IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

Equal Employment Opportunity Commission, Plaintiff,	§	
	§	**CAUSE NO: DR-99-CA-011-OLG**
v.	§	
San Antonio Shoe, Inc., Defendant.	§	

ORDER OF THE UNITED STATES MAGISTRATE JUDGE

Pending before the court are the following discovery motions and motions for sanctions: Defendant San Antonio Shoe's "Motion to Compel Production of Documents," filed on December 22, 1999; "Defendant's Motion for Sanctions and Response to Plaintiff's Opposed Motion for Protective Order and to Quash Defendant's Rule 30(B)(6) Deposition and Deposition of EEOC Investigator E. Thomas Price," filed on December 30, 1999; "Plaintiff's Motion for Sanctions and Brief in Support," filed on January 18, 2000; "Defendant's Reply to Plaintiff's Motion for Sanctions, Counter-Motion for Sanctions and Brief in Support," filed on January 21, 2000; and "Plaintiff's Motion to Strike Defendant's Rule 11 Motion," filed on January 31, 2000.

Also pending is a motion for partial summary judgment filed by Defendant San Antonio Shoe on January 14, 2000. The motion for partial summary judgment will be addressed in a separate report and recommendation.

After reviewing the discovery motions, the motions for sanctions and the relevant law,

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this Magistrate Judge concludes the motion to compel should be granted in part and denied in part; the motions for sanctions should be denied.

Background and Procedural History

On April 21, 1998, Gloria Franco filed a Charge of Discrimination against Defendant San Antonio Shoe, Inc. (SAS) in the EEOC's San Antonio office. Mr. E. Thomas Price was assigned as the Equal Employment Opportunity Commission (EEOC) investigator for the case. On July 20, 1998, the EEOC issued a Determination signed by San Antonio District Director, Pedro Esquivel, which found that SAS violated Gloria Franco's rights under Title VII of the Civil Rights Act of 1964 because of her sex, female. When efforts to settle the case failed, the EEOC filed suit against SAS on March 5, 1999.

On or about November 22, 1999, SAS served the EEOC with a Notice of Deposition Duces Tecum pursuant to Federal Rule of Civil Procedure 30(b)(6) in which the defendant requested the designation and production for oral deposition of the person or persons with knowledge in the following areas: "(1) The EEOC's investigation of Gloria Franco's complaints against San Antonio Shoe, Inc.; (2) All EEOC findings, conclusions, recommendations, and ultimate decision to sue San Antonio Shoe, Inc. as a result of Gloria Franco's complaints and/or others who may have made similar complaints; (3) the EEOC's interpretation of sexual harassment." Within the same document, the defendant states that "[p]erson's to be deposed, if not identified in the response to Plaintiff's Rule 30(b)(6) notice of deposition, are as follows: E. Thomas Price, Pedro Esquivel and John Wynkoop."

On or about the same day, SAS also served the EEOC with a Notice of Deposition Duces Tecum to take the oral deposition of EEOC investigator E. Thomas Price. In the same

notice, SAS requested the production of the following documents: "(1) The complete EEOC investigative file of Gloria Franco's complaint against San Antonio Shoe, Inc.; (2) All documents evidencing the EEOC's communications with San Antonio Shoe, Inc. that relate or pertain in any manner to complaints lodged against San Antonio Shoe, Inc.; (3) all writings of E. Thomas Price, Pedro Esquivel and John Wynkoop that relate or pertain in any manner to Gloria Franco's complaints against San Antonio Shoe, Inc.; (4) All documents evidencing EEOC's communications with the media that relate or pertain to Gloria Franco's complaints against San Antonio Shoe, Inc.; (5) the calendars, day planners, diaries or other writing evidencing scheduling of E. Thomas Price, Pedro Esquivel and John Wynkoop, for the year 1998; (6) all documents evidencing the EEOC's motivation to bring suit against San Antonio Shoe, Inc. based on the complaints of Gloria Franco."

In response to the proposed depositions, EEOC informed the defendant it would not agree to the depositions, citing the agency's "deliberative process" and attorney-client privileges. EEOC then filed a "Motion for Protective Order and to Quash Defendant's Rule 30(B)(6) Deposition and Deposition of EEOC Investigator E. Thomas Price." San Antonio Shoe responded with a "Motion to Compel Production of Documents" that the EEOC claimed were privileged. San Antonio Shoe also filed a "Motion for Sanctions" which argued the court should deny the EEOC's motion for protective order and impose sanctions on the EEOC for its failure to appear at the scheduled deposition. Not to be outdone, the EEOC responded with a "Motion for Sanctions and Brief in Support" which argued that SAS should be sanctioned by the court for failing to respond completely to the EEOC's interrogatories. SAS then filed a "Counter-Motion for Sanctions and Brief in Support" which argued that the EEOC should be

sanctioned for filing a frivolous motion for sanctions, and the EEOC answered with a "Motion to Strike" the defendant's counter-motion for sanctions. In addition to these various requests for relief, responses and counter-responses from both parties were filed. San Antonio Shoe also filed a motion for partial summary judgment, to which the EEOC responded.

On February 4, 2000 this court entered an order denying without prejudice the EEOC's "Opposed Motion for Protective Order and to Quash," filed on December 17, 2000, concluding the so-called "deliberative process privilege" clearly applied in this case but that SAS was entitled to depose E. Thomas Price and District Director Pedro Esquivel as to factual knowledge. The EEOC would be able to assert the deliberative process or any other privilege, including attorney-client privilege, in response to particular deposition questions. The court also extended the discovery deadline for the sole purpose of deposing Price and Esquivel, and ordered the EEOC to provide to the court for *in camera* inspection each of the documents as to which the attorney-client or deliberative process privilege was claimed by the EEOC.[1] The EEOC submitted these documents to the court on February 8 and 9, 2000. After reviewing the documents submitted by the EEOC, the court finds as follows:

Discussion

Motion to Compel

Because the deliberative process privilege is a qualified privilege, it may be overcome if the party seeking disclosure can demonstrate sufficient need. *See Scott v. PPG Industries,*

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[1]In response to requests from the parties for clarification of the court's February 4th order, the court entered an order on February 9th finding the EEOC should submit all of the documents identified in the Declaration of Acting District Director Guillermo Zamora for *in camera* inspection. Director Zamora's declaration asserts both the deliberative process and attorney-client privilege.

Inc., 142 F.R.D. 291, 294 (N.D. W. Va. 1992). The government's deliberative process privilege "protects predecisional materials 'reflecting deliberative or policy-making processes,' but not materials that are 'purely factual.' " *Skelton v. U.S. Postal Service*, 678 F.2d 35, 38 (5th Cir. 1982) (quoting *EPA v. Mink*, 410 U.S. 73, 87-89 (1973)); *see also Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977) (discussion of the privilege). As facts can be intermixed with analysis, a careful case-by-case analysis of the material sought is necessary. *Skelton*, 678 F.2d at 39. As the purpose of the privilege is to protect the full and free exchange of information in the agency, the test is whether disclosure would serve only to reveal the evaluative process by which a member of the decision-making chain arrived at his/her conclusion. *Id. See also N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (discussing the purpose of privilege).

As for the attorney-client privilege, the privilege generally permits nondisclosure of "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977); *see also U.S. v. Pipkins*, 528 F.2d 559, 562 (5th Cir. 1976). In federal courts, attorney-client privilege extends to confidential communications between attorney and client only if the communications are based on confidential information provided by the client; the privilege protects the secrecy of the underlying facts. *Mead*, 566 F.2d at 254; *Pipkins*, 528 F.2d at 559. It is well-settled that the attorney-client privilege applies where a government agency is a "client" and agency lawyers are the "attorneys." *National Labor Relations Board*, 421 U.S. at 154; *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980); *Mead*, 566 F.2d

at 252.

