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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

DANNY BROWN,)	Case No.: 1:14-cv-01812 - JLT
)	
Plaintiff,)	ORDER GRANTING IN PART AND DENYING
)	IN PART DEFENDANT’S MOTION TO COMPEL
v.)	
)	(Doc. 32)
AUBREY WIMBERLY,)	
)	
Defendant.)	
)	

Plaintiff Danny Brown asserts defendant Aubrey Wimberly is liable for a violation of his civil rights under the First and Fourteenth Amendments. According to Plaintiff, he made statements protected by the Constitution to Wimberly, who then “set in motion a series of events which lead to said termination and revocation of the renewal of Plaintiff’s employment contract.” (Doc. 1 at 3)

Plaintiff seeks emotional distress damages for his claim, and identified his wife Kathy Brown, and Pastor Bill Lewis as witnesses with information relating to how the termination affected Plaintiff. Defendant now seeks to compel testimony from these witnesses. (Doc. 32) Plaintiff objects on the grounds that the information sought violates the marital privilege and clergy/penitent privilege. (Doc. 38 at 23-25) For the following reasons, Defendant’s motion is **GRANTED IN PART** and **DENIED IN PART**.

I. Background

Plaintiff was employed as Director of the Wasco Recreation and Parks Department beginning in

1 September 2011. (Doc. 1 at 1, ¶ 3) Plaintiff asserts he entered into “a written employment agreement,”
2 which indicated his position was for a two-year term. (*Id.*) In April 2013, “Plaintiff was advised by
3 board members that the board of directors of the [WRPD] had voted to extend his contract for another
4 two year term.” (*Id.* at 2, ¶ 6)

5 Plaintiff asserts Defendant Aubrey Wimberly served on the board of directors of the WRPD as
6 well as “the board of directors of the Wasco Youth Little League, an organization involved in
7 sponsoring little league baseball.” (Doc. 1 at 2, ¶ 7) According to Plaintiff, Wimberly permitted the
8 League “to have a ‘sweetheart’ agreement,” and used the WRPD facilities free of charge. (*Id.*)
9 Plaintiff alleges that on May 2, 2013, after a joint meeting between the League and the WRPD, he
10 “confronted Defendant about this sweetheart agreement and indicated that Defendant was involved in a
11 conflict of interest serving on the board of both entities.” (*Id.*, ¶ 8) Plaintiff asserts that in response,
12 Wimberly said “it was none of Plaintiff’s business.” (*Id.*)

13 Plaintiff alleges that on May 16, 2013, he “received a satisfactory evaluation” at a meeting of
14 the board of directors of the WRPD. (Doc. 1 at 2, ¶ 9) After the meeting, Plaintiff again informed
15 Defendant that serving on both boards “was a conflict of interest, especially in light of the sweetheart
16 deal Defendant was allowing the [League] to have in relation to [WRPD] facilities.” (*Id.*) Plaintiff
17 asserts he told Wimberly “other groups had inquired about such a sweetheart agreement.” (*Id.*) In
18 addition, Plaintiff report he informed Wimberly that the WRPD “was scheduled for an inquiry by a
19 grand jury concerning the operations of the [WRPD] facilities in the near future and this issue would
20 surely arise in said inquiry.” (*Id.*)

21 According to Plaintiff, “On May 28, 2012, Defendant called a special meeting of the board of
22 directors of [WRPD] and during said meeting, Defendant sponsored a motion to rescind the prior two-
23 year extension of Plaintiff and to terminate Plaintiff’s employment immediately, however, with pay to
24 occur through the end of Plaintiff’s contract.” (Doc. 1 at 3, ¶ 10) Plaintiff reports the motion passed,
25 his contract renewal was rescinded, and his employment with the WRPD ended. (*Id.*)

26 Plaintiff contends his discussion with Wimberly “concerning the conflict of interest of
27 Defendant and the sweetheart agreement... as well as the potential upcoming grand jury investigation
28 involved a matter of public concern and was protected by the 1st and 14th amendments to the United

