

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

MAURICE JAMES SJOBLOM,
on behalf of himself and a class of employees
and/or former employees similarly situated,

Plaintiff,

v.

OPINION AND ORDER

07-cv-451-bbc

CHARTER COMMUNICATIONS, LLC,
CHARTER COMMUNICATIONS (CCI),
INC. and CHARTER COMMUNICATIONS,
INC.

Defendants.

Before the court is defendants' motion 1) to clarify this court's December 26, 2007 protective order, or in the alternative, to permit depositions of the individuals who submitted affidavits in support of plaintiff's motion for conditional certification and 2) to permit an additional response to plaintiff's supplemental brief in support of conditional certification. Defendants contend that the protective order does not apply to formal discovery, and in the alternative, that they should be permitted to depose the affiants. Because of the short time allowed for their response and plaintiff's objections to the depositions, defendants also seek an additional 10 days within which to depose the affiants and file their objections. Plaintiff asserts that the court's December 19, 2007 order

requesting further evidence from plaintiff does not allow for cross examination of his witnesses, an extension would needlessly delay the court's ruling on conditional certification, the court is capable of weighing the affidavits without defendants' assistance and the depositions could discourage potential class members from participating in the lawsuit. Because I agree that defendants are entitled to explore the basis of the affiants' testimony and have not had the opportunity to do so, I am granting their motion.

Before I address the parties' arguments, I will summarize the relevant allegations contained in the documents attached to the affidavit submitted by defendants' attorney.

ALLEGATIONS OF FACT

In a February 4, 2008 email to plaintiff's attorney Michael Modl, defendants' attorney Lee Schreter wrote that defendants planned to take the depositions of the following current and former employee affiants who submitted affidavits in support of plaintiff's motion for conditional certification: Joseph Niderleidner, David Zrout, Nick Seichter, Matthew Tuescher, Mark Senne, Shawn Turner, Marc Goodell, Christopher Shoup, George Carter, Brian Ayers, Josh Parham, Wendle Lee Williams, Louis Boucher, Guy Smith and Matthew Kuziel. Dkt. #215, Exh. 1. In a letter dated February 5, 2008, Modl responded that plaintiff's attorneys did not represent the affiants and could not accept a subpoena on

their behalf. Modl also asked defendants to inform him of the proposed deposition dates and locations so that he could work cooperatively in scheduling them. Id., Exh. 2.

In an email dated February 6, 2008, defendants' attorney Andrew Voss notified plaintiff's attorney Timothy Edwards that defendants were prepared to subpoena Ayers, Senne, Goodell and Boucher for depositions in different states on Friday, February 8, 2008 and were making arrangements to depose Williams, Kuziel and Smith in different states on Saturday, February 9, 2008. Dkt. #215, Exh. 3. Edwards responded to Voss via email on February 6, 2008, indicating that he could not accommodate the proposal because it would require four different lawyers to be available in four different states. Id., Exh. 4. Also on February 6, 2008, plaintiff's attorney Robert Gingras emailed Voss to object to the timing of the proposed depositions and state his belief that pursuant to the court's December 26, 2007 protective order, defendants must first obtain court approval for the method and content of the depositions. Id., Exh. 5.

By telephone conference on February 7, 2008, plaintiff's attorneys confirmed their belief that defendants must seek court approval before deposing the affiants, who are all prospective class members, and objected to any extension of time to allow defendants to supplement their response to the motion for conditional certification. Dkt. #215, ¶ 7. Defendants filed their motion for clarification on February 8, 2008. Dkt. #213. Their

response to plaintiff's supplemental brief in support of conditional certification was due on Monday, February 11, 2008.

DISCUSSION

As discussed in this court's December 19, 2007 order, an affiant must testify about what he observed himself and not speculate about what he thinks happened. Dkt. #154 at 24 (citing Payne v. Pauley, 337 F.3d 767, 772 (7th Cir. 2003); Fed. R. Evid. 602 (witness must have personal knowledge of matter in order to testify to it)). "[A]lthough personal knowledge may include reasonable inferences, those inferences must be 'grounded in observation or other first-hand personal experience.'" Payne, 337 F.3d at 772 (quoting Visser v. Packer Engineering Associates, Inc., 924 F.2d 655, 659 (7th Cir. 1991)). Accordingly, I agree that defendants should have the opportunity to depose the individuals who submitted affidavits in support of conditional certification in order to explore whether their testimony is based on personal knowledge and reasonable inferences. As defendants point out, problems of this kind showed up in portions of plaintiff's and Cone's affidavits. Dkt. #154 at 23-25. Further, in requiring plaintiff to submit further evidence in support of conditional certification, the court anticipated that defendants would want the opportunity to raise such challenges. See December 19, 2007 Order, dkt. #154 at 28

(allowing defendants opportunity to object to form or content of additional affidavits submitted by plaintiff).

Plaintiff contends that rigorous cross examination of the potential class members before they opt in to the lawsuit would discourage them from agreeing to participate as class members. Although I understand plaintiff's argument, by submitting affidavits, the affiants agreed to participate in the lawsuit at least as witnesses. By law, witnesses are and should expect to be subject to cross examination. If these witnesses choose to become plaintiffs, they will be subject to even further scrutiny. Plaintiff's concerns are based in part on the subject of this court's December 26, 2007 protective order in which the court found that defendants improperly questioned their employees and failed to inform them of their potential interests in this lawsuit. To protect potential class members from future coercion or intimidation, the court ordered defendants to obtain the court's approval before contacting or communicating with potential class members in this action. The court is satisfied that the rules governing depositions will insure that the affiants are treated appropriately.

I turn now to defendants' related concern about whether formal discovery is permitted under the protective order. The court does not intend to prevent defendants from conducting formal discovery under Fed. R. Civ. P. 26. Typically, discovery requests pursuant to Rule 26 are sent to opposing counsel for response. Counsel then have the opportunity

to object to the propriety of the requests. However, in this case, plaintiff's attorneys do not represent the potential class members and would not automatically be notified of any discovery requests or have the opportunity to object to their propriety in advance. To insure that formal discovery from potential class members proceeds with meaningful oversight, I will require defendants to notify plaintiff's counsel of depositions of potential class members, allow plaintiff's counsel to be present at the depositions of potential class members and require defendants to serve a courtesy copy of any written discovery requests on plaintiff's attorneys. I anticipate that defendants' counsel will make efforts to accommodate plaintiff's counsel when scheduling the depositions. (I note that defendants appropriately notified plaintiff of their intentions to depose the affiants and made efforts to ensure that plaintiff's counsel were available.)

Given plaintiff's objections and unavailability, defendants did not have time to depose the affiants before responding to plaintiff's supplemental brief on February 11, 2007. Although an extension may result in a short delay, fairness requires that defendants be allowed extra time in which to depose the affiants and file any objections to their affidavits. I will allow defendants 10 days in which to do so. Defendants must limit their supplemental response to any objections that they have with respect to the admissibility of the affidavits. The court is satisfied that after any such objections are filed, it will have a complete record from which to make a decision. Therefore, no reply briefs will be allowed by either side.

ORDER

IT IS ORDERED that defendants' motion is GRANTED. Under the December 26, 2007 protective order, defendants are allowed to conduct formal discovery pursuant to Fed. R. Civ. P. 26 provided that plaintiff is notified in advance and allowed to participate in any depositions. Defendants will have until February 25, 2008 to depose the potential class members who submitted affidavits in support of the motion for conditional certification and file any objections they have to the affidavits.

Entered this 14th day of February, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge