UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, vs. CONSOLIDATED RESORTS, INC., Defendants.	Case No. 2:06-cv-01104-LDG-GWF **ORDER** **(Motion for Protective Order #38)**

This matter is before the Court on Defendant Consolidated Resort, Inc.'s Motion for Protective Order (#38), filed on September 21, 2007; Plaintiff EEOC'S Opposition to Defendant's Motion for Protective Order and Cross-Motion for Order Compelling Documents and Responses to Questions at Deposition and Permission to Take Depositions In Excess of Seven Hours (#41), filed on October 1, 2007; and Defendant's Reply In Support of Motion for Protective Order and Opposition to EEOC's Cross-Motion to Compel (#42), filed on October 3, 2007. The Court conducted a hearing on these motions on October 5, 2007.

Following the hearing in this matter, the parties entered into a Stipulation Regarding Approved Deposition Questions (#46), which resolves one of the issues concerning the deposition of Defendant's general counsel. The parties have also entered into a Stipulation and Protective Order Regarding Confidentiality of Third Party Personnel Files (#49), which will govern the employee personnel records produced by Defendant.

. . .

BACKGROUND

Plaintiff U.S. Equal Employment Opportunity Commission ("EEOC") filed this action on September 7, 2006 pursuant to Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991. *Amended Complaint (#3),* ¶ 1. The EEOC alleges that Defendant Consolidated Resorts engaged in unlawful employment practices in violation of 42 U.S.C. § 2000e-5(f)(1) and (3) by sexual harassment and sex-based harassment of the Charging Party in the form of verbal, visual and physical harassment. According to the complaint, between June and September 2004, the Charging Party was forced to perform oral sex upon Supervisors and the General Sales Manager in order to keep her job and was also subjected to unwanted touching of her breasts and private area. *Amended Complaint (#3),* ¶ ¶ 13, 16. The EEOC seeks a permanent injunction against Consolidated Resorts, Inc. from engaging in sex discrimination and any other employment practice which discriminates on the basis of sex; and that the Defendant be ordered to institute and carry out policies, practices and programs which provide equal employment opportunities for women and which eradicate the effects of their past unlawful employment practices. The EEOC also requests that the Charging Party be awarded damages for her pecuniary loss and emotional distress, and that punitive damages be awarded against Defendant for its malicious and reckless conduct. *See Amended Complaint (#3),* p. 5. Consolidated Resorts denies the EEOC's allegations and, among its affirmative defenses, alleges that it promulgated appropriate policies and exercised reasonable care to prevent and promptly correct any discriminatory, harassing or retaliatory behavior and that the Charging Party unreasonably failed to properly avail herself of the preventive and/or corrective opportunities provided by Defendant. *See Answer to Amended Complaint (#6).*

The Charging Party, Erin Dawson, alleges that only Ramiro Rouco, who was Consolidated's General Sales Manager at the time, forced her to perform oral sex on him or engaged in unwanted touching of her breasts and private area. *Opposition/Cross-Motion (#41)*, p. 3. Ms. Dawson alleges that Charles Rouse, Defendant's Director of Sales, made offensive sexual comments to her, including asking her to show her breasts to him and other employees, and that Mr. Rouse sent her a sexually offensive postcard. Ms. Dawson also alleges that a third employee, Chris Kollmer, a Sales Manager, made sexually offensive statements by asking her to show her breasts to other employees. The alleged

harassment occurred while Ms. Dawson and the aforementioned employees were employed at the Defendant's sales office at the Tahiti Resort in Las Vegas, Nevada. Consolidated Resorts denies that its employees engaged in the foregoing conduct or, in the alternative, that if they did, it was not unwelcomed by or offensive to Ms. Dawson, who, Defendant alleges, engaged in sexually provocative speech and conduct in the workplace.

Ms. Dawson reported the alleged sexual harassment to Defendant's Human Resources Department on September 12, 2004. *Opposition/Cross-Motion (#41)*, pp. 3-4.[1] According to the EEOC, Defendant's Human Resources Director, Kimberly Barber, and Defendant's in-house counsel, Kevin Blair, investigated Ms. Dawson's complaint. During the pendency of the investigation, Ms. Dawson was transferred to work at Defendant's Club de Soleil office to prevent further contact between herself and Mr. Rouco. The EEOC alleges that Ms. Dawson's opportunities to earn comparable wages at the Club de Soleil location were sharply curtailed. The EEOC further alleges that although the Defendant initially promised to make Ms. Dawson financially whole for any lost compensation resulting from the transfer, it later reneged on that promise and never brought her compensation up to the level she earned prior to the transfer. *Id.* Defendant's Human Resources Department completed its internal investigation of Ms. Dawson's complaint on or about October 6 or 7, 2004 without finding that sexual harassment had occurred. Defendant gave Ms. Dawson the option of remaining at the Club de Soleil office or returning to the Tahiti Resort sales office. According to the EEOC, Mr. Blair and Ms. Barber allegedly told Ms. Dawson that the only way she could receive compensation for the alleged sexual harassment would be if she filed a worker's compensation claim and offered to assist her in doing so. *Opposition/Cross-Motion (#41),* p. 4. Ms. Dawson objected to the manner in which the Defendant's investigation was conducted and she resigned from Defendant's employment on November 8, 2004. According to the EEOC, Mr. Rouco, Mr. Rouse and Mr. Kollmer continued to work for Consolidated Resorts, and Mr. Rouco has since been promoted a number of times. As of January 2007, he heads the sales force for Consolidated Realty's Orlando, Florida resort facility. *Opposition/Cross-*

---

[1]The EEOC previously attached a copy of Defendant's internal investigation file regarding Ms. Dawson's sexual harassment complaint to its sealed reply brief in support of its Sealed Motion for Protective Order (#27). *See Sealed Reply (#31), Declaration of Dana Johnson, Exhibit "1".*

Motion (#41), p. 4, *Exhibit "B", Rouco Deposition*, p. 17:9-25.

Defendant states that it is a nationwide company with numerous discrete locations in Hawaii, Florida and Las Vegas, Nevada. In Las Vegas, Defendant and its subsidiary Consolidated Realty, Inc., maintain "a business presence" at ten locations, including the two locations where Ms. Dawson worked – Tahiti Resort and Club de Soleil. *See Motion (#38)*, pp. 3-4. The EEOC notes, however, that Consolidated Resorts maintains one human resources department which is responsible for investigating and taking appropriate action in regard to discrimination complaints arising from Defendant's different business locations. *Opposition/Cross-Motion (#41),* p. 17; *Exhibit "A"*, Deposition of Kevin Blair, p. 79.

The discovery dispute, at issue, concerns the EEOC's efforts to obtain documents and deposition testimony from Defendant regarding sexual harassment and discrimination complaints made by other employees. The EEOC served Amended Requests for Production of Documents on Defendant in February 2007 which included the following requests:

> **Request For Production No. 24:**
>
> Please produce all DOCUMENTS which evidence, set forth, or reflect any complaints or concerns brought by any of YOUR workforce (whether designated as employees or independent contractors) regarding sexual harassment, hostile environment or retaliation[.]
>
> **Request For Production No. 25:**
>
> Please produce all DOCUMENTS which evidence, set forth, pertain or relate to any complaints of harassment, discrimination, retaliation (whether based upon race, national origin, sex or membership in any other protected classification) brought by any of YOUR employees or independent contractors (including but not limited to Dawson) at any time from January 1, 2000 to the present (including but not limited to written complaints, notes or other documentation memorializing oral complaints, notes or other documentation taken in the course of or pertaining to YOUR investigation into a complaint of discrimination or harassment, notes or documentation of the results of any investigation undertaken in connection with a harassment or discrimination complaint, documentation of disciplines imposed as a result of a complaint being lodged or brought, DOCUMENTS which reflect the identity of the person or persons against whom the complaining employee brought the complaint).

Defendant's Motion for Protective Order (#38), Exhibit "A".

. . .

Defendant served its responses to these requests on June 18, 2007 and objected to them on grounds of irrelevancy, vagueness, undue burdensomeness, work-product doctrine and attorney-client privileges, and the privacy rights of third party non-litigants. *See Motion (#38)*, p. 4; *Exhibit "B."* The EEOC did not immediately confer with Defendant regarding its objections or file a motion to compel responses. The EEOC's counsel subsequently attempted to inquire into other complaints of sexual harassment during the deposition of Defendant's general counsel, Kevin Blair, on August 9, 2007. Although Defendant allowed Mr. Blair to testify about his general practices in handling such complaints, Mr. Blair refused to answer questions about specific complaints. Following Mr. Blair's deposition, the parties' counsel conferred in September 2007 regarding the scope of documents that Defendant would produce and the related areas that it would permit Mr. Blair and Defendant's other officers or employees to testify about at deposition.

Although the parties' counsel narrowed the scope of their dispute, they were unable to reach agreement. Defendant offered to produce information regarding complaints of *sexual harassment* at Erin Dawson's locations of work (Tahiti Resort and Club de Soleil) during the time she worked for Consolidated Realty (Consolidated Resorts) from 1999 to 2004, and any complaints of *sexual harassment* made against Mr. Rouco, Mr. Rouse and Mr. Kollmer which occurred prior to Ms. Dawson's resignation in November 2004. *See Motion (#38),* p. 5 and *Exhibit "E"*. The EEOC offered to limit the subject matter of its requests to complaints of *sexual harassment and gender discrimination*; to limit the scope to Defendant's sales force; and to limit the temporal scope of the requests for all of Defendant's locations in Las Vegas from 1999 to the present; and to limit the temporal scope for Defendant's Orlando, Florida location(s) from January 2007 (when Mr. Rouco began working there) to the present. As the Court understands this offer, the EEOC eliminated production of documents regarding complaints and investigations arising from Defendant's Hawaii business location(s).

Consolidated Resorts also seeks a protective order regarding those portions of its files concerning other complaints of sexual harassment which are protected by the attorney-client and/or work-product doctrine. Defendant also seeks to preclude the EEOC from questioning Defendant's in-house counsel, Mr. Blair, or Defendant's other officers or employees regarding privileged matters. The

EEOC disputes whether the attorney-client privilege or work-product doctrine applies and contends that Defendant has waived the privileges.

