

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

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EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION,  
Plaintiff,

- against -

COMPREHENSIVE BENEFITS  
CONSULTANTS,  
Defendant.

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**MEMORANDUM AND ORDER**

CV 04-3076 (LDW) (JO)

**JAMES ORENSTEIN, Magistrate Judge:**

Plaintiff Equal Employment Opportunity Commission ("EEOC"), asserting that communications among Susan Nally, claimant Jean Marie Addeo, and attorney Robert Bursky are subject to a joint attorney-client privilege, "seeks a protective order to ensure that the privilege is not breached [sic] throughout the course of this litigation" pursuant to Federal Rule of Civil Procedure 26(c). Docket Entry ("DE") 43. Defendant Comprehensive Benefits Consultants ("CBC") opposes such relief on the ground that it would constitute an unnecessary and improper "gag order." DE 44. In addition, the EEOC moves to quash CBC's subpoena *duces tecum* requiring Craig Addeo, the husband of claimant Jean Marie Addeo, to produce certain documents containing information about himself and his business. DE 38. CBC opposes that application on the ground that the EEOC lacks standing to seek such relief and on the ground that the subpoena is in any event a proper discovery mechanism. I now deny both applications: the first is denied as moot, and the second is denied for the movant's want of standing.

I. Statements By Ms. Nally

Rule 26(c) authorizes a court to protect a party, or a person from whom discovery is sought, with respect to the discovery process. The Rule specifies eight specific forms of relief

that are available, and although the list is not explicitly described as exclusive, any order pursuant to the rule must be of a kind that "justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ...." Fed. R. Civ. P. 26(c). The record before me (in addition to lacking the certification required by the rule's first sentence) does not reveal any circumstance suggesting that any such harm to the movant is imminent. Should Ms. Nally be called as a witness at trial, or should the defendant seek to introduce Ms. Nally's statements, in any form, at some other stage in these proceedings, plaintiff will have sufficient opportunity to seek to preclude of such statements based on the assertion of privilege. At this stage, however, it is unclear what a protective order would accomplish.

That the issue does not now present a live controversy does not completely end the matter, however, because the parties are continuing to engage in discovery and quite obviously have very different ideas about the status of the claim of privilege. In a minute order dated March 15, 2005, I concluded that Ms. Addeo and Ms. Nally "sought the advice of counsel together and had a common interest, that their meeting with the attorney was therefore privileged, and that there has not been an effective waiver of claimant Addeo's privilege" that would properly permit a general deposition of attorney Bursky. DE 40. While acknowledging that "there were limited waivers by Ms. Addeo – such as counsel's explanation of what the initials EEOC stand for and his belief that documentary evidence and witnesses would be important – they do not constitute a waiver as to all related communications." *Id.*

That ruling remains the law of the case and while Ms. Nally herself is not before the court or subject to the kind of "gag order" the defendant decries,<sup>1</sup> the parties and their counsel are bound by that March 15 ruling unless and until reconsidered by me or reversed by the Honorable Leonard D. Wexler, United States District Judge, pursuant to Rule 72(a) of the Federal Rules of Civil Procedure. Should Judge Wexler reverse my earlier ruling, plaintiff's application for relief will remain moot. But while review of the order is pending, and thereafter if it is affirmed, the parties and their counsel proceed at their peril in soliciting from Ms. Nally any further disclosure of the contents of a communication that is subject to a claim of privilege by Ms. Addeo. "The essential benefit of such joint collaboration ... is that a member of the common legal enterprise cannot reveal the contents of the shared communications without the consent of all the parties.... That is, the privilege continues long after a member of the agreement has departed from the legal consortium and none of the parties to the agreement may unilaterally waive the privilege." *Lugosch v. Congel*, 219 F.R.D. 220, 238 (N.D.N.Y. 2003) (citing *In re Grand Jury Subpoena*, 406 F.Supp. 381, 393 (S.D.N.Y. 1975) ("[W]ithout it the protection is reduced to an improbable alternative.")).

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<sup>1</sup> Even if she were before the court, Ms. Nally would of course not be prohibited from revealing (or the parties from soliciting) her own statements to others, including the otherwise privileged content of her statements to Ms. Addeo and attorney Bursky at their joint meeting. That privilege is hers alone to waive. *See United States v. Agnello*, 135 F. Supp.2d 380, 383 (E.D.N.Y. 2001) ("A client who is part of a joint defense arrangement is entitled to waive the privilege for *his own* statements, and his co-defendants cannot preclude him from doing so.... All that [other holders of the privilege] would be entitled to do, to the extent that a joint defense privilege did attach to the conversations, is stop Agnello from directly or indirectly revealing the privileged communications *of other participants*." (emphasis added; citations omitted)).

II. The Subpoena To Craig Addeo

As CBC correctly notes, Craig Addeo is not a party to this action. He has not sought to quash the subpoena for his records. Moreover, there is no claim before me that his wife has some personal right or privilege with respect to the documents sought in the subpoena at issue. While the EEOC may properly seek to protect Mrs. Addeo's interests as a claimant in this litigation, no such rights appear to be at stake in this motion, and the EEOC has no standing to litigate on behalf of a claimant's non-party spouse. Because that conclusion is sufficient to dispose of the motion, I have no call to determine the merits of the EEOC's criticism of the subpoena or CBC's defense of it. Should Mr. Addeo interpose a proper objection, I will consider the merits at that time.

III. Conclusion

For the reasons set forth above, plaintiff EEOC's application for a protective order and its motion to quash the subpoena *duces tecum* directed to Craig Addeo are both DENIED.

**SO ORDERED.**

Dated: Central Islip, New York  
March 30, 2005

/s/ James Orenstein  
JAMES ORENSTEIN  
U.S. Magistrate Judge