

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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LARRY LASS, )  
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 Plaintiff, )  
 )  
 v. ) No. 10-cv-2737-M1/P  
 )  
 PACIFIC PAPER PRODUCTS, INC., )  
 )  
 Defendant. )

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ORDER GRANTING PLAINTIFF'S MOTION FOR AN ORDER PERMITTING  
PLAINTIFF'S COUNSEL TO ENGAGE IN *EX PARTE* COMMUNICATIONS WITH  
DEFENDANT'S FORMER EMPLOYEES

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Before the court by order of reference is plaintiff Larry Lass's Motion for an Order Permitting Plaintiff's Counsel to Engage in *Ex Parte* Communications with Defendant's Former Employees, filed January 11, 2011. (D.E. 13.) Lass's former employer, defendant Pacific Paper Products, Inc. ("Pacific"), filed a response in opposition on January 21, and Lass filed a reply on January 24. On February 16, 2011, the court held a hearing on the motion. Counsel for all parties were present and heard. At the conclusion of the hearing, the court took the motion under advisement.

For the reasons below, and under the conditions specified by the court in this order, Lass's motion is GRANTED.

**I. BACKGROUND**

On October 15, 2010, Lass filed a complaint alleging that he

was terminated by Pacific because of his service on a federal grand jury. Specifically, Lass claims that he began working for Pacific in June of 2009 as a Lead Technician, and that throughout his employment, he performed his work to the satisfaction of his employer and had not received any criticisms or complaints about his performance. (Compl. ¶¶ 5-6.) In July of 2010, Lass was selected to serve on a federal grand jury in the Western District of Tennessee. (Id. ¶ 7.) At his orientation, he was informed that he was entitled to be paid \$40.00 per day for his grand jury service and that his employer would be required by law to pay the difference in his salary for the days that he missed work due to his grand jury service. (Id.) Lass alleges that on July 28, he informed the new plant manager, Ed Culligan, that he had been told that the company was required by law to pay him the difference in salary. Culligan asked Lass to provide supporting documentation so that he could forward it to the office in Sumner, Washington. (Id. ¶ 9.) Lass asserts that after he requested the documentation, on July 30, Leo Schultz, the Chief Financial Officer for Pacific, sent Culligan an email stating that Pacific was not required to pay for time not worked and that he did not understand why the court would think that Pacific was required to pay the difference in salary. (Id. ¶ 11.)

Lass further claims that during the week of August 9, 2010, he told Culligan he was concerned that he would be terminated for his

grand jury service. (Id. ¶ 12.) Lass also informed Culligan that he would have to serve on the grand jury on August 17 and 24, and that although he was not scheduled to work on August 17, he was supposed to work on August 24, which would conflict with his grand jury service. (Id.) On August 16, as he had routinely done throughout his employment, Lass went to work on a scheduled day off to change over one of the machines to another product. (Id. ¶ 13.) Lass discovered that the product had already been changed over on the night shift, and as a result, he monitored the wrapper on this line and made a few adjustments to improve the quality of the package. (Id.) At approximately 7:45 a.m., Tim Wade, the maintenance manager, asked Lass why he was at work. (Id. ¶ 14.) Lass explained that he had come in to change the product over. Wade instructed Lass to leave, and Lass did so. (Id.)

Lass alleges that on August 17, he reported for grand jury service and was informed by an individual in the Clerk of Court's office that Pacific was not willing to pay him for his grand jury service days and that he was being released from the grand jury. (Id. ¶¶ 15-16.) On August 18, Lass reported to work, at which time Wade handed him a letter stating that he was being suspended until August 23, allegedly because he had worked without authorization on August 16. (Id. ¶ 17.) On August 23, Lass met with Culligan and Wade, and was informed that he was being terminated for taking unscheduled breaks and disrespecting management. (Id. ¶ 18.) Lass

claims that he had never previously been warned or informed that any breaks he had taken were inappropriate, and that the reasons for terminating him are a pretext for the real reason for his termination - his service on the federal grand jury. (Id. ¶¶ 18-19.) Lass claims that his termination from employment constitutes wrongful discharge in violation of 28 U.S.C. § 1875(a) and Tennessee common law.

In the present motion, Lass seeks an order from the court authorizing his lawyer to engage in *ex parte* communications with Pacific's former employees, including Culligan, who ended his employment with Pacific on January 2, 2011.<sup>1</sup> In support of his motion, Lass argues that while Rule 4.2 of the Tennessee Rules of Professional Conduct prohibits his lawyer from communicating *ex parte* with certain high-level employees without Pacific's consent, Comment 7 to that rule expressly provides that "[c]onsent of the organization's lawyer is not required for communication with a former agent or employee."

Pacific contends, however, that Comment 7's exclusion of former employees should not apply to former employees such as Culligan, who was the sole decision maker responsible for terminating Lass, and thus, whose actions form the basis for

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<sup>1</sup> Although Lass's counsel believes that he may communicate with Pacific's former employees without first obtaining a court order, out of an abundance of caution and to avoid any appearance or claim of impropriety, he filed this motion to bring this matter before the court.

potentially imputing liability to the employer. In an affidavit attached to Pacific's opposition brief, Culligan states that he told Lass in early August of 2010 that he could not come to work on non-scheduled work days due to overtime pay concerns, that Lass took too many breaks and was warned about this problem, that he made the decision to terminate Lass because "he had shown disrespect for management authority" by continuing to work on non-scheduled work days and taking excessive breaks despite being warned, and that he made the termination decision on his own without consulting with anyone from "Corporate." (D.E. 17-1, ¶¶ 2, 6-7.) In addition, Pacific argues that Culligan would likely have confidential and attorney-client privileged information, and therefore he should be protected from *ex parte* contact by Lass's attorney given the danger of revealing this information during an *ex parte* interview. In support of this argument, Pacific attached to its opposition brief a "Separation/Transition Agreement and Release" signed by Culligan, which provides that Culligan agrees to maintain the confidentiality of Pacific's business information even after his separation from employment and that he agrees to "reasonably cooperate" with Pacific in connection with any claim or lawsuit. (D.E. 17-2, ¶¶ 4, 10.)

## II. ANALYSIS

Rule 4.2 of the Tennessee Rules of Professional Conduct ("TRPC"), titled "Communication With A Person Represented By

Counsel," states as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Tenn. Sup. Ct. Rules, Rule 8, RPC 4.2. Regarding a lawyer's communication with an organization's employees and agents, Comment 7 provides that

In the case of a represented organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with a member of the governing board, an officer or managerial agent or employee, or an agent or employee who supervises or directs the organization's lawyer concerning the matter, has authority to contractually obligate the organization with respect to the matter, or otherwise participates substantially in the determination of the organization's position in the matter. If an agent or employee of an organization is represented in the matter by his or her own counsel, consent by that counsel will be sufficient for purposes of this Rule. *Consent of the organization's lawyer is not required for communication with a former agent or employee. See RPC 4.4 (regarding the lawyer's duty not to violate the organization's legal rights by inquiring about information protected by the organization's attorney-client privilege or as work product of the organization's lawyer). In communicating with a current or former agent or employee of an organization, a lawyer shall not solicit or assist in the breach of any duty of confidentiality owed by the agent to the organization. See RPC 4.4.*

Tenn. Sup. Ct. Rules, Rule 8, RPC 4.2 cmt. 7 (emphasis added).<sup>2</sup>

Comment 7 to the TRPC is substantially similar to Comment 7 to Rule 4.2 of the American Bar Association ("ABA") Model Rules of

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<sup>2</sup> The Tennessee Supreme Court adopted the Rules of Professional Conduct in 2002.

Professional Conduct, including its exemption of former employees:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. . . . In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

ABA Model Rule of Prof'l Conduct 4.2 cmt. 7 (2010). Thus, Comment 7 to both the TRPC and the ABA Model Rules excludes former employees from the prohibition against communicating *ex parte* with represented parties.

Pacific argues that Comment 7's exclusion of former employees should not apply to former employees whose actions form the basis for potentially imputing liability to the employer, and in support of its argument cites cases from Michigan, Arizona, Florida, and New Jersey. These cases, however, are inapplicable to the case at bar. The versions of Rule 4.2 for Michigan, Arizona, and New Jersey and the accompanying comments do not contain the former employee exemption found in the TRPC and ABA Model Rules. In addition, the case from Florida cited by Pacific, Rent Club, Inc. v. Transam. Rental Fin. Corp., 811 F. Supp. 651 (N.D. Fla. 1992), was decided before the ABA revised Model Rule 4.2 in 2002 to expressly exempt former employees. See United States v. Grace, 401

F. Supp. 2d 1065, 1068 (D. Mont. 2005) (rejecting defendant's reliance on pre-2002 case law interpreting Rule 4.2 because "the text and comments of Rule 4.2 changed in 2002" and holding that the government could initiate *ex parte* communications with defendant's former employees even though the employees' conduct could be imputed to defendant). Moreover, several courts have disagreed with the Rent Club decision. See, e.g., NAACP v. Fla., 122 F. Supp. 2d 1335, 1341 (M.D. Fla. 2000); Reynoso v. Greynolds Park Manor, 659 So. 2d 1156, 1157-58 (Fla. Dist. Ct. App. 1995); Carnival Corp. v. Romero, 710 So. 2d 690, 693 (Fla. Dist. Ct. App. 1998).

As for Pacific's concerns regarding the potential that an *ex parte* interview of Culligan or other former employees could result in the disclosure of confidential or privileged information, Comment 7 speaks to this issue by reminding counsel of his ethical obligations under TRPC 4.4. However, to address Pacific's concerns regarding potential overreaching by Lass's attorney and to protect the former employees, the court will require that Lass's attorney, prior to conducting any *ex parte* interview, advise the former employee of the following: (1) counsel shall immediately identify himself as the attorney representing plaintiff in the instant lawsuit and specify the purpose of the contact; (2) counsel shall ascertain whether the former employee is represented by counsel, and if so, the contact must terminate immediately; (3) counsel



shall advise the former employee that participation in the interview is not mandatory and that he or she may choose not to participate, or to participate only in the presence of the former employee's personal attorney or defendant's attorney, and counsel must immediately terminate the interview if the former employee does not wish to participate; (4) counsel shall advise the former employee to avoid disclosure of privileged or confidential corporate information; and (5) counsel shall not attempt to solicit privileged or confidential corporate information and shall immediately terminate the interview should it appear that the former employee may reveal privileged or confidential information. See Bryant v. Yorktowne Cabinetry, Inc., 538 F. Supp. 2d 948, 953-54 (W.D. Va. 2008); Carter-Herman v. City of Philadelphia, 897 F. Supp. 899, 904 (E.D. Pa. 1995); see also Morrison v. Brandeis Univ., 125 F.R.D. 14, 19-20 (D. Mass. 1989).

### III. CONCLUSION

The motion is GRANTED in accordance with the conditions specified above.

IT IS SO ORDERED.

s/ Tu M. Pham  
TU M. PHAM  
United States Magistrate Judge

March 9, 2011  
Date