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THOMAS A. WILDER
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CAUSE NO. 342-307963-19

RICARDO AVITIA	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
VS.	§	TARRANT COUNTY, TEXAS
	§	
TEXAS CHRISTIAN UNIVERSITY,	§	
	§	
Defendant.	§	342nd JUDICIAL DISTRICT

PLAINTIFF'S BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT TEXAS CHRISTIAN UNIVERSITY, PLAINTIFF'S SECOND SET OF INTERROGATORIES TO DEFENDANT TEXAS CHRISTIAN UNIVERSITY, AND PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT TEXAS CHRISTIAN UNIVERSITY
AND
PLAINTIFF'S RESPONSE TO DEFENDANT'S AMENDED MOTION TO QUASH PLAINTIFF'S AMENDED NOTICE OF ORGANIZATIONAL REPRESENTATIVE DEPOSITION, AND FOR PROTECTIVE ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff in the above styled and numbered cause, and files this Plaintiff's Brief in Support of Plaintiff's Motion to Compel Responses to Plaintiff's First Set of Interrogatories to Defendant Texas Christian University, Plaintiff's Second Set of Interrogatories to Defendant Texas Christian University and Plaintiff's First Request for Production of Documents to Defendant Texas Christian University, and Plaintiff's Response to Defendant's Amended Motion to Quash Plaintiff's Amended Notice of Organizational Representative Deposition, and for Protective Order, pursuant to Rules 192, 193, 196, 197, 201 and 215, of the Texas Rules of Civil Procedure, for protection and for sanctions, and for grounds would respectfully show the Court the following:

I.

SUMMARY

The Court should reject Defendant TCU's attempt to hide relevant evidence of other instances of discrimination, its policies and customs for handling complaints of illegal discrimination, personnel file information, contact information for persons with knowledge of relevant facts, and studies and reports of discrimination issues performed by Defendant TCU or outside consultants.

Accordingly, the Court should compel Defendant TCU to provide the requested discovery and deny its motion to quash Plaintiff's deposition notice for an organizational representative.

Likewise, Plaintiff would ask the court to defer considering Defendant's Motion for Summary Judgment until Plaintiff is provided the discovery and has an appropriate time to conduct any other depositions or discovery necessitated by any disclosure by Defendant TCU.

II.

FACTS

Plaintiff was employed by Defendant TCU for over 6 years and received excellent performance reviews before he filed a complaint of discrimination.

Around October 1, 2017, Plaintiff made a complaint of illegal race, national origin and sex discrimination with Dr. Darron Turner, Defendant TCU's Chief University Inclusion Officer and Title IX Coordinator. As a result of this complaint, Doctor Turner had a discussion with Plaintiff's supervisor Mary Kincannon. Soon thereafter, Ms. Kincannon confronted Plaintiff and told Plaintiff she did not like hearing complaints from other departments. Soon thereafter,

Plaintiff began to receive criticism of his job performance until he was eventually terminated by Defendant TCU around April 26, 2018.

Plaintiff filed suit against Defendant TCU asserting he was terminated because of his race and national origin and in retaliation for making complaints of illegal discrimination.

Recently, Defendant TCU has come under scrutiny for racial incidents on campus and lack of diversity.

Plaintiff sought discovery by interrogatory, request for production and organizational representative deposition to obtain information regarding discrimination and retaliation at TCU. Defendant objected to producing any information except generally as regarding Plaintiff's situation, although Defendant TCU has objected to producing even some of this information. The organizational representative deposition was delayed by agreement shortly after the outbreak of the coronavirus pandemic and recently re-noticed, to which Defendant TCU has objected to responding on grounds of discoverability.

Defendant has filed a Motion for Summary Judgment and set it for hearing on August 18, 2020.

III.

OTHER INSTANCES OF DISCRIMINATION AND RETALIATION DISCOVERABLE

Information regarding other instances of discrimination and retaliation are discoverable.

The purpose of discovery is to allow the parties to obtain full knowledge of the issues and facts of the lawsuit before trial and any summary judgment proceedings. *West v. Solito*, 563 S.W.2d 240, 243 (Tex. 1978). For information to be discoverable, it must be relevant or reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 192.3(a); *In re North Cypress Med. Ctr*, 559 S.W.3d 128, 129 (Tex. 2018). The phrase "relevant to the

subject matter" is to be broadly construed. *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 664 (Tex. 2009). It is no ground for objection "that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." TEX. R. CIV. P. 192.3(a). A request "is not overbroad merely because [it] may call for some information of doubtful relevance" so long as it is "reasonably tailored to include only matters relevant to the case." *Sanderson*, 898 S.W.2d at 815.

A party may obtain names, addresses and telephone numbers of people with knowledge of relevant facts. Tex. R. Civ. P. 192.3(c). The reason this witness disclosure information is required is to allow a party to locate, interview and call a witness to trial. *$23,900 v. State*, 899 S.W.2d 314, 317 (Tex. App.—Houston [14th Dist] 1995, no writ). The plain language of Rules 192.3(c) and 192.5(c)(3) indicates that people with knowledge of relevant facts can never be protected from discovery. *Griffin v. Smith,* 688 S.W.2d 112, 113 (Tex. 1985). Thus, Defendant TCU's attempts to hide such information should be rejected.

Reports of organizations are discoverable when they are not prepared in anticipation of litigation. *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 552-53 (Tex. 1990)(internal investigation, unrelated to the matter that gave rise to the litigation, was discoverable). Thus, Defendant TCU's reports and studies, including those created by outside consultants, on race and diversity issues are discoverable.

A party may discover documents in the personnel file of a party or witness. *In re Crestcare Nursing and Rehab Ctr*., 222 S.W.3d 68, 74 (Tex. App.—Tyler 2006, orig. proceeding). A personnel file includes all matters about an employee, even if filed separately under a different name. *In re LaVernia Nursing Facility, Inc*., 12 S.W.3d 566, 570 (Tex. App.—San Antonio 1999, orig. proceeding). Thus, the requested personnel files are discoverable.

It is illegal for an employer to discriminate against an employee because of sex, race or national origin. Tex. Labor Code § 21.051. Furthermore, it is illegal to retaliate against an employee who makes a complaint of illegal discrimination. Tex. Labor Code § 21.055.

In this case, Plaintiff seeks discovery of other instances of sex, race and national origin discrimination from Defendant TCU. Plaintiff also seeks information regarding other instances of retaliation. Defendant TCU seeks to limit discovery to complaints made by Hispanic complaints in the registrar's office.

It is well established that plaintiffs in Title VII discrimination cases should be permitted a very broad scope of discovery, e.g., *Morrison v. City & County of Denver,* 80 F.R.D. 289, 292 (D.Colo.1978); see *Rich v. Martin Marietta Corp.,* 522 F.2d 333, 343 (10th Cir.1975). The scope of discovery in an EEOC case is extensive. The justification for expanding the scope of discovery is based on this consideration; since direct evidence of discrimination is rarely obtainable, Title VII plaintiffs must rely on circumstantial evidence. Any evidence of an employer's overall employment practices may be essential to plaintiff's prima facie case, *Morrison,* supra, at pg. 292.

Evidence of other instances of discrimination is relevant concerning an employer's general policy and practice with respect to minority employment and may be relevant to showing pretext. *Vance v. Planters Corp.,* 209 F.3rd 438 (5th Cir. 2000); *Kelly v. Boeing Petroleum Servs., Inc.,* 61 F.3d 350, 358 & n. 10 (5th Cir.1995).

Trevino v. Celanese Corp., 701 F.2d 397 (5th Cir. 1983) is an instructive Title VII employment discrimination case. The plaintiff sought to discover extensive information regarding the defendant's past and present employment practices. The trial court limited discovery to the two-year period preceding the filing of plaintiff's suit. *Trevino*, 701 F.2d at 397.

In reversing, the Fifth Circuit referenced the need for an expanded scope of discovery in Title VII cases and added, "[t]he imposition of unnecessary limitations on discovery is especially frowned upon" in such cases, *Trevino, 701 F.2d at 405-406.* The court reasoned much of the information sought to be discovered by plaintiff "would be highly relevant *in proving a continuing pattern* of discrimination in an integrated enterprise's promotion and transfer system." Trevino, 701 F.2d at 405. (emphasis added).

In this case, Plaintiff is alleging that Defendant TCU has a policy and practice of discriminating against non-whites. "Cross category" discrimination, that is discrimination against other non-whites who are not the same race as the Plaintiff, is relevant to show Defendant's discrimination against non-whites. *Hernandez v. Yellow Transp. Inc.*, 670 F.3d 644,653 (5th Cir. 2012) (recognizing use of other examples of discrimination in hostile work environment and that cross-category discrimination may be relevant when there is sufficient correlation between discrimination claimed by a plaintiff and that directed at others, but declining to explicitly rule on use of such evidence in that case).

The court in Murillo v. Travis Cty., held that cross-category discrimination could support a claim of discrimination and retaliation, to wit, evidence of discrimination against African Americans was relevant to discrimination claims brought by a Hispanic. 2018 WL 1514094 *4 (W.D. Tex. 2018) citing *Hernandez*, 670 F.3d at 654 ("We have said that cross-category discrimination could be relevant when there is a sufficient correlation between the kind of discrimination claimed by a plaintiff and that directed at others.")

In *Abramson v. American University*, 1988 WL 152020 (D.D.C.), the plaintiff alleged religious and national origin discrimination based on her Eastern European Jewish background. The defendant asked the court to exclude evidence because "plaintiff's case must be based on

evidence of discrimination against members of his race and his ethnic background." Id. at *1. The court disagreed, discussing Rule 401's liberal admissibility standard. Id. Evidence of discrimination toward other protected classes "would tend to prove that [the decisionmakers] harbored a discriminatory animus against minorities in general . . ." *Id*. "Other evidence that may be relevant to any showing of pretext includes ... [the employer's] general policy and practice with respect to minority employment." Id. (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973)).

