

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

South Carolina Human Affairs Commission)

Plaintiff,)

vs.)

Zeyi Chen and Zhirong Yang)

Defendants.)

IN THE COURT OF COMMON PLEAS)

FOR THE NINTH JUDICIAL CIRCUIT)

CASE NO.: 2014-CP-10-7037)

ORDER

RECEIVED
OCT 18 2018
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2018 MAY 15 AM 9:17
CLERK OF DISTRICT COURT

FACTUAL AND PROCEDURAL HISTORY

Plaintiff, South Carolina Human Affairs Commission, brought this suit against Defendants Dr. Zeyi Chen and Zhirong Yang (hereinafter referred to as “Dr. Chen,” “Dr. Yang,” and collectively as “Defendants”), for allegedly violating the South Carolina Fair Housing Law, § 31-21-40 et seq. of the South Carolina Code of Laws by engaging in policies and practices of familial status discrimination. Plaintiff filed a Motion for Partial Summary Judgment based on Plaintiff’s First Cause of Action alleging Defendants (1) discriminated in the terms, conditions or privileges of the rental of a dwelling . . . on the basis of familial status, in violation of S.C. Code Ann. § 31-21-40(2); and (2) made, printed, published, or caused to be made printed, or published, any notice, statement, or advertisement with respect to the rental of a dwelling with an intention to make a preference, limitation, or discrimination based on familial status, in violation of S.C. Code Ann. § 31-21-40(3).

This matter first came before the Court on Monday, October 9, 2017. Present for Plaintiff, the South Carolina Human Affairs Commission, was R. Alexander Pate, II. Present for Defendants, Dr. Chen and Dr. Yang, was Brooklyn A. O’Shea. Defense counsel objected to the filing and

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admissibility of information contained within Plaintiff's Memorandum and requested a protective order on the basis that the Memorandum contained confidential and inadmissible information from conciliation endeavors in violation of S.C. Code Ann. § 31-21-120(A). Plaintiff's counsel then requested clarification of what evidence and information is protected as being said or done in the course of conciliation. Both parties were given the opportunity to submit logs of what they believe fall within the confines of conciliation. After review of the materials, this Court, by Order filed February 8, 2018, protected what appeared to be conciliatory.

Subsequently, both parties filed motions for reconsideration and upon further review of the materials before the Court it, *sua sponte*, requested additional memoranda on the issue of whether the statute itself and/or the manner in which the commission administered it violated the Defendants' rights to due process of law. The Court then held a hearing on April 11, 2018. After due consideration, this Court finds that neither the statute nor the manner in which it was administered violated Defendant's rights to due process. Interpretation of S.C. Code § 31-21-120(A) and the remaining issues before this Court are addressed below.

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DISCUSSION

I. Interpretation of S.C. Code § 31-21-120(A) and the term Conciliation.

The primary issue in this case is the interpretation of S.C. Code Ann. § 31-21-120(A), which provides:

If the commission decides to resolve the complaint, it shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion **Nothing said or done in the course of the informal endeavors may be made public or used as evidence in a subsequent proceeding under this chapter without the written consent of the persons concerned.** An employee of the commission who makes public any information in violation of this provision is guilty of a misdemeanor punishable by a fine of not more than two hundred dollars or imprisoned for not more than thirty days.

S.C. Code Ann. § 31-21-120(A) (emphasis added). Specifically, the Court has been tasked with determining what exactly falls within the confines of the term “conciliation.” The difficulty with this task is that neither the statute nor the courts of this state have set forth the exact parameters of the term. In a situation such as this, when a court is tasked with interpreting a statute administered by a government agency, it is required to give deference to the agency’s interpretation unless it is “arbitrary, capricious, or manifestly contrary to the statute.” *Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Envtl. Control*, 411 S.C. 16, 34–35, 766 S.E.2d 707, 718 (2014) (citing *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778).

According to the Plaintiff’s Commissioner, Raymond Buxton, II, the term conciliation is exclusively limited to offers or concessions made for settlement and does not include factual statements made by a party. He states in his affidavit, “[the conciliation] standard is that only offers or concessions made for settlement are considered conciliatory. This specifically excludes fact and denial statements and position statements by the parties.” Similarly, Counsel for Plaintiff argued that the statute is analogous to the rule of evidence barring settlements and offers of compromise. This Court disagrees. Acceptance of these interpretations would effectively render the statute’s evidentiary bar superfluous because offers and concessions made for settlement are already excluded by a Rule of Evidence.

