

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

CIV 01-815 WJ/KBM

LCOKHEED MARTIN CORPORATION  
d/b/a LOCKHEED MARTIN MISSION SYSTEMS,

Defendant.

**ORDER DENYING IN PART AND GRANTING IN PART  
DEFENDANT'S MOTION FOR PROTECTIVE ORDER**

This matter is before the Court on Defendant's Motion For Protective Order, *Doc. 29*, which I deny in part and grant in part for the following reasons.

***I. Background***

In April 2000, Janna Roberts complained to the EEOC that her supervisor Robert Wilhelm was sexually harassing her and that Defendant had not responded appropriately since it was asking her to attend classes and counseling. *See Doc. 16*, Exh. A. During the course of its investigation, the EEOC discovered that Ms. Roberts' predecessor, Jeanette Wolfe also claimed to have been harassed in the same manner by Mr. Wilhelm and had resigned her employment as a result.

Following unsuccessful conciliation efforts, the EEOC filed this action on behalf of Ms. Wolfe and Ms. Roberts seeking, among other things, compensation on their behalf. Ms. Roberts continues to work for Defendant but Mr. Wilhelm and Ms. Wolfe do not. *See Doc. 32*, at 5 n.2.

Defendant's Answer contains a number of affirmative defenses, two of which are the subject of a pending motion to strike. Among the affirmative defenses not subject to that motion are Defendant's assertions that it took prompt remedial action to the womens' complaints about Wilhelm and acted with reasonable care to prevent any discriminatory conduct. *See generally Docs. 1, 5, 14* and tendered IPTR.

In its FED. R. CIV. P. 26 initial disclosures (the tendered IPTR has not yet been entered), Defendant identified the personnel files of Ms. Roberts, Ms. Wolfe and Mr. Wilhelm as well as files that document their complaints about one another and the subsequent company investigation into the situation. I will label the two categories of files as "personnel" and "investigation." Defendant takes a narrow position with regard to a protective order in that it (1) agrees that these files contain relevant material, (2) is not claiming that the materials are privileged, even though some are described as containing attorney work product material, and (3) will produce the files to Plaintiff. *See Doc. 29* at 3-5; *Doc. 32* at 1, 2, 5, 9.

On the other hand, Defendant, asserts the personnel files contain "home addresses and telephone numbers, performance evaluations, and salary and benefit information" and the investigation files contain "potentially embarrassing" information as Ms. Roberts, Ms. Wolfe and Mr. Wilhelm made disparaging comments about one another. Defendant has confidentiality policies for employee data and communications of employees who report complaints or raise concerns.<sup>1</sup> Due to the nature of the information, Defendant is concerned about its "potential

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<sup>1</sup> These policies specifically provide that employee communications of ethics concerns "will be protected to the greatest extent possible," *Doc. 29*, Exh. A (Attachment 1,); the "Open Door procedure is a confidential communication channel designed for employees to appeal to higher levels of management when concerns are not resolve dot their satisfaction by the employee's immediate manager," *id.* (Attachment 2, ¶ 3,); and the company "protects individual

exposure,” although it also generally argues that the information is confidential and should be treated as such. *See Doc. 31*, Exh. B; *see also Doc. 29* at 4. Defendant therefore asks that the Court require Plaintiff to agree that the information will not be “used or disseminated outside” the context of this action,” *Doc. 29*, at 6, and to have the Court enter a confidentiality order “in the form [Defendant attached to its motion] as Exhibit B.,” *id.* at 2. It appears that the parties were unable to reach an agreement because the EEOC generally does not agree to confidentiality orders, wanted a more detailed description of the contents of the files before considering the request, and finds the terms of Defendant’s proposed confidentiality order onerous. *See Doc. 32*, Exh. A.; *Doc. 31*, Exh C; *Doc. 30*, at 14-15.

## *II. Analysis*

Under Rule 26, for good cause shown, this Court may order discovery be had under specific conditions “to protect a party or person from annoyance, embarrassment, [or] oppression.” FED. R. CIV. P. 26(c). Both parties cite decisions that at bottom hold that the inquiry here is a balancing one – balancing the need for discovery against harm of “uncontrolled” disclosure. The principal cases Defendant relies on are *Province v. The Pep Boys – Manny, Moe and Jack*, 2000 WL 420626 (E.D. Pa. 2000) and *Dahdal v. Thorn Americas, Inc.*, 1997 WL 599614 (D. Kan. 1997).

One factor common to both of these decisions is the privacy interest at stake. In a different context, the Tenth Circuit has discussed the nature of the privacy interests in personnel and investigatory files, noting that

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privacy with respect to employee data. We comply with data requests from authorizes sources to meet government security or other legal requirements,” *id.* (Attachment 3 at 4).

[o]ur cases provide no absolute right to privacy in the contents of personnel files. Only highly personal information is protected. In [*Denver Policement's Protective Ass'n v. Lichtenstein* 660 F.2d 432 (10<sup>th</sup> Cir. 1981)] this court held that police internal investigation files were not protected by the right to privacy when the "documents related simply to the officers' work as police officers." *Lichtenstein*, 660 F.2d at 435.

