UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JERRI CURRY,

Plaintiff,

v.

CONTRA COSTA COUNTY,

Defendant.

_____/

No. C-12-03940 WHO (DMR)

ORDER ON PARTIES' JOINT DISCOVERY LETTER

Plaintiff Jerri Curry, Defendant Contra Costa County ("the County"), and non-party Public Employees Union Local One ("Local One") filed a joint discovery letter regarding Defendant's motion to compel the production of documents. [Docket No. 40 (Jt. Letter).] The court conducted a hearing on August 22, 2013. Following the hearing, the court conducted an *in camera* review of certain documents. For the following reasons, Defendant's motion is granted in part.

I. Discussion

A. Background

Plaintiff Jerri Curry is currently employed as a Mental Health Clinical Specialist (MHCS) for Defendant. Plaintiff, who is 69 years old, worked as a permanent part-time MHCS at the Martinez Detention Facility from 2003 until March 2010, when she transferred to a full-time position at the Central County Mental Health Clinic. Plaintiff alleges that in 2011 and 2012, she applied for and was passed over for available positions at the Martinez Detention Facility, and that Defendant

instead filled the positions with younger unlicensed and less-qualified applicants. Plaintiff alleges that after she filed a union grievance and complaints of age discrimination with the EEOC and DFEH, Defendant retaliated against her by denying her overtime, revoking her security clearance at the jail, and preventing her access to inmates. Defendant denies that it discriminated against Plaintiff; it contends that Plaintiff's loss of her security clearance resulted from her own misconduct and that Plaintiff has the same access to inmates as provided to others who are similarly situated. Plaintiff brings claims for age discrimination, retaliation, and failure to take reasonable steps to prevent discrimination and retaliation in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*., and the California Fair Employment and Housing Act, Cal. Govt. Code § 12940 *et seq*.

Defendant propounded a request for the production of all communications between Plaintiff and her union, Local One, relating to discrimination or harassment based on age, retaliation, and Plaintiff's employment with the County. (Jt. Letter 2 n.1.) Plaintiff withheld responsive documents and produced a privilege log listing ten documents. (Jt. Letter Ex. A (privilege log).) Plaintiff's privilege log indicates that the documents are withheld on the basis of the "union-employee communication" privilege, the right to privacy, and the attorney-client privilege.[1] Local One maintains that the documents are "privileged confidential communications" between Plaintiff and Local One and are not discoverable. (Jt. Letter 7.) Plaintiff joins Local One's privilege objection and also argues that the documents are not relevant to this matter. (Jt. Letter 6.) Defendant seeks an order compelling Plaintiff to produce the ten documents and re-opening Plaintiff's deposition for the purpose of questioning her about the documents.

B. Legal Standards

Federal Rule of Civil Procedure 26 provides that a party may obtain discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). "Relevancy,

[1] Plaintiff is no longer asserting the attorney-client privilege as to any of the documents at issue. (Jt. Letter 5.)

for the purposes of discovery, is defined broadly, although it is not without ultimate and necessary boundaries." *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 679-80 (N.D. Cal. 2006). "[T]he party opposing discovery has the burden of showing that discovery should not be allowed, and also has the burden of clarifying, explaining and supporting its objections with competent evidence." *La. Pac. Corp. v. Money Mkt. 1 Institutional Inv. Dealer*, 285 F.R.D. 481, 485 (N.D. Cal. 2012). Federal Rule of Civil Procedure 26 also provides that a party withholding information under a claim that it is privileged or subject to protection as trial preparation material must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim. Fed. R. Civ. Proc. 26(b)(5)(A). A privilege should be asserted within thirty days of a request for production. *See* Fed. R. Civ. P. 34(b)(2)(A).

C. Analysis

1. Relevance of the Requested Documents

As a threshold matter, Plaintiff claims that many of the documents at issue are not relevant to this litigation. The ten documents are dated from 2009 through 2012. Plaintiff's lawsuit is based upon her claim that Defendant hired younger, less-qualified applicants for the positions at the Martinez Detention Facility in 2011 and 2012, and the alleged subsequent retaliation following her grievance and EEOC and DFEH complaints regarding those hiring decisions. (Compl. ¶¶ 22-33.) As Plaintiff notes, the documents listed at privilege log entries one through seven are communications that Plaintiff had with her union from 2009 and 2010, and thus predate the discrimination and retaliation at issue in this case.[2]

Defendant argues that these documents are relevant because they may support Defendant's defense that there were legitimate, non-discriminatory reasons for its decisions to offer positions to other individuals. In addition, Defendant argues that the documents may support its theory that

[2] The documents logged as entries eight, nine, and eleven clearly are relevant, as they pertain to the grievances that Plaintiff filed with her union regarding Defendant's actions that form the basis for this case. As discussed below, Plaintiff and Local One assert that these documents are protected by a union-employee privilege.