Another problem with the commission’s interpretations is that they are readily inconsistent and do not line up with its application of the statute. In fact, it appears that the commission itself does not understand what is conciliatory and what is not. This is best supported by Plaintiffs own violation of the statute. It filed with the court materials that it later claimed to be conciliatory. In Plaintiff’s log of non-public materials setting forth what it believed to be conciliatory, it cites Plaintiff’s memorandum and a letter from Defendant Chen which were filed with the court on

October 5, 2017. Another example occurred during the deposition of Plaintiff's investigator when Counsel for Plaintiff objected to a February 27, 2014 letter, in its entirety, from Plaintiff's investigator to Defendant Chen, which contained both an offer of settlement and purely factual information, on the basis that it related to conciliation. Counsel stated, "I'm going to object to this in its entirety in as much as it contains information related to conciliation . . . anything related to conciliation is only germane to conciliation." Caldwell Dep. 72: 21-25. This application clearly contradicts Plaintiff's Counsel and Commissioner.

Another troubling instance occurred when Plaintiff changed its position entirely after providing its log of non-public materials to the Court. Plaintiff's non-public log covered deposition testimony, excerpts from memorandums, and letters to and from Defendants. Subsequently, in Plaintiff's Motion for Reconsideration the Commission took the position that the only material that should be considered conciliatory is Marvin Caldwell's deposition testimony on pages 75-80. Then, in Plaintiff's Response to Defendants' Motion for Clarification and to Reconsider, it states "Plaintiff would represent to the Court that none of the [deposition] excerpts at all should be sealed, nor any of the documents, as none of those materials are actually considered conciliatory material."

In support of Plaintiff's final position—that none of the materials sealed by the Court are conciliatory—and its Commissioner's interpretation, it cites to a number of cases from other jurisdictions where courts were interpreting federal statutes that largely mirror the statute at issue here. The limited amount of cases that have addressed this issue seem to fall in line with the Commission's approach and conclude that purely factual information relating to the merits of the charge do not fall within the scope of conciliation. *See, e.g., Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 881 (5th Cir. 1981); *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 193 (2d Cir.

1991); *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1477 (5th Cir. 1992); *Brooks v. Grandma's House Day Care Centers, Inc.*, 227 F.Supp.2d 1041, 1043 (E.D. Wis. 2002).

One holding in particular that Plaintiffs have urged this Court to adopt came from the Eastern District of Wisconsin in the *Brooks* case. In that case, the court held that a letter written by the defendant's attorney during an EEOC investigation was not conciliatory because it was neither written during the course of EEOC conciliation efforts nor did it contain statements relating to compromise, settlement, or negotiation. This Court does not disagree with the holding in that case but does decline to adopt such a concrete rule.

To say purely factual information is always admissible could have lasting, depressive effects on the conciliation process. The purpose of settlement negotiations is to encourage open and honest communications amongst the parties without fear of repercussions in later proceedings from facts that were only disclosed in order to promote settlement. A more appropriate rule comes from the Department of Housing and Urban Development's (HUD) handbook on the conciliation process. Both the investigator, in his affidavit, and Counsel for Plaintiff referenced HUD in support of Plaintiff's position. HUD states:

Although information discovered during the conciliation process cannot be factored into the investigator's recommendation, if this same information is discovered outside of the conciliation process, it is permissible for the investigator to use this information in his/her recommendation. For example, if a respondent makes an admission during conciliation negotiations, the investigator cannot use this admission in his/her recommendation. However, if the respondent makes this same admission in a later deposition, the investigator can use this admission in his/her recommendation.¹

To this extent, the Court agrees with the Plaintiff that the majority of the deposition testimony does not fall within the confines of conciliation. Nevertheless, this Court declines to adopt the rule that

¹ See HUD.Gov, Title VIII Complaint Intake, Investigation, and Conciliation Handbook (8024.1), <https://www.hud.gov/sites/documents/80241C11FHEH.PDF> (HUD Handbook).

purely factual information is never within the scope of conciliation and further finds that the Commission's interpretation is arbitrary and inconsistent, and is not entitled to any deference from this Court.

II. Commissions' Administration of Investigation and Conciliation.

One of most concerning issues in this case is the Commission's attempts to combine the conciliation and investigative processes. The Commission takes the position that such an action is permissible because its investigative power runs concurrent with its conciliation obligations. To some extent, this is true. It is clear that the statute and regulations do not require the investigator to cease fact-finding endeavors while attempting to conciliate, but they certainly do not permit the comingling of the two through a singular action.

