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CLERK, U.S. DISTRICT COURT
JUL 27 2001
CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

ROBERT L. REEVES AND ASSOCIATES,
A PROFESSIONAL CORPORATION,

Defendant.

CASE NO. CV 00-10515-DT(RZx)

ORDER DENYING PLAINTIFF U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S MOTION FOR REVIEW AND RECONSIDERATION OF MAGISTRATE JUDGE'S ORDER ON PLAINTIFF'S MOTION TO COMPEL AND ORDERING CLARIFICATION OF THE MAGISTRATE JUDGE'S PROTECTIVE ORDER

I. Background

A. Factual Summary

1. Introduction

Plaintiff U.S. Equal Employment Opportunity Commission ("Plaintiff" or "EEOC") brings this action under Title VII of the Civil Rights Act of 1964, as amended, the Pregnancy Discrimination Act ("PDA") of 1978, and Title I of the Civil Rights Act of 1991 against Defendant Robert L. Reeves and Associates, a Professional Corporation, ("Defendant"), to correct alleged unlawful employment practices on the basis of sex, and to provide appropriate relief to Judith Ignacio Quilaton ("Claimant Quilaton"), and other similarly situated female employees ("Claimants") who were adversely affected by such practices.

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1 EEOC alleges that Claimant Quilton and other similarly situated female
2 employees were discriminated against by Defendant when they were terminated because
3 of pregnancy and when female employees were sexually harassed and subjected to a
4 hostile working environment, because of their sex (female), during their employment with
5 Defendant.

6 Plaintiff brings the present Motion for Review and Reconsideration of
7 Magistrate Judge Zarefsky's June 4, 2001 oral Order on Plaintiff's Motion to Compel
8 Documents. The June 4, 2001 oral Order granted in part and denied in part Plaintiff's
9 Motion to Compel Documents, resulting in Defendant being ordered to file a supplemental
10 response within seven (7) days. Plaintiff asserts that errors in the Magistrate Judge's oral
11 Order will severely prejudice Plaintiff's ability to prosecute this case.

12 **2. Issues for Review and Reconsideration**

13 In its Notice of Motion for Review and Reconsideration of Magistrate
14 Judge's Order on Plaintiff's Motion to Compel (the "Notice"), Plaintiff contends that the
15 identified appealed-from portions of the Order were based on a failure to consider material
16 facts presented to the Court before such decision was orally issued, including but not
17 limited to:

- 18 a) Defendant's failure to produce a privilege log so as to enable the
19 Court to make a determination as to whether any privilege applies to
20 any specific document;
- 21 b) the absence of any authority for the proposition that the EEOC may
22 not discover Social Security numbers of witnesses or potential
23 witnesses;
- 24 c) the relevance of Defendant's own employment records concerning
25 its own witnesses, especially those who are or were employees of
26 Defendant;
- 27

- d) the lack of any applicable privilege preventing production of personnel documents per se under Federal Rule of Evidence 501 and federal case law (or, assuming arguendo that California state law applied, under California state law);
- e) Defendant's failure to make a showing of any need for a protective order which barred production of relevant evidence, rather than simply limiting its publication outside the context of trial preparation;
- f) the lack of notice and opportunity to be heard before the entry of a protective order limiting use of discovery documents;
- g) the failure to consider the relevance of and discoverability of prior witness statements, including statements other than in deposition transcripts, and discs of prior depositions in other litigation between Defendant and parties other than the EEOC;
- h) Defendant belatedly filed a Motion for Protective Order which Plaintiff had opposed and which was not before the Court on June 4, 2001, and which Defendant withdrew before the ruling on its Motion for Protective Order set for June 18, 2001.

(See Notice, ¶¶ 2-3.)

3. Factual Allegations of the Complaint

Plaintiff alleges the following facts in the September 29, 2000 Complaint for Civil Rights Employment Discrimination (the "Complaint"):

Plaintiff, EEOC, is the agency of the United States of America charged with the administration, interpretation, and enforcement of Title VII and is expressly authorized to bring this action under § 706(f)(1) and (3) of Title VII, 42 U.S.C., § 2000e-5(f)(1) and (3). (See Complaint, ¶ 2).

1 At all relevant times, Defendant has been and is now doing business in the
2 State of California, in the City of Pasadena, and has continuously employed at least fifteen
3 (15) employees. (See Id., ¶ 5).

4 At all relevant times, Defendant has continuously been an employer
5 engaged in an industry affecting commerce within the meaning of §§ 701 (b), (g), and (h)
6 and Title VII, 42 U.S.C., §§ 2000e-(b), (g), and (h). (See Id., ¶ 6).

7 More than thirty (30) days prior to the institution of this lawsuit, Claimant
8 Quilton, filed a charge with the EEOC alleging violations of Title VII by Defendant. The
9 EEOC investigated and issued a Letter of Determination finding that Claimant Quilton
10 and Claimants were subjected to unlawful pregnancy discrimination and a class of female
11 employees have been subjected to sexual harassment in violation of Title VII. (See Id., ¶
12 7).

