

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Civil Action No. 17-CV-02362-RBJ  
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,  
Plaintiff, and  
EGAN J. WOODWARD,  
Plaintiff-Intervenor,  
vs.  
A&E TIRE, INC.,  
Defendant.

-----  
REPORTER'S TRANSCRIPT  
Telephone Discovery Conference  
-----

Proceedings before the HONORABLE R. BROOKE JACKSON,  
Judge, United States District Court for the District of  
Colorado, commencing on the 12th day of March, 2019, in  
Courtroom A902, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:  
JAMES P. DRISCOLL-MACEACHRON, U.S. Equal Employment  
Opportunity Commission, 3300 North Central Ave., Ste. 690,  
Phoenix, AZ 85102  
LAUREN G. JAECKEL, U.S. Equal Employment Opportunity  
Commission, 303 East 17th Ave., Ste 410, Denver, CO 80203  
For the Plaintiff-Intervenor:  
SARA A. GREEN, Bachus & Schanker, LLC, 1899 Wynkoop St., Ste.  
700, Denver, CO 80202  
For the Defendant:  
JENNIFER L. GOKENBACH, Gokenbach Law, LLC, 3001 Brighton  
Blvd., Ste. 2660, Denver, CO 80216  
Sarah K. Mitchell, RPR, CRR, 901 19th Street, Room A252,  
Denver, CO 80294, 303-335-2108  
Proceedings reported by mechanical stenography;  
transcription produced via computer.

17-CV-02362-RBJ Tele. Discovery Conference 03/12/2019 2

1 \* \* \* \* \*

2 (The proceedings commenced at 10:31 a.m.)

3 THE COURT: 17CV2362, Equal Employment Opportunity  
4 Commission and Egan Woodward versus A&E Tire. The parties are  
5 calling in with a discovery dispute. Who's on the line for  
6 the plaintiff?

7 MR. DRISCOLL-MACEACHRON: Your Honor, this is Jim  
8 Driscoll-MacEachron and Lauren Jaeckel on the line on behalf  
9 of the EEOC.

10 THE COURT: That was hard to hear. Would you say it  
11 again, sir?

12 MR. DRISCOLL-MACEACHRON: Yes, Your Honor. This is  
13 Jim Driscoll-MacEachron, and with me is Lauren Jaeckel on  
14 behalf of the EEOC. Your Honor, I'm sorry. Was that audible?

15 THE COURT: Yes. And for the defendant, please?

16 MS. GOKENBACH: Yes, Your Honor. Jennifer Gokenbach  
17 on behalf of defendant A&E Tire.

18 MS. GREEN: Your Honor, Sara Green on behalf of Egan  
19 Woodward as well.

20 THE COURT: Okay. The plaintiff, contrary to the  
21 Court's practices, filed a motion for a protective order. My  
22 practice is that any discovery dispute needs to be presented  
23 to me by telephone and not in paper. Notwithstanding that,  
24 since they filed it, I looked at it, and I think I understand  
25 what the dispute concerns. At least if what the dispute

17-CV-02362-RBJ Tele. Discovery Conference 03/12/2019 3

1 concerns is the defendant's 30(b)(6) deposition notice and a  
2 request to produce Categories 4 through 9 in terms of  
3 documents, I understand the dispute.

4 Plaintiff, is there anything further you need to say?

5 MR. DRISCOLL-MACEACHRON: Thank you, Your Honor. No,  
6 I think the arguments are primarily laid out in the brief. I  
7 do apologize for the confusion on our end with regard to  
8 filing the written motions. During our meet-and-confers with  
9 counsel for A&E Tire, we discussed how the issues regarding  
10 conciliation investigation involve some particularized area of  
11 the law, and it seemed that a brief would be a good method of  
12 putting those issues before the Court, and we had read the  
13 practice standards to suggest that the parties were encouraged  
14 to use a telephonic process where possible, and we had  
15 anticipated a telephonic hearing after the briefing. But we  
16 fully understand your practices now and will certainly apply  
17 them going forward.

