1st Civ. No. A145437

Public Entity
~ No Fee Required ~
Gov. Code, § 6103

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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

TRAVERSE SUPPORTING PETITION FOR WRIT OF MANDATE

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INTRODUCTION

Plaintiff and real-party-in-interest Andrea Waters has filed a return to the City of Petaluma's petition for writ of mandate in which she attempts to justify the trial court's decision to compel discovery of the investigation into plaintiff's EEOC charge over the City's objection on the ground of attorney-client privilege and the work product doctrine.[1/] Plaintiff's efforts do not withstand scrutiny.

First, plaintiff attempts to short cut any analysis on the merits of the issues presented by contending that, under the substantial evidence standard of review, this Court must defer to the trial court's purported factual finding that the investigation did not constitute a communication between lawyer and client because the attorney-investigator, Amy Oppenheimer, was not to provide legal advice to the City as to what action it should take based on her findings. But the substantial evidence standard of review has no application here because the facts regarding the relationship between Oppenheimer and the City are undisputed, and the only task for the trial court was to decide the legal effect of those undisputed facts.

Second, plaintiff contends there was no attorney-client relationship between Oppenheimer and the City, and hence no attorney-client privilege

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[1/] As in its petition, the City refers to the documents and other information plaintiff seeks to discover collectively as "the investigation."

or work product protection for the investigation, because if an attorney is not providing legal advice, she is not providing legal services; plaintiff ignores or discounts the fact that the scope of services for which Oppenheimer was retained included the exercise of professional expertise and judgment as an attorney in marshaling and evaluating relevant evidence. Plaintiff's restricted view of the attorney-client relationship and legal services is not substantiated by law. Both federal and state law recognize the truism that ascertaining and evaluating facts for legal relevance is something an attorney acting as an attorney does. Obviously if obtaining legal advice is the purpose of retaining an attorney, the resulting relationship will be one of attorney-client. But no case cited by plaintiff stands for the proposition that *only* if the purpose is legal advice as to the client's ultimate course of action is there an attorney-client relationship.

Finally, plaintiff contends that even if the attorney-client privilege could attach to the investigation, it was waived when the City chose to assert the avoidable consequences defense in its answer to the complaint. The gist of her argument is that since an employer has a general duty to prevent discrimination in the workplace now and in the future, the time-frame of an investigation—here, post plaintiff's retirement from her job—is irrelevant. But the avoidable consequences defense is a mitigation of damages defense by which an employer attempts to prove the plaintiff

employee unreasonably failed to take advantage of its internal procedures to limit to some degree the harm she allegedly suffered. Reasonable use of the employer's internal procedures cannot happen unless the plaintiff is still employed. A post-employment investigation by definition can have nothing to do with a plaintiff's duty and opportunity to mitigate. Thus, asserting the avoidable consequences defense under the circumstances of this case did not place the substance of the post-employment investigation in issue such that the attorney-client privilege or work product protection was waived.

As more fully discussed below, plaintiff offers no sound reason why a writ should not issue directing the trial court to vacate its order compelling discovery pertaining to the investigation.

TRAVERSE

Petitioner City of Petaluma ("City") alleges as follows:

1. California law does not require an "answer to the answer." (8 Witkin, Cal. Procedure (5th ed. 2008) Extraordinary Writs, § 198, p. 1101.) The Return does not allege any affirmative defense to the writ petition, so there is no new claim that needs to be traversed.

2. Nonetheless, to the extent the Return alleges any material new matter in paragraphs 1 through 33, including the argument contained in these paragraphs, the City denies such new material matter and argument, including, without limitation, the allegations that the City waived the attorney-client privilege and work product protection, and that the retention agreement expressly declares that Oppenheimer would not be providing "legal services" to the City. (Return, pp. 6, 7, ¶ 33(a) and (d).)

