IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v. No. 99-2835 G/Bre

DILLARDS, INC.,

Defendant.

ORDER ON PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

Before the court by order of reference is the motion of plaintiff, Equal Employment Opportunity Commission ("EEOC"), pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, for a protective order directing that the proposed Fed. R. Civ. P. 30(b)(6) deposition by defendant, Dillards, Inc. ("Dillards"), of the EEOC not be had. Plaintiff also requests an award of attorney's fees and costs incurred in connection with the filing of this motion.

This action was brought pursuant to Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. §§ 2000e, et seq., by the EEOC to correct allegedly unlawful employment practices based on retaliation and to make whole a black female employee of Dillards, Mary Anderson, who was terminated because of her complaint of racial discrimination by her supervisor. According to the complaint, Anderson was hired as a sales associate in the accessories department of a Dillards store in September of 1997. In May, 1998, Anderson informed her white female supervisor that she was unable to work Saturday nights and weekends due to family illness. After the supervisor, Virginia Modlin, scheduled

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her to work the evening shift a month later, Anderson filed a written complaint with the store's operations/assistant manager, claiming that Modlin showed preference to white employees in scheduling. The agency alleged that, in retaliation for the complaint, Modlin instructed Dillards' employees to watch Anderson. In November, 1998, the EEOC claims that the charging party was terminated by Dillards for wearing store merchandise--a pair of slippers--prior to purchasing them, a practice that was, according to the complaint, well known to store management and not previously made the subject of disciplinary action.

The EEOC assigned Audrey Bonner to conduct an investigation of Anderson's charge, during which she interviewed both management and non-management personnel of defendant. As part of its initial disclosures, plaintiff produced to Dillards all non-privileged documents in its investigative file, including four signed statements from Dillards management officials taken by Bonner, notes from the interviews conducted of non-management employees, and other factual statements contained in the investigator's memorandum. On or about March 3, 2000, Dillards served upon plaintiff a Rule 30(b)(6) notice to take deposition, in which it listed the following matters upon which examination was to be conducted:

> 1. The allegations contained in the paragraph of the Complaint titled "Nature of the Action" that Defendant subjected Mary Anderson to retaliation for opposing employment practices made illegal by Title VII, and that Mary Anderson was terminated for complaining about racial discrimination by her supervisor.
>
> 2. The allegations in paragraph 6 of the Complaint that more than 30 days prior to the institution of this lawsuit, Mary E. Anderson filed a charge with the EEOC alleging violations of Title VII by Defendant and that all conditions precedent to the commencement of this lawsuit have been fulfilled.
>
> 3. The allegations in paragraph 11 of the Complaint that one

month after Mary Anderson filed her written complaint against her supervisor, Virginia Modlin, singled Anderson out for watching because of her complaint in July 1998.

4. The allegations in paragraph 12 of the Complaint that employees other than Mary Anderson wore merchandise prior to purchase and that management, including Modlin knew about the alleged practice.

5. The allegations in paragraph 19 of the Complaint that Defendant's employment actions have effectively deprived Mary E. Anderson of equal employment opportunities and adversely affected her status as an employee in retaliation for her opposition to employment practices made illegal under Title VII.

6. The allegations contained in paragraph 20 of the Complaint that Defendant's termination of Mary Anderson's employment was unlawful under § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), and intentional.

7. The allegations contained in paragraph 21 of the Complaint that the alleged unlawful practices complained of in the Complaint were committed with malice and/or with reckless indifference to the federally protected rights of Mary E. Anderson.

8. The allegations contained in Plaintiff's prayer for relief of the Complaint.

(Pl.'s Mot. for Protective Order, Ex. 3 (Rule 30(b)(6) Notice to Take Dep. and for Produc. of Docs.) at pp. 1-2.) The EEOC contends that the only individual it can designate as competent to offer testimony concerning the matters set forth in the notice is Faye Williams, plaintiff's counsel. The agency insists that it has provided Dillards with all non-privileged documents in the case and that the information sought in the deposition--counsel's mental impressions, conclusions, opinions, and trial strategies--are privileged.

Under Rule 30(b)(6), when a governmental agency is named as the deponent in a notice of deposition, "the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify." Fed. R.

Civ. P. 30(b)(6). The deponent "must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the party noticing the deposition] and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed . . . as to the relevant subject matters." S.E.C. v. Morelli, 143 F.R.D. 42, 45 (S.D.N.Y. 1992) (quoting Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Resources Auth., 93 F.R.D. 62, 67 (D.P.R. 1981)); see also F.D.I.C. v. Butcher, 116 F.R.D. 196, 201 (E.D. Tenn. 1986). Implicit in the rule is the requirement that the designated representative review matters known or reasonably available to the deponent in preparation for the deposition. Starlight Int'l Inc. v. Herlihy, 186 F.R.D. 626, 628 (D. Kan. 1999). Failure to comply with the affirmative duty set forth in Rule 30(b)(6) may expose a party to sanctions under Fed. R. Civ. P. 37. Reilly v. NatWest Markets Group, Inc., 181 F.3d 253, 268 (2d Cir. 1999), cert. denied, ___ U.S. ___, 120 S.Ct. 940, 145 L.Ed.2d 818 (2000). A party's failure to designate a representative may not be excused for purposes of Rule 37 sanctions on the grounds that the discovery sought is objectionable unless it has moved for a protective order pursuant to Fed. R. Civ. P. 26(c).

