UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

EVA CRAWFORD,

Plaintiff/Intervenor,

vs. Case No. 3:06-cv-862-J-32MCR

AUTOZONE, INC.,

Defendant.
_____/

**O R D E R**

**THIS CAUSE** is before the Court on Defendant's Motion for Protective Order (Doc. 19) filed on October 3, 2007. Plaintiffs, the United States Equal Employment Opportunity Commission ("EEOC") and Eva Crawford ("Crawford") (collectively "Plaintiffs") filed a response (Doc. 22) on October 26, 2007. Defendant filed a reply brief (Doc. 31) on November 15, 2007 and Plaintiffs filed a sur-reply (Doc. 33) on November 16, 2007. The Court has considered the parties' arguments and finds Defendant's Motion for Protective Order is due to be **granted**.

## I. BACKGROUND

Plaintiff, the EEOC, filed sexual harassment and retaliation claims against Defendant for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-

5(f)(1). (Doc. 1). Plaintiff Crawford intervened in the case and filed her own claims for violation of Title VII and the Florida Civil Rights Act on the basis of sexual discrimination, harassment and retaliation. (Doc. 9). During discovery, the EEOC served Defendant with numerous requests for production which included, inter alia, requests for Defendant's policies, procedures, and training manuals relating to sexual harassment and/or retaliation. Defendant responded to the EEOC's requests, objecting to the requests as overly-broad, irrelevant, and unduly burdensome; however, Defendant also stated that without waiving its objections, it would produce documentation of its policies and training materials, including its Store Handbook, its Code of Conduct, and excerpts of its Human Resources Toolbook. (Doc. 19, pp. 2-3). Defendant contends that on the date it provided over 1,000 pages to the EEOC in response to the EEOC's discovery requests, Defendant informed the EEOC that the production of certain documents would be subject to the execution of a confidentiality agreement. (Doc. 31, p. 2). Evidently, the parties thereafter circulated proposed confidentiality agreements and discussed such proposed agreements, albeit ultimately they were unable to agree on this issue. Id. Defendant states that during these discussions it made various compromises as to which documents would be governed by the confidentiality order. Id.

In September 2007, Defendant supplemented its responses to the EEOC's request for production of documents and specifically noted that its "Investigative Interviewing" training content, forms, and examination materials (the "training manual") are proprietary, confidential, and subject to protection under Rule 26(c)(7). Id. Plaintiffs

dispute that Defendant's training manual should be the subject of a confidentiality order.

Defendant now moves for a protective order limiting the use and dissemination of the training manual. (Doc. 19, p. 1). Defendant clearly explains it is not seeking to prohibit Plaintiffs from discovering this information; rather, it wants assurance that Plaintiffs will not use the information for purposes outside of this litigation. Id. at 3. Defendant states it developed its human resources training manual for the purpose of training its management level employees on investigative techniques. Id. Defendant's Director of Human Resources and Training, Ann Morgan, certifies that Defendant does not share this information with the public and in fact, has only provided access to this information to three of its five Divisional Human Resources Managers. (Doc. 19-3). Ms. Morgan further certifies that no other employees have access to this training manual. Id. Both Ms. Morgan and Defendant state Defendant invested a great deal of time and effort in creating the training manual and the policies within it. Id; (Doc. 19, p.4). They further assert the training manual and the policies within the training manual enable Defendant to differentiate itself from its competitors. (Docs. 19, p. 4; 19-3). Finally, Defendant contends its competitors would gain an unfair advantage if they gained access to the training material. Id.

Plaintiffs oppose the entry of a confidential order for two reasons. First, Plaintiffs argue Defendant waived its right to assert a confidentiality objection. (Doc. 22, pp. 4-5). Second, Plaintiffs argue that Defendant has failed to meet its burden demonstrating that the training manual is proprietary or confidential. Id. at 5-9.

## II. ANALYSIS

A court may enter a protective order upon motion of a party "for good cause shown." Fed. R. Civ. P. 26(c). Upon a finding of good cause, the Court may make any order "which justice requires to protect a party from annoyance, embarrassment, oppression or undue burden or expense, including" . . ."that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." Id. Moreover, the Court may agree to enter a protective order when it is necessary to expedite the flow of discovery material, promote prompt resolution of disputes over confidentiality, and facilitate the preservation of material arguably worthy of protection. DYC Fishing, Ltd. v. Beaver Street Fisheries, Inc., Case No. 3:05-cv-481-J-25TEM, 2007 WL 1655389, *2 (M.D. Fla. June 6, 2007) (citing McCarthy v. Barnett Bank of Polk County, 876 F.2d 89, 91 (11th Cir. 1989) and In re Alexander Grant & Co. Litigation, 820 F.2d 352, 356 (11th Cir. 1987).