DISCUSSION

Fed.R.Civ.Pro. 26(b)(1), as amended in 2000, generally provides that parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. The rule further provides that for good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. *EEOC v. Caesars Entertainment Inc.*, 237 F.R.D. 428, 431 (D.Nev. 2006), states that there is general consensus that the 2000 amendments do not dramatically alter the scope of discovery and that Rule 26 still contemplates liberal discovery and that relevancy under the rule remains extremely broad. The amendments, however, require the court to give greater scrutiny to discovery requests by focusing on whether the requested discovery makes sense in light of the Rule 26(b)(2) factors and by considering the totality of the circumstances, weighing the value of the material sought against the burden of providing it and taking into account society's interest in furthering the truth-seeking function in the particular case before the court. *Id.* In deciding these motions, the Court therefore begins with an analysis of the parties' claims and defenses.

Under Title VII, it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1). Sexual harassment is a form of sex discrimination. By tolerating sexual harassment against its employees, the employer is deemed to have adversely changed the conditions of their employment in violation of Title VII. *Swenson v. Potter*, 271 F.3d 1184, 1191 (9th Cir. 2001); *Nichols v. Azteca Restaurant Enterprises, Inc.,* 256 F.3d 864, 871 (9th Cir. 1991); *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000). To prove a "hostile work environment" claim, the plaintiff must demonstrate conduct "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment." *Swenson,* at 1191, citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, (1986). The plaintiff must also prove that the conduct was both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 871-72 (9th Cir. 2001).

Where harassment by a non-supervisory co-worker is alleged, an employer can only be liable if its own negligence is a cause of the harassment. The test, here, is whether the employer knew or should have known of the harassment and failed to take adequate remedial measures to stop it. *Swenson v. Potter,* 271 F.3d at 1991; *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d at 875. An employer, however, is vicariously liable for a sexually hostile work environment created by a supervisory employee with authority over the alleged victim without a showing of negligence by the employer. Where no tangible employment action is taken, however, the employer may raise an affirmative defense to liability or damages by showing (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 2292-93 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 2270 (1998) (the "*Faragher/Ellerth* Affirmative Defense").

The EEOC has alleged a claim for punitive damages against Defendant under 42 U.S.C. § 1981(a)(b)(1). In order to recover punitive damages, Plaintiff must show that Defendant engaged in intentional discrimination with malice or reckless indifference to the federally protected rights of the employee. *Kolstad v. American Dental Assoc.*, 527 U.S. 526, 119 S.Ct. 2118, 2124 (1999), states that this requirement focuses on whether the employer acted with knowledge or reckless indifference that it may be violating federal law and not merely that it engaged in intentional discrimination. In some circumstances an employer may engage in intentional discrimination in the erroneous, but good faith, belief that its conduct is lawful. While the employer may be liable for compensatory damages or subject to injunctive relief in such cases, it cannot be held liable for punitive damages. An employer is also not vicariously liable for punitive damages based on the discriminatory decisions or conduct of its managerial agents, where those decisions or conduct are contrary to the employer's good faith efforts to comply with Title VII. *Kolstad,* 119 S.Ct. at 2129.

The EEOC argues that Consolidated Resorts is not protected from liability if its investigation of Ms. Dawson's sexual harassment complaint was unreasonable or a sham. In *Swenson v. Potter*, 271 F.3d at 1193, the Ninth Circuit stated that the fact that an employer has conducted an investigation in

response to a harassment complaint does not shield it from liability if the investigation is rigged to reach a pre-determined conclusion or otherwise conducted in bad faith. *Swenson* also stated, however, that the employer can act reasonably, yet reach a mistaken conclusion as to whether the accused employee actually committed harassment. 271 F.3d at 1196. The reasonableness of the employer's conduct should be determined from its investigation and resolution of the complaint in issue. In *Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995), for example, the court held that the employer's investigation was not reasonable or adequate where it failed to promptly interview the alleged harasser, gave him an unfair opportunity to prepare extensive documentation for his defense, and accepted the alleged harasser's version of events over that of the plaintiff without taking reasonable steps to corroborate the alleged harasser's denial of harassing conduct.

The EEOC has not identified similar alleged deficiencies in Defendant's investigation of Ms. Dawson's complaint. It does allege, however, that Defendant's Human Resources Director and General Counsel improperly informed Ms. Dawson that her only remedy for the alleged sexual harassment was to make a claim for worker's compensation, thereby arguably attempting to mislead her regarding her right to pursue administrative or legal remedies under Title VII. Additionally, the EEOC alleges that Defendant reneged on its promise to provide Ms. Dawson with comparable compensation after she was transferred to Club de Soleil during the investigation. Such conduct, if established, could arguably provide circumstantial evidence that Defendant did not intend to conduct an objective and fair investigation of her complaint or implement appropriate remedies in response to a valid complaint of sexual harassment.

The Court does not agree with Defendant's argument that evidence regarding Defendant's investigation of other employees' sexual harassment complaints is wholly irrelevant to Defendant's *Faragher/Ellerth* defense, or to whether punitive damages should be imposed. Although sexual harassment complaints made by other employees, which were unknown to the plaintiff, are not relevant to proving that a hostile work environment existed, they may be relevant to assessing the employer's motive in regard to its investigation of the plaintiff's complaint. *Brooks v. City of San Mateo*, 214 F.3d 1082, 1089 n. 4 (9th Cir. 2000). In *Williams v. Conagra*, 378 F.3d 790, 790, (8th Cir. 2004), the court stated that evidence of racial bias in other employment situations, even if unknown to the plaintiff,

could permissibly lead to an inference that management was similarly biased against plaintiff and was therefore admissible to show the employer's motive. Such evidence may also be admissible to prove Defendant's reprehensible state of mind in its conduct toward Ms. Dawson for purposes of imposing punitive damages. In *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007), the Supreme Court held that although a defendant cannot be punished for its misconduct toward non-parties, that conduct may be relevant and admissible to establishing its reprehensible state of mind. The Court held that the trial court is required to properly instruct the jury to make this difficult distinction.

Therefore, evidence that Defendant engaged in a pattern and practice of inadequately investigating complaints of sexual harassment, or has routinely found in favor of the alleged harassers in a manner that indicates a pre-determined conclusion, could provide circumstantial evidence that Defendant's investigation and resolution of Ms. Dawson's complaint was not objective or fair. Although the Court may exclude evidence regarding other complaints if no relevant nexus is shown, discovery regarding Defendant's investigation and resolution of other sexual harassment claims is relevant to determine whether admissible evidence exists. As *Jackson v. Montgomery Ward & Co.*, 173 F.R.D. 524, 527-28 (D. Nev. 1997), relying on *Estes v. Dick Smith Ford Inc.,* 856 F.2d 1097, 1103 (8th Cir. 1988), explained, the rationale for permitting liberal discovery of other discrimination complaints made against an employer in a disparate treatment case is based on the difficulty plaintiffs often experience in rebutting with direct evidence an employer's account of its own motives for terminating or rejecting an employee. Circumstantial proof may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive. The same rationale is applicable to a claim that the employer failed to conduct a reasonable and fair investigation of the Charging Party's sexual harassment complaint.

The EEOC has not presented evidence, such as complaints or actions brought against Defendant by other employees, which indicate Defendant has engaged in a pattern of improper or inadequate practices in investigating sexual harassment or gender discrimination complaints. While the absence of such information does not warrant complete denial of Defendant's discovery requests, it clearly cautions against granting overly broad discovery into other types of complaints or investigations, the relevance of which is questionable. *See Spina v. Our Lady of Mercy Medical Center*, 2001 WL 630481

(S.D.N.Y. 2001) *2, stating that "'[w]here a plaintiff fails to produce any specific facts whatsoever to support a[n] ... allegation, a district court may, in its discretion, refuse to permit discovery....' *Contemporary Mission, Inc. v. United Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981)." Although not protected by a federal privilege, courts have also recognized that discovery into personnel records of non-party employees has the potential to unreasonably intrude on their privacy interests. In *Hawaii Corp. v. Crossley*, 88 F.R.D. 518, 524 (D. Hawaii 1980), the court stated that discovery of other employees' personnel files is allowed if the (1) the material sought is "clearly relevant" and (2) the need for discovery is compelling because the discovery sought is not otherwise readily available. In *Miller v. Federal Express*, 186 F.R.D. 376 (W.D. Tenn. 1999), the court held that discovery regarding personnel records of other employees should be limited to employees who were "similarly situated" to plaintiff in all of the relevant aspects. Only those portions of records containing relevant information should be produced. As the EEOC notes, some federal courts have been wary of adopting the "compelling need" standard set forth in *Crossley* and *Miller*. *See Hill v. Motel 6,* 205 F.R.D. 490, 496 (S.D. Ohio (2001); *Ladson v. Ulltra East Parking Corp.*, 164 F.R.D. 376, 378 (S.D.N.Y. 1996) and *Hicks v. Robeson County*, 187 F.R.D. 232, 235 (E.D.N.C. 1999). The "compelling need" standard is consistent with the factors that the court considers under Rule 26(b)(2), including the importance of the discovery in resolving the issues in the case, and whether it is obtainable from some other source.

Defendant argues that the limits it has proposed regarding discovery of other complaints are supported by the majority of cases. At the hearing in this matter, Defendant cited, in particular, the decision in this district in *Jackson v. Montgomery Ward & Co.*, 173 F.R.D. 524 (D. Nev. 1997). *Jackson* held that the information sought by plaintiff was relevant to his burden of showing that the employer's explanation for rejecting him for promotion was a pretext for invidious discrimination. *Id.,* at 527. The court held that plaintiff's discovery requests were properly restricted by subject matter to the facility where plaintiff was employed and were restricted to the time period of plaintiff's employment. *Id.,* at 528, citing *McClain v. Mack Trucks, Inc.*, 85 F.R.D. 53, 62-63 (E.D.Pa. 1979) and *Robbins v. Camden City Bd. of Educ.*, 105 F.R.D. 49, 58 (D.N.J. 1985). Consolidated Resorts argues that the same subject matter, geographical and temporal limitations should be imposed in this case. While the limits imposed in *Jackson* are consistent with those adopted by courts in many other cases,

these restrictions do not constitute "iron-clad" rules that courts cannot vary from regardless of the factual or legal issues presented in a particular case. The Court, therefore, considers the appropriate limits on the scope of discovery based on the factual and legal issues in this case.

A. Subject Matter Scope.

The EEOC argues that discovery of other complaints should include both sexual harassment and gender discrimination complaints. In support of its position, the EEOC argues that sexual harassment is a species or subset of sex discrimination, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66-67, 106 S.Ct. 2399, 2405 (1986), and it is logical to infer that if Defendant engaged in other forms of sexual discrimination, it was also willing to tolerate sexual harassment in its workplace(s). Plaintiff also relies on *Heyne v. Caruso*, 69 F.3d 1475 (9th Cir. 1995), in which the court held that evidence that the defendant restaurant owner engaged in sexual harassment of other employees was relevant to plaintiff's disparate treatment discrimination claim. In *Heyne*, plaintiff's employer allegedly fired her because she failed to show up for work on time. Plaintiff alleged, however, that the employer actually fired her for refusing his sexual advances. The court, therefore, held that evidence that the employer sexually harassed other employees was directly relevant to his true motive for firing plaintiff. The court cited its earlier decision in *EEOC v. Farmers Bros. Co.*, 31 F.3d 891, 897-98 (9th Cir. 1994), which held that evidence of the employer's sexual harassment of female employees and disparaging remarks about women in general were relevant to a claim that plaintiff's discharge was motivated by the employer's general feeling of hostility toward women. The evidence in *Farmers Bros.* showed that the president of the company had made a conscious decision to no longer employ women and had taken steps to eliminate female employees. The other cases cited by the EEOC generally involve the admissibility of evidence of other incidents or complaints of sexual harassment of employees in an action alleging sexual harassment. *See Dockter v. Rudolf Wolff Futures*, 913 F.2d 456, 459 (7th Cir. 1990); *Kalima v. Regents of the University of California*, 2007 WL 1514785 (N.D.Cal. 2007); *Cuesta v. Texas Dept. of Criminal Justice*, 805 F.Supp. 451, 455-56 (W.D. Tex. 1991); *Molnar v. Booth,* 229 F.3d 593 603-04 (7th Cir. 2000); *Green v. Administrators of Tulane Educ. Fund*, 284 F.3d 642, 660 (5th Cir. 2002); *Smith v. Sheahan*, 189 F.3d 529, 533 (7th Cir. 1999); and *Ayala v. Tapia*, 1991 WL 241925 (D.C. 1991). As Defendant has argued, courts have also generally limited discovery into other complaints to the same

type of conduct alleged by the plaintiff.

The Court finds that there is an insufficient factual basis to expand discovery in this case to all forms of gender discrimination complaints made against Defendant. Sexual harassment is a specific, and particularly egregious, form of sex discrimination. To establish such a claim, the harassment must be severe or pervasive. Thus, as the court in *EEOC v. Farmers Bros. Co.* held, evidence that an employer has engaged in or tolerated sexual harassment is relevant to its state of mind in allegedly discriminating against females in hiring and firing decisions. While there is a relevant nexus between sexual harassment and other forms of gender discrimination, it does not necessarily follow that because other employees may have complained of other types of gender discrimination, that it is indicative of the employer's motive to engage in or tolerate sexual harassment. Second, unlike the defendants in *Heyne* and *Farmers Bros.*, there is no allegation or evidence that the alleged harassers in this case were owners or high level policy makers of Defendant such that their alleged conduct can be directly inferred to represent the state of mind of Consolidated Resorts. Third, Plaintiff has not alleged or presented any evidence that Consolidated Resorts has engaged in other types of gender discrimination or, for that matter, that other employees besides Ms. Dawson have complained of sexual harassment. The absence of such allegations, again, caution against an overly broad scope of discovery.

Discovery into other types of gender discrimination would also likely result in litigation and additional discovery regarding other alleged forms of gender discrimination that are clearly collateral and irrelevant to those in this case. The discovery sought here is for the purpose of determining whether Defendant has engaged in a pattern or practice of improperly investigating and resolving sexual harassment complaints that would support a finding that Defendant did not conduct a reasonable or good faith investigation of Ms. Dawson's complaint. The Court, therefore, concludes that the scope of discovery into other complaints should be limited to other complaints and investigations regarding sexual harassment allegedly committed by Defendant's employees.

B. Geographic or Jurisdictional Scope.

The next issue is whether the discovery should be restricted to the two locations where Ms. Dawson worked, Tahiti Resorts and Club de Soleil, or should be more broadly allowed as to all of Defendant's Las Vegas locations. Discovery into other employee complaints or personnel files in Title

VII cases is generally confined to the employee unit in which the plaintiff worked. As the court in *Onwuka v. Federal Express*, 178 F.R.D. 508, 571 (D. Minn. 1997), states, discovery of company records is usually limited to the local facility where plaintiff is employed because those who make employment decisions vary across divisions and company-wide statistics are usually not helpful in establishing pretext. In *Hazelhorst v. Wal-Mart Stores, Inc.*, 163 F.R.D. 10, 11 (D. Kan. 1995), the court further states that discovery is usually limited to employees in the same department or office absent a particularized showing that there were hiring or firing practices and procedures applicable to all the employing units. *See also Sallis v. University of Minnesota*, 408 F.3d 470, 478 (8th Cir. 2005) ("Courts have also limited discovery of company records to the local facility where the plaintiff was employed, where there is no showing of the need for regional or nationwide discovery"); and *Boyd v. American Airlines*, 2002 U.S.Dist. LEXIS 19937 (N. D. Tex. 2002) (denying request for discovery of racial harassment complaints occurring at 91other locations of defendant airline.)

