

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY S.C. SUPREME COURT
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2018-001879

South Carolina Human Affairs Commission,

Appellant,

v.

Zeyi Chen & Zhirong Yang,

Respondents.

RECORD ON APPEAL
REDACTED VERSION

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

South Carolina Human Affairs
Commission,
Plaintiff,

vs.

Zeyi Chen & Zhirong Yang,
Defendants.

IN THE COURT COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-10-7037

ORDER

FILED
2016 NOV 15 PM 2:10
JULIE J. HENNINGSTRONG
CLERK OF COURT

The above-captioned matter was filed with the Court on November 17, 2014. An evidentiary hearing on Plaintiff's motion to enforce a settlement agreement took place on July 14, 2016, before the undersigned Honorable Benjamin H. Culbertson. Plaintiff South Carolina Human Affairs Commission (hereinafter referred to as "Plaintiff"), was represented by its attorneys, R. Alexander Pate, and Lee Ann W. Rice. The Defendants Zeyi Chen and Zhirong Yang (hereinafter referred to as "Defendants"), were represented by their attorney Ian R. O'Shea.

This case involves an action to enforce the South Carolina Fair Housing Law, § 31-21-10 et seq. of the South Carolina Code of Laws, as amended, and its implementing regulations. On March 24, 2016, Plaintiff and Defendants (hereinafter referred to as the "Parties"), participated in mediation. Following mediation, the parties reached an agreement to prepare a Consent Order that would settle the dispute and would be entered into the record. Defendants thereafter withdrew their assent to the aforementioned agreement before the Consent Order was agreed upon and entered into the record. Plaintiff filed this motion on April 15, 2016 to have the original agreement considered as an enforceable settlement agreement pursuant to Rules 43(k) and 41.1, of the South Carolina Rules of Civil Procedure.

FINDINGS OF FACT

1. The Parties of this action, with their respective attorneys present, participated in mediation on March 24, 2016.
2. Following negotiations during the mediation, the Parties reached an agreement to prepare a Consent Order that would settle the dispute and would be entered into the record.

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R-1

3. A document entitled "Settlement Agreement" evidencing the aforementioned agreement was signed by plaintiff's counsel, Lee Ann W. Rice, Defendants Chen and Yang, and Aggrieved Party, Stacey Woods, on whose behalf plaintiff filed the lawsuit; however this document was not signed by the Defendants' counsel, nor entered into the record.
4. Shortly after mediation, before the Consent Order was agreed upon and entered into the record, Defendants informed their counsel, Ian R. O'Shea, that they were withdrawing their assent to the aforementioned agreement. Thereafter, Defendant's counsel informed Plaintiff and its counsel of Defendants' withdrawal of assent to the agreement.

CONCLUSIONS OF LAW

1. At the time the document entitled "Settlement Agreement" was signed, Rule 43(k) provided in relevant part: "No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel." Rule 43(k), SCRPC.
2. South Carolina has held in the past that Rule 43(k) applies to settlement agreements. *Ashfort Corp. v. Palmetto Constr. Grp.*, 318 S.C. 492, 493, 458 S.E.2d 533, 534 (1995).
3. Rule 43(k) is plainly worded: "No agreement ... shall be binding unless" one of the three requirements is met. "Under our general rules of construction, the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637-38, 627 S.E.2d 724, 726 (2006) (citing *State v. Muldrow*, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2003)). "In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes." *Id.*
4. In *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, supra., the Supreme Court addressed Rule 43(k) in an action in which one of the parties rescinded her agreement prior to the agreement meeting the requirements of Rule 43(k). In reversing the trial Court's order granting the motion, the Supreme Court stated: "Rule 43(k) provides that

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- '[n]o agreement . . . shall be binding unless' one of the three conditions listed [in the Rule] is met. In other words, an agreement is non-binding until a condition is satisfied. Until a party is bound, she is entitled to withdraw her assent." *Id.* at 637, 627 S.E.2d at 725.
5. Similarly, in *Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006), the Supreme Court applied Rule 43(k) to bar the enforcement of a settlement agreement that was signed by the parties. In *Buckley*, the parties engaged in mediation and signed an agreement. *Id.* at 320, 635 S.E.2d at 77. The Supreme Court concluded: "[b]ecause the purported agreement the parties reached following mediation was neither entered into the court's record nor acknowledged in open court and placed upon the record, Rule 43(k), SCRPC, plainly provides that the agreement is unenforceable." *Id.* at 322, 635 S.E.2d at 78.
 6. In this case, plaintiff's counsel, Defendants, and Aggrieved Party, signed a document entitled "Settlement Agreement" on March 24, 2016, following mediation agreeing to prepare a Consent Order that would settle the dispute and would be entered into the record. Shortly after mediation, and before the Consent Order was agreed upon and entered into the record, Defendants informed their counsel that they were revoking their assent to the aforementioned agreement. Therefore, because none of the conditions listed in Rule 43(k) were met at the time, Defendants were free to withdraw their assent to the agreement, rendering it unenforceable as a settlement agreement.
 7. Plaintiff argues that compliance with Rule 43(k) is not required in this scenario, because Rule 43(k) does not apply to a written settlement agreement that the parties admit was signed by the Parties in the presence of their counsel. However, this argument does not comport with the plain language of Rule 43(k), and is contrary to South Carolina's jurisprudence concerning settlement agreements. "[Petitioner] claims that compliance with Rule 43(k) is not required in this scenario, because Rule 43(k) does not apply to a written settlement agreement that the parties admit was duly executed. We disagree." See *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 726 (2006).
 8. Plaintiff further argues that "the purpose of rules such as Rule 43(k) is: [T]o prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements." *Ashfort Corp. v. Palmetto Constr. Grp.*, 318 S.C. 492, 493, 458

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S.E.2d 533, 534 (1995). Given that settlement agreements are reviewed by the circuit court in much the same way as contracts (See *Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 S.C. 634, 640, 643 S.E.2d 692, 695 (Ct. App. 2007)), Plaintiff argues that 43(k) disputes should be analyzed through a lens similar to that of a Statute of Frauds issue in a contract dispute. However, *Farnsworth* suggests that 43(k) applies even to admitted settlement agreements.

9. Finally, Plaintiff argues that principles of equity exist that justify compelling adherence to the settlement agreement, noting that in order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract. *Gibson v. Hrysikos*, 293 S.C. 8, 358 S.E.2d 173 (Ct. App. 1987) (citing *Thomson v. Scott*, 6 S.C. Eq. (1 McCord Eq.) 32 (1825)). However, "[i]t is well known that equity follows the law," (*Smith v. Barr*, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007)), and the plain language of Rule 43(k) will not be disregarded in fashioning an equitable remedy: "[T]he court's equitable powers must yield in the face of an unambiguously worded statute." *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). Because the purported settlement agreement was not (1) reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, (2) made in open court and noted upon the record, nor (3) reduced to writing and signed by the parties and their counsel, the document entitled "Settlement Agreement" is not an enforceable settlement agreement under Rule 43(k), SCRPC.

ORDER

The Court orders that:

The South Carolina Human Affairs Commission's Motion to Enforce Settlement Agreement is hereby DENIED. And,

IT IS SO ORDERED.

Dated at Charleston, this 3 day of ^{Nov.}~~October~~, 2016


Honorable Benjamin H. Culbertson

Charleston County

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 has 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.

STANDARD

S.C. Code Ann. § 31-21-120(A) 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).

DISCUSSION

I. **Inadmissibility and Protection of Confidential Information in Violation of S.C. Code Ann. § 31-21-120(A).**

Defendants submitted a "Privilege Log", attached as Court's Exhibit 1, requesting protection for sixteen (16) items, which Defendants assert are privileged under S.C. Code Ann. § 31-21-120(A). Upon *in camera* review, the Court finds that the documents Defendants seek to protect are not "privileged," but they are shielded from public disclosure as they constitute things that were said and done in the course of conciliation.

Document Number 6 of Defendants' Privilege Log, Marvin Caldwell's February 27, 2014 letter, clearly involves conciliation endeavors and is therefore protected. During Mr.

Caldwell's deposition, Plaintiff's counsel objected to the document being discussed. Ms. Rice (counsel for SCHAC at the time) 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. Defense counsel, Ian O'Shea, replied, "Exactly what we're going for. I think that's where we're headed. That's definitely where we're headed. So I appreciate that objection." Caldwell Dep. 73: 3-7. It appears both attorneys considered the letter to be part of conciliation efforts and is thus protected under the statute.

Not only did the attorneys consider the letter to be written and received in the course of conciliation endeavors, the investigator, Mr. Caldwell, and Defendant, Dr. Chen, also testified the letter and its responses were in the course of conciliation. When Mr. Caldwell was asked, "Regarding this letter, when it was sent... is this an attempt at conciliation that you're making," he replied, "Yes." Caldwell Dep. 73: 8-13. When asked, "Do you see anything problematic about—investigating during the conciliation efforts in this letter?" Mr. Caldwell responded, "Yes." Caldwell Dep. 76: 8-17. When asked, "Is it fair to say that this letter attempts to investigate while at the same time do conciliation?" Mr. Caldwell responded, "Yes." Caldwell Dep. 76: 18-21. The final paragraph of the February 27, 2014 letter states, "I do not represent either side...I will be fair, impartial and neutral... Conciliation is a service that we provide, to see if the case can be resolved by a mutual agreement." When Dr. Chen was questioned about the conciliation documents, he was 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. The letter and the responses to the letter appear to be protected by the statute.

Documents 2, 3, and 4 of Defendants' Privilege Log, which are Exhibits C, D, and E of Plaintiffs Memo filed on October 5, 2017, are responses to the February 27th conciliation letter and were made in the course of conciliation as are the documents contained therein. Mr. Caldwell was asked about the first written response to his letter, "Did you not at this point or did you at this point consider conciliation efforts to be ongoing?" to which he responded, "Yes, because I didn't receive a response from them" about the conciliation offer. Caldwell Dep. 82: 13-17. When asked the same question about the second written response to his letter, he also testified, "Yes." Caldwell Dep. 86:4. Mr. Caldwell testified conciliation was still ongoing in March of 2014. Caldwell Dep. 86:3-4.

Because Plaintiff's Memorandum, Document Number 1 on Defendants' Privilege log, discusses and includes protected documents discussed above as exhibits from conciliation, it shall be sealed. Likewise, Defendants' Memorandum in Opposition, Document Number 5 of Defendants' Privilege Log, shall be sealed. However, Exhibits A and B of Plaintiff's Memorandum filed on October 5, 2017, the Craigslist ads, are not sealed for use in future proceedings under the conciliation statute because they were provided as part of the complaint and the parties agree they were not created during the course of conciliation.

Deposition testimony regarding conciliation efforts may also fall within the confines of S.C. Code Ann. § 31-21-120(A). The "Nonpublic Deposition Log," attached as Court's Exhibit 2, outlines the specific testimony from the deposition transcripts, listed as documents 7, 8, and 9 in Defendant's Privilege Log, which appear to be protected from future proceedings. Thus, the excerpts listed in the attached Nonpublic Deposition Log are protected under this order.

Plaintiff requested full clarification as to what the Court deems to be protected by conciliation. Therefore, the Court has reviewed additional evidence *in camera* that was not publicly filed or provided to the Court at the October 9, 2017 hearing. Defendants provided the Court with a disc containing the S.C. Human Affairs Commission's file for this matter, which is referenced in Numbers 10-14 of Defendants' Privilege Log.

Upon review, documents contained in the Conciliation folder and identical documents that appear in other folders or overlap with, summarize, reference, or otherwise contain information from conciliation shall be protected under this Order to the extent they involve communication regarding conciliation efforts or the document originated or was created during conciliation. For example, emails regarding conciliation efforts are protected under this order but documents, such as a utility bill acquired from the complainant to assess damages, is not protected because it was not created nor stated during conciliation.

II. Issue of Protection in Regards to Discovery Process.

Rule 26 of the South Carolina Rules of Civil Procedure still governs the course of discovery. Although S.C. Code § 31-21-120 prohibits public disclosure of and makes inadmissible all things said or done during the course of conciliation, it does not make such things privileged as Defendants contend. Such an interpretation could greatly impair a party's ability to fairly and effectively pursue or defend matters of this kind. Thus, should either party request information that was first obtained during conciliation and it turns out that such information falls within the scope of the standard set forth in Rule 26, then the requesting party is still entitled to production of that information subject to the provisions of this order.

III. Defendants' Occupancy Policy.

Defendants assert that the written occupancy policy sent by Defendant Chen to investigator Marvin Caldwell did not exist prior to conciliation and was prepared in response to Mr. Caldwell's conciliation efforts. The Plaintiff's strongly oppose that position. But other than Defendant Chen's deposition testimony, there does not appear to be any evidence that unambiguously supports or refutes Defendants' position. As a result, the Court requested Defendants to submit an affidavit, attached as Court's Exhibit 3, attesting to the creation of the policy.

On the basis of Defendants' affidavit and Defendant Chen's deposition testimony, the Defendant's occupancy policy, listed as Document 4 of Defendants' Privilege Log, and the line of questioning in the deposition excerpts that were elicited by direct reference to the written policy, are to be protected under this Order. Defendants' Responses to Plaintiff's Second Set of Requests for Admission, Document Number 15 of Defendants' Privilege Log, are also protected under this Order. However, the Plaintiff may choose to revisit it's contests to the occupancy policy, and any information related to it, before the trial judge who shall then make a final determination on its admissibility under S.C. Code § 31-21-120.

IT IS THEREFORE ORDERED THAT all of the documents provided in Defendants' Privilege Log and the corresponding Nonpublic Deposition Log, attached as Courts Exhibits 1 and 2, shall be protected under this Order, with the exception of the two Craigslist Ads included in Plaintiff's Memorandum as Exhibits A and B filed on October 5, 2017. Those two documents are not protected from future proceedings under conciliation privilege. Any evidentiary contests to the Craigslist ads should be argued before the trial judge.

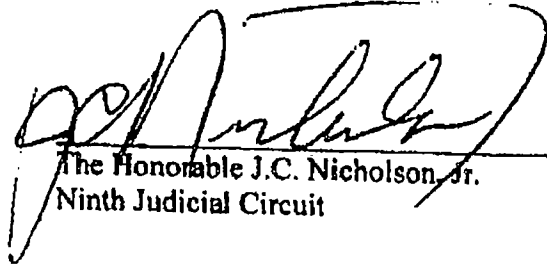
IT IS FURTHER ORDERED THAT the Clerk of Court shall also seal, the attached Affidavit, Plaintiff's Memorandum filed on October 5, 2017, and Defendants' Memorandum filed on October 9, 2017.

IT IS FURTHER ORDERED THAT the Plaintiff's contests to Defendants' occupancy policy and any corresponding material are reserved, and may be revisited before the trial judge as set forth in this order.

IT IS FURTHER ORDERED THAT a party who refuses to abide by this Order shall be subject to contempt of court and sanctions.

AND IT IS SO ORDERED.

February 5, 2018
Charleston, South Carolina



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

COURT'S EXHIBIT 1

Defendants' Privilege Log

[illegible]

COURT'S EXHIBIT 2

Nonpublic Deposition Log

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	84	122:11-22
	85	Exh. 5, 6, 7, 8

COURT'S EXHIBIT 3

2/18/18 - SEALED

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
NINTH JUDICIAL CIRCUIT
C.A. No: 2014-CP-10-7037

ORDER

FILED
2018 MAY 11 PM 2:25
JULIE B. CLARK
CLERK OF COURT

This matter came before the Court on February 7, 2018, by two Motions of the Plaintiff moving the Court to issue an Order compelling discovery responses from Defendants on both the First and Second Set of Interrogatories and the First Set of Requests for Production. Present at the hearing were Counsel for Plaintiff, R. Alexander Pate, II, and Sarah M. Gable. Present for Defendants was Brooklyn A. O'Shea.

Having heard oral arguments by both parties and reviewed the documents submitted by both parties and Plaintiff's Memorandum in Support of Motion to Compel, the Court has made the following determinations:

FINDINGS OF FACT

1. Plaintiff served Defendants the First Set of Interrogatories and Requests for Production on or about May 7, 2015, and the Second Set of Interrogatories on or about March 24, 2016.
2. Defendant first responded to the Second Set of Interrogatories on February 1, 2018, in response to Plaintiff's Motion to Compel.

3. Defendants have previously asserted that they have difficulty fully communicating in English, despite at least one defendant teaching at the Medical University of South Carolina. Defendants refused to respond to interrogatories set forth to determine the extent of Defendants' alleged deficits, asserting that Defendants' use of a translator while communicating with Counsel was privileged. Defendants' Counsel admitted that Defendants do not require a translator when communicating with her after repeated inquiries by the Court. This resolves Plaintiff's need for further information regarding Defendants' responses to Second Set of Interrogatories 2 and 3
4. Plaintiff served its Motion to Compel the First Set of Interrogatories and Requests for Production on Defendants to an incorrect address, but Counsel for Defendant was prepared to argue the motion and waive service.
5. Defendants have failed to provide a complete and appropriate response to Interrogatory 5, requesting the identification of all licensures or certifications held by Defendants. Defendants are in the best position to provide this information and shall be required to produce the same to Plaintiff.
6. Defendants allege that because they mentioned policies and procedures in the course of conciliation during the SCHAC investigation, the underlying policies and procedures are somehow now protected from disclosure. Defendants alternatively argued that any information was already set forth in what Defendant asserts is a "privilege log." The Court has reviewed the log and rejects this argument and finds that the underlying policies and procedures should be produced, if any existed.
7. In their Responses to Requests for Production, Defendants have refused to provide any identification or label or set forth with specificity any responses to the Requests

for Production. Additionally, in the Interrogatories, Defendants refer to the entirety of the documents and fail to set forth with specificity the particular documents responsive to requests. Defendants shall respond to each and every Interrogatory and Request for Production that references any documents allegedly produced through discovery or already in Plaintiff's possession as it applies to an individual interrogatory or request for production by identifying the document(s) that corresponds and/or answers the respective inquiry.

8. Defendants have refused to answer Interrogatory 16, asserting that a request for applicant information from a designated time period for a specific property is overly broad. The request is not overly broad.
9. Plaintiff has exceeded the questions and subparts allowed by the Rules of Civil Procedure and shall submit no further requests without leave of this Court.
10. Plaintiff's request for sanctions for the Court costs is denied.

CONCLUSIONS OF LAW

1. The Courts no longer practice trial by ambush. See *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct.App.1997).
2. To this end, South Carolina Rules of Civil Procedure 26, 30-36, and 45, explicitly set forth parameters and rules for discovery requests, including the time within which opposing parties have to respond, how the answers should be set forth, how documents shall be identified or produced, and the scope of the information which may be sought.
3. Discovery, whether through depositions, Requests for Admission, Interrogatories, Requests for Production, or any other form set forth in the Rules of Civil Procedure

is the appropriate avenue for requesting information from an opposing party and is wholly separate from any preceding investigations or proceedings prior to the filing of the lawsuit.

4. This hearing and the extent of this ruling is simply determining whether the information requested and the responses received are submitted in accordance with these rules and/or if the information requested is relevant. It is not for this hearing or this Order to decide the admissibility of evidence to be used in a trial.
5. Defendants' attorney has informed the Court that all matters discussed or considered in the course of conciliation endeavors are protected. She further informs the court that Judge Nicholson had previously ruled or was going to rule that such information was privilege and was not further discoverable. I was provided with a copy of Judge Nicholson's order dated February 5, 2018, on the day following this hearing. I find that Judge Nicholson's order mirrors my understanding of what may be discovered. As Judge Nicholson states,

"Rule 26 of the South Carolina Rules of Civil Procedure still governs the course of discovery. Although S.C. Code 31-21-120 prohibits public disclosure of and makes inadmissible all things said or done during the course of conciliation, it does not make such things privileged as Defendants contend. Such an interpretation could greatly impair a party's ability to fairly and effectively pursue or defend matters of this kind. Thus, should either party request information that was first obtained during conciliation and it turns out that such information falls within the scope of the standard set forth in Rule

26, then the requesting party is still entitled to production of that information subject to the provisions of this order."

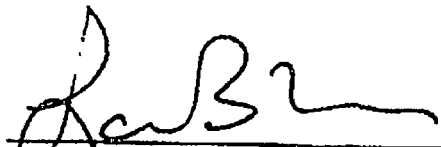
The matters requested by the Plaintiff involve policies, procedures, and licensing that existed prior to the acts which give rise to the complaint. These documents and related information are fully discoverable under the South Carolina Rules of Civil Procedure and are not protected merely because they may have been mentioned or discussed in a conciliation proceeding. In so far as the Plaintiff's request for production and interrogatories address issues arising prior to the acts which give rise to this action, they are discoverable. The matter of the admissibility of any such information will be a matter to be determined by the Trial Judge.

WHEREFORE, IT IS THEREFORE ORDERED THAT

1. Plaintiff's requests as to Plaintiff's Second Interrogatories 2 and 3 are denied as this matter was resolved on the record.
2. Plaintiff's requests that Defendants be required to provide identification of all licensures or certifications held by Defendants as set forth in Interrogatory 5 and tenant information as requested in Interrogatory 16 are granted.
3. Plaintiff's requests that Defendants be required to produce any documents responsive to Requests for Production 5 and 10, if any exist, is granted.
4. Plaintiff's requests that Defendants identify with specificity in each and every answer to an Interrogatory or Request for Production any document that is referenced in the response is granted.
5. Plaintiff shall not submit any further requests without leave of this Court.
6. Plaintiff's request for sanctions for costs is denied.

7. Defendants shall produce or provide responses for the ordered discovery on or before February 14, 2018.

AND IT IS SO ORDERED!


The Honorable Larry B. Hyman, Jr.
Ninth Judicial Circuit

February 12, 2018
Charleston, South Carolina

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-10-7037

ORDER

2018 MAY 15 AM 9:17

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

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.

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., Brunch 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 Initiating a separate telephone call in which only conciliation is discussed; (3) 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 (4) 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.

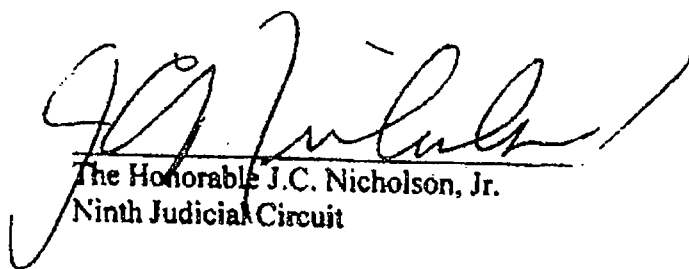
Defendants’ confusion and misunderstandings were evident throughout this process and were exacerbated by the Commission’s actions. In one of Defendant Chen’s letters he writes, “[w]e have some questions, would you please help us better understanding whole process of this complicated, time consuming, 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

Deposition Name	Tape Number	Page Range
Dr. Zeyi Chen	1	22:9-23
	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	186:1-2
	82	187:19-25
	83	188:1-5
	84	189:13-25
	85	191:7-20
	86	196 (Exhibits 5, 7, & 9)
	87	63:19-25
	88	64:1-25
	89	65:1-25
Yolanta Anbrushkevichus	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

1	Plaintiff's Memo in Support of Partial Summary Judgment	Filed w/ Clerk of Court on 10/25/2017	Alert Pass, attorney for SC Human Affairs Commission	Judge Nicholas, Defendant, O'Shea Law Firm, publicly filed on CourtFiler.org	memo in support of partial 9	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21 12(b)(1)
2	Exhibit C of Plaintiff's Memo	written 11/6/2014; filed by Plaintiff w/ Clerk of Court on 10/25/2017	Alert Chen	Marvin Caldwell, SC Human Affairs Commission, Judge Nicholson, Defendants, O'Shea Law Firm, Clerk of Court, publicly filed on CourtFiler.org	letter responding to investigator Marvin Caldwell's email/phone call	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21 12(b)(1)
3	Exhibit D of Plaintiff's Memo	written 3/12/2014; filed by Plaintiff w/ Clerk of Court on 10/25/2017	Alert Chen	Marvin Caldwell, SC Human Affairs Commission, Judge Nicholson, Defendants, O'Shea Law Firm, Clerk of Court, publicly filed on CourtFiler.org	email to Marvin Caldwell regarding Conciliation	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21 12(b)(1)
4	Exhibit E of Plaintiff's Memo	prepared during conciliation & sent 3/13/14; filed by Plaintiff w/ Clerk of Court on 10/25/2017	Alert Chen	Marvin Caldwell, SC Human Affairs Commission, Judge Nicholson, O'Shea Law Firm, Clerk of Court, publicly filed on CourtFiler.org	policy prepared by Defendants when requested by an investigator during conciliation	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21 12(b)(1)
5	Defendants' Memo in Opposition to Defendant's Motion	Filed w/ Clerk of Court on 10/29/2017	Brooklyn O'Shea, attorney for Zey Chen & Thomas Yang	Judge Nicholas, SC Human Affairs Commission, Clerk of Court, publicly filed on CourtFiler.org	memo requesting protective order for documents submitted to the Court and publicly filed in violation of S.C. Code Ann. § 31-21-12(b)(1) and requesting partial 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 12(b)(1)
6	Conclusion Letter from Marvin Caldwell	2/27/2014; provided to the Court on 10/29/17	Investigator Marvin Caldwell, SC Human Affairs Commission	Defendants Judge Nicholson, O'Shea Law Firm	conciliation efforts conducted with respondent's effort	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21 12(b)(1)
7	Letter from Zey Chen's Representative	dated 3/14/14	Testimony of Defendant, questioning by attorneys Lee Ann Rice and Lee 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 12(b)(1)	
8	Excerpts from Marvin Caldwell's Deposition	taken 3/16/2014	Testimony of Investigator, questioning by attorneys Lee Ann Rice and Lee 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 12(b)(1)	
9	Excerpts from Yolanda Aufmann-Hernandez's Deposition	taken 2/18/2014	Testimony of Defendant's assistant, questioning by attorneys Lee Ann Rice and Lee 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 12(b)(1)	
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, Lee Ann Rice	letters and various notes and communications during the conciliation period	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21 12(b)(1)
11	SC Human Affairs Commission Stacy Woods file on disk. Investigation Section documents that overlap with Conciliation Section 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 12(b)(1)
12	SC Human Affairs Commission Stacy Woods file on disk. Resolution Section documents that overlap with Conciliation Section 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 12(b)(1)
13	SC Human Affairs Commission Stacy Woods file on disk. Disposition-Closure Section documents that overlap with Conciliation Section 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 12(b)(1)
14	Defendants' Responses to Plaintiff's Second Set of Requests for Admissions 1-5-10	3/14/18	Brooklyn O'Shea, attorney for Zey Chen & Thomas Yang	SC Human Affairs Commission, Judge Nicholson	Responses to Requests for Admissions regarding Plaintiff	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21 12(b)(1)
15	Affidavit of Zey Chen	7/4/18	Zey Chen	SC Human Affairs Commission, Judge Nicholson	Affidavit regarding conciliation	Contains confidential information from Conciliation pursuant to S.C. Code Ann. § 31-21 12(b)(1)

**Zeyi Chen and Zhirong Yang
Defendants.**

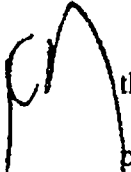
ORDER GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION

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U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C.
or "SCHAC"

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 SCHAC administered it violated

Defendants' rights to due process of law. The Court heard oral arguments on the issue on April 11, 2018 and issued its Order on May 15, 2018, finding that neither the statute nor Plaintiff's actions violated Defendants' due process rights and protecting additional materials. In response, on May 29, 2018, Defendants filed a Motion for Reconsideration as to the sole issue of the void-for-vagueness challenge and whether Defendants' due process rights were violated. That issue was ruled upon for the first time in the Court's May 15, 2018 Order. Plaintiff filed a Notice of Appeal on June 14, 2018. Appellant withdrew the appeal on July 31, 2018. The Court of Appeals dismissed the appeal with an Order filed on August 6, 2018.

DISCUSSION

 Defendants' Motion asks this Court to amend its Order to address the constitutionality of the statute. The statute the Court must address is S.C. Code Ann. § 31-21-120(A), which provides:

A person who claims to have been injured by a discriminatory housing practice or who believes that he may be injured by a discriminatory housing practice that is about to occur may file a complaint with the commission. Complaints must be in writing and shall contain information and be in a form required by the commission. Upon receipt of a complaint, the commission shall serve notice upon the aggrieved person of the time limits and choices of forums provided under this chapter and shall furnish a copy to the person who allegedly committed the discriminatory housing practice or is about to commit the alleged discriminatory housing practice and advise him of the procedural rights and obligations under the law. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (C), the commission shall investigate the complaint and give notice in writing to the person aggrieved whether it intends to resolve it. 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. If practicable, conciliation meetings must be held in the cities or other localities where the discriminatory housing practices allegedly occurred. 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).

"What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). Here, the parties and the Court have made various interpretations of the available authority as to what is considered conciliation endeavors, how the SCHAC should conduct conciliation endeavors, whether the commingling of fact-finding and conciliation endeavors is permissible, and how the process extends to discovery and subsequent proceedings.

I. Right to due process.

Plaintiff asserted in their April 11, 2018 memorandum and at the hearing that Defendants have no right to due process during the investigation, but if the Court found that there was, the only remedy is to remand the case back to the agency for further investigation and/or conciliation. Defendants argued they have a right to due process, particularly at a hearing on summary judgment, which is where these issues were first addressed before this Court. The Court agrees that Defendants have a right to due process in this matter.

II. Prior judicial decisions.

The Supreme Court of the United States has held that in deciding a void-for-vagueness challenge to a statute, the Court must look first to see whether the allegedly unconstitutional statute has been interpreted or limited by prior judicial decisions. *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). The Court is not aware of any judicial decisions interpreting or limiting the language of the statute and issues at hand.

III. Notice to a person of common intelligence.

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *City of Beaufort v. Baker*, 315 S.C. 146, 152, 432 S.E.2d 470, 472 (1993). The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies. *Huber v. South Carolina State Bd. of Physical Therapy Exam'rs*, 316 S.C. 24, 446 S.E.2d 433 (1994). A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. *Toussaint v. State Bd. of Med. Exam'rs*, 303 S.C. 316, 400 S.E.2d 488 (1991).

PM The standard is that one of common or ordinary intelligence must understand a statute's meaning and application. Defendants contend that if the accused parties and the agency vested with enforcement of the statute are not sure what is conciliatory and SCHAC arbitrarily decides what is conciliatory, Defendants are deprived of due process. The Court agrees.

IV. The deference doctrine.

The deference doctrine provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts will defer to the agency's interpretation absent compelling reasons. However, courts do not defer to an agency interpretation if it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778. *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). In this case, the Court is particularly concerned with the multitude of conflicting and arbitrary interpretations provided by the agency charged with enforcing the statute. Further, *ad hoc* or subjective application by the Court of a statute that is

unclear and has not been addressed by prior judicial decisions would deprive Defendants of due process.

V. Standards for statutory application.

The Supreme Court of the United States has provided the following explanation for a due process void-for-vagueness challenge:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99, 33 L. Ed. 2d 222 (1972). The Court in *Grayned* considered the words of the ordinance itself, the interpretations the court below had given to analogous statutes, and the interpretation of the statute given by those charged with enforcing it. *Id* at 110.

If arbitrary and discriminatory enforcement is to be prevented in this case, the statute must provide explicit standards for those who apply them, specifically the SCHAC and the courts. South Carolina's Fair Housing Law does not clearly define the standards at issue in this case. The Court addressed concerns with SCHAC's multitude of statutory interpretations asserted in this matter. A clear answer to the questions concerning this statute's meaning and application is found nowhere within the state and federal fair housing statutes, HUD guidelines, or prior judicial decisions.

V. Severability.

A statute may be constitutional and valid in part and unconstitutional and invalid in part. *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591 (2001). The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution. *Id.* South Carolina's Fair Housing Law does not contain a severability clause expressing legislative intent in the event a portion of the statute is deemed unconstitutional. Without such guidance, the Court must look to the plain language of the statute.

M S.C. Code Ann. § 31-21-120(A) addresses complaints, process and handling, and conciliation. The Court should salvage the constitutional portions of Fair Housing Law wherever possible. It is clear that the legislative intent of Fair Housing Law as a whole is to provide fair housing and to prevent housing discrimination. "An unconstitutional part of a statute makes the whole statute void, if such part is so connected with the other parts that they mutually depend upon each other as conditions and considerations for each other, so as to warrant the belief that the legislature intended them as a whole, and if they cannot be carried into effect independently of that which is void." *Knotts v. S.C. Dep't of Nat. Res.*, 348 S.C. 1, 558 S.E.2d 511 (2002).

S.C. Code Ann. § 31-21-120(A) does impact other subsections and portions of the statute. For example § 31-21-120(B) references § 31-21-120(A) and § 31-21-120(A) references § 31-21-120(C). If S.C. Code Ann. § 31-21-120(A) is removed from the statute, the remainder of the statute will be silent on pertinent aspects of enforcing Fair Housing Law, complaints, and the procedure for the administering agency to follow. Therefore, pursuant to *Knotts*, because other parts of the statute mutually depend on each other and

cannot be carried into effect independently of § 31-21-120(A), all of § 31-21-120 should be deemed void.

VI. Remedy.

Plaintiff contends that if the Court deems S.C. Code Ann. § 31-21-120(A) void-for-vagueness, the proper solution is to remand the matter back to the agency for further investigation and/or conciliation. Defendants contend that the proper solution is to dismiss this case because as the statutory authority fails, so does the ability to enforce and adjudicate the claims. The Court acknowledges this matter's procedural posture has shifted as a result of the statutory and constitutional challenges that arose. While the matter is not positioned as a motion dispositive of the entire case, the Court agrees with Defendants that the effect of rendering the statute Plaintiff's claims rely on void-for-vagueness would be dispositive of the case. A remand, as Plaintiff requested, is inappropriate because this matter is not an appeal of an administrative agency's decision to the circuit court. Further, the Court cannot remand for further investigation and conciliation when those are the very processes vaguely addressed within S.C. Code Ann. § 31-21-120(A). Therefore, if pertinent portions of the governing statute are void, this case should be dismissed.

THEREFORE, this Court grants Defendant's Motion to Reconsider as to the void-for-vagueness challenge for the following reasons:

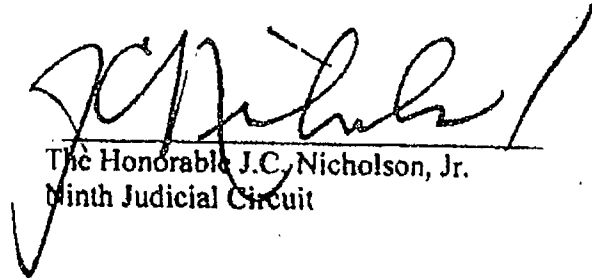
1. Defendants have a constitutional right to due process.
2. The statute and issues before the Court have not been addressed or limited by prior judicial decisions or binding authority.
3. The statute fails to adequately define terms and provide standards as to the statute's application.

4. A person of common intelligence cannot understand the statute's meaning and application if the Court, attorneys, and agency vested with the statute's enforcement differ in opinion so vastly as to the statute's meaning and application.
5. The Court will not defer to an agency interpretation, which is arbitrary, capricious, or manifestly contrary to the statute.
6. The SCHAC has inconsistently interpreted and arbitrarily enforced the statute.

IT IS ORDERED THAT this Court grants Defendants' Motion and finds S.C. Code Ann. § 31-21-120 void-for-vagueness. It is further ordered that this case is dismissed. The Court's May 15, 2018 Order is affirmed and incorporated except as modified herein.

AND IT SO ORDERED.

5 Sept 10
August 10, 2018
Charleston, South Carolina


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

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON 2014-CP-10-7037

SOUTH CAROLINA HUMAN)
AFFAIRS COMMISSION,)

Plaintiff,)

-vs-)

ZEYI CHEN and)
ZHIRONG YANG,)

Defendants.)

TRANSCRIPT OF RECORD

July 13, 2017

Charleston, South Carolina

B E F O R E:

The Honorable Benjamin H. Culbertson, Judge.

A P P E A R A N C E S:

R. Alexander Pate, II, Esquire
Lee Ann Rice, Esquire
Attorneys for the Plaintiff

Ian O'Shea, Esquire
Attorney for the Defendant

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1 (July 13, 2016.)

2 THE COURT: This is a motion to enforce a
3 settlement agreement.

4 MR. PATE: My name is Randy Pate representing
5 South Carolina Human Affairs Commission.

6 THE COURT: All right.

7 MS. RICE: I'm Lee Ann Rice, representing the
8 Human Affairs Commission as well.

9 MR. O'SHEA: I'm Ian O'Shea, representing the
10 defendants in this matter.

11 THE COURT: All right. And this is the
12 plaintiff's motion?

13 MR. PATE: Yes.

14 THE COURT: Mr. Pate, Ms. Rice, who wants to
15 argue?

16 MR. PATE: That would be me, Your Honor.

17 May it please the Court: My name is Alex
18 Pate. I'm here today representing the State of South
19 Carolina Human Affairs Commission in the interest of the
20 aggrieved party, Stacy Woods. Our agency is the state
21 level equivalent of the EEOC in employment discrimination
22 cases and of HUD in the housing context.

23 The settlement agreement in question today
24 arises out of an investigation and subsequent complaint
25 filed in Charleston County. The aggrieved party

1 complained of being discriminated against on the basis of
2 familial status, alleging her and her daughter were
3 denied the opportunity to rent an apartment owned by the
4 defendants based on the defendant's occupancy policy.

5 The Human Affairs Commission, Stacy Woods,
6 defendant, and defendant's counsel engaged in mediation
7 on March 24, 2016. Mediation was performed by Amy
8 Jenkins of McAngus Goudelock & Courie. After seven hours
9 of negotiations, the parties reached an agreement which
10 was reduced to writing. This agreement was signed by
11 both the defendants in the presence of their counsel, by
12 Ms. Woods, and by Lee Ann Rice on behalf of the Human
13 Affairs Commission.

14 Unfortunately, the document produced did not
15 have a line for defendant's counsel to sign. This
16 oversight was not noted by anyone on the day of the
17 mediation. The settlement agreement called for the
18 creation and filing of consent orders. This consent
19 order was drafted and sent to Mr. O'Shea on March 28,
20 2016. We followed up with Mr. O'Shea via e-mail and
21 telephone several times.

22 On April 4, 2016, Mr. O'Shea responded to an
23 e-mail requesting an update on the consent order,
24 acknowledged receipt, and stated he would read through it
25 that day. On April 12, Mr. O'Shea informed us via phone

1 conversation that he was having difficulty getting his
2 clients to comply with the settlement agreement. That
3 led to this motion to enforce being filed on April 20th.

4 The Human Affairs Commission on behalf of the
5 State of South Carolina and the aggrieved party, Stacy
6 Woods, asked this Court to enforce the settlement
7 agreements.

8 The first issue we're going to need to deal
9 with today is the agreement's compliance with Rule 43(k).
10 As Your Honor is aware, Rule 43(k) requires that an
11 agreement between counsel be reduced to writing, signed
12 by both parties, and also both attorneys for both sides.

13 In Ashfort Corp. v. Palmetto Construction
14 Group, the Supreme Court noted that Rule 43(k) is
15 intended to prevent disputes as to the existence and
16 terms of agreement regarding pending litigation. The
17 Courts have strictly construed Rule 43(k) requiring both
18 parties sign to it; however, in a footnote to the Ashfort
19 Corp. decision, the Court notes that the rule does not
20 apply where the agreement has been admitted and carried
21 into effect.

22 Here, there's no dispute there was an
23 agreement arrived at. After hours of negotiation, the
24 agreement was formed, was reduced to writing, and both
25 parties signed in the presence of their counsel, e-mails

1 and phone conversations after the mediation, further
2 events that both parties believed an agreement had been
3 reached.

4 Additionally, the agreement was partially
5 carried into effect as both parties consented to the
6 mediation report filed by Amy Jenkins which resulted in
7 the case being changed to settled status on the public
8 index. The Human Affairs Commission prepared the consent
9 order, and Mr. O'Shea mentioned review of that order as
10 well.

11 After reaching the conclusion that there
12 a -- that an agreement was reached, the issue of actually
13 enforcing the agreement comes into play. In South
14 Carolina -- in South Carolina jurisprudence, the
15 settlement agreements are viewed as contracts. The Court
16 of Appeals in Patricia Grand Hotel v. MacGuire stated
17 that South Carolina common law requires this. In order
18 to have a valid and enforceable contract, there must be a
19 meeting of the minds between the parties with regard to
20 all essential and material elements of the agreement.
21 The settlement agreement shows just such a meeting of the
22 minds. Its material elements are present in the
23 settlement agreement.

24 Finally, the only valid remedy in this
25 instance is an order of specific performance. In South

1 Carolina, specific performance should be granted only if
2 there's no adequate remedy at law and specific
3 enforcement of the contract is equitable between the
4 parties. Here there's no adequate remedy of law as the
5 settlement agreement requires specific acts on behalf of
6 the defendant to promote public good.

7 Specifically, it requires adherence to fair
8 housing laws, undergoing fair housing training, and the
9 posting of fair housing materials at properties offered
10 for rental. In order to compel specific performance, the
11 Court must find that there is clear evidence of a valid
12 agreement, the agreement had been partly carried into
13 execution on one side with the affirmation of the other,
14 and the party who comes to compel performance has
15 performed his or her part or has been and remains able
16 and willing to perform his or her part of the contract.

17 There's clear evidence of a valid agreement.
18 The Human Affairs Commission has partly executed the
19 obligations of that agreement and remains willing to
20 perform all of their remaining obligations under their
21 agreement.

22 For these reasons, the Human Affairs
23 Commission on behalf of the people of the State of South
24 Carolina and the interest of the aggrieved party requests
25 this Court orders the defendants perform their

1 obligations under the settlement agreement.

2 THE COURT: All right. Thank you. Mr.
3 O'Shea?

4 MR. O'SHEA: Yes. Good morning, Your Honor.
5 Thank you very much. If I may, I would like to pass a
6 case to you, as well as opposing counsel, in preparation
7 for discussion on that.

8 THE COURT: All right.

9 MR. O'SHEA: Your Honor, as opposing counsel
10 has stated, Rule 43(k) is an issue in this case regarding
11 the settlement agreement, and specifically our state
12 jurisprudence and the rules of civil procedure dictate
13 that Rule 43(k) shall be strictly construed in this case.
14 It's required that one of the three requirements of Rule
15 43(k) be met before an agreement is enforceable to settle
16 the case.

17 The case that I passed up to you, Farnsworth
18 v. Davis, is a case after Ashfort Corporation versus
19 Palmetto Construction, and it sets forth that the rule is
20 plainly worded, that no agreement shall be binding unless
21 one of these three requirements is met. In this case, my
22 client withdrew assent to any mediation discussions
23 before a consent order was distilled by both parties'
24 counsel and writing signed; as such, there is no
25 agreement to be enforced as Farnsworth dictates Rule

1 43(k) provides that shall not be binding unless the
2 conditions shall be met for 43(k), and in this case,
3 until my clients, the parties, were bound, they were
4 entitled to withdraw their assent. That's why we're
5 here.

6 THE COURT: But you acknowledge that this
7 settlement that is attached to plaintiff's motion says
8 settlement agreement. That is your client's signature,
9 where they did settle -- agree to those terms?

10 MR. O'SHEA: At mediation, they did agree to
11 specifically set forth in a following consent order, and
12 those terms of the consent order were never entered into
13 and signed by counsel.

14 THE COURT: What's the difference?

15 MR. O'SHEA: There's additional terms, such
16 as the right for the plaintiffs to continue the
17 investigation, pursue other claims, not full and final
18 settlement. It includes additional terms not discussed
19 in mediation. I let them know before they filed this
20 motion to compel my client's withdrawal of the assent,
21 and that's what brought them to file this motion to
22 compel. This case directly parallels the Farnsworth v.
23 Davis case and a long line of other cases, including
24 Buckley vs. Shealy and the Ashfort case, so we believe
25 there is not an agreement of the parties.

1 THE COURT: All right. As I understand,
2 agreements between counsel are not binding unless its
3 reduced to writing, reduced to a written stipulation
4 signed by the counsel, or entered a consent order and
5 entered in the record or made in open court and noted
6 upon the record or reduced to writing, signed by counsel.

7 Were you present?

8 MR. O'SHEA: Yes, Your Honor.

9 THE COURT: And was that in the agreement at
10 that time, that you were present, and you just did not
11 sign the agreement?

12 MR. O'SHEA: The agreement was to distill an
13 agreement in a consent order, and that was never achieved
14 so the ---

15 THE COURT: Let me see what it says.

16 MR. O'SHEA: And the footnote, Your Honor, in
17 Ashfort, which they've cited, is actually directly
18 addressed in this 2006 Supreme Court case some 11 years
19 after Ashfort, and they specifically state that the
20 Ashfort footnote, the victim does not comport with the
21 language of Rule 43(k). The Supreme Court explicitly
22 rejected that argument.

23 THE COURT: Parties have resolved this matter
24 at the mediation in the following terms.

25 All right. Anything in reply?

1 MR. PATE: Yes, Your Honor.

2 The first thing I'd point out is that
3 Farnsworth is distinguishable from the instant matter.
4 The agreement in Farnsworth was signed by the attorney
5 outside the presence of their clients. The client later
6 rescinded that agreement and then fought the enforcement
7 based on 43(k). In this instance, all the parties were
8 present, all the parties were represented, and it was a
9 mere oversight on the part of the mediator and the
10 attorneys present that there wasn't a signature line for
11 defense counsel.

12 I think there's also an equitable argument to
13 be made here regarding allowing enforcement of the
14 settlement agreement. The equitable action most
15 applicable here is equity applied to substance over form.
16 In Harpending v. Reformed Protestant Dutch Church, the
17 United States Supreme Court said when applying this
18 principle, the Court looks at the substantive intent of
19 the parties and gives an instruction consistent with such
20 intent. The substantive intent of the party is clearly
21 present in the agreement, and the agreement outlines both
22 parties' obligations and the defendants signed the
23 agreement with their attorney present.

24 The South Carolina Supreme Court explains in
25 Wilkie v. Philadelphia Life Insurance Company that an

1 equitable remedy, once established, is given legal effect
2 by dispensing with pure formalities which would otherwise
3 defeat the equity. Our Courts have at times restricted
4 Rule 43(k), in the instant matter, 43(k) is much closer
5 to a pure formality.

6 The purpose of rules such as 43(k) is to
7 prevent fraudulent claims of oral stipulations and
8 prevent the disputes in the existence and terms of the
9 agreement. Here 43(k)'s purpose is not implicated.
10 There is no dispute as to the existence of the terms
11 the agreement, but instead a mere oversight in the
12 adherence of the formal requirements of 43(k).

13 Our Supreme Court noted in Regions Bank v.
14 Wingard that this maxim has at times guided a Court to
15 relieve a party from the consequences of accident,
16 mistake, and fraud. There were five or six attorneys
17 present at the mediation, and at least four attorneys
18 present at the signing of the settlement agreement. It
19 was a simple mistake that went unnoticed by all the
20 attorneys present, and we would ask that this Court apply
21 substance over form in relieving us of that mistake.

22 The final point I'd like to make is that
23 there's a public policy argument here that is allowing an
24 attorney to avoid signing, either through an oversight or
25 perhaps intentionally -- I'm not implying that was

1 intentional here, but I think it was, in fact, an
2 oversight, but it creates a perverse incentive for an
3 attorney to not sign or have his client not sign to seek
4 enforcement if they change their mind down the line.

5 My understanding is that mediations occur
6 every single day, and I would venture to wager that
7 there's probably not an appropriate adherence of 43(k) in
8 every single instance, and strictly applying it here,
9 where both parties were represented, both parties were
10 present, and four attorneys were present at the signing,
11 would kind of throw a monkey wrench in the enforcement
12 mediations going forward.

13 THE COURT: Well, what about the fact that
14 the consent order carries additional terms that were not
15 part of the settlement?

16 MR. PATE: The only additional term, as Mr.
17 Shea indicated, is a reservation for the right to
18 continue investigation or failure to comply with
19 settlement terms. That's an implied right in every
20 settlement agreement to try to enforce the settlement
21 agreement.

22 THE COURT: So why not just take it out?

23 MR. PATE: Certainly, we would be willing to
24 strike that if it's the only difference. That's an
25 inherent right that any party has in enforcing the

1 settlement agreement but that the material terms are
2 outlined in the agreement. This is the agreement, and
3 this is the response we received after following up with
4 him four days later, and at no points during that day or
5 for the next four days did we hear anything from Mr.
6 O'Shea objecting to the contents of the consent
7 agreement.

8 Literally today is the first we're hearing
9 about that objection. We didn't hear there was an issue
10 with his clients rejecting the settlement agreement and
11 the consent agreement altogether until four days later
12 via telephone conversation.

13 The other thing of importance here is the
14 consent agreement, whereby we could reject that
15 altogether. We're seeking enforcement of the settlement
16 agreement and the terms of the settlement agreement. Any
17 additional terms in the settlement agreement can be
18 disregarded if there are any additional terms because,
19 again, we're seeking enforcement of the settlement
20 agreement today.

21 THE COURT: All right. All I can do is go on
22 Farnsworth that says there must be strict compliance with
23 Rule 43(k). Rule 43 (k) says no agreement is enforceable
24 unless reduced to the form of a consent order or written
25 stipulation signed by counsel and entered upon the

1 record, that wasn't done, or unless made in open court
2 and noted upon the record, that wasn't done, or reduced
3 to writing and signed by the parties and their counsel;
4 that wasn't done.

5 So I'm going to have to deny your motion. I
6 mean, I agree it's kind of distorted, but, to me,
7 this Farnsworth versus Davis Heating and Air Conditioning
8 is distorted too. I mean, they had to settle the case.
9 The attorneys were authorized. They reached a
10 settlement, but for whatever the Supreme Court said in
11 strict compliance with 43(k) the parties didn't sign it,
12 it wasn't announced in open court, it wasn't placed on
13 the record, it wasn't signed by all the parties and
14 attorneys, so therefore they can rescind it at any time
15 prior to any of that being done. So it's one of these --
16 I think the law abides me to do something I don't really
17 want to do, which is to deny the motion to enforce the
18 settlement.

19 All right. Do you want a formal order to
20 that effect or will a form four suffice?

21 MR. O'SHEA: Form four should suffice.

22 THE COURT: I mean, if it's appealed, y'all
23 are the ones that want to appeal it --

24 MR. PATE: We would prefer a form four, if
25 you don't mind.

1 THE COURT: If you would go ahead and prepare
2 a formal order and basically say that it's not strict
3 compliance -- and put in there that the plaintiff's
4 counsel acknowledged he was at the mediation.

5 These were the settlements. They
6 acknowledged the terms. Through an oversight, the
7 attorney didn't sign it, and that's the only reason I'm
8 denying the motion, because this case you handed up to
9 me says strict compliance. They had a signed settlement
10 everybody agrees to, but the attorney didn't sign it at
11 mediation, so therefore under this case, it can be
12 rescinded prior to it being signed.

13 All right? Thank you very much.

14
15 (Whereupon, the proceedings were concluded.)
16
17
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25

I, the undersigned Amanda Kelly Haffenden, RPR, CRR, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 13th of July 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 3, 2017

Amanda K. Haffenden

Circuit Court Reporter

1	STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT
2	COUNTY OF CHARLESTON	)	2014-CP-10-7037
3	SOUTH CAROLINA HUMAN AFFAIRS	)	
4	COMMISSION,	)	
5	PLAINTIFF,	)	SUMMARY JUDGMENT HEARING
6	vs.	)	TRANSCRIPT OF RECORD
7	ZEYI CHEN AND ZHIRONG YANG,	)	
8	DEFENDANTS.	)	

9

10

11

Monday, October 9, 2017
Charleston, South Carolina

12

13

B E F O R E:

14

The Honorable J.C. Nicholson, Jr.

15

A P P E A R A N C E S:

17

Randy Alexander Pate, II, Esq.
Attorney for Plaintiff

18

19

Brooklyn Ansley O'Shea, Esq.
Kevin Shildneck, Esq.
Attorney for Defendants

20

21

22

23

24

25

Maria Dempsey, RPR
Official Court Reporter
Charleston County Family Court
Ninth Judicial Circuit
Charleston, South Carolina

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E X H I B I T S**(No Exhibits Proffered.)**

1 THE COURT: All right. For the record, if the parties
2 would state for the record who they are and who they
3 represent, I'll appreciate it, please.

4 MR. PATE: Yes, Your Honor. Alex Pate for the South
5 Carolina Human Affairs Commission.

6 MS. O'SHEA: Brooklyn O'Shea for defendants Dr. Chen
7 and Dr. Yang.

8 MR. SHILDNECK: Kevin Shildneck for defendants Dr. Chen
9 and Dr. Yang.

10 THE COURT: Okay. So it's motion as partial judgment,
11 and I believe both parties have filed memorandums; is that
12 correct?

13 MR. PATE: Yes, Your Honor.

14 THE COURT: In one memorandum, I think the defendant
15 has raised the issue of certain affirmations in violation of
16 the statute?

17 MS. O'SHEA: Yes, Your Honor.

18 THE COURT: Is that correct, Mr. Pate?

19 MR. PATE: Yes, Your Honor.

20 THE COURT: Wait a minute. First of all, let me ask
21 you: What information are they requesting that you
22 presented to the Court? Is it by affidavit, deposition, or
23 what?

24 MR. PATE: No, Your Honor. It's two of the exhibits.
25 The plaintiffs -- or the defendants' physician statements.

1 THE COURT: The exhibits are where now?

2 MR. PATE: It should be attached to the memo as
3 Exhibits D and E. Apologize, Your Honor, C and D.

4 THE COURT: You got the exhibit?

5 All right. Exhibits C and D?

6 MR. PATE: Yes, Your Honor.

7 THE COURT: You got a copy of them?

8 MR. PATE: Yes, Your Honor. Permission to approach,
9 Your Honor?

10 THE COURT: Yes, sir.

11 MS. O'SHEA: Your Honor, if I may?

12 THE COURT: Give me a chance to look at this real
13 quick, okay, and then I'll be glad -- I'm going to hear the
14 issue about whether the Court should consider Exhibits C and
15 D before I rule on partial summary judgment, the motion
16 before me here today.

17 MS. O'SHEA: I've also asked for Exhibit E --

18 THE COURT: Pardon?

19 MS. O'SHEA: I've also asked that you review Exhibit E,
20 if I could hand that one up?

21 THE COURT: That'd be fine. Mr. Pate, I guess since
22 the defense has raised the issue of Exhibit C, D, and E are
23 not admissible, I'll listen to them first on that issue,
24 then I'll listen to you in opposition to that, and we'll
25 proceed with your partial summary judgment motion, okay?

1 Is that okay, Mr. Pate?

2 MR. PATE: Yes, Your Honor.

3 THE COURT: Okay. I'll be glad to hear from some of
4 these lawyers.

5 MS. O'SHEA: Yes, sir. May it please the Court. This
6 case arises out of South Carolina Fair Housing Law, and
7 under Fair Housing Law, there's a process called
8 conciliation, which I would consider similar to mediation.
9 And under the statute, anything that is said or done in the
10 course of a conciliation process cannot be made public or
11 used as evidence in a subsequent proceeding under the
12 statute, which is 31-21-120, Subsection A.

13 I'm arguing that Exhibits C, D, and E of their memo
14 were products of the course of conciliation. They should
15 not have been publicly filed or presented to Your Honor for
16 consideration for this hearing. What I don't want is for
17 you to think that there's something detrimental in these
18 documents that I'm concerned about. But really this whole
19 process is a creature of statute, and I don't think we get
20 to pick and choose when we get to follow the statute.

21 All this evidence was obtained during the
22 conciliation process. I don't think it should be used at
23 all, now or in the future. And beyond the exhibits, I'm
24 also referencing discussions of those exhibits within the
25 depositions, and discussions of it within the memo. I would

1 like all of that to be sealed, and I'm asking you for a
2 protective order on that. It shouldn't have been filed in
3 the first place. So I would like those documents protected.
4 And then I also had to address these issues in my reply
5 memo. I'd like to seal portions of my own memo. I tried to
6 limit my discussions to what I could, but at the same time,
7 I needed to address stuff that had already been publicly
8 filed.

9 THE COURT: Okay.

10 MS. O'SHEA: The problem with how these documents were
11 obtained is that there's an investigator involved, and under
12 the rules, when the investigator begins the conciliation
13 process, they are to suspend the fact-finding process. They
14 should remain neutral in an attempt to assist both the
15 parties, similar to a mediator. What happened here was they
16 were done at the same time. So conciliation efforts were
17 made to resolve the problem, and then beyond that continued
18 the fact finding and continued gathering these documents
19 that are here, and that's a problem.

20 You know, I take issue with the investigator wearing
21 all of these hats. So their job is to -- he has gone so far
22 as to help prepare the complaint for the complainant. He
23 investigates the complaint, he then acts as a neutral in the
24 conciliation process, and then prepares the report that goes
25 to the commission for their determination as to whether or

1 not there is discrimination involved.

2 THE COURT: Does the Commission take testimony of these
3 conciliatory efforts or how is it presented, just based on
4 what the investigator presents to the Commission or do the
5 other parties get an opportunity to present anything?

6 MS. O'SHEA: It's more like an offer. So somebody
7 makes a conciliation offer of settlement, and you can either
8 take that and accept it or continue talking about
9 settlement, or you can decline it. And if that process
10 begins and it doesn't terminate, everything that's said and
11 done in that course is conciliation. So in Mr. Caldwell,
12 the investigator's depositions, he concedes that all of this
13 was obtained during conciliation.

14 THE COURT: He concedes that Exhibits C, D, and E were
15 all obtained during conciliation?

16 MS. O'SHEA: Yes, Your Honor.

17 THE COURT: Is that correct, Mr. Pate?

18 MR. PATE: Not at all, Your Honor.

19 THE COURT: Pardon?

20 MR. PATE: Not at all, Your Honor, no.

21 THE COURT: Well, what's he say in his deposition?

22 MR. PATE: So the issue that we're running into here is
23 whenever -- any time we get a complaint from a charging
24 party regarding an allegation of discrimination in housing,
25 we send out a letter.

1 THE COURT: That's not my question. My question was
2 very simple: What does the investigator say in his
3 deposition?

4 MR. PATE: His deposition admits he should have made a
5 more explicit split between the investigation and the offer
6 to settle, but he does not concede that the entirety of that
7 was the course of the conciliation.

8 THE COURT: What portion does he say was obtained in
9 conciliation?

10 MR. PATE: Yes, Your Honor. If I may approach.

11 THE COURT: Yes, sir.

12 MR. PATE: Giving opposing counsel a copy of a letter
13 dated February 27th.

14 THE COURT: Where is his deposition?

15 MS. O'SHEA: I've got you a copy of it in the back of
16 the memo I just handed to your law clerk as Exhibit D.

17 THE COURT: Okay. Let me look. I'll look at his
18 deposition, see what he concedes and what he doesn't
19 concede. Does he concede any of Exhibits C, D, and E as
20 part of the conciliatory process?

21 MR. PATE: No, Your Honor. The physicians' statements
22 were not part of the conciliatory process.

23 THE COURT: So none of this, in your position, none of
24 this is part of conciliatory process?

25 MR. PATE: No, Your Honor. And I have case law to back

1 that up as well.

2 THE COURT: You have what?

3 MR. PATE: I have some case law citations to back that
4 up as well.

5 THE COURT: Well, that's a fact issue on whether or not
6 this is part of conciliatory process or not part of
7 conciliatory process, so what does a case have to do with
8 that?

9 MR. PATE: Well, it defines exactly what is during the
10 course of conciliation and it helps -- it's very clear --
11 it's clearly on point for this case as to what was part of
12 conciliation and what was part of the investigative process.

13 THE COURT: All right. You got a copy of the case?

14 MR. PATE: Yes, Your Honor.

15 THE COURT: You want to hand it up?

16 MR. PATE: Yes, Your Honor. The first part of this is
17 a citation to the relevant statutes, regulations, and rules.

18 Kind of as a preliminary matter here, I wanted to
19 point out that in opposing counsel's memo, a cites says,
20 South Carolina Code of Regs 65-5, which is part of the
21 subchapter on employment. It has nothing to do with
22 housing.

23 THE COURT: You said you had a case. This is not a
24 case. That is a copy of some code sections.

25 MR. PATE: Yes, Your Honor, but those are the relevant

1 code sections.

2 THE COURT: Where's the case you're referring to?

3 MR. PATE: It's on the second page, Your Honor.

4 THE COURT: Well, what's the cite?

5 MR. PATE: It's Olitsky v. Spencer Gifts.

6 THE COURT: You said on which page? Where?

7 MR. PATE: Yes, Your Honor, it's on the second page.
8 It's the second bolded heading.

9 THE COURT: Talking about the Meehan versus Commercial
10 Casualty? Just give me the case and the cite, if you would,
11 please, sir.

12 MR. PATE: Yes, Your Honor. It's Olitsky v. Spencer
13 Gifts, Inc., 964 F. 2d 1417.

14 THE COURT: All right. Go ahead.

15 MR. PATE: Your Honor, the relevant extension here, and
16 states, makes very clear, is that there's a distinction
17 between purely factual information, and information gathered
18 during the course of the negotiation. The reason that those
19 statutes are cited up front there, it outlines exactly what
20 the applicable rules are here, and the important part there
21 is the citation to the South Carolina Fair Housing Law,
22 which is identical to Title 7 of the Civil Rights Act.

23 Our Supreme Court in Orr v. Clyburn said that
24 whenever there's not South Carolina case law on an issue,
25 that a citation to these relevant federal statutes, whenever

1 it's substantially similar, is certainly persuasive, if not
2 controlling, to use their language there. So the citation
3 to Olitsky v. Spencer Gifts outlines exactly what the
4 difference is between truly factual information, which is
5 the entirety of those physician statements versus what's
6 done in the course of an --

7 THE COURT: What is your position on what the statute
8 prohibits? What does the statute prohibit, in your opinion?

9 MR. PATE: The statute prohibits the same thing that
10 Rule 408 would, the things that happen in the course of
11 comprise and negotiations, and that is not at all what the
12 physician statements are. There's no reference to any offer
13 to comprise, no discussion of settlements, no negotiation at
14 all. It's a purely factual account.

15 THE COURT: Your position is they can't mention any
16 settlement efforts; is that your position on 408?

17 MR. PATE: Yes, Your Honor.

18 THE COURT: So is what the statute is applicable to --

19 MR. PATE: Sorry, Your Honor?

20 THE COURT: -- that's your position?

21 The statute is applicable only to mentioning that
22 there was efforts to settle?

23 MR. PATE: Yes, Your Honor.

24 THE COURT: Other than that, there's nothing else in
25 the statute that's prohibited?

1 MR. PATE: Anything said or done in the course of the
2 negotiation or the conciliation efforts, and that it has to
3 pertain to the conciliation efforts, and that's the
4 important holding from Olitsky is there's a distinction
5 between factual material and information for a conciliation.

6 Your Honor, if I may approach? I have a copy of the
7 Olitsky case here as well.

8 THE COURT: Okay. Thank you. Well, let me just read
9 you part of the statute. It says, nothing said or done in
10 the course of the informal endeavors may be made public or
11 used as evidence in a subsequent proceeding under this
12 chapter. It doesn't say you can only mention or try to
13 settle -- you refer to 408.

14 MR. PATE: Yes, Your Honor, in 408 --

15 THE COURT: Well, that's not what the statute says. It
16 says very clearly, nothing said or done. What does that
17 have to do with 408?

18 MR. PATE: Well, Your Honor, Rule 408 echos that.

19 THE COURT: Pardon?

20 MR. PATE: Rule 408 is substantially similar and
21 construed the same way.

22 THE COURT: Well, the statute doesn't refer to Rule
23 408, does it? It says, nothing said or done. What's your
24 interpretation of the words nothing said or done?

25 MR. PATE: Nothing said or done, it means exactly what

1 it says, but you have to read it in context. Nothing said
2 or done in the course of the informal endeavors, and the
3 informal endeavors refer to conference conciliation and
4 persuasion. I mean, it's right there in the very same code
5 section. The important thing here is that Title 7 is
6 identical to our Fair Housing Law as far as to what is
7 disclosable. It's almost a word-for-word copy of that, of
8 the federal statute and our Supreme Court --

9 THE COURT: Well, what's that got to do with argument?

10 MR. PATE: Yes, Your Honor.

11 THE COURT: What's that have to do with this argument?

12 MR. PATE: Yes, Your Honor.

13 THE COURT: Please, tell me.

14 MR. PATE: Yes, sir. It says, citation on the second
15 page to Orr v. Clyburn, our Superior Court has specified
16 that where there's no South Carolina case law on point, and
17 there isn't any South Carolina --

18 THE COURT: That's persuasion, not binding.

19 MR. PATE: Yes, Your Honor, it says, persuasive, if not
20 controlling.

21 THE COURT: Well, it says title indications on Title 7
22 address nothing said or done in the course of informal
23 endeavors; has that been addressed under Title 7?

24 MR. PATE: Yes, Your Honor, that's the Olitsky v.
25 Spencer Gifts case.

1 THE COURT: Okay. All right. Anything else?

2 MR. PATE: Yes, Your Honor. Just kind of to pause the
3 argument here. If we were to take opposing counsel's
4 position on this, then a party could wait until an offer has
5 been made and then not ever say anything about the --
6 anything they said or did during the rest of the
7 investigation would be prohibited from introduction as
8 evidence, and that's clearly not what Congress or our
9 legislature intended in creating the statute or in either
10 statute.

11 THE COURT: What do you think the intention was with
12 legislature in passing the statute?

13 MR. PATE: Again, I think it's probably very close to
14 the same rationale for 408. Anything that's actually said
15 in the course of negotiating a settlement shouldn't be made
16 public, and makes sense. You want to encourage people to
17 begin settlement discussions. Nothing in the physicians'
18 statement reflects any sort of settlement discussion, and
19 then therefore, is not done in the course of the
20 conciliation.

21 THE COURT: Okay. Anything else?

22 MR. PATE: No, Your Honor.

23 THE COURT: Ms. O'Shea?

24 MS. O'SHEA: Thank you, Your Honor. As far as his
25 argument that once an offer is made, nothing can be used

1 beyond that, within these same statutes and regulations,
2 there's a process for terminating conciliation effort. So I
3 think Congress intended to protect the parties and their
4 interests, and to promote settlement negotiations. Now, if
5 at some conciliation isn't going well and it's not working
6 out for the best interests of the parties, there's a
7 procedure that that investigator can follow to terminate
8 conciliation and resume with the fact-finding efforts.

9 Here they were done simultaneously. I disagree with
10 my opposing counsel about what the investigator conceded to.
11 If I could direct your attention to Page 72 of his
12 deposition and memo that I handed up, if you can
13 simultaneously look at the letter that Mr. Pate handed you,
14 the very first paragraph is all about conciliation. He is
15 explaining to my clients what conciliation is. All this, I
16 would argue, is confidential, but I have to talk about it
17 for the sake of this.

18 So if you look at the first paragraph, we're talking
19 about conciliation. If you look at Mr. Caldwell's
20 testimony, he says that he's talking about conciliation;
21 that's on Page 73. But what's interesting, during the
22 deposition when we attempted to raise this letter, Ms. Rice
23 objected, citing the exact same statute that I'm citing and
24 said, you can't talk about this letter because it pertains
25 to conciliation. So it can't be a sword and a shield. You

1 can't object to it there and then publicly file it in your
2 memo for this hearing.

3 We go into Mr. Caldwell's testimony after that, and
4 he says, at the second paragraph, is attempting to
5 investigate while at the same time as conciliation, and that
6 is Line 21 on Page 76. He goes to concede that this could
7 be confusing to my clients, and that it would have been
8 better, in hindsight, to not conciliate and investigate at
9 the same time. When asked if he knew when conciliation
10 efforts deceased, he's not sure. Once this offer was made
11 in this letter, there was never a response declining it
12 where it was terminating the conciliation process. So then
13 all these other documents, the exhibits that I'm referring
14 to that should be excluded, were obtained during this very
15 process in response to this very letter that starts off with
16 the process of conciliation.

17 What's unfortunate is everybody involved in this
18 matter is familiar with the process, except my clients. The
19 investigator is familiar with it, the complainant is
20 familiar with it. She's filed multiple housing complaints
21 before. She knows the whole process. My clients have
22 English as a second language, and they're being sent letters
23 from someone who they think is a neutral party attempting to
24 negotiate settlement, obtaining these fact-finding documents
25 at the same time.

1 In addition to the statute that I've cited that says
2 nothing said or done in the course of conciliation can be
3 made public or used in the proceedings, there's also within
4 the regulations, it states that during no-fault settlement
5 negotiations, the Commission shall suspend investigative
6 efforts and give the parties reasonable time to reach a
7 settlement. He's argued that that is inapplicable here. If
8 you look at the relevant code regulation that goes with
9 conciliation for Fair Housing, says the investigator, where
10 the rights of the aggrieved party and the respondent can be
11 protected and the prohibitions with respect to disclosure of
12 information could be observed, the investigator may suspend
13 fact-finding and engage in efforts to resolve the complaint
14 by conciliation.

15 He's using the word may as in we may suspend
16 fact-finding. That's simply not it. If you can protect the
17 interests, you may suspend fact-finding and begin
18 conciliation at that time. You can't do both of them
19 together. They're mutually exclusive. So again, I'm asking
20 that all these documents that were publicly filed be sealed.
21 I want a protective order, everything that I've had to file
22 and argued in response to it, within my memo, I would like
23 sealed. It can't be used at this proceeding when we go into
24 our summary judgment motion or any other. And although it
25 says it's a misdemeanor, that's not what I'm trying to

1 pursue here. I just want to protect my client's interests.

2 THE COURT: Okay. Thank you so very much.

3 MS. O'SHEA: Thank you.

4 THE COURT: All right. Mr. Pate, let me hear you on
5 your partial summary judgment motion. I'm going to have to
6 read these cases, read the statute, read the memos, and
7 reply to your memo, and make a decision, as far as Exhibits
8 C, D, and E, whether or not the Court's going to put a
9 protective order on that or consider it on the partial
10 summary judgment motion; so let me hear you on your motion.

11 MR. PATE: Certainly, Your Honor. May I make two quick
12 points on the --

13 THE COURT: No, I've heard enough on that. I think I
14 understand the problem.

15 MR. PATE: Yes, Your Honor. Excellent.

16 THE COURT: Okay.

17 MR. PATE: As a preliminary matter, I do want to
18 address the language issue that was raised in opposing
19 counsel's --

20 THE COURT: Well, just tell me why you think you're
21 entitled to a partial summary judgment, please, sir.

22 MR. PATE: Yes, Your Honor. First of all, defense
23 hasn't stated any facts in support of their contentions for
24 why she shouldn't be required to make a factual showing,
25 once we made our prima facie showing of discrimination has

1 occurred.

2 THE COURT: Well, I'm trying to get you to tell me what
3 your prima facie is.

4 MR. PATE: Yes, Your Honor.

5 THE COURT: So I'm trying to get you to tell me.

6 MR. PATE: So there's actually two of them here.
7 There's a disparate impact and a disparate treatment
8 contention here. The disparate treatment one is based on
9 the physicians' statements where defendant Chen filed, says
10 that the housing is not suitable for a child. There's a
11 whole slew of case law that I can provide to you regarding
12 why that's appropriate for summary judgment and why that's a
13 violation. Defendants have not produced any reason why
14 there shouldn't be or why that's not appropriate for summary
15 judgment, and I think that's probably the reason they want
16 you to block out the physician statements.

17 The other issue, and that's the disparate treatment
18 where it's straight on facially, a facial violation. The
19 second facial violation is the policy itself, which is
20 Exhibit E there. In that case, it says one person per room,
21 and once we made the showing that excludes categorically all
22 families, because families are defined as two people living
23 together, one of them the minor, that categorically excludes
24 all families. So that's a facial violation of the Fair
25 Housing statute.

1 Again, once we made that prima facie showing,
2 because then it's required to show why there's a
3 nondiscriminatory reason for that. Again, if we refer you
4 guys to the physicians' statements, Dr. Chen specifically
5 said, not suitable for a child. Again, facially
6 discriminatory. They're unable to make that -- unable to
7 rebut that prima facie showing, because they don't present
8 any facts. They say, without support, that the unit is too
9 small, when it's at least 500 square feet, according to the
10 information provided in depositions and discovery. It just
11 boggles the mind that somebody could say that's not suitable
12 for two people.

13 THE COURT: Let me back up. What are you suing them
14 for?

15 MR. PATE: Yes, Your Honor, it's discrimination on
16 basis of familial status.

17 THE COURT: Pardon?

18 MR. PATE: Discrimination against this aggrieved party
19 on basis of her familial status. It's a single mother with
20 at the time four-year-old child.

21 THE COURT: What are you asking the Court, are you
22 asking in the lawsuit?

23 MR. PATE: Yes, Your Honor, we're seeking damages for
24 the aggrieved party, an administrative penalty, an
25 injunctive relief in the form of a permanent junction --

1 THE COURT: All right. You're asking for partial
2 summary judgment. What portion of that do you want the
3 summary judgment for?

4 MR. PATE: Your Honor, as far as the remedy we're
5 seeking?

6 THE COURT: Yeah.

7 MR. PATE: Enjoining them from violating those
8 provisions. We need to be able to prove at a trial --

9 THE COURT: So what you want now is enjoin them from
10 what?

11 MR. PATE: Enjoining them from violating those
12 provisions, appropriate damages for the aggrieved party, and
13 administrative fine for the ongoing --

14 THE COURT: Are you asking for a total summary judgment
15 motion or partial?

16 MR. PATE: Partial summary judgment as to these two
17 counts.

18 THE COURT: And what's that going to leave?

19 MR. PATE: That will leave a refusal to negotiate for
20 rental and also a -- I'm sorry -- oh, and a violation as far
21 as their advertising goes.

22 THE COURT: Okay. Anything else?

23 MR. PATE: Yes, Your Honor. We just submit -- again,
24 this was based on just getting the memo yesterday or the
25 reply brief, as far as the relevant statutes for summary

1 judgment. Opposing counsel, throughout their memo, state
2 that summary judgment was not appropriate for any of the
3 cases.

4 Permission to approach, Your Honor?

5 THE COURT: What are you talking about?

6 MR. PATE: That is citations concerning statements and
7 summary judgments. Summary judgment is appropriate whenever
8 a discriminatory statement has been made.

9 THE COURT: You may pass it up.

10 MR. PATE: Handing opposing counsel, this is a right
11 upon occupancy restrictions, and summary judgment being
12 appropriate whenever there's an occupancy restriction.

13 Permission to approach, Your Honor?

14 THE COURT: Yes, sir.

15 MR. PATE: Handing opposing counsel a citation
16 regarding overly broad policies regarding children, that are
17 violative or subject to summary judgment.

18 May I approach, Your Honor?

19 THE COURT: Sure.

20 MR. PATE: And finally, written summaries, written
21 statements, or written policies are subject to summary
22 judgment, and they're in violation as well.

23 Permission to approach, Your Honor?

24 THE COURT: Yes, sir. Do you have anything besides fed
25 supplement? All this is strictly fed supplement.

1 MR. PATE: Yes, Your Honor.

2 THE COURT: There's a different standard in Federal
3 Court for summary judgment versus State Court.

4 MR. PATE: Yes, Your Honor, I'm aware of that.
5 Unfortunately, there's just no South Carolina case law on
6 fair housing.

7 THE COURT: Is there anything else other than fed
8 supplement? You got any court circuit cases?

9 MR. PATE: No, Your Honor. You have to work with what
10 we have, and that's the extent --

11 THE COURT: All right. I understand. I'm just trying
12 to figure out what you're working with.

13 MR. PATE: Yes, Your Honor. Any federal law that
14 interprets a substantially similar provision can be cited in
15 our courts, and again is persuasive, if not controlling.

16 THE COURT: I understand that, you said that four or
17 five times. My question is: How does this, what you just
18 handed up tell me -- change what the South Carolina standard
19 for summary judgment versus federal standards for summary
20 judgment? That's my question to you.

21 MR. PATE: Yes, Your Honor. The standards are not that
22 dissimilar as far as the actual --

23 THE COURT: There's a whole lot dissimilar. There's no
24 scintilla of evidence in Federal Court, okay?

25 MR. PATE: Yes, Your Honor, I agree, and that was the

1 point in presenting these, is that opposing counsel, in
2 their memo, don't present any facts at all in support of
3 their position. They say that the unit doesn't have a
4 kitchen and that had a shared bathroom, but that's no -- I
5 mean, that's not a facts denying that two people could live
6 there. In fact, less than a week after they denied rental
7 to the aggrieved party, they rented it to somebody else, so
8 somebody could live there.

9 Their policy restricting it to one person, they
10 don't actually support -- there aren't any facts. So we
11 need the scintilla requirement under the South Carolina
12 pleading standards. The federal case law is just standing
13 for the proposition that there's no grounds for -- sorry,
14 that is in response to defendant's contention in summary
15 judgment isn't appropriate for those particular violations.

16 THE COURT: Okay. Anything else?

17 MR. PATE: Yes, Your Honor. And this is kind of
18 embarrassing, but in our initial -- the initial filing done
19 by attorney Barr, misused a word in the statute regarding
20 31-21-40(C), regarding making, printing, or publishing a
21 statement, stating a preference or limitation.

22 May I approach, Your Honor?

23 THE COURT: What's that have to do with your summary
24 judgment? That might affect the other issue about
25 protective order, but what's that have to do with summary

1 judgment?

2 MR. PATE: Well, Your Honor, in opposing counsel's memo
3 in opposition weaves in an intents element into the making
4 of a statement, and there is no intents element in the
5 statutes. Therefore, they haven't made an argument against
6 summary judgment on that particular point. The entirety of
7 their argument centers, oh, that's the intents is a question
8 for the jury, and there's no intent requirement here. So if
9 nothing else, on that issue, there's no intent requirement,
10 there's no argument again, and we're entitled to summary
11 judgment on that particular issue, if no other.

12 THE COURT: Okay. Thank you very much. Ms. O'Shea?

13 MS. O'SHEA: My intent argument was in response to the
14 complaint, which states that we published something with the
15 intent to discriminate; so that's where that came in. As
16 far as not making a factual dispute, it couldn't be any more
17 opposite. I can't think of a time where summary judgment
18 would be more inappropriate. Every single factual
19 allegation in this matter is contested.

20 I'll try to do a better job of explaining what
21 exactly we're here for a partial summary judgment on, and I
22 believe that is that the accusation that my clients
23 discriminated in the terms, conditions, or privileges of
24 their rental, which is where he went into the occupancy
25 issue. I would argue that all of that was obtained during

1 conciliation, and they've handicapped themselves with that
2 regard, if you agree with my first argument on the
3 protective order. But aside from that, everything is
4 factually disputed.

5 The complainant says that my clients didn't rent her
6 the unit because she had a child, and that they
7 discriminated against her because of her family status.
8 It's our contention that the rental was not made available
9 to her because it was unavailable. Someone had already come
10 and put an application and was coming to rent the unit. So
11 I don't know how you can discriminate if something's just
12 completely unavailable.

13 There was a second unit that she believes was
14 available. That one also had a signed lease and deposit on
15 file at the time she came to view it. So those are the
16 reasons that my clients did not rent the unit to her. The
17 basis for why she was declined was a Craigslist ad that she
18 believed was reposted after she came and was told that the
19 property was already rented. What she failed to consider
20 was that this place might have more than one rental
21 property. In fact, it has six. So the reposted ad with the
22 changed square footage changed price was actually a totally
23 different unit. She felt that they had declined her and
24 offered it to somebody else at a lower price, which is just
25 simply not sure.

1 As far as the characteristics of the dwelling and
2 why it would be inappropriate for a child, the investigator
3 declined many opportunities to come actually look at it, but
4 it's a small room. It doesn't have a bathroom inside, it
5 doesn't have a kitchen. It is literally just a tiny room,
6 and it's above an acupuncture clinic, a business, and it
7 shares a bathroom with other rentable units and the
8 business.

9 So when my clients were asked why they didn't rent
10 the unit to Ms. Woods, first of all, because it was
11 unavailable, but when pressured on the issue during the
12 conciliation process about why they wouldn't rent to a woman
13 with a child, they went on to say, we won't rent it to more
14 than one person anyway. Not child, but we can't have more
15 than one person, one human, in that room, because it will
16 overburden the bathroom, we don't have a kitchen. They
17 can't cook. It's not safe. People come in here with
18 illnesses getting acupuncture, and they shouldn't be sharing
19 a bathroom. At some point during that also conciliation, he
20 said it wouldn't be appropriate for a child.

21 All of these characteristics are perfectly fine to
22 consider when an owner or manager is setting occupancy
23 standards for their rental. There is no law against setting
24 a fair and reasonable occupancy policy in South Carolina.
25 There's nothing that says you have to allow two heartbeats

1 per room, which is what the investigator believed at the
2 time of all of this. You can say I want only one person to
3 rent this unit, and we made valid points for why they did
4 that, and it's all backed up by testimony under oath in the
5 depositions. And that is no kitchen, sharing a bathroom,
6 noise, there's a business below, they don't want people
7 stomping around over their heads, health and safety, and all
8 of those circumstances need to be considered as to whether
9 or not their occupancy policy was reasonable.

10 That reasonableness is a fact question for a jury,
11 and whether or not they rented it because it was unavailable
12 or didn't rent it because it was unavailable or because she
13 had a child, that's also a fact question for a jury. I
14 don't have a scintilla here. Every single thing is a
15 genuine issue of material fact, and summary judgment could
16 not be more inappropriate. Thank you.

17 THE COURT: All right. Thank y'all very much. Give me
18 the opportunity to review the memos, and I'll take it under
19 advisement and notify you as soon as I make a decision.
20 Thank you so very much.

21 (END OF TRANSCRIPT OF RECORD.)
22
23
24
25

CERTIFICATE OF REPORTER

State of South Carolina)
County of Charleston)

I, Maria Dempsey, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Family Court for Charleston County, South Carolina, on the 9th day of October 2017.

I do further certify that I am neither of kin, counsel,
nor interest to any party hereto.

November 17, 2017

Maria Dempsey, RPR
Official Court Reporter
Charleston County Family Court
Ninth Judicial Circuit
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

SOUTH CAROLINA HUMAN AFFAIRS
COMMISSION

Plaintiff

vs.

ZEYI CHEN & ZHIRONG YANG

Defendants

THE COURT OF COMMON PLEAS

DOCKET NO. 2014-CP-10-7037

TRANSCRIPT OF RECORD

April 11, 2018

Moncks Corner, S. Carolina

B E F O R E:

THE HONORABLE J. C. NICHOLSON, JUDGE

A P P E A R A N C E S:

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SARAH M. GABLE, ESQ.

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Circuit Court Reporter

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PROCEEDINGS

THE COURT: Who wants to go first on the motion to reconsider? It doesn't matter to the court; you both filed one.

MR. PATE: We'll go ahead and knock it out, Your Honor.

THE COURT: Pardon?

MR. PATE: We'll go ahead and do that, Your Honor.

THE COURT: I'll be glad to hear you.

MR. PATE: May it please the court? My name is Alex Pate along with Sarah Gable on behalf of the State of South Carolina, the South Carolina Human Affairs Commission and the aggrieved party Stacy Woods. We'll just proceed down per the brief as far as the argumentation goes.

On the issue of notice the motion for protective order was filed literally Friday evening before our Monday hearing on our filed motion for summary judgment. The severely truncated notice did not afford us proper notice to prepare our representation very well. I'd like to think that our brief that was submitted now was a lot better than the arguments I presented previously. I believe they haven't admitted to submit the affidavits that were attached as exhibits. They wouldn't have been able to show the court the clear delineation, the

1 investigator and also the Commissioner of our agency had
2 draws between investigations and conciliations. Moving
3 on to issue B regarding precedence we presented the court
4 numerous cases directly on point.

5 To be fair those are federal cases but our South
6 Carolina Supreme Court has explicitly stated that where
7 there is no state case law on regarding Human Affairs
8 Commission statutes that federal laws interpreting the
9 same statutes are persuasive if not controlling which is
10 the direct language from Moore v Clyburn [phonetic]. The
11 defendants have not produced a single authority
12 supporting their position whereas the case ---

13 THE COURT: --- what do you want changed in the
14 order?

15 MR. PATE: Yes, Your Honor. The only ---

16 THE COURT: --- tell me what you want changed in
17 the order.

18 MR. PATE: Certainly, Your Honor.

19 THE COURT: Then you can substantiate why you want
20 it changed if you would, please.

21 MR. PATE: The only things that are considered
22 conciliation are offers to negotiate, settle, or
23 compromise. Our regulations as mentioned in ---

24 THE COURT: --- well, let me ask you that. That's
25 what is in the affidavit of Mr. Buxton and that's what I

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1 wanted to read and I'll read to you what he said. This
2 standard is the only offers for concession made for
3 settlement considered conciliatory. Now that in effect
4 negates the statute. The rules of evidence say
5 settlement proposals are not admitted into evidence.
6 That is not the purpose of the statute. That's my
7 problem, okay.

8 MR. PATE: Yes, Your Honor. Even the ---

9 THE COURT: --- now you're standing there telling
10 me the only thing that is conciliatory is offers of
11 settlement. That means the statute is moot. The purpose
12 of the statute is not there. That's my concern. Address
13 it please, sir.

14 MR. PATE: Yes, Your Honor. So the rules of
15 evidence directly parallel the statute as far as the
16 entities ---

17 THE COURT: --- yes, that's right. And the
18 evidence rules would prevent that being admitted into
19 court. So the only thing y'all consider conciliatory is
20 offers of settlement.

21 MR. PATE: Respectfully, Your Honor ---

22 THE COURT: --- that's not what the statute says,
23 my friend, but go ahead.

24 MR. PATE: Respectfully, Your Honor, the notes to
25 the South Carolina rules of evidence explicitly identify

1 cases where purely factual information is not considered
2 to be ---

3 THE COURT: --- you didn't tell me factual
4 information. You said conciliatory offers and that's
5 what his affidavit says; concessions made for settlement.

6 MR. PATE: Yes, Your Honor. So ---

7 THE COURT: --- it doesn't say facts related to
8 that settlement.

9 MR. PATE: And that is exactly our point. So the
10 only things we believe that are covered by the
11 conciliation statute are Marvin Caldwell's [phonetic]
12 letter with the offer amounts, the initial offer of
13 conciliation.

14 THE COURT: Exhibit A is what you consider to your
15 memo that you have presented is what you consider
16 conciliatory; exhibit A that you submitted with your
17 affidavit on the constitutional issues, is that correct;
18 the non-public log that you attached?

19 MR. PATE: No, Your Honor.

20 THE COURT: Is that all you consider conciliatory?

21 MR. PATE: No, Your Honor. The only things we
22 believe to be conciliatory are things that are found in
23 the conciliation section so documents that we created or
24 received during the investigation that directly relate to
25 an offer or admission. Marvin Caldwell's [phonetic]

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1 deposition pages 75 through 80 where they specifically
2 discuss conciliation terms and in the first paragraph in
3 the next to the last paragraph of his February 27th
4 letter where he specifically offers to -- specifically
5 conveys the offer to settle from the aggrieved party.

6 [Whereupon, the court reviews documents]

7 THE COURT: I was just reading what your brief
8 says; I was just going by your brief. At the time of the
9 investigation he was capable of separating out
10 conciliation materials from investigative materials. In
11 fact attached is a non-public log of documents that
12 plaintiff has not made public because they relate to
13 conciliation. I just asked you did you agree that that
14 was conciliatory and you said no. Which is it?

15 MR. PATE: Yes, Your Honor. Sorry, I ---

16 THE COURT: --- you keep talking out of both sides
17 of your mouth. Which is it?

18 MR. PATE: I apologize. Yes, Your Honor, that is
19 exactly what we believe to be conciliatory materials.

20 THE COURT: And that's all you consider
21 conciliatory in this case?

22 MS. GABLE: Your Honor, may I speak to this?

23 THE COURT: Well, somebody needs to find out what
24 your argument is because y'all have flip-flopped a half
25 dozen times.

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1 MS. GABLE: Yes, Your Honor. May I respond?

2 THE COURT: Well, the second question I want to ask
3 you in your brief you mention a -- let me find it -- you
4 said there was a definition of conciliatory or whatever
5 you referred to it. Let me find it so I don't misquote
6 it.

7 [Whereupon, the court reviews documents]

8 THE COURT: Here it is. On page, I'm sorry you
9 don't have them numbered; I'm referring to in your brief
10 you said that the Commission sets forth the following
11 procedures for investigators. And you talk about
12 conciliation, okay. Is there any other guidelines for
13 investigators other than that paragraph you put in your
14 memo?

15 MR. PATE: Yes, Your Honor, although it's not the
16 statutory ---

17 THE COURT: --- I understand it's not statutory.
18 Do you have any other regulations or guides for the
19 investigators on what is conciliation and what is
20 investigative?

21 MR. PATE: Yes, Your Honor. The Department of
22 Housing and Urban Development provides funding for
23 training that is done and ---

24 THE COURT: --- I didn't ask you that. My question
25 is real simple. What does the South Carolina Human

1 Affairs have in writing to the investigators showing what
2 is conciliatory and what is not? I didn't ask you what
3 you do at your seminars with the federal government.
4 It's a simple question, is this all you have or do you
5 have anything else?

6 MR. PATE: Yes, Your Honor, guidance from the
7 Department of Housing and Urban Development which we have
8 to be substantially equivalent to directing our
9 investigators and training them in properly separating
10 investigatory materials from conciliation.

11 THE COURT: But you have no guidelines or no
12 regulations about how you separate out conciliation
13 versus investigation, is that correct?

14 MR. PATE: Outside of what is found in the
15 regulation that we have identified offers of compromise
16 and ---

17 THE COURT: --- that's what I was asking you. Is
18 this it that is in your brief?

19 MR. PATE: As far as in our regulations, yes.

20 THE COURT: Okay. That's all I was asking.

21 MR. PATE: Yes, Your Honor.

22 THE COURT: Thank you so very much. Go ahead.

23 MR. PATE: So I guess on that point the bigger
24 issue we were discussing regarding precedent is that's
25 all we have unfortunately is what we have been able to

1 find through federal courts. There isn't any South
2 Carolina case law but provisions in the South Carolina
3 Fair Housing law are identical to those found in title 7
4 regarding offers -- or the course of initiation ---

5 THE COURT: --- you made that argument to me a half
6 dozen times. Go back and tell me what you want changed
7 in the order, okay?

8 MR. PATE: Yes, Your Honor. The big thing is the
9 policy. I think that's really the bottom line here.
10 After our investigators sent three requests for
11 information we finally get a position statement from the
12 defendant and in it he explicitly admits to
13 discriminating against a child. He refused to rent to
14 the family because he said the house was inappropriate
15 for a four year old. That's a facial violation of the
16 statute.

17 Here we are four years later and defense counsel is
18 trying to get that excluded on the basis that it is
19 somehow conciliatory. If you look at the response from
20 Chen and the policy he provided to us nowhere in there is
21 there an offer of settlement, an offer of compromise, or
22 an offer to negotiate. He didn't respond at all to the
23 one paragraph that the investigator sent to him. I think
24 that really is the bottom line here is it is just an
25 attempt to obfuscate a very clear truth that the

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1 defendants violated the statute by refusing to rent to
2 Ms. Woods and her minor child.

3 THE COURT: Okay. So let me make sure I understand
4 Human Affairs position. The only thing that is
5 conciliatory is offers to compromise or offers to settle?

6 MR. PATE: That's correct, Your Honor.

7 THE COURT: That's it, nothing else?

8 MR. PATE: Yes, Your Honor.

9 THE COURT: And what does that do to the statute?

10 MR. PATE: We make it comport with the rules of
11 evidence regarding offers of settlement that ---

12 THE COURT: --- you think the statute just
13 reinforce the rules of evidence, is that your position?
14 There is no other thing that could be conciliatory in the
15 process?

16 MR. PATE: No, Your Honor. And that's what the
17 federal cases we've cited to you say is that purely
18 factual information unrelated to an offer of settlement,
19 compromise, or negotiation which again is the language
20 used in the ---

21 THE COURT: --- you sort of misquote it. I think
22 it says if it is obtainable by other means. You left
23 that wording out; at least that's what was quoted in your
24 memo.

25 MR. PATE: I believe that was in reference to your

1 order and Judge Hyman's order suggesting that if we could
2 access the information through other municipal means we
3 would be able to use it. In any event the information we
4 are seeking is purely factual information. If he had
5 sent that letter a week before in response to one of the
6 two earlier letters asking for a position statement we
7 wouldn't be having this argument at all.

8 THE COURT: So you don't think the conciliatory
9 process is similar to what is referred to in civil court
10 as a mediation process?

11 MR. PATE: That's correct, Your Honor.

12 THE COURT: You don't think it's similar to that?

13 MR. PATE: Mediation is a formal process. And that
14 is something, a service we offer. In fact the
15 investigator in that second to last paragraph of his
16 February 27th letter offered to set up a mediation
17 conference and offered it and the defendant never
18 responded to it. So mediation is in fact different from
19 conciliation. The statute specifically refers to that as
20 informal methods of ---

21 THE COURT: --- well, if you set that hearing up
22 and is that all protected?

23 MR. PATE: That would be. A mediation hearing
24 certainly would be. And those are separate ADR rules. A
25 conciliation is a more informal setting. And again as

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1 demonstrated by reference to the EOC and HUD, our sister
2 agencies at the federal level they interpret it the same
3 way.

4 THE COURT: What I was referring to was 29 CFR
5 160.1.26 federal regulations. It says factual
6 information obtained by the commission during informal
7 endeavors if such information is otherwise obtainable.
8 You keep leaving off in your argument if such information
9 is otherwise obtainable.

10 MR. PATE: Yes, Your Honor. I don't believe that
11 has ever been contested. All this information, the rules
12 and regulations that all his other tenants per his
13 deposition testimony were subject to is available. I
14 don't think that has ever been called into question that
15 this information would be otherwise available. That's
16 the reason ---

17 THE COURT: --- well, I'm calling it into question
18 right now.

19 MR. PATE: Yes, Your Honor.

20 THE COURT: That sort of gives a different
21 perspective on the regulations other than what you have
22 presenting to the court.

23 MR. PATE: Yes, Your Honor. So the information
24 that we're ---

25 THE COURT: --- what's your interpretation of that

1 language?

2 MR. PATE: If information, again if it is purely
3 factual information that would otherwise be available
4 either through a position statement or subpoena which DOC
5 and HUD and South Carolina Human Affairs Commission have
6 the authority to issue if they can get it through some
7 other method then it is not going to be excluded as
8 conciliation.

9 And again that refers to purely factual information,
10 which is the entirety of what defendants submitted to the
11 commission. There was nothing in his position statement
12 or his policy and rules for the subject property that
13 talk about anything that would be even remotely related
14 to conciliation.

15 [Whereupon, the court reviews documents]

16 THE COURT: Well, I sort of interpret the
17 regulation a whole lot different than you do but go
18 ahead.

19 MR. PATE: Yes, Your Honor. And the reason that
20 portion of it if it would otherwise be available the
21 reason it needs to be there is to prevent exactly what
22 defense counsel is trying to do here is present
23 information and claim it was all part of the conciliation
24 even though it had nothing to do with conciliation and
25 then later try to exclude it. So that's the reason that

1 rule exists, the reason the federal case law -- that's
2 exactly the harm ---

3 THE COURT: --- how do you gibe that with the fact
4 that you say only offers to settle -- I think you said
5 offers to settle or offers to compromise can be
6 protected? How do you reconcile those facts that you're
7 talking about to that?

8 MR. PATE: Certainly. So I can't envision a
9 situation where factual information would not be purely
10 factual in the distinction of the federal cases draw and
11 that would be a discussion of say medical bills or
12 injuries that were suffered or some sort of other
13 information that spoke to the issue of damages.

14 Whereas all the information presented by the
15 defendant in his position statement and his copy of the
16 policies of the rules and regulations were just his
17 accounting of what happened. And position statements are
18 identified by DOC, HUD, and the Human Affairs Commission
19 as a vital part of an investigation.

20 In fact the statute permits us to compel in the
21 production of a position statement which we certainly
22 would have done here if we had known four years ago
23 whenever the investigation was taking place that the
24 defendant -- or defense counsel would later argue is part
25 of conciliation. And that's the real point here is that

1 this information is otherwise discoverable, that there is
2 nothing in the information the defense provided or
3 defendant provided that isn't factual, that isn't
4 something related to the merits of the case. None of it
5 has anything to do with conciliation and if it did we
6 wouldn't ---

7 THE COURT: --- what do you think I should protect?
8 Just what's in your exhibit A?

9 MR. PATE: Yes, Your Honor. So the ---

10 THE COURT: --- anything else you think I need to
11 protect? Yes ma'am, I'll be glad to hear you.

12 MS. GABLE: Yes, sir. Exhibit A is actually not
13 documents that have been produced to the court. They
14 have been produced to the defense ---

15 THE COURT: --- I understand. But do you think --
16 is that the only thing you think should be protected by
17 this court under the statute?

18 MS. GABLE: Those documents we provided purely to
19 show that Mr. Caldwell was capable of separating them. I
20 believe the only thing on the record would be his
21 testimony on pages 75 through 80 of his deposition and
22 the two paragraphs that were delineated that we ---

23 THE COURT: --- so you think those documents plus
24 the deposition 85 -- 75 through 80?

25 MS. GABLE: Yes, sir. Well, those documents

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1 haven't even been produced so there is nothing -- they
2 have not been presented to the court so there is
3 nothing...

4 THE COURT: I understand that. You're not
5 answering my question. My question is ---

6 MS. GABLE: --- yes, that is the totality ---

7 THE COURT: --- pardon?

8 MS. GABLE: That is the totality of the portion.

9 THE COURT: This is what you think the court needs
10 to protect is Exhibit A?

11 MR. PATE: No, Your Honor. Yes, that needs to be
12 protected. That is just a demonstration that we are not
13 just willy-nilly assigning conciliation or investigatory
14 ---

15 THE COURT: --- you still haven't answered my
16 question.

17 MR. PATE: Yes, Your Honor.

18 THE COURT: Is this the only thing that you think
19 the court should protect under the statute?

20 MR. PATE: No, Your Honor.

21 THE COURT: What else should the court protect?

22 MR. PATE: The two excerpted paragraphs from ---

23 THE COURT: --- what page and what line?

24 MR. PATE: It's the March, sorry; February 27th
25 letter from Marvin Caldwell.

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1 THE COURT: February 27th letter. What year?
2 MR. PATE: 2014.
3 THE COURT: Okay. A letter from Caldwell to who?
4 MR. PATE: To the defendant Zeyi Chen.
5 THE COURT: All right.
6 MR. PATE: And it's the first paragraph ---
7 THE COURT: --- to the defendant; that entire
8 letter should be protected?
9 MR. PATE: We would be fine with that if that's the
10 best way to do that.
11 THE COURT: What else do you think needs protecting
12 other than what is in exhibit A to your memo?
13 MR. PATE: Pages 75 through 80 of ---
14 THE COURT: --- page 75 through 80?
15 MR. PATE: Of the Marvin Caldwell deposition.
16 THE COURT: Caldwell's deposition?
17 MR. PATE: Yes, Your Honor.
18 THE COURT: Okay. What else?
19 MR. PATE: And then the documents that are already
20 identified as being in the conciliation section of our
21 file.
22 THE COURT: Is that this [indicates]?
23 MR. PATE: The only disk we provided to counsel and
24 that counsel provided to you.
25 THE COURT: Is that this list?

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1 MR. PATE: That list is part of what is on the
2 disk. So the ---

3 THE COURT: --- okay, what else should go on this
4 list?

5 MR. PATE: Nothing else. Nothing else has been
6 presented or offered up into evidence or plans to be
7 offered up into evidence ---

8 THE COURT: --- I'm not concerned about that. I'm
9 trying to get you to tell me what needs to be protected
10 under the statute. That's all I'm trying to get you to
11 tell me. It's a real simple question.

12 MR. PATE: Yes, Your Honor. Then that list plus
13 the other two items are exhaustive of what we believe
14 needs to be protected under conciliation.

15 THE COURT: That's all you think needs to be
16 protected?

17 MR. PATE: Yes, Your Honor.

18 THE COURT: You want to amend the order to just
19 these items, is that correct?

20 MR. PATE: That's correct, Your Honor.

21 THE COURT: Okay. Thank you so very much.

22 Anything else you want to tell me? I'm not trying to cut
23 you off.

24 MS. GABLE: Yes, Your Honor if I may? The requests
25 for admission you did provide us with the caveat that we

1 could request the information some other way and we did
2 that for requests for admissions and those were then
3 included in the order. And they weren't even created at
4 the time of the hearing for the motion for
5 reconsideration. We would ask that those be taken out
6 explicitly as a separate matter.

7 THE COURT: Thank you very much. Yes, ma'am?

8 MS. O'SHEA: So if I understand their argument
9 today that is that only these monetary offers for
10 settlement should be protected but then on the other hand
11 everything in that log as well as the entire conciliation
12 section of the disk and the February 27th letter from Mr.
13 Caldwell.

14 That letter alone if they are conceding that that
15 was conciliatory then it was a misdemeanor to provide
16 that to the court on October 9th for your consideration
17 at the summary judgment hearing then my issue is what you
18 pointed out that the ball keeps moving and the position
19 on what is conciliation keeps changing. I do think it's
20 important and I know you said you wanted to hear us on
21 the motions to reconsider first but I think addressing
22 the statute itself would render those other issues moot
23 if you decided upon the statute.

24 THE COURT: I understand. But what -- anything
25 else you want to tell me pursuant to their argument? Do

1 you agree that those items that they have listed should
2 be protected? I know you think there is some other stuff
3 that needs to be protected and we'll get to that on your
4 motion.

5 MS. O'SHEA: I think I'm fine with those being
6 protected. I think it's a little contradictory to say
7 none of my deposition testimony could be excluded but
8 only the pages that they want excluded and then take the
9 position that deposition testimony can't possibly be
10 conciliatory as well. So there is a conflicting position
11 there but I'm fine with excluding whatever they want to
12 exclude honestly. I just do think there is more in
13 addition to that that needs to be addressed.

14 THE COURT: Okay. Anything else?

15 MS. O'SHEA: Yes. That the regulation that we are
16 talking about that provides some other method which you
17 mentioned that means, that points to my interpretation
18 that you need to separate fact finding from conciliation.
19 So if you can get it from some other method than
20 conciliation that when it needs to take place during an
21 investigation or discovery or whatever.

22 You shouldn't send a letter that half of the letter
23 is about a settlement offer, somewhere in the middle you
24 claim to be investigating and then the response is
25 somehow in whole deemed a formal position statement

1 because you want it to be. So that letter did have a
2 monetary offer for settlement in it. There was a
3 response that was made addressing it saying Stacy should
4 not be paid for anything and she will never be paid. And
5 then he goes in to respond to the rest of the letter
6 thinking that this is all about conciliation; I'm talking
7 with a neutral government official and I'm trying to
8 comply with his request for information.

9 I don't think that you can sandwich it inbetween
10 settlement offers and then try to investigate at the same
11 time and then expect a person of common intelligence and
12 ordinary understanding of the statute to know when you're
13 tricking them into doing both at the same time. It
14 shouldn't operate as a hybrid. You should distinguish
15 fact finding from investigation. And that's also when
16 you asked him what other regulations do you have aside
17 from this statute for an investigator he told you that
18 they have methods of properly separating materials.

19 I don't know where the authority is on that but we
20 do need to properly separate the materials but also
21 separate the means by which we obtain those materials.
22 And that would be during the discovery process or an
23 investigation; not during settlement endeavors. I think
24 the statute itself conflicts with their interpretation
25 today. It doesn't just say monetary offers. It says

1 methods of conciliation, persuasion and conference. And
2 it says anything said or done in the course of those
3 endeavors. It doesn't say just offers. Or it doesn't
4 exclude a counter offer or any kind of argument made at
5 the time. The entire purpose of it is to promote
6 alternative dispute resolution and settlement endeavors.
7 And if somebody thinks they are being tricked in the
8 meantime we're not going to have any successful dispute
9 resolution that way.

10 So it's not that somebody -- it's not that we
11 provided everything during settlement endeavors and only
12 four years later to claim it was conciliation. We all
13 knew it was conciliation. Then four years later because
14 they didn't properly investigate and now discovery is
15 over that shouldn't be our fault.

16 THE COURT: Okay. Thank you very much. Anything
17 you want to say very briefly in rebuttal?

18 MR. PATE: Super briefly, Your Honor. I just refer
19 you to our brief Brooks v Grandma's House Day Care
20 Centers ruling that an attorney's letter under Title 7
21 void of statements relating to compromise, settlement or
22 negotiation was admissible. And again if you look at
23 their response, defendant's response to 3 at that point
24 the request for information there is not a single
25 reference to an offer of compromise, settlement or

1 negotiation. If as defense counsel contends the only
2 thing he said that made it conciliation was no, she
3 shouldn't get anything then that's the end of the
4 conciliation right there. Everything else is purely
5 factual.

6 THE COURT: Okay. Thank you very much. Let me
7 hear you on your motion to reconsider. What do you want
8 me to change in the order?

9 MS. O'SHEA: I wanted the order to be sealed
10 because we're taking the position that this information
11 is confidential. So if you agree there the order should
12 be filed under seal. A large chunk of our deposition
13 excerpts that we contend should be protected were removed
14 from there.

15 Many of them are discussing exhibits that you deemed
16 were conciliatory in your order and I feel like if the
17 exhibit itself would be protected then the discussion
18 about it in deposition would also be excluded.
19 You took the position that you disagree with me that a
20 privilege exists.

21 THE COURT: I don't think it's a legal privilege.

22 MS. O'SHEA: Okay.

23 THE COURT: I think it's protected for future use
24 such as mediation.

25 MS. O'SHEA: Okay.

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1 THE COURT: Whatever occurs in mediation you can't
2 use against them later on; same approach. I just don't
3 think it's a legal privilege.

4 MS. O'SHEA: So I agree ---

5 THE COURT: --- it may be semantics. I don't have
6 any problem with calling it a privilege because it is a
7 limited privilege i.e. you can't use it against them
8 later.

9 MS. O'SHEA: Well, if we have an issue with the
10 word privilege I think it is a matter of semantics so we
11 have both considered it confidential ---

12 THE COURT: --- I agree it's probably a matter of
13 semantics.

14 MS. O'SHEA: Well, if we both use the term
15 confidential and you're agreeable to that then why don't
16 we substitute privilege with confidentiality because I
17 think it has the same effect that we're all trying to
18 reach.

19 THE COURT: Right. I tend to agree with that. Do
20 you agree with that?

21 MR. PATE: Yes, Your Honor.

22 THE COURT: I just don't think it's a legal
23 privilege.

24 MR. PATE: We agree.

25 THE COURT: Okay.

1 MS. O'SHEA: Another issue that I have with the
2 order is that it states that the information and
3 materials that we are talking about are conciliation
4 meaning, and it's a protective order so you're giving it
5 protection, you're saying that it's confidential. But
6 then further down in the order it allows admissibility of
7 all these documents to be revisited by the trial judge.

8 So I think this all started at a summary judgment
9 hearing, which is essentially -- you were the trial judge
10 for the summary judgment. It's a matter of whether or
11 not those materials I asked for a protective order
12 because they were given to you for a summary judgment
13 proceeding. And my point was these are not to be used in
14 any proceeding. So then to let it be revisited ---

15 THE COURT: --- let me interrupt you. Mr. Pate, do
16 you agree with that?

17 MR. PATE: With what, Your Honor?

18 THE COURT: The order basically says that the trial
19 judge could reopen and revisit whether it is actually
20 protected or not protected, okay.

21 MR. PATE: My understanding on reading the order in
22 conjunction with Hyman's order was that if the material
23 was provided outside of the investigation process, which
24 again we've been in litigation for four years now.
25 Anything provided after the commencement of litigation

1 can't possibly be part during the course of conciliation
2 because the conciliation ship sailed four years ago.
3 So anything that happened after that which would be the
4 entirety of their discovery process, again with the
5 exception of specific references to conciliation all of
6 that should be otherwise admissible.

7 And the admissibility would be ruled on by the trial
8 judge. That was how we read your order in conjunction
9 with Judge Hyman's order. So we didn't believe there was
10 anything inconsistent on the face of it.

11 THE COURT: I haven't seen Judge Hyman's order so I
12 don't know what it says, okay.

13 MR. PATE: Yes, Your Honor.

14 THE COURT: So you don't think that portion should
15 be changed?

16 MR. PATE: We don't think any of the materials
17 should be excluded and if it is construed to what is
18 actually conciliation material then we can call it
19 whatever we want exclude it, protect it or even call it
20 privilege at that point.

21 But as long as the information that is not part of
22 conciliation is admissible then we don't particularly
23 mind one way or the other. I don't think there is an
24 inconsistency in the order as written so we would oppose
25 the change on that ground that ultimately the trial judge

1 who is going to be sitting over the jury should be the
2 one to arbitrate any of these disputes later on.

3 THE COURT: Okay. Thank you very much.

4 MS. O'SHEA: So what the order does is it says that
5 X documents were made in the course of conciliation and
6 it's a protective order protecting those. Now it says
7 that public disclosure is prohibited and it makes all of
8 those things from conciliation inadmissible. But then
9 later on it says all of this can be revisited. The trial
10 judge can revisit ---

11 THE COURT: --- I understand. I do think that was
12 ambiguous, okay. I agree with you on that.

13 MS. O'SHEA: So I just feel like if you're going to
14 protect it ---

15 THE COURT: --- I'll tell you the reason I put that
16 in there was reviewing all this some of it would depend
17 on what context was it given and not given, was it during
18 a conciliatory, and you needed probably to take some
19 testimony to decide if it was or if it was not. Now in
20 view of their position that it's only offer of
21 settlements and offers of compromise that sort of changes
22 the whole spectrum, okay. So I think I was wrong in that
23 thinking and I will probably eliminate that, okay.

24 MS. O'SHEA: Okay, thank you. And that's a new
25 perspective that we're just now seeing on the ---

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1 THE COURT: --- well, that's their Commissioner's
2 perspective in his affidavit, okay.

3 MS. O'SHEA: Right. And if that conflicts with the
4 statute and the plain language of the statute I think
5 we're going to have to go back to the constitutional
6 argument there.

7 THE COURT: Well, I'm getting ready to get into
8 that, okay.

9 MS. O'SHEA: Okay.

10 THE COURT: I wanted to hear what y'all had
11 specifics about the statute, okay.

12 MS. O'SHEA: Beyond that the last thing that I
13 wanted clarified was how this statute interacts with
14 discovery because I think the means by which you could
15 get this some other way from ---

16 THE COURT: --- what's your interpretation of that
17 federal regulation?

18 MS. O'SHEA: I think you're going to have to get it
19 either during an investigation or discovery. A large
20 part of my point is that some of these documents didn't
21 exist except for conciliation so it wouldn't be
22 discoverable or admissible. It would have had to come
23 through an investigation that was properly done and that
24 wasn't done. So, the other thing is the statute says
25 that the only way to waive this protection of information.

1 is by written consent of the parties concerned. And I
2 don't want a discovery response to be construed as that
3 because on the one hand we have to answer discovery. We
4 have to respond to requests to admit. We have to admit
5 that these things from conciliation came about and
6 existed but at the same time requests to admit can be
7 published to a jury.