As mentioned above, both the investigator and Counsel for Plaintiff referenced HUD in support of its position. Plaintiff's Counsel actually stated at the hearing that the commission provides HUD's guidelines to its employees as a reference manual for carrying out its investigations. However, HUD's handbook appears to refute the commission's actions. They state:

If an investigator is going to be simultaneously conciliating a case, he/she must make every effort to separate the two functions. Some suggestions as to how to separate conciliation and investigation include, but are not limited to: (1) Concluding any investigation (i.e., interview, etc.) that is taking place prior to engaging in conciliation; (2) Taking a break prior to beginning conciliation; (3) Initiating a separate telephone call in which only conciliation is discussed; (4) Verbally announcing to the parties the transition to conciliation and fully explaining the difference in roles and functions of the investigator and conciliator (i.e. that anything said or done during conciliation cannot be used in the investigation); and (5) Taking steps to avoid commingling notes related to investigation and conciliation.

HUD Handbook at 11-2. HUD's guidelines also state that the investigator should make every effort to ensure the parties understand the conciliation process. *See HUD Handbook* at 11-3 (“[c]onciliators . . . should educate the parties about settlement and the realities of the case early

in the conciliation process.”).

With this in mind, the Court now turns to the February 27, 2014 letter which undoubtedly contains conciliation endeavors. It also contains purely factual information and is a blatant attempt to combine the conciliation process with the investigative process. In fact, the commission admits that its actions were improper and acknowledged that they could be confusing to a respondent. When asked, “Do you see anything problematic about—investigating during the conciliation efforts in [the February 27, 2014] letter?” Mr. Caldwell responded, “Yes.” Caldwell, Dep. 76: 8-17. When asked, “Is it possible that it’s better to during conciliation suspend investigations so that you should not confuse the two,” he responded, “yes.” Going back to the holding in *Brooks*, what Plaintiff fails to acknowledge is that the letter at issue in that case was clearly “intended to serve ‘as the Company’s statement of position with respect to the allegations contained in the charge.’” *Id.* at 1042. In this case, it is not clear what prompted Defendants’ responses and what the responses were intended to serve as.

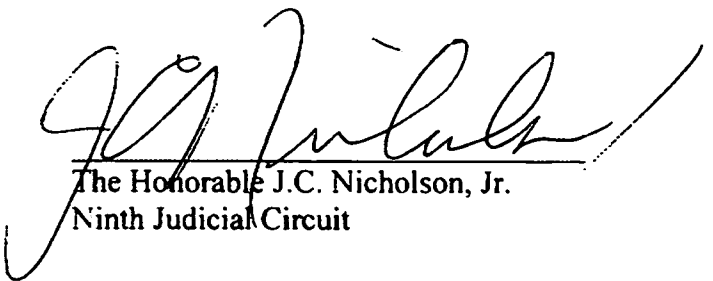
Defendants’ confusion and misunderstandings were evident throughout this process and were exacerbated by the Commission’s actions. In one of Defendant Chen’s letters he writes, “[w]e have some questions, would you please help us better understanding whole process of this complicated, time consuming, very stressful and high pressured communication to settle the case and the money problem.” His deposition testimony also confirms his lack of understanding. When asked “Why were you writing Mr. Caldwell?” Chen Dep. 116:6. He responded, “Because I thought—everything happens. He contacted me. He said he’s the person work for the government, and he said I’m mutual. I don’t talk to anybody. He’s mutual, completely mutual... a hundred percent mutual, that I can trust him and he can do things right.” Chen Dep. 116: 7-14.

Despite Defendants’ evident confusion, the Commission took no action to ensure

Defendants were adequately educated on the investigative and conciliation process. And to allow the Commission to combine conciliation and fact-finding endeavors in the manner it did and then piecemeal its file to choose which material falls under conciliation and what does not is necessarily prejudicial. To this end, the Court agrees with Defendants' position that "[i]t is both unfair and illogical to dissect conciliation endeavors in that manner"

Although the Commission's actions do not warrant dismissal, they cannot go with impunity. Therefore, in light of the Commission's violations of S.C. Code §31-21-120(A), its arbitrary and inconsistent interpretations, the commingling of investigatory and conciliatory actions, and its failure to adequately educate Defendants on the conciliatory process, an unfavorable evidentiary ruling is necessary to deter future actions of this nature. Accordingly, in any further proceedings in this action the commission is barred from using or making public any material contained in its conciliatory file, its investigative file, the attached logs submitted by the Defendants, and any material covered by this Court's previous Protective Order that is not covered by this Order. It is further Ordered that this information is protected and not admissible in any subsequent hearing in this matter.

