

IN THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
RACHEL TUDOR,	)
	)
Plaintiff-Intervenor,	)
	)
v.	)
	)
SOUTHEASTERN OKLAHOMA	)
STATE UNIVERSITY, and	)
	)
THE REGIONAL UNIVERSITY	)
SYSTEM OF OKLAHOMA,	)
	)
Defendants.	)

Case No. CIV-15-324-C

**EEOC’S MOTION TO QUASH SUBPOENAS AND FOR PROTECTIVE ORDER  
TO PROHIBIT DEPOSITIONS OF JAMES HABAS AND FORMER EEOC  
INVESTIGATOR KATHY NUSZ AND BRIEF IN SUPPORT**

Pursuant to Rule 26(b) and (c) and Rule 45(d)(3)(A)(iii) and (iv) of the Federal Rules of Civil Procedure, non-party Equal Employment Opportunity Commission (“EEOC”) moves this Court for an order quashing Defendants’ subpoenas to depose former EEOC Oklahoma Chief Receipt/Technical Information Unit Supervisor James Habas and former investigator Kathy Nusz<sup>1</sup> and for a protective order prohibiting such depositions. Specifically, the subpoenas should be quashed because they were not properly served under Rule 45(b)(1), Fed.R.Civ.P. and they are overly broad, cumulative, unduly burdensome, seek irrelevant information, and less burdensome methods are available to obtain the information.

---

<sup>1</sup> Ms. Nusz was employed by the EEOC from August 1999 until she retired in September 2015.

## PRELIMINARY STATEMENT

Defendants Southeastern Oklahoma State University and Regional University System of Oklahoma (“Defendants”) sent deposition subpoenas to former EEOC investigator Kathy Nusz and former charge intake supervisor (now investigator) James Habas, seeking to discover information about the EEOC’s investigation of Plaintiff-Intervenor Dr. Rachel Tudor’s discrimination and retaliation charge against Defendants and the EEOC’s investigation file.

**(Exhs. 1 and 2, Deposition Subpoenas of J. Habas and K. Nusz)** The EEOC is not a party to this litigation. Ms. Nusz was the EEOC investigator assigned to investigate Dr. Tudor’s charge alleging sex discrimination and retaliation by Defendants.

These subpoenas were not properly served under Fed.R.Civ.P. 45(b)(1) because they were not personally delivered to Mr. Habas or Ms. Nusz and neither subpoena was accompanied by attendance and mileage fees as required by Rule 45(b)(1). **(Exh. 3, Declaration of James Habas, ¶ 7; Exh. 4, Declaration of Kathy Nusz, ¶ 6)** As a result, the subpoenas are invalid and should not be enforced.

The subpoenas should also be quashed and a protective order entered under Fed.R.Civ.P. 26 (b) and (c) and 45(d) because deposing Ms. Nusz and Mr. Habas would subject them and the EEOC to undue burden and expense, they do not possess relevant information concerning the underlying facts of this case, their depositions are cumulative of documents and information previously provided to Defendants, and the information sought can be obtained through far less burdensome methods. In addition, these subpoenas appear to seek information protected from discovery by the deliberative process, attorney-client and other applicable privileges.

Neither Mr. Habas nor Ms. Nusz was identified by the parties in their Rule 26(a) disclosures, and Plaintiff advised the EEOC that it does not intend to call Mr. Habas or Ms. Nusz

to testify at trial. These individuals likely would not be permitted to testify at trial regarding the issues in this case. Defense counsel has failed to identify any relevant information concerning the claims and defenses which they believe Mr. Habas or Ms. Nusz may possess. Instead, Defendants assert they possess knowledge about the EEOC's investigation and the location of the investigation materials. None of these matters are relevant to whether Defendants discriminated or retaliated against Dr. Tudor.

When asked why they seek these depositions, defense counsel speculated that Mr. Habas might have "directed" the EEOC's investigation and noted that he signed the Statement authenticating the non-privileged documents produced to Defendants from the investigation file. However, Mr. Habas did not participate in, direct or supervise the investigation nor did he supervise Ms. Nusz. To the contrary, Mr. Habas has no personal knowledge of these matters except that he received a few documents by mail from Dr. Tudor which he immediately forwarded to the investigator. Defense counsel also stated they seek to depose Mr. Habas about the production of documents from the EEOC's investigation file.

There is no question in this case about whether the EEOC conducted an investigation and Defendants cannot challenge the sufficiency of that investigation. In their Answers to Plaintiff DOJ's Complaint, Defendants admit that the EEOC investigated Dr. Tudor's charge. (ECF Docs. 21 and 22, ¶ 10).

When asked to identify specific information Defendants seek regarding the investigation, defense counsel stated they believe a few of Ms. Nusz's interview notes do not contain the names of the witnesses who were interviewed and/or the dates of the interviews. They also indicated they want to question Ms. Nusz about which individuals were interviewed, what documents EEOC received during the investigation, and the "location" of such material.

However, the documents and audio recordings of witness interviews previously produced to Defendant from the EEOC's investigation file show which witnesses were interviewed, the substance of the interviews and the documents obtained during the investigation.

Defense counsel also claim that a few interviews Ms. Nusz conducted during the investigation are not documented in the file. Defendants have not identified these allegedly undocumented interviews. EEOC believes this assertion is incorrect but is willing to provide a sworn statement from Ms. Nusz listing the individuals interviewed.

As set forth above, there are far less burdensome ways for Defendants to obtain the information they allegedly seek. Defendants have the non-privileged portions of the investigation file and a privilege log identifying the documents withheld. As EEOC's counsel advised defense counsel, if Defendants identify Ms. Nusz's notes which they claim do not contain the names of the individuals allegedly interviewed or interview dates, EEOC will provide a sworn declaration setting forth such information, if available. If however the Court does not quash the Nusz subpoena, EEOC requests, in the alternative, a protective order limiting her deposition to one hour and to questions regarding the names of witnesses interviewed and the dates of such interviews.

### **PROCEDURAL BACKGROUND**

1. On April 1, 2016, defense counsel filed a Notice To Take Depositions of James Habas and Kathy Nusz on April 28 and 29, 2016, respectively. (**Exh. 5, Notice To Take Depositions**) The Notice does not specify the subject matter of the depositions. (*Id.*)
2. In early April 2016, a subpoena ordering former EEOC investigator Kathy Nusz to appear for a deposition on April 29, 2016 was left at her home. (**Exh. 2, K. Nusz Subpoena; Exh. 3, Declaration of Kathy Nusz, ¶ 6**) The subpoena was not personally

delivered to Ms. Nusz, and instead, was sent by certified mail. (**Nusz Decl., ¶ 6**) Ms. Nusz was not at her residence when the subpoena arrived and did not sign the certified mail receipt. (*Id.* at ¶ 6) Instead, Ms. Nusz's mail carrier signed for the envelope and left it at her home.<sup>2</sup> (*Id.* at ¶ 6) The subpoena was not accompanied by a witness fee check for attendance and mileage. (*Id.* at ¶ 6)

3. On April 5, 2016, the receptionist at the EEOC's Oklahoma City Office received a subpoena purporting to require James Habas to appear for a deposition. (**Exh. 1, Habas Subpoena**) This subpoena similarly was not personally hand-delivered to Mr. Habas. (**Exh. 3, Declaration of James Habas, ¶ 7**) Although it was apparently sent by certified mail, Mr. Habas did not sign for it and the subpoena was not accompanied by attendance or mileage fees. (**Habas Decl., ¶ 7**) Neither subpoena identifies the subject matter of the deposition. Mr. Habas's subpoena purports to require him to testify as a fact witness.
4. When EEOC attorney Patrick Holman asked defense counsel why Defendants noticed these depositions, defense counsel stated they wanted to depose Mr. Habas and Ms. Nusz about "the investigation" of Dr. Tudor's EEOC charge. Defense counsel also indicated they want to depose Mr. Habas regarding the EEOC's procedure for producing the non-privileged portions of the EEOC's investigation file in response to Defendants' request.
5. On April 11, 2016, EEOC attorney Jennifer Arendes spoke with defense attorney Jeb Joseph to discuss about Defendants' reasons for noticing these depositions of individuals who are not identified in the parties' Rule 26(a) disclosures and possess no personal knowledge of the underlying facts of this case. Defense counsel stated Defendants seek

---

<sup>2</sup> This letter carrier had been previously authorized to sign for packages containing medication for Ms. Nusz's husband. This individual was not authorized to accept certified mail, including subpoenas, directed to Ms. Nusz. (**Exh. 4, Nusz Declaration, ¶ 7**)

to depose Mr. Habas because he signed the letter authenticating the documents from the EEOC's investigation file and allegedly "directed" Ms. Nusz's investigation. Defense counsel stated Defendants want to depose Ms. Nusz because they believe a few of her handwritten notes in the investigation file do not indicate the names of the witnesses being interviewed or the date(s) of the interviews, and they believe a couple of interviews were not documented. **(Exh. 6, Declaration of Jennifer Arendes, ¶ 6)**

6. On April 12, 2016, Ms. Arendes advised defense counsel by telephone and email that Mr. Habas did not supervise Ms. Nusz and had no involvement in the EEOC's investigation of Dr. Tudor's charge. **(Arendes Declaration, ¶ 7 and Exh. A thereto, J. Arendes Email to J. Joseph dated April 12, 2016)** Despite these facts, defense counsel stated they still seek to depose Mr. Habas because he has knowledge of "lots of things in that [EEOC] office." **(Arendes Decl., ¶ 7)** During telephone call, Ms. Arendes again asked defense counsel what specific types of information Defendants believe Ms. Nusz possesses (other than the few items referenced in paragraph 5 above) but defense counsel did not provide specifics. **(Id.)**
7. During this telephone call, Ms. Arendes offered to resolve the dispute regarding Mr. Habas's deposition by providing an affidavit from him authenticating the documents from the investigation file (again) and describing the production of those documents to Defendants. Defense counsel did not respond to this proposed compromise. **(Arendes Decl., ¶ 8)**
8. On April 18, 2016, Ms. Arendes followed up with defense counsel by telephone to determine whether Defendants still sought to depose Mr. Habas and if so, the subject areas they expected to cover in the deposition. Defense counsel did not identify any

topics but agreed to discuss the matter with his co-counsel and get back to Ms. Arendes.

