UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CHRISE FLETCHER,

Plaintiff,

- against -

ABM BUILDING VALUE d/b/a ABM, and KATHERINE COLLADO,

Defendants.
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MEMORANDUM & ORDER

14 Civ. 4712 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiff moves to compel disclosure of communications that defendants claim are privileged and certain other information. For the reasons set forth below, plaintiff's motion is denied.

I. BACKGROUND

Plaintiff brought this suit in June 2014 against her former employer, ABM Building Value ("ABM"), and Katherine Collado, her supervisor at ABM. Plaintiff is an African American female and alleges that defendants discriminated against her on account of her race, color, ethnicity, sex, and gender. Plaintiff asserts harassment, hostile work environment, discrimination, and retaliation claims under federal and state law.

After defendants answered the complaint, we entered a scheduling order directing the parties to complete fact discovery by January 25, 2016. See Order, June 25, 2015 (ECF No. 14). The parties requested two extensions to that deadline, which we

granted, setting a new deadline of April 25, 2016. See Order, Jan. 25, 2016 (ECF No. 17); Order, Mar. 9, 2016 (ECF No. 20).

On the day fact discovery was to be completed, plaintiff requested a third extension of the deadline in order to compel additional discovery. See Pl.'s Letter, Apr. 25, 2016 (ECF No. 21). Plaintiff sought to depose members of ABM's "Termination Review Committee" (the "TRC" or "Committee"), which plaintiff alleged was involved in ABM's decision to fire her. Plaintiff also sought production of, among other things, (1) discrimination, harassment, retaliation, and wrongful termination complaints brought against ABM in the past five years, (2) salary information and personnel files for certain ABM employees, and (3) plaintiff's timesheets.

We granted the motion, in part, permitting three areas of additional discovery. First, we instructed defendants to submit an affidavit clarifying the TRC's role in plaintiff's firing and setting forth defendants' basis for claiming that its communications were privileged. Second, we allowed plaintiff to conduct a Rule 30(b)(6) deposition of the ABM employee who reviewed her October 23, 2012, Code of Business Conduct and Anti-Harassment Policy Certification. Third, we instructed defendants to produce plaintiff's time records. We denied plaintiff's remaining requesting, noting that "most of plaintiff's requests for additional discovery are based on unfounded speculation or seek

information bearing no relation to her claims of discrimination." See Order, June 22, 2016 (ECF No. 29).

Plaintiff subsequently filed a motion to reconsider our June 22, 2016, Order, which we denied on the grounds that it largely "rehashed" arguments she previously raised, improperly sought new discovery, or improperly asserted new theories of relevance. See Order, July 21, 2016 (ECF No. 39).

In the meantime, defendants submitted an affidavit clarifying the role of the TRC, which was composed of one lawyer and two non-lawyers. See Aff. of Clay Adams, July 11, 2016 (ECF No. 38-2) ¶ 4. According to the affidavit:

> Pursuant to ABM practice, a manager who has made the decision to discharge a staff or management employee must inform his or her Regional Vice President of Human Resources, who in turn will submit the matter to the TRC for evaluation prior to conducting any termination. The Regional Vice President of Human Resources and often the decision-making manager will present the matter to the TRC. The matter is then reviewed, in an attorney privileged manner, by the TRC Committee. The TRC provides attorney-client privileged advice concerning any risks associated with the termination.
>
> The TRC does not make termination decisions. The Company's operations team is responsible for making the ultimate decision to terminate any employee after reviewing the facts and circumstances, including any potential risks involved with the termination raised by the TRC.

Id. ¶¶ 5-6.

We found that the affidavit was insufficient to establish that the TRC's role was primarily legal and that its communications

were privileged. We noted that, "[g]iven the presence of two nonlawyers on the TRC and the absence of information . . . concerning the kinds of 'risks' the TRC evaluated, we cannot say at this juncture that the privilege has been established." Letter, Sept. 6, 2016 (ECF No. 45). Accordingly, we granted plaintiff leave to depose a TRC member for the limited and "sole purpose of ascertaining whether the privilege applies, i.e., whether the TRC's role is limited to providing legal advice or whether it provides business advice in the ordinary course." Id. However, we also warned plaintiff:

> Although this Court has no difficulty with the general propositions that parties are entitled to make motions regardless of the Court's view of their viability and that the sanctions regime exists to control the making of unwarranted motions, there is a recognized limit to the filing of motions to reargue. That limit should be kept in mind prior to filing any additional motion seeking to compel discovery in this case.

Id.

Plaintiff subsequently deposed Miranda Tolar, an ABM attorney and TRC member who reviewed plaintiff's termination. The parties called the Court during the deposition to rule on various objections, which we did on the record.

Plaintiff now moves to compel further depositions of the TRC members on the grounds that their communications are not protected by the attorney-client privilege. Plaintiff also moves to compel (1) production of prior discrimination, harassment, retaliation,

and unlawful termination complaints brought against ABM and information related to defendants' treatment of the complaints, (2) depositions of individuals who received, reviewed, and/or investigated responses to ABM's anti-discrimination and anti-retaliation protocols, and (3) production of personnel, timesheet, and disciplinary records for various individuals.

II. DISCUSSION

A. Termination Review Committee

Plaintiff argues that defendants have not met their burden of establishing that the TRC's communications are privileged and that, even if the communications are privileged, defendants have waived the privilege by raising the communications as a defense.

1. Defendants Have Established that the Attorney-Client Privilege Applies

"The attorney-client privilege protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance." In re Cty. of Erie, 473 F.3d 413, 418 (2d Cir. 2007). "A party invoking the attorney-client privilege must show (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." Id. at 419. The privilege may cover communications with corporate in-house counsel as long as counsel is communicating legal rather than business advice. Id. In such

context, "[w]e consider whether the predominant purpose of the communication is to render or solicit legal advice." Id. at 420; see also Neuder v. Battelle Pac. Nw. Nat. Lab., 194 F.R.D. 289, 292-93 (D.D.C. 2000) ("Where business and legal advice are intertwined, the legal advice must predominate for the communication to be protected. . . . [T]he mere fact that in-house counsel is present at a meeting does not shield otherwise unprivileged communications from disclosure.").

Contrary to plaintiff's assertion, Ms. Tolar's testimony establishes that the TRC served primarily a legal rather than business function and that the TRC's communications are privileged.[1] Ms. Tolar consistently testified that "the purpose of the Termination Review Committee is for me to do a legal analysis of the decision [to terminate] and communicate those risks to the decision maker" who ultimately decides to terminate an employee. Tr. at 134:3-6.[2] Such advice is clearly legal and

[1] Both parties submitted excerpts of Ms. Tolar's deposition transcript, see Morrison Decl. (ECF No. 55), Ex. C; Benson Decl. (ECF No. 60), Ex. D, which is cited herein as "Tr."

[2] See also Tr. at 40:6-9 ("[T]he whole reason for having the committee at all is to conduct a legal review of the termination. That's why we have an attorney present."); Tr. at 97:12-18 ("[The termination review discussion] is the discussion we have been talking about where we get on a call, I provide a legal review, conduct an analysis and then communicate legal risks to the decision maker so that they can make an informed decision about what they're going to do."); Tr. at 98:24-99:5 ("The TRC doesn't make decisions about an employee's termination. I provide a legal analysis with the risks involved. Their role is to provide me input so I can do that analysis. That is the function of the TRC. I communicate those to the decision maker so that they can make the decision."); Tr. at 100:22-101:5 ("We, I, conduct a legal review of the decision that the decision maker's [*sic*] may terminate on, annalize [*sic*] the legal risks, communicate the legal risks to the decision maker so they can

privileged. The presence of two non-attorneys on the Committee does not undermine that conclusion since Ms. Tolar testified that their "role is to provide me with information I need to do that legal analysis." Tr. at 129:8-10.[3]

Likewise, the fact that the TRC discussed the reasons for terminating an employee and reviewed non-legal documents, such as personnel records, payroll records, and performance reviews, does not convert the TRC's role into a business one or otherwise destroy the attorney-client privilege. As noted above, Ms. Tolar's testimony clearly established that the TRC's primary role was to analyze the legal risk associated with firing an employee, an analysis that would likely require reviewing documents such as personnel records, payroll record, and performance reviews.

