UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERIC KUHN,

Plaintiff,

Case No. 2:10-CV-11191

Honorable Denise Page Hood

WASHTENAW COUNTY, et al.

Defendants.

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DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO REOPEN DISCOVERY

Table of Contents

Index of Authorities

Page

Cases

Statutes

Rules

I. INTRODUCTION

This matter is currently before the Court on Plaintiff's September 29, 2011 "Motion to Reopen Discovery Regarding Investigation By the Washtenaw County Sheriff's Department Into an Incident of March 2011." Discovery began on June 3, 2010 and, after multiple extensions, ended on May 18, 2011. The parties have also fully briefed Defendants' Motion to Dismiss and for Summary Judgment, and the Court has scheduled a hearing on that dispositive motion for October 19, 2011.

Despite having nearly a full year to conduct discovery, including the taking of nine depositions and serving three sets of detailed written discovery requests on Defendants, Plaintiff now asks the Court to reopen discovery. The Court, however, should deny this belated request for two principal reasons. First, Plaintiff cannot establish good cause to reopen discovery under Rule 16 and well-established case law. Second, the request is moot because Defendants have already provided the underlying investigation reports at issue, which confirm that the County opened and conducted an investigation of the incident. Indeed, an external investigation was completed by two independent officers from independent law enforcement agencies.

A. Plaintiff Cannot Establish Good Cause

Plaintiff cannot establish good cause to reopen discovery because he could have sought discovery on the incident in question during the Court-sanctioned discovery period, but inexplicably failed to do so. It is well settled that discovery should not be reopened based on a party's failure to craft appropriate requests to uncover matters that it could have identified during discovery. The Sixth Circuit and this Court have ruled that a party may only establish "good cause" when that party acted diligently and could not have discovered the matters in question. *LaQuinta Corp. v. Heartland Properties, LLC*, 603 F.3d 327, 334-45 (6th Cir. 2010) (belated motion to reopen discovery denied where party "failed to adequately explain to the court its

inability to obtain discovery in a timely fashion"); *Barton v. Priest*, 2008 WL 4372637, *7 (E.D. Mich. 2009) (denying motion to reopen discovery and explaining that the plaintiffs failed to "demonstrate[ ] good cause for their failure to obtain discovery through the exercise of due diligence, as mandated by the Sixth Circuit."); *Newburgh/Six Mile Ltd Partnership v. Adlabs Films USA, Inc.*, 724 F. Supp. 2d 740, 750 (E.D. Mich. 2010) (motion to alter scheduling order denied where party provided no explanation or reason why it did not timely pursue defenses).

Indeed, to find otherwise would permit a party who fails to act diligently during discovery to flaunt the Court's deadlines. *LaQuinta Corp.*, 603 F.3d at 345; *see also Petter Investments, Inc. v. Hydro Engineering, Inc.*, 2009 WL 2175765, *1 (W.D. Mich. 2009) (no good cause to reopen discovery when party "could have discovered the information in a timely fashion"); *National Viatical, Inc. v. United Fidelity Corp.*, 2009 WL 612350, *2 (E.D. Mich. 2009) (motion to reopen discovery denied when party failed to prove that "despite their diligence they could not meet the original deadline").

The incident cited by Plaintiff in his current motion involves a matter that occurred in early March 2011, more than two months before discovery ended. On March 8, 2011, an Ypsilanti Township employee, Ms. April Salley, reported that she believed that an unknown person might have stolen a $20 bill from her unlocked vehicle in a parking lot shared by Ypsilanti and Washtenaw County employees. Based on her claim and a review of video surveillance for the parking lot, a County employee was identified in the vicinity of her vehicle for a brief period of time, and an investigation was completed. That investigation was completed in April 2011 and determined that there was no basis to support a claim of theft because the person in question never entered Ms. Salley's car.

Here, Plaintiff has provided no explanation why he could not have crafted his written discovery requests in a manner to cover this particular investigation. Indeed, the employee was named as a witness early in discovery and Plaintiff requested a significant amount of information relating to internal investigations, which was disclosed under a protective order. (*See* **Attachment 1**, Plaintiff's Written Discovery Requests). Having failed to timely request information concerning this investigation during discovery, Plaintiff now asks the Court for another bite at the apple, which should be denied. *LaQuinta Corp.*, 603 F.3d at 345.

The only purported justification offered by Plaintiff for not acting diligently is that he "only recently became aware of the incident and that there had been an investigation." But this is no explanation. Simply put, a party's belated discovery of an incident that he could have discovered in the course of regular discovery does not constitute good cause for an extension. His request also comes too late. Discovery ended more than four months ago and Defendants' dispositive motion has been fully briefed since August 5, 2011. *Schatzman v. County of Clermont*, 234 F.3d 1269, 2000 WL 1562819, *11 (6th Cir. 2000) (motion to reopen discovery denied when it was filed one month after defendants' motion for summary judgment had been fully briefed and five months after the close of discovery).

