the entry of a protective order. On October 7, 2015, Plaintiff filed a response and requests that the motion be denied. The Court has since taken the motion under advisement.

II. Arguments and Analysis

Plaintiff's subpoena at issue requests that Defendant produce:

Any and all records regarding the termination of employment of former Faurecia employee [Rich Basher, Rembert Parker and Greg Turgid] as referenced in paragraph 14 of the amended complaint, including but not limited to:

- A. The reason for the termination
- B. Whether at the time of termination, or thereafter, [Rich Basher, Rembert Parker and Greg Turgid] received severance pay or any other type of employment benefits pursuant to the attached severance agreement or for any other reason.

(See Defendant's Exhibit 1.)

Defendant contends that the subpoena is improper because it was issued under MCR 2.305, the court rule governing subpoenas for taking deposition, rather than under MCR 2.310, the rule governing requests for documents from a party.

MCR 2.305(A)(2) provides that a subpoena issued under MCR 2.305 may require the person to whom it is directed to produce and permit inspection and copying of designated documents or other tangible things, but the last sentence of MCR 2.305(A)(2) provides that: "The procedures in MCR 2.310 apply to a party deponent." In this case, the only portion of MCR 2.310 Defendant contends was offended by Plaintiff's subpoena was the requirement that the documents requested by produced within 8 days, rather than the 28 days permitted by MCR 2.310. However, more than 28 days have passed since Plaintiff issued the subpoena in question; therefore, any violation of MCR 2.310 has been rendered inconsequential. While the Court agrees that requests of documents from a party under MCR 2.305 must comply with MCR 2.310, the Court is not persuaded that Defendant's subpoena must be quashed on that basis.

Defendant also contends that Plaintiff's subpoena seeks information and documentation not discoverable under the Michigan Court Rules. Discovery of information must be relevant and not privileged, MCR 2.302(B)(1). The rule allows discovery of matter that is relevant to the subject matter involved in the pending action or that appears reasonably calculated to lead to the discovery of admissible evidence. *Bauroth v Hammoud*, 465 Mich 375, 381; 632 NW2d 496 (2001). Michigan has a long established tradition of liberal, open, and far-reaching discovery policy. See *Sucoe v Oakwood Hosp Corp*, 185 Mich App 484; 462 NW2d 780 (1990), *aff'd in part, vacated in part on other grounds*, 439 Mich 919; 479 NW2d 637 (1992). The rules of discovery should be construed in an effort to facilitate trial preparation and to further the ends of justice, and the discovery process should promote the discovery of the facts and circumstances of a controversy, rather than aid in their concealment. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). On motion by a party and for good cause shown, the Court may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense. MCR 2.302(C). A trial court's order to grant or deny discovery will be reversed on appeal only if the trial court abused its discretion. *Ravary v Reed*, 163 Mich App 447; 415 NW2d 240 (1987).

In this case, it is undisputed that the sought discovery is directed at the fourth element of Plaintiff's discrimination claim, i.e. that others similarly situated to Plaintiff, and outside the protected class, were treated differently for the same or similar conduct. In its motion, Defendant contends that the

information/documents sought is/are irrelevant because the past employees at issue were terminated by a different human resources manager. In support of its position, Defendant, in part, relies on the Michigan Supreme Court's decision in *Town v Michigan Bell Telephone Co*, 455 Mich 688; 568 NW2d 64 (1997).

In *Town*, the Michigan Supreme Court held that in order for two people to be similarly situated, all relevant aspects of their employment situation must be "nearly identical". *Id.* at 699-700. However, the Michigan Court of Appeals in *Sisson v Bd of Regents of the Univ of Michigan*, 174 Mich App 742, 747; 436 NW2d 747 (1989), held that the fact that two employees had different supervisors did not preclude a finding of dissimilar treatment.

