

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

MICHAEL MARTINS :
 :
 v. : C.A. No. 11-539S
 :
 RHODE ISLAND HOSPITAL :

MEMORANDUM AND ORDER

Pending before me for determination (28 U.S.C. § 636(b)(1)(A); LR Cv 72) is Defendant's Motion to Compel Plaintiff to Testify at Deposition Concerning His Communications with Teamsters Local 251. (Document No. 35). Plaintiff opposes the Motion. (Document No. 37). A hearing was held on August 28, 2013.

Plaintiff is a former Rhode Island Hospital ("Hospital") employee who was a member of Teamsters Local 251 ("Local 251"). Plaintiff commenced this action in Superior Court on September 15, 2011 and is suing the Hospital for disability discrimination and unlawful termination. He also initially sued Local 251 and two union officials for disability discrimination, breach of the duty of fair representation by refusing to submit his grievance over his termination by the Hospital to arbitration under the collective bargaining agreement ("CBA") between Local 251 and the Hospital, and intentional infliction of emotional distress. Local 251 removed the case to this Court due to the presence of a federal question. See 28 U.S.C. § 1331. However, Plaintiff subsequently stipulated to the dismissal of all of his claims against Local 251 and the two union officials on October 23, 2012.

Plaintiff was deposed by the Hospital on July 8, 2013, and he was instructed by his counsel not to answer questions concerning certain communications with Local 251 on the basis that such

communications were shielded by the attorney-client privilege because Local 251's counsel, Attorney Marc Gursky, was involved in the communications.

The Hospital contends that the communications are not privileged because there was never any attorney-client relationship between Attorney Gursky and Plaintiff. In addition, the Hospital argues that, even if Plaintiff could establish that the attorney-client privilege applied, Plaintiff waived the privilege through disclosure and by putting such communications in issue in this case primarily by way of his duty of fair representation claim against Local 251.¹ Plaintiff counters in his Opposition Memorandum that such communications are privileged settlement discussions under Fed. R. Evid. 408 as well as protected under the joint defense privilege.

Discussion

First, as to the attorney-client privilege claim, Plaintiff has presented no legal or factual basis for a finding that an attorney-client relationship existed between him and Attorney Gursky at the time. In addition, Plaintiff abandoned such argument by failing to brief it in his Opposition Memorandum. See Document No. 37. In its Memorandum, the Hospital's first argument in support of its Motion to Compel was that no attorney-client relationship existed between Plaintiff and Attorney Gursky² and that "[i]t is well-established that an attorney who represents a union generally does not have an attorney-client relationship with individual union members." (Document No. 35-1,

¹ In his Complaint, Plaintiff's factual allegations include detailed references to certain communications with Local 251 officials, the December 10, 2010 meeting held with Local 251 and a letter received from Local 251's attorney on June 29, 2011. Plaintiff also produced the June 29, 2011 letter to the Hospital in discovery and only recently asserted the attorney-client privilege as to such letter and produced a redacted version to the Hospital after this dispute arose at Plaintiff's deposition, and he changed his position as to the discoverability of the letter.

² In its Memorandum, the Hospital represents that Plaintiff's counsel sent a letter to Local 251 on October 12, 2010 (shortly after Plaintiff's termination) directing Local 251 not to have "further contact with my client." (Document No. 35-1, p. 6). In addition, in both his original and Amended Complaints, Plaintiff alleges that, "on December 10, 2010, [he] met with a representative of [Local 251] and the union's attorney to discuss his grievance." (Documents Nos. 1-1 at ¶ 50 and 23 at ¶ 56). (emphasis added).

p. 5); see Boogard v. Nat'l Hockey League Players Ass'n, No. 2:12-cv-9128, 2013 WL 1164301, at *5 (C.D. Cal. March 20, 2013) (recognizing that “an attorney handling a grievance on behalf of a union does not enter into an attorney-client relationship with the member asserting the underlying grievance; their client is the union”) (citing Peterson v. Kennedy, 771 F.2d 1244, 1258 (9th Cir. 1985)). Despite this clear argument in the Hospital’s brief, Plaintiff completely failed to address it in his Opposition and has offered no good cause for such failure.³ See Local Rule Cv 7(b)(1) (“Every objection [to a motion] shall be accompanied by a separate memorandum of law setting forth the reasons for the objection and applicable points and authorities supporting the objection.”). Thus, Plaintiff has abandoned the argument that his discussions with Attorney Gursky are protected from disclosure by the attorney-client privilege.

Second, in his Opposition, Plaintiff contends that the communications in issue are not discoverable because they are inadmissible under Fed. R. Evid. 408 as statements made during compromise negotiations about a claim. However, Rule 408 deals with admissibility of evidence at trial and not with the scope of permissible discovery under Fed. R. Civ. P. 26(b)(1). Rule 408 provides that evidence of conduct or a statement made during compromise negotiations about a claim “is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction” but may be admitted for other purposes such as bias or prejudice. Further, Plaintiff describes the communications in issue as intended “to gather information about what happened on September 11,

³ At the hearing, Plaintiff’s counsel described the omission as inadvertent without elaboration and cited one First Circuit decision on the issue (Vicor Corp. v. Vigilant Ins. Co., 674 F.3d 1, 17 (1st Cir. 2012)) that is not factually on point and simply notes that the attorney-client privilege “attaches to any communication between attorney and client in confidentiality for the purpose of seeking, obtaining or providing legal advice or assistance” and confirms that the party asserting the privilege bears the burden of showing that it applies. Plaintiff here has not provided any sufficient factual or legal bases to meet that burden.

2010 so the union could advocate for [Plaintiff's] reinstatement pursuant to his grievance.” (Document No. 37-1, p. 6). There is no evidence of any “claim” between Plaintiff and Local 251 at that time or any reasonable basis to conclude that Plaintiff was engaged in any “compromise negotiations” with Local 251 during the relevant period.⁴ Thus, Plaintiff has not established that Rule 408 precludes the Hospital from questioning him at his deposition regarding the communications with Local 251 in issue.

Third, Plaintiff advocates for this Court to recognize a “settlement privilege,” as was done in Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980-81 (6th Cir. 2003). (Document No. 37-1, p. 7-9). Plaintiff argues that, under this privilege, both his statements at the December 10, 2010 meeting with Local 251 and the letter dated June 29, 2011 are immune from discovery. (Id. at 6-10). However, Plaintiff has provided no authority from this Circuit recognizing a “settlement privilege,” and the First Circuit has intimated that no such privilege exists. See Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 12 (1st Cir. 2005) (upholding the imposition of sanctions on an attorney who “fought disclosure of a settlement agreement so obviously relevant to the impeachment of [one of the settling parties’] testimony in a future trial”); see also Cook v. CTC Commc’ns Corp., No. 06-cv-058-JD, 2006 WL 3313838, at *3 (D.N.H. Nov. 13, 2006) (“Although the Sixth Circuit has recognized a narrow privilege limited to protecting the content of settlement negotiations, it is the only circuit to have done so. Other courts have rejected a settlement

⁴ Plaintiff also argues that a June 29, 2011 letter from Attorney Gursky to his attorney is immune from discovery by virtue of Rule 408. Again, there is no reasonable basis upon which to conclude that such correspondence was either a compromise offer or negotiation covered by Rule 408. In a June 27, 2011 email to Attorney Gursky, Plaintiff’s attorney threatens legal action against Local 251 if it refused to take his client’s grievance to arbitration. By letter dated June 29, 2011, Attorney Gursky responded to the threat on behalf of Local 251 and described the threatened legal action as “frivolous” and explained the factual basis for Local 251’s decision not to pursue the grievance to arbitration. See Documents Nos. 37-4 and 37-5. There was no offer of compromise made and no negotiations reflected in such correspondence.

privilege arising from Rule 408.” (citations omitted)); Newman & Assocs. v. J.K. Harris & Co., No. 04Civ.9264(RJH)(MHD), 2005 WL 3610140, at *2 (S.D.N.Y. Dec. 15, 2005) (“Under federal law, courts have generally declined to recognize a privilege that would preclude discovery for the purpose of settlements or settlement negotiations.”). Moreover, even if such a privilege was recognized in this Circuit, it would be of no assistance to Plaintiff because, as discussed above, neither the December 10, 2010 meeting nor the June 29, 2011 letter involved settlement or compromise negotiations.

Fourth, Plaintiff argues that all of his communications with Local 251 are privileged under the joint defense privilege, an extension of the attorney-client privilege. (Document No. 37-1 at p. 11). The Hospital contends that the joint defense privilege is inapplicable because Plaintiff and Local 251 were in an adversarial posture about Plaintiff’s grievance at the time of the communications in issue, which ultimately formed the basis of Plaintiff’s claims against Local 251 in this case. In addition, even if the joint defense privilege arguably applied, the Hospital asserts that Plaintiff waived any such privilege by suing Local 251 based on these allegedly privileged communications and by producing evidence of such communications during discovery. I agree with the Hospital on both points.

Plaintiff has simply not met his burden of establishing that any communications between him and Local 251 are protected from discovery by third parties, such as the Hospital, pursuant to the joint defense privilege. Plaintiff misconstrues the privilege. The joint defense or common interest doctrine is not an independent privilege; rather, “it is an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party” and allows, for instance, attorneys facing a common litigation opponent to exchange privileged

communications by agreement in order to prepare a common defense without waiving the privilege. Ken's Foods, Inc. v. Ken's Steak House, Inc., 213 F.R.D. 89, 93 (D. Mass. 2002); see also United States v. Bay State Ambulance and Hosp. Rental Serv., Inc., 874 F.2d 20, 28 (1st Cir. 1989) (the doctrine applies to communications that are “part of an on-going and joint effort to set up a common defense strategy”). “In order for the common interest exception to apply, the party asserting the privilege must show that (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived.” Ken's Foods, 213 F.R.D. at 93. (citations omitted).

Plaintiff here fails in all three respects. There is absolutely no suggestion of any joint defense or common interest in this particular case. Plaintiff himself initiated the grievance in question with the assistance of retained counsel who promptly instructed Local 251 to refrain from “further contact with [his] client.” (Document No. 35-1, p. 6). While an employee may initiate a grievance under the CBA, only Local 251 has the contractual right to demand binding arbitration of a grievance. See Document No. 10-2, pp. 21-26.

While Plaintiff's personal interest in the grievance was to regain his job and back wages, if possible, Local 251's interests in such a situation are much broader and include the duty to fairly represent all of its members, including Plaintiff, as well as its interests in maintaining the integrity of the grievance and arbitration process and the credibility of its collective bargaining relationship with the Hospital. See F.D.I.C. v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000). (“The term ‘common interest’ typically entails an identical (or nearly identical) legal interest as opposed to a merely similar interest.”). It is apparent that Plaintiff and Local 251 did not see eye-to-eye regarding the merits of Plaintiff's grievance. Plaintiff and his retained attorney met with Local 251 and its

attorney on December 10, 2010 to discuss Plaintiff's grievance. It was not a meeting to prepare for a grievance hearing with the Hospital or an arbitration. It reasonably appears that it was a fact-finding meeting consistent with Local 251's duty to fairly represent Plaintiff. While Local 251 did unsuccessfully ask the Hospital to reconsider the termination decision at some point after the December 10, 2010 meeting with Plaintiff and his attorney, Local 251 ultimately rejected the demand of Plaintiff's retained attorney that it submit the grievance to arbitration. Local 251 also responded to Plaintiff's litigation threat with a detailed letter dated June 29, 2011 from its attorney explaining the factual bases for its decision not to proceed to arbitration. The letter included details about what Plaintiff said at the December 10, 2010 meeting as well as the substance of communications between Plaintiff's retained attorney and Local 251's attorney. The lack of any joint defense effort is clear from the totality of the communications in issue and the subsequent litigation history. However, even if Plaintiff had established that the joint defense privilege applied, his detailed reference to such communications in the original and Amended Complaints filed in this case as support for his claims and his disclosure in discovery of the June 29, 2011 letter authored by Local 251's attorney are more than sufficient to constitute a waiver of any privilege applicable to his communications with Local 251.

For the foregoing reasons, Plaintiff's Motion to Compel Plaintiff to Testify at Deposition Concerning His Communications with Local 251 (Document No. 35) is GRANTED.

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
October 8, 2013