B. Plaintiff's Request is Moot

Plaintiff's request is also moot. Defendants have provided responsive documents to Plaintiff's counsel that: (1) confirm that an investigation was completed; and (2) undercut his alleged basis of relevance for the additional discovery requested. Plaintiff alleges that the March 2011 incident may support his allegation that similarly situated white officers were not subjected to an investigation based on criminal allegations. As detailed in Defendants' motion for summary judgment, however, Plaintiff's race discrimination claims are not supported by the law or facts. The underlying facts surrounding Ms. Salley's claim further confirm this point.

Defendants have provided a copy of the internal and external investigation reports to Plaintiff's attorney, including video footage. (**Attachment 2**.)[1] These reports establish the following:

- Contrary to Plaintiff's assertions, Washtenaw County had an independent, external investigation conducted and completed an internal investigation.
- The external investigation was conducted by several officers from neighboring law enforcement agencies and determined that the officer in question did not enter Ms. Salley's vehicle or take $20 from it.
- Both investigations confirmed that the allegations were unfounded.

A review of the attached reports demonstrates that Plaintiff, who had been specifically accused of rape by a citizen on multiple occasions, cannot establish that Ms. Salley's circumstances involved a "similarly situated" employee. But even if he could, this evidence shows that Plaintiff was not treated differently. (*See* Defs.' 6/15/11 Brief In Support of Motion for Summary Judgment, pp. 22-28; Defs.' Reply Br., pp. 10-14.) In fact, unlike Plaintiff, the white officer in question was subjected to an outside criminal investigation by a third party. Plaintiff was actually treated more favorably.

Because Defendants' have provided responsive information that completely undermines Plaintiff's allegations and theory supporting his request to reopen discovery, the request is moot and the Court should deny the motion.

II. BACKGROUND

A. Factual Background

Plaintiff's description of the facts in support of his motion is inaccurate and not supported by evidence. Defendants previously set forth a detailed description of the relevant facts in this case in their summary judgment briefing. In the interests of efficiency and judicial

[1] These reports have been provided to Plaintiff's counsel as "attorneys' eyes" only material under the Court's protective order. Defendants are filing a copy of these reports under seal with this brief.

economy, Defendants will not clutter the record on this procedural motion by restating them here. Defendants, however, incorporate their prior briefs by reference.

B. The Court's Generous Discovery Period

Plaintiff and his attorneys have had nearly a year to conduct discovery in this case, and the Court previously granted two extensions. Plaintiff filed his complaint against the County on March 25, 2010, and the Court issued its first Scheduling Order on June 3, 2010. (Dkt. # 12.) In that Order, the Court permitted six months of discovery to end on December 1, 2010. On October 27, 2010, the Court extended discovery until January 1, 2011 at the request of the parties. Thereafter, on November 12, 2010, Plaintiff filed a motion to substitute counsel. The Court granted this motion and issued a second scheduling order, extending discovery for an additional five months, until May 18, 2011. (Dkt. # 25.)

During this period, Plaintiff had multiple opportunities to seek written discovery from Defendants and take depositions. Indeed, Plaintiff sent three timely sets of written discovery requests: (1) requests for production of documents on June 23, 2010; (2) another set of document requests on March 23, 2011; and (3) interrogatories, requests for admissions, and document requests on April 18, 2011. These requests were extensive and broad, signaling a clear fishing expedition. Nevertheless, Defendants responded and provided more than 8,000 pages of documents and emails. None of Plaintiff's requests, however, covered the investigation in question.

C. Plaintiff's Attempt to Circumvent the Court's Scheduling Order

Despite his knowledge that discovery had been completed months before, Plaintiff sent the County a Freedom of Information Act request that was received on September 27, 2011. (**Attachment 3**.) This request was improper as it reflects a thinly-veiled attempt to excuse Plaintiff's failure to timely pursue discovery and to circumvent the Court's scheduling

order. (*Id.*) The scope of this FOIA request was also inexplicably overbroad, harassing, and unduly burdensome. The County denied this request on the well-known basis that a party may not use FOIA as a substitute for discovery when civil litigation is pending. MCL § 15.243(1)(v) (exempting records or information "relating to a civil action in which the requesting party and the public body are parties."). Notably, Plaintiff chose to file his current motion only after his attempts to circumvent the expiration of discovery failed.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 16(b)(4) provides that a scheduling order may be modified "only for good cause with the judge's consent." Under this rule, the moving party must show that "despite their diligence they could not meet the original deadline." *Leary v. Daeschner*, 349 F.3d 888, 907 (6th Cir. 2003); *Nat'l Viatical, Inc.*, 2009 WL 612350 at *2; *Barton*, 2008 WL 4372637 at *7. Accordingly, Plaintiff must establish "good cause" to support his request to amend the Court's scheduling order to reopen discovery more than four months after discovery has closed and more than three months after Defendants filed their dispositive motion in this case.