Plaintiff's argument that the TRC did not primarily provide legal advice appears to be based on a fundamentally flawed understanding of the attorney-client privilege. Plaintiff argues that the Committee's function was primarily business because Ms.

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make an informed decision based on what they know as well as the legal analysis and legal risks associated with the decision."); Tr. at 129:5-10 ("The Termination Review Committee exists for me to provide a legal analysis and communicate those legal risks to the decision maker."); Tr. at 151:21-22 ("The whole purpose of the committee is to provide a legal review.").

[3] See also Tr. at 40:15-18 ("Q: Amado Hernandez is not involved in that review? A: He provides me input that I need to conduct the review, that's his role."); Tr. at 98:24-99:5 ("[The other members'] role is to provide me input so I can do [a legal risk] analysis."); Tr. at 104:16-19 ("Q: You are saying Amado Hernandez, the senior VP of HR, his sole and only function is to provide input to you? A: Yes."); Tr. at 134:7-11 ("Mr. Hernandez and Mr. Adams provide me input I need to do that analysis and . . . they would communicate to me as part of that process information I need to know to do that.").

Tolar "admitted" that her role on the TRC is "to see if there is a legal risk" in connection with the termination and to communicate that legal analysis to the person ultimately deciding whether to fire an employee. But that is precisely the type of legal advice that is protected by the attorney-client privilege.[4]

Plaintiff also argues that Ms. Tolar's testimony was insufficient to establish the roles of the other two members of the TRC. That argument is meritless. Ms. Tolar was deposed in order to determine whether the TRC functioned primarily in a legal or business capacity. Having found that her testimony establishes the former and that the TRC was not the ultimate decision maker, there is no need to inquire further into the other members' involvement. In any event, as noted above, Ms. Tolar testified

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[4] Plaintiff's argument is largely based on a distortion of the following comment this Court made on the record during Ms. Tolar's deposition, which plaintiff repeatedly references in her motion:

> The committee could ultimately make a business decision having received some legal advice from Ms. Tolar. The advice being such as if you fire her for your business reasons, you face a thirty percent chance of your decisions being reversed in court, but nonetheless, that is her legal opinion, but the decision of the committee is a business decision. We have your input. Thank you very much. We are going to go ahead and we are going to fire her. On the other hand, the committee could function in a way that lets the lawyer be the final decision maker.

Tr. at 72:24-73:14. The above comment, however, clearly contemplates a situation in which *the TRC* makes the ultimate decision to fire an employee, which would be a business decision. However, as noted above, it is clear from Ms. Tolar's testimony that the TRC did not make the ultimate decision to fire employees, including plaintiff, and instead only provided legal advice to the ultimate decision maker. In such a context, the TRC's communications are clearly privileged. See In re Cty. of Erie, 473 F.3d at 419-20.

that the other members' role was limited to providing her with the information she needed to conduct her legal analysis. The fact that Ms. Tolar could not testify as to what the other members did *outside* of their involvement with her and the TRC is irrelevant to whether the TRC's communications are privileged.

Accordingly, we find that defendants have established that the TRC's discussions and communications are privileged.

2. Defendants Have Not Waived the Privilege

Plaintiff next argues that defendants have waived the attorney-client privilege because they placed the TRC's communications in issue by raising them as a defense. That is simply not true. As plaintiff concedes, defendants assert that ABM fired plaintiff for allegedly destroying company property, a defense that has absolutely nothing to do with the TRC's legal review. That plaintiff believes defendants' purported reason is "highly questionable" has no bearing on whether defendants have waived the attorney-client privilege.

