

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOLORES KAMINSKI, on Behalf of Herself :
and all Similarly Situated Persons, : CIVIL ACTION
Plaintiff, :
 :
 :
v. :
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 :
FIRST UNION CORPORATION, as :
successor- in-interest to CORESTATES, : No. 98-CV-1623
FINANCIAL CORP., :
Defendant. :

MICHAEL IRETON, ROBERT GEIGER :
JOSEPH MENTA, JOSEPH TYSON, : CIVIL ACTION
WILLIAM GROSS, IV AND MARK :
DEOURVAL, on Behalf of Themselves :
and All Similarly Situated Persons, :
Plaintiffs, :
 :
 :
v. :
 :
 :
FIRST UNION CORPORATION, as :
successor- in-interest to CORESTATES : No. 98-CV-6318
FINANCIAL CORP., :
Defendant. :

BARBARA JOHNSON and DENNIS :
ANDERSON, : CIVIL ACTION
Plaintiffs, :
 :
 :
v. :
 :
 :
FIRST UNION CORPORATION, as :
successor- in-interest to CORESTATES : No. 99-CV-1509
FINANCIAL CORP., :
Defendant. :

ANTHONY VENTURA, et al., on behalf of	:	
Themselves and All Similarly Situated	:	CIVIL ACTION
Persons,	:	
Plaintiffs,	:	
	:	
	:	
v.	:	
FIRST UNION CORPORATION, as	:	
successor- in-interest to CORESTATES	:	No. 99-CV-4783
FINANCIAL CORP.,	:	
Defendant.	:	
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EVETTE ARANGO, et al.,	:	
Plaintiffs,	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
FIRST UNION CORPORATION, as	:	
successor- in-interest to CORESTATES.,	:	No. 99-CV-6532
FINANCIAL CORP.,	:	
Defendant.	:	

MEMORANDUM & ORDER

J.M. KELLY, J.

JULY , 2001

This is an opt-in class action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-626 (1994), filed by terminated employees of CoreStates Financial Corp. (“CoreStates”), the predecessor to Defendant First Union Corporation (“First Union”). Plaintiffs filed the Motion to Compel which is presently before the Court, seeking documents that First Union withheld as protected by the attorney client privilege. First Union also filed a Motion which seeks the return of a document entitled “Key Human Resources Issues.” Page four of the Key Human Resource Issues is stamped Privileged and includes a discussion of outside counsel’s opinion of the effectiveness of a release signed by terminated employees. The Key Human Resources Issues document was inadvertently attached as an exhibit to First Union’s Response to the Motion to Compel and First Union’s Motion for Summary Judgment.

BACKGROUND

This case arises from CoreStates’ BEST reorganization program, in which the CoreStates

workforce was reduced by more than 2000 employees. In order to withstand First Union's challenge based upon statute of limitations issues, Plaintiffs contend that their receipt of enhanced benefits under BEST was contingent upon their signing a release that misled them into believing they had waived their right to sue under the ADEA.

In response to Plaintiffs' discovery requests seeking information related to the BEST Release and a subsequent sheet of questions and answers about the release, First Union has produced privilege logs of documents in its possession and the possession of Aston Limited Partners ("Aston"). Aston was a reorganization consultant used by CoreStates during the BEST reorganization. First Union has also asserted, during depositions, that the attorney client privilege applies to verbal communications in the presence of an attorney. Plaintiffs argue that no privilege applies to the documents because: (1) production of the Key Human Resources Issues document waives the attorney client privilege as to that document; (2) CoreStates' reorganization consultant, Aston, reviewed the purportedly privileged documents and attended meetings with CoreStates and its attorneys; and (3) they were part of CoreStates' scheme to defraud terminated employees into believing that they had waived their right to pursue ADEA claims.

DISCUSSION

The attorney client privilege protects "confidential disclosures by a client to an attorney made in order to obtain legal assistance." Fisher v. United States, 425 U.S. 391, 403 (1976). The party seeking to assert the attorney client privilege must prove that the privilege applies to the communications at issue. See United States v. Furst, 886 F.2d 558, 576 (3d Cir. 1989). To prove the attorney-client privilege exists, First Union must show that: (1) CoreStates sought to or became a client of the attorney; (2) the attorney was a member of the bar and acting as a lawyer; (3) the communication was between the attorney and CoreStates, not in the presence of others, for the purpose of obtaining either an opinion of law, legal services or assistance in a legal

proceeding; and (4) First Union has claimed and not waived the privilege. Rhone-Poulenc Rorer, Inc. v. The Home Indemnity Co., 32 F.3d 851, 861 (3d Cir. 1994).

