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

[redacted],	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**No. 18-cv-2117-MSN-tmp**
YUSEN LOGISTICS (AMERICAS), INC.,	)	
	)	
Defendants.	)	

ORDER FOLLOWING *IN CAMERA* REVIEW OF DOCUMENTS TO WHICH DEFENDANT ASSERTS PRIVILEGE

Before the court is defendant Yusen Logistics (Americas), Inc.'s ("Yusen") request for an *in camera* review of certain documents that it maintains are protected by privilege. On November 5, 2018, Yusen filed a Memorandum for the Court's *In Camera* Review of Certain Documents to which Defendant Asserts Privilege, an amended privilege log, and the withheld documents. (ECF Nos. 33; 33-1; 33-2; 33-3; 33-4). On November 15, 2018, [redacted] responded. (ECF No. 36.) For the following reasons, the court orders Yusen to produce the pre-investigation emails and the email during the investigation. However, Yusen may withhold the post-investigation/pre-termination emails.

I. BACKGROUND

This is an employment discrimination and retaliation case brought under 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 2 ¶ 4.) Beginning in 2011, Yusen employed [redacted] as an accounts receivable supervisor. (Id. at 2 ¶ 9.) Yusen subsequently promoted [redacted] to the corporate accounts receivable manager position. (Id. at 2 ¶ 10.) [redacted] alleges that Chris Hoshell, her supervisor at Yusen, subjected her and other female employees to a hostile work environment. (Id. at 3 ¶¶ 13-19.) [redacted] further asserts that in October of 2017, [redacted] complained about the hostile work environment directly to Hoshell and other Yusen supervisors. (Id. at 4 ¶ 24.) In November of 2017, a Yusen Human Resources employee informed [redacted] that Yusen would investigate her complaint. (Id. at 4 ¶ 28.) Yusen retained Kimberly Hodges, an attorney from the law firm of Ogletree Deakins, to investigate [redacted] complaint. (Id. at 4 ¶ 30.) At some point during the investigation, it was discovered that [redacted] had recorded Hoshell, who was allegedly speaking to her "in a manner that was demeaning, aggressive, unprofessional, hostile, and intimidating." (Id. at 4 ¶ 35.) Subsequently, Yusen fired [redacted] for allegedly making this recording and playing it in front of Hodges. (Id. at 4 ¶ 39.)

In this litigation, the parties filed motions to compel, which were referred to the undersigned for determination. (ECF Nos. 21, 22, 25, 26.) In [redacted] motion to compel, [redacted] sought the production of Hodges's file relating to the investigation of [redacted] complaint. (ECF No. 21.) [redacted] asserted that this request included "the file

and notes related to communications between [redacted] and Ms. Hodges" and "any communications, impressions, and information conveyed to Yusen by Ms. Hodges." (Id. at 4-5.) In response, Yusen argued that those documents were protected by attorney-client privilege and the work product doctrine. (See generally ECF No. 23.) On October 18, 2018, the court conducted a hearing on the parties' motions to compel. At the hearing, the parties informed the court that they jointly agreed to produce the information requested in the motions. As a result of this agreement, the court orally granted the parties' motions and instructed the parties to submit a proposed order. However, as of October 29, 2018, the parties had not submitted a proposed order, which prompted the court to set a status conference to ascertain why a proposed order had not been submitted. At the status conference, the parties informed the court that they were unable to agree upon the language for the proposed order. Specifically, Yusen objected to the production of certain communications between Hodges, Yusen employees, and other Ogletree Deakins attorneys that related to Yusen's investigation of [redacted] complaint and [redacted] subsequent termination.

Because the parties otherwise agreed to produce the discovery requested in the motions to compel, the court entered an order granting both motions. (ECF No. 32.) The court's order provided:

> 1. Defendant shall be ordered to supplement its responses to Plaintiff's Requests for Production of Documents and Plaintiff's First Requests for Admission in light of Defendant's conceding that it will withdraw its attorney-

> client privilege and work produc ons as to the meeting between Kim Hodges and [redacted] on or about November 2, 2017. Defendant wil produce Kim Hodges' investigation file, notes, and related commun lating to that November 2, 2017 meeting with [redacted] Defendant will comply with the above within f the entry of this Order.
>
> 2. Plaintiff shall be ordered to supplement its responses to Defendant's First Set of Interrogatories, and shall be ordered to respond to Defendant's Requests for Production of Documents and Defendant's Requests for Admission. Plaintiff will comply with the above within 10 days of the entry of this Order.
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> 3. The Court orders that Plaintiff has not waived her objections to responses to Defendant's discovery requests. However, the Court instructs both parties to provide discovery responses in good faith and to avoid making invalid objections.
>
> 4. Neither party will be awarded costs or fees relating to the motions.

(Id. at 1-2.) However, the court allowed Yusen to temporarily withhold the communications it maintained were protected by attorney-client privilege and the work product doctrine. The court directed Yusen to submit the alleged privileged communications to the court for an *in camera* review. In addition, Yusen filed a brief in support of its position that the communications are protected by privilege. (See ECF No. 33.)

