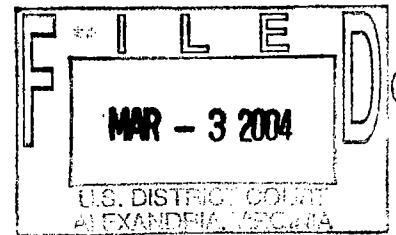


IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION



JEFFREY ALEXANDER STERLING,

Plaintiff,

v.

GEORGE TENET,
Director, Central Intelligence
Agency, et al.

Defendants.

Civil Action No. 03-329-A

ORDER

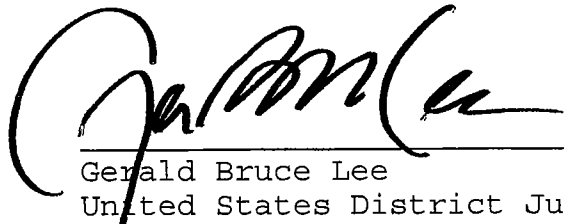
THIS MATTER is before the Court on Defendants' Motion to Dismiss. In its previous Memorandum Order of March 3, 2004, the Court granted Defendant's Motion to Dismiss, and denied Plaintiff leave to amend his Complaint. From the foregoing, it is hereby

ORDERED that JUDGMENT is ENTERED in favor of Defendants George Tenet, Director of Central Intelligence, et. al, and AGAINST Plaintiff Jeffrey Alexander Sterling.

The Clerk is DIRECTED to ENTER JUDGMENT pursuant to Federal Rule of Civil Procedure 58.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 3rd day of March, 2004.

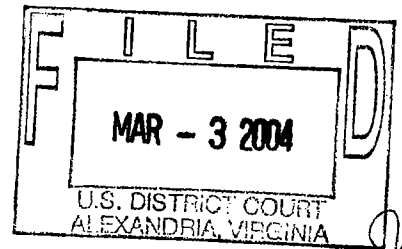


Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
03/03/04

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION



JEFFREY ALEXANDER STERLING,

Plaintiff,

v.

GEORGE TENET,
Director, Central Intelligence
Agency, et al.

Defendants.

Civ. Action No. 03-CV-329

MEMORANDUM ORDER

THIS MATTER is before the Court on two of the parties motions. The first, is the Defendants' Motion to Dismiss, based on Defendant Tenet's invocation of the state secrets privilege. The second, is the Plaintiff's Motion for Preliminary Injunction to Compel Return of EEO File Taken From Counsel. This case concerns Plaintiff's race discrimination claims made under Title VII. The issue before the Court is twofold. First, whether Defendant Tenet properly invoked the state secrets privilege? Second, if the Court recognizes the state secrets privilege, whether Plaintiff can prove his prima facie case of race discrimination?

Defendant Tenet is the Director of Central Intelligence (the DCI). As such, he is the head of the Central Intelligence Agency (the CIA) and the United States Intelligence Community. As DCI,

Defendant Tenet has a statutory duty as the custodian of the files and records of the CIA. He is also charged with protecting and preventing unauthorized disclosure.

Plaintiff, an African-American former employee of the Central Intelligence Agency, alleges that he was passed over on promotions because of his race, subjected to disparate treatment, and the subject of agency retaliation after he began equal employment opportunity proceedings. Defendant Tenet has invoked the state secret privilege, and a formal claim of statutory privilege of the DCI and the CIA to protect intelligence sources and methods, pursuant to 50 U.S.C. §§ 403-3(c)(6), 403g. Defendant Tenet argued that by litigating this case, there is the possibility of disclosure of both "Secret" and "Top Secret" classified information.¹ In support of his assertion of the state secrets privilege, the DCI has also filed both classified and unclassified declarations, dated April 17, 2002, detailing his reasoning behind the use of this privilege.²

The Court holds that the Defendant Tenet properly invoked

¹Information classified at "Secret" is material which is reasonably likely to cause serious damage to the national security. Information classified at "Top Secret" is material which is reasonably likely to cause exceptionally grave damage to the national security. See Exec. Order No. 12356, 47 Fed. Reg. 14874 (Apr. 2, 1982).