In this case, EEOC asserts the attorney-client privilege and deliberative process privilege for Documents 2, 3, 4, 5, 6, 9, 10, 11, 12, and 13. After reviewing SAS's motion to compel and the documents in question, the court finds the defendant's motion to compel, with several exceptions, should be denied. The motion to compel will therefore be granted in part and denied in part. The contested issues are hereby resolved as follows:

A. Documents 2 and 3 (Bates No. 004) were two case log entries by Investigator Price which were redacted. The court finds the first redacted entry was properly withheld pursuant to the deliberative process privilege because it describes a conclusion drawn by EEOC supervisors regarding conclusions drawn by Price's Investigative Memorandum. The EEOC states that the second redacted entry, identified as document 3, has been produced to the defendant.

B. Document 4 (Bates No. 016) is a memo dated 7-20-98 from EEOC District Director to Regional Attorney Robert Harwin. The court finds that the document includes non-case specific information which reveals instructions and the process by which the charges are evaluated between the EEOC and its counsel. The court also finds the document was properly withheld pursuant to the attorney-client and deliberative process privilege.

C. Document 5 (Bates No. 019) is a case transmittal form with two redacted handwritten notations. While the case transmittal form is a standard form used for transfers of files for all charges, the document at issue contains handwritten notes which the court finds reveal the EEOC's non-case specific internal codes for assessing cases. The court also finds the notes reveal conclusions drawn by staff and recommendations regarding the facts of this

case. The court concludes the redactions were proper under the deliberative process privilege.

D. Document 6 (Bates No. 132) is an undated handwritten note by Price which was withheld pursuant to the deliberative process privilege. In addition to recording the defendant's address in San Antonio and the dates of Gloria Franco's employment with SAS, the note also contains the legal standard for another case Price was working on at the time, and for Gloria Franco's case. The court finds the note is factual in nature and therefore discoverable. The note should therefore be provided to the defendant.

E. Document 9 (Bates Nos. 194 and 195) is a redacted version of Price's investigative memo. The court finds that only Price's pre-decisional recommendations, conclusions and credibility assessments regarding the facts summarized in the memo are redacted. The court finds that the facts which supported Price's conclusions and recommendations were not redacted. The redacted portions of the memo are protected under the deliberative process privilege.

F. Document 10 (Bates No. 201) is a page from Price's notes where one sentence has been redacted. The EEOC argues that the sentence in question represents Price's conclusion and opinion as to the facts he summarizes, but the court finds the redacted sentence is factual in nature and therefore discoverable. An unredacted version of document 10 (Bates No. 201) should therefore be produced to the defendant.

G. Document 11 (Bates No. 209) is a case transmittal form with redacted handwritten notations, which appear under the heading "Comments." The court finds the document contains notes which reveal the EEOC's non-case specific internal codes for processing cases as well as the internal process for reviewing the case. Because the redacted comments reveal

internal conclusions drawn by staff and recommendations regarding the facts of the case, the court finds the redactions are protected by the deliberative process privilege.

H. Document 12 (Bates No. 210) is a memo dated 7-20-98 from EEOC District Director to Regional Attorney Robert Harwin. The document discusses the charge by Gloria Franco against SAS but also includes non-case specific information which reveals instructions and the process by which charges are evaluated between EEOC and its counsel. The court finds the document was properly withheld pursuant to the attorney-client and deliberative process privilege.

I. Document 13 (Bates Nos. 211-213) is memo by Price dated 5-30-98, portions of which are redacted. The memo is apparently drawn from Price's notes regarding a May 26-28, 1998 visit to Del Rio. The court finds the redacted portions of the memo, with the exception of the next-to-last paragraph on page three (Bates No. 213) of the memo, paragraph B subparagraph (3), reflect Price's conclusions as to the process he followed to conduct the on-site visit, his conclusions and opinions as to the validity of evidence summarized in the memo and the credibility of witnesses whose interviews are also summarized in the memo. A version of the memo which includes paragraph B subparagraph (3) should be produced to the defendant. The court finds that the other redactions are protected by the deliberative process privilege.

