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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SAUNDRA HALL, Plaintiff and Respondent, v. CUSHFIELD MAINTENANCE WEST CORP., Defendant and Appellant.	B272137 (Los Angeles County Super. Ct. No. BC568273)

APPEAL from an order of the Superior Court of Los Angeles County. Suzanne G. Bruguera, Judge. Affirmed.

Lawyers for Justice, Edwin Aiwazian, Arby Aiwazian and Elizabeth M.R. Parker for Plaintiff and Respondent.

Norton Rose Fulbright, Robert M. Dawson and Spencer Persson for Defendant and Appellant.

INTRODUCTION

Defendant Cushfield Maintenance West Corporation appeals the trial court's $12,600 discovery sanction order. Defendant argues that it acted with substantial justification in refusing to respond to discovery requests by plaintiff Saundra Hall and that the imposition of sanctions was unjust. We find no abuse of discretion in the court's implicit finding that defendant did not meet and confer in a reasonable and good faith manner.

FACTS AND PROCEDURAL BACKGROUND

1. Plaintiff Hall's Lawsuit

Defendant provides building maintenance services for commercial properties, and temporarily employed plaintiff as a salaried employee for a little more than two months in 2014 at one of its properties. On December 31, 2014, plaintiff sued defendant, alleging Labor Code violations under California's Private Attorneys General Act (PAGA), Labor Code section 2698, et seq. Plaintiff claimed that defendant: (1) misclassified plaintiff and other employees, (2) failed to compensate plaintiff and other employees for meal periods, rest breaks, expenses, and overtime, (3) did not provide plaintiff and other employees with accurate wage statements or keep accurate payroll records, and (4) failed to pay plaintiff and other employees all of their wages due upon discharge or resignation. Defendant answered the complaint; the June 25, 2015 amended answer appears to be its operative pleading.

2. Plaintiff's Discovery Requests

On February 10, 2015, plaintiff propounded one set of form interrogatories, two sets of special interrogatories, and one set of document requests. The form interrogatories sought information about potential witnesses and information about defendant. In

the special interrogatories, plaintiff requested contact information for past and present on-site salaried employees, as well as information about the number of, employment dates for, the pay rates of, and the job duties of past and present salaried on-site employees.[1] In the requests for production, plaintiff sought defendant's records relating to plaintiff's employment, policies and procedures for salaried on-site employees in California, and the names, contact information, and personnel records for defendant's former and current on-site salaried employees in California. Plaintiff referred to these former (dating back to December 31, 2011) and current salaried employees located in California as "other aggrieved employees." All discovery requests were limited to information and documents from either the six preceding years or from December 31, 2011 to the date of the request.

Defendant served responses and objections to the discovery requests on May 15, 2015. Defendant refused to respond to any request or interrogatory seeking information on other aggrieved employees and defendant's polices, practices, and procedures as to other aggrieved employees. Defendant consistently and repeatedly objected to producing the information or documents on grounds of overbreadth and relevancy. Defendant also asserted the discovery violated the privacy rights of its employees other than plaintiff.

On June 12, 2015, plaintiff sent defendant a 14-page meet and confer letter; the letter addressed defendant's discovery responses and objections. Plaintiff detailed why, in her view,

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[1] The parties and the trial court appeared to understand "on-site" as including locations other than the location where plaintiff herself worked.

defendant's objections were not well taken under existing discovery principles. She cited case law involving wage and hour representative actions to explain why she was entitled to discover the identity of aggrieved employees, as well as information and documents regarding defendant's wage and hour policies, practices, and procedures applicable to salaried on-site employees. To assuage defendant's privacy concerns, plaintiff attached a proposed *Belaire-West* notice with an opt-out postcard to be sent by a third-party administrator preceding the release of the aggrieved employees' contact information.[2]

On June 18, 2015, defendant replied with a two-page letter indicating that it stood by its initial objections and responses. Citing the Court of Appeal's then-published *Williams v. Superior Court* (2015) 236 Cal.App.4th 1151 (*Williams I*) and a superior court order in another case, defendant asserted that PAGA plaintiffs lack the authority to discover information related to the "other aggrieved employees" without demonstrating a need for the information and providing information or facts about the other employees and how their situations paralleled that of plaintiff.[3] As it turned out, Division 1 of the Second District

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[2] "*Belaire-West* notice" refers to an opt-out notice sent to potential plaintiffs in representative actions. The notices are designed to protect the privacy rights of third parties and allow the recipient to object in writing to prevent his or her information from being disclosed to the party seeking discovery. (*Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554, 561 (*Belaire-West*).)

[3] Defendant provided the following citation for the trial court order in its meet and confer letter: *Mercado v. Atria Mgmt. Co., LLC* (Sep. 24, 2015, BC570823) 2015 WL 5704376, at *7.

Court of Appeal had filed *Williams I* on May 15, 2015, the same day defendant served responses and objections to the discovery requests. On August 19, 2015, two months after defendant had submitted its meet and confer letter, the California Supreme Court granted review of *Williams I*, effectively depublishing it. (Former Cal. Rules of Court, rule 8.1105(e)(1) ["an opinion is no longer considered published if the Supreme Court grants review"].)[4]

On July 6, 2015, soon after it received defendant's meet and confer response, plaintiff filed four motions to compel further responses to the form interrogatories, special interrogatories, and document requests. Plaintiff also requested monetary sanctions in each motion.

On October 13, 2015, defendant filed its opposition. The opposing papers relied heavily on *Williams I*, which by then no longer had precedential effect, and the superior court order that defendant had referenced in its meet and confer correspondence. That order, of course, also lacked precedential effect.[5] In relying

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[4] This rule was changed in 2016 so that certain Court of Appeal opinions remain published after the Supreme Court grants review. (Cal Rules of Court, rule 8.1105(e)(1)(B).)

Nearly two years later, on July 13, 2017, the Supreme Court reversed the Court of Appeal's decision in *Williams I*, concluding that PAGA plaintiffs have a broad right to discovery. (*Williams v. Superior Court* (2017) 3 Cal.5th 531 (*Williams II*).) We refer to the Court of Appeal's decision as *Williams I* and the Supreme Court's decision as *Williams II*.

[5] Neither *Williams I* nor the superior court order were entitled to precedential effect at the time of the discovery hearing. Accordingly, neither provided legal support for

on these opinions, defendant argued that plaintiff had no good cause for discovery of the employee information and company policies because her complaint failed to adequately allege the claimed violations of the rights of other employees. Defendant placed the burden on plaintiff to establish that she was "entitled" to such information. Finally, defendant argued that the discovery requests were vague, ambiguous and compound, and violated employees' privacy rights. Plaintiff replied, pointing out that she had good cause to discover the information because the employees were percipient witnesses, and defendant was relying on non-binding, unpublished authority to support its arguments.

3. The Court-Ordered Meet and Confer

Prior to deciding the motions to compel, the trial court ordered the parties to further meet and confer in the presence of a certified court reporter. The in-person meeting, which occurred on November 16, 2015 at plaintiff's counsel's office, quickly became contentious. The parties reiterated their positions. Plaintiff's counsel met resistance from defense counsel when she attempted to review the individual objections as to the various discovery requests. Defense counsel appeared hostile and uncivil during the meeting, a subject we discuss below.

Counsel for both parties submitted additional legal memoranda to the court, both reporting on the in-person meet and confer and reiterating their positions.

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defendant's resistive discovery conduct. We understand defendant's citation on appeal to *Williams I* as intending to demonstrate its good faith in opposing discovery but not to support the merits of its position. We address that point in part two of the discussion.

4. Trial Court's Rulings on the Motions to Compel and Issuance of Sanctions

At the hearing on the motions, the trial court told defense counsel: "I was so concerned when I read the transcript of your discussions, and I know that in your papers you blame the plaintiffs for their [sic] position, but you weren't very nice to anybody at the meet and confer. So it kind of took away from your papers." The court described the conduct as lacking civility.

Defense counsel argued that it was "very settled law" that "PAGA cases are not class action cases" and that "a lot is settled, like what to do in discovery and all that." The court disagreed. On February 25, 2016, the court granted plaintiff's four motions to compel. The court ordered defendant to pay plaintiff $12,600 in discovery sanctions.

On May 5, 2016, defendant filed in this Court a petition for writ of mandate to stay the trial court's discovery and sanctions orders pending the Supreme Court's decision in *Williams II*. The Supreme Court's decision would not be handed down for some 14 months. (See fn. 4 *ante*). We summarily denied defendant's writ petition on May 9, 2016. Defendant then sought Supreme Court review of this Court's ruling on the writ petition. The Supreme Court granted review and deferred ruling pending its decision in *Williams II*. At the same time, defendant filed the present appeal of the sanctions order.

On July 13, 2017, the Supreme Court reversed *Williams I*, concluding that PAGA plaintiffs have broad discovery rights. (*Williams II, supra,* 3 Cal.5th 531.) On August 30, 2017, the Supreme Court dismissed defendant's writ petition about the discovery orders. We provided counsel an opportunity to brief the effect of the Supreme Court's decision in *Williams II* on the

current appeal; for the most part, their arguments were unchanged.

DISCUSSION

1. General Principles and Standard of Review

Pursuant to Code of Civil Procedure section 2023.030, subdivision (a), "[t]he court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. . . . If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." Misuses of the discovery process include: "[m]aking, without substantial justification, an unmeritorious objection to discovery," "[m]aking an evasive response to discovery," "[m]aking or opposing, unsuccessfully and without substantial justification, a motion to compel," and "[f]ailing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery." (Code of Civil Proc., § 2023.010, subds. (e), (f), (h), and (i); *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1214.) Specifically, as to discovery motions, Code of Civil Procedure section 2030.030, subdivision (d) states: "The court shall impose a monetary sanction . . . against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."

Here, the trial court awarded $12,600 in sanctions against defendant after granting plaintiff's four motions to compel discovery. By deciding to impose sanctions against defendant, the trial court made an implicit finding that defendant misused the discovery process. An "appellate court is required to infer that the trial court made all factual findings necessary to support the order or judgment." (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1271.) We review the "order imposing discovery sanctions under the abuse of discretion standard. [Citation.] An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] The abuse of discretion standard affords considerable deference to the trial court, provided that the court acted in accordance with the governing rules of law. ' "The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]" [Citations.]' [Citation.] A decision 'that transgresses the confines of the applicable principles of law is outside the scope of discretion' and is an abuse of discretion." (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422.)

2. Defense Counsel's Deficient Meet and Confer Efforts Support Sanctions

Our review of the record reveals that the trial court's decision to impose sanctions appears to be based primarily on defendant's failure to engage meaningfully in the meet and confer process. The failure to meet and confer in a reasonable manner

and in good faith constitutes a discovery abuse warranting sanctions. (Code of Civil Proc., § 2023.010, subd. (i).) "A reasonable and good faith attempt at informal resolution entails something more than bickering with [opposing] counsel . . . . Rather, the law requires that counsel attempt to talk the matter over, compare their views, consult, and deliberate." (*Townsend v. Superior Court* (1998) 61 Cal.App.4th 1431, 1439.)

We next set out the substance of some of the exchanges between counsel at the recorded meet and confer, which, in our view, supported the trial court's order in this case.

a. Defense Counsel's Lack of Civility During the In-Person Meet and Confer

At the hearing on the motions to compel, the trial court made the point repeatedly that defense counsel was uncivil during the in-person meet and confer proceedings. The court stated that it was "so concerned" about defense counsel's behavior during the meet and confer, and that defense counsel wasn't "very nice to anybody at the meet and confer." The court indicated that the incivility was uncalled for. In response, defense counsel did not acknowledge any incivility, but rather asserted that he thought plaintiff's counsel was "uncivil" and "impolite" because she read from her meet and confer letter at the in-person meeting. Defense counsel also asserted that talking to plaintiff's counsel was frustrating, "like talking to a mirror." He told the court that he did not think he "was excessively impolite."

The transcript of the meet and confer supports the court's interpretation of defense counsel's uncivil behavior. Early on during the conversation, defense counsel called plaintiff's counsel "incredibly rude and unprofessional" when she pointed out that

he was not addressing the objections and pertinent discovery issues. During the meeting, defense counsel said opposing counsel's citation to analogous class action cases was "idiotic." When plaintiff's counsel asked him not to call her names, defense counsel replied, "I didn't call you a name. I said the argument was idiotic. That's a fair comment." Defense counsel also told plaintiff's counsel, "you've lost it." When plaintiff's counsel asked him to clarify what he meant, he ignored her. Later, defense counsel ridiculed plaintiff regarding a question and said that her question (which was uncomplicated) "made no sense." Defense counsel interrupted plaintiff's counsel multiple times.

