IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, vs. LOCKHEED MARTIN, ETC., Defendant.	)	CIVIL NO. 05-00479 SPK-LEK
CHARLES DANIELS, Plaintiff, vs. LOCKHEED MARTIN, ETC., Defendant.	)	CIVIL NO. 05-00496 SPK-LEK

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Before the Court is Plaintiff-Intervenor Charles Daniels' and Plaintiff United States Equal Opportunity Employment Commission's ("EEOC") (collectively, "Plaintiffs") Motion to Compel Production of Documents ("Motion"), filed July 29, 2006. This matter came on for hearing on September 6, 2006. Appearing on behalf of Mr. Daniels was Carl Varady, Esq., and appearing on behalf of EEOC was Raymond Cheung, Esq., by phone. Barry Marr, Esq., appeared on behalf of Defendant Lockheed Martin, dba Lockheed Martin Logistics Management, Inc. ("Lockheed"). After careful consideration of the Motion,

supporting and opposing memoranda, and the arguments of counsel, Plaintiffs' Motion is HEREBY GRANTED IN PART AND DENIED IN PART for the reasons set forth below.

BACKGROUND

Mr. Daniels is an African-American man who was formerly employed by Lockheed as an avionic technician. During his employment, Mr. Daniels filed an internal complaint with Lockheed, alleging that some of his co-workers harassed him because of his race. According to Mr. Daniels, his harassers found out about the complaint during Lockheed's internal investigation and subjected him to further harassment and retaliation. Mr. Daniels and the alleged harassers were transferred to a different project, where they continued to harass and threaten him. When Mr. Daniels complained, one of his supervisors threatened to fire him if he filed a complaint with EEOC. Mr. Daniels did file an EEOC complaint, as well as a complaint with Lockheed's Human Resources Department in South Carolina. He alleges that Lockheed retaliated against him by selecting him for a layoff.

Plaintiffs filed the instant Motion on July 29, 2006. The Motion addresses the parties' disputes over two types of documents: 1) email communications related to Lockheed's internal investigation of Mr. Daniels' complaints; and 2) the personnel files of Lockheed employees who may have information relevant to

Plaintiffs' case. Lockheed filed its memorandum in opposition to the Motion on August 17, 2006.

A. Investigation Emails

Lockheed produced a privilege log on June 2, 2006 and a supplemental privilege log on June 21, 2006. The supplemental privilege log identified four documents that Lockheed withheld based on either attorney-client privilege, the work product doctrine, or both. [Exh. 1 to Motion.] They are email communications from Jacquie Jones-Mounts, Lockheed's Human Resources Manager who investigated Mr. Daniels' internal complaints. Plaintiffs argue that the documents are not privileged, and even if they would otherwise be privileged, Lockheed waived any privileges by asserting certain affirmative defenses. Lockheed has raised the affirmative defense described in Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), as well as the affirmative defense that it took prompt and appropriate corrective action in response to Mr. Daniels' complaints. Plaintiffs argue that these affirmative defenses place the adequacy of Lockheed's internal investigation at issue and, therefore, the investigation emails are discoverable.

In its memorandum in opposition, Lockheed states that the first of the four emails is dated November 13, 2001, the date Lockheed received Mr. Daniels' Charge of Discrimination.

Lockheed asserts that the three other emails were prepared and transmitted in connection with the ensuing EEOC investigation. Lockheed argues that all four documents are protected by the work product doctrine. Thus, Plaintiffs may only obtain them if they establish a substantial need for the documents, which they have not done. Further, two of the documents were addressed to Lockheed's in-house counsel and are attorney-client privileged.

Lockheed argues that its Faragher/Ellerth defense does not waive any protection with respect to these documents, which were all prepared after the completion of Lockheed's internal investigation, after Mr. Daniels left the company, and after he filed his discrimination charge. Lockheed emphasizes that it did not prepare the documents in connection with its internal investigation and that it has already produced its complete investigation file to Plaintiff. Thus, Lockheed argues that it has not waived the attorney-client privilege or work product protection of the four documents identified in the supplemental privilege log.

B. Personnel Files

The parties have also had disputes over Plaintiffs' request for the personnel files of some of Mr. Daniels' co-workers. After the parties submitted letter briefs, this Court issued an EO, noting that Plaintiffs sought the files to locate witnesses and to develop evidence of the alleged discrimination,

harassment, retaliation, and the investigation into Mr. Daniels' complaints. The Court, however, denied Plaintiffs' request for the files because, although the information Plaintiffs sought was relevant, there was barely any indication that the files contained such information and there were less invasive means of requesting the information.[1] [EO, filed 6/1/06 ("June 1 EO").]

