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

THELMA CHERYL SIMMONS Plaintiff, v. THE CHILDREN'S HOSPITAL OF PENNSYLVANIA Defendant.	: : : : : : : : :	CIVIL ACTION NO. 01-5607

O P I N I O N

Newcomer, S.J. June , 2002

I. BACKGROUND

In this suit, Plaintiff alleges that Defendant is liable for employment discrimination under Title VII. More specifically, Plaintiff claims that Defendant illegally retaliated against her for her participation in an employment discrimination investigation of a former employee of Defendant, Lorraine Guyton.

Defendant hired Plaintiff in June 1999 as an executive secretary to Chad Hough ("Hough"), Vice-President of Clinical and Support Services, and Charlotte Cady, Vice-President of Nursing and Patient Care. During Plaintiff's employment, Hough investigated Guyton's allegations of discrimination. Eventually, Defendant terminated Guyton's employment, and Guyton subsequently filed a charge with the Equal Employment Opportunity Commission on February 11, 2000 alleging that Defendant unlawfully discriminated against her. Guyton also filed a complaint with

the Pennsylvania Department of Labor and Industry, Bureau of Labor Law Compliance ("DLI") on December 20, 1999. To represent it before the EEOC and DLI, Defendant retained outside counsel. To prepare his representation, Defendant's outside counsel asked Hough to prepare a summary of his investigation of Guyton, and on March 20, 2000, Hough prepared a five page summary entitled "Lorraine Guyton Investigation" (the "Summary") for counsel. Plaintiff, Hough's secretary at the time, typed the Summary for Hough, and Hough provided it to counsel.

On March 9, 2001, Defendant terminated Plaintiff's employment. Although Defendant instructed Plaintiff to destroy all copies of notes that she possessed relating to the Guyton investigation, Plaintiff failed to destroy some handwritten notes and the Summary. Plaintiff retained those items after the termination of her employment.

Shortly after it learned that Plaintiff retained the Summary, Defendant sent Plaintiff's counsel a letter on November 14, 2001 claiming that the Summary was subject to the attorney client privilege. Along with that letter, Defendant sent a copy of the Summary to Plaintiff's counsel. In the November 14, 2002 letter, Defendant wrote: "[i]f you do not currently represent Ms. Simmons, please inform me promptly. If she has other counsel, please provide me with his or her name. Otherwise, I wish to contact Ms. Simmons directly." Plaintiff did not return the

Summary.

On April 16, 2002, Defendant moved for a protective order pursuant to Federal Rule of Civil Procedure 26(c), and Plaintiff responded to that Motion on May 3, 2002. In that Motion, the Defendant asked this Court to: 1) order Plaintiff and her lawyer to return all copies of the Summary to Defendant; 2) prohibit Plaintiff and her counsel from using the Summary or information learned from it; and 3) prevent Plaintiff or her counsel from distributing or sharing the contents of the document with any other individual. Defendant claimed that the document was subject to the attorney client privilege.

On May 15, 2002, this Court Ordered the Defendant to submit a copy of the Summary for in camera review. Then, on May 22, 2002, the Court entered an Order where it did not find that the Summary is privileged. Defendant has now moved for reconsideration of that Order, and Plaintiff has responded to Defendant's Motion for Reconsideration. The Court now turns to a discussion of those submissions.

II. DISCUSSION

The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. See Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985) (setting forth the standard for a motion for reconsideration), cert. denied, 476 U.S. 1171 (1986). A

party filing a motion to reconsider must rely on at least one of the following grounds: (1) the availability of new evidence that was not previously available; (2) an intervening change in the controlling law; or (3) the need to correct a clear error of law or to prevent manifest injustice. See Reich v. Compton, 834 F. Supp. 753, 755 (E.D. Pa. 1993).

Here, after reconsidering its decision on May 22, 2002, the Court finds that the Summary is privileged, and the court erred when it found otherwise. The elements of the attorney client privilege are: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his or her subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates 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 of law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 862 (3d Cir. 1994). When determining whether a document is privileged, a Court must bear in mind that: “[a] fact is one thing and a communication concerning that fact is an entirely different

thing. The client cannot be compelled to answer the question, ‘what did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney. Id. (quoting Upjohn Co. v. United States, 449 U.S. 383, 396 (U.S. 1981).

In its May 22, 2002 Order, this Court did not find that the Summary is privileged because it found that the Summary “does not contain any legal conclusions, but is merely a collection of facts.” While true, the Summary is also a communication to counsel concerning the facts surrounding the Guyton investigation. Indeed, it is undisputed that Hough prepared the Summary to assist Defendant’s outside counsel as counsel prepared himself to represent Defendant before the EEOC and DLI. Under these facts, and because the Court finds that the Summary satisfies the elements of the attorney client privilege, the Summary is privileged. See AFP Imaging Corp. v. Philips Medizin Sys., Civ. A. No. 92-6211, 1993 WL 541194, *2 (S.D.N.Y. Dec. 28, 1993)(“A communication, such as the chronology, which is a narrative summary of events prepared for counsel for the purpose of securing legal advice and assistance, which has not been otherwise disseminated, is protected by the attorney-client privilege.”).

While the Court now finds that the Summary is

privileged, the Court must now confront Plaintiff's argument that the Defendant waived the privilege.[1] Plaintiff argues that Defendant waived the privilege when Defendant's attorney (Sarah A. Kelly) attached a copy of the Summary to her November 14, 2001 letter to Plaintiff's attorney (Joseph A. Hirsch). The attorney client privilege may be waived under some circumstance. See Rhone-Poulenc, 32 F.3d at 863 (explaining that the privilege may be waived if a client files a malpractice suit against the lawyer, if a defendant asserts reliance on the advice of counsel as an affirmative defense, or more generally if a client puts the attorney's advice in issue); Advanced Medical, Inc. v. Arden Medical Systems, Inc., 1988 WL 76128, at *2 (E.D.Pa. Jul 18, 1988)(explaining that inadvertent disclosure may result in waiver).

"A client's disclosure to a third party of a communication made during a confidential consultation with his attorney 'eliminates whatever privilege the communication may have originally possessed, whether because disclosure is viewed as an indication that confidentiality is no longer intended or as a waiver of the privilege.'" United States v. Aronoff, 466 F. Supp. 855, 862 (S.D.N.Y. 1979) (quoting In re Horowitz, 482 F.2d 72, 81 (2d Cir.), cert. denied, 414 U.S. 867 (1973)); see

[1]The Court left this argument unresolved in its May 22, 2002 Order because it found that the Summary is not privileged then.

American Health Systems, Inc. v. Liberty Health System, 1991 WL 42310, at *5 (E.D.Pa. Mar 26, 1991).

Here, Defendant's counsel intentionally sent the Summary to Plaintiff's counsel with the November 14, 2001 letter. Further, the November 14, 2001 letter suggests that Defendant's counsel was not certain that Mr. Hirsch represented Plaintiff. Indeed, that letter states that "[i]f you do not currently represent Ms. Simmons, please inform me promptly. If she has other counsel, please provide me with his or her name." There is no evidence that Defendant or its counsel made any effort to verify whether Mr. Hirsch represented Plaintiff before sending the November 14, 2001 letter. In addition, there was little reason to include the Summary with the November 14, 2001 letter. Surely there was some other way to identify the document at issue without sending a copy of it to Mr. Hirsch. Defense counsel's statement, coupled with her apparent lack of diligence, indicates that Defendant and its counsel did not take reasonable steps to preserve the privilege here. Cf. United States v. Keystone Sanitation Co., 885 F. Supp. 672, 676 (M.D.Pa. 1994) (finding waiver by inadvertent disclosure where no reasonable precautions taken); Bud Antle, Inc. v. Grow-Tech Inc., 131 F.R.D. 179, 183 (N.D.Cal. May 21, 1990). Instead, Defendant eliminated the Summary's privilege when it intentionally sent the Summary to Mr. Hirsch without knowing whether Mr. Hirsch represented the

Plaintiff.

Defendant argues that it did not waive the privilege. First, Defendant contends that when Ms. Kelly wrote Mr. Hirsch, Ms. Kelly "had every reason to believe that Mr. Hirsch was aware of and had seen the Summary." See Defendant's Reply to Plaintiff's Opposition, at 2. However, it is undisputed that Mr. Hirsch had not, in fact, seen the Summary. Additionally, it remains true that when Ms. Kelly sent Mr. Hirsch the Summary, she did not know for sure that Mr. Hirsch represented the Plaintiff.

Defendant also argues that because Mr. Hirsch was Plaintiff's agent, Defendant did not waive the privilege when it sent Mr. Hirsch the Summary. Accordingly, Defendant argues that because Plaintiff had already seen the Summary when Mr. Hirsch received a copy, no waiver occurred. The Court finds this argument unpersuasive on these facts. Even though Plaintiff may have seen the Summary, Mr. Hirsch had not, and Defendant intentionally sent Mr. Hirsch the Summary without knowing whether Mr. Hirsch represented Plaintiff. Also, as the Court explained earlier, there was little reason to send the actual Summary to Mr. Hirsch. Had Defendant wanted to preserve the Summary's privilege, it should not have sent it to Mr. Hirsch.

An appropriate Order follows.

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Clarence C. Newcomer, S.J.