REQUEST FOR STAY; TRIAL COURT STAY OF DISCOVERY EXPIRES JULY 6, 2015

1st Civ. No. A145437

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

CITY OF PETALUMA,

Defendant and Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SONOMA,

Respondent.

ANDREA WATERS,

Plaintiff and Real Party in Interest.

Sonoma County Superior Court/Empire College Annex
Case No. SCV 256309

Hon. Elliot Lee Daum, Judge
Courtroom: 16
Telephone: (707) 521-6547

PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF; REQUEST FOR IMMEDIATE STAY; MEMORANDUM OF POINTS AND AUTHORITIES

[Exhibits Filed Under Separate Cover]

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FIRST **APPELLATE DISTRICT, DIVISION** ONE	Court of Appeal Case Number:
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APPELLANT/PETITIONER: CITY OF PETALUMA RESPONDENT/REAL PARTY IN INTEREST: ANDREA WATERS	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Defendant and Petitioner CITY OF PETALUMA

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: June 19, 2015

Alison M. Turner ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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INTRODUCTION

Over objections based on the attorney-client privilege and work product doctrine, respondent trial court has granted a motion to compel disclosure of documents and other information pertaining to an investigation conducted by outside counsel for an employer in anticipation of litigation. The trial court's ruling under controlling law is wrong and constitutes an abuse of discretion requiring writ relief.

A. Nature Of The Case.

Plaintiff Andrea Waters has sued her former employer, the City of Petaluma, under the Fair Employment and Housing Act ("FEHA"; Gov. Code, § 12900, et seq.). During discovery, plaintiff moved to compel documents generated in an investigation by outside counsel retained by the City, as well as testimony pertaining to the investigation. The investigation was of charges plaintiff filed with the Equal Employment Opportunity Commission ("EEOC"). The City asserted the protections of the attorney-client privilege and work product doctrine based on the attorney-client relationship it had established with outside counsel. Plaintiff had left the City's employ before the investigation was initiated, and the purpose of retaining outside counsel was to assist in the defense of the lawsuit the City had concluded was sure to come.

The trial court granted the motion to compel all the documents and testimony relating to the investigation, finding no attorney-client or work product privilege attached and that in any event, the City had waived protection by asserting an avoidable consequences defense in its answer to the complaint.

B. The Issues.

This petition presents two issues:

- Is an investigation conducted by outside counsel, retained for her professional judgment and expertise in employment law to assist the City Attorney in the defense of anticipated litigation, protected from discovery by the attorney-client privilege and/or work product doctrine even though the communications involved did not contain legal advice as to what action should be taken based on the results of the investigation?
- When it is undisputed that the investigation at issue was initiated after plaintiff had left employment, does the assertion of the avoidable consequences defense in an answer to the complaint put the post-employment investigation into issue and constitute a waiver of the attorney-client or work product privileges?

The City contends its relationship with outside counsel was that of attorney and client and that outside counsel was retained because of her expertise in employment law to conduct the investigation into plaintiff's charges. Thus, it contends, the report as well as underlying documents and other communications related to it are protected by the attorney-client privilege and/or work product doctrine.[1/] The trial court rejected the City's assertion of privilege and work product protections on the ground that the attorney was doing what a non-attorney could do — acting as a fact-finder and not providing legal advice. The trial court was factually and legally incorrect. The investigation culminating in a report required the exercise of professional judgment to obtain and evaluate legally relevant evidence for determining potential exposure. In *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 740 ("*Costco*"), the Supreme Court held that communications between attorney and client are privileged, even if the communication is a report of factual material.

[1/] In this petition, the City focuses on the attorney-client privilege protecting its investigative file — the report, supporting documentation and other information transmitted between the City and Oppenheimer. To the extent the discovery requests target material *not* transmitted between client and attorney, that material is subject to absolute work product protection for an attorney's impressions, conclusions, opinions, or legal research or theories, written and unwritten. (Code Civ. Proc., § 2018.030; *Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1278.) It is not clear the trial court actually analyzed the issue of attorney work product and its application since in its view outside counsel was functioning as a fact-finder, not an attorney.

The trial court was incorrect on the issue of waiver as well. The City did not place the post-employment investigation, initiated for defensive purposes, into issue by asserting the avoidable consequences defense. The avoidable consequences defense addresses whether an employee could have limited her damages by taking advantage of the employer's policies, procedures, and efforts to remediate her situation. Its focus is on what did or did not happen *during* plaintiff's employment to limit damages. Where, as here, an investigation was initiated *after* the employee had resigned, the investigation is not and cannot be evidence of the adequacy of the remediation efforts of which the plaintiff failed to take advantage.

C. Why Writ Relief Is Warranted.

The Supreme Court has made clear that the use of the peremptory writ is proper in a case seeking review of an order compelling discovery of material claimed to be protected by the attorney-client privilege. (*Costco*, *supra*, 47 Cal.4th at p. 741.) As the court explained, a person challenging disclosure faces the choice between complying with the order to disclose privileged material or refusing to comply with the order and facing a charge of contempt, a choice that is no choice at all. (*Ibid*.) A writ is necessary because there is no other means of obtaining the relief sought here; there is no immediate right of appeal from an order to produce, and once the

privileged information is disclosed, there is no way to undo the harm, which is the disclosure itself.

Writ relief is also appropriate because the trial court's discovery order presents an important issue of first impression: The issue is whether a defendant employer, who has asserted the avoidable consequences defense to claims alleging FEHA violations waives the attorney-client privilege attached to an investigation initiated post-employment to prepare for anticipated litigation, when the opportunity for the employee to avoid harm no longer exists.

D. A Temporary Stay Is Necessary.

On June 8, 2015, the trial court stayed its discovery order to July 6, 2015, to permit the City to seek relief from this Court. The City requests that this Court extend the stay of the discovery order pending a final ruling on this petition in the appellate courts. While the City could not be properly sanctioned for failure to comply with a discovery order while it is in good faith seeking review of that order (*Fairfield v. Superior Court* (1966) 246 Cal.App.2d 113, 121), nonetheless, it should not have to risk such proceedings on pain of having to disclose confidential communications. Hence, a further stay pending disposition of this matter in the appellate courts is warranted.

PETITION

By this verified petition, petitioner City of Petaluma alleges:

A. The Parties.

1. Petitioner City of Petaluma ("City") is the defendant in an action now pending in respondent Superior Court for the County of Sonoma, entitled *Andrea Waters v. City of Petaluma*, Sonoma County Superior Court Case No. SCV 256309. (Exh. 1, p. 5.)[2/]

2. Respondent Sonoma County Superior Court is the court exercising jurisdiction over that action. (*Ibid*.)

3. Real party-in-interest Andrea Waters is the plaintiff in that action. (*Ibid*.)

B. Background.

4. Plaintiff was a firefighter/paramedic employed by the City beginning in June 2008. (Exh. 1, p. 7.)

5. On February 28, 2014, plaintiff went on leave. (Exh. 8, p. 79.)

6. On May 19, 2014, the City received notice from the U.S. Equal Employment Opportunity Commission ("EEOC") that plaintiff had

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[2/] The accompanying volume of exhibits is cited by exhibit number, and page number. For example, (Exh. 1, p. 1). Each exhibit is an accurate copy of the document identified and is incorporated into this petition by reference.

filed a charge alleging harassment, sexual harassment, and retaliation pertaining to the terms and conditions of her employment and training. (*Ibid*.)

7. Until receipt of this notice, the City was unaware that plaintiff had complaints in this regard. (*Ibid*.)[3/]

8. On May 22, 2014, three days after the City received notice from the EEOC, plaintiff voluntarily resigned from City employment. (*Ibid*.)

C. The Investigation.

9. The fact that plaintiff had filed her EEOC charge and almost simultaneously resigned led City Attorney Eric Danly to conclude plaintiff was not seeking corrective action but was exhausting administrative remedies prior to filing a lawsuit. (*Id*. at pp. 79-80.)

10. On June 11, 2014, Danly retained outside counsel, the law offices of Amy Oppenheimer, to investigate plaintiff's EEOC charge and to assist him in preparing to defend the City in the anticipated lawsuit. (*Id*. at pp. 80, 83-84.)

11. Danly retained Oppenheimer and her firm because of her legal expertise and over 30 years of experience in employment law as an attorney, investigator, arbitrator, mediator, and trainer. (*Id*. at p. 80.) He also wanted

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[3/] The parties dispute this fact.

to ensure the investigation would be impartial. (*Ibid*.) Specifically, he wanted to ensure the firefighters to be interviewed were properly noticed and admonished in accordance with the Fire Fighters' Bill of Rights, City policy, and applicable law; to ensure all facts relevant to plaintiff's allegations and the City's potential liability under applicable federal and state law were gathered; and to ensure the investigation report, and related notes and analysis would be subject to the attorney-client privilege and work product doctrine, as they would be if the City Attorney's Office had conducted the investigation itself. (*Ibid*.)

12. The retention agreement provided that it created an attorney-client relationship between the City and the law offices of Amy Oppenheimer. (*Id*. at p. 83.) It also provided that Oppenheimer would "use [her] employment law and investigation expertise to assist [Danly] in determining the issues to be investigated and to conduct an impartial fact-finding." (*Ibid*.) The investigation would be subject to the attorney-client privilege until and unless the City waived the privilege or a court determined it was not privileged. (*Ibid*.)

