UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*	)	
	)	CIVIL ACTION NO.
Plaintiffs,	)	2:03-CV-237-PRC
	)	
v.	)	
	)	
U.S. BELL CORPORATION, *et al.*,	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on Plaintiff EEOC's Motion to Compel Responses to Deposition Questions and Motion for Sanctions [DE 89], filed by the Equal Employment Opportunity Commission ("EEOC") on December 9, 2004. The Defendants filed a Response on December 27, 2004. The EEOC filed a Reply on January 4, 2005.

This action was filed by the EEOC for alleged violations of Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) et seq., as amended, and Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. The Complaint alleges, in part, that four individual plaintiffs and a class of female employees were subjected to sexual harassment by the Defendants. Michael Norvil has been alleged by the EEOC to be the main perpetrator of sexual harassment by the Defendants. The EEOC deposed Michael Norvil, a former manager of the Defendants, on November 18, 2004.

At the deposition, the EEOC asked Mr. Norvil questions about the following subjects to which counsel for the Defendants objected and instructed Mr. Norvil not to answer:

1) his interoffice relationships at Buzz and if he felt he violated the company's morality policy;
2) which employees he kissed at Buzz;
3) which employees he dated at Buzz;

4) which employees he "messed around with" or had sexual intercourse with at Buzz;
5) if he told the owners that he had sex with an employee;
6) if he told employees about a particular sexual episode;
7) his relationship with a former employee with whom he socialized;
8) what documents he reviewed in preparation for the deposition;
9) if he paid an attorney's fee to Mr. Johnson; and
10) how many times he had met with Mr. Johnson and who was present for any meetings.

The Defendants objected to these questions on the basis of relevance and for questions 8, 9, and 10 on the basis of the attorney-client relationship. These questions were not answered by Mr. Norvil at his deposition. At no time did counsel for the Defendants seek a protective order under Federal Rule of Civil Procedure 30(d)(4).

First, the Court finds that the efforts made by the parties during the course of the deposition satisfy the requirement that the parties attempt to resolve this dispute in good faith, and that the EEOC has filed the necessary Local Rule 37.1 certification.

The Court next considers the questions that Mr. Norvil was instructed not to answer based on the objection as to relevance. Federal Rule of Civil Procedure 30(d)(1) provides: "Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)." The general rule is that an instruction not to answer based on relevancy is improper at a deposition. *See* Fed. R. Civ. P. 30(d)(1); *see also Eggleston v. Chicago Journeymen Plumbers' Local Union No.* 130, 657 F.2d 890, 902 (7th Cir.1981) (citations omitted) (a pre-1993 amendment decision noting that the general rule is that absent a claim of privilege, it is improper for counsel at a deposition to instruct a client not to answer). However, the general rule is not hard and fast, and in some instances, refusing to answer questions may be justified if the questions "unnecessarily touch sensitive areas

or go beyond reasonable limits." *Eggleston*, 657 F.2d at 903.

In this case, the topics raised in subject areas 1-7 posed to Mr. Norvil were not privileged, nor did they touch any sensitive areas that were not relevant to the cause of action. More importantly, the questions are relevant as they go to the heart of the factual questions at issue in this case, which put Mr. Norvil's sexual behavior and the nature of his relationships with other employees of the Defendants directly at issue. It is difficult to understand how these topics could be viewed otherwise.

Relevancy, during the discovery process, is delineated by Rule 26(b)(1), which provides in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought would be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1). Mr. Norvil is alleged to be the main perpetrator of the sexual harassment alleged by the Plaintiffs. The fact that consensual sex is not illegal does not make Mr. Norvil's general sexual conduct with employees undiscoverable, as argued by defense counsel. Who Mr. Norvil kissed at the place of business of the Defendants, the employees with whom he "messed around" or had sexual intercourse, and who he dated is relevant to the claims of sexual harassment, hostile work environment, quid pro quo, constructive discharge, and retaliatory discharge. Even if Mr. Norvil believed that some of the relationships or acts were consensual, which nevertheless goes to Mr. Norvil's general sexual behavior, some relationships or acts he believes to have been consensual may not have been. Whether Mr. Norvil discussed his relationships with the owners of the Defendants goes to the knowledge of the Defendants as to Mr. Norvil's behavior. Whether he

told other employees about a particular sexual episode goes to a number of issues, including Mr. Norvil's relationship with employees and whether there was a sexually hostile work environment. In contrast with the Defendants' assertion, these questions do not seek to disclose Mr. Norvil's "entire sex life" but rather to limit the questioning to those encounters and relationships related to Mr. Norvil's employment with the Defendants, where the alleged harassment took place. Def. Br., p. 2.[1]

Although counsel for Mr. Norvil correctly stated his objection based on relevancy on the record to preserve the objection, it was improper for counsel for Mr. Norvil to instruct Mr. Norvil not to answer questions based on a relevancy objection. On this basis, the Court orders that Mr. Norvil's deposition be reopened for the purpose of posing the questions counsel directed Mr. Norvil not to answer as well as any questions that reasonably follow therefrom. In addition, the Court orders that the Defendants shall pay the EEOC's cost in bringing this motion to compel as well as for the cost of the reopened deposition. *See* Fed. R. Civ. P. 37(a)(4)(A).

The Court next turns to the objections to topics 8-10 on the basis of attorney-client privilege. "The attorney-client privilege protects from disclosure confidential communications made by a client to his attorney." *In re Walsh*, 623 F.2d 489, 492 (7th Cir. 1980). "[T]he privilege protects confidential communications, not the attorney-client relationship as a whole." *Id.* at 493. "For example, the fact of communication between a known client and his attorney is not a privileged communication." *Id.* at 494. "The privilege does not foreclose inquiry into the fact of representation itself or the dates upon which services are rendered as long as the substance of the attorney-client relationship is shielded from disclosure." *Condon v. Petacque*, 90 F.R.D. 53, 54 (N.D. Ill. 1981).

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[1] The Court notes that the Defendants' brief is not numbered in contravention of Local Rule 5.1(a).

In addition, "[i]n the absence of unusual circumstances, the amount of an attorney's fee and the conditions of his employment do not come within the attorney-client privilege." *Bailey v. Meister Brau, Inc.*, 55 F.R.D. 211, 214 (N.D. Ill. 1972); *see also In re Witnesses Before the Special March 1980 Grand Jury*, 720 F.2d 489, 491 (7th Cir. 1984).

Mr. Norvil has not worked for Buzz since February or March 2003, yet counsel for the Defendants represents Mr. Norvil in this case. The EEOC states that, in an effort to discover if any impeaching evidence exists in this regard and whether the attorney-client privilege applied, the EEOC sought to determine the parameters of the relationship between Mr. Norvil and defense counsel by asking questions such as whether Mr. Norvil was paying defense counsel, how many times the two met, and who was present during their meetings.

The Court will consider each of the three topics in turn.

First, the EEOC asked Mr. Norvil what documents he had reviewed in preparation for the deposition. The Defendants object on the basis that this question intrudes on the attorney-client relationship. Clearly, the EEOC is not asking about the substance of the communications between Mr. Norvil and his attorney, but rather what documents Mr. Norvil reviewed in preparation for his deposition. Therefore, the Court must consider whether the EEOC is entitled to know which documents, if any, Mr. Norvil reviewed prior to his deposition with the assistance of his attorney.

The work product privilege, to the extent that it protects "opinion" product, is an almost absolute privilege. *See* Fed. R. Civ. P. 26(b)(3); *Upjohn Co. v. United States*, 449 U.S. 383, 401, 101 S.Ct. 677, 688, 66 L.Ed.2d 584 (1981); *Sporck*, 759 F.2d at 316; *see also Hickman v. Taylor*, 329 U.S. 495 (1947) (first recognizing the attorney work product doctrine). "Opinion work product includes such items as an attorney's legal strategy, his intended lines of proof, his evaluation of the

strengths and weaknesses of his case, and the inferences he draws from interviews of witnesses." *Sporck*, 759 F.2d at 316. The identification itself of the documents selected by an attorney for review by a witness prior to a deposition may reveal important aspects of the attorney's understanding of the case. *Sporck*, 759 F.2d at 316; *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D. Del.1982); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977).

In tension with this privilege, Federal Rule of Evidence 612 generally entitles the EEOC to an inspection of a writing when the writing has been used to refresh memory for the purpose of testifying, either while the witness is testifying or before testifying, if the court determines such review is necessary and is in the interests of justice. *See* Fed. R. Evid. 612. Rule 612 has generally been applied to depositions through Federal Rule of Civil Procedure 30(c). Rule 612 tends to conflict with the attorney work product doctrine, especially in situations in which the attorney has sifted through a large number of documents to extract those documents the attorney believes important for the witness' review. *See, e.g.*, *McDaniel v. Freightliner Corp.*, 99 CIV 4292 RMB FM, 2000 WL 303293, at * 3-5 (S.D.N.Y. Mar. 23, 2000) (discussing the interplay between Rule 612 and the work product doctrine); *Spork v. Piel*, 759 F.2d 312, 313-14 (3d Cir. 1985), *cert. denied* 106 S.Ct. 232 (1985). Courts are divided on the issue of whether Rule 612 allows for disclosure of such documents over a claim of work product.

Some courts have held that the privilege prevails over the disclosure under Rule 612 and that the documents remained protected. *See, e,g. Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1328 (8th Cir. 1986); *Robinson v. Time Warner, Inc.*, 187 F.R.D. 144, 147 (S.D.N.Y. 1999) (stating that documents prepared by defense counsel were protected by both the attorney-client privilege and the work product doctrine, and Rule 612 could not be utilized to circumvent the doctrines); *Stone*

Container Corp. v. Arkwright Mut. Ins. Co., 1995 WL 88902, at *4 (N.D. Ill. Feb. 25, 1995) (finding that, where documents were selected for preparation of an attorney's client and had already been produced to plaintiff, Rule 612 did not override the work product doctrine); *Parry v. Highlight Indus.*, 125 F.R.D. 449 (W.D. Mich. 1989) (holding that the plaintiffs failed to establish either a substantial need to review or that disclosure was necessary in the interests of justice for core attorney work product documents that the witness reviewed prior to deposition testimony).

In contrast, other courts have held that the work product doctrine does not protect the selection of documents by an attorney for review prior to testimony when the elements of Rule 612 have been satisfied. *See, e.g., Sporck*, 759 F.2d at 317 (reasoning that satisfaction of Rule 612 could require revelation of documents collected by an attorney for review by a witness in preparation for testimony but holding that, in that case, the requirements of Rule 612 had not been met); *Nutramax Labs., Inc. v. Twin Labs., Inc.*, 183 F.R.D. 458, 469 (D. Md. 1998) (finding that the otherwise discoverable documents not containing mental impressions or legal theories of counsel, even if assembled by counsel, were not subject to the work product doctrine, due to waiver and Rule 612); *U.S. v. 22.80 Acres of Land*, 107 F.R.D. 20, 25 (D.C. Cal.1985) (recognizing that Rule 612 has been interpreted to permit discovery of writings that a witness reviewed prior to a deposition for the purpose of refreshing recollection, that any privilege or work product protection against disclosure is thus deemed waived as to those portions so reviewed, and that the court then may order disclosure if, in its discretion, it determines disclosure is in the interest of justice) (citing *In re Comair Air Disaster Litig.*, 100 F.R.D. 350, 353 (E.D. Ky.1983); *James Julian*, 93 F.R.D. at 138; *Wheeling-Pittsburgh Steel Corp. v. Underwriters Labs., Inc.*, 81 F.R.D. 8, 10 (N.D. Ill.1978)); *Marshall v. United States Postal Service*, 88 F.R.D. 348, 350 (D. D.C. 1980) (holding that "once a

document is used to refresh the recollection of a witness, privileges as to that document have been waived”); *Berkey Photo*, 74 F.R.D. at 616-17. In *Sporck*, the Court reasoned:

> Indeed, if respondent's counsel had first elicited specific testimony from petitioner, and then questioned petitioner as to which, if any, documents informed that testimony, the work product petitioner seeks to protect-- counsel's opinion of the strengths and weaknesses of the case as represented by the group identification of documents selected by counsel--would not have been implicated. Rather, because identification of such documents would relate to specific substantive areas raised by respondent's counsel, respondent would receive only those documents which deposing counsel, through his own work product, was incisive enough to recognize and question petitioner on. The fear that counsel for petitioner's work product would be revealed would thus become groundless.

759 F.2d at 318.

Being persuaded by this reasoning and having carefully reviewed the previous court decisions on this issue, the Court finds that the selection of documents by an attorney for review by a witness in preparation for a deposition, in and of itself, is protected by the work product doctrine, but that those documents may be inquired into individually by opposing counsel if the requirements of Rule 612 are met. *Sporck*, 759 F.2d at 317; *see also J. Edward Robinson v. Time Warner, Inc.,* 187 F.R.D. 144, 147 (S.D.N.Y. 1999) ("While Levien did review certain documents prior to his deposition, however, this review alone does not automatically trump claims of privilege or work product protection. Robinson must 'not only show that [Levien] . . . reviewed the documents in preparation for his deposition, but that he relied upon them in testifying.' "); *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 494 (S.D.N.Y. 1993) ("As for Rule 612, AmBase must show not only that the witness reviewed the documents in preparation for his deposition, but that he relied upon them in testifying."); *Leucadia, Inc. v. Reliance Ins. Co.*, 101 F.R.D. 674, 679 (S.D.N.Y. 1983) ("The mere fact that a deposition witness looked at a document protected by the attorney-client privilege in preparation for a deposition is an inadequate reason to conclude that the

privilege was destroyed."); *Jos. Schlitz Brewing Co. v. Muller & Phipps (Hawaii), Ltd.*, 85 F.R.D. 118 (W.D. Mo. 1980) (holding that there was no waiver when the deponent reviewed a privileged file and there was no showing of an actual use of the documents).

As set forth above, Rule 612 requires that 1) the witness use the writing to refresh his memory; 2) the witness use the writing for the purpose of testifying; and 3) the court determine that production is necessary in the interests of justice. Fed. R. Evid. 612; *Sporck*, 759 F.2d at 317. At this point in Mr. Norvil's deposition, it is unknown to the Court what types of documents, if any, were reviewed by Mr. Norvil, if any of the documents themselves are work product, if the documents have already been produced to the EEOC in the course of discovery, or to what extent the selection of those documents by the attorney hints at the attorney's opinion based on the number of documents selected from the number of documents available. The Court trusts that, with the guidelines set forth in this Order, counsel for Mr. Norvil will be able to determine which documents, if any, should be disclosed to the EEOC based on whether Mr. Norvil reviewed the document in preparation for his deposition, whether he relied on it during his deposition testimony, and whether it is in the interests of justice to disclose the document after considering the extent to which the document was relied upon and the extent to which Mr. Norvil revealed its contents during the deposition.

The second topic objected to is based on the question posed by the EEOC: "Are you yourself paying Mr. Johnson for his legal services to you?" The general rule is that information about payment of attorney fees is not privileged. *See In re Subpoenaed Grand Jury Witness*, 171 F.3d 511 (7th Cir. 1999) (citing *In re Witnesses Before the Special March 1980 Grand Jury*, 720 F.2d at 491). However, there is an exception when revealing the identify of the individual who paid the attorney

fees would violate the attorney-client privilege because revealing the identity would disclose a confidential communication, such as the motive to engage in a criminal activity. *Id.* at 513-14. This exception does not appear to apply in these circumstances nor do the Defendants attempt to suggest how the exception might apply. Therefore, this question is not protected by the attorney-client privilege.

Third, the EEOC asked how many times Mr. Norvil had met with defense counsel and who was present during those meetings. This question does not attempt to seek information pertaining to the communications with counsel but rather attempts to determine facts surrounding Mr. Norvil's representation. In fact, questions regarding who was present during certain communications may establish that the communications were not confidential. This question is not protected by the attorney-client privilege.

Based on the foregoing, the Court now **GRANTS** the Plaintiff EEOC's Motion to Compel Responses to Deposition Questions and Motion for Sanctions [DE 89]. The Court **ORDERS** that Mr. Norvil appear at the offices of the Equal Employment Opportunity Commission, 101 West Ohio Street, Suite 1900, Indianapolis, Indiana, to provide complete answers to the EEOC's questions, including any reasonable follow-up questions, not inconsistent with this Order. The Court **ORDERS** that counsel for the parties are to arrange a convenient time for the continuation of this deposition, at a time when the undersigned Magistrate Judge is available by telephone to rule on objections, if necessary.

Further, the Defendants are **ORDERED** to pay the EEOC for reasonable expenses, including attorney fees and court reporter fees, incurred (a) to bring this motion and (b) to finish the deposition of Mr. Norvil. Counsel for the EEOC are ordered to submit a certification of fees and expenses to

the Court within ten days of the completion of Mr. Norvil's deposition.

So ORDERED this 26th day of January, 2005.

s/ Paul R. Cherry
MAGISTRATE JUDGE PAUL R. CHERRY
UNITED STATES DISTRICT COURT

cc: All counsel of record