



## Daily Labor Report®

May 05, 2017



EEOC

### BDO Loses Round in Attorney-Client Privilege Battle With EEOC

#### BNA Snapshot

- Rare federal appeals court ruling on sufficiency of attorney-client privilege log
- Privilege log is document party produces in litigation when it withholds information from an opponent
- Ruling provides guidance for all sides and may be looked to by courts nationwide

 By **Patrick Dorrian**

BDO USA LLP must again convince a federal court in Texas that 278 documents it refused to turn over during an EEOC investigation of alleged discrimination are subject to the attorney-client privilege, a federal appeals court ruled (***EEOC v. BDO USA, LLP, 2017 BL 149786***, 5th Cir., No. 16-20314, 5/4/17).

The May 4 decision by the U.S. Court of Appeals for the Fifth Circuit is a win for the Equal Employment Opportunity Commission. The appeals court found that a privilege log BDO presented to defend its refusal to disclose emails and other documents was insufficient. A privilege log is a document a party produces in litigation when it withholds information from an opponent.

The ruling isn't just a win for the federal jobs watchdog, but for counsel and clients on both sides of the aisle who now have better direction on what needs to go into a privilege log, plaintiff-side lawyer Andrew S. Golub told Bloomberg BNA. Courts outside the Fifth Circuit—which includes Louisiana and Mississippi in addition to Texas—may look to the decision for guidance when handling privilege-log-sufficiency challenges, he said May 5. This type of issue rarely reaches the federal appeals level.

It is a “somewhat uncommon” ruling, management-side attorney Todd Presnell said. But there's another reason the decision may have application outside the Fifth Circuit, he told Bloomberg BNA May 5. The bias allegations against BDO arose in “the HR context,” which may have influenced the appeals court's rejection of a lower court's finding that BDO's log was sufficient to establish its asserted privilege.

Presnell, who didn't participate in the case, is a partner in the Nashville, Tenn., office of **Bradley Arant** Boulton Cummings LLP. He has written extensively about evidentiary privileges. The Houston-

based Golub is with Dow Golub Remels & Gilbreath PLLC. He also didn't participate in the case, but he previously had represented a different BDO employee in a separate discrimination case.

### Log Lacking Detail, Court Says

The EEOC is investigating allegations by BDO's former chief human resources officer. In addition, Hang Bower, an Asian American woman who separately **sued** the financial and consulting giant, alleges that she and other female employees were subjected to sex discrimination and that BDO discriminated against non-white employees. Bower also says she was ordered to stop investigating harassment allegations against male managers and a male partner, and that she was reprimanded and stripped of her responsibilities for trying to investigate those issues.

Bower, whose role required her to regularly communicate with BDO in-house counsel, told the lower court that many of the communications on the privilege log involved discussions between her and non-lawyers. She also said BDO required her to forward or courtesy copy in-house counsel "on virtually all communications" relating to HR investigations or to mark documents as "prepared at the request of legal counsel" to falsely create the appearance they contained privileged information.

During EEOC's investigation of Bower's charge, BDO objected to portions of the agency's document requests, saying the EEOC sought information that "was far beyond the scope of Bower's individual charge." The EEOC ultimately brought a subpoena enforcement action with regard to the 278 documents that BDO refused to turn over, claiming attorney-client privilege.

The U.S. District Court for the Southern District of Texas found the privilege log sufficient and dismissed the EEOC's enforcement action. But the Fifth Circuit agreed with the EEOC that the firm's privilege log contained numerous entries that were too vague and incomplete to permit the EEOC or a court to determine whether attorney-client privilege was validly claimed.

In addition, some entries didn't provide enough detail to determine whether BDO employees sought **protected legal advice or unprotected business advice**, the court said. Some entries also were unclear as to whether they actually involved confidential communications with counsel, it said.

"We are pleased that the Fifth Circuit has clarified the scope of the attorney-client privilege in the context of an administrative investigation," an EEOC spokesperson told Bloomberg BNA in a May 5 email. "The court's explanation of the difference between legal and business advice is especially helpful in this case—which involves a high-ranking HR official."

Jerry Walsh, a spokesperson for BDO, told Bloomberg BNA May 5 that the firm doesn't comment on ongoing litigation.

### What's Next?

The Texas federal district court now must reexamine the privilege log under the proper legal standard, the appeals court said. The lower court also must take another look at a protective order it issued relating to allegedly improper contacts and document

disclosures between the EEOC and the former HR chief and other BDO employees, it said.

The lower court may need to conduct an in camera, or document-by-document, review of the withheld information “given the facts and circumstances of this case,” the appeals court said.

Presnell stressed that BDO hasn't lost on its arguments that the withheld documents are privileged. It just now must present a more detailed analysis to the magistrate of why the privilege applies, he said.

Although it's up to the lower court on remand, the firm may get another chance to put forward testimony from a company representative to establish its privilege claims, he said. If allowed, such testimony likely wouldn't preclude the lower court's conducting the in camera review suggested by the Fifth Circuit, Presnell said. But an in camera review doesn't necessarily require an examination of each allegedly privileged document and the magistrate may instead only look at a representative sample of various categories of documents.

Like the ruling on the privilege log issue, the reversal of the lower court's grant of a protective order to BDO stemmed from the magistrate's seemingly overbroad standard, Golub said. That may have improperly shifted the burden of disproving BDO's claim of privilege onto the EEOC, when the party asserting a privilege actually bears the burden of establishing it, he said.

The burden can't be shifted just by producing “a flimsy privilege log,” he said.

### **General Takeaways for Employers and Employees**

A “larger takeaway” for employers, Presnell said, is that they need to be more specific in identifying communications on a privilege log, especially when communications involve in-house lawyers.

Another lesson is that when the sufficiency of a privilege log is challenged, the company needs to come forward with an affidavit from a company representative establishing why the communications on the log are privileged, preferably an in-house lawyer if the communications involved consultation with in-house counsel, Presnell said.

Judges Carl E. Stewart wrote the Fifth Circuit's opinion, which was joined by Judges Carolyn Dineen King and James L. Dennis.

EEOC attorney Susan L. Starr represented the commission. Rachel Cowen and Ileana M. Blanco of DLA Piper LLP in Houston represented BDO.

To contact the reporter on this story: Patrick Dorrian in Washington at [pdorrian@bna.com](mailto:pdorrian@bna.com)

To contact the editors responsible for this story: Peggy Aulino at [maulino@bna.com](mailto:maulino@bna.com); Terence Hyland at [thyland@bna.com](mailto:thyland@bna.com); Christopher Opfer at [copfer@bna.com](mailto:copfer@bna.com)

### **For More Information**

Text of the opinion is available at

[http://www.bloomberglaw.com/public/document/EEOC\\_v\\_BDO\\_USA\\_LLP\\_No\\_1620314\\_2017\\_BL\\_149786\\_5th\\_Cir\\_May\\_04\\_2017\\_](http://www.bloomberglaw.com/public/document/EEOC_v_BDO_USA_LLP_No_1620314_2017_BL_149786_5th_Cir_May_04_2017_)