[Doc. No. 48]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE
HONORABLE ROBERT B. KUGLER

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. FOODCRAFTERS DISTRIBUTION COMPANY, et al., Defendants, and EILEEN HORNER, et al., Intervenor Plaintiffs, v. FOODCRAFTERS DISTRIBUTION COMPANY, et al., Intervenor Defendants.	Civil No. 03-2796 (RBK)

ORDER

This matter having come before the Court upon the motion of Plaintiff Equal Employment Opportunity Commission ("EEOC"), seeking a Protective Order to prevent Defendants from taking the deposition of EEOC investigator Karen McDonough, and the Court having reviewed the moving papers and the opposition thereto; and for the reasons set forth below and for good cause shown, the Court will deny the

motion for a blanket protective order. However, the deposition of the EEOC investigator will be limited as set forth herein.

I. Background and Procedural History

On June 11, 2003, the EEOC brought this sexual harassment suit on behalf of Eileen Horner, Danelle Horner, Dayna Horner, Leighanne Reynolds and Paula Bobo, all of whom have also filed complaints in intervention against Defendants and several individual employees of Defendants. See Memorandum in Support of EEOC's Motion for a Protective Order (hereafter "Pl. Brief"), at 2. In the Complaint, the EEOC alleges that Defendants Foodcrafters Distribution Company, Tropical Plant Carriers, Inc., and Little Brownies Properties, Inc. (collectively "Foodcrafters") violated Title VII by subjecting Intervenor Plaintiffs and a class of female employees to a sexually hostile work environment which resulted in their discharge. Id. Prior to filing suit, EEOC Investigator Karen McDonough conducted an investigation into the allegations of discrimination and found that reasonable cause existed to believe Foodcrafters had committed violations of Title VII. Id. at 3. Foodcrafters allegedly challenges the sufficiency of the EEOC's investigation into this case and thus seeks to depose Ms. McDonough. Id. at 2-3. Discovery has been ongoing, and the EEOC filed the instant motion for a protective order to prevent the deposition of Ms. McDonough. Id.

Specifically, the EEOC contends that it is entitled to a

protective order because the sufficiency of its investigation is within its sole discretion. Id. at 4. In support of this assertion, the EEOC relies on EEOC v. Keco Industries, 748 F.2d 1097, 1101 (6th Cir. 1984), wherein the Court noted that other courts have not considered an objection to the sufficiency of the investigation as a ground for dismissing the charges of discrimination. Keco Industries, 748 F.2d at 1100. The EEOC further states that because its investigation and determination of reasonable cause is "not an adjudication of rights and liabilities," the sufficiency of its investigation is not relevant to the merits of the underlying dispute. Pl. Brief at 4. Finally, the EEOC asserts that the governmental deliberative process privilege prevents any inquiry into Ms. McDonough's analyses, opinions and recommendations concerning her investigation. Id.

In opposition to the EEOC's motion, Foodcrafters asserts that the EEOC is not entitled to a protective order because Foodcrafters seeks to explore factual information during the proposed deposition and such information is not within the protection of the deliberative process privilege. See Defendants' Memorandum in Opposition to EEOC's Motion for a Protective Order (hereafter "Def. Brief"), at 6. With respect to the EEOC's assertion that Ms. McDonough has no personal knowledge of the matters she investigated, Foodcrafters asserts that such claim is untenable because Ms. McDonough was "the investigator involved in a process

that is a condition precedent to EEOC's right to file suit." Id. at 5. Foodcrafters further contends that in the event a question is posed at the deposition which calls for privileged information or information beyond the knowledge of the witness, counsel may note an appropriate objection to the question at that time. Id. at 7. However, Foodcrafters contends, preventing the deposition entirely would be unfair and prejudicial and without support in fact or law. Id.

II. Discussion

The Federal Rules of Civil Procedure provide the Court with broad authority to prevent discovery or restrict its scope. See generally Fed.R.Civ.P. 26. As an initial matter, parties may only obtain discovery regarding matters that are "relevant to the claim or defense of any party" and are "not privileged." Fed.R.Civ.P. 26(b)(1). The Court may also permit "for good cause" discovery of matters that are "relevant to the subject matter involved in the action." Id. Here, Foodcrafters seeks to depose Ms. McDonough to determine facts she learned during the underlying investigation. See Def. Brief at 5. Although the parties have not specifically addressed the subjects of inquiry for the deposition, the EEOC investigator may have relevant information regarding the discrimination charges, including what she was told by the Intervenor Plaintiffs or other Foodcrafters employees that may corroborate their stories or fill in gaps in the event those who

have been deposed are unable to recall basic information. Cf. EEOC v. Airborne Express, No. Civ. A. 98-1471, 1999 WL 124380, at *1-2 (E.D. Pa. Feb. 23, 1999).

Evidence that is relevant under Rule 26(b)(1) still may not be discoverable under the Federal Rules. Rule 26(c) provides the Court with authority to enter a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" Fed.R.Civ.P. 26(c). Under the standard set forth in Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994), the moving party must demonstrate "good cause" to justify a protective order. The Third Circuit has defined "good cause" as follows:

> 'Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity.' 'Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning,' do not support a good cause showing.

Pansy, 23 F.3d at 786 (citations omitted). Whether good cause for such an order exists depends upon a "balancing of the harm to the party seeking protection (or third persons) and the importance of disclosure to the public." Id. at 787 (quoting Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427, 433-35 (1991)).

In the present case, the EEOC has not met its burden of demonstrating good cause under Pansy for entry of the protective order it seeks. The Court notes that in Keco Industries, relied on

by the EEOC, the Sixth Circuit held that it was error for the district court to examine the adequacy of the EEOC's investigation on a motion for summary judgment because doing so would encourage a two-phase litigation in which the Court first inquires into whether the EEOC had a reasonable basis for its initial finding and then turns to the merits of the case. Keco Industries, 748 F.2d at 1100-01. However, the reasoning set forth in Keco Industries does not support precluding the deposition of an EEOC investigator in cases where the EEOC is a named party. See Airborne Express, 1999 WL 124380, at *2. Therefore, to the extent the EEOC investigator has knowledge of relevant facts, Foodcrafters is entitled to obtain such discovery. In this regard, the Court does not find that the EEOC has articulated good cause to warrant a protective order precluding the deposition of the EEOC investigator.

Furthermore, neither of the contentions raised in the EEOC's supplemental brief constitute good cause justifying a protective order at this time. The Court notes the EEOC's assertion that it has fully complied with the conciliation requirements of Title VII. See Supplemental Letter Brief in Support of Motion for a Protective Order dated January 10, 2005, at 2-3. This argument, however, does not support preclusion of the deposition of the EEOC investigator. The EEOC further contends in its supplemental brief that Foodcrafters has waived its right to challenge the sufficiency of the EEOC's conciliation efforts. Id. at 4-5. Specifically, the

EEOC asserts that under Fed.R.Civ.P. 9(c) it must only aver generally that all conditions precedent have been performed, yet Foodcrafters must raise any challenge to the performance of conditions precedent with a specific denial. Id. (citing Brooks v. Monroe Systems for Business, Inc., 873 F.2d 202, 205 (8th Cir. 1989)). The EEOC states that Foodcrafters failed to specifically deny the general allegation that all conditions precedent were performed. Id. at 4-5. The Court notes that several courts have precluded discovery concerning the substantive aspects of conciliation negotiations, reasoning that allowing such discovery would destroy the openness and informality of the conciliation process and would thereby frustrate the congressional intent behind the conciliation requirement of Title VII. See, e.g., Frazier v. Southeastern Pennsylvania Transportation Authority, Civ. A. No. 84-3004, 1988 WL 117869, at *4 (E.D. Pa. Nov. 1, 1988); Haykel v. G.F.L. Furniture Leasing Co., 76 F.R.D. 386, 392 (N.D. Ga. 1976). Thus, to the extent Foodcrafters seeks discovery on the substantive aspects of conciliation, such discovery is precluded. Moreover, while Foodcrafters may challenge whether the EEOC engaged in conciliation negotiations, the Court notes that the Foodcrafters Defendants did not raise a specific objection in their answers to the complaint as required by Fed.R.Civ.P. 9(c). Therefore, discovery into the procedural aspects of conciliation does not fall within the scope of discovery under Fed.R.Civ.P. 26(b)(1) because

it does not appear to be "relevant to the claim or defense of any party[.]" Nevertheless, this rationale does not support precluding Foodcrafters from taking the deposition of the EEOC investigator as to her knowledge of other information that is relevant to the claims and defenses in this case.

Finally, the Court notes the EEOC's assertion that Foodcrafters' inquiry into the sufficiency of the investigation will purportedly create delay and diversion. Id. However, as set forth above, the EEOC investigator may have knowledge of relevant factual information which Foodcrafters may seek through a deposition. To the extent the EEOC believes that questions posed at the deposition are beyond the scope of discovery permitted by the Federal Rules, it may raise an appropriate objection at that time. The EEOC's contention, however, does not justify entirely precluding the deposition of Ms. McDonough. In addition, the Court rejects the EEOC's assertion that it would be "unduly burdensome to require the EEOC investigators to be subjected to depositions concerning their investigations." Id. at 8. The Court notes that in Leyh v. Modicon, Inc., 881 F. Supp. 420, 425 (S.D. Ind. 1995), the district court granted a protective order preventing the deposition of an EEOC investigator because "[t]he EEOC has plenty of work to do investigating new complaints, and its principal responsibility is to serve the public as a whole, not to work for the benefit of particular litigants." However, in finding that the

litigants' need for information did not justify imposing the burden of discovery on the EEOC, the court in Leyh distinguished those cases in which the EEOC was a party to the action from the case before the Court in which the EEOC was a non-party. Leyh, 881 F. Supp. at 425 n.3. Here, the EEOC is a party and Leyh is distinguishable on that ground. See Airborne Express, 1999 WL 124380, at *2. Consequently, the Court finds that a blanket protective order preventing Foodcrafters from deposing Ms. McDonough is not warranted here.

The Court further finds that the EEOC has not demonstrated that the deliberative process privilege applies to preclude the deposition. The government may invoke the deliberative process privilege to withhold communications regarding confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice, based on the concern that "were [government] agencies forced to operate in a fish bowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." See Redland Soccer Club, Inc. v. Dept. of the Army, 55 F.3d 827, 853-54 (3rd Cir. 1995), cert. denied, 516 U.S. 1071 (1996). The privilege, however, does not apply to factual information or to "communications made subsequent to an agency decision." American Express, 1999 WL 124380, at *1 (citing Redland, 55 F.3d at 854). The Third Circuit has held that the governmental agency seeking to

invoke the privilege must demonstrate its applicability and, in so doing, must present more than a general conclusion that the documents are privileged. See Redland, 55 F.3d at 854 (citing Schreiber v. Society for Savings Bancorp., 11 F.3d 217, 221 (D.C. Cir. 1993)). Moreover, only the head of the governmental agency may properly invoke the privilege, and may only do so after personally considering the material allegedly protected by the privilege. American Express, 1999 WL 124380, at *1 (citing United States v. Ernstoff, 183 F.R.D. 148, 152 (D.N.J. 1998)).

In invoking the deliberative process privilege, the EEOC states that "[a]ny inquiry into the EEOC investigator's rationale, opinion of the evidence or any other activity that reflects her analyses, opinions or recommendations with respect to her investigation or the EEOC's reasonable cause determination would be protected from disclosure by the governmental deliberative process privilege." Pl. Brief at 6. However, the EEOC asserts the privilege without any supporting documentation, such as an affidavit identifying specific information to be shielded. See, e.g., Redland, 55 F.3d at 854 (discussing the government's affidavits about internal, pre-decisional memoranda recommending courses of agency activity); see also Airborne Express, 1999 WL 124380, at *1; Rupert v. U.S., 1:CV-03-0421, 2004 WL 2110383, at *2 (M.D. Pa. Aug. 11, 2004). In addition, the EEOC has not indicated that the agency head personally asserted such privilege. The Court notes that an

"indiscriminate claim of privilege" and a "'generalized interest in confidentiality'" are insufficient bases to protect communications from disclosure. Torres v. Kuzniasz, 936 F. Supp. 1201, 1213 (D.N.J. 1996)(Kugler, J.). Furthermore, "[t]he privilege does not protect factual information . . . [or] apply to communications made subsequent to an agency decision. Moreover, even when the privilege applies, it is not absolute. The courts must balance on an ad hoc basis a number of factors." Airborne Express, 1999 WL 124380 at *1 (citing Redland, 55 F.3d at 1071). The Court therefore finds that the EEOC's blanket invocation of privilege does not provide a sufficient basis for precluding the deposition.

CONSEQUENTLY, for the reasons set forth above and for good cause shown:

IT IS this 3rd day of March, 2005,

ORDERED that the EEOC's motion for a blanket protective order is **DENIED**; and it is further

ORDERED that Foodcrafters shall limit the scope of inquiry during the deposition of the EEOC investigator consistent with this Order and the EEOC may assert any applicable privilege or objection in response to particular deposition questions in accordance with this Order.

s/ Ann Marie Donio
ANN MARIE DONIO
United States Magistrate Judge

cc: Hon. Robert B. Kugler