UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff, v. GUARDIAN ROOFING LLC, MATTHEW SWANSON, LORI SWANSON, and AARON SANTAS, Defendants.	CASE NO. 3:15-cv-05623-RJB ORDER ON GUARDIAN ROOFING LLC'S MOTION TO COMPEL FURTHER RESPONSES TO DISCOVERY REQUESTS AND FOR SANCTIONS

THIS MATTER comes before the Court on Defendant Guardian Roofing LLC's Motion to Compel Further Responses to Discovery Requests and for Sanctions. Dkts. 27, 28. The Court has considered the motion, the briefing filed in support and opposition thereof, and the remainder of the file herein. Dkts. 32, 33, 35, 36.

BACKGROUND

a. The Complaint and Amended Counterclaim.

DOL alleges that Guardian violated the Fair Labor Standards Act in its employment practices, by failing to adequately compensate employees and by failing to maintain or preserve employment records. Dkt. 1, at ¶¶13-18. *See* 29 U.S.C. §§ 207, 211(c), 215(a)(2) and (5). DOL requests an awarding of fees and costs; an awarding of damages, including liquidated damages; and injunctive relief, for Guardian to be permanently enjoined from violating FLSA employee and wage provisions. *Id*., at 6, 7.

In Guardian's Amended Counterclaim, Guardian seeks a declaratory judgment that DOL's claims lack substantial justification for its claims, which warrants awarding Guardian fees and costs under EAJA. Dkt. 30. Guardian also alleges that DOL's completion of its investigation and filing of the Complaint constituted a "final agency action" by DOL, an administrative agency. *Id*. *See* 5 U.S.C. §§ 701, 706.

b. Discovery.

Among other discovery provided, DOL has produced 10 employee-informant statements in a format that redacts the employee-informants' identities. Dkt. 33, at ¶3. DOL justifies the redaction by invoking the government informant's privilege. Dkt. 32, at 7. DOL has also redacted 21 documents that concern DOL's "confidential investigative procedures," including how DOL initiated its investigation of Guardian, by invoking the "investigative files privilege." Dkt. 33, at ¶4.

Guardian's Interrogatory No. 8 asks DOL to "[d]escribe each agency action taken by you, your investigators, representatives or agents concerning Guardian Roofing[.]" Dkt. 28-1, at 10. DOL objected to the interrogatory as vague, overly broad, and unduly burdensome. *Id*., at 26.

Guardian's Interrogatory No. 9 asks DOL to "[i]dentify each record that Guardian Roofing allegedly failed to maintain, keep, make available, and/or preserve in violation of

[FLSA] . . . and for each record state the date you requested it from Guardian Roofing and the person[s] who made the request." Dkt. 28-1, at 10. DOL objected to the interrogatory as vague and ambiguous. *Id*. In subsequent correspondence, DOL explained to Guardian the basis for its objection:

> "[The problem is] that Guardian's records are inaccurate and incomplete because Guardian failed to record the actual time its employees spent "employed" . . . Guardian did not, for example, maintain accurate records of the time its employees spent at the company shop, whether performing work or waiting for company vehicles to depart, or of the time its employees spent in transit between the shop and the . . . job site." Dkt. 32, at 15, 16.

Guardian seeks to compel: (1) information redacted by DOL under the government informant privilege; (2) information redacted by DOL under the investigative files privilege; (3) DOL's answer to Interrogatory No. 8; and (4) DOL's answer to Interrogatory No. 9. Guardian also request monetary sanctions.

DISCUSSION

A. Redactions under government informant privilege.

According to Guardian, DOL should be compelled to provide the 10 employee-informant statements in their complete, unredacted form. Guardian argues that it needs to know the employee-informants' identities now to make an informed decision about which witnesses to depose and how to depose them, or it will be forced to proceed to trial by ambush. Guardian also contends that there is only a minimal risk of additional harm in compelling production of the employee-informants' identities, because DOL has already provided a list of 65 potential trial witnesses, including employees, and DOL plans to release employee-informant statements at the pretrial conference. Dkt. 27, at 8, 9.