Ms. Arendes again asked what other topics Defendants sought to cover in Ms. Nusz's deposition but did not receive a response. (**Arendes Decl., ¶ 9; J. Arendes 4/18/16**

**Email attached thereto as Exh. B)**

9. EEOC's counsel repeatedly asked defense counsel to identify relevant topics or subject matters about which Mr. Habas and Ms. Nusz allegedly have knowledge as part of their efforts to resolve this disagreement. (**Arendes Decl., ¶ 10 and Exhs. A-E thereto**)

Defense counsel did not identify topics other than those mentioned above. (*Id.*)

10. In an effort to resolve this disagreement, EEOC's counsel offered to provide a supplemental sworn statement from Mr. Habas confirming that he had no involvement in and did not direct the EEOC's investigation and summarizing the procedure for producing the non-privileged portions of the investigation file. Defense counsel would not accept this proposed compromise. (**Arendes Decl., ¶ 11**)

11. Ms. Arendes also asked defense counsel to identify the handful of Ms. Nusz's handwritten notes which Defendants believe are missing witness names and/or interview dates and offered to provide a sworn statement from Ms. Nusz identifying the individuals interviewed and dates, to the extent she can do so. Defense counsel did not respond. (**Arendes Decl., ¶ 12**)

12. During telephone calls and by email on April 19 and 21, 2016, Ms. Arendes asked defense counsel to withdraw these subpoenas in order to avoid this motion to quash. (**Arendes Decl., ¶ 13 and Exhs. C, p. 2 (J. Arendes Email dated April 19, 2016 Email) and E thereto**) Counsel for EEOC emphasized that the testimony of these

witnesses is likely inadmissible, cumulative and irrelevant. Defense counsel acknowledged that Ms. Nusz's personal opinions, recommendations, etc. are irrelevant and largely privileged but refused to withdraw the subpoena or narrow the scope. (**Arendes Decl., ¶ 13**)

13. By email dated April 21, 2016, Ms. Arendes advised defense counsel that after reviewing the investigation file and speaking with Mr. Habas again, it is clear he did not participate in or direct the investigation of Dr. Tudor's charge. (**Exh. E to Arendes Decl.**) Ms. Arendes advised that the EEOC would provide a sworn statement to that effect in support of its motion to quash and once again asked that if Defendants believe Mr. Habas has relevant information concerning the claims and defenses in this case, they advise EEOC which would then reconsider its position. Defense counsel did not do so. (**Arendes Decl., ¶ 14**)

14. Counsel for the EEOC repeatedly conferred with defense counsel in a good faith effort to resolve this dispute.

### **ARGUMENT AND AUTHORITIES**

#### **I. Defendants' Subpoenas Should Be Quashed Because They Were Not Properly Served and Do Not Comply With Fed.R.Civ.P. 45(b)(1)**

Defendants' subpoenas of Mr. Habas and Ms. Nusz are invalid because they were not properly served and do not comply with Fed.R.Civ.P. 45(b)(1) which provides in pertinent part: "serving a subpoena requires delivering a copy to the named person and if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law." *Bank of Oklahoma v. Arnold*, 2008 WL 482860 at \* 2 (N.D. Okla.

Feb. 20, 2008); Rule 45(b)(1), Fed.R.Civ.P.; 9A Wright, Miller, Kane & Marcus, Federal Practice & Procedure Section, § 2454 (3d ed. 2016) (The longstanding interpretation of Rule 45 has been that personal service of subpoenas is required to effectuate the Rule's delivery' requirement.) It is not sufficient to leave a copy of the subpoena at the witness's home. *Id.*

The majority of courts considering the issue have held that Rule 45 requires personal in-hand service. *See, e.g., Chima v. U.S. Dept. of Defense*, 23 Fed.Appx. 721, 724 (9<sup>th</sup> Cir. 2001); *FTC v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1312-13 (D.C.Cir. 1980); *Bowers v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 6739588 at \*3 (D. Kan. Dec. 22, 2011); *Smith v. Midland Brake*, 162 F.R.D. 683, 686 (D. Kan. 1995); *Securities and Exchange Commission v. Art Intellect, Inc.*, 2012 WL 776244 at \*2 (D. Utah (March 7, 2012). Although Rule 45 has been amended several times since 2000, the methods of service did not change. *See* David D. Siegel, Practice Commentaries, 28 U.S.C.A. Fed.R.Civ.P. 45, cmt. C45-9 (West Supp. 2007).

Moreover, witness and mileage fees must be tendered concurrently with the subpoena. Rule 45(b)(1); *CF&I Steel Corp. v. Mitsui & Co.*, 713 F.2d 494, 496 (9<sup>th</sup> Cir. 1983); *Tribulak v. Minirth-Meier-Rice Clinic*, 111 F.3d 135, 135 (8<sup>th</sup> Cir. 1997); *Smith v. Midland Brake, Inc.*, 162 F.R.D. 683, 686 (D. Kan. 1995).

Neither Mr. Habas nor Ms. Nusz was properly served pursuant to Rule 45(b)(1). The subpoena for Mr. Habas was sent by certified mail to the EEOC's office and given to the receptionist, not Mr. Habas. Despite having Ms. Nusz's home address, Defendants similarly did not personally serve her. The subpoenas are also invalid because neither Mr. Habas nor Ms. Nusz received payment for their time or mileage as required by Rule 45(b)(1).

Defendants have not shown they are unable to serve Habas or Nusz and have their business and home addresses, respectively. Because the subpoenas were not properly served and do not comply with Rule 45, they should be quashed.

**II. The Subpoenas Should Be Quashed Because They Exceed The Scope of Rule 26(b) and Producing Ms. Nusz and Mr. Habas For Deposition Would Subject Them and Non-party EEOC To Undue Burden and Expense.**

Fed. R. Civ. P. 45(d)(3)(A)(iv) requires a court to quash or modify a subpoena that subjects a person to undue burden. When a non-party seeks protection from a subpoena, courts apply “the balancing standards—relevance, need, confidentiality, and harm. And even if the information sought is relevant, discovery is not allowed where no need is shown, or where compliance is unduly burdensome or where the potential harm caused by production outweighs the benefit.” *Snoznik v. Jeld-Wen, Inc.*, 259 F.R.D. 217, 222-24 (W.D.N.C. 2009) (quoting *Mannington Mills, Inc. v. Armstrong World Indus., Inc.*, 206 F.R.D. 525, 529 (D. Del. 2002)). Courts give extra consideration to the objections of a non-party, non-fact witness in weighing burdensomeness versus relevance. *See Schaff v. Smithkline Beecham Corp.*, 233 F.R.D. 451, 453 (E.D.N.C. 2005); *Realtime Data, LLC v. MetroPCS Texas, LLC*, 2012 WL 105080 at \*2 (S.D. Cal. 2012); *Whitlow v. Martin*, 263 F.R.D. 507, 512 (C.D. Ill. 2009).

To assess whether the subpoena causes an undue burden it is appropriate to use the standards of Rule 26(b) which consider whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake, and the significance of the proposed discovery in resolving issues. Rule 26(b)(1); *see also Leyb v. Modicon, Inc.*, 881 F. Supp. 420, 424 (S.D. Ind. 1995); *McCall v. Lockheed Martin Corp.*, 2006

U.S. Dist. LEXIS 46772 (S.D. Miss. July 10, 2006).

Fed.R.Civ.P. 26(b)(2)(C) provides that a court must limit the frequency or extent of discovery if it determines that: “(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; . . . or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).” Similarly, Rule 26(c) provides that the court may issue an order to protect a person from annoyance, oppression or undue burden or expense.

In this case, compliance with Defendants’ subpoenas would impose an undue burden on the EEOC, Ms. Nusz and Mr. Habas. The EEOC serves the public interest by handling approximately 90,000 charges per year. (**Arendes Decl., ¶ 16**) The agency has a long-recognized interest in minimizing involvement in litigation in which it is not a party and conserving employee resources. *See Leyb v. Modicon, Inc.*, 881 F. Supp. 420 (S.D. Ind. 1995); *Allen v. International Truck and Engine Corp.*, 2003 WL 1522942 at \*1-2 (S.D. Ind. March 21, 2003). As the *Leyb* court explained:

Because virtually any civil action alleging employment discrimination must have gone through the EEOC . . . before litigation is filed, the EEOC has obvious and well-founded concern about having its investigators spend their time testifying about old investigations instead of conducting current ones. . . . The EEOC has plenty of work to do investigating new complaints, and its principal responsibility is to serve the public as a whole, not to work for the benefit of particular litigants. . . . The possibility that the investigator might testify about [underlying facts] would be present in any case and is not sufficient to outweigh the burden of subjecting the EEOC to depositions of its investigators as a matter of course.

*Id.* at 424-25.

The plaintiff in *Leyb* sought to depose the EEOC investigator about facts discovered

during the investigation. In granting the EEOC's motion to quash and for protective order, the court noted that testimony from an investigator about the results of his investigation is not generally admissible. The court recognized that while the investigator might be able to testify about admissions made by the defendant's representatives during the investigation, this possibility was insufficient to warrant the deposition stating:

Despite the generally permissive approach to discovery . . . , the court does not believe that parties to an employment discrimination case should be able to depose EEOC investigator as a matter of course. Such depositions should not become a routine method to find a short-cut to evidence. . . . It is beyond the scope of this case to catalog the exceptional circumstances that might warrant such discovery, but there are no such exceptional circumstances here.

*Leyb*, 881 F. Supp. at 425. If investigators were allowed to be deposed in every charge or privately filed lawsuit filed, it would substantially damage the agency's ability to discharge its statutory duties. *See, e.g., Jones v. Needham et al.*, No. 15-0978 at \*2-3 (W.D. Okla. Feb. 8, 2016) (copy attached as **Exh. 7**).

Defense counsel seeks to depose these individuals about the "investigation" which is a broad, undefined topic. Most information regarding the investigation is neither relevant nor admissible. Defendants do not dispute that the EEOC performed an investigation of Dr. Tudor's charge. In addition, information or testimony about the EEOC's investigative process is generally not admissible at trial.

In *Jones, supra*, Judge Heaton granted the EEOC's motion to quash a subpoena for the deposition of investigator Nusz. As in the present case, the EEOC produced the non-privileged portions of its investigation file including all factual material. In light of that fact, the court explained that there was no apparent justification for deposing investigator Nusz

regarding the documents submitted to the EEOC. *Jones, supra* at \*2.

In *EEOC v. Unicom Elec., Inc.*, 2007 WL 9359941 at \*1-2 (C.D.Cal. March 9, 2007), the court granted the EEOC's motion to quash the deposition of the investigator as duplicative because the EEOC turned over the investigation file and plaintiff told defendant it did not plan to call the investigator as a witness.

The same is true here. The burden of the deposition substantially outweighs any likely benefit as the EEOC has already produced the non-privileged portions of the investigation file and questions regarding the scope or adequacy of the EEOC's investigation are irrelevant. Deposing Ms. Nusz and Mr. Habas would yield little, if any, benefit to the parties or the resolution of the issues in this case. As in *Leyb* and *Allen, supra*, Defendants cannot demonstrate "exceptional circumstances" necessary to justify deposing these individuals. Defendants already possess most of the information they claim to seek in these depositions.

Defendants apparently seek to depose Nusz and Habas to elicit information with which to challenge the EEOC's reasonable cause determination by attempting to show that it was based on a cursory investigation. In *EEOC et al. v. Bank of Oklahoma*, No. 03-CV-657-EA(C), slip op. at 4 (N.D.Okla. Aug. 11, 2004) (attached as **Exh. 8**), Magistrate Cleary noted that courts have frequently held that parties cannot challenge the sufficiency of the EEOC's investigation and resulting reasonable cause determination and granted the EEOC's motion to quash the deposition subpoena directed to the investigator. *Id.* at 4-5; *see also EEOC v. Keco Indus., Inc.*, 748 F.2d 1097 (6<sup>th</sup> Cir. 1984); *EEOC v. BOK Financial Corp.*, 995 F. Supp.2d 1252, 1253 (D.N.M. 2014); *EEOC v. Chicago Miniature Lamp Works*, 526 F. Supp. 974, 976 (N.D.Ill. 1981).

As the *Chicago Miniature Lamp Works* court explained, “Acceptance of [the defendant’s] theory would entitle every Title VII defendant to litigate as a preliminary matter whether EEOC had a reasonable basis for its determination. . . [This] would effectively make every Title VII suit a two-step action: First, the parties would litigate the question of whether EEOC had a reasonable basis for its initial finding, and only then would the parties proceed to litigate the merits of the action.” 526 F. Supp. at 975. Defendant is entitled to a trial *de novo*. As a result, Magistrate Cleary barred the employer from deposing the investigator to explore the basis for the EEOC’s reasonable cause determination or challenge it. The court granted the EEOC’s motion to quash but ordered it to identify the individuals interviewed during the investigation.

It is unclear exactly what information Defendants could obtain from these depositions which they do not already possess that is relevant to determining whether Defendants discriminated or retaliated against Dr. Tudor. Given that Defendants possess the non-privileged portions of the investigation file (totaling over 4,000 pages), the content of which speaks for itself, it cannot be reasonably argued that the benefit of deposing Ms. Nusz or Mr. Habas outweighs the burden. These documents reflect the facts, interviews and documents obtained during the investigation.

Moreover, given the deliberative process privilege discussed below, their testimony would be limited to authenticating documents (previously done in a sworn statement from Mr. Habas) and regurgitating factual information contained in the investigation file provided to Defendants - neither of which would assist in resolving the claims or defenses; thus, compelling the deposition testimony of these individuals would be duplicative, unnecessary

and subject them and EEOC to unnecessary and undue burden and expense. They and EEOC attorneys would be required to spend significant time preparing for and attending depositions which would provide little, if any, relevant information.

The burden imposed on the EEOC of allowing these depositions is especially significant because it opens the door to thousands of investigators being pulled away from their heavy caseloads for depositions by private litigants in *de novo* lawsuits. This court should spare the EEOC the burden, expense and time-consuming exercise of being second-guessed by litigants who are unhappy with its procedures and decisions, particularly here where it is not a party to the litigation. *Lang v. Kohl's Food Stores, Inc.*, 185 F.R.D. 542, 549-550 (W.D. Wis. 1998).

### **III. Defendants' Subpoenas Should Be Quashed To Prevent Disclosure of Privileged Information.**

This Court should also quash Defendants' subpoenas because they are calculated to "require[] disclosure of privileged or other protected matter." Fed.R.Civ.P. 45(d)(3)(A)(iii). An EEOC investigator's pre-determination decisions, mental impressions, analyses, opinions and recommendations are protected from disclosure by the deliberative process privilege. *Baker v. Dupnik*, 2010 WL 9561922 at \*6 (D. Ariz. 2010) The purpose of the privilege is to "prevent injury to the quality of agency decisions," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975), and protect the integrity of the decision-making process. *Stewart v. U.S. Dept. of Interior*, 554 F.3d 1236 (10th Cir.2009). It rests, in part, on the same need for open communication that supports the attorney-client privilege, as well as the long recognized need for government officials to formulate and provide advice without fear that private

deliberative comment will become public. *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 70 (D.C. Cir. 1974). Courts have applied the privilege to preclude questioning EEOC investigators about:

[C]onclusions, interpretations, or recommendations that the investigator formulated . . . ; the investigator's evaluation of the evidence including whether certain evidence unknown to him at the time of his investigation would have made a difference in his evaluation . . . why actions were or were not taken throughout the course of the investigation . . . ; about how the EEOC intended to use the evidence in its possession and inferences that could be drawn from that evidence . . . the relative importance the EEOC staff placed on some facts over others . . . ; and whether . . . the investigator considered certain documents to be problematic. . .

*Baker*, 2010 WL 9561922 at \*6 (citations omitted).

Defense counsel will likely question Ms. Nusz about her opinions, decisions and reasoning and the EEOC's decisions about its investigation and findings. However, the deliberative process privilege would preclude testimony about such privileged information.

### **CONCLUSION**

For the foregoing reasons, non-party EEOC respectfully requests that the Court grant its Motion To Quash the subpoenas directed to Mr. Habas and Ms. Nusz and issue a protective order barring their depositions. If Defendants identify the notes which they believe are missing witness names/interview dates, the EEOC will also provide a sworn statement from Ms. Nusz which sets forth such information, the extent available, and listing the individuals interviewed during the investigation. In the alternative, EEOC requests that the Court issue a protective order limiting Ms. Nusz's deposition to one hour about the names and dates of witness interviews.

Respectfully submitted,

/s/ Jennifer L. Arendes

JENNIFER L. ARENDES

Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION

St. Louis District Office

1222 Spruce St., Room 8.1

St. Louis, Missouri 63103

(314) 539-7916 (phone)

(314) 539-7895 (fax)

[Jennifer.arendes@eeoc.gov](mailto:Jennifer.arendes@eeoc.gov)

**Certificate of Service**

I hereby certify that on this 27th day of April 2016, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Allan Townsend  
Delora Kennebrew  
Meredith Burrell  
Shayna Bloom  
[Allan.townsend@usdoj.gov](mailto:Allan.townsend@usdoj.gov)  
[Delora.kennebrew@usdoj.gov](mailto:Delora.kennebrew@usdoj.gov)  
[Meredith.burrell@usdoj.gov](mailto:Meredith.burrell@usdoj.gov)

*Attorneys for United States of America*

Brittany Novotny  
[Brittany.novotny@gmail.com](mailto:Brittany.novotny@gmail.com)

Jillian Weiss  
Ezra Young  
[jtweiss@jtweisslaw.com](mailto:jtweiss@jtweisslaw.com)  
[eyoung@jtweisslaw.com](mailto:eyoung@jtweisslaw.com)

*Attorneys for Plaintiff-Intervenor*

Dixie Coffey  
Jeb Joseph  
[Dixie.coffey@oag.gov](mailto:Dixie.coffey@oag.gov)  
[Jeb.jospeh@oag.ok.gov](mailto:Jeb.jospeh@oag.ok.gov)

*Attorneys for Defendants*

/s/ Jennifer L. Arendes

AO 88A (Rev. 12/13) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Oklahoma

UNITED STATES OF AMERICA

Plaintiff

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, ET AL.,

Defendant

Civil Action No. CIV-15-324-C

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: James E. Habas, Chief Receipt/Technical Information Unit
U.S. EEOC Oklahoma Area Office, 215 E. Dean A. McGee Ave., Ste. 524, OKC, OK 73102
(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Table with 2 columns: Place (D&R Reporting & Video, 400 N. Walker, Ste. 160, Oklahoma City, OK 73102) and Date and Time (04/28/2016 9:00 am)

The deposition will be recorded by this method: stenographic

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached - Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 04/01/2016

CLERK OF COURT

OR

/s/Jeb E. Joseph

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Defendants SE Okla. State University & Regional University System of Okla., who issues or requests this subpoena, are:

Dixie L. Coffey and Jeb E. Joseph, Assistant Attorneys General, 313 NE 21st St., Oklahoma City, OK 73105, dixie.coffey@oag.ok.gov, jeb.joseph@oag.ok.gov, 405.521.3921

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).



AO 88A (Rev. 12/13) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. CIV-15-324-C

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

I received this subpoena for *(name of individual and title, if any)* \_\_\_\_\_  
on *(date)* \_\_\_\_\_.

I served the subpoena by delivering a copy to the named individual as follows: \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I returned the subpoena unexecuted because: \_\_\_\_\_  
\_\_\_\_\_.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of  
\$ \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.:

AO 88A (Rev. 12/13) Subpoena to Testify at a Deposition in a Civil Action (Page 3)

**Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)****(c) Place of Compliance.**

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
  - (i) is a party or a party's officer; or
  - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

**(d) Protecting a Person Subject to a Subpoena; Enforcement.**

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(g) Contempt.**

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

AO 88A (Rev. 12/13) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Oklahoma

UNITED STATES OF AMERICA

Plaintiff

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, ET AL.

Defendant

Civil Action No. CIV-15-324-C

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To:

Kathy Nusz

14731 W. Karly Ln., Yukon, OK 73099

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Table with 2 columns: Place (D&R Reporting & Video, 400 N. Walker, Ste. 160, Oklahoma City, OK 73102) and Date and Time (04/29/2016 9:00 am)

The deposition will be recorded by this method: stenographic

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached - Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(c) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 04/01/2016

CLERK OF COURT

OR

/s/Jeb E. Joseph

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Defendants SE Okla. State University & Regional University System of Okla., who issues or requests this subpoena, are:

Dixie L. Coffey and Jeb E. Joseph, Assistant Attorneys General, 313 NE 21st St., Oklahoma City, OK 73105, dixie.coffey@oag.ok.gov, jeb.joseph@oag.ok.gov, 405.521.3921

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).



AO 88A (Rev. 12/13) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. CIV-15-324-C

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

I received this subpoena for *(name of individual and title, if any)* \_\_\_\_\_  
on *(date)* \_\_\_\_\_.

I served the subpoena by delivering a copy to the named individual as follows: \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I returned the subpoena unexecuted because: \_\_\_\_\_  
\_\_\_\_\_.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of  
\$ \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_  
\_\_\_\_\_ *Server's signature*

\_\_\_\_\_ *Printed name and title*

\_\_\_\_\_ *Server's address*

Additional information regarding attempted service, etc.:

AO 88A (Rev. 12/13) Subpoena to Testify at a Deposition in a Civil Action (Page 3)

**Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)****(c) Place of Compliance.**

**(1) For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
  - (i) is a party or a party's officer; or
  - (ii) is commanded to attend a trial and would not incur substantial expense.

**(2) For Other Discovery.** A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

**(d) Protecting a Person Subject to a Subpoena; Enforcement.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

**(A) Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

**(B) Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

**(A) When Required.** On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

**(B) When Permitted.** To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

**(C) Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

**(1) Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

**(A) Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

**(B) Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

**(C) Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

**(D) Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

**(A) Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

**(B) Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(g) Contempt.**

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

DECLARATION OF JAMES E. HABAS

I, James E. Habas, state that I am over the age of 18 and make this Declaration based on personal knowledge.

1. During 2011 and 2012, I was employed as the Chief Receipt/Technical Information Unit Supervisor for the Equal Employment Opportunity Commission's Oklahoma Area Office in Oklahoma City. During 2015, I became an investigator in that office.
2. As the Chief Receipt/Technical Information Unit Supervisor in 2011 and 2012, my duties generally included, among other things, overseeing intake/receipt of charges filed with our office, maintaining office equipment, receiving calls from stakeholders and referring them to appropriate staff, outreach activities, supervising 3-4 administrative personnel. I did not supervise investigators.
3. In that supervisor position, I was not responsible for and did not participate in, direct or supervise investigations of charges filed with the EEOC.
4. I do not recall speaking with charging party Dr. Rachel Tudor. It appears she spoke with the EEOC's St. Louis District office in 2011. Joe Wilson in the St. Louis office notified me of her call and asked that I check to see whether our office had any correspondence regarding her charge. He also gave me her phone number and I returned her call as a courtesy to determine who should assist her.
5. In 2011, I frequently handled calls from charging parties and employers because our office is relatively small and I was in the office most days whereas investigators often conduct interviews and perform onsite observations and unavailable. If charging parties wanted to submit additional documents or information in support of their charges, I asked them to send it to our office and I forwarded the material to the assigned investigator or supervisor. If they asked about the status of a charge, I



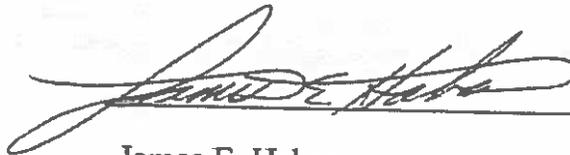
would tell them whether it was open or closed, and advise them to contact the assigned investigator for more information.

6. Based on an email in the file, it appears Dr. Tudor sent a few documents to me which I forwarded to the investigator. I did not take any action in response to these documents other than sending them to Ms. Nusz.
7. In early April 2016, the receptionist at our office received an envelope containing a subpoena for my deposition. A copy of the envelope is attached as Exhibit 1. The envelope indicates that the subpoena was sent by certified mail. I was not personally served with the subpoena by hand-delivery and did not sign the certified mail receipt. Rather, I was given the subpoena by the receptionist in the Oklahoma City office. This individual was not authorized to accept subpoenas on my behalf and I do not know whether she signed the certified mail receipt.
8. I am not aware of anyone attempting to serve me with a subpoena by hand-delivery in connection with this matter.
9. The deposition subpoena I received was not accompanied by a check for attendance or mileage fees.
10. I did not participate in, direct or supervise the investigation of Dr. Rachel Tudor's charge filed with the EEOC. In addition, I did not supervise Kathy Nusz, the investigator who conducted the investigation of these charges.
11. I have no personal knowledge about the EEOC's investigation of Dr. Tudor's charge, including witness interviews and facts gathered. I also have no personal knowledge regarding the EEOC's reasonable cause determination regarding these charges and the facts underlying this lawsuit by the Department of Justice.

12. The non-privileged documents from the Tudor charge investigation file which the EEOC produced to Defendants were provided under Section 83 of the EEOC's Compliance Manual. The EEOC produced all non-privileged documents from the investigation file pursuant to its normal policies and procedures for responding to such requests. As set forth in my Statement accompanying the documents produced to Defendants, they are true and accurate copies of the documents in the Tudor charge investigation files. Defendants did not submit a Freedom of Information Act request.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing information is true and accurate to the best of my knowledge.

Sworn to this 26 day of April, 2016.

A handwritten signature in black ink, appearing to read "James E. Habas", written over a horizontal line.

James E. Habas

PENGAD-Exposure, M. J.  
**EXHIBIT**  
3-1



OFFICE OF ATTORNEY GENERAL  
STATE OF OKLAHOMA  
313 N.E. 21ST  
OKLAHOMA CITY, OK 73105

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT  
OF THE RETURN ADDRESS FOLD ALONG DOTTED LINE  
**CERTIFIED MAIL**



91 7199 9991 7034 7005 9168

OKLAHOMA CITY  
OK 73105  
04 APR 16  
PM 4L



U.S. POSTAGE >>> PITNEY BOWES  
ZIP 73105 \$ 006.73<sup>5</sup>  
02 1M  
0001391524 APR 04 2016

James Habas  
Chief Receipt/Technical Information Unit  
U.S. EEOC Oklahoma Area Office  
215 E. Dean A. McGee Ave., Ste. 524  
Oklahoma City, OK 73102

### DECLARATION OF KATHY NUSZ

I, Kathy Nusz, state that I am over the age of 18 and make this Declaration based on personal knowledge.

1. I was employed by the Equal Employment Opportunity Commission's Oklahoma City Office as an investigator from August 1999 until I retired in September 2015. In that position, I investigated charges of discrimination filed with the agency alleging violations of Title VII and other federal employment discrimination laws. My supervisor in 2011 and 2012 was Holly Cole. James Habas was not my supervisor.
2. I investigated the charge of discrimination and retaliation filed with the EEOC by Dr. Rachel Tudor against Southeastern Oklahoma State University and The Regional University System of Oklahoma, Charge No. 564-2011-00849. No one else participated in conducting this investigation with me.
3. During my investigation of Dr. Tudor's charges, I gathered and reviewed thousands of documents and conducted numerous witness interviews. I made notes of each witness interview. All of my notes concerning these interviews are in the charge file.
4. James Habas was not responsible for and did not participate, direct or supervise my investigation of Dr. Tudor's charges filed with the EEOC.
5. During 2011, I maintained a caseload of about sixty charges at a time. I have no personal knowledge of the facts underlying Dr. Tudor's charge and the claims in this lawsuit.
6. In early April 2016, the subpoena attached hereto as Exhibit 1 ordering me to appear for a deposition on April 29, 2016 was left at my home by a U.S. Postal Service mail carrier. The subpoena was not personally delivered to me, and instead, appears to have been sent by certified mail. A copy of the envelope is attached to this

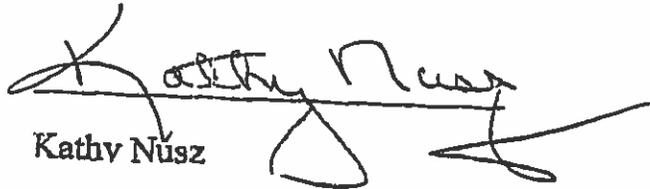


have been sent by certified mail. A copy of the envelope is attached to this Declaration as Exhibit 2. I was not home when the subpoena was delivered and I did not sign the certified mail receipt. Instead, the letter carrier signed for the envelope and left it at my home. The subpoena was not accompanied by a witness fee check for attendance and mileage.

7. This letter carrier was authorized by my husband to sign for packages containing his medication. I did not authorize this individual or anyone else to accept certified mail on my behalf, including this subpoena.
8. I am not aware of anyone attempting to serve me with a subpoena by hand-delivery in connection with this matter.
9. The deposition subpoena I received was not accompanied by a check for attendance or mileage fees.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing information is true and accurate to the best of my knowledge.

Sworn to this <sup>26<sup>th</sup></sup> day of April, 2016.

  
Kathy Nusz

AO 88A (Rev. 12/13) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Oklahoma

UNITED STATES OF AMERICA

Plaintiff

v.

SOUTHEASTERN OKLAHOMA STATE  
UNIVERSITY, ET AL.,

Defendant

Civil Action No. CIV-15-324-C

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: James E. Habas, Chief Receipt/Technical Information Unit  
U.S. EEOC Oklahoma Area Office, 215 E. Dean A. McGee Ave., Ste. 524, OKC, OK 73102  
(Name of person to whom this subpoena is directed)

**Testimony:** YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: D&R Reporting & Video 400 N. Walker, Ste. 160 Oklahoma City, OK 73102	Date and Time: 04/28/2016 9:00 am
--	--------------------------------------

The deposition will be recorded by this method: stenographic

**Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 04/01/2016

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/Jeb E. Joseph

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Defendants  
SE Okla. State University & Regional University System of Okla., who issues or requests this subpoena, are:

Dixie L. Coffey and Jeb E. Joseph, Assistant Attorneys General, 313 NE 21st St., Oklahoma City, OK 73105,  
dixie.coffey@oag.ok.gov, jeb.joseph@oag.ok.gov, 405.521.3921

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).



AO 88A (Rev. 12/13) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. CIV-15-324-C

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

I received this subpoena for *(name of individual and title, if any)* \_\_\_\_\_  
on *(date)* \_\_\_\_\_.

I served the subpoena by delivering a copy to the named individual as follows: \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I returned the subpoena unexecuted because: \_\_\_\_\_

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of  
\$ \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.:

AO 88A (Rev. 12/13) Subpoena to Testify at a Deposition in a Civil Action (Page 3)

## Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

## (c) Place of Compliance.

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
  - (i) is a party or a party's officer; or
  - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

## (d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

## (e) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has, must not use or disclose the information until the claim is resolved, must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

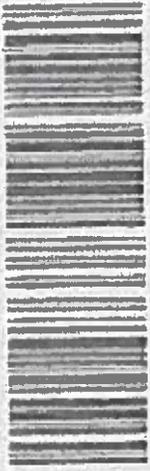
(g) *Contempt.*

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.



OFFICE OF ATTORNEY GENERAL  
STATE OF OKLAHOMA  
313 N.E. 41ST  
OKLAHOMA CITY, OK 73105

CERTIFIED MAIL



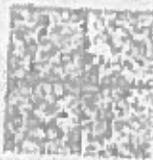
93 7199 9993 7034 7005 9195

73099856291

Kathy Nusz  
14731 W. Kathy Ln.  
Yukon, OK 73099



UNDELIVERABLE  
ON 3/30  
ON APR 1/15  
5:54 PM



US POSTAGE METERS  
APR 13 105 \$ 006.73  
0901291534 APR 04 201



**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

Plaintiff-Intervenor,

v.

Case No. CIV-15-324-C

SOUTHEASTERN OKLAHOMA STATE  
UNIVERSITY, and

THE REGIONAL UNIVERSITY SYSTEM  
OF OKLAHOMA,

Defendants.

**NOTICE TO TAKE DEPOSITIONS**

**TO: All Counsel of Record**

NOTICE IS HEREBY GIVEN pursuant to Rule 30(b)(1) of the Federal Rules of Civil Procedure, that Defendants Southeastern Oklahoma State University and the Regional University System of Oklahoma will take the deposition of the following individuals at the following dates, times, and locations listed below:

NAME	DATE	TIME	LOCATION
James Habas	April 28, 2016, and each day thereafter as necessary	9:00 a.m.	D&R Reporting 400 N. Walker, Suite 160 Oklahoma City, OK 73102 Email: <a href="mailto:depo@drreporting.com">depo@drreporting.com</a>
Kathy Nusz	April 29, 2016, and each day thereafter as necessary	9:00 a.m.	D&R Reporting 400 N. Walker, Suite 160 Oklahoma City, OK 73102 Email: <a href="mailto:depo@drreporting.com">depo@drreporting.com</a>

Dated this 1st day of April 2016.



Respectfully submitted,

/s/ Jeb E. Joseph

**DIXIE L. COFFEY, OBA #11876**

**JEB E. JOSEPH, OBA #19137**

**KINDANNE JONES, OBA #11374**

Assistant Attorneys General Oklahoma

Attorney General's Office

Litigation Division

313 NE 21st Street

Oklahoma City, OK 73105

Telephone: 405.521.3921

Facsimile: 405.521.4518

*Attorneys for Defendants Southeastern Oklahoma  
State University and The Regional University System  
of Oklahoma*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of April 2016, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Allan Townsend  
Delora Kennebrew  
Meredith Burrell  
US DEPT. OF JUSTICE CIVIL RIGHTS DIVISION-DC  
950 Pennsylvania Avenue NW Rm 49258 PHB  
Washington, DC 20530  
Email: allan.townsend@usdoj.gov  
delora.kennebrew@usdoj.gov  
meredith.burrell@usdoj.gov  
*Attorneys for United States of America*

Brittany Novotny  
NATIONAL LITIGATION LAW GROUP, PLLC  
42 Shepherd Center  
2401 NW 23rd Street  
Oklahoma City, OK 73107  
Email: bnovotny@nationlit.com  
*Attorney for Intervenor Plaintiff*

Jillian Weiss  
Ezra Young  
LAW OFFICE OF JILLIAN T. WEISS, P.C.  
PO Box 642  
Tuxedo Park, NY 10987  
Email: jtweiss@jtweisslaw.com  
Email: eyoung@jtweisslaw.com  
*Attorney for Intervenor Plaintiff*

/s/Jeb E. Joseph  
Jeb E. Joseph

DECLARATION OF JENNIFER L. ARENDES

I, Jennifer L. Arendes, being of lawful age, state that I make this declaration based upon my personal knowledge and records of non-party Equal Employment Opportunity Commission.

1. I am employed as a trial attorney in the EEOC's St. Louis District Office.
2. On April 4, 2016, Patrick Holman, trial attorney in the EEOC's Oklahoma Area Office, received the Notice of Depositions filed by Defendants regarding the depositions of former EEOC investigator Kathy Nusz and former Oklahoma EEOC Chief Receipt/Technical Information Unit Supervisor (now investigator) James Habas.
3. On or about April 5, 2016, the receptionist at the EEOC's Oklahoma Area Office received an envelope containing the subpoena for Mr. Habas's deposition. The envelope indicates that the subpoena was sent by certified mail. He advised that the subpoena was not accompanied by a check for attendance or mileage.
4. Kathy Nusz advised me that in early April 2016, a subpoena ordering her to appear for a deposition on April 29, 2016 was left at her home. She stated the subpoena was not personally delivered to her, and instead, was sent by certified mail. Ms. Nusz stated she did not sign the certified mail receipt. Instead, she said her USPS mail carrier signed for the envelope and left it at her home. She also advised that the subpoena was not accompanied by a check for attendance and mileage.
5. EEOC attorney Patrick Holman spoke with defense counsel Dixie Coffey to ask why defendants want to depose Mr. Habas and Ms. Nusz. Mr. Holman advised me that Ms. Coffey stated they want to depose Ms. Nusz "about the investigation" of Dr. Tudor's charge. Defense counsel indicated they want to depose Mr. Habas regarding



the process used to produce the non-privileged portions of the EEOC's investigation file in response to Defendants' request.