²The Court has done an *ex parte*, *in camera* review of Defendant Tenet's classified and unclassified declarations, which detail the reasons behind his invocation of the state secrets privilege.

the state secrets privilege. Based upon case law of both the United States Supreme Court and various United States Courts of Appeals, the Court is obligated to honor the DCI's assertion of this privilege, and remove all privileged information from this litigation. The Court also finds that since this privileged information is at the heart of all of Plaintiff's claims, he cannot prove a *prima facie* case, or any of the other elements necessary for his race discrimination, disparate treatment, and retaliation claims. Based on the Court's holding, the Plaintiff's motion, requesting a preliminary injunction to compel return of an EEO file taken from Plaintiff's counsel, is moot, and the Court will not comment on the merits of this motion.

Therefore, the Court finds that the Defendants' have sufficiently pled the state secrets privilege, and as such, Plaintiff lacks a judicial forum to redress his grievances. Therefore, the Defendants' Motion to Dismiss is GRANTED WITHOUT PREJUDICE.

BACKGROUND

Plaintiff Jeffrey Sterling is an African American who formerly served as an Operations Officer in the CIA's Directorate of Operations, Near East and South Asia Division. The Plaintiff served in this position from 1993 through 2001. In his unclassified pleadings, Plaintiff alleges a variety of work place

incidents which he claims were racially discriminatory, constituted disparate treatment and were retaliatory against him for initiating internal equal employment opportunity proceedings. Plaintiff brought this Title VII action against Defendants George Tenet, who is the DCI, and John Does #1-10, who are employees of the CIA. Plaintiff began this case *pro se* in the United States District Court for the Southern District of New York on August 28, 2001. The case was eventually transferred to this Court, and Plaintiff retained the assistance of counsel.

Defendant Tenet invokes the state secrets privilege. Specifically, Defendant Tenet argues that by Plaintiff's role as a CIA Operations Officer, very basic details which are relevant to prove his case, such as the nature of the employment itself, the location of his employment, and the identity of Plaintiff's supervisors and colleagues, all consist of information which is classified at either the Secret or Top Secret level. In addition, Defendant Tenet argues that the burdens of proof under Title VII necessitate the fact-finder to compare similarly situated covert operations officers work assignments, how they were graded by superiors, and the means as to how they achieved their duties. As DCI, Defendant Tenet argues that he has a statutory duty to protect classified information, and CIA "sources and methods." "Sources and methods" are the particularity in which the CIA gathers intelligence. Defendants

argue that the discovery process, as well as the public forum of a trial - either by bench or jury - would compromise sensitive national security information.

Plaintiff argues that this case is nothing more than a Title VII employment discrimination case, which federal trial courts hear everyday. Plaintiff argues that Defendants are using the state secrets privilege as nothing more than a protective shield against its allegedly discriminatory behavior against one of its African American employees. Plaintiff argues that if this Court holds that the states secret privilege is justified, it is eroding the independence between the executive and judicial branches of government. In essence, Plaintiff argues, Defendants' arguments give the executive branch *carte blanche* to do whatever actions it wants - whether legal or not - all in the name of national security. Furthermore, Plaintiff argues that the Defendants are precluded by Rule 12(g) of the Federal Rules of Civil Procedure from bringing this Motion. Plaintiff argues that Defendants are equitably estopped, and precluded by *res judicata*, from asserting the state secrets privilege to dismiss the entire case based on its failure to timely assert it earlier in the litigation.

STANDARD OF REVIEW

This matter comes before the Court on Defendants' motion to

dismiss for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). Specifically, Defendants' assert the state secrets privilege, and argue that if this Court finds that Defendants properly asserted this privilege, Plaintiff cannot prove his prima facie case of race discrimination. As discussed below, the Court has considered materials outside the pleadings in rendering its decision. In particular, the Court has done an *ex parte*, *in camera* review of Defendant Tenet's classified and unclassified declarations, which detail the reasons behind his invocation of the state secrets privilege. Accordingly, Defendants' motion to dismiss must be treated as a motion for summary judgment. See Fed R. Civ. P. 12(b).

