

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AND LATASHA JACKSON**

PLAINTIFFS

VS.

CIVIL ACTION NO. 3:05CV465-WHB-JCS

PRODUCTIVITY IMPROVEMENT CENTER, INC.

DEFENDANT

ORDER

This cause is before the Court upon the Defendant Productivity Improvement Center, Inc.'s ["PIC"] Motion to Compel EEOC Deposition Testimony [#38], and the EEOC's objection thereto. The Court has considered the motion, the response, the reply, the memorandum, and the applicable law, and finds that the motion is well advised and should be granted.

One of PIC's employees, Latasha Jackson, alleges that she was sexually assaulted by another employee. She filed a discrimination charge against PIC with the EEOC. After investigation, the EEOC filed this lawsuit against PIC, and Ms. Jackson has joined in the lawsuit as a Plaintiff.

The Defendant PIC noticed the deposition of Cheryl Harris, an EEOC employee who investigated the charges against PIC. At the deposition, counsel lodged a "deliberative process" privilege objection to nearly every question asked of Ms. Harris by defense counsel. PIC filed this motion to compel Ms. Harris's testimony, contending that the questions asked requested only factual information, and that the deliberative process privilege does not apply to facts.

In its Response, the EEOC tacitly concedes that many of the questions asked of Ms. Harris were proper. The exhibit attached to the Response, containing a partial transcript of the testimony, has some portions underlined and some portions not underlined. We are assuming that the portions which are underlined contain the disputed questions, although it is not entirely clear from the pleadings.

The Court has reviewed the transcript of the deposition and notes that the EEOC objected to nearly every question during the deposition and now still objects to numerous other questions. It contends that the responses would be irrelevant, or would be protected by the attorney work product doctrine, and/or are protected by the deliberative process privilege. This privilege protects documents or other communications that are predecisional and deliberative, prepared to "assist an agency decision maker in arriving at his decision." Renegotiation Board v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975). This privilege **does not protect purely factual or objective material.** EPA v. Mink, 410 U.S. 73, 87-89 (1973); Branch v. Phillips Petroleum Co., 638 F.2d 873, 881 (5th Cir. 1981).

The EEOC contends that the factual statements elicited from the questioning are "inextricably intertwined" with the privileged opinions and recommendations. Therefore, disclosure would compromise the confidentiality of the deliberative information, and the information should be protected, even if

factual in nature. Hopkins v. United States Dep't of Housing & Urban Dev., 929 F.2d 81, 85 (2nd Cir. 1991).

The Court finds that the information is certainly relevant to PIC's defense, or may lead to the discovery of admissible evidence. It is not protected by the work product doctrine as it was not prepared in anticipation of litigation by an attorney and does not reveal an attorney's mental impressions or thought processes. The Court also finds that the information sought is not so intertwined with the deliberative decisionmaking of the EEOC so as to render it privileged.

Most of the questions objected to **specifically ask for merely facts**, for example, "[w]hat facts did you gather during your investigation - what information did you gather as to the number of times that Ms. Jackson claims Mr. Lockett penetrated her body?" Deposition, p. 50. Because Ms. Harris was not allowed to respond to the questions, the Court does not actually know what the responsive answer would be. However, it is known that the EEOC's investigation lead to these charges; that conclusion and the charges are not confidential. The Plaintiff is entitled to discover the facts on which the charges are based.

The case law reviewed by the Court regarding this privilege almost always relates to whether **documents** were protected, not deposition testimony, the substance of which is unknown. The Court was not advised as to whether any documents would be discovered in connection with the testimony. Apparently, the

production of documents is not in dispute, and it appears that affidavits of witnesses are the only documents referred to in the questioning.

It is the EEOC's burden to establish that the information requested is privileged. Hopkins v. United States Dep't of Housing and Urban Dev., 929 F.2d 81, 86 (2nd Cir. 1991). The Court finds that the EEOC has failed to meet its burden of establishing that it properly withheld Ms. Harris's testimony. Most courts have held that the deliberative process privilege should be narrowly construed. Redland Soccer Club, Inc. v. Dept. of the Army, 55 F.3d 827, 853 (3rd Cir. 1995). We agree. The EEOC is affirmatively seeking judicial relief in this case, and an ordinary plaintiff would certainly have to respond to the questioning. Therefore, in the interest of fairness and justice, the Court finds that the privilege should be utilized only when the information sought is clearly proven to be a part of the deliberative, decisionmaking process.

The information sought here is merely part of the factual investigation undertaken by the EEOC; it is not so intertwined with the deliberative process so as to render it privileged. The Defendant is certainly entitled to know all the **facts** which gave rise to this lawsuit against it, even if such facts were gathered by the EEOC.

The Court finds that the EEOC's failure to allow the Defendant a meaningful deposition was egregious and unreasonable,

and that the Defendant should be awarded as sanctions at least a portion of its court reporter fees and costs of the deposition, as well as attorneys' fees incurred in participating in the deposition and in filing this motion.

IT IS, THEREFORE, ORDERED that the Defendant Productivity Improvement Center, Inc.'s ["PIC"] Motion to Compel EEOC Deposition Testimony [#38], is **granted**.

IT IS FURTHER ORDERED that the Defendant's request for sanctions and costs is **granted** and the Plaintiff's request for sanctions and costs is **denied**. The Defendant shall prepare and submit to the Court a statement of its costs and attorneys' fees incurred in the deposition of Ms. Harris, and an Order awarding at least a portion of same shall be entered.

SO ORDERED, this the 19th day of June, 2006.

S/ James C. Sumner
UNITED STATES MAGISTRATE JUDGE