



MICHAEL J. McQUEARY,  
Plaintiff

:IN THE COURT OF COMMON PLEAS  
:CENTRE COUNTY, PENNSYLVANIA

VS

:NO. 2012-1804

THE PENNSYLVANIA STATE  
UNIVERSITY,  
Defendant

:CIVIL ACTION

FILED FOR RECORD  
2015 JUL 24 PM 2:02  
DEBRA A. HANEL  
PROthonARY  
CENTRE COUNTY, PA

OPINION

ISSUE

Are the e-mails designated Bates #PSU 000353-000355 discoverable?

DISCUSSION

Plaintiff, a former employee of the Pennsylvania State University, hereinafter PSU, is suing on multiple counts alleging that his termination was improper. Plaintiff seeks discovery of the above referenced e-mails which PSU says are not discoverable based on the attorney-client privilege. The privilege is codified at 42 Pa.CSA §5928. Pursuant to the statute a party asserting the attorney-client privilege must establish the following elements:

- (1) The asserted holder of the privilege is or sought to become a client.
- (2) The person to whom the communication was made is a member of the bar of a court, or his subordinate.
- (3) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.
- (4) The privilege has been claimed and is not waived by the client.

Nationwide Mutual Insurance Co. vs. Fleming, 924 A.2d 1259, 1264 (Pa Super 2007), aff'd 992 A.2d 65 (Pa 2010).

Element #4 was established. As to element #2, I acknowledge that Attorney Baldwin is a licensed Pennsylvania attorney.

PSU originally submitted the affidavit of Lisa Powers, Exh. D-1, to support its position as to items #1 and #3. She asserted.

- (4) During my employment with the University, I copied University General Counsel Baldwin on e-mail communications to seek legal advice and did so as to the e-mails at issue.

On its face, the affidavit appears persuasive as to those elements. A hearing was held on May 19, 2015 to create a record. The burden was initially on PSU to establish the privilege. PSU called Lisa Powers who testified that in 2011 she was the Director of Public Relations at PSU and that she would seek advice from PSU's general counsel, Attorney Baldwin, by e-mail. She also indicated that she would include Attorney Baldwin in on e-mails, "to essentially allow her and the other recipients to "chime in"." My understanding of the term, "chime in", is that it invites everyone to whom the e-mail was sent to offer whatever comment they deem appropriate regarding the content of the e-mail. Asking non lawyers to comment on the contents of the e-mail constitutes, in my view, a waiver of the confidentiality protected by the rule as the writer is no longer in a confidential relationship with her attorney. I see no need as to these e-mails to discuss whether including counsel among the recipients of an e-mail constitutes a "communication" envisioned by element #3.

Bates # PSU 000353 contains an e-mail from Ms. Powers to Mr. Schultz which was copied to Attorney Baldwin and others. The essence of attorney-client privilege is that it

protects a communication wherein legal advice is being sought. In her affidavit, Exh. D-1, paragraph #5, Ms. Powers asserts that that was her purpose in copying in Attorney Baldwin. I find this statement not credible based on the clear language of the e-mail. The e-mail repeats the public statement made by Dr. Spanier regarding the Sandusky allegations, a statement that had been released to the media and those with ties to PSU thru PSU's own network, Penn State Live. There is absolutely no way this e-mail can be read as posing a question to anyone, let alone counsel. Rather it announced a fait accompli. No legal advice was being sought and therefore the privilege does not apply.

Bates #PSU 000353 also references statements that the attorneys for Messrs. Schultz and Curley requested be forwarded to "any media who MAY ALREADY HAVE INQUIRED" (emphasis mine). Again, no legal advice regarding these comments was sought and therefore the privilege does not apply.

Bates #PSU 000354 contains an e-mail from Mr. Schultz to Ms. Powers acknowledging receipt of the e-mail referenced as Bates # PSU 000353. It too is copied to Attorney Baldwin and others. Again, no advice is sought and no privilege applies.

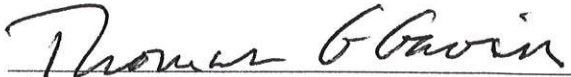
Bates # PSU 000354 contains a second e-mail that runs over to Bates #PSU 000355. This e-mail is from Ms. Powers to Mr. Schultz and is copied to Attorney Baldwin and others. It is the exact same e-mail set forth at Bates # PSU 000353. Again, it is a statement, not a request for legal advice. As such the privilege does not apply.

Based on the foregoing, I enter my

**ORDER**

AND NOW, this 20<sup>th</sup> day of July, 2015, the Prothonotary of Centre County is ORDERED to unseal the documents identified as Bates #PSU 000353 to 000355 and to make same available to plaintiff.

BY THE COURT:

  
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Thomas G. Gavin SJ