

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

Derrick Thomas,

*On behalf of himself and those
similarly situated,*

Plaintiff,

v.

Papa John's International, Inc., et al,

Defendants.

Case No. 1:17-cv-411

Judge Michael R. Barrett

PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION TO STRIKE (ECF # 92.)

1. Introduction

Reading Defendants' Motion to Strike, one is left wondering: why are Defendants so doggedly opposed to Plaintiff being allowed to present his argument to the Court in opposition to Defendants' Motion to Compel?

Plaintiff has made two reasonable requests for briefing accommodations in connection with Defendants' Motion to Compel—specifically, an (admittedly large) page limit extension and a one-week filing extension. These types of requests are typically consented to as a professional courtesy. After all, Plaintiff is only seeking these accommodations so that he can put his best argument forward in opposition to Defendants' Motion; not to prejudice Defendants or gain some unfair advantage.

The reality is that Defendants' Motion to Compel implicates the very legal standard that applies to this lawsuit because the scope of discovery is contingent on the cognizable claims and defenses in any given case. To address this standard, particularly in a type of case that courts routinely find to be inherently complex,¹ Plaintiffs sought to give the arguments the attention, time, and pages that the arguments need.

Given these circumstances, Defendants' resolute opposition to Plaintiff's requests is curious. Cases are to be adjudicated on the merits rather than procedural issues.²

Good cause exists for Plaintiff's requested briefing accommodations. The Court should grant Plaintiff's Motion to Extend the Page Limit and Motion to Extend the Filing Deadline and deny Defendants' Motion to Strike. If the Court permits the filing of Plaintiff's Response, Plaintiff does not oppose Defendants' requested page limit and timing accommodations.

2. Background

As this Court is aware, this is a wage and hour class and collective action on behalf of delivery drivers who work at nine Cincinnati-area Papa John's stores.

On November 10, 2020, Defendants' filed a Motion to Compel discovery that asked this Court to order over 700 delivery drivers to respond to detailed questionnaires about their individual vehicle expenses. ECF # 85, 86.

Defendants' discovery requests are notable for a few reasons. First, the requests seek discovery from 700 pizza delivery drivers, 600 of whom have not opted into the case as part of the collective action notice, nor are the drivers part of a certified Rule 23 class. No motion for Rule 23

¹ See, e.g., *Mullins v. S. Ohio Pizza, Inc.*, 2019 U.S. Dist. LEXIS 11019, *6 (S.D. Ohio, Jan. 18, 2019).

² There is a "strong policy in favor of deciding cases on their merits." *Shepard Claims Service, Inc. v. William Darrah & Associates*, 796 F.2d 190, 194 (6th Cir., July 18, 1986).

class certification has even been filed yet. Second, the requests seek individual vehicle expenses from the drivers, which another court in this district has already held to be outside of the scope of discovery in this type of lawsuit. *Hatmaker v. PJ Ohio, LLC*, 2020 U.S. Dist. LEXIS 39715, *2 (S.D. Ohio, Mar. 6, 2020); and *see Hatmaker v. PJ Ohio, LLC*, 2020 U.S. Dist. LEXIS 178298, *5 (S.D. Ohio, Sept. 28, 2020). By propounding these requests and then moving to compel responses, Defendants ask the Court to overrule this District's precedent. *See Arp v. Hohla & Wyss Enters., LLP*, 2020 U.S. Dist. LEXIS 207512, *3 (S.D. Ohio, Nov. 5, 2020) ("Courts in this district defer to the [DOL] Handbook" when adjudicating suits for vehicle expense under-reimbursements).

In Plaintiff's view, to properly respond to Defendants' Motion to Compel, Plaintiff must delve into the details and complexities of the competing legal standards that might apply to this case (Plaintiff's preferred DOL Handbook standard, and Defendants' preferred "reasonable approximation" standard). In addition, Plaintiff must address the more traditional discovery issues raised by Defendants (for example, is it proper to serve discovery on absent class members when there is not a certified Rule 23 class?). To address all these issues properly, Plaintiff believed he would need to submit a brief up to 70 pages in length.

On the day after Defendants' Motion was filed, November 11, 2020, Plaintiff asked Defendants if they would consent to Plaintiff seeking leave to file a Response brief up to 70 pages in length. Defendants refused to consent, and instead immediately sent an email to Chambers requesting a status conference with the Court. As a result, on November 12, 2020, Plaintiff filed his Motion to Exceed the Page Limit as "opposed." ECF # 87.

Next, after the Thanksgiving holiday, Plaintiff's deadline was fast upon him. Recognizing they would need some additional time to complete a complex brief, Plaintiff asked Defendants for

their consent to seek leave to extend Plaintiff's response deadline by one week, until December 8, 2020. While there was some confusion about the reason for Plaintiff's request, Defendants ultimately came to know—through Plaintiff's Motion to Extend the Deadline and subsequent communications from Plaintiff's counsel (see ECF # 90-1)—that Plaintiff sought an extension simply because he needed more time to complete his brief in light of the holiday. The request was not intended to prejudice Defendants. Still, Defendants opposed Plaintiff's request for an extension. As a result, on November 30, 2020, Plaintiff filed his request for a one-week extension as “opposed.” ECF # 88.

On November 30, 2020, Defendants filed an Opposition to Plaintiff's Motions to Exceed the Page Limit and for an Extension of the Deadline. ECF # 89.

On December 8, 2020, Plaintiff filed a Reply in Support of his Motions to Exceed the Page Limit and for an Extension of the Deadline. ECF # 90.

On the same day, December 8, 2020, Plaintiff filed his Response in Opposition to Defendants' Motion to Compel and a Cross-Motion for Protective Order. ECF # 91. Plaintiff's combined brief is 69 pages. Presumably, because Plaintiff filed a Response and a Motion, each could be separated and encompass 20 pages as a matter of right.

Defendants now move to strike Plaintiff's Response/Cross-Motion because the Court has not yet ruled on Plaintiff's requests to exceed the page limit or extend the filing deadline. If, however, the Court permits Plaintiff's filing, Defendants request two briefing accommodations even greater than those requested by Plaintiff—they seek to file permission to each file a 79-page brief and seek a 44-day extension on their filing deadline.

Plaintiff opposes Defendants' Motion to Strike but does not oppose Defendants' alternative relief. Plaintiff has no objection to Defendants using as many pages as they think they need to make their arguments in support of their Motion to Compel and in Opposition to Plaintiff's Motion for Protective Order. Plaintiff also has no objection to Defendants being permitted a 44-day extension of their Reply/Response deadline given the complexity of the issues and the fact that it is the Holiday season. For the same reasons, Plaintiff does request a similar extension, until March 15, 2021, to file his Reply in Support of his Motion for Protective Order thereafter.

3. Argument

3.1. Plaintiff's Response in Opposition to Motion to Compel and Cross-Motion for Protective Order should be accepted as filed.

Despite the Thanksgiving holiday and complexity of the issues before the Court, Defendants claim that a one-week extension and additional pages are beyond the pale. As a result, Defendants ask the Court to treat their Motion to Compel as unopposed and order 700+ delivery drivers (600 of whom are neither opt-ins nor part of a certified Rule 23 class) to respond to irrelevant discovery.

In making their argument, Defendants cannot point to any prejudice they will suffer because of Plaintiff's requests. The closest Defendants come to a claim of prejudice is their claim that it is "fundamentally unfair to Defendants for Plaintiff to disregard the Local Rules at his choosing." ECF # 92, Page ID 1828. Defendants also claim that Plaintiff's requested accommodations are "deliberate and strategic." *Id.*

To the contrary, Plaintiff acted diligently and appropriately under the circumstances. Plaintiff did not disregard the Court's rules, he did his best to seek leave in a prompt and proper manner.

Plaintiff acknowledges that the Local Rules require a Response brief to be filed within 21 days of the filing of the Motion. Plaintiff also acknowledges that the Court's Civil Practice Standards limits briefs and/or memoranda in support or opposition to any motion to 20 pages unless a party is granted leave of Court. Barrett Civil Practice Standards, I.G. Plaintiff has not disregarded these rules; he has done the opposite. Plaintiff has specifically requested relief from these requirements, *as contemplated by the Rules*, by promptly requesting consent from Defendants and then making a motion with the Court and explaining the good cause that justifies Plaintiff's request.

In response to the accusation that Plaintiff's requests are "deliberate and strategic," Plaintiff admits that it is true. Plaintiff's requested accommodations were made deliberately, *i.e.*, on purpose, and Plaintiff also believes it serves his strategic advantage to put his best arguments in front of the Court. This is consistent with the "strong policy" that cases be decided on their merits. *Shepard Claims Service, Inc.*, 796 F.2d at 194. However, Plaintiff's requests are not—as Defendants seem to want to suggest but stop short of saying—part of some nefarious plan on the part of Plaintiff to prejudice Defendants in their defense of this case.

If it was improper for Plaintiff to file his brief before receiving a ruling from this Court on his two reasonable requests for accommodation from the Local Rules, Plaintiff apologizes to the Court. However, under the circumstances, Plaintiff would have been damned if he did, and damned if he did not. If Plaintiff attempted to trim his 69-page brief down to a two 20-page briefs, it would have become unrecognizable, and he would have had to forego a number of valid arguments in his favor. If Plaintiff had not filed a brief within the extended time he requested from the Court, Plaintiff assumes Defendants would have presented some other argument for why it

should be stricken (“It has been filed outside of the time period that even Plaintiff requested.”). For these reasons, Plaintiff filed the brief he has asked the Court for permission to file.

In Plaintiff’s view, he has made reasonable requests that should not be particularly controversial, but Defendants are attempting to make them controversial. Plaintiff’s requests are neither designed to nor do they harm or prejudice Defendants. Instead, Plaintiff’s requests have been made in good faith, for good cause, and properly in accordance with the Rules. Plaintiff asks that the Court accept Plaintiff’s Response/Motion as filed.

3.2. Plaintiff is not opposed to Defendants’ requested briefing accommodations.

Next, if the Court accepts Plaintiff’s Response/Motion as filed, Defendants ask for their own page and time extension. However, in violation of the Court’s Civil Practice Standards, Defendants’ request does not clearly state how many pages they are requesting. ECF # 92, Page ID 1829. From what Plaintiff can glean, it appears Defendants are seeking permission to *each* file 79-page Reply/Response briefs. They seek permission to file them by February 4, 2021, 44 days after their natural deadline. In other words, Defendants seek permission to file two Reply briefs that are a combined 178 pages.

Assuming Plaintiff is reading Defendants’ request correctly, Plaintiff does not oppose Defendants’ request.

However, if the Court grants Defendants’ request, Plaintiff asks for permission to file a Reply in Support of her Motion for Protective Order by March 15, 2021, and for Plaintiff to be permitted up to 70 pages for that Reply.

4. Conclusion

Good cause exists for Plaintiff's requests to exceed the page limit and extend his filing deadline. Because the requests do not prejudice Defendants, the Court should grant Plaintiff's requests.

Assuming that the Court also grants Defendants' requests for page extensions and extra time and Plaintiff's similar request, Defendants' Reply/Response brief should be filed on February 4, 2021. Plaintiff's Reply in Support of his Motion for Protective Order should be filed by March 15, 2021.

Respectfully submitted,

/s/ Andrew Kimble

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Andrew Kimble _____
Andrew Kimble