UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

Plaintiff,

-vs- **Case No. 2:00-cv-409-FtM-29DNF**

KRONBERG BAGEL COMPANY D/B/A BAKIN' BAGELS

Defendant.

ORDER

The Court has reviewed the multitude of discovery motions that were filed in this action. It is clear from many of these motions that the parties should have cooperated to resolve many of the issues that were raised without involving the Court in petty disputes. It is also clear that some of these motions were filed without a sound legal basis, and were meant to harass the opposing party. In the future, the Court will consider sanctioning any party who files a motion that lacks a sound basis in law, or that should have been resolved without court intervention. These comments apply to all parties in this action.

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MOTION: **NOTICE OF WITHDRAWAL OF DEFENDANT'S MOTION TO COMPEL MORE COMPLETE RESPONSES TO REQUEST TO PRODUCE AND FOR SANCTIONS (Doc. No. 86)**

FILED: **October 1, 2001**

THEREON it is **ORDERED** that the motion is **GRANTED**.

MOTION: **DEFENDANT'S MOTION TO COMPEL MORE COMPLETE RESPONSES TO REQUEST TO PRODUCE AND FOR SANCTIONS (Doc. No. 51-1, 51-2)**

FILED: **August 28, 2001**

THEREON it is **ORDERED** that the motion is **DENIED** as moot.

MOTION: **DEFENDANT'S MOTION TO ENLARGE PERIOD FOR FILING ITS MEMORANDUM IN OPPOSITION TO PLAINTIFF AND INTERVENORS' JOINT MOTION TO EXTEND DISCOVERY CUT-OFF (Doc. No. 68)**

FILED: **September 13, 2001**

THEREON it is **ORDERED** that the motion is **GRANTED**.

The Clerk is directed to file the memorandum in Opposition to Joint Motion for Extension of Discovery Cutoff dated September 11, 2001, separately.

MOTION: **INTERVENORS' SECOND MOTION TO COMPEL AND STRIKE DEFENSES (Doc. No. 60-1, 60-2)**

FILED: **September 7, 2001**

THEREON it is **ORDERED** that the Motion to Compel (60-1) is **GRANTED in part and DENIED in part,** that the Motion to Strike Defenses (Doc. No. 60-2) is **DENIED**.

Interrogatory No. 1[1] seeks the following:

> For every individual employed by Bakin' Bagels in any capacity from January 1, 1997 to present, the individual's last known address and telephone number, sex, date of birth, social security number, inclusive dates of employment, job title and reason for leaving if no longer employed.

Request for Production No. 42 seeks the following:

> All documents reflecting the name, last known address and telephone number, sex, date of birth and/or social security number of all individuals who have worked for Defendant within the past five (5) years.

The Defendant argues that these requests are too broad. In its September 17, 2001 Order (Doc. 70), the Court limited the information that the Defendant had to produce to the names, last known addresses, telephone numbers and social security numbers of past employees. The Court finds that this information is sufficient to respond to the Intervenors' interrogatories. The Defendant shall have eleven (11) days in which to produce this information.

[1] The Intervenors quote certain interrogatories and requests for production in their motion, but fail to make any argument regarding these interrogatories and requests for production. The Court will not address the interrogatories and requests for production that lack argument.

With respect to Interrogatory No. 2 and Request for Production No. 38, the Defendant agreed to remove its objections and provide this information. Therefore, the Motion to Compel is denied as to Interrogatory No. 2 and Request for Production No. 38.

Request No. 9 seeks the following:

> All documents reflecting the relationship between Defendant and John Kronberg including without limitation contracts, agreements, and/or correspondence.

Request No. 12 seeks the following:

> All documents reflecting the relationship between Defendant and Christopher J. Kronberg including without limitation contracts, agreements, and/or correspondence.

The Defendant agreed to produce these documents upon an appropriate protective order being entered. The parties are required to meet to attempt to reach an agreement as to how these documents will be produced including the terms of an appropriate protective order should it be necessary.

Request No. 10 seeks the following:

> All documents reflecting the relationship between Defendant and Peggy Kronberg including without limitation contracts, agreements, and/or correspondence.

Request No. 11 seeks the following:

> All documents reflecting the relationship between Defendant and Mike Krasny including without limitation contracts, agreements, and/or correspondence.

The Intervenors did not set forth clearly who Peggy Kronberg and Mike Krasny are and how their relationship to the Defendant is relevant in this case. "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P.26(b)(1) At this point, the Court does not have enough

information to determine whether these Requests are relevant. Therefore, the Motion to Compel is denied as to these requests.

Request Nos. 21 though 25 seek the following information concerning Christopher J. Kronberg, Scott Anderson, Michael DeBlasi, Bryan Hale, and C. John Kronberg:

> All documents concerning alleged poor performance or misconduct, by [the above individuals], including all disciplinary files or other documents reflecting any disciplinary action against [them].

