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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST B.Y. COLUMBUS

CYNTHIA IRVIN,

Plaintiff,

vs.

Civil Action 2:97-CV-1397
Judge Holschuh
Magistrate Judge King

GOODYEAR TIRE AND
RUBBER COMPANY,

Defendant.

OPINION AND ORDER

Plaintiff, a former employee of defendant Goodyear Tire and Rubber Company, asserts claims under the Americans with Disabilities Act ["ADA"], 42 U.S.C. §12101, *et seq.*, and R.C. §4112.99, alleging that she was terminated from her position as a Textile Engineer on the basis of her disability and that the defendant failed to provide a reasonable accommodation for her disability. This matter is before the Court on plaintiff's motion to compel discovery.

Plaintiff seeks to compel responses to interrogatories and production of documents pursuant to Fed. R. Civ. P. 37. Rule 26(b)(1) provides that parties may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" Furthermore, "[t]he information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

Personnel File of Dr. Toeppen-Sprigg

Plaintiff first seeks production of the personnel file of Dr. Barbara Toeppen-Sprigg, who is an employee of defendant and who proposed a method to accommodate plaintiff's disability. Plaintiff states that, due to a severe reaction to isocyanate chemicals, her abilities to think, concentrate, learn, breathe and work have been substantially limited. (*Plaintiff's Motion to Compel* at 1-2). Plaintiff claims that she experiences dizziness, fatigue, facial numbness, and problems with breathing and coordination. (*Id.* at 2). Dr. Toeppen-Sprigg suggested that plaintiff consider using a self-contained breathing apparatus ["SCBA"] to accommodate plaintiff's breathing problems. However, Dr. Toeppen-Sprigg apparently abandoned the idea in light of plaintiff's expressed concern that use of the SCBA would interfere with her ability to move freely in the performance of her job. (*Id.*)

In response to plaintiff's Interrogatory 28, which requested the names of persons who participated in the decision to discharge plaintiff, defendant named Dr. Toeppen-Sprigg and Bruce Kendrick. (*Plaintiff's Request #28* attached to *Motion to Compel*). Plaintiff's Production Request 29 seeks the entire personnel files of these individuals. (*Id.*) Defendant objected to the production request on the basis that the request is "overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and seeks confidential information." (*Id.*)¹ Defendant asserts that Dr. Toeppen-Sprigg's participation in the decision to terminate plaintiff was limited to her assessment, from a medical standpoint, of plaintiff's job-related impairments and the feasibility of accommodating plaintiff. Defendant argues that

¹Defendant has agreed to produce Mr. Kendrick's file, but objects to the production of Dr. Toeppen-Sprigg's file.

production of the doctor's own personnel file is irrelevant, because Dr. Toeppen- Sprigg has no supervisory authority, and would invade her right of privacy vis à vis the information contained in the file. (*Defendant's Memorandum contra* at 2-3).

The Court concludes that discovery of Dr. Toeppen-Sprigg's personnel file is appropriate. Defendant's objection on the basis of privilege is not well-taken because personnel files are not privileged under federal law. *Horizon of Hope Ministry v. Clark Co., Ohio*, 115 F.R.D. 1, 6 (S.D. Ohio 1986); FRE 501. The Court also rejects defendant's assertion that the contents of the personnel file are not relevant to plaintiff's claim since Dr. Toeppen-Sprigg did not act in a supervisory capacity. Defendant has represented that Dr. Toeppen-Sprigg evaluated plaintiff's abilities and participated in the decision to terminate plaintiff; at a minimum, then, her personnel file is reasonably calculated to lead to the discovery of admissible evidence, because it may reflect the quality of her job performance. Furthermore, any concern with regard to Dr. Toeppen-Sprigg's interest in the privacy and confidentiality of her file is adequately addressed by the protective order entered into by the parties and approved by the Court. (*Agreed Protective Order* June 19, 1998).

Defendant's Policies, Procedures, Guidelines

Plaintiff's Production Requests 7-9 seek information regarding written or unwritten policies, procedures or guidelines of the defendant, in effect from January 1, 1995 to the present, which apply to the employment rights, duties and responsibilities of employees. (*Requests Nos. 7,8,9* attached to *Plaintiff's Motion to Compel*). Defendant objects on the basis that the requests are "overly broad, unduly burdensome and [are] not reasonably calculated to lead to the discovery

of admissible evidence.” (*Id.*). However, defendant indicates in its memorandum *contra* that it has agreed to produce the policies, procedures or guidelines which relate to the issues in the case and which were in effect at plaintiff’s place of employment. (*Defendant’s Memorandum contra* at 3-4). However, plaintiff contends that it is impermissible for the defendant to determine which policies, procedures or guidelines are relevant to the issues involved. In response, defendant states that plaintiff should not be permitted to review all of defendant’s policies and procedures in effect at plaintiff’s place of employment. (*Id.* at 4).