The state secrets privilege is one that is rooted in federal common law to facilitate the Chief Executive's right and duty to protect the military and diplomatic secrets of the nation. See, e.g., *United States v. Reynolds*, 345 U.S. 1, 7-11 (1953); *In re Under Seal*, 945 F.2d 1285 (4th Cir. 1991); *Fitzgerald v. Penthouse Intern., Ltd.*, 776 F.2d 1236 (4th Cir. 1985).

Reynolds was the first case in which the Supreme Court considered, and recognized, the state secrets privilege. Although *Reynolds* dealt specifically with "military secrets," subsequent case law has expanded the state secrets privilege to include information that would result in "impairment of the

nation's defense capabilities, disclosure of intelligence gathering methods or capabilities, and disruption of diplomatic relations with foreign governments," *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) (footnotes omitted), or where disclosure "would be inimical to national security." *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991).

The *Reynolds* Court held that the state secrets privilege is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. *Reynolds*, 345 U.S. at 7-8. Although *Reynolds* discourages the Court from granting the state secrets privilege lightly³, subsequent jurisprudence has held that courts lack the expertise to second guess an executive official's use of the state secrets privilege, and that "courts should accord the utmost deference to executive assertions of privilege upon grounds of military or diplomatic secrets." *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978).

³"Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case." *Reynolds*, 345 U.S. at 9-10.

ANALYSIS

The first step in the Court's analysis of the state secrets privilege is to determine whether Defendant's Tenet's use of the privilege meets the requirements set forth in *Reynolds*, 345 U.S. at 7-8. After an *in camera* review of Defendant Tenet's declaration, the Court concludes that the state secrets privilege was properly invoked. Defendant Tenet, the Director of Central Intelligence, contends that in order for Plaintiff's case to proceed, Plaintiff would have to reveal intelligence sources and intelligence gathering techniques which would endanger ongoing intelligence operations and operatives in the field. As such, Defendant Tenet, as DCI, is the head of the government entity in control of the information relevant to this case, and is charged with the responsibility to direct intelligence operations, to protect national security, and to protect intelligence sources and methods from unwarranted disclosure. See 50 U.S.C. § 403-3(c)(6). Defendant Tenet has, as exhibited by both his classified and unclassified declarations, personally considered the information that Plaintiff needs for his case, and the information that will most likely become public in further litigation proceedings and in trial.

Plaintiff argues that the Court must "not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial

role." Opp'n to Def.'s Mot. to Dismiss and to Proceed *In Camera* and *Ex Parte* at 16 (quoting *Virtual Defense and Development International v. Republic of Moldova*, 133 F.Supp. 2d 9, 23 (D.D.C. 2001)).

Applying state secrets jurisprudence to this case puts the Court in an unique bind. If Plaintiff's case did not involve highly sensitive classified material, and if the DCI did not invoke the state secrets privilege, this Court would have no difficulty adjudicating Plaintiff's Title VII claims. In fact, a great deal of the caseload of this Court involves hearing race, sex, and disability discrimination claims. However, this is not a typical Title VII employment discrimination case. Although Plaintiff argues that this Court can try this case without jeopardizing national security, this argument fails to factor all of the peculiarities of this case. Virtually all of Plaintiff's duties as an Operations Officer are classified. The location of Plaintiff's workplace is classified. All of Plaintiff's supervisors and most of his co-workers names are classified (hence Defendants John Does #1-10). The basic duties that a Court would ask a jury to perform as fact finder, such as to examine what Plaintiff's duties were, and to compare these duties to similarly situated Operations Officers, are impossible to achieve because all of this information is classified. The only way to achieve this, theoretically, is to choose jurors who have

the applicable security clearances. Because the whole point of a jury in the American judicial system is to randomly choose citizens regardless of race, sex, economic status - or other intangibles, such as one's eligibility for a security clearance - this is an impossible goal to reach.