In their Motion, the Intervenors clarify their request as follows: "they seek only information that is directly related to the issues in this case, i.e., whether any of the managers were ever disciplined or rated poorly in performance for failing to prevent or properly respond to the problem of sexual harassment or sex discrimination that ran rampant in Defendant's store." (Motion, p. 16) The Defendant agreed that this limitation would narrow the scope of the request and strike a proper balance between revealing personal records and the Intervenors' right to have this information. Therefore, the Court will limit these requests to any documents showing that these individuals were disciplined or rated poorly in performance for failing to prevent or properly respond to the problem of sexual harassment or sex discrimination. In all other respects the Motion to Compel regarding these Requests is denied.

Request No. 43 seeks the following:

> All documents reflecting the Defendant's revenues, expenses, profits, losses and net worth for the years 1997 through the present.

The Intervenors claim that this information is relevant to the claim of punitive damages and to the issue of whether the corporate veil was pierced. Concerning the issue of piercing the corporate veil, the Intervenors claim that loaning money to the corporation might pierce the corporate veil. The

Intervenors fail to cite any cases which stand for this proposition. The Court will not require financial disclosure based on a theory that is not well supported. The Defendant also argues that it has or will be filing a motion for summary judgment regarding the claim of punitive damages, and if granted, the claim for punitive damages would not survive. The Court has determined that this discovery request is premature. If the issue of punitive damages survives the dispositive motion, then the Defendant shall provide the requested financial information within fifteen (15) days from the date of that decision. Otherwise the Defendant is not required to provide this information.

The Defendant responded that it has no documents in response to Request No. 68. Therefore, the Motion to Compel is denied as to this request.

The Plaintiff argues that the Court should strike the Defendant's Affirmative Defenses as a remedy for not providing discovery. The Court finds that this remedy is not appropriate. The Defendant requests fees and costs for having to respond to the instant motion. The Court finds no cause to award fees and costs. Therefore, this issue is denied.

MOTION: **INTERVENORS' AND PLAINTIFF'S JOINT MOTION TO COMPEL OR, IN THE ALTERNATIVE, STRIKE AFFIRMATIVE DEFENDANTS (Doc. No. 61-1, 61-2)**

FILED: **September 7, 2001**

THEREON it is **ORDERED** that the Motion to Compel (61-1) is **GRANTED** in part and **DENIED** in part, and that the Motion to Strike Affirmative Defenses (Doc. 61-2) is **DENIED**.

The Intervenors and Plaintiff argue that the Defendant alleged in its Fifth, Eighth and Thirteenth Affirmative Defenses that it promptly investigated the complaints of sexual harassment and took

appropriate remedial action. However, during discovery, the Defendant asserted the work-product privilege as to documents involving the investigation conducted by Mary Green, an individual hired by the Defendant. Additionally, in response to the Plaintiff and Intervenors discussion about deposing Mary Green, the Plaintiff and Intervenors claim that Defense Counsel stated that "you will have to litigate that one." The Plaintiff and Intervenors claim that the Defendant should be required to respond to a multitude of requests for production that relate to this investigation, and that John Kronberg should be required to answer questions that were posed at his deposition which he was improperly instructed not to answer.

The Defendant responds that Mary Green's conclusions and assessments are protected by the work-product privilege, and that all other information from her investigation was provided during discovery. The Defendant cites to John Kronberg's deposition in its Response to show the Court that John Kronberg did in fact answer questions regarding the investigation such why Mary Green was chosen, her qualifications, how she conducted the investigation, what files were provided to her, and who she interviewed. John Kronberg also answered questions regarding his actions in response to Mary Green's findings. The only information that the Defendant did not provide was Mary Green's conclusions and assessments. Specifically, the question was "What did she [Mary Green] report back to you?" Mr. Kronberg was instructed not to answer based on the work-product privilege.

The Fifth, Eighth and Thirteenth Affirmative Defenses assert that the Defendant took reasonable care to prevent and correct the sexually harassing behavior, and the Defendant is protected by good faith. Fed.R.Civ.P. 26(b)(3)[2] provides as follows:

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[2] The work product privilege is not defined as a substantive privilege. *Shipes v. BIC Corp.*, 154 F.R.D. 301, 305 n.2 (M.D. Ga. 1994) As such, federal law, not state law, applies.

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery had substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The work-product privilege is a common law privilege described in detail in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) The privilege is to protect materials prepared in anticipation of litigation. *McMahon v. Eastern Steamship Lines, Inc.*, 129 F.R.D. 197, 198 (S.D. Fla. 1989) The privilege extends to documents which were prepared by a party or his representative such as an agent or an employee working on behalf of the party and which were prepared with the prospect of litigation in mind. *Joiner v. Hercules, Inc.*, 169 F.R.D. 695, 698 (S.D. Ga., 1996) The work-product privilege is not absolute, and a party may obtain work-product documents upon a showing of substantial need. *Id.* The burden is on the moving party to show that he cannot obtain the substantial equivalent of the requested documents through other efforts such as conducting his own investigation. *Id.* Even then, the Court must preclude from discovery "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *In re Grand Jury Proceedings*, 73 F.R.D. 647, 653 (M.D. Fla. (1977)

In the instant case, the Defendant claims to have investigated the complaints of sexual harassment and took remedial action. To establish whether the Defendant did investigate and take remedial action, the Defendant must show only that it hired Mary Green, she investigated the claims, and that remedial action was taken. The Defendant has permitted discovery into the investigation itself

and any remedial action taken. Mary Green's conclusions are not relevant to whether an investigation occurred and the remedial action taken, especially based on the statements by Counsel for the Defense that Mary Green will not testify at trial.

In addition, Mary Green was hired by the Defendant upon learning of the potential for litigation and she was working on the behalf of the Defendant. Therefore, the work-product privilege applies to the documents prepared by Mary Green for the Defendant. The Court must then look to the document to determine if it contains mental impressions or conclusions of a representative of the party. While she was investigating, Mary Green was a representative party of the Defendant and these documents contain her conclusions regarding her investigation. Therefore, the Court grants in part the Motion to Compel, and the Defendant is required to provide all portions of the documents prepared by Mary Green which do not include her conclusions regarding the investigation. The Court will deny in part the Motion to Compel as to all parts of the documents prepared by Mary Green that contain her conclusions and mental impressions. This ruling applies to all of the document requests. The Court is satisfied that John Kronberg sufficiently answered the questions posed to him at his deposition regarding the investigation.[3]

The Plaintiff argues that the Court should strike the Defendant's Affirmative Defenses as a remedy for not providing discovery. The Court finds that this remedy is not appropriate.

[3] The Court will not address the issue of Mary Green's deposition as it appears that it was never noticed.

MOTION: **PLAINTIFF'S MOTION FOR RECONSIDERATION OF COURT'S ORDER GRANTING DEFENDANT'S MOTION FOR A PROTECTIVE ORDER REGARDING PLAINTIFF'S NOTICE OF CONTINUATION OF CHRIS KRONBERG DEPOSITION OR IN THE ALTERNATIVE MOTION FOR LEAVE TO TAKE ONE ADDITIONAL DAY OF DEPOSITION OF CHRIS KRONBERG (Doc. No. 62-1, 62-2)**

FILED: **September 10, 2001**

THEREON it is **ORDERED** that the motion is **GRANTED**.

The Court has reviewed both party's pleadings. It is clear that Chris Kronberg is a key witness in this action as he was the manager and owner of the Defendant at the time. However, it is also clear that Mr. Kronberg suffers from health problems that may affect a deposition. The Court will permit the EEOC to take an additional four (4) hours of deposition of Mr. Kronberg on a date and time that is convenient to him as well as counsel.

MOTION: **DEFENDANTS' MOTION TO COMPEL MENTAL EXAMINATION (Doc. No. 63)**

FILED: **September 7, 2001**

THEREON it is **ORDERED** that the motion is **DENIED**.

The Defendant is requesting that the Intervenor Victoria Briggs submit to a mental examination by Dr. Sylvia F. Carra. The Defendant based this request upon the argument that the EEOC is seeking damages for emotional pain, suffering, inconvenience, humiliation and loss of enjoyment of life. The

Intervenor argued in response that the Defendant has failed to show that the Plaintiff has placed her mental condition "in controversy" as is required under Fed.R.Civ.P. 35.

Fed.R.Civ.P. 35(a) provides as follows:

> Order for Examination. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Under Fed.R.Civ.P. 35, the "defendant must establish that plaintiff's mental condition or physical condition is 'in controversy' and must show 'good cause' for the mental or physical examination(s). This requires an affirmative showing that the mental or physical condition is 'really and genuinely' in controversy and that good cause exists for each particular examination." *Ali v. Wang Laboratories, Inc.*, 162 F.R.D. 165 (M.D. Fla., 1995) In requesting mental examination, the defendant must make a "greater showing" than in other types of discovery. *Id.* The Court must consider the pleadings, the court file, and another information provided to it. An Intervenor's "'mental condition' within the meaning of Rule 35 is not necessarily placed in controversy merely because plaintiff seeks recovery for 'emotional distress.' A person with no 'mental condition' may still suffer emotional distress which is compensable." *Id.* at 167-168.

