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November 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of JUSTIN HICKMAN, Complainant, v. HUBER CARBONATES, LLC, Respondent.	DISCRIMINATION PROCEEDING Docket No. LAKE 2018-0387-DM MSHA Case No. NC-MD-18-06 Mine: Quincy Plant Mine ID: 11-02627

ORDER GRANTING RESPONDENT'S MOTION FOR DECLARATORY JUDGMENT

Before: Judge Priscilla M. Rae

INTRODUCTION

This proceeding is before me upon a complaint of discrimination under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(2) ("Mine Act"). A hearing is scheduled for February 19-20, 2019 in a location to be determined.

Huber Carbonates, LLC ("Huber" or "Respondent") has filed a motion for Declaratory Judgment seeking the return of an attorney-client privileged email communication (and all copies thereof) obtained by the Secretary and a bar on the use of this email by the Secretary in this or any other proceeding under the Mine Act. The Secretary has filed a response in opposition to this motion.

The issue of whether the document is privileged was decided, in the affirmative, through an *in camera* review by Judge David Simonton on November 16, 2018. At issue presently is whether Respondent waived that privilege.

STATEMENT OF THE FACTS

On August 8, 2018, outside counsel for Huber sent an email to Respondent's in-house counsel and members of management. The email contained legal advice concerning the instant case, as well as other legal matters. The words "ATTORNEY-CLIENT PRIVILEGED COMMUNICATION" were included in the subject line of the original email and a footer within the email further declared the contents as privileged and instructed unauthorized receivers on the means to return the email. Later that day, a member of Huber management included an EH&S Coordinator on the email chain. The EH&S Coordinator had information about the original email

and was needed to analyze the legal issues being discussed. Respondent's Motion for Declaratory J. ("Resp. Mot.") at 2-3.

Respondent later learned that, on August 16, 2018, the EH&S Coordinator had forwarded this email chain, via blind carbon copy ("bcc"), to a Plant Engineer being discussed in the chain. On August 16, 2018, the Plant Engineer deleted the "ATTORNEY-CLIENT PRIVILEGED COMMUNICATION" notation in the subject line and forwarded the email to an MSHA inspector. Resp. Mot. at 3.

On September 6, 2018, counsel for Respondent contacted counsel for MSHA, via phone, to discuss the August 8, 2018 email communication and the subsequent events. In a written response, counsel for MSHA stated that the documents were protected by attorney-client privilege. Resp. Mot. at 4.

On October 3, 2018, counsel for Huber sent a written request to counsel for MSHA, in which it demanded that the August 8, 2018 email correspondence be returned to Huber and stated the information contained therein could not be used by MSHA in the Plant Engineer's 105(c) discrimination claim filed on September 27, 2018. Counsel for MSHA refused this demand in his October 12, 2018 response. Resp. Mot. at 5.

On October 18, 2018, counsel for Respondent filed a motion requesting the court to issue Declaratory Judgment that (1) the email correspondence was privileged, (2) all copies of the email correspondence be returned to Huber or destroyed, and (3) MSHA be barred from using the email correspondence in this and any other future proceeding against Huber instituted by MSHA or the Secretary. Resp. Mot. at 1, 12.

On November 5, 2018, the Secretary filed an opposition to Respondent's motion for Declaratory Judgment and requested a hearing in order to determine whether the document was protected by the attorney-client privilege and, if so, whether Respondent waived that privilege.[1] On November 13, 2018, Judge Rae referred the motion and opposition to Judge Simonton and requested that he conduct an *in camera* review of the email chain in order to determine whether attorney-client privilege applied. Secretary's Opposition to Resp. Mot. ("Sec'y Opp.) at 1-2.

On November 16, 2018, Judge Simonton held that the contents of the email chain were indeed protected by the attorney-client privilege. He returned the case to Judge Rae for further deliberations on whether Huber waived this privilege. In Camera Review Holding that Subsequent Email Chain is Protected by Attorney-Client Privilege ("In Camera Rev.") at 1, 4.

DISPOSITION

As noted above, at issue is whether Huber waived the attorney-client privilege which protected the contents of the email chain which originated on August 8, 2018. Each party focuses on two different events in which Respondent could have waived the privilege. The Secretary

[1] I have determined the facts were sufficiently pleaded in the parties' motions and, as such, are not at issue. For this reason, the questions of attorney-client privilege and waiver are solely matters of interpretation of law. Thus, no hearing is required.

argues the privilege was waived on August 8, 2018 when a member of Huber management included the EH&S Coordinator on the email chain. Respondent argues it did not waive the privilege when the EH&S Coordinator forwarded the email on August 16, 2018 to the Plant Engineer, by bcc, because the Coordinator did not have the power to waive attorney-client privilege.

I find Respondent did not waive the attorney-client privilege when including the EH&S Coordinator on the email chain, neither did it waive the privilege when the EH&S Coordinator forwarded the email, because the EH&S Coordinator did not have the power to waive the attorney-client privilege.

i. Respondent did not waive the attorney-client privilege when a member of management included the EH&S Coordinator in the email chain, because the latter needed to know the information.

In a corporation, the attorney-client privilege attaches to both the corporation and individuals within it. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985). Traditionally, the privilege only existed in communications between top-level management and counsel. Radiant Burners, Inc. v. Am. Gas Ass'n, 320 F.2d 314, 323-24 (7th Cir. 1963) (the court applied the "control group" test, which only protected communications of top-level management, defined as the corporate client, and counsel). However, the Supreme Court rejected this test in Upjohn Co. v. United States and established a balancing test where the attorney-client privilege applies to communications between a company employee and an attorney if:

(1) the information communicated is necessary to provide legal advice to the corporation or was ordered to be communicated by superior officers;

(2) the information was not available to counsel from "control group" management already;

(3) the communications concerned matters within the scope of the employee's duties;

(4) the employee was aware that they were being questioned so the corporation could receive legal advice; and

(5) the communications were considered confidential when made and kept confidential.

Upjohn Co. v. United States, 449 U.S. 383, 394-95 (1981). When these factors are met, a lower-level employee is considered part of the corporate client and communications involved are privileged.

In applying these factors to the inclusion of the EH&S Coordinator on the email chain, it is clear that the EH&S Coordinator, though a lower-level employee, constituted part of the corporate client. Hence, his inclusion on the email chain did not disrupt or waive the attorney-client privilege.

As Respondent noted in their motion and as affirmed by Judge Simonton, the email was sent for the purpose of obtaining legal advice. The EH&S Coordinator was included in the chain by a superior officer because he "had information about the contents of the original email communication and his assistance was needed to analyze some of the legal issues that were being discussed." Resp. Mot. at 3. Lastly, the EH&S Coordinator would have known both this purpose and the confidential nature of the communications due to the contents of the email and the "ATTORNEY-CLIENT PRIVILEGED INFORMATION" notation in the subject line. Indeed, the fact that the EH&S Coordinator forwarded the email to the Plant Engineer via bcc, a means which would conceal the transfer of information, indicated his knowledge of the confidentiality of the communication.

The Secretary argues that the privilege did not extend to the EH&S Coordinator, because he did not "need to know" the information contained in the email chain. Scholtisek v. Eldre Corp., 441 F. Supp. 2d 459, 464 (W.D.N.Y. 2006) (holding that the disclosure of information that an employee did not "need to know" to perform his responsibilities removed that information from the attorney-client privilege). In Scholtisek, the court held that dissemination of privileged information to lower-level employees destroys the attorney-client privilege if the employee did not "need to know" the information in order to perform their job effectively or make decisions related to the subject matter of the communication. This "need to know" standard "must be analyzed from two perspectives: (1) the role in the corporation of the employee or agent who receives the communication; and (2) the nature of the communication, that is, whether it necessarily incorporates legal advice." Scholtisek, 441 F. Supp. 2d at 464.

The Respondent has adequately articulated that the EH&S Coordinator was included in the privileged email so that he could give relevant information which pertained to the communication. The EH&S Coordinator needed to know the information provided by counsel to then give context required for the corporate client to obtain legal advice. The inclusion of a specific lower-level employee for the purpose of receiving his particular knowledge about the contents of the original email stands in contrast to the case cited by the Secretary in which confidential communications were widely distributed to lower-level employees. Smithkline Beecham Corp. v. Apotex Corp., 194 F.R.D. 624 (N.D. Ill. 2000).

Thus, I find that Respondent did not waive the attorney-client privilege and the privileged communications retained the attorney-client privilege when a member of Huber management included the EH&S Coordinator on the email chain.

ii. The attorney-client privilege was not waived when the EH&S Coordinator forwarded the email to the Plant Engineer, because he did not have the power to waive the privilege.

The power to waive the attorney-client privilege held by a corporation rests with the corporation's management and is normally exercised by its officers and directors. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985). A lower-level employee has no power to waive the privilege unless she is given the authority to do so by one who holds the privilege (i.e., corporate management). U.S. v. Chen, 99 F.3d 1495, 1502

(9th Cir. 1996); Alexander v. F.B.I., 198 F.R.D. 306 (D.D.C. 2000) (holding that privilege was not waived when a lower-level employee disclosed privileged information because the officers and directors of the corporation had not authorized the lower-level employee to waive the privilege); Bus. Integration Servs. v. AT&T, 251 F.R.D. 121, 125-27 (S.D.N.Y. 2008), aff'd, No. 06 Civ. 1863(JGK), 2008 WL 5159781 (S.D.N.Y. Dec. 9, 2008) (a non-executive manager lacked authority to waive the attorney-client privilege). Furthermore, employees must generally keep their employer's confidences. Chen, 99 F. 3d at 1502.

There is no indication in the record that the EH&S Coordinator was given authority by the corporate management to waive the attorney-client privilege. To the contrary, the email communicated that it was protected by attorney-client privilege and "made clear [it] was not intended for transmission to or receipt by any unauthorized persons…." Resp. Mot. at 2. Without this authority, he lacked the power to waive the attorney-client privilege and the document remained privileged when he inappropriately forwarded it to the Plant Engineer.

The Secretary relies heavily on the holding in Jonathan Corp. v. Prime Computer in arguing that the EH&S Coordinator both held the privilege and the power to waive that privilege. In Jonathan, Prime Computer provided attorney-client privileged communication to an employee without indicating that the communication was confidential or privileged. The employee, who was the sole representative of Prime Computer to Jonathan Corp., disclosed the privileged communication in negotiating with Jonathan Corp. This disclosure occurred in the ordinary course of his business with Jonathan Corp. Subsequently, Prime Computer's corporate officers made no attempt to recover the privileged information until two years after the disclosure was made. Jonathan Corp. v. Prime Computer, Inc., 114 F.R.D. 693, 695 (E.D. Va. 1987). In determining whether this communication retained its privileged status, the court held that Prime Computer had waived the privilege when it failed to designate the communication as privileged, allowed the employee to disclose it in the ordinary course of business, and failed to recall the communication following its disclosure. Jonathan Corp., 114 F.R.D. at 699.

The facts in the instant case are easily distinguished from Jonathan. Huber clearly communicated to the EH&S Coordinator that the contents of the email chain were privileged in the subject line notation, as well as the footer of the email. There is no evidence that the EH&S Coordinator forwarded the email as a means of communicating in the ordinary course of business. Instead, his use of blind carbon copy via email seems to indicate he knew the forwarding of a privileged email was irregular. Lastly, there is ample evidence to indicate that Huber, unlike Prime Computer, swiftly attempted to retrieve the privileged communication after learning of its disclosure. As noted, counsel for Huber contacted counsel for MSHA and requested the return of the communication. When that request was rejected, Huber sought the court's review.

For these reasons, I find that the EH&S Coordinator had no power to waive the attorney-client privilege because he had not been granted the authority from Huber management to do so. Thus, the communications retained their privileged status when he forwarded them to the Plant Engineer.

Accordingly, Respondent's Motion for Declaratory Judgment is **GRANTED** in part. The Secretary is **ORDERED** to return the August 8, 2018 email (and subsequent versions) held by the Counsel for Trial Litigation and ensure all other copies, or emails containing a copy of the privileged email, are destroyed.[2]

Priscilla M. Rae
Administrative Law Judge

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[2] In Respondent's Motion for Declaratory Judgment, Huber requested an order preventing the use of the contents of the August 8, 2018 email in any litigation, present or future, instituted by MSHA or the Secretary against Huber. In view of the ruling that the privileged communication be return and that copies be destroyed, it is unnecessary to address that portion of Respondent's motion.