IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Equal Employment Opportunity Commission,	)	
Plaintiff,	)	C.A. No. 7:13-1583-HMH
vs.	)	**OPINION & ORDER**
BMW Manufacturing Co., LLC,	)	
Defendant.	)	

This matter is before the court on the following motions: Defendant BMW Manufacturing Co., LLC's ("BMW MC") motion for summary judgment; BMW MC's motion in limine to exclude the testimony of Michael Campion; Plaintiff Equal Employment Opportunity Commission's ("EEOC") motion for partial summary judgment; and the EEOC's motion in limine to exclude the testimony of Christina Banks. After review, the court denies BMW MC's motion for summary judgment, denies BMW MC's motion in limine, denies the EEOC's motion for partial summary judgment, and denies the EEOC's motion in limine.

I. Factual and Procedural Background

Since opening its manufacturing plant in 1994, BMW MC has utilized a criminal background check in hiring employees. (Def. Mem. Supp. Mot. Summ. J. Attach. 7 (Medley Aff. ¶ 14), ECF No. 168-3.) According to BMW MC, its policy governed site access for its direct employees, contractors, and individuals working from its third-party service providers. (Id. (Medley Aff. ¶ 15), ECF No. 168-3.) From 1994 until July 27, 2008, BMW MC relied exclusively on third-party service providers for logistics functions at BMW MC's facility. (Id.

(Medley Aff. ¶ 26), ECF No. 168-3.) Logistics functions include managing material arriving to the assembly area, shipment verification, and unloading and delivering inbound materials to the assembly line. (Id. (Medley Aff. ¶ 27), ECF No. 168-3.)

On July 1, 2007, UTi Integrated Logistics, Inc. ("UTi") became the third-party logistics provider at the BMW MC facility. (Id. (Medley Aff. ¶ 28), ECF No. 168-3.) In early 2008, UTi and BMW negotiated a termination of their services arrangement wherein UTi would no longer be responsible for logistics functions at the BMW MC facility. (Def. Mem. Supp. Mot. Summ. J. Attach 7 (Medley Aff. ¶ 32), ECF No. 168-3.) Thereafter, BMW MC contracted with Management Analysis and Utilization, Inc. ("MAU") to screen and employ logistics workers with the employees beginning work on July 27, 2008. (Id. (Medley Aff. ¶ 34), ECF. No. 168-3.) BMW MC provided MAU with its criminal background check policy. (Id. Attach. 5 (Brewster Decl. ¶ 12), ECF No. 167-5.) Furthermore, BMW MC's agreement with MAU required that each applicant for a position with MAU undergo a criminal background check. (Id. (Brewster Decl. ¶ 13), ECF No. 167-5.) In June and July 2008, MAU informed BMW that certain UTi employees and temporary staffing agency employees did not meet the criteria of BMW MC's criminal background check guidelines. (Def. Mem. Supp. Mot. Summ. J. Attach. 7 (Medley Aff. ¶ 37), ECF No. 168-3.) MAU informed BMW MC of the identities of the individuals who did not meet BMW MC's site access guidelines, and BMW MC revoked site access for 58 individuals on June 27, 2008, and another 42 individuals on July 18, 2008. (Id. (Medley Aff. ¶ 39, ECF No. 168-3.)

The EEOC initiated this litigation by filing a complaint alleging that BMW MC's "use of its criminal conviction background check policy constitutes an unlawful employment practice in

violation of Section 703(a) of Title VII [of the Civil Rights Act of 1964]" because "BMW [MC]'s policy had, and continues to have, a significant disparate impact on black employees and applicants and is not job-related and consistent with business necessity." (Compl. ¶ 27, ECF No. 1). On May 14, 2015, BMW MC moved for summary judgment and to exclude the testimony of the EEOC's statistical expert on disparate impact. The same day, the EEOC moved for partial summary judgment and to exclude the testimony of BMW MC's expert on job relatedness and business necessity. Both parties filed their responses on June 8, 2015, and the parties filed their replies on June 18, 2015. On July 27, 2015, the court heard argument on the cross-motions for summary judgment and BMW MC's motion to exclude the EEOC's statistical expert. This matter is now ripe for review.

II. Discussion of the Law

A. Summary Judgment Standard

Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding whether a genuine issue of material fact exists, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

A litigant "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985)

(citation omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." Monahan v. County of Chesterfield, 95 F.3d 1263, 1265 (4th Cir. 1996) (citation omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Ballenger v. N.C. Agric. Extension Serv., 815 F.2d 1001, 1005 (4th Cir. 1987).

