

San Antonio Shoe, Inc. (SAS) in the EEOC's San Antonio office. Mr. E. Thomas Price was assigned as the 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."¹

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

¹The EEOC claims it does not bring its Motion for Protective Order and to Quash on behalf of John Wynkoop. Wynkoop is no longer an employee of the EEOC and is not within the control of the EEOC.

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 privilege and the fact that the EEOC was in the process of producing documents, not privileged, which it claimed were responsive to the defendant's proposed areas of inquiry. EEOC then filed the present 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 claims are protected by the deliberative process privilege. San Antonio Shoe also filed a Motion for Sanctions which argued that 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 which argued that SAS should be sanctioned by the court for failing to respond completely to the EEOC's interrogatories. In addition to these requests for relief, responses and counter-responses from both parties are on file.

Discussion

Motion for Protective Order and to Quash

The EEOC claims it is entitled to a protective order because the governmental deliberative process privilege shields the requested testimony and cannot be overcome by the defendant's purported needs. 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); *EEOC v. Fina Oil and Chemical Co.*, 145 F.R.D. 74, 75 (E. D. Tex. 1992). 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; *Fina*, 145 F.R.D. at 75. 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) (purpose of privilege); *Fina*, 145 F.R.D. at 75. This privilege is founded on the belief that there are certain governmental processes related to legal and policy decisions which cannot be carried out effectively if they must be carried out under the public eye. *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 881-882 (5th Cir. Unit A 1981).

The defendant responds that the deliberative process privilege does not even apply in this case because the EEOC is the plaintiff. SAS cites the decision in *EEOC v. Citizens Bank & Trust Co. of Maryland*, 117 F.R.D. 366 (D. Md. 1987), which held that when the government seeks affirmative relief, as it does in this case, it is fundamentally unfair to allow

it to evade discovery of materials that a private plaintiff would have to turn over. The EEOC, however, notes that this decision was criticized by at least one other judge in the Maryland District Court, *see Allen and EEOC v. The Hearst Corporation*, 56 Fair Empl. Prac. Cas. (BNA) 1121 (D. C. Md. 1991), and that the Fifth Circuit and district courts have recognized the EEOC's right to assert the deliberative process privilege. *See Branch*, 638 F.2d at 881-82; *Arnold Red and EEOC v. Bozeman-Hill Corp., et al.*, Civil Action No. A-94-323, unpublished opinion (W. D. Tex. January 10, 1995); *Fina*, 145 F.R.D. at 75. The court agrees with the plaintiff that the EEOC, or any other government agency, does not waive the deliberative process privilege merely because it is the plaintiff in a lawsuit.

Although the deliberative process privilege clearly applies in this case, the court is not prepared to deny SAS the opportunity to conduct relevant discovery. The court has found no published opinion denying a litigant the opportunity to depose a witness as to factual knowledge because of the deliberative process privilege. For example, in *EEOC v. Fina Oil & Chemical Co.*, 145 F.R.D. at 74, a case cited by the EEOC, the EEOC submitted documents for *in camera* inspection to determine whether they were disclosable to the employer. In *Scott v. PPG Industries, Inc.*, another case cited by the EEOC, the court addressed the deliberative process question only after the EEOC's attorney objected to questions concerning certain exhibits at the deposition of an EEOC investigator and the employer moved to compel answers to those questions. 142 F.R.D. at 292. The court agrees with SAS that the proper remedy is for the EEOC to assert the deliberative process or any other privilege in response to particular deposition questions, and not a protective order.

Motion to Compel Production of Documents

After reviewing SAS's motion to compel and the EEOC's response, the court finds that an *in camera* inspection of the disputed documents must be made before the court can determine whether the withheld and redacted documents are covered by the deliberative process or any other applicable privilege. *See Branch v. Phillips Petroleum Co.*, 638 F.2d at 883 (noting that determination of whether documents are privileged "must be made by the court rather than the administrative agency asserting the privilege.").

Motions for Sanctions

The parties' motions for sanctions will be held in abeyance pending the court's *in camera* review of the disputed documents and the scheduling of depositions as to Price and Esquivel.

Conclusion and Order


Accordingly, **IT IS HEREBY ORDERED** that the EEOC's "Opposed Motion for Protective Order and to Quash Defendant's Rule 30(B)(6) Deposition and Deposition of EEOC Investigator E. Thomas Price" is **DENIED WITHOUT PREJUDICE** to the EEOC properly and in good faith to assert any applicable privileges in response to particular deposition questions or document requests.

IT IS FURTHER ORDERED that the discovery deadline of December 7, 1999, promulgated in the court's June 10, 1999 Scheduling Order, is **HEREBY EXTENDED** for the sole purpose of deposing Investigator E. Thomas Price and District Director Pedro Esquivel as to their factual knowledge.

IT IS FURTHER ORDERED that the EEOC shall provide to the court, for *in camera*

inspection, each of the documents as to which privilege is claimed by the EEOC, so the court can rule on the defendant's "Motion to Compel Production of Documents."

SIGNED on this 4th day of February, 2000.



DURWOOD EDWARDS
U.S. MAGISTRATE JUDGE