The focus in a sexual harassment case is on the defendant's activities and not on the perceptions of the plaintiff/intervenor or the intervenor's reaction to defendant's conduct. *Robinson v. Jacksonville Shipyards, Inc.* 118 F.R.D. 525 (M.D. Fla., 1988) "If the defendant's conduct was sufficiently extreme to violate Title VII, then plaintiff's reaction to or interpretation of that conduct is unimportant. If, on

the other hand, defendant's conduct did not unreasonably interfere with plaintiff's working environment, her perception of defendant's conduct does not suffice to create a violation of Title VII." *Id.* at 531, citing *Jennings v. D.H.L. Airlines*, 101 F.R.D. 549, 551 (N.D. Ill., 1984). In *Robinson*, the District Court found that this objective standard regarding Title VII cases did not place the plaintiff's mental condition in controversy. *Robinson*, 118 F.R.D. 531. The Court found that by permitting mental examination in Title VII cases where no substantive count involved allegations regarding mental condition " would endorse mental examinations in every Title VII hostile work environment sexual harassment case. This result is unacceptable." *Id.* as 531, citing *Vinson v. Superior Court*, 43 Cal. 3d 833, 840, 740 P.2d 404, 409, 239 Cal. Rptr. 292, 297 (1987)

The Defendant has not made a sufficient showing to warrant a mental examination of Victoria Briggs. The Court finds that Victoria Briggs mental condition is not "in controversy" in this action. Therefore, the Court will not require that Ms. Briggs submit to a mental examination.

MOTION: **DEFENDANTS' MOTION TO COMPEL MENTAL EXAMINATION (Doc. No. 66)**

FILED: **September 7, 2001**

THEREON it is **ORDERED** that the motion is **DENIED** as moot. It appears that this motion is a duplicate of (Doc. 63).

MOTION: **DEFENDANT'S MOTION TO COMPEL COMPLETE DAMAGES DISCLOSURES (Doc. No. 64)**

FILED: **September 7, 2001**

THEREON it is **ORDERED** that the motion is **GRANTED**.

The EEOC and the Intervenors provided damage disclosures for compensatory and punitive damages as the statutory maximums without listing a specific dollar amount. The Defendant argues that the Plaintiff and Intervenors should be required pursuant to Fed.R.Civ.P. 26(a)(1)(C) to disclose a specific dollar amount for these items of damage. The Court has reviewed the Plaintiff and Intervenors damage disclosures for Compensatory Damages and Punitive Damages and finds them insufficient. Therefore, the EEOC and the Intervenors shall provide reasonable estimates for Compensatory and Punitive damages within twenty (20) days from the date of this Order.

MOTION: **DEFENDANT'S MOTION TO COMPEL EEOC'S ANSWERS TO DEFENDANT'S SECOND SET OF INTERROGATORIES (Doc. No. 85)**

FILED: **September 28, 2001**

THEREON it is **ORDERED** that the motion is **DENIED.**

The Defendant is requesting that the Court compel the EEOC to respond more fully to the following Interrogatory:

> List every statement or action by Kevin Healey which you contend created or contributed to a hostile work environment, proving the date, time and place, witnesses and circumstances of each statement or action.

The EEOC responded to this Interrogatory by generally describing the workplace, the individuals involved, and the time frame. The EEOC argues that this response is sufficient, and that it does not have the burden to review all of the extensive depositions that were taken of the Intervenors and the similarly situated females and the document discovery to cite the pages that describe each incident. The EEOC argues that the Defendant is well able to review the depositions and other discovery to find this information. The Defendant argues that Federal Rule of Civil Procedure 33 requires the EEOC to respond to this Interrogatory fully. Rule 26 (b)(2) does allow the court to limit discovery if it determines: "(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive."

In the instant case, the EEOC provided a general outline of the dates, individuals, and location of the alleged sexual harassment. The Defendant has equal access to all of the discovery that was provided to it to locate the specific allegations of the similarly situated females. This Interrogatory was duplicative of the prior discovery, and therefore, the Court will deny the Motion to Compel.

MOTION:	**PLAINTIFF AND INTERVENORS' JOINT MOTION FOR EXTENSION OF DISCOVERY CUT-OFF (Doc. No. 53)**
FILED:	**August 30, 2001**

THEREON it is **ORDERED** that the motion is **DENIED** without prejudice.

The Plaintiff and the Intervenors failed to set forth the exact discovery that has not been completed and the reason why each type of discovery had not been completed. Absent agreement by the Defendant, the Court will not generally extend the discovery period.

DONE and **ORDERED** in Chambers in Ft. Myers, Florida this 31st day of October, 2001.

DOUGLAS N. FRAZIER
UNITED STATES MAGISTRATE JUDGE

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Unrepresented Parties

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