IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

AMERICAN SUPERIOR FEEDS, INC., d/b/a BLUEBONNET MILLING COMPANY,

Defendant.

Case No. CIV-02-911-T

ORDER

On November 21, 2002, Plaintiff filed a motion requesting, under Fed.R.Civ.P. 26(c) and 45(c), the Court quash the subpoena issued to its investigator, Robert Hill. Defendant filed its response and objection to Plaintiff's motion on November 22, 2002. The matter is at issue.

According to the parties' recitations, Mr. Hill, who is employed by Plaintiff as an investigator, was assigned to investigate allegations of age discrimination and violations of the Equal Pay Act allegedly occurring at Defendant's Ardmore, Oklahoma, offices.[1] Mr. Hill obtained documents from Defendant and its counsel as well as interviewed several of Defendant's employees. Following Mr. Hill's investigation, a "for cause" determination was issued by the EEOC.

In the present discovery dispute, Defendant issued a subpoena to compel Mr. Hill's attendance and testimony at a deposition scheduled to occur on November 26, 2002. Plaintiff responded to the deposition notice and subpoena with the present motion. In its response to Plaintiff's motion, Defendant identifies three specific purposes in seeking Mr. Hill's deposition

[1] The charging party (an individual) Linda Denison, filed her Charge of Discrimination with the EEOC on January 3, 2001.

testimony. First, Defendant wants to question Mr. Hill "concerning his fact gathering process." Second, Defendant wishes "to depose Federal Investigator Robert Hill as to the truth concerning the tape recording issue."[2] Finally, Defendant states it "seeks to depose Federal Investigator Robert Hill concerning facts, specifically, his investigation of witnesses and his fact finding results." (Defendant's Objection at 3, 4.) Defendant specifically disavows an intent to depose Mr. Hill regarding his "opinions and recommendations" that led to Plaintiff's issuance of the "for cause" determination as such would arguably violate Plaintiff's "deliberative process privilege." See, NLRB v. Sears, 421 U.S. 132, 149, (1975) and Greyson v. McKenna & Cuneo, 879 F.Supp. 1065, 1069 (D.Colo. 1995). Accordingly, the Court will consider Plaintiff's motion in light of the limited nature or scope of the proposed deposition of Mr. Hill.

Plaintiff's remaining objections to Defendant's request to depose Mr. Hill are threefold. First, Plaintiff argues Mr. Hill's deposition is cumulative and duplicative as Plaintiff has "produced to Defendant all factual material contained within the charge file." Second, Plaintiff argues questioning regarding the scope or adequacy of the EEOC's investigation are irrelevant to the issues to be tried in the case. Finally, Plaintiff argues the burden of the deposition outweighs any likely benefit as its has already produced the non-privileged portions of its investigative file and it is an undue burden to require its investigators to testify regarding their investigation.[3]

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[2] Apparently, Mr. Hill displayed a tape recorder during interviews of Defendant's employees occurring on July 26, 2001. Mr. Hill, through Plaintiff, has now denied recording any of the interviews despite admitting to the presence of the recorder.

[3] In support thereof, Plaintiff recites that it received more than 80,000 charges of discrimination in FY2001 and expects that number to increase this year. Plaintiff argues that the burden of requiring its investigators to testify regarding past investigations limits the investigators' ability to conduct investigations into new cases. Plaintiff offers no statistical information regarding the number of employment discrimination cases it prosecutes itself.

Under the Federal Rules of Civil Procedure,

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed.R.Civ.P. 26(b)(1).

Under the Federal Rules, a party may not bar the deposition of one of its employees or agents by reciting that the facts known to that employee or agent were revealed by previously produced written discovery materials. Generally, a party seeking discovery has the right to obtain and confirm the information contained in written documents through any manner provided for by the Federal Rules of Civil Procedure. Plaintiff has offered the Court no reason to rule otherwise in this case.

While the Court generally agrees that information or testimony regarding the EEOC's investigative process is not admissible at trial, Defendant has made a reasonable argument that the information to be provided by Mr. Hill may lead to the discovery of admissible evidence. For example, Mr. Hill may testify to the identity of witnesses or statements made by Ms. Denison.

Finally, the Court acknowledges the burden that routinely requiring the EEOC's investigators to testify in employment discrimination cases would place on the EEOC's resources. However, this is not a routine case. In this case, the EEOC itself is a party and it has provided the Court with no authority suggesting it can avoid discovery that a private party in a similar position would be required to produce. See EEOC v. Airborne Express, 1999 WL 124380 (E.D. Pa. 1999) ("Defendant has made a reasonable showing that at least some of what it seeks to discovery is relevant factual information not apparently otherwise available in serious litigation in which the EEOC is a party seeking affirmative relief.").

Accordingly, for the foregoing reasons, the Court finds Plaintiff's motion to quash the deposition subpoena issued to Mr. Hill (Doc. No. 17) should be DENIED. However, the deposition date (November 26, 2002) is STRICKEN and the parties shall reset the deposition at a mutually convenient date and time.

IT IS SO ORDERED this 25th day of November, 2002.

RALPH G. THOMPSON
UNITED STATES DISTRICT JUDGE