6. On April 11, 2016, I called defense attorney Jeb Joseph to inquire further about Defendants' reasons for taking these depositions of individuals who are not identified in the parties' Rule 26(a) disclosures and possess no personal knowledge of the underlying facts of Dr. Tudor's charge. Defense counsel stated they seek to depose Mr. Habas because he signed the letter from the EEOC authenticating the documents from the investigation file that were produced to Defendants and he "directed" Ms. Nusz's investigation. Defense counsel stated Defendants want to depose Ms. Nusz because they believe a few of her handwritten notes in the investigation file do not indicate the names of the witnesses being interviewed or the date(s) of those interviews. He also indicated that they believe there were some interviews during the EEOC's investigation which are not documented in the file.
7. On April 12, 2016, I advised defense counsel by telephone and email that Mr. Habas did not supervise Ms. Nusz and had no involvement in and did not direct the EEOC's investigation of Dr. Tudor's charge. **(Exh. A hereto, J. Arendes Email to J. Joseph dated April 12, 2016)** Despite these facts, defense counsel stated they still seek to depose Mr. Habas because he has knowledge of "lots of things in that office." During this April 12 telephone call, I again asked defense counsel what specific types of information Defendants believe Ms. Nusz possesses (other than a few allegedly missing names/dates in her interview notes and the identities of all individuals interviewed) but defense counsel did not provide any specifics. The EEOC can provide a list of the individuals interviewed during the investigation.

8. During the April 12, 2016 call, I offered to resolve the dispute regarding Mr. Habas's deposition by providing a sworn statement from him authenticating the documents from the investigation file (again) and describing the process used in producing those documents to Defendants. Defense counsel did not respond to this proposal.
9. On April 18, 2016, I followed up with defense counsel by telephone to determine whether Defendants still sought to depose Mr. Habas, and if so, the subject areas that might be covered in the deposition. Defense counsel did not identify any topics but agreed to discuss the matter with his co-counsel and let me know. I asked again what other topics Defendants sought to cover in Ms. Nusz's deposition but defense counsel did not respond. (**See J. Arendes 4/18/16 Email attached hereto as Exh. B**)
10. In numerous telephone conversations and emails, I conferred with defense counsel to attempt to determine whether there are relevant topics or subject matters about which Mr. Habas and Ms. Nusz allegedly have knowledge and could be deposed. (**See Exhs. A-E hereto**) Defense counsel did not identify any topics other than those mentioned above and said the individuals have knowledge about the EEOC's investigation and related documents.
11. In an effort to resolve this disagreement, I offered to provide a supplemental sworn statement from Mr. Habas confirming that he had no involvement in and did not direct the EEOC's investigation and summarizing the procedure for producing the non-privileged portions of the investigation file to Defendants. Defense counsel would not accept this proposed compromise.
12. I also asked defense counsel to identify the handful of Ms. Nusz's notes which defense counsel believe are missing witness names and/or interview dates and offered

to provide a sworn statement from Ms. Nusz identifying the individuals interviewed, the names and dates, if any, that are missing from her notes, to the extent she recalls them from five years ago. Defense counsel did not respond.

13. During telephone calls and by email on April 19 and 21, 2016, I asked defense counsel to withdraw these subpoenas. (Exhs. C and E hereto) I stated the testimony of these witnesses is cumulative, irrelevant, and likely inadmissible. Defense counsel acknowledged that Ms. Nusz's personal opinions, recommendations, etc. are irrelevant and largely privileged but refused to withdraw the subpoena or narrow the scope.
14. By email dated April 21, 2016, I advised defense counsel that after reviewing the one document he identified from the investigation file and the remainder of the investigation file and speaking with Mr. Habas again, he had no involvement in and did not direct the EEOC's investigation of Dr. Tudor's charge. (Exh. E hereto) In this email, I stated the EEOC would provide a sworn statement to that effect in support of its motion to quash. Again, I asked that if Defendants believe Mr. Habas has relevant information concerning the claims and defenses in this case, defense counsel advise EEOC which would then reconsider its position. Defense has not done so.
15. Mr. Holman and I have conferred in good faith with defense counsel in an effort to resolve this dispute but have been unable to do so.
16. The EEOC handles approximately 90,000 administrative charges each year.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing information is true and accurate to the best of my knowledge.

Sworn to this 27th day of April, 2016.

A handwritten signature in black ink, appearing to read 'Jennifer L. Arendes', written over a horizontal line.

Jennifer L. Arendes

**JENNIFER ARENDES - US v. Southeastern Okla. State Univ. - Habas and Nusz subpoenas**

---

**From:** JENNIFER ARENDES  
**To:** jeb.joseph@oag.ok.gov  
**Date:** 4/12/2016 5:48 PM  
**Subject:** US v. Southeastern Okla. State Univ. - Habas and Nusz subpoenas  
**CC:** HOLMAN, PATRICK

---

Mr. Joseph,

Thank you for speaking with me again today about the deposition subpoenas of Ms. Nusz and Mr. Habas. As mentioned, I have been advised that Mr. Habas was not Ms. Nusz's supervisor and did not direct or participate in this investigation (as you indicated last time we spoke).

As Patrick Holman advised Ms. Coffey, we are willing to provide an affidavit regarding the production of the investigation file by the EEOC that authenticates the documents and describes the procedure for production.

Please let me know in the next few days whether you still wish to depose Mr. Habas, and if so, identify the relevant topics about which you believe he has knowledge.

I will review the investigation file when I receive it and get back to you regarding Ms. Nusz's deposition. You indicated that your office seeks to question her about witness interviews she conducted and her notes of those interviews. As I indicated, while there may be some factual matters concerning those interviews and possibly her notes setting forth facts obtained during the interviews, we believe her mental impressions, opinions, recommendations, discussions with legal and her supervisors, as well as other matters are privileged and not discoverable.

Please let me know if there are other topics and subject areas you seek to ask Ms. Nusz about. We are trying to understand the types of information you are seeking to obtain from Ms. Nusz so we can attempt to resolve the disagreement regarding her deposition.

As we discussed, neither plaintiff nor defendant has identified either of these individuals in its Rule 26 disclosures so it is unclear what information you believe they possess that is relevant to the claims or defenses in the lawsuit. I look forward to hearing from you.

Jennifer

Jennifer Arendes  
Trial Attorney  
Equal Employment Opportunity Commission  
1222 Spruce St.  
Rm. 8.100  
St. Louis, MO 63103  
office: (314) 539-7916  
cell: (314) 303-1915  
fax: (314) 539-7893  
[jennifer.arendes@eoc.gov](mailto:jennifer.arendes@eoc.gov)



**JENNIFER ARENDES - US v. Southeastern Okla Univ.**

---

**From:** JENNIFER ARENDES  
**To:** jeb.joseph@oag.ok.gov  
**Date:** 4/18/2016 4:49 PM  
**Subject:** US v. Southeastern Okla Univ.

---

Jeb

Just want to follow up on my call to you this afternoon since I did not hear from you in response to my last email. You advised that your office still wants to depose Jim Habas even though he did not supervise Ms. Nusz during the investigation and did not supervise/participate in the investigation of the Tudor charge.

When I asked what subject matters you believe would be covered in a deposition of Mr. Habas, you did not identify any. I asked if the inquiry would concern production of the EEOC's file and noted that Dixie and Patrick discussed a possible affidavit in lieu of this deposition.

You agreed to check with Dixie and let me know tomorrow morning.

I also advised that we are not available for any depositions on April 28 or 29, the dates your office unilaterally selected in the subpoenas.

Please let me know why you believe it is necessary to depose Mr. Habas and whether there are any other areas of inquiry you anticipate for Ms. Nusz's deposition (besides the questions you mentioned in our earlier call regarding notes of certain witness interviews) so we can determine whether we need to file a motion to quash and/or for protective order regarding both depositions.

Thank you,  
Jennifer

Jennifer Arendes  
Trial Attorney  
Equal Employment Opportunity Commission  
1222 Spruce St.  
Rm. 8.100  
St. Louis, MO 63103  
office: (314) 539-7916  
cell: (314) 303-1915  
fax: (314) 539-7893  
[jennifer.arendes@eoc.gov](mailto:jennifer.arendes@eoc.gov)



**JENNIFER ARENDES - RE: US v. Southeastern Okla. State Univ. - Habas and Nusz subpoenas**

---

**From:** Jeb Joseph <jeb.joseph@oag.ok.gov>  
**To:** JENNIFER ARENDES <JENNIFER.ARENDES@EEOC.GOV>  
**Date:** 4/19/2016 4:12 PM  
**Subject:** RE: US v. Southeastern Okla. State Univ. - Habas and Nusz subpoenas  
**CC:** PATRICK HOLMAN <PATRICK.HOLMAN@EEOC.GOV>, Dixie Coffey <dixie.coffey@oag.ok.gov>, Lori Cornell <lori.cornell@oag.ok.gov>

---

Dear Jennifer,

We tried calling you to talk about the Nusz/Habas depositions, and the other issues you've raised in your emails and telephone conversations with me, but you did not answer. We left you a voicemail message, so just give us a call back at your convenience. You told me last week that you would get investigation file for the Ms. Nusz's investigation and then get back to me about subject areas, but I have still not heard from you in that regard. I'm hopeful that your information there will help us refine our use of Ms. Nusz's time (and Mr. Habas' time, for that matter).

Thank you in advance for your time and consideration.

-Jeb

Jeb E. Joseph  
Assistant Attorney General  
Litigation Division  
Office of the Attorney General  
313 N.E. 21st Street  
Oklahoma City, OK 73105  
(405) 522-8940 - Office  
(405) 521-4518 - Fax

This email may contain material that is confidential, privileged and/or attorney work product for the sole use of the intended recipient. Any review, reliance upon, or distribution by others, or forwarding without express permission is strictly prohibited. If you are not the intended recipient, please contact the sender and delete all copies.



Help conserve trees and space. Don't print this e-mail unless it's really necessary.

---

**From:** JENNIFER ARENDES [JENNIFER.ARENDES@EEOC.GOV]  
**Sent:** Tuesday, April 12, 2016 5:49 PM  
**To:** Jeb Joseph  
**Cc:** PATRICK HOLMAN  
**Subject:** US v. Southeastern Okla. State Univ. - Habas and Nusz subpoenas





**JENNIFER ARENDES - RE: US v. Southeastern Okla. State Univ. - Habas and Nusz subpoenas**

---

**From:** JENNIFER ARENDES  
**To:** Joseph, Jeb  
**Date:** 4/20/2016 6:33 PM  
**Subject:** RE: US v. Southeastern Okla. State Univ. - Habas and Nusz subpoenas

---

Jeb,

Thank you for talking with me again today about these two depositions. However, your email misstates several items regarding our communications. For example, in our call last week, I stated Mr. Habas advised me that he did not investigate this charge or direct the investigation (as you indicated). I never said he had absolutely no contact with Dr. Tudor. I do not have time right now to address the other inaccuracies in your email but do not agree that it correctly characterizes our discussions.

I will review the document you mentioned this afternoon, speak with Mr. Habas and finish reviewing the last portion of the file. During our call today, I repeatedly asked you what information you believe Mr. Habas and Ms. Nusz have that could be relevant to the claims and defenses in this case. You stated that was not the standard and instead stated they know who was interviewed and what documents and information were given to the EEOC. I still do not understand what relevance that has to the issues in this lawsuit.

As you acknowledged, neither of them have personal knowledge of the underlying facts as they were not involved in the interactions between Dr. Tudor and the University.

I will call you tomorrow.

Jennifer

Jennifer Arendes  
Trial Attorney  
Equal Employment Opportunity Commission  
1222 Spruce St.  
Rm. 8.100  
St. Louis, MO 63103  
office: (314) 539-7916  
cell: (314) 303-1915  
fax: (314) 539-7893  
[jennifer.arendes@eEOC.gov](mailto:jennifer.arendes@eEOC.gov)

>>> Jeb Joseph <jeb.joseph@oag.ok.gov> 4/20/2016 5:22 PM >>>

Jennifer,

Thank you for visiting with me just now. During our conversation you acknowledged that Mr. Habas had told you he had no involvement or contact with the complainant in this case. However, during our conversation I provided examples of additional information suggesting that not to be the case. It is my understanding that based on the information I provided to you, you are going to check again with Mr. Habas to address and assess (among other things) his direct communication with the Plaintiffs in this case going back to as early as April of 2011. Please keep in mind that Mr. Habas's contacts with the Plaintiff-Intervenor is just one area of information which we believe is discoverable. There are likely multiple others. Regardless, you also said that you would also attempt to finish going through the case file, and talk to Mr. Habas again. You said that after you have done so, you will call me back.



**JENNIFER ARENDES - US v. Southeastern Okla Univ - J. Habas subpoena**

---

**From:** JENNIFER ARENDES  
**To:** jeb.joseph@oag.ok.gov  
**Date:** 4/21/2016 3:23 PM  
**Subject:** US v. Southeastern Okla Univ - J. Habas subpoena  
**CC:** Allan.Townsend@usdoj.gov

---

Jeb,

Tried to reach you by phone this morning and this afternoon. Please give me a call at your earliest convenience at my office or on my cell after 4:15 at 314 303-1915.

I finished reviewing the investigation file and the email from Dr. Tudor which you referenced yesterday. I have not seen any documents indicating that Mr. Habas participated in or directed the investigation of Dr. Tudor's charges. After checking into the matter, it appears that Dr. Tudor contacted the wrong EEOC office and our office advised her to speak with the Oklahoma office. Our office contacted Mr. Habas, a supervisor in the Okla. office, and told him that we had been contacted in error. Our office gave Mr. Habas the contact info for Dr. Tudor. Mr. Habas called Dr. Tudor and she stated she was sending some documents to the Okla. office. Mr. Habas merely forwarded those documents to the assigned investigator.

Mr. Habas was a supervisor who often received calls from charging parties/respondents because he was in the office and easier to reach than many investigators. He would refer the callers to the investigators and did not investigate charges or direct investigations. Doc EEOC 4690 (which you referenced) merely shows that Dr. Tudor spoke with Mr. Habas on 4/13/11 but does not indicate the nature of the call. The email indicates that Dr. Tudor submitted some documentation to that office to support her charge. This material was forwarded to the investigator. This email does not indicate that Mr. Habas played a role in the investigation.

We will provide the court with a sworn statement from Mr. Habas to this effect in support of our motion to quash the subpoena. As I have previously requested, if you believe there is information Mr. Habas possesses that is arguably relevant to this case, please let me know and we will reconsider our position. If not, please withdraw this subpoena so we can avoid the need to involve the court.

Thank you.  
Jennifer

Jennifer Arendes  
Trial Attorney  
Equal Employment Opportunity Commission  
1222 Spruce St.  
Rm. 8.100  
St. Louis, MO 63103  
office: (314) 539-7916  
cell: (314) 303-1915  
fax: (314) 539-7893  
jennifer.arendes@eeoc.gov



IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

BRYAN "SHANE" JONES, )
Plaintiff, )
vs. ) NO. CIV-15-0978-HE
JULIE NEEDHAM; and )
NEEDHAM TRUCKING LLC., )
Defendants. )

ORDER

Plaintiff has issued a subpoena duces tecum for deposition directed to Kathy A. Nusz, who was apparently the EEOC investigator involved with plaintiff's filing with the EEOC. The subpoena also seeks all documents generated in connection with plaintiff's filing.

The EEOC has moved to quash the subpoena on the grounds of its technical insufficiency under the rules and based on issues of undue burden and privilege. Also pending is defendant's motion to dismiss which argues, among other things, that plaintiff's quid pro quo claim for sexual harassment should be dismissed for failure to exhaust administrative remedies. It appears plaintiff's subpoena is pertinent only to resolution of that issue.

The question appears to boil down to whether plaintiff is entitled to depose Ms. Nusz on the question of what was submitted to the EEOC by, or on behalf of, the plaintiff. The briefs submitted in connection with the motion to dismiss indicate that the central question as to exhaustion of the quid pro quo claim is whether or not an "attachment" relied on by

The EEOC's motion indicates Ms. Nusz has since retired.



plaintiff was in fact submitted to the EEOC as part of the intake questionnaire. It appears undisputed that the EEOC did not conduct an investigation of plaintiff's complaint, so there is no suggestion of there being other evidence that might have been generated by such an investigation. Rather, the determinative question for purposes of defendant's motion to dismiss is whether the EEOC got the attachment.<sup>2</sup>

The EEOC's motion indicates it has already turned over to plaintiff a copy of its entire charge file, less six pages reflecting internal deliberations. Plaintiff's response does not challenge that assertion. So, if the "attachment" was in fact submitted to the agency, the production already made would reflect that. There is no reason to assume that documents viewed as internal deliberations would include the attachment and, in any event, the EEOC's submissions explicitly state "the 'factual statement' which appears to be at issue in the parties' motion to dismiss briefing is not contained in the charge file . . . ." As the pertinent issue appears to turn on what plaintiff's submissions to the agency were, and what those submissions put it on notice of, there is no apparent justification for deposition testimony from an investigator going beyond that.

Depositions of EEOC investigators may be warranted in some circumstances, but a sufficient showing of justification has not been made here. As the EEOC argues, submitting its investigators to deposition as a matter of course would, given the volume of charges filed and the number of court cases arising from them, substantially damage the agency's ability

---

<sup>2</sup>*Defendant says the agency did not, based on the fax transmission numbering in connection with the submission of the intake questionnaire.*

to discharge its statutory duties.

The motion for protective order of the EEOC [Doc. #19] is **GRANTED**. The subpoena duces tecum at issue is **QUASHED**. If plaintiff challenges the fact that only four pages of intake questionnaire, not including the "attachment,"<sup>3</sup> were submitted to the EEOC, he may file a supplement to his response to the motion to dismiss within **seven (7) days**. Otherwise, the court will address the exhaustion issue in the motion on the assumption the attachment was not submitted.

**IT IS SO ORDERED.**

Dated this 8th day of February, 2016.

  
JOE HEATON  
CHIEF U.S. DISTRICT JUDGE

---

<sup>3</sup>The fax was apparently from plaintiff's law firm, so the firm would presumably have records to show a fifth page, if in fact it was sent.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**  
AUG 11 2004  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

EQUAL EMPLOYMENT OPPORTUNITY )  
COMMISSION, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
BANK OF OKLAHOMA, )  
 )  
Defendant. )  
 )  
-- AND -- )  
 )  
HERBERT PHILLIP WOODEND, )  
 )  
Plaintiff-Intervenor, )  
 )  
v. )  
 )  
BANK OF OKLAHOMA, )  
 )  
Defendant. )

Case No. 03-CV-657-EA(C) ✓

ORDER

This matter came before the Court for hearing on July 29, 2004, on *Plaintiff Equal Employment Opportunity Commission's Motion for Protective Order and Request for Expedited Ruling*. [Dkt. # 35]. Plaintiff seeks to bar the deposition of EEOC investigator Kathy Nusz ("Nusz") on ground of privilege, relevancy and duplication.

This is an action under Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991. Plaintiff, Equal Employment Opportunity Commission ("EEOC"), alleges that Bank of Oklahoma ("BOK") violated Title VII in retaliating against Intervenor Herbert Phillip Woodend ("Woodend") for his opposition to practices

402



made unlawful by Title VII. EEOC seeks both injunctive relief and damages to compensate Woodend for his alleged injuries.

Woodend filed his charge with the EEOC alleging a violation of Title VII. Pursuant to its procedures, the EEOC investigated Woodend's charge and found reasonable cause that the charge was true. When efforts at conciliation failed, EEOC filed this action.

On or about July 12, 2004, BOK served notice of its intent to take the deposition of Nusz, the EEOC investigator who investigated Woodend's charge. BOK's Notice of Deposition did not state the subject matter of the deposition. See Attachment "A" to Plaintiff's Motion, Dkt. # 35. On July 16, 2004, EEOC brought this motion seeking a protective order barring the Nusz deposition.

#### *Discussion*

EEOC seeks to bar Nusz' deposition largely on the basis of the so-called "deliberative process privilege" pertaining to pre-decisional documents prepared "to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975) (predecisional consultative memos not discoverable under Freedom of Information Act). The privilege protects against disclosure of "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *City of Virginia Beach v. Department of Commerce*, 995 F.2d 1247, 1253 (4<sup>th</sup> Cir. 1993). The privilege is based on the theory that some governmental processes related to legal and policy decisions cannot be carried out effectively if they must be carried out in the public eye. *Branch v. Phillips Petroleum Co.*, 638 F.2d 873,

881-82 (5<sup>th</sup> Cir.1981). Thus, EEOC seeks to bar any inquiry into the deliberative process by which the agency made its determination that reasonable cause existed that Woodend's charge was true. In this regard, EEOC relies on a line of cases holding that inquiry into EEOC's deliberative process is off-limits and that it is not the job of EEOC investigators to "work for the benefit of particular litigants." *Leyh v. Modicon, Inc.*, 881 F. Supp. 420 (S.D.Ind. 1995) (Plaintiff not permitted to depose EEOC investigator about his recollection of facts he discovered in his investigation of Plaintiff's charge). In addition to *Branch* and *Leyh*, these cases include *Allen v. International Truck and Engine Corp.*, 2003 WL 1522942 (S.D. Ind.) (Defendant not permitted to depose EEOC employees who drafted Investigative Memorandum relied upon by Plaintiff to support class certification); and *Scott v. PPG Ind., Inc.*, 142 F.R.D. 291 (N.D. W.Va. 1992) (Denying employer's motion to compel EEOC investigator to testify about documents covered by deliberative process privilege).

BOK contends that it does not intend to inquire into EEOC's deliberative process, but only wants to know how extensive Nusz' investigation was – specifically, what persons she interviewed – in order to neutralize any undue influence created by EEOC's reasonable cause determination. BOK relies on cases that note that a ban on discovery of EEOC investigation is less warranted where the EEOC itself is a party to the action. *E.g.*, *E.E.O.C. v. Citizens Bank and Trust Co. of Maryland*, 117 F.R.D. 366 (D. Md. 1987) (“[W]hen the Government seeks affirmative relief, it is fundamentally unfair to allow it to evade discovery of materials that a private plaintiff would have to turn over.”) (*citing EEOC v. Los Alamos Constructors, Inc.*, 382 F.Supp. 1373 (D.N.M. 1974); *E.E.O.C. v. Chemsico*, 203 F.R.D. 432 (E.D. Mo. 2001) (purcly factual material is discoverable by

private parties in litigation with the Government); *McClelland v. Andrus*, 606 F.2d 1278, 1287 (D.C. Cir. 1979) (factual material falls outside the scope of the deliberative process privilege).

Rule 26(c) provides:

[F]or good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters....

Based upon a review of the relevant cases and the representations of counsel made at the July 29, 2004, hearing, it appears that the deliberative process privilege is not at issue here. BOK represents that it does not seek to inquire into EEOC's deliberative process in reaching its reasonable cause determination. Based on this representation, the undersigned holds that the requested discovery is not barred by the deliberative process privilege.

Separate from the issue of deliberative process privilege is the question of whether BOK may seek to challenge the basis of EEOC's reasonable cause determination. BOK apparently seeks to depose Nusz to elicit information with which to challenge the thoroughness of EEOC's reasonable cause determination by attempting to show that this determination was based on a "cursory" investigation. The goal, BOK contends, is to counter a jury's "predisposition" to believe the claims against it by virtue of the fact that EEOC brought the charge itself. BOK clearly seeks to contest the adequacy of the EEOC investigation and the resulting reasonable cause determination. Courts have frequently held that such an inquiry is improper. In *EEOC v. Keco*

*Industries, Inc.*, 748 F.2d 1097 (6<sup>th</sup> Cir. 1984), the court found that it was error for the district court to inquire into the sufficiency of the Commission's investigation. *Id.* at 1100.

[T]he nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency. The purpose of the EEOC's investigation of a discrimination charge is to determine if there is a basis for that charge. The reasonable cause of determination issued as a result of the investigation is designed to notify the employer of the EEOC's findings and to provide a basis for later conciliation proceedings.

*Id.* (citing *EEOC v. Chesapeake and Ohio Railway*, 577 F.2d 229 (4<sup>th</sup> Cir. 1978).

In *EEOC v. Chicago Miniature Lamp Works*, 526 F. Supp. 974 (N.D.Ill. 1981), the court noted the problem with opening the door to the sort of inquiry BOK seeks:

That line of inquiry would deflect the efforts of both the Court and the parties from the main purpose of this litigation: to determine whether [the defendant] has actually violated Title VII. Acceptance of [the defendant's] theory would entitle every Title VII defendant to litigate as a preliminary matter whether EEOC had a reasonable basis for its determination... [This] would effectively make every Title VII suit a two-step action: First, the parties would litigate the question of whether EEOC had a reasonable basis for its initial finding, and only then would the parties proceed to litigate the merits of the action.

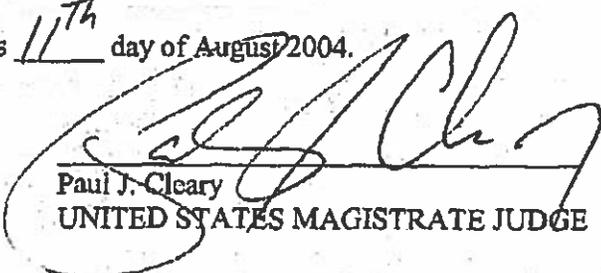
*Id.* at 975 (emphasis added). See also *EEOC v. E.I. Dupont de Nemours*, 373 F. Supp. 1321, 1338 (D. Del. 1974) (Congress did not intend the federal courts to review agency determinations of reasonable cause. Respondent is entitled to a trial *de novo* in the district court. If the charge is frivolous or misdirected, procedures are there available by which the respondent may extricate himself from liability.)

The undersigned concludes that an employer is not entitled to depose Ms. Nusz to explore the basis for EEOC's reasonable cause determination or to challenge that determination. However, this conclusion does not operate as a total bar to discovery from EEOC. Where the EEOC is itself a party to an action limited discovery is appropriate.

*EEOC v. Los Alamos Constructors, Inc.*, 382 F. Supp. 1373, 1375 (D. N.M. 1974) (When the government or one of its agencies comes into court (with very few exceptions) it is to be treated in exactly the same way as any other litigant.). This is particularly so since courts have discretion whether to admit into evidence the EEOC reasonable cause determination. 8 Emp. Coord. Employment Practices § 106:5 (July 2004).<sup>1</sup> If EEOC were to seek to admit the fact of its reasonable cause determination at trial, BOK is entitled to basic information as to whom Nusz interviewed in her investigation of the charge against BOK. Such information may be relevant to the issue of whether the EEOC's reasonable cause determination should be admitted into evidence.

The undersigned concludes that BOK is entitled to factual information as to whom the EEOC investigator interviewed in conducting her investigation herein; however, this does not require a deposition of Ms. Nusz. The information BOK seeks is easily obtained in a less obtrusive and less burdensome manner. Accordingly, EEOC's Motion for Protective Order is **GRANTED**. BOK may not depose Ms. Nusz. However, within five (5) days of the date herein, EEOC shall identify for BOK those persons Nusz interviewed during her investigation.

IT IS SO ORDERED this 11<sup>th</sup> day of August 2004.

  
Paul J. Cleary  
UNITED STATES MAGISTRATE JUDGE

<sup>1</sup> See also *EEOC v. Loral Aerospace Corp.*, 162 F.3d 1172, 1998 WL 769820, at \*2 (10<sup>th</sup> Cir.) (unpublished opinion) in which the trial court exercised its discretion and did not admit the EEOC determination. The case is cited to show that within the Tenth Circuit the question is left to the trial court's discretion.