

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SONDRA W. HYMAN, *et al.*,

Plaintiff,

v.

FIRST UNION CORPORATION, *et al.*,

Defendant,

Civil No. 94-1043 (RCL)

FILED

JUN 21 2001

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM AND ORDER

This matter comes before the court upon a motion by the United States Equal Employment Opportunity Commission (the "EEOC") to intervene and compel defendant First Union Corporation ("First Union") to disclose documents sealed under a Protective Order and Joint Stipulation ("POJS") entered into in the above titled matter. For the following reasons, the EEOC's motion shall be denied.

I. FACTS

On May 12, 1994, former First Union employees filed a civil action, Case No. 94-1043, against the defendant, claiming age and race discrimination. On March 1, 1996, this Court entered a POJS in the case, with terms agreed upon by First Union and 123 plaintiffs, which required that certain categories of disclosed documents be filed under seal. A negotiated settlement conclusively resolved the case on October 22, 1997.

Shortly after suit was filed, on September 8, 1994, Commissioner Joyce E. Tucker, on behalf of the EEOC, charged First Union with the violation of Section 703 of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* and Section 4(a) of the Age Discrimination in Employment Act of 1967, *as amended*, 29 U.S.C. § 626 *et seq.* The EEOC alleged that First Union's layoff, discharge, transfer, and rehiring practices unlawfully discriminated against Blacks and persons over the age of 40, who held management positions with the corporation.

On May 10, 2000, after reviewing information collected from questionnaires issued to former First Union employees; on-site reviews conducted at First Union offices in Charlotte, North Carolina, and McLean, Virginia; interviews with First Union officials, who were directly involved with the corporation's termination and hiring processes; and diskettes containing First Union employee personnel file data, the EEOC issued a reasonable cause decision on Commissioner Tucker's charge, EEOC Charge Number 835-94-0005. The EEOC concluded that of the approximately 240 former employees, who initiated the above titled civil action, 30 were eligible for class relief. On September 6, 2000, the EEOC moved to intervene in this case and compel disclosure of the documents sealed under the POJS. This court today denies the EEOC's motion.

II DISCUSSION

A. Issues Presented

First Union argues that this court should prevent the EEOC from intervening and disturbing the protective order in the above titled action, because: (1) First Union would be prejudiced by such a disclosure, and (2) the EEOC has failed to show a compelling need for

documents to be unsealed.

1. Permissive Intervention

Rule 24(b) of the Federal Rules of Civil Procedure states that "[u]pon timely application anyone may be permitted to intervene in an action...when a statute of the United States confers a conditional right to intervene." Fed.R.Civ.P. 24(b). The Court of Appeals for this Circuit has concluded that Rule 24(b) "vests district courts with considerable discretion" in determining whether to allow intervention. *See EEOC v. National Children's Center, Inc.*, 146 F.3d 1042, 1046 (D.C. Cir.1998). After reviewing the facts on record and the arguments advanced by both parties, this Court believes that the EEOC should not be allowed to intervene and compel disclosure of court sealed documents. First Union would be prejudiced if such a disclosure was ordered, and the EEOC has failed to demonstrate a compelling need for the documents.

a. Prejudice to First Union

Unsealing the documents would be prejudicial to First Union. The Court of Appeals for this Circuit has consistently held that "a motion for intervention after judgment will usually be denied where a clear opportunity for pre-judgment intervention was not taken." *Associated Builders and Contractors, Inc. v. Herman*, 166 F.3d 1248, 1256 (D.C. Cir.1999) (citing *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir.1986) and citing *Massachusetts School of Law v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997)). During the course of its investigation of the Commissioner's charge, the EEOC was fully aware of the civil suit pending against First Union, yet failed to act when the parties proposed that a POJS be entered by this Court. Now,

more than three years after this suit was resolved, the EEOC attempts to intervene and alter the Court's order of March 1, 1996.

The EEOC alleges that regulatory and statutory mandates, which require that an investigation be completed before the Commission intervenes, prohibited it from joining the civil suit at the time when the POJS was being submitted and entered. *See* EEOC's Reply Memorandum at 4. However, the EEOC fails to cite any authority to justify such an assertion. The section of the statute authorizing EEOC intervention in ongoing civil actions simply states that "[t]he Commission shall have the power...to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved respondent other than a government, governmental agency or political subdivision." 42 U.S.C. § 2000e-4(g)(6). And the section describing the method for intervention states that "[u]pon timely application, the court may, in its discretion, permit the Commission...to intervene in such civil action upon certification that the case is of general public importance." 42 U.S.C. § 2000e-5(f)(1). The plain text of the statute does not indicate that an investigation must be completed before intervention can occur. Moreover, the EEOC could have taken steps short of formal intervention to voice its concerns with this Court, especially if, as the EEOC now asserts, First Union was attempting to undermine the Commission's investigatory power by having the POJS entered. *See* EEOC's Reply Memorandum at 5.

In effect, through its inaction, the EEOC set a trap for First Union. First Union disclosed a number of confidential documents with the belief that the POJS would remain unchallenged in the future and that its provisions would "survive and remain in full force and effect after the entry of Final Judgment." POJS at 8. To allow the EEOC to benefit from its own slothful behavior, by now permitting it to access sealed documents, would be unfair and prejudicial to First Union.

b. Compelling Need

"Once a confidentiality order has been granted and relied upon, it can only be modified if an 'extraordinary circumstance' or 'compelling need' warrants the requested information."

F.D.I.C. v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982). The EEOC focuses on the "strong presumption in favor of public access to judicial proceedings" in an attempt to establish a compelling need for disclosure of the documents. *EEOC v. National Children's Center, Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996) (citing *Johnson v. Greater Southeast Community Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991)). However, while "[a] court's decrees, its judgments, its orders, are the quintessential business of the public's institutions...other portions of the record—such as documents filed with the court or introduced into evidence—often have a private character, diluting their role as public business." *Id.* at 1409. The documents that First Union provided in discovery in the original proceeding are of a very private nature. Many contain confidential business information. As a result, the presumption toward their disclosure is weakened. In light of these circumstances, the EEOC can not demonstrate the compelling need required for the POJS to be altered.

III. CONCLUSION

This court finds: 1) that First Union would be prejudiced by disclosure, and 2) that the EEOC has not shown a "compelling need" for documents to be unsealed. Accordingly, the court denies the EEOC's Motion to Intervene and Compel Disclosure of Court Sealed Documents.

So ordered.



ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

Date: 6.21.01