

## THE ADVANTAGES AND PITFALLS OF SELF-AUDITS

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In today's litigious workplace, employers are increasingly turning to voluntary self-audits to evaluate their efforts in promoting equal employment. Other employers are required to conduct audits, in the form of Affirmative Action plans, to comply with Executive Order 11246. Conducting such audits assists companies in identifying problem areas and implementing policies or programs to correct them. Whether compelled to by law or acting on their own accord, employers must realize that these audits may be discoverable by plaintiffs in employment discrimination lawsuits. Employers have attempted to safeguard such documents from disclosure, with varying degrees of success, through one of three privileges: 1) the self-evaluative privilege or self-critical analysis privilege, 2) the attorney-client privilege, and 3) the work product privilege.

### I. The Self-Critical Privilege:

- A. Banks v. Lockheed-Georgia Co., 53 F.R.D. 283 (N.D. Ga. 1971) is the first employment discrimination case to recognize the self-critical analysis privilege. In 1970, the Company "appointed a 'team' of employees to study the company's problems in the area of equal employment opportunities, and to determine the progress, if any, of the company's Affirmative Action Compliance Programs." Id. at 283. The team prepared a number of reports, which were presented to the Department of Defense Contracts Compliance Office. Plaintiffs sought production of the reports, including the portion that contained a candid self-analysis of the Company's compliance with Title VII and Executive Order 11246; Defendant objected. The court reasoned that it "would be contrary to . . . public policy to discourage frank self-criticism and evaluation in the development of affirmative action programs." Id. at 285. The court denied the plaintiffs request for the reports concluding that "to allow the plaintiffs access to the written opinions and conclusions of the members of Lockheed's own research team would discourage companies such as Lockheed from making investigations that are calculated to have a positive effect on equalizing employment opportunities." Id. The court did order the Company to provide the plaintiffs with the factual or statistical information used by the team in preparing the reports.
- B. Webb v. Westinghouse Electric Corp., 81 F.R.D. 431 (E.D.Pa. 1978) – In Webb, the court outlined "guideposts" for the application of the self-critical analysis: 1) materials protected have generally been those prepared for mandatory government reports; 2) only subjective, evaluative materials have been protected; 3) objective data within those same materials have not been protected; and 4) courts are sensitive to the plaintiff's need for the material and courts have denied discovery only where the policy favoring exclusion clearly outweighs the plaintiff's need. Id. at 434. Subsequent courts have followed the Webb guideposts. See, Vanek v. Nutrasweet Co., 59 Empl. Prac. Dec. ¶ 41,600 (N.D.Ill. 1992); O'Connor v. Chrysler Corp., 86 F.R.D. 211 (D.Mass. 1980).

- C. Mazzella v. RCA Global Communications, Inc., 1984 WL 55541 (S.D.N.Y. 1984) – One of the few cases state that the privilege could apply to voluntary self-evaluations. “On balance we do not believe that the distinction between the voluntary and involuntary programs is sufficiently significant to require different treatment, particularly in the absence of a showing of compelling need by the plaintiff for purely self-evaluative analysis by the defendant company.” Id. at \*6.
- D. In Flynn v. Goldman, Sachs & Co., 1993 WL 362380 (S.D.N.Y. 1993), the court found that the self-critical privilege protected documents generated for the defendant by a third party. In Flynn, Catalyst, an organization that studies equal and fair employment of women, conducted confidential interviews of the defendant’s employees and presented reports summarizing the results of its research. Catalyst argued that disclosing the documents would cause it serious harm and reduce the likelihood that employers would voluntarily seek such critical analysis from Catalyst or similar consulting firms. In finding that the self-critical analysis privilege applied, the court acknowledged the interests of the defendant, the consulting firm, and the employees interviewed. The court concluded that allowing discovery would have a chilling effect on candid discussions and that “[t]he goal of eliminating any barriers to the full participation of women in the highest levels of corporate America is well served by encouraging such self-critical assessments, and that goal should not be undermined absent a compelling showing of need, which must be determined in light of the plaintiff’s claims.” Id. at \*2.
- E. In Sheppard v. Consolidated Edison Co. of NY, 893 F. Supp. 6 (E.D.N.Y. 1995), the court distinguished between evaluative material, which may be protected by the self-critical analysis privilege, and underlying facts, which are discoverable. In Sheppard, the plaintiff employees sought discovery of an employment opportunity and affirmative action study and to depose two persons regarding the study. The court discussed that the “self-critical analysis privilege is based upon the notion that single ‘disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigations and evaluations or compliance with law or with professional standards.’” Id. at 7. (citations omitted). The court accepted the defendant’s argument that allowing discovery would “chill future voluntary self-critical analysis of companies who in good faith seek to improve their employment practices. . .” Id. The court, however, noted that the underlying facts were discoverable.
- F. Hardy v. New York News, 114 F.R.D. 633 (S.D.N.Y. 1987) – Prior to the plaintiffs lawsuit, the Company’s equal employment manager created several documents reflecting her effort to monitor and analyze the employer’s minority employment goals. Then, the Company hired a consulting firm, which prepared an analysis of the News’ workforce and drafts of an affirmative action plan. After the lawsuit was filed, the plaintiffs requested those documents. The court refused

