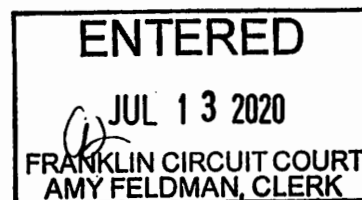


COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 19-CI-00036



NICOLE LIBERTO

PLAINTIFF

vs.

**COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF AGRICULTURE**

DEFENDANT

ORDER

This matter is before the Court upon Plaintiff's *Motion to Compel*. Upon review of the parties' briefs and papers, and after being sufficiently advised, the Court hereby **GRANTS**, in part, and **DENIES**, in part, Plaintiff's *Motion to Compel*.

FACTS

Plaintiff, Nicole Liberto, is employed as the Deputy General Counsel for Defendant, Commonwealth of Kentucky, Department of Agriculture ("KDA"). Plaintiff's supervisor is Joseph Bilby, General Counsel for KDA. Plaintiff suffers from hypertrophic cardiomyopathy. After Plaintiff's employment, KDA accommodated Plaintiff's condition by allowing her to telecommute. This accommodation was revised in July 2018, when KDA began requiring Plaintiff to come to the office if she felt well enough. If Plaintiff felt unwell, she was permitted to use accrued leave. The instant action was filed shortly thereafter.

On February 28, 2020, Plaintiff took the deposition of Mark White ("White"), the Human Resources Director for KDA. In the course of White's deposition, counsel for KDA objected to fifteen (15) separate questions, claiming that the questions were seeking

privileged information that is covered by the attorney-client privilege. Subsequently, Plaintiff filed a *Motion to Compel*, asking this Court to enter an Order compelling White to answer the questions posed at his deposition. The following questions were asked and objected to at White's deposition:

- (1) What, as best you can recollect, precipitated the request to Ms. Liberto that she provide information from a physician[?]
- (2) What as you recall was the purpose of you getting this letter from [a physician]?
- (3) After you got this letter from [a physician], to what use was the letter put as part of the human resources process here at the [KDA]?
- (4) Did you participate prior to June 1, 2018, with any personnel at the [KDA] regarding Ms. Liberto's medical condition and any accommodation she had requested because of that medical condition?
- (5) Did you have any role in preparing this letter marked as exhibit 9 that's dated June 1, 2018?
- (6) Was there to your understanding some dissatisfaction by the [KDA] with the existing agreement as to a reasonable accommodation with Ms. Liberto?
- (7) The decision, as I understand it, was made to terminate the existing reasonable accommodation agreement with Ms. Liberto and continue forward on different terms. Is that correct?
- (8) Do you know who was responsible for compiling [performance evaluation numbers]?
- (9) Do you recall anything about the discussions that are referred to in Exhibit 8?
- (10) Did you participate in any discussions between October 29, 2019, and February 4, 2020, regarding Ms. Liberto's medical condition?
- (11) Did you have any role in drafting Exhibit Number 8?
- (12) Did you review Exhibit Number 8?
- (13) What, as you understand it, is the purpose of Exhibit Number 8 from the Department's perspective?
- (14) Do you know whether any efforts were made by the department to obtain medical information related to [Exhibit Number 8]?
- (15) Do you know whether any efforts were made by the department to further solicit information from [the physician] related to the department's letter dated February 4, 2020?

Exhibits 8 and 9 are letters from KDA to Liberto that detail the termination of her prior accommodation.

ANALYSIS

CR 26.02 governs the scope of discovery. CR 26.02(1) provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]” Communications covered by the attorney-client privilege are privileged matters not discoverable under CR 26.02. *See Leggett v. Sprint Comm. Co.*, 307 S.W.3d 109 (Ky. Ct. App. 2005); *see also Collins v. Braden*, 384 S.W.3d 154 (Ky. 2012). KRE 503(b) codifies the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:

- (1) Between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (2) Between the lawyer and a representative of the lawyer;
- (3) By the client or a representative of the client or the client’s representative or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (4) Between representatives of the client or between the client and a representative of the client; or
- (5) Among lawyers and their representatives representing the same client.

