

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:03-CV-86-BR(3)

FILED
8-29-03 *bx*
DAVID W. DANIEL, CLERK
US DISTRICT COURT, EDNC

TONY W. DRIVER,)
)
Plaintiff,)
)
vs.) **ORDER**
)
NORTEL NETWORKS, INC.,)
)
Defendant.)
_____)

This Cause comes before the Court upon Plaintiff's Motion To Compel And Request For Expedited Consideration. [DE-11.] The motion is accompanied by a supporting memorandum [DE-12] and includes the certification of a good faith effort to resolve this dispute without court action, as required by Fed. R. Civ. P. 37(a)(2)(B) and Local Civil Rule 7.1(c), EDNC. Defendant timely filed a response. [DE-14.] This matter is therefore ripe for adjudication.

BACKGROUND

This action arises from Defendant's denial of Plaintiff's application for long-term benefits under an employee benefit plan sponsored by Defendant and subject to the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq., as amended ("ERISA"). [DE-1, Ex. A.]

Plaintiff worked for Defendant from May 24, 1999 until February 5, 2001, when

*copy faxed 8/29
& mailed*

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Defendant approved his request for disability leave due to a back condition. Id.

Defendant paid Plaintiff short-term disability benefits for twenty-six (26) weeks, pursuant to its Disability Plan (the "Plan"). Id. On July 30, 2001, Plaintiff applied for long-term disability benefits. Id.

Under the Plan, Prudential Insurance Company ("Prudential")¹ administered the initial claims review and the first level of administrative appeal, and Defendant's Employee Benefits Committee ("EBC") conducted the second and final administrative appeal. [DE-14, p. 2.]

Prudential denied Plaintiff's claim on August 28, 2001, and denied Plaintiff's initial appeal on January 3, 2002. Id. Plaintiff timely filed his second and final appeal on July 22, 2002. Id. By this time, Plaintiff had retained counsel, who corresponded with Defendant on Plaintiff's behalf, submitting a letter and supporting documents to the EBC. Id.

The EBC met on October 28, 2002, reviewed Plaintiff's claim, and voted to deny it. Id. at 3. Defendant's Senior Benefits Counsel, Ruth A. Hillis, attended the meeting in her capacity as the EBC's legal counsel. Id., Ex. B. Debbie Lorimer, an employee of Defendant who provided staff support to the EBC, also attended. Id. Neither Ms. Hillis nor Ms. Lorimer was a voting member of the EBC. Id.

During the October 28, 2002 Meeting, Ms. Hillis made two pages of handwritten

¹ Prudential was dismissed as a defendant in this action on April 4, 2003. [DE-7.]

notes, which she described as “my impression of matters I considered significant in the EBC's discussion of and decision to deny the appeal.” Id.

By letter dated November 18, 2002, Ms. Hillis notified Plaintiff of the EBC's denial of his final appeal and the grounds for that decision. [DE-12, Ex. 6.] On December 3, 2003, Defendant offered Plaintiff a severance package and a related release of claims. [DE-14, p. 3.] By letter dated December 9, 2002, Plaintiff's counsel informed Defendant that Plaintiff would not accept the severance package and would instead “pursue his claim for long-term disability benefits in court.” [DE-12, Ex. 5.]

On December 24, 2003, Ms. Lorimer faxed a copy of Plaintiff's letter to William H. Knapp, Defendant's Senior Counsel. [DE-14, Ex. B.] The fax cover sheet contained a message from Ms. Lorimer to Mr. Knapp. Id.

On January 8, 2003, Plaintiff filed suit pursuant to 29 U.S.C. § 1132(a)(1)(B),² alleging that Defendant wrongfully denied Plaintiff's application for long term disability benefits because it failed to conduct a “reasoned and principled review of his claim” and thus breached its fiduciary duties under ERISA. [DE-1, Ex. A, ¶¶ 20, 22.]

During discovery, Defendant produced a privilege log that identified the notes taken by Ms. Hillis and the fax cover sheet sent by Ms. Lorimer in response to Plaintiff's request for “all documents withheld under a claim of privilege.” [DE-11, Ex. 1.]

² “A civil action may be brought by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]”

In the instant motion, Plaintiff moves the Court for an order compelling the production of these two documents. Defendant, along with its response, submitted under seal copies of the two challenged documents for an in camera review.

ANALYSIS

Defendant grounds its opposition to producing the Hillis notes and the Lorimer fax cover sheet upon the work-product and attorney-client privileges, respectively. Plaintiff argues that the two documents fail to satisfy the elements of the asserted privileges and that in any event the fiduciary exception precludes Defendant from relying upon the attorney-client privilege as grounds to withhold production of either document.

Since jurisdiction of this action arises under federal law, Rule 501 of the Federal Rules of Evidence provides that federal common law governs the questions of privilege presented by this motion.³ In re Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984).

A. The Fiduciary Exception

An ERISA plan administrator functions as a trustee and thus owes a fiduciary duty to the plan beneficiaries, Wildbur v. Arco Chemical, Co., 974 F. 2d 631, 645 (5th Cir. 1992) (citing 29 U.S.C. §§ 1002(21), 1103(a) and (c)(1), and 1104(a)(1)), and “an

³ “Except as otherwise required . . . , the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.” Fed. R. Evid. 501.

obligation to provide full and accurate information to the plan beneficiaries regarding the administration of the plan,” In re Long Island Lighting Co., 129 F.3d 268, 271-72 (2nd Cir. 1997) (citations omitted). Accordingly, in an ERISA action brought by a plan beneficiary, “an employer acting in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration.” Id. at 272; see also Wildbur, 974 F.2d at 645 (holding that “an ERISA fiduciary cannot assert the attorney-client privilege against a plan beneficiary about legal advice dealing with plan administration”).

Since the entire claims review process constitutes plan administration, courts have concluded that the fiduciary exception precludes the assertion of privilege for legal advice given to a plan administrator concerning the merits of a beneficiary's appeal of a denial of benefits. See Lewis v. UNUM Corp. Severance Plan, 203 F.R.D. 615, 620 (D. Kan. 2001) (reasoning that “denying benefits to a beneficiary is as much a part of the administration of a plan as conferring benefits to a beneficiary”); Coffman v. Metropolitan Life Ins. Co., 204 F.R.D. 296, 299 (S.D.W. Va. 2001) (ordering the production of documents created before the final denial of benefits, where it appeared that the plan administrator consulted counsel “in the context of the claims review process itself”); Geissal v. Moore Med. Corp., 192 F.R.D. 620, 625 (E.D. Mo. 2000) (finding fiduciary exception applicable to counsel's advice and opinions related to plan administrator's final decision denying coverage and given prior to that decision).

However, the fiduciary exception does not preclude an ERISA fiduciary from asserting the attorney-client privilege for communications with counsel retained by the fiduciary to defend itself in an action brought by plan beneficiaries or to advise the fiduciary of its exposure to civil or criminal liability as a result of taking a particular administrative action. United States v. Mett, 178 F.3d 1058, 1064 (9th Cir. 1999); see also Lewis, 203 F.R.D. at 620.

Finally, courts have concluded that the fiduciary exception does not generally apply to documents protected as work-product, unless the protected documents directly relate to a plan administrator's alleged breach of fiduciary duty. See Aull v. Calvacade Pension Plan, 185 F.R.D. 618, 626 (D. Col. 1998) (citing cases); Donovan v. Fitzsimmons, 90 F.R.D. 583, 588 (N.D. Ill. 1981) (recognizing that the fiduciary exception “cannot be readily applied to defeat the work-product rule,” but declining to rule out its application in all cases, “lest the work-product immunity swallow up the [fiduciary] exception in its entirety”).

B. The Hillis Notes

Defendant argues that the notes Ms. Hillis took during the EBC's October 28, 2002 meeting qualify for protection as attorney work-product.

First articulated by the United States Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947), the work product protection doctrine has been codified by Rule 26(b)(3) of the Federal Rules of Civil Procedure, which provides in relevant part:

[A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and *prepared in anticipation of litigation* . . . only upon a showing that the party seeking discovery has substantial need of the materials . . . and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. 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 . . . concerning the litigation. (emphasis added).

Interpreting Fed. R. Civ. P. 26(b)(3), the Fourth Circuit explained that the rule divides work product into two parts, an attorney's "mental impressions, conclusions, opinions, or legal theories," which the Fourth Circuit has labeled "pure work product," and "all other documents and tangible things prepared in anticipation of litigation or for trial." Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc., 967 F.2d 980, 984 (4th Cir. 1992). The first category is "absolutely immune" from discovery and the other only qualifiedly immune." Id. Material fitting into the latter category is discoverable, but only upon a showing of the requester's "substantial need" and inability "without undue hardship to obtain the substantial equivalent of the materials by other means." Id.; Fed. R. Civ. P. 26(b)(3).

Prior to determining whether a document is absolutely or qualifiedly immune, "attention must be turned first to whether the documents or tangible things were prepared in anticipation of litigation . . ." Nat'l Union Fire Ins. Co., 967 F.2d at 984. The mere likelihood of litigation does not satisfy the threshold "anticipation of litigation" showing:

[B]ecause litigation is an ever-present possibility in American life, it is more often the case than not that events are documented with the general possibility in mind. Yet, '[t]he mere fact that litigation does eventually ensue does not, by itself, cloak materials' with work product immunity. . . . The document must be prepared *because* of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of event that reasonably could result in litigation. . . . Determining the driving force behind the preparation of each requested document is therefore required in resolving a work product immunity question.

Id. (citations omitted) (emphasis in original).

According to Defendant, Ms. Hillis's notes “reflect her cognitive processes regarding the decision to deny Plaintiff's appeal,” and thus constitute “absolutely” immune opinion work-product under Fed. R. Civ. P. 26(b)(3). [DE-14, p. 6.] Defendant further argues that the notes are at least qualifiedly immune from discovery, and asserts that Plaintiff has failed to show “substantial need” for them. Id. Finally, Defendant contends that either work-product protection applies independent of the attorney-client privilege, and consequently, from the fiduciary exception. Id.

However, the Court does not need to determine whether those notes qualify as “pure work product,” nor whether the fiduciary exception would preclude Defendant from asserting any applicable work-product protection for those notes, because Defendant fails to make the threshold showing that Ms. Hillis prepared these notes in “anticipation of litigation,” Fed. R. Civ. P. 26(b)(3). Nat'l Union Fire Ins. Co., 967 F.2d at 984 (cited supra at 6, 7).

Defendant asserts that Ms. Hillis reasonably foresaw the likelihood that Plaintiff would litigate his claim, given that he had retained counsel to assist in the pursuit of his appeals, a process which had lasted over a year. Id. However, regardless of whether Ms. Hillis had a reasonable certainty that Plaintiff would sue Defendant if the EBC denied his final appeal, this would not demonstrate that she took notes “because of” the anticipated litigation. See Nat’l Union Fire Ins. Co., 967 F.2d at 984 (clarifying that a party’s anticipation of litigation does not demonstrate that it prepared a document “because of the prospect of litigation”).

A review of her notes indicates that Ms. Hillis and Ms. Lorimer responded to factual questions regarding the key documentary evidence presented in Plaintiff’s appeal. Ms. Hillis also explained certain material provisions of the Plan and recorded the final vote. Moreover, her description of the notes as “my impression of matters I considered significant in the EBC’s discussion of and decision to deny the appeal” **[DE-14, Ex. B]**, demonstrates that her recorded opinions focused on the EBC’s decision, and not on any exposure to liability which that decision could create. In short, Ms. Hillis fulfilled her assigned duty as legal advisor to the EBC, which presumably relied upon that advice in deciding that Plaintiff did not qualify for long term disability benefits. See Nat’l Union Fire Ins. Co., 967 F.2d at 984 (stating, “materials prepared in the ordinary course of business . . . or for other non-litigation purposes are not documents prepared in anticipation of litigation within the meaning of Rule 26(b)(3)”).

Other courts have similarly concluded that documents prepared by the fiduciary's legal counsel in the context of the claim review process are not created "in anticipation of litigation," even where the beneficiary had retained counsel prior to a final decision. See Coffman, 204 F.R.D. at 299 (concluding that threats of litigation by beneficiary's lawyer during claim review process was not "the driving force" for the creation of documents "prepared in the context of and for the purpose of determining Plaintiff's claim for benefits"); Lewis, 203 F.R.D. at 622-23 (holding that counsel's documented "pre-decisional advice and opinions" to plan administrators were not protected by the work-product doctrine; the fact that the threatened litigation later resulted "[did] not change the ordinary business nature of the attorney's legal advice into advice rendered in anticipation of litigation").

Because Defendant fails to show that Ms. Hillis prepared her notes "in anticipation of litigation," these otherwise discoverable notes are not protected as her work-product. Accordingly, the Court GRANTS Plaintiff's request for an order compelling production of these notes.

Finally, though Defendant does not argue that the notes contain communications protected by the attorney-client privilege, for the reasons stated above, supra at 9, the Court finds that any privileged communication contained in the notes related directly to plan administration. Accordingly, the fiduciary exception would apply and make those communications discoverable. See supra at 5-6.

C. The Lorimer Fax Cover Sheet

Defendant asserts that the message contained in the cover sheet faxed by Ms. Lorimer to William Knapp, Defendant's Senior Counsel, is protected by the attorney-client privilege. [DE-14, p. 7.]

The burden of establishing the attorney-client privilege rests upon the claimant of the privilege. Hawkins v. Stables, 148 F.3d 379, 383 (4th Cir. 1998). As articulated by the Fourth Circuit, the elements of the attorney-client privilege are:

- (1) The asserted holder of the privilege is or sought to become a client;
 - (2) the person to whom the communication was made
 - (a) is a member of the bar of a court, or his subordinate and
 - (b) in connection with this communication is acting as a lawyer;
 - (3) the communication relates to a fact of which the attorney was informed
 - (a) by his client
 - (b) without the presence of strangers
 - (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
 - (4) the privilege has been
 - (a) claimed and
 - (b) not waived by the client.
- (citations omitted).

In re Allen, 106 F.3d 582, 600 (4th Cir. 1997).

Based upon the following representations, an examination of the cover sheet itself, and considering the nature of the letter accompanied by the cover sheet, the Court concludes that Defendant has satisfied its burden to demonstrate that each of the four elements of the test for attorney client privilege applies to this communication.

In her affidavit, Ms. Lorimer states that she sent the fax cover sheet to Mr. Knapp “to obtain his legal advice and assistance in the defense of the disability benefits lawsuit

that [Plaintiff's counsel] said his client would be pursuing.” [DE-14, Ex. B.] The fax cover sheet accompanied the letter written by Plaintiff's counsel, who informed Defendant that “[Plaintiff] intends to pursue his claim for long-term disability in court and, therefore, will not sign the release you sent him.” *Id.* In its memorandum, Defendant represents that Mr. Knapp is a member of the bar and that Ms. Lorimer sent the cover sheet “without disclosing the message to strangers . . .” [DE-14, p. 8.] Defendant also states that it has not waived this privilege. *Id.*

Taken together, the first two elements require a communication within the context of an attorney-client relationship. In the corporate context, the attorney-client privilege “exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice,” Upjohn Co. v. United States, 449 U.S. 383, 390 (1981), and “includes communications involving corporate officers and agents who possess the information requested by the attorney or who will act on the legal advice,” Santrade, LTD v. Gen. Elec. Co., 150 F.R.D. 539, 545 (E.D.N.C. 1993) (citing Upjohn, 449 U.S. at 390).

Accordingly, at the time she sent the fax, an attorney-client relationship existed between Ms. Lorimer, Defendant's employee, and Mr. Knapp, Defendant's in-house counsel.

The third element requires that the communication was made in confidence for the purpose of seeking legal advice. The confidential nature of an attorney-client communication is satisfactorily demonstrated where the client expressly states her intent

that the communication remain confidential or where the attorney could reasonably discern such an intent. In re Grand Jury, 727 F.2d at 1356. Ms. Lorimer does not assert in her affidavit that she intended her communication to remain confidential. However, neither does the cover sheet indicate that she expected or intended Mr. Knapp to divulge the contents of the cover sheet with another person. Moreover, the accompanying letter from Plaintiff's counsel stating Plaintiff's intent to sue Defendant gave Mr. Knapp reasonable grounds to conclude that Ms. Lorimer intended her message to remain confidential. Even if Ms. Lorimer intended other employees of Defendant to read her message, that would not defeat the confidential nature of the message. See Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 442 (S.D.N.Y. 1995) (concluding that "dissemination of confidential communications" to fellow employees "who share[] responsibility for the subject matter underlying the consult" does not destroy the confidential nature of the communication) (internal citation omitted).

With respect to the fourth and final element, Defendant has expressly claimed the privilege and the record contains no evidence that Defendant has waived it.

Having found that the attorney-client privilege applies to the Lorimer cover sheet, the Court must now determine whether the fiduciary exception bars Defendant from asserting the privilege.

The Court concludes that the fiduciary exception does not apply to this privileged communication. Ms. Lorimer sent this fax after Plaintiff had exhausted his appeals,

rejected Defendant's offer of a severance package, and communicated via retained counsel his intent to litigate rather than settle his claim. Moreover, she did not send this communication to Ms. Hillis, the legal advisor to the EBC, but to another in-house counsel. It is apparent therefore that Ms. Lorimer made this communication when Defendant faced an imminent lawsuit, not merely a possible one.

Because this privileged communication directly related to the defense of Plaintiff's imminent suit challenging the EBC's decision and not to the decision itself, the fiduciary exception does not require its disclosure to Plaintiff. See Mett, 178 F.3d at 1064; Lewis, 203 F.R.D. at 620 (cited supra at 6). Accordingly, Plaintiff's request for an order compelling disclosure of the fax cover sheet sent by Ms. Lorimer to Mr. Knapp on December 24, 2002, is DENIED.

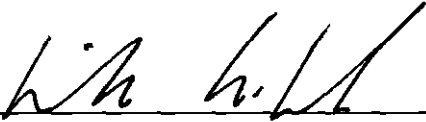
CONCLUSION

Having considered the motion and the pertinent parts of the record, and being otherwise fully advised in the premises, it is:

ORDERED AND ADJUDGED that Plaintiff's Motion To Compel [DE-11] is GRANTED IN PART AND DENIED IN PART. Plaintiff's request for an order compelling production of the notes taken by Ms. Hillis at the EBC's October 28, 2002 meeting is GRANTED. Plaintiff's request for an order compelling disclosure of the fax cover sheet sent by Ms. Lorimer to Mr. Knapp on December 24, 2002, is DENIED. Defendant shall comply with this order by close of business, September 3, 2003.

Each party shall bear its own costs and expenses. Fed. R. Civ. P. 37(a)(4)(C).

DONE AND ORDERED in Chambers at Raleigh, North Carolina this 25th day of
August, 2003.



WILLIAM A. WEBB
UNITED STATES MAGISTRATE JUDGE

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