

1997 WL 665757  
United States District Court, E.D. Wisconsin.

EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION, Plaintiff,

v.

ST. MICHAEL HOSPITAL OF FRANCISCAN  
SISTERS, Milwaukee, Inc., Defendant.

No. Civ.A. 96-C-1428. | Sept. 26, 1997.

**Attorneys and Law Firms**

Dennis R. McBride, Barbara L. Henderson, Reuben Daniels, Henry Hamilton, III, Equal Employment Opportunity Commission, Milwaukee District Office, Milwaukee, WI, Laurie A. Vasichek, Equal Employment Opportunity Commission, Minneapolis, MN, C. Gregory Stewart, Rosalind Gray, Equal Employment Opportunity Commission, Washington, DC, for Equal Employment Opportunity Commission, plaintiff.

Thomas W. Scrivner, Scott C. Beightol, Steven S. Gensler, Michael, Best & Friedrich, Milwaukee, WI, for St. Michael Hospital of Franciscan Sisters, Milwaukee, Inc., defendant.

**Opinion**

**DECISION AND ORDER DENYING THE  
DEFENDANT’S MOTIONS TO COMPEL**

REYNOLDS, J.

\*1 In this suit, the Equal Employment Opportunity Commission (“EEOC”) alleges that the defendant St. Michael Hospital of Franciscan Sisters (“St.Michael”) violated Title VII of the Civil Rights Act of 1964. Allegedly, the defendant disciplined, denied a lateral transfer to, and terminated Connie Johnson (“Johnson”) because of her race, African American, and in retaliation for her prior complaints about discrimination. Further, St. Michael is alleged to have maintained a racially hostile work environment.

Currently before the court are the two latest discovery disputes in this case. The frequent necessity of the court’s involvement in discovery in this case cannot go unnoticed, and the parties are reminded that much of the structure of orderly litigation depends on their willingness to work together to resolve disputes of this type. In this case, discovery disputes are simply taking up an inordinate amount of the parties’ and the court’s time and energy.

The specific disputes currently before the court involve St. Michael’s motions to compel discovery of the EEOC file of its investigation of Johnson’s charge, and to discover interim earnings and benefits Johnson enjoyed following her separation from St. Michael. The motions are denied.

**THE EEOC’S INVESTIGATION FILE**

In this case, the retaliation and hostile work environment claims were not included in Johnson’s EEOC charge or amended EEOC charge of discrimination. These two claims are the subject of St. Michael’s motion for partial summary judgment filed on June 12, 1997. In its response brief to that motion, the EEOC claims that it may litigate the claims not included in Johnson’s charge because the EEOC, as a plaintiff, may pursue any illegal acts of discrimination encountered during its investigation of an individual’s charge.

The parties have frozen the briefing process by stipulation so that St. Michael could move the court for an order compelling the EEOC to produce its investigation record, allowing St. Michael to challenge the EEOC’s assertion that the retaliation and hostile environment claims arose from the Johnson investigation. The EEOC has asserted the deliberative process privilege in withholding the file. Because St. Michael neither makes a sufficiently particularized showing of need for the file nor elucidates an issue to which it would be relevant, the court upholds the EEOC’s assertion of privilege and denies St. Michael’s motion.

The deliberative process privilege “protects communications that are part of the decision-making process of a government agency.” *United States v. Farley*, 11 F.3d 1385 (7th Cir.1993). The privilege does not protect factual information or communications occurring after the agency makes its decision. Because St. Michael’s motion appears to concede that the privilege adheres, and because the motion fails to specify specific documents or types of information sought, the court assumes that unprotected materials have either been produced or were not sought in the first place.

\*2 Despite St. Michael’s failure to provide relevant authority, the court recognizes that the privilege may be overcome by “a sufficient showing of a particularized need to outweigh the reasons for confidentiality.” *Id.* In *Farley*, the court noted that a generalized claim that the documents were necessary to an affirmative defense will not suffice. Therefore, St. Michael’s two-sentence claim that its laches defense obviates the privilege is patently insufficient.

St. Michael's claim that the EEOC's decision in this case to go beyond the scope of Johnson's charge merits more rigorous analysis. Once an individual's charge with the EEOC triggers an investigation, the EEOC may bring suit in court to end any discrimination it uncovers, includes in its determination of reasonable cause, and attempts to conciliate with the employer. *EEOC v. St. Anne's Hosp.*, 664 F.2d 128 (7th Cir.1981). In this case, it appears undisputed that the retaliation and hostile environment claims were set forth in the EEOC's letter of determination and were the subject of conciliation efforts.

St. Michael claims, however, that it can attack the EEOC's assertion that it uncovered the grounds for retaliation and hostile environment claims during the Johnson investigation. As a preliminary matter, it is difficult to understand how St. Michael would demonstrate that the EEOC did not come upon these claims in its investigation but nonetheless included them in its letter of determination and conciliation efforts. In any case, St. Michael may not litigate the reasonableness of the EEOC's determination.

The determination serves as notice to an employer of the EEOC's findings. It is not an adjudication of a claim. *St. Anne's*, 664 F.2d at 131. In a lawsuit following such a determination, an employer-defendant may not litigate, as a preliminary matter, the reasonableness of the EEOC's determination, as this would end-run the purpose of the litigation: to ascertain whether the defendant actually violated Title VII. *See EEOC v. Chicago Miniature Lamp Works*, 526 F.Supp. 974 (N.D.Ill.1981). Because the EEOC's determination of reasonable cause is a discretionary, administrative function, an employer-defendant is entitled to a trial de novo. Stated differently, St. Michael is free to challenge the EEOC's contention that St. Michael violated the law—by meeting the EEOC's proof—but not by attempting to undermine the EEOC's administrative determination. *See EEOC v. Tempel Steel Co.*, 723 F.Supp. 1250 (N.D.Ill.1989).

This particular line of St. Michael's attack on the scope of the suit at bar would fail even if the deliberative process privilege were not at issue. Therefore, because the privileged documents are not relevant to a disputed issue, St. Michael cannot make a particularized showing of need, even if it tried, as a matter of law. *See Farley*, 11 F.3d at 1390. St. Michael's motion to breach the deliberative process privilege is denied.

### JOHNSON'S INTERIM BENEFITS AND EARNINGS

\*3 Though its not clear, St. Michael's second motion to

compel appears to seek two types of information. First, the motion seeks unspecified documentation of aspects of Johnson's self-employment. Second, St. Michael seeks unspecified documentation concerning Johnson's filing for, eligibility for, and receipt of unemployment benefits. These issues are muddled by the EEOC's assertion that it has furnished these documents with the exception of documentation of the amount of the benefits Johnson received.

The court does not have sufficient information to resolve these discovery disputes in any great detail. Two principles, however, can be ascertained that may allow the parties to resolve the intricacies of these discovery issues. The first is that unemployment benefits generally will not be deducted from an award of back pay in a Title VII case.

St. Michael misidentifies the purpose of the collateral sources rule: It does not serve to prevent overcompensation, but to prevent overpayment. *Perry v. Larson*, 794 F.2d 279 (7th Cir.1986). Therefore, a defendant seeking an offset based on payments made by a third party, in this case unemployment insurance, seeks nothing less than an unearned windfall. The interesting point, of course, is that, absent a mechanism to repay unemployment insurance, one of the parties will enjoy the surplus funds generated by the defendant's liability for lost wages during a period also covered by unemployment compensation. Courts have held with near uniformity that of the two parties at bar—a defendant found liable for illegal race discrimination, and a plaintiff found to be a victim of such discrimination—if a windfall must inure to one, it should be the plaintiff. Nevertheless, should St. Michael make good on its promise to demonstrate that “[a]n offset is clearly warranted here,” the relevant dollar figure can be ascertained at that time.

St. Michael's request for unspecified documents related to Johnson's self-employment (beyond her tax-records), presents a slightly more difficult question. St. Michael is entitled to attempt to prove that Johnson failed to use reasonable diligence in attempting to mitigate the damages caused by St. Michael's allegedly discriminatory acts. Therefore, St. Michael is entitled to discovery of documents relevant to the question of whether Johnson's self-employment constituted an honest, good faith effort at mitigation. *See Smith v. Great American Restaurants*, 969 F.2d 430, 438 (7th Cir.1992).

However, it seems prudent to point out that detailed scrutiny of every minor business decision could easily go beyond the scope of the “honest, good faith effort” inquiry. St. Michael is cautioned that merely because Johnson's business may have been a small and informal venture<sup>1</sup> does not provide an entree to exhaustively pursue every detail of Johnson's personal life on a hunch, for example, that business assets were somehow involved.

<sup>1</sup> The court, of course, has no information before it about the nature or fate of Ms. Johnson's business.

Having reviewed these principles, the court turns to St. Michael's Document Request No. 16, First Request for Documents, June 17, 1997, which demands: "All documents which evidence, summarize or relate to Connie Johnson's income and expenses as a nail technician or specialist." In response, the EEOC objected on vagueness and breadth grounds but nonetheless proffered Johnson's tax forms.

\*4 On one hand, the court agrees with the objections. That is, it is hard to understand, for example, why St. Michael would want every scrap of paper related to the purchase of a nail file during the period in question. The demand at issue appears to encompass such a broad universe of documentation. On the other hand, St. Michael is entitled to documentation, beyond the tax forms, that is relevant to whether Johnson's self-employment was an honest and good-faith attempt at mitigation.

However, because the court has insufficient facts about Johnson's business or any existing documentation thereof, the court cannot order specific production of materials. Further, because of the nature of St. Michael's Document Request No. 16, a mere grant of its motion to compel

would not be useful to the parties. As is the intended course of discovery, the parties will have to work this matter out amongst themselves. The court believes that the foregoing discussion, coupled with a good faith effort, should allow the parties to resolve this discovery issue without further intervention.

### CONCLUSION

The defendant St. Michael Hospital of Franciscan Sisters's motion to compel discovery of the EEOC's investigation file is **DENIED**.

The defendant St. Michael Hospital of Franciscan Sisters's motion to compel discovery of the amount of unemployment compensation received by Connie Johnson is **DENIED** with leave to renew should it become necessary.

### Parallel Citations

75 Fair Empl.Prac.Cas. (BNA) 124