

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Respondent.

Background

Assuming familiarity with the fairly lengthy and contentious history of the present dispute, there is no need to repeat that entire history herein. This is especially so considering the relatively narrow scope of Bashas' motion to compel. In its motion, Bashas' requests that this court order the EEOC to: "(1)

1 produce all responsive telephone records, including incoming
2 calls; and (2) produce a complete privilege log for its
3 discovery responses." Mot. (doc. 59). Additionally, because
4 it believes that EEOC "'representatives'" have impermissibly (1)
5 contacted Bashas' employees, including management, and (2) made
6 public information about the EEOC's investigation, Bashas' seeks
7 a confidentiality order. See id. at 7:23; and at 8:20. I.

8 **Telephone Records**

9 As to Bashas' request for production of telephone records,
10 initially the EEOC provided only records for "Outward
11 Call[s][.]" Mot., exh. 9 thereto (Doc. 59-9) at EEOC-B1-00025 -
12 EEOC-B1-00027 (emphasis added). In responding to this motion
13 to compel, the EEOC submitted the declaration of Everett Barnes,
14 its "Director of Telecommunications and Networking in the Office
15 of Information Technology at EEOC Headquarters in Washington[,]
16 D.C." Resp., exh. 1 thereto (Doc. 62-1) at 1, ¶ 1:24-27. Mr.
17 Barnes declares that "[b]ecause the EEOC's telephone records are
18 a byproduct of [its long distance telephone provider's] . . .
19 billing system[,], and there is no charge to receive an incoming
20 telephone call, there are no telephone records generated for
21 incoming telephone calls." Id. at 2, ¶ 7. Consequently,
22 according to Mr. Barnes, "[t]he EEOC does not have any records
23 of incoming telephone calls for the Phoenix District Office."
24 Id. at 3, ¶ 8. Based upon the foregoing, the EEOC responds that
25 the court should deny as moot Bashas' motion to compel as to the
26 EEOC's telephone records.

27 In its reply, Bashas' notes that "[i]t was not until
28 Bashas' filed [its] Motion to Compel that the EEOC provided a

1 detailed explanation of its production of telephone records in
2 its Response." Reply (Doc. 65) at 5:27 - 6:1. Bashas' is not,
3 however, seeking any specific relief as to the produced
4 telephone records. Almost as an afterthought, in the last
5 sentence of its motion, Bashas' generically "requests an award
6 of its reasonable costs and fees incurred in making this
7 Motion[.]" Id. at 9:21-22.

8 **II. Privilege Log**

9 Turning to the second aspect of Bashas' motion to compel,
10 the privilege log, Bashas' claims despite "assert[ing] that much
11 of the information requested is protected from disclosure by
12 privilege, including the attorney-client and governmental
13 deliberative privilege," the EEOC is "ignor[ing] Bashas' request
14 for a privilege log." Mot. (Doc. 59) at 9:24-26. Bashas'
15 stresses that it is not "suggest[ing] that the EEOC should
16 produce privileged documents or provide detailed information in
17 a privilege log that would disclose the [EEOC's] work product."
18 Id. at 10:8-10 (internal quotation marks omitted). Instead,
19 Bashas' "requests that the EEOC produce a privilege log with as
20 much specificity as possible, that includes all responsive
21 documents identified as privileged." Id. at 10:11-13.

22 Bashas' rationale is that the governmental deliberative
23 process privilege, which it claims the EEOC has "repeatedly
24 asserted[,] . . . has limited applicabilty. Id. at 10:12-13.
25 Further, Bashas' reasons that it "cannot debate the
26 applicability of th[at] limited privilege if the [EEOC] refuses
27 to identify privileged documents in a privileged [sic] log."
28 Id. at 10:23-24. Accordingly, Bashas' is seeking a court order

1 requiring the EEOC to "produce a complete privilege log for its
2 discovery responses." Id. at 10:27-28.

3 Basically it is the EEOC's position that because, as the
4 record reflects, it has "informed [Bashas'] on more than one
5 occasion that it has produced all responsive documents that it
6 possessed[,]""¹ and because "[t]here is nothing to document in a
7 privilege log[,]"" the court should deny this aspect of Bashas'
8 motion to compel. Resp. (Doc. 62) at 7:14-16.