Rule 26(c) of the Federal Rules of Civil Procedure permits the court to limit or prohibit discovery upon a showing of good cause by the party resisting discovery if it finds that justice requires such action "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." Fed. R. Civ. P. 26(c). Motions for protective orders absolutely prohibiting a deposition are rarely granted except in extraordinary circumstances. West Peninsular Title Co. v. Palm Beach County, 132 F.R.D. 301, 302 (S.D. Fla. 1990). While the Rules do not expressly prohibit taking the deposition of opposing counsel, requests therefor, as plaintiff has noted, have been met by the courts

with disfavor. See Nguyen v. Excel Corp., 197 F.3d 200, 209 (5th Cir. 1999); Evans v. Atwood, No. CIV.A.96-2746, 1999 WL 1032811, at *2 (D.D.C. Sept. 29, 1999); Slater v. Liberty Mut. Ins. Co., No. CIV.A.98-1711, 1999 WL 46580, at *1 (E.D. Pa. Jan. 14, 1999); Central Vt. Public Serv. Corp. v. Adriatic Ins. Co., 185 F.R.D. 179, 179 (D. Vt. 1998); Dunkin' Donuts, Inc. v. Mandorico, Inc., 181 F.R.D. 208, 209 (D. P.R. 1998). Requests to take the deposition of a party's lawyer have been held to constitute a circumstance justifying departure from the normal rule regarding the prohibition of depositions and, therefore, would generally satisfy the Rule 26(c) good cause requirement. See Nguyen, 197 F.3d at 209; Simmons Foods, Inc., 2000 WL 300152, at *2; West Peninsular Title Co., 132 F.R.D. at 302; N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 84-85 (M.D.N.C. 1987). Depositions of counsel are best limited to situations where the party seeking the deposition has demonstrated that (1) no other means exist for obtaining the information sought; (2) the information is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986).

In addition, Rule 26(b)(3) creates a qualified immunity which protects from discovery documents and tangible things prepared in anticipation of litigation. Fed. R. Civ. P. 26(b)(3). This Rule protecting work product affords special protection to the mental impressions and opinions of counsel, while permitting discovery of other work product materials "upon an adverse party's demonstration of substantial need or inability to obtain the equivalent without undue hardship." In re Perrigo Co., 128 F.3d 430, 437 (6th Cir. 1997). The selection and arrangement of documents may also fall within the ambit of work product protection in certain circumstances. Morelli, 143 F.R.D. at 47. As the court stated

in N.F.A. Corp.,

> [b]ecause deposition of a party's attorney is usually both burdensome and disruptive, the mere request to depose a party's attorney constitutes good cause for ordering a Rule 26(c), Fed. R. Civ. P., protective order . . . [D]eposition of the attorney [usually] merely embroils the parties and the court in controversies over the attorney-client privilege and, more importantly, involves forays into the area most protected by the work product doctrine--that involving an attorney's mental impressions or opinions.

N.F.A. Corp., 117 F.R.D. at 85.

Indeed, in this case, counsel for Dillards has instructed the court that they have no desire to depose the EEOC's lawyer and no intention of inquiring into her thought processes and mental impressions. Rather, defendant's interest centers on the factual basis of the claims asserted in this action. In EEOC v. HBE Corp., 157 F.R.D. 465 (E.D. Mo. 1994), a case relied upon by plaintiff in support of its motion, the EEOC claimed, as it has here, that its trial counsel was the only person with knowledge of the information requested by the defendant in its Rule 30(b)(6) notice. The court granted the agency's motion for protective order based on the Shelton factors, primarily on the grounds that the defendant failed to assert that there was another person competent to testify as to the matters at issue. HBE Corp., 157 F.R.D. at 466. In this case, however, the defendant has identified three persons other than counsel who are knowledgeable of the facts surrounding this lawsuit, including Bonner; W. S. Grabon, district director for the EEOC's Memphis office, who stated in an affidavit that the information reflected in the plaintiff's answers to Dillards' interrogatories and requests for production were true, correct, and accurate; and the claimant.

Upon review of the pleadings, the court is in agreement with both parties that the deposition of the EEOC's attorney is not warranted or necessary. To that extent, plaintiff's motion for protective order is granted. However, Dillards is not precluded from inquiry into

the plaintiff's contentions. The EEOC may designate a person other than counsel who may be prepared to answer questions on its behalf in accordance with Rule 30(b)(6) or Dillards may, by notice or upon agreement of the parties, depose those persons referred to in the pleadings as having knowledge of the facts alleged in the complaint. In addition, the defendant may propound to the EEOC contention interrogatories, which have been found to be an appropriate method for obtaining the information sought. See Morelli, 143 F.R.D. at 47. Plaintiff's request for attorney's fees and expenses in connection with the filing of this motion is denied.

IT IS SO ORDERED this 27th day of April, 2000.

J. DANIEL BREEN
UNITED STATES MAGISTRATE JUDGE

N O T I C E O F D I S T R I B U T I O N

This notice confirms a copy of document docketed as number 46 in case 2:99-cv-02835 was distributed by fax, mail, or direct printing on May 1, 2000 to the parties listed.

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