EEOC issued a modified request for the personnel files, seeking "[a]ll documents related [to] the investigation of harassment, discrimination, retaliation, racism, or other employment misconduct which identify or refer to" persons previously identified by Mr. Daniels as having retaliated against him. [Mem. in Supp. of Motion at 4-5 (alterations in original).] Plaintiffs later offered to exclude six employees from this group and to enter into a protective order covering any information about the remaining nineteen employees.[2] Plaintiffs still seek the entire personnel files of Vonne Rudolph/Hamilton, Lockheed's

---

[1] On June 12, 2006, Plaintiffs appealed the June 1 EO to the district court. The district court filed its order affirming the June 1 EO on July 3, 2006.

[2] Plaintiffs state that the nineteen employees fall into four categories, although some fall in multiple categories. The categories are: *harassers* - David Ader, Roy Cooledge, James Gutierrez, James Hansen, Robert McGee, and James Glenn; *supervisors/other managers* - Gutierrez, Hansen, Glenn, Dick Mullen, James Schwecke, Mike Sartor, and Larry Cochran; *coworkers/witnesses* - Eulogio Arizala, Walter Blackwell, Thomas Carey, John Collins, Vernon Gross, Jon Kicker, and Richard Wolford; and *other discrimination victims* - Winton Wallace and Thomas Carey. [Mem. in Supp. of Motion at 5-6.]

Human Resources Investigator, and Jones-Mounts, both of whom investigated Mr. Daniels' complaint. Lockheed has not produced the requested files.

Plaintiffs argue that the modified request has been sufficiently narrowed and is no longer overly broad. Plaintiffs argue that Lockheed must prove that the information requested is clearly irrelevant. Plaintiffs argue that Lockheed's affirmative defenses have put the requested personnel files at issue. In order to determine the adequacy of Lockheed's internal investigation, Plaintiffs need Hamilton's and Jones-Mounts' personnel files. The files would show their education, experience, and training in conducting discrimination investigations and also whether there have been any complaints against them, such as claims of bias in an investigation. Plaintiffs argue that they need the files before they depose Hamilton and Jones-Mounts.

Plaintiffs further argue that other documents from the internal investigation are relevant. Lockheed apparently produced the unredacted files of alleged harassers Gutierrez, McGee, Ader, and Cooledge, and witness Carey during the EEOC investigation. Lockheed, however, has refused to produce those files for purposes of the instant litigation or to certify that

it produced the files to EEOC in their entirety.[3] Plaintiffs argue that the alleged harassers' prior conduct, any prior discrimination complaints against them, and any disciplinary actions Lockheed took against them are relevant to the effectiveness of Lockheed's anti-discrimination policy. It would also establish notice of the harassers' conduct.

Plaintiffs argue that they are entitled to the requested information from the files of the supervisors' and managers' who were not directly involved in the harassment or retaliation because they failed to take corrective action when they received complaints. Plaintiffs argue that their employment history, particularly any training they have had regarding workplace discrimination and harassment, is relevant. With regard to the mangers who retaliated against him, Plaintiffs wish to determine the scope of their authority and whether they took similar retaliatory action in the past.

Plaintiffs argue that they need to examine the personnel files of the coworker witnesses to determine whether members of a protected class have been treated less favorably than non-protected employees. Plaintiffs wish to compare Lockheed's treatment of Plaintiff to that of employees who did not complain of discrimination. They also need to test

[3] Plaintiffs state that, if Lockheed would affirm that the files it produced to EEOC are complete, the relief requested in this Motion would not be necessary as to those files.

Lockheed's claim that it transferred Mr. Daniels to South Carolina because of his low seniority.

Plaintiffs seek Carey's personnel file because they allege that Lockheed constructively terminated Carey by denying him a transfer after he wrote a statement supporting Mr. Daniels. Plaintiffs contend that Carey's file will show that Lockheed had no legitimate basis to deny his transfer. Wallace is another African-American electrician who worked with some of Mr. Daniels' harassers. Plaintiffs wish to review his file to see if he made similar complaints of racial harassment. This would establish a discriminatory policy or practice.

Lockheed states that it responded to the revised request for production of documents on June 9, 2006. Relying in part on the June 1 EO, Lockheed objected to the request for Hamilton's and Jones-Mounts' personnel files. With regard to the other requests, Lockheed objected on the ground that it had already produced its internal investigation files.

Lockheed points out that the June 1 EO denied Plaintiffs' attempt to secure the wholesale production of the requested personnel files. Plaintiffs still seek the wholesale production of Hamilton's and Jones-Mounts' personnel files, but they have not explained why that request is distinguishable from the request the Court denied in the June 1 EO.

Finally, Lockheed argues that it provided unredacted

copies of the personnel files of the alleged harassers. Lockheed has reviewed the other employees' files that Plaintiffs seek and Lockheed is not aware of any investigations of discrimination or harassment against those persons. Lockheed therefore argues that Plaintiffs' request for documents regarding Mr. Daniels' investigation and other investigations is moot.

DISCUSSION

I. Motion to Compel

Federal Rule of Civil Procedure 26(b) provides: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . . [or] reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b). Relevancy, for purposes of Rule 26(b), is a broad concept that is construed liberally. "Discovery is not limited to the issues raised only in the pleadings, but rather it is designed to define and clarify the issues." Miller v. Pancucci, 141 F.R.D. 292, 296 (C.D. Cal. 1992) (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)).

A. Investigation Emails

The parties apparently do not dispute that the four documents identified in Lockheed's supplemental privilege log are relevant to the issues in this case. Lockheed argues that these documents are protected by attorney-client privilege, the work

product doctrine, or both. Plaintiffs argue that the documents are not privileged and, if they are, Lockheed waived any privilege through its affirmative defenses.

1. Attorney-Client Privilege

"Issues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law." Clarke v. Am. Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992) (citing United States v. Zolin, 491 U.S. 554, 562 (1989); Fed. R. Evid. 501) (some citations omitted). The attorney-client privilege protects a client's confidential communications to an attorney to obtain legal services. Courts apply the privilege only when necessary to achieve a client's full and frank disclosure to his attorney. The party asserting the privilege bears the burden of establishing that it applies to the documents sought by the opposing party. See id. The elements of the privilege are:

> (1) When legal advice of any kind is sought (2) from a professional legal adviser in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are, at the client's instance, permanently protected (7) from disclosure by the client or by the legal adviser (8) unless the protection be waived.

United States v. Martin, 278 F.3d 988, 999 (9th Cir. 2002) (citing 8 Wigmore, Evidence § 2292, at 554 (McNaughton rev. 1961); United States v. Plache, 913 F.2d 1375, 1379 n. 1 (9th Cir. 1990)). "The privilege only protects disclosure of

communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney[.]" Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).

Lockheed claims that the November 13, 2001 email and the January 29, 2004 email are attorney-client privileged communications. This Court has reviewed the documents *in camera* and finds that Jones-Mounts, acting on Lockheed's behalf, sought legal advice from professional legal advisors, and that the emails were confidential communications related to that purposes. Some portions of the two emails, however, are mere recitations of the underlying facts of this case. The factual recitations do not reveal any legal strategy or other analysis. General facts about representation, including the identity of the client and the general purpose of the work performed, are usually not protected by the attorney-client privilege. See United States v. Amlani, 169 F.3d 1189, 1194 (9th Cir. 1999) (quoting Clarke v. Am. Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992)). This Court therefore finds that the attorney-client privilege does not apply to the factual recitations in the two emails; those portions must be produced to Plaintiffs. The Court finds that the attorney-client privilege applies to the remainder of the emails, unless Lockheed waived the privilege.

A party makes an implied waiver of the attorney-client privilege when "(1) the party asserts the privilege as a result

of some affirmative act, such as filing suit; (2) through this affirmative act, the asserting party puts the privileged information at issue; and (3) allowing the privilege would deny the opposing party access to information vital to its defense." Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1326 (9th Cir. 1995) (citing Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975)). Plaintiffs argue that Lockheed's assertion of the Faragher/Ellerth defense[4] and the defense that it took prompt and appropriate corrective action in response to Mr. Daniels' complaint put the sufficiency of Lockheed's internal investigation at issue and waived any privilege attached to investigation communications. Plaintiffs are correct that the sufficiency of Lockheed's internal investigation of Mr. Daniels' complaints is at issue in this case. The November 13, 2001 and January 29, 2004 emails, however, were not a part of the investigation. Lockheed's affirmative defenses did not put those communications at issue. The Court finds that Lockheed did not waive the attorney-client privilege as to those documents.

[4] Faragher and Ellerth established a framework to determine whether an employer is liable for a hostile work environment, as well as a two-prong affirmative defense to liability and damages. The employer must prove that it exercised reasonable care to prevent and promptly correct any discriminatory behavior and that the plaintiff did not take advantage of preventative or corrective opportunities that the employer provided. See Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 959 (9th Cir. 2004).