9 Bashas' replies, as it did regarding the telephone records,
10 that "it was not until [it] filed this Motion that the EEOC
11 finally clarified that it does not have any additional
12 responsive documents to these discovery requests privileged or
13 otherwise[.]" Reply (Doc. 65) at 6:1-3. In its reply, however,
14 Bashas' does not seek any further relief pertaining to a
15 privilege log other than the generic request for attorneys' fees
16 and costs noted earlier.

17 Indeed, Bashas' devotes the bulk of its reply to arguing,
18 for the first time, that it "has evidence that suggests the
19 EEOC's response omitted hundreds of pages of documents provided
20 to the agency by Elizabeth Lawrence, attorney for the plaintiffs
21 in the *Parra* litigation, shortly after this Court denied the
22 plaintiffs' second attempt to certify their pay claim." Reply
23 (Doc. 65) at 1:19-22. Bashas' further claims that "[t]he
24 documents provided by Ms. Lawrence suggest that other EEOC
25 discovery responses are incomplete." Id. at 1:23. Thus,
26 pursuant to Fed. R. Civ. P. 27, "Bashas' requests that the Court
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28 ¹ See, e.g., Resp., exh. 3 thereto (Doc. 62-1) at 1-2; id., exh. 4
thereto (Doc. 62-1) at 8:24-9:2.

1 order the EEOC to supplement incomplete responses to its
2 requests." Id. at 1:23-24. Bashas' attaches to its reply
3 sixteen supporting exhibits, including eight declarations from
4 Bashas' employees. All eight claim to have been approached
5 outside Bashas' stores by people purporting to be investigating
6 wage and treatment discrimination at Bashas'.

7 **III. Confidentiality Order**

8 Bashas' motion for a confidentiality order arises from
9 activities outside several of its stores on June 23, 2010.
10 Bashas' asserts that immediately following the bankruptcy
11 court's denial of discovery to the Parra plaintiffs, EEOC
12 "'representatives[,]" who "identified themselves as
13 representing 'Pat Miner, EEOC Investigator[,]" appeared outside
14 several of Bashas' stores. Mot. (Doc. 59) at 7:23-26.
15 According to Bashas', those individuals approached Bashas'
16 employees, including managers, "advis[ing] them of a 'case'
17 against Bashas' and 'discrimination' by Bashas'." Id. at 7:20-
18 21 (emphasis omitted).

19 When Bashas' attorney learned of this conduct, she contacted
20 Ms. Miner right away, demanding that the EEOC discontinue such
21 contact with Bashas' employees. See Mot., exh. 17 thereto (Doc.
22 59-17) at 2-4. At that time, Bashas' advised the EEOC of its
23 position that such conduct "seemed to run afoul of 28 U.S.C. §[]
24 2000e-5(b)'s² requirement that 'Charges shall not be made public
25 by the Commission.'" Id. at 8:21-22 (footnote added); see also

27 ² Bashas' mistakenly relies upon Title 28 of the United States Code, when
28 the language which it is quoting is from Title 42 of that Code. In fact, Title 28
does not contain a section 2000e.

1 id., exh. 17 thereto (Doc. 59-17) at 2-4. Bashas' further
2 advised the EEOC that it deemed that conduct to be "contrary to
3 28 U.S.C. § 2000e-8(e) [.]"³ Id. at 8:23; see also id., exh. 17
4 thereto (Doc. 59-17) at 2-3. The primary thrust of that statute
5 is to make strictly confidential any information the EEOC
6 obtains as part of its investigation "prior to the institution
7 of any proceeding [there]under[.]" 42 U.S.C. § 2000e-8(e) (West
8 2003).

9 Claiming that the EEOC is in "blatant disregard [of] its own
10 internal confidentiality rules," Bashas' is requesting that the
11 court enter a confidentiality order as follows:

12 No officer or employee of the [EEOC] shall
13 make public in any manner whatever any
14 information obtained by the [EEOC] pursuant
15 to its authority prior to the institution
16 of any proceeding involving such information.
Any officer or employee of the [EEOC] who
shall make public in any manner whatever any
information in violation of this subsection *shall*
be guilty of contempt of Court.