Moreover, the two United States 6th Circuit cases Defendant relies upon for the proposition that two people must have the same supervisors to be similarly situated do not actually stand for that position. The two cases Defendant relies upon are *Mitchell v Toledo Hospital*, 964 F2d 577 (6th Cir, 1992) and *McMillan v Castro*, 403 F3d 405 (6th Cir, 2006.). *McMillan* references, quotes and clarifies *Mitchell*. Accordingly the Court will address *McMillan*.

Defendant relies on the following portion of the Court's Opinion in *McMillan*:

In *Mitchell*, we held that "to be deemed 'similarly-situated', the individuals with whom plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subjected to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

McMillan, at 413.

However, Defendant fails to include the remainder of the Court's holding, which provides the actual standard. Specifically, the Court continued:

We have since clarified that "*Mitchell* itself only relied on those factors relevant to the factual context in which the *Mitchell* case arose -- an allegedly discriminatory disciplinary action resulting in the termination of the plaintiff's employment. *Ercegovich* [*v. Goodyear Tire & Rubber Co.*, 154 F3d 344, 352 (6th Cir. 1998)],

Although "[t]hese factors generally are all relevant considerations in cases alleging differential disciplinary action," we explained, [c]ourts should not assume ... that the specific factors discussed in *Mitchell* are relevant factors in cases arising under different circumstances, but should make an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the non-protected employee. The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered "similarly-situated;" rather, as this court has held in *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir.1994) , the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in "all of the *relevant* aspects." *Id.* (citation and footnote omitted).

Indeed, we have held, relying on *Ercegovich*, that a plaintiff claiming racial discrimination was similarly situated to a non-protected employee even though the two individuals "worked in different ... departments and *had different supervisors.*" *Seay v. Tenn Valley Auth.*, 339 F.3d 454, 479 (6th Cir.2003) (emphasis added). In so holding, we recognized *Mitchell*'s "same supervisor" language, but explained that that particular criterion "has never been read as an inflexible requirement" and was not relevant to the plaintiff's claim in that case. *Id.* at 479–80. The fact that the two individuals had different supervisors did not prevent them from being deemed similarly situated, we reasoned, because "all of the people involved in the decision-making process, including Plaintiff's immediate supervisor and the department manager, were well-aware of the discipline meted out to past violators, including [the non-protected employee], who had violated the policy on at least two occasions." *Id.* at 480.

It is clear from the foregoing that the requirement that a plaintiff and her comparator "must have dealt with the same supervisor" to be considered similarly situated does not automatically apply in every employment discrimination case. Whether that criterion is relevant depends upon the facts and circumstances of each individual case.

McMillan, 405 F3d at 413-414.

Accordingly, under both Michigan and Federal caselaw, a plaintiff need not establish that the employees in question had the same supervisor in order for the Court or trier of fact to find that they were similarly situated.

In addition, Defendant contends that the evidence is not relevant because the employees at issue were not terminated for the same reason that Plaintiff was terminated. In support of their position, Defendant relies on an affidavit in which Jillian Czapinski, its current human resource manager, in which she testified that the three former employees at issue were terminated for a different reason than Plaintiff. (See Defendant's Exhibit 2.) While the cause of the employees' termination is relevant, Defendant's position is merely an attempt to hand-pick the parts of the individual's terminations that are favorable to their defense of Plaintiff's claim without having to turn over all of the relevant evidence. While the above-referenced case law supports the proposition that all relevant aspects must be nearly identical to be considered similarly situated, the case also supports the position that there is no "silver bullet." Rather, a court must look at the entire picture before determining whether individuals are similarly situated.

Accordingly, the Court is persuaded that any determination as to the issue of whether the alleged individuals were similarly situated to Plaintiff is premature

at this time. Rather, the Court is convinced that in order to provide a full picture in this case, Plaintiff must be allowed to conduct his discovery into the circumstances surrounding the other individuals' terminations. As a result, Defendant's motion to quash must be denied.

III. Conclusion

Based upon the reasons set forth above, Defendant's motion to quash and for a protective order is DENIED. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

Date: NOV 25 2015

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge