

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT – 8th DIVISION
CIVIL ACTION NO. 00-CI-288

DIANA KOONCE

PLAINTIFF

vs. **PLAINTIFF’S RESPONSE TO MOTION FOR PROTECTIVE ORDER**

LEXINGTON PUBLIC LIBRARY

DEFENDANT

* * * * *

The defendant’s motion for protective order makes basically four arguments in support of its motion for protective order. First, defendant argues that sufficient testimony has been rendered by Bob Estes regarding the termination of Bob Patrick to make further examination unnecessary. Second, defendant argues that the reasons, circumstances, etc. for Patrick’s termination are irrelevant. Third, defendant argues that some documents are immune from discovery because it and Bob Patrick agreed they would be . Finally, defendant argues that all further information is shielded from discovery because the library engaged a lawyer to serve as a personnel manager when it decided it had to terminate Patrick’s employment. These arguments are without merit.

First, contrary to the representations made in defendant’s memorandum, Mr. Estes testified in his deposition that he did not know the full circumstances that led to Patrick’s termination from the library:

Q: Mr. Estes, are you familiar with the circumstances that led to Mr. Patrick’s departure from the library?

A: I’m familiar with some of them because I was involved in meetings with managers and so forth where attempts were made to iron out problems that he was having with managers, but beyond that I’m not familiar with the details that culminated in his resignation.

(Bob Estes deposition at 22, which is attached as exhibit 1 to defendant's memo).

Thus, it is plain, as Mr. Estes clearly stated, that he was not able to testify fully about these matters.

Second, what Mr. Estes did testify about Mr. Patrick regarding his inability to co-exist and adequately consider the wishes of what Mr. Estes refers to as the public service managers is exactly a matter that Ms. Koonce raised prior to the time that her job was threatened by Patrick, her managerial responsibilities were stripped from her by Patrick, and she was berated, belittled and abused by Mr. Patrick and the library's human resources director, a Don Schabel, when she complained of the unlawful treatment to which she was being subjected. The evidence developed in this record directly links Patrick's termination with Ms. Koonce's claims.

Third, in Kentucky private agreements between parties to keep relevant evidence secret are not enforceable. In *Meenach v. General Motors Corp.*, Ky., 891 S.W.2d 393 (1995), the Supreme Court rejected an attempt by General Motors to obstruct discovery where it had memorialized a confidentiality agreement into the judgment of another state court. The defendant's attempt cannot fare better; private agreements to impede discovery of the truth do not work.

Fourth, the attorney-client privilege does not help defendant because it chose to make its lawyer its *de facto* personnel manager. Business advice regarding personnel matters does not become privileged legal advice just because a lawyer has become the personnel manager. "When the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected

simply because legal considerations are also involved.” *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 643-44 (S.D.N.Y. 1987).

In the *Hardy* case communications to a lawyer, who also served as Director of Employee Relations, regarding affirmative action programs were not privileged. Legal advice may not be privileged if it is merely incidental to the business advice. *United States v. International Business Mach. Corp.*, 66 F.R.D. 206, 212-13 (S.D.N.Y. 1974). When the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved. *SCM v. Xerox*, 70 F.R.D. 508, 517 (D.Conn. 1976).

The affidavit submitted indicates that defendant sought a lawyer’s advice on a personnel issue, “concerns” about Bob Patrick. This is clearly a matter of business advice. Accordingly, the business aspects of the matter are not protected simply because legal considerations were also involved. Therefore, defendants’ motion should be overruled.

Finally, if the Court has any doubt as to whether the lawyer was rendering legal advice or business advice and therefor as to the application of the privilege, it should review the documents *in camera*. *Shobe v. EPI Corp.*, Ky., 815 S.W.2d 395, 397-398 (1991).

CONCLUSION

For all the foregoing reasons, defendant’s motion should be **overruled**. Alternatively, the court should review the allegedly privileged documents *in camera* prior to making a ruling.

Respectfully submitted,

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Certificate of Service

It is hereby certified that a copy of the foregoing was hand-delivered this _____
day of November 2000, to the following:

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