UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONNIE WALKER,

Plaintiff,

-v-

H & M HENNER &MAURITZ, L.P., *et al.*,

Defendants.

MEMORANDUM ORDER

16 Civ. 3818 (JLC)

JAMES L. COTT, United States Magistrate Judge.

In this employment action alleging race discrimination (as well as wage-and-hour violations) against her former employer, Plaintiff Connie Walker ("Walker") has moved by letter-motion to quash several subpoenas that Defendant H & M Hennes & Mauritz L.P. ("H & M") proposes to serve on Walker's former and current employers as well as three colleges and universities that she allegedly attended. Docket No. 37. Walker argues that the subpoenas seek irrelevant information and are a "pure fishing expedition." In response, H & M contends that it "has reason to believe that there is evidence to support its after-acquired evidence defense," and therefore seeks a "limited scope of documents from third parties to confirm or disprove the facts supporting this defense." Docket No. 38.

The Court recently addressed a similar issue in *Henry v. Morgan's Hotel Group, Inc.*, 15-CV-1789 (ER) (JLC), 2016 WL 303114 (S.D.N.Y. Jan. 25, 2016). In *Henry*, also an employment discrimination case, plaintiff's former employer issued subpoenas to three former employers in order to develop evidence to attack plaintiff's credibility and to support an after-acquired evidence defense. The Court quashed the subpoenas in *Henry* for a number of reasons, including that the documents sought by the subpoenas requested irrelevant information. *Id.* at *3-4. The analysis in *Henry* will not be repeated here, but is rather incorporated by reference.

While the facts and circumstances in the two cases are not identical, H & M's justifications for the subpoenas are virtually the same: to develop evidence to attack Walker's credibility and to support its after-acquired evidence defense.

H & M explains that during the course of its hiring process, it reviewed two different versions of Walker's résumé and there are "inconsistencies between the education and experience listed" in them. It also contends that there are "[o]ther documents" in its possession suggesting that Walker may have "embellished" her work experience. Those documents are not identified in H & M's submission to the Court (other than the notes from her interviews, which were generated by H & M not Walker). Given the two versions of the résumé and these other otherwise unidentified documents, H & M seeks permission to serve subpoenas on four prior employers and three colleges and/or universities.

The showing that H & M has made is insufficient to justify these subpoenas. A former employer's "belief" that it "may" have an after-acquired evidence defense, without more than the information proffered by H & M, does not warrant the sort of discovery proposed here. While the Supreme Court recognized the after-acquired evidence defense in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362 (1995), it cautioned against the potential for abuse of the discovery process by employers seeking to limit their liability through such a defense. *Id.* at 363. The Court pointedly observed: "The concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under [civil rights laws] is not an insubstantial one, but we think the authority of the courts . . . to invoke the appropriate provisions of the Federal Rules of Civil Procedure will deter most abuses." *Id.* Courts have relied on this language in *McKennon* in holding that the after-acquired evidence defense cannot be used to pursue discovery in the absence of some basis for

believing that after-acquired evidence of wrong-doing will be revealed. *Chamberlain v. Farmington Sav. Bank*, No. 3:06-CV-1437 (CFD), 2007 WL 2786421, at *2 (D. Conn. Sept. 25, 2007) (collecting cases).

The concerns expressed in *McKennon* are even starker given the amendments to the Federal Rules of Civil Procedure in 2015. As discussed in *Henry*, the amendments to Rule 26(b)(1) now allow discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." 2016 WL 303114, at *3. As the Advisory Committee observed, the proportionality factors have been restored to their former position in the subsection "defining the scope of discovery," where they had been located prior to the 1993 amendments to the Rules. Fed. R. Civ. P. 26(b)(1) Advisory Committee's Notes to 2015 Amendments. *Id.* Under the amended Rule, "[r]elevance is still to be 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on' any party's claim or defense." *State Farm Mut. Auto. Ins. Co. v. Fayda*, No. 14-CV-9792 (WHP) (JCF), 2015 WL 7871037, at *2 (S.D.N.Y. Dec. 3, 2015) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). However, the amended Rule is intended to "encourage judges to be more aggressive in identifying and discouraging discovery overuse" by emphasizing the need to analyze proportionality before ordering production of relevant information. *Id.* (citing Fed. R. Civ. P. 26(b)(1) Advisory Committee's Notes to 2015 Amendments). The burden of demonstrating relevance remains on the party seeking discovery,

but the newly revised rule "does not place on [that] party. . . the burden of addressing all proportionality considerations." *Id.*[1]

In this light, the Court concludes that the information sought is not "proportional to the needs of the case." The issue presented here is whether H & M's actions directed toward Walker in its training program over a five-month period that ultimately led her to leave the company were racially discriminatory or based on valid considerations. Walker's prior work history has nothing to do with that issue. In addition, to the extent H & M believes that Walker may have been misleading during the hiring process about her prior experience, H & M does not explain why its vetting process and "due diligence," if any, in its contact with Walker's prior employers would not have revealed the very information that it now purports to seek through these subpoenas. Finally, if H & M was concerned about the alleged inconsistencies in Walker's résumé, which it acknowledges that it obtained during the course of the hiring process, it would presumably have followed up at that time and not have hired her into its training program.

For all of these reasons, the motion to quash is granted. The Clerk is directed to close Docket Number 37.

SO ORDERED.

Dated: New York, New York
September 12, 2016

JAMES L. COTT
United States Magistrate Judge

[1] The only case H & M cites to justify its position is a Southern District of Indiana decision from 2002 which well predates the amendments to the Rules.