13 Since at least August 11, 1995, Defendant has engaged in unlawful
14 employment practices at its Pasadena, California location, in violation of § 703(a) of Title
15 VII, 42 U.S.C. § 2000e-2(a) and the Pregnancy Discrimination Act, 42 U.S.C. Section
16 20002-(k), by:

- 17 (a) terminating Claimant Quilton and other similarly situated pregnant
18 female employees; and,
- 19 (b) sexually harassing a class of female employees, which created a
20 hostile work environment and affected the terms and conditions of
21 their employment.

22 (See Id., ¶ 8).

23 The effect of the practices has been to deprive Claimant Quilton and other
24 female employees and former employees of equal employment opportunities and to
25 otherwise adversely affect their employment status because of their female sex and
26 pregnancy. (See Id., ¶ 9).

1 The unlawful employment practices were and are intentional, and were
2 committed with malice or reckless indifference to the federally protected rights of
3 Claimant Quilton and other female employees. (See Id., ¶ 11).

4 As a direct and proximate result of the acts of Defendant, Claimant
5 Quilton and other female employees have each suffered emotional pain, suffering,
6 inconvenience, loss of enjoyment of life, humiliation and damages, as well as loss of
7 earnings, according to proof. (See Id., ¶ 12).

8 **B. Procedural Summary**

9 On September 29, 2000 Plaintiff filed the Complaint for Civil Rights
10 Employment Discrimination in the United States District Court for the Central District of
11 California, which was assigned to District Judge Dickran Tevrizian as Case No: CV-00-
12 10515 DT (RZx).

13 On December 5, 2000, Defendant filed an Answer to the Unverified
14 Complaint.

15 On June 4, 2001, Magistrate Judge Ralph Zarefsky conducted a hearing on
16 Plaintiff's First Motion to Compel Production of Documents. Pursuant to that hearing,
17 Magistrate Judge Zarefsky issued an oral Order which granted in part and denied in part
18 Plaintiff's Motion to Compel Documents.

19 On June 11, 2001, Defendant filed a Motion for Leave to Amend Answer,
20 which this Court granted on July 9, 2001.

21 On June 22, 2001, Plaintiff filed a Notice for Review and Reconsideration
22 of Magistrate Judge's Order on Plaintiff's Motion to Compel.¹

23
24 ¹Plaintiff attempted to file its Notice for Review and Reconsideration of Magistrate
25 Judge's Order on Plaintiff's Motion to Compel on June 18, 2001. However, it was rejected under
26 Local Rule 7.4.2 because written notice of motion was lacking or timeliness of motion was
27 incorrect. Plaintiff then correctly filed its Motion on June 22, 2001, fourteen (14) days after the
28 Magistrate Judge's June 4, 2001 Order. Defendant asserts that F.R.C.P. 72(a) provides that a
party may serve and file objections to the Magistrate Judge's order within ten (10) days from said

1 On June 26, 2001, Plaintiff filed the Motion for Review and
2 Reconsideration of Magistrate Judge's Order on Plaintiff's Motion to Compel, which the
3 Court ordered taken under submission on July 2, 2001. This Motion is presently before the
4 Court.

5 On July 2, 2001, this Court received but did not file Defendant's
6 Opposition to Plaintiff's Motion for Review and Reconsideration of Magistrate Judge's
7 Order on Plaintiff's Motion to Compel.

8 On July 9, 2001, Plaintiff filed a Reply for its Motion for Review and
9 Reconsideration of Magistrate Judge's Order on Plaintiff's Motion to Compel.

10 On July 10, 2001, Defendant filed a Notice of Errata With Regard to Filing
11 its Opposition to Plaintiff's Motion for Review and Reconsideration of Magistrate Judge's
12 Order on Plaintiff's Motion to Compel.

13 **II. Discussion**

14 **A. Standard**

15 Pursuant to Federal Rule of Civil Procedure 72(a), the district court must
16 consider objections to a Magistrate Judge's order and modify or set aside any portion of
17 the Magistrate Judge's order found to be clearly erroneous or contrary to law. The Ninth
18 Circuit has emphasized that a non-dispositive order entered by a Magistrate must be
19 deferred to unless it is "clearly erroneous or contrary to law." See, Grimes v. City and
20 County of San Francisco, 951 F.2d 236, 241 (9th Cir. 1991). Such orders are not subject
21 to de novo determination. See, id. "The reviewing court may not simply substitute its
22 judgment for that of the deciding court." Id. (citing United States v. BNS, Inc., 858 F.2d
23 456, 464 (9th Cir. 1988)).

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27 order, or is forever barred from raising such objections. The Court admonishes Plaintiff to abide
28 by the Local Rules, but declines to dismiss Plaintiff's Motion on that basis, as further stated in this
Order.

1 Local Rule 3.3.1 Governing Duties of Magistrate Judges follows Rule 72.

2 Local Rule 3.3.1 provides in pertinent part:

3 [W]ithin ten (10) days of service upon him of a written ruling,
4 or order on a pretrial matter not dispositive of a claim or defense,
5 any party aggrieved by a Magistrate Judge's decision may file
6 (original and two copies) and serve a motion for review and
7 reconsideration before the District Judge to whom the case is
8 assigned, specifically designating the portions of the decision
9 objected to and specifying wherein such portions of the decision
10 are clearly erroneous or contrary to law, with points and
11 authorities in support thereof.

12 **B. Analysis**

13 **1. The Motion for Review and Reconsideration of The Magistrate**
14 **Judge's Order is Denied.**

15 Judge Zarefsky, in his June 4, 2001 Order, granted in part and denied
16 in part Plaintiff's Motion to Compel. Judge Zarefsky did not issue a written order, but
17 issued an oral Order entered into the tape-recorded record. Plaintiff requested a transcript
18 of the Magistrate's Order on June 6, 2001, but as of June 18, 2001, claims that no
19 transcript had been received. In its Motion for Review and Reconsideration of Magistrate
20 Judge's Order on Plaintiff's Motion to Compel (the "Motion"), Plaintiff states that Judge
21 Zarefsky ruled as follows concerning requests which Plaintiff now moves this Court to
22 review and reconsider:

- 23 (1) **Request for Production No. 1:** All documents showing all actual
24 compensation and benefits for attorneys and non-attorney employees since
25 January 1995 and the costs thereof, including summary plan descriptions,
26 bills for coverage costs for employer and employee eligibility criteria, wage
27 rates, and annual W-2's for each employee or partner.

1 **Magistrate Judge's Order on Production No. 1:** Defendant must provide
2 documents showing eligibility for benefits such as Summary Plan
3 Descriptions and W-2's for employees or equivalent for partners of
4 Defendant law firm. Defendant can redact social security numbers. For
5 identification purposes, Defendant must identify whether male or female.

- 6 (2) **Request for Production No. 3:** All documents reflecting facts known by
7 the individuals identified as witnesses in Defendant's Initial Disclosure,
8 including but not limited to witness statements, whatever form, including
9 previous depositions.

10 **Magistrate Judge's Order on Production No. 3:** Defendant has complied
11 by making transcripts of previous depositions available for inspection and
12 copying.

- 13 (3) **Request for Production No. 4:** Personnel documents for all [80]
14 individuals listed on Defendant's Initial Disclosures.

15 **Magistrate Judge's Order on Production No. 4:** Motion denied on the
16 grounds of relevance and privacy; EEOC must show relevance, and
17 production of the personnel records for Defendant's witnesses is not
18 relevant to the issue of credibility.

- 19 (4) **Request for Production No. 5:** Personnel documents for all [fewer than
20 20] individuals listed on Plaintiff's Initial Disclosures.

21 **Magistrate Judge's Order on Production No. 5:** Motion granted as to this
22 request for names, telephone numbers, and addresses, but denied as to
23 social security numbers. Further, the Magistrate Judge issued an oral
24 protective order limiting the use of documents to counsel and their staff.

- 25 (5) **Request for Production No. 22:** All documents which describe or reflect
26 the structure or organization of Defendant law firm for each year from
27 January 1, 1994 to the present.

1 **Magistrate Judge's Order on Production No. 22:** Defendant does not
2 have to invent an organizational chart.

3 (See Motion, ¶¶ 4-6).

4 **a. Plaintiff's Motion is Not Time-Barred²**

5 Defendant seeks to oppose Plaintiff's Motion based on the fact that it is
6 time-barred for failure to timely file the Motion for Review and Reconsideration.

7 Federal Rule of Civil Procedure 72(a) provides that a party may serve and file objections
8 to the Magistrate Judge's order within ten (10) days from said Order, or is forever barred
9 from raising such objections. This Court's Standing Order in Section 4 provides that a
10 party moving for reconsideration must file and serve the motion within ten (10) days of an
11 oral ruling that the Magistrate Judge states will not be followed by a written ruling.

12
13 ²Defendant seeks to oppose the Motion for Review and Reconsideration based on the
14 contention that Plaintiff has violated Local Rule 7.16. The Local Rule partially states that "no
15 motion for reconsideration shall in any manner repeat any oral or written argument made in
16 support of or in opposition to the original motion." Defendant alleges that Plaintiff's Motion
17 includes verbatim passages and arguments from its original motion to compel which was
18 presented at the time Magistrate Judge Zarefsky heard the matter. Opposition to Plaintiff's
19 Motion for Review and Reconsideration of Magistrate Judge's Order on Plaintiff's
20 Motion to Compel (the "Opposition"), 2: 2-8. Defendant further states that Plaintiff's motion
21 fails to comply with Local Rule 7.16 in that it does not provide any evidence that "a material
22 difference in fact or law from that presented to the Court before such decision that in the exercise
23 of reasonable diligence could not have been known to the party moving for reconsideration at the
24 time of such decision, or (b) the emergence of new material facts or a change of law occurring
25 after the time of such decision, or (c) a manifest showing of a failure to consider material facts
26 presented to the Court before such decision." Opposition, 2: 13-20. Defendant also asserts that
27 Plaintiff has violated Local Rule 7.13, which provides that if any "motion... has been made to any
28 Judge of this Court and has been denied in whole or in part or has been granted conditionally or
on terms, any subsequent motion for the same relief in whole or in part... shall be presented to the
same Judge whenever possible." If presentation to the same Judge is not possible, the moving
party has to "file and serve a declaration setting forth the material facts and circumstances as to
each prior motion." Opposition, 2: 29-30; 3:1-7. Defendant contends that since Plaintiff has not
filed such a Declaration, the Motion for Review and Reconsideration should be set aside.

This Court finds that the Local Rules regarding filing a declaration upon re-
filing a Motion is by its own terms not applicable in view of F.R.C.P. 72(a), since the EEOC is not
asking for reconsideration of the Magistrate Judge's ruling, but review by the District Judge under
Rule 72(a).

1 Federal Rule of Civil Procedure 6(e) provides that if the prescribed time period is under
2 eleven (11) days, the calculation of time shall not include weekends. Opposition, 1: 1-12.

3 On June 4, 2001, Magistrate Judge Zarefsky ruled on the discovery matter
4 presently before this Court. Plaintiff attempted to file its Notice for Review and
5 Reconsideration of Magistrate Judge's Order on Plaintiff's Motion to Compel on June 18,
6 2001, the last day to file such a motion. However, the Motion was rejected by the Clerk's
7 office pursuant to Local Rule 7.4.2 because written notice of motion was lacking or
8 timeliness of motion was incorrect. Plaintiff subsequently filed its corrected
9 Motion on June 22, 2001, fourteen (14) days after the Magistrate Judge's June 4, 2001
10 Order. The Court declines to deny Plaintiff's Motion based on Plaintiff's failure to comply
11 with Local Rule 7.4.2 as specified in the June 20, 2001 Notice of Document Discrepancy
12 filed with the Court for the following reasons.

13 A recent Ninth Circuit Court of Appeals decision, Ordonez v. Johnson,
14 2001 WL 649909 (9th Cir. (Cal.)), is clearly applicable to the instant facts presently before
15 this Court on the issue of whether the motion is time-barred. In Ordonez v. Johnson, 2001
16 WL 649909 (9th Cir. (Cal)), a federal inmate brought a pro se *Bivens* action against
17 assistant United States attorneys and FBI agents for alleged civil rights violations. The
18 district court dismissed with prejudice federal prisoner Ordonez's civil rights action for
19 failure to timely file an amended complaint. Although the district court received
20 Ordonez's complaint within the filing deadline, the district court rejected and returned the
21 complaint because it did not comply with the Central District of California Local Civil
22 Rule 3.5.1. The Court of Appeals found that the district court's decision to dismiss was an
23 abuse of discretion. The Court held that the inmate constructively filed an amended
24 complaint before the filing deadline, notwithstanding failure to comply with the local rule.
25 The Court stated: "We have previously held that a complaint is filed when it is placed in
26 the actual or constructive custody of the clerk [of the court], despite any subsequent
27 rejection by [the clerk] of the pleading for non-compliance with a provision of the local
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1 rules.” Ordonez v. Johnson, 2001 WL 649909, 2 (9th Cir.(Cal.)) (internal quotations and
2 citations omitted). Similarly, Plaintiff EEOC’s filing of its Notice of Motion for Review
3 and Reconsideration on June 18, 2001 indicates that the motion was placed in the actual or
4 constructive custody of the clerk, despite the clerk’s subsequent rejection of the same due
5 to non-compliance with Local Rule 7.4.2 . Thus, this Court finds that the EEOC’s Motion
6 is not time barred.

7 **b. Social Security Numbers**

8 Judge Zarefsky ruled that Defendant can redact individuals’ social security
9 numbers, on the ground that no basis exists for the disclosure of social security numbers,
10 in response to two of the Requests for Production (Nos. 1 and 5). These requests sought
11 documents showing compensation and eligibility benefits for Defendant’s employees
12 (Request No.1) and for personnel documents for all individuals listed on Plaintiff’s Initial
13 Disclosures (Request No. 5). (See Motion, ¶ 6).

14 Plaintiff states that the Supreme Court has interpreted discovery rules
15 liberally in Title VII cases to provide plaintiffs with broad access to employer’s records.
16 Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 657 (1989). Plaintiff also asserts that
17 personnel records are discoverable in federal question cases, including Title VII actions.
18 Guerra v. Board of Trustees, 567 F.2d 352 (9th Cir. 1977); Ceramic Corp. of America v.
19 Inka Maritime Corp., 163 F.R.D. 584 (C.D. Cal. 1995). Plaintiff states that it should have
20 access to social security numbers of individuals from whom Plaintiff is likely to discover
21 relevant evidence. The EEOC claims that access to the Social Security numbers of current
22 and former employees of Defendant allows Plaintiff to locate witnesses and to make
23 accurate assessments of Defendant’s treatment of employees.

24 This Court, however, disagrees with Plaintiff’s assertions regarding
25 discovery of the social security numbers and concurs with the Magistrate Judge’s ruling.
26 The EEOC seeks the personal and private information of non-Claimants to this lawsuit.
27 Plaintiff has no factual or legal support for its claim and makes no logical nexus between
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1 what it seeks to discover and its allegations, but rather relies on the liberality of the
2 Federal Discovery Rules. However, as much as the Federal Discovery Rules are to be
3 liberally construed, this Court must also arrive at a “definite and firm conviction that [a]
4 mistake has been committed,” in order to conclude that a Magistrate Judge’s decision is
5 clearly erroneous. Folb v. Motion Picture Industry Pension & Health Plans et al., 16 F.
6 Supp. 2d 1164 (C.D. Cal. 1998); 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a).
7 Furthermore, the Folb court held that issues of relevancy are traditionally left to the
8 discretion of the trial court, and thus, do not come under the clearly erroneous standard of
9 Rule 72(a) of the Federal Rules of Civil Procedure for review of Magistrate Judge’s
10 decisions. Id. Instead, where the Magistrate’s decision concerns an evidentiary question of
11 relevancy, “the Court must review the decision with an eye toward the broad standard of
12 relevance in the discovery context, and thus, the standard of review in most instances, is
13 not the explicit statutory standard, but the clearly implicit standard of abuse of discretion.”
14 Id. (quoting Geophysical Systems Corp. v. Raytheon Co., Inc., 117 F.R.D. 646, 647 (C.D.
15 Cal. 1987); see also, In re Application for an Order for Judicial Assistance in a Foreign
16 Proceeding in the High Court of Justice, Chancery Division, England 147 F.R.D. 223, 225
17 (C.D. Cal. 1993)). This Court finds that Plaintiff has not met this standard.

18 Furthermore, Plaintiff’s cited cases are inapposite to the instant case. For
19 example, in Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 657 (1989), cannery
20 workers brought a civil rights action that alleged disparate treatment based on race. Their
21 disparate treatment claims included allegations of nepotism, different hiring channels, and
22 rehire preferences. At issue before the Court was “records or other information which will
23 disclose the impact which it tests and other selection procedures have upon employment
24 opportunities of persons by identifiable race, sex, or ethnic group.” Wards Cove, 490 U.S.
25 at 656. Hence, the Court required that there be a link between the requested items and the
26 allegations of the complaint. Here, however, the EEOC requests personnel files and social
27 security numbers of third persons unrelated to this lawsuit except in their capacity as

1 witnesses. The EEOC indicates that personnel files of lay witnesses are integral to the case
2 in ascertaining the credibility of witnesses. However, absent from Plaintiff's request is a
3 logical nexus between the social security numbers and the allegation in the Complaint.

4 In another case cited by Plaintiff, Guerra v. Board of Trustees, 567 F.2d
5 352 (9th Cir. 1977), a Mexican-American doctor brought an employment discrimination
6 action against state university officials on behalf of Chicano employees and applicants for
7 employment. An order was entered denying the university officials' motion to prohibit
8 filing on court of faculty performance evaluations obtained through discovery. University
9 officials filed a petition for writ of mandamus or prohibition requiring the district judge to
10 reverse or vacate his ruling and to grant officials' motion to prohibit the filing. The Ninth
11 Circuit held that in view of ready availability of alternatives to protect confidentiality such
12 as in camera disclosure of documents, sealing of records, use of assumed names where
13 practical or deletions of names altogether, and strict control over copies, petition for
14 mandamus or prohibition would be denied. Guerra 567 F.2d at 355. The EEOC's reliance
15 on Guerra is unavailing because it is readily distinguishable. In Guerra, plaintiffs sought
16 discovery of their own personnel evaluations. The EEOC seeks discovery of personnel
17 files of third party witnesses. Such discovery is unrelated to the allegations in the
18 complaint.

19 Finally, in Ceramic Corp. of America v. Inka Maritime Corp., 163 F.R.D.
20 584 (C.D. Cal. 1995), also cited by Plaintiff, plaintiff's expert witness moved to quash
21 subpoena duces tecum served on custodian of records for expert's former employer, and
22 for protective order. The Court denied plaintiff's expert's motion to quash and opted for
23 disclosure of the personnel file as it pertained to his expert qualifications on being the
24 master of a vessel. Again, the disclosure of personnel files is permitted when there is a
25 logical nexus. Plaintiff cites Wards Cove, Guerra, and Ceramic Corp in support of its
26 motion to discover personnel records. However, the complaints in these cases are factual,
27 unlike the EEOC's complaint, which Judge Zarefsky described as being "pretty thin" and
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1 having “no facts.” See Exh. 1046 at 5: 4-7. This Court concurs. As such, this Court finds
2 Plaintiff’s arguments in support of reconsideration unavailing.

3 **c. Witness Statements**

4 Plaintiff’s Request for Production No.3 requests all documents reflecting
5 facts known by the individuals identified as witnesses in Defendant’s Initial Disclosures,
6 including any but not limited to witness statements, in whatever form, including previous
7 depositions. Judge Zarefsky ruled only as to transcripts and denied Plaintiff’s request on
8 the ground that Defendant has already complied by making transcripts available for
9 inspection and copying.

10 Plaintiff contends that the Magistrate Judge’s ruling was erroneous because
11 the Order referred only to transcripts of depositions and that Plaintiff is entitled to
12 statements other than depositions. Plaintiff also states that Defendant has not offered to
13 produce the deposition transcripts requested, contrary to the Magistrate Judge’s finding.

14 According to the record before it, this Court finds that Defendant has
15 complied and made deposition transcripts available for inspection and copying since May
16 of 2001. The EEOC did not inspect and copy the depositions from the underlying Reeves
17 v. Hanlon litigation and instead insisted that Defendant copy thousands of pages.

18 Defendant was not improper in refusing Plaintiff’s request. Judge Zarefsky’s ruling that
19 Defendant had complied with its obligations under Federal Rules of Civil Procedure was
20 not error. In fact, apparently, it was not until Judge Zarefsky’s ruling that the EEOC
21 undertook efforts to arrange for inspection and possible copying of the transcripts.

22 In addition, this Court considers Defendant’s statement “that it is not
23 possessed of witness statements outside of deposition transcripts or declarations which
24 have been provided to the EEOC on several occasions” to be persuasive (Opposition, 17:
25 6-9) due to the fact that Plaintiff does not contradict the EEOC statement in its Reply.
26 Accordingly, this Court declines to grant review and reconsideration of the Magistrate
27 Judge’s ruling to compel discovery of the witness statements.

1 **d. Personnel Documents**

2 Magistrate Judge Zarefsky denied Plaintiff's Motion as to Plaintiff's
3 Request for Production No. 4 on the grounds of relevance and privacy stating that there
4 was no relevance to the credibility of Defendant's records regarding Defendant's
5 witnesses. Plaintiff contends that this was error. Pursuant to Federal Rule of Civil
6 Procedure 26(b)(1), Plaintiff states that it is entitled to discovery regarding any matter, not
7 privileged, which is relevant to the subject matter involved in the pending action or which
8 is reasonably calculated to lead to the discovery of admissible evidence. Plaintiff again
9 cites to Wards Cove, Guerra, and Ceramic Corp in demonstrating the liberality of the
10 Federal discovery rules.

11 **i. Relevance**

12 This Court notes Defendant's position that the EEOC is aware of the
13 location of Defendant's past and present employees as it has sent out numerous
14 solicitation letters to said persons promising them an entitlement to back pay and
15 compensation. Additionally, Defendant asserts that it has provided the names and last
16 known addresses of its witnesses. Defendant contends that no one is interfering with
17 Plaintiff's right to speak to all potential witnesses or effectively present its case without
18 the ability to freely contact former co-workers to ascertain their knowledge of factual
19 allegations. According to the Defendant, the EEOC has already spoken with Defendant's
20 employees years ago and has sent solicitation letters to Defendant's employees on
21 repeated occasions. Plaintiff has provided this Court with no convincing evidence to the
22 contrary. Furthermore, as previously stated in this Order, Plaintiff makes no logical nexus
23 between the requested discovery and the allegations made in the complaint. Accordingly,
24 this Court denies Plaintiff's Motion for Review based on relevancy. However, as an
25 additional basis, the Court will also consider Plaintiff's arguments against Defendant's
26 assertion of privilege.

1 **ii. Absence of Privilege**

2 Federal Rule of Evidence 501 provides:

3 Except as otherwise required by the Constitution of the United
4 States or provided by Act of Congress or in the rules proscribed
5 by the Supreme Court pursuant to statutory authority, the privilege
6 of a witness, person, government, State, or Political subdivision
7 thereof shall be governed by the principles of the common law as
8 they may be interpreted by the courts of the United States in the
9 light of reason and experience. However, in civil actions and
10 proceedings, with respect to an element of a claim or defense as
11 to which State law supplies the rule of decision, the privilege of a
12 witness, person, government, State or political subdivision thereof
13 shall be determined in accordance with State law.

14 Therefore, according to Federal Rule of Evidence 501, federal privilege law applies in
15 federal question cases, and state privilege law applies in diversity cases. See Solarzano v.
16 Shell Chemical Co., 2000 WL 1145766 (E.D. La.). Judge Paez of the District Court for
17 the Central District of California, in a persuasive decision entitled Folb v. Motion Picture
18 Industry Pension & Health Plans et al., 16 F. Supp. 2d 1164, aff'd, 216 F.3d 1082 (9th Cir.
19 2000), 2000 WL 420636 (9th Cir. (Cal.)) and affirmed by the Ninth Circuit (in a brief,
20 unpublished opinion), overruled a Magistrate Judge’s decision to apply state privilege
21 under the principle of comity. Id.; accord, Jackson v. County of Sacramento, 175 F.R.D.
22 653, 654 (E.D. Cal. 1997) (holding that federal privilege law should not be determined by
23 comity to the law of the forum state in a federal question case). “Though Federal Rule of
24 Evidence 501 applies in diversity actions, and not in federal subject matter cases (as is the
25 instant case), the District Court for the Central District of California in the earlier (1995)
26 Ceramic decision advocated that state constitutional principals may be considered in the
27 interests of comity. See Ceramic Corp. of America v. Inka Maritime Corp., Inc. 163

1 F.R.D. 584, 588 (C.D. Cal. 1995) (“To the extent that California constitutional provision
2 regarding privacy creates state privilege against disclosure, it would not be entitled to legal
3 recognition in federal question case pending in federal court, though if state doctrine
4 promoting confidentiality did not conflict with federal interest, it could be taken into
5 account as a matter of comity”). However, the interest in comity appears to be
6 disapproved. As succinctly stated in the 1998 Folb decision:

7 To the extent the authority relied upon by the Magistrate
8 Judge suggest federal courts should look to the law of the
9 forum state as a matter of comity in determining the contours
10 of federal privilege law, that authority is disapproved by
11 Jaffee [v. Redmond], 518 U.S. 1, 16 n.15, 116 S.Ct. 1923
12 (1996)]. See, Jackson v. County of Sacramento, 175 F.R.D.
13 653 (E.D. Cal. 1997) (correctly holding that Cook [v. Yellow
14 Freight System, Inc.], 132 F.R.D. 548, 550 (E.D. Cal. 1990)
15 (holding federal courts should look to interests behind state
16 privileges as a matter of comity)] and Pagano [v. Oroville
17 Hosp.], 145 F.R.D. 683, 687-88 (E.D. Cal. 1993)(holding
18 pendent state law claims governed by federal privilege law
19 but state law should be applied where provisions of state
20 privilege can be harmonized with federal discovery law)]
21 overruled by Jaffee to the extent those cases suggest federal
22 privilege law is informed primarily by the law of the forum
23 state as a matter of comity rather than by the law of the 50
24 states in the aggregate as evidence of reason and experience.

25 As an additional consideration, in Soto v. City of Concord, 162 F.R.D. 603
26 (N.D. Cal. 1995), the district court cited to Hampton v. City of San Diego, 147 F.R.D.
27 227, 230 (S.D. Cal. 1993) in which the court declined to apply state-codified privacy laws,
28

1 but did conduct a general balancing test to determine the privacy interests of the officers in
2 that case. In particular, the “court also balanced the need for the requested personnel files
3 against the privacy interests of individual police officers, expressing concern only for the
4 privacy of those non-party officers involved at the scene of the incident,”(Id.) much like
5 the Magistrate Judge’s concern over access to non-party witness-employees’ personnel
6 records. Thus, Plaintiff EEOC is barred from discovery under both federal case law and
7 state law.

8 Plaintiff contends that the Magistrate Judge’s ruling was erroneous because
9 there is no federal privacy privilege allowing a defendant to withhold records related to
10 that party’s witnesses. This Court agrees with this general proposition, though
11 examination of district court cases cited by Plaintiff reaches a contrary result due to
12 distinguishing facts, or more specifically, a result that this Court cannot find to be clearly
13 erroneous. For example, Plaintiff cites Coughlin et al. v. Lee, 946 F.2d 1152 (5th Cir.
14 1991) and Griffith v. WalMart, 163 F.R.D. 4 (E.D. Ky. 1995) to demonstrate the absence
15 of privilege in regards to personnel files. This Court disagrees with Plaintiff’s analysis of
16 Coughlin and Griffith. In both Coughlin and Griffith, the personnel files that were sought
17 for discovery were those of individuals who were involved in the alleged harassment.

18 In Griffith, the plaintiff brought an employment discrimination suit and
19 sought to compel discovery of employer’s personnel files with regard to managerial
20 employees who were allegedly involved in events leading to employee’s discharge. In
21 other words, the personnel files sought were those of individuals involved in the events
22 leading to plaintiff’s termination. Griffith, 163 F.R.D. at 4. Similarly, in Coughlin,
23 sheriff’s deputies brought action against the sheriff to recover for discharge and retaliation
24 for exercise of free speech and political association. The personnel files of the sheriff’s
25 employees who were guilty of infractions more serious than those committed by deputies,
26 but who allegedly supported sheriff in election and were not discharged, were relevant
27 discovery material on issue of sheriff’s alleged pretext in dismissing the deputies.
28

1 Coughlin, 946 F.2d at 1158. In the case before this Court, in contrast to the cases cited by
2 Plaintiff, the personnel documents of individuals who are third party witnesses are sought.
3 Plaintiff does not allege that these third persons took part in the alleged discrimination and
4 harassment.³

5 e. **Review and Reconsideration of The Magistrate Judge's**
6 **Issuance of Protective Order *Sua Sponte* regarding**
7 **Witnesses' Personnel Files is Denied.**

8 Plaintiff seeks review and reconsideration of Judge Zarefsky's Order that
9 the documents responsive to Request for Production No. 5 shall be protected by protective
10 order limiting access to counsel and staff. See Exh. 1046 at 14: 15-19. Plaintiff contends
11 that this ruling is clear error because the standards and procedures for issuance of a
12 protective order were not followed.

13
14
15 ³Even if the Court were to consider California privilege law, California law also bars Plaintiff from
16 being entitled to the discover the personnel files. California Code of Civil Procedure Section 2017(a), in
17 pertinent part, states:

18 Unless otherwise limited by order of the court in accordance
19 with this article, any party may obtain discovery regarding any
20 matter, not privileged, that is relevant to the subject matter
21 involved in the pending action or to the determination of any
22 motion made in that action, if the matter either is itself admissible
23 in evidence or appears reasonably calculated to lead to the
24 discovery of admissible evidence.

