IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff, MEMORANDUM AND ORDER

07-C-349-S

v.

CITY OF MADISON, WISCONSIN,

Defendant.

Order to show cause came on to be heard before the Court in the above entitled matter on September 19, 2007, the plaintiff, Equal Employment Opportunity Commission ("EEOC") having appeared by Dennis McBride, senior trial attorney; defendant, City of Madison, Wisconsin ("Madison") by Bell, Gierhart & Moore by David E. McFarlane. Honorable John C. Shabaz, District Judge, presided.

MEMORANDUM

Plaintiff EEOC argues that its subpoena should be enforced because defendant has failed to satisfy its burden in proving that the subpoena was not enforceable. Conversely, defendant Madison argues that the subpoena should not be enforced because the documents are protected under the work product doctrine or under the "self-critical analysis privilege."

First, the Court will not recognize the "self-critical analysis privilege." The Seventh Circuit has not recognized such a privilege, Burden-Meeks v. Welch, 319 F.3d 897, 901 (7th Cir. 2003), and the Supreme Court has reasoned against creating new privileges

to EEOC subpoenas based on Congress' decision not to recognize any special privileges under 28 U.S.C. §§ 2000e-8(a) and 2000e-9, Univ. of Pennsylvania v. EEOC, 493 U.S. 182, 189, 110 S. Ct. 577, 107 L. Ed. 2d 571 (1990). Accordingly, the Court finds the arguments concerning the "self-critical analysis privilege" unpersuasive.

What remains for the Court to address are the issues surrounding EEOC subpoena enforcement and application of the work-product doctrine. In EEOC subpoena enforcement proceedings a court has a limited oversight role. EEOC v. United Air Lines, Inc., 287 F.3d 643, 649 (7th Cir. 2002). In general, "an EEOC subpoena must be enforced where (1) the investigation is within the agency's authority, (2) the subpoena is not too indefinite, and (3) the requested information is reasonably relevant." EEOC v. Ill. State Tollway Auth., 800 F.2d 656, 658 (7th Cir. 1986) (citing EEOC v. A.E. Staley Mfg. Co., 711 F.2d 780, 783 (7th Cir.1983)). Furthermore, the Seventh Circuit "has long recognized that the EEOC has broad investigatory powers to investigate violations of Title VII." A.E. Staley Mfg. Co., 711 F.2d at 783 (citations omitted).

"[T]here are [however] privileges that can be used to keep information from government agencies" such as attorney-client privilege or work product doctrine. See U.S. Dep't of Educ. v. Nat'l Collegiate Athletic Ass'n, 481 F.3d 936, 938 (7th Cir. 2007) (citations omitted). Moreover, although there are such recognized privileges, "[m]any decisions caution against the creation of new privileges, even for what appear to be good reasons . . . ." Burden-Meeks, 319 F.3d at 901 (citing Univ. of Pa., 493 U.S., 189.

The work-product doctrine is meant to "shield[] materials that are prepared in anticipation of litigation from the opposing party, on the theory that the opponent should not be allowed to take a free ride on the other party's research, or get the inside [information] on that party's strategy . . . ." Mattenson v. Baxter Healthcare Corp., 438 F.3d 763, 767-68 (7th Cir. 2006) (citations omitted). Furthermore, there is a distinction between "materials 'prepared [by one's opponent] in anticipation of litigation' that contain 'the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation,' and those that do not contain such impressions, conclusions, etc." Id. (alterations in original) (citing Fed. R. Civ. P. 26(b)(3)).

In addressing whether the work-product doctrine applies, "the threshold determination . . . is whether the materials sought to be protected from disclosure were in fact prepared in anticipation of litigation." Binks Mfg. Co. v. Nat'l Presto Indus., Inc., 709 F.2d 1109, 1118 (7th Cir. 1983). The doctrine does not apply unless it can be said that the document had been "prepared or obtained *because* of the prospect of litigation." Id. at 1119 (emphasis in original) (citation omitted). Furthermore, "'[i]f in connection with an accident or an event, a business entity in the ordinary course of business conducts an investigation for its own purposes, the resulting investigative report is produceable in civil pre-trial discovery.'" Id. (quoting Janicker v. George Washington Univ., 94 F.R.D. 648, 650 (D.D.C. 1982)).

In this case, defendant does not dispute (1) that the evidence sought is relevant, (2) that what is requested in the subpoena is clearly defined or (3) that the EEOC is acting within its authority. See Ill. State Tollway Auth., 800 F.2d at 658. In general, the law favors enforcement of an EEOC subpoena when the three elements listed above are undisputed. Id. However, defendant raises as its last line of defense and its only legally supported objection to the subpoena, the work-product doctrine.[1]

The Court is persuaded that the EEOC's broad investigatory powers to investigate violations of Title VII require the work-product doctrine be applied ever so carefully with an eye toward not limiting that broad investigatory power granted the EEOC by Congress. The Supreme Court noted that "Title VII 'sets forth an integrated, multistep enforcement procedure that enables the Commission to detect and remedy instances of discrimination." Univ. of Pa., 493 U.S. at 190 (quoting EEOC v. Shell Oil Co., 466 U.S. 54, 62 (1984) (quotation omitted)). This enforcement process "confers [upon the EEOC] a broad right of access to relevant evidence. . . ."

[1]If the City Attorney's office had full control over the investigation and the investigation report was prepared because of the prospect of litigation, as defendant argues, then it puzzles the Court why defendant did not argue for attorney-client privilege based on the fact that all those working at the Overture Center are City of Madison employees (McFarlane Aff., Ex. A) and interviewing them to discuss litigation would be discussions between a client (i.e., city employees) and its attorney (i.e., the City Attorney) which potentially would be protected by such a privilege. Defendant's failure to argue as such and reach instead for the work-product doctrine evidences the weak footing it rests on in its attempt to surmount its burden of proving the subpoena unenforceable.

Id. at 191. Accordingly, a decision to limit the EEOC's access to relevant evidence should be rare and made with caution.

In this case, defendant's Investigation Report was not "prepared . . . *because* of the prospect of litigation." Binks Mfg. Co., 709 F.2d at 1120 (emphasis and alteration in original)(internal quotation marks and citation omitted). First, although there was the remote prospect of future litigation that is not enough to obtain protection under the work-product doctrine. See id. at 1119. Statements within the unaltered portions of the report support that the investigation was done in the ordinary course of business because of Bob D'Angelo's ("D'Angelo") retirement amid allegations of sexual harassment.

For example, the letter provided to Mayor Cieslewicz explained that it was an investigation of the workplace environment. The introduction to the report explains that "[a]lthough the alleged perpetrator of the inappropriate conduct was permanently out of the workplace, the Mayor said he wanted to ensure that the work environment at Overture in the wake of D'Angelo's departure was respectful and free of harassment." (Martin Aff., Ex. B. at 1.) Also, it is noted that "[t]his investigation was not focused on the specific allegations of misconduct raised by Monica Everson. The investigation of those allegations ended when D'Angelo announced his retirement and immediate departure from the workplace." (Martin Aff., Ex. B at 2.) These statements do not support that the investigation was performed because of the prospect of litigation, i.e., for the specific allegations raised by Monica Everson, but

instead was done for ordinary business purposes, i.e., to ensure the current work environment was respectful and free of harassment.

Moreover, the City Attorney's office did not itself perform or control the investigation but merely was a source of advice during the investigation and such a role weighs against the investigation being performed because of the prospect of litigation.[2] Attorneys are almost always consulted on a business' in house investigations and, in fact, it is at the core of an attorney's job to generally advise clients about conducting such investigations. If such involvement by an attorney placed an in house investigation under the work-product doctrine then every private employer's in house investigation would fall outside the scope of the EEOC's broad investigatory power.

However, such sweeping coverage of the work-product doctrine does not appear even when the EEOC is not involved. See Binks Mfg. Co., 709 F.2d at 1119. Furthermore, to construe the coverage of the work-product doctrine so broadly when the EEOC is involved "would place a potent weapon in the hands of employers who have no interest in complying voluntarily with the Act, who wish instead to delay as long as possible investigations by the EEOC." Shell Oil Co., 466 U.S. at 81. Accordingly, the City Attorney's advisory role weighs against the investigation having been performed because of the

[2]The Court is not saying that the work-product doctrine applies only when attorneys perform investigations but in this case the City Attorney's office was in a mere advising role which although not a determinative factor in whether to place the investigation report under the work-product doctrine weighs against it being more than an unprotected in house investigation.

prospect of litigation, which favors not placing the materials under the protection of the work-product doctrine.

Furthermore, the EEOC is not attempting to take a free ride on defendant's research but is trying to fulfill its statutory duty to investigate potential discrimination. Defendant argued that it attempted to give the EEOC enough pertinent and unprotected information concerning the investigation for the EEOC to be able to perform its statutory duty. However, defendant does not "have the right to impede government investigations because it wants to conduct its own investigations without hindrance." U.S. Dept. of Edu., 481 F.3d at 938. Again, to allow a defendant to determine what the EEOC needs to perform its statutory duty would be placing another weapon in employers' hands to delay EEOC investigations. See Shell Oil Co, 466 U.S. at 81.

Regardless of what defendant attempted to do, based on the information in the record, the Court is not persuaded that defendant's attorney's or its representative's mental impressions or legal theories concerning the litigation are in the investigation report and notes. Accordingly, defendant has failed to prove that the information sought by the EEOC is protected under the work-product doctrine.

Clearly, the law favors allowing the EEOC to obtain "relevant" information concerning alleged discrimination in its attempt to enforce Title VII. Defendant does not dispute that the evidence is relevant and accordingly there is a presumption in favor of enforcing a subpoena requesting such relevant evidence. Also,

defendant's argument that the investigation, notes and all, is covered under the work-product doctrine is at most disputable and the facts before the Court favor that the investigation was not performed because of the prospect of litigation, which removes the material from under the protection of the work-product doctrine. Failure to prove protection under the work-product doctrine leads to defendant's failure to show cause as to why the subpoena is unenforceable and accordingly the EEOC's subpoena must be enforced.

ORDER

IT IS ORDERED that plaintiff EEOC's subpoena No. CHMK-A7-0039 lawfully issued March 21, 2007 pursuant to Section 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-9, shall be enforced against defendant forthwith.

Entered this 20th day of September, 2007.

BY THE COURT:

/s/

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JOHN C. SHABAZ
District Judge