

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

EQUAL EMPLOYMENT OPPORTUNITY : CIVIL ACTION
COMMISSION :
 :
v. :
 :
AIRBORNE EXPRESS : No. 98-1471

MEMORANDUM ORDER

This is a Title VII action. The Equal Employment Opportunity Commission (EEOC) is suing on behalf of Rodney Wilkins, alleging that defendant discriminated against Mr. Wilkins while he was in its employ on the basis of race, subjected him to a racially hostile work environment and retaliated against him for his complaints of discriminatory treatment. The EEOC has moved for a protective order to prevent defendant from taking the deposition of any EEOC personnel.

Defendant noticed the deposition of Marie Staley, an EEOC investigator assigned to this case. The EEOC represents that the parties agreed to cancel the deposition. Defendant represents that the parties merely agreed to postpone it. The EEOC maintains that defendant is now again seeking to conduct the deposition of Ms. Staley "for no apparent valid reason." Defendant also seeks to depose the EEOC personnel most knowledgeable about the investigation of Mr. Wilkins'

discrimination charge and about an earlier discrimination charge Mr. Wilkins filed against a prior employer in 1992 or 1993.

The EEOC asserts that neither Ms. Staley nor any other EEOC employee has any information which defendant may discover because they do not have "any personal knowledge of any facts relating to the underlying charge of discrimination," because any matters regarding the government's deliberative process are privileged and because the EEOC's findings are not material to this action as the issue of discrimination should be determined de novo.

The deliberative process privilege protects from disclosure material containing a governmental official's "confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice." Redland Soccer Club, Inc. v. Dept. of the Army, 55 F.3d 827, 853 (3d Cir. 1995) (internal quotations and citation omitted), cert. denied, 516 U.S. 1071 (1996). The privilege does not protect factual information. Id. at 854. The privilege does not apply to communications made subsequent to an agency decision. Id. Moreover, even when the privilege applies, it is not absolute. The courts must balance on an ad hoc basis a number of factors including the relevance of the evidence sought to be protected, the availability of comparable evidence from the sources, the "seriousness" of the litigation and the issues involved, the role of the government in

the litigation and the possibility of future timidity by government employees. Id; In re Sealed Case, 121 F.3d 729, 737-38 (D.C. Cir. 1997) (same).

It is not at all clear that the privilege has been properly invoked. See United States v. Ernststoff, 183 F.R.D. 148, 152 (D.N.J. Oct. 16, 1998) (privilege must be asserted formally by head of agency after personal consideration of material allegedly protected by privilege); Scott Paper Co. v. United States, 943 F. Supp. 501, 502-03 (E.D. Pa. 1996) (agency heads may not delegate authority to invoke privilege); Walker v. NCNB National Bank of Florida, 810 F. Supp. 11, 13 (D.D.C. 1993). Further, the EEOC has not demonstrated its entitlement to a blanket protective order precluding virtually all discovery from any EEOC employee.

The EEOC correctly states in its motion that "[c]onsiderable hardship would be caused if personnel of the commission were routinely required to testify in thousands of cases which are privately litigated subsequent to a finding of probable cause or no probable cause." This, however, is not such a case. In the instant case the EEOC is a party plaintiff. "[W]hen the government seeks affirmative relief, it is fundamentally unfair to allow it to evade discovery of materials that a private plaintiff would have to turn over." E.E.O.C. v. Citizens Bank and Trust Co., 117 F.R.D. 365, 366 (D. Md. 1987)

(overruling claim of deliberative process privilege). See also Leyh v. Modicon, Inc., 881 F. Supp. 420, 425 n.3 (S.D. Ind. 1995) ("[t]he relevant considerations are very different when the EEOC is not a party to the litigation in which discovery is sought"); Allen v. Hearst Corp., 1991 WL 323020, *1 (D. Md. Aug. 16, 1991) (limiting discovery in privately litigated case to disclosure of factual portions of EEOC investigative file and deposition of principal EEOC investigator assigned to case).

Defendant has made a reasonable showing that at least some of what it seeks to discovery is relevant factual information not apparently otherwise available in serious litigation in which the EEOC is a party seeking affirmative relief. It is uncontroverted that the charging individual, Mr. Wilkins, has purported to be unable to recall even basic information, rendering defense access to his contemporaneous statements to the EEOC particularly important. Information related to the earlier claim by Mr. Wilkins appears to be potentially quite important in corroborating the legitimate reason for his termination proffered by defendant.

ACCORDINGLY, this day of February, 1999, upon consideration of plaintiff EEOC's Motion for a Protective Order (Doc. #12) and defendant's response thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED** without prejudice to the EEOC properly

and in good faith to assert any applicable privilege in response to particular deposition questions or document requests.

BY THE COURT:

JAY C. WALDMAN, J.