

FILED  
CHARLOTTE, N. C.

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

JUL - 8 1999

Civil Action No. 3:98CV395-McK

U. S. DISTRICT COURT  
W. DIST. OF N. C.

EQUAL EMPLOYMENT )  
OPPORTUNITY COMMISSION, )  
Plaintiff. )  
v. ) ORDER  
)  
TOYOTA CITY, INC., )  
Defendant. )

THIS MATTER is before the court for ruling on Defendant's Motion to Compel (doc. 14) and Intervenor Brandy Skinner's Response (doc. 16).

This is a sexual harassment and discrimination case filed by Plaintiff EEOC regarding treatment of former employee Intervenor Skinner. Pursuant to Rule 37(a)(2)(b) of the Federal Rules of Civil Procedure, Defendants move this Court to compel answers to interrogatories, requests for production and questions asked at Intervenor's deposition. The information requested regards Intervenor's settlement with N.C. Search, the temporary agency that placed Intervenor with Defendant. Intervenor's counsel has objected to and/or not responded to the questions or requests on the grounds that to so do would violate the terms of a confidentiality agreement entered into as part of the settlement with N.C. Search.

At Intervenor's deposition on May 11, 1999, Intervenor's counsel instructed her not to answer questions regarding the settlement. He repeatedly stated his position that he would be

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"glad to discuss it" but he felt a court order was appropriate because to voluntarily provide this information violated the confidentiality agreement. (Intervenor's Deposition, p. 27, 28, 29, 34, 35, 103, 104.) In response to this objection, defense counsel asked whether Intervenor would oppose a motion for such order and Intervenor's counsel replied as follows:

I will say that we have an obligation to keep it confidential, and that we will not voluntarily give this information. And I'm not going to say its not relevant to your case. I think it is pretty relevant to it, but we have agreed to confidentiality, and we are going to keep that until the court tells us to do otherwise.

Id. at 104.

Defendant then proposed a stipulated protective order providing for disclosure of the information while protecting its confidential nature. Intervenor would, of course, have to consent to the order. Intervenor responded stating that "[w]hile I recognize the relevancy of the agreement, I do not feel it would be in the spirit of the agreement for me to consent to a stipulation ordering it disclosed. As such, I can only suggest that you file an appropriate motion with the court." (Doc. 16, Ex. B.)

Defendants then filed this motion to compel. In response, Intervenor restated her willingness to provide the information and conceded both that the information requested is relevant and that a court order is an appropriate resolution of this matter. Intervenor stated again that she felt constrained by the confidentiality agreement and did not want to be subject to liability for breach of the agreement.

Given the positions of the parties on this issue, this Court finds that Defendant's motion to compel should be **GRANTED**.

At the end of his motion to compel, Defendant stated that it "additionally requests that the costs and fees involved in bringing this motion be taxed against the intervenor." (Doc. 14.) Defendant did not request a hearing, submit a supporting brief setting forth the factors to be considered in a motion for costs under Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5<sup>th</sup> Cir. 1974), nor did defense counsel attach an affidavit regarding hours expended and the amount requested. Defendant argued only that it had made informal good faith efforts to obtain the discovery without court intervention and that Intervenor's rejection of the proposed protective order was unreasonable and therefore supported an award of fees and costs. Intervenor opposed the motion for fees and costs, arguing that because she was trying to honor a confidentiality agreement and because she clearly stated this position to defense counsel, she was "substantially justified" in not providing the information.

Rule 37(a)(4) of the Federal Rules of Civil Procedure provides that if a motion to compel is granted, "the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party

the reasonable expenses incurred in making the motion, including attorneys' fees, unless the court finds ... that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust." Opposing a motion to compel is "substantially justified" if the motion raised an issue "about which reasonable people could genuinely differ on whether a party was bound to comply with a discovery rule." 8A Wright, Miller & Marcus Federal Practice and Procedure, § 2288, at 665-66 (1994). The Supreme Court has stated that Rule 37(a)'s "substantially justified" language has never been interpreted as meaning "justified to a high degree," but rather has been held to be satisfied if there is a "genuine dispute" or "if reasonable people could differ as to [the appropriateness of the contested action]". Pierce v. Underwood, 487 U.S. 552, 565 (1988) (internal quotations omitted).

In the present case, Defendant moved to compel Intervenor to disclose certain information that Intervenor refused to disclose on the grounds that the information was subject to a confidentiality agreement. After thoroughly reviewing the pleadings, this Court concludes that an award of costs should not be entered against Intervenor.

The court believes that Intervenor's position was "substantially justified" because she was acting to protect the confidential agreement made with N.C. Search and to protect herself from any liability for breach thereof. Additionally, Intervenor clearly stated her position to defense counsel at least as far back as the deposition. This Court appreciates the efforts of defense counsel in fashioning a protective order to avoid filing a motion to compel. However, under these circumstances, it is clear to this Court that if the confidentiality agreement prohibited Intervenor from disclosing the information, she could not circumvent this prohibition by consenting to the protective order. This Court finds that her rejection of the proposed order was, therefore, not unreasonable. Accordingly, on the facts before this Court, Defendant's additional motion for costs and fees will be denied.

**IT IS THEREFORE ORDERED** that Defendant's motion to compel is **GRANTED** and the accompanying motion for fees and costs is **DENIED**.

**IT IS SO ORDERED.**

This 7<sup>R</sup> day of July, 1999.

  
\_\_\_\_\_  
H. BRENT MCKNIGHT  
UNITED STATES MAGISTRATE JUDGE

United States District Court  
for the  
Western District of North Carolina  
July 9, 1999

\* \* MAILING CERTIFICATE OF CLERK \* \*

Re: 3:98-cv-00395

True and correct copies of the attached were mailed by the clerk to the following:

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- CC:
- Judge ( )
- Magistrate Judge ( )
- U.S. Marshal ( )
- Probation ( )
- U.S. Attorney ( )
- Atty. for Deft. ( )
- Defendant ( )
- Warden ( )
- Bureau of Prisons ( )
- Court Reporter ( )
- Courtroom Deputy ( )
- Orig-Security ( )
- Bankruptcy Clerk's Ofc. ( )
- Other \_\_\_\_\_ ( )

Date: 7-9-99

Frank G. Johns, Clerk

By: Beverly Pace  
Deputy Clerk