18 THE COURT: Let me ask you one question. This  
19 concerns request number five. You're objecting to five, I  
20 guess, right?

21 MR. DRISCOLL-MACEACHRON: Yes, Your Honor.

22 THE COURT: Five asks you to produce factual  
23 information obtained by the EEOC during its investigation.  
24 Why wouldn't that be perfectly appropriate?

25 MR. DRISCOLL-MACEACHRON: Your Honor, we think it's

17-CV-02362-RBJ Tele. Discovery Conference 03/12/2019 4

1 important to take topic five in the context of both topics  
2 four and six within this, and this is how it was discussed in  
3 the meet-and-confer, and the defendant's answer and discovery  
4 responses in this complaint. Topic five, consistent with  
5 topics four and six, is seeking information that really goes  
6 to the sufficiency of the investigation. A&E Tire already has  
7 the non-privileged portion of the EEOC's file which contains  
8 all the factual information that the EEOC obtained during its  
9 administrative investigation.

10 The only information that A&E Tire could be seeking  
11 would be follow-up questions on that, and I know the district  
12 held in a subsequent decision in the Albertson's litigation  
13 questions that have natural follow-up questions that involve  
14 the deliberative process are protected by that privilege as  
15 well. And here this topic, as with topic six, is really going  
16 towards the sufficiency of the investigation.

17 As the cases we lay out in our motion state, the  
18 sufficiency of the investigation is not an issue that is  
19 justiciable. It's not an affirmative defense. So long as the  
20 EEOC has done investigation, and here A&E Tire has admitted  
21 that the EEOC conducted some investigation, then the condition  
22 precedent has been met, and so any discovery on the  
23 investigation beyond what's been produced with the file is  
24 outside the scope of discovery.

25 THE COURT: Yeah, well, that's -- that's a nice

Sarah K. Mitchell, RPR, CRR

17-CV-02362-RBJ Tele. Discovery Conference 03/12/2019 5

1 speech, but I didn't ask you about paragraphs four and six or  
2 about context. Looking just at paragraph five, it seems to me  
3 that any factual information obtained by the EEOC during its  
4 investigation is discoverable, and I can't even conceive of  
5 why it wouldn't be.

6 MR. DRISCOLL-MACEACHRON: Your Honor, I understand  
7 that position, and our concern is that given that they already  
8 have all the facts produced in the EEOC's investigation and  
9 realize this topic is going to be going into the sufficiency  
10 of the investigation, why things aren't -- weren't inquired  
11 about, why things aren't in the file, the questions that  
12 aren't about that specific factual information, and that's why  
13 we have concerns about it going beyond the scope of the  
14 discovery as it's limited by the scope of Title VII.

15 THE COURT: Well, okay. Now, on the other side, the  
16 side that propounded the discovery, what makes you think that  
17 you're entitled to get into their investigative and  
18 deliberative process?

19 MS. GOKENBACH: Yes, Your Honor. We are not looking  
20 to go into the investigative and deliberative process other  
21 than to learn -- potentially learn facts that go to the  
22 motivation for the EEOC to file the lawsuit on behalf of the  
23 claimant, the credibility and the veracity of the allegations,  
24 and specifically during Mr. Egan's deposition, he testified  
25 that certain of the facts alleged in the complaint by the EEOC

17-CV-02362-RBJ Tele. Discovery Conference 03/12/2019 6

1 are contrary to his statements to them.

2 He also testified that his statement that was made to  
3 the investigator and that the investigator took notes on was  
4 incomplete or was in error, and he testified contrary to those  
5 documents that are in the file. And we just want to do  
6 discovery on that to understand why that discrepancy -- if we  
7 can, why that discrepancy exists, if there were -- essentially  
8 one of our defenses is forming up to be that there may be  
9 creative facts here to support a narrative that the EEOC  
10 wanted to present rather than the actual facts that were  
11 presented to it by the claimant, and those that are contained  
12 in the investigative file.

