

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Senior District Judge Richard P. Matsch

Civil Action No. 10-cv-00800-RPM

ROBERT FRASER,

Plaintiff,

v.

AVAYA INC., a Delaware corporation, and  
THE AVAYA INC. SICKNESS AND ACCIDENT DISABILITY PLAN,

Defendants.

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ORDER DENYING DEFENDANTS' MOTION TO COMPEL

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The defendants' motion to compel (#123) seeks production of four documents which the plaintiff has withheld on the ground that they reflect his privileged communications with union representatives in connection with grievances that he filed regarding the termination of his employment. Avaya argues that this court should not recognize any such "union member-union representative" privilege or, alternatively, that the asserted privilege does not apply because no grievance proceeding is pending.

"The burden of establishing the applicability of a privilege rests on the party seeking to assert it." *In re Grand Jury Subpoena Duces Tecum*, 697 F.2d 277, 279 (10th Cir. 1983).

Contrary to the defendant's arguments, the plaintiff has shown both the existence of the asserted privilege and its applicability to the disputed documents.

The asserted privilege arises from rights and duties created under the National Labor Relations Act. An employee must be able to communicate candidly with union representatives

about matters that are the subject of a grievance proceeding. *See Cook Paint & Varnish Co.*, 258 NLRB1230 (1981).

The plaintiff's response states that there is an ongoing dispute between the union and Avaya over the timeliness of the plaintiff's grievance and the issue of arbitrability has not been resolved. Avaya is not entitled to discover the plaintiff's communications with union officials regarding his disputes with Avaya.

Accordingly, it is

ORDERED that the defendants' motion to compel (#123) is denied.

Dated: October 10, 2013

BY THE COURT:

s/Richard P. Matsch

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Richard P. Matsch, Senior District Judge