17 Id. at 11:3-6 (emphasis added).

18 Succinctly put, the EEOC responds that Bashas' is
19 impermissibly seeking "to involve the Court in the [this]
20 administrative investigation without any legal authority to
21 support its position." Resp. (Doc. 62) at 13:21-22. The EEOC
22 also sharply disputes Bashas' depiction of the encounters
23 between Bashas' employees and EEOC investigators. The EEOC is
24 adamant; its investigators are simply following their statutory
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26
27 ³ Again, Bashas' mistakenly relies upon Title 28 of the United States
28 Code, when obviously it intended to rely upon 42 U.S.C. § 2000e-8(e). The court
is proceeding upon the assumption that Bashas' intended to rely upon §§ 2000e-5(b)
and 2000e-8(e) as found in Title 42 of the United States Code.

1 and regulatory mandate to interview witnesses. In carrying out
2 that mandate, the EEOC is equally adamant that its investigators
3 are complying with all applicable statutes, rules, regulations,
4 and the EEOC's own Compliance Manual. Therefore, the EEOC
5 asserts that this court should deny Bashas' motion for a
6 confidentiality order.

7 Bashas' retorts that despite how the EEOC depicts its
8 interviews with Bashas' employees, those interviews "most
9 certainly w[ere] not 'normal' according [to] the EEOC's own
10 guidelines." Reply (Doc. 65) at 7:19-20. Bashas' then goes on
11 to enumerate the ways in which it believes the EEOC failed to
12 follow its own "guidelines." See id. at 8:5-15. For example,
13 Bashas' points to a sentence in the EEOC's Compliance Manual
14 stating, "Interview witnesses under conditions which assure
15 privacy." Resp., exh. 5 thereto (Doc. 62-1) at 23-3, § 23.6(b).
16 By contacting Bashas' employees "in Bashas' parking lots, . . .
17 where Bashas' customers and other members of the public were
18 coming and going[,]" Bashas' strongly suggests that the EEOC
19 violated that privacy provision. See Reply (Doc. 65) at 8:10-
20 11. Bashas' further challenges the EEOC's failure to address
21 the EEOC's alleged violations of 42 U.S. C. §§ 2000e-5(b) and
22 2000e-8(e).

23 Somewhat tellingly, Bashas' acknowledges the possibility
24 that the court may "choose[] not to address [its] request for a
25 confidentiality order in this Motion[.]" Id. at 9:12-13. In
26 that event, Bashas' adds that "the EEOC's heavy-handed approach
27 to its self-initiated charge most certainly questions the
28 legitimacy of the administrative subpoena and Commissioner's

1 Charge, and demonstrates the confidentiality concerns raised in
2 the subpoena enforcement action." Id. at 9:13-16.

3 **Discussion**⁴

4 **I. Motion to Compel**

5 Bashas' has all the telephone records which are available
6 for production from the EEOC, as the Barnes' declaration in
7 particular makes clear. Further, as the EEOC has explained,
8 there are no documents to include in a privilege log. See Resp.
9 (Doc. 62) at 6:1 - 9:2. The court therefore denies as moot
10 Bashas' motion to compel as to telephone records and a privilege
11 log. See Dilbert v. Potter, 2009 WL 1517734, at *8 (N.D. Cal.
12 June 1, 2009) (denying as moot plaintiff's motion to compel
13 where defendant filed a declaration "stating that all medical
14 records in existence and responsive to Plaintiff's document
15 requests ha[d] been produced"); see also Miller v. Woodford,
16 2010 WL 2850776, at *2 (E.D.Cal. July 20, 2010) (denying motion
17 to compel document production where defense counsel verified
18

19 ⁴ Before addressing the merits, the court is compelled to comment upon
20 the timing of the EEOC's response and Bashas' reply. They are both late under the
21 applicable rules. According to the Certificate of Service attached to Bashas'
22 motion, confirmed by the Notice of Electronic Filing ("NEF"), on July 23, 2010,
23 Bashas' filed and electronically served its motion on the EEOC. Mot. (Doc. 59) at
24 12 (Certificate of Service). Pursuant to LRCiv 7.2(c), the EEOC had "14[] days
25 after service . . . within which to serve and file a responsive memorandum." LRCiv
26 7.2(c). Computing that 14 day time period in accordance with Fed. R. Civ. P.
27 6(a)(1), as the court must, means that the EEOC had until Friday, August 6, 2010,
28 by which to timely file and serve its response. The EEOC did not file and serve
that response until Monday, August 9, 2010, however - 3 days late.