KRE 503(a)(2) defines “representative of the client” as: “a person having authority to obtain legal services, or to act on advice thereby on behalf of the client” or “any employee or representative of the client who makes or receives a confidential communication” in the course or scope of their employment, concerning the subject matter of their employment, and to effectuate legal representation for the client.

Plaintiff argues that none of the questions objected to at White's deposition are covered by the attorney-client privilege because they did not seek information regarding communications between attorney and client made for the purpose of obtaining legal advice. Alternatively, Plaintiff claims that the privilege was waived when KDA asserted the affirmative defense of acting in good faith and with reasonable grounds for believing it was acting in compliance with state and federal law. KDA, conversely, asserts that all communications between White and Bilby were for the purpose of obtaining legal advice regarding KDA's obligations to Plaintiff and her disability accommodations. As such, KDA contends that White is a "representative of the client" under KRE 503(a)(2) and any communications between White and counsel were privileged. KDA additionally reasons that a majority of the questions posed were in regard to communications that have occurred during the pendency of and directly concerning this action, making the invocation of privilege proper.

The Court agrees with Plaintiff that nearly all of the questions posed at White's deposition do not seek information covered by the attorney-client privilege, with the exception being question six (6).¹ It is true that White would qualify as a representative of the client under KRE 503, and the attorney-client privilege would apply, if there were communications between White and counsel for the purpose of obtaining legal advice.² However, the only question that asks White to divulge any information regarding communications with KDA's General Counsel, Joseph Bilby, is question six (6), as it asks

¹ "Was there to your understanding some dissatisfaction by the [KDA] with the existing agreement as to a reasonable accommodation for Ms. Liberto?"

² White qualifies as a representative of the client if: (1) he was an employee; (2) making or receiving confidential communications; (3) in the course or scope of his employment; (4) concerning the subject matter of his employment; and (4) to effectuate legal representation for KDA. *See* KRE 503(a)(2)(B).

about dissatisfaction with Plaintiff's disability accommodation. That question is seeking information about communications made with KDA's counsel regarding KDA's legal obligations to Plaintiff and her disability accommodation. The remaining questions, on the other hand, do not seek such information. Simply asking White about his role, as Human Resources Director, in the process of drafting or reviewing letters to Plaintiff does not require divulging confidential communications with counsel. Similarly, asking White about KDA's request for a physician's letter or who compiles personnel evaluation numbers does not require divulging such information and is a Human Resources function. The remaining questions can be answered with a "yes" or "no" and also do not require White to go into detail about any communications he had with KDA's counsel regarding legal advice. However, the Court must caution that if Plaintiff's counsel were to seek that information after White answers such question, that would be protected by the attorney-client privilege and is objectionable.

The Court is presented with the rare scenario where Plaintiff is an attorney, and her direct supervisor, Joseph Bilby, is also an attorney and counsel for the administrative agency where Plaintiff is employed. As outlined above, communications made to Joseph Bilby, in his capacity as General Counsel for KDA, by employees that are acting in the course of and concerning the subject matter of their employment to effectuate legal representation are protected by the attorney-client privilege and not discoverable. The Court finds that the only question that seeks such a communication is question six (6), as it seeks information regarding communications made from White to Joseph Bilby regarding KDA's obligations to Plaintiff and her disability accommodation. The remaining questions may be answered.

WHEREFORE, Plaintiff's *Motion to Compel* is hereby **GRANTED**, in part, as to all questions except question six (6), and **DENIED**, in part, as to question six (6).

SO ORDERED, this 29 day of June, 2020.



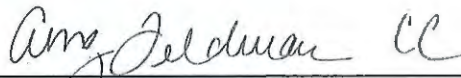
THOMAS D. WINGATE
Judge, Franklin Circuit Court

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was mailed, this 13 day of ~~June~~ ^{July} 2020, to the following:

Hon. Robert L. Abell
Robert Abell Law
120 North Upper Street
Lexington, Kentucky 40507

Hon. Heather L. Becker
Hon. Carmine G. Iaccarino
Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601



Amy Feldman, Franklin County Circuit Court Clerk