When plaintiff's counsel asked for legal grounds for withholding training manuals, defense counsel responded condescendingly: "Okay. I'll repeat myself because obviously you forgot what I said the last time." At times, defense counsel became patronizing with comments like, "You're with me again? Okay." When plaintiff's counsel tried to clarify defendant's objections as to each discovery request, defense counsel told her: "Repeating the same question over and over again is not a clarification. It's a waste of time amongst intelligent people." Defense counsel also stated: "The good thing is we have a court reporter, and if you don't remember it, the record will."

Later, defense counsel spoke condescendingly when plaintiff's counsel suggested using the *Belaire-West* notice to protect employee privacy interests. In response to plaintiff's proposal, defense counsel said: "You're seriously asking me now whether we would be willing to do a *Belaire* notice? . . . I'm sorry that I was unclear. Let me try to be clear. Now, if there's something you don't understand about what I'm saying, tell me so I can try to clarify for you. The *Belaire* notice procedure does

not apply to PAGA. Do you understand what I'm saying now, or do I need to clarify it further?" Defendant had no legal support for the proposition that *Belaire-West* notice procedures cannot be used in PAGA actions. We also observe that in *Williams II*, the Supreme Court referred to the *Belaire-West* notices repeatedly in its explanation of why PAGA discovery should be broad.

Towards the end of the meet and confer defense counsel taunted plaintiff's attorney telling her that the Supreme Court would side with defendant and find that PAGA plaintiffs cannot engage in such discovery. Defense counsel stated: "All right. Are you big enough to write me a written apology if the Supreme Court comes down saying the opposite of what you just said?" and "My question to you is, if the Supreme Court comes down with a decision that says--that is not just going forward, but is an interpretation of PAGA from the beginning that is inconsistent with what you just said, will you send me a written apology?" In sum, defense counsel was hostile and unreasonable, and failed to display a sincere effort to resolve the discovery impasse.

b. Defendant's Refusal to Respond to Any Discovery Related to Other Employees Was Not Supported by Law

The trial court also implicitly concluded defendant did not engage in a good faith, substantive discussion about the individual objections and refused to provide plaintiff with references to published case law to support his stance. Defendant emphasized that all of its objections about privacy, vagueness, ambiguity, overbreadth, and relevance were based on defendant's assertion that plaintiff is not entitled to conduct discovery as to other employees. Defendant told plaintiff: "any question concerning employees other than Ms. Hall trigger[s] all

of those objections." And, "[t]he concept, if it's going to be simplified, as I said over and over again is that we're not producing records that don't relate or apply to Ms. Hall or that would not be fairly produced in a lawsuit where she is the only plaintiff and there's no PAGA issue."

Defendant failed to provide legal authority in support of its position. Rather, defense counsel stated, "Judge Myers [sic] seems to agree with us.[6] There are judges out there that have taken the same position that we're taking so we can hardly be said to be extraordinary. And ultimately, the Supreme Court is going to address this. We believe that the position we have taken is very legally supported, and we've provided you with that support."

The other authority defendant relied on in the meet and confer briefing was the Court of Appeal's then depublished opinion in *Williams I*. During the meet and confer, plaintiff pointed out to defendant that "even *Williams* allowed for discovery for a particular branch for a particular position [within defendant's company], and you're refusing to do it even that much?" Defendant refused to negotiate even minimal discovery, saying "the facts of *Williams* are distinguishable from ours." Plaintiff offered to compromise by asking defendant to produce job descriptions for any other on-site salaried employees or

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[6] Defendant's "Judge Myers" comment appears to be to the unpublished trial court ruling made by Judge Barbara A. Meiers in another case and which defendant relied on in its opposition to the motion to compel. In that unpublished order, the trial court sua sponte ordered the plaintiff to amend his complaint because the plaintiff had not properly pleaded his PAGA action; it did not address the breadth of discovery whatsoever. Even if citable, the order itself was inapt to this case.

property managers who worked for defendant during the covered period, but defendant refused.