25 In a recent California case, Juarez v. Boy Scouts of America, Inc., 81 Cal.App.4th 377
26 (2000), an adult who had been sexually molested as a boy by a volunteer group leader in a national youth
27 organization brought an action against the organization and the church where his group held its meetings
28 for breach of fiduciary duty, negligence, and intentional infliction of emotional distress. The Court in
Juarez determined that the plaintiff failed to show a compelling need for disclosure of information in
'ineligible volunteer files' kept by the Boy Scouts that would outweigh the right of privacy under the State
Constitution enjoyed by the non-parties in the files, thus precluding discovery of the files. The plaintiff had
not shown that the information contained in those files was directly relevant to any disputed issue in the
case. The Court stated that there was no compelling need for the information that outweighed the right to
privacy. Juarez 81 Cal. App. 4th at 392. Similarly, this Court views that the EEOC has failed to show a
compelling need for the disclosure of the third party's personnel files, considering that the third party's
right to privacy outweighs the EEOC's demand for the information. In addition, Defendant points out that
the third persons whose information is sought have instructed Defendant not to produce the such
information.

1 In particular, Plaintiff contends no motion for a protective order was before
2 the Magistrate court on June 4, 2001. Instead, Defendant apparently filed a Motion for
3 Protective Order after the June 4, 2001 hearing date, which was set for hearing on June 18,
4 2001. However, Defendant withdrew the Motion once the Court issued its own order *sua*
5 *sponte*. Plaintiff argues that Defendant had waived its right to request a protective order by
6 failing to move for a protective order within 30 days of Plaintiff's First Request for
7 Production of Documents, as required by Rule 34(b).

8 On this basis, Plaintiff is requesting review and reconsideration of the
9 protective order issued by Judge Zarefsky because there was no procedural or substantive
10 basis for such an order and because Plaintiff was denied the right to be heard on the
11 issuance of a protective order. However, a court may, if circumstances so justify, enter a
12 protective order *sua sponte*. See, Lesal Interiors, Inc. v. Resolution Turst Corp., 153
13 F.R.D. 552, 558 , n.4 (D. N.J. 1994) (where a court determined to deny motion to compel
14 discovery, it could enter a protective order *sua sponte* if circumstances so justified); Nestle
15 Foods Corp. v. Aetna Cas. & Sur. Co., 129 F.R.D. (D. N.J. 1990) (court in its discretion
16 can enter protective order upon showing of good cause).

17 Plaintiff further contends that the Order should apply to both parties and
18 should allow Plaintiff the right to use documents in conference with witnesses and experts.
19 Plaintiff asserts that the terms of the oral Order are ambiguous, and should be clarified so
20 as to prevent inadvertent breach, which could give rise to contempt proceedings. See
21 Motion, 15: 15-20. This Court agrees. Upon this Court's review of the transcript of Judge
22 Zarefsky's issuance of protective order, this Court notes that the scope of the order is
23 indeed unclear and requires clarification. As such, this Court orders the Magistrate Judge
24 to clarify the parameters of the protective order.

25 **f. Structure of Defendant Law Firm**

26 Plaintiff's Request for Production No. 22 sought all documents which
27 describe or reflect the structure or organization of Defendant law firm from 1994 to the
28

1 present. Judge Zarefsky ruled that Defendant is not required to invent an organizational
2 chart. Plaintiff contends that it did not only seek an organizational chart, but also sought
3 information that would allow Plaintiff to assess the supervisory and subordinate positions
4 of individuals whom Defendant may call as witnesses, and to understand which
5 individuals were in a supervisory relationship to the Charging Party and other claimants in
6 this case during the years that employees of Defendant were subject to sexual harassment
7 and terminated due to pregnancy.

8 This Court concurs with the Magistrate Judge in finding that Defendant
9 should not be required to provide anymore information than it already has in regard to the
10 structure of the firm. Defendant contends in its Opposition, and Plaintiff does not deny in
11 its Reply, that Defendant has provided a timely response to Plaintiff's request for
12 production and in so doing, provided documents responsive to Plaintiff's request.
13 Opposition, 17: 24-26. Defendant states that it has provided Plaintiff with all the
14 documentation that exists. *Id.* As such, this Court denies Plaintiff's Motion for Review
15 and Reconsideration on this issue as well.

16 **III. Conclusion**

17 Accordingly, this Court denies Plaintiff EEOC's Motion for Review and
18 Reconsideration of Magistrate Judge's June 4, 2001 oral Order. However, this Court
19 orders the Magistrate Judge to clarify the contours, extent, and parties subject to its
20 protective order so as to avoid any possibility of its violation and any ensuing contempt
21 proceedings. This may be accomplished by the Magistrate Judge by issuing a written order
22 of the June 4, 2001 oral Ruling.

23 **IT IS SO ORDERED.**

24
25 Dated: JUL 27 2001

26 **DICKRAN TEVRIZIAN**
27 _____
28 Dickran Tevrizian, Judge
United States District Court