In its brief, Yusen concedes that at the hearing it withdrew "its assertion of the work product and attorney client privilege as to Ms. Hodges' investigative notes and communications which were made in Ms. Hodges' role as investigator." (ECF No. 33 at 1.) However, Yusen maintains that "the privilege remains where Ms.

Hodges was providing legal advice, including emails which clearly consist of attorney work product or where legal advice is being provided." (Id. at 1-2.) [redacted] raises three arguments in response. (ECF No. 36.) First, [redacted] argues that the court (by agreement of the parties) already granted her motion to compel and Yusen is attempting to re-litigate the motion and the court's ruling. (Id. at 1-2). Next, [redacted] argues that the withheld communications are not protected by privilege. (Id. at 2-3.) Finally, [redacted] argues that even if the withheld communications are privileged, Yusen has waived the privilege. (Id. at 3-4.)

II. ANALYSIS

A. Attorney-Client Privilege

"The 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.'" Jackson v. Bd. of Educ. of Memphis City Schs., No. 07-2497, 2008 WL 747288, at *1 (W.D. Tenn. Mar. 18, 2008) (quoting Ross v. City of Memphis, 423 F.3d 596, 600 (6th Cir. 2005)). The elements of the attorney-client privilege are:

> (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 burden

of establishing the attorney-client privilege rests with the person asserting it." Doe v. Hamilton Cty. Bd. of Educ., No. 1:16-cv-373, 2018 WL 542971, at *2 (E.D. Tenn. Jan. 24, 2018).

Further, "[t]he attorney-client privilege applies '[w]here legal advice of any kind is sought.'" Alomari v. Ohio Dep't of Pub. Safety, 626 F. App'x 558, 570 (6th Cir. 2015) (quoting Reed, 134 F.3d at 355) (alteration in original); Kamenski v. Wellington Exempted Vill. Schs., No. 1:14-cv-1489, 2016 WL 1732872, at *5 (N.D. Ohio May 2, 2016) ("[T]he attorney-client privilege protects only confidential disclosures made for the purpose of obtaining legal advice."). "Fundamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct." Alomari, 626 F. App'x at 570 (quoting In re Cty. of Erie, 473 F.3d 413, 419 (2d Cir.2007)). "It is now 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); see also Edwards v. Whitaker, 868 F. Supp. 226, 228 (M.D. Tenn. 1994) (the attorney-client privilege "only applies if the lawyer is providing legal advice or services, and [it] will not protect disclosure of non-legal communications where the attorney acts as a business or economic advisor." (internal citation and quotation omitted)). "When a communication involves both legal and non-legal matters, we

'consider whether the predominant purpose of the communication is to render or solicit legal advice.'" Alomari, 626 F. App'x at 570 (quoting In re Cty. of Erie, 473 F.3d at 419); see also Koumoulis v. Indep. Fin. Mktg. Grp., Inc., 295 F.R.D. 28, 37-38 (E.D.N.Y. Nov. 1, 2013) ("Each attorney-client communication need not specifically ask for legal advice, but the party asserting the privilege must first establish that the information is sent to counsel in order for counsel to provide legal advice." (internal citation and quotation omitted)).

In addition, "'[l]itigants cannot hide behind the privilege if they are relying on privileged communications to make their case' or, more simply, cannot use the privilege as 'a shield and a sword.'" In re United Shore Fin. Servs., No. 17-2290, 2018 WL 2283893, at *2 (6th Cir. Jan. 3, 2018) (quoting In re Lott, 424 F.3d 446, 452–53 (6th Cir. 2005)). "When a party reveals privileged communications or otherwise waives the protections of the attorney-client privilege, 'that party waives the privilege as to all communications on the same subject matter.'" Mooney ex rel. Mooney v. Wallace, No. 04-1190, 2006 WL 8434638, at *8 (W.D. Tenn. July 12, 2006) (quoting United States v. Skeddle, 989 F. Supp. 905, 908 (N.D. Ohio 1997)). "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).

B. Work Product Doctrine

"The work product doctrine 'is distinct from and broader than the attorney-client privilege.'" United States v. BAE Sys. Tactical Vehicle Sys., LP, No. 15-12225, 2017 WL 1457493, at *7 (E.D. Mich. Apr. 25, 2017) (quoting In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 294 (6th Cir. 2002)). Under the work product doctrine, "[o]rdinarily, 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). "A party asserting the work product privilege 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) (internal citation and quotation omitted). When determining whether a document was created in anticipation of litigation, the Sixth Circuit has directed district courts to apply the "because of" test. Id. The test "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." Id. at 594. "Thus, 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. In addition, "[i]f a document is prepared in anticipation of litigation, the fact that 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., 578 F.3d 432, 439 (6th Cir. 2009) (quoting Roxworthy, 457 F.3d at 593) (emphasis added).

