

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

CIVIL NO. 01-339-KKC

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

PLAINTIFF

VS:

ORDER COMPELLING PRODUCTION
BY KENTUCKY OFFICE OF EMPLOYMENT
AND TRAINING

WAL-MART STORES, INC.

DEFENDANT

* * * * *

Plaintiff EEOC has moved to compel production of documents concerning “job orders,” which the EEOC sought under subpoena from third-party Kentucky Office of Employment and Training “KOET.” KOET, a state executive agency, objected to production of the job order forms under KRS § 151B.280(3)(a) and an administrative reg passed, in part, under that statute. Defendant Wal-Mart, Inc., the affected employer, filed a written response in support of the objection. All parties appear to concede that records exist that a) would be responsive to the EEOC subpoena and b) would relate to job vacancies and/or qualifications for jobs with Defendant during the time period relevant to the EEOC’s action. *See* DEs #108, 110, 111 & 112.

It is true that the reg, 787 KAR 2:020(2), classifies the job order forms as “confidential and not subject to disclosure” under state law. The statute itself provides that the relevant cabinet secretary shall promulgate rules to protect the “confidential nature” of “all” KOET records that would identify a program “client.” The Court accepts, without deciding, that the regulation properly makes the classification. That designation is not effective to thwart discovery in this case.

This is a federal action in which federal law alone defines the parties' rights and obligations. In such a case, federal civil and evidentiary rules, and federal common law, govern access to and discoverability of information. *See* Fed.R.Evid. 501; *see also Pearson v. Miller*, 211 F.3d 57, 61 (3rd Cir. 2000)(“[D]iscovery disputes in federal courts are governed by federal law. . . . [S]tate statutory confidentiality provisions . . . do not directly govern[.]”). The EEOC makes a proper showing of relevance, since the job order forms may have information related to available openings, job descriptions, and candidate criteria.

The state statute cannot, in and of itself, bar discovery in this case. Indeed, a federal court is in no way bound by state confidentiality rules in evaluating a discovery request relative to a federal claim. Here, no one advocates that the confidentiality provision reflects a true “privilege.” Rather, Wal-Mart, arguing on behalf of the KOET, makes practical arguments concerning the purposes of KOET and its need for full disclosure from cooperating employers. Such is not the contour of a federal privilege. Notably, KOET nowhere describes the confidentiality issue as involving a privilege.¹

The Court has considered relevant authority on the issue, and notes that the federal common law privilege analysis is a narrow one; this type of confidentiality statute would not support a privilege finding. *See Pearson*, 211 F.3d at 67-70; *see also EEOC v. Ill. Dep't of Employment*, 995 F.2d 106, 107-08 (7th Cir. 1993)(rejecting privilege based on state confidentiality statute making unemployment compensation hearing confidential and stating: “When federal law governs, as it does here, only privileges recognized by the national government matter. “).

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Thus, neither KOET or Wal-Mart characterizes the statute or reg as involving a confidential communication, which would be a traditional privilege hallmark.

Additionally, the Court notes that the statute itself permits broad interagency sharing. The statute also generally, and without textual limitation, allows disclosure “insofar as disclosure may be permitted under state or federal law.” KRS § 151B.280(3)(a)(2). The default federal rule permits discovery of relevant material, and Rule 45 is a proper discovery avenue. *See* Fed. R. Civ. P. 26; 45. Further, the Court notes that, in the investigative context, federal law assures EEOC access to evidence “relevant to” a charge under investigation. *See* 42 U.S.C. § 2000e-8(a). The state interest in nondisclosure cannot trump the primary federal interest in discovery in this context.

The Court does respect the values reflected in the state confidentiality statute and will, to the extent reasonably necessary, protect those values. The Court orders that KOET promptly produce any documents² responsive to the subpoena that KOET withheld under authority of KRS § 151B.280 and/or 787 KAR 2:020. If Defendant finds that the information produced truly contains material that it considers proprietary and in need of protection, the Court will entertain a timely motion to restrict the use or dissemination of the produced material to the instant action.

The Court hereby rules on a nondispositive matter under 28 U.S.C. § 636(b)(1)(A). Said statute provides the relevant appeal rights and provisions concerning such a ruling.

This the 4th day of January, 2007.



Signed By:

Robert E. Wier *REW*

United States Magistrate Judge

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This Order thus extends to the job orders themselves and any other documents withheld by KOET based on its confidentiality objection.