2002 WL 31947153
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
SAFEWAY STORE, INC., Defendant.

No. C–00–3155 TEH(EMC). | Sept. 16, 2002.

Intervenor/claimant in Equal Employment Opportunity Commission (EEOC) worker's compensation action against employer moved to compel production of documents from employer. The District Court, Chen, United States Magistrate Judge, held that: (1) employer's late delivery of privilege log in response to discovery requests did not warrant waiver of asserted privileges; (2) attorney-client privilege was not applicable absent evidence of confidentiality; (3) documents created by self-insured employer as part of internal investigation into claim were not within work-product doctrine; (4) work-product doctrine did protect documents authored in anticipation of EEOC case; (5) work-product doctrine did not protect third-party investigator's report that included co-worker interviews, given its relevance to claimant's assertion of harassment; and (6) claimant was entitled to attorney fees based on employer's needless delay in producing privilege log.

Motion granted in part and denied in part.

Opinion

ORDER RE ORR'S MOTIONS TO COMPEL (No. 46) AND FOR ATTORNEY'S FEES (No. 45)

CHEN, Magistrate J.

***1** On May 23, 2002, Intervenor Karen Orr filed a Motion to Compel Production of Documents and a Motion for Attorney's Fees.

On August 5, 2002, the Court granted in part Orr's Motion to Compel and took under submission the issue of whether defendant Safeway Stores, Inc. ("Safeway") waived its asserted attorney-client privilege doctrine and/or work-product doctrine over Safeway's internal investigative reports requested by Orr in Inspection Demand Nos. 17 and 18, and Orr's Motion for Attorney's Fees.

The Court, having reviewed the briefs, supporting documentation and record in this case, as well as having heard the argument of counsel at the July 31, 2002 hearing, makes the following determinations:

WAIVER OF THE PRIVILEGE CLAIMS

Orr contends that Safeway's assertion of the attorney-client privilege and/or work-product doctrine for the investigative reports that are the subject of Orr's Inspection Demand Nos. 17 and 18, is improper, because Safeway has waived any privileges based on its failure to provide a privilege log until 4:00 p.m. on July 30, 2002.

Once a request for discovery is served, Federal Rule of Civil Procedure 34(b) provides in pertinent part that the responding party must "state with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated." Where the responding party seeks to assert the attorney-client privilege and or the work-product doctrine, the party's assertion must be express and

"describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." Fed.R.Civ.P. 26(b)(5). *See Cable & Computer Technology, Inc. v. Lockheed Saunders, Inc.,* 175 F.R.D. 646, 650 (C.D.Cal.1997) ("[T]he party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying explaining and supporting its objections."); *Brown v. Smythe,* No. Civ. 90–3815, 1991 WL 275785, *1 (E.D.Pa. Dec.18, 1991) (stating that the party seeking to assert the attorney-client privilege or the work product doctrine must make "a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality"). Generally, the responding party asserting certain protections provides the propounding party with a privilege log containing "the date of the document, the name of its author, the name of its recipient, the names of all people given copies of the document, the subject of the documents and the privileges asserted." *Brown,* 1991 WL 275785, at *1. *See* Schwarzer, Tashima & Wagstaff, *California Practice Guide: Federal Civil Procedure Before Trial,* § 11:735–36 (2001 revised). The responding party should also provide competent evidence where necessary to substantiate a claim of privilege.

***2** [1] Here, Orr's discovery request was propounded on Safeway in November 2001. Safeway timely responded to the request in January 2002. In response to Inspection Demand Nos. 17 and 18, Safeway offered the following responses:

> [Safeway] objects to [Inspection Demand No. 17] on the grounds that is (*sic*) vague, ambiguous and overly broad as to time an (*sic*) subject matter, seeks documents that are not relevant to this action nor reasonably calculated to lead to the discovery of admissible evidence, seeks documents protected from disclosure by the attorney-client privilege and/or work product doctrine, and seeks documents protected from disclosure by third-party privacy rights.
>
> [Safeway] objects to [Inspection Demand No. 18] on the grounds it is vague, ambiguous and overly broad as to time and the terms "investigator" and "statements," and seeks documents protected from disclosure by third-party privacy rights.

Safeway's response was clearly inadequate. Where, as here, the responding party provides a boilerplate or generalized objection, said "objections are inadequate and tantamount to not making any objection at all." *Walker v. Lakewood Condominium Owners Association,* 186 F.R.D. 584, 587 (C.D.Cal.1999). *See Ritacca v.. Abbott Laboratories,* 203 F.R.D. 332, 335 n. 4 (N.D.Ill.2001) ("As courts have repeatedly pointed out, blanket objections are patently improper, ... [and] we treat [the] general objections as if they were never made." (internal citation omitted)). *See also U.S. ex rel. Burroughs v. Denardi Corp.,* 167 F.R.D. 680, 687 (S.D.Cal.1996) (*"Denardi"*) ("Generally, a party's failure to serve timely objections to document production requests constitutes waiver of any objections which the party might have to the requests."), *citing, Richmark Corp. v. Timber Falling Consultants,* 959 F.2d 1468, 1473 (9th Cir.), *cert. dismissed, China Everbright Trading Co. v. Timber Falling Consultants, Inc.,* 506 U.S. 948, 113 S.Ct. 454, 121 L.Ed.2d 325 (1992).

However, this inadequate response does not necessarily imply that Safeway has waived attorney-client privilege and/or the work product doctrine as to Inspection Demand Nos. 17 and 18. Safeway provided Orr with a privilege log on July 30, 2002. The log was six months tardy and was provided only after Orr filed a motion to compel discovery of documents.

Safeway answers that since January, it has indicated to Orr that a privilege log would be forthcoming and that Safeway's delay was due in part to its effort to clarify the scope of Orr's request and attempt to negotiate a protective order.

Finding that a party has waived its right to assert a privilege objection due to its conduct (or lack thereof) is a harsh sanction utilized where that party has unjustifiably delayed discovery. *Ritacca,* 203 F.R.D. at 335. *See Eureka Financial Corp. v. Hartford Acc. and Indem. Co.,* 136 F.R.D. 179, 185 (E.D.Cal.1991). In exercising the Court's discretion, it must analyze the circumstances of such delay on a case by case basis. *See id.* "Minor procedural violations, good faith attempts at compliance, and other such mitigating circumstances militate against finding waiver. In contrast, evidence of foot-dragging or a cavalier attitude towards following court orders and the discovery rules supports finding waiver." *Ritacca,* 203 F.R.D. at 335 (citations omitted). For example in *Denardi, supra,* the court found that although a party's failure to serve timely objections to document production requests generally constitutes waiver of any objections which the party might have to the requests, a six-day delay in responding to the propounding party's requests was not unfair and thus did not equate to a waiver. *Denardi,* 167 F.R.D. at 687. Conversely, in *Ritacca, supra,* the court found that the defendant's five month delay during which time it never mentioned its privilege objections to be inexcusable and unjustified. *Ritacca,* 203 F.R.D. at 336. The court concluded that the defendant's "casual disregard for the discovery rules in this litigation can only be characterized as unjustified, inexcusable, and in bad faith." *Id.*

***3** While the length of the delay in the case at bar is more similar to *Ritacca* than *Denardi,* this case is distinguishable from

Ritacca. In *Ritacca,* the plaintiff had no idea that the defendant intended to assert privilege doctrines until after the plaintiff filed a motion to compel almost five months after discovery was due. *Id.* at 335. Unlike *Ritacca,* both parties were aware that Safeway was asserting the attorney-client privilege and/or the work-product doctrine as to certain documents. Orr repeatedly requested and Safeway promised to produce a privilege log. Thus, there was no complete surprise attendant to Safeway's delay and thus the risk of prejudice to Orr in the instant case is not as severe as that in *Ritacca.* Moreover, at least one court has stated that an improper blanket assertion of privilege might be excused "if [the defendant] had taken the time to correct its error *prior to the discovery hearing on the issue." Eureka,* 136 F.R.D. at 184 (emphasis in original). *See Bud Antle, Inc. v. Grow–Tech, Inc.,* 131 F.R.D. 179, 182–83 (N.D.Cal.1990) (six week delay in producing privilege log after making generalized assertions of privilege was not deemed waiver).

