

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

TONY NOBLES,

Plaintiff,

v.

JACOBS/IMC, JACOBS ENGINEERING
and HOVENSA,

Defendants

CIVIL NO. 2002/26

TO: Lee J. Rohn, Esq.
Michael Sanford, Esq.
Beth Moss, Esq.

ORDER ON PLAINTIFF'S MOTION TO COMPEL
JACOBS IMC (FILED APRIL 17, 2003)

THIS MATTER came for consideration on Plaintiff's Motion to Compel Jacobs IMC (JIMC) to provide more complete responses to discovery requests. JIMC filed opposition to the motion and Plaintiff filed a reply to such opposition.

At issue are the number of interrogatories propounded by Plaintiff [Fed. R. Civ. P. 33(a)] and the sufficiency of JIMC's responses. Upon consideration, the Court finds the following principles are applicable hereto.

I. (A) Allowable Number of Interrogatories

The Court's position regarding counting interrogatories is set out in *Nyfield v. Vitelco et al.*, 200 F.R.D. 246 (D.V.I. 2001); which is fully incorporated herein. See

also: *Safeco of America v. Rawstron*, 181 F.R.D. 441 (C.D.Cal. 1998); *Kendall v. GES Exposition Services, Inc., et al.*, 174 F.R.D. 684 (D.Nev. 1997). In *Safeco, id.* at 445, the court cited favorably the test espoused in *Kendall, id.* at 681, and noted, "Unfortunately, despite heroic effort, this formula also falls short of a bright line test." Accordingly, any analysis by the court is per force partly subjective.

(B) Relevance

Federal Rules of Civil Procedure 26(b)(1) provides that parties may obtain discovery regarding any matter, not privileged which is relevant to the claim or defense of any party. The information sought need not be admissible at trial if it is **reasonably calculated to lead to the discovery of admissible evidence.**

The requirement of relevancy should be construed liberally and with common sense, rather than in terms of narrow legalisms. No one would suggest that discovery should be allowed of information that has no conceivable bearing on the case. But it is not too strong to say that a request for discovery should be considered relevant if there is any possibility that the information

sought may be relevant to the subject matter of the action. If protection is needed, it can better be provided by the discretionary powers of the court under Rule 26(c) than by constricting the concept of relevance. Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE, CIVIL 2D § 2008 (see § 2009 n. 21).

(C) Control

Answers to interrogatories must include all information within the party's control or known by the party's agents. *Cage v. NY Cent. R. Co.*, 276 F.Supp. 778, 786-87 (W.D.Pa. 1967), aff'd 386 F.2d 998 (3d Cir. 1967).

The answering party cannot limit his answers to matters within his own knowledge and ignore information immediately available to him or under his control...If an appropriate interrogatory is propounded, the answering party will be required to give the information available to him, if any, through his attorney, investigators employed by him or on his behalf or other agents or representatives, whether personally known to the answering party or not.

Miller v. Doctor's General Hospital, 76 F.R.D. 135, 140 (N.D.Ok. 1977) [internal citations omitted]. See also, *Hansel v. Shell Oil Corp.*, 169 F.R.D. 303, 306 (E.D.Pa. 1996); *Ballard v. Allegheny Airlines, Inc.*, 54 F.R.D. 67, 69 (E.D.Pa. 1972). To the extent any response remains unknown after due inquiry, Defendant may so aver. Fed. R. Civ. P. 34; *Schwartz v. Marketing*

Publishing Co., 153 F.R.D. 16, 21 (D.Conn. 1994);
Rayman v. The American Charter Fed. Sav. & Loan Assoc.,
148 F.R.D. 647, 651 (D.Neb. 1993).

A party must produce all discoverable documents or things responsive to a request that are in the party's possession, custody or control. *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136 (1980).

Documents are deemed to be within the possession, custody or control of a party if the party has actual possession, custody, or control, or the legal right to obtain the documents on demand. *In Re: Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995). Documents held by a subsidiary or affiliated corporation may be within a party's control. *Uniden America Corp. v. Ericsson, Inc.*, 181 F.R.D. 302, 306 (M.D.N.C. 1998).

D. Reference to Records

Rule 33(d) allows the responding party the option of specifying the records from which the answer may be derived or ascertained providing, however that such "...specification shall be in sufficient detail to permit the interrogating party to locate and to identify as readily as can the party served, the records from which the answer may be ascertained."