to protect the documents from disclosure on the basis of the self-evaluation privilege because it found that the documents at issue were not mandated by the government. In addition, it found that the plaintiff's interest in obtaining this information to prove discriminatory intent outweighed society's interest in encouraging candid self-analysis and voluntary compliance with the law, rejecting the News' argument that the prospect of disclosure in litigation would deter the voluntary development of affirmative action programs:

Regardless of whether the News is required to set minority hiring goals, it has an obligation to comply with the law and as a matter of sound business management, has an obligation to take steps to prevent litigation by implementing policies that will improve the utilization of minorities. Accordingly, the failure of the News or any other corporation to initiate and continue aggressive affirmative action programs merely because documents pertaining to their efforts might become available in the context of litigation would be contrary to basic principles of risk management.

Id. at 641.

- G. Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985) recognized the self-critical analysis privilege as shielding the disclosure of the self-critical portions of an employer's affirmative action plans. Id. at 551. The court acknowledged that the privilege was qualified in that the precise bounds of the privilege should be determined on a case-by-case basis so as to best serve the goal of equal opportunity in employment. Id. Providing this privilege fosters the goal of removing discriminatory practices from the workplace by creating "an effective incentive structure for candid and unconstrained self-evaluation." Id. at 552. Additionally, fairness dictates that self-critical evaluations should remain confidential since the law requires many employers to conduct such evaluations. Id. The court noted, however, that a defendant waives the privilege by introducing evidence of its affirmative action efforts. Id. Specifically, if an employer uses its affirmative action policy as a "manifestation of nondiscrimination," it may not also conceal a self-critical evaluation that may reveal a much different picture. Id. As the court in Martin v. Potomac Electric Power Company later interpreted this rationale, if the employer is allowed to use the positive aspects of its reports to show its good intentions, then the plaintiff should enjoy a similar opportunity to use the negative aspects of the reports to illustrate his or her position. 1990 WL 15787, at \*4 (D.C. Cir.) (citing Coates, 756 F.2d at 551-52).
- H. Martin v. Potomac Elec. Power Co., 1990 WL 158787 (D.C. Cir.) analyzed the arguments for and against recognizing a self-critical analysis privilege to shield documents from discovery in a private employment discrimination action. The arguments in favor of recognizing the privilege suggest that (1) the privilege

encourages candid and forthright assessments by employers evaluating their own employment practices; (2) forced disclosure of such assessments would have a chilling effect on an employer's voluntary compliance with equal employment opportunity laws; (3) disclosure would stifle candid compliance with federal equal employment opportunity reporting requirements; and (4) requiring employers to candidly evaluate their strengths and weaknesses is unfair if they are required to then disclose those evaluations for use in an employment discrimination suit. Id. at \*2.