13. In that regard, Oppenheimer would interview witnesses, collect and review pertinent information, and report "what we believe happened, and the basis for that conclusion." (*Ibid*.) Findings would be based on an "impartial and professional evaluation of the evidence." (*Ibid*.)

14. The retention agreement also provided that "[i]t is understood that in this engagement we will not render legal advice as to what action to take as a result of the findings of the investigation." (*Ibid*.)

D. The Lawsuit And Discovery.

15. Plaintiff sued the City on November 6, 2014 under FEHA on theories of hostile environment harassment, discrimination, retaliation, and failure to prevent harassment, discrimination and retaliation. (Exh. 1, pp. 5-11.)

16. The City filed its answer on December 19, 2014. (Exh. 2, pp. 14-21; see Exh. 18, p. 172.) The Eighteenth Affirmative Defense asserted that "Defendant exercised reasonable care, and properly took all steps necessary to prevent and correct any violations of any . . . state statute . . . and Plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities or to otherwise avoid harm." (Exh. 2, p. 19.) The Twenty-First Affirmative Defense asserted plaintiff "fail[ed] to take reasonable and necessary steps to avoid the harm and/or consequences [she] allegedly suffered." (*Ibid*.)

17. Plaintiff served discovery requests on December 2, 2014 and the City responded on February 2, 2015. (Exh. 4, pp. 27-28.) In its responses, the City objected to every request seeking production of Oppenheimer's report and other materials bearing on the investigation on

the ground such was protected by the attorney-client privilege and work product doctrine. (Exh. 5, pp. 37-56; Exh. 10, pp. 93-98.)

E. Plaintiff's Motion To Compel.

18. On March 6, 2015, plaintiff moved to compel documents and testimony relating to the City's investigation on the ground they were relevant to her Failure to Prevent cause of action and two of the City's affirmative defenses. (Exh. 3, pp. 23-24.) Plaintiff sought all the documents Oppenheimer created or referred to in the course of her investigation, including the final report, as well as notes, witness interviews, and audio tapes, and also to depose Oppenheimer regarding the investigation. (Exh. 5.)[4/] In her supporting memorandum, she contended that no attorney-client privilege attached to the investigative files, and even if the privilege did attach, the City had waived the privilege by asserting an avoidable consequences defense by the Eighteenth and Twenty-First Affirmative Defenses. (Exh. 4, pp. 30-33.)

19. The City opposed the motion. (Exhs. 7-10.)

20. On April 22, 2015, the trial court heard argument on plaintiff's motion. (Exh. 12.)

21. In an order filed and served on May 19, 2015, the trial court granted the motion, finding the investigation was not protected from

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[4/] The City refers herein to the documents and other information sought collectively as "the investigation."

discovery by either the attorney-client privilege or the work product doctrine and that even if either attached to any of the information, the City had waived the protection by asserting the avoidable consequences doctrine as an affirmative defense. (Exh. 13.)

22. On June 8, 2015, the trial court ordered a stay of disclosure until July 6, 2015. (Exh. 17.)

23. Trial is currently set for January 29, 2016.

F. Why The Trial Court Erred.

24. The trial court ordered disclosure on the ground that the documents and information sought by plaintiff "do not constitute a communication between a lawyer and her client wherein the lawyer is offering legal advice nor are they writings that reflect an attorney's evaluation or interpretation of the law or the facts." (Exh. 13, p. 138.) This content-based approach to the question of privilege is contrary to law. Under *Costco*, *supra*, 47 Cal.4th 725, communications made within an attorney-client relationship, even if they include unprivileged material or a report of factual material, are privileged. (*Id*. at pp. 732, 740.) The focus of the inquiry is the dominant purpose of the relationship, which, per the evidence in this case, was indisputably one of attorney and client.

25. The trial court further erred when it concluded that the avoidable consequences defense, premised on employer policies, practices,

and remedial conduct during the period of plaintiff's employment and on whether plaintiff took advantage of them, placed in issue an investigation initiated after plaintiff's resignation and constituted a waiver of any protection. Its ruling is contrary to the law pertaining to the adverse consequences defense and the law regarding waiver. (See *State Department of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1044 ("*State Department of Health Services*") [employer took reasonable steps to prevent and correct workplace harassment and employee failed to use those measures]; *Southern California Gas Co. v. Public Utilities Comm.* (1990) 50 Cal.3d 31, 40-41 ("*Southern California Gas Co.*") [waiver of client has put the substance of the privileged communication "directly" at issue].)