3. This Court should grant the relief prayed for in the petition.

VERIFICATION

I, Eric W. Danly, declare:

I am an attorney duly licensed to practice law in California. I am the City Attorney for petitioner City of Petaluma, and was during the events giving rise to this action. I have reviewed and am familiar with the records and files that are the basis of the Petition and this Traverse. I have read the foregoing Traverse 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 October 29, 2015 at Petaluma, California.

Eric W. Danly

MEMORANDUM OF POINTS AND AUTHORITIES

THE INVESTIGATION IS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND/OR WORK PRODUCT DOCTRINE BECAUSE THE CITY RETAINED OPPENHEIMER'S FIRM TO PROVIDE LEGAL SERVICES IN THE FORM OF AN INVESTIGATION.

In its petition, the City established that the attorney-client privilege turns on the purpose of the relationship between attorney and client and that the City retained Amy Oppenheimer ("Oppenheimer") and her firm for the purpose of obtaining legal services in the form of an investigation to assist City Attorney Eric Danly ("Danly") in preparing to defend the City in an anticipated lawsuit and to enable him to advise the City as to a proper course of action. (Petition, pp. 28-32.)

In opposition, plaintiff contends this Court need not reach the merits of the City's arguments because the substantial evidence standard of review is controlling and the Court must defer to the trial court's purported finding of fact that no attorney-client relationship existed between Oppenheimer and the City. (Return, p. 9.) Limiting the meaning of "legal services" so that it is merely a synonym for "legal advice," plaintiff also contends that no attorney-client relationship existed: legal advice was beyond the scope of Oppenheimer's retention, and she was merely to be a fact-finder. (Return,

pp. 15-24.) She also contends the City "forfeited" the privilege. (*Id*., pp. 24-28.) Plaintiff's contentions are without merit.

A. The Substantial Evidence Standard Of Review Is Not Applicable To The Purely Legal Issues Before This Court.

Plaintiff contends that this Court must defer to the trial court's purported factual finding that no attorney-client relationship existed between Oppenheimer and the City, because the substantial evidence standard of review is controlling. (Return, p. 9.) Plaintiff is incorrect. When facts are conflicting, a trial court's factual determinations are reviewed for substantial evidence. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 ("*Costco*"); *Dorel Industries, Inc. v. Superior Court* (2005) 134 Cal.App.4th 1267, 1273.) However, in this case, the facts regarding the relationship between the City and its outside counsel are not in conflict; the only conflict or dispute is about the legal effect of those facts.

What it means to provide legal services, such that an attorney-client relationship is created, is purely a legal question. The trial court implicitly found Oppenheimer was not providing legal services, i.e., was not in an attorney-client relationship with the City on the basis of one undisputed fact: while Oppenheimer was retained to investigate the facts behind plaintiff's EEOC charge, she was not retained to give legal advice as to

what action the City should take on the basis of the findings resulting from her investigation. (See Exh. 13, pp. 139-140.) The trial court incorrectly determined the legal significance of that fact to be that no privilege or work product protection attached to the investigation. Because the trial court's ruling regarding privilege was based on an incorrect legal conclusion drawn from undisputed facts, its determination that the investigation was not privileged is subject to independent review. (See *Dorel Industries, Inc. v. Superior Court*, *supra*, 134 Cal.App.4th at p. 1273 [trial court's conclusion as to the legal significance of facts is subject to independent review]; see *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888 [classification of an item as a fixture is a question of law subject to independent review].)

When a trial court applies the wrong legal standard or otherwise bases its rulings on an incorrect understanding of the law, it abuses its discretion. (*Costco*, *supra*, 47 Cal.4th at p. 733; see also *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal.App.4th 359, 393 ["Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion"]; Petition, p. 28.) The trial court here abused its discretion when it granted plaintiff's motion to compel discovery of the investigation. It concluded:

no legal advice, no privilege. That conclusion is wrong as a matter of law. As further discussed below, the trial court's order cannot stand.

B. Plaintiff Fails To Refute The Fact That Oppenheimer Was Retained To Provide Legal Services To The City When She Was Retained To Conduct The Investigation.

