IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

LORI VAUGHN and BRENDA CONNELL,

Plaintiff-Intervenors,

vs.

KROGER FOOD STORES, INC.,

Defendant.

CASE NO. 99-4187-GPM

ORDER

Before the Court is Defendant's Motion to Compel (Doc. 72), with supporting memorandum, filed June 16, 2000. Pursuant to Rules 26 and 37 of the Federal Rules of Civil Procedure and Local Rule 37.1, Kroger moves the Court for an Order compelling the EEOC to provide responses to the following discovery: damage calculations; medical documentation for class members; production of a qualified Rule 30(b)(6) deponent; and answers to questions for which the EEOC asserted the governmental deliberative process privilege during the deposition of Mr. Charles Bold.

On August 23, 1999, the EEOC filed this action for sex-based and sexual harassment on behalf of a class of Kroger's female employees under **Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*** The EEOC alleges that, since at least 1988, Kroger engaged in a pattern and practice of discrimination against a class of female employees because

of their sex, by subjecting them to a hostile and abusive work environment and by failing to take prompt remedial action to eliminate the harassment after Kroger became aware of such behavior. At the time the Complaint was filed, the EEOC was aware of allegations that harassment was committed by a department supervisor, Donald Underwood, at the Marion, Illinois, store from 1986 until May, 1997. Since filing the Complaint, the EEOC states that it has learned that sexual harassment complaints were made to Kroger store management against at least four other male employees at that store, some of which were prior to the charges filed regarding Underwood.

A. CLAIMS FOR DAMAGES

Kroger argues that the EEOC should be compelled to produce information and documents regarding calculations or a factual basis for its claims for damages. Kroger states that the EEOC alleges that it sought "in excess of $300,000" in compensatory damages for each class member and "in excess of $300,000" in punitive damages for each class member, as well as possible additional damages for emotional pain and suffering beyond that generally sought by the EEOC.

The EEOC responds that it is not required to provide such information because it has informed Kroger that it seeks in excess of $300,000 in each compensatory and punitive damages for each class member and that it does not seek back-pay, front-pay, lost future earnings or reinstatement for any class member. The EEOC states that only one class member has sought medical treatment in connection with her claim, and that the EEOC is not seeking any out-of-pocket costs or pecuniary compensation on her behalf. Thus, current class members have not incurred any out-of-pocket costs or pecuniary compensatory damages as a result of the discrimination alleged. The EEOC states that courts have recognized that emotional distress injuries are not readily amenable to quantification and that damages for such claims are determined by the trier of fact.

The Seventh Circuit, in ***Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576, 581 (7th Cir. 1996)**, rejected defendant's argument that plaintiff was required to quantify how much of her distress was due to her firing, or even to establish that most of her distress stemmed from the firing. The Court stated that it was not convinced that psychological injuries are readily amenable to such quantification and that forcing such a burden of proof upon a plaintiff would make compensatory damages nearly impossible to recover. ***Id.*** The case cited by Kroger, ***In re Aircrash Disaster Near Roselawn, Ind.*, 273 F.D.R. 295 (N.D. Ill. 1997)**, discusses the breadth of discovery available under the Federal Rules of Civil Procedure but does not address the specific issue of production of damage calculations. **273 F.D.R. at 303**. Because class members do not seek out-of-pocket costs or pecuniary compensatory damages and because psychological injuries are not readily quantifiable, the Court will deny Kroger's Motion as to production of information and documents regarding the EEOC's claims for damages.

B. MEDICAL DOCUMENTATION

Kroger argues that the EEOC should be compelled to produce documents related to each class member's medical history and treatment. Kroger states that, in its Complaint, the EEOC seeks damages for "past future and non-pecuniary losses, including emotional pain, suffering, inconvenience, loss of enjoyment of life and humiliation." Kroger maintains that by seeking such damages, the EEOC has placed the mental state of the class members at issue and has waived any privacy rights which might have been asserted with respect to their medical information. Kroger argues that it is entitled to these medical records in order to determine whether class members' past medical history may have contributed to their alleged emotional distress. Kroger cites an Eastern District of Missouri case in which the Court found that plaintiffs who were similarly situated to the plaintiffs in the instant case had waived the

psychotherapist-patient privilege because they sought damages for emotional distress.

The EEOC responds that the class members' medical records are not relevant because they are seeking compensatory damages for generalized emotional harm and no professional testimony will be presented. The EEOC states that it agreed to provide relevant medical records of the only class member (other than plaintiff-intervenors, Brenda Connell and Lori Vaughn) who testified that she sought medical treatment due to Kroger's hostile work environment. The EEOC maintains that medical records for other class members are not relevant to their claims and are an invasion of their privacy rights because they did not seek medical or psychological treatment as a result of Kroger's harassment. The EEOC states that it seeks non-pecuniary compensatory damages, including emotional pain, suffering, inconvenience, loss of enjoyment of life and humiliation on behalf of current class members. Compensatory damages will be proven, according to the EEOC, by the class members' testimony and perhaps that of family, friends or co-workers. The EEOC asserts that, in situations virtually identical to the one before this Court, courts have routinely denied motions to compel production of medical records on the same bases set forth here, i. e., relevance and invasion of privacy.

Both parties cite ***Santelli v. Electro-Motive*, 188 F.R.D. 306 (N.D.Ill. 1999)**, to support their positions. In ***Santelli***, the court discussed whether a Title VII plaintiff puts privileged communications with her psychotherapist at issue, and thus waives her privilege, by seeking to recover damages for emotional distress. ***Santelli*, 188 F.R.D. at 308 (citing 42 U.S.C. § 1981a (b)(3) (damages for emotional pain, suffering, mental anguish, and loss of enjoyment of life are recoverable in cases of intentional employment discrimination)**. The court rejected a narrow waiver rule stating that it ". . . would enable a party who had undergone psychotherapy to offer at trial only the testimony of a retained, non-treating expert and thereby prevent discovery

of what she had told her treating psychotherapist. . . ." ***Id.*** This would ". . . allow the party to provide the expert with a selective 'history,' while preventing the veracity of that history from being tested by comparing it to what the party had reported to her treating psychotherapist." ***Id.*** **(citing *Allen v. Cook County Sheriff's Dept.*, 1999 WL 168466 (N.D.Ill. 1999) (". . . the defendants should have ample opportunity to scrutinize the basis for the opinions of Allen's therapists if she attempts to elicit therapist testimony or evidence to prove her damages caused by her alleged emotional distress."); *E.E.O.C. v. Danka Industries, Inc.*, 990 F.Supp. 1138, 1142 (E.D.Mo. 1997) ("Plaintiffs cannot rely on advice given by certain psychotherapists to support their claims while at the same time expect to keep confidential advice given by other psychotherapists that may weaken their claims.")**. The court continued that a party is not deprived of the psychotherapist-patient privilege simply because the communication between psychotherapist and patient is relevant to a particular issue in a case because, "[B]y definition, privileges exclude from a case otherwise relevant information." ***Id.*****(citing *Matter of Grand Jury Proceeding, Cherney*, 898 F.2d 565, 567 (7th Cir. 1990) (explaining that the attorney-client privilege has the effect of withholding relevant information from the fact finder)**. However, a privilege holder can waive the privilege by affirmatively putting the privileged communications directly at issue in a lawsuit. ***Id.*** **(citing *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175 n. 1 (7th Cir. 1995) ("the attorney-client privilege is generally waived when the client asserts claims or defenses that put his attorney's advice at issue in the litigation.")**. The Seventh Circuit in ***Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987)**, indicated that "a waiver of the privilege can occur 'when a holder [of the privilege] relies on a legal claim or defense, the truthful resolution of which will require examining confidential communications.'" ***Id.*** **at 309**. It

appears that, under ***Lorenz***, plaintiffs' insistence on a claim for emotional distress damages, depending on the scope of the claim, would be enough to cause a waiver of the psychotherapist-patient privilege. ***Id***.

