UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LISA KWESELL; CHRISTINE TURECEK; AND JASON SCHWARTZ, individually and on behalf all others similarly situated,	:	CIVIL ACTION NO.: 3:19-cv-01098 (KAD)
Plaintiffs,	:	*Putative class action*
v.	:	
YALE UNIVERSITY,	:	
Defendant.	:	November 26, 2019

DEFENDANT'S MOTION TO STAY PROCEEDINGS

Defendant Yale University ("Yale") hereby moves for an order staying proceedings in this case through January 31, 2020, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and this Court's inherent authority.

The EEOC's regulations for employee wellness programs under the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) are of central importance in this case. EEOC regulations governing employee wellness programs were in place until December 20, 2018, at which point the EEOC withdrew the regulations with the expectation of promulgating new ones. 83 Fed. Reg. 65296-01, -02. Plaintiffs do not contend that Yale's Health Expectation Program (the "Program") violated those federal regulations; nor could they, as Yale's Program carefully followed the regulations. Instead, Plaintiffs seek to exploit the happenstance of a brief gap in the regulatory framework, when employee wellness programs nationwide suddenly lacked regulatory guidance. Within the past several days, though, the EEOC has announced that it will issue new regulations in January 2020, closing the temporary

gap that underlies Plaintiffs' claims.[1]

A stay of proceedings is warranted because the EEOC's new rules will significantly affect the core legal issues in this case and thus affect discovery and the legal arguments the parties will pursue. Forcing the parties into hurry-up litigation before the proposed rules are issued would cause the parties to pursue avenues that quite likely will prove inefficient, needlessly costly, and immaterial in whole or in part once the rules are issued.

I. Legal Standard

"The decision whether to stay an action calls on a district court's studied judgment, requiring the court to examine the particular facts before it and determine the extent to which a stay would work a hardship, inequity, or injustice to a party, the public or the court." *Range v. 480-486 Broadway, LLC*, 810 F.3d 108, 113 (2d Cir. 2015) (quotation marks and alterations omitted). In addition, Rule 26(c) gives courts "the discretion to stay discovery for 'good cause.'" *Cuartero v. United States*, No. 3:05CV1161 RNC, 2006 WL 3190521, at *1 (D. Conn. Nov. 1, 2006). "[W]here it is efficient for a trial court's docket and the fairest course for the parties, a stay is proper . . . ." *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 622 (S.D.N.Y. 2012). A court may order a stay "pending resolution of independent proceedings which bear upon the case . . .

[1] *See Amendments to Regulations Under [the ADA]*, Office of Info. and Regulatory Affairs ("OIRA") (Fall 2019 Agenda), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=3046-AB10 (listing January 2020 as the "[t]imetable" for issuing a notice of proposed rulemaking); *Amendments to Regulations Under [GINA]*, OIRA (Fall 2019 Agenda), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=3046-AB11 (same). The EEOC appears poised to act soon, as the January 2020 timetable extends by only one month the December 2019 target published earlier this year. *See Amendments to Regulations Under [the ADA]*, OIRA (Spring 2019 Agenda), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=3046-AB10 (Dec. 2019 timetable). When the EEOC has expected significant delay, it has announced a longer extension. *See Amendments to Regulations Under [the ADA]*, OIRA (Fall 2018 Agenda), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=3046-AB10 (June 2019 timetable, later extended 6 months to Dec. 2019). That earlier delay was likely due in significant part to the EEOC's loss of a quorum for five months in early 2019, before the quorum was restored in May with the appointment of a new commissioner. *See The EEOC Is Back In Business, At The Urging Of Business*, Forbes (May 31, 2019), https://www.forbes.com/sites/patriciagbarnes/2019/05/31/the-eeoc-is-back-in-business-at-the-urging-of-business/#697cb52f438d.

whether the separate proceedings are judicial, administrative, or arbitral in character," and whether or not "the issues in such proceedings are necessarily controlling of the action before the court." *Goldstein v. Time Warner N.Y.C. Cable Grp.*, 3 F. Supp. 2d 423, 437-38 (S.D.N.Y. 1998).

II. Discussion

A. A Stay Is Warranted Because the New EEOC Rules Will Very Likely Have an Important Effect on the Central Issue in This Case.

The EEOC's forthcoming rules warrant a stay of proceedings. When an agency is expected to clarify a regulation or issue within its domain and of great significance to a pending case, a stay of proceedings is often appropriate to conserve and efficiently allocate both the court's and parties' resources. *See, e.g.*, *Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, No. 3:12-CV-1208 SRU, 2014 WL 518992, at *3 (D. Conn. Feb. 3, 2014) (staying case where "[t]he resolution of [an FCC] petition will have a substantial effect on the disposition of controlling issues in this case").[2] That is the case here.

The dispositive legal question underlying Plaintiffs' claims is whether and to what extent a "voluntary" program under the ADA and GINA may include financial incentives to participate.

[2] *See also, e.g.*, *S. New England Tel. Co. v. Glob. Naps, Inc.*, No. CIV.A. 304CV2075JCH, 2005 WL 2789323, at *6 (D. Conn. Oct. 26, 2005) (staying claims raising "issues very much in flux and currently being considered by the FCC" as indicated in a recently issued Notice of Proposed Rulemaking); *Frontier Tel. of Rochester, Inc. v. USA Datanet Corp.*, 386 F. Supp. 2d 144, 151 (W.D.N.Y. 2005) (finding it "prudent to stay the instant case until such time as the FCC resolves [an] issue" via proposed rulemaking where "the FCC has been actively considering the issue for more than a year, and it appears that a decision will be forthcoming in a matter of months, as opposed to years"); *Grimm v. APN, Inc.*, No. SACV1700356JVSJCGX, 2018 WL 4793088, at *3 (C.D. Cal. Jan. 8, 2018) (staying case pending agency's decision as to "rulemaking on the subject matter of this litigation" because "it could significantly limit the issues currently litigated"); *Saubers v. Kashi Co.*, 39 F. Supp. 3d 1108, 1113 (S.D. Cal. 2014) (dismissing case without prejudice (an alternative to a stay) where an FDA notice indicated "an active and ongoing regulatory process involving the specific issues raised in this litigation"); *Raitport v. Harbour Capital Corp.*, No. 09-CV-156-SM, 2013 WL 4883765, at *1 (D.N.H. Sept. 12, 2013) ("Given the substantial effect that the outcome of the pending administrative proceedings will have on disposition of the pending issues in this case, . . . this litigation shall be stayed pending a final decision in those matters."); *Sequoia Forestkeeper & Earth Island Inst. v. U.S. Forest Serv.*, No. CV F 07-1690LJODLB, 2008 WL 2131557, at *5 (E.D. Cal. May 21, 2008) (judicial economy served by staying case pending the Forest Service's issuance of a revised environmental assessment that would shape the parties' positions and that "ha[d] the potential to advance significantly the resolution of the claims").

While motions to stay most often follow motions to dismiss, Yale chose instead to answer and move for a stay for two reasons. First, the Amended Complaint fails to mention the total cost of Plaintiffs' healthcare coverage, a decisive factor under the former version of the EEOC's rules. Second, the EEOC's new proposed rules will soon issue, very likely modifying the legal landscape and reshaping the parties' arguments.

Knowledge of the new proposed rules will also help the parties, and the Court, determine the appropriate contours of discovery. The EEOC's new rules will likely modify the categories of relevant discovery and could eliminate the need for much of the discovery that Yale presently anticipates the parties will pursue. The total cost of Plaintiffs' healthcare coverage, for example, might remain a fact that carries significant, if not dispositive, weight in future summary judgment proceedings. If so, little discovery would be needed to establish that undisputed fact and dismiss the case. The picture is different, however, if the new EEOC proposal makes it unnecessary for Yale to establish the total cost of coverage or, alternatively, adds additional factors that are not currently necessary to explore.

We need not guess at the EEOC's position, however, because it is poised to propose those rules soon. Proceeding with discovery now, before seeing the new rules, would pose a substantial risk that the parties will launch into costly efforts responding to production requests, conducting depositions, and developing positions that will ultimately have little, if any, relevance to the dispositive questions. As discussed below, such efforts would be quite burdensome. In contrast, conducting discovery after the EEOC issues proposed rules would focus discovery on the most important issues and avoid needlessly expending time and resources.[3]

[3] While the proposed rules will not immediately be final, they will at a minimum be highly informative and a strong predictor of what the EEOC will promulgate as final rules. They will offer far more guidance than the parties currently have. Proposed rules ordinarily provide a sixty-day or thirty-day comment period, after which final rules are promulgated. *See* Congressional Research Service, *The Federal Rulemaking Process: An Overview* at 9-10 (June

B. In the Absence of EEOC Rules, Discovery Could Be Broad and Burdensome.

Absent EEOC rules guiding the inquiry into what is "voluntary," Plaintiffs' claims would likely entail broad and burdensome discovery requiring significant time and resources, and would implicate the disclosure of confidential information and the involvement of third parties. Yale's defenses would require correspondingly broad inquiries in response. Given the pendency of the EEOC's action and the present uncertainty about what categories of discovery will be material under the new rules, proceeding with discovery at this point is unwarranted. This case should therefore be stayed until the EEOC announces the new proposed rules.

Plaintiffs' claims, by their nature, are very likely to entail significant discovery burdens if the case proceeds now. Plaintiffs intend to seek the identities of every member of each putative sub-class and determine those thousands of individuals' economic and non-economic damages. *See* Rule 26(f) Report, ECF no. 31, at 6. And although Plaintiffs represent at this point that they oppose "individualized discovery from each member of the putative class" and that their "first round of discovery requests will not seek individualized private health information for anyone other than the named Plaintiffs," *id.* at 6, 8, identifying class and sub-class members and their damages would inevitably involve burdensome discovery. Indeed, the Amended Complaint spends many pages describing various individuals' unique circumstances, some of them named plaintiffs and some of them putative class members. To the extent Plaintiffs believe that those allegations are relevant to their legal claims, their position seems to be that such individual circumstances help define whether an individual's participation in the Program is "voluntary" and thus permissible under the ADA and GINA. *See, e.g.*, Am. Compl. ¶ 71 (describing an

17, 2013). An extension of the stay may be warranted to accommodate the notice period, but the Court need not decide that question now.

employee whose annual salary is $49,920, who considers $25 per week "a lot of money," who does not want to have a colonoscopy, and who views the health coaching aspects of the Program as being told "who to talk to and when").

Discovery would therefore likely entail requests for Yale to produce health and financial records for potentially thousands of employees and their spouses, which is both burdensome for Yale and an intrusion into the privacy of employees and their spouses who are only members of a putative class. To defend against Plaintiffs' claims, Yale would have to depose putative class members about their individual circumstances. In addition, Plaintiffs intend to seek the details of Yale's arrangements with its vendors, Rule 26(f) Report at 6, which Yale expects would entail third-party depositions of individuals at Yale vendors HealthMine and Trestle Tree. Plaintiffs also plan to seek discovery of details surrounding the collective bargaining between Yale and Unite Here Locals 34 and 35, the unions that represented Plaintiffs in negotiating the benefits package that includes the Program. *Id.* This, too, would entail multiple depositions, including of union leadership not party to this action.

To start down the road of such burdensome discovery at this point is premature, given the pendency of the EEOC's proposed rules. The importance of much of that discovery, and thus the parties' need to pursue it, remains highly uncertain and will depend greatly on what the EEOC says. *Supra* Part II.A. It is imprudent and inefficient for the parties to set the contours of discovery, and for this Court to referee them, blind to the EEOC's forthcoming rules.

C. A Stay Would Not Unduly Prejudice Plaintiffs.

Plaintiffs would suffer no undue prejudice from the modest stay Yale is requesting. "Delay by itself does not necessarily constitute undue prejudice, as nearly every judicial stay involves delay." *Conair Corp. v. Tre Milano*, LLC, No. 3:14-CV-1554 AWT, 2015 WL

4041724, at *4 (D. Conn. July 1, 2015). The information that Plaintiffs propose to request in discovery will be equally available to them in 2020. *See, e.g., Grimm v. APN, Inc.*, No. SACV-1700356JVSJCGX, 2018 WL 4793088, at *4 (C.D. Cal. Jan. 8, 2018) (no substantial risk of undue prejudice from stay pending agency rulemaking where requested three-month stay was "relatively short" and there was "no reason to think that" defendant would "destroy or intentionally lose evidence"). To the extent that Plaintiffs claim an ongoing harm to class members, a stay will not prevent them from seeking redress for whatever ongoing harm they allege (e.g., the $25/week). Moreover, whatever disadvantage the Plaintiffs might claim, it would not outweigh the significant abovementioned benefits of a stay under these circumstances.

* * *

Defendants have discussed the issue of staying discovery with counsel for Plaintiffs, who does not consent to this motion. A Rule 16 conference with the Court to determine an appropriate plan for discovery is currently scheduled for December 2. If the Court grants this motion, Yale would propose that the parties confer again as early as possible after either the EEOC issues the proposed rules or the stay expires, and that the parties raise any issues or changed circumstances with the Court at that time.

WHEREFORE, for the foregoing reasons, Defendant Yale University requests that the Court grant this motion to stay proceedings through January 31, 2020.

Respectfully submitted,

November 26, 2019

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