UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

CIVIL NO. 01-339-KKC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION — PLAINTIFF

vs: ORDER

WAL-MART STORES, INC. — DEFENDANT

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The Court considers several issues implicating privilege and proper discovery scope. The motions at issue are the following:

a. The EEOC's motion for a protective order concerning the subject matter of represented class member depositions. *See* DE ##167/168, 170 (Wal-Mart Response), 173 (EEOC Reply).

b. Wal-Mart's complimentary motion to compel answers to questions/production of documents affected by the scope topic. *See* DE ##171/172, 174 (EEOC Response), 179 (Wal-Mart Reply). This category also encompasses Wal-Mart's effort to discover the identity of a man in attendance at a previous depo prep session on July 16, 2007 apparently involving some of the represented class members.

The Court and parties discussed the issues as part of the January 31, 2008 status hearing in this case, and the Court applies the Rule 26 and 37 standards for compelling or protecting a party from discovery.

Based on the record, the hearing, and a review of applicable authority, the Court rules as follows on the issues presented by these motions.

1. Confidential communications between the EEOC and represented class members come within the attorney-client privilege.

Federal common law determines application of the attorney-client privilege in a matter arising under federal law. *See* Fed. R. Evid. 501. Professor Wigmore's classic formulation provides:

> where (1) legal advice is sought (2) from a professional legal advisor in his capacity as such, (3) a communication relating to that purpose, (4) made in confidence, (5) by the client (or attorney), (6) is at his instance permanently protected, (7) from disclosure by himself or the legal advisor, (8) except if the privilege is waived.

In re Rivastigimine Patent Litig., 239 F.R.D. 351, 357 (S.D.N.Y. 2006); *see also In re VisionAmerica, Inc. Sec. Litig.*, 2002 WL 31870559, *2 (W.D. Tenn. Dec. 18, 2002)(citing *United States v. Goldfarb,* 328 F.2d 280, 281 (6th Cir.1964).

The Sixth Circuit further endorses consideration of drafted (but not enacted) FRE 503 as a useful starting point for privilege analysis. *See Ross v. City of Memphis*, 423 F.3d 596, 600-02 (6th Cir. 2005); *see also* Proposed Rule 503 *reprinted at* 56 F.R.D. 183, 235-237 (1973). The privilege proponent bears the burden of establishing privilege applicability, and a court must narrowly construe any privilege, as a matter blocking otherwise legitimate discovery. *See Laethem Equipment Co. v. Deere and Co.*,. 2007 WL 2873981, *5 (E.D. Mich. Sep. 24, 2007). Still, serving the underlying purpose of the doctrine – candor between client and lawyer – must inform a court's approach. *See Ross*, 423 F.3d at 600-02.

The EEOC's role in Title VII litigation complicates the analysis. In one sense, the EEOC acts to exonerate general principles reflected in the statute. However, Title VII and Supreme Court precedent recognize that the EEOC also acts to pursue private relief for qualifying claimants. *See* 42 U.S.C. § 2000e-5(f)*; see also Int'l Brotherhood of Teamsters v. United States,* 97 S. Ct. 1843,

1851 (1977); *Gen. Tel. Co. of the Nw., Inc. v. EEOC,* 100 S. Ct. 1698, 1704 (1980)("When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination."). A Title VII claimant may independently pursue relief, but there plainly is a general identity of interests between an individual asserting discrimination and the EEOC asserting discrimination against the same employer concerning the same set of circumstances. *See Gen. Tel.*, 100 S. Ct. at 1703 ("We do no more than follow a straightforward reading of the statute, which seems to us to authorize the EEOC to sue in its own name to enforce federal law by obtaining appropriate relief for those persons injured by discriminatory practices forbidden by the Act.")

The Court finds that, under the Wigmore/503 formulation, the attorney-client privilege does protect communications between the EEOC and represented class members in this case. Once a woman has sought or requested legal guidance from the EEOC, concerning a claim against Wal-Mart, she has triggered the protections of the attorney-client privilege with respect to communications salient to such guidance. The key to privilege analysis is the client's expectations, as draft Rule 503 reflects. Thus, if a "person . . . consults a lawyer with a view to obtaining professional legal services" a privilege exists as to "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." *See* Proposed Rule 503; *see also E.E.O.C. v. Johnson & Higgins, Inc.*, 1998 WL 778369, *4 (S.D.N.Y. Nov. 6, 1998)("Whether a privileged attorney-client relationship exists rests upon the client's intent to seek legal advice and the client's belief that he is consulting an attorney, *i.e.,* someone who will keep the

communications confidential.").[1] The Rule defines "client" based on communicant expectations, not lawyer conduct.

It would undercut the expectations of the advice-seeking claimants, and do great harm to the EEOC's full statutory charge, to permit exploration of confidential exchanges between the individuals seeking legal guidance and the EEOC. Wal-Mart may not inquire into post-representation, confidential communications between the EEOC and any claimant the EEOC represents. Representation commences (or commenced) upon a woman requesting or seeking legal advice from the EEOC regarding the/a claim against Wal-Mart.

The Court has reviewed all of the cited cases that assess this question. Interestingly, the question is never "if" a privilege ultimately exists between the EEOC and a claimant, but rather "when" the protection attaches. Thus,

> If an individual has indicated an intention to be a class member with the expectation that the EEOC would represent him or her, then there exists an attorney-client relationship.

E.E.O.C. v. Joslin Dry Goods Co., 2007 WL 433144, *5 (D.Colo. Feb. 2, 2007); *E.E.O.C. v. Collegeville/Imagineering Ent.*, 2007 WL 158735, *1 (D.Ariz. Jan. 17, 2007)("The Court has

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[1] Wal-Mart's focus is on the EEOC's conduct – relative to, *e.g.*, the Rules of Professional Conduct or the discovery rules – and thus is somewhat misplaced. Whether the EEOC acts like the women represented are traditional clients, in every sense of the word and for all purposes, does not define whether the women are clients for purposes of the attorney-client privilege. However, the Court shares Wal-Mart's dismay over practical inconsistencies in the EEOC's handling. Certainly, it is reasonable to expect the EEOC to facilitate necessary appearances by the class members it represents in this case. The EEOC may not have the control or responsibility one would attach to a traditional representative relationship, but the EEOC owes a level of courtesy and responsiveness reflective of its status as the party formally seeking available relief for all class members. The EEOC cannot cry privilege at one turn and then act like any of the represented class members are unaffiliated third parties at the next, when burdens of litigation management arise. The Court expects fair accountability by the EEOC in balancing its duties.

reviewed the cases cited by both Plaintiffs and Defendants to discern **when** an attorney-client relationship begins in a Title VII lawsuit brought by the EEOC.")(emphasis added); *E.E.O.C. v. TIC-The Indus. Co.*, 2002 WL 31654977, *3 (E.D.La. Nov. 21, 2002)("The case law is not definitive regarding **the moment when** the EEOC enters into an attorney-client relationship with the members of the class it seeks to represent.")(emphasis added); *E.E.O.C. v. Morgan Stanley & Co., Inc.*, 206 F. Supp.2d 559, 561 (S.D.N.Y.2002)(same).

The Court has found no case rejecting the attachment of a privilege to a Title VII claimant actually seeking advice and representation from the EEOC, and the Court has found no case endorsing the broad and invasive right of examination Wal-Mart advocates. Application of the Wigmore elements establishes, in the Court's view, that if a Title VII claimant seeks legal advice from the EEOC, then confidential communications concerning rendition of advice by the EEOC fall within the traditional attorney-client privilege, absent waiver. The Court therefore GRANTS the EEOC's motion for a protective order, upon good cause, to the extent that the Court restricts Wal-Mart from inquiring into or discovering confidential exchanges between the EEOC and a represented class member from the point at which the particular member sought legal guidance from the EEOC.

