

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

WENDELL W. REINKING,)
)
Plaintiff,)
)
vs.)
)
)
ALYESKA PIPELINE SERVICE CO.,)
ALYESKA PIPELINE SERVICE CO.)
PENSION PLAN FOR OPERATING)
COMPANY EMPLOYEES (initially)
effective July 1, 1976), ALYESKA)
PIPELINE SERVICE CO.)
SEPARATION BENEFITS PLAN NO.)
516; ALYESKA PIPELINE SERVICE)
CO. PENSION PLAN RETIREMENT)
AND TRUST COMMITTEE, and)
ALYESKA PIPELINE SERVICE CO.)
HUMAN RESOURCES DEPARTMENT)
AS PLAN ADMINISTRATOR FOR)
ALYESKA SEPARATION BENEFITS)
PLAN NO. 516,)
)
Defendants.)
_____)

3:07-cv-00212 JWS
ORDER AND OPINION
[Re: Motion at Docket 70]

I. MOTION PRESENTED

At docket 70, plaintiff Wendell W. Reinking (“Reinking”) moves for an order pursuant to Federal Rule of Civil Procedure 37(a) compelling disclosure of nine

documents withheld by defendants Alyeska Pipeline Service Co., Alyeska Pipeline Service Co. Pension Plan for Operating Company Employees, Alyeska Pipeline Service Co. Pension Plan Retirement and Trust Committee, Alyeska Pipeline Service Co. Separation Benefits Plan No. 516, and Alyeska Pipeline Service Co. Human Resources Department (collectively "APSC") pursuant to a claim of attorney-client privilege. At docket 76, APSC opposes the motion. Reinking replies at docket 78. Per the court's order at docket 80, APSC filed the nine documents relating to the pending motion *in camera*. Oral argument was not requested, and it would not assist the court.

II. BACKGROUND

The parties engaged in discovery following the court's May 6, 2009 order permitting limited discovery regarding APSC's alleged conflict of interest in denying Reinking's claims for benefits under pension plans governed by the Employment Retirement Security Act (ERISA). The parties have since conferred in person and via correspondence regarding the production of the nine documents at issue here, but have not been able to reach an agreement. Plaintiff's counsel reviewed the nine documents pursuant to a non-waiver agreement entered by the parties before pursuing this motion.

III. DISCUSSION

Under Rule 37 (a) after giving notice to other parties and persons affected, a party seek an order which compels discovery of that which has been sought. The Federal Rules further provide: "Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense. . . . For good cause,

the court may order discovery of any matter relevant to the subject matter involved in the action.”¹

The court has reviewed the nine documents *in camera*. It is the court’s conclusion that all of them relate to ERISA plan amendments. The issue at bar is thus whether the nine documents relating to plan amendments sought by Reinking are subject to the attorney-client privilege.

As the nomenclature suggests, the attorney-client privilege shields confidential communications between an attorney and a client. The privilege is “perhaps, the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system.”² Once the privilege has been established, the party seeking to pierce it bears the burden of showing that an exception exists.³ “[H]ard cases should be resolved in favor of the privilege, not in favor of disclosure.”⁴

Of course, the privilege is not an absolute which may be applied without any exceptions. The Ninth Circuit has joined other courts in recognizing a “fiduciary exception” to the attorney-client privilege.⁵ In the context of an ERISA claim, the fiduciary exception provides that “an employer acting in the capacity of ERISA fiduciary

¹Fed. R. Civ. P. 26(b)(1).

²*United States v. Mett*, 178 F.3d 1058, 1062 (9th Cir. 2000) (quoting *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997)).

³See *Bauer*, 132 F.3d at 509 (to make use of crime-fraud exception to privilege government had burden to show connection of communication to illegal act).

⁴*Mett*, 178 F.3d at 1065.

⁵*Id.* at 1062-63 (citing *United States v. Doe*, 162 F.3d 554, 556-57 (9th Cir. 1998); *United States v. Evans*, 796 F.2d 264, 265-66 (9th Cir. 1986)).

is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration.”⁶ The *Mett* opinion makes clear—and Reinking hangs his hat on the proposition—that the attorney client privilege may not be invoked with respect to legal advice concerning plan administration.⁷ As the discussion in *Mett* plainly shows, whatever the *Mett* court meant to encompass within the concept of plan administration, it extends no further than actions taken in a fiduciary capacity. The circumstances presented to the *Mett* court did not require it to elaborate on the definition of plan administration in any way that is useful here. The Supreme Court, on the other hand, has made clear that when plan sponsors change the terms of an ERISA plan, they “do not fall into the category of fiduciaries.”⁸

Reinking argues that the fiduciary exception should apply to the nine documents at issue because the Ninth Circuit’s ruling in *Mett* compels the production of privileged documents related to the administration of a plan when those documents do not contain specific advice and opinion about the personal civil or criminal liability of the fiduciaries.⁹ Conversely, APSC contends that *Mett* does not permit disclosure because the attorney-client communications contained in the documents do not relate to actions taken in a fiduciary capacity for the benefit of plan beneficiaries, which is a prerequisite for

⁶*Id.* at 1063 (quoting *Becher v. Long Is. Lighting Co. (In re Long Is. Lighting Co.)*, 129 F.3d 268, 272 (2d Cir. 1997)).

⁷*Id.* at 1064.

⁸*Lockheed Corp v. Spink*, 517 U.S. 882, 890 (1996).

⁹Doc. 70 at pp. 8-10.

applying the fiduciary exception.¹⁰ Reinking relies too heavily on *Mett*. While the decision contains an illuminating discussion of the fiduciary exception, it does not address the question of whether amending an ERISA plan is an administrative action undertaken in a fiduciary capacity. In *Mett*, the defendants in a criminal prosecution sought to protect memoranda from their attorneys that detailed potential civil and criminal consequences of pension plan withdrawals that the defendants had made.¹¹ Here, Reinking is seeking attorney-client communications related to proposed pension plan amendments, a subject simply not addressed in *Mett*.

Reinking also argues that plan amendments implicate the fiduciary exception because amendments that affect accrued and vested pension benefits implicate fiduciary matters.¹² However, the Supreme Court has explained that “without exception, [p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries.”¹³ The Ninth Circuit has likewise ruled that “an employer does not act in its fiduciary capacity as a plan administrator when it makes a business decision to amend a plan.”¹⁴ While “an employer’s obligations as an ERISA fiduciary are not suspended while it considers a proposal to amend an existing ERISA plan or to adopt a

¹⁰Doc. 76 at p. 2.

¹¹*Id.* at 1062.

¹²Doc. 78 at 4.

¹³*Hughes Aircraft Company v. Jacobson*, 525 U.S. 432, 445 (1999) (quoting *Lockheed*, 517 U.S. at 890).

¹⁴*Bins v. Exxon Company U.S.A.*, 220 F.3d 1042, 1047 (9th Cir. 2000).

replacement plan,”¹⁵ the employer’s consideration of changes to an ERISA plan “does not, in and of itself, implicate ERISA’s fiduciary duties.”¹⁶

In this case, after reviewing APSC’s nine documents *in camera*, the court finds that the fiduciary exception to the attorney-client privilege does not apply. The nine documents at issue here are all related to proposed amendments to the pension plan. There is no indication from the documents that APSC was acting in a fiduciary capacity when considering the plan amendments.

Reinking argues that a plan amendment disturbing vested pension benefits is a breach of fiduciary duty,¹⁷ but that argument, while possibly meritorious, is not relevant to the inquiry which must be made in the context of the motion considered here. Reinking has not shown that APSC was acting in a fiduciary capacity when considering amendments to the plan or amending the plan, and therefore the fiduciary exception is inapplicable.

V. CONCLUSION

For the reasons above, Reinking’s motion at docket 70 is **DENIED**.

DATED at Anchorage, Alaska, this 9th day of August 2010.

/S/
JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

¹⁵*Id.* at 1047-48.

¹⁶*Id.* at 1053.

¹⁷Doc. 78 at pp. 3-8.