

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 November 2016

CASE NO.: 2015-OFCCP-1

IN THE MATTER OF:

**OFFICE OF FEDERAL CONTRACT COMPLIANCE
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR**

Complainant

v.

**JBS USA HOLDINGS, INC., JBS USA, LLC AND
SWIFT BEEF COMPANY d/b/a JBS AND
f/k/a JBS SWIFT & COMPANY,
in their own capacity and as successors-in-interest to
Swift Foods Company and Swift & Co.,**

Respondents

ORDER GRANTING OFCCP'S MOTION TO COMPEL

On October 21, 2016, Plaintiff filed its present Motion to Compel, seeking an order from the undersigned to compel Defendants to produce: "(1) portions of Defendants' annual and bi-annual audits that relate to hiring and selection of applicants at the Hyrum, Utah facility and Defendants' compliance with the laws; and (2) adverse impact analyses of their hiring and selection of applicants at the Hyrum, Utah facility, on or before October 31, 2016.

Defendants filed an Opposition to OFCCP's Motion to Compel on October 31, 2016, contesting its responsibility to produce the requested documents and information. With regards to the at-issue selection analyses or "adverse impact analyses" requested by Plaintiff, the parties reached an agreement on October 24, 2016. As evidenced by my November 9, 2016 order,

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Defendants agreed to turn over the two selection analyses. Thus, the disagreement regarding the analyses was rendered moot. However, the parties continue to contest the discoverability of the internal audits.

Defendants assert that the internal audits were not responsive to Plaintiff's written discovery responses. Moreover, Defendants contend, "[i]rrespective of the fact that the internal audits are not responsive to Plaintiff's discovery requests, the documents are protected from disclosure pursuant to the attorney client privilege as they were prepared at the direction of counsel for purposes of ensuring compliance with various employment laws."

Plaintiff filed its Reply to Defendants' Opposition to OFCCP's Motion to Compel on November 7, 2016. First, Plaintiff argues that the internal audits were responsive to a number of interrogatories and requests for production. However, following Defendants' protests regarding responsiveness, Plaintiff propounded new discovery in which the internal audits were requested by name. Accordingly, Plaintiff argues that the issue of the audits' responsiveness to discovery is now moot.¹ Plaintiff continues to argue against the applicability of the attorney-client privilege to the internal audits.

DISCUSSION

The Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246, governing the Office of Federal Contract Compliance Programs (hereinafter the "OFCCP rules") provide that, after the commencement of an action, "a party may serve on any other party a request to produce and/or permit the party, [], to inspect and copy any **unprivileged** documents, [] which contain or may lead to relevant information and which are in the possession, custody, or control of the party upon whom the request is served." 41 C.F.R. § 60-30.10 (emphasis added). Privileges "of a witness, person, government, State, or political subdivision thereof" are governed by "the principles of the common law as they may be interpreted by the courts of the United States in the light of

¹ According to Plaintiff, Defendants also asserted the "self-critical analysis" privilege in the course of discovery. Plaintiff preemptively argued against the application of the privilege in its Motion to Compel; however, Defendants did not assert the privilege in its opposition. Accordingly, the applicability of the self-critical analysis privilege shall not be discussed herein.

reason and experience." 29 C.F.R. § 18.501.² Thus, "except as otherwise provided by Act of Congress, or by rules or regulations prescribed by the administrative agency pursuant to statutory authority, or pursuant to executive order," privileges shall be governed by the principles of common law. Id.

As mentioned above, Plaintiff's motion requests the production of a series of internal audits performed by Defendants and denies the applicability of the attorney-client privilege to protect the audits from disclosure.

Defendants contend that the internal audits are protected by the attorney-client privilege. According to Defendants, the "attorney client privilege protects the confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice." In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1998). Furthermore, Defendants note that the "Supreme Court has held that, in the corporate context, the privilege applies as long as '[t]he communications at issue were made by [company] employees to counsel for [the company] acting as such, at the direction of corporate superiors in order to secure legal advice from counsel.'" Upjohn v. United States, 449 U.S. 383, 394 (1981).