8 And so if what we're talking about is inadmissible
9 within those that's how discovery is coming into this.
10 I'm not sure how that statute would interact with it.
11 And I definitely don't think that discovery response
12 should be construed as written consent of the person's
13 concern under the statute. So I think we have to reply
14 to their discovery but I don't necessarily think it is
15 all admissible because it came from discovery when the
16 original source of it is conciliation endeavors.

17 THE COURT: Okay. Thank you very much. As I said
18 when we started I've read your memos concerning the
19 requests to address the issue of due process as to the
20 vagueness of the statute itself and what I meant by the
21 vagueness and the failure to distinguish or set up any
22 guidelines on how you handle conciliation and how you
23 handle investigations in separating the two.

24 Having read your memos and listened to your
25 arguments this morning I have one question for both of

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1 you along the constitutional lines that I would like to
2 ask you. The way it is administered is my concern. In
3 other words for John Q. Public out here who is not a
4 lawyer who you're dealing with probably 95 percent of the
5 time I would assume; maybe higher than that. I don't
6 know; you probably do know.

7 There is no delineation to that person on what
8 conciliatory means, what an investigation means, and how
9 can that person determine whether you are trying to
10 conciliate with them or investigate with them. Now based
11 upon what you told me this morning the only thing that is
12 conciliatory is compromised in money offers. So
13 basically anything that happens is not conciliatory
14 unless it involved money or settlement.

15 Now that is never told to anybody. That is not told
16 to John Q. Public. So my concern is how you administer
17 this statute. Does that prevent a person and deny their
18 due process and is it arbitrary capricious the way you
19 are administering the statute therefore it is a denial of
20 due process. That's my question to both of you.

21 MR. PATE: Your Honor, we would certainly say no
22 it's not.

23 THE COURT: Well, I wouldn't expect you to say
24 anything else.

25 MR. PATE: The primary duty of the agency is to

1 prevent and eliminate discrimination. So ---

2 THE COURT: --- I don't argue with that. It's a
3 good agency and you've got a good mission. The question
4 I'm questioning is people are entitled to certain rights,
5 okay. Due process is one of them.

6 MR. PATE: Well, Your Honor, as we reference in our
7 memo there is no due process right attached to a purely
8 administrative non-determinative procedure, which is
9 exactly what our investigations are. So there is no due
10 process right implicated and the case law is very clear
11 that due process rights don't attach at the
12 administrative phase when it doesn't result in a final
13 non-appealable order and that's just not the case here.

14 I guess I would go further to say that if we -- if
15 our agency's procedures are a violation of due process
16 then those federal agencies are also violating due
17 process and at least eight of our sister states are also
18 violating due process because we have identical
19 procedures in place ---

20 THE COURT: --- I'll be perfectly honest with you I
21 don't really care what they do in federal court and the
22 other states. I'm talking about the citizens of South
23 Carolina, okay.

24 MR. PATE: Respectfully, Your Honor, the South
25 Carolina ---

1 THE COURT: --- I understand those states and that
2 statute is persuasive and I understand they are very
3 persuasive as you said possibly the way you should rule
4 and that's fine. But I still got a problem with what I
5 said.

6 MR. PATE: Yes, Your Honor. Just going back to a
7 discussion of the cases the investigators do as we
8 mentioned in our memo less than 10 percent of our cases
9 result in a cause finding. The remainder of them are
10 either a no-cause finding or a conciliation or an
11 administrative closure. There is no bias on the part of
12 the agency. The investigator has no incentive to go out
13 and get somebody. I mean outside of that being his job
14 there is no personal profit motive.

15 The attorneys have no profit motive in that. We
16 don't get attorneys fees. We get paid the same whether
17 we win or lose so it would be much easier for us to just
18 say no-cause on everything and be done with it. So the
19 defense counsel has consistently insinuated that there is
20 some sort of -- that we are neutral or they keep using
21 the scare quotes around neutral and that's just simply
22 not -- they are misconstruing or they are
23 mischaracterizing our investigations as being somehow
24 bias. And that is just not the case here. The
25 investigator is neutral. His duty is to get information

1 from both sides. He can issue subpoenas on behalf of
2 either side and then ultimately he can serve as a
3 negotiator between the two sides. In fact he is required
4 by the statute to do so.

5 So it's strange to say that the statute is written
6 within statutory requirement from the legislature saying
7 that you must attempt to conciliate and you must
8 investigate is somehow a violation. Again, as mentioned
9 in our memo unless it's demonstratively repugnant to the
10 Constitution it should not be found to be
11 unconstitutional and I think that's clearly not the case
12 here.

13 THE COURT: Anything else?

14 MR. PATE: No, Your Honor.

15 THE COURT: Thank you so very much. Yes, ma'am?

16 MS. O'SHEA: So we've got the affidavit from the
17 Commissioner ---

18 THE COURT: --- what's your position on that
19 argument that due process doesn't attach to
20 administrative procedures?

21 MS. O'SHEA: It's very simple. This is not an
22 administrative procedure. We're in Common Pleas in
23 Circuit Court. This all arose out of a summary judgment
24 hearing. So what he's telling you is down below before
25 the, you know during their administrative investigation

1 no due process rights exist. Now the question before you
2 is does due process exist in Circuit Court when
3 information from settlement endeavors get publically
4 filed and used in a summary judgment proceeding. That is
5 their day in court. So no, there wasn't a final
6 determinative decision below because you have the option
7 of electing for Circuit Court or to go before a panel of
8 their people at the Human Affairs Commission.

9 My clients have chosen this court so this is their
10 day in court. This is where due process absolutely
11 exists. So that's the position there. We're not in an
12 investigation. It is determinative. The decision that
13 you make on this has due process implications on the
14 defendants and other people ---

15 THE COURT: --- do you think the way it is
16 administered violates your client's due process under the
17 State Constitution?

18 MS. O'SHEA: Absolutely.

19 THE COURT: Since he keeps talking about the U.S.
20 Constitution we'll talk about the State Constitution and
21 its due process clause.

22 MS. O'SHEA: I would say both. It's vague enough
23 and the standard is a person of common intelligence. And
24 here we are a Circuit judge, a bunch of lawyers, the
25 agency charged with enforcing it and we all have

1 different interpretations about it. And the agency
2 itself has a plethora of interpretations of what the
3 statute means. So every time we argue it they take a
4 different position. And if it is vague enough to allow
5 them to do that it is a due process issue.

6 If we're not sure and this court takes a stab at it,
7 takes a guess on one of these interpretations or if they
8 take a guess while enforcing the statute my client's
9 rights are violated. And it's vague enough that it
10 allows -- if there are ten different positions that you
11 could take with ten different people it allows for equal
12 protection violations. And it ---

13 THE COURT: --- I'm not impressed with your equal
14 protection violation, okay.

15 MS. O'SHEA: Okay.

16 THE COURT: But go ahead.

17 MS. O'SHEA: My point there is you could take one
18 position with one respondent and another with ---

19 THE COURT: --- I understand but you don't have any
20 evidence they have taken different positions, okay.
21 That's why I've got a problem with due process -- excuse
22 me, equal protection. You have to prove that they have
23 treated other people differently and they do it in a
24 routine fashion. And that's not here. At least it may
25 be but it's not before me, okay.

1 MS. O'SHEA: Sure. Let's stick with the vagueness
2 that they have taken all of those different positions in
3 this one case alone. So how is it so clear that a person
4 of common intelligence should understand that, that if
5 you are in a conciliation investigation hybrid? They
6 think they are dealing with a neutral government official
7 that is trying to help them.

8 We do challenge the neutrality of it and the
9 enforcement. I think it's less significant than the
10 vagueness of the statute itself. But here's where I
11 think we have a problem. The investigator here drafted
12 the complaint. And nowhere in the rules does it allow
13 the investigator from the Human Affairs Commission to
14 write somebody's complaint for them and to say I'm not
15 neutral until we file the complaint. And this is all in
16 his deposition testimony.

17 Then he becomes a neutral, he files the complaint.
18 And then he becomes the investigator. He's the fact
19 finder and the mediator all at the same time. And then
20 he gets to summarize what took place during those
21 endeavors and prepare an account of what he thinks took
22 place and then give it to the Commissioner to make a
23 determination of whether or not discrimination occurred.
24 And this is all from the same person. And if he makes a
25 mistake it's the agency's job to fix it or cover it up or

1 whatever it may be. So there is a state there where if
2 he commits an error are we just going to go forward with
3 it forever or are we going to stop it right there. So
4 that's how I have an issue with the enforcement of it.

5 I also think that they have to distinguish fact
6 finding and investigation from conciliation. I don't
7 think they can operate as a hybrid and you can trick
8 people by sending a hybrid letter or having a hybrid
9 proceeding. People need to know if they are in a
10 confidential settlement endeavor proceeding or if they
11 are not. We don't have definitions for how to enforce
12 this.

13 The court doesn't have it, the statute doesn't have
14 it, they don't have it so we're all just kind of groping
15 in the dark with what do we do with this. That's not
16 fair for a person of common understanding. They've made
17 an argument in their memo that if there is a question you
18 should defer to the agency's interpretation. And I agree
19 with that. With all of the Constitutional arguments
20 we've all citing the same law ---

21 THE COURT: --- they're talking about the deference
22 to their determination.

23 MS. O'SHEA: Sure. But it is their interpretation
24 ---

25 THE COURT: --- there is some law to that effect.

1 MS. O'SHEA: Right. But if their interpretation is
2 found nowhere in the statute this position taken by the
3 Commissioner there is no mandatory authority before the
4 court that says only monetary offers or settlement offers
5 are conciliatory. It just doesn't exist. So you can
6 defer to their interpretation but not when it is pulled
7 out of thin air.

8 And I think can you, which position would you defer
9 to even; there are so many of them. I don't which one
10 you would pick. And the fact that you have so many
11 options I think it just demonstrates how vague this
12 statute really is. They've also said that if you agree
13 that the statute is vague the remedy would be to remand
14 it.

15 THE COURT: Remand is not before the court. I
16 don't know why he put remand in there but that's neither
17 here nor there. That's not an issue as far as this court
18 is concerned. We're not on an appeal.

19 MS. O'SHEA: Right.

20 THE COURT: We're trying to decide what should be
21 protected and what shouldn't be protected. And remand is
22 a total -- I don't know. I view that as a red herring,
23 okay.

24 MS. O'SHEA: I do too. But there is an issue where
25 if you decide that this statute is unconstitutionally

1 vague then what? So procedurally it is postured in a
2 strange way where we have to wonder what is the outcome
3 of that. And I think it allows for a dispositive motion
4 to be granted at some point; be it here or later.

5 THE COURT: Thank you so very much.

6 MS. O'SHEA: Thank you.

7 THE COURT: I appreciate y'all's argument. I
8 appreciate your memos. I would just ask one thing if I
9 may from Mr. Pate from the Human Affairs Commission. I
10 believe you said earlier there are some federal cases
11 that specifically say the same thing that Commissioner
12 Buxton put in his memo, excuse me, his affidavit. And
13 what you said is the only thing that is conciliation is
14 offers to settle or offers to compromise.

15 Would you please send me copies of those cases and
16 highlight the findings on those particular cases? You
17 may have already put them in your memo but sometimes it
18 was sort of clustered together and it was a hard time to
19 pick out what you were referring to. I want to see those
20 cases that have that holding, okay, in federal court.

21 MR. PATE: Yes, Your Honor.

22 THE COURT: Hopefully you can find a Circuit Court
23 rather than a district court case. I don't know if you
24 can or not. And the only other question I have for you is
25 this -- let me find it.

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1 [Whereupon, the court reviews documents]

2 THE COURT: I've made the comment about the remand
3 and I quite frankly don't think it was an issue but I'm
4 trying to decide. You put it in your memo. You must
5 have said the word remand 25 or 30 times; I don't know
6 why. But you said on page 10 of your memo and I'll read
7 it to you: If the court finds that this does not apply
8 then the only remedy for the court is to remand the case
9 back to the agency for further investigation,
10 conciliation or both and you quoted Morgan v Secretary of
11 Housing and Urban Development 985 F.2d 1451, a 10th
12 circuit case of 1993.

13 Now that case reading the case said that the
14 Secretary did not try to conciliate and they remanded it
15 back to conciliate. That's not the issue before me. Why
16 are you talking about remand? Explain it to me please.

17 MR. PATE: Yes, Your Honor. We understood that the
18 due process issue was a violation of the defendant's
19 right or the respondent's right at the administrative
20 level to understand what was conciliation. If it is
21 found that our processes violate due process ---

22 THE COURT: --- no, the due process argument if I
23 find it a denial of due process the case is dismissed,
24 okay.

25 MR. PATE: Certainly, Your Honor ---

1 THE COURT: --- there is no remand period. Now the
2 Court of Appeals might remand it back on appeal but there
3 is no remand. I don't understand what you're talking
4 about on remand.

5 MR. PATE: Fair enough, Your Honor ---

6 THE COURT: --- in this scenario in the process
7 that we have procedurally.

8 MR. PATE: Your Honor, our understanding is that if
9 there was ---

10 THE COURT: --- I know you would love for me to do
11 that to get a second bite at the apple on conciliation.
12 Is that what you're trying to say?

13 MR. PATE: We doubt conciliation would be effective
14 even if it were remanded back for further conciliation.

15 THE COURT: Okay. Well, why are you talking about
16 remand 25 and 30 times in this brief?

17 MR. PATE: Your Honor, that's just what the case
18 law suggests. If there is a problem with the
19 conciliation or the investigation ---

20 THE COURT: --- that's not the issue I'm talking
21 about.

22 MR. PATE: Fair enough, Your Honor. Then we may
23 have just misunderstood the issue; it may just be an
24 error on my part.

25 THE COURT: I mean that's not the issue I'm talking

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1 about.

2 MR. PATE: Fair enough. We understood there was an
3 issue with the investigation slash conciliation.

4 THE COURT: And procedurally on a summary judgment
5 motion how can I possibly remand something if there is
6 nothing to remand. I mean we've got a case in Common
7 Pleas.

8 MR. PATE: Yes, Your Honor. It's not uncommon for
9 a court to send back ---

10 THE COURT: --- I've remanded things but generally
11 it's on appeal. You remand it to the Magistrate to
12 answer this specific question or you remand it back to do
13 this. The Court of Appeals remands things back to
14 Circuit Court to have hearings on factual basis and send
15 it back. There are all kinds of remands.

16 The advantage of a remand is you can't appeal a
17 remand, okay. You used to do that in worker's comp
18 cases; remand it back to the full Commission and the
19 other side couldn't appeal it. But that's neither here
20 nor there. I just don't follow your logic in the
21 scenario we're talking about about remand.

22 MR. PATE: And again, our thing was if there was
23 going to be a problem with the conciliation that the --
24 the only case law that we could find found that the
25 remedy for that was to remand it back for a second round

1 of conciliation.

2 THE COURT: And the second question I want to ask
3 you your first two pages is a character assassination on
4 the defendants. Quite frankly I don't care whether he is
5 the worse most ornery dishonest guy in Charleston County
6 or the best guy in Charleston County this is immaterial.
7 Why did you put all of that in there?

8 MR. PATE: Well, Your Honor ---

9 THE COURT: --- I don't care. That wasn't the
10 issue I asked you to brief his character. You could
11 raise that before a jury. Why did you put all that
12 garbage in there?

13 MR. PATE: Your Honor, we thought it was relevant
14 to the defendant's refusal to respond to the first two
15 requests for information sent by the investigator. The
16 purpose of that is just illustrating that this is a
17 common occurrence with this particular defendant is a
18 refusal to cooperate with law enforcement ---

19 THE COURT: --- he has an extensive history at
20 thumping his nose at the law and the agency
21 investigation; extensive history. He holds himself out
22 to be a doctor. He has no valid license or practice.
23 Contemptible behavior; what's all that got to do with the
24 issue I'm asking you to talk about?

25 MR. PATE: Fair enough. It was just background on

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1 what we thought would be the issue at hand here was that

2 ---

3 THE COURT: --- you're trying to say he's a bad guy
4 so I'll rule in your favor?

5 MR. PATE: No, Your Honor, just that he has a
6 history of ---

7 THE COURT: --- well next time you do a brief for a
8 judge don't put all that garbage in there, okay.

9 MR. PATE: Certainly, Your Honor.

10 THE COURT: I don't care and most judges don't
11 care. I was trying to deal with the legal issue and not
12 his character.

13 MR. PATE: Yes, Your Honor.

14 THE COURT: Okay. Thank y'all very much.

15 MS. O'SHEA: Thank you.

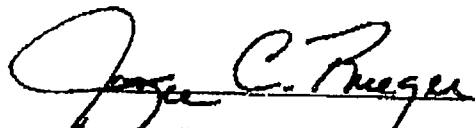
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C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of Common Pleas for Berkeley County, South
Carolina on the 11th day of April, 2018.

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

June 2, 2018


Joyce C. Rueger, CVR-M
Court Reporter

AGREEMENT TO MEDIATE

SHAC and Stacy Woods v. Zeyi Chen and Zhirong Yang, SHAC Charge No. [currently unknown]

LOGISTICS

The parties and their counsel agree to attempt a negotiated resolution of their pending claims through mediation. The mediation has been scheduled and confirmed as follows:

Date/Time: March 24, 2016, beginning at 10:00 a.m.

Location: McAngus Goudelock and Courie, LLC, 765 Johnnie Dodds Blvd., Suite 200, Mt. Pleasant, South Carolina 29464

Mediator: Amy Jenkins, Esq., McAngus Goudelock and Courie, LLC (Direct Dial: 843-576-2917)

ATTENDANCE AND AUTHORITY

All parties agree to attend the mediation conference with full authority to enter into a resolution of this matter. It is agreed and understood that each party is required to have in attendance at the mediation such person(s) (including insurance carrier representatives, if applicable) with full authority to settle the dispute. Attendance should be in person unless the mediator agrees otherwise.

It is agreed and understood that the mediation is private and is reserved for the parties and their representatives. Other persons may attend only with the permission of all of the parties and with the consent of the mediator.

The parties agree that they have the full day scheduled and are available for the full day of mediation, until the parties achieve settlement or the mediator declares an impasse or adjournment.

THE MEDIATION PROCESS

Mediation is an extension of the negotiation process utilizing the services of a neutral and impartial third party who acts to encourage communication and facilitate the resolution of the parties' disputes. It is an informal and non-adversarial process with the objective of providing a structured, managed negotiation to assist the parties in their efforts to reach a settlement agreement. The mediated settlement conference is not a trial or hearing, the mediator is not a judge, and the parties retain their right to continue the case if they do not reach settlement.

Mediation is consensual in nature. The ultimate decision-making authority in the mediation rests with the parties. The mediator's role includes assisting in identifying and clarifying issues, encouraging joint problem-solving, stimulating meaningful communication and negotiation, analyzing alternatives, and exploring creative solutions. The mediator will not coerce or unfairly influence any party.

The parties also understand that the mediator has an obligation to work on behalf of each party equally and that the mediator cannot render individual legal advice to any party. The mediator may, however, point out strengths and/or weaknesses in each party's position. It is agreed and understood that no attorney-client relationship exists between the mediator and the parties, and that the mediator is not providing legal services to any of the parties.

PROCEDURE AND CONFIDENTIALITY

At mediation, the mediator will make some brief opening remarks during a joint session regarding the process, after which all present will have the opportunity to make their opening remarks, engage in dialogue, and propose solutions to the issues in dispute. The joint session is generally followed by private and confidential meetings with each party and their counsel. The mediator will keep the specific content of such meetings confidential unless and until the party providing the information indicates that it is acceptable for the mediator to share this information with the other party. The mediator may request additional joint sessions as appropriate to facilitate resolution. Any partial or global settlement will be reduced to a written and enforceable Memorandum of Settlement on the date of settlement.

The parties agree to keep all matters discussed and information exchanged during the mediation confidential (though the facts of the case subject to discovery before the mediation remain subject to discovery after the mediation). Mediation discussions, written and oral communications, any draft resolutions, and any unsigned mediated agreements shall not be admissible in any court proceeding. Only a mediated agreement, signed by the parties may be so admissible. The parties further agree to not call the mediator to testify concerning the mediation or to provide any materials generated during or for the mediation in any court proceeding between the parties. The mediation is considered by the parties and the mediator as settlement negotiations.

COST OF MEDIATION

The mediator's hourly charge is \$285.00 per hour (includes time for review of any materials, pre-mediation conference time, the mediation conference, preparation and filing of any mediator's report, and travel time outside of Charleston County, South Carolina). Mediator charges also will include reimbursement of any necessary and reasonable expenses. Total mediation charges will be split evenly between the parties, unless otherwise agreed. At the conclusion of the process, the mediator will prepare and send to counsel a Statement for the mediation services, which is due and payable upon presentment. The mediator waives any advance deposit or administrative fee in consideration for counsel's assurance of prompt payment.

The parties understand that they shall be responsible for two hours of the mediator's time at the above stated mediation rate for any appointment which they schedule but do not attend and do not provide at least 24-hours advance notice of the cancellation.

Agreed to this 11th day of March, 2016.

I have read and understood this Agreement to Mediate and will abide by its terms:

Plaintiffs:

Defendants:

SHAC

Zeyl Chen

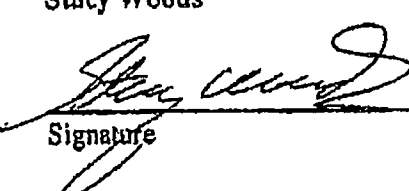


Signature

Signature

Stacy Woods

Zhirong Yang


Signature

Signature

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

PROOF OF ADR OR EXEMPTION

FILE NO.: 2014-CP-10-7037

FILED
2016 MAR 29 PM 2:11
JULIE J. ARTHUR
CLERK OF COURT

(An original and copy of this form is to be completed and filed with the Office of the Clerk of Court and a copy forwarded to the attorneys for the parties within 10 days of the conclusion of ADR or within 300 days of the filing date of the action, whichever is earlier.)

PURSUANT to the South Carolina Alternative Dispute Resolution Rules (SCADR):

- A. I certify that this case is exempt from ADR for the following reason and the parties wish to exercise that exemption:

Plaintiff/Attorney for Plaintiff

Defendant/Attorney for Defendant

Print Name

Print Name

Phone/Fax
Date: _____

Phone/Fax

- B. ☒ 1. Alternative Dispute Resolution (ADR) was conducted in the form of:

Mediation

(Note: If binding arbitration has been chosen by the parties but not yet completed, an appropriate order of dismissal must be attached hereto.)

2. The neutral(s) was/were: (Name of arbitrator/mediator):

Amy Jenkins, McAngus Goudelock & Courie, LLC

3. The ADR was conducted on March 24, 20 16

4. As a result of ADR, this case should be considered (please check one);

(X) Fully Settled.

() by Consent Judgment, to be filed by _____

or () Voluntary Dismissal to be filed by _____

() Partially Settled.

() At an Impasse.

() In need of further ADR I ☐ am ☐ am not willing to continue as a neutral. I recommend that ADR resume as of _____.

5. Plaintiff ☒ was present ☐ was not present
Defendant ☒ was present ☐ was not present

6. Other participants were:

X Lawyer for Defendant Ian O'Shea and Jim Leffew
X Lawyer for Plaintiff Le Ann Rice and Alex Pate
____ Representative for Insurance Carrier _____
____ Guardian *ad Litem* _____
____ Experts _____
____ Others _____

7. Choice of the neutral was by:

X Stipulation
____ Court Order

8. The total number of hours spent in ADR was: 7 hours.

9. Further comments of the neutral:
The Parties will be filing a Consent Order in the near future.



Neutral's Signature

Date: 3/28/16

)

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;

- 1

IT IS SO AGREED:

Lee Ann Rice
South Carolina Human Affairs Commission

By Attorney Lee Ann Rice

Stacy Woods
Stacy Woods

Zeyi Chen
Zeyi Chen

Zhirong Yang
Zhirong Yang

policy, practice, or act that results in disparate impact on a member or members of a protected class.

2. This Order requires that Defendants take actions as set forth below to remedy the alleged violations. Defendants retain the discretion to take any additional actions that they believe are appropriate to achieve the goals of this Order. The effective date of this Order shall be the date on which it is entered by the Court.

B. Remedial Efforts

1. Within one year of the effective date of this Order, Defendants will coordinate with a member of SCHAC to arrange for a training session on fair housing principles. This training shall be conducted by SCHAC at no cost to Defendants and will take place in Charleston County at a location to be agreed upon by the parties.

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C. Civil Penalty

1. Defendants shall pay a civil penalty in the amount of nine thousand, five hundred dollars (\$9500). The payments shall be made as follows:

- a) Three thousand, five hundred dollars (\$3500) within thirty (30) days of the date of this Order;
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1. The parties agree that mediation costs shall be split equally between the parties.

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1. SCHAC reserves the right to reopen its investigation should Defendants fail to comply with the terms of this Order. SCHAC may, upon request or on its own initiative, undertake to verify compliance with the terms of this Order. Additionally, SCHAC, in accordance with S.C. Code § 31-21-120 (D), shall make public the terms of this Order.

IT IS SO ORDERED this ____ day of _____, 2016.

The Honorable Roger M. Young Sr.
Chief Administrative Judge, Ninth Judicial Circuit

Charleston, South Carolina

Dated: March _____, 2016

I SO CONSENT:

Lee Ann W. Rice, Esq. (SC Bar #78367)
R. Alex Pate, II, Esq. (SC Bar #101967)
Staff Counsel
South Carolina Human Affairs Commission
1026 Sumter Street, Suite 101
Columbia, SC 29201
Counsel for Plaintiff

I SO CONSENT:

Ian R. O'Shea, Esq. (SC Bar # 100712)
O'Shea Law Firm
1120 Folly Road
Charleston, SC 29412
Counsel for Defendants

Pate, Alex

From: Pate, Alex
Sent: Monday, March 28, 2016 1:31 PM
To: Ian O'Shea
Subject: RE: SHAC & Stacy Woods v. Zeyi Chen & Zhirong Yang
Attachments: Consent Order 3 28 16.docx

Ian,

Hope your weekend went well. Attached is the consent order we've drafted. Going to contact the clerk to verify that it's captioned appropriately.

Let me know if there's anything that needs modification.

-Alex

R. Alexander Pate, II
Staff Attorney
South Carolina Human Affairs Commission
1026 Sumter St; Suite 101
Columbia, SC 29201
(p)803.737.4678
(f)803.737.7835

R-149

Pate, Alex

From: Pate, Alex
Sent: Friday, April 01, 2016 1:36 PM
To: Ian O'Shea
Subject: Chen settlement

Ian,

Following up on the proposed consent order; give me a call when you get a chance so we can get filing logistics worked out.

Hope your week's gone well,

-Alex

R. Alexander Pate, II
Staff Attorney
South Carolina Human Affairs Commission
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Columbia, SC 29201
(p)803.737.4678
(f)803.737.7835

R-150

Pate, Alex

From: Ian O'Shea <ioshea@theoshealawfirm.com>
Sent: Monday, April 04, 2016 9:49 AM
To: Pate, Alex
Subject: Re: Chen settlement

Alex,

I hope you had a nice weekend as well. I'm reviewing the document today and will get in touch with you once I have gotten thru it.

Sincerely,

Ian

Ian O'Shea, Esq.
O'Shea Law Firm, LLC
1120 Folly Road
Charleston, SC 29412

Phone: 843-805-4943

Fax: 843-805-4974

DISCLAIMER:

The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential and/or legally privileged material. Any review, retransmission, dissemination or other use of this information, directly or indirectly, by persons or entities other than the intended recipient is prohibited. If you are not the intended recipient please contact the sender and delete the material from all computers in which it resides. Internet communications cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late, incomplete, or contain viruses. Therefore, we do not accept responsibility for any errors or omissions that are present in this message, or any attachments, that have arisen as a result of e-mail transmission. If verification is required, please request a hard-copy version or contact us by phone.

Any views or opinions presented are solely those of the author and do not necessarily represent those of the firm.

CIRCULAR 230 DISCLOSURE: To comply with Treasury Department regulations, we inform you that, unless otherwise expressly indicated, any tax advice contained in this communication (including any attachments or enclosures) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed under the Internal Revenue Code or any other applicable tax law, or (ii) promoting, marketing or recommending to another party any entity, investment, plan, transaction, arrangement, or other tax related matter.

On Fri, Apr 1, 2016 at 1:35 PM, Pate, Alex <rpate@schac.sc.gov> wrote:

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-Alex

R. Alexander Pate, II
Staff Attorney
South Carolina Human Affairs Commission
1026 Sumter St; Suite 101
Columbia, SC 29201
(p)[803.737.4678](tel:803.737.4678)

(f)[803.737.7835](tel:803.737.7835)

R-152

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

South Carolina Human Affairs
Commission,

Plaintiff,

vs.

Zeyi Chen & Zhirong Yang,

Defendants.

IN THE COURT OF COMMONS PLEAS
NINTH JUDICIAL CIRCUIT

FILE NO. 14-CP-10-7037

NOTICE OF MOTION AND MOTION TO
ENFORCE SETTLEMENT AGREEMENT

FILED
2016 APR 15 PM 2:11
CLERK OF COURT

TO: IAN O'SHEA, ATTORNEY FOR THE DEFENDANTS

PLEASE TAKE NOTICE that the Plaintiff, South Carolina Human Affairs Commission (hereinafter "Plaintiff"), will move this Court in ten days or as soon as it may be heard thereafter for an Order compelling enforcement of the Settlement Agreement signed by the Defendant in the presence of their attorney on or March 24, 2016. This Motion is made pursuant to Rules 43 (k) and 41.1., SCRPC, as well as legal precedent regarding the enforcement of settlement agreements.

BACKGROUND

On March 24, 2016, the parties participated in mediation. After lengthy negotiations, the parties reached a settlement agreement. The settlement agreement was reduced to writing and signed by the parties in the presence of their counsel. (Exhibit 1) The signed document set forth the clear and specific terms of the settlement agreement between the parties. Id. Thereafter, the mediator, Amy L. Jenkins, Esq., signed a Proof of ADR report, indicating that the case was "fully settled." (Exhibit 2)

Parties agreed, also, to file "a Consent Order in the near future." *Id.* Plaintiff's attorneys prepared a proposed Consent Order and emailed it to Defendants' attorney on April 1, 2016. (Exhibit 3) Defendants' attorney acknowledged receipt of the Consent Order. *Id.* Defendants' attorney indicated by phone that his clients are unwilling to move forward with the agreed upon settlement. In response to this, Plaintiff's counsel emailed Defendant that this Motion would be forthcoming if no further response was received. (Exhibit 4)

LEGAL ANALYSIS

Plaintiff seeks an Order of this Court enforcing the settlement agreement between the parties pursuant to SCRCP 43 (k), which states that "No agreement between counsel affecting the proceedings in an action shall be binding unless ... reduced to writing and signed by the parties and their counsel." The purpose of this rule is "to prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence of and terms of agreements and to relieve the court of the necessity of determining such disputes, which it has been said are often more perplexing than the case itself." *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 495, 458 S.E.2d 533, 535 (1995). Settlement agreements are reviewed by the circuit court in much the same way as contracts. *Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 S.C. 634, 640, 643 S.E.2d 692, 695 (Ct.App. 2007). When "an agreement is clear and capable of legal construction the courts [sic] only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *Messer v. Messer*, 359 S.C. 614, 628, 598 S.E. 2d 310, 317 (Ct. App. 2004). When an agreement is plain and unambiguous, the court does not have the authority to modify its terms. *Patricia Grand Hotel*, 372 S.C. at 640, 643 S.E.2d at 695.

Applying the law to the facts and current procedural posture of the case it is clear that SCRCP 48 (k) bind the parties in this matter to the settlement agreement signed by the parties. It

is further clear that the parties hereto have an agreement that affects the proceedings in this action and which has been reduced to writing and signed by the parties. The Court should view this settlement agreement in the same way and under the same scrutiny that it would afford a contract. There are no ambiguous terms; indeed there is no dispute between the parties as to the terms, rather the Defendants seek to nullify what the Plaintiff considers a binding contract under the Rules of Civil Procedure and legal precedent.

CONCLUSION

Plaintiff respectfully requests an Order of the Court compelling the enforcement of the settlement agreement attached hereto.

Respectfully submitted,



Lee Ann W. Rice, Esq. (SC Bar No.: 78367)
R. Alex Pate, Esq. (SC Bar No.: 101967)
South Carolina Human Affairs Commission
1026 Sumter Street, Suite 101
Columbia, SC 29201
(803) 737-7800
larice@schac.sc.gov
rpate@schac.sc.gov

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina

April 14, 2016

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

SOUTH CAROLINA HUMAN AFFAIRS
COMMISSION,

Plaintiff,

vs.

ZEYI CHEN & ZHIRONG YANG,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2014-CP-10-07037

SETTLEMENT AGREEMENT

The parties have resolved this matter at mediation held on March 24, 2016 on the following terms:

1. The mediator fees and costs shall be equally split between the Plaintiff and the Defendants.
2. The Defendants commit to complying with the Fair Housing Laws in the future. There is no admission of liability on their part. The parties agree that there was a *bona fide* dispute in this case as to the law and the facts.
3. Defendants agree to participate in one free training session conducted by the Plaintiff on fair housing principles to be held in Charleston County, South Carolina.
4. Defendants agree to post a fair housing laws poster on their rental premises, which shall be provided to them at no cost by the Plaintiff.
5. The Defendants agree to pay to the Plaintiff a total amount of Nine Thousand Five Hundred Dollars (\$9500.00) to be split into three payments as follows:
 - a. An initial payment of Three Thousand Five Hundred Dollars (\$3500.00) to be paid within thirty (30) days of the Consent Order being fully executed;
 - b. A second payment of Three Thousand Dollars (\$3000.00) to be paid within thirty after issuance of the first payment;
 - c. A third payment of Three Thousand Dollars (\$3000.00) to be paid within thirty after issuance of the second payment.
6. These terms will be reduced to a formal Consent Order to be executed by all of the parties, which shall be a public document.

IT IS SO AGREED:

Lee Ann Rice
South Carolina Human Affairs Commission

By Attorney Lee Ann Rice

Stacy Woods
Stacy Woods

Zeyi Chen
Zeyi Chen

Zhirong Yang
Zhirong Yang

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

PROOF OF ADR OR EXEMPTION

FILE NO.: 2014-CP-10-7037

FILED
2016 MAR 29 PM 2:11
JULIE J. KRISTONG
CLERK OF COURT

(An original and copy of this form is to be completed and filed with the Office of the Clerk of Court and a copy forwarded to the attorneys for the parties within 10 days of the conclusion of ADR or within 300 days of the filing date of the action, whichever is earlier.)

PURSUANT to the South Carolina Alternative Dispute Resolution Rules (SCADR):

- A. _____ I certify that this case is exempt from ADR for the following reason and the parties wish to exercise that exemption:

Plaintiff/Attorney for Plaintiff

Defendant/Attorney for Defendant

Print Name

Print Name

Phone/Fax
Date: _____

Phone/Fax

- B. X 1. Alternative Dispute Resolution (ADR) was conducted in the form of:

Mediation

(Note: If binding arbitration has been chosen by the parties but not yet completed, an appropriate order of dismissal must be attached hereto.)

2. The neutral(s) was/were: (Name of arbitrator/mediator):

Amy Jenkins, McAngus Goudelock & Courie, LLC

3. The ADR was conducted on March 24, 20 16

4. As a result of ADR, this case should be considered (please check one);

(X) Fully Settled.

() by Consent Judgment, to be filed by _____

or () Voluntary Dismissal to be filed by _____

() Partially Settled.

() At an Impasse.

() In need of further ADR I ☐ am ☐ am not willing to continue as a neutral. I recommend that ADR resume as of _____

5. Plaintiff ☒ was present ☐ was not present
Defendant ☒ was present ☐ was not present

6. Other participants were:

X Lawyer for Defendant Ian O'Shea and Jim Leffew
X Lawyer for Plaintiff Le Ann Rice and Alex Pate
____ Representative for Insurance Carrier _____
____ Guardian *ad Litem* _____
____ Experts _____
____ Others _____

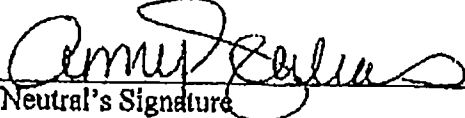
7. Choice of the neutral was by:

X Stipulation
____ Court Order

8. The total number of hours spent in ADR was: 7 hours.

9. Further comments of the neutral:

The Parties will be filing a Consent Order in the near future.


Neutral's Signature

Date: 3/28/16

AGREEMENT TO MEDIATE

SHAC and Stacy Woods v. Zeyi Chen and Zhirong Yang, SHAC Charge No. [currently unknown]

LOGISTICS

The parties and their counsel agree to attempt a negotiated resolution of their pending claims through mediation. The mediation has been scheduled and confirmed as follows:

Date/Time: March 24, 2016, beginning at 10:00 a.m.

Location: McAngus Goudelock and Courie, LLC, 765 Johnnie Dodds Blvd., Suite 200, Mt. Pleasant, South Carolina 29464

Mediator: Amy Jenkins, Esq., McAngus Goudelock and Courie, LLC (Direct Dial: 843-576-2917)

ATTENDANCE AND AUTHORITY

All parties agree to attend the mediation conference with full authority to enter into a resolution of this matter. It is agreed and understood that each party is required to have in attendance at the mediation such person(s) (including insurance carrier representatives, if applicable) with full authority to settle the dispute. Attendance should be in person unless the mediator agrees otherwise.

It is agreed and understood that the mediation is private and is reserved for the parties and their representatives. Other persons may attend only with the permission of all of the parties and with the consent of the mediator.

The parties agree that they have the full day scheduled and are available for the full day of mediation, until the parties achieve settlement or the mediator declares an impasse or adjournment.

THE MEDIATION PROCESS

Mediation is an extension of the negotiation process utilizing the services of a neutral and impartial third party who acts to encourage communication and facilitate the resolution of the parties' disputes. It is an informal and non-adversarial process with the objective of providing a structured, managed negotiation to assist the parties in their efforts to reach a settlement agreement. The mediated settlement conference is not a trial or hearing, the mediator is not a judge, and the parties retain their right to continue the case if they do not reach settlement.

Mediation is consensual in nature. The ultimate decision-making authority in the mediation rests with the parties. The mediator's role includes assisting in identifying and clarifying issues, encouraging joint problem-solving, stimulating meaningful communication and negotiation, analyzing alternatives, and exploring creative solutions. The mediator will not coerce or unfairly influence any party.

The parties also understand that the mediator has an obligation to work on behalf of each party equally and that the mediator cannot render individual legal advice to any party. The mediator may, however, point out strengths and/or weaknesses in each party's position. It is agreed and understood that no attorney-client relationship exists between the mediator and the parties, and that the mediator is not providing legal services to any of the parties.

PROCEDURE AND CONFIDENTIALITY

At mediation, the mediator will make some brief opening remarks during a joint session regarding the process, after which all present will have the opportunity to make their opening remarks, engage in dialogue, and propose solutions to the issues in dispute. The joint session is generally followed by private and confidential meetings with each party and their counsel. The mediator will keep the specific content of such meetings confidential unless and until the party providing the information indicates that it is acceptable for the mediator to share this information with the other party. The mediator may request additional joint sessions as appropriate to facilitate resolution. Any partial or global settlement will be reduced to a written and enforceable Memorandum of Settlement on the date of settlement.

The parties agree to keep all matters discussed and information exchanged during the mediation confidential (though the facts of the case subject to discovery before the mediation remain subject to discovery after the mediation). Mediation discussions, written and oral communications, any draft resolutions, and any unsigned mediated agreements shall not be admissible in any court proceeding. Only a mediated agreement, signed by the parties may be so admissible. The parties further agree to not call the mediator to testify concerning the mediation or to provide any materials generated during or for the mediation in any court proceeding between the parties. The mediation is considered by the parties and the mediator as settlement negotiations.

COST OF MEDIATION

The mediator's hourly charge is \$285.00 per hour (includes time for review of any materials, pre-mediation conference time, the mediation conference, preparation and filing of any mediator's report, and travel time outside of Charleston County, South Carolina). Mediator charges also will include reimbursement of any necessary and reasonable expenses. Total mediation charges will be split evenly between the parties, unless otherwise agreed. At the conclusion of the process, the mediator will prepare and send to counsel a Statement for the mediation services, which is due and payable upon presentment. The mediator waives any advance deposit or administrative fee in consideration for counsel's assurance of prompt payment.

The parties understand that they shall be responsible for two hours of the mediator's time at the above stated mediation rate for any appointment which they schedule but do not attend and do not provide at least 24-hours advance notice of the cancellation.

Agreed to this _____ day of March, 2016.

I have read and understood this Agreement to Mediate and will abide by its terms:

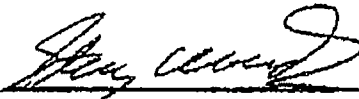
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SHAC



Signature

Stacy Woods



Signature

Defendants:

Zeyl Chen

Signature

Zhirong Yang

Signature

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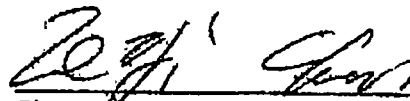
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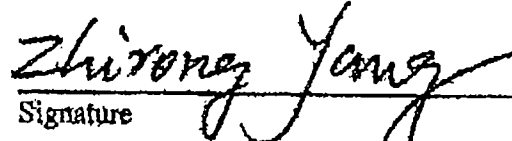
Defendants:

Zeyi Chen



Signature

Zhirong Yang



Signature

Pate, Alex

From: Ian O'Shea <ioshea@theoshealawfirm.com>
Sent: Monday, April 04, 2016 9:49 AM
To: Pate, Alex
Subject: Re: Chen settlement

Alex,

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Ian

Ian O'Shea, Esq.
O'Shea Law Firm, LLC
1120 Folly Road
Charleston, SC 29412

Phone: 843-805-4943

Fax: 843-805-4974

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On Fri, Apr 1, 2016 at 1:35 PM, Pate, Alex <rpate@schac.sc.gov> wrote:

Ian,

Following up on the proposed consent order; give me a call when you get a chance so we can get filing logistics worked out.

Hope your week's gone well,

-Alex

R. Alexander Pate, II
Staff Attorney
South Carolina Human Affairs Commission
1026 Sumter St; Suite 101
Columbia, SC 29201
(p)803.737.4678

(f)803.737.7835

Pate, Alex

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Sent: Monday, March 28, 2016 1:31 PM
To: Ian O'Shea
Subject: RE: SHAC & Stacy Woods v. Zeyi Chen & Zhirong Yang
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policy, practice, or act that results in disparate impact on a member or members of a protected class.

2. This Order requires that Defendants take actions as set forth below to remedy the alleged violations. Defendants retain the discretion to take any additional actions that they believe are appropriate to achieve the goals of this Order. The effective date of this Order shall be the date on which it is entered by the Court.

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1. Within one year of the effective date of this Order, Defendants will coordinate with a member of SCHAC to arrange for a training session on fair housing principles. This training shall be conducted by SCHAC at no cost to Defendants and will take place in Charleston County at a location to be agreed upon by the parties.

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III. Reservations

1. SCHAC reserves the right to reopen its investigation should Defendants fail to comply with the terms of this Order. SCHAC may, upon request or on its own initiative, undertake to verify compliance with the terms of this Order. Additionally, SCHAC, in accordance with S.C. Code § 31-21-120 (D), shall make public the terms of this Order.

IT IS SO ORDERED this ____ day of _____, 2016.

The Honorable Roger M. Young Sr.
Chief Administrative Judge, Ninth Judicial Circuit

Charleston, South Carolina

Dated: March _____, 2016

I SO CONSENT:

Lee Ann W. Rice, Esq. (SC Bar #78367)
R. Alex Pate, II, Esq. (SC Bar #101967)
Staff Counsel
South Carolina Human Affairs Commission
1026 Sumter Street, Suite 101
Columbia, SC 29201
Counsel for Plaintiff

I SO CONSENT:

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O'Shea Law Firm
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Charleston, SC 29412
Counsel for Defendants

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STATE OF SOUTH CAROLINA
HUMAN AFFAIRS COMMISSION



Raymond Buxton, II
Commissioner

1026 Sumter Street, Suite 101 (29201)
Post Office Box 4490
Columbia, South Carolina 29240-4490
(803) 737-7800 (803) 737-7835 Fax

www.state.sc.us/schac
(800) 521-0725 In-State

February 11, 2014

Chen Zeyi
1465 Stuart Engals Blvd.
Mount Pleasant, SC 29464

Certified Receipt # 7011 1350 0005 5245 9046

Re: Woods, Stacy vs. Chen, Zeyi & Yang, Zhirong
SHAC# H-1-14-003/HUD # 04-14-0292-8

Dear Chen Zeyi:

The above referenced housing discrimination complaint was filed with the South Carolina Human Affairs Commission (SHAC) on February 10, 2014, pursuant to the South Carolina Fair Housing Law (31-21-120, S.C. Code of Laws of 1976, as amended). A copy of the complaint is enclosed.

You may file with this office an Answer to the complaint not later than ten (10) days after receipt of this letter. You may assert in your Answer any defense which might be available in a court of law. The answer must be signed and affirmed under penalty of perjury and may be reasonably and fairly amended at any time. The affirmation must state "I declare under penalty of perjury that the foregoing is true and correct."

You are encouraged to read carefully the enclosed Notice. Contained in the Notice is important information regarding Rights under the Fair Housing Law and the processing of the complaint.

You will be contacted after your response has been received. If you have any questions, please contact me at (803) 737-3179 or (800) 521-0725. You may reach me at my email at mcaldwell@schac.sc.gov.

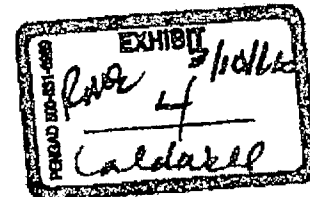
Sincerely,

Marvin L. Caldwell

Marvin L. Caldwell
Investigator, Fair Housing

Enclosures

/mlc



Our mission is to eliminate and prevent unlawful discrimination in employment, housing and public accommodation.

**REQUEST FOR INFORMATION
REFUSAL TO RENT**

**CASE NUMBER H-1-14-005
Woods, Stacy v. Chez, Zeyi & Yang, Zhirong**

**Request for Information for the property located at 1465 Stuart Englis Boulevard
Mount Pleasant, SC 29464:**

1. Provide a position statement and address each issue alleged in the complaint.
2. Provide a copy of the complainant's application and documents obtained regarding the Complainant's qualifications for tenancy.
3. Provide the following information for all owners, in whole or in part, of the property:
 - 3.1. Name
 - 3.2. Address
 - 3.3. Type of ownership
 - 3.4. Phone number
 - 3.5. A list of all other properties in which an ownership is held.
4. Describe what type of business owns or operates the property. Include the following in the description:
 - 4.1. Form of organization
 - 4.2. All jurisdictions where the respondent does business, and
 - 4.3. Primary place of business
5. Provide the following information of any person or entity involved in or responsible for the management or rental of the property:
 - 5.1. Name
 - 5.2. Title
 - 5.3. Address
 - 5.4. Phone number
6. Provide the following information for all employees
 - 6.1. Name
 - 6.2. Title
 - 6.3. Address
 - 6.4. Phone number
7. Provide copies of, or make available for inspection, all rental applications, leases, and waiting lists for the property for the last six months.
8. Provide copies of all rules, regulations, policies, and procedures used to determine if a prospective renter is qualified to rent a unit. If these rules, regulations, policies, and procedures are not written, how are leasing agents and potential renters made aware of them?
9. Provide a copy of any fair housing policies or guidelines used by the management of the property. How are employees made aware of these policies?
10. Provide a map/layout of the property. Label each building and the types of units available.
11. How many units are located at the property?
12. How many unites were vacant during the last six months?

13. Provide the following information for each tenant residing at the property:
 - 13.1. Name
 - 13.2. Address
 - 13.3. Date of tenancy
 - 13.4. Unit type
 - 13.5. Race
 - 13.6. Familial Status
14. Has any person or entity involved in the ownership, management, or rental of the property been the subject of a fair housing or discrimination investigation? If so, provide the following information:
 - 14.1.1. Name of agency investigating the complaint
 - 14.1.2. Agency case number
 - 14.1.3. Nature of complaint
 - 14.1.4. Disposition of complaint
15. Has any person or entity involved in the ownership, management, or rental of the property been the subject of an investigation by any real estate licensing board or association? If so, please describe the nature and outcome of the investigation.



**STATE OF SOUTH CAROLINA
HUMAN AFFAIRS COMMISSION**



Raymond Buxton, II
Commissioner

1026 Sumter Street, Suite 101 (29201)
Post Office Box 4490
Columbia, South Carolina 29240-4490
(803) 737-7800 (803) 737-7835 Fax

www.state.sc.us/schac
(800) 521-0725 In-State

February 27, 2014

Yang Zhirong
1465 Stuart Engals Blvd.
Mount Pleasant, SC 29464

Re: Woods, Stacy vs. Chez, Zeyi & Yang, Zhirong
SHAC# H-1-14-005/HUD # 04-14-0292-8

Dear Yang Zhirong:

During the course of the investigation, there will be opportunities to resolve the complaint through the process of conciliation. Conciliation is a mutual agreement (with the approval of the Agency) with written terms and conditions that both parties agreed upon. The conciliation will be recited in a legal binding document called "Conciliation Agreement".



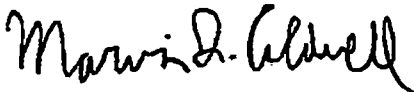
As the Investigator, I am inclined to continue to investigate the case just in case the complaint can't be resolved through conciliation. The Complainant informed me that that there were a few points that were not mentioned in her complaint. The Complainant stated she called and spoke to Yolanda (with a disguised voice) the day after being denied the chance to rent the property on January 10, 2014, inquiring about what seemed to be the same unit listed at a cheaper price and less square footage on Craigslist. The Complainant stated that Yolanda informed her that the unit was still available. So with the information I initially requested, can you provide me with the information of the individual who the property was actually rented to, including their Race and Familial Status. I will also need the copies of the application showing the date the lease started

and a copy of the application showing the date the individual filed an application. I will need to speak to Yolanda as well to get her side of the story, so please provide me with her contact information.

Again, I want to reiterate that I do not represent either side during this investigation. I will be fair, impartial and neutral throughout the investigative process. The information I requested is needed to gather all the facts in the allegations. Conciliation is a service that we provide, to see if the case can be resolved by a mutual agreement. The Complainant also stated that she is interested in some form of mediation and/or in-person fact finding conciliation attempt. If that is something you are interested in as well, let me know.

If you have any questions, feel free to contact me.

Sincerely,



Marvin L. Caldwell
Investigator, Fair Housing

/mlc

U.S. Postal Service
CERTIFIED MAIL RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)
 (For use by individuals and businesses only)

OFFICIAL USE

Postage \$	
Certified Fee	
Return Receipt Fee (Indemnity Required)	
Restricted Delivery Fee (Indemnity Required)	
Total Postage & Fees \$	

Postmark Here

Sent to: Yang Zhirong
 Street Address: Yang Zhirong
 or PO Box:
 City, State, ZIP:

SENDER'S CONFIRMATION SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
 Yang Zhirong
 30 Colleton Drive
 Charleston, SC 29407

2. Article Number
 (Transfer from service label) 7011 2000 0002 0039 7879

COMPLETE THESE SECTIONS CAREFULLY

A. Signature
 X Zhirong Yang

B. Received by (Printed Name)
 Zhirong Yang

C. Date of Delivery
 DEC 12

D. Is delivery address different from item 1?
 If YES, enter delivery address below: Yes No

3. Service Type
☒ Certified Mail ☐ Priority Mail Express™
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ Collect on Delivery

4. Restricted Delivery? (Extra Fee) ☐ Yes

PS Form 3811, July 2013 Domestic Return Receipt



STATE OF SOUTH CAROLINA
HUMAN AFFAIRS COMMISSION



Raymond Buxton, II
Commissioner

1026 Sumter Street, Suite 101 (29201)
Post Office Box 4490
Columbia, South Carolina 29240-4490
(803) 737-7800 (803) 737-7835 Fax

www.state.sc.us/schac
(800) 521-0725 In-State

February 27, 2014

Chen Zeyi
1465 Stuart Engals Blvd.
Mount Pleasant, SC 29464

Re: Woods, Stacy vs. Chez, Zeyi & Yang, Zhirong
SHAC# H-1-14-005/HUD # 04-14-0292-8

Dear Chen Zeyi:

During the course of the investigation, there will be opportunities to resolve the complaint through the process of conciliation. Conciliation is a mutual agreement (with the approval of the Agency) with written terms and conditions that both parties agreed upon. The conciliation will be recited in a legal binding document called "Conciliation Agreement". At this time the Complainant has made an offer to settle. The Complainant stated that she would settle for \$3,500. The Complainant stated she will have to pay \$865 for rent now as apposed to \$700 (the second listing amount of the unit). The Complainant stated that she will have to pay \$225 monthly for water and electricity monthly. The Complainant also stated she had to pay a \$30 application fee and \$120 processing fee. The Complainant stated she got to \$3,500 by totaling the extra monthly expenses she has to pay totaling to \$2,900, \$150 in application and processing fee and \$450 for pain and suffering. As the Respondents, you may accept, decline or make a counter offer.

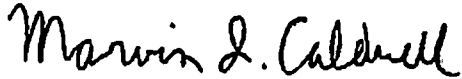
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If you have any questions, feel free to contact me.

Sincerely,

A handwritten signature in black ink that reads "Marvin L. Caldwell". The signature is written in a cursive, flowing style.

Marvin L. Caldwell
Investigator, Fair Housing

/mlc

7004 1350 0005 5245 9084

U.S. Postal Service
CERTIFIED MAIL RECEIPT
 (Domestic Mail Only - No Insurance Coverage Provided)
 For delivery information visit us online at usps.com

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

Postmark Here

Sort To _____
 Street, Apt. No.,
 or PO Box No. _____
 City, State, ZIP+4 _____

SENDER'S CERTIFICATION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return this card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
 Chen Zeyi
 30 Colleton Drive
 Charleston, SC 29407

ADDRESSEE'S CERTIFICATION

A. Signature ☒ Agent
☒ Addressee

B. Received by (Printed Name) _____ C. Date of Delivery _____

D. Is delivery address a school, business, or government office? ☐ Yes
 If YES, enter delivery address below: _____ ☐ No

3. Service Type
☒ Certified Mail® ☐ Priority Mail Express™
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ Collect on Delivery

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number
 (Transfer from service label) 7004 1350 0005 5245 9084

PS Form 3811, July 2013 Domestic Return Receipt

Caldwell, Marvin

From: gomes4580 <gomes4580@163.com>
Sent: Thursday, March 06, 2014 4:44 PM
To: Caldwell, Marvin
Subject: the complaint

Marvin Caldwell

Investigator, Fair Housing

Human Affair Commission

March 6, 2014

Dear Mr. Marvin Caldwell:

We appreciate your work and patience. In fact, we received the letter from your commission and letter from US Department of Housing; we were shocked by the complaint. Zeyi Chen and Zhirong Yang, We are married couple with different last name due to Chinese tradition. We are owner of rental place, but Yolanta Anriushkiavichus did ad, communication, showing, application, negotiation, record keeping, and management work. There was no discrimination involved in the whole process.

Stacy Wood never stated her race and we never asked. Stacy drove to location later that night, we already closed business, door locked, we left office, we went to car, and entered car. When Yolanta noticed a car was parking, Stacy was stayed inside her car, then Yolanta was walking toward her car, then friendly told Stacy, said: sorry, the place was rented. It was so dark, it is impossible to judge the person skin color.

We never care about tenant race and skin color. I, Zeyi Chen, myself is darker, when I was child, people called me black boy.

More than 20 years ago, we had a long-term leased house first floor on Ashley Avenue in Charleston near to the colonial lake, there was only 2 bedrooms, one next to other room, one small kitchen and small bathroom. My family was sharing everything with one tenant in one of two rooms. This was first tenant of my family in Charleston, he is darker African American; we were lived in the house, respected each other very well for longtime and became friend. He left because he married a white girl and had a child; he specifically brought his child to my office and let me to look at.

Actually, we have 2 places with black tenants. We are doing well with our tenants, discrimination never happened.

Stacy used race for complaining and wants to get something from what she fabricated story, it is purely money motivated.

Stacy saw the ad on 1-8 14, she emailed expressing her interest; she made appointment on 1-10 14. She came when it was dark, we already closed and locked office and went to the car. When Yolanta noticed the incoming car, she walked to the car and was friendly, talked to her and told her the place was already rented, and Yolanta was not rude at all.

On her next call, Yolanta was friendly and patiently talking to her, but Stacy was rude, short tempered, and was not interested in listening to Yolanta. Stacy was yelling, screaming and threatening, if the state government can get phone record from Comcast, you will discover their conversation and know what the truth was. We have tried to get the phone record from Comcast since we received your letter, but we failed.

The place for rent was room, good for single person. There was no kitchen, no oven, and no range. There is only one infrared cooking plate in each unit. The room was on the second floor, there are a lot of steps from ground, and it is not appropriate for 4 years old child. Each place rented to one person, it is why the rent is so inexpensive

Stacy claimed in document, she saw the place, it is not true, she does not know where the place is, first floor, middle floor or second floor? Front or back? She does not know.

Stacy claimed in document and said, Yolanta checked her financial information. It is not true. We do not have any information about her. After Ad, Yolanta received more than 25 emails and phone calls, she was very busy.

We suggest, we forgive what Stacy did in this process, but she needs to know, everyone has a lot to do in our life and work. We want to respect mutually and live peacefully.

Dear Mr. Marvin Caldwell: you worked very hard to help resolve the misunderstanding in this rental subject. We appreciate very much for your help. Please contact us if you have any question, thank you very much,

Sincerely yours,

Zeyi Chen and Zhirong Yang

843-763-1964 (h)

Yolanta Andriushkiavichus

843-697-5164(c)

Caldwell, Marvin

From: gomes4580 <gomes4580@163.com>
Sent: Wednesday, March 12, 2014 11:51 AM
To: Caldwell, Marvin
Subject: the complaint

Marvin Caldwell

Investigator, Fair Housing

Human Affair Commission

March 12, 2014

Dear Mr. Marvin Caldwell:

My wife and myself, we have received your registered letter to my home and to 1465 Stuart Engals Blvd, Each time we needed to go post office. You said in letter , there is attachment which is not in letter, we thought we already have it. We will give you more information about what was happened and information about the building and tenants as you requested. Stacy should not be paid for anything and she will never be paid. We will continue work to make everything clear. We will send more mail as soon as possible. We hope you have received a registered letter from Zeyi Chen, Zhirong Yang, and Yolanta Andriushkiavichus. thank you very much for your patience,

We appreciate your work and patience. In fact, we received the letter from your commission and letter from US Department of Housing; we were shocked by the complaint. Zeyi Chen and Zhirong Yang, We are married couple with different last name due to Chinese tradition. We are owner of rental place, but Yolanta Anriushkiavichus did ad, communication, showing, application, negotiation, record keeping, and management work. There was no discrimination involved in the whole process.

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We suggest, we forgive what Stacy did in this process, but she needs to know, everyone has a lot to do in our life and work. We want to respect mutually and live peacefully.

Dear Mr. Marvin Caldwell: you worked very hard to help resolve the misunderstanding in this rental subject. We appreciate very much for your help. Please contact us if you have any question, thank you very much,

Sincerely yours,

Zeyi Chen and Zhirong Yang

843 763-1964 (h)

Volanta Andriushkiavichus

843 697 5164(c)

From: gomes4580 <gomes4580@163.com>
Date: 2014-03-13 04:20:19
To: "mcaldwell@schac.sc.gov" <mcaldwell@schac.sc.gov>
Subject: building situation

Marvin Caldwell

Investigator, Fair Housing

Human Affair Commission

March 12, 2014

Housing Discrimination Complaint
Woods, Stacy v. Chez, Zeyi & Yang, Zhirong
Inquiry No.: 373746
HUD File No.: 04-14-0292-8

Woods, Stacy vs. Chez, Zeyi & Yang, Zhirong
SHAC# H-1-14-005/HUD # 04-14-0292-8

Dear Mr. Marvin Caldwell:

The whole building of 1465 Stuart Engals Blvd was occupied by our Mount Pleasant office of non-invasive skin care and acupuncture clinic. In the late part of last year, we were planning to retire and close our business, but before holiday the professors of my wife's laboratory got a 4 years research grant. My wife will work for another four years in MUSC. I decided to continue my business in reduced scale.

The second floor was part of my office, usually less frequently used. A chiropractor was interested in renting it as her office. Another two acupuncturists, an esthetician and a massage therapist also interested in it too. A nationwide commercial real estate company called me almost every month and is always highly interested in its rent as office space.

However, before the final decision about my business future, we decided to try temporarily short term rent as two units on second floor. We were always hesitated about second floor for rent, because the potential tenant activity over our head might affect our business. This is the reason why we did not allow people to move in second floor as tenant.

One unit was rented to a single person for 6 month from January 5, 2014. The remaining space was reserved originally for a chiropractor. Because no commitment was made, we decide to search a single person tenant for short term rent. The rent can up-to 6 months, but the tenant can reduce the rental period whenever the tenant asks one month earlier with written agreement for rental termination. There is no penalty and deposit will return to the tenant after inspection by Yolanta.

The second unit over our procedure room was rented to a tenant on January 16, 2014 for 6 months. After termination of these two rental agreement, we will take these two units back for our office use or the commercial real estate company will handle it as commercial office space. Rent the room as single person residence is absolutely temporary. The building is commercial setting, as physician's office, approved by Charleston County.

After ad on Craigslist, in first and second day, Yolanta received numerous emails, calls and a number of communications between her and inquirers; there were more than 25 serious responses and inquirers. Responders were searching for their best ideal space among many places they have searched online; Yolanta was searching the best ideal candidate among those responders and inquirers. If one person wanted to be accepted as application candidate as prospective tenant, Yolanta must perform background checks, including review the documents of the financial information, criminal history. We will mail you one sample of our application form for potential candidate to fill for you to look.

A female student responded on January 8, 2014. She was searching for the room rent for herself by email and call. She made appointment and came on 4 pm of January 10, 2014. After student visited the place, she and her boyfriend of other state liked the room, and filled application form. The student promised: she will come back with document of her and her parents' financial information, credit history, other information and money for deposit.

If we are satisfied with all the information and document and if she agrees with our policy, rule and regulation, then we will make an agreement with her and we will accept her deposit money.

On January 8, 14, Stacy woods emailed and called, expressed interest. She made an appointment on January 10, 2014. When she came on that day, it was already dark, our business was closed, door locked, we went to the car. Yolanta discovered a car was parking. She walked to the car, after mutual introduction, Yolanta politely told Stacy: the place was rented.

The student did not come back as she promised. We decided to publish a new ad for \$700 per month. Yolanta received many responses. One of callers was Stacy.

Yolanta tried to tell Stacy, the space rent was for one person. Stacy was not happy with her explanation, and she became upset, rude, and she was not interested in listening to yolanta's explanation, she was yelling, screaming and threatening.

After each ad on Craigslist, there were numerous calls, emails and phone/online communication. Yolanta was extremely busy and stressful. But her goal was to select and to find one single person as potential tenant among many inquirers. The financial information, credit history, criminal history, rental history all have to be asked and checked and verified.

Yolanta had to emphasize the rent is short term, maximum six months. We have no time deadline, but we only permit one single person to rent this space. If no right candidate found, we would keep our second floor room vacant. We will never allow the occupancy of second floor to destroy our business and destroy our patient's peaceful environment for healing and relaxation. The room for rent is over the head of our treatment and procedure room. The insulation is not good. Walking, moving, dancing, vibration, speaking, music, all be heard. Our patients were complaining about this disturbance sometime.

In this building, I treat patients with variety of health problems: back pain, anxiety, headache, sinusitis, cold, upper respiratory infection.... Even though there are door separating first floor

and second floor, but we share same entrance door and same walk way. It is not in the best interest of very young child.

After each ad, there were so many responders, but only one single person can be chosen. Some people would be disappointed. Most people understood the situation. The majorities of space seeker understand that, they have the right to select and to choose their best ideal place among many, the place manager has the right to select and to choose ideal tenant. We never received the complaint. Stacy is an exception. Craigslist's ad has advantage, but can be risky and dangerous.

Stacy did not have the chance to rent; it was not due to her race or her child. This building has complex situation, we can only permit one single person to rent one unit. My business is remaining functioning; we cannot allow any couple, or any parent child to move into this unit.

Otherwise, our business cannot be normally performing and our patients' interest would be hurt and damaged. We hope: Stacy understands our situation and patient's interest and her child best interest.

I have a patient who often wants to have treatment in evening or holiday due to her work schedule, she call my cell phone or my home phone first, then she comes to my home, drives me to my office if it is raining, too hot or too cold. I have many patients, but only this patient is enjoying this after-hour privilege. She is exceptional, she is dark African American. She trusts me and I serve her for many years until now.

This is another example; it shows that we do not discriminate. Please read and give me your advice, thank you very much,

Sincerely yours,

Zeyi Chen,

Zhirong Yang

Yolanta Andriushkiavichus

Pate, Alex

From: Pate, Alex
Sent: Thursday, April 12, 2018 12:27 PM
To: Nicholson, J. C. Law Clerk (Jonathan Arndt)
Cc: 'Brooklyn O'Shea'; Wooten Rice, Lee Ann; Ian O'Shea; Gable, Sarah
Subject: SCHAC v Chen; Cases requested at April 11 hearing
Attachments: Barnes v Ergon Refining Inc.rtf; Binder v Long Island Lighting Co.rtf; Branch v Phillips Petroleum Co.rtf; Brooks v Grandmas House Day Care Centers Inc.rtf; Dhillon v Lincare Inc of Delaware.rtf; EEOC v Parker Drilling Co.rtf; EEOC v Philip Services Corp.rtf; EEOC v Scrub Inc.rtf; Frazier v Indiana Dept of Labor.rtf; Hill v Shoe Show Inc.rtf; Olitsky v Spencer Gifts Inc.rtf; Pemberton v Lloyds Register Drilling Integrity Services Inc.rtf; Cases requested at April 11 Hearing.docx

Judge Nicholson,

Please find attached a short list of cases you requested at the hearing yesterday; also attached are copies of the cases themselves. Some duplicative cases from Texas and the Fifth Circuit were excluded, although Plaintiff can send those over if you wish.

If anything further is needed, please let us know.

Sincerely,

R. Alexander Pate, II
Staff Attorney
South Carolina Human Affairs Commission
1026 Sumter St; Suite 101
Columbia, SC 29201
(p)803.737.4678
(f)803.737.7835

R-189

38 F.3d 568

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Fifth
Circuit Rules 28.7, 47.5-3, 47.5-4. (Find CTA5
Rule 28 and Find CTA5 Rule 47)
United States Court of Appeals,
Fifth Circuit.

Alfred BARNES, Plaintiff-Appellant,
v.
ERGON REFINING, INC.,
Defendant-Appellee.

No. 93-7375.

Summary Calendar.

Oct. 4, 1994.

Appeal from the United States District Court for the
Southern District of Mississippi (CA 91-0189-B).

Before SMITH, EMILIO M. GARZA, and PARKER,
Circuit Judges.

Opinion

PER CURIAM.*

*1 Alfred Barnes sued Ergon Refining, Inc. ("Ergon") for refusing to hire him as a pool operator at Ergon's Vicksburg, Mississippi, oil refinery. Barnes claimed that Ergon intentionally discriminated against him because of his race, in violation of 42 U.S.C. § 1981 (1988) and Title VII of the Civil Rights Act of 1964 ("Title VII"). Barnes also claimed under Title VII that Ergon refused to hire him in retaliation for a charge he had previously filed against a former employer. The jury found for Ergon on Barnes' § 1981 claim, and the district court found in favor of Ergon on his Title VII claims. Barnes appeals certain evidentiary rulings and the judgment against him. Finding no reversible error, we affirm.

I

Barnes, an African-American, applied for work at Ergon a few weeks after he was laid off from his job at Petrosource, another oil refinery in Vicksburg, Mississippi. Ergon had no openings at that time, and Steve Reed, an Ergon manager, informed Barnes of that fact.

A few months later, a friend told Barnes that Ergon had openings, including an entry-level position as a pool operator at a pay rate of \$6 per hour.¹ Barnes spoke again with Reed, who had been asked by Ricky Allen, the plant superintendent, to conduct the initial screening of candidates. Reed interviewed Barnes, and referred him to Allen for further consideration. Allen interviewed Barnes for the position of pool operator.

Barnes had the requisite qualifications for the pool operator position. He had several years of experience in similar jobs at Petrosource, and he had completed special training during his service in the armed forces. When he was laid off from Petrosource, Barnes held a supervisory position and was making approximately \$12 per hour.

At the time of his interview with Allen, Barnes had also filed an EEOC charge against his former employer, Petrosource, for race discrimination regarding his discharge from that company. Barnes informed a receptionist at Ergon, Ruth Brown, of this claim, and Brown relayed this information to Allen.

When Ergon told Barnes that they did not intend to hire him, he contacted and met with Allen. Allen told Barnes that Barnes was overqualified, and, based on past experience, he believed that Barnes would be dissatisfied with the entry-level pool operator job and would not stay long-term.

Barnes filed a charge of racial discrimination with the EEOC. When the EEOC declined to pursue his claim, Barnes filed suit against Ergon, claiming that Ergon's refusal to hire him constituted racial discrimination, in violation of 42 U.S.C. § 1981 and Title VII. He also claimed that Ergon refused to hire him as retaliation for his charge against Petrosource. The § 1981 claim was tried before a jury, and the district court heard the Title VII claims. Both the jury and the district court found that Barnes had failed to prove

discrimination. Accordingly, the district court entered judgment in favor of Ergon on all claims. Barnes now appeals, asserting that the district court erred in 1) excluding evidence Barnes sought to admit from the EEOC file concerning his charge against Ergon; 2) entering judgment against him; and 3) denying him judgment as a matter of law.

II

A

*2 Barnes first contends that the district court erred by excluding documents from his EEOC file.¹ “[W]e will reverse an evidentiary ruling only where the district court has clearly abused its discretion and a substantial right of a party is affected.” *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 202 (5th Cir.1992); see also Fed. R. Evid. 103(a) (“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected”); see also *Rock v. Huffco Gas & Oil Co.*, 922 F.2d 272, 277 (5th Cir.1991) (applying Rule 103(a)).

Section 706(b) of Title VII provides that “[n]othing said or done during and as a part of such informal [EEOC conciliation] endeavors may be ... used as evidence in a subsequent proceeding without the written consent of the persons concerned.” 42 U.S.C. § 2000e-5(b) (1988 & Supp. V 1993). In *Olitsky v. Spencer Gifts, Inc.*,² we excluded the entire EEOC file, because “[s]ection 706(b) clearly prohibits any use of EEOC conciliation material in subsequent litigation, even by the parties to the agency proceeding.” *Id.* at 706.³

Barnes argues, however, that even if the entire file is not admissible, the district court erred in refusing to allow the admission of specific documents from that file.⁴ On appeal after remand in *Olitsky*, we held that if the documents are not conciliation material, section 706(b) does not bar their admission. *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471 (5th Cir.1992), cert. denied, --- U.S. ---, 113 S.Ct. 1253, 122 L.Ed.2d 652 (1993) (approving the district court’s admission of document which “contained no reference to conciliation efforts”). While “proposals and counter-proposals of compromise” are conciliation material, information that consists solely

of “purely factual material related to the merits of [the plaintiff’s] charge” is not. *Branch v. Phillips Petroleum Co.*, 638 F.2d 873 (5th Cir. Unit A 1981). We agree with Barnes that Documents P-6, P-8,⁵ P-10, and P-11 contain only factual material to which section 706(b)’s bar does not apply.

Exclusion of these documents, however, is reversible only if exclusion affects Barnes’ substantial rights. See Fed.R.Evid. 103(a). The exclusion of EEOC file information is harmless error if “after weighing the evidence actually admitted, [none of the excluded documents] would have added appreciable weight to the contention that the [action] was discriminatory.” *Garcia v. Gloor*, 618 F.2d 264, 271-72 (5th Cir.1980), cert. denied, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981). The district court found that none of the documents constituted direct evidence of discrimination and noted that its decision would not have varied had it considered the excluded information. Although the excluded documents do contain some information not completely duplicative of the testimony offered by Ergon at trial, we do not see that they add any appreciable weight to Barnes’ claim of discrimination or retaliation. Accordingly, we hold that the district court’s exclusion of Exhibits P-6, P-8, P-10, and P-11 was harmless error.

B

*3 Barnes further contends that the district court erred by failing to render judgment in his favor on either the race discrimination or retaliation claims. In finding that Barnes did not carry his burden of persuasion on the issue of intentional discrimination, the district court acted as trier of fact.⁶ We review the district court’s determination for clear error. See *Williams v. Southwestern Bell Tel. Co.*, 718 F.2d 715, 718 (5th Cir.1983). Findings of fact are “clearly erroneous” when the appellate court, upon a review of the entire record, is “left with the definite and firm conviction that a mistake has been committed.” *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)); see also *United States v. Meneses*, 962 F.2d 420, 428 (5th Cir.1992) (applying *Anderson*).

1

Under Title VII, it is unlawful for any employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to ... compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988). A Title VII plaintiff carries "the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977). A prima facie case includes the following elements: 1) that the plaintiff was a member of a protected class; 2) that the plaintiff was qualified for the position at issue; 3) that the defendant refused to hire the plaintiff despite the plaintiff's qualifications; and 4) that the defendant continued to seek other applicants. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). If the plaintiff demonstrates a prima facie case of discrimination, the burden of production shifts to the defendant to show a legitimate and nondiscriminatory basis for the adverse employment decision. *Id.* If the defendant does rebut the prima facie case, the plaintiff then must show that the defendant's offered reason is pretext. See *id.*⁴

Where, as in this situation, the case has been fully tried, we do not review the entire *McDonnell Douglas* presentation; instead, we focus solely on the district court's finding that Ergon did not intentionally discriminate against Barnes. See *Williams*, 718 F.2d at 717 ("The three-fold analysis contemplated by *McDonnell Douglas* and *Burdine*, however, is not the proper vehicle for evaluating a case that has been fully tried on the merits."). Primarily, we decide whether the district court committed clear error when it "decide[d] which party's explanation of the employer's motivation it believe[d]." *United States Postal Svc. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983); see also *Ollitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1478 (5th Cir.1992) ("When the defendant has produced evidence of a nondiscriminatory reason for plaintiff's discharge and plaintiff has had an opportunity to challenge that reason as pretextual, the trier of fact should proceed directly to the ultimate issue of whether the defendant intentionally discriminated against plaintiff. The initial prima facie case is no

longer relevant."), *cert. denied*, --- U.S. ---, 113 S.Ct. 1253, 122 L.Ed.2d 652 (1993); *Elliott v. Group Medical & Surgical Svc.*, 714 F.2d 556, 565 (5th Cir.1983) ("[O]ur concern is not with the state of the evidence at any of its stages, but rather with the evidence in the case at large."), *cert. denied*, 467 U.S. 1215, 104 S.Ct. 2658, 81 L.Ed.2d 364 (1984). Accordingly, "[t]he extent to which we assess the proceedings below according to the *McDonnell Douglas* order of proof is directed only by the format in which the parties' arguments are presented." *Williams*, 718 F.2d at 718; see also *Merwine v. Board of Trustees for State Institutions of Higher Learning*, 754 F.2d 631, 636 (5th Cir.) (applying *Elliott* and *Williams*), *cert. denied*, 474 U.S. 823, 106 S.Ct. 76, 88 L.Ed.2d 62 (1985).

*4 We agree with the district court that Barnes demonstrated a prima facie case. As an African-American, he is a member of a protected class. He was qualified for the position of pool operator. Finally, Ergon did not hire Barnes and continued to interview other applicants. Consequently, the burden shifted to Ergon to provide a legitimate, nondiscriminatory reason for its decision not to hire Barnes.

In order to satisfy the burden of production, a defendant must "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected ... for a legitimate, nondiscriminatory reason.... To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant." *Burdine*, 450 U.S. at 254-55, 101 S.Ct. at 1094; see also *Aikens*, 460 U.S. at 714, 103 S.Ct. at 1481 (requiring defendant to rebut with legally sufficient evidence). "[The] defendant has failed to meet its burden of production [if it] has failed to introduce evidence which, *taken as true*, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 2748, 125 L.Ed. 407 (1993).

Barnes asserts that Ergon's stated reason for refusing to hire him was legally insufficient. In Title VII cases, this Court has found a defendant's reason legally insufficient when the defendant fails to prove a logical relationship between the requirements of the position and the stated reason. See, e.g., *Waldorf v. Board of Comm'rs for E. Jefferson Levee Dist.*, 857

F.2d 1047, 1051 (5th Cir.1988) (holding defendant's reason insufficient because no connection to job requirements); *Bunch v. Bullard*, 795 F.2d 384, 393-94 (5th Cir.1986) (rejecting district court's finding of legitimate basis as improper because defendant failed to show relationship between allegedly discriminatory tests and job requirements). We have also rejected reasons that are completely subjective. See *Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384, 1390 (5th Cir.1983), cert. denied, 465 U.S. 1006, 104 S.Ct. 999, 79 L.Ed.2d 231 (1984) (rejecting "subjective, standardless decision-making by company officials," where the employer had no provisions for notifying employees of promotion openings and no objective bases for evaluating applicants); *Davis v. Jackson County Port Auth.*, 611 F.2d 577, 578 (1980) (rejecting as a legitimate nondiscriminatory reason plaintiff's desire, as stated on her application, to be paid more than job offered, because defendant never considered interviewing the plaintiff and no black person had ever been employed in that office and function).

Ergon's proffered reason was that Barnes was overqualified for the position of pool operator, and Ergon believed that he would not be satisfied with an entry-level position and would leave. Moreover, Ergon stated that it had difficulty retraining experienced persons to perform their duties according to Ergon's procedures, rather than those procedures they had learned and used in their prior positions. With virtually no legal argument, Barnes challenges the legal sufficiency of Ergon's reason, arguing that it was "inevitably" standardless and subjective. We disagree. The district court found that other workers had left Ergon because they were accustomed to higher pay and more responsibility, and that prior familiarity with other methods hampered Ergon's ability to retrain workers in its own preferred operating procedures. Ergon's experience with other "overqualified" applicants provided the objective basis lacking in *Boykin*. Moreover, unlike the plaintiff in *Davis*, Ergon did interview Barnes and did not reject him at the initial screening level.¹⁰ Consequently, we hold that Ergon's stated reason for rejecting Barnes was not legally insufficient, and the district court did not commit clear error in accepting Ergon's proffered reason as a legitimate and nondiscriminatory basis for refusing to hire Barnes."

*5 Having found Ergon's stated reason not legally insufficient, entry of judgment for Ergon was improper only if the evidence was insufficient for the trier of fact to conclude that Ergon had not

discriminated against Barnes. See *Elliott*, 714 F.2d at 564 ("We are simply to determine whether the record contains evidence upon the basis of which a reasonable trier of fact could have concluded as the [trier of fact actually] did."). As we have already discussed, Ergon introduced evidence of its unsatisfactory experience with other overqualified applicants. Moreover, Ergon produced evidence regarding its difficulty in retraining persons who had established other ways of performing certain tasks. We hold that this evidence allows a reasonable trier of fact to find in favor of Ergon.

2

To prevail on a Title VII retaliation claim, a plaintiff must show 1) that he engaged in protected activity; 2) that the defendant acted adversely against the plaintiff subsequent to that activity; and 3) a causal link between these two events. See *Jack v. Texaco Research Center*, 743 F.2d 1129, 1131 (5th Cir.1984). Barnes' protected activity (filing a charge against Petrosource) and Ergon's adverse decision not to hire him are not at issue. The only question is whether Barnes proved a connection between the two events. Because the district court found for Ergon, we review Barnes' challenge for sufficiency of the evidence. Accordingly, we will reverse only if the evidence so overwhelmingly favored Barnes that a reasonable trier of fact could not have found against him. See *Elliott*, 714 F.2d at 564. Barnes demonstrated only that Allen knew about the charge against Petrosource at or about the time he interviewed Barnes. In response, Ergon demonstrated that Allen had a policy of hiring and promoting African-Americans, and Allen testified that the Petrosource charge did not influence his decision. Ultimately, the resolution of this issue rests on the credibility of Barnes and Allen. "[W]hen a trial judge[] ... credit[s] the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson*, 470 U.S. at 575, 105 S.Ct. at 1512. The district court, as trier of fact, found that the charge against Petrosource did not factor in Allen's decision not to hire Barnes. The evidence is sufficient to support this conclusion.

C

Barnes also challenges the district court's refusal to grant him judgment as a matter of law. "In reviewing a district court's disposition of a motion for judgment [as a matter of law], we apply the same test as did the district court, without any deference to its decision." *Little v. Republic Ref. Co.*, 924 F.2d 93, 95 (5th Cir.1991). "To reverse the district court's denial of [judgment as a matter of law], we must find after reviewing the entire record in the light most favorable to the [nonmovant] that the evidence so overwhelmingly favors [the movant] 'that no reasonable jury could have arrived at the disputed verdict.'" *Patterson v. F.D.I.C.*, 918 F.2d 540, 547 (5th Cir.1990) (quoting *Long v. Shultz Cattle Co.*, 881 F.2d 129, 132 (5th Cir.1989)).

*6 Barnes contends that the district court should have granted his motion for judgment as a matter of law on the § 1981 race discrimination claim.¹² The § 1981 claim presented to the jury was based on the same issue of race discrimination as the Title VII claim discussed previously in this opinion. Barnes introduced a prima facie case of race discrimination.

Footnotes

- * Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.
- 1 Ergon also had an opening for a laboratory analyst, for which Barnes applied. The district court ruled that Barnes was not qualified for that position, and Barnes does not challenge this finding.
- 2 Prior to bringing a civil suit for discrimination, a claimant must file a charge with the EEOC, who investigates the charge. If the EEOC finds no reasonable cause indicating a valid charge, the EEOC dismisses the charge, and the claimant is then free to file suit. See 42 U.S.C. § 2000e-5; see also *E.E.O.C. v. Associated Dry Goods Corp.*, 449 U.S. 590, 595, 101 S.Ct. 820-821, 66 L.Ed.2d 762 (1981) (describing EEOC administrative process).
- 3 842 F.2d 123 (5th Cir.), cert. denied, 488 U.S. 925, 109 S.Ct. 307, 102 L.Ed.2d 326 (1988), modified on other grounds on appeal after remand, 964 F.2d 1471 (5th Cir.1992), cert. denied, — U.S. —, 113 S.Ct. 1253, 122 L.Ed.2d 652 (1993).
- 4 Barnes argues that the EEOC never reached the conciliation stage in his case, and consequently section 706(b) does not apply. The stage of the proceeding, however, does not determine whether the information is conciliation material. See *Olitsky*, 842 F.2d at 706-07 (rejecting contention that investigatory stage can be disclosed because not "conciliation"). Barnes also contends that *E.E.O.C. v. Associated Dry Goods Corp.*, 449 U.S. 590, 101 S.Ct. 817, 66 L.Ed.2d 762 (1981), supersedes *Olitsky* and renders the entire file admissible. We agree with the district court that *Associated Dry Goods* addresses only whether the EEOC file is discoverable; it does not reach the question of admissibility. *Id.* at 596-97, 101 S.Ct. at 821.
- 5 The documents Barnes sought to introduce contained information submitted to the EEOC by Ergon. Document P-6 is a letter from Ergon's attorney to the EEOC detailing Ergon's position regarding Barnes'

Because Ergon's explanation for its decision was not legally insufficient, Ergon did not "stand silent in the face of the presumption." See *Burdine*, 450 U.S. at 254, 101 S.Ct. at 1094. As we have already held that the evidence supported the district court's decision in the Title VII context, Ergon's evidence clearly sufficed to raise a genuine issue of material fact for the jury. Therefore, we will not disturb the jury verdict.

III

For the foregoing reasons, we AFFIRM the judgment of the district court.

All Citations

38 F.3d 568, 1994 WL 574190

retaliation claim and setting forth facts surrounding that position. Document P-8 lists the initial and present title and salary of Ergon employees. Documents P-10 and P-11 review the facts surrounding Barnes' application to Ergon and Ergon's decision not to hire Barnes.

- 6 Ergon contends that, because P-15 contains substantially the same information as P-8, the admission of P-15 divests the exclusion of P-8 of all error. Because P-15 does not contain the pay history information included in P-8, we disagree.
- 7 This case was decided prior to the 1991 amendments to Title VII, which allow for jury trials. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S.Ct. 1483, 1508, 128 L.Ed.2d 229 (1994) (jury trial provision of Title VII 1991 amendments does not apply to pre-1991 cases); see also *West v. Resolution Trust Co.*, 22 F.3d 99, 100 (5th Cir.1994) (applying *Landgraf*).
- 8 See also *Texas Dep't of Community Aff. v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981): The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. 450 U.S. at 255, 101 S.Ct. at 1095; *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1087 (5th Cir.1994) (applying *McDonnell Douglas* test); *Vaughn v. Edel*, 918 F.2d 517, 521 (5th Cir.1990) (same).
- 9 *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993), clarifies that it is only the presumption created by the prima facie case that is no longer relevant. See *id.* at ____, 113 S.Ct. at 2749 ("If, on the other hand, the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework-with its presumptions and burdens-is no longer relevant."). The plaintiff's prima facie case still retains its relevance for the ultimate issue of intentional discrimination. See *id.* ("The factfinder's disbelief of the reasons put forward by the defendant ... may, together with the elements of the prima facie case, suffice to show intentional discrimination.").
- 10 Barnes argues that Ergon's failure to interview him prior to hiring Marvin Ashley, a white person, constituted racial discrimination. The district court held that, because Barnes was working for his former employer at the time of this opening, and because Barnes did not reapply until after the position was filled, Barnes did not apply for the position Ashley filled. The evidence supports the district court's finding; we hold that it was not clearly erroneous.
- 11 Other courts have accepted overqualification as a legitimate basis for rejecting an applicant. See *Woody v. St. Clair County Comm'n*, 885 F.2d 1557, 1561 (11th Cir.1989) ("[I]t was not error to find that Wyatt validly rejected Woody because she was over-qualified for the position of general office worker.... [P]eople are often turned away from employment because they are 'over-qualified.' "); see also *Taggart v. Time, Inc.*, 924 F.2d 43, 47-48 (2d Cir.1991) (acknowledging that, in other contexts, overqualification can be a legitimate reason, but rejecting it in age discrimination context, because although "[a]n employer might reasonably believe that an overqualified candidate-where that term is applied to a younger person-will continue to seek employment more in keeping with his or her background and training, an older applicant that is hired is quite unlikely to continue to seek other ... opportunities"). Here, we have no reason to believe that a person's race would make him any more or less likely to seek other opportunities more equivalent to his prior positions.
- 12 Barnes actually generally contests the denial of judgment as a matter of law. Our holding that the evidence sufficiently supports the trier of fact's decision on the Title VII claims renders the question of judgment as a matter of law moot on those claims, leaving only the § 1981 race discrimination claim.

933 F.2d 187
United States Court of Appeals,
Second Circuit.

Donald BINDER, Plaintiff-Appellant,
v.
LONG ISLAND LIGHTING COMPANY,
Defendant-Appellee.

No. 838, Docket 90-7815.

Argued Jan. 7, 1991.

Decided May 22, 1991.

Synopsis

In age discrimination action, the United States District Court for the Eastern District of New York, Jacob Mishler, J., entered summary judgment in favor of employer, and employee appealed. The Court of Appeals, Winter, Circuit Judge, held that employee established prima facie case.

Vacated and remanded.

Altimari, Circuit Judge, filed concurring opinion.

Attorneys and Law Firms

*188 Lawrence C. Downes, New York City (Gilroy Downes & Horowitz, New York City, of counsel), for plaintiff-appellant.

Mindy S. Novick, Hicksville, N.Y. (Cynthia R. Clark, Hicksville, N.Y., of counsel), for defendant-appellee.

Before KEARSE, WINTER and ALTIMARI, Circuit Judges.

Opinion

WINTER, Circuit Judge:

Donald Binder, a former employee of Long Island Lighting Company ("LILCO"), claims that he was forced to accept early retirement because of age discrimination. Based on affidavits from various witnesses, the district court granted summary judgment in favor of LILCO, and Binder appealed.

We reverse on the ground that Binder has produced un rebutted evidence sufficient to allow a jury to find in his favor.

BACKGROUND

In 1955, Binder graduated from college with a bachelor's degree in mechanical engineering and went to work for LILCO. In *189 1969, shortly after earning a master's degree in nuclear engineering, he began supervising the construction of the Shoreham Nuclear Power Station. In 1970, he became the first project engineer for Shoreham, a position that involved him in management decisions regarding the plant's size, configuration and equipment. In 1972, he was promoted to manager of LILCO's nascent nuclear engineering division and, after the division was given departmental status in 1978, became department manager, serving in that capacity for another six years. In April 1984, he was transferred to the post of Assistant to the Vice President of Nuclear Operations. A few months later, in December 1984, he became Consulting Engineer to the Vice President of Engineering and Administration, Dr. Matthew Cordaro.

The mid-1980's were difficult years for LILCO. By 1984, when William Catacosinos took over as LILCO's Chairman and Chief Executive Officer, the company's costly efforts to license and operate the Shoreham facility had rendered its financial condition perilous. According to his affidavit in support of LILCO's motion for summary judgment, Catacosinos employed a "hands-on" management style, under which decisions of any significance, including staffing levels and individual placement decisions, required his personal approval. In addition, he tried to make the company's bureaucracy leaner by laying off more than five hundred employees. Finally, he decided to eliminate the position of "staff assistant" to senior LILCO executives. Catacosinos's affidavit states his belief that staff assistants impede the flow of information between the executive and others in the organization and cause the executive to lose familiarity with the areas for which he or she is responsible.

Binder was not among the five hundred laid off. However, Dr. Cordaro's elevation from Vice President of Engineering and Administration to Senior Vice President of Operations and Engineering

put Binder's continued employment as an assistant to Cordaro in conflict with Catacosinos's policy against staff assistants for senior LILCO executives. Indeed, in December 1985, when Cordaro assumed his new post, Catacosinos asked John Dye, LILCO's Executive Vice President, "to make sure Dr. Cordaro did not bring any staff assistants with him." At that time, Cordaro had two staff assistants, Walter Ferrarro, age 46, and Binder, age 56. Catacosinos stresses in his affidavit that his

directive regarding Dr. Cordaro's staff assistants was not based on the qualifications or performance, nor identity of those "staff assistants" nor their ages.... [M]y opposition to the continuation of those positions was based on my general belief that "staff assistants" are organizationally unnecessary and inefficient.

A few months after issuing this directive, Catacosinos discovered that Ferrarro and Binder were still serving as Cordaro's staff assistants. Catacosinos then told Cordaro directly that he was not permitted to have staff assistants in his new position. Cordaro again failed to act, whereupon Catacosinos spoke with him a second time, this time emphasizing that he "must take action and that he should confer with Human Resources to attempt to locate other positions for these individuals." Only after this second conversation did Cordaro comply with Catacosinos's directive and eliminate Ferrarro's and Binder's positions.

In October 1986, after learning that his position was to be eliminated, Binder met with Robert Kelleher, LILCO's Vice President of Human Resources, to discuss other employment opportunities within the company. According to Binder's affidavit, Kelleher gave Binder no reason to doubt that he would receive another position. Kelleher stated that he would look for a position and would contact Binder when something arose.

Several months passed without any word from Kelleher. Binder states that Kelleher's silence did not seem odd at the time because it was "consistent with the absence of any expression of urgency regarding the elimination of my position as Consulting Engineer, the fact that I was still performing important functions at the *190 Company, and past

practice at LILCO." Kelleher's affidavit states that he made no effort to contact Binder because, after reviewing both existing vacancies and upcoming personnel needs, he was unable to find another position within the company suitable for someone with Binder's qualifications and experience. Specifically, the affidavit states:

As a result of this meeting with Mr. Binder, I reviewed upcoming organizational requirements to determine whether there might be something suitable for Mr. Binder. By "review" I mean I looked at personnel requisitions that had been submitted either to fill vacancies or new positions, and I thought about any information I had obtained verbally-perhaps that someone was planning to retire or resign. I was seeking positions which would have been appropriate for Mr. Binder (as well as Mr. Ferrarro). By "appropriate" I mean within the salary and grade level Mr. Binder was at and requiring many, if not all, of the technical skills he possessed.... One of my concerns in placing someone of Mr. Binder's education and experience is that I not "underemploy" the individual. By that I mean that if you place a person in a position which uses little of their knowledge or places them in a subordinate role to that which they had been filling, the individual becomes frustrated and suffers from low morale....

Based on Mr. Binder's experience, skills and salary, it appeared to me there were no positions available within the Company at that time or in the immediate foreseeable future. By "available" I mean positions which were approved and, therefore, budgeted for and for which there was a vacancy.

Kelleher was not the only person at LILCO whom Binder contacted in an effort to secure a new position, however. In January 1987, Cordaro mentioned to Christopher Cole, manager of the company's newly formed Project Management Department, that Binder was available. After Binder approached Cole, Cole offered Binder a position in that department. This was, however, an unbudgeted position, and when it was submitted for approval to Catacosinos, he refused to authorize it. Binder asserts that Catacosinos rejected the proposed position because he wanted to force older workers, such as Binder, out of the company. Catacosinos, on the other hand, states the following:

When I investigated the situation, I came away with the opinion that Mr. Cole had sought to create a job in addition to those already authorized by me for this new organization because his boss, Dr. Cordaro, led him to believe he wanted him to. Although the tasks set forth to be performed by the person to fill this position were necessary, they were not high priority tasks and could have been performed by the authorized complement.... I could not permit a job to be added simply to keep an individual with the Company; it was imperative that the Company keep its costs at a minimum and learn to run more effectively and efficiently. For this reason, I barred the creation of an additional position in Project Management.

Binder's affidavit concedes that the particular position may not have existed at the time of Cole's offer by acknowledging that Cole continued to seek the creation of such a position after Binder's departure. However, Binder also states that there were numerous other positions opening up in the Project Management Department for which he was qualified but for which he "was not even considered" and that they were filled by persons who were younger than he.

On February 3, 1987, LILCO told Binder to accept early retirement or face termination. Catacosinos explains the company's ultimatum as follows:

[I]t was not Mr. Binder that I was objecting to. It was an organizational imperative that required me to act as I did. At no time did I say or infer [sic] to anyone that no job should be found for Mr. Binder. On the contrary, my concern was only that an available, budgeted position commensurate with Mr. Binder's experience be found. If there was no such *191 position, then the Company would have to make the decision to separate Mr. Binder from employment with LILCO. I never directed that a position not be found for Mr. Binder.

... The decision regarding the elimination of Mr. Binder's position was based solely on legitimate business reasons and was in no way predicated upon Mr. Binder's age.

Although Binder elected to "retire," LILCO concedes that his retirement was not voluntary.

In April 1988, Binder commenced the instant action, alleging violations of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.* (1988), and by amended complaint, the New York Human Rights Law, N.Y. Exec. Law § 296 (McKinney 1991). Following a period of discovery, LILCO moved for summary judgment, which was granted. Binder now appeals.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must establish that there is no genuine issue of material fact to be submitted to the trier of fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); see *Brady v. Town of Colchester*, 863 F.2d 205, 210 (2d Cir.1988). "As a general rule, all ambiguities and inferences to be drawn from the underlying facts should be resolved in favor of the party opposing the motion, and all doubts as to the existence of a genuine issue for trial should be resolved against the moving party." *Brady*, 863 F.2d at 210 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 n. 2, 106 S.Ct. 2548, 2556 n. 2, 91 L.Ed.2d 265 (1986) (Brennan, J., dissenting) and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970)).

However, where the nonmoving party bears the burden of proof as to a particular issue, the moving party may satisfy his burden under Rule 56 by demonstrating an absence of evidence to support an essential element of the nonmoving party's claim. *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2553; *Brady*, 863 F.2d at 210-11. As we have observed:

[W]here the moving party has attempted to demonstrate that the nonmoving party's evidence is insufficient as a matter of law to establish his claim, the burden shifts to the nonmoving party to come

forward with persuasive evidence that his claim is not "implausible." The question then becomes, is there sufficient evidence to reasonably expect that a jury could return a verdict in favor of the nonmoving party.

Brady, 863 F.2d at 211 (citations omitted). Viewing the evidence produced in the light most favorable to the nonmovant, if a rational trier could not find for the nonmovant, then there is no genuine issue of material fact and entry of summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2511-12, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-88, 106 S.Ct. 1348, 1355-57, 89 L.Ed.2d 538 (1986).

¹³¹ ¹² The parties' respective burdens of proof under the ADEA are the same as under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1988). See, e.g., *Taggart v. Time, Inc.*, 924 F.2d 43, 45-46 (2d Cir.1991); *Montana v. First Fed. Sav. & Loan Ass'n of Rochester*, 869 F.2d 100, 103 (2d Cir.1989); *Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40, 43 (2d Cir.1988). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981). An employer may not remain silent in the face of a prima facie showing but must come forward with a "clear and reasonably specific" explanation of its decision to rebut the prima facie showing and to afford the plaintiff a full and fair opportunity to show pretext. *Id.* at 258, 101 S.Ct. at 1096. Nevertheless, "the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was the true reason," *192 *Price Waterhouse v. Hopkins*, 490 U.S. 228, 245, 109 S.Ct. 1775, 1788, 104 L.Ed.2d 268 (1989) (emphasis added),¹ although the plaintiff may prove discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095 (emphasis added).

¹³¹ ¹⁴ We examine the parties' evidentiary submissions in light of these principles. We agree

with LILCO that the no-staff-assistant policy applicable to senior executives was an age-neutral policy. Binder has offered no evidence that this policy was anything but a legitimate attempt to enhance efficiency by removing impediments to the flow of information to and from executives and by ensuring that executives not delegate their responsibilities. Binder has not, for example, proffered evidence that younger staff assistants were allowed to remain in their positions. We also agree with LILCO that Binder has failed to present evidence that the failure to approve the new but unbudgeted position offered to Binder by Cole was based on age. Binder's affidavit states that Cole continued to seek to have that position created after Binder was forced to take early retirement. Cole's conduct, therefore, demonstrates that the position did not exist when Cole made his offer to Binder. Moreover, in asserting that the job responsibilities of this proposed position were spread among several other positions in the Project Management Department, Binder tacitly concedes that the position was in fact never created, much less created and filled by a younger person. There is no evidence that Catacosinos's refusal to create the new position was based on anything other than the need to economize. Binder thus failed to carry his burden with regard to both the loss of his position as assistant to Cordaro and to the offer of a position that did not exist by Cole.

¹⁵¹ However, Binder also asserts that numerous other positions were opening up in the Project Management Department when he was forced to retire, that he was qualified for many of them, and that they were filled by younger people. In response, LILCO proffered Kelleher's and Catacosinos's affidavits. Kelleher does not deny the availability of such positions or that they were filled by younger persons. Rather, he states that none were "suitable" or "appropriate" for Binder because none were at the salary and grade level achieved by Binder or required the technical skills he possessed. That being the case, he concludes that Binder would have been "underemployed" in any of the jobs that were open or imminently so, and that placing him in such a position would have led to his frustration and low morale. Catacosinos's affidavit echoes this view in stating that any position offered to Binder would have to be commensurate with his experience. We do not believe that these affidavits are sufficient as a matter of law to rebut Binder's prima facie case.

¹⁶¹ ¹⁷ In *Taggart v. Time, Inc.*, decided after the grant

of summary judgment in the instant matter, we reversed an entry of summary judgment for the defendant employer where the employer's professed reason for rejecting a job applicant was "overqualification." Taggart had applied for some thirty-two positions throughout Time's businesses, and we held that Time's rebuttal evidence that Taggart was overqualified for one of these positions might be considered pretextual by a trier of fact. See 924 F.2d at 48. The only relevant difference between the facts in *Taggart* and those in the instant case is that Binder made no express statement that he would accept a particular job at a lower salary or grade level. However, Binder had no occasion *193 on which to express his views on the matter. Kelleher's affidavit indicates that no particular positions were discussed with Binder and that the "suitability" of a position for Binder was Kelleher's, rather than Binder's, decision. Catacosinos's affidavit again echoes Kelleher on this point. Although a trier would be free to conclude that Kelleher was acting out of a genuine desire to avoid placing Binder in a job in which he might be frustrated, exhibit low morale and perform poorly, it would also be free to conclude that this explanation was pretextual. The ADEA does not forbid employers from adopting policies against "underemploying" persons in certain positions so long as those policies are adopted in good faith and are applied evenhandedly. However, such policies may also serve as a mask for age discrimination, and the issues of good faith and evenhanded application cannot be resolved on a motion for summary judgment on the present record. We therefore reverse.³

To avoid repetitious proceedings, we address an evidentiary ruling of the district court that has been briefed on this appeal. In an effort to show that LILCO's stated explanation was pretextual, Binder has cited LILCO's written submission to the EEOC stating that "the final decision regarding [the elimination of Binder's position] was reached in October of 1986." Binder asserts that the bulk of LILCO's submissions indicate that the decision to eliminate Binder's position was made at an earlier date, and that, therefore, the EEOC statement casts doubt on LILCO's professed explanation.

³ Although the district court noted that LILCO's submission to the EEOC seemed to strengthen rather than weaken LILCO's case, the court refused to consider the EEOC statement on the ground that Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b) (1988), bars the admissibility in court of anything

"said or done" in informal proceedings before the EEOC. This was erroneous. The district court's assumption that Title VII's provision regarding the inadmissibility of statements before the EEOC applies to ADEA actions is unfounded. Although much of the case law interpreting the ADEA and Title VII is congruent, differences between the two statutory schemes exist and may not be ignored. Title VII contains an express provision barring the admissibility of statements made to the EEOC, whereas the ADEA contains no such provision. Congress enacted the ADEA in the wake of Title VII, and we believe that any omission in the text of the ADEA of a provision found in Title VII is likely to reflect a deliberate decision on Congress's part. Whether the exclusionary rule of Section 706(b) of Title VII is preferable as a matter of policy is not for us to decide. It is not so clear that the use in subsequent litigation of factual statements submitted to the EEOC is so unwise that we are tempted to find by implication a rule barring such use. Factual statements regarding past events are distinguishable from offers of compromise, and, if the principal objective of an EEOC proceeding is to ascertain what has occurred and, wherever possible, to resolve disputes without litigation, a rule that allows employers to give off-the-record accounts of relevant events will not necessarily advance that objective. Accordingly, based on both the ADEA's lack of an express analog to Section 706(b) of Title VII *194 and our belief that EEOC proceedings will not be impaired by a rule allowing the admission in subsequent litigation of factual statements made during the course of EEOC proceedings, we hold that the district court erred when it refused to consider LILCO's EEOC statement.³

However, like the district court, we note our skepticism as to the purported relevance of the EEOC statement. LILCO's statement that it made the "final" decision to eliminate Binder's position in October 1986 is not inconsistent with the company's contentions. Catacosinos's affidavit states that he issued his directive regarding Ferraro and Binder in December 1985 but recounts at length the difficulties that he faced in getting Cordaro to implement the directive. It hardly undercuts Catacosinos's credibility, or that of others at LILCO, to have told the EEOC that the company's "final" decision to eliminate these positions was made in October 1986, the time at which Cordaro actually eliminated Binder's position.

We vacate and remand for further proceedings

consistent with this opinion.

ALTIMARI, Circuit Judge, concurring:

Under constraint of this Court's recent decision in *Taggart v. Time Inc.*, 924 F.2d 43 (2d Cir.1991), I concur in the decision reached by the majority. I write separately to express my concern that *Taggart* will make summary judgment in many Age Discrimination in Employment Act ("ADEA") cases a rarity and will place numerous employers in an untenable predicament.

A literal reading of *Taggart* strongly suggests that whenever an employer refuses to hire or retain an "overqualified" person, who is protected under the ADEA, a resulting employment discrimination action will automatically present a triable issue of fact. While this outcome might be justified if the term "overqualified" were invariably a buzzword for "too old," in reality an employer may have legitimate reasons for declining to employ overqualified individuals. Indeed, the Court in *Taggart* acknowledged this point when it indicated that overqualification is a permissible basis to refuse to hire or retain "a younger person." *Taggart*, 924 F.2d at 47-48 ("An employer might reasonably believe that an overqualified candidate—where that term is applied to a younger person—will continue to seek employment more in keeping with his or her background and training.").

Certainly, an employer might reasonably determine that placing an "overqualified" individual in a particular position would, as defendant-appellee LILCO contends, demoralize the individual and engender frustration, low morale and poor job performance. When such a judgment is made, under circumstances that fail to give rise to an inference of age discrimination, summary judgment should be available. To hold otherwise bestows talismanic significance on the term "overqualified" and needlessly permits ADEA plaintiffs to evade

meritorious motions for summary judgment. This result is at odds with the precedent of this Circuit, see *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.), cert. denied, 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985), *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir.1988), and contrary to the spirit of Federal Rule of Civil Procedure 56(c), see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986).

It also seems to me that *Taggart* foists an unfair and unnecessary "heads I lose, tails you win" choice upon employers. After *Taggart*, when an employer legitimately concludes that a job applicant—who is within the ADEA's protected class—is overqualified for the position sought, what are the employer's choices? The employer can reject the applicant and risk an ADEA action that will necessarily require trial on the merits. Alternatively, the employer can extend an offer to the applicant and *195 wait to see if its concerns about morale, frustration and poor job performance were accurate. I seriously doubt that Congress intended this Hobson's Choice when it enacted the ADEA.

Finally, as the majority notes, *Taggart* was decided after the district court granted summary judgment on behalf of LILCO. Thus, when Judge Mishler issued his thoughtful and well-reasoned opinion, he was unaware of *Taggart* and its implications. I therefore believe that on remand the district court should initially consider whether evidence exists that would permit a reasonable trier of fact to conclude that LILCO's stated reason for not retaining Binder was pretextual.

All Citations

933 F.2d 187, 55 Fair Empl.Prac.Cas. (BNA) 1525, 56 Empl. Prac. Dec. P 40,781, 60 USLW 2015

Footnotes

- 1 The result in *Price Waterhouse*, a mixed-motive case, is not to the contrary. There, the Court held that, once a plaintiff had established, by direct evidence, that her gender was a significant motivating factor in her failure to make partner, the burden shifted to the employer to show that this proven discrimination was harmless. However, the burden of establishing what was "deemed an affirmative defense," 490 U.S. at 246, 109 S.Ct. at 1788, arose only after the plaintiff had proven that her employer acted unlawfully; it did not arise on the basis of a prima facie showing.

- 2 In reversing, we do not rely upon a statistical chart produced by Binder purporting to show that LILCO favored younger workers in its 1984 lay-offs. Although Binder was not among those laid off, based on this summary, Binder's attorney represented to the district court that "the percentages of those fired increased substantially with age and adversely impacted on older employees," pointing to LILCO's termination of only 4.8% of employees in the 30-35 age group as compared with 17% in the over-60 age group. As the district court noted, however, the chart from which these figures are drawn is marked "as of 3/12/84" and thus appears to have been based on rather stale data. More significantly, it does not prove even what it was offered to prove, because it also shows that employees in the age group "to 29" accounted for more than 20% of LILCO's earlier terminations. This fact suggests that, contrary to Binder's contention, LILCO did not disproportionately favor its younger workers during previous workforce reductions. Given these infirmities, we agree with the district court's conclusion that Binder's chart fails to support his claim of discrimination against older workers.
- 3 LILCO's statement to the EEOC was a written explanation of the reasons for and timing of the challenged employment decision. It thus was a factual representation to an administrative tribunal. We express no view as to whether we would reach the same conclusion had the statement been made during settlement negotiations between the parties.

638 F.2d 873
United States Court of Appeals,
Fifth Circuit.
Unit A

Bobby L. BRANCH, Plaintiff,

v.

PHILLIPS PETROLEUM COMPANY,
Defendant-Appellee,

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, Movant-Appellant.

No. 80-2015

Summary Calendar.

March 5, 1981.

Synopsis

In an equal employment opportunity suit brought against an employer, employer sought to subpoena certain records from the Equal Employment Opportunity Commission. The United States District Court for the Southern District of Texas at Houston, Robert O'Connor, Jr., J., ordered compliance with the subpoena, and the Commission appealed. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) the Commission had right of immediate appeal from district court's order; (2) the Commission properly withheld all information related to charges filed by employee against former employers and same was true whether or not employer could discover from employee himself information concerning employee's discrimination claims against other employers; information obtained by Commission during its efforts to conciliate employee's charges against employer was privileged against disclosure to employer; and (3) to extent that documents withheld from employer were internal working papers on which opinions were expressed, policies were formulated and actions were recommended, they were privileged, but to extent that documents contained purely factual material in form that could be separated without compromising privileged portions of document, material was not privileged and was subject to discovery.

Vacated and remanded.

Attorneys and Law Firms

*875 Leroy D. Clark, Gen. Counsel, E.E.O.C., Constance L. Dupre, James N. Finney, Associate Gen. Counsel, W. Sherman Rogers, Vella M. Fink, Washington, D. C., for movant-appellant.

John B. Abercrombie, Joseph R. Weeks, Houston, Tex., Gordon Cooper, Houston, Tex., for defendant-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

Opinion

CHARLES CLARK, Circuit Judge:

This appeal arises out of a Title VII suit brought by Bobby L. Branch against his employer, Phillips Petroleum Company, appellee *876 herein. Phillips sought, obtained, and served a subpoena on the custodian of records for the Equal Employment Opportunity Commission, Harriet Joan Ehrlich, directing her to produce for inspection and copying any and all records related to any charge of discrimination filed by Branch. The Commission, which is not a party to this lawsuit, resisted the subpoena, claiming that some of the documents sought by Phillips were privileged. The district court entered an order compelling compliance with the subpoena, and the Commission appeals. No party requests oral argument. See Fifth Circuit Local Rule 18. For the reasons stated below we vacate and remand.

I. FACTS

In March, 1975, Branch filed a charge with the Equal Employment Opportunity Commission alleging that Phillips had discriminated against him on account of his race when his employer suspended him. He also charged that Phillips had discriminated against him, other blacks, and Mexican-Americans in its hiring, promotion, and demotion practices. The Commission initially determined that there was reasonable cause to believe that the charge was true, but after making

some conciliation efforts it rescinded that determination and found no reasonable cause. Then, in August, 1977, Branch filed a second charge against Phillips, alleging racial discrimination in its failure to promote him. At the time of the events giving rise to this appeal, the Commission had yet to make an assessment of the merits of this second charge.

Subsequently, Branch brought this employment discrimination suit against Phillips based upon the conduct alleged in his first charge of discrimination filed with the EEOC. Branch claimed that he had been discriminatorily suspended and demoted because of his race and that Phillips had established a pattern and practice of racial discrimination. During his deposition testimony, Branch stated that he had filed charges of discrimination with the EEOC against two of his prior employers. He also admitted that he had filed his second charge of racial discrimination against Phillips.

Phillips then obtained the subpoena which is the subject of this appeal. The subpoena was served on Harriet Joan Ehrlich, director of the Commission's Houston district office, and commanded her to testify at the taking of her deposition at 11:30 A.M. on July 19, 1979, the very day on which it was served. The subpoena also directed Ehrlich to bring for inspection and copying

any and all files, records, papers, billings, personnel and/or employment records, including correspondence of any claims and other reports submitted by and any way related to BOBBY L. BRANCH, and any and all files related to any charge of discrimination filed by BOBBY L. BRANCH against any employer or other individual.

Ehrlich responded to the subpoena by producing records related to Branch's first charge against Phillips. However, in written responses to questions accompanying the subpoena, she explained that certain records covered by the terms of the subpoena had been excluded pursuant to Section 83.6 of the EEOC Compliance Manual. Because this provision prohibits their disclosure, Ehrlich withheld information connected with charges filed by Branch

against other employers, agency memoranda containing staff evaluations and recommendations, and information related to conciliation efforts made by the Commission. In addition, the Commission did not reveal any information connected with Branch's second charge filed against Phillips.

Phillips' attempts to resolve the dispute informally were unavailing. Finally, after nearly a year had elapsed, Phillips filed a motion to compel compliance with the subpoena. In response, the Commission moved to have the subpoena quashed on the ground that disclosure of the requested documents was prohibited by the confidentiality provisions of Title VII, 42 U.S.C. ss 2000e-5(b) and 2000e-8(e). The district court issued an order without reasons compelling the Commission to produce the records *877 demanded in the subpoena,¹ and the Commission appeals.

II. APPEALABILITY OF THE DISTRICT COURT'S ORDER

⁽¹⁾ Initially, Phillips contends that the court is without jurisdiction to entertain this appeal. Under 28 U.S.C. s 1291, the courts of appeal "have jurisdiction of appeals from all final decisions of the district courts of the United States...." Phillips relies upon the well-established general principle that most orders requiring or denying discovery, including those issued in connection with a subpoena, are not "final decisions" within the meaning of section 1291 and, hence, are not immediately appealable. See, e. g., *United States v. Ryan*, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971); *Cobbledick v. United States*, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940); *Alexander v. United States*, 201 U.S. 117, 26 S.Ct. 356, 50 L.Ed. 686 (1906). See generally 4 Moore's Federal Practice P 26.83(3) (2d ed. 1979). Ordinarily, the subpoenaed party must either comply with the terms of the subpoena or refuse to do so and contest its validity if he is subsequently cited for contempt for his refusal to obey. To permit immediate appeal from orders compelling compliance or denying a motion to quash would open the door to multiple appeals, thereby offending the policy against "piecemeal litigation" embodied in the finality rule. *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 634, 89 L.Ed. 911, 916 (1945).¹ Phillips maintains that an application of these principles makes the district court's order unappealable at

present.

[2] [3] In response, the Commission relies upon an exception to the general rule which has evolved in this circuit. This exception allows immediate appeal by a governmental entity where the government is not a party to the lawsuit and asserts some governmental privilege to resist release of the subpoenaed material. See, e. g., *Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 622 (5th Cir. 1973); *Fears v. Burriss Manufacturing Co.*, 436 F.2d 1357, 1360 n.2 (5th Cir. 1971); *Carr v. Monroe Manufacturing Co.*, 431 F.2d 384, 387 (5th Cir. 1970), cert. denied sub nom. *Aldridge v. Carr*, 400 U.S. 1000, 91 S.Ct. 456, 27 L.Ed.2d 451 (1971); *Overby v. U. S. Fidelity & Guaranty Co.*, 224 F.2d 158, 162 (5th Cir. 1955).

These arguments were first advanced by the parties to another panel of this court when Phillips filed a motion to dismiss the appeal. In an order issued without opinion, the panel denied Phillips' motion. That disposition by the prior panel is binding upon this panel. *United States v. Alfrey*, 620 F.2d 551 (5th Cir. 1980); *Trunkline Gas Co. v. FERC*, 608 F.2d 582 (5th Cir. 1979). Accordingly, Phillips' contention must be rejected.

[4] Yet, the theory upon which that motion presumably was denied may be unsound in light of the Supreme Court's decision of *United States v. Ryan*, supra. The Supreme Court has acknowledged only a limited number of exceptions to the general rule that pre-contempt disclosure orders are not appealable. See *878 *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (permitting pre-contempt appeal by the President of the United States in order to avoid unnecessary constitutional confrontation between two branches of government); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) (permitting appeal from an order that finally determines rights which are collateral to those asserted in the action, are too important to be denied review, and which cannot await final judgment because they would be irreparably lost); *Perlman v. United States*, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918) (permitting appeal where denial of immediate review would render impossible any review of the party's claims). All of the recognized exceptions are extremely narrow, and the lower courts have been exceedingly chary of enlarging their scope. See, e. g., *In re Attorney General of United States*, 596 F.2d 58 (2d Cir. 1979), cert. denied, 444 U.S. 903, 100 S.Ct.

217, 62 L.Ed.2d 141 (1979) (refusing to extend Nixon exception to Attorney General); *North Carolina Ass'n of Black Lawyers v. North Carolina Board of Law Examiners*, 538 F.2d 547 (4th Cir. 1976) (refusing to extend Cohen exception beyond claims of true privilege).

However, before *Ryan* was decided in 1971, this circuit carved out another exception allowing immediate appeal by the government when it was not a party to the action and was asserting some governmental privilege. In cases like *Overby*, where disclosure is sought from a non-governmental party who has custody of the documents, application of this governmental privilege exception appears to be no more than a simple variation of the rule developed by the Supreme Court in *Perlman*.³

[5] But extending the governmental privilege exception to cases, like *Cates*, in which the government is both holder of the privilege and custodian of the subpoenaed material introduces a problem. The rationale supporting this application of the rule has been expressed in the following terms:

The theory of allowing an appeal rests on the proposition that forced disclosure would irretrievably breach the claim of privilege and render an appeal from final judgment meaningless....

Cates, 480 F.2d at 622. See *Carr*, 431 F.2d at 387. This line of reasoning is similar to the argument advanced and rejected by the Supreme Court in *Ryan*. *Ryan* claimed that he would be forced to undertake a substantial burden in complying with the subpoena unless he could effect an immediate appeal, but the Court rejected his argument.

We think that respondent's assertion misapprehends the thrust of our cases. Of course, if he complies with the subpoena he will not thereafter be able to undo the substantial effort he has exerted in order to comply. But compliance is not the only course open to respondent. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to

comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review.

402 U.S. at 532, 91 S.Ct. at 1582, 29 L.Ed.2d at 88 (footnote omitted and emphasis supplied). The clear implication of the reasoning in Ryan is that the government's interest in maintaining some privilege of non-disclosure is no more irretrievably breached *879 than the private party's energies irrevocably expended. In each case, the subpoenaed party has an alternative avenue through which to vindicate its rights without sacrificing the interest it seeks to protect. The Ryan court based its decision on "the necessity for expedition in the administration of the criminal law...." 402 U.S. at 533, 91 S.Ct. at 1582, 29 L.Ed.2d at 88. The institutional pressure caused by civil litigation dictates the same result in the civil context. Nevertheless, Cates clearly extends the right of immediate appeal to the government even when it is itself in custody of the subpoenaed material. Such is the case now before us. The Commission has the right of immediate appeal from the district court's order compelling compliance with its subpoena.

III. GOVERNMENTAL PRIVILEGE

We turn now to the merits of the Commission's appeal. The subpoena issued against the EEOC commanded it to disclose all records and documents connected with any charge of discrimination filed by Branch. On its face, the subpoena describes matter subject to discovery if not privileged. Fed.R.Civ.P. 26(b) (1). But the Commission claims that the confidentiality provisions of Title VII and its own regulations create a privilege as to some of the subpoenaed documents. Accordingly, it withheld three categories of material: all information related to charges filed by Branch against other employers; non-factual materials associated with the Commission's conciliation efforts; and intra-agency memoranda, reports, and recommendations. We conclude that each of these three classes of materials are privileged.

[6] [7] The Commission asserts the Government's "executive" or "official information" privilege. This privilege not only shields facts or communications received by public officials in the performance of their duties relating to state secrets or national security, see *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), but also less secret kinds of official information disclosure of which would be harmful to some governmental interest. Information expressly declared by statute to be confidential is so privileged. See generally McCormick, *Handbook of the Law of Evidence*, ss 106-109 (2d ed. E. Cleary 1972); 8 J. Wigmore, *Evidence* s 2378 (McNaughton Rev. 1961).

[8] The Commission argues that the confidentiality provisions of Title VII expressly create a privilege against disclosure of charges filed by Branch against other employers and information connected with those charges. Section 706(b) of Title VII specifically provides that "(c)harges shall not be made public by the Commission" and provides a criminal penalty for any person who violates its terms.⁴ 42 U.S.C. s 2000e-5(b). Senator Humphrey, who introduced the compromise amendment that was ultimately adopted by Congress, explained the purpose of the non-disclosure provisions in the following way:

It should be noted that this is a ban on publicizing and not on such disclosure as is necessary to the carrying out of the Commission's duties under the statute.... The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal agencies, but rather is aimed at the making available to the general public of unproven charges.

*880 110 Cong.Rec. 12723 (1964). Recognition of the congressional purpose underlying enactment of Title VII's non-disclosure provisions has led this court to conclude that they "were not intended to prohibit the Commission from divulging to the parties involved or their counsel information obtained by the Commission during its investigation of a claim of unlawful discrimination." *H. Kessler & Co. v. EEOC*, 472 F.2d 1147, 1152 (5th Cir. 1973) (en banc) (emphasis supplied). The court also acknowledged that the Commission could erect those barriers to disclosure necessary for the performance of its statutory functions and to prevent public revelation of the information which it obtained. *Id.*

[9] Phillips argues that the reasoning in *Kessler* would permit disclosure in this case. Because it is a party to

a pending Title VII lawsuit, Phillips maintains that it is not "the public" within the meaning of section 706(b). This contention is without merit. That the non-disclosure provisions of the Act were not intended to apply to the immediate parties does not imply that they were also not intended to apply to any Title VII litigant. Phillips' posture vis a vis other employers against whom Branch has brought charges is not substantially different from that of any other member of the public. Disclosure to Phillips of the details of Branch's charges against his prior employers by the Commission well might undermine the purpose of section 706(b) if potential parties feared that their filings could be the subject of discovery.

¹¹⁰ ¹¹¹ Phillips also contends that the official privilege created by section 706(b) is not absolute, that it can be overridden if individual need for the material outweighs the harm resulting from non-disclosure. Phillips asserts material would be valuable to impeach Branch's credibility if it disclosed that he regularly files meritless charges against employers. This possibility is insufficient to overcome the congressional policy embodied in section 706(b).¹

¹¹² The second category of material sought by Phillips consists of information obtained by the Commission during its efforts to conciliate Branch's charges against it. The EEOC claims that section 706(b) also makes this information privileged. Section 706(b) requires the Commission to employ "informal methods of conference, conciliation, and persuasion" to resolve any claim of unlawful discrimination. It then goes on to provide that "(n)othing said or done during and as a part of such informal endeavors may be made public by the Commission ... or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. s 2000e-5(b).

Once again, Phillips maintains that it is not the "public" within the intention of the statute. Although Kessler simply held that section 709(e) of the Act does not prohibit disclosure to the charging party or his attorney information obtained by the Commission during the course of its investigation of a complaint, Phillips insists that its reasoning justifies disclosure to the parties of information obtained by the Commission during its conciliation endeavors.

We cannot accept this analysis. The obvious purpose of the statute's prohibition on revealing statements made or actions taken during the Commission's

conciliation efforts is to promote the congressional policy favoring unlitigated resolution of employment discrimination claims. Cooperation and voluntary compliance are the preferred means for the elimination of unlawful employment discrimination, and Congress created the Commission and established an informal dispute resolution procedure to accomplish this goal.

(I)t is clear that Congress placed great emphasis upon private settlement and the elimination of unfair practices without litigation on the ground that voluntary compliance is preferable to court action. Indeed, it is apparent that the primary role of the EEOC is to seek elimination of *881 unlawful employment practices by informal means leading to voluntary compliance.

Hutchings v. United States Industries, 428 F.2d 303, 309 (5th Cir. 1970) (citations omitted). See Alexander v. Gardner-Denver Co., 415 U.S. 36, 44, 94 S.Ct. 1011, 1017-18, 39 L.Ed.2d 147, 155 (1974); United States v. Allegheny-Ludlum Industries, 517 F.2d 826, 846-48 (5th Cir. 1975). However, the prospect of disclosure or possible admission into evidence of proposals made during conciliation efforts would tend to inhibit the kind of free and open communication necessary to achieve unlitigated compliance with the requirements of Title VII.⁴ Therefore, disclosure of conciliation materials, even to the parties, would discourage negotiated settlement and frustrate the intention of Congress.

The Commission's regulations and policies manual make no exception for disclosure of conciliation materials to opposing parties. See C.F.R. s 1601.26(a); EEOC Compliance Manual s 83.6(f).⁷ The manual does, however, provide for disclosure of purely factual information about the merits of a charge, gleaned by the Commission during its conciliation endeavors. The Commission makes such material available to the parties for their use in litigation.⁸

¹¹³ To the extent that the district court required disclosure of proposals and counter-proposals of compromise made by the parties during the Commission's efforts to conciliate Branch's charges

against Phillips, its disclosure order was in error. To the extent that the order included purely factual material related to the merits of Branch's charge, it was not.

The final category of material covered by the district court's order includes intra-agency memoranda, reports of agents and subordinates, staff evaluations, and advisory recommendations. Unlike the first two categories of subpoenaed material, no express statutory privilege exists to prevent public disclosure of these documents. Instead, the Commission appeals to the common law version of the official information privilege protecting against disclosure of materials that would be "injurious to the consultative functions of government..." *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F.Supp. 939, 946, 141 Ct.Cl. 38 (1958), quoted in *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S.Ct. 1504, 1516, 44 L.Ed.2d 29, 47 (1975). In this form, the privilege has often been applied to shield from disclosure those documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Carl Zeiss Stiftung 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, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967). See *McClelland v. Andrus*, 606 F.2d 1278 (D.C.Cir.1979); *Freeman v. Seligson*, 405 F.2d 1326 (D.C.Cir.1968); *Davis v. Braswell Motor Freight Lines, Inc.*, 363 F.2d 600 (5th Cir. 1966); *Olson Rug Co. v. NLRB*, 291 F.2d 655 (7th Cir. 1961); 8 *Wright & Miller*, supra, s 2019 at 167-69 (citing cases).

¹¹⁴¹ This application of the official privilege is founded on the belief that there are certain governmental processes related to legal and policy decisions which cannot be *882 carried out effectively if they must be carried out under the public eye. Government officials would hesitate to offer their candid and conscientious opinions to superiors or co-workers if they knew that their opinions of the moment might be made a matter of public record at some future date. "There is a public policy involved in this claim of privilege for this advisory opinion the policy of open, frank discussion between subordinate and chief concerning administrative action." *Kaiser Aluminum & Chemical Corp.*, 157 F.Supp. at 946. See generally *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 150-52, 95 S.Ct. at 1516-17, 44 L.Ed.2d at 47 (1975); *United States v. Nixon*, 418 U.S. at 705, 94 S.Ct. at 3106, 41

L.Ed.2d at 1062 (1974); *EPA v. Mink*, 410 U.S. 73, 86-87, 93 S.Ct. 827, 835-36, 35 L.Ed.2d 119, 131 (1973).

¹¹⁵¹ Nevertheless, the official privilege is not absolute. Manifestly, the ultimate goal of the official privilege is to protect the integrity of the administrative decisionmaking process. Accomplishment of this purpose, however, would not be frustrated by disclosure of those memoranda consisting solely of factual material or of purely factual material contained within deliberative memoranda and separable from its context. Thus, the courts have uniformly held that such purely factual information is not protected by the privilege. See, e. g., *Machin v. Zuckert*, 316 F.2d 336 (D.C.Cir.1963), cert. denied, 375 U.S. 896, 84 S.Ct. 172, 11 L.Ed.2d 124; *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654 (D.C.Cir.1960). See generally *EPA v. Mink*, 410 U.S. at 87-88, 93 S.Ct. at 836, 35 L.Ed.2d at 132. The privilege, therefore, only extends to documents which are a part of the deliberative process of government.*

¹¹⁶¹ ¹¹⁷ The Commission's disclosure rules are consistent with these principles. The EEOC Compliance Manual directs Commission employees to withhold those deliberative memoranda which contain staff impressions, evaluations, and recommendations related to the merits of a charge and proposed action by the Commission.¹⁸ To the extent that the documents withheld from Phillips by the Commission are internal working papers in which opinions are expressed, policies are formulated, and actions are recommended, they are privileged. To the extent that the documents contain purely factual material in a form that can be separated without compromising the privileged portions of the documents, the material is not privileged and is subject to discovery.

¹¹⁸¹ Phillips also claims that the Commission has not properly invoked the privilege against disclosure of conciliation materials and intra-agency memoranda.

There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration of that officer.

United States v. Reynolds, 345 U.S. at 7-8, 73 S.Ct. at 532, 97 L.Ed. at 733. The purpose of this procedural requirement is to insure that subordinate

officials do not lightly or mistakenly invoke the government's privilege in circumstances not warranting its application. However, there has *883 been sufficient compliance by the Commission to satisfy this goal. Ehrlich is director of the Commission's Houston district office and custodian of the records subpoenaed by Phillips. She refused to disclose the subpoenaed materials only after consulting with the office of the General Counsel in accordance with EEOC regulations. See 29 C.F.R. ss 1610.30-1610.36. Moreover, Ehrlich made the Commission's objections to disclosure and its basis for them known to the court in written responses to questions accompanying the subpoena itself. Therefore, Phillips' objection is without merit.

Finally, there is one category of documents over which no dispute remains. When served with Phillips' subpoena, the Commission also declined to release information concerning Branch's second charge of discrimination against Phillips.¹¹ On appeal the Commission now concedes that the present lawsuit encompasses the allegations made in the second charge. Thus, it asserts no privilege to immunize it from discovery and informs the court that it has notified counsel for Phillips of its willingness to disclose it. Accordingly, that much of the district court's order which compels the EEOC to divulge unprivileged material connected with Branch's second charge against Phillips is affirmed.

¹¹ However, our conclusion that certain classes of materials are privileged does not completely dispose of the case. The district court must apply these principles to the particular documents withheld by the Commission. The EEOC concedes its obligation to disclose purely factual information obtained during the conciliation process or contained within its

internal documents but asserts that Phillips has already received all the information to which it is entitled. However, this is a determination that must be made by the court rather than the administrative agency asserting the privilege. See *United States v. Reynolds*, 345 U.S. at 7-8, 73 S.Ct. at 531, 97 L.Ed. at 733 (1953); *Carr*, 431 F.2d at 387-89; *Overby*, 224 F.2d at 162-63; *McCormick*, supra, s 110 at 235; *Wigmore*, supra, s 2379 at 809-10.

Consistent with this opinion, the district court should determine which specific documents or portions of documents withheld by the Commission are privileged. Furthermore, on remand the district court need not necessarily make an in camera inspection of all the subpoenaed material. The "agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material" to which Phillips would be entitled. *EPA v. Mink*, 410 U.S. at 94, 93 S.Ct. at 839, 35 L.Ed.2d at 839.

The order appealed from is vacated, and the case is remanded for further proceedings not inconsistent with this opinion. Each party shall bear its own costs.

VACATED AND REMANDED.

All Citations

638 F.2d 873, 25 Fair Empl.Prac.Cas. (BNA) 653, 25 Empl. Prac. Dec. P 31,614, 31 Fed.R.Serv.2d 135, 7 Fed. R. Evid. Serv. 1578

Footnotes

¹ The district court's original order compelling the Commission to produce all records demanded in the subpoena erroneously stated that Ehrlich had been served on July 17, 1979, and that the Commission had not attempted to quash or stay the subpoena. The Commission subsequently moved for reconsideration, and the district court denied its motion.

² The policy of finality is grounded in practical concerns of judicial administration. Justice Frankfurter elaborated these considerations as follows:

Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leader-footed.

Cobbledick v. United States, 309 U.S. 323, 325, 60 S.Ct. 540, 541, 84 L.Ed. 783, 784 (1940).

- 3 Under the Perlman doctrine, when a subpoena is directed to a person who has custody of material as to which another person may claim a privilege of non-disclosure, the person who holds the privilege may seek immediate review of the disclosure order. The justification for permitting immediate appeal under these circumstances is that the privilege-holder has no power to compel the custodian of the material to risk a contempt citation for his refusal to comply with the court's order. Thus, denying the holder of the privilege the right to immediate review would leave him "powerless to avert the mischief of the order," *Perlman*, 247 U.S. at 13, 38 S.Ct. at 419, 62 L.Ed. at 955, and "would practically defeat the right to any review at all." *Cobbledick*, 309 U.S. at 324-25, 60 S.Ct. at 541, 84 L.Ed. at 785 (footnote omitted). See generally *National Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174, 177-81 (2d Cir. 1979).
- 4 Section 706(b) provides, in pertinent part, as follows:
Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission.... If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.
42 U.S.C. § 2000e-5(b).
- 5 We do not decide whether Phillips may discover from Branch himself Branch's other claims of discrimination. We hold only that Phillips' need for this information does not override the government's interest in non-disclosure.
- 6 The purpose of the statute is similar to that embodied in the traditional evidentiary rule making offers of compromise and settlement inadmissible. See, e. g., *Fed.R.Evid.* 408.
- 7 Section 83.6(f) of the EEOC's Compliance Manual provides in part as follows:
Conciliation Materials Remove information in the case file which concerns the Commission's attempts to settle the charge by the informal methods of conference, conciliation and persuasion. But see also Section 1801.26(b) of the Commission's Procedural Regulations which provides that factual information obtained by the Commission during the course of such informal endeavors may be disclosed provided that the factual information was otherwise obtainable by the Commission under its authority in Section 709 of Title VII.
The subsection then enumerates specific EEOC forms which should be expunged from the case file prior to any disclosure.
- 8 See 29 C.F.R. § 1601.26(b); EEOC Compliance Manual § 83.6(f), *supra* note 7.
- 9 Although this case arises in the ordinary common law discovery context, it is worth noting that the Freedom of Information Act exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Supreme Court has determined that the factual material/deliberative process dichotomy applicable for the official privilege is also applicable for cases decided under the FOIA. See *EPA v. Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).
- 10 The EEOC Compliance Manual instructs Commission staff members who disclose information from case files in the following terms:
Intra-Agency and Inter-Agency Memoranda Remove the Investigator's Memorandum. Remove all memoranda, notes and other documents prepared by Commission attorneys or received from other governmental agencies which contain recommendations or mental impressions as to strategy for settling the case or litigation. Remove all memoranda or notes from the Regional Office of the General Counsel, from Office of General Counsel and from the Department of Justice.
EEOC Compliance Manual § 83.6(d).
- 11 The Commission explains its failure to disclose the information connected with Branch's second charge by pointing out that Phillips' subpoena was served upon Ehrlich on the same day set for production and that it could not know the scope of this lawsuit. In addition, Phillips' motion to compel compliance made no reference to the second charge.

Branch v. Phillips Petroleum Co., 638 F.2d 873 (1981)

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227 F.Supp.2d 1041
United States District Court,
E.D. Wisconsin.

Darice BROOKS, Plaintiff,
v.
GRANDMA'S HOUSE DAY CARE CENTERS,
INC., Defendant.

No. 01-C-0375.

Oct. 15, 2002.

Synopsis

African-American former employee brought Title VII action against employer. During trial, employer objected to admission into evidence of letter from employer's attorney to Equal Employment Opportunity Commission (EEOC). In memorandum supplementing oral ruling, the District Court, Adelman, J., held that letter was not subject to Title VII provision prohibiting admission of evidence presented to EEOC as part of informal endeavors.

So ordered.

Attorneys and Law Firms

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Roger Pettit, Milwaukee, WI, for Defendant.

Opinion

*1042 MEMORANDUM

ADELMAN, District Judge.

Plaintiff Darice Brooks sued her former employer, defendant Grandma's House Day Care Centers, Inc., alleging that she was discharged based on her race (African-American) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq. This memorandum supplements my oral ruling on an evidentiary issue that arose during the trial, namely whether a letter written by defendant's counsel to the Equal Opportunity Employment Commission

("EEOC") responding to plaintiff's allegation of discrimination was admissible in evidence. I found that it was.

I. FACTS

Defendant, a corporation that operates a number of day care centers in the Milwaukee area, hired plaintiff as a lead teacher at its center in Brookfield, Wisconsin, a Milwaukee suburb. Plaintiff was the only African-American teacher at the Brookfield Center, and none of the children there were African-American.

Plaintiff was hired with a forty-five day probationary period. Kim Spankowski, the director of the Brookfield Center, testified that during plaintiff's probationary period she advised plaintiff that she needed to improve her teaching, and that she provided a written review stating what plaintiff needed to do in order to be retained. Spankowski listed as deficiencies plaintiff's reluctance to take charge of her class, the quality of her supervision, and the nature of her interaction with the children.

On May 10, 1999, Spankowski asked plaintiff to transfer to defendant's Highland Center. A majority of the children and some of the teachers at the Highland Center were African-American. Plaintiff testified that Spankowski told her that if she agreed to the transfer Spankowski would give her a good review when she received her forty-five day evaluation. Spankowski denied this assertion.

Spankowski testified that she asked plaintiff to transfer because the Highland Center needed teachers, because she thought that the Highland director, who was very experienced, might be able to help plaintiff improve, and because the Highland Center was an easier commute for plaintiff.

After spending one day at Highland, plaintiff decided that she did not wish to transfer. She preferred the facility at Brookfield and also regarded the Brookfield location as more convenient. Thus, the next day she returned to the Brookfield Center.

On May 20, 1999, Spankowski terminated plaintiff's employment. She noted on plaintiff's final review that she had improved but not sufficiently to warrant continued employment.

II. DISCUSSION

At trial, plaintiff attempted to introduce in evidence a statement in a letter written by defendant's counsel, Roger Pettit, to the EEOC. Defendant submitted the letter in response to the EEOC's notice to it of plaintiff's discrimination charge. The letter was intended to serve "as the Company's statement of position with respect to the allegations contained in the charge." (Pettit Letter of 4/5/00 attached to Def.'s Mem. in Support of Def.'s Mot. in Limine.)

The statement that plaintiff sought to introduce was as follows:

The Employee is correct that she was offered the opportunity to transfer to the Company's Highland Center on West Vliet Street, but omits to explain the reason for the offer. The offer to *1043 transfer from the Brookfield Center to the Highland Center was based upon her lack of transportation. Note item number 5 on the April 30th conference report. The Employee did not drive to and from work; rather she relied upon her fiancé to pick her up. Unfortunately, her fiancé would arrive at the facility an hour and a half prior to the end of her shift. During that time, the fiancé would either stay on the playground or in her room. When that occurred, the Employee was distracted from her duties and, in some instances, would remain in the room when the children went out for recess with only the Assistant, thus taking the class out of the ratio of teachers to students mandated by the State. While employed at the Company, the Employee was also attending M.A.T.C. part-time. In an attempt to

reduce her transportation problems and to alleviate a performance problem caused by her boy-friend's presence on the premises, the offer to transfer to the Highland Center was made. Jill Tritz, the Supervisor at the Highland Center, advised that the Employee was at the Center only on one day, May 11th, and refused any work load. She sat for the balance of the day and returned to the Brookfield Center.

(*Id.* at 2-3.) Plaintiff wanted to introduce the statement because she believed that it cast doubt on Spankowski's credibility because it made no mention of two of the reasons that Spankowski testified had caused her to ask plaintiff to transfer, i.e., that the Highland Center needed teachers and that its director could provide her with superior training.

Defendant stipulated to the authenticity of the letter but argued that 42 U.S.C. § 2000e-5(b) barred its admission in evidence. Section 2000e-5(b) provides in part:

If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. *Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.*

Id. (emphasis added).

In determining the effect of the statute my task was to implement the language enacted by Congress. *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir.1998). The goal of statutory construction is to ascertain the intent of

the legislature, and the language of the statute is the most reliable indicator of congressional intent. *Time Warner Cable v. Doyle*, 66 F.3d 867, 876 (7th Cir.1995).

The statute bars statements made during EEOC attempts to resolve employment discrimination cases through "informal endeavors." § 2000e-5(b). Informal endeavors include such methods as "conference, conciliation and persuasion." *Id.* The statute provides that the EEOC may utilize such endeavors "if [it] determines after ... investigation that there is reasonable cause to believe that the charge is true." *Id.*

The letter in the present case was not written in the course of informal endeavors by the EEOC to settle the case. Further, the EEOC had not yet completed its investigation and had not determined that there was reasonable cause to believe that the charge was true. Thus, I found that the plain language of § 2000e-5(b) did not bar admission of the statement.

*1044 Congress's intent in prohibiting statements made during conciliation efforts was to encourage free and open communication in order to achieve negotiated settlements. *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 880-81 (5th Cir.1981). The statute's purpose is similar to that embodied in the traditional evidentiary rule making offers of compromise and settlement inadmissible. See e.g., Fed.R.Evid. 408; *Branch*, 638 F.2d at 881 n. 6. Thus, the statute did not bar admission of the Pettit letter, not only because the letter was not written in the course of EEOC conciliation efforts, but also because it contained no statements relating to compromise, settlement or negotiation.

The present case is indistinguishable from *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1476-77 (5th Cir.1992). In *Olitsky*, as here, the plaintiff sought to admit a letter written by the defendant's attorney, Ronald Mangel, responding to the notice from the EEOC of plaintiff's discrimination claim. The Mangel letter, like the letter here, denied that the employer had discriminated and asserted facts in support of the employer's position. The court ruled that the letter was admissible because it contained no information relating to settlement but, rather, only factual information relating to defendant's position on the merits. *Id.* at 1477. Similarly, the Pettit letter made no mention of settlement but, instead, provided purely factual material in support of defendant's position that it had not discriminated.

The rationale of *Olitsky* also finds support in *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 193 (2d Cir.1991), an age discrimination case. There, the court said:

Factual statements regarding past events are distinguishable from offers of compromise, and if the principal objective of an EEOC proceeding is to ascertain what has occurred and, whenever possible, to resolve disputes without litigation, a rule that allows employers to give off-the-record accounts of relevant events will not necessarily advance that objective. Accordingly, based on both the ADEA's lack of an express analog to Section 706(b) of Title VII and our belief that the EEOC proceedings will not be impaired by a rule allowing the admission in litigation of factual statements made during the course of EEOC proceedings, we hold that the district court erred when it refused to consider Lilco's EEOC statement.

Id. (footnote omitted).

Defendant argued that the letter should be excluded based on *EEOC v. Gear Petroleum*, 948 F.2d 1542 (10th Cir.1991), where the court excluded a statement by a defendant's attorney to the EEOC. *Gear*, however, is distinguishable from the present case because the *Gear* court based its decision on its conclusion that the statement in question was made "in the context of compromise negotiations." *Id.* at 1545. In contrast, as has been discussed, the Pettit letter was not written in such a context.

Defendant did not dispute that the statement was relevant or argue that it was inadmissible for any reason other than § 2000e-5(b). Defendant did argue, however, that I should exclude the statement because, otherwise, Pettit would have to testify in order to explain it. Although Pettit ultimately did not testify, the possibility that he might have felt obliged to do so

caused me concern because it is generally undesirable for lawyers serving as advocates at trial, as Pettit was, to also be *1045 witnesses. See e.g., Wis. Sup.Ct. R. 20:3.7. However, because the statement was relevant and arguably important to plaintiff's case, it would have been unfair to plaintiff to exclude the statement for this reason.

All Citations

227 F.Supp.2d 1041, 90 Fair Empl.Prac.Cas. (BNA)
175, 60 Fed. R. Evid. Serv. 758

Therefore, for the reasons stated, I determined that the Pettit statement was admissible.

Footnotes

- ¹ In an earlier trial of the case, the Fifth Circuit held that the district court erred in admitting the entire EEOC file. *Olitsky v. Spencer Gifts, Inc.*, 842 F.2d 123, 127 (5th Cir.1988).

2008 WL 2539660
Only the Westlaw citation is currently available.
United States District Court, W.D. Louisiana,
Monroe Division.

Lynette Taylor DHILLON
v.
LINCARE INC. OF DELAWARE.

Civ. Action No. 06-1822.

June 20, 2008.

Attorneys and Law Firms

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Theus Grisham et al, Monroe, LA, for Lynette Taylor
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Delaware.

Opinion

RULING

ROBERT G. JAMES, District Judge.

*1 Plaintiff Lynette Taylor Dhillon ("Dhillon") brought this lawsuit against her former employer Lincare Inc. of Delaware ("Lincare"), alleging racial and sexual harassment and racial discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.*, and assault and battery and intentional infliction of emotional distress in violation of state law.

On June 19, 2008, the Court issued an Amended Ruling and Amended Judgment granting in part and denying in part Lincare's Motion for Summary Judgment. The Court dismissed with prejudice Dhillon's Title VII claims of sexual or sexual harassment; race discrimination in promotions, compensation, and job assignments; constructive discharge; and for punitive damages. The Court also dismissed with prejudice Dhillon's state law claims of assault and battery and intentional infliction of emotional distress. However, the Court denied Lincare's Motion for Summary Judgment on

Dhillon's Title VII claim of a racially hostile work environment based on her marriage to a native of India.

Pending before the Court are certain Motions in Limine filed by Lincare affected, at least in part, by the Court's Ruling: (1) Motion in Limine to Exclude Evidence and Testimony Regarding Time-Barred Acts ("Motion on Time-Barred Acts") [Doc. No. 55], (2) Motion in Limine to Exclude Irrelevant and Improper Evidence and Testimony ("Motion to Exclude Irrelevant Testimony") [Doc. No. 56], and (3) Motion to Strike or in the Alternative Motion in Limine to Exclude Evidence in Support of Plaintiff's Claim for Punitive Damages ("Motion to Exclude Evidence on Punitive Damages") [Doc. No. 57].

For the following reasons, Lincare's Motion to Exclude Evidence on Punitive Damages is GRANTED, and its Motion on Time-Barred Acts and Motion to Exclude Irrelevant Testimony are GRANTED IN PART and DENIED IN PART.

First, the Court has granted Lincare's Motion for Summary Judgment on Dhillon's punitive damages claim under Title VII. Therefore, Dhillon is not entitled to produce any evidence or testimony solely to support her now-dismissed claim for punitive damages. Lincare's Motion to Exclude Evidence on Punitive Damages is therefore GRANTED.

Second, in its Motion on Time-Barred Acts, Lincare seeks an order of Court barring any evidence or testimony regarding acts which occurred more than 300 days prior to the time that Dhillon filed her EEOC Charge. In effect, Lincare's motion, if granted, would bar any evidence or testimony from the period of March 29, 2004 (Dhillon's effective date of hiring) to December 27, 2004. To the extent that Lincare seeks to limit evidence or testimony related to Dhillon's hostile work environment claim based on her interracial marriage, its motion is DENIED.

In *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002), the Supreme Court held that a "Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate 180- or 300-day period, but a charge alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period." Dhillon has alleged harassment occurring well within the 300-day

period; thus, she may present evidence and testimony of harassment that occurred prior to the 300-day period, but which was part of the same unlawful conduct.

*2 However, Dhillon had also raised Title VII claims of sexual harassment and racial discrimination based on Lincare's failure to promote, discriminatory compensation, and discriminatory job assignments. The Court has granted Lincare's Motion for Summary Judgment on these claims on the basis that Dhillon failed to exhaust her administrative remedies. The claims are, thus, now time-barred. To this extent, Lincare's Motion on Time-Barred Acts is GRANTED, and Dhillon cannot present any evidence or testimony related solely to these claims.

Third, in its Motion to Exclude Irrelevant Testimony, Lincare seeks to exclude three categories of evidence: (1) portions of the deposition testimony of Cathy Roan ("Roan"), Dhillon's former supervisor, and T.J. Wright, Dhillon's former co-worker and an alleged harasser; (2) affidavits of Terri Douglas, Chris Dowdy, and Lewis Thompson; and (3) a May 3, 2006 letter Lincare submitted to the EEOC.

Pursuant to Federal Rule of Evidence 402, "[e]vidence which is not relevant is not admissible." "[R]elevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed.R.Evid. 403.

With regard to Roan's and Wright's deposition testimony, Dhillon does not object to the exclusion of

this evidence. Accordingly, Lincare's motion on these portions of Roan's and Wright's deposition testimony is GRANTED. As Dhillon points out, this testimony might become admissible at trial. If so, the Court will consider any arguments when urged.

In the second part of its motion, Lincare moves to exclude the affidavits of Terri Douglas, Chris Dowdy, and Lewis Thompson from trial. Dhillon does not object to the exclusion of these affidavits. Accordingly, Lincare's motion on the affidavits is GRANTED.

Finally, as to Lincare's counsel's letter to the EEOC, the Court finds that the letter should not be excluded from evidence. In *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471 (5th Cir.1992), the Fifth Circuit determined that admission of a letter from the general counsel for the defendant employer to the EEOC was not an abuse of discretion because the letter contained only "purely factual information and related [the employer's] position on the merits of [the plaintiff's claim]. The letter contained no reference to conciliation efforts." *Id.* at 1477; *cf.* Fed.R.Evid. 408. Further, the letter is not hearsay under Federal Rule of Evidence 801(d)(2) as either "(A) the party's own statement, in ... a representative capacity or ... (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent ... concerning a matter within the scope of the agency ... made during the existence of the relationship." Accordingly, Lincare's motion to exclude this letter is DENIED.

All Citations

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2014 WL 5410661
United States District Court, D. Alaska.
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, Plaintiff,
and
Kevin D. McDowell, Intervenor-Plaintiff,
v.
PARKER DRILLING COMPANY, Defendant.
No. 3:13-cv-00181-SLG.
Signed Oct. 22, 2014.

Opinion

ORDER

SHARON L. GLEASON, District Judge.

*1 Before the Court at Docket 85 is Parker Drilling's Motion to Compel EEOC's Production of Documents Bates Numbered EEOC 000001-000099, filed on August 4, 2014. Presently at issue are only three pages of documents, Bates numbered 000092, 000093, and 000095. The motion seeks the production of those documents and the awarding of fees and costs.¹ For the reasons discussed below, the motion will be granted in part and denied in part.

BACKGROUND

On June 3, 2014, Parker Drilling served document production requests on the EEOC.² The EEOC responded on July 3, 2014.³ The privilege log in effect at the time of the EEOC's response indicated that 99 pages of documents, Bates numbered 000001-000099, were withheld only under an asserted "conciliation" privilege.⁴ The withheld documents were identified as including backpay calculations made by an EEOC investigator, Parker Drilling website content and job announcements, correspondence between Parker Drilling and the EEOC during conciliation efforts, internal EEOC correspondence, and interviews conducted with Mr. McDowell.⁵ Parker Drilling filed its motion to compel the EEOC to produce the withheld documents

on August 4, 2014.⁶ The EEOC opposed the motion on August 21, 2014, taking the position that it could not lawfully release the documents without Mr. McDowell's and its own consent.⁷ Parker Drilling replied on September 2, 2014.⁸ Oral argument was not requested and was not necessary to the Court's determination of the motion.

In its reply, Parker Drilling indicated that on August 28, 2014, the EEOC stated that "we have obtained the necessary consents to disclose non-privileged documents compiled during the conciliation phase of the Commission's charge processing" and turned over 96 pages of documents that the agency had initially withheld.⁹ The EEOC continues to withhold three documents, Bates numbered 000092, 000093, and 000095.¹⁰ In a revised privilege log, it continues to assert the conciliation privilege and adds combinations of the attorney-client and government deliberative process privileges.¹¹ Those three pages are the only documents now at issue.

Parker Drilling seeks an order compelling the production of the remaining three documents.¹² It asserts the conciliation privilege is inapplicable and that the EEOC waived the newly asserted privileges by failing to identify them in its initial privilege log.¹³ Parker Drilling also seeks its fees and costs associated with this motion to compel under Rule 37(a)(5)(A).¹⁴ It asserts that an award is appropriate in light of the EEOC having delayed disclosure of 96 pages of documents until after Parker Drilling filed its motion to compel.¹⁵

DISCUSSION

1. The conciliation privilege.

42 U.S.C. § 2000e-5(b) provides in pertinent part that if the Commissioner determines after investigation that there is reasonable cause to believe an unlawful employment practice claim has merit,

*2 the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may

be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.

A. The public disclosure provision of § 2000e-5(b) does not prevent disclosures to Parker Drilling.

The public disclosure provision of § 2000e-5(b) provides that “[n]othing said or done during and as a part of [conciliation efforts] may be made public by the Commission ... without the written consent of the persons concerned.” Parker Drilling asserts that as a party to this case, it is not a member of the “public” to whom disclosure of conciliation documents is prohibited. It cites to the Supreme Court’s holding in *EEOC v. Associated Dry Goods* for support.¹⁶ There, the EEOC sought to administratively subpoena records from Associated Dry Goods, an employer.¹⁷ Associated Dry Goods refused to produce the records unless it was assured that the EEOC would hold its records in absolute secrecy and not provide them to the charging parties.¹⁸ The EEOC refused to agree, leading Associated Dry Goods to seek a declaration that the EEOC could not disclose the company’s records to the charging parties.¹⁹ In rejecting Associated Dry Goods’ position, the Court held:

[W]e have concluded that Congress did not include charging parties within the “public” to whom disclosure of confidential information is illegal under the provisions of Title VII here at issue. Section 706(b) states that “[c]harges shall not be made public.” The charge, of course, cannot be concealed from the charging party. Nor can it be concealed from the respondent, since the statute also expressly requires the Commission to serve notice of the charge upon the respondent within 10 days of its filing. Thus, the “public” to whom the statute forbids disclosure of charges cannot logically include the parties to the agency proceeding.²⁰

In a footnote appended to that passage, the Court also noted:

The statute also forbids public disclosure of any matters arising in informal conciliation “without the written consent of the persons concerned.” This phrase suggests that the parties, the “persons” whose consent would most obviously be necessary, are not members of the “public” to whom

disclosure is forbidden.²¹

Here, it appears that the EEOC is not arguing that it is permitted to withhold conciliation materials from Parker Drilling under the public disclosure provision of § 2000e-5(b).²² Given the Supreme Court’s interpretation in *Associated Dry Goods*, the Court finds that the public disclosure provision does not apply where a party such as Parker Drilling seeks conciliation documents from the EEOC.²³

B. The evidentiary provision of § 2000e-5(b) privileges some documents from discovery by Parker Drilling.

²⁴ The evidentiary provision of § 2000e-5(b) provides that “[n]othing said or done during and as a part of [conciliation efforts] may be ... used as evidence in a subsequent proceeding without the written consent of the persons concerned.” The Ninth Circuit has not directly examined this provision. However, the Fifth Circuit has considered it in a line of cases cited by both parties.²⁵

In *Branch v. Phillips Petroleum*, a defendant-employer subpoenaed the EEOC for all information in the EEOC’s possession relating to a plaintiff-employee.²⁶ The EEOC was not a party to the underlying Title VII suit between the employee and employer.²⁷ The EEOC moved to quash the subpoena, citing § 2000e-5(b), but the district court ordered all of the information produced.²⁸ In reversing portions of the district court’s order, the Fifth Circuit examined the extent to which § 2000e-5(b) precluded discovery of “information obtained by the Commission during its efforts to conciliate.”²⁹ The court held that “proposals and counter-proposals of compromise made by the parties during the Commission’s efforts to conciliate” are not discoverable.³⁰ But it also held that “purely factual material related to the merits” of the employee’s charge are not privileged and can be discovered.³¹ The court emphasized that the determination of what materials are privileged “must be made by the court rather than the administrative agency asserting the privilege.”³²

In *Olitsky v. Spencer Gifts* (“*Olitsky I*”), the Fifth Circuit examined the use of an EEOC investigative file in a subsequent proceeding between Spencer Gifts and Olitsky, a former Spencer employee. The file included an investigator’s handwritten notes recording Spencer’s general counsel’s partial

admission of liability.” The court held that the employer’s partial admission should not have been admitted into evidence because it was “exactly the kind of exchange among the parties and the EEOC that informal conciliation ought to encourage.”³³ Noting *Branch*’s prohibition on the discovery of EEOC conciliation material, the court stated that “Section [2000e-5(b)] clearly prohibits any use of EEOC conciliation material in subsequent litigation, even by the parties to the agency proceeding.”³⁴

In the follow-up case of *Olitsky v. Spencer Gifts* (“*Olitsky II*”), the court examined whether a position letter that Spencer had sent to the EEOC during the EEOC’s investigation of a discrimination claim brought by Olitsky should have been admitted into evidence.³⁵ The court found that admission of the letter was not barred by § 2000e-5(b) because

[the] letter set forth purely factual information and related Spencer’s position on the merits of Olitsky’s claim. The letter contained no reference to conciliation efforts between Spencer and the EEOC. Spencer neither made any offers of settlement nor responded to any such offers by the EEOC in the ... letter.³⁶

³⁴ In summary, this Court interprets the Fifth Circuit cases to stand for the following propositions: (1) § 2000e-5(b) prohibits the use of conciliation materials in subsequent proceedings absent consent of the parties; (2) conciliation materials are “proposals and counter-proposals of compromise by the parties during the EEOC’s efforts to conciliate”;³⁷ and (3) the bar on “use[] as evidence” is expansive, encompassing both the discovery of evidence and the admissibility of that evidence.

Parker Drilling maintains that *Olitsky I* held that “42 U.S.C. § 2000e-5(b) does not prohibit disclosure by the EEOC of materials to the parties” but instead prohibits only their admission into evidence in subsequent proceedings.³⁸ Parker Drilling therefore moves the Court to compel the disclosure of all of the documents marked as “conciliation” by the EEOC. But while the *Olitsky* cases are focused on admissibility, the Fifth Circuit’s holding in *Branch* protects conciliation documents against discovery to the parties, and not just their admission into evidence in court proceedings.³⁹ This Court is persuaded that the Fifth Circuit’s interpretation in *Branch* of § 2000e-5(b) to preclude the mandatory disclosure of conciliation materials is correct. As the Fifth Circuit held, such a rule “promote[s] the congressional policy favoring unlitigated resolution of employment

discrimination claims.”⁴⁰

The EEOC, for its part, maintains that *Olitsky II* should not be read so broadly so as to require “that EEOC must provide all documents gathered or created during conciliation that are not ‘offers of settlement.’”⁴¹ But the statute specifically protects only what is “said or done during and as a part of” conciliation efforts.⁴² Only a very broad reading of “said or done” would permit the EEOC to withhold under § 2000e-5(b) factual material simply because it was produced during the conciliation process.⁴³ Here again, this Court finds the Fifth Circuit’s analysis persuasive. The Court holds that only proposals or counterproposals of compromise made by the parties during the Commission’s efforts to conciliate are shielded from discovery by § 2000e-5(b).

C. Application to documents in dispute.

The Court ordered the *in camera* submission of the three remaining disputed documents, Bates numbered 000092, 000093, and 000095.⁴⁴ Upon review, the Court finds that the documents numbered 000092 and 000093 are conciliation materials privileged from discovery under § 2000e-5(b) because they consist of “proposals and counter-proposals of compromise by the parties.”⁴⁵ Document 000095 does not contain such materials, and therefore is not material to which the § 2000e-5(b) conciliation privilege applies.

II. Additional privileges asserted as to document 000095.

Rule 26 states that “[w]hen a party withholds information otherwise discoverable by claiming that the information is privileged ... the party must: i) expressly make the claim; and ii) describe the nature of the document, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”⁴⁶

⁴⁵ Here, the EEOC’s initial privilege log listed only the conciliation privilege for document 000095.⁴⁷ However, its supplemental privilege log added the attorney-client and government deliberative process privileges as additional privileges applicable to document 000095.⁴⁸ Parker Drilling asserts that the EEOC has waived both of these privileges because it did not include them in its initial privilege log.⁴⁹

The Ninth Circuit discussed privilege waivers in *Burlington Northern & Santa Fe Railway Co. v. U.S. District Court for the District of Montana*.³⁰ There, the defendant failed to produce a privilege log until five months after Rule 34's 30-day deadline and subsequently made changes to that log.³¹ The plaintiff argued waiver, and the district court agreed.³² The appellate court affirmed.³³ It held that when determining whether the failure to timely or adequately assert a privilege constitutes a waiver, a court should apply "a holistic reasonableness analysis, intended to forestall needless waste of time and resources, as well as tactical manipulation of the rules and the discovery process."³⁴ The Ninth Circuit set out four factors to consider:

[1] the degree to which the objection or assertion of privilege enabled the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged ... [2] the timeliness of the objection and accompanying information about the withheld documents ... [3] the magnitude of the document production; and [4] other particular circumstances of the litigation that make responding to discovery unusually easy ... or unusually hard.³⁵

In this case, the EEOC had provided a timely privilege log but later asserted two additional privileges. Although not completely analogous, the Court finds the *Burlington* approach useful to evaluate the waiver issue presented.

The first *Burlington* factor is the degree to which the initial assertion of privilege enabled Parker Drilling and the court to evaluate whether the withheld documents were in fact privileged. Here, until the disputed documents were submitted for *in camera* review, they could not be adequately evaluated to determine the basis, if any, upon which they were privileged.³⁶

The second *Burlington* factor is the timeliness of the objection and accompanying information about the withheld documents. Here, the EEOC had initially provided a privilege log that asserted only the conciliation privilege.³⁷ Nearly two months after its discovery response, on August 26, 2014, it asserted the two new privileges after Parker Drilling had filed its motion to compel and the EEOC had filed a response that continued to assert only the conciliation privilege.³⁸

The third *Burlington* factor considers the magnitude

of the overall document production. This factor appears intended to grant leeway to parties who, due to the scale of document production, serve an untimely or incomplete privilege log. Here, there is no indication that the scale of document production was a barrier to the EEOC's timely assertion of all applicable privileges.

*6 The fourth *Burlington* factor permits the Court to consider any further circumstances that would make responding to a discovery request unusually easy or unusually hard. Although this circuit has not closely examined § 2000e-5(b), the EEOC's Compliance Manual does not classify a document such as 000095 as conciliation material.³⁹ This circumstance alone should have alerted the EEOC of its need to evaluate the document for alternative privileges and assert them if warranted.

Upon consideration of these four factors, the Court finds that the EEOC waived the attorney-client and government deliberative process privileges for the document Bates numbered 000095 by failing to raise these privileges when its discovery response was due. Therefore, Parker Drilling's motion to compel the production of document 000095 will be granted.

III. Parker Drilling's request for attorney's fees.

Parker Drilling seeks an award of "reasonable costs and fees" associated with its motion to compel.⁴⁰ Rule 37(a)(5)(A) generally requires a court to award reasonable costs, including attorney's fees, to the movant if the requested discovery is provided after a motion to compel is filed.⁴¹ However, a court shall not award expenses if (1) the movant filed its motion before attempting in good faith to obtain the discovery without court action, (2) the opposing party's nondisclosure was substantially justified, or (3) other circumstances make an award of expenses unjust.⁴² Here, the EEOC provided 96 pages to Parker Drilling, but only after Parker Drilling had filed its motion.

A. Parker Drilling attempted in good faith to obtain discovery before court action.

In its motion to compel and attached exhibits, Parker Drilling sets out its exchanges with the EEOC over the documents at issue here.⁴³ After reviewing these materials, the Court finds that Parker Drilling made a good faith effort to obtain the disputed documents

prior to filing its motion to compel.

B. The EEOC was not substantially justified in initially withholding all of the documents from discovery based on 42 U.S.C. § 2000e-5(b).

A court may not award attorney's fees if a party's "nondisclosure, response, or objection was substantially justified."⁶⁴ "Substantially justified" "describes a position that has a reasonable basis both in law and in fact."⁶⁵

Based on the EEOC's first privilege log, the 96 pages of documents the EEOC has now produced include backpay calculations made by an EEOC investigator, Parker Drilling website content and job announcements, correspondence between Parker Drilling and the EEOC during conciliation efforts, and records of a "conciliation interview" conducted with Mr. McDowell.⁶⁶ Parker Drilling asserts that these documents contain "purely factual material," and not "communications or proposals made during the conciliation process."⁶⁷ It asserts that the EEOC was not substantially justified in asserting a conciliation privilege as to these documents. Parker Drilling asserts that by eventually producing the documents, the EEOC "implicitly acknowledged that its prior position in refusing to produce the documents was not substantially justified...."⁶⁸

⁶⁷ To the extent that the EEOC relied on the public disclosure provision of § 2000e-5(b), such reliance was not substantially justified given the Supreme Court's holding in *Associated Dry Goods*. However, whether the EEOC's reliance on the evidentiary provision of § 2000e-5(b) was substantially justified as to the documents that were initially withheld is a closer question.

The EEOC's response brief relies heavily on the Fifth Circuit cases discussed above, as well as district court decisions that either summarily apply a conciliation privilege or themselves rely on the Fifth Circuit precedents.⁶⁹ Yet as discussed above, the Fifth Circuit holdings do not provide substantial justification for the EEOC's initial assertion of a conciliation privilege over those documents that are unequivocally purely factual materials, such as excerpts from Parker Drilling's own website. Nor can the EEOC rely on its own regulations or compliance manual to justify withholding a broader range of materials than are covered by the statutory language.⁷⁰

The EEOC also cites *Haykel v. G.F.L. Furniture Leasing Co.*, a pre-*Associated Dry Goods* and Branch district court decision from Georgia.⁷¹ There, the employer sought all of the EEOC's file covering conciliation negotiations.⁷² The court rejected that discovery request as "overbroad and unsupported by relevant case authority."⁷³ The court did not address § 2000e-5(b). Rather, it concluded that "allowing discovery concerning substantive aspects of conciliation negotiations" would serve no purpose except to allow "one party to improperly gain access to inter-office memoranda and other confidential information."⁷⁴ Read together with the more recent and more thorough analyses of the Fifth Circuit, *Haykel* does not provide substantial justification for the withholding of purely factual materials from the parties.

The EEOC has presented other justifications for withholding these documents in its response to the motion.⁷⁵ However, the sole basis asserted for its withholding of the documents cited in the initial privilege log was "conciliation,"⁷⁶ a position the EEOC continued to maintain was justified in its response.⁷⁷

Based on the foregoing, the Court finds that the EEOC was not substantially justified in relying on § 2000e-5(b) to initially withhold those documents that are clearly limited to purely factual matters related to the merits of this controversy.

C. An award of expenses would not be unjust.

The Court has found no special circumstances that would make an award of expenses unjust.

CONCLUSION

For the reasons discussed above, IT IS ORDERED that:

1. The Motion to Compel the production of the documents Bates numbered 000092 and 000093 at Docket 85 is DENIED.
2. The Motion to Compel the production of the document Bates numbered 000095 is GRANTED. The EEOC shall produce the document to Parker

Drilling within 7 days of the date of this order.

asserts are unequivocally purely factual matters. The EEOC may file a response within 14 days thereafter.

*8 3. The Motion to Compel the production of all other documents is DENIED as moot.

4. Parker Drilling is awarded reasonable fees and costs associated with obtaining those materials that the EEOC later produced that are unequivocally purely factual matters. Parker Drilling shall submit a declaration and memorandum within 14 days of this order that includes its delineation of those materials it

All Citations

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Footnotes

1 Docket 85 (Def.Motion) at 15; Docket 116 (Def.Reply) at 14.

2 Docket 85 (Def.Motion) at 5.

3 *Id.* at 7–8.

4 Docket 85 (Def.Motion) at 8; Docket 86–1 (Privilege Log) at 1–2.

5 Docket 86–1 (Privilege Log) at 1–2.

6 Docket 85 (Def.Motion) at 16.

7 Docket 106 (Pl.Opp.) at 9 (“Because the Commission and Intervenor have not consented to such disclosure, the Commission cannot produce deliberative conciliation materials.”).

8 Docket 106 (Pl.Opp.) at 20; Docket 116 (Def.Reply) at 15.

9 Docket 116 (Def.Reply) at 3.

10 Docket 117–2 (Supp. Privilege Log) at 1.

11 *Id.*

12 Docket 116 (Def.Reply) at 14.

13 *Id.* at 4–6.

14 *Id.* at 6–14.

15 *Id.* at 14.

16 Docket 85 (Def.Motion) at 10 (citing 449 U.S. 590, 598 (1981)).

17 *Associated Dry Goods*, 449 U.S. at 593–94.

18 *Id.*

19 *Id.* at 594.

20 *Id.* at 598 (internal citations and footnotes omitted).

21 *Id.* at 598 n. 13 (internal citation omitted).

22 See Docket 107 (Decl. of Flores) at 2 ¶ 4 (stating the EEOC recognized Parker Drilling as a "party in the case consistent with *Associated Dry Goods* " but that "it would not produce conciliation documents to either of the parties because the Commission had not received consent for disclosure as required by statute").

23 See also *Olitky v. Spencer Gifts, Inc.*, 842 F.2d 123, 126 (5th Cir.1988) (citing *Associated Dry Goods*, 449 U.S. 590, 598) ("Olitky is correct that the [public disclosure] section does not prevent disclosure by the EEOC of material to the parties to the agency proceeding.").

24 See Docket 85 (Def.Motion) at 10; Docket 106 (Pl.Opp.) at 9, 14–16.

25 638 F.2d 873, 876 (5th Cir.1981).

26 *Id.* at 876.

27 *Id.* at 876–77.

28 *Id.* at 880.

29 *Id.* at 881.

30 *Id.*

31 *Id.* at 883.

32 842 F.2d 123, 125 (5th Cir.1988).

33 *Id.* at 126–27.

34 *Id.* at 126.

35 984 F.2d 1471, 1476 (5th Cir.1992).

36 *Id.* at 1477.

37 *Id.* (quoting *Branch*, 638 F.2d at 881).

38 Docket 85 (Def.Motion) at 10.

39 See *Branch*, 638 F.2d at 880–81.

40 *Branch*, 638 F.2d at 880.

41 Docket 106 (Pl.Opp.) at 16.

42 42 U.S.C. § 2000e–5(b).

43 Cf. Fed. R. Ev. 408 advisory committee's note 1972 ("A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation).

44 See Docket 126 (Order).

45 See *Olitsky II*, 964 F.2d at 1477 (quoting *Branch*, 638 F.2d at 881).

46 Fed.R.Civ.P. 26(b)(5)(A).

47 Docket 86–1 (Privilege Log) at 2.

48 Docket 117–2 (Supp. Privilege Log) at 1.

49 Docket 116 (Def.Reply) at 4–6.

50 408 F.3d 1142, 1149 (9th Cir.2005).

51 *Burlington*, 408 F.3d at 1149–50; see Fed.R.Civ.P. 34(b)(2)(A). The court explicitly rejected "a *per se* waiver rule that deems a privilege waived if a privilege log is not produced within Rule 34's 30-day time limit."

52 *Burlington*, 408 F.3d at 1147.

53 *Id.*

54 *Id.* at 1149.

55 *Id.*

56 Cf. *Branch*, 638 F.2d 873, 883 ("The EEOC ... asserts that [plaintiff] has already received all the information to which it is entitled. However, this is a determination that must be made by the court rather than the administrative agency asserting the privilege.").

57 Docket 85 (Def.Motion) at 8; see Docket 86–1 (Privilege Log) at 1–2.

58 Docket 116 (Def.Reply) at 1–2.

59 See EEOC Compliance Manual § 83.4(c) ("Remove only information on settlement/conciliation offers received from one party that were not conveyed to the other, such as a charge party's statement of minimum settlement made at intake or a settlement offer by the respondent that EEOC held in abeyance and never conveyed to the charging party.").

60 Docket 85 (Def.Motion) at 15.

61 Fed.R.Civ.P. 37(a)(5)(A).

62 *Id.*

63 Docket 85 (Def.Motion) at 6–8.

64 Fed.R.Civ.P. 37(a)(5)(A)(ii).

65 *Timms v. United States*, 742 F.2d 489, 492 (9th Cir.1984); see *Pierce v. Underwood*, 487 U.S. 552, 585 (1988) (holding that “substantially justified” means “justified in substance or in the main” and that this formulation “is no different from the ‘reasonable basis both in law and fact’ formulation adopted by the Ninth Circuit”).

66 Docket 86–1 (Privilege Log) at 1–2.

67 Docket 116 (Def.Reply) at 13 (citing Docket 117 (Saade Dec.) at 3 ¶ 6).

68 Docket 116 (Def.Reply) at 10; see *Id.* at 10–14.

69 Docket 106 (Pl.Opp.) at 8–16 (citing *EEOC v. U.S. Steel Corp.*, Civil Action 10–12, 2013 WL 625315 *11 (W.D.Pa.2013) (no analysis); *EEOC v. Hotspur Resorts Nevada, Ltd.*, No. 2:10–cv02265–RCJ–GWF, 2012 WL 2415541 *5 (D. Nev. June 26, 2012) (citing the Fifth Circuit in determining after *in camera* review that materials were related to conciliation efforts); *EEOC v. Scrub, Inc.*, No. 09 C 4228, 2010 WL 2136807 *5–6 (N.D.Ill. May 25, 2010) (relying on *Branch*); *EEOC v. Con-Way Freight, Inc.*, No. 4:07–CV–1638 CEJ, 2008 WL 4066424 *3 (E.D.Mo. Aug. 27, 2008) (summary application of § 2000e–5(b)); *Frazier v. Se. Pa. Transp. Auth.*, Civ.A. No. 84–3004, 1988 WL 117869 *5 (E.D.Pa. Nov. 1, 1988) (relying on *Branch*)).

70 See Docket 85 (Def.Motion) at 11–13 (asserting that EEOC Compliance Manual § 83.4 provides that the “conciliation privilege cannot be asserted to withhold *all* documents from a requesting party but only those that evidence an offer of settlement that was not conveyed”); Docket 106 (Pl.Opp.) at 14 n. 7 (responding). The manual provides in pertinent part that the EEOC “[r]emove [before disclosure] only information on settlement/conciliation offers received from one party that were not conveyed to the other, such as a charging party’s statement of minimum settlement made at intake or a settlement offer by the respondent that EEOC held in abeyance and never conveyed to the charging party.” This guidance provides no justification for withholding purely factual materials. Likewise, 29 C.F.R. § 1601.26(a) provides that “[n]othing that is said or done during and as part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion may be made a matter of public information by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.”). Because the regulatory text is substantively identical to the underlying statute, the regulatory text is presumed to have the same meaning as the statutory text. See *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (“Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”).

71 78 F.R.D. 388 (N.D.Ga.1976).

72 *Haykel*, 76 F.R.D. at 392.

73 *Id.* at 392–93.

74 *Id.* at 392. But the court also noted that “we cannot say that any discovery request which defendants might make

concerning conciliation negotiation materials would be denied a fortiori...." *Id.* at 392–93.

⁷⁵ See, e.g., Docket 106 (Pl.Opp.) at 14–17 (arguing that Parker Drilling is in possession of some of the documents withheld or has the underlying information necessary to replicate work done by the EEOC).

⁷⁶ Docket 86–1 (Privilege Log) at 1–2.

⁷⁷ Docket 106 (Pl.Opp.) at 9 ("As set out above, the EEOC's privilege log identifies documents withheld pursuant to statute.").

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635 F.3d 164
United States Court of Appeals,
Fifth Circuit.

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, Plaintiff–Appellant,**
v.
**PHILIP SERVICES CORPORATION, now
known as Philip Holdings, L.L.C.,
Defendant–Appellee.**

No. 10–20291.

March 4, 2011.

Synopsis

Background: Equal Employment Opportunity Commission (EEOC) brought action against employer, alleging breach of alleged oral agreement reached pursuant to conciliation process required by Title VII. The United States District Court for the Southern District of Texas, Gray H. Miller, J., 2010 WL 724418, dismissed action. EEOC appealed.

[Holding:] The Court of Appeals, DeMoss, Circuit Judge, held that, as matter of apparent first impression, suit was barred by Title VII provision prohibiting disclosure of conciliation material.

Affirmed.

Attorneys and Law Firms

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Appeal from the United States District Court for the Southern District of Texas.

Before KING, DeMOSS and PRADO, Circuit

Judges.

Opinion

DeMOSS, Circuit Judge:

This appeal asks us to determine whether a party may sue for breach of an alleged oral contract reached during Title VII's conciliation process. Because such action is contrary to the relevant statute and frustrates the purposes of Title VII, we affirm the district court.

I.

Nine employees of Appellee Philip Services Corporation (PSC) filed charges with Appellants Equal Employment Opportunity Commission (the Commission) against PSC, alleging racial discrimination. After finding reasonable cause to support the charges of discrimination, the Commission initiated the conciliation process with PSC as required by Title VII. *See* 42 U.S.C. § 2000e–5(b). On February 23, 2009, the parties participated in a conciliation conference *165 and subsequently exchanged several e-mails negotiating settlement terms. Approximately two weeks after the conciliation process was initiated, PSC withdrew from the negotiations. The Commission asserts that it was reducing the parties' verbal agreement to writing at the time PSC withdrew from the conciliation process.

On May 28, 2009, the Commission filed a breach of contract action with the district court, seeking specific enforcement of the terms of the alleged oral conciliation agreement. In support of its complaint, the Commission submitted a declaration asserting that the parties had reached an agreement on injunctive and monetary relief. The declaration further alleged that a written conciliation agreement was presented to PSC and that PSC verbally agreed to the terms. PSC filed a motion to dismiss or, alternatively, a motion for summary judgment. PSC disputed that a final agreement had been reached. PSC asserted that shortly after the conciliation process began, it withdrew from the negotiations because two employees wanted additional monetary relief and PSC was not prepared to settle the claims with less than all nine employees; none of the employees had executed final releases; and the

Commission had not yet provided PSC with a proposed written agreement.

The magistrate judge issued a recommendation that the district court grant PSC's motion to dismiss on the grounds that Title VII's confidentiality provision was an "insurmountable impediment" to the Commission's attempts to enforce the oral conciliation agreement. On February 25, 2010, the district court adopted the magistrate judge's recommendation and dismissed the Commission's suit, finding that "the plain language of the statute makes it clear that there are no exceptions" to Title VII's prohibition against using conciliation material in subsequent proceedings. On appeal, the Commission asks this court for a remand to the district court for discovery and a determination of whether the parties had entered into an oral contract.

II.

We review de novo a district court's determination on a motion to dismiss under Rule 12(b)(6), accepting "all well-pleaded facts as true [and] viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir.2007) (quotations and citations omitted).

¹¹ Title VII requires that the Commission "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The Commission may file a civil action only if it has first been unable to secure a conciliation agreement from the employer. See *E.E.O.C. v. Agro Distrib., LLC*, 555 F.3d 462, 468 (5th Cir.2009); see also 42 U.S.C. § 2000e-5(f)(1). Title VII provides that "[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 2000e-5(b). Title VII imposes sanctions for such disclosure, subjecting individuals who make public information in violation of this section to a fine "not more than \$1,000 or imprisonment for not more than one year, or both." *Id.*

¹² The Commission argues that this court should read the statute as prohibiting disclosure only in

subsequent proceedings on the merits of the charge, and that a suit to enforce an oral conciliation agreement *166 is not a subsequent proceeding within the meaning of the statute. The Commission asserts that this interpretation is consistent with the legislative history and with Congress's goal of encouraging settlement of employment disputes through conciliation. For the following reasons, we disagree.

A.

By its plain language, the statute does not carve out any exceptions to its prohibition against disclosure of conciliation material. See 42 U.S.C. § 2000e-5(b) ("*Nothing* said or done and as a part of such informal endeavors may be made public by the Commission ... or used as evidence in a subsequent proceeding without the written consent of the persons concerned." (emphasis added)). The Commission's own disclosure rules are nearly identical to the statute. See 29 C.F.R. § 1601.26(a) ("*Nothing* that is said or done during and as part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion may be made a matter of public information by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." (emphasis added)). The Commission would have us read an exception into the statute that is not contemplated by its plain terms, and we will not presume that Congress intended there to be an exception to or limitation of the meaning of the statute when it is unambiguous. See, e.g., *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 919 (5th Cir.1993). "Information expressly declared by statute to be confidential is so privileged." *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 879 (5th Cir. Unit A Mar.1981) (citation omitted). An inquiry into whether the parties entered into an oral conciliation agreement violates the clear prohibition against disclosure of what was "said or done" during conciliation.

The Commission argues that the phrase "subsequent proceeding" should be limited to subsequent proceedings on the merits. The Commission asserts that the legislative history of the statute demonstrates that the statute was not intended to prevent disclosure of conciliation information during a subsequent

specific enforcement action. The Commission directs us to the following:

It should be noted that this is a ban on publicizing and not on such disclosure as is necessary to the carrying out of the Commission's duties under the statute.... The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal agencies, but rather is aimed at the making available to the general public of unproven charges.

Id. at 879–80 (quoting 110 Cong. Rec. 12723 (1964) (statement of Sen. Humphrey)) (alteration in original).

The legislative history references 42 U.S.C. § 2000e–5(b) which provides, in relevant part

[w]henver a charge is filed ... the Commission shall ... make an investigation thereof.... Charges shall not be made public by the Commission.... If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the *167 written consent of the persons concerned.

42 U.S.C. § 2000e–5(b). The relevant portion of the statute contains two distinct non-disclosure provisions: 1) prohibition against disclosure of filed charges and 2) prohibition against disclosure of what was said and done during conciliation. *See id.* The

statement of Senator Humphrey addresses only the first non-disclosure provision and indicates Congress's intent that unproven, uninvestigated charges not be made known to the general public. *See E.E.O.C. v. Associated Dry Goods Corp.*, 449 U.S. 590, 599–600, 101 S.Ct. 817, 66 L.Ed.2d 762 (1981) (discussing Senator Humphrey's statement as establishing Congress's intent with respect to unproven charges); *Branch*, 638 F.2d at 880 (finding that Senator Humphrey's statement explained the purpose of the provision that “[c]harges shall not be made public by the Commission”). The legislative history does not address the non-disclosure provision concerning conciliation, and is therefore unpersuasive when used in an attempt to limit the disclosure of conciliation material in a subsequent proceeding.

The Commission's interpretation of the phrase is also contrary to our case law. In *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1476 (5th Cir.1992), an employee attempted to introduce at trial a letter that the Commission objected to as conciliation evidence barred by the statute. We held that a distinction exists between “factual material related to the merits of the charge and proposals and counter-proposals of compromise made by the parties during the EEOC's efforts to conciliate.” 964 F.2d at 1477 (internal marks and citation omitted). “[D]isclosure of the former [is] allowable, but disclosure of the latter [is] not.” *Id.* Title VII thus prohibits use of conciliation material in subsequent litigation, even by the parties to the proceeding. *See id.* What was “said or done” during conciliation must be revealed to determine the existence of an oral agreement. Such disclosure is clearly prohibited in a subsequent proceeding to establish the existence of an oral conciliation agreement.

B.

The Commission also points to our decision in *Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207, 1209 (5th Cir. Dec.1981), asserting that *Fulgence* permits specific enforcement of an oral conciliation agreement. In *Fulgence*, we held that “federal law determines the validity of oral agreements in employment discrimination actions brought pursuant to Title VII.” 662 F.2d at 1209. Federal law does not require settlement agreements to be reduced to writing. *Id.* In reaching that conclusion, we found that

a state law's "requirement that settlement agreements be reduced to writing might hamper a significant federal interest, since Congress has mandated a policy of encouraging voluntary settlement of Title VII claims." *Id.* Although the Commission's argument is facially appealing, there is a critical distinction between *Fulgence* and the circumstances presented here. There is no express statutory privilege to prevent disclosure of settlement agreements. The communications at issue in *Fulgence* were settlement negotiations subject to common law. *Fulgence* does not contemplate or discuss the statutory provision governing conciliations pursuant to Title VII, and thus is not instructive in this matter.

The Commission's reliance on *E.E.O.C. v. Safeway Stores, Inc.*, 714 F.2d 567 (5th Cir.1983) is likewise unhelpful. In *Safeway*, the Commission brought suit seeking specific performance on three written conciliation agreements entered into between *168 the Commission and the employer. 714 F.2d at 569. The court found that it had jurisdiction to consider specific enforcement actions on conciliation agreements because "[i]f conciliation agreements were unenforceable, there is little question that this primary role of voluntary compliance would be undermined." *Id.* at 573. The Commission asserts that *Safeway* stands for the proposition that, in order to affect the primary purpose of Title VII, oral conciliation agreements must be subject to specific enforcement. However, the primary issue considered in *Safeway* was whether the district court had subject matter jurisdiction over an enforcement action of written conciliation agreements pursuant to Title VII. *Id.* at 569. Unlike a determination of whether the parties entered into an oral contract that necessarily requires an inquiry into what was "said or done," written conciliation agreements reflect the intent of the parties in reaching a settlement. The Commission's own regulations recognize the importance of reducing conciliation agreements to writing. See 29 C.F.R. § 1601.24(a) ("Where such conciliation attempts are successful, the terms of the conciliation agreement shall be reduced to writing and shall be signed by the Commission's designated representative and the parties." (emphasis added)). As such, *Safeway* does not resolve whether a challenge to an alleged oral conciliation agreement is subject to specific enforcement actions.

C.

Finally, the Commission asserts that prohibiting enforcement of oral conciliation agreements contravenes the purposes of Title VII, which was designed to encourage voluntary settlements of employment discrimination claims. See, e.g., *Ricci v. DeStefano*, — U.S. —, 129 S.Ct. 2658, 2674, 174 L.Ed.2d 490 (2009) (recognizing "Congress's intent that voluntary compliance be the preferred means of achieving the objectives of Title VII" (internal marks and citations omitted)); *Agro Distrib.*, 555 F.3d at 468 ("Conciliation is the preferred means of achieving the objectives of Title VII.") (quoting *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 609 (9th Cir.1982) (internal marks omitted)); *Branch*, 638 F.2d at 880 ("The obvious purpose of the statute's prohibition on revealing statements made or actions taken during the Commission's conciliation efforts is to promote the congressional policy favoring unlitigated resolution of employment discrimination claims."); *Hutchings v. U.S. Indus., Inc.*, 428 F.2d 303, 309 (5th Cir.1970). ("[I]t is clear that Congress placed great emphasis upon private settlement and the elimination of unfair practices without litigation on the ground that voluntary compliance is preferable to court action." (internal marks and citations omitted)). The Commission argues that prohibiting enforcement of oral conciliation agreements frustrates the ability of the Commission to enter into and enforce voluntary settlements.

The Commission is certainly correct to emphasize the importance of this policy, however these policy goals are not realized only through enforcement of conciliation agreements. Keeping private what is "said or done" during conciliation is necessary to encourage voluntary settlements. "[T]he prospect of disclosure or possible admission into evidence of proposals made during conciliation efforts would tend to inhibit the kind of free and open communication necessary to achieve unlitigated compliance with the requirements of Title VII." *Branch*, 638 F.2d at 881. "[D]isclosure of conciliation materials, even to the parties, would discourage negotiated settlement and frustrate the intention of Congress." *Id.* To establish an oral contract, the Commission would necessarily have to disclose the proposals and counter-proposals *169 of compromise made by the parties. Such disclosure is contrary to the plain language of the statute and frustrates the purpose of encouraging voluntary settlements. Congress was presumably mindful of the policy goals of Title VII when it enacted the relevant

provisions.

The Commission argues that our holding creates an opportunity for abuse because “an employer would be free to enter into a conciliation agreement, bide its time for so long as it benefited from doing so, and then breach the agreement with no fear of sanction.” *Safeway*, 714 F.2d at 573. This is not as significant a concern as the Commission makes it out to be. Upon revocation of an alleged settlement agreement, the Commission is permitted to bring suit on the merits, so long as a good faith attempt at conciliation is made. *See, e.g., Agro Distrib.*, 555 F.3d at 468 (finding that the EEOC has fulfilled its statutory duty to attempt conciliation if it “(1) outline[s] to the employer the reasonable cause for its belief that Title VII has been violated, (2) offer[s] an opportunity for voluntary compliance; and (3) respond[s] in a reasonable and flexible manner to the reasonable attitudes of the employer.” (citation omitted)). Moreover, our decision does not leave the Commission unable to seek enforcement of a conciliation agreement, nor does it hamper its ability to resolve employment disputes through voluntary compliance. This court has clearly established that a written conciliation agreement is enforceable by the parties in a specific enforcement action in the federal courts. However, we hold that when, as here, the Commission is seeking a determination of whether the parties entered into an oral contract, such action necessarily requires an inquiry into what was said or done and is in direct violation of the statute.

III.

In the nearly fifty years since Title VII has been in effect, the parties have not identified and this court has not found any federal action seeking to enforce an oral conciliation agreement. Yet this is certainly not the first time in which a party has changed its mind or reneged on a verbal settlement agreement. Should this court permit actions seeking to establish an oral conciliation agreement, we would certainly see an increase in such actions and would risk a decrease in the open communication necessary to reach voluntary settlements during the conciliation process. *See Branch*, 638 F.2d at 881. Neither of these outcomes further Congress’s policy goals when establishing Title VII. *See id.*

For the foregoing reasons, we affirm the decision of the district court.

AFFIRMED.

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EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, Plaintiff,

v.

SCRUB, INC., Defendant.

No. 09 C 4228.

May 25, 2010.

Attorneys and Law Firms

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Opinion

MEMORANDUM OPINION AND ORDER

SUSAN E. COX, United States Magistrate Judge.

*1 This is a civil rights case where the Equal Employment Opportunity Commission ("EEOC") claims defendant Scrub, Inc. ("Scrub") has engaged in a pattern of discrimination against a class of African Americans by failing to hire and recruit them due to their race. Presently before the Court are three motions in this case: (1) Scrub's motion to compel documents withheld under claims of privilege [dkt 58]; (2) Scrub's motion to compel documents relating to EEOC communications with potential claimants [dkt 60], and; (3) EEOC's motion for a protective order [dkt 95]. The motions are granted in part and denied in part, as outlined below.

A. Scrub's motion to compel documents withheld

under claims of privilege [dkt 58]

In this motion to compel, Scrub argues that EEOC has wrongly refused to produce certain documents contained in the EEOC's investigative file, specifically regarding its pre-suit investigation. Scrub claims EEOC is incorrectly asserting a claim of privilege under section 706(b) of Title VII (42 U.S.C. § 2000e-5(b)), or, the government deliberative process privilege.

A bit of background on the process at EEOC is helpful in understanding how the distinction is made between discoverable documents and those that are generally protected by a privilege. Documents that reflect "predecisional analysis" are generally those protected by the government deliberative process privilege. EEOC explains that before it issues a letter of determination in a case, an investigator (in this case, Luis Rodriguez) writes an investigative memorandum. Then EEOC issues a letter of determination when the agency finds reasonable cause for the allegations described in the underlying charge. EEOC will "conciliate," or, essentially engage in settlement negotiations after that letter of determination is issued. The litigation unit does not pursue litigation unless and until conciliation has been attempted. Because all communications made "prior to and as a part of an agency determination are protected from disclosure" EEOC argues that any document or communication during this period of time is protected.¹

First, the statutory privilege that is asserted with respect to EEOC conciliations is found in section 2000e-5(b), which provides that:

If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. *Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.* Any

person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.²

Similarly, addressing evidence obtained during an investigation of a discrimination charge, section 2000e-8(e) provides that:

*2 It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information.³

Courts have explained that the purpose of the statute's prohibition on revealing statements or actions taken during the EEOC's conciliation process "is to promote the congressional policy favoring unlitigated resolution of employment discrimination claims."⁴ Specifically, a co-sponsor of the Senate bill stated "[th]e maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried on in privacy. If voluntary compliance with this title is not achieved, the dispute will be fully exposed to public view when a court suit is filed."⁵

As to the government deliberative process privilege, the rule exempts from disclosure documents that "reflect the deliberative or policy-making processes of governmental agencies."⁶ The government claiming the privilege first has to comply with the formal requirements for asserting the privilege by: (1) having the department head make a formal claim of the privilege; (2) submitting a declaration outlining the reason for confidentiality; and (3) identifying and describing the documents falling within the privilege.⁷ Then there is a two prong test used to determine if materials fall within the privilege: (1) the material must be predecisional or antecedent to the adoption of an agency policy; and (2) the material must be deliberative or actually related to how the policies were formulated.⁸ If the privilege applies, a court may still order disclosure if the plaintiff demonstrates a "particularized need" that outweighs the defendant's need for confidentiality.⁹

Here, Scrub attaches to its motion, as Exhibit A, its annotation of EEOC's privilege log. This document includes over 40 sets of documents that EEOC claims are privileged. The document also lists what privilege EEOC is asserting and whether Scrub disputes the EEOC's position (22 of those listed Scrub does not dispute). For example, a sampling of the documents in dispute include: an investigative memorandum prepared by EEOC's investigator, Mr. Rodriguez; calculations of gross payroll; calculations of "Scrub Shortfall"; handwritten notes by Mr. Rodriguez; and a draft charge against Scrub. With this list, Scrub believes that the Court can determine whether the privilege is properly asserted. If more is needed, however, Scrub requests the Court view the documents *in camera* to determine if the privilege has been rightly asserted.

As an initial matter, we must address Scrub's procedural argument that EEOC did not satisfy the requirements for asserting the privilege in the first place and, second, that it waived the privilege with respect to certain sets of documents because it asserted the privilege too late. In support, Scrub cites to *Pacific Gas & Electric Company v. The United States*, where the Court of Federal Claims found that there was no need to address whether the plaintiff had made a showing of need to overcome the qualified deliberative process privilege because it held that the defendant did not meet the threshold three-part test.¹⁰

*3 [T]he court's conclusion is based on the fact that defendant has failed to meet the procedural requirements for invoking the deliberative process privilege: first, defendant has failed to demonstrate that the privilege was properly invoked by an appropriate official; second, defendant has failed to "supply the court with 'precise and certain reasons' for maintaining the confidentiality of the requested document[s]," [citation omitted] and third, defendant's affidavits supporting its assertions of the deliberative process privilege have been belatedly executed.¹¹

Here, Scrub claims that because EEOC did not provide an affidavit from its Chair at the moment that EEOC invoked the privilege, it did not comply with the procedural requirements. EEOC has, in response to Scrub's motion, now filed an affidavit from its Acting Chairman, Stuart Ishimaru stating that he has personally reviewed the documents and found that they contain predecisional analysis, recommendations, opinions and conclusions of the

EEOC's investigatory personnel.¹² EEOC also cites to *United States v. Board of Education of the City of Chicago*, where a district court in our Circuit—Judge Aspen—found that the first part of the three-part test was met, despite a late affidavit.¹³ In that case, the court held that because the government official filed an affidavit, though “not doing so when he first claimed the privilege,” the privilege was nonetheless formally invoked when the affidavit was filed during the course of the dispute.¹⁴ This is enough for this Court to find EEOC's late affidavit sufficient. And because Scrub does not dispute the other two prongs of the procedural requirements—that EEOC outlined the reasons for confidentiality and identified the documents falling within the privilege—we find that EEOC has properly invoked the privilege.

We are also persuaded by EEOC's argument that it does not waive its privilege because it asserted the privilege for certain documents after giving Scrub a privilege log. As stated by EEOC, there is no statute of limitations for amending a privilege log. Apparently, though Scrub does not make this clear, EEOC produced documents on December 23, 2009 and then amended its privilege log on February 12, 2010 to assert the government deliberative process privilege. To support its claim for waiver, Scrub cites to a case in our district—our colleague Judge Brown—where, in a footnote, the court noted that the Federal Rules of Civil Procedure require discovery responses within 30 days, thus, an objecting attorney should also articulate any objections within those 30 days.¹⁵ We do not disagree that, procedurally, that is correct. Counsel should request additional time if a privilege log is required and not yet prepared within the 30 days. But in this case we believe the EEOC's “delay” in amending its privilege log does not warrant the drastic measure of waiver as asserted by Scrub.

Moving to the substance of the dispute, Scrub argues that the privilege does not apply because: (1) the EEOC is a plaintiff; (2) the privilege does not protect factual material; and (3) the privilege does not bar discovery related to the conciliation process where Scrub was a party. Scrub, however, has waived the first argument as to whether EEOC, as a plaintiff, prohibits reliance on the privilege. Arguments presented for the first time in a reply are waived.¹⁶ Even if it were timely, Scrub cites only to cases outside this Circuit for the proposition that when the agency is the plaintiff, courts favor discovery over privilege.¹⁷ The problem is, in our district the privilege has been applied even where the EEOC is a

plaintiff.¹⁸ We conclude that this alone, therefore, does not invalidate the use of the privilege.

*4 Second, Scrub asserts that the privilege does not protect factual material. This is, in fact, true.¹⁹ Scrub contends, however, that EEOC is withholding certain factual information found in the alleged privileged documents and refers to several cases where, after *in camera* reviews, those courts found “purely statistical” reports, investigator's memoranda containing factual material, and other “severable” factual material to be outside the scope of the privilege and ordered to be produced.²⁰ Scrub agrees that all predecisional materials, or, documents created prior to the execution of the EEOC's Letter of Determination are protected. Scrub, nonetheless, argues that at least parts of Mr. Rodriguez's investigative memorandum and draft memorandum should be disclosed, even though those would have been created before any letter of determination.²¹ Likening this case to *EEOC v. Fina Oil & Chemical Company*, where the Texas district court found that, after an *in camera* review of the investigative report, certain portions of the report reflected “routine agency procedure” and were “in no way revelatory of ... the deliberative process,” Scrub believes there may be discoverable factual information included in Mr. Rodriguez's report.²²

Then Scrub asserts that the document EEOC describes as the analysis of Scrub's income and potential liability (labeled in the privilege log as the calculations of gross payroll compiled by EEOC investigator W. Hubbard), as well as a memorandum in which an EEOC statistician calculated the statistical likelihood that Scrub discriminates based on census data (labeled as “Research and Technology Report on Scrub applicant data” in EEOC's privilege log) should also be disclosed.²³ Scrub argues that those calculations are not possibly recommendations or opinions, so the calculations must be factual in nature and discoverable. Here, Scrub again relies on Fifth Circuit opinions where the courts found purely statistical reports, where there were no subjective conclusions, not deliberative.²⁴

Scrub also argues that handwritten notes by EEOC's investigator, Mr. Rodriguez, cannot all be regarding policy or decisionmaking so, therefore, must be at least partially discoverable. Finally, Scrub points to two additional sets of documents as discoverable: one containing Mr. Rodriguez's mathematical calculations and another containing unknown “Sensitive Information.”²⁵ Essentially, Scrub

contends that these documents, on their face, include some factual information and, thus, warrant an *in camera* review by the Court to determine what can yet be discovered.

EEOC responds generally that all of the withheld documents contain analysis, personal impressions or recommendations and, therefore, are protected from disclosure. EEOC then attempts to distinguish the documents at issue here from those described in the case relied on by Scrub, *Fina Oil*, by claiming that the "subjective conclusions" are not easily segregable from "purely factual material."⁵ For example, EEOC claims that the documents authored by EEOC's in-house mathematical statistician, Bliss Cartwright, contain evaluations and analyses of applicant shortfall, applicant data, and gross payroll, mixed with facts gleaned from the investigative file and census data. EEOC then further explains that all of Mr. Cartwright's statistical reports include subjective conclusions, which are protected by the government deliberative process privilege. As to Mr. Rodriguez, EEOC asserts that disclosure of the facts in his documents would reveal why he took those facts into consideration.

⁵ EEOC also argues that Scrub has failed in its burden to show why the Court should require production of these disputed documents. Once the EEOC has satisfied its threshold burden of establishing that the privilege applies, which it has here, Scrub has the burden to show a particularized need for the documents.⁶ Then the court balances the litigant's need for disclosure against the government's need for secrecy.⁷ According to Scrub, its only claim of need for this discovery relates to its claim of *laches* and its belief that EEOC did not timely pursue investigation of the underlying charge in this case. Scrub asserts, therefore, that any document that may disclose whether Mr. Rodriguez was diligently pursuing the investigation in a timely fashion is relevant. Relevance, however, is an insufficient reason for breaching the deliberative process privilege.⁸ Scrub must show a "particularized need for the privileged documents that outweighs defendants' interest in not disclosing them."⁹

A showing of relevancy, however, is enough to warrant an *in camera* inspection.¹⁰ Without an *in camera* review of these documents, the Court is only really able to provide guesswork. EEOC, to no surprise, disagrees that the Court should conduct an *in camera* inspection of the documents. EEOC cites to *Chemcentral/Grand Rapids Corporation v. United*

States Environmental Protection Agency, where the district court declined to require an *in camera* inspection "just to make sure EPA is telling the truth."¹¹ In that case, the court found that the plaintiff failed to explain why the documents in dispute even possibly contained undisclosed factual material and, without some evidence that the EPA was lying, the court refused an *in camera* inspection.¹² Though we are similarly inclined to refuse an *in camera* inspection, to truly determine whether disclosure "would serve only to reveal the evaluative process," which is what the privilege is designed to protect, we see no alternative.¹³ As noted by Judge Conlon, "in determining whether a party's claim of need outweighs the government's interest in confidentiality, an *in camera* inspection is usually appropriate."¹⁴ It is evident that in most government deliberative process privilege cases, because facts can be intermixed with analysis, courts take a careful case-by-case analysis of the material sought before making a determination. Here we must do the same.

The final argument we must address is Scrub's claim that the privilege does not bar discovery related to the conciliation process where Scrub was a party, again referring back to section 706(b) of Title VII, which provides that "[n]othing said or done during and as a part of such informal endeavors [—conference, conciliation, and persuasion—] may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned."¹⁵ Here Scrub cites to the United States Supreme Court decision in *EEOC v. Associated Dry Goods Corporation*, where the Court interpreted the language in section 706(b).¹⁶ Specifically, the Court discussed the word "public" in the statute, stating that it did not "logically include the parties to the proceedings."¹⁷ Relating to that case, Scrub argues that here, because it participated in the conciliation, it should be permitted discovery of conciliation materials.

¹⁸ EEOC, however, contends that the conciliation privilege outlined in the statute allows EEOC to withhold such materials because, in this case, the charging party has not consented to such disclosure.¹⁹ EEOC then cites to *EEOC v. Olsten Staffing Services Corporation*, which only addressed whether a third party could access conciliation documents, not whether the defendant itself could access the documents.²⁰ More on point, however, the *Olsten* court cited to a Fifth Circuit case, *Branch v. Phillips Petroleum Company*, where the court noted that

disclosing details of a plaintiff's charges against an employer could "undermine the purpose of section 706(b) if potential parties feared that their filings could be the subject of discovery." "In the *Branch* case, the Fifth Circuit noted that the EEOC's regulations and policies manual "make no exception for disclosure of conciliation materials to opposing parties" (while distinguishing such materials from purely factual information, which, it acknowledged, is discoverable)."

Scrub believes *Branch*, and other cases that have barred production of materials to the employer, were simply wrongly decided. It is true that *Branch*, though decided several months after *Associated Dry Goods*, did not cite to the Supreme Court's decision. It nevertheless held that,

the prospect of disclosure or possible admission into evidence of proposals made during conciliation efforts would tend to inhibit the kind of free and open communication necessary to achieve unlitigated compliance with the requirements of Title VII. Therefore, disclosure of conciliation materials, even to the parties, would discourage negotiated settlement and frustrate the intention of Congress."

This view succinctly refutes Scrub's position. Here, the Fifth Circuit likened the purpose of section 706(b), and the confidentiality provisions therein, to the traditional evidentiary rule making offers of compromise and settlement that are inadmissible under Federal Rule of Evidence 408.⁴⁴ Here, we do the same. We acknowledge that *Associated Dry Goods* did, in fact, find that disclosure of "the charge" to the charging party itself was intended by the statute (because "the charging party cannot logically be a member of the 'public' to whom disclosure is forbidden ...").⁴⁵ The Court also found that the "the charge" could not be concealed from the employer, "since the statute also expressly requires [EEOC] to serve notice of the charge upon the respondent within 10 days of its filing."⁴⁶ But, like the Fifth Circuit, we cannot interpret the Supreme Court's analysis of disclosure to encompass all communications made during conciliation. We will not, therefore, require EEOC to disclose communications or proposals made during the

conciliation process. Again, purely factual material related to the merits of the EEOC charge, however, remain discoverable.

B. Scrub's motion to compel documents relating to EEOC communications with potential claimants [dkt 60]

*7 This motion relates to certain form letters and questionnaires that EEOC sent out to potential plaintiffs, or, persons it believed may have applied for positions with Scrub. EEOC has already produced to Scrub a copy of the form letter that it sent out and a copy of the blank questionnaire. But Scrub wants all of the completed questionnaires, of which EEOC claims there are over 600, and more arriving daily. EEOC has refused to produce these documents, asserting the attorney-client privilege and the work product privilege.

The questionnaires at issue in this case were sent with a form cover letter, informing the recipient that if he or she believed to have been discriminated against due to race, and would like to participate in the EEOC's lawsuit, to return the questionnaire.⁴⁷ The cover letter also notes that it will be up to the EEOC as to whether the recipient meets the qualifications for inclusion in the case. Then the actual questionnaire requests general information, including name, race, address, dates applied to Scrub and if they were offered a position at Scrub.⁴⁸ It should be noted, however, that the first question on the questionnaire is "[i]f you qualify as a class member, do you want the EEOC to represent you?"

The attorney-client privilege is "strictly construed" because it inevitably makes discovery more difficult by preventing the disclosure of often relevant information.⁴⁹ The privilege protects communications between an attorney and a client but is limited to circumstances where an attorney is acting as a legal advisor.⁵⁰ Communications between the EEOC and individuals for whom the EEOC seeks relief are, however, privileged by *de facto* attorney-client privilege.⁵¹ The privilege may also extend to prospective EEOC claimants.⁵²

The essential question here is whether the recipients of the cover letter and questionnaire were prospective EEOC claimants that would be covered by the attorney-client privilege. Scrub presents two main arguments: (1) that the completed questionnaires are not protected, citing to *EEOC v. ABM Industries*

Inc.,³³ and; (2) even if the privilege applies, the facts contained in the completed questionnaires must be produced. We will first look to the principle case relied upon by Scrub. In *ABM*, like here, the California district court addressed whether a letter and questionnaire sent to “a group of potential claimants (and/or witnesses)” would suffice to create the attorney-client privilege and limit disclosure of the completed questionnaires.³⁴ The court found that it did not. The court noted that simply because the EEOC brings a Title VII suit does not automatically create the attorney-client privilege across an entire potential class.³⁵ So the court ultimately concluded that “the EEOC’s cover letter and form of questionnaire” were not protected by the attorney-client privilege.³⁶

Scrub would like us to follow this same analysis and require production of all of the questionnaires. It is useful to first discuss how, in reaching its conclusion, the *ABM* court interpreted *EEOC v. International Profit Associates, Inc.*, which is a case from our district.³⁷ The court in *International Profit* found that an attorney-client relationship exists when an individual contacts the EEOC through questionnaires and phone calls.³⁸ The questionnaires in that case, however, were not at issue. Only the interview notes taken by EEOC attorneys were in dispute.³⁹ The *ABM* court, therefore, distinguished itself from *International Profit* and noted its disagreement with courts that had found *International Profit* to stand for the proposition that simply contact through a questionnaire would automatically create a privilege. Specifically, the court explained that,

*8 *International Profit* shows that it was the subsequent contacts (i.e., those occurring after they initially called and/or returned the questionnaires) with the EEOC during which the interviewees expressly affirmed their intention to enter into an attorney-client relationship with the EEOC that established the creation of such a professional relationship.⁴⁰

Another point the *ABM* court made—when it decided not to extend the privilege to the questionnaires—was that the questionnaires at issue “did not promise or intimate in any way that information disclosed in completing the questionnaire would remain confidential.”⁴¹ The court found that because the privilege only extended to “legal advice” or communications that “reveal the substance of a client confidence,” the particular questionnaire used did not reveal “the kind of information the privilege is designed to protect.”⁴² Specifically, the questionnaire

only sought identifying information, including name, address, age and telephone number, and then asked for limited information on employment with the company and whether the individual had witnessed sexual harassment while working.⁴³

Similarly, in *International Profit*, and in this case, the questionnaires also primarily asked for identifying information and dates worked.⁴⁴ But more importantly, the EEOC in *International Profit* actually produced the completed questionnaires.⁴⁵ It was only the interview notes, which were generated because the potential claimants contacted the EEOC via the returned questionnaires or telephone calls, that were in dispute and eventually determined to be covered by the attorney-client privilege. Simply comparing those facts with our case supports Scrub’s position to turn over the questionnaires.

But this case falls somewhere in the middle. Like *ABM* and *International Profit*, in this case the questionnaires ask for general identifying information. It could, therefore, be argued that such information is not privileged and the questionnaires should be turned over (as it would seem was done without dispute in *International Profit*). Here, however, the questionnaires also ask if the recipient would like the EEOC to represent them. This adds another layer to the analysis because in *ABM* the questionnaires were missing this “critical” piece.⁴⁶ In *ABM* the court stated that there was “no adequate showing that the EEOC’s cover letter or questionnaire expressly offered the recipient the EEOC’s legal services,” yet another reason that the court ruled that the privilege did not extend.⁴⁷ The *ABM* court addressed this when it cited to *Bauman v. Jacobs Suchard*,⁴⁸ another case in our district where a primary purpose of the letter and questionnaire sent to potential claimants was to ask if they wished to be represented by the EEOC.⁴⁹ In *Bauman*, the protection of the attorney-client privilege extended to the completed questionnaires.⁵⁰

*9 This distinction is important, and tips the balance in favor of applying the privilege here. Where the questionnaires are completed by persons seeking legal representation, the privilege extends.⁵¹ “The attorney-client privilege covers communications where ‘legal advice of any kind is sought’ and is not dependent upon the initiation or contemplation of litigation.”⁵² An attorney-client relationship is also not tied to actual employment of a lawyer, so Scrub’s argument that the questionnaires are not privileged because EEOC did not make a definitive offer to

represent potential claimants is unavailing (pointing to EEOC's cover letter that indicates that it will be the EEOC's decision as to whether the recipient meets the qualifications for inclusion in the case).¹⁰

This brings us to Scrub's argument that facts contained in EEOC's interview notes must also be disclosed. EEOC argues that interviews with class members and witnesses are protected from disclosure by the work product doctrine. We agree. As was noted above, the court found in *International Profit* that the interview notes generated from the potential claimants' contact with EEOC were covered by the attorney-client privilege.¹¹ And though not all written material prepared by an attorney "with an eye toward litigation" will necessarily be free from discovery, "it is essential that a lawyer work with a certain degree of privacy."¹² Rule 26(b) (3) of the Federal Rules of Civil Procedure protects work product that reveals an attorney's mental processes. Only after a showing of substantial need will work product be required to be produced, and even then the Rule provides that mental impressions, conclusions, opinions and legal theories shall remain protected from disclosure.¹³ The completed questionnaires and any interview notes of communications between prospective class members and EEOC counsel are, therefore, protected from disclosure.¹⁴

We recognize, however, Scrub's argument that the disclosure of *facts* communicated to an attorney are not protected by the privilege.¹⁵ As was suggested by EEOC, Scrub has now filed additional interrogatories requesting specific facts, one of which remains in dispute and is the subject of EEOC's motion for protective order. Because this argument is better served when discussing the specific interrogatory Scrub has propounded, we will move to that issue.

C. EEOC's motion for a protective order [dkt 95]

In briefing the above two motions, EEOC noted that instead of seeking certain information from EEOC through the questionnaires and interview notes as a last resort, Scrub was requesting them as a "first resort before exhausting other means of discovery." What EEOC recommended, therefore, was that Scrub try to obtain the facts it was seeking (e.g., information about the nature of class members' claims) through interrogatories. Now Scrub has done so, and EEOC objects to one of those interrogatory requests, Interrogatory Number 7. This interrogatory requests that EEOC:

*10 State all dates on which you submitted applications for employment with Scrub, the position(s) for which you applied, the manner in which you received, filled out and submitted your application, the person to whom you submitted your application, all meetings and telephone conferences with Scrub employees or agents regarding the application, and any and all of your observations related to Scrub's treatment of you or others at any time on in Scrub's offices.

EEOC contends in its motion that it is willing to provide a complete response to this request with respect to class members that it may call to testify in the liability phase of the trial and with respect to class members for whom it seeks compensatory damages. These two groups constitute approximately, according to EEOC, 150 people. EEOC also provides that it will respond on behalf of all 650 class members to all portions of Interrogatory Number 7, except the portion that asks for "all of your observations related to Scrub's treatment of you or others at any time on in [sic] Scrub's premises" and "all meetings and telephone conferences with Scrub employees." So the dispute is limited to only this portion of the interrogatory. And we need not further address Scrub's argument that the disclosure of facts is required—specifically, its request for information about whether class members were interviewed, when they applied, and when they interviewed—because EEOC intends to, and should, provide such information.

EEOC's objection to providing a response for all 650 class members, as to each of their observations related to Scrub's treatment of them, and regarding all meetings and telephone conferences, is that it will then have to contact each of these individuals to obtain the information. EEOC argues that doing so would be extremely burdensome and asserts that there is little potential relevance of such information to Scrub's defenses. In other words, EEOC claims that there is no relation between Scrub's treatment of the remaining class members and Scrub's defense that it did not engage in a pattern or practice of failing to hire African-Americans. EEOC, nonetheless, also has offered to respond on behalf of

a random sample of class members whom it represents (in addition to class members that it may call to testify in the liability phase of the trial and class members for whom it seeks compensatory damages).

We find this to be an appropriate compromise. As noted by EEOC, it is not required to put on proof with respect to each individual class member. Instead, a pattern or practice of discrimination may be established through statistical evidence.” Scrub, however, argues that despite EEOC’s ability to put on proof through statistics, Scrub is entitled to sort through the facts EEOC has gathered to choose anecdotes “that tend to undermine the EEOC’s case.”⁹⁰ Scrub is essentially arguing that it does not believe that EEOC has not engaged in individual discovery. In other words, Scrub believes that EEOC is potentially withholding information on class members’ experiences with Scrub. The Court is unwilling to make that assumption. The appropriate solution, at this stage, is to require EEOC to respond to the interrogatory in full, as it has agreed to do. But with respect to the disputed portion of the interrogatory, EEOC is to respond on behalf of a random sample of class members, as it had offered to do (in addition to the witnesses and class members for whom it seeks compensatory damages). This limited discovery will allow Scrub to determine,

generally, whether the experiences of the other 400 plus EEOC class members (not included in the 150 class member group the EEOC has already agreed to provide responses for) are worth further discovery efforts.

D. Conclusion

*11 As fully outlined above, Scrub’s motion to compel documents withheld under claims of privilege is granted in part and denied in part [dkt 58]; Scrub’s motion to compel documents relating to EEOC communications with potential claimants is denied [dkt 60], and; EEOC’s motion for a protective order is granted in part and denied in part [dkt 95]. EEOC is directed to provide to the Court the necessary documents for *in camera* inspection on or before June 2, 2010.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 2136807

Footnotes

1 See *U.S. v. Farley*, 11 F.3d 1385, 1389 (7th Cir.1993).

2 42 U.S.C. § 2000e-5(b) (emphasis added).

3 42 U.S.C. § 2000e-8(e).

4 *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 880-81 (5th Cir.1981); see also *Haykel v. G.F.L. Furniture Leasing Co.*, 76 F.R.D. 386, 392 (D.C.Ga.1976) (agreeing that conciliation negotiations should not be subject to discovery because it would “destroy the openness and informality of the conciliation process”).

5 *EEOC v. Dry Goods Corp.*, 449 U.S. 590, 600, n. 16, 101 S.Ct. 817, 66 L.Ed.2d 762 (quoting 110 Cong. Rec. 8193 (1964) (emphasis added)).

6 *Brown v. U.S. Patent and Trademark Office*, 355 F.Supp.2d 940, 942 (N.D.Ill.2005).

7 *K.L. v. Edgar*, 964 F.Supp. 1206, 1209 (N.D.Ill.1997).

8 *Brown*, 355 F.Supp.2d at 942.

9 See *Sronkoski v. Schaumburg Sch. Dist., No. 54*, 2009 WL 1940779, *1 (N.D.Ill. July 1, 2009).

10 70 Fed. Cl. 128 (2006).

11 *Pacific Gas & Electric Co.*, 70 Fed. Cl. at 136–37.

12 Dkt. 86, Exh 1.

13 610 F.Supp. 695, 698 (N.D.Ill.1985).

14 *Board of Educ. of City of Chicago*, 610 F.Supp. at 698.

15 *Hobley v. Chicago Police Commander Burge*, 2003 WL 22682362, *3 (N.D.Ill. Nov.12, 2003).

16 See *In re Neopharm, Inc. Securities Litig.*, 2010 WL 1335824, *17 (N.D.Ill. Mar.31, 2010) (citing *Carter v. Tennant Co.*, 383 F.3d 673, 678 (7th Cir.2004)).

17 See *E.E.O.C. v. Los Alamos Constructors, Inc.*, 382 F.Supp. 1373, 1386 (D.N.M.1974) (finding that “government files are not sacrosanct” and “firmly claims of privilege will not be recognized to further a desire by the EEOC to fight an opponent one of whose hands the EEOC wants to tie behind the opponent’s back.”); see also *EEOC v. Citizens Bank and Trust Co. of Maryland*, 117 F.R.D. 366, 368 (D.Md.1987) (noting that the court would be inclined to sustain claims of privilege where the government was not the plaintiff).

18 See *U.S. E.E.O.C. v. Continental Airlines, Inc.*, 395 F.Supp.2d 738 (N.D.Ill.2005).

19 See *Enviro Tech. Int’l, Inc. v. U.S. E.P.A.*, 371 F.3d 370, 375 (7th Cir.2004).

20 See *E.E. O.C. v. Fina Oil & Chem. Co.*, 145 F.R.D. 74, 76 (E.D.Tex.1992) (citing a Fifth Circuit case that found purely statistical reports, absent subjective conclusions, not deliberative in nature); see also *E.E. O.C. Chemisco, Inc.*, 203 F.R.D. 432 (E.D.Mo.2001) (denying in camera review but ordering documents containing factual material to be produced); *Greene v. Thalheimer’s Dep. Store*, 93 F.R.D. 657, 661 (E.D.Va.1982) (ruling that the purely factual passages contained in the privileged documents should be pulled out, where they “are severable from their context”).

21 See dkt 58, Exh. A.

22 See 145 F.R.D. 74, 76 (E.D.Tex.1992).

23 EEOC’s Resp., Exh 1, Bates # E00074 and E00118–156.

24 See *Fina*, 145 F.R.D. at 76; see also *Pacific Molasses Co. v. N.L.R.B.*, 577 F.2d 1172, 1183 (5th Cir.1978).

25 EEOC’s Resp., Exh 1, Bates # E000276–281 and E000371–375.

26 See *Fina*, 145 F.R.D. at 75.

27 See *K.L.*, 984 F.Supp. at 1209 (citing *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir.1993)).

28 *Id.*

29 *Id* (citing *Farley*, 11 F.3d at 1390).

30 *Id*.

31 *E.E.O.C. v. Stauffer Chem. Co.*, No. 89-2725, 1990 WL 19967, *2 (N.D.Ill. Feb.27, 1990) (citing *McClelland v. Andrus*, 606 F.2d 1278, 1280 (D.D.Cir.1979)).

32 1992 WL 724965, *13 (N.D.Ill. Aug.20, 1992).

33 *Id*.

34 *See Fina*, 145 F.R.D. at 75.

35 *E.E.O.C. v. Stauffer Chem. Co.*, No. 89-2725, 1990 WL 19967, *2 (N.D.Ill. Feb.27, 1990) (citing *United States v. Bd. of Educ.*, 610 F.Supp. 695, 699 (N.D.Ill.1985)).

36 42. U.S.C. § 2000e-5(b).

37 449 U.S. 590, 101 S.Ct. 817, 66 L.Ed.2d 762 (1981).

38 *Assoc. Dry Goods Corp.*, 449 U.S. at 598.

39 42 U.S.C. § 2000e-5(b) (providing that "[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.").

40 627 F.Supp.2d 972, 975 (W.D.Wis.2009).

41 *Olisten Staffing Services Corp.*, 627 F.Supp.2d at 975 (citing *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 880-81 (5th Cir.1981).

42 *See Branch*, 638 F.2d at 881.

43 *Branch*, 638 F.2d at 881.

44 *Id*; *see also* Fed.R.Evid. 408.

45 449 U.S. at 598.

46 *Id*.

47 Dkt 60, Scrub's Mt to Compel, exh. F.

48 Dkt 60, Scrub's Mt to Compel, exh. G.

49 *In re sulfuric Acid Antitrust Litigation*, 235 F.R.D. 407, 414 (N.D.Ill.2008).

50 *In re sulfuric Acid Antitrust Litigation*, 235 F.R.D. at 414.

⁵¹ See *E.E.O.C. v. Tony's Lunge, Inc.*, 2010 WL 1444874, *2 (S.D.Ill. April 9, 2010) (citing *Bauman v. Jacobs Suchard, Inc.*, 136 F.R.D. 460, 461 (N.D.Ill.1990)).

⁵² *E.E.O.C. v. Int'l Profit Associates, Inc.*, 206 F.R.D. 215, 219 (N.D.Ill.2002).

⁵³ 261 F.R.D. 503, 508 (E.D.Cal.2009).

⁵⁴ *ABM Indus.*, 261 F.R.D. at 508.

⁵⁵ *Id.* (citing *EEOC v. Collegiville/Imageneering Ent.*, 2007 WL 158735 at *1 (D.Ariz.2007)).

⁵⁶ *Id.* at 511.

⁵⁷ 206 F.R.D. 215 (N.D.Ill.2002).

⁵⁸ *ABM Indus.*, 261 F.R.D. at 508, n. 4.

⁵⁹ *International Profit Associates, Inc.*, 206 F.R.D. at 218.

⁶⁰ *ABM Indus.*, 261 F.R.D. at 508, n. 4.

⁶¹ *Id.* at 510.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 206 F.R.D. at 217.

⁶⁵ *Id.*

⁶⁶ See 261 F.R.D. at 508.

⁶⁷ *Id.*

⁶⁸ 136 F.R.D. 460 (N.D.Ill.1990).

⁶⁹ *ABM Indus.*, 261 F.R.D. at 508.

⁷⁰ *Id.* (discussing the ruling in *Bauman v. Jacobs Suchard*, 136 F.R.D. 460).

⁷¹ See *Vodak v. City of Chicago*, No. 03-2463, 2004 WL 783051, *4 (N.D.Ill.2004).

⁷² *Vodak*, No. 03-2463, 2004 WL 783051 at *4 (citing *U.S. v. White*, 950 F.2d 426, 430 (7th Cir.1991)).

⁷³ See *id.*; see also *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir.1978) (holding that the lawyer client relationship begins with the preliminary consultation "with a view to retention of the lawyer,

although actual employment does not result.”).

74 206 F.R.D. at 218.

75 *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 81 L.Ed. 451 (1947).

76 Fed.R.Civ.Pro. 26(b)(3); *see also Upjohn Co. v. U.S.*, 449 U.S. 383, 400, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

77 *See International Profit Associates, Inc.*, 206 F.R.D. at 219.

78 *See U.S.E.E.O.C. v. Bill Heard Chevrolet Corp.*, No. 07-1195, 2009 WL 2489282 (D.Nev.2009) (noting that “[a]lthough the questionnaires and responses themselves are protected from disclosure, the underlying factual information is not.”).

79 *See Int’l Broth. of Teamsters v. U.S.*, 431 U.S. 324, 329, 97 S.Ct. 1843, 52 L.Ed.2d 398 (1977) (finding that statistical analyses can establish a prima facie case of racial discrimination and employment discrimination).

80 Scrub’s Resp. at 13.

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United States District Court,
S.D. Indiana,
Indianapolis Division.

Rudolph FRAZIER, Sr., Plaintiff,
v.
INDIANA DEPARTMENT OF LABOR,
Defendant.

No. IP01-0198-C-T/G.

March 17, 2003.

Attorneys and Law Firms

Tamika Bates, Roberts & Bishop, Indianapolis, IN,
for Plaintiff.

Loralei C. Lannan, Office of Attorney General,
Indianapolis, IN, for Defendant.

Opinion

ENTRY ON DEFENDANT'S MOTION IN LIMINE¹

JOHN DANIEL TINDER, District Judge.

^{*1} The Defendant, the Indiana Department of Labor ("DOL"), filed a motion in limine seeking to exclude the following matters from discussion or revelation at trial by the parties, their counsel and their witnesses: (1) any retaliation against the Plaintiff on the part of the Defendant; (2) back pay or front pay of the Plaintiff; (3) any prior investigations, disciplinary actions, counseling, performance evaluations, work improvement plans, or involuntary separation of employment of the Plaintiff's supervisors or fellow employees with the exception of Nancy Jones to the extent she might be considered comparable to the Plaintiff; (4) any medical, psychological or psychiatric condition of the Plaintiff alleged to be proximately caused by any fact or allegation of the Plaintiff until admissible evidence of such condition is presented by an expert witness, except that the Plaintiff may be allowed to testify in lay terms from his personal knowledge as to allegations of mental anguish or emotional distress; (5) any medical, psychological or psychiatric condition of the Plaintiff

alleged to be proximately caused by any fact or allegation of the Plaintiff by any lay witness; (6) any expenses incurred for any medical, psychological or psychiatric condition of the Plaintiff alleged to be proximately caused by any fact or allegation of the Plaintiff by the Plaintiff or any witness until an expert witness testifies as to the reasonableness of the cost and necessity of the treatment; (7) any Equal Employment Opportunity Commission ("EEOC") charges, grievances, and administrative or legal claims or causes of action, including the investigations of such charges, grievances, and administrative or legal claims or causes of action of the Plaintiff and other former or current DOL employees including the position statements of the complainants and respondents and the resolution or settlement of any such charges, claims or actions; (8) any subsequent remedial measure to prove any allegation of the Plaintiff; (9) settlement negotiations; and (10) any alleged acts of discrimination not referenced in the charge the Plaintiff filed with the EEOC, alleged acts of retaliation or "whistle blower" claims. Each matter is addressed in turn.

(1) Retaliation

The Plaintiff's retaliation claim against the Defendant was dismissed by the court and, thus, any evidence of retaliation against the Plaintiff is irrelevant in the trial of the discrimination claims and inadmissible under Federal Rule of Evidence 402. Even if relevant, such evidence should be excluded under Rule 403 as its probative value would be substantially outweighed by the danger of unfair prejudice to the Defendant and confusion of the issues. Therefore, the Defendant's motion in limine is **GRANTED** as to any retaliation against the Plaintiff on the part of the Defendant.

(2) Back Pay/Front Pay

Back pay and front pay awards under Title VII are equitable issues for the judge's determination rather than the jury's. See *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 951-52 (7th Cir.1998) (holding Title VII authorizes front pay as an equitable remedy); *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1147 (7th Cir.1993) (back pay in age discrimination case); *Price v. Marshall Erdman & Assocs.*, 966 F.2d 320, 324 (7th Cir.1992) (same); *Grayson v. Wickes Corp.*, 607 F.2d 1194, 1195 (7th Cir.1979) (back pay under Equal Pay Act). As a result, the Defendant's motion

in limine is GRANTED as to back pay and front pay of the Plaintiff. For purposes of this order, back pay is the difference between the past wages and benefits the Plaintiff received in the Field Auditor position and the wages and benefits he would have received had he remained in the Controller position, and front pay means the difference between the future wages and benefits that the Plaintiff will earn in the Field Auditor position and the wages and benefits he would have earned had he remained in the Controller position. Thus, the jury will not be instructed on back or front pay as an element of damages, evidence of compensation matters may not be offered or referred to in the presence of the jury, and no argument about compensation matters is to be made in the presence of the jury.

*2 However, the evidence may show that the pay differential in some way relates to mental anguish or emotional distress damages. That is to say that the court can envision the presentation of evidence to show that the reduction in pay and prestige could have affected the Plaintiff's state of mind. This order in limine, therefore, does not preclude mention or general reference to the existence of a pay differential between the pay the Plaintiff received in the Controller position and the pay he received after being removed from that position and placed in the Field Auditor position, if it is linked by the evidence to a claim for mental anguish or emotion distress. The differential is not to be quantified, as with a claim for front or back pay, but rather, can be mentioned in a general way if it is shown to have a relationship to the matters of damage that are within the jury's province.

(3) Comparator Evidence

The Plaintiff has listed on his final exhibit list performance appraisals for Joseph Black, Chris Bryant, David Crall, Brent Cuniffe, Gregory Dewey and Jennifer Hoene, and work improvement plans for Douglas Book, Louise Andreani/Carr, Gary Cahill, Kevin Coleman, Joseph Hilgenberg, James Lamb and Jason Reason. At the final pretrial conference, the Plaintiff indicated his intent to offer evidence at trial that such individuals received performance appraisals or work improvement plans. In the summary judgment entry, see Entry Adopting the Magistrate Judge's Report and Recommendation as Modified Herein, dated October 16, 2002, at pages 3-4, footnote 2, the court anticipated that this issue would need to be addressed in the future and that day has

now arrived.

The evidence at issue is intended to support a finding that employees similarly situated to the Plaintiff but not in the protected class were treated more favorably. "A similarly situated employee is one who is 'directly comparable to [the plaintiff] in all material respects.'" *Rogers v. City of Chicago*, No. 02-1211,-F.3d-, 2003 WL 483202, at *6 (7th Cir. Feb. 26, 2003) (quoting *Grayson v. O'Neill*, 308 F.3d 808, 819 (7th Cir.2002)); see also *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir.2002) (finding plaintiff not comparable to another employee in all material respects where plaintiff and other employee reported to and were evaluated by different supervisors and had different qualifications, experiences and responsibilities). In deciding whether another employee is similarly situated to the Plaintiff, the court must consider "all relevant factors, the number of which depends on the context of the case." *Patterson*, 281 F.3d at 680 (quoting *Radue v. Kimberly Clark Corp.*, 219 F.3d 612, 617 (7th Cir.2000)).

Relevant factors include whether the employee and proffered comparable " 'dealt with the same supervisor' " and were " 'subject to the same standards.' " *Id.* at 680 (quoting *Radue*, 219 F.3d at 617-18); see also *Lim v. Tr. of Ind. Univ.*, 297 F.3d 575, 581 (7th Cir.2002) (holding male professors granted tenure before implementation of higher publishing standards several years before female professor was a tenure candidate were not similarly situated to female professor); *Snipes v. Ill. Dep't of Corr.*, 291 F.2d 460, 463 (7th Cir.2002) (holding district court did not abuse its discretion in concluding that plaintiff was not similarly situated to co-employees who had different supervisors than plaintiff). Commonality of supervisors is important because "[d]ifferent employment decisions, concerning different employees, made by different supervisors ... sufficiently account for any disparity in treatment, thereby preventing an inference of discrimination." *Snipes*, 291 F.3d at 463 (quotation omitted); see also *Radue*, 219 F.3d at 618 (explaining when "different decision-makers are involved, two decisions are rarely similarly situated in all respects"). Another relevant factor is whether the employee and proffered comparable held the same or equivalent positions at the time of the challenged employment decision. See, e.g., *Patterson*, 281 F.3d at 680 (holding plaintiff failed to show coworker was similarly situated where coworker "held an entirely different position in another division of the

company"); *Hoffman Dombrowski v. Arlington Int'l Racecourse, Inc.*, 254 F.3d 644, 651 (7th Cir.2001) (deciding comparator was not similarly situated to plaintiff because they did not hold the same or equivalent positions at the time of the challenged employment decision); cf. *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 743-44 (7th Cir.1999) (comparing plaintiff to only other employee in same level managerial position as plaintiff).

*3 Considering these relevant factors, the court determines based on the record before it that Black, Bryant, Crall, Cuniffe, Dewey, Hoene, Book, Andreani/Carr, Cahill, Coleman, Hilgenberg, Lamb and Reason are not similarly situated to the Plaintiff.² Even though these employees were merit employees of the DOL like the Plaintiff and, thus, subject to some of the same standards, including personnel rules, their circumstances are far different from his. These employees did not share the same direct supervisor with the Plaintiff. Commissioner Joyce was not responsible for performing, and did not perform, their appraisals or work improvement plans, but rather, merely signed off on the appraisals or plans for them done by others. This difference in the role Joyce played respecting their appraisals and plans would sufficiently account for any difference in the giving of such appraisals and plans between these employees and the Plaintiff. See *Radue*, 219 F.3d at 618.

In addition, these employees appear to have held positions quite different from and not equivalent to that held by the Plaintiff at the time of his removal, and they presumably had quite different responsibilities. For example, Cuniffe's position was classified on his performance appraisal as "Indst. Hygnt 4" (Pl.'s Br. Opp'n Summ. J., Ex. 10) and Lamb's position was classified as "Constr Insp 4." (*Id.*, Ex. 18). If the Plaintiff were correct in claiming that all merit employees were sufficiently similar to him, then almost every state employee would be a comparator. This cannot be. Being a merit employee subject to the same personnel rules as the Plaintiff may make all merit employees comparable in one material respect to the Plaintiff, but this is just one respect. A similarly situated employee is directly comparable to the Plaintiff "in all material respects." *Rogers*, 2003 WL 483202 at *6.

The Plaintiff has not demonstrated that Black, Bryant, Crall, Cuniffe, Dewey, Hoene, Book, Andreani/Carr, Cahill, Coleman, Hilgenberg, Lamb, Reason or any person other than Nancy Jones, is

directly comparable to the Plaintiff in all material respects. Therefore, the court concludes that no one other than Nancy Jones is sufficiently similarly situated to the Plaintiff as to be considered his comparator. The Defendant's motion in limine is **GRANTED** as to any prior investigations, disciplinary actions, counseling, performance evaluations, work improvement plans, or involuntary separation of employment of the Plaintiff's supervisors or fellow employees with the exception of Nancy Jones.

(4) Medical, Psychological or Psychiatric Condition

The Defendant seeks to exclude any reference to or evidence of any medical, psychological or psychiatric condition of the Plaintiff alleged to be proximately caused by any fact or allegation of the Plaintiff until admissible evidence of such condition is presented by an expert witness, except that the Plaintiff may be allowed to testify in lay terms from his personal knowledge as to allegations of mental anguish or emotional distress. The DOL contends that such matters are outside the scope of knowledge of lay persons and require the testimony of any expert under Rules 701, 702 and 703 of the Federal Rules of Evidence. The court agrees.

*4 Matters regarding the causation of any of the Plaintiff's medical, psychological or psychiatric conditions require expert testimony. See Fed.R.Civ.P. 701(c), 702; *DeSanto v. Rowan Univ.*, 224 F.Supp.2d 819, 830 (D.N.J.2002) (granting motion in limine to exclude doctor's testimony that the plaintiff suffered from gastric disorders where doctor had not been identified as an expert witness and concluding that expert testimony was required to establish connection between plaintiff's condition and defendant's allegedly discriminatory conduct); *Ferris v. Pa. Fed'n Bhd. of Maint. of Way Employees*, 153 F.Supp.2d 736, 743-45 (E.D.Pa.2001) (excluding testimony of doctor who was not qualified as an expert as to the causation of the plaintiff's mental conditions). Any specific diagnoses of the plaintiff's condition, likewise, require expert testimony. See, e.g., *DeSanto*, 224 F.Supp.2d at 830; *Ferris*, 153 F.Supp.2d at 746. So, the motion in limine is **GRANTED** as to any medical, psychological or psychiatric condition of the Plaintiff alleged to be proximately caused by any fact or allegation of the Plaintiff until admissible evidence of such condition is presented by an expert witness.

The Plaintiff, however, will be allowed to testify from his personal knowledge as to any emotional distress or mental anguish that he allegedly suffers. *See id.* It bears repeating, however, that the Plaintiff cannot testify about his beliefs as to how this emotional distress or mental anguish was caused, absent expert testimony regarding causation. *See id.*

(5) Lay Testimony as to Medical, Psychological or Psychiatric Condition

For the reasons stated above in addressing paragraph (4) of the motion in limine, the motion also will be **GRANTED** as to evidence of any medical, psychological or psychiatric condition of the Plaintiff alleged to be proximately caused by any fact or allegation of the Plaintiff by any lay witness.

(6) Expenses of Medical, Psychological or Psychiatric Treatment

Given the court's conclusion that expert testimony is required regarding the causation of any of the Plaintiff's alleged medical, psychological or psychiatric conditions, it follows that to the extent the Plaintiff seeks to recover expenses incurred for treating such a condition, expert testimony also is required to establish the reasonable cost and necessity of treatment for such condition. *See Ferris v. Pa. Fed'n Bhd. of Maint. of Way Employees*, 153 F.Supp.2d 736, 743 (E.D.Pa.2001). Therefore, the Defendant's motion in limine is **GRANTED** as to the Plaintiff's expenses incurred for any medical, psychological or psychiatric condition alleged to be proximately caused by any fact or allegation of the Plaintiff by the Plaintiff or any witness until the reasonableness of cost and necessity of treatment are testified to by an expert witness.

(7) EEOC Matters

The Defendant argues that EEOC matters are irrelevant, inadmissible under a Rule 403 balancing test, inadmissible hearsay, and inadmissible under Rule 408. The DOL also contends that admission of evidence of such matters would violate section 706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b). Though the court agrees that EEOC charges, grievances, and claims, including the investigations of such charges, grievances, and

claims of the Plaintiff and other former or current DOL employees including the position statements of the complainants and the resolution or settlement of any such charges, grievances or claims are inadmissible for a number of reasons, including on the basis of relevance, a Rule 403 balancing test, and hearsay, *see Tulloss v. Near N. Montessori Sch.*, 776 F.2d 150, 154 (7th Cir.1985), the court disagrees with respect to the DOL's position statements in response to any claim, grievance or charge of the Plaintiff.

*5 An employer's position statement in an EEOC proceeding may be admissible to the extent it constitutes an admission, or to show the employer has given inconsistent statements in justifying its challenged decision, which may tend to prove that its stated reasons are pretexts. *See, e.g., Maschka v. Genuine Parts Co.*, 122 F.3d 566, 570-71 (8th Cir.1997); *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1476-77 (5th Cir.1992). Further, disclosure of factual information related to the DOL's position on the merits of Mr. Frazier's EEOC Charge is not inadmissible under section 706(b). *See, e.g., Olitsky*, 964 F.2d at 1477. That section precludes admission of anything said or done as part of the informal endeavors by the EEOC to correct the alleged unlawful discrimination by "informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). A defendant's position statement is not necessarily given as part of such conciliatory endeavors. If, however, the DOL's position paper contains statements relating to compromise, settlement or conciliation, such statements would be inadmissible and should be redacted. *See* 42 U.S.C. § 2000e-5(b); *cf. Brooks v. Grandma's House Day Care Ctr., Inc.*, 227 F.Supp.2d 1041, 1044-45 (E.D.Wis.2002). Accordingly, the Defendant's Motion in Limine is **DENIED** as to the DOL's position statement made in response to Mr. Frazier's charge, but **GRANTED** as to all other matters raised in paragraph (7) of the Defendant's motion in limine. However, before counsel for the Plaintiff makes any reference to the DOL's position statement to the EEOC, a showing must be made outside the presence of the jury of the relevance of the position statement, that is, that it either contains admissions against interest or that it is inconsistent with the DOL's assertions in this litigation.

(8) Subsequent Remedial Measures

The Defendant's motion in limine is **GRANTED** as to any subsequent remedial measures taken by the

DOL. Evidence of such measures is not admissible to prove negligence or culpable conduct pursuant to Federal Rule of Evidence 407.

(9) Settlement Negotiations

The Defendant's motion in limine is **GRANTED** as to settlement negotiations as evidence of the same is inadmissible under Federal Rule of Evidence 408.

(10) Scope of EEOC Charge

The Defendant's memorandum supporting its motion in limine addresses under paragraph (10) only matters either outside the scope of the Plaintiff's EEOC charge or alleged acts which occurred outside the limitations period. It is unclear to what matters the Defendant refers to in its motion as "whistle blower" claims, and, thus, the court does not address any such claims to the extent they do not fall within claims that are outside the scope of the EEOC charge or outside the limitations period. Matters of retaliation are covered by paragraph (1) and need not be repeated in connection with paragraph (10).

"Generally a plaintiff may not bring claims under Title VII that were not originally brought among the charges to the EEOC." *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 550 (7th Cir.2002) (quotation omitted). However, a plaintiff may bring claims not in the EEOC charge if the claim is " 'like or reasonably related' to the EEOC charges, and the claim in the complaint reasonably [could] be expected to grow out of an EEOC investigation of the charge." *Id.* (quotation omitted). Claims are alike or reasonably related if "there is a factual relationship between them. This means that the EEOC charge and the complaint must, at minimum, describe the same conduct and implicate the same individuals." *Id.* (quotation omitted).

*6 Allegedly discriminatory acts which occurred more than 300 days before the Plaintiff filed his Charge of Discrimination are not actionable, unless there is a continuing violation. See *Minor v. Ivy Tech*

State Coll., 174 F.3d 855, 857 (7th Cir.1999). The Plaintiff has not shown a continuing violation, and it seems that he could not since he bases his claim on the discrete acts of removing him from the position of Controller and demoting him to the position of Field Auditor. See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 2072-73 (2002); *Tinner v. United Ins. Co. of Am.*, 308 F.3d 697, 708 (7th Cir.2002), petition for cert. filed, No. 02-1049, 71 U.S.L.W. 3489 (Jan. 8, 2003).

Therefore, the Defendant's motion in limine is **GRANTED** as to any alleged acts of discrimination which occurred more than 300 days before the Plaintiff filed his Charge of Discrimination and as to acts not included in the Plaintiff's Charge; provided, however, that the court will reconsider this latter ruling if and when the Plaintiff makes a sufficient showing that any matters not included in his EEOC Charge are like or reasonably related to his EEOC Charge and reasonably could be expected to grow out of an EEOC investigation of his Charge.

Conclusion

The Defendant's Motion in Limine is **GRANTED IN PART** and **DENIED IN PART** as set forth above. With respect to any matters for which the motion is granted, it is **ORDERED** that the parties and their counsel and witnesses shall not mention or refer to such matters in the presence of the jury or offer evidence of such matters to the jury, without counsel first consulting and obtaining express permission from the court outside the presence of the jury. Counsel are **DIRECTED** to inform the parties and all of their witnesses of this order.

All Citations

Not Reported in F.Supp.2d, 2003 WL 21254424

Footnotes

- ¹ This Entry is a matter of public record and is being made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

- 2 The work improvement plans for Book, Cahill and Reason were not offered by the Plaintiff in opposing the Defendant's summary judgment motion, and the court has been unable to find their plans elsewhere in the record. For purposes of this ruling, it is assumed that these employees, like the others offered by the Plaintiff, did not have Commissioner Joyce as their direct supervisor; Joyce did not conduct their work improvement plans or appraisals, but merely signed off on them; and they held positions different from and not equivalent to that held by the Plaintiff.

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2015 WL 4527722
United States District Court,
W.D. Tennessee,
Western Division.

Barry L. HILL, Plaintiff,
v.
SHOE SHOW, INC., Defendant.

No. 13-2931-STA-cgc.
Signed July 27, 2015.

Attorneys and Law Firms

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Opinion

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

S. THOMAS ANDERSON, District Judge.

*1 Before the Court is Defendant Shoe Show, Inc.'s Motion for Summary Judgment (ECF No. 19) filed on May 1, 2015. Plaintiff Barry L. Hill has responded in opposition, and Defendant has filed a reply brief.¹ For the reasons set forth below, Defendant's Motion is **DENIED**.

BACKGROUND

I. Factual Background

Plaintiff's Complaint alleges that Defendant discriminated against him on the basis of his race in violation of Title VII, 42 U.S.C. § 1981, and the Tennessee Human Rights Act.² Defendant now seeks summary judgment on each of Plaintiff's claims for relief. Defendant has prepared a statement of undisputed facts as required by Local Rule 56.1(a), to which Plaintiff has responded. For his part Plaintiff

has asserted that additional facts are not in dispute, and Defendant has responded to Plaintiff's statement of additional facts. For purposes of summary judgment, the Court finds that the following material facts are not genuinely in dispute.

Defendant operates retail shoe stores throughout the country. (Def.'s Statement of Undisputed Fact ¶ 1.) Plaintiff was originally hired by David Bowser (white male), one of Defendant's district managers, as a store manager at Defendant's location on Summer Avenue in Memphis, Tennessee. (*Id.*) Plaintiff commenced his employment on March 12, 2012. (*Id.* ¶ 2.) Plaintiff voluntarily resigned his employment with Defendant without notice on March 17, 2012, less than one week after he started. (*Id.* ¶ 3.) Plaintiff cited the area of town and the fact that he thought shoes were being stolen from the store as the reasons for his resignation. (*Id.*) A few months later in July 2012, Plaintiff was shopping at Defendant's store in the Oak Court Mall in Memphis, when he was approached by David Bowser who happened to be at the store that day. (*Id.* ¶ 5.) Plaintiff testified that Bowser approached him and asked him whether he was interested in managing the store. (*Id.* ¶ 6.) Plaintiff had gone to the Oak Court store to shop, not to seek a job; Bowser brought up the management opportunity to Plaintiff. (*Id.* ¶ 7.) Plaintiff accepted Bowser's offer and started as the store manager in the Oak Court location on July 16, 2012. (*Id.* ¶ 8.)

In Defendant's stores, each employee is assigned a one-digit employee code at the outset of his or her employment. (*Id.* ¶ 11.) The code allows the employee to clock in and out of the computer-based register. (*Id.*) Each employee also records time on a timesheet. (*Id.* ¶ 13.) The timesheet is a green-bar piece of paper kept in the back of the store where the employee signs his or her name and enters the date and the number of hours worked. (*Id.* ¶ 14.) The handwritten timesheet is used to calculate employee hours for payroll purposes. (*Id.* ¶ 15.) A sign was posted in the back of the Oak Court store near the timesheet reading: "Notice, do not sign in/out for another employee, consequences = termination!!!" (*Id.* ¶ 16.) Furthermore, the store's policy manual contained a section entitled "work schedules," which stated that all employees must sign in and out for themselves and that an employee may be terminated for signing in and out for someone else. (*Id.* ¶ 18.) Plaintiff understood that the rules regarding clocking in or out for other employees applied to him as the store manager. (*Id.* ¶ 17.) For the week ending

February 14, 2013, Plaintiff handwrote times worked by Taylor King, Amber Peters, Jamie Padden, and Cash Montesio on the sign-in sheet. (*Id.* ¶ 19.) These employees did not complete or sign the timesheet themselves. (*Id.*)

*2 Plaintiff disputes Defendant's characterization of the timekeeping policy. According to Plaintiff, the posted notice did not address or apply to clocking in and out of the store computer system to perform managerial functions. (Pl.'s Resp. to Def.'s Statement ¶ 16.) Plaintiff has adduced a declaration from Rosalba Espinoza, a former store manager at one of Defendant's stores who worked under Bowser's supervision. Espinoza explains that a code was needed to carry out managerial functions such as inventory control, completing transfers, completing payroll, entering time, transmitting time and payroll to the home office, and keying in bank deposits. (Espinoza Decl. ¶ 4, ECF No. 22-1.)

In addition to the store manager, each of Defendant's stores is staffed with a keyholder, who operates much like an assistant manager, as well as one or more sales associates. (Def.'s Statement of Undisputed Facts ¶ 9.) Jamie Padden became a keyholder at the Oak Court store on February 1, 2013. (*Id.* ¶ 10.) Padden was assigned an employee code by Bowser on Padden's first day of employment. (*Id.* ¶ 12.) Padden's code allowed her to clock in on the computer-based register but did not enable her to perform managerial functions such as a completing a return of merchandise. (*Id.*)

On Monday, February 11, 2013, Bowser visited the Oak Court location. (*Id.* ¶ 20.) When Bowser arrived, he discovered that Jamie Padden was the only employee in the store. (*Id.* ¶ 21.) Defendant asserts that this was a scheduling error by Plaintiff because Padden had only been on the job for a few days at that time and was too inexperienced to be the only employee in the store. (*Id.* ¶ 22.) Bowser also discovered that although Plaintiff was not in the store, Plaintiff was clocked in on the computer-based register as if he were present. (*Id.* ¶ 23.) When Bowser asked Padden if Plaintiff had been there, Padden responded that Plaintiff had not. (*Id.* ¶ 24.) According to Defendant, Padden stated to Bowser that Plaintiff had instructed her to clock him in. (*Id.*)

Plaintiff disputes these facts and contends that Bowser had given Plaintiff approval to take the day off and knew that Plaintiff would not be present at work on February 11, 2013. (Pl.'s Resp. to Def.'s

Statement ¶ 22.) Plaintiff further claims that Bowser knew that in Plaintiff's absence, a keyholder would be running the store that day. (*Id.* ¶ 23.) As for Padden's preparation to take charge at the store, Padden had prior retail experience and had completed her mandatory training. (*Id.* ¶ 22.) Plaintiff had also advised Bowser that Padden needed a working keyholder's code because the code she had did not allow her to perform managerial functions. (*Id.* ¶ 23.) In fact, Bowser had instructed Plaintiff to allow other keyholders to use his code to perform managerial functions in the past. (*Id.* ¶¶ 16, 17, 23.) Plaintiff denies that he ever instructed Padden to clock him in on February 11, 2013. (*Id.* ¶ 24.) If Padden clocked Plaintiff in on February 11, 2013, she did so to use his manager code to perform managerial functions. (*Id.*)

*3 When Plaintiff reported to work on Tuesday, February 12, 2013, Bowser asked him how Plaintiff had been clocked in the previous day. (Def.'s Statement of Undisputed Fact ¶ 25.) Plaintiff responded that he did not know. (*Id.*) At that point Bowser asked for Plaintiff's keys and terminated his employment. (*Id.*) Bowser completed a separation report on which he marked the reason for Plaintiff's termination as "Violation of Company policy" and wrote in the "Remarks" section: "Barry is terminated for failure to follow or comply with established Company policies and procedures including clock-in/clock-out procedures." (*Id.* ¶ 26.) Plaintiff adds that during a site visit one week prior to his termination, Bowser had complimented Plaintiff on the store only later to remark to Plaintiff, "Seriously, get your resume prepared." (Pl.'s Resp. to Def.'s Statement ¶ 26.)

Pursuant to Local Rule 56.1(b), Plaintiff has submitted a statement of the following additional facts. A keyholder or store manager can operate a store and perform necessary and required managerial functions, though the parties disagree over whether a keyholder can perform all of those functions. (Pl.'s Statement of Add'l Facts ¶ 27; Def.'s Resp. to Pl.'s Add'l Fact ¶ 27.) Defendant never reprimanded or terminated Padden for using Plaintiff's code for clocking in and clocking out to perform managerial functions. (Pl.'s Statement of Add'l Facts ¶ 28.) Plaintiff was replaced with an individual who was not in Plaintiff's protected class, Troy Shrekengeist a white male. (*Id.* ¶ 29; Def.'s Resp. to Pl.'s Add'l Fact ¶ 29.) Defendant hired Skrekengeist to replace Plaintiff within two or three days of Plaintiff's termination. (Pl.'s Statement of Add'l Facts ¶ 37.)"

Plaintiff next asserts that once Plaintiff filed a charge of discrimination with the EEOC, Defendant responded to the charge and cited only Plaintiff's violation of the clocking in and clocking out policy as the cause for his termination. (*Id.* ¶ 33.)¹² With respect to the timesheets, Plaintiff asserts that he kept two timesheets, the official form signed by the employees and another for personal use at his desk. (*Id.* ¶ 35.) Defendant adds that the timesheet signed by employees was a predated timesheet each store manager was required to submit to payroll. (Def.'s Resp. to Pl.'s Add'l Fact ¶ 35.) Bowser discovered the predated timesheet with Plaintiff's handwriting on it, and Plaintiff testified this was the timesheet he would have submitted to payroll, had the employees signed it. (*Id.*) Bowser was not aware that Plaintiff kept two timesheets. (*Id.*)

The parties have asserted a number of other facts, which the Court holds are not material to the issues presented at summary judgment. As such, the Court has not included this evidence in its recitation of the material facts for purposes of analyzing Defendant's Motion. The Court pauses to note this proof and the parties' disputes about it for the record. First, the parties dispute how Jamie Padden came to be a keyholder at Defendant's Oak Court store. According to Defendant, the Oak Court store's keyholder resigned, and Plaintiff hired Jamie Padden with whom he had worked at a previous job as the new keyholder at the Oak Court location. (*Id.*) According to Plaintiff, Bowser reassigned Terrence Fugh, an African American male and a keyholder at the Oak Court store, to Defendant's Summer Avenue store with the knowledge that the Summer Avenue store was closing, all to make room for Padden. (Pl.'s Resp. to Def.'s Statement of Fact ¶ 10; Pl.'s Statement of Add'l Facts ¶ 36.) In response Defendant contends that Bowser sent Fugh to the Summer Avenue store on a temporary basis and planned to bring Fugh back to the Oak Court store once the Summer Avenue store closed. (Def.'s Resp. to Pl.'s Add'l Fact ¶ 36.) When Fugh informed Bowser that he was looking for another job, Bowser considered that Fugh's resignation and did not schedule Fugh for any additional shifts. (*Id.*) Based on this record, the Court concludes that the circumstances surrounding Fugh's reassignment are disputed but largely irrelevant to the issues presented.

^{*4} Second, Plaintiff asserts that Bowser instructed Espinoza to watch African-American and Latino customers more closely so that they would not steal

merchandise. (Pl.'s Statement of Add'l Facts ¶ 30.) Defendant disputes the claim citing Espinoza's deposition testimony where she stated that Bowser treated everyone the same. (Def.'s Resp. to Pl.'s Add'l Fact ¶ 29.) Defendant's objection is noted; however, Espinoza's deposition testimony in context describes how Bowser treated his subordinates and employees while Espinoza's declaration addresses how Bowser instructed her to scrutinize Defendant's minority customers. In any event the Court finds that this statement is immaterial to the question of whether Defendant discriminated against Plaintiff on the basis of his race.

Finally, Defendant cites Plaintiff's deposition testimony that during the week that Plaintiff was the store manager at the Summer Avenue location, Bowser told Plaintiff that he wanted Plaintiff to take Bowser's place when Bowser retired and that Plaintiff reminded Bowser of himself. (Def.'s Statement of Undisputed Fact ¶ 4.) Defendant argues that this and other proof tends to show that Bowser did not harbor any animus against Plaintiff due to his race. Defendant further argues that this proof supports a "same actor" inference. The Court considers Defendant's same actor argument fully below. At the summary judgment stage, the Court finds that Bowser's statements to Plaintiff are not material.

II. Defendant's Evidentiary Objections

Defendant has raised two specific objections to documents cited by Plaintiff to support his fact contentions at summary judgment. Defendant objects to the admissibility of its written position statement addressed to the EEOC in response to Plaintiff's charge of discrimination. For support Defendant relies on 42 U.S.C. § 2000e-5(b), which states in relevant part that "[n]othing said or done during and as a part of such informal [conciliation] endeavors may be ... used as evidence in a subsequent proceeding without the written consent of the persons concerned."¹³ The same subparagraph outlines the administrative procedure for investigating a charge of discrimination. Once a complainant makes a charge of discrimination, the EEOC has 120 days to make a reasonable cause determination about the charge. If it "determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and

persuasion.”¹⁴ The evidentiary prohibition contained in section 2000e-5(b) covers statements made during this informal “conference, conciliation, and persuasion” phase of the administrative proceedings. Courts construing section 2000e-5(b) have held that the prohibition on the use of these statements in a subsequent proceeding does not apply to position papers reciting one party’s version of events.¹⁵

*5 The Court holds that the statutory prohibition on which Defendant relies does not apply here. Defendant has not shown that it gave its written statement as part of the “conference, conciliation, and persuasive” phase of the administrative proceedings. Defendant has not shown that the EEOC had made a probable cause determination and progressed to the informal conciliation process at the time Defendant gave its statement, though the statement does refer to mediation. Perhaps more importantly, the statement is merely a recitation of Defendant’s version of the facts and contains no proposals for informal conciliation that might imply an effort to reach a settlement with Plaintiff over his charge of discrimination.¹⁶ Therefore, the Court concludes that section 2000e-5(b)’s exclusion of statements made during conciliation efforts does not apply here.

Next, Defendant objects to the admissibility of findings made by the Tennessee Department of Labor and Workforce Development in the course of Plaintiff’s application for unemployment benefits. Plaintiff claims that the state made a finding that Plaintiff had no control over Padden using Plaintiff’s code to perform her job functions during Plaintiff’s day off. Plaintiff has attached a copy of the Department’s written opinion awarding him unemployment benefits. Defendant argues that the Department of Labor and Workforce Development’s findings are not admissible under Tennessee law. Tenn.Code Ann. § 50-7-304(k) provides as follows: “No finding of fact or law, judgment, conclusion, or final order made with respect to a claim for unemployment compensation under this chapter may be conclusive in any separate or subsequent action or proceeding in another forum, except proceedings under this chapter, regardless of whether the prior action was between the same or related parties or involved the same facts.”¹⁷ The Sixth Circuit has interpreted this statute to mean that TDOL decisions cannot be used in civil cases because they are the result of “quick and inexpensive hearings with different standards of proof than civil trials.”¹⁸ As a result, an unemployment hearing officer’s decisions should not be admitted in an employment

discrimination suit.¹⁹ Based on this clear statutory authority, the Court concludes that the written findings of the Tennessee Department of Labor and Workforce Development are not admissible in the case at bar. Therefore, the Court declines to consider them as part of its summary judgment analysis.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a) provides that a party is entitled to summary judgment if the moving party “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”²⁰ In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party,²¹ and the court “may not make credibility determinations or weigh the evidence.”²² When the motion is supported by documentary proof such as depositions and affidavits, the nonmoving party may not rest on his pleadings but, rather, must present some “specific facts showing that there is a genuine issue for trial.”²³ It is not sufficient “simply [to] show that there is some metaphysical doubt as to the material facts.”²⁴ These facts must be more than a scintilla of evidence and must meet the standard of whether a reasonable juror could find by a preponderance of the evidence that the nonmoving party is entitled to a verdict.²⁵ When determining if summary judgment is appropriate, the Court should ask “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-side that one party must prevail as a matter of law.”²⁶ In this Circuit, the nonmoving party must “put up or shut up” as to the critical issues of the claim.²⁷ Summary judgment must be entered “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”²⁸

ANALYSIS

*6 Defendant seeks judgment as a matter of law as to all of Plaintiff’s remaining claims for race discrimination.²⁹ Title VII makes it an “unlawful employment practice for an employer ... to discriminate against any individual ... because of [his] race, color, religion, sex, or national origin.”³⁰

Section 1981 "prohibits intentional race discrimination in the making and enforcing of contracts involving both public and private actors," including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."¹¹ The THRA makes it a "discriminatory practice for an employer to ... discharge any person or otherwise to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, creed, color, religion, sex, age or national origin."¹² Courts evaluate section 1981 and THRA claims of discrimination under the same analytical framework and federal case law that apply to Title VII claims.¹³ Thus, the Court's "analysis and conclusions concerning the Title VII claims apply equally to parallel claims brought under THRA" and section 1981.¹⁴

Where as here a plaintiff offers only circumstantial evidence of unlawful discrimination, the Court analyzes the case using the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).¹⁵ Plaintiff bears the initial burden to establish his *prima facie* case of discrimination by showing that (1) he is a member of a protected group, (2) he was subject to an adverse employment decision, (3) he was qualified for the position, and (4) he was either replaced by a person outside of the protected class or was treated differently than similarly situated non-protected employees.¹⁶ Defendant argues that Plaintiff cannot carry this initial burden because Plaintiff lacks proof as to two of the elements of his *prima facie* case. The Court disagrees.

Concerning Plaintiff's qualifications for the job, Defendant argues that Plaintiff was not otherwise qualified for the store manager position because he had violated company policy on timekeeping. Defendant's argument improperly conflates two different stages of the *McDonnell Douglas* burden-shifting framework. Defendant claims that Plaintiff was no longer qualified for his job because he had violated company policy, and at the same time Defendant claims that its legitimate reason for terminating Plaintiff was Plaintiff's violations of company policy. The Sixth Circuit has held that in anti-discrimination cases district courts should assess whether the plaintiff is "otherwise qualified" for his or her position at the *prima facie* stage without

considering the employer's legitimate, nondiscriminatory reason for its adverse action against the plaintiff.¹⁷ The Court of Appeals has explained that "[t]o do so would bypass the burden-shifting analysis and deprive the plaintiff of the opportunity to show that the nondiscriminatory reason was in actuality a pretext designed to mask discrimination."¹⁸ Instead, for purposes of the plaintiff's *prima facie* showing, the Courts should only assess Plaintiff's qualifications "prior to and independent of the events that led to the adverse action."¹⁹ The Court finds then that Defendant's argument on this point is not persuasive. Therefore, Defendant's Motion is denied as to this issue.

*7 Defendant next argues that Plaintiff cannot prove that he was treated less favorably than an employee outside of his protected class. The parties dispute whether Espinoza, Padden, or even Bowser received more favorable treatment than Plaintiff for engaging in similar violations of Defendant's timekeeping policies. The Court need not resolve this issue because Plaintiff can also make out a *prima facie* case of race discrimination by showing that he was replaced by an employee outside of his protected class. The undisputed fact at summary judgment is that Defendant replaced Plaintiff with a white male, Troy Shrekengeist.²⁰ Under the circumstances Plaintiff need not also prove that another employee outside of his protected class received more favorable treatment from Defendant. Therefore, Defendant's Motion is denied as to this issue.

Having held that Plaintiff can make out a *prima facie* case of race discrimination, the burden of production now shifts to Defendant to proffer a legitimate, nondiscriminatory reason for terminating Plaintiff's employment. The Court finds no genuine dispute on this point. Defendant asserts that Plaintiff was terminated for two violations of the company's timekeeping policy: allowing Jamie Padden to use his code to clock him in and filling out timesheets for other employees. While the parties disagree over whether Defendant's reasons were pretextual, they appear to agree that such reasons are legitimate, nondiscriminatory grounds for termination. The Court concludes then that Defendant has carried its burden on this point.

The burden now shifts back to Plaintiff to demonstrate by a preponderance of the evidence that Defendant's reasons are pretext for discrimination. Plaintiff can make this showing by proving one of the following: (1) Defendant's proffered reason has no

basis in fact, (2) Defendant's proffered reason did not actually motivate the decision to terminate Plaintiff, or (3) Defendant's proffered reason was insufficient to motivate its decision." Put another way, Plaintiff's burden "is to produce sufficient evidence from which a jury may reasonably reject the employer's explanation" and infer discrimination.⁴ Even then summary judgment for the defendant may be appropriate "if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred."⁴

The Court holds that triable questions of fact remain about Defendant's reasons for terminating Plaintiff's employment. With respect to Plaintiff's sharing his code with Padden, a genuine dispute exists over whether Padden's use of the code was sufficient cause for Plaintiff's termination. First and foremost, Plaintiff testified during his deposition that he had shared his manager's code with other keyholders at the store during their training.⁴ According to Plaintiff, he gave these employees his code at Bowser's direction and only until Bowser "could fix it," presumably by setting up the new keyholder with his or her own code.⁴ Other evidence shows that Padden, who was hired as a new keyholder at the Oak Court store only 10 days prior to Plaintiff's termination, did not yet have her own code and that Bowser was aware Padden needed her own code. Plaintiff testified at his deposition that Padden had asked him on more than one occasion when she would get a code of her own, and Plaintiff responded that he was trying to address the situation with Bowser.⁴ Perhaps most importantly, Plaintiff testified that Bowser gave him the day off on February 11, 2013, and therefore knew that Plaintiff would not be in the store that day. Viewing this proof in the light most favorable to Plaintiff, a reasonable juror could conclude that Bowser had authorized Plaintiff to share his manager's code with new keyholders in the past, that Plaintiff had to share his code with Padden during her initial training, and that in Plaintiff's absence on February 11, 2013, and without her own code, Padden would need to use Plaintiff's code to perform managerial functions. Under the circumstances, reasonable minds could differ over whether Defendant was justified in firing Plaintiff for sharing his code with Padden.

^{*8} Defendant has adduced proof from Bowser,

showing that Padden reported to him Plaintiff had instructed her to clock him in on February 11, 2013. Defendant argues that Plaintiff's instructions to Padden violated the company's policy prohibiting employees from clocking in or clocking out for another employee.⁴ It is not clear to the Court what motive Plaintiff would have had to instruct Padden to clock him in. The same handwritten timesheet found by Bowser on Plaintiff's desk showed that on Monday, February 11, 2013, Plaintiff had written in the word "off" for his time that day. It seems to be undisputed that the handwritten timesheet, not the computer clock in with Plaintiff's code, was the official record for company payroll. The fact then that the actual record used to calculate payroll reflected that Plaintiff was off on February 11, 2013, cuts against any inference that Plaintiff had directed Padden to clock him in on that day for some improper purpose. And for the reasons already explained, a genuine question exists over whether Plaintiff instructed Padden to use his code that day only to perform managerial functions in his absence.

Turning to the timesheet issue, the Court also holds that genuine questions of fact remain about whether Defendant had legitimate cause to terminate Plaintiff's employment over filling out the timesheet for other employees. Bowser states in the first of his summary judgment declarations that on February 11, 2013, he visited the store and discovered the official timesheet blank, only to return to the store the next day and find it with time entries completed, all in the same handwriting.⁴ Defendant asserts that Plaintiff's filling out the timesheet for other employees constituted a violation of its policy against one employee clocking in or clocking out for another employee. But Plaintiff testified during his deposition that Bowser had once completed a timesheet for store employees and then had the employees initial the entries.⁴ In her declaration, Espinoza states that she also witnessed Bowser complete employee timesheets and that Bowser was aware of Espinoza sometimes filling in timesheets for employees who were unable to complete a timesheet.⁴ Viewing this proof in the light most favorable to Plaintiff, a reasonable juror could find that Plaintiff's timekeeping was substantially the same as Bowser's or Espinoza's. As such, the timesheet issue was not sufficient to warrant Plaintiff's termination.

While not disputing that Bowser or Espinoza may have completed timesheets, Defendant argues in its reply brief that Plaintiff's conduct was distinguishable from any conduct of Bowser or

Espinoza. First, Defendant argues that even if Bowser filled in a timesheet as Plaintiff claims, Bowser still required the employees to sign their own names on the completed timesheet. Be that as it may, there is no evidence that Plaintiff wrote in employee signatures or initials or that Plaintiff did not require his employees to sign their own name or initials on the February 2013 timesheet. In fact, the timesheet attached as Exhibit 8 to Defendant's summary judgment brief does not contain any employee signatures, and the only initials on the timesheet are those of Plaintiff and one other employee.⁹ In short, there is no proof that Plaintiff did anything Bowser himself had not done on a previous occasion by filling in time entries for employees.

⁹ As for Espinoza, Defendant argues that her declaration only shows that she completed timesheets for employees who were unable to do so themselves, i.e. employees who were no longer working for Defendant. Defendant's interpretation of Espinoza's testimony appears to be correct. However, the issue presented is whether Defendant disciplined Plaintiff for engaging in conduct substantially similar to Espinoza's. Defendant's stated reason for terminating Plaintiff was simply the fact that he had violated the company's bright-line rule prohibiting one employee from clocking in or clocking out for another employee. Or as Defendant states in its opening brief, "Shoe Show has timekeeping policies that uniformly apply to its employees."¹⁰ Plaintiff has challenged that explanation by showing that Bowser, the same decisionmaker who fired Plaintiff for writing in time entries, was aware that Espinoza also wrote in time entries for employees, arguably in violation of the letter of the company policy, but never received discipline for it. Defendant cannot have it both ways, arguing that Bowser legitimately enforced a zero tolerance timekeeping policy against Plaintiff but then made an exception when Espinoza violated the same policy. Therefore, the Court rejects Defendant's arguments distinguishing Plaintiff's purported timekeeping infraction.

Defendant argues that even if Plaintiff could create an issue of fact at the pretext stage, Defendant is nevertheless entitled to judgment as a matter of law under the honest belief rule. The Sixth Circuit's honest belief rule entitles an employer to "summary judgment on pretext even if its conclusion is later shown to be mistaken, foolish, trivial, or baseless."¹¹ An employer's investigation of misconduct "need not be perfect in order to pass muster under the rule."¹² In fact, the employer is not required to interview the

employee or some or all of his witnesses.¹³ "The key inquiry is instead whether the employer made a reasonably informed and considered decision before taking an adverse employment action."¹⁴ In order to rebut the employer's reliance on the rule, the plaintiff must come forward with proof of "an error on the part of the employer that is too obvious to be unintentional."¹⁵

The Court holds that triable issues preclude the application of the honest belief rule at summary judgment in this case.¹⁶ The "determinative question" is not whether Plaintiff actually violated the company's clock in policy but whether Bowser "reasonably and honestly believed that he did."¹⁷ According to Defendant, Bowser had a good faith belief that Plaintiff had instructed Padden to clock him in on February 11, 2013. For the reasons already explained, a factual dispute exists about (1) whether Bowser had allowed Plaintiff to share his manager's code with new keyholders in the past, (2) whether Plaintiff had to disclose his code to Padden during her training, (3) whether Bowser gave Plaintiff the day off on February 11, 2013, knowing that Padden would need to use Plaintiff's code, and (4) whether Plaintiff's violation of the timekeeping policy was substantially similar to apparent violations Bowser and Espinoza had committed in the past. Viewing the evidence in the light most favorable to Plaintiff, a jury could find that Bowser did not reasonably and honestly believe Plaintiff had violated the company's timekeeping policy. Therefore, summary judgment under the honest belief rule is not appropriate.

¹⁰ Finally, Defendant argues that it is entitled to summary judgment based on the same actor inference. The Sixth Circuit recognizes the same actor inference "which allows one to infer a lack of discrimination from the fact that the same individual both hired and fired the employee."¹⁸ Importantly, the same actor inference is a permissive inference, meaning that the finder of fact may draw the inference but is not required to do so.¹⁹ In this case the fact that Bowser recruited and hired Plaintiff for the job and then seven months later fired Plaintiff merely gives rise to an inference of non-discrimination, an inference a jury can weigh in deciding the merits of Plaintiff's claims. Likewise, the evidence about the number of African-Americans hired by Bowser as store managers or Bowser's instructions to scrutinize minority customers more closely does not dictate judgment as a matter of law in either party's favor. It bears emphasis that at summary judgment the Court must draw all

inferences in favor of the nonmoving party.⁶ The Court concludes then that the same actor inference does not alter its summary judgment analysis.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 4527722, 2015
Fair Empl.Prac.Cas. (BNA) 186,845

CONCLUSION

The Court holds that genuine issues of material fact remain for trial in this case. Therefore, Defendant's Motion for Summary Judgment is **DENIED**.

Footnotes

- 1 Plaintiff filed what appears to be a truncated version of his brief (ECF No. 20) at 11:57 p.m. on June 2, 2015, the deadline for submitting his response under Local Rule 56.1(b). On the following day, Plaintiff filed two expanded versions of the brief. The result is that Plaintiff technically filed his final brief one day late. Plaintiff should have first sought leave of Court to amend his brief or better yet an extension of time to file the file completed brief. Despite these defects in Plaintiff's briefing, Defendant has not objected to Plaintiff's late filing. Therefore, the Court will accept the late-filed brief here.
- 2 The Complaint also alleges that Defendant is liable to Plaintiff under the Fair Labor Standards Act for unpaid compensation. According to Defendant's memorandum in support of its Motion for Summary Judgment, Plaintiff has accepted Defendant's offer of judgment as to that claim.
- 3 Plaintiff adds that he kept two timesheets, one for his personal use at his desk and one for employees to sign. (Pl.'s Resp. to Def.'s Statement ¶ 13.) Plaintiff also states that he is not certain whether the document attached as Exhibit 8 to Defendant's Motion is his desk timesheet or the timesheet signed by employees. (*Id.*)
- 4 Plaintiff disputes this statement and reiterates his response to Defendant's previous statement about timesheets. The Court finds that Plaintiff has not actually shown how a genuine dispute exists about the basic format of the timesheet or the procedure for employees to write in their times and sign the timesheet. Therefore, the Court considers Defendant's statement to be undisputed for purposes of summary judgment.
- 5 Just as with the previous statement of undisputed fact, Plaintiff disputes this statement and reiterates his response to Defendant's previous statement about timesheets. The Court finds that Plaintiff has not actually shown how a genuine dispute exists about the purpose of the timesheet. Therefore, the Court considers Defendant's statement to be undisputed for purposes of summary judgment.
- 6 Defendant has actually included a document that purports to be the posted notice itself.
- 7 Plaintiff disputes this fact and again reiterates his response to Defendant's previous statements about timesheets. The Court finds that Plaintiff has not actually shown how the additional facts he asserts create a genuine dispute about the existence of a written policy prohibiting employees from clocking in or out for other employees. Therefore, the Court considers Defendant's statement to be undisputed for purposes of summary judgment.
- 8 Plaintiff actually claims that Bowser had instructed Plaintiff and Espinoza to allow keyholders to use their manager codes to "clock in" and perform managerial functions. (Pl.'s Resp. to Def.'s Statement ¶¶ 18, 17, 23.) However, not all of the materials cited by Plaintiff substantiate his claim that Bowser directed Espinoza to share her code with other employees. One portion of Plaintiff's deposition testimony consists of a conversation between Plaintiff and Espinoza in which Espinoza allegedly told Plaintiff that Bowser had instructed her to share her manager code with employees. This proof constitutes inadmissible hearsay. And the cited portions of Espinoza's own deposition testimony and declaration do not show that Bowser instructed Espinoza to share her code, only that Espinoza did in fact share her code with employees. Notably, Espinoza did not testify that Bowser knew Espinoza was sharing her code.
- 9 Plaintiff disputes these statements but only reiterates his response to Defendant's previous statements about

Padden using his code to clock him in on February 11, 2013. The Court finds that Plaintiff has not actually shown how a genuine dispute exists about the events of February 12, 2013. Therefore, the Court considers Defendant's statements about Plaintiff's termination to be undisputed for purposes of summary judgment.

10 Plaintiff again disputes the statement about the separation report but only reiterates his response to Defendant's previous statements about Padden using his code to clock him in on February 11, 2013. The Court finds that Plaintiff has not actually shown how a genuine dispute exists about the contents of the separation report. Therefore, the Court considers Defendant's statements about Plaintiff's termination to be undisputed for purposes of summary judgment.

11 Plaintiff also asserts that Shrekengeist was a friend of Bowser. (Pl.'s Statement of Add'l Facts ¶ 37.) However, the evidence Plaintiff cites to support this claim is not admissible. Plaintiff has only his own deposition testimony, which consists of speculation and conjecture, and a deposition exhibit, which is handwritten and lacks authentication. Even if Plaintiff had admissible evidence to support his contention, the Court is not convinced that the purported fact is material to the issues presented at summary judgment.

12 Plaintiff has cited for support the actual document submitted by Defendant to the EEOC as a position paper on Plaintiff's charge. Defendant argues that the document is inadmissible under 42 U.S.C. § 2000e-5(b). For reasons explained more fully below, the Court holds that the paper is admissible.

13 42 U.S.C. § 2000e-5(b).

14 *Id.*

15 *E.g. Ollitsky v. Spencer Gifts, Inc.*, 984 F.2d 1471, 1477 (5th Cir.1992); *Brooks v. Grandma's House Day Care Ctrs., Inc.*, 227 F.Supp.2d 1041, 1043 (E.D.Wis.2002).

16 See also Fed.R.Evid. 408(a)(1) ("Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim to impeach by a prior inconsistent statement or a contradiction: conduct or a statement made during compromise negotiations about the claim....").

17 Tenn.Code Ann. § 50-7-304(k).

18 *Reed v. Intermodal Logistics Serv., LLC.*, No. 09-2807, 2011 WL 4565450, at *13-14 (W.D.Tenn. Sep.29, 2011) (citing *Pascal v. Anchor Advances Prod., Inc.*, No. 96-5453, 1997 U.S.App. LEXIS 17732, at *14, 1997 WL 397221 (8th Cir. July 10, 1997)).

19 *Id.*

20 Fed.R.Civ.P. 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Eastham v. Chesapeake Appalachia, L.L.C.*, 754 F.3d 356, 360 (8th Cir.2014).

21 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

22 *Laster v. City of Kalamazoo*, 746 F.3d 714, 726 (6th Cir.2014).

23 *Celotex*, 477 U.S. at 324.

24 *Matsushita*, 475 U.S. at 586.

25 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

26 *Anderson*, 477 U.S. at 251-52.

27 *Lord v. Saratoga Capital, Inc.*, 920 F.Supp. 840, 847 (W.D.Tenn.1995) (citing *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir.1989)).

28 *Celotex*, 477 U.S. at 322.

29 Plaintiff argues in his response brief that Defendant failed to move for summary judgment on Plaintiff's claim under 42 U.S.C. § 1981. The Court finds that Defendant did, in fact, seek summary judgment on this claim in its opening brief. Def.'s Mot. for Summ. J. 1, 2 (ECF No. 19) ("Plaintiff alleges that he was terminated because of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and Tennessee state law" and "Defendant moves for entry of an Order granting its Motion for Summary Judgment and dismissing Plaintiff's claims for relief in their entirety").

30 42 U.S.C. § 2000e-2(a)(1).

31 *Amini v. Oberlin College*, 440 F.3d 350, 358 (6th Cir.2006) (other citations omitted).

32 Tenn.Code Ann. § 4-21-401(a)(1).

33 *Jackson v. Bd. of Educ. of Memphis City Sch. of Memphis, Tenn.*, 494 F. App'x 539, 543 n. 1 (6th Cir.2012) (citation omitted); Tenn.Code Ann. § 4-21-311(e) (codifying *McDonnell Douglas* burden shifting framework in THRA cases).

34 *Jackson*, 543 F. App'x at 543 n. 1.

35 *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 (6th Cir.2009).

36 *Wheat v. Fifth Third Bank*, 785 F.3d 230, 237 (6th Cir.2015).

37 *White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232, 242 (6th Cir.2005) (applying rule in Title VII sex discrimination case); *Cicero v. Borg-Warner Auto., Inc.*, 280 F.3d 579, 585 (6th Cir.2002) ("Instead of using the discharge justification to judge whether Cicero was qualified at the prima facie stage [of his ADEA claim], the Court should only consider the employer's proffered reason in the later stages of the *McDonnell Douglas* analysis."); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 662-63 (6th Cir.2000) (applying rule in pregnancy discrimination case).

38 *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 574 (6th Cir.2003) (*en banc*) (citing *Cline*, 206 F.3d at 660-61)).

39 *Tysinger v. Police Dept. of City of Zanesville*, 463 F.3d 569, 573 (6th Cir.2006) (applying rule in pregnancy discrimination case) (citations omitted). See also *Rosebrough v. Buckeye Valley High School*, 690 F.3d 427, 433 (6th Cir.2012) (holding that "there can be no logical basis for requiring [an ADA plaintiff] to have a CDL to be 'otherwise qualified' for the position of training to obtain a CDL" where the plaintiff was hired as a school bus driver trainee but failed to obtain her commercial drivers license).

40 See also Def.'s Answer ¶ 19 (ECF No. 10).

41 *Martinez*, 703 F.3d at 915.

42 *Lefevers v. GAF Fiberglass Corp.*, 667 F.3d 721, 725 (6th Cir.2012).

