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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 LORAN G. NORTHROP,

9 Plaintiff,

10 v.

11 SAFEWAY INC,

12 Defendant.

C16-350 TSZ

MINUTE ORDER

13 The following Minute Order is made by direction of the Court, the Honorable
14 Thomas S. Zilly, United States District Judge:

15 (1) Plaintiff's motion to compel discovery, docket no. 46, is DENIED. The
16 Settlement Investigation and creation of the "Chronology of Events" documents were
17 undertaken at the express direction of Safeway's in-house counsel, William Harris, in
18 direct response to a demand letter from Mr. Northrop's former attorney that explicitly
19 threatened litigation. As such, documents connected to the Settlement Investigation, such
20 as the Chronology of Events and investigation notes sought here, as well as Ms. Roldan's
21 oral testimony concerning the details of that investigation are protected by the work-
22 product doctrine. *See O'Conner v. Boeing North American, Inc.*, 216 F.R.D. 640, 644
23 (C.D. Cal. 2003) (holding that notes and oral testimony concerning witness interviews
conducted by a private investigator on behalf of plaintiffs' counsel were protected by the
work-product doctrine and granting a protective order precluding the deposition of the
investigator); *see also United States v. Nobles*, 422 U.S. 225, 238-39 (1975) ("It is
therefore necessary that the [work-product] doctrine protect material prepared by agents
for the attorney as well as those prepared by the attorney himself."); *Appeal of Hughes*,
633 F.2d 282, 290 (3d Cir. 1980) (holding that a request for a private investigator's oral

1 testimony regarding witness interviews goes to “the core of the work product of an agent
of the attorney.”¹

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3 Moreover, contrary to plaintiff’s arguments, Safeway has not waived work-
4 product protection of the Settlement Investigation by virtue of its assertion of a
5 *Faragher-Ellerth* defense because Safeway does not rely upon the Settlement
6 Investigation in support of that defense. *See Mendez v. Saint Alphonsus Regional*
7 *Medical Center, Inc.*, 2014 WL 3406015, at *4 (D. Idaho 2014) (“[T]he attorney-client
8 privilege and work product protection are not waived if the defendant does not rely on an
9 investigation in support of either its *Ellerth-Faragher* defense or any other defense in the
10 case.”). None of Safeway’s defenses are premised on the Settlement Investigation and
11 plaintiff has failed to articulate any other “substantial need for the materials” sufficient to
12 overcome work-product protection. *See Fed. R. Civ. P. 26(b)(3)*. There is simply no
13 evidence in the record to support a conclusion that plaintiff was unable to procure the
14 facts underlying the Settlement Investigation by resort to alternative sources or that resort
15 to such alternative sources would be unduly burdensome. Accordingly, the “Chronology
16 of Events,” any investigation notes, and Ms. Roldan’s oral testimony concerning the
17 details of the investigation are subject to work-product protection that has not been
18 waived and are therefore not discoverable. *See Hughes*, 633 F.2d at 290 (granting motion
19 to quash the government’s subpoena of an attorney’s private investigator where the
20 government “made no showing that the same information could not be obtained easily by
21 resort to alternative sources”); *see also Baker v. General Motors Corp.*, 209 F.3d 1051,
22 1054 (8th Cir. 2000) (“Discovery of a witness statement to an attorney is generally not
23 allowed if that witness is available to the other party.”).

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15 ¹ Plaintiff contends that Safeway’s harassment and discrimination policy demonstrates
16 that Safeway would have conducted an investigation and created the “Chronology of Events” (or
17 a similar document) in the ordinary course of business irrespective of whether litigation was
18 anticipated. *See U.S. v. Fidelity & Guaranty Co. v. Braspetro Oil Services, Co.*, 2000 WL
19 744369, at *8 (S.D.N.Y. June 8, 2000) (“[D]ocuments that are prepared in the ordinary course of
20 business or that would have been created in essentially similar form irrespective of the litigation
21 are not protected [by the work-product doctrine].”). But the fact that Safeway’s general policy
22 requires prompt investigation of reports of discrimination, Second Dec. of Susan Mindenbergs,
23 docket no. 53, Ex. 7 at 5, provides little, if any, support for plaintiff’s contention that Safeway
would have undertaken the Settlement Investigation, and created the “Chronology of Events” or
any investigation notes, absent an explicit threat of litigation by plaintiff’s former representative.
When Safeway received the demand letter from plaintiff’s former attorney, it had already
conducted an investigation of the events surrounding plaintiff’s termination in response to a
union grievance filed by Mr. Northrop. *See Decl. of Sue Bonnet*, docket no. 41, ¶¶ 8-11
(investigation conducted in May 2014); *Decl. of Jennifer Sheffield*, docket no. 34, Ex. 2 (Harris
Decl. at ¶ 2 & Ex. A) (Demand letter dated September 3, 2014). Based on the results of that
investigation, Safeway filed a grievance response denying Mr. Northrop’s allegations and the
Union ultimately withdrew the grievance. *Bonnet Decl.*, ¶ 15 and Ex. D.

1 (2) The Clerk is directed to send a copy of this Minute Order to all counsel of
record.

2 Dated this 4th day of April, 2017.

3 William M. McCool
Clerk

4 s/Karen Dews
5 Deputy Clerk

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