1 States Constitution.” (Doc. 1 at 3, ¶ 13) He asserts this speech “was a determining factor in the
2 termination of employment and the revocation of his two-year renewal of his employment contract.”
3 (*Id.*, ¶ 14) Accordingly, Plaintiff filed a complaint against Wimberly for a violation of his civil rights
4 pursuant to 42 U.S.C. § 1983, seeking economic and punitive damages, as well as damages “[f]or
5 emotional distress and mental anguish.” (*Id.* at 3-4, ¶¶15-16)

6 In his initial disclosures, Plaintiff identified his wife, Kathy Brown, as a witness with
7 “information relating to how Plaintiff’s termination affected him emotionally and the damages he
8 sustained.” (Doc. 38-1 at 2) He also identified Pastor Bill Lewis as a witness with “information
9 concerning how the termination of employment affected Plaintiff.” (*Id.*) Defendant sought to take the
10 depositions of Ms. Brown and Pastor Lewis on April 20, 2016. (*See* Doc. 38-2; Doc. 38-3) However,
11 both depositions were terminated without making a record of the questions to be asked when counsel
12 could not agree on the scope of the marital and clergy privileges, or whether each privilege was waived.

13 **II. Motion to Compel Testimony from Ms. Brown**

14 **A. Legal Standards**

15 Federal Rule of Evidence 501 provides that “[t]he common law – as interpreted by the United
16 States courts in the light of reason and experience – govern a claim of privilege.” The Ninth Circuit
17 determined, “The common law recognizes two separate privileges arising out of the marital
18 relationship”: (1) “the anti-marital facts privilege” and (2) the “marital communications” privilege.
19 *United States v. Marashi*, 913 F.2d 724, 729 (9th Cir. 1990).

20 The anti-marital facts privilege permits a witness to refuse to testify against his or her spouse.
21 The privilege applies only “during the length of the marriage.” *Marashi*, 913 F.3d at 729. The
22 witness-spouse alone holds the privilege, and may choose to waive it. *Trammel v. United States*, 445
23 U.S. 40, 53 (1979). The marital communications privilege “bars testimony concerning statements
24 privately communicated between spouses.” *Marashi*, 913 F.3d at 729. The privilege may be invoked
25 by either the testifying or non-testifying spouse, even after dissolution of the marriage. *Id.* The
26 marital communications privilege is limited to (1) confidential (2) “words or acts intended as
27 communication to the other spouse,” (3) “during the course of a valid marriage.” *Id.* citing *Pereira v.*
28 *United States*, 237 U.S. 1, 6 (1954); *United States v. Lefkowitz*, 618 F.2d 1313, 1318 (9th Cir.), *cert.*

1 *denied*, 449 U.S. 824 (1980). Thus, the marital communications privilege does not extend to
2 statements “made before, or likely to be overheard by, third parties.” *Id.*

3 B. Discussion and Analysis

4 The parties disagree upon the application of the marital communications privilege to Mrs.
5 Brown’s testimony. Plaintiff contends he is seeking “only ... to waive privilege as to discussions
6 related to Plaintiff’s assertions to defendant that defendant had a conflict of interest.” (Doc. 38 at 23)
7 Further, Plaintiff argues that he will “only use Mrs. Brown’s observations concerning emotional
8 distress to substantiate that claim.” (*Id.*)

9 Significantly, counsel agree that a plaintiff may invoke the marital communications privilege,
10 yet the spouse may still offer testimony regarding *observations* without violating the privilege. *See*
11 *Lefkowitz*, 618 F.2d at 1318 (holding that a wife’s observation of boxes of files being moved into
12 offices was not a communicative act protected by the marital privilege); *United States v. Parker*, 834
13 F.2d 408, 411 (4th Cir. 1987) (holding the privilege “generally, extends only to utterances”); *United*
14 *States v. Irons*, 646 F. Supp. 2d 927, 957 (E.D. Tenn. 2008) (“the marital communications privilege
15 prevents a spouse from testifying about confidential communications that occurred during the marriage
16 but does not foreclose testimony about the spouse’s observations as to the other spouse’s actions and
17 appearance”). Consequently, Plaintiff has not waived the marital communications privilege simply by
18 identifying his wife as a witness. However, if Mrs. Brown offers any testimony regarding confidential
19 *discussions* with Plaintiff, the marital communications privilege is implicated.