Attorneys' Fees and Costs

The EEOC's response to SAS's motion to compel also asks that if the court denies the defendant's motion, the court grant "any other relief to which the Court determines that Plaintiff EEOC is entitled under Federal Rule 37(a)(4)." Rule 37(a)(4) provides in part:

> (B) If the motion [to compel] is denied, the court . . . shall, after affording an opportunity to be heard, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.
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> (C) If the motion is granted in part and denied in part, the court . . . may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

It is apparent from the tone of the motion to compel and the parties' motions and counter-motions for sanctions, that neither side has really conferred with the other in the true spirit, if not the letter of Rule 37(a) and LOCAL RULE CV-7(I), Western District of Texas, because good faith discussions between counsel should have resolved many of the issues brought before the court. The fact that this court labors under a very heavy criminal caseload should make it clear to everyone that it does not have the luxury of resolving irrational or pointless pretrial disputes. If an award of attorneys' fees and expenses were to be made, the court thinks it would have to be made *against* both parties in equal amounts. The motion to compel was granted in part and denied in part. Under these circumstances, the court finds that a just apportionment of fees and costs incurred by the parties in connection with the motion is to require both sides to bear their own. FED. R. CIV. P. 37(a)(4)(C). The request for attorney's fees and costs is denied.

SAS's Motion for Sanctions

The motion for sanctions filed by SAS argues that the court should strike the EEOC's complaint or impose monetary sanctions against the EEOC for its failure to appear at a noticed deposition. The EEOC responds that it should not be sanctioned because the plaintiff's

counsel informed the defendant's counsel of the EEOC's intent to not produce any EEOC staff until ordered to do so by the court.

According to the record, the defendant's Notice of Deposition Duces Tecum was received by counsel for the EEOC on November 22, 1999. The Notice scheduled the oral and video depositions of EEOC's designated witnesses at 9:00 a.m. on December 20, 1999. The EEOC filed its "Opposed Motion for Protective Order and to Quash Defendant's Rule 30(B)(6) Deposition" on December 17, 1999, three days before the scheduled deposition. The defendant's motion for sanctions was filed on December 30, 1999. Counsel for the EEOC states in her reply to the defendant's motion for sanctions that she was first contacted by a paralegal for the defendant's counsel one or two weeks prior to submission of the Notice of Deposition. During this conversation, the paralegal inquired as to the availability of EEOC investigator Price for a deposition. Counsel for the EEOC states that she informed the paralegal that due to the EEOC's policy of invoking the deliberative process privilege, the EEOC could not agree to the deposition, and, thus, could not produce Price for a deposition absent an order from the court. Counsel for the EEOC states that she also encouraged the defendants to submit the Notice of Deposition so as to allow the plaintiff to file its motion for protective order.

Rule 37(d) of the Federal Rules of Civil Procedure clearly provides that a party's failure to appear for deposition, or to respond to interrogatories or a request for inspection, may not be excused on the ground that the discovery sought is objectionable, unless the party failing to act has a pending motion for protective order as provided by Rule 26(c). FED. R. CIV. P. 37(d). SAS cites the last paragraph of the 1993 Advisory Committee Notes to Rule

37(d) and argues that merely filing a Rule 26 motion for protective order does not automatically stay a properly noticed deposition. According to SAS, if a party wishes to be excused from attending a deposition, they must first obtain a court order allowing them to do so.

After carefully reviewing the Advisory Committee Notes to Rule 37(d), however, the court disagrees. SAS's brief cites the 1993 Advisory Committee Notes as follows:

> The last sentence of this subdivision is revised to clarify that it is the pendency of a motion for protective order that may be urged as an excuse for a violation of subdivision (d) . . . . [I]t should be noted that the filing of a motion under Rule 26(c) is not self-executing -- the relief authorized under that rule depends on obtaining the court's order to that effect.

This edited quotation is somewhat misleading. The entire passage reads as follows:

> The last sentence of this subdivision is revised to clarify that it is the pendency of a motion for protective order that may be urged as an excuse for a violation of subdivision (d). If a party's motion has been denied, the party cannot argue that its subsequent failure to comply would be justified. In this connection, it should be noted that the filing of a motion under Rule 26(c) is not self-executing -- the relief authorized under that rule depends on obtaining the court's order to that effect.

