

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

CIVIL NO. 01-339-KKC

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

PLAINTIFF

vs:

ORDER CONFIRMING WORK
PRODUCT PROTECTION

WAL-MART STORES, INC.

DEFENDANT

* * * * *

The Court previously analyzed application of the work-product doctrine to a deposition prep session involving the EEOC and several represented class members. Wal-Mart sought discovery concerning an alleged third party¹ in attendance at that session. *See* DE ## 171 Wal-Mart Motion to Compel; 174 EEOC Response; 179 Wal-Mart Reply. In the prior ruling, the Court determined that the work-product doctrine blocks Wal-Mart's access to information about the prep session, unless waiver occurred. *See* DE #209 Order. The order deferred full waiver analysis pending ex parte supplementation by the EEOC. The EEOC has supplemented as directed, and the Court now issues its ruling on the question of waiver.

1

In essence, Wal-Mart sought the identity of the third person, contact information concerning the person, and permission from the Court to discover "the entirety of the information shared" at the prep session. *See* DE #171 Wal-Mart's Motion to Compel. At oral argument, Wal-Mart suggested that it seeks only identity, but the briefing reveals that the ultimate goal, of course, is access to the substance of the prep session.

As the Court already noted, work-product waiver is in some respects distinct from waiver of the attorney-client privilege. While attorney-client protection necessarily hinges on intended full confidentiality and resultant promotion of lawyer-client candor, the work-product doctrine exists to foster the adversarial system. Thus, disclosure to a third party normally works a waiver of the attorney-client privilege, but waiver is less categorical as to protectible work product. *See id.* at 8. As previously held, for work-product waiver to occur, disclosure must be to an adversary or under circumstances likely to reach or apprise an adversary. *See id.*; *see also* Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 404 (3rd ed. 1997) (“The essential question concerning waiver of the work-product doctrine by disclosure is whether the material has been kept from adversaries. . . . [T]he focus . . . is on the extent to which the relationship [of disclosure] is an adversarial one and what efforts were made to keep adversaries from obtaining the material.”).

The Court ordered supplementation because of sparsity in the record concerning the necessary analysis. The EEOC’s ex parte document indicates that a third party did attend a July 2007 deposition prep session involving several represented class members. The third party, a male, is in a close personal relationship with a represented class member and has no affiliation with Wal-Mart. The EEOC’s tender confirms that it described the meeting as confidential to all persons present and admonished all against subsequent disclosure.

Based on the record, as supplemented, the Court finds that no waiver of work-product protection² occurred. Whether or not the EEOC acted incautiously by admitting a third party to the

2

The Court already noted that presence of a third party could waive the attorney-client privilege. *See* DE #209 at 6. However, complex questions exist over application of waiver in the context of group representation – including issues as to waiver scope; power to waive; and extent of waiver among privilege claimants. Based on the effect of the work-product decision, which precludes discovery of the prep session, the Court finds it unnecessary to resolve these questions.

depo prep session, the particular circumstances did not result in waiver. The third party has no tie to Wal-Mart. Indeed, the third party was present because of his intimate personal relationship with a represented class member. Finally, the EEOC took steps to communicate that the meeting was a confidential event and that participants should not later disclose items discussed. Including the third party obviously was not a disclosure to Wal-Mart, and the character of the session and specifics of the individual indicate that discovery by Wal-Mart was not a likely consequence. Based on the recognized limits for waiver in the context of the work-product doctrine, the doctrine's protection remains intact. The Court DENIES Wal-Mart's efforts to seek discovery related to the depo prep session. *See* DE #171.

The lone remaining issue is whether the Court should identify the man involved. The EEOC continues to contend that even his identity is protected. However, witness identity normally is not protected by the work-product doctrine or the attorney-client privilege. The Court has noted and applied that principle before in this case, *see* DE #163 at 6, 8, and the Court would block identification here only to the extent that revealing a person's name might also reveal protected litigation strategy. The third party's identity betrays no tactical choices by the EEOC in this case.

The EEOC maintains that Wal-Mart cannot establish relevancy, even as to the name of the third party. The Court disagrees for two reasons. First, as a generic matter, a discussion about the merits or strategy of the Wal-Mart/EEOC case, involving important witnesses, surely offers the reasonable potential for discoverable information. If Wal-Mart's counsel and managers held a case-strategy meeting at which a third party attended, it is difficult for the Court to believe that the EEOC

Even if the meeting participants waived the attorney-client privilege as to themselves and/or as to that meeting, the protection of the work-product doctrine would bar discovery.

would not view the identity of that third party as “relevant” under the scope of Rule 26. Such a meeting – just like the prep session here – might involve a discussion of factual and legal strengths and weaknesses in the dispute. Plainly, the content would be relevant (though not likely discoverable). Second, and building on the first, identity here blends directly with the ultimate privilege analysis. Thus, if the prep session is not protected by privilege, then the third party is a person with discoverable knowledge; however, if the prep session is protected, the person’s knowledge is not “discoverable” under Rule 26(b)(1). As the Court’s analysis shows, the person’s role and identity here contribute significantly to a continued finding of privilege. Wal-Mart must be “enabled[d] to assess the [privilege] claim” by having sufficient specifics as to the basis for protection. *See* Rule 26(b)(5)(A). The Court believes that, in fairness and in compliance with the Rules, Wal-Mart is entitled to know the man’s name and his connection to the class.

The Court will give the EEOC an opportunity to block identification via a timely appeal to the District Judge. Failing a timely appeal, the Court will file a notice in the record that simply names the third party and states his connection to the class. That is, the Court will provide his name, the identified class member, and their relationship as stated in the EEOC’s *ex parte* supplement.

To be clear, when/if the person is identified, Wal-Mart **shall not** contact or seek discovery from him, directly or indirectly. Wal-Mart may not pursue additional discovery from or concerning the third party absent express, **advance** permission from the Court. Unless an appeal effects a change in the status of the rulings, the Court will not permit discovery from the third party.

The Court issues this Order resolving a non-dispositive pretrial matter under 28 U.S.C. § 636(b)(1)(A). Any party objecting to this Order should consult said statute and Rule 72(a) concerning its right of and mechanics for reconsideration before the District Court.

This the 6th day of March, 2008.



Signed By:

Robert E. Wier *REW*

United States Magistrate Judge