

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BERTA M. TAFFINGER : CIVIL ACTION
 :
 v. :
 :
 BETHLEHEM STEEL CORPORATION : NO. 00-4668

MEMORANDUM AND ORDER

HUTTON, J.

October 24, 2001

Presently before the Court are the parties' Renewed Motion for Entry of Stipulated Protective Order Regarding Confidentiality of Discovery Material (Docket No. 13), and Plaintiff's Motion to Compel Discovery Responses (Docket No. 12). For the foregoing reasons, the Court declines to grant the relief sought.

I. BACKGROUND

Plaintiff Berta M. Taffinger ("Plaintiff") brought suit against her former employer, Bethlehem Steel Corporation ("Defendant"), alleging claims under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Equal Pay Act, and the Pennsylvania Human Relations Act. The parties jointly proposed to designate as "confidential" certain documents sought in Plaintiff's First Request for Production of Documents, including resumes, employment histories, and salary histories of Defendant's employees who are not parties to the lawsuit. On July 27, 2001, the Court dismissed with leave to renew the parties' first proposed

Protective Order Regarding Confidentiality of Discovery Material because the parties failed to prove good cause for the issuance of the protective order. On September 13, 2001, Plaintiff filed a Motion to Compel Discovery Responses. After Plaintiff filed the motion, the Defendant filed a Renewed Motion for Entry of a Stipulated Protective Order on September 19, 2001. The Court finds that the parties have failed to correct the defects that rendered their initial proposed order fatal.

II. LEGAL STANDARD

In Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994), the Third Circuit Court of Appeals delineated the parameters which govern the Court's consideration of whether a confidentiality stipulation concerning discovery materials should be entered. The presumption in this Circuit is that there exists a right of public access to judicial proceedings and judicial records. Littlejohn v. Bic Corp., 851 F.2d 673, 677-78 (3d Cir. 1988) (citation omitted). Nevertheless, while the Court possesses discretion over whether the presumption of public access may be overcome, protective orders cannot be granted capriciously. See Wils v. Phillips, No. CIV. A. 98-5752, 1999 WL 1212191, at *1 (E.D. Pa. Dec. 17, 1999). A protective order is still an exceptional form of relief, to be granted only where the most serious prejudice is threatened, even - and perhaps especially - where the parties seek it jointly. See Bryan v. Pep Boys-Manny, Moe and Jack, Civ. A. No. 00-1525, 2000 WL

1367600, at *1 (E.D. Pa., Sept. 21, 2000) (quoting Nault's Auto. Sales, Inc. v. Am. Honda Motor Co., Inc., 148 F.R.D. 25, 43-44 (D. N.H. 1993)).

A showing of "good cause" is a threshold requirement for the protection of discovery materials. In this Circuit, the good cause requirement is no mere formality. Rather, "Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity." Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," do not support a showing of good cause. Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986). The burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the moving party. Id. at 1122. The specificity requirement not only acts as a strict limit upon what may be protected, but further provides the Court with the information necessary to tailor the least restrictive possible order, should the circumstances justify one.

In determining whether "good cause" exists, the federal courts have adopted a balancing approach, under which the following factors may be considered: (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; (3) whether

disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public. See Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995). A party desiring a protective order must demonstrate specifically, through an application of these factors, that disclosure would work a clearly defined and serious injury upon him. See Pansy, 23 F.3d at 786. Again, the fact that such an order is sought jointly by the parties in a non-adversarial manner does not excuse the Court from its duty of scrutinizing the merits of a proposed protective order.

II. DISCUSSION

A. Protective Order

The Court recognizes that the instant matter concerns private parties to a lawsuit which arguably is of little legitimate public interest. See Pansy, 23 F.3d at 788 (stating that "if a case involves private litigants, and concerns matters of little legitimate public interest, [these considerations] should be . . . factor[s] weighing in favor of granting or maintaining an order of confidentiality."). Moreover, the parties stipulate that certain information and documents should receive protection from public

disclosure. Nevertheless, the parties fail to establish the requisite good cause that warrants the Court's approval of the proposed Protective Order.

