

Minute Order Form (06/97)

United States District Court, Northern District of Illinois


Name of Assigned Judge or Magistrate Judge	David W. McKeague	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	99 C 1959	DATE	5/14/2001
CASE TITLE	Jones,etal vs. Scientific Colors,etal		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

- (1) Filed motion of [use listing in "Motion" box above.]
- (2) Brief in support of motion due _____.
- (3) Answer brief to motion due _____. Reply to answer brief due _____.
- (4) Ruling/Hearing on _____ set for _____ at _____.
- (5) Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
- (6) Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
- (7) Trial[set for/re-set for] on _____ at _____.
- (8) [Bench/Jury trial] [Hearing] held/continued to _____ at _____.
- (9) This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
 FRCP4(m) General Rule 21 FRCP41(a)(1) FRCP41(a)(2).
- (10) [Other docket entry] The Court concludes the magistrate judge's order denying the motion to compel is contrary to law and must be set aside. The EEOC's motion to compel production of documents is granted. With due respect for the work privilege doctrine, however, the Court will require defendant Scientific Colors to submit all documents described in the "privilege log" first to the court for in camera review by the magistrate judge. Defendant's submission shall be made not later than 5/23/01. The magistrate judge shall undertake this review and make disclosures to the EEOC no later than 6/1/01.
- (11) [For further detail see order attached to the original minute order.]

<input type="checkbox"/>	No notices required, advised in open court.	 EO-7 FILED FOR DOCKETING 01 MAY 21 AM 9:01	number of notices	Document Number 85
<input type="checkbox"/>	No notices required.		MAY 22 2001	
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GL	courtroom deputy's initials	Date/time received in central Clerk's Office	mailing deputy initials	

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NORMAN JONES, et al.

Plaintiffs,

v.

Case No. 99 C 1959

SCIENTIFIC COLORS, INC.,
d/b/a APOLLO COLORS, INC.,

HON. DAVID W. McKEAGUE*

Defendant,

and

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Case No. 00 C 0171

Plaintiff,

v.

SCIENTIFIC COLORS, INC., d/b/a
APOLLO COLORS,

Defendant.

DOCKETED
MAY 22 2001

ORDER ON OBJECTIONS TO MAGISTRATE JUDGE'S ORDER

On April 3, 2001, Magistrate Judge Ian H. Levin issued a bench ruling denying the motion of plaintiff Equal Employment Opportunity Commission to compel production of documents. The EEOC had sought to compel defendant Scientific Color's production of documents generated by its undercover investigation and handwriting analysis undertaken in response to employees' complaints of racial

*United States District Judge, Western District of Michigan, sitting by designation.

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harassment. The magistrate judge denied the motion based on his conclusion that the documents were protected by the work product privilege. Now before the Court are the EEOC's objections to the magistrate judge's ruling.

The magistrate judge's ruling may be modified or set aside only if "clearly erroneous or contrary to law." Fed R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). The EEOC contends the ruling is contrary to law in that it fails to recognize that, under the circumstances of this case, Scientific Colors has waived its right to rely on the work product privilege.

Pursuant to the work product doctrine, essentially codified at Fed. R. Civ. P. 26(b)(3), documents prepared in anticipation of litigation are subject to discovery only on a showing of necessity. And where necessity is shown and production is ordered, "the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation. Fed. R. Civ. P. 26(b)(3). Defendant is said to have waived this privilege as a result of its assertion of an affirmative defense in response to plaintiffs' Title VII claims.

Among its affirmative defenses, defendant has averred that "plaintiff's claims are barred because the defendant exercised reasonable care to prevent and promptly correct harassing behavior" See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742,

764-65 (1998) (recognizing legitimacy of the affirmative defense); *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998) (same). By asserting this defense and by professing its intention to rely on its undercover investigation in support of the affirmative defense, the EEOC argues defendant has placed the reasonableness of its investigation at issue, opened the door to discovery, and impliedly waived any work product privilege. The argument finds substantial support in the case law. See *Madanes v. Madanes*, 199 F.R.D. 135, 150 (S.D. N.Y. 2001); *Robinson v. Time Warner, Inc.*, 187 F.R.D. 144, 146 (S.D. N.Y. 1999); *Brownell v. Roadway Package System, Inc.*, 185 F.R.D. 19, 25-26 (N.D. N.Y. 1999); *Peterson v. Wallace Computer Services, Inc.*, 984 F.Supp. 821, 825-26 (D. Vt. 1997); *Johnson v. Rauland-Borg Corp.*, 961 F.Supp. 208, 210-11 (N.D. Ill. 1997); *Harding v. Dana Transport, Inc.*, 914 F.Supp. 1084, 1098-99 (D. N.J. 1996).

Scientific Colors maintains, however, that it has stopped short of waiving the privilege by virtue of its stipulation (1) that it does not presently intend to use the contents of its investigation, and (2) that it will disclose to the EEOC those contents which it might later decide it does want to use. The magistrate judge agreed with Scientific Colors that this stipulation was sufficient to preserve the privilege. This Court cannot agree. The Court finds the stipulation inadequate for two reasons.

Even as it disavows any *present* intention to use the contents of its investigation in support of its affirmative defense, Scientific Colors insists on the right to rely on the *fact* that it undertook the investigation as evidence of its reasonable efforts to prevent and correct racial harassment. Yet, in evaluating the reasonableness of defendant's investigatory and remedial conduct, the finder of fact must necessarily consider such factors as timeliness, thoroughness and employer bias. See *Peterson*, 984 F.Supp. at 826. Unless notes and memoranda produced in the course of the investigation are disclosed to the EEOC, its ability to test the reasonableness of the investigation will be unfairly impaired. *Id.*; *Brownell*, 185 F.R.D. at 25.

Second, in connection with the second element of defendant's stipulation, the Court notes that discovery is presently scheduled to close on June 1, 2001. Defendant's open-ended reservation of the right to change its mind on using the contents of the investigation, and to *then* produce relevant documents, offers the EEOC no assurance of a timely opportunity to conduct meaningful discovery and trial preparation. Again, the terms of defendant's stipulation result in fundamental unfairness.

Accordingly, the Court concludes the magistrate judge's order denying the motion to compel is contrary to law and must be set aside. Defendant has, by virtue of its affirmative defense, impliedly waived its work product privilege. Its stipulation is

ineffective to preserve the privilege. The EEOC's motion to compel production of documents will therefore be granted. With due respect for the work privilege doctrine, however, the Court will require defendant Scientific Colors to submit all documents described in the "privilege log" first to the Court for *in camera* review by the magistrate judge with due regard for protection against unnecessary disclosure of counsel's mental impressions, opinions and legal theories. See *Peterson*, 984 F.Supp. at 826. That is, to the extent the subject documents contain otherwise privileged matters which are not relevant to defendant's affirmative defense, they will not be disclosed to the EEOC. Defendant's submission of documents to the Court shall be made not later than May 23, 2001. The magistrate judge shall undertake this review and make the appropriate disclosures to the EEOC not later than June 1, 2001.

IT IS SO ORDERED.

Dated: May 14, 2000



DAVID W. MCKEAGUE
UNITED STATES DISTRICT JUDGE