"The responding party may not simply refer to a mass of

records...to rely on Fed. R. Civ. P. 33(d) the responding party must specifically identify which documents contain the requested information in its answer to the interrogatory..." *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 564 (D.Kan. 1997); see also *Rainbow Pioneer v. Hawaii-Nevada Inv. Corp.*, 711 F.2d 902, 906 (9th Cir. 1983); *Smith v. Logansport Comm. School Corp.*, 193 F.R.D. 637, 650 (N.D.Ind. 1991); *Martin v. Easton Publishing Co.*, 85 F.R.D. 312, 315 (E.D.Pa. 1980).

E. Defenses

The parties are entitled to know the factual basis of the claim, defenses, or denials of their opponents. Fed. R. Civ. P. 26(b)(1). See *Audio Text Communication Network, Inc. v. Telecom, Inc.*, 1995 WL 625963 (D.Kan.); *Lance, Inc. v. Ginsburg*, 32 F.R.D. 51, 53 (E.D.Pa. 1962). A party must supplement its discovery response if additional or corrective information has not otherwise been made known to the other parties. Fed. R. Civ. P. 26(e)(2). Regarding affirmative defenses, Defendant must respond to interrogatories by stating all facts currently known to Defendant as requested by Plaintiff. The Court does not require Defendant to provide such information with regard to

the ultimate determination for the Court as to whether Defendant was negligent. To do so would require Defendant to aver all facts demonstrating the negative proposition of Plaintiff's non-claim. Defendant also need not respond to any interrogatory concerning an affirmative defense based solely upon a legal proposition.

F. Assertion of Privilege

Fed.R.Civ.P. 26(b)(5) provides:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Under the rule, the party asserting the privilege or protection must specifically identify each document or communication and the type of privilege or protection being asserted in a privilege log.

To properly demonstrate that a privilege exists, the privilege log should contain a brief description or summary of the contents of the document, the date the document was

prepared, the person or persons who prepared the document, the person to whom the document was directed, or for whom the document was prepared, the purpose in preparing the document, the privilege or privileges asserted with respect to the document, and how each element of the privilege is met as to that document. . . . The summary should be specific enough to permit the court or opposing counsel to determine whether the privilege asserted applies to that document.

Smith v. Dow Chemical Co. PPG et. al., 173 F.R.D. 54, 57-58 (W.D.N.Y. 1977)(internal citations omitted). See also, *McCoo v. Denny's Inc.*, 192 F.R.D. 675, 680 (D. Kan. 2000); *In Re: Pfohl Brothers Landfill Litigation*, 175 F.R.D. 13, 20-21 (W.D.N.Y. 1997); *First American Corp. v. AL-Nayhan*, 2 F.Supp.2d 58, 63 n.5 (D.D.C. 1998); *Jones v. Boeing Co.*, 163 F.R.D. 15, 17 (D.Kan. 1995).

G. Work Product Protection

The work product doctrine provides protection for materials prepared by an attorney or his or her agent in anticipation of litigation, for use in trial. The purpose of the work-product doctrine is to encourage careful and thorough preparation for litigation by a party's attorney. *U.S.A. v. Ernstoff*, 183 F.R.D. 148,

153 (D.N.J. 1998) [citing *Hickman v. Taylor*, 329 U.S.
495 (1947) and other cases].

However, we do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had..."

Hickman, 329 U.S. at 504.

Because the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product... Thus, work product does not preclude inquiry into mere facts of an investigation. *Resolution Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995).

The crux of this qualified privilege is the protection of the lawyer's mental processes, his strategy, and his legal theories evolved in preparation for trial, free from unnecessary intrusion by the opposing party. This protection does not extend to all information supplied to the attorney at his request... Statements or reports made in the ordinary course of business and not in preparation for trial do not embody the lawyer's opinion, tactics, or conclusions and, accordingly, they do not enjoy the privilege afforded the attorney's work...

Here, the written statements sought were concededly obtained in preparation for trial. But it does not appear that production would involve any new or substantial invasion of thoughts of plaintiff's attorneys.

U.S.A. v. Swift & Company, et al., 24 F.R.D. 280, 282
(N.D.Ill. 1959).

Attorneys often refuse to disclose during discovery those facts that they have acquired through their investigative efforts and assert as the basis for their refusal, the protections of the work product doctrine. Where such facts are concerned as opposed to the documents containing them or the impressions and conclusions drawn from them, they must be disclosed to the opposing party in response to a proper request for discovery.

Swarthmore Radiation Oncology, Inc. et al. v. Lapes,
155 F.R.D. 90, 92 (E.D.Pa. 1994).

Indisputedly, the Milbank report qualifies as material prepared or collected in anticipation of litigation. Indisputedly, also, the protection is qualified and demands a particularized determination with respect to each piece of information sought. Thus, neither the fact that the list was compiled by Milbank, nor the fact that it was attached to a report prepared in anticipation of possible litigation is dispositive. Rather, application of the rule depends upon the nature of the document, the extent to which it may directly or indirectly reveal the attorney's mental processes, the likely reliability of its reflection of witnesses' statements, the degree of damage that it will convert the attorney from advocate to witness, and the degree of availability of the information from other sources.

U.S.A. v. Amerada Hess Corp., 619 F.2d 980, 987 (3d Cir. 1980) [internal citations omitted].

Accordingly, the courts have allowed the privilege where the documents may disclose the attorneys' mental impressions, conclusions, opinions, or legal theories concerning the litigation but have denied it as to purely factual matters not indicative thereof notwithstanding that they may have been assembled during the litigation process.

H. The Extent of Attorney-Client Disclosure to be Allowed

The purpose of the attorney-client privilege is:

...to encourage full and frank communication between the attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.

Upjohn Co. v. United States, 101 S.Ct. 677, 682; see also *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.*, 32 F.3d 851, 862 (3d Cir. 1994); *In Re: Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979).

The privilege applies equally when the client is a corporation. *Upjohn* at 682-683. No bright-line rule governs the applicability of the attorney-client

privilege. Rather, courts should determine the applicability of the privilege on a case-by-case basis. *Id* at 686. (See complete discussion in *Harding v. Dana Transport, Inc.* 914 F.Supp. 1084, 1090-1091 (D.N.J. 1996).

The existence of attorney-client privilege in documents must be determined by the Court. 5 V.I.C. § 854.

The traditional elements of the attorney client privilege that identify communications that may be protected from disclosure in discovery are: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his or her subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client...

While documents may be protected from disclosure in discovery because they contain confidential communications that are privileged, that protection may be inapplicable to facts incorporated in the communication...

[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication

concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'what did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney..."

Rhone-Poulenc Rorer, Inc. at 862-63 [internal citations omitted].

I. Burdensomeness

In order to resist compliance with discovery requests the responding party has the burden of demonstrating that responding thereto would be unduly burdensome and oppressive. See e.g. *Continental Illinois National Bank & Trust Co. of Chicago v. Caton et al.*, 136 F.R.D. 682, 685 (D.Kan. 1991). "Bare assertions that the discovery requested is overly broad, unduly burdensome, oppressive or irrelevant are ordinarily insufficient...to bar production." *Isaac v. Shell Oil Co. et al.*, 83 F.R.D. 428, 431 (E.D.Mich. 1979); *General Telephone & Electronics Laboratories, Inc. v. National Video Corp.*, 297 F.Supp. 981, 984 (N.D.Ill. 1968); *Pulse Card, Inc. v. Discovery Card Services, Inc.*, 1996 WL 397567 *2 (D.Kan. July 11, 1996).

J. Personnel Files

In determining appropriate discovery to be allowed from personnel files, the Court must weigh Plaintiff's right to relevant discovery against the privacy interest of such non-parties. On balance, it appears that the extent of discovery allowed must be tailored to the particular allegations at issue. *Dorchy v. Washington Metropolitan Area Transit Authority*, 45 F.Supp. 2d 5, 15 (D.D.C. 1999); *Onwuke v. Federal Express Corp., et al.*, 178 F.R.D. 508, 517-18 (D.Minn. 1997). "We think

the proper balance between privacy interests of non-party third persons and the discovery interests of a party litigant is to assure that only those portions of the pertinent personnel files, which are clearly relevant to the parties' claims are open to disclosure and then subject to an appropriate Confidentiality Order as the circumstances require." See also, *Northern v. City of Philadelphia*, 2000 WL 35526 *3 (E.D.Pa. 2000). "Although personnel files are discoverable, they contain confidential information and discovery of them should be limited." *Miles v. Boeing Company*, 154 F.R.D. 112, 115 (E.D.Pa. 1994).