The parties seek to deem confidential documents that contain salary and employee evaluation information, such as personnel files, attendance records, and performance evaluations. See Renewed Mot. for Entry of Stipulated Protective Order at 2-3. In support of their proposal, the parties contend that "[d]isclosure of the confidential information may impinge on legitimate privacy interests . . . of non-parties . . ." Id. at 2. The Court recognizes that "[t]here exists a strong public policy against the disclosure of personnel files." Morton v. F.H. Paschen, Inc., Civ. A. No. 96-7179, 1998 WL 13270, at *3 (E.D. Pa. Jan. 15, 1998) (quoting In re the One Bancorp Sec. Litig., 134 F.R.D. 4, 12 (D. Me. 1991)); but see Vearling v. Bensalem Township Sch. Dist., Civ. A. No. 94-7711, 1996 WL 119984, at *1 (E.D. Pa. March 18, 1996) ("There may well be information in a typical personnel file, however, which is not sensitive and does not implicate legitimate privacy interests, e.g., an employee's job title, job description, hiring date, assigned work location."). However, in order for the Court to issue a protective order under the standard promulgated in Pansy, the parties must show with specificity the injury or injuries they will suffer. See Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984) (emphasis added).

The case of Frupac Intern. Corp. v. M/V "CHUCABUCO," Civ. A. No. 92-2617, 1994 WL 269271 (E.D. Pa. June 15, 1994) is instructive. In Frupac, the parties sought to prohibit disclosure of "[a]ll personal data, salary levels and performance reviews and other performance analyses of the parties and any other employees or ex-employees." Id. at *2. The parties, however, "fail[ed] to establish the specificity and relevance of the information sought to be protected, which is necessary [for the court] to approve the order." Id. Since the parties failed to "explain the specific data, reports, and reviews that are confidential," the court concluded that it could not approve the order and thereby "sanction the imprecise confidentiality agreement." Id. See also Makar-Wellbon v. Sony Elec., Inc., 187 F.R.D. 576, 577 (E.D. Wis. 1999) (declining to issue a protective order in a Title VII employment discrimination case where the parties sought "to protect information 'pertaining to personnel files or confidential personnel-related documents concerning Defendant's employees and/or former employees,'" because "[i]n an employment discrimination case of this type, the parties' proposed order could cover a lion's share of the material produced in discovery.").

Similarly, the parties to the instant Motion request the Court's approval in designating personnel files, attendance records, and performance evaluations as confidential. While the parties' Motion addresses the factors enumerated by the Third

Circuit in Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995), they fail to recite any concrete reasons for the requirement of a protective order. Rather, the parties rely solely on conclusory statements that the documents, if released, "may impinge on legitimate privacy interests" or "may cause embarrassment to private individuals."¹ Pansy requires specificity in describing the interests to be protected and the Court will not require a confidentiality agreement absent a showing that the interests of the parties in maintaining confidentiality outweighs the public interests in disclosure. See also Doe v. White, Civ. A. No. 00-0928, 2001 WL 649536, at *2 (N.D. Ill. June 8, 2001) ("Without a specific demonstration of fact . . . 'conclusory statements are not sufficient'" for a protective order to issue) (citation omitted). Without a detailed description of the documents sought or the alleged confidential information contained therein, the Court will not require a confidentiality agreement for production of this information.

Moreover, the Court notes that here, as in Frupac, "consideration of this confidentiality agreement . . . may totally unnecessary and inappropriate." Frupac, 1994 WL 269271, at *1. Under Federal Rule of Civil Procedure 26(c), parties must confer

¹ It bears mentioning that the Third Circuit has clearly recognized that "[w]hile preventing embarrassment may be a factor satisfying the 'good cause' standard, 'an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious.'" Pansy, 23 F.3d at 787 (quoting Cipollone, 785 F.2d at 1121).

with each other in a good faith effort to reach an agreement without the need for court intervention before filing a motion for a protective order. See Fed. R. Civ. P. 26(c). The standard set forth in Rule 26(c) "is consistent with the recent legal trend toward conserving judicial resources by allowing the parties to resolve many discovery issues privately, and seeking court intervention only when there is a good faith dispute or possible breach of an agreement." Frupac, 1994 WL 269271, at *1. "Here, the parties have resolved their concerns by entering into the agreement between and among themselves. There would appear to be no need for court approval or intervention at all." Id.

The Court notes that the parties have the option of agreeing privately to keep information concerning the Defendant's personnel records confidential, and may enforce such an agreement in a separate contract action. See, e.g., Aetna Casualty & Surety Co. v. George Hyman Const. Co., 155 F.R.D. 113, 115 (E.D. Pa. 1994); Frupac, 1994 WL 269271, at *3 (recognizing parties ability "to stipulate among themselves to whatever confidentiality they reasonably, lawfully and ethically conclude is appropriate"). Then, should disagreement arise as to whether particular documents should be deemed confidential, the party seeking protection can make a Rule 26(c) motion regarding those documents. Otherwise, if the parties still wish to obtain the protective order sought in their stipulation, they must provide the Court with a more specific

description of the individual documents or categories of documents they seek to protect. Accordingly, the parties Renewed Motion for Entry of Stipulated Protective Order is denied with leave to renew.

B. Motion to Compel

Finally, the Court denies without prejudice Plaintiff's Motion to Compel Discovery Responses. Federal Rule of Civil Procedure 37 provides the framework for the enforcement of discovery requests. Rule 37(a) gives a court authority to order one party to comply with the other's legitimate discovery requests. To be entitled to an order compelling discovery, however, the party seeking the order must, among other things, "include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." Fed. R. Civ. P. 37(a)(2)(B); E.D. Pa. R. 26.1(f). These assurances are necessary to prevent parties from seeking a court order in the first instance, without first attempting to resolve a discovery matter between themselves. See Robert Billet Promotions, Inc. v. IMI Cornelius, Inc., Civ. A. No. 95-1376, 1998 WL 150957, at *1 (E.D. Pa. Mar. 30, 1998).

Plaintiff's instant Motion to Compel is procedurally deficient. Plaintiff failed to attach the necessary certification that the parties, after reasonable effort, have attempted to resolve this dispute before the filing of such a motion to compel. Local Rule 26.1(f) provides in pertinent part: "No motion or other

application pursuant to the Federal Rules of Civil Procedure governing discovery or pursuant to this rule shall be made unless it contains a certification [] that the parties, after reasonable effort, are unable to resolve the dispute." E.D. Pa. R. Civ. P. 26.1(f). Courts have held that "this Rule is not merely a formalistic requirement," but was in fact "intended to reduce the unnecessary burden on the Court" and opposing counsel. Crown Cork & Seal Co., Inc. v. Chemed Corp., 101 F.R.D. 105, 106-07 (E.D. Pa. 1984). Accordingly, the Plaintiff's motion to compel is denied without prejudice.

An appropriate Order follows.

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O R D E R

AND NOW, this 24th day of October, 2001, upon consideration of the parties' Renewed Motion of Stipulated Protective Order Regarding Confidentiality of Discovery Material (Docket No. 13) and Plaintiff's Motion to Compel Discovery Responses (Docket No. 12), IT IS HEREBY ORDERED that:

- (1) The parties' Motion for Entry of Stipulated Protective Order Regarding Confidentiality of Discovery Material (Docket No. 13) is **DENIED WITH LEAVE TO RENEW**; and
- (2) Plaintiff's Motion to Compel Discovery Responses (Docket No. 12) is **DENIED WITHOUT PREJUDICE**.

BY THE COURT:

HERBERT J. HUTTON, J.