The premise that prejudice of all kinds, including sexism and racism "go together" within individuals is a venerable one in social psychology. For instance, the "Social Dominance Orientation" of people can predict both racial- and gender-based prejudice and confirms that they most often co-exist within the same people. See *Felicia Pratto, Jim Sidanius, Lisa M. Stallworth, and Bertram F. Malle, Social Dominance Orientation: A Personality Variable Predicting Social and Political Attitudes*, 67 Journal of Personality & Social Psychology 4, 741-63 (1994).

Actions and failures to act by Defendant TCU's managers are relevant to their state of mind, including their common mindset that they need not comply with any aspect of their company's policies prohibiting discrimination and retaliation. The jury can reasonably infer that the racist apple does not fall far from the sexist or retaliating tree. Evidence of institutional state-of-mind may be presented for the consideration of the trier-of-fact because an employer's willingness to consider impermissible factors such as race, age, sex, national origin, or religion while engaging in one set of presumably neutral employment decisions—in this case, pay scales—might tend to support an inference that such impermissible considerations may have entered into another area of ostensibly neutral employment decisions—here, an employee's termination. While this court has recognized that "proof of a general

atmosphere of discrimination is not the equivalent of proof of discrimination against an individual," it may be one indication that the reasons given for the employment action at issue were "implicitly influenced" by the fact that the plaintiff was of a given race, age, sex or religion.

This is an unlawful termination case filed pursuant to Texas Labor Code 21.051 and 21.055. Plaintiff alleges that he was discriminated against in the terms and conditions of his employment because of his national origin, Mexico, gender, male, and as a Hispanic. He also alleges that after complaining of the disparate treatment, his job performance was unjustly criticized, he was harassed, and set up to fail with extreme and unrealistic job demands. Ultimately, Plaintiff would show that he was terminated in retaliation for making his complaints.

Plaintiff Avitia, a veteran, was a high performing Veteran Specialist in the Defendant's Registrar Office until he complained about the disparate treatment imposed on him by his supervisor, Tiffany Wendt, and the Registrar, Mary Kincannon.

In the Fall 2017, TCU's veteran/dependent student population grew by approximately 100 students creating a significant increase in Plaintiff's workload. Plaintiff requested that the Defendant re-classify him as an exempt employee from a non-exempt employee so that he could work as many hours per week as necessary to perform his work requirements without the need for overtime. He was willing to work more hours for essentially less pay for the benefit of TCU. He reviewed his job description and his duties and believed that he met the requirements for an exempt employee. Plaintiff's Caucasian female counterpart, the NCAA certifying employee, was classified as exempt. His request was rejected. After his complaint, he was subjected to unjust criticism and harassment, placed on a Performance Improvement Plan, and ultimately terminated. Plaintiff seeks discovery regarding Defendant's efforts to prevent discrimination and to include persons of color in its community of faculty, staff, and students.

TCU's discrimination and retaliation policies emanate from the top. TCU's policy against discrimination and retaliation is applicable to each segment of the TCU community, including staff, faculty, and students. The anti-discrimination policy specifically designates the Chief Inclusion Officer and Title IX Coordinator as responsible for overseeing the policy. The Coordinator is responsible for overseeing a centralized response to all reports of discrimination, harassment, and other conduct that violates its anti-discrimination policy. The manner in which the Coordinator investigated and acted upon all complaints of discrimination and retaliation is relevant to show the effectiveness of its policies through the various departments, whether the policies were enforced in university departments, or whether the Coordinator allowed discrimination and prohibited conduct to occur, thus giving a green light to others to engage in unlawful practices.

Even if instances of discrimination is limited to the Registrar's offices, policy and custom of handling complaints of illegal discrimination should encompass Dr. Turner's entire purview. Moreover, Dr. Turner is responsible under TCU policy for receiving and handling complaints of a broad range of discrimination. Plaintiff testified that Dr. Turner tried to talk him out of filing a complaint of discrimination. 3 TCU students have also alleged that Dr. Turner tried to talk them out of complaints of discrimination. Certainly evidence of Dr. Turner's policy and practice of receiving and handling complaints of discrimination is relevant to Plaintiff's retaliation claim and how it was handled (or discouraged) by Dr. Turner and Defendant TCU. Thus, Defendant TCU's attempt to limit discovery to the Registrar's office ignores the scope of Dr. Turner's responsibility.

Plaintiff. Requests the Court reject Defendant TCU's attempt to hide evidence of discrimination and retaliation at TCU.

IV.

CONCLUSION AND. PRAYER

Accordingly, Defendant TCU should be ordered to produce discovery, including an organizational representative deposition regarding other discrimination, other complaints of discrimination and reports on race and diversity issues as well as other discovery issues raised in Plaintiff's Motion to Compel.

WHEREFORE, PREMISES CONSIDERED, the Plaintiff prays that this motion be set for a hearing, and upon said hearing, the Court order the Defendants to fully and adequately answer the discovery requests previously served on the Defendants, and provide an organizational representative for deposition; order that such discovery be produced so that Plaintiff may adequately respond to Defendant's Motion for Summary Judgment, and for such other relief to which the Plaintiff may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon the attorneys of record of all parties in the above cause in accordance with the Texas Rules of Civil Procedure, on this the 20th day of July, 2020.

/s/ JASON C.N. SMITH
JASON C.N. SMITH