

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
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EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Applicant,

v.

MALAISE LAW FIRM, P.C.,

Respondent.

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Civil Action No. _____

SA10 MC0160 0G

APPLICATION TO ENFORCE ADMINISTRATIVE SUBPOENA
AND BRIEF IN SUPPORT THEREOF

I. INTRODUCTION

This is an action for enforcement of EEOC's Administrative Subpoena *Duces Tecum*, No. SA-09-08, pursuant to Section 710 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-9 ("Title VII"). Jurisdiction is conferred upon the Court by Section 706(f)(3), 42 U.S.C. § 2000e-5(f)(3), and by Section 11 of the National Labor Relations Act, 29 U.S.C. § 161, as amended, which is incorporated in Section 710 of Title VII, 42 U.S.C. § 2000e-9.

Applicant, the United States Equal Employment Opportunity Commission ("the Commission"), seeks enforcement of an Administrative Subpoena *Duces Tecum* ("Subpoena") it issued in conjunction with its investigation of a Title VII charge of sexual harassment and retaliatory discharge. Respondent, Malaise Law Firm, P.C. ("Malaise"), a Texas corporation doing business in the city of San Antonio, is the employer that has refused to provide a list of all employees assigned to its Personal Injury Department during the period of March 1, 2008, through March 1, 2009, including the name, job position, sex, current or last known home address and home phone number for each employee and, if no longer employed, the date of

termination and the reason for termination (hereinafter the "Requested Information"). After Malaise refused to provide this information, the EEOC issued a Subpoena, which it now requests this Court to enforce. As will be shown in greater detail below, the Commission's Subpoena is valid, and the information and/or records requested therein are material and relevant to the Commission's lawful purpose of investigating claims of employment discrimination.

II. FACTUAL BACKGROUND

Robert J. Harlow ("Harlow") filed a Charge of Discrimination (the "Charge"), which was received by the Commission on March 24, 2009. A true and accurate copy of the Charge is submitted to the Court as Exhibit "1" to the Affidavit of Julia Way, which is attached hereto and incorporated herein by reference. The Charge alleges that J. Todd Malaise, the attorney who owns and manages the Malaise Law Firm, subjected Harlow and other employees to unwelcome sexual comments and behavior, and then discharged him in retaliation for reporting the sexual harassment and for not terminating other employees who also opposed and/or reported this discriminatory conduct.

The Commission mailed a copy of the Charge filed by Harlow, along with the Notice of Charge of Discrimination, to Malaise on March 26, 2009. *See* Exhibit "2" to the Affidavit of Julia Way. The Commission began investigating this Charge by sending its first Request for Information to Malaise on April 1, 2009. *See* Exhibit "3" to the Affidavit of Julia Way. Malaise responded by denying all of the allegations, and it stated Harlow was released from his employment after numerous verbal and written warnings. *See* Exhibit "4" to the Affidavit of Julia Way. As part of its investigation, on July 9, 2009, the Commission requested Malaise to provide:

- (1) A list of all employees who were discharged or resigned during the period of March 1, 2008 through March 1, 2009, including the name, job

position, sex, current or last known home address and home phone number for each employee and, if applicable, the date and reason for termination; and

- (2) A list of all the employees who were assigned to the Personal Injury Department during the relevant time period, including the name, job position, sex, current or last known home address and home phone number for each employee.

See Exhibit “5” to the Affidavit of Julia Way.

On July 14, 2009, the Commission received two letters from J. Todd Malaise claiming that the requests were a “fishing expedition.” Malaise stated that the employees assigned to the Personal Injury Department were Sandra Hidalgo, Yvette Santoya, and Charging Party, Robert Harlow; however, it refused to provide the personal contact information on the basis that such disclosures would violate privacy rights of present and former employees. *See* Exhibits “6” and “7” to the Affidavit of Julia Way. On July 20, 2009, the Commission again requested Malaise to provide the Requested Information, and advised Malaise that failure to provide the responsive information and/or records would compel the Commission to subpoena the Requested Information, pursuant to Section 710 of Title VII. *See* Exhibit “8” to the Affidavit of Julia Way.