2. Work Product Doctrine

Lockheed also asserts that all four documents identified in the supplemental privilege log are protected by the work product doctrine. The work product doctrine provides a qualified immunity for material prepared by a party or its representative in anticipation of litigation. See Hickman v. Taylor, 329 U.S. 495 (1947). In order to be protected under the work product doctrine, the material must meet the following conditions: (1) be a document or tangible thing; (2) be prepared in anticipation of litigation or for trial; and (3) be prepared by or for a party, or by or for its representative. See Fed. R. Civ. P. 26(b)(3). The burden of establishing work product protection lies with the proponent, and "it must be specifically raised and demonstrated rather than asserted in a blanket fashion." Yurick v. Liberty Mut. Ins. Co., 201 F.R.D. 465, 472 (D. Ariz. 2001) (citations omitted).

There are two types of work product: fact work product, "written or oral information transmitted to the attorney and recorded as conveyed by the client"; and opinion work product, "any material reflecting the attorney's mental impressions, opinions, conclusions, judgments, or legal theories." In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 294 (6th Cir. 2002) (citations and quotation marks omitted). The protection accorded fact work product can be pierced where

the opposing party can demonstrate a substantial need for the information and that he cannot otherwise obtain the substantial equivalent of the work product without undue hardship. See Rule 26(b)(3). Opinion work product, however, is afforded greater protection. See id. ("In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.").

This Court, having reviewed the disputed documents *in camera*, finds that they are documents, prepared in anticipation of litigation, that were prepared by Lockheed's representative. All four documents, however, contain general recitations of the facts of this case and the recitations do not contain any analysis, nor are they incorporated into any legal strategy or opinion. The general recitations are not facts gathered or compiled for purposes of litigation. The Court therefore finds that those general recitations are not work product and must be produced to Plaintiffs. The remainder of the documents constitute facts transmitted in preparation and anticipation in nature. They do not contain an attorney's mental impressions, opinions, conclusions, or strategies. The Court therefore finds that the documents, with the exception of the factual recitations, are fact work product.

To the extent that the documents contain fact work product, Plaintiffs have not demonstrated that they have a substantial need for the information and that they cannot obtain the substantial equivalent of the information without undue hardship. The Court now turns to the issue whether Lockheed waived the protection of the work product doctrine.

The Ninth Circuit has stated that the waiver analysis for the attorney-client privilege "applies equally to the work product privilege, a complementary rule that protects many of the same interests." Bittaker v. Woodford, 331 F.3d 715, 722 n. 6 (9th Cir. 2003) (en banc) (citing Upjohn, 449 U.S. at 400). District courts within the Ninth Circuit have applied the Hearn factors to determine whether a party has waived the protection of the work product doctrine. See, e.g., Tennison v. City & County of San Francisco, 226 F.R.D. 615, 622 (N.D. Cal 2005). For the reasoning discussed in Section I.A.1., this Court finds Lockheed did not waive the protection of the work product doctrine.

The Court therefore GRANTS the Motion with regard to the factual recitations in each of the four documents identified in the supplemental privilege log. The Court DENIES Plaintiffs' request to compel production of the documents in all other respects. The Court will conduct an additional *in camera* review of the documents and will redact any attorney-client privileged information or work product material. The Court will return the

redacted documents to Lockheed and Lockheed shall produce them to Plaintiffs by no later than **Monday, September 11, 2006.**

B. Personnel Files

Plaintiffs seek an order compelling the production of the entire personnel files of Hamilton and Jones-Mounts. Plaintiffs are required to demonstrate that the files are relevant to any claim or defense in this action. Hamilton and Jones-Mounts conducted Lockheed's internal investigation into Mr. Daniels' complaints. At the hearing on the Motion, Plaintiffs noted that they may have been other employees who participated in the investigation. Plaintiffs argue that the investigators' personnel files are relevant to the sufficiency of the investigation. Plaintiffs argue that they need to determine the investigators' qualifications for conducting investigations and whether there have been any complaints against them for the manner in which they conducted other investigations.

Plaintiffs have not established the relevancy of the investigators' entire personnel files. Plaintiffs have only established the relevancy of information regarding the investigators' education, experience, and training in conducing discrimination investigations, and whether any complaints have been filed against them for being biased in an investigation or for incompetent conduct in an investigation. Plaintiffs' Motion is therefore GRANTED IN PART as to the personnel files of

Hamilton, Jones-Mounts, and any other employees who participated in the investigation into Mr. Daniels' complaints.[5]

Lockheed shall produce the portions the files dealing with the employees' education, experience, and training in conducting discrimination investigations and whether there have been any complaints filed against those employees regarding the conduct of such investigations. Lockheed may redact the employees' personal information, if the information is unrelated to those areas, e.g., social security numbers, home addresses, marital status, *etc.* Lockheed shall produce the applicable portions of the personnel files by no later than **Monday, September 11, 2006.** The Court also orders the parties to meet-and-confer regarding a stipulated protective order concerning any personnel files produced in discovery.

With regard to the other employees' personnel files, Plaintiffs seek "[a]ll documents related [to] the investigation of harassment, discrimination, retaliation, racism, or other employment misconduct which identify or refer to" persons previously identified by Mr. Daniels as having retaliated against

[5] The Court does not consider an employee who merely transmitted or distributed documents in connection with the investigation as being a participant in the investigation. The Court is concerned with employees who actively participated in the investigation, such as employees who interviewed others about Mr. Daniels' allegations and employees who made the ultimate recommendations or decisions about the merits of the internal complaints.

him. [Mem. in Supp. of Motion at 4-5 (alterations in original).] Plaintiffs seek information regarding Mr. Daniels's complaint, as well as information regarding other similar, but unrelated, incidents of discrimination. Information about Mr. Daniels' complaints is relevant to the sufficiency of the investigation and the occurrence of other incidents of discrimination is relevant to the issue of notice and the sufficiency of Lockheed's preventative programs and measures.

Lockheed, however, has already produced the investigation file regarding Mr. Daniels' complaint. Further, during the EEOC investigation, Lockheed produced the unredacted files of alleged harassers Gutierrez, McGee, Ader, and Cooledge, and witness Carey. Lockheed has also stated that it has reviewed the other files Plaintiffs seek and there was no evidence of any other investigations of discrimination or harassment against those persons. This Court therefore finds that Lockheed has adequately responded to Plaintiffs' request for personnel files.

The Court, however, ORDERS Lockheed to provide sworn declarations or affidavits by a Lockheed employee or employees, with personal knowledge, certifying that Lockheed: 1) produced the complete, unredacted, personnel files of Gutierrez, McGee, Ader, Cooledge, and Carey in the EEOC investigation; and 2) reviewed the other requested personnel files and found that there was no evidence of other complaints against those individuals for

harassment or discrimination. Lockheed shall file the declarations or affidavits by no later than **October 11, 2006.**

II. Sanctions

Finally, Lockheed argues that it is entitled to its reasonable expenses, including attorney's fees, incurred in connection with the Motion because Plaintiffs are not entitled to the relief they seek and because the Motion was unnecessary in light of Lockheed's willingness to discuss responses to a more narrowly tailored version of Plaintiffs' requests.

Where a motion to compel production is granted in part and denied in part, the court "may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner." Fed. R. Civ. P. 37(a)(4)(C). Under the circumstances of this case, the Court finds it appropriate for the parties to bear their own costs incurred in connection with the instant Motion. Lockheed's request for sanctions is therefore DENIED.

CONCLUSION

On the basis of the foregoing, Plaintiffs' Motion to Compel Production of Documents, filed July 29, 2006, is HEREBY GRANTED IN PART AND DENIED IN PART. The Motion is GRANTED insofar as:

1) Lockheed must produce the factual recitation portions

of the documents identified in the supplemental privilege log. Lockheed shall produce the documents to this Court for *in camera* review. The Court will redact any attorney-client privileged or work product material and Lockheed shall produce the redacted documents to Plaintiffs by September 11, 2006.

2) With regard to the Lockheed's employees who participated in the investigation of Mr. Daniels' complaint, Lockheed shall produce, pursuant to an appropriate protective order, the portions of their personnel files dealing with the employees' education, experience, and training in conducting discrimination investigations and whether there have been any complaints filed against those employees regarding the conduct of such investigations. Lockheed shall produce those portions of the personnel files by September 11, 2006.

3) Lockheed shall produce declarations or affidavits certifying that it has produced the complete, unredacted, personnel files of Gutierrez, McGee, Ader, Cooledge, and Carey, and that it has reviewed the other requested personnel files and found no evidence of other discrimination or harassment complaints. Lockheed shall file the declarations or affidavits by

October 11, 2006.

The Motion is DENIED in all other respects and Lockheed's request for sanctions is also DENIED.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAI`I, September 8, 2006.

/S/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States Magistrate Judge

EEOC V. LOCKHEED MARTIN; CIVIL NO. 05-00479 SPK-LEK; CHARLES DANIELS V. LOCKHEED MARTIN; CIVIL NO. 05-00496 SPK-LEK; ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS