IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

WALKESHEIA WARD, DARLENA McBRIDE, TANYA GARDNER, ROBERT DONELSON, RAQUEL MAIDEN, CHARLES SMITH, LARONICA WILLIAMS, LATOYA YOUNG, MACHELLE GUY, ROSCOE HAYMON, ROBERT WILLIAMS, and DAMENICA JOHNSON, Plaintiffs, vs. VON MAUR, INC., Defendant.	No. 3:04-cv-00159-RP-RAW (Consolidated for pretrial purposes with 4:06-cv-00182-RP-RAW)
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, vs. VON MAUR, INC., Defendant.	RULING ON DEFENDANT'S MOTION TO STRIKE EXPERT OPINIONS OR COMPEL PRODUCTION OF EEO-1 REPORTS
DARLENA McBRIDE, TANYA GARDNER, ROBERT DONELSON, RAQUEL MAIDEN, CHARLES SMITH, LARONICA WILLIAMS, LATOYA YOUNG, ROSCOE HAYMON, and ROBERT WILLIAMS, Plaintiff-Intervenors, vs. VON MAUR, INC., Defendant.	

The issue presented by the captioned motion [128] concerns the discoverability of EEO-1 reports submitted by local area "comparator" employers and considered by plaintiffs' expert, Dr. Jerry Goldman, in making a statistical analysis of Von Maur's Davenport, Iowa workforce.

On August 26, 2007 the EEOC and individual plaintiffs produced Dr. Goldman's report to Von Maur. The report was based in part on "various EEO-1 reports for Von Maur and competitive comparison properties for the years 2003 and 2004" provided to Dr. Goldman by the EEOC. (Motion Ex. 1 at 1). Based on pooled workforce data gleaned from the EEO-1 reports of comparator employers Dr. Goldman concluded "that the average percentage representation of African-American employees in Von Maur facilities in Davenport is disparately low in relation to average African-American employee representation in comparable properties in 2003 and to a statistically significant degree in 2004." (Id. at 4).

On October 1, 2007 the EEOC sent to Von Maur the EEO-1 reports provided to Dr. Goldman. Dr. Goldman's deposition was taken by Von Maur in two sessions in the first part of November 2007. At the deposition Von Maur's counsel requested the EEOC produce additional EEO-1 reports. After considering this request the EEOC's counsel, Mr. Dennis McBride, wrote to Von Maur's counsel advising the EEOC had determined that while it was authorized to produce EEO-1 reports to its expert, it was not authorized to produce the

reports to Von Maur's counsel. Mr. McBride asked that Von Maur return the EEO-1 reports "inadvertently produced" to Von Maur's counsel, except for those of Von Maur itself. Thinking it could not adequately respond to Dr. Goldman's opinions without the ability to analyze the same data on which he had relied, Von Maur resisted return of the reports. An exchange of correspondence ensued over the course of the next month and a half in which the plaintiffs proposed that the EEOC would produce data from EEO-1's without identifying the comparators from which the information had been drawn, or produce the data in pooled form identifying the comparators pooled but without identifying data specific to each comparator. These proposals were not acceptable to Von Maur, though Von Maur did return the disputed EEO-1 reports.

In early February 2008 the parties reached agreement in principle on a protective order which would, subject to certain restrictions, permit Von Maur and its experts to have access to and use the EEO-1 reports in this litigation. Final agreement fell apart when Von Maur objected to plaintiffs' argument in resistance to Von Maur's motion to modify scheduling order which, in Von Maur's view, violated the spirit of what it thought was the parties' agreement to take the EEO-1 issue off the table. Von Maur now moves to strike Dr. Goldman's opinions to the extent based on the EEO-1 reports or, alternatively, compel production of the EEO-1 reports provided to Dr. Goldman under an order permitting the use

of the reports by Von Maur and its experts in pretrial preparation and at trial.

Section 709(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(c), requires employers subject to the act to make such reports to the EEOC as it may prescribe by regulation or order. The EEOC requires each employer with more than 100 employees to, on or before September 30 of each year, send in an "Employer Information Report EEO-1" indicating the racial, ethnic and gender makeup of its workforce in various job categories. (Motion Resp., Decl. of McBride, Ex. C). 29 C.F.R. § 1602.7. Section 709(e) restricts the public disclosure of this information by EEOC officers or employees:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this chapter involving such information.

42 U.S.C. § 2000e-8(e). Violation of § 709(e) is a misdemeanor.

Plaintiffs argue § 709(e) means that "[t]he EEOC must keep each employer's information confidential unless the EEOC sues that employer." (Opp. to Motion at 8). The Court believes such a construction is at odds with the text of the statute.

The parties have identified only one case addressing the scope of the § 709(e) restriction, EEOC v. Area Erectors, Inc., 247 F.R.D. 549 (N.D. Ill. 2007). The EEOC and plaintiff-intervenor in

that case alleged the defendant employer had terminated the intervenor and other African-American employees because of their race. The employer sought the production of all EEO-3 reports submitted by sixteen labor organizations from January 1, 2005, a form of report also required by the EEOC under its § 709 authority. Id. at 550; see 42 U.S.C. § 2000e-8(c). The EEOC objected, arguing § 709(e) prohibited disclosure. Area Erectors, 247 F.R.D. at 550. The court agreed, holding the action before it "[did] not 'involve' the EEO3 [sic] reports because this case concerns the wrongful termination of Defendant's employees based on race, not the wrongful refusal to hire." Id. at 551. As the racial makeup of the employment pool available to the employer was not at issue, the case did not "involve" reports which would have contained that data. Id. The court's discussion of the issue suggests the ruling might have been different had the case, like this one, involved the disparate treatment of African-Americans in hiring decisions.

If Congress had intended that an employer's workforce information be kept confidential unless the EEOC sued that employer, it could have said so in language prohibiting public disclosure "prior to the institution of a proceeding under [Title VII] against an employer providing such information," or the like. Instead, the statute prohibits public disclosure under § 709 only "prior to the institution of *any* proceeding under [Title VII] *involving* such information." (Emphasis added). The broad italicized

operative terms do not require the EEOC to maintain the confidentiality of an employer's EEO-1 reports unless the EEOC sues that employer. This construction is consistent with the legislative history indicating the disclosure provisions of Title VII were intended as "a ban on *publicizing* and not on such disclosures as is necessary to the carrying out of the Commission's duties under the statute." EEOC v. Assoc. Dry Goods Corp., 449 U.S. 590, 599 (1981)(quoting 110 Cong. Rec. 12819 (1964), remarks by Senator Humphrey)(emphasis original to Supreme Court).

These consolidated (for pretrial purposes) cases are proceedings under Title VII. In the Ward case the plaintiffs allege they were denied employment in 2003 or 2004 on the basis of their race as part of a pattern or practice of racial discrimination by Von Maur. In the EEOC case the Commission, in the exercise of its enforcement authority, sues on behalf of the class of African-Americans who were not hired for warehouse, truck driver and sales associate positions on the basis of race. Statistical evidence usually plays a critical role in both pattern and practice and class action disparate treatment cases. 1 L. Larson, Employment Discrimination § 9.03[1] at 9-14.2 (2d Ed. 2005); see Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977); Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977). The disclosure of the EEO-1 reports to Dr. Goldman reflects a judgment by the EEOC that the disclosure was warranted in carrying out its duties under

Title VII. The EEO-1 reports "detail the workforce racial composition of both Von Maur and the competition that may be used as a comparison standard," (Motion Ex. 1 at 2), and as such they are an important indicator in determining "the racial composition of the qualified . . . population in the relevant market." Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650 (1989)(quoting Hazelwood, 433 U.S. at 308). The workforce composition of other similar "comparator" employers to be found in the EEO-1 reports given to Dr. Goldman is therefore involved in this case, and may be disclosed to Von Maur for litigation purposes.

The EEOC's offer to provide information from the EEO-1 reports in a manner which would not identify the data as to each comparator store would perhaps enable Von Maur to meet Dr. Goldman's opinion based on a statistical analysis of the comparators' workforces, but if the statute does not prohibit disclosure of the EEO-1's to Von Maur, the fact the plaintiffs' expert has considered them, and indeed relied on them in forming his principal opinion, entitles Von Maur to the same documents. See Fed. R. Civ. P. 26(a)(2)(B) and Advisory Committee Notes to 1993 Amendments (Rule 26 expert disclosure obligation requires disclosure of all materials furnished to experts in forming their opinions); Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co., 412 F.3d 745, 750 (7th Cir. 2005)("A testifying expert must disclose and therefore retain whatever materials are given to

him to review in preparing his testimony . . . ."); Kooima v. Zacklift Int'l, Inc., 209 F.R.D. 444, 446-47 (D.S.D. 2002)(all documents and information disclosed to testifying expert are discoverable).

While the disclosure to Von Maur of the EEO-1's considered by Dr. Goldman is not prohibited, the information in them from other employers should not be publicized beyond what is necessary to prosecute or defend this litigation. Confidential information is usually subject to disclosure under a protective order. Federal Market Committee v. Merrill, 443 U.S. 340, 362 n.24 (1979). It is therefore appropriate to cabin the disclosure of the EEO-1 reports to the four corners of this lawsuit as the parties contemplated in the protective order to which they were at one point prepared to agree. The terms of the draft protective order in the motion papers appear adequate to the task. By separate filing the Court has entered the protective order with one substantive modification, deleting the last sentence of paragraph 3, which pertains to trial and is unnecessary.

As part of the present motion Von Maur asks that the Court enter an order permitting the use of the EEO-1 reports by defendant and its experts at trial. The receipt and use of confidential information at trial is always subject to the control of the trial judge. The trial court has many means at its disposal to protect the EEO-1 reports and the information in them from

disclosure beyond what is necessary. The handling of the EEO-1 reports at trial is a matter properly reserved for the final pretrial process.

The Court will not strike Dr. Goldman's expert opinions based on the EEO-1 reports. To this point no prejudice has occurred to Von Maur, and with trial still six months away it is premature to consider a sanction under Fed. R. Civ. P. 37(c)(1).

Motion [128] **granted in part and denied in part.** The motion to strike is denied. The motion to compel is granted and the EEOC shall produce to Von Maur the EEO-1 reports provided to plaintiffs' expert subject to the protective order entered this date.

IT IS SO ORDERED.

Dated this 4th day of April, 2008.

ROSS A. WALTERS
UNITED STATES MAGISTRATE JUDGE