*Flanagan v. Munger*, 890 F.2d 1557, 1570 (10<sup>th</sup> Cir. 1989).

I find Defendant's investigation files indistinguishable from the police internal investigation files in *Flanagan* and that any privacy or confidentiality interest at stake is minimal under the circumstances of this case. The general allegations stemming from those events are already part of the record. The details will become part of the record as well if the matter proceeds to trial. Nonetheless, there is no suggestion by Defendant that the entire matter and proceedings be sealed because the subject of the suit could prove embarrassing for Wilhelm/Roberts/Wolfe or to Defendant, for that matter.

Likewise, do not find home addresses, telephone numbers and performance evaluations of Mr. Wilhelm, Ms. Roberts and Ms. Wolfe "highly personal" in the context of this case. These three individuals are the principal witnesses and their work performance could be critically relevant to Plaintiff's claims as well as Defendant's affirmative defenses. The Court cannot disregard that salary and benefit information in the personnel files is generally highly confidential. To the extent salary/benefit information is relevant (for example, calculating the women's damages), it would appear the parties could acquire the specific information needed by interrogatory or deposition. Thus, I would permit redaction of salary and benefit information from the personnel files at this juncture.

There is no suggestion on the record before me that the EEOC plans to use the personnel

and investigation files to obtain irrelevant nonparty employee information or to drum up more suits against Defendant for its own purposes. For example, it is only the three personnel files of the main participants and not all of Defendant's employee records that will be produced. Moreover, there is no allegation by Defendants that the investigation files reveal any wrongdoing on the part of, or anything embarrassing about, other employees. Rather, according to Defendant, information about other employees in the investigation files merely identifies those who were questioned about what they had observed going on between Wilhelm and Roberts/Wolfe.<sup>2</sup> Elsewhere the record suggests indicates that during the EEOC's investigation it was provided with at least part of the investigation files and the women's personnel files. It discovered alleged harassment of only Ms. Roberts and Ms. Wolfe by Mr. Wilhelm and conciliated only on their behalf. *See Doc. 18* at 6. The Complaint is not styled as a class action and is directed only toward Ms. Wolfe and Ms. Roberts.

On the other hand, the EEOC's response does not plainly assure Defendant or the Court that it will not share the personnel and investigation file information with someone outside of this case. In fact, the EEOC's response says it will do so "properly." The specific instance it mentions is sharing information with Ms. Roberts' counsel for "settlement purposes." I find that Defendant's request that the EEOC not use or disseminate the personnel and investigation information outside this action is generally reasonable. However, Defendant's request that the Court require the EEOC to enter into Defendant's proposed confidentiality agreement is unreasonable because the broad agreement is inconsistent with the relief Defendant argues it is

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<sup>2</sup> As such, I find no need to redact the names of these nonparty employees who are witnesses only as I did in another decision requiring disclosure of investigation files. *See Bauer v. City of Albuquerque*, CIV 00-110 JC/KBM – ACE (*Doc. 44*).

seeking. Throughout its memorandum and reply Defendant emphasizes that it is only requesting that the EEOC keep the personnel and investigation files in this suit. Yet, the proposed agreement is drafted in sweeping terms that grant Defendant the ability to designate *any* discovery material as confidential thereby putting the burden on Plaintiff to motion the Court to undo that designation. *See Doc. 29, Exh. B. at ¶¶3, 5.*

Accordingly, I deny the motion in part and grant it in part. Although Defendant shall produce the personnel and investigation files, the EEOC cannot share the contents of those files with anyone outside this suit absent a confidentiality agreement and any necessary waivers or releases<sup>3</sup> from Ms. Roberts, Ms. Wolfe, or Mr. Wilhelm. I believe this limited restriction strikes the proper balance as it will not interfere with production of discovery to the EEOC and will protect the interests identified in *Dahdal* and *Province* – keeping relevant personnel file information within the confines of the suit and preventing discovery in one suit from being employed as a means to find other potential clients.

**IT IS HEREBY ORDERED THAT** Defendant’s motion (*Doc. 29*) is DENIED IN PART AND GRANTED IN PART, as follows: Defendant will produce the personnel and investigation files and may redact the salary and benefit information from the personnel files. The EEOC is precluded from using the information from these files beyond this litigation.

  
UNITED STATES MAGISTRATE JUDGE

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<sup>3</sup> Presumably Defendant “fears exposure” in the form of a claim against it by Ms. Roberts, Ms. Wolfe or Mr. Wilhelm for disclosing the information without limiting its use. Defendant mentions that presently, neither Ms. Roberts, Ms. Wolfe, nor Mr. Wilhelm have provided a release authorizing Defendant to turn over their personnel files. On the other hand, it is unclear what steps have been taken by whom to secure any necessary releases.