While the Court could in its discretion find a waiver, it is reluctant to do so here given the harshness of the sanction. Safeway's delay however, does inform the analysis of Orr's Motion for Attorney's Fees discussed below.

ANALYSIS OF THE DOCUMENTS

The analysis of the claimed privileges is informed by the applicable procedural history herein. Orr propounded her discovery request in November 2001 and Safeway responded in January 2002. In response, Safeway asserted in conclusory terms that some of the documents requested were protected by the attorney-client privilege and/or the work-product doctrine. On May 23, 2002, Orr filed a Motion to Compel Discovery. In its opposition to Orr's Motion, Safeway submitted neither privilege log nor any specific evidence in support of its privilege claims. When Safeway finally produced a privilege log on July 30, 2002, it failed to supplement the log with any competent evidence explaining or substantiating the bases of its privilege claims.

[2] On August 14, 2002, the Court ordered that the documents Safeway asserted were protected by the attorney-client privilege and/or work-product doctrine (Orr's Inspection Demand Nos. 17 and 18) be produced in camera and under seal for the Court's review. The Court also invited Orr to brief the applicability of the attorney-client privilege and/or the work-product doctrine based on the description of the reports contained in the privilege log. However, even though Safeway produced the documents under seal, it never sought to supplement the record with any affidavits or evidence explaining the applicability of the attorney-client privilege and/or the work-product doctrine to the documents. Accordingly, the Court must take the record as it finds it. Under these circumstances, Safeway has the burden of establishing applicability of the attorney-client privilege and/or work product doctrine. *See Newport Pacific, Inc. v. County of San Diego,* 200 F.R.D. 628, 632–33 (S.D.Cal.2001). Because the Court has nothing other than a generally conclusory privilege log and the documents themselves, the Court can find a document privileged only where the attorney-client privilege and/or work-product doctrine obviously applies based on the face of the document itself.

***4** The following documents were produced under seal by Safeway for the Court's in camera review: Proposed Livadas Warning Notice; March 14, 2001 SIU Investigation Report (authored by Leigh Ann Rice); July 23, 1997 Document from Bill Best Investigations; November 9, 2000 SIU Investigation Report (authored by Mike Wallach); November 17, 2000 Document from Perez Investigations; September 20, 2001 Investigation Report (authored by Richard Naumann); and an October 18, 2001 Investigation Report (authored by Richard Naumann). Included with the in camera document production were several audiotapes (witness interviews summarized in the Leigh Ann Rice report) and one videotape (related to the Perez report).

Having reviewed these documents, the Court determines that not all the documents warrant exclusion from discovery.

ATTORNEY–CLIENT PRIVILEGE

"The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice, as well as an attorney's advice in response to such disclosures." *United States v. Chen,* 99 F.3d 1495, 1501 (9th Cir.1996) (internal quotation omitted), *cert. denied,* 520 U.S. 1167, 117 S.Ct. 1429, 137 L.Ed.2d 538 (1997). The privilege applies to a communication between a lawyer and his or her client where the lawyer counsels, as well as when the lawyer actually represents the client in litigation. *Id.*

Because the attorney-client privilege "impedes full and free discovery of the truth," the privilege must be strictly construed. *Weil v. Investment/Indicators, Research and Management, Inc.* 647 F.2d 18, 24 (9th Cir.1981). *See Hartford Fire Insurance Co. v. Garvey,* 109 F.R.D. 323, 327 (N.D.Cal.1985). The privilege is applicable to communications: "(1) When legal advice of any kind is sought (2) from a professional legal adviser in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are, at the client's instance, permanently protected (7) from disclosure by the client or by the legal adviser (8) unless the protection be waived." *United States v. Martin,* 278 F.3d 988, 999 (9th Cir.2002), citing, 8 Wigmore, *Evidence* §§ 2292, at 554 (McNaughton rev.1961).

