

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

ALICIA GUY,

Plaintiff,

v.

No. 2:18-cv-02117-MSN-tmp

YUSEN LOGISTICS (AMERICAS), INC.

Defendant.

**ORDER OVERRULING DEFENDANT'S PARTIAL OBJECTIONS TO MAGISTRATE
JUDGE'S ORDER FOLLOWING *IN CAMERA* REVIEW OF DOCUMENTS TO
WHICH DEFENDANT ASSERTS PRIVILEGE**

Before the Court is Defendant Yusen's Partial Objections to Magistrate Judge's Order Following *In Camera* Review of Documents to which Defendant Asserts Privilege, filed January 3, 2019 under seal. (ECF No. 39.) After considering Defendant's partial objections, Plaintiff's Statement of Opposition to Defendant's Partial Objections to Magistrate Judge's Order Following *In Camera* Review of Documents Deemed Unprotected by Privilege or Work Product by the Court (ECF No. 40), the Magistrate Judge's Order Following *In Camera* Review of Documents to Which Defendant Asserts Privilege (ECF No. 38), and all other relevant documents,¹ the Court finds that Defendant fails to make a showing that the Magistrate Judge's Order was clearly erroneous or contrary to law. Defendant's partial objections are **OVERRULED**.

¹ These documents include Plaintiff's Motion to Compel Discovery, filed August 12, 2018 (ECF No. 21), and the Magistrate Judge's Order Granting Plaintiff's and Defendant's Motion to Compel Discovery, filed November 1, 2018 (ECF No. 32).

BACKGROUND

Plaintiff commenced this action on February 22, 2018, claiming employment discrimination and retaliation pursuant to the Tennessee Human Rights Act, Section 1981 of the Civil Rights Act of 1866, and the Family and Medical Leave Act. (ECF No. 2 at PageID 16 ¶ 4.) Both parties filed motions to compel, which were then referred to the Magistrate Judge for determination. (ECF Nos. 21, 22, 25, 26.) Plaintiff's motion to compel sought production of files relating to the investigation of Plaintiff's hostile work environment complaint, including "the file and notes related to communications between Ms. Guy and Ms. Hodges" and "any communications, impressions, and information conveyed to Yusen by Ms. Hodges." (ECF No. 21 at PageID 75–76.) Defendant argued that those documents were protected by attorney-client privilege and the work product doctrine. (*See* ECF No. 23.)

The Magistrate Judge conducted a hearing ("the hearing") on the parties' motions to compel on October 18, 2018, where the parties informed the Magistrate that they jointly agreed to produce the information requested in the motions. (ECF No. 38 at PageID 283.) Accordingly, the Magistrate Judge orally granted the parties' motions and instructed them to submit a proposed order granting the motions. (*Id.*) The parties failed to submit a proposed order, so the Magistrate Judge held a status conference where it was learned that the parties were unable to agree on language for the proposed order. (*Id.*) Defendant objected to the production of certain communications between Kimberly Hodges ("Hodges"), an Ogletree Deakins attorney who was to investigate Plaintiff's hostile work environment complaint, Defendant's employees, and other Ogletree Deakins attorneys who dealt with Defendant's investigation into Plaintiff's hostile work environment complaint and termination. (*Id.*)

The Court entered an order granting both motions because the parties otherwise agreed to produce what was requested in the motions to compel. (ECF No. 32.) The Court did, however, allow Defendant to temporarily withhold communications it maintained were protected by attorney-client privilege and the work product doctrine. (ECF No. 38 at PageID 284.) Defendant was to submit the alleged privileged communications for an *in camera* review. (*Id.*) In doing so, Defendant argued three categories of those communications were protected by attorney-client privilege and the work product doctrine: (1) the pre-investigation emails; (2) an email during the investigation providing legal advice;² and (3) post-investigation/pre-termination emails. (ECF No. 33 at PageID 188.) After reviewing the documents, arguments of counsel and statements of counsel in open court as to Plaintiff's motion to compel, the Magistrate Judge ordered Defendant to produce the pre-investigation emails and the email during the investigation, but found that Defendant could withhold the post-investigation/pre-termination emails. (*Id.* at PageID 281.) On January 3, 2019, Defendant filed its objections to the Magistrate Judge's order. (ECF No. 39.) Plaintiff filed a statement of opposition to defendant's partial objections on January 17, 2019. (ECF No. 40.)

STANDARD OF REVIEW

When considering "non-dispositive" matters such as a motion to compel, the district court shall apply a "clearly erroneous or contrary to law" standard of review pursuant to 28 U.S.C. § 636(b)(1)(A). *United States v. Curtis*, 237 F.3d 598, 603 (6th Cir. 2001) (citing *United States v. Raddatz*, 447 U.S. 667, 673 (1980)). Where the Court refers a non-dispositive motion to a Magistrate Judge, "the district judge must consider timely objections and modify or set aside any

² This email is between Kimberly Hodges, an attorney from the law firm of Ogletree Deakins who Defendant retained to investigate Plaintiff's hostile work environment complaint made against Plaintiff's supervisor, and Corporate HR Manager Chris Allen.

part of the order that is clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a). “A judge of the court may reconsider any pretrial matter . . . where it has been shown that the magistrate’s order is clearly erroneous or contrary to law.” 28 U.S.C. § 636(b)(1)(A). In doing so, a district court can “overturn [a magistrate judge’s decision] only if it is clearly erroneous or contrary to law.” *Banner v. City of Flint*, 99 Fed. Appx. 29, 35 (6th Cir. 2004) (quotation and citation omitted). When addressing factual findings, the “clearly erroneous” standard applies; and when addressing legal conclusions, the less stringent “contrary to law” standard applies. *Currier v. Fogel*, 668 F.2d 100, 116 (2d Cir. 1981), *cert. denied sub nom. Currier v. Fogel*, 459 U.S. 828 (1982).

This matter stems from a motion to compel that was referred to the Magistrate Judge. As such, this Court’s review of the Magistrate Judge’s decision based on Defendant’s partial objections is under the “clearly erroneous or contrary to law” standard, pursuant to 28 U.S.C. § 636(b)(1)(A).

ANALYSIS

1. Attorney-Client Privilege

Attorney-client privilege “protects from disclosure confidential communications between a lawyer and his client in matters that relate to the legal interests of society and the client.” *Ross v. City of Memphis*, 423 F.3d 596, 600 (6th Cir. 2005). The elements for the privilege are as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.

Reed v. Baxter, 134 F.3d 351, 355–56 (6th Cir. 1998). The party asserting the privilege has the burden of establishing the existence of the privilege. *U.S. v. Dakota*, 197 F.3d 821, 824 (1999).

The privilege applies “where legal advice of any kind is sought.” *Reed*, 134 F.3d at 355. It is, however, “generally accepted that communications between an attorney and client of primarily a business nature are outside the scope of the privilege.” *Glazer v. Chase Home Fin., LLC*, No. 1:09-cv-1262, 2015 WL 12733394, at *4 (N.D. Ohio Aug. 5, 2015). “[T]he privilege does not permit an attorney to conduct his client’s business affairs in secret.” *In re Grand Jury Subpoenas*, 803 F.2d 493 (9th Cir. 1986). It “only applies if the lawyer is providing legal advice or services, and [the attorney-client privilege] will not protect disclosure of non-legal communications where the attorney acts as a business or economic advisor.” *Edwards v. Whitaker*, 868 F. Supp. 226, 228 (M.D. Tenn. 1994) (internal citation and quotation omitted). To determine whether a communication is privileged when it involves both legal and non-legal matters, a court must “consider whether the predominant purpose of the communication is to render or solicit legal advice.” *In re Cty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007).

“Litigants cannot hide behind the privilege if they are relying upon privileged communications to make their case. ‘The attorney-client privilege cannot at once be used as a shield and a sword.’” *In re Lott*, 424 F.3d 446, 454 (6th Cir. 2005) (quoting *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)). “The scope of the waiver turns on the scope of the client’s disclosure, and the inquiry is whether the client’s disclosure involves the same subject matter as the desired testimony.” *United States v. Collis*, 128 F.3d 313, 320 (6th Cir. 1997).

These legal standards are the same used by the Magistrate Judge in the order following *in camera* review. (See ECF No. 38 at PageID 285–88.) Therefore, this Court determines that the Magistrate Judge applied the correct law when making its decision.

2. *Work Product Doctrine*

“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative.” Fed. R. Civ. P. 26(b)(3)(A). The work product doctrine “is distinct from and broader than the attorney-client privilege.” *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002). “A party asserting the work product doctrine bears the burden of establishing that the documents he or she seeks to protect were prepared ‘in anticipation of litigation.’” *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006) (quoting *In re Powerhouse Licensing, LLC*, 441 F.3d 467, 473 (6th Cir. 2006) (“Once the party requesting discovery establishes relevance, the objecting party has the burden of showing that the material was prepared in anticipation of litigation or for trial.”)). The 6th Circuit established the “because of” test in *United States v. Roxworthy*, “which asks (1) whether a document was created because of a party’s subjective anticipation of litigation, as contrasted with an ordinary business purpose, and (2) whether that subjective anticipation of litigation was objectively reasonable.” 457 F.3d at 594. “A document will not be protected if it would have been prepared in substantially the same manner irrespective of the anticipated litigation.” *Id.* at 593–94. “If the document is prepared in anticipation of litigation, the fact it also serves an ordinary business purpose does not deprive it of protection, . . . but the burden is on the party claiming protection to show that anticipated litigation was the ‘driving force behind the preparation of each requested document.’” *In re Prof’ls Direct Ins. Co.*, 439 F.3d 439 (6th Cir. 2009) (quoting *Roxworthy*, 457 F.3d at 593).

These legal standards are the same used by the Magistrate Judge in the order following *in camera* review. (See ECF No. 38 at PageID 288–89.) Therefore, this Court determines that the Magistrate Judge applied the correct law when making its decision.

DISCUSSION

Defendant argues that the following factual findings and legal conclusions relating to these issues are clearly erroneous and contrary to law:

The finding that Yusen agreed to provide documents that consist of attorney-work product or where legal advice is being provided; [t]he finding that the primary purpose of Yusen’s pre-investigation emails was to provide business and not legal advice; and [t]he conclusion that Yusen’s pre-investigation emails are not covered by the attorney-client privilege or work product doctrine.

(ECF No. 39 at PageID 295.) Defendant ultimately objects to producing pre-investigation emails between employees of Yusen and Yusen’s in-house and outside counsel subject to *in camera* review and an e-mail during the investigation between Ms. Hodges and Corporate HR Manager Chris Allen. (ECF No. 39 at PageID 298–300.)

1. PRE-INVESTIGATION EMAILS

Defendant maintains that the communications between employees of Yusen and Yusen’s in-house and outside counsel subject to *in camera* review are protected by the attorney-client privilege and work product doctrine. (ECF No. 39 at PageID 299.)

a. Attorney-Client Privilege

In its brief to the Magistrate Judge, Defendant stated that the emails between Ogletree attorneys, including Hodges, were privileged due to “Yusen’s request for a confidential privileged investigations and recommendations regarding same.” (ECF No. 38 at PageID 290 (quoting ECF No. 3 at PageID 189).) The Magistrate Judge’s order following *in camera* review found that this particular communication was previously subject to the Court’s earlier order granting the motion to compel and that Defendant would still have to produce these communications. (ECF No. 38 at PageID 290.) The Magistrate Judge’s order also found that because these emails were relating to Defendant’s request to conduct an internal investigation and the firm’s discussions about how to

conduct the investigation, the predominant purpose of the communication was not to solicit legal advice. *See Alomari v. Ohio Dept. of Public Safety*, 626 Fed.Appx. 558, 570 (6th Cir. 2015). (Id. at PageID 290–91.) Additionally, it was determined that Defendant waived attorney-client privilege by disclosing other communications on the same subject matter. *See Mooney v. Wallace*, 2006 WL 8434638, at *8 (W.D. Tenn. July 12, 2006); *see also Mainstay High Yield Corp. Bond Fund v. Heartland Indus. Partners, L.P.*, 263 F.R.D. 478, 480 (E.D. Mich. 2009) (“The widely applied standard for determining the scope of a waiver of attorney-client privilege is that the waiver applies to all communications relating to the same subject matter.”). (ECF No. 38 at PageID 291.)

The Magistrate Judge applied the correct standards for attorney-client privilege and waiver of the privilege in determining that (1) the predominant purpose was not to solicit legal advice, and that (2) Defendant waived the privilege by disclosing other communications in the same subject matter. (ECF No. 38 at PageID 291.) Defendant fails to show that the Magistrate Judge’s ruling was clearly erroneous or contrary to law in determining that these communications are not protected from disclosure by attorney-client privilege under the facts in this case.

The Court also finds that the Magistrate Judge’s determination that Defendant waived the privilege by producing emails on the same subject matter was not clearly erroneous or contrary to law. (*See id.*) Defendant agreed to produce email exchanges regarding how to conduct the investigation and to produce an email exchange about the strategy for the investigation. (*See* ECF No. 33 at PageID 194.)

b. Work Product Doctrine

The Magistrate Judge found that the work product doctrine was “inapplicable here because these communications were not made in anticipation of litigation.” (ECF No. 38 at PageID 291.) The communications discuss an internal investigation into Plaintiff’s hostile work environment

claims against her superior, and the Magistrate Judge determined it was improbable that Defendant anticipated Plaintiff's termination or this litigation when the communications were sent. (ECF No. 38 at PageID 291.)

