

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LINDA PIPPEN, et al., Plaintiffs, v. THE STATE OF IOWA, et al., Defendants.	Case No. CL 107038 (tentatively consolidated with Case Nos. CL 103856 & 103122) PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF ELECTRONIC WORKFORCE DATA
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THE PLAINTIFFS Linda Phippen *et al.*, submit their reply to Defendants' Response to Plaintiff's Motion to Compel Production of Electronic Workforce Data ("Defs' Response") as follows:

ARGUMENT

Defendants' response to Plaintiffs' motion seeking production of or access to Defendants' workforce data weaves and bobs through its many unjustified explanations for refusing to produce information relevant to class certification issues. Contrary to Defendants' claims, Plaintiffs do not "want everything;" nor have the failed to identify the workforce data they seek. Rather, Plaintiffs identified – by database and field code or category – the specific information they have asked Defendants to produce and why they believe it is relevant to determining whether class certification is appropriate.

Despite this, Defendants do not respond to Plaintiffs' primary argument regarding the relevance of information sought: to refute Defendants efforts to oppose class certification by providing a statistical analysis, such as a regression analysis, to demonstrate a common pattern of treatment of African-American across all agencies. *See*

Plaintiffs' Motion at ¶¶ 21-31. Defendants fail to respond to this argument because, as Plaintiffs' fear, they hope to be able to criticize Plaintiffs for failing to perform a statistical analysis or at least point to individual differences that a statistical analysis may show are meaningless.

Not only do Defendants fail to engage Plaintiffs' primary argument, they also fail in any way to distinguish the string of cases originally cited in Plaintiff's motion establishing the data Plaintiffs' seek is relevant and *routinely* produced as part of class certification discovery. *See* Plaintiffs' Motion at ¶¶ 29-37. Instead, Defendants primarily claim that: (a) data produced the same day it filed its response to Plaintiffs' motion is sufficient to meet Plaintiffs' needs; (b) any other data is unduly burdensome or confidential.

But Defendants offer no explanation or justification for their claims of burden. And the electronic data Defendants were able to produce expeditiously and efficiently after Plaintiffs filed their motion demonstrates that their claims of burden are specious. The fact that Defendants were able to produce some electronic workforce data in such a short period of time after Plaintiffs filed their motion demonstrates the process of producing information – even from AS-400 – is not as onerous as Defendants would have Plaintiffs believe.

Specifically, Defendants agreed to produce some of this information through correspondence on August 5, 2009 (days before Plaintiff was required to file their motion to compel with the Court) (Defs' Response, Ex. B). Just over two weeks later, Defendants' produced two additional CD-Roms containing newly produced electronic workforce data. *See* August 21, 2009 Letter from Defendants (attached as Exhibit J).

Although Defendants' original correspondence referenced problems producing data that from Defendants' AS 400 system, Defendants now claims to have produced "[a]ll data from AS-400." (attached as Exhibit J). Plaintiffs' counsel are conferring with Defendants to clarify whether this claim is accurate. It appears to Plaintiffs that Defendants only produced data from AS-400 regarding Defendants' affirmative action plans and reports – summaries or reports of information, rather than that actual data on which those summaries or reports are based.

Plaintiffs appreciate Defendants' efforts to supplement their production, but almost all of the electronic workforce data Defendants have produced thus far are reports or summaries of stored data, not the actual data on which those reports are based. The only exception appears to be that Defendants have produced actual demographic data regarding candidates who applied for positions using the Brass Ring system for 2007 and 2008 (but not other years that system was in use). But because Defendants have not produced any data regarding which specific applicants applied for a particular job or jobs within an EEO classification or the composition of Defendants' workforce by job category or classification, Plaintiffs still are unable to prepare a statistical analyses like that described in their initial motion.

Defendants basically responded to Plaintiffs' requests by producing what *they* believe is relevant, not what Plaintiffs' requested and not what Plaintiffs' expert has informed them is relevant to determining whether a common course of treatment of African-Americans exists despite differences in departments, categories of jobs applied for, or other differences Defendant will claim makes class certification inappropriate. As Plaintiff's ample authority demonstrates (and the lone employment discrimination

putative class action cited by Defendants confirms), however, the electronic workforce data Plaintiffs seek is relevant to class certification issues and, accordingly, should be produced.

The lone case Defendants cite that involved discovery in a putative employment discrimination class action makes clear that the discovery Plaintiffs seek regarding merit system employees is relevant and should be produced. Defendants cite *O'Bar v. Lowes Home Ctrs., Inc.*, No. 5:04-cv-00019, 2007 WL 1299180 (W.D.N.C. May 2, 2007), in support of its argument that Plaintiffs' requests seek too much information. But in *O'Bar*, the Court allowed company-wide pre-certification discovery regarding all employees across the country potentially affected by the policies and practice the plaintiff's challenged. *Id.* at *3 (authorizing "precertification discovery" regarding "all managers and officers at the regional, district and national level" because those were the employees to whom the challenged policy or practice applied). Plaintiffs, by limiting their own requests to merit system employees, voluntarily curtailed their requests to those employees affected by application of Defendants' central hiring and promotion system and other centralized systems.

Defendants also argue Plaintiffs' efforts to seek information regarding compensation or work history of current state employees should not be produced because it is "confidential." Plaintiffs seek this information so they can, for example, assess whether prior State employment or prior State employment within a job category changes the common pattern of treatment African-Americans experience or whether, as Plaintiffs allege, African-Americans are excluded from higher-paying, managerial positions). Defendants' claim regarding confidentiality is utterly baseless. The State (through the

legislature) maintains a public database with each employee's name, agency, title, gender and salary from 1993-2008. *See* <http://www.legis.state.ia.us/Fiscal/salbook/>. Such publicly available information can hardly be said to be confidential (in conferring regarding production, Defendants refused to produce this information with the supplemental category of race). In any event, confidentiality of an employment record is not a basis for objection to its production but rather may be a basis for a protective order. *See, e.g. Onwuka v. Federal Express Corp.*, 178 F.R.D. 508, 517 (D. Minn. 1997) (“We think the proper balance, between the privacy interests of non-party third persons, and the discovery interests of a party litigant, is to assure that only those portions of the pertinent personnel files, which are clearly relevant to the parties' claims, are open to disclosure and, then, subject to an appropriate Confidentiality Order as the circumstances require.”).

Plaintiffs would prefer that Defendants provide the information they seek through a mass data transfer. Notably, Defendant does not claim to this Court that is not possible or feasible – only that Defendants have refused to do so because they believe information Plaintiffs seek is not relevant. (Defs' Response at 2). Likewise, Defendants vehemently object to allowing Plaintiffs access to Defendants' databases, yet encourage Plaintiffs' to “provide proposed queries to the State.” (Defs' Response at 5). Respectfully, as Exhibit D to Plaintiff's Motion indicates, Plaintiffs have done what they can to identify the specific data fields and categories they are seeking given the information Defendants have produced about their database. Plaintiffs sought only that information which their expert told them was relevant to statistical analyses he may wish to perform.

As Plaintiffs will attempt to further explain at the hearing (and the numerous cases cited in Plaintiff's initial motion explain), through statistical analysis Plaintiffs will attempt to show a common course of treatment of African-American applicants and employees of the State that exists *despite* the fact they sought or held employment that involved "different agencies ... different decision makers, [and] different jobs." (Defs' Response at 1). Thus, the evidence Plaintiffs seek is relevant determining whether class certification is appropriate. *See* Iowa Rules 1.261 and 1.263. To refute Defendants' defenses, Plaintiffs and their counsel stand ready to undertake the significant burdens associated with these statistical analyses – all Plaintiffs need is the data from which to perform those analyses.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court Order Defendants to produce the electronic workforce data Plaintiffs seek or, alternatively, make such data available to Plaintiffs and their expert.

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August 21, 2009

VIA HAND DELIVERY

Tom Newkirk
Newkirk Law Firm, P.L.C.
515 East Locust, Suite 300
Des Moines, IA 50309

Dear Tom:

Enclosed, please find three CDs containing:

1. Updated Applicant Flow data for FY 2007 and FY2008 by Hiring Agency and EEO Job Class;
2. FY2007 and FY2008 Applicant Flow data by "List Type";
3. Demographic data from Brass Ring System for all Applicants currently in the system (candidate number, race, gender, highest level of education, last app date, disability, zip code, age range, employee status and agency);
4. Underutilization calculations and underlying data;
5. All data from AS-400; and
6. DAS 11,707-DAS 11,776; DOT 31,170-DOT 31,268; DVR 1-331; ICN 1-ICN 400; DCU 1-DCU 9; DPD 138-DPD 373; DPS 1-DPS 34; IDE 1-IDE 8; IWD 36.626-IWD 36,633; DHS 46,972-DHS 48,809, and DHS 36,813A which encompass specific hiring files for positions noted by the Plaintiffs during their depositions and specific supplements to hiring files previously produced.

Please let me know if you have any questions or concerns. Thank you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Julia S. Kim".

Julia S. Kim

Encl.