According to Defendants, internal audits and compilations of data which were undertaken by employees "for the purpose of providing the information to counsel (in-house or outside) in seeking legal advice on compliance with applicable regulatory schemes fall[] within the attorney-client privilege." United States ex. rel. Vainer v. DaVita, Inc., 2014 U.S. Dist. LEXIS 187865 (N.D. Ga. Aug. 13, 2014). Moreover, Defendants deny that the dissemination of and discussion of the audits amongst non-attorneys does not destroy the privilege "so long as the employees with whom the information was shared had a need to know its contents because of the corporate structure." S. Bell Tel. & Tel Co v. Deason, 632 So. 2d 1377 (Fla. 1994).

² The OFCCP rules dictate that any and all evidentiary matters shall be governed by "the Office of Administrative Law Judges' Rules of Evidence (hereinafter the "OALJ rules") at 29 C.F.R. [Part] 18, subpart B...." 41 C.F.R. § 60-30.18. As such, 29 C.F.R. § 18.501 is instructive in this matter.

Defendants contend the internal audits were performed at the direction of JBS' in-house counsel, conducted by Employers' compliance team and reviewed by JBS' inside and outside counsel. Moreover, Defendants assert that the audits are conducted for purposes of self-evaluation of compliance with employment laws. As such, Defendants believe the internal audits are protected from disclosure due to the attorney-client privilege.

In contrast, Plaintiff denies the applicability of the attorney-client privilege to the internal audits. Plaintiff contends the primary purpose of the internal audits was not to seek legal advice. According to Plaintiffs, the internal audits occurred at regular intervals - once or twice annually - and not at the behest of Defendants' counsel. Moreover, though Defendants' counsel "may have assisted with drafting the form to be used in the audit, the audits themselves were conducted by non-attorneys, and the results shared with non-attorneys." Plaintiff also points out that neither deponent which testified regarding the internal audits indicated that attorneys reviewed the results or provided legal advice about the results. Lastly, Plaintiff asserts, even if Defendants' counsel provided advice regarding the results of the audits, Plaintiff does not seek such communications. Plaintiff only seeks the audits themselves and does not believe they are subject to the attorney-client privilege.

Attorney Client Privilege

The attorney-client privilege serves to "encourage full and frank communications between attorneys and their clients and thereby promote the broader public interest in the observance of law and administration of justice." Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981). The attorney-client privilege protects communications between clients and their attorneys made for the purpose of securing legal advice or services. Id.; Cobell v. Norton, 213 F.R.D. 16, 24 (D.D.C. 2003). However, the mere fact that an attorney was a party to the communication "does not automatically render the communication subject to the attorney client privilege." In re Grand Jury Proceedings, 616 F.3d 1172, 1182 (10th Cir. 2010) (citing Motley v. Marathon Oil Co., 71 F.3d 1547, 1550-1551 (10th Cir. 1995)). Rather, such communications must "relate to legal advice or strategy sought by the client." In re Grand Jury Proceedings, supra (citing Johnston 146 F.3d 785, 794 (10th Cir. 1998)).

As recognized by the Court in Upjohn, "complications in the application of the [attorney-client] privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual." Upjohn, 449 U.S. at 390. In consideration of the nature and breadth of regulatory legislation "confronting the modern corporation, corporations, unlike most individuals 'constantly go to lawyers to find out how to obey the law...particularly since compliance with the law in this area is hardly an instinctive matter.'" Id., at 392-393 (internal citations omitted). Thus, 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." Id., at 391 (internal citations omitted). Nevertheless, as previously mentioned, the privilege extends only to protect communications between clients and their attorneys for the purpose of securing legal advice or services. As explained by the Supreme Court "[a] fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'what did you say or write to the attorney' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." Id., at 395-396 (emphasis added).

In Upjohn, the Supreme Court considered a situation wherein general counsel for Upjohn Co. consulted with outside counsel regarding a discovery that one of Upjohn's foreign subsidiaries made payments to or for the benefit of foreign government officials in order to secure government business. Upjohn, 449 U.S. at 386-387. After consulting with outside counsel, it was decided that the company would conduct an internal investigation in regards to these payments. Id. In connection with the investigation, attorneys prepared a letter directed to "all foreign general and area managers" which contained a questionnaire. Id. The letter "began by noting recent disclosures that several American companies made 'possibly illegal' payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn." Id. Recipients of the letter and questionnaire were instructed to treat the investigation as "highly confidential." Id.