[3] Here, on their face, none of the documents reviewed by the Court meets all of the elements of attorney-client privilege. As a threshold matter, the documents do not appear to involve any communications between Safeway as client and its counsel for the purpose of obtaining or providing legal advice. *See Admiral Insurance Co. v. United States District Court,* 881 F.2d 1486, 1492 (9th Cir.1989). Nor is there any evidence as to their intended confidentiality. Based on the record before the Court, the privilege is inapplicable.

WORK–PRODUCT DOCTRINE

While in general, "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action," Fed.R.Civ.P. 26(b)(1), the work-product doctrine was created to "prevent exploitation of a party's efforts in preparing for litigation." *Admiral Insurance,* 881 F.2d at 1494. "The work-product doctrine is not a privilege, but a qualified immunity protecting from discovery documents and tangible things prepared by a party or his representative *in anticipation of litigation." Id.* (emphasis added). *See* Fed.R.Civ.P. 26(b)(3). The doctrine seeks to preserve the privacy of an attorney's thought processes, encourage careful and thorough preparation by the attorney without undue and needless interference, and prevent exploitation of a party's efforts in preparing for litigation. *Hickman v. Taylor,* 329 U.S. 495, 511–16, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

***5** In determining what documents are prepared "in anticipation of litigation," documents prepared in the ordinary course of business do not fall under the work-product rule, because the documents would have been created regardless of any threat of litigation. *See Matter of Fishchel,* 557 F.2d 209, 213 (9th Cir.1977). "The privilege is available only if the primary motivating purpose behind the creation of the materials was to assist in pending or impending litigation." *United States v. Bell,* No. C 94–20342, 1994 WL 665295, *4 (N.D.Cal. Nov.9, 1994). In other words, documents are created "in anticipation of litigation" where "such documents would not have been generated *but for* the pendency or imminence of litigation." *Newport Pacific,* 200 F.R.D. at 632 (internal quotation omitted) (emphasis added).

Orr contends and Safeway does not dispute that Safeway self-insures and conducts its own internal investigations into worker's compensation claims. Generally, in the insurance context, such claims investigations are prepared in the normal course of business and are rarely considered attorney work-product. *See Schmidt v. United States District Court,* 127 F.R.D. 182, 184 (D.Nev.1989) ("since insurance companies have a routine duty to investigate accidents, such materials are not prepared in anticipation of litigation, but are prepared in the ordinary course of business absent unique circumstances"). Distinguishing between claims investigating and work done in anticipation of litigation may turn on whether the investigations include or involve legal opinions or trial strategies, *id.,* and whether the investigation deviated from the norm. *See, e.g., Allendale Mutual Ins. Co. v. Bull Data Systems, Inc.,* No. 91–6103, 1993 WL 20164, *4 (N.D.Ill. Jan. 27, 1993) (examining whether the investigation deviated from the norm). The relationship between the investigation and the impending litigation "must be sufficiently concrete so as to provide assurance that the routine claims processing material prepared in the ordinary course of [ ] business will not immunized from discovery ." *Schmidt,* 127 F.R.D. at 184.

The Court will discuss the applicability of the work-product doctrine to each of the documents reviewed in camera in turn.

— Proposed Warning Notice to Livadas

On its face, the Proposed Warning Notice to Livadas was created in the scope of ordinary business practice. The document is a draft of a warning notice addressed to Livadas. Nothing suggests that such a written warning (and drafts thereof) are not prepared in the ordinary course of employee relations. As such, this document does not warrant work-product protection.

— March 14, 2001 SIU Investigation Report (authored by Leigh Ann Rice); November 9, 2000 SIU Investigation Report (authored by Mike Wallach); and November 17, 2000 Document from Perez

Investigations

[4] On their face, the March 14, 2001 SIU Investigation Report, the November 9, 2000 SIU Investigation Report, and the November 17, 2000 Document from Perez Investigations involve investigations into worker's compensation claims filed by Orr.

***6** The report by Leigh Ann Rice is a summary of Ms. Rice's interviews of other Safeway employees whom came into contact with, or observed, Orr prior to March 14, 2001. The report appears to have been generated as a result of Orr's worker's compensation claim filed on February 15, 2001.

The report by Mike Wallach involves a thorough background check of Orr. The report appears to have been generated as a result of Orr's filing of a worker's compensation claim on September 28, 2000.

The Perez Sub–Rosa Report is the summary of an investigation into Orr's day-to-day activities over a three-day period beginning November 2, 2000. The request for the report was prompted by yet another worker's compensation claim filed by Orr, arising from an injury suffered on June 1, 1997.

On the face of these reports, the Court cannot conclude that they were anything other than an investigation into Orr's worker's compensation claim prepared in the ordinary course of investigating and adjusting such claims by Safeway as a self-insurer. Significantly, these documents do not state that Safeway had taken an adverse position on the claims and was preparing for litigation over compensability. As noted above, Safeway submitted no evidence to the contrary. Thus, there is no evidence in the record that establishes that these reports would not have been created *but for* the imminency of litigation. Because it is Safeway's burden to demonstrate that these documents warrant work-product protection, the Court finds that Safeway failed to carry its burden in establishing application of the attorney work-product doctrine.

— September 20 and October 18, 2001 Investigation Reports (authored by Richard Naumann)

[5] On their face, these reports were clearly authored in anticipation of the instant litigation. The reports specifically identify as the subject of the report the instant case, *Equal Employment Opportunity Commission v. Safeway*. Moreover, the reports indicate that they were prepared at the request of, and are addressed to, Ann Wicks, Safeway's counsel of record in the instant case. Having reviewed the reports, it is clear that the reports would not have been created but for the impending litigation and as such, warrant work-product protection. The Court also finds Orr has no compelling need for these documents.

— July 23, 1997 Document from Bill Best Investigations

[6] This report involves Safeway's investigation into Orr's June 1, 1997 worker's compensation claim and summarizes interviews with Orr and several co-employees. The report also includes, in limited form, the opinion of Mr. Best as to certain matters.

The report states this investigation was initiated after Safeway concluded that it would contest Orr's worker's compensation claim. On its face, therefore, it appears that the report was prepared in anticipation of litigation over Orr's worker's compensation claim, and therefore constitutes attorney work-product.

Because the work-product doctrine is not an absolute privilege, but a qualified one, Orr may overcome the doctrine where she makes a sufficient showing of need. The standard for overriding work-product privilege is more demanding where documents are considered opinion work-product. *See McKenzie v. McCormick,* 27 F.3d 1415, 1420 (9th Cir.1994) (stating that more than substantial need and undue hardship need be shown to overcome traditional work-product protections, but that a far greater showing of necessity and unavailability by other means is required for "opinion" work product), *cert. denied, McKenzie v. Weer,* 513 U.S. 1118, 115 S.Ct. 916, 130 L.Ed.2d 797 (1995).

***7** In this case, the bulk of the Best report consists of summaries of witness interviews. While some degree of opinion or mental impression arguably inheres in such summaries, *see, e.g., Upjohn Co. v. United States,* 449 U.S. 383, 399, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) ("[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes"), the report is largely a factual narrative. But whether considered traditional work-product or opinion work-product, the Court concludes the report must be produced.

The Ninth Circuit has expressly held that even opinion work-product may be discovered where "mental impression are *at issue* in a case and [ ] the need for the material is compelling." *Holmgren v. State Farm Mutual Auto. Ins. Co.,* 976 F.2d 573, 577 (9th Cir.1992) (emphasis in original). *Cf. Duplan Corp. v. Moulinaje et Retorderie de Chavanoz,* 509 F.2d 730, 734 (4th Cir.1974), *cert. denied,* 420 U.S. 997, 95 S.Ct. 1438, 43 L.Ed.2d 680 (1975). Here, Orr has alleged that Safeway has engaged in a pattern of retaliation against Orr dating back to 1997 including, *inter alia,* its incessant effort to investigate a claim of Orr's racially discriminatory conduct Safeway knew was baseless. According to Orr, the Best report may prove that Safeway knew there was no evidence to substantiate that Orr made a racial comment to a co-worker as alleged. The Best report containing evidence relative to this claim and the investigator's comments about the evidence (*e.g.,* witness credibility) goes to Safeway's state of mind, an element directly relevant to Orr's claim of harassment and retaliation.

Additionally, the information contained in the Best report cannot be obtained from any other source. Mr. Best interviewed numerous witnesses in 1997 about the alleged incident. Even if the witnesses were available for examination today, there is no substitute for the contemporaneous statements made by those witnesses close in time to the alleged incident. Prior statements have independent corroborative or impeachment value. Moreover, the report itself is probative of Safeway's knowledge and state of mind. Safeway has not identified any substitute for this information. Therefore, the Court determines that, because Orr has demonstrated that Safeway's knowledge and state of mind may be informed by the Best report, Orr's need for the report is compelling. Moreover, the report cannot be obtained from any other equivalent means. It must be produced.

ATTORNEY'S FEES

[7] Federal Rule of Civil Procedure 37(a) provides in pertinent part that where a motion to compel the production of evidence is granted, the Court "shall, after affording an opportunity to be heard, require the party [ ] whose conduct necessitated the motion ... to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees."

Based on the above analysis, the Court determines that Safeway's action in failing timely to provide Orr a privilege log was inexcusable and without substantial justification. The Court also finds that Safeway's failure to produce the documents and insistence on a protective order without moving for such an order as directed by the District Court, necessitated Orr's Motion to Compel and caused Orr to incur needless delay.

***8** Based on the affidavit submitted by Orr in support of the Motion for Attorney's Fees, the Court orders that Safeway shall pay Orr reasonable attorney's fees and costs in the amount of $5,400.00, incurred in connection with Orr's Motion to Compel. These fees were based in part upon estimates made when the motion was filed. In light of further developments, including the additional briefing relative to the belatedly produced privilege log, the amount awarded is conservative and reasonable.

ORDER

The Motion to Compel (No. 46) is GRANTED IN PART AND DENIED IN PART. Safeway shall produce to Orr, the Proposed Livadas Warning Notice, the March 14, 2001 SIU Investigation Report (authored by Leigh Ann Rice), the November 17, 2000 Document from Perez Investigations, the November 9, 2000 SIU Investigation Report (authored by Mike Wallach), and the July 23, 1997 Document from Bill Best Investigations. Safeway shall also produce any and all audio or videotapes that correspond with the above documents. Safeway may redact any information relating to costs or fees charged by the investigators since that information is irrelevant.

Safeway is not required to produce the September 20 and October 18, 2001 Investigation Reports (authored by Richard Naumann), as such documents are protected by the work-product doctrine. All documents ordered produced by this Order shall be delivered to Orr's counsel, Daniel Qualls, at Qualls & Workman, LLP, 244 California Street, Suite 410, San Francisco, Calif. 94111, on or before Friday, September 20, 2002, at 12:00 noon. Additionally, all documents ordered produced by this Order shall be covered by the Protective Order entered into by the parties on August 9, 2002.

The Motion for Attorney's Fees and Costs (No. 45) is GRANTED. Safeway shall pay Orr fees and costs in the amount of

$5,400.00, within fourteen (14) days of this Order.

IT IS SO ORDERED.