Plaintiff contends the facts "overwhelmingly" contradict the existence of an attorney-client relationship between Oppenheimer and the City. (Return, pp. 11, 19.) Her principal contention is that "[t]he tasks spelled out in the retention agreement between Oppenheimer and Petaluma involved no legal advice or legal services," and she faults the City for supposedly failing to point to any "legal advice or legal services" required of or provided by Oppenheimer. (Return, pp. 12, 14.) Plaintiff's contention does not withstand scrutiny.

1. Undisputed evidence makes clear that the investigation was to be the product of and reflect Oppenheimer's skill and judgment as an attorney, and was to facilitate Danly's advice to the City.

As discussed (Petition, pp. 31-32), the undisputed evidence makes clear that Oppenheimer was retained to act as an attorney—not as a labor negotiator, not as a claims adjuster, but as one who would bring her legal skills to bear to assist the City in developing a response to plaintiff's

charges and the anticipated litigation.[2/] For example, the retention agreement not only expressly created an attorney-client relationship, but it also provided that Oppenheimer would use her "employment law . . . expertise" to produce findings based on her "professional evaluation of the evidence." (Exh. 8, p. 83.) Danly's declaration established that he retained Oppenheimer's firm "to benefit from her legal expertise" based on "over 30 years experience in employment law." (*Id*. at p. 80.) With this expertise, she would provide an impartial and thorough investigation to gather "all facts relevant to [plaintiff's] allegations and [the City's] potential . . . liability under applicable federal and state law." (*Ibid*.) In addition, her legal training and knowledge would ensure that the way she conducted the investigation would be procedurally correct under the law. (See *ibid.* [interview to comply with Fire Fighters' Bill of Rights, City policy, and applicable law].)

"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. . . .*" (*Upjohn Co. v. United States* (1981) 449 U.S. 383, 390-391 [101 S.Ct. 677, 66 L.Ed.2d 584], emphasis added; *Wellpoint*

[2/] Plaintiff cites a number of cases where attorneys were retained or employed to exercise skills *other than* their legal skills. (Return, p. 18.) These cases, therefore, have no application to this case, nor does plaintiff attempt to demonstrate otherwise.

Health Networks, Inc. v. Superior Court (1997) 59 Cal.App.4th 110, 128; *Harding v. Dana Transport, Inc.* (D.N.J. 1996) 914 F.Supp. 1084, 1091.) Oppenheimer was to assist Danly by handling this first step as the City prepared to defend against plaintiff's charges. (Exh. 8, pp. 80, 83.)

In short, she was retained to investigate the facts *because* of her expertise in employment law and her ability as an attorney to use professional judgment to obtain and evaluate legally relevant evidence for purposes of determining potential exposure. (*Ibid*.) She was to provide factual information to facilitate Danly's fulfillment of his duty under Government Code section 41801 to advise the City. Fact-gathering which pertains to and is to be the foundation for legal advice "counts as 'professional legal services.'" (*United States v. Rowe* (9th Cir. 1996) 96 F.3d 1294, 1297.)

In *Costco*, the Supreme Court instructed that a court analyzing the issue of privilege must first consider the dominant purpose of the relationship between an attorney and one who retains him or her. (*Costco*, *supra*, 47 Cal.4th at pp. 739-740.) Oppenheimer's "dominant purpose," indeed her only purpose, was to provide professional legal services so that Danly could in turn advise the City as to an appropriate course of action. As a matter of law, an attorney-client relationship existed between Oppenheimer and the City.