In this matter, Plaintiff's Complaint alleges in significant part that Plaintiff was a black male citizen of the Virgin Islands who worked for various "Jacobs' companies" over nine years. In October 2000, Plaintiff was asked to go to St. Croix where he was employed as a foreman. While working for "Jacobs" at the HOVENSA refinery, Plaintiff observed that "JIMC and Jacobs Corporation" had a racially discriminatory pay scale system for the same and similar work and that when Plaintiff complained of

such problem¹ he was retaliated against and filed (on November 22, 2000). Plaintiff states that he was barred forever from working at the "Hess Refinery" and ordered to leave the island immediately or he would be removed from his company housing. Plaintiff alleges that he was forced to leave the island and was not able to apply for a job at HOVENSA again "until HOVENSA would agree."

II. Review of Plaintiff's Interrogatories

Upon review of the subject interrogatories in the context of

I(A) above the Court finds the following²:

1. Interrogatory No. 1 constitutes two interrogatories, *i.e.* conditions of employment, changes and eligibility

1. Plaintiff's Complaint alleges that Plaintiff complained that he should be paid the same as the white employees doing the same category of work as Plaintiff and the local hires should be paid the same salary as well (par. 17).

2. In general, the Court has not counted introductory requests to state whether an event occurred (*e.g.* interrogatories number 10 and 11) separate from the following requests to provide the particulars thereof, because the statement imposes no extra obligation on Defendant (*i.e.* Plaintiff could have instead stated, "with regard to all documents indicating whether [such fact occurred], provide the following particulars"). However, Plaintiffs' requests to identify all persons having knowledge of such information (*e.g.* interrogatories 10 and 11) are counted as separate inquires. The reason therefor is that although identity of persons who are the source of the various facts inquired about may be logically subsumed within and necessarily related to the primary question, the determination of the identity **of all persons having knowledge of such information** requires additional effort by Defendant.

for promotion; and identity of participants and description of their involvement.

2. Interrogatory No. 2 constitutes two interrogatories, *i.e.* duties and particulars thereof; and identity of participants and description of their involvement.
3. Interrogatory No. 3 constitutes three interrogatories, *i.e.* identity of supervisors; evaluations and reprimands issued; and objective criteria relied upon.
4. Interrogatories number 4, 5, and 5 constitutes two interrogatories each *i.e.* particulars concerning persons employed in the positions; and particulars concerning cessation of employment, promotion, or transfer.
5. Interrogatory number 7 constitutes three interrogatories, *i.e.* complaints received and particulars thereof; identity of all persons with knowledge of such notice; and actions taken in response.
6. Interrogatories numbers 8, 9, 13, 14 and 15 constitute one interrogatory each.
7. Interrogatories number 10, 11, and 12 constitute two interrogatories each, *i.e.* HOVENSA and JEGI's various

connections with barring Plaintiff from the HOVENSA refinery; and identity and pedigree of persons with knowledge who participated therein.

In general, Plaintiff's queries are complex and compound and the Court has liberally allowed combination of many sub-parts that may have been subject to additional count. Plaintiff has made no timely request for additional interrogatories as provided in Fed. R. Civ. P. 33(a), however the Court will allow interrogatories 1-15 which per the above, total 27. JEGI need not further respond to interrogatories 16-25.

III. In Particular

1. All responses requested by this Order shall be provided to Plaintiff within fifteen (15) days of the date of this Order.
2. Regarding Interrogatories No. 4 and 5
To the extent it has not already done so, JIMC shall further respond by providing the requested information for the period November 1, 1997 to November 22, 2000.
3. Regarding Interrogatory No. 6
Plaintiff's motion is DENIED.

4. Regarding Interrogatory No. 7

JIMC shall further respond as requested with regard to notice of any kind from **Plaintiff or anyone acting on behalf of Plaintiff**. If IMC contends that any action taken in response to Plaintiff's Complaint of racial slurs at the refinery is subject to a claim of privilege, it must comply with Fed. R. Civ. P. 26(b)(5) as described in I(F) above.

