

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

EILEEN CROWLEY,)
)
 Plaintiff)
)
 v.) Civil No. 00-183-P-C
)
 L.L. BEAN, INC.,)
)
 Defendant)

ORDER

This matter is before me as a result of a discovery dispute that arose between the parties concerning Defendant’s assertion of attorney-client privilege with respect to a July 9, 1998, meeting of Defendant’s counsel and others. The dispute arises in the context of the Rule 30(b)(6) deposition of Defendant. I instructed both parties to provide me with a brief memorandum of law addressing the issues raised by the assertion of privilege. Plaintiff has orally moved to compel Defendant to reveal any communications between counsel and Defendant that took place at the July 9 meeting on two grounds. She argues: (1) the privilege never attached to these communications because of the presence of a third party; and (2) if the privilege did attach, Defendant has waived it by asserting the affirmative defense of prompt and remedial action based in part upon the July 9, 1998, meeting and actions taken as a result of that meeting. Based upon my review of the facts, I now **GRANT** the Plaintiff’s oral request and order that the deponent supplement deposition answers previously withheld as privileged.

Factual Background

Plaintiff Eileen Crowley filed suit against Defendant L.L. Bean alleging discrimination on the basis of gender based upon sexual harassment that created an intimidating, hostile, and

offensive working environment. (Amended Complaint ¶¶ 39- 40). Plaintiff complains that a co-employee stalked her and intimidated her in violation of the law and that Defendant failed to take remedial action. Although the alleged harassment commenced in October 1996 and Plaintiff alerted her employer to the situation in February 1997, the co-employee remained employed by Defendant until July 24, 1998. Plaintiff obtained an emergency protective order against the co-employee on July 7, 1998, and was granted a full protection order after a court hearing on July 17, 1998.

The instant dispute relates to a meeting held by Defendant on July 9, 1998. The so-called “Threat of Violence” meeting was attended by L.L. Bean human resources and security personnel, Plaintiff’s supervisors, L.L. Bean attorney Alfred Frawley, Esq., and Geoffrey Smith, L.C.S.W. Smith serves Defendant in a dual capacity. He is an independent contractor retained under Defendant’s Employee Assistance Plan to assist employees with personal and work related counseling matters. He also serves as a consultant to Defendant when clinical mental health expertise is required. I am fully aware of the dual nature of Smith’s responsibilities in light of an earlier discovery dispute in this case. At that time counsel for Plaintiff subpoenaed Smith’s notes of this July 9, 1998, meeting and Smith refused to turn them over without a court order. At the discovery conference in connection with that dispute independent counsel represented Smith. Although he objected to turning over any notes or information regarding the alleged harasser, Smith voiced no objection to turning over his notes of this meeting. Defendant did not object to this disclosure, but took the position that *it* could not compel Smith to provide his personal notes. (See Docket No. 14, Report of Telephone Conference and Order). Smith has provided his handwritten notes to both parties.

Defendant has not objected to turning over to Plaintiff information about the July 9, 1998 meeting. Nor has it argued that Smith's communications at that meeting were confidential. This dispute has arisen in a very narrow context. At the Rule 30(b)(6) deposition Plaintiff made inquiry into what *counsel* may have communicated to the deponent *at the July 9 meeting in the presence of Mr. Smith*. Counsel for Defendant objected on the basis of attorney-client privilege. Counsel for Plaintiff argues that what was said to the personnel present at the meeting may be relevant on the issue of Defendant's deliberate violation of her federal rights relating to her punitive damage claim and may also be relevant on the issue of whether or not Defendant took prompt and effective remedial action as asserted by way of affirmative defense. Defendant has provided full discovery of what was said and done by everyone present at the July 9 meeting with the exception of the statements made by counsel.

Discussion

The issue presented by this case is whether the circumstances of the July 9 meeting constituted a "waiver" of the attorney-client privilege. The classic parameters of the attorney-client privilege are well articulated by the First Circuit in *United States v. MIT*, 129 F.3d 681 (1st Cir. 1997).

That privilege has been familiarly summed up by Wigmore in a formula that federal courts have often repeated:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 J. Wigmore, *Evidence* § 2292, at 554 (McNaughton rev.1961).

Id. at 684. "Waiver" is described as a "loose and misleading label for what is in fact a collection of different rules addressed to different problems." *Id.*

Plaintiff really argues two separate tacks under the “waiver” rubric: (1) by voluntarily making a partial disclosure to her of what was said at the July 9 meeting, Defendant has waived all right to claim that communications with counsel occurring at that meeting were confidential; and (2) by making statements in the presence of Mr. Smith, a third party, Defendant made a deliberate and voluntary disclosure of what might have been a privileged communication to someone other than the attorney or client.

I do not accept Plaintiff’s first waiver argument that because Defendant complied with discovery requests relating to the July 9 meeting, the attorney-client privilege was waived simply because Frawley sat in on the meeting. Frawley’s role in this matter, as best as can be ascertained on this record, was not investigative. He was present as events unfolded, presumably to advise Defendant on how to proceed. Any communications with his client before, after, or during the meeting about the subject matter of this lawsuit, if not made in the presence of third parties, would be subject to attorney-client privilege. Plaintiff has had ample opportunity to discover what Defendant knew about this factual situation and about the state of the law of sexual harassment by co-employees other than through the confidential communications of counsel. Frawley’s mere presence at the meeting does not mean that the attorney-client privilege does not attach to confidential communications with his client.

Defendant counters Plaintiff’s second waiver argument, that Smith’s presence at the meeting negated the privilege, by arguing that Smith’s status as an independent contractor does not destroy Defendant’s claim of privilege based on *In re Bieter Company*, 16 F.3d 929 (8th Cir. 1994). The *Bieter* Court noted, “[A]t times there will be potential information-givers who are

not employees of the corporation but who are nonetheless meaningfully associated with the corporation in a way that makes it appropriate to consider them ‘insiders’ for purposes of the privilege.” *Id.* at 936 (quoting John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. Rev. 443, 498 (1982)). Conversely, courts have tended to recognize that when a client chooses to share communications outside a “magic circle” of insiders, the privilege does not apply. *MIT*, 129 F.3d at 685.

That Smith might, under different circumstances, fall within the definition of such an insider seems apparent to me. However, under the facts as developed on this record, the July 9 meeting did not concern itself with confidential communications in the classic Wigmore sense. Defendant has said, in essence, that Plaintiff can obtain discovery about everything that was said and done at the meeting, “except the statements made by our attorney.” Because Defendant previously took the position that Smith’s notes of the meeting were not under their control and that what he told them at the meeting was not confidential, there is simply no basis for arguing that whatever Frawley may have said in Smith’s presence comes within the attorney-client privilege. What Courts have not countenanced is *selective* disclosure of communications to one outsider while withholding them from another. *See id.* at 685. If Frawley and Defendant engaged in a conversation while Smith was present, Plaintiff would be entitled to discover the content of that conversation not only from Smith, but also from Defendant in the context of the Rule 30(b)(6) deposition. Defendant must supplement the Rule 30(b)(6) deposition by answering the questions posed.

CERTIFICATE

- A. This report fairly reflects the actions taken at the hearing.
- B. The Clerk shall submit forthwith copies of this report to counsel in this case.