The Court concludes that these requests, limited to plaintiff’s place of employment, are reasonably calculated to lead to the discovery of admissible evidence. Plaintiff’s motion to compel is meritorious in this regard.

Claims Involving Handicap/Disability Discrimination

Plaintiff makes several requests with regard to other charges or lawsuits against the defendant involving handicap/disability discrimination. Request 16 seeks

a complete copy of each charge of handicap/disability discrimination filed against defendant with the Ohio Civil Rights Commission and/or the Equal Employment Opportunity Commission and/or any state civil rights enforcement agency, at any time from January 1, 1988 to the present.

(*Plaintiff’s Request 16* attached to *Motion to Compel*). Request 17 seeks production of documents created by defendant in response to such charges of discrimination. Request 18 asks if the defendant has ever been sued for handicap and/or disability discrimination, and Request 19 seeks the names, addresses and telephone numbers of plaintiffs in any such actions. Plaintiff also seeks copies of all pleadings and motions from any such lawsuits. (*Request 20*). Defendant

objects to each of these requests on the basis that they are “overly broad, unduly burdensome and [are] not reasonably calculated to lead to the discovery of admissible evidence.”

Plaintiff asserts that the requested information concerning defendant’s treatment of other employees is probative of whether it discriminated against plaintiff. (*Plaintiff’s Motion to Compel* at 9). Defendant states that, in connection with these requests, it offered to provide plaintiff with a list containing the following: discrimination charge numbers, the names of the charging parties, and the dates of filing; the name of any plaintiff, the court where any action was filed and the date of filing, but only for claims originating at plaintiff’s place of employment. (*Defendant’s Memorandum contra* at 5).

The Court concludes that plaintiff’s requests are appropriate, but only as to charges or actions involving either the facility at which plaintiff worked or involving the same persons instrumental in plaintiff’s termination. There is no reason to believe that employment decisions made by other persons or at other facilities of defendant would be relevant to plaintiff’s claims. As so modified, plaintiff’s motion to compel is meritorious. Furthermore, the Court concludes that the protective order in effect in this action adequately addresses the privacy interests of such other claimants.

Review of Defendant’s Equal Employment Opportunity Practices

Plaintiff’s Request 21 asks if the defendant has ever conducted “an audit, report or review of its Equal Opportunity Employment Practices” and Request 22 seeks a copy of any such audit, review or report. (*Requests 21, 22* attached to *Plaintiff’s Motion to Compel*). Defendant objects on the basis that these requests are “overly broad, unduly burdensome and [are] not reasonably

calculated to lead to the discovery of admissible evidence.” (*Id.*):- In its memorandum *contra*, defendant asserts that any such audits, reports or reviews are subject to a “self-critical analysis privilege” and, furthermore, that no such reviews have been conducted at the facility or division in which plaintiff was employed. (*Defendant’s Memorandum contra* at 6). However, plaintiff states that she seeks any such reviews, audits or reports conducted by the defendant company as a whole, as “some of the persons who Goodyear identifies as having made the decision to [terminate] plaintiff had responsibilities and authority beyond the plant where plaintiff worked.” (*Plaintiff’s Motion to Compel* at 12).

In accordance with FRE 501, whether a self-critical analysis privilege can be asserted by defendant with respect to the claims arising under federal law in this case depends on whether the privilege is recognized under the federal common law. In this regard, the United States Supreme Court has cautioned that a privilege should not be created and applied unless it “promotes sufficiently important interests to outweigh the need for probative evidence. . . .” *University of Pa. v. Equal Employment Opportunity Comm.*, 493 U.S. 182, 189 (1990), quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980). The self critical analysis privilege is based on the notion that “disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigations and evaluations or compliance with the law. . . .” *Sheppard v. Consolidated Edison Co.*, 893 F.Supp. 6, 7 (E.D. N.Y. 1995), quoting *Reilly v. Metro-North Commuter Railroad Co.*, No. 93-7317, 1995 WL 105286 (S.D. N.Y. March 13, 1995). Some courts have called this rationale into question in the context of employment discrimination cases, which themselves provide a means for eradicating discrimination. *See Tharp v. Sivyver Steel Corp.*, 149 F.R.D. 177, 184 (S.D. Iowa 1993). *See also Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283

(N.D. Ga. 1971); *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211 (D.Mass. 1980) (recognizing the privilege); cf. *Tharp v. Sivyer Steel Corp.*, *supra* (privilege does not apply in context of employment discrimination).

The United States Court of Appeals for the Sixth Circuit has not addressed the issue of the existence of a self critical analysis privilege;² however, it is clear that, even when the privilege is recognized, its applicability is limited to the following context:

(1) [the] materials protected have generally been those prepared for mandatory governmental reports; (2) only subjective, evaluative materials have been protected; (3) objective data in those same reports have not been protected; and (4) in sensitivity to plaintiffs' need for such materials courts have denied discovery only when the policy favoring exclusion has clearly outweighed Plaintiffs' need.