Here, Defendant's Human Resources Department was/is responsible for investigating and resolving sexual harassment complaints arising from any of the Defendant's business locations. Thus, Defendant's practices and procedures in handling sexual harassment complaints occurring at locations other than Tahiti Resorts and Club de Soleil would not be materially different or less relevant than its investigation of complaints occurring at those two locations. Because Defendant's investigation of other sexual harassment complaints, unknown to Ms. Dawson, are not relevant or admissible to prove that a hostile work environment existed at the Tahiti Resorts or Club de Soleil, *Brooks v. City of San Mateo*, *supra,* there is also no reason to restrict the discovery to those two locations on that ground. Restricting the scope of the discovery to Tahiti Resorts and Club de Soleil could, however, result in misleading information regarding Defendant's practices. Under such a restriction, Plaintiff would be deprived of information regarding sexual harassment complaints that may have been made against supervisory employees at Defendant's other Las Vegas, Nevada business locations which provide equally relevant evidence about Defendant's practices.

A related reason for limiting discovery of other complaints or personnel files to the plaintiff's employment unit is the unnecessary burden that may be imposed on a large corporation which conducts business in many different locations. In *Boyd v. American Airlines*, 2002 U.S.Dist. LEXIS 19937 (N.

D. Tex. 2002), for example, the court refused to order defendant to produce records regarding any complaint or report of racial harassment or a racially hostile work environment at any of defendant's 91 business locations during a two year period. There was no indication in *Boyd*, however, that defendant's investigation of racial harassment complaints was centralized in one office. In this case, no information has been provided that the sexual harassment complaints made by employees at Defendant's other Las Vegas business locations are not readily accessible or are so voluminous that an undue burden would be imposed on Defendant. The Court, therefore, concludes that the relevant scope of discovery regarding other complaints of sexual harassment should include Defendant's other Las Vegas, Nevada business locations.[2] This conclusion is consistent with *Onwuka, Hazelhorst, Sallis* and other similar cases.

C. Temporal Scope.

Several, if not many, courts have limited discovery to the period of plaintiff's employment and do not permit discovery into other employee complaints that occurred after plaintiff's employment terminated. *See Rossbach v. Fernandez Rundle*, 128 F.Supp.2d 1348, 1354 (S.D. Fla. 2000); *Johnson v. Jung*, 2007 U.S. Dist. Lexis 43638 (N.D. Ill. 2007); *Laurenzano v. Lehigh Valley Hospital, Inc.*, 2001 U.S. Dist. Lexis 10534 (E.D.Pa. 2001); *Landry v. AT&T,* 1999 U.S. Distr. Lexis (E.D. La. 1999); and *Childers v. Slater,* 1998 WL 429849 (D.D.C. 1998). Most of these cases imposed the limitation with little discussion of the possible relevancy of post-employment complaints. The limitations appeared to have generally been imposed to prevent over broad and burdensome discovery. *Jackson v. Montgomery Ward & Co.* did not specifically address the issue because the plaintiff was currently employed by the defendant and thus his requests were within the scope of discovery generally allowed by the courts. The EEOC has cited a few cases in which the courts appear to have ordered or permitted discovery into other complaints that occurred after the plaintiff was no longer employed by the defendant. *See e.g. Hill v. Motel 6,* 205 F.R.D. 490, 496 (S.D. Ohio (2001)*; Wolber v. Kitsap Mental Health Services*, 200 WL 1734079 (W.D. Wash. 2006). These cases, also contain no discussion of the basis for doing so. As

---

[2]The EEOC's request, in its compromise proposal, for complaints arising from Defendant's Orlando, Florida location since January 2007 appears to be directed ensuring that it uncovers any subsequent complaints relating to Mr. Rouco.

with the limitations generally imposed on geographic scope, the Court believes that discovery into other complaints should generally be restricted to the period of the plaintiff's or charging party's employment, unless good cause is shown to support discovery of subsequent complaints.

Defendant's practices and procedures in investigating and resolving other sexual harassment complaints in temporal proximity to Ms. Dawson's September 2004 complaint are likely to be more relevant than remote incidents. Of course, other factors, such as whether the same employees were involved and the similarity of the allegations and steps taken in the investigation, affect relevancy. Thus, Defendant's practices in investigating sexual harassment complaints within a reasonable period before and after Ms. Dawson's complaint are reasonably relevant to its practices in investigating her complaint. As the EEOC argues, for example, if Defendant investigated another sexual harassment complaint against Mr. Rouco a few months after Ms. Dawson made her complaint, this likely would be very relevant to the handling of her complaint. The Court, therefore, believes that in striking the proper balance, some discovery into subsequent complaints is relevant, and that a period of approximately one year subsequent to Ms. Dawson's complaint should be sufficient to generally cover other relevant investigations.

The Court again notes that the EEOC has not alleged or shown that Defendant has engaged in a general practice of not properly investigating and resolving sexual harassment complaints. Nor has Defendant alleged that it has adopted different practices or procedures for investigating and resolving such complaints since it investigated Ms. Dawson's complaint. Were such a defense asserted, discovery into more recent complaints would arguably be justified. If Plaintiff establishes that Defendant failed to conduct a reasonable investigation of Ms. Dawson's complaint and other similar complaints, the court can fashion appropriate injunctive relief based on the evidence presented to it. This disposes of the EEOC's claim that it needs to obtain evidence of all complaints up to the present time in order for appropriate injunctive relief to be granted.

There may be a stronger basis for allowing discovery of any other sexual harassment complaints made against Mr. Rouco, Mr. Rouse or Mr. Kollmer after Ms. Dawson left Defendant's employment. Information contained in those investigation files could possibly reveal admissible evidence relevant to Ms. Dawson's complaint, or possibly show some bias on Defendant's part in pursuing investigation of

complaints against those employees. It would, of course, be helpful to know whether any subsequent sexual harassment complaints have been filed against Mr. Rouco, Mr. Rouse or Mr. Kollmer and, if so, the dates thereof and the general nature of the allegations. This would, at least, avoid a "cat and mouse" game whether there are any such complaints that might contain relevant and discoverable information and would allow the Court to determine whether production of these files should also be ordered.

D. Attorney-Client Privilege and Work-Product Doctrine.

Defendant asserts the attorney-client privilege in regard to confidential legal advice provided by its in-house counsel, Mr. Blair, concerning the investigations of other complaints of sexual harassment. *See Upjohn Co. v. United States*, 449 U.S. 383, 393-95 (1981); *Admiral Ins. co. v. U.S. Dist. Court*, 881 F.2d 1486 (9th Cir. 1989); *Shearing v. Iolab Corp.*, 975 F.2d 1541, 1546 (Fed.Cir. 1992). Defendant also alleges that documents and information arising from its investigation of other sexual harassment complaints are protected by the work-product doctrine. Fed.R.Civ.Pro. 26(b)(3).

The work-product doctrine protects materials that were prepared in anticipation of litigation. The EEOC argues the work-product doctrine does not apply to materials that were prepared as part of Defendant's ordinary practice to enforce its anti-harassment policy or to comply with its legal duty to investigate and remedy the allegations. *See Sanchez v. Matta*, 229 F.R.D. 649, 656 D. N.M. 2004). On the other hand, *Sanchez* states that if the purpose of preparing the document or materials was to provide legal advice or prepare for litigation then the privilege applies. *Id.* The Defendant suggests that the mere filing of an internal sexual harassment complaint is sufficient to place an employer in anticipation of litigation. See *EEOC v. Lutheran Social Services,* 186 F.3d 959, 969 (D.C. Cir. 1999). Depending on the facts and circumstances regarding the investigation of other sexual harassment complaints, Defendant may or may not have been in anticipation of litigation. As *Diamond State Ins. Co.,* 157 F.R.D. at 699, states:

> Courts have not found a "neat general formula" to determine whether documents were prepared in anticipation of litigation. *United States v. Davis,* 636 F.2d 1028, 1040 (5th Cir.1981), citing *Kent Corp. v. N.L.R.B.,* 530 F.2d 612, 623 (5th Cir.1976), *cert. denied* 429 U.S. 920, 97 S.Ct. 316, 50 L.Ed.2d 287 (1976), *In re Grand Jury Investigation,* 599 F.2d 1224, 1229 (3d Cir.1979). Determining the driving force behind the preparation of each requested document is required in resolving a work product immunity question. *Murray Sheet Metal,* 967 F.2d at 984.

The Court, therefore, cannot issue a blanket order that the work-product doctrine applies or does not apply to Defendant's other sexual harassment complaint files. A party asserting the attorney-client privilege or work-product doctrine is required to provide a privilege log or other evidence sufficient to establish a prima facie case for the protection of the privilege as to particular documents. *See* Fed.R.Civ.Pro. 26(b)(5)(A); *Diamond State Ins. Co. v. Rebel Oil Co., Inc.*, 157 F.R.D. 691 (D. Nev. 1994). Defendant should provide a privilege log and, if necessary, affidavits, supporting its assertion of the attorney-client privilege and work-product doctrine for the documents that it seeks to withhold from those files.

The EEOC argues that Defendant waived the privileges by not specifically raising them during Mr. Blair's deposition as grounds for instructing him not to answer questions regarding the details of other sexual harassment claims. Under the circumstances of this case, the Court does not find waiver of the privileges on this basis. First, as noted above, Defendant asserted both privileges in its objections to Plaintiff's requests for production of documents. Secondly, given the position taken by the Defendant during the deposition regarding the scope of discovery into other complaints of sexual harassment, the parties did not reach the point at which Mr. Blair was asked specific questions regarding other sexual harassment complaints wherein either privilege would be invoked. Third, Defendant promptly moved for a protective order regarding inquiry into the privileged materials or information.

The EEOC also argues that Defendant has waived its attorney-client privilege and work-product doctrine privilege by asserting the *Faragher/Ellerth* affirmative defense in this case. In support of its position, the EEOC cites *Walker v. County of Contra Costa*, 227 F.R.D. 429 (N.D. Cal. 2005); *Brownell v. Roadway Package System, Inc.*, 185 F.R.D. 19 (N.D.N.Y. 1999); and *McGrath v. Nassau County Healthcare Corp.,* 204 F.R.D. 240, 245 (E.D.N.Y. 2001). The court in *Walker* analyzed the basis for finding waiver as follows:

> When an employer injects into a lawsuit an issue concerning the adequacy of its investigation, and the investigation was undertaken by an attorney or law firm, a waiver of the traditional protections must be deemed to have occurred. "If a defendant employer hopes to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation, then it will have put the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy."

Walker, 227 F.R.D. at 534, quoting *Wellpoint Health Networks, Inc. v. Superior Court of Los Angeles County*, 59 Cal.App.4th 110, 123, 128. 68 Cal.Rptr.2d 844 (1997).

The EEOC acknowledges, however, that the waiver of the attorney-client privilege does not extend to confidential legal advice an attorney may provide to an employer or its other agents who are conducting an investigation of a sexual harassment or discrimination claim, where the attorney is not himself involved in conducting the investigation. *See Waugh v. Pathmark Stores*, 191 F.R.D. 427 (D.N.J. 2000). The court in *Walker v. County of Contra Costa* also noted that the court should not issue a blanket nullification of privilege, but should make findings on a document-by-document basis in regard to whether the privileges have been waived.

In this case, Consolidated Resorts has placed the reasonable or adequacy of *its investigation of Ms. Dawson's sexual harassment complaint* in issue by asserting the *Faragher/Ellerth* affirmative defense. Defendant has waived its attorney-client privilege or work-product doctrine privilege concerning *that* investigation which was partly conducted by its in-house counsel, Mr. Blair. Defendant, however, has not placed the reasonableness of its investigations of other sexual harassment complaints directly in issue by asserting the affirmative defense in regard to its handling of Ms. Dawson's complaint.[3] Rather, it is the EEOC which potentially seeks to place other sexual harassment complaints in issue. Plaintiff has not cited any authority which supports a finding that an employer waives its attorney-client or work-product privileges to all other sexual harassment complaints by asserting the *Faragher/Ellerth* affirmative defense in regard to the plaintiff or charging party's complaint. In the Court's judgment, this would be an over broad and unjust application of waiver.

The issue of waiver regarding other complaints is also premature. Conceivably, the EEOC may attempt to introduce evidence of other sexual harassment complaints revealed through discovery to show Defendant's unreasonable practices. It is also conceivable that Defendant may seek to rebut any such showing by demonstrating that its investigations of those complaints were also reasonable. At that

---

[3]Nor has any evidence been provided to the Court that Defendant has been sued on any other claim of sexual harassment in which it has asserted the *Faragher/Ellerth* affirmative defense such that waiver of its privileges may be found on that basis.

point, an issue of waiver of Defendant's privileges may arise. Until and unless that occurs, Defendant has not waived its attorney-client or work-product privileges regarding other sexual complaints. Therefore, Mr. Blair and Defendant's other representatives are not required to answer questions relating to confidential attorney-client communications or regarding Defendant's attorney's mental impressions, opinions or conclusions formed during the investigation of other sexual harassment complaints unless Defendant intends to introduce evidence regarding the reasonableness of adequacy of those investigations at trial. To the extent that Defendant and its witnesses rely on the attorney-client and work-product privileges in refusing to answer such questions, Defendant should also be precluded from introducing such testimony at trial to support the reasonableness and adequacy of its investigation and handling of other sexual harassment complaints. Accordingly,

IT IS HEREBY ORDERED that Defendant Consolidated Resort, Inc.'s Motion for Protective Order (#38) and Plaintiff EEOC'S Opposition to Defendant's Motion for Protective Order and Cross-Motion for Order Compelling Documents and Responses to Questions at Deposition and Permission to Take Depositions In Excess of Seven Hours (#41) are **granted** and **denied** as follows:

1. Defendant is ordered to produce documents relating to complaints of sexual harassment against any employees that arose from any of Defendant's business locations in Las Vegas, Nevada between January 1, 2000 and December 31, 2005, inclusive. Defendant shall also inform Plaintiff and the Court whether there are any more recent complaints of sexual harassment made against Mr. Rouco, Mr. Rouse or Mr. Kollmer, and, if so shall identify the date the complaint was made and the general nature of the allegation made.

2. Defendant's production of other complaints shall include documents relating to Defendant's investigation and any disciplinary or remedial action taken in regard to the complaints, other than documents that Defendant claims are protected from disclosure pursuant to the attorney-client privilege or the work-product doctrine. Defendant shall provide a privilege log to Plaintiff in accordance with Rule 26(b)(5)(A) and *Diamond State Ins. Co. v. Rebel Oil Co., Inc.*, 157 F.R.D. 691 (D. Nev. 1994), regarding its assertions of the attorney-client privilege or work-product doctrine regarding the contents of such complaint files.

. . .

3. Defendant's in-house counsel, Mr. Blair, or Defendant's other officers and employees are not required to disclose privileged attorney-client communications regarding such other complaints or the attorney's "opinion work product" regarding the investigation of such complaints, unless Defendant intends to introduce evidence or testimony at trial that its investigation of such complaints were reasonable and adequate.

4. Plaintiff may further depose Defendant's counsel, Mr. Blair, regarding the matters set forth in the parties' Stipulation Regarding Approved Deposition Questions (#46). At this point, however it is unclear whether and to what extent Plaintiff may need additional time to depose Mr. Blair or Mr. Rouco in regard to other complaints that may be produced by Defendant. The Court directs counsel for the parties to meet and confer regarding this matter once Defendant has complied with this order regarding production of other complaints. If they are unable to agree, Plaintiff may renew its *Cross-Motion (#41)* on an emergency basis and the Court will determine whether and to what extent additional time is required to depose Mr. Blair or Mr. Rouco regarding other sexual harassment complaints.

DATED this 25th day of October, 2007.

George Foley Jr.

GEORGE FOLEY, JR.
United States Magistrate Judge