FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 16, 2017

SECRETARY OF LABOR, MSHA on behalf of **LOUIS SILVA JR.**, Complainant v. AGGREGATE INDUSTRIES WRC, INC., Respondent	DISCRIMINATION PROCEEDING Docket No. WEST 2017-0482-DM RM-MD-17-05 Mine: Morrison Plant Mine ID: 05-00864

ORDER HOLDING THAT SUBJECT EMAIL IS NOT PROTECED BY THE ATTORNEY-CLIENT PRIVILEGE

This matter is before me on a complaint of discrimination filed by the Secretary of Labor ("Secretary") on behalf of Louis Silva, Jr. pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(2), against Aggregate Industries WRC, Inc. ("Aggregate Industries"). Silva was terminated from his position as a Quality Control Technician at the Morrison Plant on or about January 19, 2017.

During a deposition of Al Quist, taken on or about September 29, 2017, counsel for the Secretary presented the witness with a copy of an email Quist sent on March 2, 2017, in response to an email sent to him on March 1 by William Doran of the law firm of Ogletree Deakins. Quist is the safety manager at the Morrison Plant. The emails were sent in response to the Secretary's Application for Temporary Reinstatement that had been filed with the Commission on or about February 28, 2017, Docket No. WEST 2017-265-DM.[1] Doran, who is an attorney for Aggregate Industries, attached a copy of the Application for Temporary Reinstatement to the email he sent to Quist. The emails were provided to counsel for the Secretary by Aggregate Industries during discovery in the present discrimination case.

Matthew Linton, also with Ogletree Deakins, represented Aggregate Industries at the deposition. When Linton saw the email, he objected to its use on the basis that it was inadvertently disclosed to the Secretary during discovery. He stated that the email was protected by the attorney-client privilege and noted that it stated, in a large font at the top of the email, "Privileged and Confidential – Attorney Work Product." Linton told counsel for the Secretary and David Lichtenstein, counsel for Silva, that he wanted the email destroyed or returned to him. He relied upon Rule 502(b) of the Federal Rules of Evidence. Counsel for Complainant agreed to sequester the email during the course of the deposition.

[1] The temporary reinstatement case was resolved when I granted the parties' joint motion to approve the terms of their agreement on economic reinstatement by order dated March 20, 2017.

The parties were not able to resolve the dispute concerning the email in the week or so following the deposition. Counsel asked that I hold a conference call during which they could present their argument to me with the understanding that I would resolve the issues surrounding the email. They stated that they needed a quick resolution because additional depositions are scheduled for October 17 and 19.[2]

Two issues were presented to me during the conference call, as follows: (1) is the email sent by Quist dated March 1, 2017 protected by attorney-client privilege and, if so, (2) was the privilege waived when the email was provided to the Secretary during discovery? Issues of waiver are governed by Rule 502(b) of the Federal Rules of Evidence and Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure. Although these rules are not binding on the Commission, they codify generally accepted evidentiary and procedural principles.

Attorney-Client Privilege

For the reasons set forth below, I find that the email in question is not protected by the attorney-client privilege.[3] The portion of the email that is the subject of the dispute is not Doran's email to Quist, but Quist's response. The email sets forth Quist's opinion that Aggregate Industries should "fight" the temporary reinstatement case and, presumably, the underlying discrimination case. It was not a confidential communication from Quist to Doran or any other attorney directing him to pursue the case and it does not discuss strategy for litigating the issues. It does contain Quist's opinions about Silva's discrimination complaint.