Defendant's myopic approach to its meet and confer obligations on PAGA discovery was not supported by *Williams I*. Aside from the fact that *Williams* was then under review by the Supreme Court, *Williams I* itself does not go as far as defendant suggests. In *Williams I*, the Court of Appeal approved of an incremental discovery path in a PAGA wage and hour labor case, where the plaintiff sought to represent fellow non-exempt employees across California. The court permitted the plaintiff to discover employee information for the store where he had worked, required the deposition of plaintiff before he could discover information for statewide employees, and encouraged the plaintiff to obtain the defendant's corporate policies and depositions of the defendant's corporate officers in order to bolster the plaintiff's renewed motion to compel. (*Williams I, supra,* 236 Cal.App.4th at pp. 1155, 1157-1159.)

A different picture emerges in our case. Plaintiff here sought dates for availability to depose defendant's corporate representatives, but in the months that followed the request, defendant refused to provide dates of availability.[7] Plaintiff also sought defendant's corporate policies by requests for production, but that was rebuffed as well.[8] Finally, defendant did not take up plaintiff's offer to have her deposition taken, nor did

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[7] At oral argument, defendant asserted that plaintiff had in fact taken the deposition of two persons most knowledgeable—one before the meet and confer and one after it. The record does not reflect that these depositions occurred.

[8] Defendant appears to have produced only company documents related to employees in plaintiff's position.

defendant propound interrogatories on plaintiff. Rather, defendant propounded only one request for production of documents, which the court found to be overbroad. The court denied defendant's motion to compel this discovery.

c. The Trial Court Implicitly Found Defendant's Privacy Arguments Were Not Made in Good Faith

The arguments appear to be unsupported by veritable privacy concerns. For example, in both her meet and confer letter and at the in-person meet and confer, plaintiff offered to send *Belaire-West* notices to aggrieved employees to alleviate defendant's privacy concerns. Defense counsel refused this solution, stating that he knew "of no case in California that has even suggested that *Belaire-West* notice apply to PAGA claims." Defendant also asserted in its oppositions that *Belaire-West* notices would be too costly for defendant to send. Yet, during the hearing on the motions to compel, defense counsel admitted to the court, "I don't know right now whether we're talking about Ms. Hall and five employees or Ms. Hall and two hundred employees." This admission raises the question—how could defendant assert *Belaire-West* notices were cost-prohibitive and too burdensome, when defendant did not know how many of these notices would even be sent?

Defense counsel made a similar admission when discussing the privacy objections to employee manuals. There, plaintiff's counsel asked whether defendant made an assessment of whether the discovery requests in fact encompassed communications entitled to the privacy privilege. Defense counsel responded, "Have we combed through every personnel file of the company going back a number of years? The answer is no." Defense counsel then admitted that he had not found any

documents to actually be withheld on privacy grounds, but rather was simply withholding the documents because he did not believe plaintiff was entitled to discovery of documents related to anyone but herself.

3. Defendant's Remaining Arguments Regarding Substantial Justification are Unpersuasive

The overall theme of defendant's appellate brief was that defendant was substantially justified in opposing the motion to compel because of the Court of Appeal's decision in *Williams I* and the decision of the Supreme Court to grant review. Defendant also argued on appeal that in hindsight, the Supreme Court's granting review of the discovery ruling in this case showed the legal question was at least a close one and therefore defendant had acted in good faith.

We understand the law in this area was unsettled during the discovery process. But that is precisely why the meet and confer process was so important to an orderly resolution of plaintiff's discovery demands during that very period. When the law is settled, perhaps there is less need for protracted meet and confer proceedings since by definition, the law more decisively supports the position of one party or the other. Moreover, it is the obligation of a party refusing discovery to have some positive legal basis, not just a vacuum, for its position.

Under the circumstances we have described, the trial court did not abuse its discretion in imposing sanctions.

DISPOSITION

We affirm the discovery sanctions order. Plaintiff Saundra Hall is awarded costs on appeal.

RUBIN, Acting P.J.

WE CONCUR:

GRIMES, J.

ZELON, J.*

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* Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.