2. The Court cannot determine, on this record, whether the presence of a third-party waived the attorney client privilege and/or applicable work product protection.

Wal-Mart seeks the identity of a man present for a deposition prep session involving the EEOC and some of the represented class members.[2] Although discovery of the man's "identity"

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[2] The Court agrees that the EEOC's refusal to provide the identity, in this context, frames the matter properly for a motion to compel. Wal-Mart plainly sought information via deposition that raises a ripe issue for consideration.

is one issue, the next step in the topic would certainly be discovery from the identified person and/or discovery as to the specific meeting. As such, the Court turns to the substantive analysis.

The Court already has ruled that the attorney-client privilege would cloak confidential communications between the EEOC and represented class members. However, communications in the presence of a true third-party likely would not be confidential, or, to phrase it differently, the third-party's presence may effect privilege waiver. *See E.E.O.C. v. Texas Hydraulics, Inc.*, 246 F.R.D. 548, 556 (E.D.Tenn. 2007)("Voluntary disclosure of privileged communications to a third party is considered a waiver of the attorney-client privilege because it is inconsistent with the notion of confidentiality.")(citing *In re Grand Jury Proceedings Oct. 12, 1995,* 78 F.3d 251, 254 (6th Cir.1996)). However, the **reason** for the third-party's presence matters. Thus: "[W]here a third party is present during attorney-client communications, as either the party's or the attorney's agent, in order to facilitate the effective rendition of legal services, the protection of the privilege remains intact." *Oxyn Telecomm., Inc. v. Onse Telecom*, 2003 WL 660848, *2 (S.D.N.Y. Feb. 27, 2003). The record does not identify the man present for the session or explain why he was in the room.

Even if waiver may have occurred, in whole or part, as to the subject matter of the particular meeting, the work product doctrine might continue to protect the meeting content from discovery. The work product doctrine emanates from *Hickman v. Taylor*, 67 S.Ct. 385 (1947), partially codified within Rule 26. Materials produced or created by counsel or a party "because of" litigation fall within the doctrine's protection. *See United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006).

The Rule itself protects only "documents and tangible things," *see* Rule 26(b)(3), but the doctrine foundationally extends beyond the tangible. *See United States v. One Tract of Real Prop.*, 95 F.3d 422, 428 n.10 (6th Cir. 1996)("When applying the work product privilege to such non-

tangible information, the principles enunciated in *Hickman* apply, as opposed to Rule 26(b)(3) of the Federal Rules of Civil Procedure, which applies only to 'documents and tangible things.'"); *U.S. Info. Sys., Inc. v. IBEW*, 2002 WL 31296430, *5 (S.D.N.Y. Oct. 11, 2002).

While a showing of substantial need, and no reasonable alternative information source, may permit a party access to *factual* work product, the law jealously and wholly protects from review the mental impressions and theories of counsel. *See* Rule 26(b)(3)(noting that ordering court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative of a party concerning the litigation"). Attorney mental impressions are sacrosanct. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002)("However, absent waiver, a party **may not obtain** the 'opinion work product of his adversary; i.e., 'any material reflecting the attorney's mental impressions, opinions, conclusions, judgments, or legal theories.'")(quotation omitted)(emphasis added).

There is little doubt that a deposition prep session centrally involves an attorney's case assessment, discussion of important facts/theories, and expert anticipation of adversarial testing:

> The questions and comments by a lawyer and his client's employees as they discuss legal and factual questions that have arisen in litigation or prepare for a deposition are at the heart of a lawyer's preparation and surely the attorney must be permitted to do that in peace, free from the intrusion of opposing counsel.

Banks v. Office of Senate Sergeant-at-Arms, 241 F.R.D. 376, 382 (D.D.C. 2007). The framework and content of such a meeting would demonstrate, indeed largely would be comprised of, the conducting attorneys' opinion work product. As such, the only possible basis for discovery of the content of that meeting would be waiver.