2. Plaintiff cites no authority for its cramped view of the attorney-client relationship.

The flawed assumption at the heart of plaintiff's contention that no attorney-client relationship existed is that if the services provided do not include legal advice, they are not legal services. Thus, plaintiff asserts "there was no attorney-client relationship because the purpose of the relationship was not to provide legal advice." (Return, p. 4; see also p. 13 [retention agreement provided that "Oppenheimer would *not* perform the tasks that are unique to an attorney in an attorney-client relationship—again, no legal advice and no legal services"].) Purporting to quote the Supreme Court in *Costco*, plaintiff contends, "[t]he attorney-client privilege 'does not attach to an attorney's communications when the client's dominant purpose in retaining the attorney was *something other than to provide the client with a legal opinion or legal advice.*'" (Return, p. 15, citing *Costco*, *supra*, 47 Cal.4th at p. 735, plaintiff's emphasis.) Plaintiff quotes a point made by the plaintiffs in *Costco*, not by the Supreme Court. But her position is consistent with the trial court's order. (See, e.g., Exh. 13, p. 139 [trial court rules only services consisting of "confidential legal advice" are protected].)

Astonishingly, the trial court went so far as to conclude that even if an attorney is retained to exercise professional expertise and judgment in gathering and evaluating evidence, she is not providing a legal service for

purposes of establishing an attorney-client relationship if she does not also provide advice. That is, the privilege or work product protection do not attach "just because the mechanics of the investigation itself reflect *an attorney's evaluation or interpretation of the law or the facts*. Upon Ms. Oppenheimer's engagement the parties agreed that she would not render legal advice. Accordingly, her conclusions cannot constitute her communications of *legal advice* to the City Attorney." (Exh. 13, pp. 139-140, first emphasis added.)

Behind plaintiff's contentions and the trial court's ruling is the notion that gathering facts is something any nonattorney could do. (See Return, p. 21 [Oppenheimer "conducted a who-did-what-to-whom investigation, (and) gave Petaluma her best guess as to who-did-what-to-whom"]; see *ibid.* ["Oppenheim's role was expressly limited to that of factfinder, and there is no evidence that she was hired to provide legal advice or legal services."].)[3/]

[3/] Plaintiff's repeated linking of legal advice and legal services throughout the brief underscores her position that legal services begin and end with legal advice. By logical inference, if an associate in a law firm gathered and evaluated the results of discovery, her results would not be protected because it was not her responsibility to advise the client, but the partner's. No one can seriously contend this division of labor within a firm limits the application of the privilege. Nor should it when there is a division of labor between outside counsel and another attorney who actually advises the client on the basis of outside counsel's findings.

Plaintiff's characterization of the investigation is of course based on speculation, since Oppenheimer's report has not been disclosed, and the characterization is also contrary to the undisputed facts that Oppenheimer's findings would be based on her "professional evaluation of the evidence," and that she was to make this evaluation in light of "applicable federal and state law." (Exh. 8, pp. 80, 83.) Such an evaluation is not something a nonattorney could do. Rather, it is a task that is "unique to an attorney." (See Return, p. 13 [Oppenheimer not to perform tasks "unique" to an attorney].)

In sum, the fact that a nonattorney can investigate facts does not mean that an attorney who investigates facts will not bring something to the investigation that a nonattorney cannot, namely legal experience and judgment. The City proffered evidence to establish that Oppenheimer and her firm were retained to perform legal services, evidence which plaintiff does not dispute but to which neither she nor the trial court assigns value because of a cramped view of the meaning of legal services and a false dichotomy between factfinding and legal services. The Court should reject such reasoning.

3. To contend that for an attorney-client relationship to exist, the dominant purpose of the relationship must be a particular form of privileged communication is to put the content cart before the relationship horse; per *Costco*, if the purpose of the relationship is to be one of attorney-client, then any confidential communication is privileged.