G. Why A Writ Is Necessary.

26. The City has no plain, speedy, or adequate remedy at law other than this petition. Threatened loss of a privilege through a discovery ruling is recognized as an appropriate issue for writ relief: "The need for the availability of the prerogative writs in discovery cases where an order of the trial court granting discovery allegedly violates a privilege of the party against whom discovery is granted, is obvious. The person seeking to exercise the privilege must either succumb to the court's order and disclose the privileged information, or subject himself to a charge of contempt for his refusal to obey the court's order pending appeal." (*Costco*, *supra*, 47

Cal.4th at p. 741, internal quotations and citations omitted.) "Extraordinary review of a discovery order will be granted when a ruling threatens immediate harm, such as loss of a privilege against disclosure . . . . [W]here the petitioner seeks relief from a discovery order that may undermine a privilege, we review the trial court's order by way of extraordinary writ." (*Doe v. Superior Court* (2011) 194 Cal.App.4th 750, 754.) Once the privileged information is disclosed, "there is no way to undo the harm which consists in the very disclosure." (*People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1071.)

27. The trial court had no discretion but to deny the motion to compel discovery of the investigation because the documents and information sought constituted communications transmitted in the course of an attorney-client relationship and so are protected by the attorney-client privilege, regardless of whether they included unprivileged material or reports of factual material. (*Costco*, *supra*, 47 Cal.4th at pp. 732, 734, 740.)

28. The case presents a significant legal issue of first impression — whether asserting the avoidable consequences defense waives the attorney-client privilege attached to a post-employment investigation in anticipation of litigation. Prompt resolution of this issue is important not only to the parties in this case, but to all employers preparing to defend in actions under FEHA: to conclude, as the trial court did here,

that the post-employment investigation was the best evidence of what the employer would have done before the employee's resignation puts in jeopardy an employer's right to invoke the privilege for confidential communications as it prepares to litigate, because to prepare for litigation one must always investigate and assess the facts.

29. The assertion of the avoidable consequences defense, addressing whether plaintiff took advantage of policies and procedures in place to correct and prevent harassment, did not constitute waiver of the attorney-client privilege that attached to the investigation initiated after plaintiff had left her employment.

H. This Petition Is Timely.

30. The trial court entered its order granting the motion to compel on May 19, 2015. (Exh. 13.) The City filed this petition fewer than sixty days later. The petition is therefore timely. (*Cal West Nurseries, Inc. v. Superior Court* (2005) 129 Cal.App.4th 1170, 1173.)

I. A Stay Is Necessary.

31. On June 8, 2015, the trial court stayed its discovery order to July 6, 2015, to permit the City to seek relief from this Court.

32. This Court should issue a temporary stay of the discovery order as necessary to protect the effectiveness of the writ petition. If the Court's consideration of this writ petition extends beyond July 6, the City

should not be put to the choice of having to disclose privileged materials or face contempt charges.

PRAYER

WHEREFORE, petitioner City of Petaluma prays that this Court:

1. Issue a peremptory writ of mandate or other appropriate relief directing respondent court (a) to vacate its order of May 19, 2015 and to enter a new order denying plaintiff's motion to compel documents and testimony relating to the City's investigation; or in the alternative:

2. Issue an alternative writ of mandate or other appropriate relief directing respondent court to show cause why such a peremptory writ should not issue, and then issue such a peremptory writ;

3. Issue a stay pending the final disposition of this petition in the appellate courts;

4. Award the City its costs in this proceeding; and

5. Grant the City such other relief as is just and proper.

DATED: June 19, 2015

Respectfully submitted,

THE CITY ATTORNEY'S OFFICE
CITY OF PETALUMA
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Alison M. Turner

By: _____
Alison M. Turner
Attorneys for Defendant and Petitioner CITY OF PETALUMA

VERIFICATION

I, Samantha W. Zutler, declare:

I am an attorney duly licensed to practice law in California. I am a partner with Burke, Williams, & Sorensen, LLP, attorneys of record in the trial court for petitioner City of Petaluma. I have reviewed and am familiar with the records and files that are the basis of this petition. I have read the foregoing Petition For Writ of Mandate, Prohibition or Other Appropriate Relief and know its contents. The allegations are within my personal knowledge and accurately reflect what is alleged or set forth in the records or files of this case, and I certify that they are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on June 19, 2015 at San Francisco, California.

Samantha W. Zutler

MEMORANDUM OF POINTS AND AUTHORITIES

WRIT RELIEF IS NECESSARY TO PREVENT THE CITY FROM BEING COMPELLED TO COMPLY WITH DISCOVERY REQUESTS THAT VIOLATE THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES.