20 Defendant contends that “Plaintiff expressly waived marital privilege” by offering the testimony
21 of Mrs. Brown. (Doc. 38 at 20) Defendant observes that “California Evidence Code §973(a) provides,
22 “[A] married person who testifies in a proceeding to which his spouse is a party, or who testifies against
23 his spouse in any proceeding does not have a privilege under this article in the proceeding in which
24 such testimony is given.” (*Id.*) In addition, the defendant contends that “[b]y presenting herself to
25 testify, Kathy Brown waived the privilege as to her communications with Plaintiff on emotional
26 distress issues.” (*Id.*) Defendant argues Plaintiff and his spouse should not be permitted “to pick and
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1 choose which marital communications are to be preserved.”¹ (*Id.* at 21) The defendant relies on *United*
2 *States v. Plache*, 913 F.2d 1375, 1379 (9th Cir. 1990) for the proposition that a voluntary waiver of the
3 attorney-client privilege “constitutes a waiver of the privilege on all other communications on the same
4 subject.” (Doc. 38 at 20) Likewise, the defendant cites *IMC Chemicals, Inc. v. Niro Inc.*, 2000 WL
5 1466495, at *1 (D. Kan. July 19, 2000), for the proposition that a voluntary waiver of the attorney-
6 client privilege results in a waiver as to “communicates related to the disclosed matters.” (Doc. 38 at
7 20-21) The defendant cites also *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) in which the
8 court held, “When a party reveals part of a privileged communication in order to gain an advantage in
9 litigation, it waives the privilege as to all other communications relating to the same subject matter . . .”
10 Finally, the defendant cites *McCormick-Morgan, Inc. v. Teledyne Indus., Inc.*, 134 F.R.D. 275, 280
11 (N.D. Cal.), rev'd on other grounds, 765 F.Supp.611 (N.D. Cal. 1991), to support the position that once
12 a voluntary waiver occurs as to a subject, it is waived for the entirety of that subject. The court held,

13 MMI has argued that the subject matter scope of its waiver reaches only those specific
14 potential bases for challenging validity or enforceability that are the subjects of
15 communications it already has disclosed (relating primarily to prior art and pre-filing
16 sales activity). We hold that this argument is inconsistent with both the relevant case
17 law and with MMI's own voluntarily made commitments in this case. The law is clear:
18 MMI cannot waive the attorney-client privilege as to certain communications regarding
19 infringement, validity, and enforceability, but not others.

20 Thus, the defendant doesn't take the position that testimony by Mrs. Brown as to one subject waives
21 the marital privilege on all subjects. Rather he notes that the disagreement surrounds the scope of the
22 confines of the “subject” as to which the privilege is waived.

23 Plaintiff contends Mrs. Brown may testify about “discussions related to Plaintiff's assertions to
24 defendant that defendant had a conflict of interest,” and that he seeks to waive the privilege for this