43 *Griffin v. Finkbeiner*, 689 F.3d 584, 593-94 (6th Cir.2012) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)).

44 Hill Dep. 164:11-24, Dec. 11, 2014 (ECF No. 22-2).

45 *Id.* at 164:11–15.

46 *Id.* at 175:3–14. Plaintiff did not directly testify that he followed through and went to Bowser to remind him to set up Padden's code. Even so, giving Plaintiff the benefit of every reasonable inference as the Court must do at summary judgment, this testimony if accepted as true shows that Bowser knew before February 11, 2013, that Padden needed her own code to perform managerial functions at the store.

47 Elsewhere in its briefing, Defendant seems to argue that Plaintiff violated company policy not only by sharing his manager's code with Padden but by allowing her to use it while he was not present in the store. *E.g.* Def.'s Reply Br. 8 (ECF No. 25) ("As for allowing the use of his code, Plaintiff testified that Bowser knew that Amber Peters and Terrence Fugh had operated the computer after Plaintiff had entered his own code and while Plaintiff was present in the store—but not that Bowser knew that Plaintiff had given them the passcode to clock him in when he was not there."); *id.* at 10 ("Bowser certainly did not know that Plaintiff had provided Padden his confidential passcode to use while Plaintiff was not present."). Viewing the evidence in the light most favorable to Plaintiff, a genuine dispute exists over whether Bowser decided to terminate Plaintiff only for sharing his code with Padden or whether Bowser terminated Plaintiff for allowing her to use the code while also being absent from the store.

48 Bowser Decl. ¶¶ 14, 15, ex. A to Def.'s Mem. in Support (ECF No. 19–6).

49 Hill Dep. 184:17–185:6. Plaintiff went on to testify that Espinoza also completed timesheets for employees who had recently quit so that the employees would receive a final paycheck. This portion of Plaintiff's testimony appears to be inadmissible hearsay. Even so, Espinoza has offered much the same proof in her own declaration. As such, the Court need not consider this portion of Plaintiff's deposition testimony to substantiate his claim that Espinoza also filled out timesheets for other employees.

50 Espinoza Decl. ¶ 6.

51 There is no evidence before the Court that Plaintiff wrote in the initials of the other employee. The Court would note that the handwriting for each set of initials appears to be different, though the Court is not well-situated here to make an assessment to the handwriting. In the final analysis, this appears to be a fact question for a jury.

52 Def.'s Mem. in Support 7 (ECF No. 19–1).

53 *Loyd v. Saint Joseph Mercy Oakland*, 766 F.3d 580, 590–91 (6th Cir.2014) (quoting *Chen v. Dow Chem. Co.*, 580 F.3d 394, 401 (6th Cir.2009)).

54 *Id.* at 591 (citation omitted).

55 *Seeger v. Cincinnati Bell Tel. Co., LLC*, 681 F.3d 274, 286 (6th Cir.2012).

56 *Loyd*, 766 F.3d at 591.

57 *Id.*

58 While the Sixth Circuit has never squarely addressed the issue, in at least one reported decision, it has treated the honest belief rule as a question of fact for the jury unless, of course, the proof is undisputed. *Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405, 414 (6th Cir.2008) ("Plaintiff has produced sufficient evidence to place at issue whether Dr. Kabour made a reasonably informed and considered decision before terminating her. In addition, to the extent the racial slur was a factor in plaintiff's firing, there is a material issue whether a reasonable and informed decision was made.").

59 *Seeger*, 681 F.3d at 286.

60 *Wexler*, 317 F.3d at 572-73 (citing *Buhmaster v. Overnite Transp. Co.*, 61 F.3d 461 (6th Cir.1995)).

61 *Wexler*, 317 F.3d at 573.

62 *Id.* ("We therefore reject the idea that a mandatory inference must be applied in favor of a summary-judgment movant whenever the claimant has been hired and fired by the same individual.").

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964 F.2d 1471
United States Court of Appeals,
Fifth Circuit.

John D. OLITSKY, Plaintiff-Appellee,
Cross-Appellant,
v.
SPENCER GIFTS, INC.,
Defendant-Appellant, Cross-Appellee.

No. 91-1010.

June 22, 1992.

On Petition for Rehearing July 28, 1992.

Synopsis

Fired employee brought action against former employer alleging violations of Age Discrimination in Employment Act (ADEA) and Employee Retirement Income Security Act (ERISA). The United States District Court for the Northern District of Texas, William C. Keady, J., entered judgment for employee on both claims. On cross appeals, the Court of Appeals, 842 F.2d 123, reversed and remanded. On remand, the District Court, A. Joe Fish, J., entered judgment in favor of employee but refused to double jury's award of front pay as liquidated damages. Cross appeals were taken. The Court of Appeals, Wiener, Circuit Judge, held that: (1) any error in admitting testimony about result of prior trial was harmless; (2) admitting employer's position letter to EEOC was not abuse of discretion; (3) refusing to give requested instructions of prima facie case of age discrimination was not error; (4) finding that employer intended to deprive employee of pension benefits was not clearly erroneous; and (5) liquidated damages provision of ADEA did not require doubling of front pay award.

Affirmed.

Attorneys and Law Firms

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Appeals from the United States District Court for the
Northern District of Texas.

Before BROWN, KING and WIENER, Circuit
Judges.

Opinion

WIENER, Circuit Judge:

Spencer Gifts, Inc. (Spencer) appeals a judgment against it for firing John D. Olitsky in violation of the Age Discrimination in Employment Act (ADEA)¹ and the Employee Retirement Income Security Act (ERISA).² Olitsky cross-appeals, arguing that the district court erroneously refused to double the jury's award of front pay as liquidated damages under the ADEA. Finding no merit to the arguments of either party, we affirm.

I.

FACTS

In December 1983, Spencer fired Olitsky from his position as merchandise manager. Olitsky was 53 years old. Spencer originally hired Olitsky in 1973, when he was 42 years old, as a buyer for its retail store division. Olitsky resigned from Spencer in 1979 to take a position with another company. In 1981, Spencer again hired Olitsky, who was then 50 years old, as a merchandise manager. Spencer performed well in that position in 1981 and 1982 and received favorable evaluations.

In October 1983, Hank Roth, a general merchandise manager for Spencer, informed Olitsky that his performance had deteriorated and that the buyers whom he supervised were not performing adequately. When Roth dismissed Olitsky in December 1983, he explained to Olitsky that he had not satisfactorily improved his performance, that Spencer was in the process of reorganizing its merchandise department, and that as a result of the reorganization, there would

be no room for Olitsky. When he was fired, Olitsky was only a few months from meeting the ten-year vesting period of his benefits under Spencer's pension plan.

Olitsky filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that Spencer fired him because of his age. After the EEOC conducted an investigation, but before it made a determination of Olitsky's charge on the merits, Olitsky brought suit in federal district court, alleging violations of the ADEA and ERISA. After a jury trial, the district court entered judgment in favor of Olitsky on both claims. In *Olitsky I*,¹ we reversed and remanded, holding that the district court had erroneously admitted into evidence the EEOC's file on Olitsky's charge.

On remand, the jury returned a verdict for Olitsky, finding that Spencer willfully discriminated against Olitsky on the basis of age, and awarding him backpay of \$500,000 and lost pension benefits of \$100,000. The district court accepted the jury's finding *1474 of willfulness, doubled the jury's backpay and lost pension benefits awards as liquidated damages, awarded \$400,000 as front pay and \$123,000 as lost pension damages under Olitsky's ERISA claim.² Spencer appeals.

II.

ANALYSIS

Spencer challenges several aspects of the district court proceedings in this appeal. It argues that the district court erroneously (1) admitted certain documents and testimony into evidence, (2) refused to give jury instructions on disputed *prima facie* elements of Olitsky's ADEA claim, and (3) determined that Spencer violated ERISA when it fired Olitsky. Olitsky argues on cross-appeal that the district court erred in failing to double his front pay award after the jury found that Spencer acted willfully in violating the ADEA.

A. Admission of evidence.

¹ ² The admission of evidence is within the sound discretion of the district court. We will reverse a

district court's evidentiary rulings only upon a finding of abuse.³

1. Result of the prior trial.

During Olitsky's direct examination at trial, he testified as follows:

Q. What kinds of problems have you encountered that have kept you from getting high level employment since being terminated at Spencer Gifts and since the first trial of this case?

* * * * *

A. [S]ince the first trial it's more difficult because the entire gift industry is aware I won that case for a large amount of money.

Spencer immediately moved for a mistrial, arguing that Olitsky's statement about the result of the first trial was extremely prejudicial to Spencer and that the prejudice could not be cured by a jury instruction.

The district court conducted a bench conference and noted that Spencer had allowed Olitsky to refer to the prior trial in his opening statement without objection, and that Spencer did not raise the issue in its motion *in limine*, even though that motion did address several issues that the district court considered "a lot less harmful than [reference to the prior trial]." There was also a discussion about whether Spencer was contending that Olitsky did not mitigate his damages by diligently searching for employment and whether Olitsky offered the testimony about the first trial to rebut that contention. The district court stated that it had asked Spencer earlier in the trial whether it was making such a contention, but that Spencer "danced around that question" and did not specifically deny that it was.

The district court concluded the bench conference by denying Spencer's motion for mistrial, stating again that it did not understand why Spencer did not raise the issue in its motion *in limine*. The district court recalled the jury and gave the following instruction:

[Y]ou have heard testimony about a previous trial of this case. The fact that this is the second trial is irrelevant to your consideration of this case.

You should not consider the fact of a previous trial or its outcome in any way. Your verdict in this case must be based solely upon the facts as you find them from the evidence introduced at this trial with the law as I shall give to you during the trial or at the end of the case.

The district court further instructed the jury before it retired to deliberate:

You have heard that there was a previous trial of this case. Except for testimony from that trial which has been admitted as evidence in this trial, you should disregard everything about that earlier trial in reaching your verdict in *1475 this case. Common sense will tell you that the adjudication from the earlier trial must have been flawed; otherwise, we would not have spent all of the time and effort required by this trial to determine the rights and liabilities of the parties. If you should allow the fact of the previous trial or its outcome to influence you, that would be improper, and all of the time and effort spent on this trial will have been wasted.

In arguing that the evidence of the result of the first trial was so prejudicial that the curative instruction was not adequate to eliminate the harm, Spencer relies on *United States v. Williams*.⁶ In that case, a criminal defendant and his three co-defendants were convicted in a jury trial, but the district court granted their motion for new trial. On the third day of the second trial, the government informed the district court that a local television news broadcast on the previous night had included a report about the trial. The report stated that the four defendants had previously been convicted, but that a new trial had been granted. The district court polled the jury, and two jurors admitted that they had seen the report. Both jurors stated that the report would not influence their decision in the case. The defendant moved for a mistrial, but the district court denied that motion. The

district court instructed the jury to disregard everything not heard in court. The court proceeded with the trial, and the defendants were again convicted.

On appeal, we held that because the news report's mention of the result of the first trial was probative of guilt and highly prejudicial, the exposure of the two jurors to that information resulted in an unfair second trial.⁷ We concluded that the prejudice was not corrected by the district court's instruction, and we reversed and remanded for a new trial.⁸

Spencer also relies on *Coleman Motor Co. v. Chrysler Corp.*⁹ In that Third Circuit case, the plaintiff (Coleman) called as a witness Sam Liberto, who was the plaintiff in a previous suit against the same defendant (Chrysler), in which the allegations were identical to those in *Coleman*. In the previous suit, the jury had found that Chrysler conspired to monopolize trade, but that Liberto had sustained no damages, so judgment was entered for Chrysler. In *Coleman*, Chrysler cross-examined Liberto about his suit against Chrysler and brought out the fact that Liberto had recovered no money from that suit. On redirect, Coleman asked Liberto whether the jury in his suit had found that Chrysler had conspired to monopolize trade, and he answered in the affirmative. Chrysler objected, but the district court allowed the testimony. The district court instructed the jury that they could consider the verdict in the previous trial in assessing the credibility of Liberto and in determining whether Chrysler had notice and intent. The Third Circuit held that Chrysler's reference to the previous verdict was a permissible attempt to show Liberto's bias, but that Coleman on redirect did not limit its questions about the previous verdict to an effort to rebut the implication of bias.¹⁰ Thus, held the court of appeals, Coleman's references to the prior verdict were prejudicial and warranted a new trial because "[t]he admission of a prior verdict creates the possibility that the jury will defer to the earlier result and thus will, effectively, decide a case on evidence not before it."¹¹

^[3] In the instant case, the disclosure of the result of the first trial did not prejudice Spencer to the extent Spencer would have us believe. Spencer was at least partly to blame for the disclosure, as the district court recognized. Spencer "danced around" the district court's question whether it was contending that Olitsky failed to mitigate his damages, and Spencer failed to raise the issue, which it now argues was incurably prejudicial, in its motion *in limine*.

In addition, the curative instruction given by the district court negated any prejudice *1476 that may have occurred and distinguishes the instant case from *Williams* and *Coleman*. In *Williams*, the trial court gave only "the usual instruction to disregard everything not heard in court. No specific instruction was given the two jurors to disregard the news report of the prior trial, nor were they instructed that the prior instructions were not evidence of guilt."¹³ Additionally, such evidentiary rulings in criminal trials, with their constitutional overtones, are at best weakly analogous in civil cases.

In *Coleman*, the trial court instructed the jury that it *could* consider the result of the prior trial as evidence for a limited purpose. In the instant case, however, the district court clearly instructed the jury, on two occasions, that the first trial was irrelevant and that the jury was not to consider the occurrence or result of the first trial for any purpose. We conclude that those instructions were sufficient to cure any harm that may have resulted from the mention of the first trial and its results.

2. Spencer's position letter to the EEOC.

In *Olitsky I*, the district court admitted into evidence the entire file on this dispute prepared by Janice Johnson, an investigator for the EEOC. That file included Johnson's handwritten notes that reported Ronald Mangel, general counsel for Spencer, as saying he "can't rebut if McNally was promoted." McNally was a younger employee whom Spencer promoted when Olitsky was fired. Olitsky used Mangel's statement to argue to the jury that Spencer had admitted that it could not rebut the allegation of age discrimination. We stated that Mangel's supposed admission of liability was "the kind of exchange among the parties and the EEOC that informal conciliation ought to encourage" and that allowing the use of such admissions in later litigation "would attach a penalty to the candor and forthrightness that Congress obviously believed were necessary to the successful conciliation of disputes."¹⁴ We held that the admission of the entire EEOC file constituted reversible error.¹⁵

Johnson gave Spencer notice of Olitsky's claim by letter dated March 22, 1984. Mangel responded with a position letter dated April 11, 1984 to Johnson (the "Mangel letter"). That letter denied that Spencer had discriminated against Olitsky and stated that Olitsky

was fired because his sales were inadequate. The Mangel letter also stated, in part, that "Ms. Jeri Hurvitz replaced Mr. Olitsky as Merchandising Manager.... Her birthdate is October 5, 1956." Spencer referenced the Mangel letter and attached a copy of it to its answers to Olitsky's interrogatories during pretrial discovery.

At the second trial on remand, Olitsky introduced Spencer's discovery responses, including the Mangel letter. Olitsky also introduced a summary chart that included references to and excerpts from the Mangel letter. The district court admitted those exhibits over Spencer's objection.

Spencer argues that the admission of the Mangel letter, which was part of Johnson's EEOC file that we held inadmissible as a whole in *Olitsky I*, violates both section 706(b) of Title VII of the Civil Rights Act of 1964¹⁶ and the holding of *Olitsky I*.

Section 706(b) provides in part:

If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. *Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned* (emphasis added).

In *Olitsky I* we stated that the admission of the entire EEOC file violated section 706(b), but we did not decide whether section *1477 706(b) applied to an ADEA case.¹⁶ Neither do we decide that question here, as we hold that the Mangel letter did not constitute conciliation evidence to which section 706(b) would apply.

¹⁴ The Mangel letter set forth purely factual information and related Spencer's position on the merits of Olitsky's claim. The letter contained no

reference to conciliation efforts between Spencer and the EEOC. Spencer neither made any offers of settlement nor responded to any such offers by the EEOC in the Mangel letter. In *Branch v. Phillips Petroleum Co.*,¹⁷ we distinguished between "purely factual material related to the merits of [the] charge" and "proposals and counter-proposals of compromise made by the parties during the [EEOC's] efforts to conciliate" and held that under section 706(b), disclosure of the former was allowable, but disclosure of the latter was not.¹⁸ We adhere to that distinction and hold that the Mangel letter does not constitute conciliation material that section 706(b), were it to apply, would render inadmissible.

Spencer argues that under the law of the case doctrine, our holding in *Olitsky I* prohibited the district court from admitting the Mangel letter. Spencer interprets that holding too broadly. In *Olitsky I* we held that the *entire EEOC file* was inadmissible, but we did not hold that each individual item within that file would be inadmissible in and of itself. Here we are presented with only one document from that file. Finding that the Mangel letter did not constitute conciliation material, we hold that the district court did not abuse its discretion in admitting that single letter into evidence.

3. Rumors of Hank Roth's drug use.

¹⁹ In its response to a pretrial interrogatory from Olitsky, Spencer stated that Gene Brog, the President of Spencer Gifts, had heard rumors that Hank Roth, Olitsky's supervisor, had used drugs. At trial, Olitsky cross-examined Brog, who approved Roth's decision to fire Olitsky, about those rumors and introduced Spencer's response to the interrogatory. Brog testified that he did not investigate those rumors. Olitsky maintained that, as Roth was younger than Olitsky, that evidence showed that Spencer treated younger employees more favorably than older employees and that Spencer's asserted reason for firing Olitsky was a pretext for age discrimination.

Spencer argues that the district court erred in admitting that evidence because (1) Olitsky did not establish a connection between the failure to investigate the rumors and Spencer's firing of Olitsky; (2) Olitsky did not prove that Roth actually used drugs; (3) Olitsky did not show a connection between Brog's approval of Roth's decision to fire Olitsky and the fact that Brog heard rumors of Roth's drug use; and (4) under FED.R.EVID. 403, any

probative value of the evidence was substantially outweighed by the danger of prejudice, confusion of the issues, and misleading the jury. We are convinced that the evidence of Roth's rumored drug use was not unfairly prejudicial to Spencer, and we hold that the district court did not abuse its discretion in admitting it.

4. Olitsky's open heart surgery.

²⁰ Olitsky testified that he underwent open heart surgery in February 1984 while searching for another job. Spencer argues that the district court erred in admitting that testimony because it was irrelevant, and any probative value of that testimony was substantially outweighed by the danger of prejudice to Spencer. Olitsky asserts that, like his testimony about being "blacklisted" following his success in the original trial of this case, the evidence of heart surgery was offered to rebut Spencer's contention that Olitsky failed to mitigate his damages. As we noted above, Spencer did not clearly express to the district court whether or not it was making such a contention. Thus, the district court did not abuse its discretion in admitting Olitsky's testimony.

*1478 B. Jury instructions.

²¹ Spencer contends that two elements of Olitsky's *prima facie* ADEA case²² were in dispute and that the district court erred in refusing to submit jury questions on those two elements. Spencer asserts that the district court should have submitted jury questions on (1) whether Olitsky was qualified for the position he held with Spencer and (2) whether Olitsky was replaced by someone outside the protected class. By refusing to submit those questions, Spencer argues, the district court usurped the province of the jury.

We rejected that argument in *Walther v. Lone Star Gas Co.*²³ In *Walther*, we stated:

When the defendant has produced evidence of a nondiscriminatory reason for plaintiff's discharge, and plaintiff has had an opportunity to challenge that reason as pretextual, the trier of fact should proceed directly to the ultimate issue of whether the defendant intentionally discriminated against the plaintiff. The initial *prima facie* case is no longer relevant.

Under the logic of [*U.S. Postal Service Bd. of Governors v. Aikens*] [460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403], it is clear that the issue of whether a plaintiff made out a prima facie case has no place in the jury room. Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing. Instead, the court should instruct the jury to consider the ultimate question of whether defendant terminated plaintiff because of his age. To the extent our decisions before or after *Aikens* imply that the issue of prima facie case is a factual question for the jury to resolve, we reject such implications as dictum.²¹

The district court did not err in its instructions to the jury.

C. Olitsky's ERISA claim.

Section 510 of ERISA prohibits employer action against an employee who participates in a pension benefit plan for "the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."²² To recover under section 510, a plaintiff "need not show that 'the sole reason for his [or her] termination was to interfere with pension rights'; however, the plaintiff must show that the employer had the 'specific intent to violate ERISA.'"²³ Olitsky contended that Spencer violated section 510 by firing him within a few months before Olitsky would have met the ten-year vesting requirement for benefits under Spencer's pension plan, thereby causing him not to receive any benefits under the plan.

Gene Brog testified that when Spencer rehired Olitsky in 1981, Brog mistakenly believed, and told Olitsky, that because of Olitsky's break in service with Spencer between 1979 and 1981, Olitsky was not entitled to credit for his years of service prior to 1979, so that he would have to start a *1479 new ten-year vesting period. Brog further testified that he did not learn that Olitsky had received credit for his prior years of service until after Olitsky was fired. Hank Roth also testified that he did not know the status of Olitsky's vesting when he made the decision to fire Olitsky. Spencer argues that there is thus no evidence that anyone involved in the decision to fire Olitsky knew that Olitsky was close to vesting when he was fired.

The district court did not submit Olitsky's ERISA

claim to the jury. Rather, the district court acted as fact-finder on that claim and found that Spencer had violated section 510. The district court stated:

[A]s I instructed the jury, I feel free to disbelieve the testimony of any witness, even if it is unimpeached. I did not find Mr. Brog to be a credible witness, at least on this issue about pensions, and I am persuaded by all the circumstantial evidence provided by the plaintiff that there was specific intent in the timing of his discharge to deprive him of his vesting in the pension plan.

[²⁴] We accept a trial court's findings of fact unless they are clearly erroneous or influenced by an incorrect view of the law.²⁴ Olitsky was fired shortly before the vesting of his pension benefits. Spencer contends that Olitsky was fired because of poor work performance and that the vesting of benefits did not enter into its decision to fire him. The district court chose not to give credence to the testimony of the individuals who made the decision to fire Olitsky, and reasonably inferred from the proximity of the date of firing to the date of vesting that Spencer intended to deprive Olitsky of his benefits. That finding was not clearly erroneous.

D. Doubling of the front pay award.

[²⁵] The ADEA liquidated damages provision²⁵ states, in part:

Amounts owing to a person as a result of a violation of this Chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of Sections 216 and 217 of this Title; Provided, That liquidated damages shall be payable only in cases of willful violations of this Chapter. In any action brought to enforce this Chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Chapter, including without limitation judgments compelling employment, reinstatement, or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid

overtime compensation under this section.

Olitsky argues that a front pay award constitutes an "amount owing" under that provision, requiring the doubling of such an award as liquidated damages upon a finding of a willful violation of the ADEA. We have not previously addressed that question, but six other circuits have rejected Olitsky's argument.²⁹ Olitsky has not persuaded us that those circuits have interpreted that statute incorrectly. The district court thus did not err in refusing to double Olitsky's front pay award.

III.

CONCLUSION

The district court did not abuse its discretion in its evidentiary rulings, partly because of Spencer's attempts to conceal its trial strategy. The district court was correct in refusing to give jury questions on the elements of Olitsky's *prima facie* case, as those elements are not factual questions for the jury to decide. Spencer has failed to convince us that the district court's finding that Spencer violated section 510 of ERISA was clearly erroneous. In addition, *1480 the district court correctly refused to double Olitsky's front pay award, as such an award does not constitute an "amount owing" under the liquidated damages provision of the ADEA. For the foregoing reasons, the decision of the district court is

AFFIRMED.

ON PETITION FOR REHEARING

July 28, 1992.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the

Footnotes

¹ 29 U.S.C. §§ 621-634.

same is hereby DENIED.

We are constrained to caution counsel for Spencer Gifts henceforth to exercise greater self-restraint in their briefs, motions, petitions, and other writings filed with this court. We admire and encourage vigorous advocacy; we deplore and discourage stridently perjorative rhetoric and unprofessional mischaracterizations of fact and law, particularly when such mischaracterization involves an order, judgment or opinion of this court. An apodictical example of the latter is found on the first page of counsels' petition for rehearing: Twice the panel opinion's affirmation of the district court's evidentiary ruling is characterized as punishment. In one instance the word *punishment*, and in another instance the word *punished*, is set off by quotation marks, yet neither ostensibly-quoted word appears anywhere in this panel's opinion! Neither is there even the slightest implication in either the district court's or this panel's opinions that they were rendered punitively. The same lack of professionalism that is demonstrated by the intemperateness of counsels' petition for rehearing was demonstrated in counsels' original brief to this court.

Moreover, let counsels' client harbor no misconception that either the district court's evidentiary ruling or this panel's affirmation of that ruling was in any way punitive; Spencer Gifts' loss of this case cannot be laid at the feet of either court. This court, like most, assiduously avoids tarring the client with the brush intended for lawyers whose behavior we deem unprofessional.

But here we neither formally reprimand nor otherwise sanction counsel for Spencer Gifts. We do, however, seriously caution counsel against repeating such transgressions in the future.

All Citations

964 F.2d 1471, 61 Fair Empl.Prac.Cas. (BNA) 1507, 59 Empl. Prac. Dec. P 41,657

- 2 29 U.S.C. §§ 1001-1461.
- 3 *Olitsky v. Spencer Gifts, Inc.*, 842 F.2d 123 (5th Cir.), *cert. denied*, 488 U.S. 925, 109 S.Ct. 307, 102 L.Ed.2d 326 (1988).
- 4 The district court stated that in light of its \$123,000 award as lost pension benefits under ERISA and the jury's award of \$100,000 as lost pension benefits under the ADEA, Olitsky would be entitled to recover only \$123,000 for lost pension benefits (in addition to \$100,000 as liquidated damages for willfulness) so as to prevent a double recovery.
- 5 *Jon-T Chems., Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1417 (5th Cir.1983).
- 6 568 F.2d 484 (5th Cir.1978).
- 7 *Id.* at 470-71.
- 8 *Id.* at 471.
- 9 525 F.2d 1338 (3d Cir.1975).
- 10 *Id.* at 1350-51.
- 11 *Id.* at 1351.
- 12 *Williams*, 568 F.2d at 468.
- 13 *Olitsky I*, 842 F.2d at 127.
- 14 *Id.*
- 15 42 U.S.C. § 2000e-5(b).
- 16 *Olitsky I*, 842 F.2d at 128.
- 17 838 F.2d 873 (5th Cir. Unit A 1981).
- 18 *Id.* at 881.
- 19 In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, 677 (1973), the Supreme Court formulated an evidentiary procedure for race discrimination cases which has been adapted for ADEA cases. First, the plaintiff must prove a *prima facie* case of age discrimination, which consists of evidence that the plaintiff: (1) was discharged; (2) was qualified for the position; (3) was within the protected class at the time of discharge; (4) was replaced by someone outside the protected class; or (5) by someone younger; or (6) show otherwise that his discharge was because of age. *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1504-05 (5th Cir.1988). If the plaintiff proves a *prima facie* case, a presumption of discrimination arises which the defendant must rebut by articulating a "legitimate, nondiscriminatory reason for its disparate treatment of the plaintiff." *Id.* at 1505. If the defendant succeeds in rebutting the presumption, the plaintiff must prove that the defendant's articulated reasons are mere pretexts for discrimination. The plaintiff can do this either by showing that a discriminatory reason more likely motivated the defendant or by showing that the defendant's reason is

unworthy of credence. *Id.* (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).

20 952 F.2d 118 (5th Cir.1992).

21 *Id.* at 126–27 (citations omitted).

22 29 U.S.C. § 1140.

23 *Clark v. Resistoflex Co., Div. of Unidynamics Corp.*, 854 F.2d 762, 770 (5th Cir.1988) (quoting *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987)) (emphasis in original).

24 *Branch-Hines v. Hebert*, 939 F.2d 1311, 1317 (5th Cir.1991).

25 29 U.S.C. § 626(b).

26 See *Wheeler v. McKinley Enters.*, 937 F.2d 1158, 1163 n. 2 (6th Cir.1991) (“‘Front pay’ may be recoverable as well, but it cannot figure in the calculation of liquidated damages.”); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1188, 1210 (7th Cir.1989) (“Since front pay is a prospective remedy, an award of front pay damages is not an ‘amount owing’ for purposes of section 626(b).”); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1556–57 (10th Cir.1988) (finding that section 626(b), read in light of section 216(b) of the Fair Labor Standards Act, provides for two types of relief—“amounts owing” and other “legal or equitable relief”—and that front pay is included in the latter and is not subject to doubling); *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 382–83 (3d Cir.1987); *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1258–59 (2d Cir.1987) (front pay is not “amount owing”; as an equitable award, it is not subject to doubling under section 626(b)); *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1348 (9th Cir.1987) (“By the express terms of the statute, liquidated damages are an additional amount equal to the backpay and benefits award” and thus do not include front pay.), *cert. denied*, 484 U.S. 1047, 108 S.Ct. 785, 98 L.Ed.2d 870 (1988).

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United States District Court,
S.D. Texas, Houston Division.

David Pemberton, Plaintiff,

v.

Lloyd's Register Drilling Integrity Services,
Inc., Defendant.

CIVIL ACTION NO. 4:16-CV-01732

Signed 11/16/2016

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Opinion

MEMORANDUM & ORDER

KEITH P. ELLISON, UNITED STATES DISTRICT
JUDGE

*1 Before the Court is the Motion to Strike Use of Position Statement and Motion for Protective Order (Doc. No. 12) submitted by Defendants Lloyd's Register Drilling Integrity Services, Inc. (LRDIS") and Ricky Eaton (collectively, "Defendants"). After considering Defendants' motion, the responses thereto and applicable law, the Court finds that the motion must be denied.

I. BACKGROUND

This is an age discrimination case. Plaintiff David Pemberton was fired from his position at LRDIS at the age of 66. (Complaint, Doc. No. 7, ¶ 2.) Mr. Pemberton worked at LRDIS from 2013 to 2015 as a Compliance Lead Manager, where he conducted safety inspections and certifications of offshore deep-water oil rigs in the Gulf of Mexico. (Doc. No. 7, ¶ 9.) According to Mr. Pemberton, he had years of industry experience, and his colleagues and

customers regarded him highly. (Doc. No. 7, ¶ 9.) In the summer of 2015, Mr. Pemberton received an unfavorable performance review rating, after his manager was allegedly pressured to lower Mr. Pemberton's evaluation score. (Doc. No. 7, ¶ 12.) That September, Ricky Eaton, a manager at LRDIS purportedly told a fellow senior employee that a specific customer did not want to work with Mr. Pemberton. (Doc. No. 7, ¶¶ 14-15.) Mr. Pemberton was shocked when Mr. Eaton told him about the customer complaint. Mr. Pemberton then reported his conversation with Mr. Eaton to his supervisor and another manager. Neither manager investigated the customer complaint allegations. On September 17, 2015, LRDIS fired Mr. Pemberton. (Doc. No. 7, ¶ 16-17.)

After his termination, Mr. Pemberton filed a charge of age discrimination with the Texas Workforce Commission—Civil Rights Division ("TWC-CRD") and the Equal Employment Opportunity Commission ("EEOC"). (Doc. No. 7, ¶ 23.) LRDIS then submitted a Position Statement to the EEOC, denying any unfair treatment for any unlawful reason, and citing Mr. Pemberton's attitude and poor teamwork as grounds for termination. (Doc. No. 7, Ex. 6.) The Position Statement referenced complaints by LRDIS' clients, although it did not mention any by name. (Doc. No. 7, Ex. 6.) In LRDIS' cover letter to the EEOC, it labeled the Position Statement as confidential commercial information; the EEOC found LRDIS' assertion of confidentiality unwarranted. (See Doc. No. 12, Exs. 2-3.) Defendants now request that the Court strike any use of the Position Statement, arguing it is privileged material and hearsay.

II. LEGAL STANDARD

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. ... Information within this scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1).¹ Upon a motion from a party, the court may issue "an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... forbidding the disclosure of discovery." Fed. R. Civ. P. 26(c).

*2 "Ordinarily, a party may not discover documents

and tangible things that are prepared in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3)(A). A party may not, "without purported necessity or justification ... secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. ... Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

III. ANALYSIS

Defendants argue the Position Statement should be excluded because it is privileged material and hearsay. The Court finds the Position Statement does not fall within attorney-client privileged communication or attorney work product. Additionally, the Position Statement is not hearsay. It would therefore be inappropriate to strike use of the Position Statement.

A. The Position Statement is not a privileged communication or attorney work product.

Defendants incorrectly believed that their request to the EEOC for confidentiality converted the Position Statement into privileged communication. LRDIS announced in its cover letter accompanying the Position Statement: "The Company considers its position statement and other materials submitted to the Commission to be confidential commercial information pursuant to the nondisclosure rules under Section 706(b), Title VII of the Civil Rights Act of 1964 and 5 U.S.C. 552(b)." (Doc. No. 12, Ex. 2.) Section 706(b) states:

If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or

employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. 42 U.S.C. § 2000e-5 (2015).

Section 706(b) pertains to statements made during efforts of "conference, conciliation, and persuasion." The Fifth Circuit has "distinguished between purely factual material related to the merits of the charge and proposals and counter-proposals of compromise made by the parties during the EEOC's efforts to conciliate." *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1477 (5th Cir. 1992) (internal citations omitted). In *Olitsky*, the court held that a position letter—which denied that the employer had discriminated and gave alternate reasons for firing the complaining employee—did not constitute conciliation evidence. 964 F.2d at 1477. LRDIS' only allusion to conciliation was its request to the EEOC to issue a No Cause finding and dismiss Mr. Pemberton's charge; there was no mention of a settlement offer or conversation. (Doc. No. 7, Ex. 6.) As in *Olitsky*, the Position Statement's content related to factual information regarding the merits of Mr. Pemberton's claim. Because the Position Statement was not conciliation evidence, § 706(b) does not apply to this document, and it may be disclosed.

The Position Statement also does not qualify as work product. Work product is an attorney's preparation for a case, reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs," among other things. *Hickman*, 329 U.S. at 511. The work product protection allows "a lawyer [to] work with a certain degree of privacy" to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Id.* Defendant argues that the Position Statement is work product because it was prepared in anticipation of litigation and reflects counsel's legal argument. But not "all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery." *Id.*

*3 The Position Statement is unlike true work product. Courts have excluded opinion letters prepared by an expert upon counsel's request, studies prepared by an accountant in anticipation of litigation, and earlier drafts of position letters. *See, e.g., Treat v. Tom Kelley Buick Pontiac GMC, Inc.*,

No. 1:08-CV-173, 2009 WL 1543651, at *10 (N.D. Ind. June 2, 2009); *Pacamor Bearings, Inc. v. Minebea Co.*, 918 F. Supp. 491, 514 (D.N.H. 1996). The Position Statement is distinct from any of these. Although counsel prepared it in anticipation of litigation, it does not reflect the lawyer's attempts to process her legal theories and strategies free from interference. Nor was the Position Statement an exchange of notes or mental impressions between the LRDIC's lawyers and the EEOC. The policy behind protecting work product—to promote effective representation by allowing a lawyer to securely write down her thoughts in preparation for trial—does not call for restricting disclosure of the Position Statement.¹

B. The Position Statement is not hearsay.

Defendant also seeks to exclude the Position Statement on hearsay grounds, citing Federal Rules of Evidence 613, 801, 802 and 805. However, the Position Statement is not hearsay. If Plaintiff attempts to introduce the Position Statement in evidence, it will be “a statement offered against an opposing party ... made by the party's agent or employee on a matter within the scope of that relationship and while it existed.” Fed. R. Evid. 801(d)(2)(D). LRDIS's counsel submitted the letter to the EEOC. Because the “attorney is the agent of his client,” the Position Statement is a statement made by Defendants' agent. *Rogers v. The Marshal*, 68 U.S. 644, 651 (1863). See also *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340, 354, n.4 (5th Cir. 1981) (“in the eyes of the law the agent is considered as standing in the place of the principal”). The Position Statement is therefore not hearsay under Fed. R. Evid. 801(d).

The Fifth Circuit has repeatedly found position statements admissible. See, e.g. *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 237 (5th Cir.

2015); *Miller v. Raytheon Co.*, 716 F.3d 138, 144 (5th Cir. 2013); *McInnis v. Alamo Cmty. Coll. Dist.*, 207 F.3d 276, 282 (5th Cir. 2000). Plaintiff argues the Position Statement is relevant to show inconsistent reasons given by Defendants for firing Mr. Pemberton. The Fifth Circuit has explicitly allowed employees to use position statements containing false information to show pretext. See *Burton*, 798 F.3d at 237 (“A jury may view erroneous statements in an EEOC position statement as circumstantial evidence of discrimination”); see also *Miller*, 716 F.3d at 144. Although one court upheld the exclusion of an employer's letter to the EEOC that would reveal its changing positions over the course of litigation, *Lindsey v. Prive Corp.*, 161 F.3d 886, 894–95 (5th Cir. 1998), that decision is in conflict with subsequent appellate decisions. Given prior courts' admission of position statements in similar circumstances, it would be inappropriate to prohibit any and all future uses of the Position Statement at this time.

IV. CONCLUSION

Defendants have failed to show that the Position Statement is privileged or hearsay. In this early stage of litigation, the Court is hesitant to strike, or issue a protective order as to, a potentially relevant document that is not subject to any exclusion. The Court hereby **DENIES** Defendants' Motion to Strike Use of Position Statement and Motion for Protective Order.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2016 WL 6820389

Footnotes

- 1 Plaintiff argued Defendant's motion was untimely under Fed. R. Civ. P. 12(f). In their reply brief, Defendants explain that they seek to strike the Position Statement pursuant to Rule 26, not Rule 12(f). The Court agrees with Defendants that rules governing discovery proceedings apply here. Thus, the Court does not need to consider timeliness under Rule 12(f).
- 2 The Parties discuss whether Defendants waived a privilege by sending the Position Statement to the EEOC. Because the Court finds that the Position Statement is neither privileged communications nor work product, the Court does not need to address the waiver question.

End of Document

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Pate, Alex

From: Nicholson, J. C. Law Clerk (Jonathan Arndt) <JNicholsonLC@sccourts.org>
Sent: Thursday, October 26, 2017 4:35 PM
To: Brooklyn O'Shea; Mefford, Tracie; Pate, Alex; Wooten Rice, Lee Ann; Ian O'Shea
Subject: RE: South Carolina Human Affairs Commission v. Zeyi Chen, et al. 14-CP-10-7037

Mrs. O'Shea,

Judge Nicholson has decided to issue a protective order and seal any publicly available information that was obtained during the conciliation proceedings. However, should the Plaintiff subsequently acquire such information through another admissible procedure it may revisit the issue before the trial judge. Please prepare a proposed order to that effect and confer with opposing counsel prior to submitting it to the court. Please email me the final order in Microsoft word format.

Judge Nicholson has also denied Plaintiff's Motion for Summary Judgment. You do not need to incorporate this ruling into the order as a short order will be filed next week.

Please let me know if you have any questions or concerns.

Kindest regards,

Jonathan S. Arndt

Law Clerk to The Honorable J.C. Nicholson, Jr.
Circuit Court Judge
100 Broad Street
Charleston, South Carolina 29401
Tel: (843) 958-5047
JNicholsonLC@sccourts.org

From: Brooklyn O'Shea [mailto:brook@theoshealawfirm.com]
Sent: Thursday, October 5, 2017 4:11 PM
To: tmefford@schac.sc.gov; rpate@schac.sc.gov; Nicholson, J. C. Law Clerk (Jonathan Arndt) <JNicholsonLC@sccourts.org>; larice@schac.sc.gov; Ian O'Shea <ioshea@theoshealawfirm.com>
Subject: South Carolina Human Affairs Commission v. Zeyi Chen, et al. 14-CP-10-7037

Tracie and Alex.

R-276

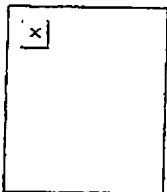
We are about to review the memo you submitted to Judge Nicholson today. The email states that the memo will be sent in three parts. We received two parts as attachments to your email. Can you confirm that you either meant to send just the two or if there is a third part, will you please email it to me so that we don't have to wait for the hard copy to come in the mail?

Thank you.

Kind regards,
Brooklyn

--

Brooklyn A. O'Shea
Attorney at Law



O'Shea Law Firm, LLC
1120 Folly Road
Charleston, SC 29412
Tel: 843-805-4943

R-277

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**Pate, Alex**

---

**From:** Nicholson, J. C. Law Clerk (Jonathan Arndt) <JNicholsonLC@sccourts.org>  
**Sent:** Thursday, October 26, 2017 5:18 PM  
**To:** Pate, Alex; Brooklyn O'Shea  
**Cc:** Mefford, Tracie; Wooten Rice, Lee Ann; Ian O'Shea  
**Subject:** RE: South Carolina Human Affairs Commission v. Zeyi Chen, et al. 14-CP-10-7037

Mr. Pate and Mrs. O'Shea,

Yes, that will be in the order. Also, I forgot to mention in the previous email that Judge Nicholson would like for both parties to submit some type of privilege log outlining materials and portions thereof that contain information believed to have been obtained during the conciliation proceedings.

**Jonathan S. Arndt**  
Law Clerk to The Honorable J.C. Nicholson, Jr.  
Circuit Court Judge  
100 Broad Street  
Charleston, South Carolina 29401  
Tel.: (843) 958-5047  
[JNicholsonLC@sccourts.org](mailto:JNicholsonLC@sccourts.org)

R-278

**From:** Pate, Alex [mailto:rpate@schac.sc.gov]  
**Sent:** Thursday, October 26, 2017 4:46 PM  
**To:** Brooklyn O'Shea <brook@theoshealawfirm.com>; Nicholson, J. C. Law Clerk (Jonathan Arndt) <JNicholsonLC@sccourts.org>  
**Cc:** Mefford, Tracie <tmefford@schac.sc.gov>; Wooten Rice, Lee Ann <larice@schac.sc.gov>; Ian O'Shea <ioshea@theoshealawfirm.com>  
**Subject:** RE: South Carolina Human Affairs Commission v. Zeyi Chen, et al. 14-CP-10-7037

Mr. Arndt,

Would it be possible, in advance of the order being issued or as part of the order, for some clarification on what exactly is being considered "conciliation proceedings," so that the Commission does not inadvertently violate the order going forward?

R. Alexander Pate, II  
Staff Attorney  
South Carolina Human Affairs Commission  
1026 Sumter St; Suite 101

Columbia, SC 29201  
(p)803.737.4678  
(f)803.737.7835

**From:** Brooklyn O'Shea [<mailto:brook@theoshealawfirm.com>]  
**Sent:** Thursday, October 26, 2017 4:44 PM  
**To:** Nicholson, J. C. Law Clerk (Jonathan Arndt) <[JNicholsonLC@sccourts.org](mailto:JNicholsonLC@sccourts.org)>  
**Cc:** Mefford, Tracie <[tmefford@schac.sc.gov](mailto:tmefford@schac.sc.gov)>; Pate, Alex <[rpate@schac.sc.gov](mailto:rpate@schac.sc.gov)>; Wooten Rice, Lee Ann <[larice@schac.sc.gov](mailto:larice@schac.sc.gov)>; Ian O'Shea <[ioshea@theoshealawfirm.com](mailto:ioshea@theoshealawfirm.com)>  
**Subject:** Re: South Carolina Human Affairs Commission v. Zeyi Chen, et al. 14-CP-10-7037

Mr. Arndt,

Thank you. I will prepare and send the proposed order as instructed.

Sincerely,  
Brooklyn

On Thu, Oct 26, 2017 at 4:35 PM, Nicholson, J. C. Law Clerk (Jonathan Arndt) <[JNicholsonLC@sccourts.org](mailto:JNicholsonLC@sccourts.org)> wrote:

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**Jonathan S. Arndt**

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**Subject:** South Carolina Human Affairs Commission v. Zeyi Chen, et al. 14-CP-10-7037

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R-280

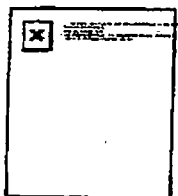
Thank you.

Kind regards,

Brooklyn

--  
**Brooklyn A. O'Shea**

**Attorney at Law**



O'Shea Law Firm, LLC

1120 Folly Road

Charleston, SC 29412

Tel: 843-805-4943

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Plaintiff's Log of Nonpublic Materials

| NO. | Document Description | Date | Author | Recipient | Subject Matter | Category |
|------------|---|--------------------------------------|--|--|--|---|
| 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 sccourts.org | memo in support of partial SJ | Contains nonpublic information from Conciliation pursuant to S.C. Code Ann. § 31---21---120(A) |
| 2 | Defendants' Memo in Opposition | 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 sccourts.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 nonpublic information publicly filed and submitted to the Court from Conciliation pursuant to S.C. Code Ann. § 31---21---120(A) |

| | | | | | | |
|---|---|--|--|---|---|--|
| 3 | 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 nonpublic information from Conciliation pursuant to S.C. Code Ann. § 31---21---120(A) |
| 4 | Letter from Defendant Chen | 3/6/2014; filed w/ Clerk of Court on 10/5/2017 | Defendant Chen | SC Human Affairs Commission | Investigation/conciliation | Contains nonpublic information from Conciliation pursuant to S.C. Code Ann. § 31---21---120(A) |
| 5 | 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 | Contains nonpublic information from Conciliation pursuant to S.C. Code Ann. § 31---21---120(A) |
| 6 | 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 | Contains nonpublic information from Conciliation pursuant to S.C. Code Ann. § 31---21---120(A) |
| 7 | Excerpts from Yolanta Anbriushkiavichus' Deposition | taken 2/18/2016 | Testimony of Defendant's agent, questioning by attorneys Lee Ann Rice and Ian O'Shea | Questioning and answers pertaining to conciliation and information obtained during conciliation | | Contains nonpublic information from Conciliation pursuant to S.C. Code Ann. § 31---21---120(A) |

S

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

South Carolina Human Affairs
Commission,

Case No.: 2014-CP-10-7037

Plaintiff,

vs.

**AFFIDAVIT OF
COMMISSIONER RAYMOND BUXTON, II**

Zeyi Chen & Zhirong Yang

Defendants.

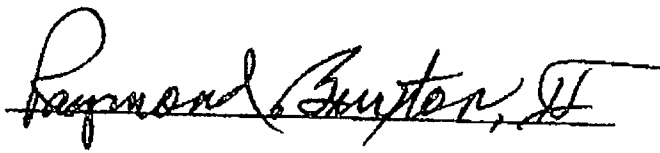
PERSONALLY APPEARED BEFORE ME, Raymond Buxton, II, the undersigned, who being duly sworn, has stated

1. My name is Raymond Buxton, II, and I have served as Commissioner of the South Carolina Human Affairs Commission for a combined five and a half years. In total, I have almost thirty-four years with the agency in some capacity.
2. As Commissioner, I am appointed by the Governor and serve at his or her pleasure, charged with the responsibility for implementing anti-discrimination policies in housing, employment, and public accommodations.
3. In my capacity as Commissioner, I oversee the entire Human Affairs Commission staff, which, in conjunction with education and outreach, primarily serve the citizens of South Carolina through its investigative powers.
4. Per the Fair Housing Law, its implementing regulations, and relevant case law germane to the Civil Rights Act of 1964, the Commission is required to encourage parties to settle a complaint on terms that are mutually agreeable to the parties. The SC Fair Housing Law also requires the Commission to complete both investigations and pre-determination conciliation efforts, within 100 days of the original complaint being filed. Because of this, investigators must simultaneously neutrally investigate the complaints facts, while also offering an opportunity for settlement negotiations.
5. Settlement offers in conciliation would include monetary relief for damages, equitable relief for the housing seeker, and injunctive relief regarding discriminatory practices.
6. Additionally, the investigator is given the option of suspending fact finding and engaging in conciliation if and when the investigator believes a party wishes to resolve a complaint by offering a settlement. Indeed, the Commission's staff includes a mediator who provides conciliation services to parties on a full time basis, and investigators may refer conciliation efforts to him when they believe a meaningful settlement discussion will occur.
7. The Commission has adopted the same standard for determining whether something is conciliatory based on how the Courts have interpreted conciliation in other parts of the Civil Rights Act of 1964, through our legal department's review of appropriate case law,

interpretation of other jurisdictions, and specific Department of Housing and Urban Development guidance.

8. This 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.
9. I believe that this interpretation of our regulation fully encompasses our duty of nondisclosure under the statute, protects all parties and their respective interests, and provides for the most efficient work flow for the agency.
10. I respectfully request that this Court respect the Agency's interpretation of the statute that I have been so dutifully charged to exercise.

FURTHER AFFIANT SAYETH NOT.

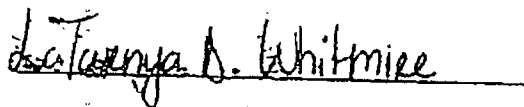


Raymond Buxton, II

Commissioner

Sworn and subscribed before me this

16th day of February, 2018



Notary Public for South Carolina

My Commission Expires: 8/11/2025

1 under the law it has to be a formal statement
2 that's accepted?

3 MS. RICE: Object to form.

4 THE WITNESS: I couldn't say. I'm not
5 sure.

6 MR. O'SHEA: Exhibit number 5 I'm
7 entering into evidence.

8 (Caldwell EXH. 5, 2/27/14 Letter to Chen
9 Zeyi from Marvin Caldwell, marked for
10 identification.)

11 BY MR. O'SHEA:

12 Q. As far as you're aware, Exhibit Number
13 4 that we just looked at, is that the first
14 correspondence you had with your respondents?

15 A. Yes. From what I recall, yes.

16 Q. February 11?

17 A. Uh-huh.

18 Q. Do you looking at this document
19 believe that this appears to be the second
20 correspondence you've had with the respondents?

21 MS. RICE: I'm going to object to this
22 in its entirety in as much as it contains
23 information related to conciliation, again under
24 regulation 65-225 sub F sub I, anything related to
25 conciliation is only germane to conciliation and

1 should not be brought into any testimony
2 thereafter.

3 MR. O'SHEA: Exactly what we're going
4 for. I think that's where we're headed. That's
5 definitely where we're headed. So I appreciate
6 that objection.

7 BY MR. O'SHEA:

8 Q. Regarding this letter, when it was
9 sent, looking at this letter, it appears in the
10 first paragraph, which you attempted -- it appear,
11 is this an attempt at conciliation that you're
12 making?

13 A. Yes.

14 Q. Is that a standard practice to attempt
15 conciliation at any stage in the investigation?

16 A. Yes, at any stage in every
17 investigation.

18 Q. What do you know as far as, it may
19 have been alluded to a moment ago, conciliation
20 discussions between parties?

21 A. What do I know?

22 Q. What do you know about the nature of
23 those conversations? Are they confidential? How
24 can that information discussed during conciliation
25 be used?

1 It reads that: As the investigator, I'm inclined
2 to continue to investigate the case just in case
3 the complaint can't be resolved.

4 It appears then that you go on to
5 inquire specific questions of the respondents
6 regarding your investigation; is that correct?

7 A. Correct.

8 Q. Do you see anything problematic
9 about --

10 MS. RICE: Object to form.

11 BY MR. O'SHEA:

12 Q. -- investigating during the
13 conciliation efforts in this letter?

14 A. As far as going from conciliation to
15 asking specific questions?

16 Q. Yes.

17 A. Yes.

18 Q. Is it fair to say that this letter
19 attempts to investigate while at the same time do
20 conciliation?

21 A. Yes.

22 Q. Would you agree that responses to your
23 questions from this letter addressed during
24 conciliation with them would be privileged?

25 MS. RICE: Object to form.

1 moment if you need -- Dr. Chen declined
2 conciliation?

3 A. I don't see anything.

4 Q. As far as the top portion of the first
5 page of Exhibit 6, it appears be an email. Does
6 it appear to be an email from you on March 7 to
7 one of the respondents?

8 A. Correct.

9 Q. Is it your position that this was
10 their position statement, what you considered
11 their position statement, this document?

12 A. Yes. Yes. A written response, yes.

13 Q. Did you not at this point or did you
14 at this point consider the conciliation efforts to
15 be ongoing?

16 A. Yes, because I didn't receive a
17 response from them.

18 Q. Later in this email, the bottom
19 portion, I'll read a sentence. You can confirm if
20 you understand this to be your case -- your
21 thinking at the time: Right now we just have your
22 word against hers, and the documentation should
23 prove one way or another by showing factual
24 evidence, history, and pattern of practice.

25 Is that what you at the time, March 7,

THE WITNESS: March 12, yeah.

BY MR. O'SHEA:

Q. March 12, excuse me. You said yes?

A. Yes.

(Caldwell EXH. 8, Woods Statement,
marked for identification.)

BY MR. O'SHEA:

Q. Take a moment to review this document.
Let me know when you're ready.

(The witness reads the document, as
requested.)

THE WITNESS: Okay.

BY MR. O'SHEA:

Q. So Exhibit Number 8, do you know or
recognize what this document is?

A. Something sent by -- well, statement
or maybe a rebuttal sent by Ms. Woods.

Q. Do you know who wrote this document?

A. It says: Thank you, Stacy Woods. So
I'm assuming, I'm guessing she sent it to me.

Q. Do you know if this was sent
electronically or if it was sent by mail?

A. I can't recall.

Q. Do you know if there's a signed copy
of this out there?

1 and Yolanta.

2 Q. What about Exhibit 5; who signed that
3 one?

4 A. The second one is me, my wife, and
5 Yolanta.

6 Q. Why were you writing Mr. Caldwell?

7 A. Why I call him? Because I thought --
8 everything happens. He contacted me. He said he's
9 the person work for government, and he said I'm
10 mutual. I don't talk to anybody. He's mutual,
11 completely mutual.

12 Q. Mutual?

13 A. A hundred percent mutual, that I can
14 trust him and he can do things right.

15 Q. So you provided these to Marvin after
16 he first contacted you?

17 A. Uh-huh.

18 Q. Do these look like complete copies of
19 what you would have sent him?

20 A. I think so.

21 Q. Both Exhibit 4 and 5?

22 A. I don't know whether anything else ...

23 Q. As far as you can tell it looks like --

24 A. It looks like it was not accomplished.

25 Q. Now that you've had a chance to read

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2018-001879

South Carolina Human Affairs Commission,

Appellant,

v.

Zeyi Chen & Zhirong Yang,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal Redacted Version contains all material required to be included and not any other material.

August 30, 2019



R. Alexander Pate, II
Lee Ann Rice
South Carolina Human Affairs Commission
1026 Sumter Street, Suite 101
Columbia, South Carolina 29201
rpate@schac.sc.gov
larice@schac.sc.gov
(803) 737-7800

Karl S. Bowers, Jr.
Bowers Law Office, LLC
Post Office Box 50549
Columbia, South Carolina 29250
butch@butchbowers.com
(803) 753-1099
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
J.C. Nicholson, Jr., Circuit Court Judge

RECEIVED

AUG 30 2019

S.C. SUPREME COURT

Appellate Case No. 2018-001879

South Carolina Human Affairs Commission,

Appellant,

v.

Zeyi Chen & Zhirong Yang,

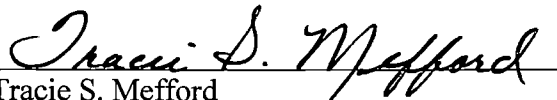
Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August, 2019, in Columbia, South Carolina, I served a copy of the foregoing **Record on Appeal Redacted Version** on the Respondents by depositing the same in the United States Mail, postage prepaid, and addressed as follows:

Zeyi Chen
30 Colleton Drive
Charleston, South Carolina 29407

Zhirong Yang
30 Colleton Drive
Charleston, South Carolina 29407


Tracie S. Mefford
South Carolina Human Affairs Commission
1026 Sumter Street, Suite 101
Columbia, South Carolina 29201
(803) 737-7821