As stated before, this Court determines that the Magistrate Judge applied the correct standard when addressing the work product doctrine arguments raised by Defendant. The Magistrate Judge found that although Defendant seeks to withhold these email exchanges amongst Ogletree attorneys, they were made about an internal investigation regarding an employee's complaint, not necessarily in anticipation of this litigation. Whether the investigation was conducted in anticipation of litigation is a close call, but the Magistrate Judge applied the correct law in analyzing the issue, and his conclusion is not clearly erroneous or contrary to law under the facts in this case.

Additionally, Defendant fails to argue that the Magistrate Judge's determination was clearly erroneous or contrary to law. Therefore, the Magistrate Judge's ruling as to the pre-investigation emails and the work product doctrine stands.

For the foregoing reasons, this Court determines that the Magistrate Judge's decision ordering production of the pre-investigation emails (*see* ECF No. 38 at PageID 289-91.) was not clearly erroneous or contrary to law, and Defendant's objection as to the pre-investigation emails is **OVERRULED**.

2. *EMAIL DURING THE INVESTIGATION*

Defendant argues that the November 3, 2017 email between Ms. Hodges and Corporate HR Manager Chris Allen is subject to attorney-client privilege and work product doctrine. Defendant also argues that it did not agree to produce this particular e-mail, but "agreed to produce Ms. Hodges' notes and communications which were made in Ms. Hodges' role as investigator, such as

her notes, memorandum, calendar invites, and emails directly involving her investigation into Plaintiff's October 2017 complaint." (ECF No. 39 at PageID 298.)

The Court disagrees with Defendant's repeated assertion that it did not agree to produce this particular e-mail at the October 18, 2018 hearing before the Magistrate Judge. After careful review of the audio of the hearing,³ this Court determines that Defendant's counsel did agree to produce Ms. Hodge's correspondence. While Mr. Harrison, counsel for Defendant who was present at the hearing, did mention Ms. Hodge's notes, he stated repeatedly that he would produce the document at "issue" in Plaintiff's motion to compel. (See ECF No. 21.) This Court has carefully reviewed the audio recording and the following are statements made by Mr. Harrison and the Magistrate Judge during different portions of the hearing:

- Mr. Harrison: "I'm willing to concede that issue if he'll answer my discovery fully."
- Mr. Harrison: "I think there's an arguable basis for privilege, but I'm willing to concede that issue. I understand his position and it is a defense in our case, and I'm willing to concede that issue. But [Plaintiff's counsel] has got to answer my discovery."
- Magistrate Judge: "It sounds like . . . Defendants are willing to produce the documents and other information that's of issue in the Plaintiff's motion to compel because it sounds like they are going to rely on that investigation."
- Mr. Harrison: "I'm willing to mutually agree that we will both produce these documents we seek."
- Mr. Harrison: "What [Plaintiff's counsel] has asked today is that we produce Kim Hodge's documents relating to her investigation and we've conceded that issue. . . . [T]here is no evasion of anything. We said we're going to produce the documents, that's fine."
- Mr. Harrison: "I've said I will concede the attorney-client privilege issue. And that was the basis of our objection . . . it was all based on the attorney-client privilege. . . . [Plaintiff's counsel] has filed a motion and that's what's

³ The parties were notified at the beginning of the hearing by the Magistrate Judge that the Court was recording the hearing via the Court's electronic recording system.

before the Court. I've conceded. I'll agree to give him those documents from Kim Hodges. That's not an issue anymore."

- Mr. Harrison: "If I give him the documents from Kim Hodges, I think that kind of answers everything. It'll give him everything he needs, and our answer is based on that."
- Magistrate Judge: "What we have here is the Plaintiff is agreeable to produce their information. Defendants are agreeable now to produce their information since they are conceding that they're not going to push the issue of attorney-client privilege as to the Hodge's investigation."