25 ¹ *But see Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 668 (9th Cir. 2003) [“At least one California court has recognized a
26 party's ability to preserve a privilege through a limited waiver. In *People v. Aguilar*, 218 Cal.App.3d 1556, 267 Cal.Rptr.
27 879 (1990), overruled in part on other grounds, *People v. Ervin*, 22 Cal.4th 48, 90, 91 Cal.Rptr.2d 623, 990 P.2d 506
28 (2000), the California Court of Appeal held that waiver did not occur when a criminal defendant selectively waived the
privilege for purposes of a hearing conducted under California Rule of Evidence § 402. *Aguilar*, 218 Cal.App.3d at 1564-
65, 267 Cal.Rptr. 879. The trial court in *Aguilar* erroneously held that the defendant's testimony was admissible only if it
met the requirements of California Evidence Code § 795, which sets forth requirements for admissibility of non-defendant
witness testimony. *Id.* at 1563, 267 Cal.Rptr. 879. In order to comply with the trial judge's erroneous holding, defense
counsel allowed the prosecution to examine privileged communications from the defendant's interviews with a hypnotist
for the singular purpose of a hearing to determine whether post-hypnosis evidence should be admissible. *Id.* at 1565, 267
Cal.Rptr. 879. Defense counsel specifically stated that the waiver was not intended to apply to any aspect of discovery. *Id.*
Under these circumstances, the California Court of Appeal held that the privilege was not generally waived. *Id.*”]

1 testimony only. In support of this position, Plaintiff cites several cases in which the courts indicate a
2 waiver may be held to “only specific subjects or discussions.” (Doc. 38 at 24, citing *Weil v.*
3 *Investment/Indicators, Research & Management*, 647 F.2d 18, 24 (9th Cir. 1981); *In re Grand Jury*
4 *Proceedings Oct. 12, 1995*, 78 F.3d 251, 256 (6th Cir. 1996); *Knepp v. United Stone Veneer, LLC*, 2007
5 U.S. Dist. LEXIS 65423 (M.D. Pa. 2007)). For example, in *Weil*, the Ninth Circuit examined whether
6 the attorney-client privileged was waived when a party “disclose[d] a privileged attorney
7 communication about a matter that is relevant and material to issues in the case, and then invoke the
8 privilege to prevent discovery of other communications about the same matter.” *Id.*, 647 F.2d at 24.
9 The Court found the attorney-client privilege was waived, and directed the party to disclose further
10 communications “about the matter actually disclosed.” *Id.* Similarly, in *Knepp*, the court indicated that
11 it would “follow the rule for the attorney-client privilege” to determine whether a statement in a
12 pleading constituted a waiver of the marital communications privilege. *Id.*, 2007 U.S. Dist. LEXIS
13 65423 at *16. In doing so, the court held, “The only remaining question is the extent of the waiver.
14 This disclosure does not waive the privilege with respect to all confidential communications between
15 Robin and David Barrett. Still, we will follow the rule for the attorney-client privilege and find that the
16 privilege has been waived as to all communications on the same subject matter . . .” *Id.* Likewise,
17 *Jones-McNamara v. Holzer Health Sys.*, 2014 WL 4805412, at *3 (S.D. Ohio Sept. 26, 2014) quoted *In*
18 *re Grand Jury Proceedings*, Oct. 12, 1995, 78 F.3d 251, 256 (6th Cir.1996) when the court held, “[T]he
19 marital communications privilege is similar to the attorney-client privilege, which is also subject to
20 waiver through voluntary disclosure of a privileged communication; but the scope of that waiver is also
21 limited to questions which ‘clearly pertain to the subject matter of the specific points on which a waiver
22 did occur.’”

23 Plaintiff agrees to waive the marital communications but only as to a single conversation in
24 which he discussed with his wife his concerns about a conflict of interest he believed the defendant had.
25 However, all of the cases cited by the plaintiff and, in fact, all of those cited by the defendant,
26 demonstrate there may be a selective waiver but the waiver, once it occurs, is as to the *entirety* of the
27 subject. Thus, if Mrs. Brown testifies about the conversation with her husband, the marital privilege is
28 waived as to that particular *subject* not simply as to that particular time the subject was discussed.

1 Because there has not yet been a waiver on any subject, the Court finds the marital communications
2 privilege is intact and has not been waived. Thus, Defendant’s motion to compel testimony regarding
3 her communications with Plaintiff is **DENIED**.

4 On the other hand, the defendant is entitled to explore any relevant subject with Mrs. Brown—
5 based upon her personal observations and about which she would know—as long as they do not seek
6 information that seeks to force her to divulge confidential marital communications not otherwise
7 waived. To this extent the motion is **GRANTED**.

8 **III. Motion to Compel Testimony from Pastor Lewis**

9 **A. Legal Standards**

10 In *Trammel v. United States*, 445 U.S. 40, 51 (1980), the Court held, “The priest-penitent
11 privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute
12 confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and
13 guidance in return.” Likewise, the Third Circuit determined

14 [A] clergy-communicant privilege does exist. We further hold that this privilege
15 protects communications to a member of the clergy, in his or her spiritual or
16 professional capacity, by persons who seek spiritual counseling and who reasonably
17 expect that their words will be kept in confidence. As is the case with the attorney-
18 client privilege, the presence of third parties, if essential to and in furtherance of the
19 communication, does not vitiate the clergy-communicant privilege. Neither the record
20 nor the district court's findings, however, are sufficient to establish whether any of
21 those present at the counseling session should be considered third parties, to gauge the
22 impact of any third party's presence, and to enable us to ascertain whether the privilege
23 was properly invoked in this case.

24 *In re Grand Jury Investigation*, 918 F.2d 374, 377 (3rd Cir. 1990). The Court explained “[t]he
25 threshold criterion for deciding whether the privilege should attach” is whether the communication was
26 “made to a clergyperson.” *Id.* at 385. However, the privilege does not apply to statements made, even
27 in confidence, to a person who happens to be a member of the clergy but who is receiving the
28 statements outside the purpose of spiritual counseling. *See In re Grand Jury Investigation*, 918 F.2d at
377. The burden is on the person asserting the privilege to establish its applicability, though it may be
asserted “by a clergyperson on behalf of a communicant.” *Id.*, n. 15.

27 **B. Discussion and Analysis**

28 Pastor Lewis is a clergyman within the meaning of the privilege. Plaintiff argues he is waiving

1 the privilege only as to conversations related to the “emotional distress Plaintiff suffered from his
2 termination,” and “a discussion that occurred just prior to his termination about his job (similar to the
3 wife) that involves a prior consistent statement regarding Plaintiff’s belief that defendant had engaged
4 in a conflict of interest.” (Doc. 38 at 26) However, Defendant contends he should be compelled to
5 answer any questions on “the subject matter of the emotional distress experienced by Brown both as to
6 this incident and as to other prior incidences of employment termination and as to his overall emotional
7 well-being”² (*id.* at 2).

8 Rather, only those statements Mr. Brown made to Pastor Lewis while seeking or receiving
9 spiritual counsel are protected. However, based upon the authorities discussed above related to the
10 marital privilege, if Mr. Brown waives the privilege on a subject, he waives it for the entirety of the
11 subject. For example here, Mr. Brown makes clear he intends to waive the privilege only as to the
12 emotional distress he suffered from the loss of the job with WRPD. He does not intend to waive it as to
13 all sources of emotional distress.

14 This does not preclude the defendants from exploring the observations or other information
15 Pastor Lewis has related to other sources of emotional distress for Mr. Brown, as long as they do not
16 seek information that will force him to divulge confidential communications. As with Mrs. Brown, the
17 defendants are entitled to depose Pastor Lewis on all subjects—rather than mere single conversations
18 related to a subject—as to which Mr. Brown waives the privilege.

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26 ² Plaintiff’s counsel iterated at the hearing that the plaintiff seeks only “garden variety” emotional distress damages. He
27 stated the plaintiff will not offer pastor Lewis in the professional capacity as a “counselor” and, therefore, Pastor Lewis
28 will be permitted to offer only lay, percipient information about the plaintiff’s demeanor and, if appropriate, statements
about his distress. Pastor Lewis will not be permitted to offer any opinions about the cause of the emotional or any
prognosis or diagnosis.

