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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES EQUAL  
EMPLOYMENT OPPORTUNITY  
COMMISSION,

Petitioner - Appellee,

v.

AMERICAN APPAREL, INC.,

Respondent - Appellant.

No. 08-55262

D.C. No. CV-07-06778-ODW

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Otis D. Wright, District Judge, Presiding

Submitted April 17, 2009\*\*  
Pasadena, California

Before: SILVERMAN and CALLAHAN, Circuit Judges, and QUIST,<sup>\*\*\*</sup> District  
Judge.

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously finds this case suitable for decision without  
oral argument. *See* Fed. R. App. P. 34(a)(2).

\*\*\* The Honorable Gordon J. Quist, United States District Judge for the  
Western District of Michigan, sitting by designation.

Respondent, American Apparel, Inc. (“American”), appeals the district court’s order directing it to comply with an administrative subpoena from Petitioner, the Equal Employment Opportunity Commission (“EEOC”), in connection with a sexual harassment Charge of Discrimination filed by a former American employee.

We review the district court’s decision regarding enforcement of an administrative subpoena de novo. *F.D.I.C. v. Garner*, 126 F.3d 1138, 1142 (9th Cir. 1997). For the following reasons, we reverse.

First, although the EEOC is granted broad investigatory powers under Title VII, *see* 42 U.S.C. § 2000e-8(a); *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 68 (1984) (recognizing that the relevance limitation on the EEOC’s authority to investigate “is not especially constraining”), those powers are subject to recognized privileges and protections. *See Dole v. Milonas*, 889 F.2d 885, 888-890 (9th Cir. 1989) (recognizing attorney-client privilege as a limitation on administrative subpoena issued by the Secretary of Labor). American made a preliminary showing that the notes and memoranda prepared by its outside counsel may be protected work product and/or subject to the attorney-client privilege.

Second, although a party may waive both the attorney-client privilege or work product protection by injecting an issue into the case, *see Bittaker v.*

*Woodford*, 331 F.3d 715, 718-20 (9th Cir. 2003), the record does not show that American had done so in this case. Although American asks us to decide whether the EEOC is entitled to the disputed documents, the parties raise issues that the district court should consider in the first instance, including how to evaluate American's assertion of privilege and work product protection, and whether and to what extent, they are waived. *See Dole*, 889 F.2d at 890.<sup>1</sup>

**REVERSED AND REMANDED.**

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<sup>1</sup>In light of this disposition, we decline to take judicial notice of the documents submitted by American.