Plaintiff's argument that the Court must not become a "rubber stamp" for the executive's use of the state secrets privilege is well taken. To do so would only encourage abuse of the privilege by the executive. Particularly in today's post-September 11th environment, the Court must be mindful of the potential risk or temptation for the executive to encroach on civil liberties and rights behind the curtain of "national security" or "states secrets," unless the Court conducts meaningful judicial review of such claims. However, while the Court is not to second-guess the determination of an agency head who has properly asserted the privilege of state secrets, the Court must assess the substance of the declaration asserting the claim, review the facts of Plaintiff's claims, the evidence which may be necessary to assess the claim, the classification of the evidence, and determine whether there are ways to adjudicate the claim without revealing classified information. *See, e.g., Halkin*, 598 F.2d at 9.

In a routine Title VII case, under these circumstances, Plaintiff Sterling could probably prove a prima facie case for

race discrimination. However, the fact of the matter is that the DCI has stated that all of the information which Plaintiff needs to prove his prima facie case of race discrimination is classified at either Secret or Top Secret. This Court is not an intelligence agency. Therefore it is not the place of the Court to oversee the classification of documents and information, to examine or question the rationale of why officials classified this information at the level it is, or to redetermine whether information is truly "Secret" or "Top Secret." The only time in which a court should deny the privilege is if, after an examination of the agency head's declaration of his reasoning behind asserting the privilege, it is transparently obvious that the agency is engaging in an abuse of the privilege. Defendant Tenet's assertion of the state secrets privilege to Plaintiff's claims is not such a case.

Once the appropriate executive official properly asserts the state secrets privilege, the court's inquiry becomes whether the case falls into one or more of the following categories. First, if state secrets are critical to the resolution of core factual questions in the case, the court should dismiss the case. See *D.T.M. Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334 (4th Cir. 2001); *Fitzgerald v. Penthouse Int'l, Inc.*, 776 F.2d 1236, 1241-42 (4th Cir. 1985). Second, the court should dismiss the case if the plaintiff's ability to prove his case necessarily

depends on or threatens the disclosure of privileged information. See *Farnsworth Cannon v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (per curiam) (en banc). Third, the court should grant summary judgment to the defendant if the invocation of the privilege deprives him of a valid defense. E.g., *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989).

Plaintiff Sterling's case falls into the first two categories described above. State secrets are critical to the resolution of the core factual questions in the case. See Director's Classified Declaration at ¶¶ 1-9, 13-25, 26-34, 36-38 (detailing specifics about intelligence sources and methods employed by the Agency); ¶¶ 13-14, 22-24, 33-34, 36-38, 40-49, 51-52 (explains how specific intelligence sources and methods could be compromised); ¶¶ 23, 31-33, 36 (explains how release of specific information could have direct impact on safety of intelligence sources); ¶¶ 22-25 (explains how disclosure of specific information would have adverse impact on United States' foreign relations); and ¶¶ 6, 12-21, 34, 38, 40 (explains why it is not possible to sanitize or redact in any meaningful way the classified information necessary to litigate this matter.)

Second, Plaintiff's ability to prove his claim depends on or threatens the disclosure of state secrets. See *id.* Plaintiff was an Operations Officer in the covert operations directorate of the CIA. Basic pieces of information, such as where Plaintiff

worked, what his duties were, and a comparison of those duties to other Operations Officers, all are matters classified at either the Secret or Top Secret levels. In essence, Plaintiff cannot make a prima facie case as to any of his discrimination claims. Although Plaintiff argues that the redacted administrative EEO record contains sufficient unclassified direct and indirect evidence of discrimination for him to make his prima facie case, it is not for the Court, in this case, to second guess the judgment of the DCI in asserting the state secrets privilege. The potential for inadvertent exposure of classified information, even relying upon the EEO file, is simply too great.