I reach this conclusion for a number of reasons. The email was sent to nine individuals, most of whom were not attorneys. It was presented as "news" from Doran. It was addressed, "Dear All." Doran was not listed in the "To:" line of the email but in the "Cc:" line. Quist sent the subject email to management officials, including two in-house counsel, stating that the company should fight Silva's claims. A document is not protected by the privilege just because one or more attorneys are listed as recipients of a document. This email was not directed to counsel for the company in confidence with instructions or information about the litigation but was an email notifying management of the litigation and asking them to read the attached Application for Temporary Reinstatement. The email was an *announcement* telling management that the Secretary filed an application for temporary reinstatement; it was not a *confidential communication* between Aggregate Industries and its attorneys. The fact that the top of the email contained language asserting that it is privileged and confidential is not controlling. In reaching

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[2] The description of the events at the deposition of Quist was provided to me during the conference call held on October 13, 2017. The parties also presented oral argument on the legal issues raised herein.

[3] At my request, a copy of the email was provided to me by Linton for my in-camera review. I placed this email under seal and it remains under seal in the event Aggregate Industries wishes to file a petition for interlocutory review of this order under 29 C.F.R. § 2700.76. Such review is not a matter of right. I also had a recording made of the conference call which shall also remain confidential.

this conclusion, I reject Aggregate Industries' argument that the email was a protected communication between Quist and Aggregate Industries' in-house and outside counsel.

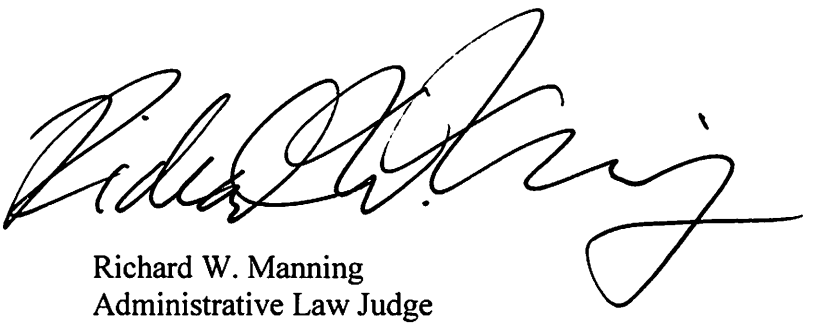
The email does not include legal advice, an attorney's impressions of the case, or a discussion of confidential facts or strategy from the client. Commission Judge Margaret Miller, in *BHP Copper, Inc.*, 38 FMSHRC 893, 897-99 (April 2016), discussed the eligibility requirements that the Commission has relied upon in analyzing attorney-client communication issues. I relied upon these eligibility requirements in finding that the document is not protected. To be protected, the communication must relate to a "fact of which the attorney was informed (a) by his client, (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal service or (iii) assistance in some legal proceeding." *Id.* (citations omitted). Although a corporate client is not just one person, I find that, upon review of its wide distribution to lower level Morrison Plant supervisors as well as its contents, the email in question does not meet this requirement. This email was not sent for the purpose of obtaining an opinion of law, legal advice, or retaining the services of the law firm of Ogletree Deakins.

In addition, as Judge Miller stated, although a client may not be compelled to answer the question, "What did you say or write to your attorney?" he may not refuse to disclose relevant facts within his knowledge merely because he incorporated a statement of such fact into his communication with his attorney, whether in-house or outside counsel. *Id.* at 898. I hold that the email was not protected by the attorney-client privilege but, if it was, Quist could still be required to answer deposition questions about his knowledge of facts regarding Silva's discrimination complaint, and his state of mind at the time of Silva's termination and at the time the Secretary filed the temporary reinstatement application and complaint of discrimination. Other deposition witnesses can be asked these questions as well.

Because I find that the email in question is not protected by the attorney-client privilege, I need not reach the issue whether the email should be destroyed or returned under Fed. R. Evid. 502(b) and Fed. R, Civ. P. 26(b)(5)(B).

ORDER

Based on information and argument provided during the conference call held with counsel and my in-camera review of the disputed email, I hold that the email in question is not protected by the attorney-client privilege. Nevertheless, given the importance of the attorney-client privilege, the email shall remain sequestered to give Aggregate Industries an opportunity to file a petition for interlocutory review, if it so desires. If it seeks such review, it shall do so as quickly as possible.



Richard W. Manning
Administrative Law Judge

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