### A. Waiver

As an initial matter, the Court finds Defendant has not waived any argument it has concerning confidentiality. In their brief, Plaintiffs cite cases to support their contention that because Defendant did not initially object to disclosure of the training manual based on confidentiality, they have now waived such objection. This argument is unsupported, however, by the cases Plaintiffs cite. To the contrary the cases on which Plaintiffs rely make it clear that a court has discretion to excuse the failure to object in a timely manner. See United Steelworkers of America, AFL-CIO-CLC v. Ivaco, No. 1:01-CV-0426-CAP, 2002 WL 31932875, *4 (N.D. Ga. Jan. 13, 2003); Blumenthal

v. Drudge, 186 F.R.D. 236, 240 (D. D.C. 1999). Notably, "minor procedural violations, good faith attempts at compliance, and other mitigating circumstances will militate against finding waiver." Ivaco, 2002 WL at *4.

Defendant, in its initial response to the EEOC's request for production, objected on various bases; however, Defendant's response did not include a confidentiality objection. On the other hand, Defendant's response did note that it would only produce "excerpts from its Human Resources Toolbook." Nevertheless, on the date Defendant produced documents responsive to the EEOC's requests, Defendant informed the EEOC that production of certain documents would be subject to a confidentiality order. The parties then engaged in discussions concerning the text of proposed agreements. Indeed, Plaintiffs were put on notice that Defendant believed several of its documents constituted confidential information. Thus, the circumstances in this case do not necessitate a finding that Defendant waived its confidentiality objection.

**B. Commercial Information**

The parties dispute whether Defendant's training manual constitutes a trade secret or other confidential research, development or commercial information and whether Defendant has shown good cause to keep such information private. Pursuant to Rule 26(c)(7), upon finding a showing of good cause, the Court may enter an order which prevents a trade secret or other confidential research, development, or commercial information from being revealed or which only allows such information to be revealed in a designated way. Although "good cause" is not subject to a precise

definition, "it generally signifies a sound basis or legitimate need to take action." In re Alexander, 820 F.2d at 356.

In determining whether Defendant has shown good cause, the undersigned is required to balance Plaintiffs' interest in obtaining access to this information and using it outside of this litigation against Defendant's interest in keeping the information confidential. Id. ("[T]his circuit has superimposed a "balancing of interests" approach to Rule 26(c)."); Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985) (stating that "the federal courts have superimposed a somewhat more demanding balancing of interests approach to the Rule" which requires a court to balance one party's interest in obtaining the information from the other party's interest in keeping it confidential).

Defendant argues it has shown good cause for this Court to issue a protective order because the undisputed facts demonstrate the training manual was specifically developed by Defendant, used only with certain management employees, is not publicly available, and represents valuable development and commercial information of Defendant. (Doc. 31, p. 3). Rule 26(c) does not provide an absolute privilege which shields trade secrets and similar confidential information from discovery. Empire of Carolina, Inc. v. Mackle, 108 F.R.D. 323, (S.D. Fla. 1985). A party resisting discovery of confidential information is required to show that the information sought is confidential and that disclosure might be harmful. Id; DYC Fishing, Ltd., 2007 WL at *1 (finding that because the requested documents were confidential and disclosure could cause potential injury to defendant, defendant's interests in keeping the information

confidential far outweighed plaintiff's desire for free use of the discovered documents), but see Kaiser Aluminum & Chemical Corp. v. Phosphate Engineering and Const. Co., Inc.,153 F.R.D. 686, 688 (M.D. Fla. 1994) (requiring proof that information is confidential and disclosure would be harmful before issuing a protective order).

Importantly, Defendant has taken adequate precautions to keep the requested information in its training manual confidential. In fact, only three of Defendant's five managers have access to the information. Moreover, Defendant utilized substantial time and resources in developing its training manual. Despite Plaintiffs' assertion that this information is not related to Defendant's business of selling automobile parts, the training manual is an integral part of Defendant's business because a company's human resources department and human resources practices may play a vital role in hiring and retaining employees. Thus, the training manual is confidential commercial information.

Defendant and Ms. Morgan represent that Defendant 's training program is intended to teach the regional human resources managers how to consistently conduct investigations with respect and integrity. (Doc. 19-3, p. 2). They believe Defendant's approach to teamwork and its business environment, as reflected by its training manual, differentiates it from its competition. Arguably, disclosing this information could cause harm to Defendant in that other companies, including its competitors, would have an opportunity to gain insight into Defendant's private business operations and may piggyback off Defendant's efforts and work product, which Defendant took precautions to protect; however, the Court is not convinced that disclosure of these materials would

in fact result in harm to Defendant. Nevertheless, the fact that Defendant is willing to disclose this information to Plaintiffs as long as Plaintiffs agree to use it for purposes of this litigation only, in addition to the fact that Plaintiffs have failed to offer any justification for use of this information outside of this litigation, leads this Court to conclude that such information should not be disclosed outside of this litigation.

Before concluding, however, the Court notes Plaintiffs assert two additional points which merit discussion. First, Plaintiffs argue that Defendant cannot use evidence of the investigation as a sword to prove its affirmative defense, yet also shield Plaintiff from the training materials Defendant used to conduct its investigation regarding the incidents alleged in this case. (Doc. 22, p. 8). This argument is inapplicable because Defendant is not using the training manual as a shield; it is willing to disclose such information, so long as Plaintiffs maintain its confidentiality.

Next, although Plaintiffs assert it seeks to use the training materials for litigation, they also argue that public access to the courts outweighs any privacy interest of Defendant regarding these materials. (Doc. 22, p. 9). Plaintiffs misconstrue the common law and First Amendment right to access as they apply to this issue. The Eleventh Circuit has provided a clear explanation of these rights in Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304 (11th Cir. 2001). Specifically the Eleventh Circuit has noted that the First Amendment right of access to civil cases is more limited than in criminal cases -- which requires a court to find a compelling governmental interest before it limits access to a proceeding. Id. at 1310. The court articulated that "[m]aterials merely gathered as a result of the civil discovery process . . . do not fall

within the scope of the constitutional right of access's compelling interest standard." Id. (citing Alexander Grant & Co. Litigation, 820 F.2d 352, 355 (11th Cir. 1987). Moreover, "discovery materials and proceedings are not public components of a civil trial . . .they are conducted in private as a matter of modern practice. . . .Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." Id. at 355 n. 6. Finally, the Eleventh Circuit noted that "public disclosure of discovery material is subject to the discretion of the trial court and the federal rules that circumscribe that discretion." Id. at 355. As Chicago Tribune Co. makes clear, the First Amendment does not guarantee a right of access to discovery material and thus, there is no First Amendment right of access to Defendant's training manual at this time.

The Eleventh Circuit also explains the common-law right of access in Chicago Tribune Co., stating:

> [b]eyond establishing a general presumption that criminal and civil actions should be conducted publicly, the common-law right of access includes the right to inspect and copy public records and documents. The right to inspect and copy is not absolute, however, and a judge's exercise of discretion in deciding whether to release judicial records should be informed by a 'sensitive appreciation of the circumstances that led to . . . [the] production [of the particular document in question.] Not unlike the Rule 26 standard, the common-law right of access requires a balancing of competing interests.

Id. at 1311. (internal citations omitted). The Court distinguished items which are considered public or judicial records from those that are not, stating that the media and public presumptively have access to the former, but not the latter. Id. Finally, the court described situations which require heightened scrutiny when a court conceals records

from the public and media, id; however, these situations described are inapplicable to the instant case.

Here, Defendant seeks an order designating its training manual as confidential and requests Plaintiffs not use this material outside of this litigation. Notably, Defendant's proposed protective order permits use of the training manual at trials, hearings, or depositions, and also permits it to be copied as an exhibit to depositions, motions, or other court filings in this litigation. Thus, limiting Plaintiffs' use of these materials for purposes of this litigation only will not infringe the common-law right to access. Moreover, upon balancing the parties' competing interests, the Court finds Defendant's interest in keeping its commercial documents confidential outweighs Plaintiffs' arguments otherwise. In fact, Plaintiffs fail to assert any basis for wanting to use this information outside of this litigation. Similarly, Plaintiffs fail to offer any persuasive argument regarding why Defendant's training manual should not be designated confidential or subject to Defendants' proposed protective order.

In sum, the Court finds Defendant's training manual is confidential commercial information. Although Defendant has not demonstrated with particularity the harm that will occur upon disclosure of this material, Defendant is not seeking to preclude Plaintiff from obtaining this information. Rather, it seeks to disclose the requested information under the guarantee that this information will not be used outside this litigation. Plaintiffs are directed to refrain from any public disclosure of Defendant's training manual outside of this litigation. See American Standard Inc. V. Humphrey, 2007 WL 1812506, *3 (M.D. Fla. 2007) (requiring plaintiff to refrain from disclosing confidential

information to anyone other than parties and representatives of parties, and further limiting Plaintiff's use of the information to matters pertaining to the instant litigation, despite the fact that defendant failed to show disclosure of confidential information would be harmful).

Finally, the Court has considered Defendant's proposed protective order (Doc. 19-4 ), and finds the entry of this order is appropriate to expedite the flow of discovery material, promote the prompt resolution of disputes over confidentiality, and facilitate the preservation of material arguably worthy of protection. DYC Fishing, Ltd., 2007 WL at *2. The Court adopts the terms of the Proposed Protective Order drafted by the parties and attached to this Order.[1] The parties are hereby bound by the terms of the attached Protective Order. Notably, the Protective Order permits any party to apply to the Court for a modification of such order.

Accordingly, after due consideration, it is hereby

[1] The Court has revised the order by deleting the term "Proposed" in the order's title and has revised a clerical error in the proposed order, i.e., it changed the word "Defendants" to "Plaintiffs" in paragraph 1 to reflect Defendant's presumed intentions.

**ORDERED:**

1. Defendant's Motion for Protective Order (Doc. 19) is **GRANTED.**

2. The parties shall be bound by the terms of the attached Protective Order.

3. Plaintiffs are directed to limit disclosure of Defendant's "Investigative Interviewing" training content, forms, and examination materials for use in this litigation only.

**DONE AND ORDERED** in Chambers in Jacksonville, Florida this 7th day of December, 2007.

Monte C. Richardson

MONTE C. RICHARDSON
UNITED STATES MAGISTRATE JUDGE

Copies to:

Counsel of Record