A. The Standard Of Review.

"A trial court's determination of a motion to compel discovery is reviewed for abuse of discretion." (*Costco*, *supra*, 47 Cal.4th at p. 733.) The trial court abuses its discretion when it applies the wrong legal standard. (*Ibid*.) A party claiming the attorney-client privilege has the burden of establishing a communication made in the course of an attorney-client relationship. (*Ibid*.) Once the party does that, "the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply." (*Ibid*.) The attorney-client privilege is liberally construed "to promote a full and free relationship between the attorney and the client." (*Musser v. Provencher* (2002) 28 Cal.4th 274, 283; *Kroll & Tract v. Paris & Paris* (1999) 72 Cal.App.4th 1537, 1545.)

B. The Report And Related Materials Are Protected By The Attorney-Client Privilege And/Or Work Product Doctrine.

The attorney-client privilege is set forth in Evidence Code section 954, and permits a client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer" made in the course of an attorney-client relationship. "Confidential communication" means "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence" by confidential means, and "includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Evid. Code, § 952.) "The attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication *irrespective of whether it includes unprivileged material*." (*Costco*, *supra*, 47 Cal.4th at p. 734, emphasis added.)

The fundamental purpose of the attorney-client privilege "'is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. . . .' [Citation.]" (*Costco*, *supra*, 47 Cal.4th at pp. 732, 740-741.) The focus on the inquiry as to whether a communication is privileged is "the dominant purpose *of the relationship*,"

here between the City and outside counsel. (*Id*. at p. 739, original emphasis.) If it is determined that "the communications were made during the course of an attorney-client relationship, the communications, *including any reports of factual material*, would be privileged, even though the factual material might be discoverable by some other means." (*Id*. at p. 740, emphasis added.)

1. The City and Oppenheimer's law firm were in an attorney-client relationship.

Oppenheimer's firm and the City were in an attorney-client relationship because, as a threshold matter, that is the only way Oppenheimer could lawfully conduct the investigation for the City without being licensed as a private investigator. (See Bus. & Prof. Code, § 7520 [those acting as private investigators must be licensed as such]; see *id.* at § 7521 [defining private investigator by activity]; see *id.* at § 7522, subd. (e) [exempting from private investigator licensing requirement "[a]n attorney at law in performing his or her duties as an attorney at law"].) Thus, the retention agreement expressly states: "This agreement creates an attorney/client relationship between the City, and the law offices of Amy Oppenheimer." (Exh. 8, p. 83; see also *id*. at p. 80 [the retention agreement "expressly creates an attorney/client relationship between the City and the law offices of Amy Oppenheimer"].) Thus, as next discussed,

Oppenheimer was retained to function as an attorney in conducting the investigation.

2. Oppenheimer was retained for her expertise and experience in employment law to assist in the defense by conducting an investigation.

The evidence proffered by the City in opposing the motion to compel established that the investigation in this case is subject to the attorney-client privilege because the relationship established between Oppenheimer's law firm and the City was a confidential one, for obtaining legal services from Oppenheimer. In that regard, the City Attorney's Office and Oppenheimer's firm were a legal team. Oppenheimer's firm was retained "to assist [the City Attorney] in preparing to defend the City in the anticipated lawsuit . . . [¶] . . . to assist [him] in determin[ing] the issues to be investigated and to conduct impartial fact finding regarding Plaintiff's EEOC Charge." (Exh. 8, p. 80.)

Critical to this relationship was Oppenheimer's "over 30 years' experience in employment law as an attorney, investigator, arbitrator, mediator and trainer." (*Ibid*.) Indeed, Eric Danly, the City Attorney, declared under penalty of perjury that he retained her "*to benefit from her legal expertise and experience* and to ensure the investigation would be objective and impartial." (*Ibid.*, emphasis added.) He wanted to ensure the investigation "would gather all facts relevant to the allegations and

potential . . . City liability under applicable federal and state law." (*Ibid*.) Moreover, the relationship was intended to be confidential: "I wanted to ensure that the investigation report, and related notes, analysis and other records, would be subject to the attorney-client and work product privileges just the same as they would be if the investigation were conducted by my office." (*Ibid*.)

In her declaration, Oppenheimer confirmed she was retained "to assist the City in responding to an . . . EEOC . . . Charge filed by Plaintiff against the City that implicitly threatened litigation." (Exh. 9, p. 86.) She described in detail the steps she took to maintain the confidentiality of her investigation. (*Ibid*.)

The retainer agreement attached to Danly's declaration reflects the same intention of confidential relationship and privilege: "As attorneys, we will use our employment law and investigation expertise to assist you in determining the issues to be investigated and to conduct impartial fact-finding." (Exh. 8, p. 83.) In that regard, "[w]e will tell you what we believe happened, and *the basis for that conclusion*. We are not guaranteeing any particular result and we will reach our findings based on an impartial and *professional evaluation of the evidence*." (*Ibid*., emphasis added.)

3. That Oppenheimer would not provide legal advice as to what to do with the results of the investigation does not defeat the attorney-client privilege.

The trial court ruled that the investigation was not protected by the attorney-client privilege or work product doctrine because Oppenheimer stated in the retainer agreement that "it is understood that in this engagement we will not render legal advice as to what action to take as a result of the findings of the investigation. Rather, you [Danly] are solely responsible for providing the City legal advice relating to this matter." (Exh. 13, p. 139; see Exh. 8, p. 83.) The trial court further found that even if Oppenheimer had "provided services that consisted in part of confidential legal advice, the privilege would protect only those communications containing confidential legal advice and does not extend to Oppenheimer's investigation." (Exh. 13, p. 139.) As to testimony regarding the investigation, "like the documents, [it] is not subject to either attorney client privilege or work product protection just because the mechanics of the investigation itself reflect an attorney's evaluation or interpretation of the law or the facts." (*Ibid*.) In the trial court's view, no legal advice, no protection.

a. The trial court's content-based ruling is simply incorrect under the law, and *Costco* compels its rejection.

The fact that Oppenheimer was not to render legal advice as to what action to take with the results of the investigation does not defeat the privilege, because it does not defeat the facts that an attorney-client relationship was established between the City and Oppenheimer, and that the investigation, including the report and all other related materials, was intended to be confidential information for the City Attorney so that he, in turn, could properly advise the City.[5/] As the *Costco* court made clear, the privilege protects a "*transmission* irrespective of its content." (*Costco*, *supra*, 47 Cal.4th at p. 739, original emphasis.) The court emphasized "'[n]either the statutes articulating the attorney-client privilege nor the cases which have interpreted it make any differentiation between "factual" and "legal" information.'" (*Costco*, *supra*, 47 Cal.4th at p. 734, quoting *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 601 ("*Mitchell*").) Thus, for example, in *Mitchell*, an attorney's warnings to his client about the effects of chemical exposure were privileged even though they involved factual

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[5/] The Government Code assigns to the city attorney the role of advising city officials. (See Gov. Code, § 41801 ["The city attorney shall advise the city officials in all legal matters pertaining to city business"].) That there is a division of labor so that other legal services are performed by other attorneys in anticipation of litigation does not mean the other attorneys are not functioning as attorneys, i.e., as part of the City's legal team.

information, not legal advice. (37 Cal.3d at p. 601.) Legal advice or opinion in Evidence Code section 952 defining "confidential" is just one type of information protected. (*People v. Bolden* (1979) 99 Cal.App.3d 375, 379; see also 2 Witkin, Cal. Evidence (5th ed. 2012) Witnesses, § 111, p. 409 ["[t]he protected communication may be either 'information transmitted between a client and his or her lawyer' or 'advice given by the lawyer'" or "'a legal opinion formed' even though not communicated to the client"].)

Under *Costco*, the proper focus in the analysis of privilege is whether there is an attorney-client relationship and whether the communication was transmitted confidentially in the course of that relationship, not whether an attorney's legal advice was part of the communication. *County of Los Angeles Board of Supervisors v. Superior Court* (2015) 235 Cal.App.4th 1154, 1174; see also *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 51 [after *Costco*, "the focus of the inquiry is the dominant purpose of the relationship between the parties to the communication. . . . [W]hen the party claiming the privilege shows the dominant purpose of the relationship between the parties to the communication was one of attorney-client, the communication is protected by the privilege"]; see *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371 ["[t]he attorney-client privilege applies to communications in the course of professional employment that are

intended to be confidential"]; *City & County of San Francisco v. Superior Court* (1951) 37 Cal.2d 227, 236 [if "'the communication is intended to be confidential . . . , the privilege comes into play' (citation)"].)

b. *Wellpoint Health Networks, Inc.* does not support the trial court's ruling.

Significantly, the trial court based its ruling on a misreading of *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 121-122 ("*Wellpoint*"), which it took to stand for the proposition that "a report that simply summarizes the investigation or presents factual conclusions for management action and does not contain confidential legal advice is not protected from discovery even though it was prepared by an attorney." (Exh. 13, p. 139.) *Wellpoint* pre-dates *Costco* and if the court had held what the trial court here suggests it held, it would be inconsistent with *Costco*. But the trial court's reading of *Wellpoint* is incorrect. The *Wellpoint* court rejected the lower court's conclusion that the privilege did not apply to a prelitigation investigation where the investigating attorney was acting as fact-finder. (*Id.* at p. 114.) To the contrary, a showing that an employer had hired an attorney to investigate charges of discrimination was all that was "necessary to support a prima facie claim of privilege, i.e., communication in the course of the lawyer-client relationship" and the plaintiff employee, as is true here, had presented no facts to refute that presumption. (*Id*. at pp. 123-124.) The *Wellpoint* court went on to cite,

with approval, federal authority for the proposition that "[t]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. . . . The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. . . ." (*Id.* at p. 128, internal quotations omitted, citing *Harding v. Dana Transport, Inc.* (D.N.J. 1996) 914 F.Supp. 1084, 1091 [finding investigation by attorney into charges of discrimination was subject to attorney-client privilege].)

Contrary to the trial court's suggestion, there is more to providing legal services than providing legal advice. Identifying the factual issues to be investigated in light of the law, and knowing what questions to ask to obtain legally relevant facts for determining potential exposure are tasks that call for the professional judgment and expertise in employment law that an attorney can provide. Oppenheimer was retained for exactly that professional judgment and expertise to assist the City Attorney in defending the City in the anticipated lawsuit.[6/] That providing legal advice to city officials as to what should be done with the results of her investigation was

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[6/] See Exh. 8, pp. 80, 83 (retention agreement providing that Oppenheimer would "use [her] employment law and investigation expertise to assist [City Attorney] in determining the issues to be investigated" and that her findings would be based on a "professional evaluation of the evidence").

not within the scope of her retention, as it could not be under the Government Code, does not defeat the attorney-client privilege or the protection of the work product doctrine.

In sum, the investigation is subject to the attorney-client privilege and/or work product doctrine, and the trial court order granting the motion to compel must be vacated on that basis.

C. The City Did Not Waive The Protections Of The Attorney-Client Privilege Or Work Product Doctrine By Asserting An Avoidable Consequences Defense.

An implied waiver of the attorney-client privilege is established when the person seeking disclosure of privileged information demonstrates "that the client has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action." (*Southern California Gas Co.*, *supra*, 50 Cal.3d at p. 40; *Mitchell*, *supra*, 37 Cal.3d at p. 609.) There is no "waiver of the attorney-client privilege where the substance of the protected communication is not itself tendered in issue, but instead simply represents one of several forms of indirect evidence in the matter." (*Id*. at p. 606; *Southern California Gas Co.*, *supra*, 50 Cal.3d at p. 41.)

The trial court found that the City had waived any protection for the investigation by asserting the avoidable consequences defense, as

purportedly evidenced by a statement in its opposition to the motion to compel that "the City never had an opportunity to investigate and remedy any alleged discrimination." (Exh. 13, pp. 141-142; Exh. 7, p. 64.) The trial court's conclusion is incorrect. The avoidable consequences defense under the circumstances of this case does not put the substance of the investigation — that is, the report and other documents and information which plaintiff seeks — "directly at issue" and disclosure is not essential for a fair adjudication of the action.

1. Legal principles encompassed in the avoidable consequences defense and invoked in this case.

As stated by the California Supreme Court,

> [I]n a FEHA action against an employer for hostile environment sexual harassment by a supervisor, an employer may plead and prove a defense based on the avoidable consequences doctrine. In this particular context, the defense has three elements: (1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered.

(*State Department of Health Services*, *supra*, 31 Cal.4th at p. 1044.)

As emphasized by the court, the avoidable consequences defense allows the employer "to escape liability for those damages, and only those damages, that the employee more likely than not could have prevented with

reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment." (*Ibid*.)

The avoidable consequences defense asserted in this case pertains to what the employer and employee did or did not do *during the latter's employment*. Plaintiff seeks damages for the City's failure to prevent violations of FEHA to her detriment, pursuant to Government Code section 12940, subdivision (k), which provides that it is unlawful for an employer "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." As this court has noted, "'[t]his provision creates a statutory tort action with the usual tort elements [duty of care to plaintiff, breach of duty, causation and damages]. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286 [73 Cal.Rptr.2d 596].)' (Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2011) § 7.671, p. 7-109.)" (*Veronese v. Lucasfilm Ltd*. (2012) 212 Cal.App.4th 1, 28.) Thus, in seeking damages for her alleged injuries, plaintiff alleged "Defendant failed to take all reasonable steps necessary to prevent harassment, discrimination and retaliation from occurring in violation of Government Code section 12940(k). . . . [¶] As a proximate result . . . Plaintiff has been harmed . . . ." (Exh. 1, p. 10.)

In response to plaintiff's allegations and cause of action for failure to prevent, the City asserted the avoidable consequences defense which, if successful, would reduce the damages for the alleged harm she suffered. Specifically, the City asserted that it "exercised reasonable care, and properly took all steps necessary to prevent and correct" any FEHA violations and "Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities or to otherwise avoid harm." (Exh. 2, p. 19 [Eighteenth and Twenty-First Affirmative Defenses].) To establish that defense, "the employer ordinarily should be prepared to show that it has adopted appropriate antiharassment policies and has communicated essential information about the policies and the implementing procedures to its employees." (*State Department of Health Services*, *supra*, 31 Cal.4th at p. 1045.) If, for example, an employee complained during her employment about unlawful treatment, the employer asserting an avoidable consequences defense would be required to show that it promptly investigated such a complaint and took action to remediate the situation and prevent any further violative conduct, but that plaintiff failed to take advantage of the opportunities to avoid further harm. (Cf. *id*. at p. 1046 [if employer failed to investigate complaints or otherwise act on them, future

victims would have a strong argument the employer's policies and procedures were inadequate].)[7/]

2. The avoidable consequences defense addresses conduct during plaintiff's term of employment, not an investigation after her resignation in anticipation of litigation, and so there is no waiver.

It is apparent from the foregoing statement of controlling law that the focus of the avoidable consequences defense is on what occurred *during* employment to cause or limit plaintiff's damages. The avoidable consequences defense asserted here simply does *not* put in issue an investigation instituted *after* plaintiff left employment, when it was too late to remediate her situation and when the purpose of the investigation at that point was simply to prepare for anticipated litigation by finding out what happened.

That is to say, the "*substance* of the protected communication" — e.g., the investigation report and underlying documents — is "not *itself* tendered in issue" by means of the avoidable consequences defense asserted in the circumstances of this case and hence is not "essential" to the

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[7/] If a *future* claimant directed discovery to *past* complaints and investigations, such as the one at issue here, the City might well be put to the choice of continuing to assert the privilege *or* asserting an avoidable consequences defense as to that future claimant. For purposes of the damages allegedly incurred by plaintiff in *this* case, the avoidable consequences defense simply does not put in issue the post-employment investigation.

adjudication of the action. (*Mitchell*, *supra*, 37 Cal.3d at pp. 606, 609, emphasis added; *Southern California Gas Co.*, *supra*, 50 Cal.3d at pp. 40-41.) In short, it cannot be said "the gravamen of the [defense] is so inconsistent with the continued assertion of the privilege as to compel the conclusion that the privilege has in fact been waived." (*Transamerica Title Ins. Co. v. Superior Court* (1987) 188 Cal.App.3d 1047, 1052, citing *Wilson v. Superior Court* (1976) 63 Cal.App.3d 825.)

The trial court asserted that "the best evidence of what Defendant would have done earlier is what it has done in response to her EEOC complaint." (Exh. 13, p. 142.) This assertion defies logic in light of the timing and purpose of the investigation at issue. It evidences, as well, a complete failure to comprehend the law either of waiver or of the avoidable consequences defense.

Finally, it implies that the very act of assessing the facts and whether a defense is possible, much less developing that defense, strips the employer of protections the law otherwise provides for attorney-client communications. This cannot be the case.

The City has not waived protection for the post-employment investigation by its retained attorney. For this reason, too, the trial court's discovery order must be vacated.

3. In the unlikely event this Court agrees with the trial court that the avoidable consequences defense constitutes a waiver of attorney-client and work product protection, immediate disclosure would be improper.

If assertion of the avoidable consequences defense under the circumstances of this case constitutes a waiver of the attorney-client and work produce privileges — and the City strongly contends it does not — then in fairness the proper course is not to order immediate disclosure but to give the City the option of maintaining the defense and disclosing the documents and information or abandoning the defense and maintaining the privilege. At this stage of proceeding, there would be no prejudice to plaintiff in so doing. Given the facts and law here, it is not at all obvious that a defense addressing whether plaintiff took steps to minimize her damages during employment puts in issue a post-employment investigation, and if it does, then any waiver was plainly inadvertent. This Court should not countenance "a 'gotcha' theory of waiver" in which assertion of a defense intended to apply to conduct before plaintiff left her job "becomes the equivalent of actual consent" to the waiver of attorney-client and work product protections of a post-employment investigation. (*State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 654.)

CONCLUSION

For the reasons stated above, this Court should issue a peremptory writ of mandate directing respondent court to vacate its March 19, 2015 order granting plaintiff's motion to compel discovery and to enter a new order denying the motion.

DATED: June 19, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to rules 8.204(c)(1) and 8.486(a)(6) of the California Rules of Court, the **PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES** contains 6,904 words, not including the tables of contents and authorities, the caption page, the verification page, signature blocks, or this certification page.

DATED: June 19, 2015

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Alison M. Turner