In Upjohn, the Supreme Court found the fact-gathering communications fell within the privilege. The Court noted that "information, which was not available from upper-echelon management, was needed to supply legal advice concerning compliance with certain laws and regulations." Upjohn, 449 U.S. at 394. The communications were limited to matters within the scope of the employee's corporate duties. Moreover, the employees were "sufficiently aware that they were being questioned in order that the corporation could obtain legal advice." Id. The questionnaire was accompanied by a "statement of policy" which indicated the legal ramifications of the investigation into the payments and made known the company's policy with respect to future practices. Accordingly, the Court found such communications to be protected from disclosure by the attorney-client privilege. Id., at 395.

The communications at issue in the present matter are quite distinguishable from those protected by the Supreme Court in Upjohn. Despite Defendants contentions, the evidence does not reveal audits which fall within the attorney-client privilege. The audits do not appear to have been conducted in order to obtain legal advice.

First, the evidence provided by the parties in connection with this Motion to Compel does not reveal a stratagem amongst Defendants and Defendants' counsel of collecting data and information for the purpose of obtaining legal advice. Indeed, in the excerpts submitted by the parties, deponents testified that the internal audits were performed at regular intervals. Such audits occurred regularly, once or twice a year, and do not appear to have been conducted at the direction of any attorney. (DX-C; CX-1; CX-2)³. Moreover, though witnesses testified that portions of such internal audits were performed for the purpose of ensuring compliance with regulatory schemes, there is no evidence that such audits were gathered for the purpose of obtaining legal advice regarding the company's compliance with regulatory schemes. (DX-C; DX-D; CX-1; CX-2). Nor does the evidence reveal that the audits were later used in an effort to obtain legal advice.

³ References to exhibits are as follows: Defendants/Respondent's exhibits: DX-____; Complainant/Plaintiff's exhibits: CX-____.

Second, the evidence does not reveal that legal counsel played a primary or even supporting role in the process of the internal audits. Witnesses generally testified that attorneys were involved when the process was being formalized. Moreover, attorneys were used "more recently" to develop the questionnaire and review the audits after they were created by the compliance team. (DX-C; DX-D; CX-1; CX-2). According to the testimony, the audits may have been conducted by a "compliance person" or "an HR director." (DX-C; CX-2). The results of the audit were then discussed with human resources, graded by the compliance team and returned to the HR director. (DX-C; DX-D; DX-E; CX-1; CX-2). The grade given to the audit is used to give the team "a sense of how significant [] opportunities are" and whether there is an immediate need for action or correction. (DX-C; CX-2). However, any further involvement of legal counsel, either in conducting the audits, reviewing the audits, or consulting regarding the results of the audits, is unclear.

Third, though employees may have operated under an understanding that the contents of the audits were privileged, unlike in Upjohn, there is no evidence that this belief is due to knowledge that such audits were used for the purpose of obtaining legal advice. Witness testimony reveals that employees believed the audits to be privileged because they were reporting "actual results for the audit" as opposed to merely sharing "best practices." (DX-D; CX-1). The evidence does not reveal that persons conducting the audits nor those participating in the audits had any understanding that the audits were being performed for the purpose of obtaining legal advice.

Accordingly, whether such internal audits were indeed used for the purposes which Defendants suggest is entirely unclear from the evidence presented. As with most privileges, the burden of proof of establishing the applicability of the privilege falls upon the party asserting the privilege. In re Grand Jury Proceedings, supra at 279. The party must make a "**prima facie**" showing that the attorney-client privilege applies to the documents or information they are seeking to withhold. In re Grand Jury Investigation, supra, at 1071. Based upon the evidence presented, Defendants failed to meet their burden. Plainly, the evidence does not support a finding that the internal audits are entitled to the protection of the attorney-client privilege.

CONCLUSION AND ORDER

IT IS HEREBY ORDERED based on the foregoing that Plaintiff's Motion to Compel is hereby **GRANTED**.

ORDERED this 25th day of November, 2016, at Covington, Louisiana.



Digitally signed by LEE J. ROMERO JR.
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OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=Covington, S=LA, C=US
Location: Covington LA

LEE J. ROMERO, JR.
Administrative Law Judge

SERVICE SHEET

Case Name: OFCCP - DALLAS TX v JBS USA HOLDINGS INC

Case Number: 2015OFC00001

Document Title: **ORDER GRANTING OFCCP'S MOTION TO COMPEL**

I hereby certify that a copy of the above-referenced document was sent to the following this 25th day of November, 2016:



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