Finally, the Court holds that Rule 12(g) of the Federal Rules of Civil Procedure, equitable estoppel, and res judicata do not preclude Defendants from asserting the state secrets privilege at this stage of the litigation. Plaintiff argues that Defendants are precluded under all of these doctrines because the Defendants previously filed a motion in the Southern District of New York seeking that this case be dismissed for lack of venue, or, in the alternative, that it be transferred to the Eastern District of Virginia under 28 U.S.C. § 1404(a). Judge Schwartz, in the Southern District of New York, denied Defendants' motion to dismiss based on lack of venue. In Judge Schwartz's opinion, he addressed the issue of the state secrets privilege, and found that the invocation by Defendant Tenet of the state secrets

privilege was inappropriate in this case. However, Judge Schwartz does admit that, unlike in the matter before this Court, Defendant Tenet only "contends that the decision to invoke the state secrets privilege should be given deference [and] (correctly) stops short of arguing that its mere invocation mandates dismissal." *Sterling v. Tenet, et al.*, No. 01 Civ. 8073, slip op. at 5. In this case, Defendants argue that proper invocation of the state secrets privilege should not be given deference, but dismissal. In addition, unsealed exhibit 14, a Government Memorandum addressed to Judge Schwartz during the Southern District of New York litigation, specifically states that the Defendants intend to move solely on the issue of venue without prejudice to the Government's right, either in the Southern District of New York or the Eastern District of Virginia, to raise any other ground for dismissal of the Complaint. Judge Schwartz's opinion was simply *dicta* for this Court.

The very idea that a citizen has a right without a remedy in this context is not a satisfactory result at first blush. As in *Tilden*, this Court is fully aware that the invocation of the state secrets privilege in this case will deny Plaintiff a forum under Article III of the Constitution for adjudication of his claim. Dismissal of a case based upon the state secrets privilege is extraordinary, but not unprecedented. See e.g.,

Bowles v. United States, 950 F.2d 154 (4th Cir. 1991) (dismissal warranted because "no amount of effort or care will safeguard the privileged information."); *Fitzgerald*, 776 F.2d at 1243 (dismissal of defamation action warranted "because there was simply no way [the] case could be tried without comprising sensitive military secrets"); *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815 (D.C. Cir. 1984) (dismissal of Title VII lawsuit warranted because without disclosure of state secrets, insufficient evidence of discrimination existed). While this case meets the requirements of state secrets, there is no general rule that the Civil Rights Act does not apply in cases involving employment discrimination and the Central Intelligence Agency, or any other national security agency. Each case must be measured on its own merits.

After a thorough analysis of the framework set forth in *Reynolds* and its progeny, the Court holds that Defendants invocation of the state secrets privilege stands, and Plaintiff's case must be dismissed to protect classified information without a determination on the merits.

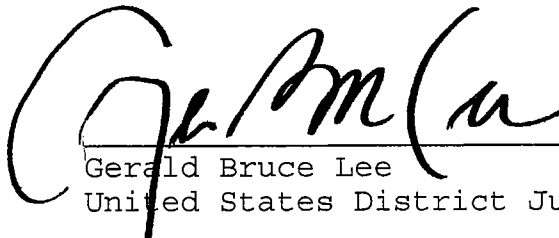
Conclusion

In conclusion, Defendant Tenet has properly invoked the state secrets privilege as outlined in *Reynolds* and its progeny. Because Defendant Tenet has properly invoked this privilege,

Plaintiff does not have the ability to present a prima facie case on any of his discriminatory claims. Finally, Plaintiff's civil procedure arguments, that Defendants invocation of the state secrets privilege is barred by Federal Rule of Civil Procedure 12(g), equitable estoppel, and res judicata also fail. Judge Schwartz's opinion was dicta, and this Court finds that Defendants properly invoked its state secrets privilege.

For the foregoing reasons, it is hereby ORDERED that Defendants' Motion to Dismiss is GRANTED WITHOUT PREJUDICE. Plaintiff is DENIED leave to amend his Complaint. The Clerk is directed to enter judgment in favor of Defendants pursuant to Rule 58 of the Federal Rules of Civil Procedure. The Clerk is directed to forward a copy of this Order to counsel.

Entered this 3rd day of March, 2004.


Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
03/03/04