13 THE COURT: Yeah. Well, if that's the best defense  
14 you have, you're in big trouble. The statement that you're  
15 not trying to get into their deliberative process is entirely  
16 lacking credibility, because, for example, in number four you  
17 want to know about their general investigative procedures. In  
18 number seven, you want to know about their general  
19 conciliation procedures. In number nine, you want to know  
20 whether their efforts comply with the mandates of the agency's  
21 Strategic Enforcement Plan.

22 Now, I have heard rumors to the effect that ever  
23 since Denver lost their regional office to Phoenix that the  
24 investigations and the conciliation process has deteriorated,  
25 and maybe it has and maybe it hasn't, but I think it's none of

Sarah K. Mitchell, RPR, CRR

17-CV-02362-RBJ Tele. Discovery Conference 03/12/2019 7

1 the business of the people involved. That's like asking a  
2 settlement mediator to reveal his thought processes after the  
3 mediation is concluded unsuccessfully.

4 The Court's ruling is that the motion for protective  
5 order is granted as to paragraphs four, six, seven, eight, and  
6 nine, but is denied as to paragraph five. And the Court,  
7 again, reminds the parties that if you have discovery  
8 disputes, you must confer, and if you can't then resolve it,  
9 call and set up a telephone hearing. Do not file paper. The  
10 reason that is my practice is because we are buried in  
11 motions. And generally speaking, if I listen to both sides, I  
12 can make a decision on a discovery dispute very quickly based  
13 on a shockingly large number of years doing this, and I don't  
14 want you to spend your client's money or taxpayer money  
15 preparing motions that the Court doesn't want. Is there  
16 anything else today?

17 MR. DRISCOLL-MACEACHRON: No, Your Honor.

18 MS. GOKENBACH: No, Your Honor.

19 THE COURT: All right then, have you folks tried to  
20 have a mediation with a professional mediator?

21 MR. DRISCOLL-MACEACHRON: Your Honor, this is Jim  
22 Driscoll-MacEachron on behalf of EEOC. We have mediation  
23 scheduled, set for later this month.

24 THE COURT: Who's doing the mediation, please?

25 MR. DRISCOLL-MACEACHRON: That is -- I believe it's

17-CV-02362-RBJ Tele. Discovery Conference 03/12/2019 8

1 Judge Bill Meyer with the JAG group.

2 THE COURT: Who? I heard you say JAG. I didn't hear  
3 the name.

4 MR. DRISCOLL-MACEACHRON: I believe it's Bill Meyer,  
5 Your Honor.

6 THE COURT: Well, if you've got Bill Meyer, you've  
7 broken through the most difficult hurdle there is in Denver,  
8 because he is so busy and such in demand that you're lucky to  
9 have him. I wish you well. I think he's very good at what he  
10 does.

11 MR. DRISCOLL-MACEACHRON: Thank you, Your Honor.

12 THE COURT: By the way, his Starbucks drink of choice  
13 is a Flat White, just so you know. Maybe you can use that  
14 little tidbit of trivia to get a chuckle out of him or  
15 something. Good luck with that. I hope you get this  
16 resolved. Thank you.

17 MS. GOKENBACH: Thank you.

18 THE COURT: Good-bye.

19 (The proceedings were concluded at 10:44 a.m.)  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

REPORTER'S CERTIFICATE

I, SARAH K. MITCHELL, Official Court Reporter for the United States District Court for the District of Colorado, a Registered Professional Reporter and Certified Realtime Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein at the time and place aforementioned and that the foregoing pages constitute a full, true and correct transcript.

Dated this 19th day of March, 2019.

/s/ Sarah K. Mitchell

SARAH K. MITCHELL  
Official Court Reporter  
Registered Professional Reporter  
Certified Realtime Reporter