5. Regarding Interrogatory No. 9

JIMC shall further respond to parts (a)-(e) with regard to any investigations or analysis that JIMC does not assert are subject to work product and/or attorney-client privilege. JIMC shall further respond to parts (a), (c) and (e) with regard to any investigations or analysis claimed privileged and shall then also comply with Fed. R. Civ. P. 26(b)(5) as described in I(F) above.

6. Regarding Interrogatories No. 10 and 11

JIMC shall further respond to the best of its knowledge with regard to any HOVENSA instructions, influence, involvement, authorization, approval, disapproval or connection with regard to hiring, promotion, pay,

termination, layoff, overtime and/or benefits of Plaintiff.

7. Regarding Demand for Production No. 2

To the extent it can be located, JIMC shall produce the letter of intent and contractor evaluation (as agreed by JIMC).

8. Regarding Demand for Production No. 5 & 6

a. To the extent no already done, prior to any production of such files, Plaintiff shall execute an appropriate confidentiality agreement with regard to such information.

b. JIMC shall further respond by producing the requested information from the files of all JIMC foremen and general foremen at the HOVENSA refinery for the period November 1, 1997 to November 22, 2000.

c. In compliance therewith, JIMC shall deliver the complete personnel files of the applicable foremen/general foremen to JIMC's attorneys who shall extract therefrom the information to be produced. To the extent any of the required personal information is deemed to be particularly

sensitive and not relevant to this matter JIMC may submit (only) such particularly sensitive information to the Court for *in camera* review.

d. Because of the volume of the material to be produced herein may be large and may entail substantial copying costs (to Plaintiff) the parties are encouraged to meet and confer further in regard to the scope of production.

9. Regarding Demand for Production No. 7

Plaintiff's motion is DENIED.

10. Regarding Demand for Production No. 8

JIMC shall further respond with regard to the documents and personnel file of Victor River (Rivera). [See III(8)(a-c) above in such regard]. Plaintiff's motion is otherwise DENIED.

11. Regarding Demand for Production No. 9

JIMC shall further respond with regard to John Wood, Mr. Chrislow and Mr. Moe with regard (only) to any reprimands, evaluations, warnings, or discipline arising from or related to any incidents concerning complaints of pay or benefits disparity based upon race, national origin or "place of hire"

discrimination; and/or racial slurs. [See III (8)(a-c) above in such regard]. Plaintiff's motion is otherwise DENIED.

12. Regarding Demand for Production No. 11

Plaintiff's motion is DENIED.

13. Regarding Demand for Production No. 21

JIMC shall further respond as requested with regard to JEGI's involvement, etc. with regard to JIMC employees' pay and benefits. Plaintiff's motion is otherwise DENIED.

14. Regarding Demand for Production No. 22

Plaintiff's motion is DENIED.

15. Regarding Demand for Production No. 31

JIMC shall further respond as requested. To the extent JIMC maintains that any such documents are privileged, it shall comply with Fed. R. Civ. P. 26(b)(5) as described in Part I(f) above and shall produce copies of any documents withheld pursuant to claim of privilege for *in camera* review (with copy of JIMC's privilege log).

16. Regarding Demand for Production No. 40, 41, & 42

JIMC has stated after diligent search, it has no

responsive documents. Accordingly, JIMC shall provide a narrative averment of its efforts in such regard.

17. Regarding Demand for Production No. 43

JIMC shall further comply as requested for the period November 1, 1997 to November 22, 2000 limited to any matters relevant to pay or benefits disparity based upon discrimination pursuant to race, national origin, and/or "place of hire"; and/or racial slurs at the workplace.

18. Regarding Demand for Production No. 44

JIMC shall produce all complaints for the period November 1, 1997 to November 20, 2000 limited to any matters relevant to the matters stated in Part III(17) above. If Plaintiff then requests further particular documents from such proceedings, the parties shall confer in such regard.

19. Regarding Demand for Production No. 46

JIMC shall further respond as provided in Part III(5) above (regarding interrogatory no. 9) and shall produce copies of any documents withheld pursuant to claim of privilege to my chambers for *in camera* review (with copy of JIMC's privilege log).

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ENTER:

Dated: July 7, 2003

_____/s/_____
JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
WILFREDO MORALES
Clerk of Court

By: _____
Deputy Clerk