Plaintiff has a pattern of making unfounded complaints of retaliation by her supervisors, and are thus relevant to Plaintiff's credibility.

The court conducted an *in camera* review of these documents, and concludes that entry number six, an email string from 2010 with the subject line "Fw: Re: Retaliation" (bates-stamped P00470-P00472) is discoverable, based upon the theories of relevance proffered by Defendant.[3] As discussed below, because the document is not privileged, it must be produced to Defendant. The remaining documents in this category are not relevant and are thus not subject to discovery.

2. Union-Employee Communications

Plaintiff and Local One claim all of the documents at issue are protected by the "union-employee communication" privilege. Local One describes the documents as "confidential communications between the Plaintiff and her Union representatives in connection with the Union's representation of its members in grievance proceedings pursuant to a collective bargaining agreement." (Jt. Letter 7.)

This court exercises federal question jurisdiction over Plaintiff's federal claims pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over Plaintiff's pendent state law claims. Therefore, the federal law of privilege applies in this case. *See Agster v. Maricopa Cnty.*, 422 F.3d 836, 839-40 (2005) (noting that "[w]here there are federal question claims and pendent state law claims present, the federal law of privilege applies.") (citing Fed. R. Evid. 501); *see also Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982) ("[W]hen there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility, rather than any state law privilege, is the controlling rule . . . . [T]he general rule in federal practice disfavor[s] privileges not constitutionally based."). Federal Rule of Evidence 501 provides federal courts with "the flexibility to develop rules of privilege on a case-by-case basis." *Trammel v. U.S.*, 445 U.S. 40, 47 (1980). However, it is well-established that the federal "policy favoring open discovery requires that privileges must be 'strictly construed.'" *Dowling v. Am. Haw. Cruises, Inc.*, 971 F.2d 423, 425 (9th Cir. 1992) (quoting *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990)). The Supreme Court has

[3] The court expresses no opinion regarding the admissibility of this document, only its discoverability.

made it clear that an evidentiary privilege is not applied "unless it 'promotes sufficiently important interests to outweigh the need for probative evidence. . . .'" *Univ. of Pa.*, 493 U.S. at 189 (quoting *Trammel*, 445 U.S. at 51). "Inasmuch as '[t]estimonial exclusionary rules and privileges contravene the fundamental principles that "the public . . . has a right to every man's evidence,'" any such privilege must 'be strictly construed.'" *Id*. (quoting *Trammel*, 445 U.S. at 50) (internal citations omitted). The party seeking an exception from this principle bears the burden of establishing the existence of a privilege and its applicability to a particular case. *See In re Grand Jury Subpoenas Dated Jan. 20, 1998*, 995 F. Supp. 332, 334 (E.D.N.Y. 1998). Further, the Supreme Court has cautioned courts not to exercise the authority granted by Federal Rule of Evidence 501 "expansively," particularly where "it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." *Univ. of Pa.*, 493 U.S. at 189.

There is no published Ninth Circuit authority supporting the existence of a union-employee communications privilege. The Ninth Circuit recently expressed its opinion on this topic in an unpublished opinion, *Kyei v. Oregon Department of Transportation*, 497 Fed.Appx. 711, 713 (9th Cir. 2012). In that case, the court found that a district court's admission of testimony by two union representatives did not constitute plain error. The court noted that "[n]either Supreme Court nor Ninth Circuit precedent provide authority for a union member/union representative privilege. We also choose not to 'continue the evolutionary development of testimonial privileges' by recognizing a new privilege in this case." *Id*.

A number of district courts have considered the question and concluded that no privilege protects union-employee communications relating to grievance proceedings, including two recent cases in this district. In *Dang v. Sutter's Place, Inc.*, No. C 10-02181 RMW (PSG), 2012 WL 2906109, at *3 (N.D. Cal. Jul. 13, 2012), the court concluded that communications between a union and the plaintiff, who had been represented by the union in a related grievance, were not privileged. In another case, the court held that communications between a plaintiff, her attorney friend, and union representatives were not privileged, citing *Dang* and noting that the plaintiff had cited no authority to support the proposition that there is a privilege for union-employee communications. *Fox v. Shinseki*, No. CV 11-04820 EDL, 2013 U.S. Dist. LEXIS 82087, at *14-15 (N.D. Cal. Jun.

11, 2013). Other district courts in the Ninth Circuit have reached the same conclusion. *See Parra v. Bashas' Inc.*, No. CIV 02-591-PHX RCB, 2003 WL 25781409, at *4-5 (D. Ariz. Oct. 2, 2003); *see also McCoy v. Sw. Airlines Co., Inc.*, 211 F.R.D. 381, 387-88 (C.D. Cal. 2002) (expressly refusing to extend the attorney-client privilege to protect communications between pilots and their union representatives made in preparation for grievance hearings; collecting cases).

Local One cites one district court decision to support its position, but the decision is distinguishable. In *Black v. Potter*, No. C 08-01344 SI, 2010 WL 532408, at *1-2 (N.D. Cal. Feb. 6, 2010), the court considered whether communications between a Plaintiff and a lay union representative in connection with EEOC proceedings were privileged. The court concluded that where there is statutory or regulatory authority for lay representation, a party could object to the disclosure of communications relating to that representation where the communications were intended to be kept confidential. 2010 WL 532408, at *2. In so holding, the court noted that "in the Court's view, protecting the confidentiality of communications between an aggrieved employee and the union representative who is acting as the employee's advocate in EEOC proceedings furthers the traditional rationales underlying the attorney-client privilege." *Id.* Local One urges the court to adopt this reasoning here. However, the communications at issue in *Black* were in the context of an EEOC proceeding; here, the communications involve a grievance procedure, and Local One has not identified a comparable authorizing statute. *See McCoy*, 211 F.R.D. at 387 (refusing to find communications with union representatives privileged under state law where no statute specifically authorized representation by lay persons at grievance proceedings); *see also Am. Airlines, Inc. v. Superior Court*, 114 Cal. App. 4th 881, 889-90 (2003) (refusing to recognize a union privilege under California law; rejecting argument that California Labor Code section 923 implies such a privilege).

Local One also cites *Peterson v. State*, 280 P.3d 559, 564-65 (Alaska 2012), a recent decision by the Alaska Supreme Court. In *Peterson*, the court found a "union-relations privilege" implied in the state's Public Employment Relations Act (PERA). That statute recognizes the rights of public employees to organize for the purpose of collective bargaining, and provides that public employers may not interfere with the exercise of employees' rights. The court found that "the right of the union and its members to function free of harassment and undue interference from the State"

is implicit in the statute. *Id*. at 565. Further, the statute provided that any attempt by the state to force the disclosure of confidential communications between an employee and a union representative during a grievance proceeding would constitute an unfair labor practice. The court found that this protection should not be lost if the grievance dispute is not resolved and the employee files a civil suit. *Id*. Therefore, the Alaska court's conclusion rests on that state's public employment statute. Again, Local One has identified no similar statutory basis from which the court may imply a union-employee communications privilege.[4]

As Local One has not identified authority for the recognition of a union-employee communications privilege in this context, the court declines to recognize such a privilege in this case.

3. Right to Privacy

Local One also argues that the documents at issue are protected from disclosure by its constitutional rights of associational privacy protected under the First Amendment and the California Constitution. While Local One is correct that a union may assert First Amendment rights, it must demonstrate a "prima facie showing of arguable first amendment infringement." *Brock v. Local 375, Plumbers Int'l Union of Am., AFL-CIO*, 860 F.2d 346, 349-50 (9th Cir. 1988). In order to make such a showing, Local One must demonstrate that the disclosure of the documents would result in "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Id*. at 350. A prima facie showing requires "objective and articulable facts, which go beyond broad allegations or subjective fears." *Id*. at 350 n.1; *see also Dang*, 2012 WL 2906109, at *3 (holding that declaration reflecting subjective beliefs about possibility of "chilling effect" insufficient to make such a showing). Here, Local One has made no showing as to First Amendment infringement. Therefore, the documents may not be protected from disclosure on this basis.

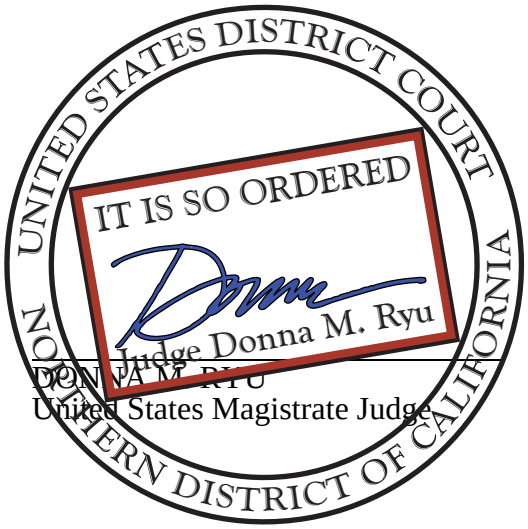
[4] Local One also cites *Cook Paint & Varnish Co.*, 258 NLRB 1230, at *1231-32, 1981 WL 21122, at *1231-32 (1981), in support of its position, but this case is not on point. In *Cook Paint*, the NLRB addressed whether threatening a union representative with discipline for refusing to submit to an interrogation by the employer about conversations with a union employee constitutes an unfair labor practice.

II. Conclusion

As the court concludes that the documents at issue are not protected by a union-employee communications privilege or Local One's rights to associational privacy, Plaintiff shall immediately produce to Defendant the documents at entries six, eight, nine, and eleven on her privilege log. Defendant may re-open Plaintiff's deposition for no more than one hour for the purpose of questioning her regarding these four documents.

IT IS SO ORDERED.

Dated: August 28, 2013



DONNA M. RYU
United States Magistrate Judge