Likewise, in accordance with LRCiv. 7.2(d), Bashas' had "seven . . . days
after service of the responsive memorandum to file a reply memorandum[.]" LRCiv.
7.2(d). The Certificate of Service attached to the EEOC's response, and confirmed
by the corresponding NEF, shows that the EEOC electronically served Bashas' with its
response on August 9, 2010. Resp. (Doc. 62) at 16. Therefore, computing that seven
day time frame in accordance with Fed. R. Civ. P. 6(a)(1) means that Bashas' had
until August 16, 2010, by which to timely file and serve its reply. Bashas' did not
file and serve its reply, however, until August 19, 2010 - three days late.

Partially because the parties did not mention it, the court is willing to
overlook the untimeliness of these filings. The court will not be so lenient in the
future though.

1 that there were no responsive documents to compel).

2 In its reply, Bashas' significantly expanded the scope of
3 its initial discovery motion. Instead of limiting its request
4 for relief to telephone records and a privilege log, as it did
5 in its motion, in Bashas' reply it seeks to compel production
6 of, *inter alia*, potentially "hundreds of pages of documents
7 provided to [the EEOC] by Elizabeth Lawrence, attorney for the
8 plaintiffs in the Parra litigation[.]" Reply (Doc. 65) at 1:19-
9 21. The court declines to consider this argument made for the
10 first time in Bashas' reply. See Dawe v. Corrections USA, 2010
11 WL 1689107, at *2 (E.D. Cal. April 26, 2010) (citing Cross v.
12 Washington, 911 F.2d 341, 345 (9th Cir. 1990)) ("Because these
13 arguments were not raised in [defendant's] initial motion their
14 inclusion in the reply was improper."); and Schultz v. Ichimoto,
15 2010 WL 3210764, at *1 (E.D. Cal. Aug. 10, 2010) (citing, *inter*
16 *alia*, United States v. Bohn, 956 F.2d 208, 209 (9th Cir. 1992))
17 ("Normally, arguments raised for the first time in a reply brief
18 or at the hearing on a motion are disregarded.") The obvious
19 reason for declining to consider this belated argument by
20 Bashas' is prejudice to the EEOC given its lack of an
21 opportunity to respond. The court, therefore, abides by its
22 prior rulings herein and denies in all respects Bashas' motion
23 to compel discovery.

24 **II. Motion for Confidentiality Order**

25 The court also denies Bashas' motion for a confidentiality
26 order, but for different reasons. First, Bashas' has not
27 provided a sufficient legal or factual basis for such relief.
28 Bashas' has not cited to any legal authority to support the

1 entry of such a confidentiality order. Further, the supporting
2 declarations contain relatively little detail about the
3 declarants' encounters with EEOC investigators. Without the
4 gloss of counsel, those declarations show that those encounters
5 were fairly innocuous. Second, the EEOC through its counsel,
6 explicitly recognizes that it "and its employees are bound by,
7 and follow, the relevant law." Resp. (Doc. 62) at 14:18-19.
8 Third, Bashas' proposed confidentiality order borrows language
9 from 42 U.S.C. § 2000e-5(b) and 42 U.S.C. § 2000e-8(e), and,
10 hence, it is duplicative. Fourth, as drafted, the proposed
11 confidentiality order is potentially overbroad especially
12 insofar as it mandates a finding of contempt without affording
13 any process. Accordingly, the court DENIES Bashas' motion for
14 a confidentiality order.

15 **III. Motion to Strike**

16 Disregarding the arguments made for the first time in
17 Bashas' reply, renders moot the EEOC's motion to strike that
18 reply and its accompanying exhibits. The court, therefore,
19 DENIES that motion to strike.

20 For the reasons set forth herein, IT IS ORDERED that:

21 (1) the "Motion to Compel Discovery Response and Motion for
22 Confidentiality Order" (Doc. 59) is DENIED in its entirety; and

23 (2) the "Motion to Strike" (Doc. 66) is DENIED as moot.
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1 DATED this 2nd day of September, 2010.

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8 Copies to all counsel of record

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Robert C. Broomfield
Senior United States District Judge