DOL argues that Guardian has not provided authority for its proposition that DOL is required to disclose its employee-informants' identities at this early stage in the proceedings; that

Guardian will be adequately equipped to impeach witnesses at trial, because DOL will disclose the employee-informants' identities at the pretrial conference; that Guardian already has the substantive information needed to defend itself in the discovery provided; and that other courts "have ruled time and time again" that employers, like Guardian, do not need to know employees' identifying information to defend themselves. Dkt. 32, at 11, 12.

The informant's privilege is a well-established privilege that protects "the identity of the persons who furnish information of violations of law" from "those who would have cause to resent the communication." *Roviaro v. United States*, 353 U.S. 53, 59-60 (1957). The privilege serves "a significant public service [by] encouraging citizens to report illegal activity." *Chao v. Sec. Credit Sys., Inc.*, No. 08–267, 2009 WL 1748716, at *3 (W.D.N.Y.2009) (citation omitted). However, the privilege will give way "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Rovario*, at 60-61. Once the informant's privilege is properly invoked, courts must decide where to draw "[t]he dividing line" of where it should apply, balancing the need for effective law enforcement with an employer's fundamental right to a fair trial. *In re Perez*, 749 F.3d 849, 856 (9th Cir. 2014).

The informant's privilege is commonly invoked by DOL in FLSA cases. *Sec'y of Labor v. Superior Care Inc.*, 107 F.R.D. 395, 397 (E.D.N.Y.1985). *See also, e.g., Brock v. Gingerbread House, Inc.*, 907 F.2d 115, 116–17 (10th Cir.1990); *Brennan v. Engineered Prods., Inc.*, 506 F.2d 299, 302–05 (8th Cir.1974); *Hodgson v. Charles Martin Inspectors of Petrol., Inc.*, 459 F.2d 303 (5th Cir.1972); *Solis v. Delta Oil Co., Inc.*, 2012 WL 1680101 (S.D.Ohio 2012); *Chao v. Sec. Credit Sys.*, 2009 WL 1748716 at *2–4 (W.D.N.Y.2009); *Chao v. Westside Drywall*, 254 F.R.D. 651 (D.Oreg.2009); *Martin v. New York City Transit Auth.*, 148 F.R.D. 56, 62–65

(E.D.N.Y.1993). In FLSA actions, "informants are an important lot[,]" so offering informants the protection that the privilege affords DOL a "better chance of candid dialog." *In re Perez,* 749 F.3d at 856. Some courts view the privilege's use to be particularly defensible at the discovery stage of litigation. *See e.g., Perez v. L & J Farm Picking, Inc.*, No. 12–24426, 2013 WL 5446625, at *3 (S.D.Fla.2013) ("Defendants have failed to show a sufficient need to require Plaintiff to disclose the identity of its trial witnesses two and a half months early."); *Brock v. J.R. Sousa & Sons, Inc.*, 113 F.R.D. 545, 546 (D.Mass.1986) ("The informer's privilege has been rather uniformly applied in cases involving the Fair Labor Standards Act to protect the plaintiff from disclosing the names of its witnesses and copies of the witnesses' statements during discovery.").

Because DOL indicates it will disclose the identities of the employee-informants it intends to use for trial at the pretrial conference, the fight over DOL's invocation of the informant's privilege is mostly a fight about *when,* not *if,* DOL should disclose the identifying information. While Guardian is correct—that Guardian should not be forced into trial by ambush—Guardian will know the employee-informant identities approximately 10 days before trial, which should be sufficient. DOL has not redacted information about Guardian's pay practices and its employee's daily routines, which is the basis for DOL's claims and probably most of the useful material Guardian will need for depositions. Guardian has the names of DOL's 65 employee witnesses, all of whom Guardian can now interview and/or depose. Many cases resolve prior to a pretrial conference, and with that possibility in mind, the Court cannot find that Guardian's right to a fundamentally fair trial is compromised by the delay in releasing employee-informant identities, even if deposing additional witnesses could be inefficient. *Perez v. American Future Systems, Inc.*., 2013 WL 5728674 (1,800 aggrieved employees not sufficient

reason to pierce informer's privilege); *Chao v. Raceway Petrol*, 2008 WL 2064354 at *4 (D.N.J.2008) (despite 600 potential employee-witnesses, "efficiency . . . is not weighty enough to overcome the public policy against disclosure").

Finally, the Court notes that it makes no ruling on the issue of whether any of the employee-informants should be interviewed and/or deposed prior to trial but after the close of discovery, by setting up a special schedule for that purpose, and requiring DOL to produce the witnesses. Also, dispositive motions may be specially considered after the dispositive motions deadline.

The motion to compel on these grounds should be granted in part. DOL may rely on the informant's privilege to protect the identities of its 10 employee-informants until the pretrial conference, but DOL should then disclose all of the 10 employee-informants' identities and produce all of their unredacted statements, regardless of whether those persons will be called by DOL as witnesses.

B. Redactions under investigative files privilege.

Guardian seeks to compel production of investigation information that DOL redacted under its "investigative files privilege." According to DOL, disclosing investigation information redacted under the investigative files privilege "would threaten future investigations by revealing internal procedures and analysis to potential violators," and Guardian has not shown that its need for the information outweighs the public interest in non-disclosure. Dkt. 32, at 13. Guardian counters by arguing that the investigation files privilege can no longer apply, because DOL completed its investigation of Guardian, so the investigation's protection is no longer needed. Dkt. 27, at 3, 11, 12.

The common law authority for DOL's invocation of the "investigative files privilege" is less than clear. Neither the 2nd Circuit nor the 9th Circuit cases that DOL relies upon makes any direct reference to such a privilege. Dkt. 32, at 13, citing to *In re The City of New York*, 607 F.3d 923, 940-41 (2d Cir.2010) and *N.L.R.B. v. Silver Spur Casino*, 623 F.2d 571, 580 (9th Cir. 1980). It appears that DOL may be conflating the investigative files privilege with the law enforcement privilege, equating the former with the latter. Dkt. 32, at 13 ("The investigative files privilege (or "law enforcement privilege") permits the Secretary to withhold information"). DOL seeks to protect "primarily, information related to how [the] investigation was initiated and conducted," Dkt. 32, at 13, so it appears that the privilege invoked could be intended to be the law enforcement privilege, sometimes also referred to as the federal investigatory privilege. *Brooks v. County of San Joaquin*, 275 F.R.D. 528, 533 (E.D.Cal.2011); *Hemstreet v. Duncan*, 2007 WL 4287602 at *2 (Oreg.2007). Whatever its label, "the purpose of the [law enforcement] privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals . . . in an investigation, and otherwise to prevent interference with an investigation." *Id*., citing to *In re Dep't of Investigation of City of New York*, 856 F.2d 481, 484 (2nd Cir.1988). The privilege requires courts to balance "the public interest in nondisclosure against the need of the particular litigant for access to the privileged information." *Id.*

In this case, the public interest in nondisclosure of DOL's investigative techniques is exceeded by Guardian's need for the information. According to DOL, disclosing its investigative techniques could "threaten future investigations by revealing internal agency procedures and analysis," but DOL does not further elaborate on the reasons for this statement. *See* Dkt. 32, at 13, 14. In essence, DOL asks the Court to 'just trust' DOL, relying on general platitudes, which

is insufficient. It does not appear that DOL is still investigating Guardian, so DOL's argument that disclosing its investigative techniques could harm "future investigations" is moot as to this case, and DOL offers no specifics about how disclosure in this case could harm future investigations for other cases. For example, DOL advances no argument about the likelihood of employers in other cases obtaining the investigation information, and DOL does not explain why a court protective order would be an insufficient means of protection against inappropriate disclosure. On the other hand, DOL's investigatory techniques are a proper discovery subject for Guardian.

The motion to compel DOL's production of investigatory procedures should be granted. DOL should produce all investigation documents redacted under the purported investigative files privilege.

C. Interrogatory No. 8.

Guardian requests that DOL be compelled to respond to Interrogatory No. 8, which asks DOL to identify "each agency action taken" by DOL against Guardian. Dkt. 28-1, at 10. Guardian seeks to compel DOL's response because Guardian anticipates that DOL will assert a sovereign immunity defense to Guardian's counterclaim, a defense that DOL may argue is appropriate because thus far DOL has not completed a final agency action against Guardian, making a court challenge premature. *Id*. Guardian argues that DOL intentionally evades a response, in spite of Guardian providing a clear definition, found in the Administrative Procedure Act. Dkt. 35, at 6.

DOL argues in response that, assuming the definition Guardian proposes, DOL has not taken a final agency action.[1] Dkt. 32, at 15. That response appears to answer the interrogatory, although not its proper form. DOL further argues that Guardian is attempting to use Interrogatory No. 8 "to get [DOL] to admit to the legitimacy of the legal underpinnings of Guardian's counterclaims." Dkt. 32, at 15.

A positive answer by DOL to Guardian's interrogatory would be an admission dispositive of Guardian's counterclaim, so DOL understandably resists. More problematic for Guardian, however, is that requiring DOL to answer its interrogatory as Guardian insists calls for a legal conclusion, which may not be best resolved through an interrogatory. And apart from the legal conclusion the interrogatory calls for, Guardian is equally well-positioned to evaluate DOL's actions against Guardian, as the target recipient of any agency actions, so Guardian hardly needs DOL to disclose what actions DOL is taking against it. The characterization of DOL's actions against Guardian is a question of law, that the parties will litigate and, when appropriately raised, this Court will resolve.

The motion to compel DOL's response to Interrogatory No. 8 should be denied.

D. Interrogatory No. 9.

Guardian seeks to compel DOL's answer to Interrogatory No. 9, which asks DOL to "[i]dentify each record that Guardian Roofing allegedly failed to maintain, keep, make available, and/or preserve in violation of [FLSA]." Dkt. 28-1, at 10. According to Guardian, it is insufficient for DOL to allege that Guardian's records are inaccurate "generally," and inappropriate for DOL to refer Guardian back to its own document production rather than answer the question. Dkt. 27, at 13. Guardian contends further that DOL has the initial burden to prove

[1] DOL makes this same argument in its pending motion to dismiss. Dkt. 37.

that Guardian failed to maintain accurate records, which DOL has not met by avoiding its obligation to identify specific incidents. Dkt. 35, at 6. DOL argues in response that "it is impossible" to identify every instance for which Guardian failed to keep proper records. Dkt 32, at 16.

Guardian does not provide any authority for its argument that DOL need be more specific about individual instances of inaccurate records. In fact, the one case that Guardian cites to, *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 686-87 (1946), superseded by statute on other grounds, spoke favorably of the opposite. The Supreme Court of the United States reversed the lower court for approaching the calculation of employees' unpaid wages in an overly formulaic way, which placed an "impossible hurdle" on employees alleging unpaid wages. *Id*., at 686. That court went on to describe a situation, like here, where it is alleged that employment records are inaccurate, stating that there need only be "sufficient evidence to show the amount and extent of that work *as a matter of just and reasonable inference*." *Id*. DOL has met this burden. Although DOL has not provided Guardian with specific dates, places, or times of its alleged records violations, DOL has described with sufficient specificity the types of situations from which a reasonable inference arises. If anything, it is Guardian, not DOL, that has a burden to be specific, because once DOL has met its initial burden, "[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference[.]" *Id*., at 687, 688.

The motion to compel DOL's response to Interrogatory No. 9 should be denied.

E. Motion for Sanctions.

Guardian argues that DOL's resistance to providing Guardian with discovery, requiring Guardian to file the instant motion, warrant sanctions against DOL.

Sanctions are not warranted; this motion should be denied.

ORDER

THEREFORE, the Guardian Roofing LLC's Motion to Compel Further Responses to Discovery Requests and for Sanctions (Dkt. 27) is GRANTED IN PART and DENIED IN PART.

(1) Guardian's request to compel the disclosure of the 10 employee-informant statements is GRANTED IN PART. DOL shall provide them at or prior to the pretrial conference.

(2) Guardian's request to compel investigation information redacted under the "investigative files privilege" is GRANTED. All discovery redacted under this privilege shall be provided.

(3) Guardian's request to compel DOL's answer to Interrogatory No 8 is DENIED.

(4) Guardian's request to compel DOL's answer to Interrogatory No. 9 is DENIED.

(5) Guardian's request for sanctions is DENIED.

IT IS SO ORDERED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 11th day of April, 2016.

ROBERT J. BRYAN
United States District Judge