A district court is afforded discretion when considering motions to reopen discovery. *LaQuinta Corp.*, 603 F.3d at 334. In assessing such motions, courts consider multiple factors such as:

(1) whether the moving party has demonstrated good cause;

(2) the length of the discovery period;

(3) whether the need for additional discovery was precipitated by dilatory actions or neglect of the moving party;

(4) whether the moving party could have discovered the need for discovery with reasonable diligence during regular discovery period;

(5) whether the opposing party cooperated in discovery; and

(6) whether the opposing party would be prejudiced.

Id.; *Lee v. Metro. Government of Nashville*, 2011 WL 2882227, *6 (6th Cir. 2011); *see also Victory Lane Quick Oil Chance v. Hoss*, 2009 WL 777869, *1 (E.D. Mich. 2009).

IV. ARGUMENT

A. Plaintiff has Failed to Establish Good Cause to Reopen Discovery

Multiple factors confirm that Plaintiff cannot establish good cause to reopen discovery.

First, this Court and the Sixth Circuit have repeatedly held that good cause does not exist when a party fails to act diligently in discovery to uncover the matters at issue. *LaQuinta Corp.*, 603 F.3d at 334-45 (belated motion to reopen discovery denied where party "failed to adequately explain to the court its inability to obtain discovery in a timely fashion"); *Barton*, 2008 WL 4372637 at *7 ("Plaintiffs have not demonstrated good cause for their failure to obtain discovery through the exercise of due diligence, as mandated by the Sixth Circuit."); *Petter Investments, Inc.*, 2009 WL 2175765 at *1 (no good cause to reopen discovery when party "could have discovered the information in a timely fashion"); *National Viatical, Inc.*, 2009 WL 612350 at *2 (E.D. Mich. 2009) (motion to reopen discovery denied when party failed to prove that "despite their diligence they could not meet the original deadline").

Plaintiff failed to provide any explanation for why he could not have pursued the requested discovery during the year-long period provided by the Court. Defendants identified the County officer as a witness in this case from the beginning, and Plaintiff could have sought discovery on investigations related to this individual. He did not do so timely. Instead, he waited until months after discovery closed and after Defendants had fully briefed their dispositive motion. Case law is clear under these circumstances. Good cause does not exist.

Second the length of discovery sanctioned by the Court weighs in favor of denying the motion. Plaintiff had a year of discovery. He was represented by two different attorneys who served three different sets of written discovery requests and conducted nine depositions during this period.

Third, Defendants cooperated in discovery by providing timely responses and disclosing more than 8,000 documents in response to Plaintiff's broad and extensive requests. Indeed, Plaintiff did not contest any of Defendants' responses or reasonable objections by filing a motion to compel.

Fourth, Defendants will suffer undue burden and prejudice if they are forced to reopen discovery months after filing their dispositive motion. Defendants should not be subjected to additional costs and burdens of discovery simply because Plaintiff is unhappy with how he took advantage of the year-long discovery period in this case. Plaintiff's belated attempts represent nothing more than a fishing expedition and should be denied.

B. Plaintiff's Request is Moot

A motion will be denied as moot when the relief requested is no longer necessary or would not make a legal difference to the legal interests of the parties. *See Bender v. United States*, 372 Fed. Appx. 638, 640 (6th Cir. 2010). Here, the Court should deny Plaintiff's motion as moot because Defendants have provided the underlying investigation documents, which confirm that an independent investigation was completed under County policy. As explained above, this cannot be evidence that Defendants treated Plaintiff differently because of his race, and additional discovery would not make a difference to the legal interests of the parties.

C. Plaintiff's Requested Discovery is Irrelevant, Overbroad, and Unduly Burdensome

Finally, the scope of Plaintiff's request to reopen discovery is irrelevant, overly broad, and would impose undue burdens on Defendants after Plaintiff failed to pursue discovery in a manner that would have uncovered this issue. There is simply no reasonable basis to require Defendants' witnesses to undergo additional depositions on this issue or to require Defendants to bear the costs of additional discovery at this late stage—especially when Defendants have already provided Plaintiff with evidence confirming that an investigation of Ms. Salley's claim was completed by independent, outside law enforcement officers.

V. CONCLUSION

For the reasons above, the Court should deny Plaintiff's motion to reopen discovery.

In the alternative, the Court should delay ruling on this motion until after resolving the pending dispositive motion. Even if Plaintiff could establish good cause and his motion was not moot, Plaintiff has acknowledged that this motion should not impact the Court's October 19, 2011 hearing on that motion.

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Dated: October 6, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Nanette Cortese, attorney for Plaintiff.

MILLER JOHNSON
Attorneys for Defendants

Dated: October 6, 2011

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