

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

AVERY SIMMONS, an individual,

Plaintiff,

v.

SAFEWAY, INC., d/b/a HAGGEN FOOD
AND PHARMACY, a Delaware
corporation,

Defendant.

CASE NO. 18-5522 RJB

ORDER ON MOTION TO COMPEL

THIS MATTER comes before the Court on Defendant Safeway, Inc., d/b/a Haggen Food and Pharmacy's ("Haggen" or "Defendant") Haggen's Motion to Compel Documents Refreshing Plaintiff's Memory and to Resume Deposition. Dkt. 21. The Court has considered the pleadings filed regarding the motion and the remaining file.

On May 14, 2018, Plaintiff Avery Simmons filed this employment discrimination case in Thurston County, Washington, Superior Court, in connection with her employment at Haggen's Olympia, Washington store. Dkt. 1-2. Haggen moves for an order compelling Simmons to produce a typed document that she asserted she used to refresh her memory during her

1 deposition and an order allowing Haggen to proceed with a second, limited deposition. Dkt. 21.
2 The Court reviewed the document in-camera. For the reasons provided below, Haggen’s motion
3 to compel and for leave to conduct a second limited deposition (Dkt. 21) should be granted, in
4 part, and denied as to its motion for an award of reasonable expenses.

5 **I. BACKGROUND FACTS, PROCEDURAL HISTORY, AND SPECIFIC FACTS**
6 **RELATED TO THE PENDING DISCOVERY MOTIONS**

7 **A. BACKGROUND FACTS**

8 According to the Amended Complaint, Haggen hired the Plaintiff on February 16, 2017.
9 Dkt. 12, at 2. She asserts that she was injured at work in August of 2017 and filed a worker’s
10 compensation claim. *Id.* The Plaintiff maintains that the Defendant issued a “Personnel Action
11 Notice” about her workplace injury because she filed her workers’ compensation claim. *Id.*

12 Around October 16, 2017, the Plaintiff alleges that another employee “sexually harassed
13 Plaintiff in the form of unwanted touching and sexual luring.” Dkt. 12, at 2. She asserts that she
14 followed the Defendant’s “written anti-harassment policy by reporting her co-workers’ sexually-
15 harassing behavior.” *Id.* The Plaintiff maintains that after her report, the Defendant issued two
16 “Personnel Action Notices for conduct that occurred before the Plaintiff complained of the
17 harassment.” *Id.* She states that Defendant’s Human Resources Department, “without following
18 its own policy by investigating, told Plaintiff there was no issue.” *Id.*, at 3. The Plaintiff asserts
19 the Defendant did not follow its own policy and failed to address the behavior. *Id.* She
20 maintains that she “reasonably believed she had no choice but to quit;” she did so on October 24,
21 2017. *Id.*

22 **B. PROCEDURAL HISTORY**

23 The Plaintiff asserts claims against Haggen for hostile work environment, discrimination,
24 and retaliation under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et. seq.*, and the

1 Washington Law Against Discrimination, RCW 49.60, *et. seq.* Dkt. 12, at 3-4. She also makes
2 claims for claim suppression and wrongful termination under Washington common law. *Id.* The
3 Plaintiff seeks injunctive relief, damages, attorneys' fees, and costs. *Id.*

4 The discovery deadline was June 3, 2019, the dispositive motions deadline is July 2,
5 2019, and the trial is set to begin on September 30, 2019. Dkt. 18.

6 **C. FACTS RELATED TO MOTION TO COMPEL AND FOR FURTHER**
7 **DEPOSITION OF PLAINTIFF**

8 On December 10, 2018, Plaintiff's deposition was taken for around four hours. Dkt. 22, at 1,
9 and Dkt. 22-1, at 3-12. During her deposition, the Plaintiff acknowledged that she reviewed a
10 page-and-a-half document, typed by her attorney, to refresh her memory of the events
11 surrounding this case. Dkt. 22-1, at 4. Defense counsel asked the Plaintiff whether she recalled
12 "what the statement says in it," and the Plaintiff's counsel instructed her not to answer on the
13 grounds of attorney-client privilege and work-product doctrine protection. *Id.*, at 5. The
14 Plaintiff testified that the document was created from her own notes of the events, taken before
15 she consulted legal counsel, and then reorganized and typed by her attorney after they met. Dkt.
16 27-1, at 11-12. She testified that the typewritten version (that she used to refresh her memory)
17 was not different, in any way that is important, to her handwritten version. Dkt. 27-1, at 12.
18 During the deposition, counsel for Defendant indicated that they may seek to depose Plaintiff
19 again after production of the document. Dkt. 21-1, at 5. After the deposition, the Plaintiff sent
20 the Defendant a copy of her handwritten notes but did not send the typed version. Dkt. 27-2.
21 The parties met and conferred and were unable to resolve the issue. Dkt. 22, at 1-2.

22 **II. DISCUSSION**

23 **A. STANDARD ON DISCOVERY GENERALLY**

24 Fed. R. Civ. P. 26 (b)(1) provides:

1 Unless otherwise limited by court order, the scope of discovery is as follows:
2 Parties may obtain discovery regarding any nonprivileged matter that is relevant
3 to any party's claim or defense and proportional to the needs of the case,
4 considering the importance of the issues at stake in the action, the amount in
5 controversy, the parties' relative access to relevant information, the parties'
6 resources, the importance of the discovery in resolving the issues, and whether the
7 burden or expense of the proposed discovery outweighs its likely benefit.
8 Information within this scope of discovery need not be admissible in evidence to
9 be discoverable.

6 “The court should and ordinarily does interpret ‘relevant’ very broadly to mean matter that is
7 relevant to anything that is or may become an issue in the litigation.” *Oppenheimer Fund, Inc. v.*
8 *Sanders*, 437 U.S. 340, 351, n.12 (1978)(quoting 4 J. Moore, Federal Practice ¶ 26.56 [1], p. 26-
9 131 n. 34 (2d ed. 1976)).

10 **B. STANDARDS FOR ATTORNEY CLIENT PRIVILEGE, WORK-PRODUCT
11 DOCTRINE, AND MOTION TO COMPEL**

12 Where, as here, there are federal question claims and pendent state law claims present,
13 federal common law governs claims of privilege. *Agster v. Maricopa County*, 422 F.3d 836, 839
14 (9th Cir. 2005); Fed. R. Evidence (“FRE”) 501.

15 1. Attorney-Client Privilege Standard

16 “The attorney-client privilege protects confidential communications between attorneys and
17 clients, which are made for the purpose of giving legal advice.” *United States v. Richey*, 632
18 F.3d 559, 566 (9th Cir. 2011). The privilege exists where:

19 (1) legal advice of any kind is sought (2) from a professional legal adviser in his
20 capacity as such, (3) the communications relating to that purpose, (4) made in
21 confidence (5) by the client, (6) are at his instance permanently protected (7) from
22 disclosure by himself or by the legal adviser, (8) unless the protection be waived.

21 *Richey*, at 566. The party asserting the “privilege has the burden of establishing the relationship
22 and privileged nature of the communication.” *Id.*

23 2. Work-Product Standard

1 “The work-product doctrine protects from discovery documents and tangible things
2 prepared by a party or his representative in anticipation of litigation.” *Richey*, at 567.
3 2011)(*internal quotation marks and citation omitted*). “To qualify for work-product protection,
4 documents must: (1) be prepared in anticipation of litigation or for trial and (2) be prepared by or
5 for another party or by or for that other party’s representative.” *Id.* “The work-product
6 doctrine’s protections are waivable.” *Id.*

7 “The work-product rule is not a privilege but a qualified immunity protecting from
8 discovery documents and tangible things prepared by a party or his representative in anticipation
9 of litigation.” *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1494 (9th
10 Cir. 1989).

11 The principal difference between the attorney-client privilege and the work
12 product doctrine, in terms of the protections each provides, is that the privilege
13 cannot be overcome by a showing of need, whereas a showing of need may justify
14 discovery of an attorney's work product.

15 *Id.* Under Rule 26 (b)(3)(A), “ordinarily, a party may not discover documents . . . that are
16 prepared in anticipation of litigation,” but those materials may be discoverable if the party
17 seeking them “shows that it has substantial need for the materials to prepare its case and cannot,
18 without undue hardship, obtain their substantial equivalent by other means.” The Rule
19 continues, providing that “[i]f the court orders discovery of those materials, it must protect
20 against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s
21 attorney.” Rule 26 (b)(3)(B).

22 3. Motion to Compel Standard

23 Rule 37 (a)(1) provides:

24 On notice to other parties and all affected persons, a party may move for an order
compelling disclosure or discovery. The motion must include a certification that
the movant has in good faith conferred or attempted to confer with the person or

1 party failing to make disclosure or discovery in an effort to obtain it without court
2 action.

3 **C. MOTION TO COMPEL DOCUMENT AND TO CONTINUE DEPOSITION**

4 1. Motion to Compel Writing Used to Refresh Plaintiff's Memory

5 FRE 612, "Writing Used to Refresh a Witness's Memory" provides:

6 (a) **Scope.** This rule gives an adverse party certain options when a witness uses a
7 writing to refresh memory:

8 (1) while testifying; or

9 (2) before testifying, if the court decides that justice requires the party to have
10 those options.

11 (b) **Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. §
12 3500 provides otherwise in a criminal case, an adverse party is entitled to have the
13 writing produced at the hearing, to inspect it, to cross-examine the witness about
14 it, and to introduce in evidence any portion that relates to the witness's testimony.
15 If the producing party claims that the writing includes unrelated matter, the court
16 must examine the writing in camera, delete any unrelated portion, and order that
17 the rest be delivered to the adverse party. Any portion deleted over objection must
18 be preserved for the record.

19 (c) **Failure to Produce or Deliver the Writing.** If a writing is not produced or is
20 not delivered as ordered, the court may issue any appropriate order.

21 The Ninth Circuit Court of Appeals has not directly ruled on the interplay between FRE
22 612 and documents sought to be protected under the attorney-client privilege and work-product
23 doctrine. After noting that FRE 612 applies to depositions, the Third Circuit Court of Appeals
24 found that the following three conditions must be met before a party may obtain a document used
by a witness prior to testifying: "1) the witness must use the writing to refresh his memory; 2) the
witness must use the writing for the purpose of testifying; and 3) the court must determine that
production is necessary in the interests of justice." *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir.
1985).

1 The Plaintiff argues that the typed written version is protected by attorney-client privilege
2 and work-product doctrine. Dkt. 26. She maintains that how counsel rearranged the typed
3 timeline reveals important aspects of counsel’s understanding of the case and inferences counsel
4 drew from the privileged communications between counsel and the Plaintiff. *Id.* She also argues
5 that a further deposition should not be allowed. *Id.*

6 The Defendant argues that disclosure of the typed timeline is critical to effective cross-
7 examination and impeachment. Dkt. 31. It maintains that justice would be served by disclosure
8 of the document because “it would be unfair for Plaintiff’s counsel to use a writing to suggest
9 facts to Plaintiff, and then deny Haggen access to that very document that might reveal the
10 suggestion.” *Id.* The Defendant asserts that it is not engaged in a fishing expedition – it only
11 seeks one document. *Id.*

12 The Defendant’s motion to compel (Dkt. 21) should be granted. Each of the elements of
13 *Sporck* are met. The Plaintiff acknowledged that she used the typed document at issue to refresh
14 her memory for the purpose of testifying at her deposition. Dkt. 27-1, at 12. Further,
15 “production is necessary in the interests of justice.” *Sporck*, at 317. The Defendant has shown
16 “substantial need for the materials to prepare its case and cannot, without undue hardship, obtain
17 their substantial equivalent by other means.” Rule 26 (b)(3)(A). To effectively cross examine
18 the Plaintiff, the Defendant is entitled to the document; it is important to its defense. Plaintiff’s
19 testimony is the primary evidence offered in support of her claims. Further, the request is narrow
20 in scope. Any privilege the Plaintiff had in the document has been waived. The Plaintiff should
21 turn the document over to the Defendant.

22 2. Motion to Continue with the Plaintiff’s Deposition
23
24

1 Under Fed. R. Civ. P. 30(d), depositions are ordinarily limited to one day of seven hours.
2 Fed. R. Civ. P. 30(d)(1). The Court “must allow additional time . . . if needed to fairly examine
3 the deponent.”

4 The Defendant states that it is “willing to take Plaintiff’s deposition in a mutually
5 agreeable location closer to Plaintiff’s place of work or home and limit the deposition only to
6 covering the documents Plaintiff used to refresh her recollection.” Dkt. 21, at 6. With these
7 parameters in mind, the Defendant’s motion to continue with the Plaintiff’s deposition (Dkt. 21)
8 should be granted. The additional time is needed to fairly examine the deponent.

9 3. Motion for Award of Reasonable Expenses

10 The Defendant moves for reasonable expenses under Fed. R. Civ. P. 37(a)(5)(A). Dkt. 21.

11 Rule 37(a)(5)(A)(iii) provides that if a motion to compel is granted the Court must award
12 reasonable expenses, unless “other circumstances make an award of expenses unjust.” An award
13 of expenses would be unjust in this case.

14 **III. ORDER**

15 It is **ORDERED** that:

- 16 • The Defendant’s Motion to Compel Documents Refreshing Plaintiff’s Memory and to
17 Resume Deposition (Dkt. 21) **IS GRANTED, in part, and DENIED as to its**
18 **motion for an award of expenses.**

19 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
20 to any party appearing *pro se* at said party’s last known address.

21 Dated this 5th day of June, 2019.

22 

23 ROBERT J. BRYAN
24 United States District Judge