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United States District Court, S.D. New York.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
and
Nipu TAZUL et al., Intervenor–Plaintiffs,
v.
REKREM, INC. d/b/a Whole Foods in Soho et al., Defendants.

No. 00 CIV. 7239(CBM). | Jan. 10, 2002.

Opinion

MEMORANDUM OPINION AND ORDER

MOTLEY, District J.

***1** The court heard oral argument yesterday on the motion of non-party Jackson Lewis Schnitzler & Krupman ("JLSK") to quash the subpoena served upon it by the Equal Employment Opportunity Commission ("EEOC"). For the reasons set forth below, JLSK's motion to quash is hereby GRANTED in part and DENIED in part.[1]

[1] On January 4, 2002—more than a month after JLSK filed its reply brief, and only one business day before oral argument—the EEOC filed a motion for leave to file a "response brief" and purported to file its "response brief." That motion is hereby DENIED, and the purported "response brief" is hereby STRICKEN from the docket.

Communications between a client and his or her attorney made for the purpose of seeking professional advice generally are privileged from disclosure. The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). As fundamental as the attorney-client privilege is, however, a client may in certain circumstances waive the privilege—for example, by asserting reliance upon the advice of counsel as an affirmative defense. *See, e.g., In re Sunrise Sec. Litig.,* 130 F.R.D. 560, 570 (E.D.Pa.1989); *Remington Arms Co. v. Liberty Mut. Ins. Co.,* 142 F.R.D. 408, 411–16 (D.Del.1992). As a matter of fundamental fairness, where a defendant asserts the "advice of counsel" defense a plaintiff is entitled to discover the nature and circumstances of the legal advice upon which the defendant supposedly relied—notwithstanding the attorney-client privilege that would otherwise apply. *See id.*[2]

[2] It is not clear whether "advice of counsel" can serve as a defense to a claim of unlawful retaliation under Title VII. *See Farias v. Instructional Systems. Inc.,* 259 F.3d 91, 101 (2d Cir.2001) ("We need not decide whether there are circumstances where the advice of counsel could constitute or assist a defense to a claim of retaliation."). For purposes of the instant motion, the court assumes without deciding that there is a legal basis for Rekrem's assertion of the "advice of counsel" defense.

JLSK readily concedes that Rekrem's assertion of the "advice of counsel" defense with respect to its filing of the *Tazul* complaint constitutes, to some degree, a waiver of the otherwise applicable attorney-client privilege. JLSK takes issue, however, with the extent of the waiver, asserting that the waiver should be deemed limited both as to time and as to scope.[3]

[3] The EEOC argues that JLSK's motion to quash should be denied in its entirety because JLSK never produced a privilege log as contemplated by Federal Rule of Civil Procedure 45(d)(2) and Local Rule 26.2. The purpose of a privilege log is to provide a description of the allegedly privileged materials sufficient to enable the demanding party to challenge the claim of privilege. Here, there is no question that the materials withheld as privileged are indeed privileged in the first instance. The question, rather, is the extent to which the otherwise applicable privilege has been waived—an issue that demands an analysis of the scope of the "advice of counsel" defense, not an analysis of the nature of every single withheld document. For this reason, the EEOC's privilege log argument is not persuasive.

With respect to time, JLSK argues that no waiver of the attorney-client privilege applies to legal advice concerning the *Tazul* lawsuit that occurred after June 8, 1999—the date the *Tazul* complaint was filed. JLSK correctly observes that the issue with respect to Rekrem's assertion of the "advice of counsel" defense is simply what motivated it to file the *Tazul* complaint, and JLSK contends that everything that happened after the complaint was filed is irrelevant to *why* Rekrem filed the complaint in the first place. This argument is not persuasive. To be sure, pre-filing communications are more apt to be probative of good faith than post-filing communications, but post-filing communications certainly might tend to prove or disprove the motivation for the earlier filing. Rekrem opened the door to this line

of inquiry and, in doing so, waived its attorney-client privilege with respect to anything that could shed light on whether it did or did not file the *Tazul* complaint in reliance upon the advice of counsel. Accordingly, the court rejects JLSK's attempt to limit its production burden to materials created before the June 1999 filing of the *Tazul* complaint.

***2** In addition to its suggestion that the "advice of counsel" waiver be limited temporally, JLSK also argues that the waiver should be limited in scope. Specifically, JLSK contends that Requests Nos. 3 and 4—which seek production of all materials upon which JLSK relied in advising Rekrem to file the *Tazul* lawsuit—do not fall within the limited privilege waiver. JLSK contends that "non-factual" items such as its legal research fall outside the waiver because the "advice of counsel" defense goes only to the defendant's state of mind—i.e., what Rekrem was trying to accomplish by filing the *Tazul* complaint, not whether the complaint had any objective basis in law. Once again, however, the question is not whether the production of JLSK's legal research is guaranteed to prove or disprove that Rekrem filed the *Tazul* complaint in good faith, but rather whether production is reasonably likely to lead to relevant evidence. The EEOC has every right to know whether Rekrem believed JLSK had a good-faith basis for recommending the filing of the *Tazul* complaint, and the scope, extent, and nature of JLSK's legal research could be relevant in this regard. It must be remembered that Rekrem itself chose to assert the "advice of counsel" defense, and fundamental fairness requires that the EEOC be given ample opportunity to ascertain whether Rekrem indeed relied on counsel in good faith. Accordingly, the court rejects JLSK's objections to Requests Nos. 3 and 4.

JLSK next objects to Requests Nos. 5 through 8, which seek information relating to Rekrem's solicitation of affidavits from its employees swearing that it had not engaged in a pattern of discrimination. Here, the court agrees with JLSK that the affidavits have nothing whatsoever to do with Rekrem's suggestion that it filed the *Tazul* complaint on the advice of counsel. The EEOC points to paragraphs 15 and 22 of the *Tazul* complaint, in which Rekrem references position statements it filed with the EEOC that appended the affidavits in question as supporting materials. As JLSK points out, however, these were nothing more than passing references in the "Facts" section of the *Tazul* complaint, and it is clear from a plain reading of the complaint that the affidavits had nothing whatsoever to do with the various alleged bases for liability therein. More importantly, the EEOC's complaint in this case does not allege any connection between the affidavits and Rekrem's filing of the *Tazul* complaint, and thus there is no nexus between the affidavits and Rekrem's invocation of the "advice of counsel" defense. Accordingly, JLSK's motion to quash Requests Nos. 5 through 8 is hereby GRANTED.

JLSK advances a similar objection to Requests Nos. 9 though 12, which seek otherwise privileged information relating to advice JLSK gave Rekrem regarding the underlying EEOC charges. JLSK argues that its advice regarding the underlying charges has nothing to do with the "advice of counsel" defense, which pertains only to Rekrem's motivation for filing the allegedly retaliatory *Tazul* complaint, not its motivation for instituting the alleged workplace policies and practices that are the subject of the underlying charges. The court agrees that JLSK's advice regarding the underlying charges in general exceeds the boundaries of Rekrem's limited waiver of its attorney-client privilege, which pertains only to advice regarding the *Tazul* lawsuit. Accordingly, JLSK's motion to quash Requests Nos. 9 through 12 is hereby GRANTED.

***3** Finally, JLSK objects to Requests Nos. 13 through 16—which seek JLSK's fee arrangement with Rekrem and its billing records—on the ground that the information sought is irrelevant and that production would be unduly burdensome. The EEOC responds by asserting (rather cryptically) that there is a "short ... timeline" between the beginning of JLSK's representation of Rekrem and the subsequent filing of the *Tazul* complaint and that disclosure of the fee arrangement would reveal "which terminations occurred after JLSK began to represent Rekrem." EEOC Br. at 15–16. The point of defendant's invocation of the "advice of counsel" defense, however, is not that Rekrem *fired* anyone on advice of counsel, but rather that Rekrem *filed the Tazul lawsuit* on advice of counsel. It is therefore irrelevant whether the firings took place before or after JLSK was retained. To the extent that the requested materials have potential relevance in the remedial stage of this proceeding—with respect to attorneys' fees, for example—the EEOC can obtain the information by serving discovery requests upon Rekrem directly. Accordingly, JLSK's motion to quash Requests Nos. 13 through 16 is hereby GRANTED.

It is FURTHER ORDERED that JLSK shall produce documents in response EEOC Requests Nos. 1–4 on or before January 18, 2002.

SO ORDERED.