B. Additional Discovery Requests

Plaintiff also moves to compel production of additional discovery, including (1) a re-deposition of Brad Neilley, the manager who ultimately made the decision to terminate plaintiff, (2) discrimination, harassment, retaliation, and unlawful termination complaints brought by other ABM employees and information related to defendants' treatment of such complaints,

(3) depositions of individuals who received, reviewed, and/or investigated defendants' responses to anti-discrimination and anti-retaliation protocols, and (4) various individuals' personnel, timesheet, and disciplinary records.

Plaintiff's requests are denied. This is now the *fourth* time plaintiff has requested much of this discovery, requests we have repeatedly rejected. See Order, June 22, 2016 (ECF No. 29); Order, July 21, 2016 (ECF No. 39); Letter, Sept. 6, 2016 (ECF No. 45).

Plaintiff argues that she has not previously sought similar or identical discovery. That is simply false. The discovery plaintiff seeks is identical to the discovery she previously sought and which we denied. See Pl.'s Letter, Apr. 25, 2016 (ECF No. 21) at 2-3 (requesting "complaints of discrimination and of wrongful termination made against Defendants in the last 5 years" and "important personnel records for any of the witnesses deposed other than Defendant Collado"); Pl.'s Letter, June 3, 2016 (ECF No. 25) (requesting depositions of "Witnesses Who Received, Reviewed and/or Investigated Employee Complaints of Unlawful Discrimination, Harassment and Retaliation, Including Plaintiff's," and a second deposition of Brad Neilley).

Plaintiff seeks to distinguish her present discovery requests on the grounds that they are necessary to debunk defendants' "Faragher-Ellerth" defense. However, we previously rejected plaintiff's additional discovery requests under this theory of

relevancy on the grounds that it was not raised in plaintiff's initial motion to compel. See Order, July 21, 2016 (ECF No. 39) at 3. Plaintiff may not seek to continually re-litigate adverse decisions by simply raising new arguments, especially since plaintiff was on notice of the defense from defendants' answer.

Finally, plaintiff argues that she should be able to re-depose Mr. Neilley because "Defendants did not claim that Mr. Neilley was the sole decision maker until *after* Plaintiff's temporary co-counsel initially deposed him." Reply Mem. in Support of Pl.'s Mot. to Compel (ECF No. 66) at 8. Again, that is simply false. As plaintiff previously noted, Neilley testified that he made the "ultimate" decision to fire plaintiff in his initial deposition. See Pl.'s Letter, June 3, 2016 (ECF No. 25) at 4 ("On February 29, 2016, deponent Brad Neilley testified that 'Ultimately' he terminated Ms. Fletcher's employment."); id., Ex. D, Neilley Dep. Tr. 40:16-17 ("Who made the decision to terminate [Ms. Fletcher]? A: Ultimately, myself.")

C. Imposition of Costs and Legal Fees

Federal Rule of Civil Procedure 37(a)(5)(B) provides:

> If [a motion to compel disclosure or discovery] is denied, the court . . . must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(5)(B).

In accordance with that Rule, plaintiff and her counsel are hereby afforded the opportunity to explain why reasonable expenses, including attorneys' fees incurred by defendants in responding to plaintiff's motion, should not be awarded. Plaintiff has ten days to file her submission.

III. CONCLUSION

For the reasons stated above, plaintiff's motion is denied, and the Clerk of the Court is directed to terminate ECF No. 53.

The parties are granted leave to file motions for summary judgment and should confer on a briefing schedule. If only one party moves for summary judgment, no more than 60 days should pass between the moving party filing its motion and its reply. If both parties move for summary judgment, each party should combine its motions and cross-motions into single briefs such that each party submits four (rather than six) briefs, and no more than 70 days passes between the moving party's initial brief and the cross-moving party's final brief. The parties should notify the Court of the briefing schedule within two weeks.

SO ORDERED.

Dated: New York, New York
April 18, 2017

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE