

[Doc. No. 201]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

CAROL BELL, on behalf of
herself and those similarly
situated,

Civil No. 08-6292 (RBK/AMD)

Plaintiff,

v.

LOCKHEED MARTIN CORPORATION,

Defendant.

ORDER

Presently before the Court is Plaintiffs' motion to compel certain documents withheld from production by Defendant based upon an assertion of the self-critical analysis privilege. The sole issue before the Court with respect to this motion is whether Defendant is entitled to assert a self-critical analysis privilege in response to document requests. Defendant asserts that such a privilege has been recognized by a number of courts in this district and other districts. See, e.g., Bracco Diagnostics, Inc. v. Amersham Health Inc., No. 03-6025, 2006 WL 2946469, at *3-4, 8 (D.N.J. Oct. 16, 2006). Plaintiffs, while

acknowledging that there are cases in the district that recognize the privilege, assert that (1) other district court cases do not recognize the privilege, see Spencer Sav. Bank, SLA v. Excell Mortg. Co., 960 F. Supp. 835, 839 (D.N.J. 1997) (refusing to recognize the self-critical analysis privilege), and that (2) dicta in the 2009 Third Circuit case of Alaska Electrical Pension Fund v. Pharmacia Corp., 554 F.3d 342, 351 n.12 (3d Cir. 2009) provides guidance that "this Circuit does not recognize the self-critical analysis privilege." (Pls.'s Resp. to Ct.'s Req. for Supplemental Briefing on Pls.' Claw-Back Mot. [Doc. No. 249] (hereinafter, "Pls.' Supplemental Br."), 7.) For the reasons set forth below, the Court rejects Defendant Lockheed Martin's assertion of the self-critical analysis privilege as a basis to withhold production of otherwise relevant documents. Consequently, the motion to compel is granted.

The background of this proposed nationwide class action has been set forth in detail by the Court in a recent opinion addressing a variety of issues, and will not be repeated herein. See Bell v. Lockheed Martin Corp., 270 F.R.D. 186, 188-89 (D.N.J. 2010). In this case, Plaintiffs generally seeks certification of a nationwide class action on behalf of a putative class against Defendant, Lockheed Martin Corporation, for gender discrimination

under Title VII of the Civil Rights Act of 1964 and 1991 as amended, 42 U.S.C. §§ 2000e et seq. and the New Jersey Law Against Discrimination, as amended, N.J. Stat. Ann. § 10:5-1 et seq., and for individual claims for gender discrimination and retaliation under Title VII and the NJLAD. Although the parties have had extensive motion practice in connection with the discovery in this case, the issue before the Court on this motion is relatively straightforward: whether the self-critical analysis privilege may be asserted as a basis to withhold production of otherwise relevant discovery.

As noted by Defendant, a number of federal courts have recognized the self-critical analysis privilege under federal law. See, e.g., Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379, 385 (N.D. Ga. 2001). In doing so, courts have noted that the "self-critical analysis privilege has been recognized as a qualified privilege which protects from discovery certain critical self-appraisals ... [and] allows individuals or businesses to candidly assess their compliance with regulatory and legal requirements without creating evidence that may be used against them by their opponents in future litigation." Reichhold Chems., Inc. v. Textron, Inc., 157 F.R.D. 522, 524 (N.D. Fla. 1994); see also Reid, 199 F.R.D. at 384 (noting that the

privilege "generally protects reflective materials that analyze and seek to improve the employer's comprehensive approach to equal employment opportunity."). Generally,

[t]he self-critical analysis qualified privilege allows individuals or businesses to candidly evaluate their compliance with regulatory and legal requirements without creating evidence that may be used against them in future litigation. The rationale for this qualified privilege is that critical self-evaluation fosters the compelling public interest that individuals and businesses comply with the law.

Craig v. Rite Aid Corp., No. 4:08-CV-2317, 2010 WL 5463292, at *2 (quoting 6 James Wm. Moore et al., Moore's Federal Practice § 26.48[2] (3d ed.)).

Under Rule 501 of the Federal Rules of Evidence,¹ "federal privileges apply to federal law claims, and state

1. FED. R. EVID. 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

privileges apply to claims arising under state law" but "'when there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility, rather than any state law privilege, is the controlling rule.'" Pearson v. Miller, 211 F.3d 57, 66 (3d Cir. 2000) (citing Wm. T. Thompson Co. v. Gen. Nutrition Corp., 671 F.2d 100, 104 (3d Cir. 1982)).

Thus, "[w]here, ... there are both federal and state law claims, federal privileges rather than state privileges apply to all claims." Wei v. Bodner, 127 F.R.D. 91, 94 (D.N.J. 1989) (citing Wm. T. Thompson Co., 671 F.2d at 104). Therefore, as Plaintiffs in this case have alleged both federal and state law claims under Title VII of the Civil Rights Act of 1964 and 1991 and the New Jersey Law Against Discrimination, see Bell, 270 F.R.D. at 188, the Court will apply the federal law of privilege to all claims. Wei, 127 F.R.D. at 94.

The Court notes that in enacting Rule 501 "Congress ... 'manifested an affirmative intention not to freeze the law of privilege ... [but sought] to "provide courts with the flexibility to develop rules of privilege on a case-by-case basis," and to leave the door open to change.'" In re Grand Jury, 103 F.3d 1140, 1149 (3d Cir. 1997) (citing Trammel v. United States, 445 U.S. 40, 47 (1980)). Accordingly, the Third

Circuit has recognized that "[i]n keeping with these principles, the Supreme Court has rarely expanded common-law testimonial privileges[, and that] ... other federal courts, ... have likewise declined to exercise their power under Rule 501 expansively." In re Grand Jury, 103 F.3d at 1149; see also United States v. Nixon, 418 U.S. 683, 710 (explaining that privileges "are not lightly created, nor expansively construed, for they are in derogation of the search for truth."); Pearson, 211 F.3d at 67 (Third Circuit noting that "with very limited exceptions, federal courts have generally declined to grant requests for new privileges.") Both the Third Circuit and the Supreme Court have cautioned that establishing privileges on a case-by-case basis under Rule 501 should be exercised with care. See, e.g., Univ. of Pa. v. E.E.O.C., 493 U.S. 182, 189 (1990) ("although Rule 501 manifests a congressional desire 'not to freeze the law of privilege' but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, ... we are disinclined to exercise this authority expansively."); Pearson, 211 F.3d at 67 ("federal courts are to assess the appropriateness of new privileges as they arise in particular cases, but they are to conduct that assessment with a recognition that only the most compelling candidates will

overcome the law's weighty dependence on the availability of relevant evidence.").

The crux of Plaintiffs' argument in this motion centers upon the decision in Alaska Electrical Pension Fund in which the Third Circuit expressly stated in a footnote that "[t]he self-critical analysis privilege has never been recognized by this Court and [the Court] see[s] no reason to recognize it now." 554 F.3d at 351 n.12 (citing Union Pac. R.R. Co. v. Mower, 219 F.3d 1069, 1076 n.7 (9th Cir. 2000) and recognizing that the Ninth Circuit called the privilege "novel" and has not recognized the privilege). Plaintiffs argue that "the Third Circuit has addressed the existence of the self-critical analysis privilege ... and stated that it is not recognized in this Circuit." (Pls.' Supplemental Br. 10) (emphasis omitted). Defendant, however, contends that the Third Circuit's "comments about the self-critical-analysis privilege are obiter dicta and therefore are not binding on this court."² (Def.'s Supplemental Br. on

2. In footnote two of its supplemental brief, Defendant defines the term "obiter dictum" as "'[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).'" (Def.'s Supplemental Br. 4 n.2) (citing Black's Law Dictionary (9th ed. 2009)) (emphasis added). The Court notes that although Defendant argues that footnote twelve in Alaska Electrical Pension Fund is not binding, Defendant acknowledges that "obiter dictum" "may be considered persuasive." (Def.'s Supplemental Br. 4 n.2.)

Self-Critical Analysis Privilege [Doc. No. 248] (hereinafter, "Def.'s Supplemental Br."), 4.) Plaintiffs acknowledge that "this statement from the Third Circuit is dicta, and as such, is not binding on this Court." (Pls.' Supplemental Br. 3.) However, the parties disagree as to whether the Third Circuit's footnote sufficiently addresses whether the self-critical analysis privilege should be recognized and applied in this Circuit. Defendant asserts that "the comments of the Third Circuit panel ... do not squarely address whether the self-critical analysis privilege should be recognized." (Def.'s Supplemental Br. 4) (emphasis omitted). Plaintiffs argue that this footnote addresses the self-critical analysis privilege insofar as "instead of simply refusing to decide the issue ..., the Third Circuit made a point of admonishing the district court for its reliance upon the self-critical analysis privilege while cautioning the district court on how th[e] Circuit viewed the self-critical analysis privilege." (Pls.' Supplemental Br. 4).