A. Waiver by Production

While the Key Human Resources Issues document has been produced twice in documents filed with the Court, First Union argues that such waiver was inadvertent and that the document should now be returned and treated as though it was never produced. The filing of a document with the court, however, creates a presumption of public access to the document. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 782 (3d Cir. 1994). Accordingly, since First Union twice placed the Key Human Resources Issues into the public record by filing it with the Court, it has waived the attorney client privilege as to that document. See McGreevy v. CSS Indus., Inc., Civ. A. 95-CV-8063, 1996 WL 412813, at *3 (July 17, 1996).¹

B. Communications Revealed to Aston

As with all other aspects of the attorney client privilege, the burden is upon First Union to prove that communications revealed to Aston are privileged. Third parties may participate in privileged communications between attorney and client where their presence allows the attorney and client to communicate and enables the attorney to provide legal advice. United States v. Kovel, 296 F.2d 918, 920-21 (2d Cir. 1961). The classic example is a language interpreter who provides the attorney with a translation of the client's communication that the attorney can understand. Id. at 921. An accountant, however, may also allow an attorney to understand the client's financial situation and apply it to the client's legal affairs. Id. at 922. On the other hand, an engineer who gathers data about a client's environmental obligations is merely discovering facts, and his communications are not privileged. Occidental Chem. Corp. v. OHM Remediation

¹ Plaintiffs also argue that disclosure of the Key Human Resources Issues waives the attorney client privilege as to all documents related to drafting the BEST Release as First Union had selectively released privileged materials. The Court is convinced that First Union did not intend to release an unredacted copy of the Key Human Resources Issues and given the Court's analysis of Plaintiffs' other arguments, this argument need not be further analyzed.

Servs. Corp., 175 F.R.D. 431, 437 (W.D.N.Y. 1997). Likewise, an accountant retained merely to provide accounting services, despite the presence of an attorney, is not assisting in the provision of legal services and those communications are not privileged. Kovel, 296 F.2d at 922.

First Union chose not to present any testimony directly from Aston. The First Union employees that testified made much of the “one of the family” relationship between Aston and CoreStates and that Aston signed a confidentiality agreement with CoreStates. The testimony presented demonstrated that Aston was an outside business consultant. First Union presented no evidence that demonstrated that Aston facilitated communications between CoreStates and its attorneys. While the existence of a confidentiality agreement demonstrates that CoreStates and Aston intended their communications would remain confidential, nothing about the confidentiality agreement suggests that Aston was somehow presenting legal advice. In fact, deposition testimony of Aston’s principal, Paul Allen (“Allen”), and an Aston consultant, Cheryl Turnbull, was that Aston provided no legal advice.

Charles Coltman (“Coltman”), who was a member of CoreState’s BEST Steering Committee, testified that although Allen attended almost every Steering Committee meeting, (Tr. June 12, 2001 hr’g at 45) he was not involved in the discussion concerning how to fix bad data, id. at 46, he was not involved in the conversation about whether or not the selection process was biased, id., he did not have any role regarding the selection of people for termination in the BEST Process, id., and he did not play any role in any conversation regarding whether or not statistical data can be used against CoreStates. Id. Further, Coltman could not remember: (1) any role Allen played in discussing the reasons why the legal department was recommending a waiver be used in the BEST Process, id. at 47; (2) Allen specifically assisting in the discussion on waivers, id.; (3) any role by Allen concerning the release and waiver, id. at 48; and (4) Allen providing or assisting in providing any legal advice about the Older Workers' Protection Act. Id. at 49. In fact, Coltman testified:

Q. So Aston was not hired specifically to assist CoreStates in connection [with] these specific legal issues, was it?

A. No.

Id. The evidence presented is overwhelming that Aston was a business consultant that played no role in providing legal services to CoreStates. Accordingly, there is no attorney client privilege attached to any documents viewed by Aston or any communications where Aston was present.

C. Crime Fraud Exception

“The party seeking discovery must present evidence which, if believed by the factfinder, would be sufficient to support a finding that the elements of the crime-fraud exception were met.” Haines v. Liggett Group, Inc., 975 F.2d 81, 96 (3d Cir. 1992). To determine whether the crime-fraud exception is applicable, that court must look at the client's intentions. In re Grand Jury Proceedings, 604 F.2d 798, 802 (3d Cir. 1979). If a court determines that the client intended to commit a criminal or fraudulent act, that court may refuse to allow the party to assert the attorney client privilege. Id. In other words, the Court must decide whether it is reasonable to believe that CoreStates sought legal advice to draft a release designed to mislead terminated employees into believing that they were waiving their ADEA rights. Upon reviewing the BEST Release and the background of its preparation, the Court is convinced that a reasonable factfinder could believe that CoreStates drafted the BEST Release with the intent to deceive terminated employees into believing they must waive their ADEA rights in order to receive enhanced benefits. The BEST Release contains no indication that it does not apply to age discrimination claims while it told employees that they waived any and all claims. Even if a Plaintiff showed the BEST Release to an attorney not familiar with the ADEA's disclosure requirements created by the Older Workers Benefits Protection Act, 29 U.S.C. § 626, it is likely that the attorney would believe that the Release was intended to cover all discrimination claims.

Likewise, the Question and Answer document that CoreStates forwarded to terminated

employees had no indication whether they could retain their enhanced BEST severance benefits and sue CoreStates under the ADEA. A factfinder could reasonably find that the Question and Answer document was designed to hide this material fact. Therefore, documents and communications related to drafting the BEST Release and the Question and Answer document are not privileged, based upon the crime fraud exception.

CONCLUSION

Production of the Key Human Resources Issues document in two documents filed with the Court has waived the attorney client privilege as to that document. First Union's waiver of this document cannot be reversed by now returning the document. Any purportedly privileged communications that included representatives of Aston are not privileged because First Union failed to prove that Aston facilitated communications between CoreStates and its attorneys. Finally, a reasonable factfinder could find that the BEST Release and the subsequent Question and Answer document were designed to mislead terminated employees as to their rights to sue under the ADEA and retain their enhanced severance benefits. A briefing schedule for First Union's Motion for Summary Judgment is contained in the attached Order.

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v. :

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FINANCIAL CORP., :
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v. :

FIRST UNION CORPORATION, as :
successor- in-interest to CORESTATES : No. 98-CV-6318
FINANCIAL CORP., :
Defendant. :

BARBARA JOHNSON and DENNIS :
ANDERSON, : CIVIL ACTION
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v. :

FIRST UNION CORPORATION, as :
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FIRST UNION CORPORATION, as	:	
successor- in-interest to CORESTATES	:	No. 99-CV-4783
FINANCIAL CORP.,	:	
Defendant.	:	
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EVETTE ARANGO, et al.,	:	
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FIRST UNION CORPORATION, as	:	
successor- in-interest to CORESTATES.,	:	No. 99-CV-6532
FINANCIAL CORP.,	:	
Defendant.	:	

ORDER

AND NOW, this day of July, 2001, upon consideration of the Motion to Compel (Doc. No. 265) of Plaintiffs and the Emergency Motion for Return of Document (Doc. No. 277) of Defendant, the various Responses thereto and after an Evidentiary Hearing and Oral Argument in these matters, it is ORDERED:

1. The Motion for Return of Document is DENIED. The Clerk of Court shall Unseal all documents previously filed under seal in this matter.
2. The Motion to Compel is GRANTED. The attorney client privilege does not apply to any documents or communications revealed to Aston Limited Partners. Defendant shall produce all documents to which it previously asserted the attorney client privilege to Plaintiffs, on or before July 16, 2001.
3. Plaintiffs shall Respond to Defendant’s Motion for Summary Judgment Regarding the

Untimeliness of Plaintiffs' Claims (Doc. No. 271) on or before July 30, 2001. Defendant shall file its Reply, if any, on or before August 10, 2001.

BY THE COURT:

JAMES MCGIRR KELLY, J.