



Cardenas v. Prudential Insurance Co. of America

2003 | Cited 0 times | D. Minnesota | May 16, 2003

ORDER AFFIRMING ORDER OF MAGISTRATE JUDGE DATED AUGUST 28, 2002

Plaintiffs have sued defendant Prudential Insurance Company of America ("Prudential") alleging a variety of employment discrimination claims. This matter is now before the Court on plaintiffs' appeal of an Order of United States Magistrate Judge Franklin L. Noel dated August 28, 2002. An order of a Magistrate Judge on nondispositive pretrial matters may be reversed only if it is clearly erroneous or contrary to law. See 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); D. Minn. LR 72.1(b)(2). The Court has reviewed the Magistrate Judge's Order and the parties' submissions, and now affirms the Magistrate Judge.

BACKGROUND

On July 27, 2001, this Court affirmed an Order of the Magistrate Judge denying Prudential's motion to strike plaintiffs' changes to their deposition transcripts. Because these changes were extensive, however, the Court allowed Prudential to conduct further depositions of plaintiffs and to request reimbursement for its costs associated with those additional depositions. See *Cardenas v. Prudential Ins. Co. of Amer.*, Civ. Nos. 99-1421, 99-1422, slip op. at 6-7 (D. Minn. July 27, 2001). Prudential subsequently sought to recover such costs, submitting an affidavit detailing the amounts of time spent in connection with the further depositions and related matters. In response, plaintiffs filed a motion to compel production of all Prudential's time sheets, billing records, and billing statements in this litigation. On August 28, 2002, the Magistrate Judge denied plaintiffs' motion. Plaintiffs now appeal the relevant portion of that Order.

ANALYSIS

Plaintiffs contend that the Magistrate Judge's Order was clearly erroneous and contrary to law, arguing that they need the complete billing records for this litigation to determine whether Prudential's request for reimbursement is reasonable. Prudential argues that plaintiffs' motion is overbroad and unnecessary given the small amount of time spent on the depositions relative to the entire case. More important, Prudential contends that its billing records are protected from discovery by the attorney-client privilege and the work product doctrine. This appeal turns largely on the applicability of these privileges.

Plaintiffs' principally contend that the billing records in this case must be produced because they were generated in the ordinary course of business. Plaintiffs are correct that attorney's billing



Cardenas v. Prudential Insurance Co. of America

2003 | Cited 0 times | D. Minnesota | May 16, 2003

records do not automatically enjoy protection through the attorney-client privilege or work product doctrine. See *Bieter Co. v. Blomquist*, 156 F.R.D. 173, 179-180 (D. Minn. 1994) (holding that billing records are not work product if generated in the ordinary course of business and not in preparation for litigation); *Beavers v. Hobbs*, 176 F.R.D. 562, 565 (S.D. Iowa 1997) (holding that billing records that do not reveal confidential information are generally not protected by the attorney-client privilege). However, the same cases that plaintiffs cite to compel discovery also support the proposition that billing records may be protected from discovery where they contain confidential communications between lawyer and client, or if the records were prepared in anticipation of litigation.

For example, plaintiffs rely heavily on *Bieter Co. v. Blomquist*. In that case, a judge of this Court held that billing statements were discoverable only because they "were generated in the ordinary course of business and not in preparation for litigation." *Bieter Co.*, 156 F.R.D. at 180. The Court also noted, however, that the billing records contained descriptions of services rendered, and "would arguably constitute opinion work product if they had been prepared in anticipation of litigation." *Id.* at 180 n.15.¹ Plaintiffs also rely upon *Rayman v. American Charter Fed. Savings & Loan Ass'n*, 148 F.R.D. 647 (D. Neb. 1993) and *Pandick, Inc. v. Rooney*, No. 85-C-6779, 1998 WL 61180 (N.D. Ill. June 3, 1988). Both of those cases held that attorney billing records were not covered by the attorney-client privilege. *Rayman*, 148 F.R.D. at 659-60; *Pandick*, 1998 WL 61180 at *2. They recognized, however, that billing records could be privileged if they contained confidential communications or provided legal advice. See *Rayman*, 148 F.R.D. at 660 ("Because the documents do not provide any type of legal advice, they are not covered by attorney client privilege."); *Pandick*, 1998 WL 61180 at *2 (holding that billing records are not privileged because they revealed no confidential communications and did not disclose the "substance of the work performed or matter discussed").

A substantial body of case law also supports the argument that attorney billing records may be privileged if they contain information that is privileged. For example, the Ninth Circuit has held that bills, ledgers, statements, time records and the like [that]... reveal the nature of the services provided, such as researching particular areas of law, also should fall within the [attorney-client] privilege.... On the other hand, a simple invoice requesting payment for unspecified services rendered reveals nothing more than the amount of the fee and would not normally be privileged.

In *re Grand Jury Witness*, 695 F.2d 359, 362 (9th Cir. 1982) (emphasis added) (footnote omitted). See *Beavers*, 176 F.R.D. at 564-65 ("Generally, billing records which do not reveal confidential information are subject to discovery and not protected by the attorney-client privilege.") (emphasis added); *Fidelity & Deposit Co. of Maryland v. McCulloch*, 168 F.R.D. 516, 523 (E.D. Pa. 1996) (holding that "billing records clearly are subject to the attorney-client privilege to the extent that they reveal litigation strategy and/or the nature of the services performed.") (internal quotation marks and citation omitted); *Real v. Continental Group, Inc.*, 116 F.R.D. 211, 213-14 (N.D. Cal. 1986) (holding that attorney bills that reveal the nature of legal services provided are privileged); *Weeks v. Samsung Heavy Indus., Ltd.*, No. 93-C-4899, 1996 WL 288511 at *2 (N.D. Ill. May 30, 1996) (holding that attorney billing statement containing legal advice was communicated in attorney's role as legal



Cardenas v. Prudential Insurance Co. of America

2003 | Cited 0 times | D. Minnesota | May 16, 2003

adviser and therefore was privileged).

In this case, Prudential argued before the Magistrate Judge that its billing records contain narrative descriptions of conversations between clients and attorneys, the subjects of legal research or internal legal memoranda, and activities undertaken on the client's behalf. Prudential argued that these materials were prepared for the purposes of this litigation, and were regularly communicated to the client as part of counsel's legal advice. Upon considering this argument, the Magistrate Judge ruled that the documents need not be produced. Given the case law supporting attorney-client privilege and work product protections for billing records, the Court cannot find that the Magistrate Judge's decision under these circumstances was clearly erroneous or contrary to law. Therefore, the Court will affirm the Magistrate Judge's August 28, 2002 Order.

ORDER

Based on the foregoing, all the records, files, and proceedings herein, IT IS HEREBY ORDERED that plaintiff's appeal [Civil Case No. 99-1421, Docket No. 173; Civil Case No. 99-1422, Docket No. 139] is DENIED and the Magistrate Judge's Order dated August 28, 2002 denying plaintiff's motion to compel production of complete and unredacted time sheets, billing records, and billing statements [Civil Case No. 99-1421, Docket No. 171; Civil Case No. 99-1422, Docket No. 137] is AFFIRMED.

JOHN R. TUNHEIM United States District Judge

1. "Opinion work product" includes conclusions, mental impressions, opinions, and legal theories concerning litigation, and enjoys a near absolute immunity from discovery. *Gundacker v. Unisys Corp.*, 151 F.3d 842, 848 & n.5 (8th Cir. 1998); *In re Murphy*, 560 F.2d 326, 335-36 (8th Cir. 1977).