In an effort to resolve this matter without judicial intervention, EEOC’s Supervisory Trial Attorney, Judith G. Taylor, addressed the relevancy, privacy concerns, and objections raised by Malaise in her letter dated August 13, 2009. *See* Exhibit “9” to the Affidavit of Julia Way. Ms. Taylor explained that Malaise’s relevancy objection lacked merit because Section 709(a) of Title VII states that the Commission “shall ... have access to ... any evidence ... that relates to unlawful employment practices covered by Title VII.” As to the privacy issue, Ms Taylor explained that Title VII safeguards the confidentiality of information related to a company’s employees. When Malaise refused to provide the Requested Information, the Commission issued a Subpoena on September 9, 2009, compelling production of the documents it had

previously requested Malaise to provide. *See* Exhibit “10” to the Affidavit of Julia Way. The Subpoena requested only the following information:

Provide a list of all the employees who were assigned to the Personal Injury Department during the period of March 1, 2008, through March 31, 2009. Identify each employee by name, job position, and gender. If no longer employed, state the reason for termination and the last date of employment. Also, provide the current or last known home address and home phone number for each employee.

Malaise responded to the Subpoena on September 18, 2009, by seeking to revoke or modify the Subpoena, pursuant to the Commission’s regulation, 29 C.F.R. § 1601.16(b)(1) (1990). *See* Exhibit “11,” to the Affidavit of Julia Way. After filing its Petition to Revoke or Modify Subpoena, the Commission received a letter from HOLLAND & HOLLAND, L.L.C., dated September 21, 2009, wherein Malaise provided five (5) “Confidential Employee History” sheets (hereinafter “Employee Histories”). *See* Exhibit “12,” to the Affidavit of Julia Way. These Employee Histories do not fully respond to the EEOC’s Subpoena. The Subpoena specifically requested information from the period of March 1, 2008, through March 31, 2009, and these documents, for the most part predate this period, and it is uncertain if the contact information, some of which is missing, is current. The information contained in these Employee Histories do not indicate if the named employees are/were assigned to the Personal Injury Department; and, if and/or when each individual was terminated. The Employment Histories provided show only an employment date, which the Commission presumes to be the hire date of each employee. Unless the Court orders Malaise to fully respond to the Subpoena, Malaise will be able to pick and choose the evidence it believes is relevant and likely most supportive of Malaise’s position, and this will thwart the Commission’s ability to conduct a fair and impartial investigation of Harlow’s Charge of Discrimination.

In its Petition to Revoke or Modify Subpoena, Malaise objected to producing the Requested Information claiming that the Subpoena was improper because it was not seeking the production of evidence but appeared to be asking Malaise to create documents. The Commission found this argument was not a legitimate basis for challenging the Subpoena because the request for names of employees, contact information, and the reason for separation from employment is the type of information that should be maintained by Malaise, or any other employer, in the regular course of business. Malaise also objected on the basis that the Subpoena was overly broad in that it seeks information regarding persons who were not employed at the same time as Harlow. The Commission found this objection without merit because the one (1) year time period established by the EEOC was relevant to the period of time Harlow was employed and the date of his discharge. Malaise also objected to the Subpoena on the basis that the information sought invaded the privacy rights of its current and former employees. The Commission denied this objection because the Supreme Court and lower courts have consistently rejected confidentiality arguments as a defense to a subpoena because contact information for current and/or former employees is relevant, as these are the individuals who have first-hand knowledge of facts relevant to allegations of discrimination in the workplace. The Commission, after considering all of Malaise's objections, denied its Petition to Revoke or Modify Subpoena, and it set forth the reasons and legal basis for denying each objection raised by Malaise. *See* Exhibit "13," to the Affidavit of Julia Way. Malaise was notified of the denial on November 23, 2009, and was directed to provide the information by December 4, 2009.

To date, Malaise has not complied with the Commission's Subpoena. Malaise's conduct has caused unnecessary delay and hindered the overall effectiveness of the Commission's

investigation of the Charge filed by Harlow. The Commission, therefore, is now entitled to enforcement of its Administrative Subpoena.

III. ARGUMENTS AND LEGAL AUTHORITIES

A. The Commission Issued Its Administrative Subpoena Pursuant To Its Authority To Investigate A Charge Of Discrimination.