AND IT IS SO ORDERED.



The Honorable J.C. Nicholson, Jr.
Ninth Judicial Circuit

May 14, 2018
Charleston, South Carolina

**COURT'S
EXHIBIT 1**

Deposition Privilege Log

Witness	Item Number	Page Line(s)
Dr. Zeyi Chen	1	22:3-23
	2	23:9-10
	3	24:10-25
	4	25:1-5
	5	26:12-23
	6	27:6-13
	7	104:11-13
	8	113:5-25
	9	114:1-25
	10	115:1-25
	11	116:1-25
	12	117:1-25
	13	118:1-25
	14	119:1-25
	15	120:1-25
	16	128:15-25
	17	129:1-14
	18	144:20-25
	19	145:1-25
	20	146:1-25
	21	147:1-11
	22	158:24-25
	23	159:1-22
	24	172:24-25
	25	173:1-6
	26	186:1-25
	27	187:1-10
	28	188:24-25
	29	189:1-25
	30	190:1-12
	31	191:17-25
	32	192:1-9
	33	196:2-16
	34	197:13-21
	35	198:13-20
	36	207 (Exhibits 4, 5, & 6)

Deposition Privilege Log

Marvin Caldwell	37	41:10-25
	38	42:01:00
	39	63:19-25
	40	64:21-23
	41	72:6-10
	42	72:18-25
	43	73:1-25
	44	74:1-25
	45	75:1-25
	46	76:1-25
	47	77:1-25
	48	78:1-25
	49	79:1-25
	50	80:1-25
	51	81:1-25
	52	82:1-25
	53	83:1-25
	54	84:1-25
	55	85:1-25
	56	86:1-4
	57	91:4-7
	58	94:22-25
	59	95:1-16
	60	96:1-11
	61	105:14-25
	62	106:1-3
	63	107:5-25
	64	113:4-25
	65	114:1-25
	66	115:1-5
	67	120:13-17
	68	137:13-14
	69	146:2-8
	70	153:15-21
	71	154:2-4
	72	157:16-25
	73	158:1-25
	74	159:1-15
	75	167:22-25
	76	168:1-25
	77	169:1-5
	78	183:21-25
	79	184:1-25

Deposition Privilege Log

Marvin Caldwell	80	185:1-25
	81	186:1-25
	82	187:19-25
	83	188:1-5
	84	189:13-25
	85	191:7-20
	86	196 (Exhibits 5, 7, & 9)
Yolanta Anbriushkiavichus	87	63:19-25
	88	64:1-25
	89	65:1-25
	90	66:1-16
	91	68:22-25
	92	69:1-25
	93	70:1-4
	94	100:3-14
	95	108:24-25
	96	109:1-4
	97	109:18-25
	98	110:1-15
	99	120:13-25
	100	121:1-15
	101	122:1-25
	102	123:1-15
	103	124:1-25
	104	125:1-14
	105	129 (Exhibits 5 & 6)
	106	130 (Exhibits 7 & 8)

**COURT'S
EXHIBIT 2**

Defendants' Privilege Log

Document Number	Document Description	Date	Author/Category	Recipient	Subject/Matter	Category of Privilege
1	Plaintiff's Memo in Support of Partial Summary Judgment	filed w/ Clerk of Court on 10/5/2017	Alex Pate, attorney for SC Human Affairs Commission	Judge Nicholson, Defendants, O'Shea Law Firm, publicly filed on CourtPlus.org	memo in support of partial summary judgment	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)
2	Exhibit C of Plaintiff's Memo	written 3/6/2014; filed by Plaintiff w/ Clerk of Court on 10/5/2017	Zeyi Chen	Marvin Caldwell, SC Human Affairs Commission, Judge Nicholson, Defendants, O'Shea Law Firm, Clerk of Court, publicly filed on CourtPlus.org	letter responding to Investigator Marvin Caldwell's conciliation letter	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)
3	Exhibit D of Plaintiff's Memo	written 3/12/2014; filed by Plaintiff w/ Clerk of Court on 10/5/2017	Zeyi Chen	Marvin Caldwell, SC Human Affairs Commission, Judge Nicholson, Defendants, O'Shea Law Firm, Clerk of Court, publicly filed on CourtPlus.org	email to Marvin Caldwell regarding conciliation	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)
4	Exhibit E of Plaintiff's Memo	prepared during conciliation & sent 3/13/14; filed by Plaintiff w/ Clerk of Court on 10/5/2017	Zeyi Chen	Marvin Caldwell, SC Human Affairs Commission, Judge Nicholson, O'Shea Law Firm, Clerk of Court, publicly filed on CourtPlus.org	policy prepared by Defendants when requested by investigator during conciliation	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)
5	Defendants' Memo in Opposition & Depo Excerpts	filed w/ Clerk of Court on 10/9/2017	Brooklyn O'Shea, attorney for Zeyi Chen & Zhirong Yang	Judge Nicholson, SC Human Affairs Commission, Clerk of Court, publicly filed on CourtPlus.org	memo requesting protective order for documents submitted to the Court and publicly filed in violation of pursuant to S.C. Code Ann. § 31-21-120(A) and requesting denial of partial summary judgment	Responds to confidential information publicly filed and submitted to the Court from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)
6	Conciliation Letter from Marvin Caldwell	2/27/2014; provided to the Court on 10/9/17	Investigator Marvin Caldwell, SC Human Affairs Commission	Defendants, Judge Nicholson, O'Shea Law Firm	conciliation efforts combined with investigative effort	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)
7	Excerpts from Zeyi Chen's Deposition	taken 1/26/16	Testimony of Defendant, questioning by attorneys Lee Ann Rice and Ian O'Shea		questioning and answers pertaining to conciliation and information obtained during conciliation	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)
8	Excerpts from Marvin Caldwell's Deposition	taken 3/10/2016	testimony of investigator, questioning by attorneys Lee Ann Rice and Ian O'Shea		questioning and answers pertaining to conciliation and information obtained during conciliation	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)
9	Excerpts from Yolanta Anbrishkhtavichus' Deposition	taken 2/18/2016	Testimony of Defendant's assistant, questioning by attorneys Lee Ann Rice and Ian O'Shea		questioning and answers pertaining to conciliation and information obtained during conciliation	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)
10	SC Human Affairs Commission Stacy Woods file on disk, Conciliation Section	various dates	SC Human Affairs Commission prepared the disc and titled the conciliation folder containing documents prepared by various involved parties	O'Shea Law Firm	letters and various notes and communications during the conciliation period	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)
11	SC Human Affairs Commission Stacy Woods file on disk, Investigative Section documents that overlap with, summarize, or contain Conciliation documents and references	various dates	SC Human Affairs Commission prepared the disc containing documents prepared by various involved parties	O'Shea Law Firm	letters and various notes, summaries, documents, and communications during the conciliation period	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)
12	SC Human Affairs Commission Stacy Woods file on disk, Evidentiary Section documents that overlap with, summarize, or contain Conciliation documents and references	various dates	SC Human Affairs Commission prepared the disc containing documents prepared by various involved parties	O'Shea Law Firm	letters and various notes, summaries, documents, and communications during the conciliation period	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)
13	SC Human Affairs Commission Stacy Woods file on disk, Deliberative Section documents that overlap with, summarize, or contain Conciliation documents and references	various dates	SC Human Affairs Commission prepared the disc containing documents prepared by various involved parties	O'Shea Law Firm	letters and various notes, summaries, documents, and communications during the conciliation period	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)
14	SC Human Affairs Commission Stacy Woods file on disk, Disposition-Closure Section documents that overlap with, summarize, or contain Conciliation documents and references	various dates	SC Human Affairs Commission prepared the disc containing documents prepared by various involved parties	O'Shea Law Firm	letters and various notes, summaries, documents, and communications during the conciliation period	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)
15	Defendants' Responses to Plaintiffs Second Set of Requests for Admission #'s 5-10	1/19/18	Brooklyn O'Shea, attorney for Zeyi Chen & Zhirong Yang	SC Human Affairs Commission, Judge Nicholson	responses to Requests for Admission regarding conciliation	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)
16	Affidavit of Zeyi Chen	1/24/18	Zeyi Chen	SC Human Affairs Commission, Judge Nicholson	Affidavit regarding conciliation	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21-120(A)