The court found the arguments against allowing a self-critical analysis privilege to shield the discovery of documents most compelling. First, the court rejected the idea that allowing private plaintiffs access to a company's affirmative action plans, compliance reports, and similar documents would have a negative impact on the quality of the internal evaluations or the candor used in preparing government reports. The court noted that written affirmative action plans and compliance reports are mandatory for certain employers and that employers often engage in self-analysis for the sole purpose of complying with government reporting regulations, thus the court questioned the candor of many reports. Id. at \*3. Moreover, many other deterrents to candid reporting already exist, casting doubt on the degree to which disclosure would actually have a "chilling effect." Id. Second, the court dismissed the idea that disclosure would undermine the goal of equal employment opportunity. Id. at \*4. Noting that candid self-evaluations, coupled with aggressive affirmative action plans, are generally viewed positively for an employer, the court suggested that companies conducting such assessments should have nothing to fear. Id. Finally, the court found that private litigation may well further the goal of equal employment opportunity more effectively than the privilege by giving plaintiff's the information necessary to prove discrimination. Id. Therefore, the court held that a defendant in a private discrimination suit could not use the self-critical analysis privilege to protect from discovery documents analyzing or discussing a company's compliance with equal employment opportunity laws.

- I. Aramburu v. Boeing Co., 885 F. Supp. 1434 (D. Kan. 1995) upheld a magistrate court's decision to compel Boeing to disclose portions of its affirmative action plans and related documents, all of which reflected Boeing's subjective analysis of its own performance in meeting objectively established goals. The underlying action involved a former Boeing employee alleging that Boeing had discriminated against him in violation of various anti-discrimination acts, including Title VII.

The magistrate court acknowledged a split in authority as to whether the privilege of self-critical analysis applies in Title VII cases or to affirmative action plans. However, the court opted against recognizing the privilege in either area based on the reasoning set forth in University of Pennsylvania v. EEOC, 493 U.S. 182

(1990).<sup>1</sup> First, the magistrate discounted Banks' (see discussion of Banks supra) underlying assumption that access to affirmative action plans by litigants would discourage employer's from making investigations which are calculated to have a positive effect on equalizing employment opportunities." Id. Second, the court took the position that the potential for future disclosure was not likely to impact an employer's decision to comply with legal requirements such as mandates to prepare and implement affirmative action plans. Id. Third, the magistrate found it inappropriate to recognize such a privilege because neither Congress nor the EEOC has done so in the years since the passage of the Civil Rights Act of 1964. Id. (The magistrate relied on this same reasoning in refusing to apply the privilege to affirmative action plans. Id.) Next, citing the "strong public policy in favor of private enforcement of the Civil Rights Act as a means of discouraging discrimination," the court found that employees were entitled to any benefit an affirmative action plan might have in establishing their claims since employers also benefited from such plans. Id. Finally, citing the fundamental principles set forth in University of Pennsylvania, the magistrate judge held that it was inappropriate to recognize the self-critical analysis privilege in Title VII cases. Id. Based on the arguments and authorities cited by the magistrate, the district court refused to recognize the privilege of self-critical analysis in Title VII. Id. at 1441.

- J. Zapata v. IBP, Inc., 1994 WL 649322 (D. Kan. 1994) involved a class action suit alleging a pattern and practice of discrimination against Mexicans and Mexican-American employees. Id. at \*1-2. The plaintiffs requested disclosure of the defendant's affirmative action plans. Id. at \*4. Relying on the magistrate judges' reasoning in Aramburu v. Boeing (set forth above), the court refused to recognize the privilege of self-critical analysis to shield the company's affirmative action plans and reports from disclosure. Like the Aramburu court, the court was persuaded by the Supreme Court's reluctance to recognize such a privilege in light of Congress' consideration of the competing concerns and its failure to provide for such a privilege in the thirty-plus years since it enacted the Civil Rights legislation. Id. at \*5 (discussing the Supreme Court's analysis in University of Pennsylvania v. EEOC).
- K. In Etienne v. Mitre Corp., 146 F.R.D. 145 (E.D. Va. 1993), the court rejected the self-critical analysis privilege for documents compiled by the defendant regarding compliance with equal opportunity laws, including a study of the impact of certain actions on protected groups. The employer was a government contractor and therefore subject to equal employment opportunity audits by the Office of

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<sup>1</sup> In University of Pennsylvania, the United States Supreme Court refused to recognize a special common law privilege to protect peer-review materials from disclosure to the EEOC in regard to a claim of discrimination under Title VII. 493 U.S. at 189. The Court reasoned that Congress had considered the relevant competing concerns in this area and had opted not to provide any such privilege for peer review documents. The Court also refused to premise protection from disclosure on the expansion of the First Amendment right of academic freedom. Id. at 199. Similarly, the Court declined to require more than a showing of mere relevance by the EEOC when requesting documents from the university.

Federal Contract Compliance Programs. The court dismissed the argument that the allowing discovery would discourage the production of self-critical analysis because the reports are required by law. Additionally, the court found a strong public interest in allowing disclosure of internal investigations in a private employment discrimination suit and concluded that applying the self-critical analysis privilege would contravene the public interest in vindicating employment rights.

## II. Attorney-Client and Work Product Privileges

A. The essential elements of the attorney-client privilege are:

- 1) Where legal advice of any kind is sought
- 2) from a professional adviser in his capacity as such,
- 3) the communications relating to that purpose
- 4) made in confidence
- 5) by the client
- 6) are at his instance permanently protected
- 7) from disclosure by himself or by the legal adviser
- 8) except the privilege be waived.

Wright & Graham, Federal Practice and Procedure: Evidence § 5473 (1994), citing, 8 Wigmore, Evidence, McNaughton rev. 1961, § 2292, p. 554.

B. In federal courts, the attorney-client privilege applies to communications by corporate employees which concern matters within the scope of their corporate duties, when the employees are aware that the information is being provided to enable counsel to provide legal advice to the corporation. Upjohn Co. v. U.S., 449 U.S. 383 (1981).

C. The work-product privilege was first enunciated in Hickman v. Taylor, 329 U.S. 495 (1947), and codified in Fed. R. Civ. P. 26(b)(3): “a party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party’s representation . . . only upon a showing that the party seeking discovery has substantial need of the materials.” The standard most often cited for protecting a document pursuant to the work-product privilege is as follows:

[T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. [Footnote omitted.] But the converse of this is that even though litigation is already in prospect, there is not work-product immunity for documents prepared in the regular course of business rather than for purposes of the litigation.

Wright & Graham, Federal Practice and Procedure: Evidence § 2024, at 343-46 (1994).

- D. In Hardy, discussed supra, the Company also sought to protect the documents requested by plaintiffs under the attorney-client and work product privileges. The court refused. The court noted that none of the documents were prepared by an attorney, prepared at the direction of an attorney, or addressed to the Company's outside counsel. Some of the documents were addressed or sent to in-house counsel, but there was nothing to indicate that he requested or received the documents, or the information contained in them, in his capacity as legal counsel for the purpose of rendering legal advice, as opposed to his capacity as a corporate manager. In addition, because the documents were not kept in locked cabinets, segregated in any way, or marked "confidential" or "privileged," but were mingled with other personnel documents, they were not treated a confidential.
- E. Sprague v. Thorn Americas, Inc., 129 F.3d 1355 (10<sup>th</sup> Cir. 1997) – This is a lawsuit alleging gender discrimination and sexual harassment. At issue was a memorandum prepared by the in-house counsel addressing the company's disparate treatment of women. The company claimed that it was protected by the attorney-client privilege. The memorandum was prepared for higher management by the in-house counsel acting within the scope of his employment and for the purpose of rendering legal advice. The court found the memorandum to be privileged.

### III. Practical Advice

- A. Review must be at the direction and control of counsel. Protection will not come from passing documents and information through counsel.
- B. Use outside counsel, if possible. Outside counsel appears more objective in the eyes of third parties.
- C. Instruct all employees to cooperate with counsel and to communicate in strictest confidence.
- D. Control the documents. Restrict access to them. Keep them confidential. Mark them as such. Mark them "privileged."
- E. Cite to possible litigation risks.
- F. Do not conduct a review until the company is prepared to deal with the findings.
- G. Make sure management is committed to remedying any problems that are found before they are found.
- H. If a problem is found, fix it and document the remedial actions.
- I. The document should also detail what the company is doing right. You may have to produce it or a judge may look at it in an in camera review.