

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

-vs-

Case No. 6:03-cv-383-Orl-28DAB

C-SONYA, INC., CONCEPT 2000
PROFESSIONAL EMPLOYERS, INC.,

Defendants.

ORDER

This cause came on for consideration without oral argument on the following motion filed herein:

**MOTION: PLAINTIFF EEOC'S EMERGENCY MOTION FOR A
PROTECTIVE ORDER FOR THE 30(B)(6) DEPOSITION
OF AN EEOC OFFICIAL (Doc. No. 24)**

FILED: April 26, 2004

THEREON it is ORDERED that the motion is DENIED.

Plaintiff Equal Employment Opportunity Commission ("EEOC") filed suit against Defendants C-Sonya, Inc. and Concept 2000 Professional Employers, Inc. ("Concept 2000"), an employee leasing service, alleging employment discrimination based on race. EEOC alleges that the Defendants terminated at least two bartenders because they were African American.

On April 2, 2004, Concept 2000 noticed a deposition of an EEOC representative under Federal Rule of Civil Procedure 30(b)(6) for May 3, 2004. On April 26, 2004, EEOC filed its Emergency¹ Motion for a Protective Order (Doc. No. 24) and Concept 2000 filed its Response on April 28, 2004 (Doc. No. 25). The EEOC objects to Concept 2000's deposition because it contends that the official who is in the best position to provide the information sought in the deposition is the EEOC's attorney, litigating the case on behalf of the EEOC, and the attorney-client, work-product, and governmental deliberative process privileges would "prevent him from providing any evidence reasonably calculated to lead to the discovery of relevant evidence." The EEOC also contends that all relevant documents pertaining to the noticed categories have been provided during discovery and through the initial disclosures.²

A central issue in this discovery dispute is whether the Defendants C-Sonya, Inc. and Concept 2000 are "joint employers," as applicable under the discrimination statutes to make them jointly liable for the discrimination alleged in this case. Doc. No. 1 ¶ 6 (allegation that Defendants operated as joint employers). The EEOC's Complaint alleges facts that C-Sonya, Inc. took certain discriminatory actions by terminating its African American bartenders (Doc. No. 1 ¶9), but does not specifically allege discriminatory conduct by Concept 2000. Concept 2000 contends that its only relationship with C-Sonya is that of an employee leasing company performing administrative services such as payroll and providing workers' compensation benefits, and the only way it would be liable on a "joint

¹The EEOC contends that an emergency was created when the issues underlying the Motion were not resolved at a previously scheduled medication conference on April 14, 2004. The EEOC fails to explain why its Motion was not filed on once the conference was cancelled on April 13, 2004, and why it waited until April 26, 2004 to file the Motion in this Court.

²Though both parties make reference to "other discovery" that has been conducted, it is not clear from their briefings why contention interrogatories have not identified the underlying facts apparently being sought in this 30(b)(6) deposition. The EEOC did not provide copies or specify its responses that would be redundant of the facts sought in the Notice of Deposition.

employer” theory is if it exercised day-to-day control over the workplace of C-Sonya or participated in the unlawful employment practices alleged.

Concept 2000’s deposition notice pursuant to Rule 30(b)(6) listed topics seeking the factual bases for: the allegation of “joint employers,” naming Concept 2000 as a Defendant, all damages claimed, violations of Title VII, witnesses interviewed prior to filing the lawsuit³, and the extent of the investigation into the relationship between Concept 2000 and C-Sonya conducted by the EEOC prior to filing the lawsuit (“Categories 1 - 6”), and refusing to dismiss Concept 2000 from the suit. (“Category 7”) Doc. No. 24, Ex. A.

Concept 2000 contends that despite extensive discovery pursued thus far in the case, EEOC has refused to turn over any documents that support its assertion that Concept 2000 acted as a joint employer with C-Sonya and has not provided any documents responsive to the subjects of the 30(b)(6) deposition. Concept 2000 contends that it is left with no alternative but to seek the deposition of the EEOC representative because there is no other way for Concept 2000 to obtain information on the subjects described in the Notice of Deposition.

The EEOC contends that this Court “should protect EEOC’s trial counsel from having to appear at deposition, where the attorney-client, work-product, and governmental deliberative process privileges prevent him from providing any evidence reasonable calculated to lead to the discovery of relevant evidence.” Doc. No. 24 at 4. Concept 2000 argues that it has never sought to depose EEOC’s attorney; Concept 2000 believes the EEOC investigator George Ruggiano would be more appropriate for most of the subjects sought in the Deposition Notice. The fact that there are

³Concept 2000 states in its Response (Doc. No. 25) that it is willing to restrict this topic to witnesses interviewed who provided facts supporting the existence of a joint employment relationship.

individuals other than the EEOC's attorney competent to testify distinguishes this case from cases cited by the EEOC. *See E.E.O.C. v. HBE Corp.*, 157 F.R.D. 465, 466 (E.D. Mo. 1994) (protective order granted where defendant did not assert that there was another individual at the Equal Employment Opportunity Commission competent to testify about matters at issue); *see also E.E.O.C. v. TruGreen Ltd. Partnership*, 185 F.R.D. 552, 557 (W.D. Wis. 1998) ("TruGreen gains absolutely nothing useful to this lawsuit from the EEOC's answers to TruGreen's requests for admission, regardless what those answers might be.").

As Concept 2000 points out, the burden is on the EEOC to show why each privilege exists and that it is entitled to the protective order. Fed. R. Civ. P. 26(c) ("The burden of establishing that the attorney-client privilege applies rests upon the party asserting the privilege."). No matter how the questions are phrased, queries concerning the EEOC's refusal to dismiss Concept 2000 as a Defendant from this lawsuit delve into material clearly protected by the EEOC's attorney-client privilege and work-product doctrine. For the remaining Categories 1-6 of the Deposition Notice, on the basis of its Motion for Protective Order standing alone, EEOC has not met its burden to establish it is entitled to a protective order limiting discovery into the underlying facts, in its role as Plaintiff in the case. *See Equal Employment Opportunity Commission v. Airborne Express*, Civ. 98-1471, 1999 WL 124380 (E.D. Pa. Feb. 23, 1999) (where EEOC is party plaintiff in case, it cannot evade discovery of materials that a private plaintiff would have to turn over).

However, this Order is not intended in any way to preclude the EEOC from asserting any applicable, viable privileges during the deposition in response to specific questions asked by Concept 2000, in accordance with the Federal Rules of Civil Procedure. Indeed, the Court surmises that much of what is likely to be asked will be covered by the work product doctrine.

DONE and **ORDERED** in Orlando, Florida this 28th day of April, 2004.



DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE



Copies furnished to:

Counsel of Record

F I L E C O P Y

Date Printed: 04/28/2004

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