Plaintiff acknowledges that for purposes of the attorney-client privilege, one must determine the dominant purpose of the relationship. (Return, p. 18.) However, the gist of plaintiff's argument throughout the brief is that only one purpose qualifies to establish an attorney-client relationship, the purpose of obtaining legal advice. Thus, she cites *Costco* for the proposition that "[i]f the purpose of the relationship is in part to seek legal advice, and in part otherwise, application of the privilege turns on the *dominant* purpose." (Return, p. 16, original emphasis.) However, plaintiff incorrectly paraphrases *Costco*. The Supreme Court did not articulate so narrow a test, and certainly would not have articulated a test turning on one particular form of privileged communication between attorney and client—legal advice: it is the attorney-client relationship that determines whether a communication is privileged, not the other way around. Thus, what the *Costco* court actually said was that a court must first "determine the dominant purpose of the relationship . . . was it one of attorney-client" or something else, such as claims adjuster-insurance corporation. (*Costco*,

supra, 47 Cal.4th at pp. 739-740.) Once it is determined that the dominant purpose of the relationship is one of attorney-client, then a communication between attorney and client is privileged *whether or not it contains legal advice*. (*Costco*, *supra*, 47 Cal.4th at p. 736; see also *id.* at p. 739 [the privilege protects a "transmission irrespective of its content"]; *id.* at p. 734 [neither statutes nor case law differentiates between factual and legal information in interpreting the privilege].)

This is the point that the trial court failed to grasp. (See Exh. 13, p. 139 [trial court states that "even if the court were to conclude that Oppenheimer 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"].) For the trial court, no legal advice, no privilege. Plaintiff goes a step further: absent a purpose to seek legal advice, no attorney-client relationship. The law does not support this position.

Nor does the undisputed evidence. As discussed, the express purpose of the relationship between Oppenheimer and the City was that it be one of attorney-client, with communications between Oppenheimer and the City as confidential as they would be if the investigation were conducted by the City Attorney himself. Oppenheimer was to bring to bear her legal skills and knowledge of the law in order to determine the factual

issues that needed to be investigated in light of the law and in order to ask the right questions to obtain legally relevant facts. She was to provide a professional evaluation of the facts to determine potential exposure. In other words, she was to do the ground work of the defense, functioning as a lawyer. That there was to be a division of labor between Oppenheimer and Danly with respect to legal services does not make the services Oppenheimer provided something any nonlawyer could perform, and does not make her in any way comparable to the "soccer referee" of plaintiff's attempted analogy. (Return, pp. 1, 18.)[4/]

4. Plaintiff's additional evidence does not dispel the conclusion that Oppenheimer was retained to provide legal services.

As discussed, the only fact the trial court used to justify its ruling that communications between the City and Oppenheimer were not protected was that she was not retained to provide legal advice. (Exh. 13, pp. 139-140.) In an effort to present "overwhelming" evidence against the existence

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[4/] Plaintiff cites cases where the task of investigation and the task of preparing to prosecute or defend were purportedly performed by a single attorney. (Return, pp. 16-17, citing *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, *Harding v. Dana Transport, Inc*. (D.N.J. 1996) 914 F.Supp. 1084.) These cases do not hold much less suggest that if there is a division of labor, with different attorneys assigned different duties, communication between them regarding the facts developed in an investigation are not subject to the attorney-client privilege.

of an attorney-client relationship, plaintiff raises other purported facts that do nothing to refute the fact that Oppenheimer was providing legal services.

First, plaintiff suggests the fact that Oppenheimer was retained to do an "impartial" investigation and an "impartial" evaluation of the evidence is inconsistent with the notion that she was retained to provide legal services. (Return, pp. 13-14, 20.) This is an extraordinary notion. It would obviously be a disservice to a client facing a lawsuit to offer a biased, non-objective evaluation of the facts. The point in retaining outside counsel is to ensure that this does not happen. Not surprisingly, plaintiff cites no authority in support of the proposition suggested here—that the attorney-client relationship is only established between client and an attorney who simply tells a client what it wants to hear. For an attorney to be impartial is hardly a disqualification for the job of providing legal services.

Second, plaintiff contends Oppenheimer could not have been retained to assist the City Attorney in preparing to defend the City in the anticipated litigation because "[h]er name has not appeared anywhere in the litigation outside of the context of her role as a workplace investigator." (Return, p. 21.) The fact that Oppenheimer did not appear on pleadings as an advocate for the City once the lawsuit got underway is irrelevant. Not every attorney providing legal services is a litigator. Oppenheimer's role

was not to litigate but to lay the groundwork for the litigation once it got underway.

Third, plaintiff contends the retention agreement did not create an attorney-client relationship because it "left altogether open and up to the judiciary to determine whether any attorney-client relationship exists." (Return, p. 20.) This is not only incorrect, it is nonsense. The retention agreement expressly stated that it created an attorney-client relationship and that "unless or until" the City or a court decided otherwise, the investigation would be subject to the attorney-client privilege. (Exh. 8, p. 83.) The retention agreement simply acknowledges the obvious—namely that circumstances might change and the City might decide for whatever reason to waive the privilege, or a court might disagree with the City on the privilege issue if at some point the privilege were challenged. The language to which plaintiff points is not evidence that no attorney-client relationship was created by the retention agreement.

These additional "facts" only serve to establish that plaintiff has no sound basis upon which to argue the nonexistence of an attorney-client relationship between Oppenheimer and the City such that the investigation must be disclosed. The attorney-client privilege and work product doctrine protect the investigation from disclosure. As next discussed, there was no waiver of that protection.

C. Plaintiff Fails To Establish That Assertion Of The Avoidable Consequences Defense, Which Pertains To Her Efforts To Mitigate Damages While Employed, Puts The Post-Employment Investigation In Issue.

In finding waiver of the attorney-client privilege, the trial court found that the City's post-employment investigation into plaintiff's EEOC charges for purposes of defending anticipated litigation was the "best evidence" of what actions the City would have taken before plaintiff's resignation, and so, implicitly, the post-employment investigation was at issue and any privilege as to it waived. (Exh. 13, p. 142.)

Plaintiff contends the post-employment investigation is at issue because an employer's "investigatory and remedial" duties continue after an employee has left employment, since the employer's corrective action must address not only current harassment but deter such conduct in the future. (Return, p. 27.) Plaintiff also suggests that the employer has a duty to reinstate and so the fact that a plaintiff is no longer employed at the time of an investigation cannot be dispositive. (Return, p. 26.)

Both the trial court and plaintiff fail to grasp or choose to ignore three points that are fundamental to the question of waiver and the avoidable consequences defense:

- It is first and foremost a *defense* as to damages based on a doctrine that focuses on a *plaintiff's duty to mitigate* her damages, although obviously in proving this defense, a defendant must prove that the opportunity to mitigate was available;
- For there to be waiver of the privilege, the party claiming privilege must have put the communication *directly* at issue;
- Disclosure must be essential for a fair adjudication of the action.

(Petition, pp. 38-40.)

Moreover, both trial court and plaintiff ignore the basic principles of waiver articulated by this Court and others:

> Waiver requires the *intentional* relinquishment of a known right upon knowledge of the facts. The burden is on the party claiming a waiver of right to prove it by clear and convincing evidence that does not leave the matter to speculation. As a general rule, doubtful cases will be decided against the existence of a waiver.

(*Ringler Associates Inc. v. Maryland Cas. Co.* (2000) 80 Cal.App.4th 1165, 1188, emphasis added ("*Ringler*").)

1. Plaintiff's duty to mitigate.

Plaintiff cites the Supreme Court's recitation of the elements of an avoidable consequences defense in *State Department of Health Services v. Superior Court* (2003) 31 Cal.4th 1026 ("*State Department of Health*

Services"). (Return, pp. 24-25.) The discussion that follows, however, omits any mention of an *employee's responsibilities* with respect to preventive or corrective measures, which are at the heart of the avoidable consequences defense. There is no reference to the common law doctrine of avoidable consequences which focuses on the plaintiff: "a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure." (*State Department of Health Services, supra,* 31 Cal.4th at p. 1043.) There is no reference to the purpose of the defense—to allow the employer "to escape liability for 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." (*Id.* at p. 1044.)

In fact, there is no way to infer from plaintiff's argument, or the trial court's ruling, that the avoidable consequences defense is about anyone's duty but the employer's, i.e., no way to discern that it arises from the *employee's* "legal duty to mitigate damages while pursuing remedies against [her] former employer." (*Candari v. Los Angeles Unified School Dist.* (2011) 193 Cal.App.4th 402, 409; *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 871.)

Indeed, plaintiff takes the position that the investigation is at issue because the adequacy of the employer's conduct in the face of discrimination *in general* is at issue, because the employer has a duty to prevent workplace discrimination at all times. On that premise, the time-frame of the particular investigation at issue would be irrelevant. Thus plaintiff states "In considering the defense, the jury is obligated to consider whether Petaluma in general took reasonable steps to avoid workplace misconduct. Among other evidence . . . the jury will consider whether Petaluma's conduct in *this* case was reasonable. And in *this* case those steps included the post-employment investigation." (Return, p. 26, original emphasis.) In other words, the post-employment investigation is merely evidence of whether the City's response to workplace misconduct was generally reasonable or adequate. Plaintiff is removed from the equation.

But the avoidable consequences defense is not about the City's obligations "in general." It is about plaintiff's obligation to mitigate and whether the City is able to prove that obligation was not met through no fault of its own. "The avoidable consequences doctrine enables an employer to show that reasonable use of its internal procedures would have prevented at least some of the harm the employee suffered." (*Rosenfeld v. Abraham Joshua Heschel Day School, Inc.* (2014) 226 Cal.App.4th 886, 889-890.) Reasonable use of the employer's internal procedures cannot

happen unless the plaintiff is still employed. The assertion of the avoidable consequences defense may put the adequacy of an investigation into a person's allegations at issue if that person is still employed and able to take advantage of the opportunity of any corrective measures the employer undertakes as a result of such an investigation; and under those circumstances the employer may waive the privilege as to that pre-retirement investigation. But a post-retirement investigation can have nothing to do with a plaintiff's duty to mitigate through use of the employer's internal procedures. Once retired, it's too late for her to use those procedures.

Plaintiff's attempt to circumvent this problem and to render irrelevant the fact that the investigation was post-employment by raising a purported duty to reinstate is meritless. She cites no authority for the proposition that "[c]ourts have long held that . . . post-employment inquiries are very much part of the remediation effort because employers can and should make 'unconditional offers of reinstatement.'" (Return, p. 26.) Reinstatement may be an optional remedy but the one case plaintiff cites, *Ford Motor Co. v. EEOC* (1982) 458 U.S. 219 [102 S.Ct. 3057, 73 L.Ed.2d 721], simply held that rejection of an unconditional job offer ends the accrual of potential backpay liability under Title VII. (*Id*. at pp. 231-232.) *Ford* did not hold that an employer is obligated to offer reinstatement.

Reinstatement as a remedy is irrelevant in this case, in any event. FEHA does not mandate reinstatement. There is no allegation or evidence that plaintiff ever sought and was refused reinstatement, or that the purpose of the investigation was to determine whether reinstatement would be an appropriate remedy. In other words, plaintiff raises the issue of reinstatement in a complete vacuum to further distract from the fact that the avoidable consequences defense in this case is first and foremost about this plaintiff's duty to mitigate her damages, so that when the investigation, and any corrective action, occurred is critical to the analysis.

2. Plaintiff fails to show the City put the investigation *directly* at issue.

There is no "waiver of the attorney-client privilege where the substance of the protected communication is not itself tendered in issue, but simply represents one of several forms of indirect evidence in the matter." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 590, 606; *Southern California Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 41.) As the foregoing discussion makes plain, both trial court and plaintiff view the substance of the investigation as *indirect* evidence bearing on whether the City fulfilled *its* duty to correct and deter wrongful conduct in the workplace.

But the proper question is whether asserting the avoidable consequence defense places a post-employment investigation directly at

issue. Is the investigation at the heart of the City's avoidable consequences defense? Clearly not. An investigation conducted after the employee has left cannot result in corrective measures that *she* could take advantage of, because she is no longer in a position to do so, having resigned.[5/]

3. Plaintiff makes no attempt to show disclosure of the investigation is essential to a fair adjudication of the case. In fact, it is not.

The notion behind this principle pertaining to waiver in the context of the avoidable consequences defense is obvious: An employer cannot rely on the substance of its investigation as evidence that it responded appropriately to an employee's allegations of discrimination, but then refuse on the grounds of privilege to allow the evidence to be tested. Nothing like that is happening here.

Here, in asserting the avoidable consequences defense, the City is asserting that during plaintiff's employment, it had in place policies and procedures she failed to take advantage of before she quit her job and sued for damages. The City will be able to prove the avoidable consequences

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[5/] If a *future* claimant directed discovery to *past* complaints and investigations, such as the one at issue here, the City might be put to the choice of continuing to assert the privilege *or* asserting an avoidable consequence 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.

defense without reference to the investigation for which it claims privilege. That investigation conducted after plaintiff left was to prepare for an inevitable lawsuit, not to provide opportunities of remediation *as to her*. Hence, disclosure of the substance of the investigation is not essential to a fair adjudication of the case.

Plaintiff may think otherwise because the investigation may include, e.g., factual information gained through witness interviews that arguably might help her case. But a privilege is not waived because the information in the communication may be relevant to a case and useful to the person opposing the privilege. (See *Costco*, *supra*, 47 Cal.4th at p. 732 [the Legislature has determined that the importance of preserving confidentiality in the attorney-client relationship outweighs the fact that "exercise of the privilege may occasionally result in the suppression of relevant evidence"].) Indeed, plaintiff cannot be heard to complain about the application of the privilege. "[I]f . . . the factual material referred to or summarized in [the investigation] is itself unprivileged it may be discoverable by some other means, but plaintiffs may not obtain it by compelling disclosure of the [investigation]." (*Id*. at p. 736.) Plaintiff has those other means available without violating the attorney-client privilege.

4. Plaintiff has not shown an intentional and knowing relinquishment of the privilege.

Given the circumstances of this case, the City had no reason to know it was relinquishing the right to assert the attorney-client privilege or work product protection with respect to the investigation. Indeed, the very fact that a debate over whether waiver occurred is taking place in this Court undercuts any conclusion that the City knowingly waived its rights. The uncertainty raises at least a legitimate doubt as to whether waiver occurred, and doubtful cases, according to this Court, "will be decided against the existence of a waiver." (*Ringler*, *supra*, 80 Cal.App.4th at p. 1188.)

CONCLUSION

For the reasons stated above and in the petition, 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: October 30, 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 **TRAVERSE SUPPORTING PETITION FOR WRIT OF MANDATE** contains 5,846 words, not including the tables of contents and authorities, the caption page, the verification page, signature blocks, or this certification page.

DATED: October 30, 2015

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Alison M. Turner

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On October 30, 2015, I hereby certify that I electronically filed the foregoing **TRAVERSE SUPPORTING PETITION FOR WRIT OF MANDATE** through the Court's electronic filing system, TrueFiling.

I certify that participants in the case who are registered TrueFiling users will be served by the electronic filing system pursuant to California Rules of Court, rule 8.70:

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I further certify that participants in this case who are not registered TrueFiling users are served my mailing the foregoing document by First-Class Mail, postage prepaid to the following non-TrueFiling participant(s):

Honorable Elliot Lee Daum
Judge of the Sonoma County Superior Court, Courtroom 16
3035 Cleveland Avenue, Suite 200
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[Respondent / Case No. SCV-256309]

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Executed on October 30, 2015 at Los Angeles, California.

/s/ Pauletta L. Herndon
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