UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

MOTHERS WORK, INC., OF AMERICA d/b/a LAB CORP.

Defendant.

CIVIL NO. SA-04-CA-873-XR

ORDER

Came on to be considered: plaintiff the Equal Employment Opportunity Commission's ("EEOC") motion to compel discovery filed September 7, 2005;[1] defendant Mothers Work, Inc.'s ("Mothers Work") response filed September 20, 2005;[2] the EEOC's reply filed September 21, 2005;[3] and Mothers Work's advisory filed October 4, 2005.[4]

Procedural History

The EEOC initiated this lawsuit on September 28, 2004, by filing its complaint, with included jury demand, alleging that Mothers Work engaged in unlawful employment practices on the basis of disability in violation of Title I of the Americans with Disabilities Act ("ADA"), and

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[1] Docket no. 24.

[2] Docket no. 29.

[3] Docket no. 30.

[4] Docket no. 31.

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seeking relief for one of Mothers Work's former employees, Monica E. Safarty ("Safarty").[5] In brief, the EEOC alleges that Mothers Work wrongfully discharged Safarty on October 31, 2003 from her position as a regional manager because she was a qualified person with a disability as defined by the ADA and was on an approved medical leave of absence.[6] The EEOC characterizes the ADA claim as "seeking relief for a disabled employee who was terminated when she requested a reasonable accommodation of medical leave."[7] As relief, the EEOC seeks: (a) a permanent injunction enjoining Mothers Work "from discriminating against any qualified employees because of their disabilities by failing to provide reasonable accommodations, terminating qualified individuals because of their disability, and/or engaging in any other employment practice which discriminates on the basis of disability;" (b) a permanent injunction requiring Mothers Work to "institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices, including . . . posting notices regarding its compliance with the ADA;" (c) an order requiring Mothers Work to "make

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[5] 42 U.S.C. §§ 12101 et seq.; docket nos. 1 and 2.

[6] Docket no. 1 at 3. The complaint alleges:

> On or about October 31, 2003 defendant, Mothers Work, Inc., engaged in unlawful employment practices at its San Antonio, Texas location, in violation of Title I of the ADA, 42 U.S.C. §§ 12101 et seq. More specifically, on or about October 31, 2003:
>
> > (a) defendant discharged Monica Sarfaty from her position as a Regional Manager because she was a qualified individual with a disability as defined by the ADA; and
> >
> > (b) defendants discharged Monica Sarfaty from her position of Regional Manager while out on approved medical leave of absence.

Id. at 2-3.

[7] Docket no. 30 at 3.

whole Safarty" by providing back pay and pre-judgment interest as well as reinstatement or front pay; compensation for past and future pecuniary (such as, relocation, job search and medical expenses) and non-pecuniary losses (such as for emotional pain, suffering, inconvenience, loss of enjoyment of life, and humiliation); and punitive damages; and (d) an award of such further relief "as the Court deems necessary and proper in the public interest," including the award of costs to the EEOC.[8]

On January 24, 2005, Mothers Work filed its answer which raises four affirmative defenses: failure to mitigate; failure to satisfy statutory and jurisdictional prerequisites to filing a law suit in a timely manner; punitive damages are barred by Mothers Work's good faith efforts to comply with anti-discrimination laws; and, with respect to the merits, "all actions in the complaint were taken in good faith and without discriminatory, harassing, or retaliatory motive and for legitimate, non-discriminatory reasons."[9]

On April 5, 2005, the District Court entered a scheduling Order which, among other things, established a discovery deadline of December 16, 2005 and a dispositive motion deadline of January 17, 2006.[10] On August 16, 2005, the District Judge approved the parties' agreed protective Order.[11]

Motion to Compel

On September 7, 2005, the EEOC filed a motion to compel discovery and memorandum

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[8] Id. at 3-4.

[9] Docket no. 6 at 2-3.

[10] Docket no. 18.

[11] Docket no. 21.

in support.[12] In brief, the motion seeks an Order compelling Mothers Work to: (a) answer interrogatories 2, 4, 5, and 16 of plaintiff's first set of written interrogatories; (b) produce all documents responsive to requests for production 1, 2, 3, 4, 6, 13, 17, 18, 19, 20 and 28 of the EEOC's first request for production of documents; and (c) produce a privilege log for any information or documents withheld on a claim of privilege.[13] On September 20, 2005, Mothers Work filed its response which, in addition to arguments on the scope of discovery, presents substantive arguments challenging discovery regarding requests for production 1, 17, and 19 as well as each of the challenged interrogatories.[14] In brief, Mothers Work argues certain of the discovery requests are over-broad, perhaps relating to an FMLA cause of action, not alleged in the complaint, but not the single ADA claim included in the complaint.[15] Mothers Work further represents that certain information, withheld until the agreed protective order was filed, has since been or will be produced, and other information was withheld under a claim of attorney-client or work product privileges.[16] On September 21, 2005, the EEOC filed its reply, re-urging arguments in support for the scope of information sought in the interrogatories and requests for production at issue as well as arguing Mothers Work has not been forthcoming with discovery

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[12] Docket no. 24.

[13] Id. at 18.

[14] Docket no. 29.

[15] Docket no. 29 at 1.

[16] Id. at 2.

promised in its response.[17] On October 4, 2005, Mothers Work filed an advisory listing documents produced to the EEOC the previous day.[18]

Discussion

Standards

Rule 26 of the Federal Rules of Civil Procedure specifies certain types of information that must be initially disclosed without a discovery request and also provides methods for the discovery of additional matters.[19] With respect to the scope of discovery, Rule 26 states:

> Parties may obtain discovery regarding **any matter, not privileged, that is relevant to the claim or defense of any party**, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. **For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.**[20]

Discovery must not be "unreasonably cumulative or duplicative."[21] Rule 26 provides that the parties may obtain additional discovery through written interrogatories or requests for production of documents and other items.[22]

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[17] Docket no. 30. The EEOC argues that "[b]ecause Mothers Work continues to violate the letter and spirit of the discovery rules by refusing to produce even the most basic employment documents relevant to this case," an award of sanctions and costs is appropriate. Id. at 4.

[18] Docket no. 31.

[19] FED. R. CIV. P. 26.

[20] FED. R. CIV. P. 26(b)(1) (emphasis added).

[21] FED. R. CIV. P. 26(b)(2).

[22] FED. R. CIV. P. 26(a)(5).

Federal Rule of Civil Procedure 33 provides that a party may serve upon any other party written interrogatories in order to discover any information relevant under Rule 26(b)(1).[23] Interrogatories are not to exceed twenty-five (25) in number including discrete sub-parts, without first obtaining leave of court.[24] Federal Rule of Civil Procedure 34 permits discovery of documents "which are in the possession, custody, or control of the party upon whom the request is served."[25] Rule 37(a)(2)(B) provides that if a party fails to answer an interrogatory or produce requested documents, the discovering party may move for an order compelling an answer.[26] An "evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond."[27]

Scope of Discovery

As a threshold matter, the Court addresses the scope of discovery, an issue pertinent to many of the disputed requests. The complaint asserts a cause of action for disability discrimination in violation of the ADA. A plaintiff makes a prima facie showing of disability discrimination in violation of the ADA discrimination by establishing that she: (1) was disabled or regarded as disabled; (2) qualified for the job; (3) was subjected to an adverse employment action on account of her disability; and (4) was replaced by or treated less favorably than a

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[23] FED. R. CIV. P. 33(a) & (c).

[24] FED. R. CIV. P. 33(a).

[25] FED. R. CIV. P. 34(a).

[26] FED. R. CIV. P. 37(a)(2)(B).

[27] FED. R. CIV. P. 37(a)(3).

non-disabled employee.[28] A "qualified person with a disability" is a person who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[29] A "reasonable accommodation," according to statutory and case law, "may include job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, or other similar accommodations for individuals with disabilities."[30]

A central theme of Mothers Work's objections is the scope of discovery sought in the disputed interrogatories and document requests. In essence, Mothers Work might concede that certain of the information requested relates to the "subject matter" of discrimination, but argues it is not relevant to the asserted "claim" of wrongful discharge of Safarty in violation of the ADA or any "defense" asserted by Mothers Work's to the ADA claim. Accordingly, Mothers Work opposes several requests on the grounds of relevance, over-breadth, and burdensomeness. The EEOC's motion and reply do not expressly ask the Court to enter a finding of "good cause" to

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[28] McInnis v. Alamo Cmty. Coll. Dist., 207 F.3d 276, 279-80 (5th Cir.2000).

[29] 42 U.S.C. § 12111(8).

[30] 42 U.S.C. § 12111(9). The ADA prohibits discrimination based on disability regarding leave, including leave of absence, sick leave or other leave, 29 C.F.R. § 1630.4. The EEOC cites the Ninth Circuit's decision in Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1128, 1135-36 (9th Cir. 1999), cert. denied, 535 U.S. 1011, 122 S.Ct. 1592 (2002), which held:"A leave of absence for medical treatment may be a reasonable accommodation under the ADA." Docket no. 30 a 4 n.9. Title 29, C.F.R. § 1630.2(o), also cited by plaintiff, defines "reasonable accommodation" and provides a non-exhaustive list of reasonable accommodations which does not, it should be noted, include a request for a medical leave of absence or medical leave.

allow expanded "subject matter" discovery, but assert that the challenged requests, for example for information on any manager nationwide who requested FMLA or medical leave for any reason, are appropriate, on several grounds, including:[31]

- the information "'appears reasonably calculated to lead to the discovery of admissible evidence;'"[32]

- "[t]he scope of discovery is never limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues;"[33]

- "it is appropriate to allow the EEOC to inquire as to whether other persons complained that medical leave was being unlawfully denied to them because they are major sources of relevant information concerning Mothers Work Inc.'s employment practices;"[34]

- Mothers Work allegedly terminated Safarty's employment after she requested medical leave;

- Mothers Work's termination of Safarty's employment was tantamount to a denial of a request for an accommodation, an element of an ADA claim, because "the accommodation sought by Ms. Safarty to accommodate her disability was medical leave"[35] through the

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[31] Many of the cases cited by the EEOC in support of its arguments on relevance and scope pre-date the amendment to Rule 26 which limited the initial scope of discovery to claims and defenses, without a finding of good cause. See docket no. 24 at 5 nn. 8, 9, 10; and at 8 n.19.

[32] Docket no. 24 at 5 (citation omitted).

[33] Id. (citation to a 1995 Tenth Circuit case quoting a 1978 United States Supreme Court case omitted).

[34] Id. at 6; docket no. 30 at 3 ("The medical leave information sought by the EEOC is relevant to this lawsuit because Ms. Safarty sought an accommodation of medical leave.").

[35] Id. at 6.; docket no. 30 at 3.

submission of an FMLA leave act form;[36]

- "[w]hether other employees complained to Mothers Work, Inc. that they were being denied medical leave under similar circumstances as Ms. Safarty, **even if the employees were not disabled as defined under the ADA**, should be considered by a jury in determining whether the company was aware of its legal responsibilities to grant medical leave to eligible employees;"[37] and

- the request is not burdensome as "Mothers Work's Human Resources Department already maintains detailed Excel spreadsheets identifying those employees who have taken medical leave."[38]

Although the contested discovery requests well-illustrate that decisions on relevance are tied to the facts and arguments presented, decisions that can be re-evaluated as facts are developed, the Court does not agree that this record justifies the entry of a finding of "good cause" allowing discovery of certain of the contested requests, for example, all employees or managers who were denied medical leave for any reason[39] or that such a request seeks information relevant to plaintiff's ADA claim. The EEOC's contention that it expects the information could show a "pattern and practice of discriminating against those employees requesting medical leave" which would be "evidence of pretext"[40] is, on this record, genuinely

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[36] Docket no. 24 at 7.

[37] Id. (emphasis added).

[38] Docket no. 30 at 3.

[39] See discussion of interrogatory 4 below.

[40] Id. at 4.

debatable. If the manager in question was not requesting medical leave as an accommodation for a disability within the purview of the ADA, arguably the company's response to that leave request would be irrelevant to whether Mothers Work violated the ADA when it terminated Safarty's employment after asking for an accommodation or determining whether has a "pattern and practice" of discriminating based on a disability.[41] To the extent a disputed discovery request seeks "subject matter" discovery without providing "good cause," the request must be disallowed. The Court's rulings on the EEOC's motion to compel limit discovery to non-privileged information relevant to a "claim or defense."

Requests for Production Nos. 1, 2, 3, 4, 6, 13, 18, 19, 20, and 28

Mothers Work, with the protective order in place, has represented in its response that it has or will produce all responsive non-privileged documents in its possession, custody, and

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[41] The EEOC argues a March 2004, affidavit produced by the former head of Human Resources of Mothers Work produced in a lawsuit in the United States District Court for the District of Massachusetts apparently involving FMLA leave for pregnancy-- not an ADA cause of action – demonstrates the relevance of its requests for information about other employees' requests for medical leave (docket no. 24 at 5-6 and its exhibit 8). Although the EEOC argues it is aware that "various members of management" have sued Mothers Work for violations of Title VII, FMLA, and ADA after being terminated "for requesting medical leave," and asserts the circumstances were "similar" to Safarty's, the EEOC does not expressly represent that the "various" employees requested medical leave as an accommodation under the ADA, the claim asserted by Sarfarty (id. at 6 n.12). That the U. S. Department of Labor may have concluded Mothers Work violated the FMLA when terminating Safarty's employment while she was on "approved medical leave" (id. at 7 n.14) does not change the result, as Safarty asserts an ADA claim, not an FMLA claim, in this case.Such arguments are not sufficient to show that any Mothers Work employee or manager's request for medical leave – every doctor's appointment and sick day nationwide – is relevant to plaintiff's ADA claim asserted in this case. To conclude otherwise, would construe "relevance" so broadly to nullify the need for particularized inquiry and "good cause" to pursue "subject matter," as opposed to "claim or defense," discovery.

control responsive to requests for production 1, 2, 3, 4, 6, 13, and 19,[42] and will continue to search for documents responsive to requests 18, 20, and 28 and produce any non-privileged responsive documents it locates.[43] But, the EEOC maintains that Mothers Work "continues to violate the letter and spirit of the discovery rules by refusing to produce even the most basic employment documents relevant to this case," such as Mothers Work's hiring, leave, and disciplinary policies, its entire "reference manual" in effect in October 2003, as well as Safarty's personnel file.[44] On October 4, Mothers Work filed an advisory to indicate it had disclosed the personnel files of Safarty and her manager and the relevant policies from its policy and procedure manual.[45]

In sum, based on Mothers Work's representation that it will produce all responsive non-privileged documents, subject to its continuing duty to disclose, and based on its advisory, the EEOC's motion to compel all responsive non-privileged documents in response to requests for production 1, 2, 3, 4, 6, 13, 18, 20, and 28 is **denied as moot**, subject further to the rulings below, as appropriate, including the production of a privilege log.[46]

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[42] Mothers Work continues to assert a privilege objection to request for production 19 which is addressed further below.

[43] Docket no. 29 at 3-4.

[44] Docket no. 30 at 2, 4.

[45] Docket no. 31 at 1 and its exhibit A.

[46] For clarity, the Court notes Mother's Work's representation it will produce all non-privileged information responsive to request 19, but, for clarity, reserves its ruling on the motion to compel further response to request 19, to a discussion of attorney client and work product privileges below. Mothers Work's attorney work product, including attorney's notes, is exempt from discovery pursuant to FED. R. CIV. P. 26(b)(3). Opinion work product, consisting of the mental impressions, conclusions, opinions, or legal theories of an attorney or other legal

Interrogatory 2

Interrogatory 2 asks for the identification of "all specific legal or factual contentions which form the basis for your defense in this lawsuit."[47] Mothers Work objected on the basis of work-product and acknowledged a continuing duty to disclose. Mothers Work further responded:

> Mothers Work contends it terminated Ms. Safarty for legitimate, non-discriminatory reasons and that it made good faith efforts to comply with anti-discrimination laws at all times and has adopted, publicized, and enforced against the type of discrimination alleged in the Complaint.[48]

No further factual or legal contentions were disclosed.

The information requested in interrogatory 2 falls well within the scope of permitted discovery. The EEOC's motion to compel all non-privileged information in response to interrogatory 2 is **granted**, subject to the production of a privilege log and Mothers Work's continuing duty to disclose, Mothers Work must serve a supplementary response to interrogatory 2 within ten (10) days of the date of this Order.

Request for Production 19

Request for Production 19 seeks "[a]ll documents of Mothers Work, Inc. addressing the reasons for terminating Monica Sarfaty for the month of October 2003.[49] Mothers Work responded:

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representative of Mothers Work also is not discoverable. FED. R. CIV. P. 26(b)(3).

[47] Docket no. 24, exhibit 1 at 10.

[48] Id., exhibit 3 at 2.

[49] Docket no. 24, exhibit B.

> Mothers Work objects to producing information or documents privileged from disclosure under the attorney-client privilege, the attorney work-product doctrine and/or other applicable privilege or protection from discovery, including, but not limited to, information or documents gathered by counsel from persons other than defendants in defense of this litigation. Subject to and without waiver of this objection, Mothers Work has already produced to plaintiff documents addressing the reasons for terminating Ms. Sarfaty. As discovery in this matter is ongoing, Mothers Work reserves the right to supplement its response with additional responsive documents identified during the course of its investigation.[50]

The parties appear to agree that documents relating to Sarfaty's termination are relevant to the EEOC's claim. In the post-reply advisory, Mothers Work indicates that certain information responsive to request 19, as well as request 1 discussed above, has been produced.

The parties disagree over whether and to what extend Mothers Work may be entitled to assert the attorney-client or work product privileges to resist disclosure of certain documents. Mothers Work represents that in-house counsel Craig Swartz ("Swartz") was involved in communications with Mothers Work employees concerning the decision to terminate Sarfaty and even though he signed the termination letter, Mothers Work did not waive its attorney-client privilege regarding "all communications that were necessary to create the document."[51] Mothers Work also invokes the work product privilege regarding legal advice Swartz provided from "approximately October of 2003 until the present," as Swartz considered such advice to be "in anticipation of litigation."[52] On the other hand, the EEOC argues that "[b]y writing and signing the termination letter, Swartz made himself a fact witness subject to discovery," and the EEOC should be permitted to delve into the facts leading to the termination, regardless of whether they

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[50] Id., exhibit 4 at 8-9.

[51] Docket no. 29 at 8-9.

[52] Id. at 9.

involve Swartz.[53]

The attorney-client privilege generally protects confidential communications made by a client to his lawyer for the purpose of obtaining legal advice. A corporate client has a privilege to refuse to disclose, and prevent its attorneys from disclosing, confidential communications between its representatives and its attorneys when the communications were made to obtain legal services.[54] Inquiry into the substance of the client's and attorney's discussions implicates the privilege and an assertion of the privilege is required to preserve it.[55] Meanwhile, the attorney work-product privilege first established in Hickman v. Taylor,[56] and codified in FED. R.CIV. P. 26(b)(3) for civil discovery, protects from disclosure materials prepared by or for an attorney in anticipation of litigation.[57] Since Hickman, courts have reaffirmed the strong public policy on which the work-product privilege is grounded. The Supreme Court in Upjohn found that "it is essential that a lawyer work with a certain degree of privacy" and further observed that if discovery of work product were permitted "much of what is not put down in writing would remain unwritten" and that "the interests of clients and the cause of justice would be poorly served."[58]

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[53] Docket no. 24 at 16-17.

[54] Nguyen v. Excel Corporation, 197 F.3d 200, 206 (5th Cir. 1999) (citing Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677 (1981)).

[55] Id.

[56] 329 U.S. 495, 67 S.Ct. 385 (1947).

[57] Hickman, 329 U.S. at 510-511, 67 S.Ct. at 393-94.

[58] Upjohn, 449 U.S. at 397-398, 101 S.Ct. at 686-87.

The EEOC has cited no authority in support of its contention that Swartz's act of signing the letter terminating Safarty's employment waives the attorney client privilege regarding all communications between Swartz and Mothers Work employees and representatives regarding the termination decision. Similarly, the EEOC has not demonstrated that it is not reasonable for Swartz to have concluded that documents he created from October, 2003, through December 15, 2003, to the present pertaining to Safarty were in anticipation of litigation.[59] For purposes of the motion to compel, the EEOC has not overcome Mothers Work's asserted privileges.

In sum, the EEOC's motion to compel all responsive non-privileged documents in response to request for production 19 is **granted**; to the extent not already accomplished, Mothers' Work must produce non-privileged responsive documents within ten (10) days of the date of this Order, subject to the production of a privilege log pursuant to FED. R. CIV. P. 26(b)(5), as further discussed below, as well as Mothers Work's continuing duty to disclose subsequently discovered non-privileged responsive documents.

Interrogatories 4, 5 and 16 and Request for Production 17

Interrogatories 4, 5 and 16 and request for production 17 share the common themes of seeking information related to either past or present employees of Mothers Work and medical leave. Interrogatory 4 asks Mothers Work to "[i]dentify all employees who have complained to Mothers Work, Inc. that they have been denied a request for medical leave."[60] Interrogatory 5 asks Mothers Work to "[i]dentify former employees of Mothers Work, Inc., including members

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[59] Mothers Work terminated Safarty's employment in October 2003 and Safarty filed her EEOC charge on December 15, 2003.

[60] Docket no. 24, exhibit 1 at 10.

of management, who were terminated by Mothers Work, Inc. while on approved medical leave."[61] Interrogatory 16 asks Mothers Work to "[i]dentify all members of management of Mothers Work, Inc. including District Managers, who have requested medical leave as an accommodation for a disability . . . [and] for each person identified, state date and basis of the request whether the leave was granted and the employee's current employee status."[62] Finally, request for production 17 seeks "[a]ll complaints of discrimination alleging that Mothers Work, Inc. denied medical leave to employees."[63] Mothers Work has objected to producing the requested information on the following grounds: the information is not relevant to the ADA claim or any defense, the requests are not reasonably limited in time and scope, the information is private or personal or confidential, and production is overly burdensome.[64]

At this stage of the case, the Court accepts as true the allegations in the complaint. Further, the Court assumes that a request for medical leave, under appropriate circumstances, might be a reasonable accommodation for a qualified disability.[65] But, the specific factual allegations regarding Safarty's specific situation are almost nonexistent. For example, it is unknown at this time the nature and characteristics of Safarty's alleged disability or whether leave to seek medical treatment or an extended leave of absence might enable Safarty to perform the essential functions of her job. Presumably, such matters would inform a determination of

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[61] Id.

[62] Id., exhibit 1 at 12-13.

[63] Id., exhibit 2 at 9.

[64] Id., exhibit 3 at 5-6, 8-9; Id., exhibit 4 at 8.

[65] See note 30, above.

relevance.

On the record here developed, the EEOC's motion to compel a response to interrogatories 4 and 5 and request for production 17 are **denied** on the ground that the EEOC has not demonstrated such information is relevant to a claim or defense; the EEOC's motion to compel a further response to interrogatory 16 is **granted**, limited to the four-year period of October 1, 2001 through October 31, 2005, on the ground that information about other managers who expressly requested medical leave as an accommodation for a disability is relevant to the EEOC's ADA claim and, to the extent not already accomplished, Mothers' Work must serve a supplementary response to interrogatory 16 to provide non-privileged responsive information within ten (10) days of the date of this Order, subject to the production of a privilege log pursuant to FED. R. CIV. P. 26(b)(5), as further discussed below, as well as Mothers Work's continuing duty to disclose.

Conclusion

Based on the foregoing analysis,

IT IS ORDERED that the EEOC's motion to compel[66] is **GRANTED in part** and **DENIED in part** as provided in this Order, namely:

the motion to compel further response to requests for production 1, 2, 3, 4, 6, 13, 18, 20 and 28 are **denied as moot**, subject to the requirement that Mothers Work serve a privilege log regarding any information or document withheld on a claim of privilege and subject to the continuing duty to disclose;

the motion to compel further response to interrogatory 2 is **granted**, subject to the

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[66] Docket no. 24.

production of a privilege log and Mothers Work's continuing duty to disclose, Mothers Work must serve a supplementary response to interrogatory 2 within **ten (10) days** of the date of this Order;

the motion to compel further response to request for production 19 is **granted**; to the extent not already accomplished, Mothers' Work must produce non-privileged responsive documents within **ten (10) days** of the date of this Order, subject to the production of a privilege log as well as Mothers Work's continuing duty to disclose subsequently discovered non-privileged responsive documents;

the motion to compel a further response to interrogatories 4 and 5 and request for production 17 are **denied**; and

the motion to compel a further response to interrogatory 16 is **granted**; to the extent not already accomplished, Mothers' Work must serve a supplementary response to interrogatory 16 to provide non-privileged responsive information limited to the period of October 1, 2001 through October 31, 2005, within **ten (10) days** of the date of this Order, subject to the production of a privilege log as well as Mothers Work's continuing duty to disclose.

IT IS ALSO ORDERED that, if not already accomplished, within **ten (10) days** of the date of this Order, Mothers Work must serve on the EEOC a privilege log pertaining to responsive information not disclosed subject to a claim of attorney-client or attorney work product privilege pursuant to FED.R.CIV.P. 26(b).

IT IS ALSO ORDERED that the EEOC's request for fees and costs[67] is **DENIED**.

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[67] Docket no. 30 at 4.

IT IS ALSO ORDERED that any other relief requested in the motion to compel not expressly granted is **DENIED**.

IT IS ALSO ORDERED that this case is **RETURNED** to the District Court.

NOTICE OF RIGHT OF REVIEW AND APPEAL

Pursuant to Fed.R.Civ.P. 72, Rule 4 in Appendix C of the Local Rules of this Court[68] and 28 U.S.C. § 636(b)(1) , unless otherwise ordered by the District Judge, any party objecting to any portion of this Order must file and serve a written objection within **ten (10) days** of the date of this Order.

ORDERED, SIGNED AND ENTERED this 14 day of October, 2005.

Pamela A. Mathy
United States Magistrate Judge

[68] With respect to non-dispositive rulings, Rule 4 provides, in pertinent part, "[a]ny party may appeal from a magistrate judge's order determining a motion or matter under subsection 1(c) of these rules, supra, [a non-dispositive ruling] within 10 days after issuance of the magistrate judge's order . . ." The District Judge will "set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law. The judge may also reconsider sua sponte any matter determined by a magistrate judge under this rule."