Unlike the attorney-client privilege, a party waives work-product protection only by a disclosure that "substantially increases the opportunity for potential adversaries to obtain the

information." *JA Apparel Corp. v. Abboud*, 2008 WL 111006, at *3 (S.D.N.Y. Jan. 10, 2008)(quotation omitted). The Sixth Circuit has expressly recognized that disclosure must be to an "adversary" to effect waiver in the work product context. *See In re Columbia*, 289 F.3d at 306 ("Other than the fact that *the initial waiver must be to an 'adversary*, there is no compelling reason for differentiating waiver of work product from waiver of attorney-client privilege.")(emphasis added).

The record simply does not provide enough information to make this determination. If the third person was a claimant's spouse or family member, no work-product waiver likely occurred. However, the Court simply cannot make a finding based on the lack of empirical evidence. As such, the Court ORDERS that, within ten (10) days of the date of this order, the EEOC provide the following information in a *sealed* filing with the Court:

a. The name of the third-party present for the July 16, 2007 depo prep session;[3]

b. The identities of the other meeting participants;

c. The connection of the third-party to the case or to any meeting participant; and

d. The reason for the third-party's presence at the meeting.

Based on its *in camera* review of the filing, the Court will evaluate whether it needs further development to formulate a ruling.

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[3] The identity of the person likely is not protectable, and the Court would anticipate identifying the person. However, if the identity itself were to reveal strategy – *e.g.*, that the person had particular expertise or was a consultant – the answer might change.

3. Deposition scope must comport with the structure of the case and with the substance of this Order.

As to the remaining scope issues, Wal-Mart should have more latitude with the EEOC-identified Stage I/direct-knowledge witnesses than it will have with respect to the general class member depositions. *See* DE # 163 at 10 (order referencing limited scope/duration). However, that latitude is subject to the bifurcated nature of the trial. Additionally, the privilege rulings in this Order further affect deposition subject matter. Thus, the Court GRANTS the EEOC's motion for a protective order, for good cause, on the following terms:

As to the Stage I/direct-knowledge witnesses:

a) Wal-Mart may confirm that the EEOC represents the witness and may reasonably attempt to determine when the representation commenced, *i.e.*, when the witness initially sought representation/advice from the EEOC concerning a potential claim against Wal-Mart. Wal-Mart may not seek to discover or ask questions about any EEOC/claimant communications following that established point-in-time.

b) Wal-Mart may query a witness's general understanding of her relationship with the EEOC, but again, Wal-Mart may not delve into or discover post-representation communications.

c) Unless Wal-Mart did not hire or promote a particular deponent *because of* prior representations from her concerning work history, Wal-Mart may *briefly* (not to exceed thirty (30) minutes of deposition time) survey a witness's current employment status and employment history, identifying prior employers and periods/duties/requirements of employment. If Wal-Mart made an employment

decision as to a particular witness on the basis of her representations concerning work history, the time limitation stated does not apply.

This ruling recognizes the impeachment/bias values Wal-Mart asserts but further reaffirms that Stage I will not involve a series of mini-trials and that the Court has deferred any damage considerations to potential Stage II.

CONCLUSION

On the terms stated, the Court therefore:

a. GRANTS the EEOC's motion for a protective order. *See* DE ##167/168; and

b. DENIES, consistent with the privilege ruling and scope analysis, Wal-Mart's corresponding motion to compel answers to questions/production of documents. *See* DE ##171/172. Wal-Mart's discovery access, as relevant, is as defined by this Order; and

c. DEFERS Wal-Mart's motion concerning the third-party's identity pending the EEOC's supplementation of the record for *in camera* review, as specified herein.

* * *

This order resolves various nondispositive pre-trial matters, per 28 U.S.C. § 636(b)(1)(A). The parties should consult said statute and Rule 72(a) for applicable appeal rights and mechanics.

This the 19th day of February, 2008.

Signed By:
Robert E. Wier
United States Magistrate Judge

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