C. Documents Subject to the *In Camera* Review

In its brief, Yusen identifies three categories of documents that it contends are protected by attorney-client privilege and the work product doctrine. Specifically, Yusen asserts the following documents are protected: 1) pre-investigation emails; 2) an email during the investigation providing legal advice; and 3) post-investigation/pre-termination emails. (ECF No. 33 at 2.) In response, [redacted] initially argues that the court's order granting her motion to compel already requires Yusen to produce those documents. (ECF No. 36 at 1-2.) [redacted] also argues that those emails are not protected by privilege, and even if those emails are privileged, Yusen waived the privilege. (Id. at 2-5.)

1. Pre-Investigation Emails

Yusen first contends that emails between Ogletree attorneys, including Hodges, are privileged as they relate to "Yusen's request for a confidential privileged investigation and recommendations

regarding same." (ECF No. 33 at 3.) Yusen emphasizes that the only email in this category that includes a Yusen employee is the email where Yusen's Vice President, Mary Anne Kennedy, and an Ogletree attorney discuss the basis for Yusen's requested investigation. (Id.) [redacted] argues that the court's oral order granting her motion to compel requires Yusen to produce those documents. Specifically, in her motion to compel, [redacted] requested Hodges's investigation file, which included "communications between [redacted] and Ms. Hodges [and] . . . communications, impressions, and information conveyed to Yusen by Ms. Hodges." (ECF No. 21 at 4-5.) The court finds that this request covers the pre-investigation communications, which relate to the investigation of [redacted] complaint. As such, the court concludes that the parties' agreement and the court's order require Yusen to produce these communications.

Even if these communications were not subject to the court's earlier order, Yusen would still be required to produce these communications for several reasons. First, the communications are not protected by attorney-client privilege. The communications relate to Yusen's request for Ogletree Deakins to conduct an internal investigation and the firm's subsequent discussions about how to conduct that investigation. Planning for and conducting such investigations are often conducted internally by a company's human resources department. Therefore, the court concludes that

the predominant purpose of the communication was not to solicit legal advice. See Alomari, 626 F. App'x at 570. Moreover, even if these communications were privileged, Yusen waived that privilege by disclosing other communications on the same subject matter. See Wallace, 2006 WL 8434638, at *8; 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 other communications relating to the same subject matter." (internal citation and quotation omitted)). For example, Yusen agreed to produce an email exchange between Hodges and Corporate HR Manager Chris Allen regarding the strategy for the investigation. (ECF No. 33-1 at 2.) As for the work product doctrine, it is inapplicable here because these communications were not made in anticipation of litigation. The communications discuss an investigation into [redacted] hostile work environment claims against Hoshell. At the outset of that investigation, it is improbable that Yusen anticipated [redacted] termination or this litigation.

2. Email During the Investigation

Next, Yusen contends that an email where Hodges "is providing legal advice to Corporate HR Manager Chris Allen regarding Yusen's potential actions towards Plaintiff following the investigation and the avoidance of potential legal claims" is also protected by privilege. (ECF No. 33 at 4.) This email, between Hodges and

Allen, was sent while Hodges was investigating [redacted] complaint and relates to the investigation. The court finds that this email must be produced pursuant to the court's earlier order granting [redacted] motion to compel. However, even without the court's order, this email would be discoverable. Like the pre-investigation communications, this email is not protected by the attorney-client privilege. The court finds that providing business advice was the primary purpose of the communication. In addition, Yusen has produced other communications, made during the investigation, between Hodges and Allen regarding the strategy for the investigation and the investigation itself. (See ECF No. 33-1 at 2) (amended privilege log indicating that Yusen will produce email exchanges between Hodges and Allen regarding the investigation). Therefore, even if this communication were privileged, Yusen waived that privilege by producing other emails on the same subject matter.

Whether the email between Hodges and Allen is protected by the work product doctrine presents a closer question. The court finds that this email must be produced because of the court's prior order granting [redacted] motion to compel. However, even without that order, Yusen has not met its burden of establishing that "anticipated litigation was the driving force behind the preparation of each requested document." In re Prof'ls Direct Ins. Co., 578 F.3d at 439 (internal citation and quotation omitted).

3. Post-Investigation/Pre-Termination Emails

The final category of communications that Yusen alleges are privileged involve emails that "contain mental impressions, opinions, and legal recommendations of outside counsel to Yusen General Counsel regarding language in Plaintiff's termination letter and severance agreement." (ECF No. 33 at 4.) After conducting an *in camera* review of these communications, the court concludes that Yusen may withhold them because they are protected by attorney-client privilege. The communications do not relate to Hodges's investigation and therefore the court's prior order does not require Yusen to produce them. Further, the communications are between Yusen employees, including its general counsel, and Ogletree attorneys and relate to [redacted] termination decision. As Yusen asserts in its brief, these communications include legal advice as to how [redacted] severance agreement and termination letter should be worded. (ECF No. 33 at 4.) Therefore, Yusen may withhold the post-investigation/pre-termination emails.

III. CONCLUSION

For the reasons above, Yusen is ordered to produce the emails that it identifies as pre-investigation emails and the email sent during the investigation, within ten days from the date of this order. However, Yusen may withhold the documents it identifies as post-termination/pre-termination emails.

IT IS SO ORDERED.

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

December 20, 2018
Date