In the instant case, however, plaintiffs seek to limit the scope of emotional distress claims to generalized or "garden variety" emotional harm. Plaintiffs have stated that they do not intend to present the testimony of any medical or mental health professional at trial. Indeed, plaintiffs state that none of the class members sought medical treatment as a result of the alleged hostile work environment except for a single class member whose medical records have been provided. As in ***Santelli***, plaintiffs have limited their emotional distress claim to the negative emotions experienced essentially as the intrinsic result of the defendant's alleged conduct. In denying Kroger's motion to compel the production of medical records, the Court will additionally bar plaintiffs from introducing evidence of any resulting symptoms or conditions (such as sleeplessness, nervousness, depression) that they might have suffered. ***Id***. **(citing *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 637-38 (7th Cir. 1974) (holding that compensatory damages may be awarded for humiliation, either inferred from circumstances or established by testimony, and that medical evidence of mental or emotional impairment is not necessary to sustain such an award)**. Rather, as in ***Santelli***, plaintiffs will be permitted to testify only to feelings of humiliation, disgust, embarrassment, anger or being upset because of the alleged discrimination. Plaintiffs may find that they are better off disclosing medical records rather than so narrowing their claims, but the choice is theirs. The Court concludes that Kroger is not entitled to discover plaintiffs' medical records and that those records remain privileged.

C. PRODUCTION OF A QUALIFIED RULE 30(b)(6) DEPONENT

Kroger moves the Court to compel the EEOC to produce a qualified Rule 30(b)(6)

deponent, stating that Rule 30(b)(6) imposes a duty upon the named entity to prepare its selected deponent adequately to testify on matters known by deponent and which the entity reasonably should know. Kroger states that the individual designated by the EEOC, Mr. Charles Bold, stated that he was unqualified to testify to several of the categories contained in the Rule 30(b)(6) Notice. Kroger maintains that, although Mr. Bold attempted to answer questions related to some of the enumerated areas, his testimony is significantly tainted by his disclaimer that he was unqualified to testify in any of those areas.

The EEOC responds that, in compliance with the Order of this Court, it produced for deposition the investigator for the relevant charges, Mr. Bold. The EEOC argues that Kroger is attempting to misrepresent and mischaracterize Mr. Bold's testimony. The EEOC states that Mr. Bold was qualified to answer questions in the areas described in the 30(b)(6) Notice, but he was concerned about the broad wording of the 30(b)(6) Notice, specifically, the phrase "any and all."

The Court agrees with the EEOC that Kroger has attempted to mischaracterize the testimony of Mr. Bold. Kroger states that Mr. Bold said, "Several of these questions say any and all policies. I am not qualified to speak." Mr. Bold's statement was "Several of these questions say any and all policies. I am not qualified to speak to any and all policies about anything." Defendant's Exhibit S, page 15. Mr. Bold stated that he was familiar with the efforts that were taken in the conciliation process but that he did not know if he could speak to "each and every point." The EEOC provided the witness most knowledgeable, the investigator in charge of the investigation and the conciliator in this matter. In Defendant's Response to the EEOC's Motion for a Protective Order, Kroger stated that Mr. Bold, because of his knowledge of the case, was "one of the more important individuals in this case." Plaintiffs' Exhibit B, page 8. It appears to the Court that Mr. Bold is the individual most knowledgeable about the case. Further, Mr.

Bold's refusal to make such a broad claim, that he had knowledge about "any and all policies," does not entitle Kroger to a second Rule 30(b)(6) deponent and does not taint the testimony Mr. Bold provided. Therefore, the Court will deny Kroger's Motion as to the production of a qualified Rule 30(b)(6) deponent.

D. THE EEOC'S ASSERTION OF THE GOVERNMENTAL DELIBERATIVE PROCESS PRIVILEGE DURING MR. BOLD'S DEPOSITION

Kroger states that during Mr. Bold's deposition, counsel for the EEOC continually asserted the governmental deliberative process privilege ("GDP") and instructed him not to answer questions posed by Kroger's counsel. Kroger maintains that, by seeking affirmative relief in this case and placing its investigatory and conciliation efforts directly at issue, the EEOC has waived the GDP with respect to the questions posed to Mr. Bold. In the alternative, Kroger argues that, if the EEOC has not waived this privilege, the EEOC was not entitled to assert it during Mr. Bold's deposition because the privilege is narrow and the questions asked were factual rather than confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice. Kroger states that its need for this information outweighs the EEOC's privilege.