Title VII authorizes the Commission to investigate allegations of employment discrimination, such as the one Harlow brought against Malaise. *See Occidental Life Ins. Co. of California v. EEOC*, 97 S.Ct. 2447, 2450-51 (1977). *See also* 42 U.S.C. § 2000e-5(b) (1981). One of the Commission's primary investigative tools is its statutory right to access and copy "... any evidence of any person being investigated or proceeded against that relates to unlawful employment practices" 42 U.S.C. § 2000e-8(a) (1981). Title VII hearings and investigations are to be conducted in accordance with Section 11 of the National Labor Relations Act ("the NLRA"), 29 U.S.C. § 161(1) (1978), which provides, in pertinent part:

The Board, or its duly authorized agents or agencies, shall ... forthwith issue to such party [the party under investigation] subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation.

29 U.S.C. § 161(1) (1978). *See also* 42 U.S.C. § 2000e-9 (1981) and 29 C.F.R. § 1601.16 (1990).

B. This Court Has Jurisdiction to Enforce This Enforcement Action.

This Court has jurisdiction to enforce the Subpoena the Commission issued to Malaise pursuant to Section 11 of the NLRA, which provides relief for the administrative agency whose subpoena has been ignored. Section 11 reads as follows:

(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States ... within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to

obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

29 U.S.C. § 161(2) (1978).

C. The Commission's Subpoena Seeks Documents And Information Relevant To Harlow's Charge Of Discrimination.

When asked to enforce a Subpoena issued by the Commission, the Court must establish that the underlying charge is valid and the information requested in the subpoena is relevant to the charge. *See EEOC v. Shell Oil Co.*, 104 S.Ct. 1621, 1632 n.26 (1984). A charge is valid if it was filed with the Commission; the allegations are in written form and taken under oath¹; and it contains sufficient information to raise an allegation that an employer engaged in a discriminatory act or practice. *See* 42 U.S.C. § 2000e-5(b) (1981). The Commission has elaborated on these statutory charge requisites by promulgating 29 C.F.R. § 1601.12 (1990), which provides that a charge must state: (1) the charging party's full name, address, and telephone number; (2) the full name and address of the person against whom the charge is made; (3) a clear, concise statement of the facts underlying the charge, including pertinent dates; (4) the approximate number of employees respondent employs, if known; and (5) whether the charge is simultaneously pending before a state or local fair employment practice agency. Harlow's Charge comports with all of these requisites and is valid. *See EEOC v. Shell Oil Co.*, 104 S.Ct. 1621, 1630 (1984). *See also New Orleans Pub. Serv., Inc. v. Brown*, 507 F.2d 160, 164 (5th Cir. 1975).

¹A charge taken under penalty of perjury is given the same force and effect as if taken under oath. 28 U.S.C. § 1746 (1992).

The relevancy of the information requested in the Subpoena before this Court now bears examination. The Supreme Court stated in *EEOC v. Shell Oil Co.*, “[s]ince the enactment of Title VII, courts have generously construed the term ‘relevant’ and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer.” 104 S.Ct. at 1631. The allegations contained in the charge do not narrowly circumscribe the Commission’s investigation. Rather, the charge serves as a “jurisdictional springboard” enabling the Commission “to investigate whether the employer is engaged in any discriminatory practices.” *EEOC v. Hutting Sash & Door Co.*, 511 F.2d 453, 455 (5th Cir. 1975). The Court further stated that an “adoption of a requirement that the Commission demonstrate a ‘specific reason for disclosure’ . . . beyond a showing of relevance, would place a substantial litigation-producing obstacle in the way of the Commission's efforts to investigate and remedy alleged discrimination.” *University of Pennsylvania v. E.E.O.C.*, 110 S.Ct. 577, 584 (1990) citing *Branzburg v. Hayes*, 408 U.S. 665, 705-706. As the Supreme Court stated in *University of Pennsylvania v. EEOC*, 493 U.S. 182, 193 (1990)(quoting *EEOC v. Franklin & Marshall College*, 775 F.2d 110, 116 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986)), “an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence necessary for an agency investigation.”

The Requested Information is relevant because it will enable the Commission to determine if Harlow and/or other employees were indeed subjected to unwelcome sexual harassment, and/or if Harlow and possibly other employees were retaliated against in violation of Title VII. Clearly, the material sought would “cast light,” either positive or negative, on the allegations set out Harlow’s Charge.

D. Title VII Prohibits Disclosure of Private/Confidential Information To The Public.

The objection based on the speculative concerns regarding the disclosure of what Malaise contends are privacy issues is also without merit. Title VII prohibits the Commission from disclosing to the public, information concerning or related to any charge filed with the Commission which is under investigation. Section 706(b) of Title VII provides that:

Charges shall not be made public by the Commission Nothing said or done during and as a part of [the Commission's informal endeavors at resolving charges of discrimination] may be made public

Section 709(e) of Title VII provides:

It shall be unlawful for any officer of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section [to investigate charges of discrimination and to require employers to maintain and submit records] prior to the institution of any proceeding under this title involving such information.

Furthermore, the courts routinely have ordered employers to identify their employees by name and produce contact information, and they cite to the broad powers that Title VII confers upon the Commission to have access to any evidence that may be relevant to the charge. Generally speaking, the courts have found that “confidentiality is no excuse for noncompliance [with an EEOC subpoena] since Title VII imposes criminal penalties for EEOC personnel who publicize information obtained in the course of investigating charges of employment discrimination.” *See EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 312 (7th Cir. 1981). Since the confidentiality of information related to a company’s employees is sufficiently safeguarded by Title VII, this is not a valid objection for refusing to comply with the EEOC’s request for information. Indeed, federal courts have had little trouble ordering employers to produce an employee’s home address in response to an EEOC subpoena. *See e.g., Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir.

1986)(ordering the enforcement of an EEOC subpoena which required the employer to supply the EEOC with the home addresses and telephone numbers of employees and supervisors); *Bay Shipbuilding Corp.*, 668 F.2d at 312-13 (affirming district court's decision to enforce a subpoena requiring an employer to provide, among other things, the home addresses for all its current employees).

Even if a timely Freedom of Information Act ("FOIA") request is made after the investigation is closed, two (2) exemptions under FOIA protect from disclosure information that could reasonably be expected to constitute an unwarranted invasion of privacy. FOIA exemption 6 permits the EEOC to withhold information about individuals in "personnel and medical files" if its disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). This includes contact information, social security numbers, and the reason(s) an individual left employment. Additionally, FOIA exemption 7(c) authorizes the EEOC to withhold information where the production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(c). This exemption protects from public disclosure information such as social security numbers, dates of birth, and contact information. Therefore, if a timely and proper FOIA request were to be made, the information Malaise claims is private would not be disclosed.

IV. CONCLUSION AND PRAYER FOR RELIEF

Malaise's objections to the Commission's Subpoena all lack merit and the Requested Information is not only relevant but is needed in order for the Commission to properly and fairly investigate Harlow's Charge of Discrimination. Current and former employees may have relevant information to Harlow's allegations of harassment and retaliation. Current employees may be reluctant to be completely forthright regarding the allegations of discrimination. Away

from the watchful eye of supervisors and coworkers, these same employees may provide important information relevant to Harlow's allegations. With respect to former employees, their home telephone numbers provide an efficient way for establishing communication and inquiring about Harlow's allegations. Clearly, the Commission has no other means available to acquire this information other than to seek judicial enforcement of the Subpoena.

WHEREFORE, PREMISES CONSIDERED, Applicant, the United States Equal Employment Opportunity Commission respectfully requests that:

A. An Order to Show Cause be issued directing Malaise to appear before this Court on a date certain, to be fixed by said Order, and to show cause, if there be any, why an Order should not be issued directing Malaise to comply with the Commission's Subpoena;

B. Upon return of said Order to Show Cause, an Order be issued directing Malaise to comply with the Subpoena; and

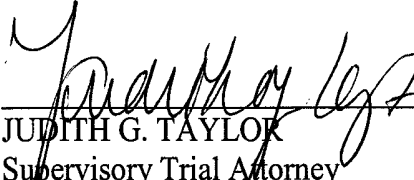
C. The Commission be granted such other and further relief, to which it has shown itself to be justly entitled, including but not limited to, the award of costs incurred in the prosecution of this Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Application to Enforce an Administrative Subpoena was served via certified mail, return receipt requested, on this the 24th day of February 2010, on:

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