In deciding this issue, the Court concurs with the reasoning in Craig v. Rite Aid Corp., No. 4:08-CV-2317, 2010 WL 5463292, at *5 (M.D. Pa. Dec. 29, 2010). In Craig, defendant corporation claimed that the self-critical analysis privilege protected from discovery documents "related to [d]efendants'

voluntary internal assessment of their compliance with the Fair Labor Standards Act ..., labor laws, and existing bargaining agreements." Id. at *1. The magistrate judge, however, found that these documents could not properly be "shielded from discovery by the invocation of a broadly-framed self-critical analysis privilege." Id. While acknowledging that there is case law within the Third Circuit recognizing or applying the privilege, the court in Craig expressly called into question the weight of these decisions and noted that the court was "doubtful of the privilege's validity in the Third Circuit, in light of the appellate court's recent admonition that: 'The self-critical analysis privilege has never been recognized by this Court and we see no reason to recognize it now. Cf. Union Pac. R.R. Co. v. Mower, 219 F.3d 1069, 1076 n.7 (9th Cir. 2000) (calling the privilege "novel," and noting that the Ninth Circuit has not recognized the privilege.)'" Craig, 2010 WL 5463292, at *5 (citing Alaska Elec. Pension Fund, 554 F.3d at 351 n.12). Similarly, in Smith v. Life Investors Insurance Company of America, the district judge relied on footnote twelve in Alaska Electrical Pension Fund to conclude "that the 'self critical analysis privilege' is not recognized by ... the Third Circuit and does not apply" to a party's attempt to prevent production of

a document in a discovery dispute. Smith v. Life Investors Ins. Co. of Am., No. 2:07-cv-681, 2009 WL 3364933, at *8 (W.D. Pa. Oct. 16, 2009) (citing Alaska Elec. Pension Fund, 554 F.3d at 351 n.12). See also Davis v. Kraft Foods N. Am., No. 03-6060, 2006 WL 3486461, at *2 (E.D. Pa. Dec. 1, 2006) (questioning the viability of the self-critical analysis prior to the decision in Alaska Electrical Pension Fund based on the Third Circuit's comments in Armstrong v. Dwyer, 155 F.3d 211, 214 (3d Cir. 1998), referencing the "so-called" self-critical analysis privilege, and its statements in In re Grand Jury, 103 F.3d 1140, 1155 (3d Cir. 1997), where "the Court cited with approval a Minnesota decision 'deferring to [the] legislature to create a privilege for self-evaluation data.' (citing In re Parkway Manor Healthcare Ctr., 448 N.W.2d 116, 121 (Minn. Ct. App. 1989))." The court in Craig further concluded that its ruling rejecting the self-critical analysis privilege was consistent with the principle that courts "are to exercise caution and restraint in applying privileges since '[t]he legislature, not the judiciary, is institutionally better equipped to perform the balancing of competing policy issues required in deciding whether the recognition of a ... privilege is in the best interests of

society[.]'" Craig, 2010 WL 5463292, at *5 (citing In re Grand Jury, 103 F.3d at 1154).

In this case, the Court similarly finds that footnote twelve in Alaska Electrical Pension Fund is persuasive authority from the Third Circuit which calls into question the continuing viability of the self-critical analysis privilege in this Circuit. Although the Court acknowledges that footnote twelve is not binding authority, the Court notes the Third Circuit's explicit statement that the self-critical analysis privilege has never been recognized by the Third Circuit. A majority of other Circuits have similarly declined to recognize the self-critical analysis privilege. See Jewell v. Polar Tankers Inc., No. 09-1669, 2010 WL 1460165, at *1 (N.D. Cal. Apr. 8, 2010) (finding that "[w]hile some Circuits have recognized the existence of a self critical analysis privilege, the majority have declined to do so[,] and noting that "[t]he Ninth Circuit has never recognized" the privilege.); see also Craig, 2010 WL 5463292, at *3 n.1 (identifying that "Other circuit courts have similarly declined to recognize or apply the [self-critical analysis] privilege[,] and citing as examples, Burden-Meeks v. Welch, 319 F.3d 897 (7th Cir. 2003); Union Pac. R.R. v. Mower, 219 F.3d 1069 (9th Cir. 2000); In re Kaiser Aluminum & Chem. Co., 214 F.3d 586,

593 (5th Cir. 2000); Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663, 667 (4th Cir. 1977)); see also Davis, 2006 WL 3486461, at *2 (finding that "A majority of the Circuits have refused to recognize or apply the self-critical analysis privilege. See In re Qwest Communications Intern, Inc., 450 F.3d 1179, 1198 n.8 (10th Cir. 2006) (only a minority of states have recognized the self-critical analysis privilege); Burden-Meeks v. Welch, 319 F.3d 897, 899 (7th Cir. 2003) (declining to recognize the self-critical analysis privilege); Union Pacific R. Co. v. Mower, 219 F.3d 1069, 1076 n.7 (9th Cir. 2000) (same); In re Kaiser Aluminum and Chemical Co., 214 F.3d 586, 593 (5th Cir. 2000) (same); Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663, 667 (4th Cir. 1977) (refusing to apply the self-critical analysis privilege to protect disclosures to the E.E.O.C.)").

In deciding this issue, the Court notes Defendant's argument that "many federal courts - including this Court and other district courts in the Third Circuit - have already recognized the self-critical analysis privilege and have established a framework for applying it." (Def.'s Supplemental Br. 5) (emphasis omitted). However, the cases Defendant cites for this proposition were decided before Alaska Electrical Pension Fund. Compare Alaska Elec. Pension Fund, 554 F.3d 342

(decided Jan. 30, 2009), with³ Bracco, 2006 WL 2946469 (decided Oct. 16, 2006); Kopacz v. Delaware River & Bay Auth., 225 F.R.D. 494 (D.N.J. 2004) (decided July 21, 2004); Clark v. Pa. Power & Light Co., No. 98-3017, 1999 WL 225888 (E.D. Pa. Apr. 14, 1999); McClain v. Mack Trucks, Inc., 85 F.R.D. 53 (E.D. Pa. 1979) (decided Dec. 12, 1979); Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431 (E.D. Pa. 1978) (decided Dec. 18, 1978); Droughn v. FMC Corp., 74 F.R.D. 639 (E.D. Pa. 1977) (decided June 21, 1977); Wehr v. Burroughs Corp., 477 F. Supp. 1012 (E.D. Pa. 1979) (decided Aug. 31, 1979); Dickerson v. U.S. Steel Corp., No. 73-1292, 1976 WL 596 (E.D. Pa. July 16, 1976); Rodgers v. U.S. Steel Corp., No. 71-793, 1975 WL 297 (W.D. Pa. Apr. 20, 1975); Sanday v. Carnegie-Mellon Univ., No. 75-256, 1975 WL 294 (W.D. Pa. Dec. 19, 1975). Indeed, the court in Bracco, expressly recognized at the time the case was decided that "neither the United States Supreme Court nor the Third Circuit Court of Appeals ha[d] addressed the existence of a self-critical analysis privilege." 2006 WL 2946469, at *3.

Consequently, in light of the Third Circuit's statement in Alaska Electrical Pension Fund that the Circuit has never

3. The following cases are cited by Defendant in its Supplemental Brief. (See Def.'s Supplemental Br. 5-6.)

recognized the self-critical analysis privilege and sees no reason to do so now, the Court agrees with the court in Craig, and rejects Defendant's assertion of the self-critical analysis privilege as a basis to withhold documents. Plaintiffs' motion to compel is hereby granted.

CONSEQUENTLY, and for the reasons set forth above and for good cause shown,

IT IS on this 31st day of January 2011,

ORDERED that Plaintiffs' motion [Doc. No. 201] to compel, shall be and is hereby, **GRANTED**; and it is further

ORDERED that Defendant shall produce documents previously withheld on the basis of the self-critical analysis privilege.

s/ Ann Marie Donio
ANN MARIE DONIO
UNITED STATES MAGISTRATE JUDGE

cc: Hon. Robert B. Kugler