The EEOC responds that the GDP protects communications that are part of the decision-making process of a governmental agency. The EEOC claims that Kroger seeks information protected by the GDP, specifically, the opinions and impressions of a government official during a pre-suit investigation. The EEOC states that courts engage in a two-part analysis in determining whether to uphold the government's claim of GDP: first, whether the government has shown that the privilege applies to the information the government seeks to protect and, second, whether the litigant has shown that it has a particularized need for the information. The

EEOC maintains that Kroger asked questions concerning Mr. Bold's opinion or assessment rather than concerning facts. Further, the EEOC states that Kroger asked questions regarding Mr. Bold's activities and the EEOC's practices and procedures. The EEOC asserts that Kroger has failed to show a particularized need for the information or that the information sought is even relevant.

"The deliberative process privilege protects communications that are part of the decision-making process of a governmental agency." ***U.S. v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (citing *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-152, 95 S.Ct. 1504, 1516-1517 (1975)**. Because of the need for frank discussion of legal and policy matters, communications made prior to and as a part of an agency determination are protected from disclosure, but communications made subsequent to an agency decision are not similarly protected. ***Id.* at 151-52, 95 S.Ct. at 1516-17**. The GDP protects from disclosure material containing a governmental official's "confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice." ***E.E.O.C. v. Airborne Express*, 1999 WL 124380, 1 (E.D.Pa. 1999) (quoting *Redland Soccer Club, Inc. v. Dept. of Army of U. S.*, 55 F.3d 827, 853 (3d Cir.1995) (internal quotations and citation omitted), *cert. denied*, 516 U.S. 1071 (1996)**.

The GDP may be overcome where a sufficient showing of a particularized need outweighs the reasons for confidentiality. ***Id.* at 152 (citing *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C.Cir. 1980) (the privilege should be applied "as narrowly as consistent with efficient Government operation"); *Black v. Sheraton Corp. of America*, 564 F.2d 531, 545 (D.C.Cir. 1977)**.

Having reviewed Kroger's submission (Exhibit S), the Court finds that the testimony at

issue is within the scope of the deliberative process privilege. The questions to which the EEOC counsel objected concerned communications made prior to and as a part of an agency determination or called for Mr. Bold's opinions and impressions, or both. Therefore, the EEOC could only be required to produce them if Kroger made a showing that its need for the documents outweighed the EEOC's interest in not disclosing them. ***Coastal States Gas Corp.*, 617 F.2d at 868; *Black*, 564 F.2d at 545**. Kroger, however, has not shown such a particularized need.

Kroger argues that the questions upon which the privilege was asserted related to two matters at issue in this litigation: (1) the allegations and credibility of Plaintiff-Intervenors Lori Vaughn and Brenda Connell and (2) whether the EEOC satisfied its obligations regarding the conciliation of this dispute. That the questions asked may be relevant to these issues is an insufficient reason for breaching the deliberative process privilege. ***Farley*, 11 F.3d at 1390**. The Court must balance Kroger's need for the information against its nature and the effect of disclosure on the government. ***Id***. Mr. Bold's testimony is not relevant to the issues raised by Kroger. Kroger is aware of the allegations of Vaughn and Connell, and, if Kroger is not aware of these allegations, such information is certainly available from a source other than Mr. Bold. Mr. Bold's assessment of the credibility of Vaughn and Connell also lacks relevance. If Vaughn and Connell have made conflicting statements or lack credibility, Kroger is entitled to put on such evidence at trial. Mr. Bold's opinion on this matter is without weight and irrelevant. Kroger has also failed to show a particularized need for information regarding the EEOC satisfying its obligation to conciliate. The EEOC has provided extensive discovery on this issue, sufficient, in fact, for Kroger to file dispositive motions on this issue. Kroger has not identified any specific information for which it has a particularized need beyond that which has been provided. The Court will not allow Kroger a fishing expedition. Therefore, the Court will deny Kroger's

Motion as to the governmental deliberative process privilege.

Accordingly, for the above-stated reasons, IT IS THE ORDER of this COURT that Defendant's Motion to Compel (Doc. 72) be DENIED.

IT IS SO ORDERED.

Dated this 11th day of September, 2000.

GERALD B. COHN
UNITED STATES MAGISTRATE JUDGE