2. Disparate Impact Analysis

"To establish a prima facie case of disparate impact discrimination under Title VII, [the EEOC] must 'show that the facially neutral employment practice had a significantly discriminatory impact.'" Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 265 (4th Cir. 2005) (quoting Walls v. City of Petersburg, 895 F.2d 188, 191 (4th Cir. 1990)). The employment practice must "impose[] a substantially disproportionate burden upon a claimant's protected group as compared to a favored group within the total set of persons to whom it is applied." Wright v. Nat'l Archives and Records Serv., 609 F.2d 702, 711 (4th Cir. 1979) (citation omitted). The impact may be shown by statistical evidence. Anderson, 406 F.3d at 265. Once the EEOC establishes a prima facie case, "the employer must then demonstrate that any given requirement [has] a manifest relationship to the employment in question, in order to avoid a finding of discrimination." Id. (citation and internal quotation marks omitted and alteration in original). "A plaintiff must do more than merely raise a statistical inference of discrimination before the burden shifts to the employer; it must actually prove the discriminatory impact. If the plaintiff cannot make a *prima facie* showing of disparate impact, it is appropriate

to grant summary judgment to the employer." EEOC v. Freeman, 961 F. Supp. 2d 783, 791-92 (D. Md. 2013) (citing Garcia v. Spun Steak Co., 998 F.2d 1480, 1486 (9th Cir. 1993)), aff'd 778 F.3d 463 (4th Cir. 2015).

BMW MC moves for summary judgment, arguing that the EEOC fails to submit evidence showing disparate impact because the set of 724 incumbent UTi employees that the EEOC has analyzed is inadequate to demonstrate that its criminal background check policy had a disparate impact. (Def. Mem. Supp. Mot. Summ. J 16-20, ECF No. 168.); (Def. Mem. Supp. Mot. Limine 10-21, ECF No. 169-1.) The EEOC submits that the appropriate set of individuals to examine is the incumbent UTi employees who sought continued employment at BMW MC through MAU because this is a "termination," and only incumbent UTi employees are similarly situated for purposes of determining disparate impact. (Pl. Mem. Opp'n Mot. Summ. J. 10-17, ECF No. 190.) Additionally, the EEOC argues that when analyzing the set of 724 individuals, it has shown a statistically significant disparate impact, entitling it to summary judgment. (Pl. Mem. Supp. Mot. Summ. J. 4-16, ECF No. 171-1.)

After review of the parties' arguments and the evidence before the court at this time, the court finds there are genuine issues of material fact concerning which individuals are similarly situated for purposes of determining disparate impact. The court has serious concerns regarding whether the set of 724 individuals is adequate to determine disparate impact, but at this stage of the case, the court is constrained to deny summary judgment to both parties. The parties may renew their arguments as to the appropriate group of individuals at trial.

BMW further submits that it is entitled to summary judgment because it is not an employer within the meaning of Title VII. (Def. Mem. Supp. Mot. Summ. J. 22-27, ECF No.

168.) The Fourth Circuit recently clarified that courts should use the "hybrid test" to determine if an employer is a "joint employer" and therefore can be found liable as an employer under Title VII in Butler v. Drive Automotive Industries of America, Inc., No. 14-1348, 2015 WL 4269615 (4th Cir. July 15, 2015). The Fourth Circuit stated that the "common-law element of control remains the 'principal guidepost'" in determining whether an individual is jointly employed by two or more entities. Id. at *4. However, the court outlined nine factors that the court should consider to determine joint employment:

> (1) authority to hire and fire the individual;
> (2) day-to-day supervision of the individual, including employee discipline;
> (3) whether the putative employer furnishes the equipment used and the place of work;
> (4) possession of and responsibility over the individual's employment records, including payroll, insurance, and taxes;
> (5) the length of time during which the individual has worked for the putative employer;
> (6) whether the putative employer provides the individual with formal or informal training;
> (7) whether the individual's duties are akin to a regular employee's duties;
> (8) whether the individual is assigned solely to the putative employer; and
> (9) whether the individual and putative employer intended to enter into an employment relationship.

Id. at *8. Here, BMW MC relies on its contracts with UTi and affidavits from its employees and UTi's employees to argue that it was not the claimants' joint employer under the nine-factor test. (Def. Mem. Supp. Mot. Summ. J. 23, ECF No. 168.) The EEOC has submitted declarations from the claimants regarding BMW MC's involvement in their supervision, hours, tools, systems, and termination from employment. (Pl. Mem. Opp'n Mot. Summ. J. 6-7, ECF No. 190.) Accordingly, the court finds that there are genuine issues of material fact as to whether BMW MC was the claimants' joint employer.

BMW MC's final argument in favor of summary judgment is that public policy requires criminal background checks and supports granting summary judgment. (Def. Mem. Supp. Mot. Summ. J. 27-30, ECF No. 168.) The court finds this argument insufficient to support summary judgment. Accordingly, BMW MC's motion for summary judgment is denied.

Finally, BMW MC moves to exclude the reports and testimony of Michael Campion, the EEOC's statistical expert on disparate impact. (Def. Mot. Limine, ECF No. 169.) Additionally, the EEOC moves to exclude the reports and testimony of Christina Banks, BMW MC's expert on job-relatedness and business necessity. (Pl. Mot. Limine, ECF No. 175.) The court finds that the parties' arguments at this stage of the case involve consideration of the weight to be given the experts rather than their admissibility. Thus, the motions in limine are denied. However, the parties may reargue their positions regarding the experts' admissibility at trial.

It is therefore

ORDERED that BMW MC's motion for summary judgment, docket number 167, is denied. It is further

ORDERED that BMW MC's motion in limine, docket number 169, is denied. It is further

ORDERED that the EEOC's motion for partial summary judgment, docket number 171, is denied. It is further

ORDERED that the EEOC's motion in limine, docket number 175, is denied.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
July 30, 2015