1999 WL 236736
United States District Court, E.D. Pennsylvania.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
v.
AIRBORNE EXPRESS.

No. CIV. A. 98–1471. | April 20, 1999.

Opinion

MEMORANDUM ORDER

WALDMAN.

***1** The Equal Employment Opportunity Commission (EEOC) has asserted Title VII discrimination and retaliation claims on behalf of a charging party, Mr. Wilkins. Mr. Wilkins worked for defendant between February 1994 and December 1995. Plaintiff alleges that Mr. Wilkins was terminated because of race and for engaging in protected activity. Defendant contends he was terminated for "insubordination" and "flagrant disobedience of orders."

Presently before the court is defendant's motion to compel discovery and for sanctions.

Plaintiff deposed William Sutton, one of Mr. Wilkins' former co-workers. Counsel for the EEOC asked Mr. Sutton whether he had heard particular supervisors direct specific quoted racially discriminatory statements to Mr. Wilkins. Mr. Sutton said he had not. Mr. Wilkins had earlier testified at his deposition that he was aware of only one racial slur directed at him in September 1995. Until this point in the litigation, there had been no suggestion that any of defendant's employees made the statements about which Mr. Sutton was questioned. These quoted statements were written on a document. Defense counsel requested that counsel for the EEOC produce the document from which he was reading or at least identify it. Counsel refused, citing attorney-client privilege.

A party not producing a document under a claim of privilege must provide a description of the document so the other party, and if necessary the court, can determine whether the asserted privilege actually applies. *See* Fed.R.Civ.P. 25(b)(5). Defendant moved to compel the EEOC to produce the document or provide a description of it. By order of February 19, 1999, the court directed the EEOC to produce or describe the document.

The EEOC subsequently provided defendant with a description stating the document:

> consists of notes made by Mr. Wilkins of the discriminatory treatment he suffered while employed by Defendants. These notes were given to counsel for the EEOC after the action was brought and after the close of Mr. Wilkins' first day of depositions. Mr. Wilkins has represented that he prepared these notes after speaking with EEOC counsel. Therefore, the document is a privileged communication between counsel and client/Charging Party.

Defendant has now moved to compel the EEOC to produce the notes and for sanctions including an order precluding the introduction of the notes or any evidence reflecting the information contained in them.

Communications between charging parties and EEOC attorneys may be subject to the attorney-client privilege. *See EEOC v. Johnson & Higgins, Inc.,* 1998 WL 778369, *4 (S.D.N.Y. Nov.6, 1998) (collecting cases); *Bauman v. Jacobs Suchard, Inc.,* 136 F.R.D. 460, 462 (N.D.Ill.1990). Plaintiff's contention that the notes are *per se* a privileged communication because Mr. Wilkins prepared them after speaking with counsel is not sound. Not every communication between a party and his attorney is privileged. *See Glenmede Trust Co. v. Thompson,* 56 F.3d 476, 486 n. 16 (3d Cir.1995).

***2** A client's recitation of incidents of discriminatory treatment by defendant's agents, even if written down to assist his attorney, is not *per se* privileged. The attorney-client privilege only applies to communications which were intended to remain confidential. The privilege is to be construed narrowly to protect only those communications which may not have been made absent the privilege. *See Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976); *Westinghouse Electric Co. v. Republic of the Philippines,* 951 F.2d 1414, 1423–24 (3d Cir.1991); *Guzzino v. Felterman,* 174 F.R.D. 59, 61 (W.D.La.1997); *Pacamor Bearings, Inc. v. Minebea Co., Ltd.,* 918 F.Supp. 491, 510 (D.N.H.1996); *Reich v. Hercules, Inc.,* 857 F.Supp. 367, 372 (D.N.J.1994).

Mr. Wilkins acknowledges that he gave this document to the EEOC "to aid counsel in questioning future witnesses." Information cannot fairly be characterized as confidential when it is related to counsel for the purpose of confronting witnesses with it. There is no apparent

reason why a person pursuing a discrimination claim against his former employer would expect or want to keep confidential his recollection of discriminatory treatment to which he was subjected by defendant's agents. There is no suggestion that Mr. Wilkins in any way objected when counsel read the content of the notes to Mr. Sutton. *See Barrett v. Vojtas,* 182 F.R.D. 177, 179 (W.D.Pa.1998) ("attorney-client privilege does not apply to communications that are intended to be disclosed to third parties or that in fact are so disclosed") (quoting *United States v. Rockwell Intern.,* 897 F.2d 1255, 1265 (3d Cir.1990)).

Notes of things defendant's agents said or did with regard to Mr. Wilkins which he intends to relate to others to substantiate a claim are not privileged.

Plaintiff has the burden of showing that his communication was protected by the attorney-client privilege. *See, e.g., In re Grand Jury Investigation,* 918 F.2d 374, 385 n. 15 (3d Cir.1990). He has not done so.*

* Plaintiff has not claimed work product protection for the notes and thus effectively waived any such protection. *See Carte Blanche (Singapore) PTE, Ltd. v. Diners Club Intern., Inc.,* 130 F.R.D. 28, 32 (S.D.N.Y.1990). *See also In re Lindsey,* 158 F.3d 1263, 1282 (D.C.Cir.1998) (protection of work product doctrine waived by communication of covered material). Even if the doctrine were otherwise applicable, defendant has shown a substantial need for the information in the notes and the inability to obtain it through other means. *See In re Ford Motor co.,* 110 F.3d 954, 966 (3d Cir.1997). At his deposition, Mr. Wilkins testified to a single discriminatory remark. Shortly thereafter, he apparently memorialized various similar purported comments. A trial should not be an ambush. Defendant has a strong need and right to know the evidence of discrimination it faces at trial. Defendant was entitled to a complete and reliable response from Mr. Wilkins at his deposition to the question calling for any discriminatory treatment or remark of which he was aware. It appears as a practical matter that defendant can now obtain such a response only from Mr. Wilkins' written account.

At this juncture, the court will not impose the "extreme sanction" of excluding evidence. *See, e.g., Sheppard v. Glock, Inc.,* 176 F.R.D. 471, 473 (E.D.Pa.1997), *aff'd,* 142 F.3d 429 (3d Cir.1998). The court will order plaintiff to produce those portions of the notes prepared by Mr. Wilkins which would be responsive to defendant's deposition question to him about discriminatory treatment or comments by defendant's agents, unless plaintiff certifies that it will not seek to introduce evidence of the incidents later recollected by Mr. Wilkins in his notes.

ACCORDINGLY, this _____ day of April, 1999, upon consideration of defendant's Motion to Compel Production of Wrongfully Withheld Document and for Sanctions (Doc. # 27), and plaintiff's response thereto, IT IS HEREBY ORDERED that said Motion is GRANTED in part in that within seven days plaintiff shall produce to defendant a copy of the portion of the notes of Mr. Wilkins which purport to describe any incidents of discriminatory comments or treatment which he intends to relate at trial, and said Motion is otherwise DENIED.

Parallel Citations

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