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Issue Date: 20 July 2015

Case No. 2014-AIR-22

In the Matter of:

MARK ESTABROOK,
Complainant,

v.

FEDERAL EXPRESS CORPORATION,
Respondent.

ORDER FOLLOWING *IN CAMERA* REVIEW

This proceeding arises from a claim of whistleblower-protection under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").[1] The statute prohibits retaliatory or discriminatory actions by covered employers against their employees who engage in activity protected by the Act.

After receiving the Respondent's privilege log on January 15, 2015, the Complainant submitted an Amended Motion to Compel Requests for Admissions, Interrogatories, and Requests for Documents ("Amended Motion") on February 19, 2015. By Order issued May 28, 2015, the undersigned Ordered that the purportedly-privileged documents withheld by the Respondent be produced for *in camera* review. Accordingly, on June 15, 2015, the Respondent submitted the withheld documents, accompanied by its *Memorandum in Support of In Camera Inspection of Privileged Documents* ("Memorandum"), which outlined the basis for each assertion of privilege. Having extensively reviewed the withheld materials and the corresponding arguments of the parties, the validity of the asserted privilege will be discussed below.

Discussion

As recognized by the Respondent, the proponent of the privilege bears the burden to establish its applicability. (Memorandum at 3)(citing *In re Dayco Corporation Derivative Securities Litigation,* 102 F.R.D. 633, 635 (S.D. Ohio 1984)). In order to avoid disclosing the contents of the allegedly privileged matter, the contents of those documents for which the allegation of privilege has been found meritorious will not be discussed, but only referred to obliquely. The withheld documents will be placed in the administrative file under seal, however, for the purpose of any appellate review. It should be noted, though, to allay any unfounded

[1] 49 U.S.C. § 42121 (2011).

suspicion by the Complainant, none of the documents found to be privileged contained any evidence that could be described as in the nature of a "smoking gun."[2]

The following analysis, therefore, shall address the Complainant's challenges to the Respondent's assertion of privilege rather than the contents of the forty challenged documents.

Attorney-Client Privilege Inapplicable to Communications with Paralegal

Foremost, the Complainant challenged the applicability of the attorney-client privilege to Items 1, 6, 7, 12, and 19 because those documents purportedly "originate[d] from a paralegal rather than an attorney." (Amended Motion at 7.) In support, the Complainant cited *HPD Labs v. Clorox Co.*, 202 F.R.D. 410, 415 (D.N.J. 2001) for the proposition that communications with a paralegal are not privileged when the advice of the paralegal, instead of that of an attorney, is sought. In contrast, however, *HPD* also recognized that the privilege may extend to communications made "to assist an attorney to formulate and render legal advice to a client." *Id.* at 415.

Having reviewed the documents, I find Items 1, 7, and 19 to have been properly withheld under the asserted attorney-client privilege. The referenced communications were made to and by the Respondent's paralegal in order to facilitate legal advice from the Respondent's in-house counsel to its management. Notably, the client communications to the paralegal, and *vice versa*, appear to have been made and received only in the paralegal's capacity as the attorneys' agent. Therefore, I find that items 1, 7, 1and 19 are privileged and properly withheld.

However, Items 6 and 12 were withheld under an assertion of protected work product, not attorney-client privilege. (*See* Memorandum at 10, 12.) I note that documents created by a non-lawyer may constitute protected work product if the non-lawyer was acting as an agent of an attorney providing legal advice. *See Heroit v. Byrne,* 257 F.R.D. 645 (N.D. Ill. 2009); *In re Grand Jury Proceedings,* 2001 U.S. Dist. LEXIS 15646 (Oct. 3, 2001). However, to be protected, documents prepared by an agent also must be prepared in anticipation of litigation. *See Toledo Edison Co. v. G.A. Techs., Inc.,* 847 F.2d 335 (6th Cir. 1988).

I find that Item 6 was created after the Complainant's previous OSHA complaint had been withdrawn. Furthermore, the Respondent failed to demonstrate that it was prepared in anticipation of litigation, instead claiming merely that it "discusses the manner in which the Legal Department handled the OSHA Complaint." (Memorandum at 10.) Similarly, the nature of Item 12 indicates that it was prepared by the paralegal neither as an agent of the attorney or in anticipation of litigation. Therefore, the Respondent's assertion of work product immunity fails as to both Items 6 and 12 and I order their disclosure.

Failure of Work Product Privilege Absent Existing Legal Claim

The Complainant challenged the Respondent's assertion of work-product immunity for Items 1, 2, and 6 through 19 because they were purportedly created at times when no active legal

[2] Consequently, it should be noted, the undersigned does not feel that reviewing the materials has in any way affected my ability to hear the case impartially.

claim existed. In support, the Complainant highlighted that a "substantial and significant threat of litigation" is required to substantiate a claim for work product immunity. *Trujilo, supra.* As noted above, Items 1, 6, 7, 12, and 19 have been addressed. Further, of the remaining documents challenged, only Items 2, 14, 15, 16, and 18 were withheld under an assertion of work-product immunity.[3]

Item 2 contains the mental impressions of a paralegal, which, if covered by work-product immunity, are protected from disclosure even in the face of a showing of substantial need.[4] *See Toledo Edison Co. v. G.A. Techs., Inc.,* 847 F.2d 335 (6th Cir. 1988) The burden of showing that the nature of the materials are "mental impressions, conclusions, opinions or legal theories of an attorney or representative [agent]" rests on the objecting party. *John B. v. Goetz*, 879 F. Supp. 2d 787, 897 (M.D. Tn. 2010)(citing *Toledo Edison, supra,* at 339-40). I note that the nature of the document, in that it includes the declarant's opinion, is clear. Further, I find that the paralegal created the withheld document as an agent of Robb Tice, the attorney to whom it was provided. Accordingly, I find that Item 2 has properly been withheld as work product.

According to the Respondent, Item 14 was purportedly protected work product because it was "an internal Legal Department communication regarding the defense of Complainant's claims." (Memorandum at 13.) However, without more, that explanation fails to show that the withheld communication was prepared in anticipation of litigation. Accordingly, I find that Item 14 has been improperly withheld and order its disclosure.

Items 15 and 16 are comprised of communications made in confidence between Respondent's management and in-house counsel. The documents generated during that exchange clearly include the impressions and conclusions necessary to the development of the Respondent's legal strategy. Accordingly, those documents have been properly withheld.

Item 18 has been withheld under an assertion of work-product immunity based on the document's purported "insight into work performed in the furtherance of legal advice and counseling." (Memorandum at 14.) Finding that explanation unpersuasive, I order its disclosure.

In sum, the Respondent has failed to substantiate its claim that Items 14 and 18 are protected work product. Accordingly, Items 14 and 18 must be disclosed.

Waiver

According to the Complainant, the Respondent engaged in the selective provision of privileged and confidential documents relating to the reasons for referring the Complainant to compulsory psychiatric review. (Amended Motion at 7.) The Complainant argued that the meeting notes provided by the Respondent (which it attached) were privileged. Therefore, the Complainant argued, the Respondent waived any assertion of privilege for all documents related

[3] Items 8 through 11 and 17 were withheld under an assertion of attorney-client privilege which I have found persuasive.

[4] The Respondent argued that the requested communication was "first, not relevant to this case." (Memorandum at 8.) However, as a threshold matter, I find that the Complainant's request is reasonably calculated to discover relevant evidence as defined by Fed. R. Evid. 401 and Fed. R. Civ. Proc. 26.

to this same subject matter. *See Hernandez v. Tannien,* 604 F.3d 1095, 1100 (9th Cir. 2010)). The Complainant also attested that the notes constituted the Respondent's "primary evidence of its allegedly non-discriminatory intent." (Amended Motion at 8.)

Having reviewed Exhibit G, I note that the Respondent did provide four pages of notes taken by Todd Ondra, the Respondent's Managing Director of Aviation and Regulatory Safety, during a meeting with the Complainant and others. Those notes, although marked "PRIVILEGED AND CONFIDENTIAL," contained neither attorney-client communications nor Mr. Ondra's impressions of the Complainant's security critique that prompted the meeting. Further, Mr. Ondra is not an attorney nor was he acting at the behest of an attorney while taking the meeting notes. Instead, the notes are essentially minutes of the Respondent's meeting with the Complainant. They contain only secondhand recitations of the security concerns the Complainant expressed during the meeting. Accordingly, the notes are not privileged, and therefore, voluntary disclosure of them did not constitute a waiver of any privilege associated with other documents regarding the same subject matter.

Communications Created for Internal Investigation are Discoverable

Lastly, the Complainant challenged the Respondent's withholding of any internal documents or communications "originated by or sent to Labor Counsel Robert Tice, identified by FedEx as one of the primary decision-makers and one of only three fact witnesses." (Amended Motion at 7.) The Complainant asserted that documents created by Mr. Tice are discoverable because the work-product doctrine does not apply when an attorney undertakes an internal investigation to comply with internal policy. *Id.* (citing *Harding v. Dana Transport, Inc.,* 914 F. Supp. 1084 (D.N.J. 1996)).

However, I find *Harding* to be distinguishable in that the court in *Harding* held that the defendant-employer "impliedly waived the protection provided by the work[-] product doctrine" by asserting an affirmative defense of "reasonable investigation" to thwart liability under Title VII under a theory of *respondeat superior,* thus placing the attorney-led investigation directly at issue. *Id.* at 1099. Specifically, the Court reasoned that "[j]ustice requires that the plaintiffs be permitted to respond to the defenses asserted with a full spectrum of information." *Id.*

I note further that the Complainant has not alleged such a specific waiver, but instead implies that Mr. Tice's mere involvement in the creation of the documents warrants their disclosure. I do not find this argument persuasive, specifically in light of the *Harding* Court's express acknowledgement that "attorneys are still free to prepare their cases without fear of disclosure to an adversary as long as they and their clients refrain from making such disclosures themselves." *Id.* (citing *Westinghouse v. Republic of the Philippines*, 951 F.2d 1414, 1429 (3d Cir. 1991)).

Moreover, I note that as the Lead Counsel for Respondent's Labor Relations department, Mr. Tice was involved in nearly all of the communications withheld. Ordering blanket disclosure of investigative documents created by in-house counsel would limit corporate attorneys' ability to "obtain factual information from a number of individuals within that corporation . . . with the intent to enhance client representation." *Id.* at 1091 (citing *Upjohn Co. v. United States*, 449 U.S.

383, 390 (1981)); *see also Hickman v. Taylor,* 329 U.S. 495, 511 (1947)("Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference"). Accordingly, I find the Complainant's challenge to be unpersuasive.

Conclusion

In sum, I find the vast majority of the Respondent's assertions of privilege to be well-founded. However, I find that the Respondent failed to establish the required protection regarding Items 6, 12, 14, and 18. Accordingly, the Respondent is **ORDERED** to disclose Items 6, 12, 14, and 18 from its privilege log within 10 days of the issuance of this Order.

SO ORDERED.

Digitally signed by John P. Sellers III
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Location: Cincinnati OH

JOHN P. SELLERS, III
Administrative Law Judge

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Case Number: **2014AIR00022**

Document Title: **Order**

I hereby certify that a copy of the above-referenced document was sent to the following this 20th day of July, 2015:

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