FED. R. CIV. P. 37(d) Advisory Committee Notes. As the court understands the requirements of Rule 37(d), it is only in those circumstances where the court has actually ordered discovery that a pending motion for protective order cannot be used as an excuse for non-production. *See* MOORE'S FEDERAL PRACTICE § 37.94 (citing 1993 Advisory Committee Notes and noting that "[a]lthough the pendency of a motion for protective order may be urged as an excuse for not responding to a discovery probe, that source of possible excuse disappears once the motion is denied.").

In this case, by contrast, the EEOC filed a motion for protective order prior to the date

of the scheduled deposition, and no discovery had been ordered by the court. The court therefore finds the EEOC's pending motion provides a good faith excuse for failing to produce the proposed deponents. The court also finds that the defendant failed to establish that the plaintiff's actions were representative of a willful, bad faith attempt to avoid discovery, *see FDIC v. Conner*, 20 F.3d 1376 (5th Cir. 1994) (sanction of dismissal appropriate only where refusal to comply results from willfulness or bad faith, and is accompanied by a clear record of delay or contumacious conduct), or that the defendant is entitled to the attorneys' fees and costs it incurred in opposing the EEOC's motion. SAS's motion for sanctions is denied.

EEOC's Motion for Sanctions

The EEOC's motion for sanctions argues that the defendant should be sanctioned by the court for failing to respond completely to the EEOC's interrogatories. The defendant's response not only argues that the EEOC's motion is without merit, but asserts a "Counter-Motion for Sanctions" arguing the EEOC should be sanctioned "for its frivolous motion for sanctions."

According to the record, the EEOC served SAS with its "First Set of Interrogatories" on September 24, 1999. On October 20, 1999 the defendant answered the interrogatories. After asking the defendant in interrogatory number one to "[i]dentify by name and social security number each person who has, or who you believe has knowledge of facts relevant to this lawsuit and/or to the charge/claim of discrimination made against Defendant," interrogatory two asked the defendant that "[f]or each person identified in Interrogatory number one, state the facts each such person knows or the facts that you believe each such person knows." After responding to interrogatory number one with the names and addresses

of approximately 31 individuals (seven other people were listed but addresses and telephone numbers were not known), the defendant initially responded to interrogatory number two as follows:

> Objection. This Interrogatory is burdensome and harassing and would require Defendant to interview each such person to determine the facts they know. Since Plaintiff worked at Defendant's factory for several years, it would also be very burdensome to try to list each fact each of her co-workers or supervisors knew.

SAS answered what it considers the "unobjectionable portion of the interrogatory" by providing the identify and location of each person it believes had knowledge of facts, and general statements as to why the person was named.

It is well-settled that a timely objection to an interrogatory suspends the obligation to answer the objectionable portion pending a ruling by the court. The burden is on the party propounding the interrogatory to file a motion to compel under rule 37(a) if it disputes the party's objection. *See* CHARLES A. WRIGHT, ARTHUR R. MILLER, AND MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 2173 (3d ed. 1998) (". . .if an objection is made the interrogated party does not answer the interrogatory, unless the party who served the interrogatory moves under Rule 37(a) to compel an answer to it."). In this case, however, the EEOC never sought a ruling on SAS's objection (asserted on October 20, 1999) and waited until January 18, 2000, after the expiration of the court's extended discovery deadline, to move for sanctions. *See* Court's Scheduling Order of June 11, 1999 ("No motions relating to discovery, including Rule 26(c), 29, or 37 motions, shall be filed after the expiration of the discovery period unless they are filed within five business days after the discovery deadline and they pertain to conduct occurring during the final seven calendar days of discovery. Any

other discovery-related motions filed after the discovery deadline will not be entertained."). Having failed to seek a ruling on SAS's objection until after the expiration of the discovery period, the EEOC is in no position now to move for sanctions. The EEOC's motion for sanctions is therefore denied.

The Counter-Motion

The only remaining issue concerns the defendant's counter-motion for sanctions. The EEOC has moved to strike this motion because it fails to comply with Rule 11, which requires parties to file motions for sanctions separately. EEOC argues that SAS violated Rule 11 by including the counter-motion in its response to the EEOC's motion for sanctions. *See* FED. R. CIV. P. 11(c)(1)(A) ("[a] motion for sanctions under this rule shall be made separately from other motions or requests . . ."). EEOC also claims the defendant failed to comply with the rule's so-called "safe harbor" provision, which requires a Rule 11 motion to be served on the opposing party and not filed with the court until 21 days after service is performed. *See id.* Since the defendant served the counter-motion on the EEOC only one day before it was filed with the court, *see* "Defendant's Reply to Plaintiff's Motion for Sanctions, Counter-Motion for Sanctions and Brief in Support," filed on January 21, 2000, there is no question it violates the spirit as well as the letter of Rule 11.

SAS nevertheless argues in reply that its counter-motion is not based on Rule 11, but rather on Rule 37(a)(4), which enumerates the sanctions a court may impose on parties following the court's review of a motion to compel or a protective order. *See* FED. R. CIV. P. 37(a)(4). The court, however, rejects this argument. To begin with, Rule 37(a)(4) was never mentioned in the defendant's counter-motion, and both of the cases cited in the motion --

Local 106, SEIU v. Homewood Memorial Gardens, Inc., 838 F.2d 958 (7th Cir. 1988) and *Harris v. WGM Continental Broadcasting*, 650 F.Supp 568 (N.D. Ill. 1986) -- concerned Rule 11, not Rule 37(a)(4). Furthermore, the EEOC's January 18th motion for sanctions was based upon Rules 37(d) and 26(g) and not a motion to compel or a protective order. Rule 37(a)(4) only authorizes courts to award attorney's fees and costs associated with the success or failure of a motion to compel discovery. The rule itself is entitled "Failure to Make Disclosure or Cooperate in Discovery: Sanctions," and by its express terms applies to one resisting discovery. The court agrees with the EEOC that Rule 37(a)(4) does not afford the type of relief SAS is requesting in its counter-motion for sanctions. The EEOC's motion to strike is granted.

Conclusion and Order

Accordingly, **IT IS HEREBY ORDERED:**

(1) Defendant San Antonio Shoe's "Motion to Compel Production of Documents," filed on December 22, 1999, is **GRANTED IN PART AND DENIED IN PART;**

(2) Plaintiff EEOC's request for attorney's fees and costs pursuant to Rule 37(a)(4) is **DENIED;**

(3) Defendant San Antonio Shoe's "Motion for Sanctions and Response to Plaintiff's Opposed Motion for Protective Order and to Quash Defendant's Rule 30(B)(6) Deposition and Deposition of EEOC Investigator E. Thomas Price," filed on December 30, 1999, is **DENIED;**

(4) "Plaintiff's Motion for Sanctions and Brief in Support," filed on January 18, 2000, is **DENIED;**

(5) "Defendant's Reply to Plaintiff's Motion for Sanctions, Counter-Motion for Sanctions and Brief in Support," filed on January 21, 2000, is **DENIED**;

(6) "Plaintiff's Motion to Strike Defendant's Rule 11 Motion," filed on January 31, 2000, is **GRANTED;**

(7) "Plaintiff's Opposed Motion for Protective Order and to Quash Defendant's Rule 30(B)(6) Deposition and Deposition of EEOC Investigator E. Thomas Price," filed on December 17, 1999, is again **DENIED**, pursuant to this court's order of February 4, 2000 and February 9, 2000; and

(8) Plaintiff EEOC's motion for clarification of this court's order concerning the plaintiff's motion for protective order and defendant's motion to compel, filed on February 9, 2000, is **DENIED AS MOOT,** pursuant to this court's order of February 9, 2000.

SIGNED on this 29th day of March, 2000.

DURWOOD EDWARDS
U.S. MAGISTRATE JUDGE