Case No.: A145437

Exempt from Fees
(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 SONOMA,

Respondent.

ANDREA WATERS,

Plaintiff and Real Party in Interest.

PROPOSED *AMICUS CURIAE* BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, CALIFORNIA ASSOCIATION OF JOINT POWERS AUTHORITIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION ON BEHALF OF PETITIONER, CITY OF PETALUMA

The Honorable Elliot Lee Daum, Judge of the Superior Court
Superior Court of the State of California, County of Sonoma
Case No. SCV 256309
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INTRODUCTION

The public entities that comprise the membership of *Amici Curiae* the League of California Cities, the California State Association of Counties, the California Association of Joint Powers Authorities, and the California Special Districts Association (collectively, "*Amici*"), like all employers, face important decisions when an employee files an administrative charge with the Equal Employment Opportunity Commission ("EEOC") alleging workplace harassment and retaliation and then promptly quits. One critically important decision under such circumstances, given the reasonable probability of litigation implicit in the employee's actions, relates to how the public entity will go about assessing the employee's claims.

This decision will often hinge on a variety of factors including, but not limited to, how much is already known about the allegations, the resources of the public entity, the level of relevant in-house expertise, the nature and complexity of the allegations, the identities of the complainant and/or respondent, and the likelihood of litigation. In certain situations, public entities may choose to investigate such claims themselves. In other circumstances, particularly where litigation appears likely, public entities may hire outside attorneys to investigate the claims in order to both benefit from their legal expertise and to avail themselves of the attorney-client privilege and work product doctrine.

In this case, Petitioner City of Petaluma ("Petitioner" or the "City"), when confronted with the factual scenario sketched out above, i.e., an employee's filing of an administrative charge alleging harassment and retaliation followed closely by a resignation, chose to hire an outside attorney – a specialist in employment law with some 30 years' experience in the field as an attorney, investigator, arbitrator and mediator – to conduct

an impartial investigation into the former employee's claims. This post-resignation, pre-litigation investigation was, among other things, intended to gather all facts relevant to the employee's allegations and the City's potential liability under state and federal law. Importantly, the City was seeking to ensure, given the likelihood of litigation and corresponding rights of discovery, that any investigative report (and related notes and analysis prepared by the outside attorney) would be subject to attorney-client and work product protections.

This not-uncommon fact pattern has given rise to two questions of significant import to public entities in the area of workplace investigations conducted by outside counsel.

The first is whether 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, is 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.

The second is whether an employer waives the attorney-client or work product privileges by asserting the "avoidable consequences" defense in an answer to a complaint, even when it is undisputed that the investigation at issue was initiated after plaintiff left employment.

Amici respectfully submit that, contrary to the conclusions of the trial court on these important questions, the answer to the first question is yes and the answer to the second is no.

This brief focuses not on the legal arguments set forth by Petitioner supporting these core conclusions, but instead examines the potential negative ramifications of the trial court's decision on public entities – and

on the public interest and public policy more generally. As discussed more fully below, the trial court's decision creates a potent disincentive for public entities to conduct thorough investigations of harassment, discrimination and retaliation claims lodged by employees or former employees because of the possibility that the investigative reports and materials gathered as part of such investigations may be subject to disclosure over objections based on the attorney-client privilege and work product doctrine. In discouraging such investigations, the trial court's decision in turn interferes with sound, timely and fact-based decision-making by public entities about whether a case should be settled or litigated, erodes the public interest in identifying, rooting out and preventing discriminatory practices where they might exist, and hampers the ability of public entities to defend fully against such claims.

Moreover, the decision of the trial court below – that the mere assertion of the "avoidable consequences" affirmative defense in the City's answer to Plaintiff's complaint effectively waived the attorney-client and work product protections otherwise applicable to the post-resignation, pre-litigation investigation of this former employee's claim – is again against the public interest because it further impairs the ability of public entities to defend fully against claims of harassment, discrimination or retaliation by exacting an automatic privilege waiver in return for merely pleading a potential defense.

Amici respectfully request that this Court issue the writ of mandate sought by Petitioner directing the respondent court to vacate its order of May 19, 2015, granting Plaintiff's motion to compel discovery and to enter a new order denying the motion.

STATEMENT OF FACTS

In the interest of economy, *Amici* adopt the statement of facts set forth in the Petition for Writ of Mandate, Prohibition or Other Appropriate Relief filed by Petitioner.

ARGUMENT

I. The Trial Court's Erroneous Decision, if it Stands, Would Discourage Public Entities From Conducting Thorough Investigations into Claims of Harassment, Discrimination and Retaliation

Every year, the California Department of Fair Employment and Housing ("DFEH") and the EEOC receive thousands of complaints made by persons alleging that they have been subjected to conduct violating the state and federal civil rights laws enforced by these agencies.

The DFEH, for instance, annually processes more than 19,000 complaints alleging violations of the laws enforced by that agency, with a majority of such complaints involving allegations of discrimination in employment in violation of the California Fair Employment Housing Act ("FEHA") (Government Code section 12900 *et seq*.).[1] The EEOC, meanwhile, averaged 7,000 charges filed annually in California from fiscal years 2009 to 2014.[2] Public employers are certainly not immune from such complaints.

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[1] These figures are contained in the DFEH's Report to the Joint Legislative Budget Committee, dated March 2015, which is available at the DFEH Web site at *http://www.dfeh.ca.gov/res/docs/Statisitcs/2015/DFEH%20Report%20to%20the%20Legislature%20(2).pdf*. *Amici* respectfully request that the Court take judicial notice of this report pursuant to Evidence Code sections 452(h) and 459(a).

[2] Statistical information regarding EEOC Charge Receipts for California is available at the EEOC Web site at *http://www1.eeoc.gov/eeoc/statistics/enforcement/charges_by_state.cfm#centercol*. *Amici* respectfully request

Employers, public and private alike, are under a legal duty to promptly investigate allegations of workplace discrimination and harassment. (Gov. Code, § 12940(j)(1), (k); *California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1024-1025 [holding that an employer's statutory obligation to prevent discrimination includes a requirement that the employer promptly investigate a discrimination claim]; *Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035-1036 [similar].) By statute, employers are permitted to hire outside attorneys "performing his or her duties as an attorney at law" (or licensed private investigators) to investigate these kinds of employment-related complaints. (Bus. & Prof. Code, § 7522 (e); *see generally* Bus. & Prof. Code, § 7520 *et seq.*)

Here, Plaintiff filed a charge with the EEOC and then quit City employment, all within the span of several days in May 2014. Given these factual circumstances, it was eminently reasonable for the City Attorney to anticipate that litigation was on the horizon.[3] In light of this reasonable prospect of litigation, the City in this case hired Amy Oppenheimer, a seasoned employment law attorney and investigator, to investigate Plaintiff's claims, which investigation indisputably occurred following Plaintiff's resignation. (Exh. 8 to Petition for Writ of Mandate, pp. 83-84.) The retention agreement between the City and Oppenheimer stated that the agreement created an attorney-client relationship between the City and the Law Offices of Amy Oppenheimer and that the investigation would be

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that the Court take judicial notice of this statistical information pursuant to Evidence Code sections 452(h) and 459(a).

[3] Indeed, Plaintiff filed suit against the City in November 2014 under the FEHA on theories of hostile work environment harassment, discrimination, retaliation and failure to prevent harassment, discrimination and retaliation. (Exh. 1 to Petition for Writ of Mandate.)

subject to the attorney-client privilege unless the privilege were waived or a court determined that it did not apply. (*Ibid.*) It further stated that Oppenheimer would rely on her employment law and investigation expertise in conducting the inquiry and would reach findings based upon "an impartial and professional evaluation of the evidence." (*Ibid.*) The retention agreement stated that Oppenheimer would "not render legal advice as to what action to take as a result of the findings of the investigation," which would be the sole responsibility of the City Attorney (*Ibid.*) – an unsurprising provision given that by law, "[t]he city attorney shall advise city officials in all legal matters pertaining to city business." (Gov. Code, § 41801; *see also* Petaluma City Charter section 26.)

Under the circumstances presented here, the public interest tilts strongly in favor of affording the City the option of proceeding precisely as it did, i.e., hiring outside counsel, well-versed in the relevant field of law, to conduct an investigation of the former employee's claims under the auspices of the attorney-client privilege (Evidence Code section 954) and the work product doctrine (Code of Civil Procedure section 2018.30). The trial court's rejection of attorney-client and work product protections for the investigation conducted in this case creates a powerful disincentive for public entities to fully, impartially and professionally investigate such claims, which disincentive is against the public interest and public policy.[4]

[4] This is not to say, of course, that there are never situations in which a public entity may choose or, indeed, may be required, to disclose an investigative report (or related materials) that might otherwise be protected by the attorney-client privilege or work product doctrine. For instance, a public entity may in effect waive the attorney-client privilege regarding the contents of an attorney's investigation where it relies on the investigation – i.e., puts the investigation directly in issue – in defending against a claim that it failed to prevent discrimination, harassment and/or retaliation from occurring. (*See Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 128.) Moreover, to the extent a public entity might

First, the trial court's decision, by discouraging thorough investigations into allegations of harassment, discrimination and retaliation, runs contrary to the strong public policy favoring the elimination of workplace discrimination and harassment. The FEHA makes plain that public policy requires the protection and safeguarding of the right and opportunity of all persons to seek, obtain and hold employment without discrimination and that the FEHA itself is intended to eliminate discriminatory practices. (Gov. Code, § 12920.) Less-than-thorough investigations will most certainly make it more difficult for public entities to accurately identify instances of harassment and discrimination in their ranks, which will in turn make it more difficult for public entities to take steps needed to effectively address such conduct, e.g., disciplinary action, reassignments and/or policy changes. (*See Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 126 [remedial action reasonably calculated to end harassment "is unlikely to take shape in the absence of a thorough investigation of the alleged acts of harassment"].)

Second, and relatedly, it is in the public interest for public entities to have the opportunity to obtain frank and impartial assessments of potential litigation – protected by the attorney-client privilege and work product doctrine, if they so choose – at an early stage, so that they can determine

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seek to rely on the findings of an investigation in taking punitive action against a permanent public employee, due process would in all likelihood require disclosure of the investigation to the employee in question. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215.) Those situations are, however, markedly different from the present one in that under those circumstances, the employer has made a decision to affirmatively put in issue or rely upon the investigative report in either defending itself in litigation or in imposing discipline against an employee with a property interest in employment.

whether or not a claim is potentially meritorious.[5] Candid assessments that lay out the "good" facts as well as the "bad" are critically important to the ability of public entities to make informed decisions about whether, for instance, to settle a meritorious claim at an early stage prior to a significant expenditure of public funds, or whether litigation, and the corresponding financial outlay that the same will entail, is warranted in the case of an unmeritorious claim. Indeed, the policy underlying the work product doctrine is intended to further this goal of in-depth case preparation by "preserv[ing] the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases." (Code Civ. Proc., § 2018.020(a).) Recognizing the attorney-client privilege and work product doctrine under these circumstances clearly furthers the public interest in informed decision-making by public officials who are fully apprised of the totality of relevant facts. The trial court's decision would in effect inhibit such decision-making. It is noteworthy that the Ralph M. Brown Act (Government Code section 54950 *et seq*.) allows for confidential closed sessions by local legislative bodies on matters involving potential litigation against the agency (Government Code section 54950(d)(2)) and that the California Public Records Act exempts from disclosure records pertaining to pending or anticipated litigation to which a public agency is a party until the matter has been finally adjudicated or otherwise settled (Government Code

[5] It is not uncommon for charges filed with the EEOC or DFEH to provide very cursory descriptions of the allegedly unlawful conduct at issue, which dearth of information makes investigations into such claims that much more important. (*See, e.g.*, 29 C.F.R. § 1601.12 [persons filing EEOC charges need only provide a "clear and concise" description of the alleged unlawful employment practices and charges are liberally construed for sufficiency].)

section 6254(b)). These provisions of law are statutory embodiments of the importance of allowing public entities an opportunity, if they so choose, to confidentially assess potential litigation.

And third, the trial court's decision adversely affects the ability of public entities to potentially defend against harassment, discrimination and retaliation claims by raising the specter that any pre-litigation investigation they conduct – whether through outside counsel or otherwise – could be obtained and used against them by potential plaintiffs. (It bears noting, on this front, that the work product doctrine is intended, among other things, to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., § 2018.020(b).) The truth is that public entities face the same hard realities as other civil litigants. The interpretation of the trial court effectively relegates them to second-class status vis-à-vis plaintiffs, who would be in prime position to take undue advantage of public entities' efforts to investigate potential cases in anticipation of litigation. Indeed, under the trial court's rationale, a reasonably prudent city attorney would be duty-bound to carefully consider whether a thorough investigation under circumstances such as those presented here would even be advisable given that any adverse findings, recommendations for policy changes, or the like would be almost certain to become fodder for plaintiff's counsel. Thus, absent the protections afforded by the attorney-client privilege and work product doctrine, public entities will in all likelihood conduct far narrower investigations into claims of harassment, discrimination or retaliation – particularly where litigation appears likely – out of concern that their adversaries may be able to use these public entities' own efforts against them.

In sum, the trial court's decision discourages full and thorough investigations – which investigations further the public interest in

facilitating sound decision-making by public officials, eradicating discriminatory employment practices, and affording public entities the opportunity to defend themselves in litigation. To avoid such a result, *Amici* respectfully request that the City's Petition be granted.

II. The Trial Court's Erroneous Decision that the City Waived the Attorney-Client and Work Product Protections Otherwise Applicable to a Pre-Litigation Investigative Report Further Interferes with the Ability of Public Entities to Defend Themselves in Litigation

An employer sued for sexual harassment under the FEHA may assert the avoidable consequences doctrine as a defense. If successful, the employer will avoid liability for damages the employee "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." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1044.)

Here, the trial court concluded that even if the attorney-client privilege or work product doctrine applied to the post-resignation, pre-litigation investigation and related information sought by Plaintiff, the City had "waived any privilege that may have attached" by pleading the avoidable consequences doctrine as an affirmative defense in its answer.

The trial court's decision on this issue further undercuts the ability of public entities to fully prepare for, and defend themselves fully in, litigation. This is because it exacts from a public entity (and potentially any employer), at an early stage in the litigation, a waiver of the attorney-client privilege and work product doctrine merely for pleading a potential affirmative defense (the precise contours of which may have yet to be

determined).[6] Moreover, the trial court's decision improperly presumed that the City's "best evidence" on the potential avoidable consequences defense was the post-resignation, pre-litigation investigative report commissioned by the City. In doing so, the trial court ignored the possibility that the City, as the party bearing the burden of proof on this potential defense, might well seek to rely on evidence other than the report in proving the defense – e.g., evidence that the City had anti-harassment policies and procedures in place and Plaintiff during her employment failed to avail herself of them, or that the City took adequate preventative measures during her employment – a distinct possibility given that the defense focuses on whether a plaintiff, during her employment, unreasonably failed to use the preventative and corrective measures for sexual harassment that the employer provided. (*See* Judicial Council of California Civil Jury Instructions (2015 edition) CACI No. 2526). On this point, the trial court failed to meaningfully analyze or articulate how, in its view, assertion of the avoidable consequences defense by the City purportedly placed in issue a pre-litigation investigative report conducted for the City after Plaintiff resigned from City employment.

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[6] It bears noting that as a procedural matter, an answer must contain the following: (1) "The general or specific denial of the material allegations of the complaint controverted by the defendant" and (2) "A statement of any new matter constituting a defense." (Code Civ. Proc., § 431.30(b).) Under the established rules of pleading, "[a] party who fails to plead affirmative defenses waives them." (*California Academy of Sciences v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442; *Hughes v. Nashua Mfg. Co.* (1968) 257 Cal.App.2d 778, 783.) Thus, good practice would dictate that all possible affirmative defenses, even those inconsistent in legal theory or fact, be raised in an answer because of the potential consequences for failure to do so. Pleading an affirmative defense in an answer does not require a defendant to pursue it.

In sum, the City's Petition should be granted on the further basis that the trial court's decision impedes the ability of public entities to defend themselves in litigation by improperly assuming a waiver of attorney-client and work product protections where an employer pleads the avoidable consequences defense in an answer.

CONCLUSION

For all the foregoing reasons, *Amici* respectfully request that this Court issue the writ requested by Petitioner directing the trial court to vacate its order of May 19, 2015, granting Plaintiff's motion to compel discovery and enter a new order denying the motion.

Dated: October 29, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, IVAN DELVENTHAL, an attorney duly admitted to practice before all courts of the State of California and an attorney for *Amici Curiae*, hereby certify that the attached brief complies with the form, size and length requirements of Rule 8.204 of the California Rules of Court in that it was prepared in proportionally spaced type in Times New Roman 13-point, double-spaced, and contains fewer than 14,000 words as measured by the word count function of "Microsoft Office Word 2013."

DATED: October 29, 2015

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned, am employed by Renne Sloan Holtzman Sakai LLP. My business address is 350 Sansome Street, Suite 300, San Francisco, California 94104. I am readily familiar with the business practices of this office. I am over the age of 18 and not a party to this action.

On October 29, 2015, I served the following document(s):

PROPOSED *AMICUS CURIAE* BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, CALIFORNIA ASSOCIATION OF JOINT POWERS AUTHORITIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION ON BEHALF OF PETITIONER, CITY OF PETALUMA

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☑ **United States Mail**. I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses on the attached Service List and deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

Honorable Elliot Lee Daum Judge of the Sonoma County Superior Court Courtroom 16 3035 Cleveland Ave., Ste. 200 Santa Rosa, CA 95402	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 29, 2015, at San Francisco, California.

By: */s/ Rochelle Redmayne*
Rochelle Redmayne