

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Joan B. Gottschall	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	01 C 4427	DATE	4/23/2003
CASE TITLE	EEOC and Marian Townson, et al. vs. International Profit Associates, Inc.		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

- (1) Filed motion of [use listing in "Motion" box above.]
- (2) Brief in support of motion due _____.
- (3) Answer brief to motion due _____. Reply to answer brief due _____.
- (4) Ruling/Hearing on _____ set for _____ at _____.
- (5) Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
- (6) Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
- (7) Trial[set for/re-set for] on _____ at _____.
- (8) [Bench/Jury trial] [Hearing] held/continued to _____ at _____.
- (9) This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
 FRCP4(m) Local Rule 41.1 FRCP41(a)(1) FRCP41(a)(2).
- (10) [Other docket entry] Enter Order. This court sets aside Magistrate Judge Denlow's ruling denying EEOC's motion for a protective order and grants the motion for a protective order [150-1].
- (11) [For further detail see order attached to the original minute order.]

<input type="checkbox"/> No notices required, advised in open court. <input type="checkbox"/> No notices required. <input type="checkbox"/> Notices mailed by judge's staff. <input type="checkbox"/> Notified counsel by telephone. <input checked="" type="checkbox"/> Docketing to mail notices. <input type="checkbox"/> Mail AO 450 form. <input type="checkbox"/> Copy to judge/magistrate judge.	courtroom deputy's initials <div style="font-size: 2em; font-family: cursive;">RS/ea</div>	Date/time received in central Clerk's Office <div style="font-size: 1.5em; font-family: monospace;">APR 24 2003</div>	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="text-align: center;">number of notices</td> <td rowspan="4" style="text-align: center; vertical-align: middle; font-size: 3em;">155</td> </tr> <tr> <td style="text-align: center;">date docketed</td> </tr> <tr> <td style="text-align: center;">docketing deputy initials</td> </tr> <tr> <td style="text-align: center;">date mailed notice</td> </tr> <tr> <td style="text-align: center;">mailing deputy initials</td> <td></td> </tr> </table>	number of notices	155	date docketed	docketing deputy initials	date mailed notice	mailing deputy initials	
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

EQUAL EMPLOYMENT)	
OPPORTUNITY COMMISSION,)	
)	
Plaintiff,)	
and)	
)	
MARIAN TOWNSON, et al.,)	
)	
Plaintiff-Intervenors,)	
)	
v.)	
)	
INTERNATIONAL PROFIT)	
ASSOCIATES, INC.,)	
)	
Defendant.)	

DOCKETED
APR 24 2003

Case No. 01 C 4427

Judge Joan B. Gottschall

ORDER

The EEOC has objected to an order by Magistrate Judge Denlow denying EEOC's motion for a protective order. As this is a discovery order, the court reviews it for abuse of discretion. Having considered the arguments of the parties, this court sets aside the Magistrate Judge's ruling and grants the motion for a protective order.

During the pendency of this sexual harassment litigation, defendant IPA hired James Colello as its Director of Human Resources and fired him a few weeks later, entering into a "Severance Agreement and General Release" which contained a "Confidentiality" provision which provided in part that Colello was prohibited from disclosing "anything relating to his employment" to other former, current or prospective employees, or their lawyers, "except as may be necessary in response to lawful process of any judicial or adjudicative authority or otherwise allowed by law." Severance Agreement, ¶7.

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EEOC asserts that after Colello's discharge, EEOC spoke to him and "obtained information from him about sexual harassment he observed or that was reported to him and information about the operation of IPA's human resources department." EEOC's Objections at 2. On March 20, 2003, EEOC filed a motion to compel IPA to produce documents created by Colello at IPA relating to the subjects Colello discussed with them. On the next day, March 21, 2003, IPA's counsel, Mr. Cherry, sent a letter to Colello which stated as follows:

Dear Mr. Colello:

It is now clear that you have breached your confidentiality agreement with IPA, have broken your word, and have made statements which appear clearly designed maliciously to harm International Profit Associates. You are also not operating from a truthful base.

If you have counsel to represent you in a lawsuit that you wish me to speak with prior to a lawsuit, please let me know promptly. I will wait five (5) business days.

Sincerely,

ss// Myron M. Cherry

On March 24, EEOC filed an Emergency Motion for a Protective Order before Judge Denlow, seeking a protective order to prevent IPA from interfering with EEOC's ability to communicate with Mr. Colello. Judge Denlow denied the motion. His reasoning, as set forth in the transcript of the hearing before him, was that the EEOC was essentially requesting that he enjoin the filing of a lawsuit by IPA, and that with Mr. Colello neither before him in person or by counsel, he was unwilling to litigate the enforceability of the settlement agreement, especially in view of the fact that Mr. Colello appeared to be freely sharing information with the EEOC so that the EEOC's ability to gather information was not being impeded.

Before this court, the EEOC argues that a confidentiality agreement which is used to chill employees' participation in legitimate investigations is contrary to public policy, and rather than asking the court to invalidate the Severance Agreement, EEOC is simply requesting a ruling that the confidentiality provision is not enforceable insofar as it might be invoked to prevent Mr. Colello from communicating with EEOC. Although EEOC agrees with Judge Denlow that Colello has in the past provided EEOC with information, "his continued willingness to do so will undoubtedly be stifled under threat of a lawsuit by IPA." EEOC's Objections at 8. IPA agrees with Judge Denlow: No injunction is necessary. Moreover "EEOC has no right to prevent other parties from enforcing whatever rights they may have pursuant to whatever contracts they have." IPA's Response at 2-3.

Courts have not hesitated to make clear, in the face of such confidentiality agreements, that they are unenforceable against employees who share information with the EEOC. In *E.E.O.C. v. Astra, USA, Inc.*, 94 F.3d 738 (1st Cir. 1996), the First Circuit affirmed the grant of a preliminary injunction enjoining the defendant from enforcing provisions of its settlement agreements with former employees which barred the employees from aiding EEOC investigations as against public policy. *Id.* at 744. In *EEOC v. Morgan Stanley & Co., Inc.*, 2002 WL 31108179 (S.D.N.Y. Sept. 20, 2002), the court, in a pretrial ruling, ruled that regardless of release agreements between Morgan Stanley and former employees, the employees "may communicate freely with the EEOC regarding gender discrimination claims, notwithstanding any non-assistance clauses in their release agreements." *Id.* at *1. The non-assistance clause, while subject to different interpretations, could "be interpreted as forbidding potential claimants from cooperating freely with the EEOC's investigation" and could therefore "have a chilling impact on

claimants” in violation of the important public policy interest in unimpaired investigation by the EEOC. *Id.*

This court agrees with the EEOC that in the face of an agreement that could be interpreted as prohibiting a former employee from communicating freely with the EEOC, the court should intervene to make clear that no such interpretation of the agreement is sustainable. The EEOC is not seeking an injunction, and no showing of an actual impairment of EEOC’s investigation is necessary. As in *Morgan Stanley*, it is sufficient if the court sees the likelihood of a chilling impact, and it certainly sees that likelihood here. Mr. Cherry’s letter threatens Mr. Colello for breaching his confidentiality agreement, and there is nothing in the record to suggest that Mr. Cherry was referring to some disclosure by Mr. Colello other than his communications with the EEOC. The court accordingly rules that Mr. Colello may communicate freely with the EEOC, notwithstanding his severance agreement, and the confidentiality provision of his severance agreement is hereby ruled to be inapplicable to communications with the EEOC, as any contractual impairment of present or former IPA employees’ ability to communicate freely with the EEOC is void as against public policy. IPA may not seek to enforce, or threaten to seek to enforce, the Severance Agreement against Mr. Colello based on his communications with the EEOC.

ENTER:



JOAN B. GOTTSCHALL
United States District Judge

DATE: April 21, 2003