BNA's

EMPLOYMENT DISCRIMINATION

BNA Employee-Owned Since 1947

REPORT



# Is the Equal Employment Opportunity Commission Just Like a Private Party? What to Expect When Seeking Discovery From the Agency

BY: DONALD R. LIVINGSTON AND MELISSA L. DULSKI

When propounding discovery on the Equal Employment Opportunity Commission during litigation, what should you expect? And how do you get the information you need? This article discusses several unique issues that arise when seeking discovery from EEOC, both in terms of the types of privileges EEOC may assert, and the nature of the information EEOC has in its possession to disclose.

## I. Privileges That EEOC May Assert

EEOC has a number of different privileges that protect from disclosure certain types of relevant information. These privileges include ones that are available to private parties, such as the attorney-client and work product privileges, as well as privileges unique to governmental agencies, including the deliberative process privilege, informer's privilege, high government official doctrine, and official information privilege. When EEOC asserts one of these privileges, it is given the opportunity to provide the court with affidavits or witness testimony to establish that the information sought "fall[s] clearly beyond the range of material" to which the defendant is entitled.[1] Ultimately, however, it is the court's responsibility, not EEOC's, to determine whether disclosure of the information is required.

### A. Attorney-Client and Work Product Privileges

EEOC has invoked the attorney-client privilege in two situations: (1) to protect from discovery confidential communications between EEOC's lawyers and its agency leaders; and (2) to protect communications with the persons on whose behalf EEOC has filed, or is about to file, suit. The first situation is resolved on the basis of traditional attorney-client privilege principles.[2] The second situation is not resolved so simply because no attorney-client relationship exists between EEOC and charging parties.[3] However, no reported decision has required an EEOC attorney to disclose litigation communications with a charging party. In fact, despite the lack of an attorney-client relationship, courts have held that EEOC may properly evoke the attorney-client privilege to protect communications between EEOC counsel and the individuals who are the beneficiaries of EEOC's action, particularly where an individual beneficiary believed that an attorney-client relationship existed.[4]

*Donald R. Livingston is a partner and Melissa L. Dulski an associate with Akin Gump Strauss & Feld's Washington, D.C. office. Livingston is author of the treatise* ***EEOC Litigation and Charge Resolution*** *(BNA Books, 2005, http://www.bnabooks.com) from which this discussion is adapted. For additional information on this issue, see the discussion in Ch. 17 of the book.*

[1] *EPA v. Mink*, 410 U.S. 73, 94 (1973).

[2] *See EEOC v. Pasta House Co.*, 70 FEP Cases 227 (E.D. Mo. 1996) (citing *United States v. Miracle Recreation Equip. Co.*, 118 F.R.D. 100, 107 (S.D. Iowa 1987)).

[3] *See Williams v. United States*, 665 F. Supp. 1466, 1469–70, 54 FEP Cases 1764 (D. Or. 1987) (citing *Bratton v. Bethlehem Steel Corp.*, 649 F.2d 658, 669, 26 FEP Cases 783 (9th Cir. 1980)); *Hoffman v. United Telecomm. Inc.*, 117 F.R.D. 440, 443–44, 58 FEP Cases 407 (D. Kan. 1987).

[4] *See, e.g., EEOC v. Johnson & Higgins*, 78 FEP Cases 1127 (S.D.N.Y. 1998); *EEOC v. Nebco Evans Distrib. Inc.*, No. 8:CV96-00644, 1997 WL 416423, at *4 (D. Neb. Jun. 9, 1997).

 ISSN 1072-1967

Moreover, EEOC has successfully taken the position that communications between EEOC counsel and claimants in EEOC lawsuits are also protected from disclosure by the common interest rule.[5]

When pre-litigation communications occur between EEOC lawyers and charging parties that are for the purpose of evaluating claims to determine whether to file a lawsuit, EEOC may invoke either the attorney client privilege or the attorney work product doctrine to protect materials prepared in anticipation of litigation.[6] EEOC takes the position, and courts have agreed, that oral communications between its attorneys and claimants or potential witnesses made in the anticipation of or for litigation are absolutely protected under Rule 26(b)(3) of the Federal Rules of Civil Procedure because their disclosure would necessarily reveal the EEOC attorney's mental impressions.[7]

## B. Privileges Not Available to Private Parties

EEOC may also invoke several privileges that are generally not available to private litigants. For instance, EEOC often invokes the deliberative process privilege to prevent disclosure of communications that are part of the decision-making process of the agency.[8] To fall under this privilege, the communications must ''reflect[] advisory opinions, and recommendations and deliberations comprising part of a process by which government decisions and policies are formulated.''[9] The privilege, however, does not protect factual information[10] or communications occurring after EEOC makes its decision.[11] Where the facts are intermixed with analysis, the factual information should be disclosed if the factual information can be segregated from the evaluative sections of the material.[12]

Generally, to invoke the deliberative process privilege, there must be a formal claim of privilege, lodged by the head of the agency, after personal consideration of the materials sought.[13] However, some courts allow the privilege to be invoked by an EEOC district director[14] and an EEOC litigation attorney can invoke the privilege during depositions.[15] However, once the privilege is challenged in court, the privilege must ordinarily be asserted by EEOC's chairman through an affidavit or declaration stating that he or she, as the agency head, personally reviewed the materials, and explaining with reasonable specificity the reasons for withholding the materials.[16]

The deliberative process privilege may be overcome by ''a sufficient showing of a particularized need that outweighs the reasons for confidentiality.''[17] Courts will engage in a balancing test to determine whether to the pierce the privilege, weighing a number of factors. These include the relevance of the evidence sought to be protected, the availability of comparative evidence from other sources, the ''seriousness'' of the litigation and the issues involved, the role of the government in the litigation, and the possibility of future timidity by government employees.[18]

Another privilege EEOC may invoke is the informer's privilege, which prevents the disclosure of the identity of those persons who complain to and assist EEOC in its enforcement of the anti-discrimination laws.[19] The applicability of this privilege is also determined by a balancing test, which weighs the government's interest in protecting the identities of its informants against the defendant's need for the material in question.[20] If EEOC invokes this privilege, it may still be required to disclose the identity of informers in response to discovery requests asking for the names of persons with knowledge of relevant facts, but it would not have to include in such responses the fact that the individual was an informer.[21]

Two additional privileges EEOC may invoke during discovery are the high government official doctrine and the official information privilege. The former doctrine protects government officials from being compelled to

---

[5] *See, e.g., EEOC v. HBE Corp.*, 64 FEP Cases 1518 (E.D. Mo. 1994) (protecting conversations between Title VII claimant and EEOC attorney); *EEOC v. Chemtech Int'l Corp.*, 4 AD Cases 1465 (S.D. Tex. 1995) (communications between charging party who intervened in EEOC's ADA action and EEOC's attorneys were protected communications ''between a party and the attorney for a co-litigant''); *Bauman v. Jacobs Suchard Inc.*, 136 F.R.D. 460, 462 (N.D. Ill. 1990) (stating ''EEOC and the other plaintiffs . . . are aligned together. The privilege applies to communications between a party and the attorney for a co-litigant'').

[6] Fed. R. Civ. P. 26(b)(3).

[7] *EEOC v. Carrols Corp.*, 215 F.R.D. 46, 51–52 (N.D.N.Y. 2003); *EEOC v. Int'l Profit Assocs. Inc.*, 206 F.R.D. 215, 220–21 (N.D. Ill. 2002).

[8] *United States v. Farley*, 11 F.3d 1385 (7th Cir. 1993).

[9] *Redland Soccer Club Inc. v. Army*, 55 F.3d 827, 853 (3d Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996) (deliberative process privilege protects from disclosure material containing a governmental official's ''confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice''); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 952 (1967).

[10] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151, 89 LRRM 2001 (1975); *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 882, 25 FEP Cases 653 (5th Cir. 1981); *Skelton v. U.S. Postal Serv.*, 678 F.2d 35, 38 (5th Cir. 1982) (quoting *Mink*, 410 U.S. at 87–89).

[11] *EEOC v. Fina Oil & Chem. Co.*, 145 F.R.D. 74, 61 FEP Cases 614 (E.D. Tex. 1992); *Greene v. Thalhimer's Dep't Store*, 93 F.R.D. 657, 28 FEP Cases 918 (E.D. Va. 1982).

[12] *Fina Oil & Chem. Co.*, 145 F.R.D. at 76; *Mink*, 410 U.S. at 87–89 (agency must produce ''compiled factual material or purely factual material contained in deliberative memoranda and severable from its context . . .'').

[13] *Walker v. NCNB Nat'l Bank of Fla.*, 810 F. Supp. 11, 13 (D.C. Cir. 1993); *EEOC v. Airborne Express*, No. Civ. A. 98-1471, 1999 WL 124380 (E.D. Pa. Feb. 23, 1999).

[14] *United States v. Reynolds*, 345 U.S. 1, 7–8, 10 (1953).

[15] *Scott v. PPG Indus.*, 142 F.R.D. 291 (N.D. W. Va. 1992) (stating ''it is ludicrous to suggest that the agency head rather than the litigation attorney should be required to invoke the deliberative process privilege in a deposition'').

[16] *See United States v. AT&T Co.*, 86 F.R.D. 603, 605 (D.D.C. 1979) (stating ''The decision involves policy, not simple law, and is therefore more than a government lawyer's decision.''); *National Lawyers Guild v. Attorney Gen.*, 96 F.R.D. 390, 396–99 (S.D.N.Y. 1982).

[17] *Farley*, 11 F.3d at 1389; *EEOC v. Citizens Bank & Trust Co. of Md.*, 117 F.R.D. 366, 44 FEP Cases 435 (D. Md. 1987).

[18] *Airborne Express*, 1999 WL 124380; *Walker*, 810 F. Supp. at 13; *PPG Indus.*, 142 F.R.D. at 294.

[19] *Crowder v. Colart Corp.*, 476 F. Supp. 207, 24 FEP Cases 822 (E.D. Wis. 1979).

[20] *EEOC v. Consolidated Edison of N.Y.*, 37 FEP Cases 1660 (S.D.N.Y. 1981).

[21] *EEOC v. Los Alamos Constructors*, 382 F. Supp. 1373 (D.N.M. 1974); *Hoffman v. United Telecom. Inc.*, No. 76-223-C2, 1989 WL 81060, at *4 (D. Kan. Mar. 6, 1989).

  EDR ISSN 1072-1967

testify — absent extraordinary circumstances — about their reasons for taking official actions.[22] The latter protects from disclosure information expressly declared by statute to be confidential.[23] The official information privilege is often invoked by EEOC to protect from disclosure information related to charges, because under Title VII such information is confidential.[24] While this privilege is not intended to prohibit EEOC from divulging to the parties information obtained by it during the investigation of the underlying charge,[25] EEOC may rely on the official information privilege to protect conciliation materials and positions from discovery.

## II. Discovery Directed to Claimants

As mentioned earlier, although EEOC sues for relief for individuals, EEOC does not have an attorney-client relationship with charging parties and other claimants in EEOC's action. Therefore, when a defendant serves interrogatories or requests for production on EEOC that are directed at charging parties or claimants, the charging party or claimant may have no obligation to respond to this discovery. While it is the practice of EEOC to attempt to respond fully to discovery that concerns an individual whose claim is part of EEOC's lawsuit, the charging party or the claimant, and not EEOC, is likely to have sole control over the information or documents requested. Consequently, EEOC's responses will often state that they are based upon EEOC's best efforts to secure the information and documents. Thus, the better course of action for defendants is to serve the interrogatories and production requests on EEOC, and also to serve a subpoena under Rule 45 of the Federal Rules of Civil Procedure to seek the same information from the charging party or other claimants. Because the same is true for securing the appearance of claimants or charging parties at their depositions, defendants should, in addition to confirming with EEOC that the individual will appear, issue a deposition subpoena to the individual.

---

[22] *Morgan v. United States*, 304 U.S. 1, 58 (1938).

[23] *See 8 John Henry Wigmore, Evidence in Trials at Common Law* § 2378 (McNaughton rev. 1961) (describing the nature of privilege).

[24] 42 U.S.C. § 2000e-5(b) (''(c)harges shall not be made public by the Commission''); *Branch v. Phillips Petroleum Co*., 638 F.2d 873, 879, 25 FEP Cases 653 (5th Cir. 1981).

[25] *H. Kessler & Co. v. EEOC*, 472 F.2d 1147, 1152, 5 FEP Cases 405 (5th Cir. 1973) (en banc).