O'Connor v. Chrysler Corp., 86 F.R.D. at 217, quoting *Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431, 433 (E.D. Pa. 1978). In the case at bar, it is unclear whether defendant's audits, reports or reviews, if any, were prepared for mandatory government reports, so as to trigger the application of a self critical analysis privilege, or were simply prepared at the defendant's own initiative. In any event, the protections of the privilege are not absolute, see *Urseth v. City of Dayton*, 653 F.Supp. 1057 (S.D. Ohio 1986), and this Court is not convinced that the rationale for the privilege outweighs the need for probative evidence regarding the defendant's possible intent and motivation. Moreover, Ohio law -- which governs plaintiff's state law claim -- has not recognized the self-critical analysis privilege. See *Ohio ex rel. Celebrezze v. Cecas Int'l, Inc.*, 66 Ohio App.3d 262, 264 (Clermont Co. Ct. App. 1990).

In short, the Court concludes that plaintiff's Requests 21 and 22 are reasonably calculated

²The Court has, however affirmed in part a decision in which the privilege was recognized by the trial court. See *Jamison v. Storer Broadcasting Co.*, Nos. 83-1170, 83-1244, 1987 WL 44901 (6th Cir. Sept. 30, 1987).

to lead to the discovery of admissible evidence, and that the protective order in effect in this action adequately protects any privacy interests of the defendant in this regard. Defendant must respond to plaintiff's requests, which requests are not limited to the particular facility or division where plaintiff was employed.

Job Descriptions

Plaintiff's Request 24 seeks production of job descriptions for employees performing work substantially similar to that performed by plaintiff and who are employed at any of defendant's facilities throughout the country, from January 1, 1996 to the present. Defendant originally objected on the basis that the request is "overly broad, unduly burdensome and [is] not reasonably calculated to lead to the discovery of admissible evidence." (*Request 24 attached to Plaintiff's Motion to Compel*). Plaintiff asserts that the duties associated with plaintiff's position are relevant to the issue of whether the defendant reasonably accommodated plaintiff's disability, *i.e.*, whether plaintiff was qualified to fill a similar position.

Defendant has now agreed to produce job descriptions with regard to the facility where plaintiff was employed; however, defendant persists in its objection with respect to job descriptions for facilities nationwide. (*Defendant's Memorandum contra at 7*). Defendant states that plaintiff's position as a textile engineer involved developing fabric used in conveyor belt manufacture, and that plaintiff's facility was the only one in the United States which manufactured conveyor belts. Defendant therefore asserts that job descriptions from other facilities are irrelevant. (*Id. at 7-8*). Plaintiff asserts that, due to her disability, she requested transfer to a vacant position in North Carolina; however, the request was denied. (*Plaintiff's Motion to*

Compel at 2-3). In view of these facts and the issue of reasonable accommodation, the Court concludes that defendant must produce job descriptions for its Textile Engineers at plaintiff's facility and at the facility in North Carolina.

Undue Hardship Defense

Plaintiff's Request 31 asks if the defendant contends that an accommodation of unpaid leave of absence and/or reassignment to a vacant position for plaintiff would have caused an undue hardship. Defendant objects on the basis that the request calls for a legal conclusion and, in addition, that it "is improper and it presumes there was an obligation to accommodate the Plaintiff and that the accommodations noted would have been appropriate." (*Request 31* attached to *Plaintiff's Motion to Compel*). Defendant states that, if plaintiff should first identify the specific accommodation requested, defendant will then either confirm or deny whether such request was made, and if made, will indicate whether the basis for the denial was a claim of undue hardship. (*Defendant's Memorandum contra* at 8). Plaintiff has now done so. (*See Exhibit A, Interrogatory 10* attached to *Plaintiff's Reply*). Defendant must therefore respond, if it has not already done so, to plaintiff's Request 31.

Remaining Requests

Plaintiff's motion to compel presents additional issues which appear to have been resolved. *See* Requests Nos. 10, 13, 14, 23, 25 and 26. Accordingly, the Court will not address plaintiff's motion to compel as it relates to these requests.

Conclusion

Plaintiff's motion to compel discovery is GRANTED in part and DENIED in part, consistent with the foregoing. Defendant shall provide responses and produce documents, as required, within twenty (20) days of the date of this order. Plaintiff's request for expenses associated with the motion to compel is DENIED.

If any party seeks reconsideration of this Order, that party may, within ten (10) days, file and serve on all parties a motion for reconsideration by the Court, specifically designating this *Opinion and Order*, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1); Rule 72(a); Fed. R. Civ. P.; Eastern Division Order 91-3 (I)(F)(5).



Norah McCann King
United States Magistrate Judge