In the hearing, counsel for Defendant did not limit what Defendant would produce as it related to Ms. Hodge's documents and communications. This email at issue was sent while Ms. Hodges was investigating Plaintiff's complaint and it relates to that investigation. (*See* ECF No. 33 at PageID 195.) Therefore, based upon Mr. Harrison's representation at the hearing, it must be produced pursuant to the agreement made during the hearing, regardless of the Magistrate Judge's earlier order granting Plaintiff's motion to compel and the Magistrate Judge's Order Following *in Camera* Review of Documents to Which Defendant Asserts Privilege. (ECF Nos. 32, 38.)

a. Attorney-Client Privilege

The Magistrate Judge found that, even without the previous orders, this email would be discoverable because it is not protected by attorney-client privilege since the email contains business advice as to how to deal with an employment related matter. (ECF No. 38 at PageID 292.) Defendant has also produced other communications made during the investigation between Ms. Hodges regarding the strategy for investigation and the investigation itself. (*See Id.*; ECF Nos. 33 at PageID 194.) The Magistrate Judge applied the correct standard in deciding whether this email was covered under attorney-client privilege and determined that it was not covered. His application of the law was also correct, so the Magistrate Judge's decision was not clearly erroneous or contrary to law.

Even if the Magistrate Judge had found that the subject email was privileged, Defendant waived the privilege by telling the Court it would produce Ms. Hodge's communications,⁴ (see ECF No. 33 at PageID 194–95) and the Magistrate Judge so found. (ECF No. 38 at PageID 292.) *See Edwards*, 868 F. Supp. at 226 (“[V]oluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject matter.”) Defendant does not address in its objections why the Magistrate Judge's determination that attorney-client privilege was waived for this email was clearly erroneous or contrary to law. The burden of establishing that the privilege has not been waived falls on the party asserting the privilege. Defendant has not met that burden.

b. Work Product Doctrine

The next issue is whether this November 3, 2017 email is protected by the work product doctrine. In its partial objections, Defendant argues that this email “provides legal advice as Ms. Hodges is advising Mr. Allen on the avoidance of potential legal claims,” (ECF No. 39 at PageID 300.); however, Defendant fails to argue how this email was sent in anticipation of litigation. As such, the Court agrees with the Magistrate Judge's order and finds that Defendant fails to meet its burden of showing that “anticipated litigation was the driving force behind the preparation of each requested document.” *In re Prof'ls Direct Ins. Co.*, 578 F.3d 432, 439 (6th Cir. 2009) (internal

⁴ The Court notes that Defendant not only agreed to produce Ms. Hodge's documents and communications at the hearing before the Magistrate Judge, but Defendant also conceded the entire issue as to attorney-client privilege at the hearing. *See Waive*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/waive> (last visited Apr. 11, 2019) (“Waive implies conceding . . .”). Defendant waived attorney-client privilege by conceding the issue in open court before the Magistrate Judge. This matter is distinguished from *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337 (9th Cir. 1996), where the party asserting privilege had signed a separate settlement agreement waiving privilege as to certain documents. Here, Defendant conceded the attorney-client privilege issue as to Ms. Hodge's documents and communications before the Magistrate Judge, who subsequently entered an order to that effect. (See ECF No. 32.)

citation and quotation omitted). (See ECF No. 38 at PageID 292.) The Magistrate Judge applied the correct standard and found that this email was not protected by the work product doctrine. Although the Magistrate Judge did state that “[W]hether the email between Hodges and Allen is protected by the work product doctrine presents a closer question” (*Id.*), Defendant does not show that the email was sent in anticipation of litigation or that the Magistrate Judge’s decision was clearly erroneous or contrary to law.

For the foregoing reasons, the Court determines that the Magistrate Judge’s order requiring that the November 3, 2017 email must be produced is not clearly erroneous or contrary to law and Defendant’s objection as to this communication is **OVERRULED**.

CONCLUSION

For the reasons above, Defendant’s partial objections to the Magistrate Judge’s Order Following *In Camera* Review of Documents to Which Defendant Asserts Privilege are **OVERRULED**. Defendant is ordered to produce the pre-investigation emails⁵ and the email between Ms. Hodges and Defendant during the course of the investigation⁶ prior to commencement of Plaintiff’s deposition.

IT IS SO ORDERED this 11th day of April, 2019.

s/ Mark S. Norris

MARK S. NORRIS
UNITED STATES DISTRICT JUDGE

⁵ See ECF No. 33-2 identified as Category 1 – Pre-Investigation Emails (Bates Nos. Yusen [Guy] 000093-95; 102, 110–113; 120–123; 130–132; 152–154; 161–163).

⁶ See ECF No. 33-3 identified as Category 2 – Email Providing Legal Advice During Investigation (Bates Nos. Yusen [Guy] 000570; 576).