

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

MARVIN PROCHASKA,

Plaintiff,

v.

MENARD, INC.,

Defendant.

ORDER

10-cv-686-bbc

Plaintiff Marvin Prochaska has appealed a discovery order of Magistrate Judge Stephen Crocker in this case brought under the Age Discrimination in Employment Act. Plaintiff challenges two aspects of the magistrate judge's November 9, 2011 decision. Dkt. ##155 and 162. First, he says that the magistrate judge should have ordered John Menard to sit for a deposition. Second, he says that the magistrate judge should have ordered defendant to answer Interrogatories Nos. 7 and 8, which ask defendant to "describe in detail" the reason that 215 particular employees were terminated and provide contact information for those former employees.

In addition, plaintiff has filed an exhibit in which counsel explains in camera the topics to be covered in the proposed deposition. Dkt. #168. Defendant has moved to

“strike” that exhibit on the ground that plaintiff should not have filed it in camera. Dkt. #183.

Plaintiff says that all the information he is seeking relates to a defense defendant is raising regarding “after-acquired evidence,” that is, evidence defendant discovered after it terminated plaintiff that it says would have justified his dismissal in and of itself if defendant had known about it at the time. McKennon v. Nashville Banner Pub. Co., 513 U.S. 352 (1995). In particular, defendant says it discovered that plaintiff violated company policies regarding fraternization and conflicts of interest and that plaintiff failed to “properly secure the release or reduction of construction bonds.” Dft.’s Br., dkt. #55, at 29-31. “After-acquired evidence like this does not bar all relief, although it can limit recoverable damages.” Rooney v. Koch Air, LLC, 410 F.3d 376, 382 (7th Cir. 2005). Apparently, defendant wishes to rely on the termination of the other employees to show that it enforces these policies consistently.

I decline to overturn the magistrate judge’s decision. With respect to the proposed deposition of John Menard, plaintiff’s appeal is premature because the magistrate judge denied that request *without prejudice*. In particular, the magistrate judge stated, “If, after taking other discovery, plaintiff still has a genuine need to obtain relevant, discoverable information from Menard, then plaintiff may seek leave to depose him at that time.” Dkt. #155. Plaintiff ignores this aspect of the magistrate judge’s order. Fed. R. Civ. P.

26(b)(2)(C)(i) allows a court to limit discovery when it “can be obtained from some other source that is more convenient, less burdensome, or less expensive,” so I cannot conclude that the magistrate judge’s limitation is contrary to law or clearly erroneous, which is the standard of review. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). Because the parties have finished briefing summary judgment, this evidence will not be useful until trial, so plaintiff is not unfairly prejudiced.

Similarly, I do not believe that the magistrate judge erred in concluding that it would be unduly burdensome to require defendant to provide detailed narratives of the reasons different employees were terminated. As the magistrate judge pointed out during the telephone conference, it will be defendant’s problem at trial if it is unable to show that these other employees were terminated for violating the policies or if it attempts to rely on evidence at trial that it failed to produce during discovery.

Finally, with respect to the contact information, it does not seem that the parties addressed this issue during the telephone conference. In any event, defendant represents that it has given plaintiff all the contact information it has and plaintiff does not challenge that representation. Obviously, defendant cannot produce what it does not have.

Because I deny plaintiff’s motion for reconsideration, it is unnecessary to consider plaintiff’s in camera exhibit. This moots defendant’s motion to strike.

ORDER

IT IS ORDERED that plaintiff Martin Prochaska's motion for reconsideration of the Magistrate Judge Stephen Crocker's November 9, 2011 order, dkt. #167, is DENIED. Defendant Menard, Inc.'s motion to "strike" an exhibit to plaintiff's motion, dkt. #183, is DENIED as moot.

Entered this 9th day of December, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge