

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

EQUAL EMPLOYMENT)	
OPPORTUNITY COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	CIV-03-1363-R
)	
CITGO PETROLEUM)	
CORPORATION,)	
)	
Defendant.)	

ORDER

Before the Court is another motion to compel filed by Plaintiff Equal Employment Opportunity Commission (EEOC). By this motion, EEOC seeks to compel certain deposition testimony of Mr. Bobo, Defendant's Quality Assurance Manager, and Mr. Gary Barentine, plant manager at Defendant's Oklahoma City facility, by a continuation of their depositions and an order requiring them to answer certain questions; the costs of reconvening and continuing those depositions; and an order allowing the EEOC to inquire into the same areas with Defendant's employees Brad Helton, Diana Kersey, Connie Schlect and Dana Lack. Alternatively, EEOC seeks an Order in limine preventing Defendant Citgo from presenting any testimony at trial that Mr. Clark was the only person who'd been given "special treatment" in terms of limiting his work so he performed fewer jobs because of his vision difficulties, that Clark had to have his work corrected and/or that Clark was a threat in the workplace. Defendant's counsel directed Mr. Bobo and Mr. Barentine not to answer a

number of questions at their depositions, asserting that the information sought was subject to the work product and/or attorney-client privileges. Defendant objects to Plaintiff's motion, relying upon the work product and/or attorney-client privileges.

Plaintiff's motion to compel is GRANTED. The work product doctrine only applies to documents and tangible things. *See* F.R.Civ.P. 26(b)(3); *Feldman v. Pioneer Petroleum, Inc.*, 87 F.R.D. 86, 89 (W.D. Okla. 1980); 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2023 at p. 330 & § 2024 at pp. 336-37. Plaintiff by this motion does not seek the production of documents or tangible things. It has been said that when work product protection is claimed for intangible matters, e.g., oral statements, the principles announced in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), rather than Rule 26(b)(3), F.R.Civ.P., apply. *See United States v. One Tract of Real Property*, 95 F.3d 422, 428 n. 10 (6th Cir. 1996); *Maynard v. Whirlpool Corp.*, 160 F.R.D. 85, 87 (S.D. W. Va. 1995); 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure*, § 2024 at pp. 337-38. The principles of *Hickman* protect from disclosure an attorney's mental impressions and recollections of oral witness statements made or obtained in anticipation of litigation. *See Hickman v. Taylor*, 329 U.S. at 508-514, 67 S.Ct. at ___, 91 L.Ed. at 461-64. They do not protect the names of persons interviewed, when they were interviewed nor do they protect from disclosure a non-lawyer's mental impressions and recollections. *See id.* *See also Feldman v. Pioneer Petroleum, Inc.*, 87 F.R.D. at 89 (work product concept provides no shield against discovery by

interrogatories and depositions of facts that the adverse lawyer has learned, the persons from whom he has learned such facts or the existence or nonexistence of documents).

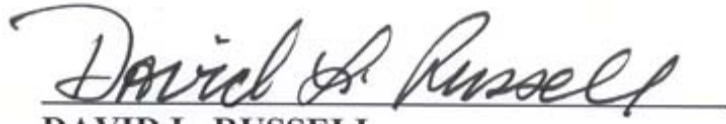
The attorney-client privilege does protect from disclosure communications made by Defendant's employees to Defendant's in-house and/or outside counsel or their agent(s) acting at their direction (e.g. Brad Helton) for the purpose of Defendant's obtaining advice of its counsel. *See Upjohn Co. v. United States*, 449 U.S. 383, 394-97, 101 S.Ct. 677, ___, 66 L.Ed.2d 584, 594-96 (1981). The attorney-client privilege, however, does not protect against disclosure who was interviewed and when or relevant facts within the witnesses' knowledge. *See id.*, 449 U.S. at 365-66, 101 S.Ct. at ___, 66 L.Ed.2d at 595.

In this case, Plaintiff seeks to make inquiries of Mr. Bobo and Mr. Barentine and other employees of Defendant as to whether they interviewed anyone or if anyone directed them to conduct interviews, what facts were learned doing such interviews, who was interviewed, whether anyone from Human Resources conducted interviews and similar inquiries. Those questions do not seek information which is protected or shown by Defendant to be protected by either the attorney-client or work product privileges. Accordingly, Plaintiff's motion to compel a continuation of the depositions of Mr. Bobo and Mr. Barentine to obtain answers to those types of inquiries, if Plaintiff chooses, is GRANTED and Plaintiff may make those types of inquiries of other witnesses. For the parties' guidance, the witnesses may not be required to answer what they said or what others said to Defendant's outside and/or in-house counsel or to Brad Helton acting at the direction of Defendant's counsel because those communications are protected by the attorney-client privilege. If statements of Defendant's

employees to Defendant's counsel or to Brad Helton acting at the direction of Defendant's counsel obtained in anticipation of trial are written or reduced to writing in some fashion and the deponent has viewed the written statement(s), the deponent may not reveal the content of the statement(s) because Rule 26(b)(3) protects against the disclosure of documents prepared in anticipation of litigation. Plaintiff has not shown or attempted to show that it has a substantial need of such written statements and that it is unable without undue hardship to obtain the substantial equivalent of the statements by other means. Plaintiff is free to take the depositions of Defendant's employees who worked with and supervised Jason Clark and ask its own questions of those individuals as to their observations of Clark's work, any special treatment afforded him, etc.

Plaintiff's motion for an order requiring Defendant to pay the costs of a continuation of Mr. Bobo's and Mr. Barentine's depositions is DENIED inasmuch as the witnesses answered many of the subject questions and the information sought by the questions Defendant's counsel directed the witnesses not to answer is of marginal relevance and significance to Plaintiff. Plaintiff's alternative motion for an Order prohibiting Defendant from presenting certain testimony at trial is DENIED.

IT IS SO ORDERED this 22nd day of November, 2004.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE