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United States District Court, N.D. Illinois, Eastern Division.

Norman JONES, et al., Plaintiffs,
v.
SCIENTIFIC COLORS, INC., d/b/a Apollo Colors, Inc., Defendant.
UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
SCIENTIFIC COLORS, INC., d/b/a Apollo Colors, Defendant.

Nos. 99 C 1959, 00 C 0171. | July 26, 2001.

Opinion

MEMORANDUM OPINION AND ORDER SUSTAINING MAGISTRATE JUDGE'S RULING

MCKEAGUE,* J.

***1** On June 1, 2001, Magistrate Judge Ian H. Levin issued a bench ruling denying the motion of defendant Scientific Colors, Inc., to quash the notice of deposition of its attorney Daniel V. Kinsella. Defendant has timely filed objections. 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).

Neither defendant nor plaintiff Equal Employment Opportunity Commission ("EEOC") has provided the Court with a transcript of Magistrate Judge Levin's bench ruling. Nonetheless, it is apparent that he refused to quash the notice of deposition based, at least in part, on this Court's May 14, 2001 determination that Scientific Colors had impliedly waived any work product privilege and opened the door to discovery by asserting-as an affirmative defense to plaintiff's racial harassment claims-that it has exercised reasonable care to prevent and promptly correct harassing behavior, as evidenced by its own undercover investigation of the workplace.

Defendant does not take issue with the Court's May 14, 2001 ruling. Defendant argues, however, that deposition of its counsel threatens an intrusion upon the attorney-client relationship that goes beyond the limited scope of its implied waiver of the work product privilege. Observing that depositions of opposing counsel are disfavored, *see Madanes v. Madanes,* 199 F.R.D. 135, 151 (S.D.N.Y.2001), defendant contends the EEOC has failed to satisfy the prerequisites to such an extraordinary measure by demonstrating that: "(1) no other means exist to obtain the sought-after information, (2) the information at issue is both relevant and not privileged, and (3) the information in question is crucial to the discovering party's trial preparation." *Id.*

The Court disagrees. Attorney Kinsella has acknowledged that the undercover investigation was initiated at his instance. The EEOC has also demonstrated that Mr. Kinsella was actively involved in directing the investigation. By asserting its undercover investigation as a reasonable measure undertaken to prevent and correct harassment, defendant has placed the nature and scope of the investigation at issue. Mr. Kinsella, in his capacity as investigator, rather than legal advisor, appears to be uniquely qualified to explain the scope of the investigation and its findings, as well as the responsive actions taken by Scientific Colors. The EEOC is therefore entitled to make pertinent inquiry of him in furtherance of assessing the reasonableness of the investigation.

Accordingly, the Court concludes that even under the *Madanes* standard, attorney Daniel Kinsella is properly subject to deposition in this *limited* extent. *See Harding v. Dana Transport, Inc.,* 914 F.Supp. 1084, 1103 n. 13 (D.N.J.1996) (observing, under similar circumstances, that allowing deposition of the defendant's counsel, as investigator, was not intended to expose all aspects of his professional association with his client, but only the nature and scope of the investigation).

***2** The Court thus finding that the magistrate judge's denial of defendant's motion to quash is neither clearly erroneous nor contrary to law, the same is hereby SUSTAINED and defendant's objections are OVERRULED.

IT IS SO ORDERED.

Footnotes

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