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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ERIC CARLSON,

Plaintiff,

v.

LEWIS COUNTY HOSPITAL
DISTRICT No.1, a Washington
governmental entity; ROSS JONES, a
married man; JUDY RAMSEY, a married
woman; KENTON SMITH, a married
man; MARC FISHER, a married man;
SHANNON KELLY, a married woman;
SHERI HENDRICKS, a married woman,

Defendants.

CASE NO. 15-5913

ORDER ON PLAINTIFF’S MOTION
TO COMPEL DISCOVERY AND
FOR WAIVER OF ATTORNEY-
CLIENT PRIVILEGE

This matter comes before the Court on the Plaintiff’s Motion to Compel Discovery and for Waiver of Attorney-Client Privilege (Dkt. 19) and the Defendants’ motion to strike (Dkt. 24). The Court has considered the pleadings filed regarding the motions and the remaining file.

On December 15, 2015, Plaintiff, a gay man, filed this case asserting claims for violation of his procedural due process and equal protection rights under the U.S. Constitution (pursuant to 42 U.S.C. § 1983) and for violations of the Washington Law Against Discrimination, RCW 49.60, *et. seq.* (“WLAD”) in connection with the termination of his employment. Dkt. 1. Plaintiff seeks damages, attorney’s fees and costs. *Id.*

1 Pending before the Court is Plaintiff's motion to compel Defendants to respond to
2 Plaintiff's First Interrogatories and Requests for Production and for an "order finding that
3 Defendants have waived the attorney-client privilege." Dkt. 19. Plaintiff also seeks an award of
4 attorney's fees and costs incurred in bringing this motion. *Id.* For the reasons provided, the both
5 the Plaintiff's motion (Dkt. 19) and the Defendants' motion to strike (Dkt. 24) should be granted,
6 in part, and denied, in part.

7 **I. FACTS AND PENDING MOTIONS**

8 **A. FACTS**

9 According to the Complaint, Plaintiff Mr. Carlson was hired by Defendant Lewis County
10 Hospital District No. 1 ("Hospital District") as the Chief Financial Operator of Morton General
11 Hospital ("Morton") on November 21, 2014. Dkt. 1, at 3. Hiram Whitmer, the Chief Executive
12 Officer of Morton, made the decision to hire Plaintiff. *Id.* The Hospital District is governed by
13 an elected board of commissioners ("board"), who are some of the individually named
14 Defendants here. *Id.* The Complaint maintains that at the time Plaintiff was hired, Morton's
15 accounting system was "a disaster." *Id.* It asserts that Morton had just written off a million
16 dollars in unbilled account receivables because they had not been timely billed. *Id.* The
17 Complaint alleges that Morton was at risk of having to write off several million more dollars
18 because other account receivables had gone unbilled for so long. *Id.* It maintains that Plaintiff
19 did a good job for Morton, and that Mr. Whitmer awarded Plaintiff a large retention bonus in
20 December of 2014. *Id.*

21 The Complaint asserts that after meeting him, members of the hospital's board stated that
22 they were "disturbed" by Plaintiff's homosexuality and expressed their "distaste" at having a
23 homosexual man as a leader at Morton. *Id.*, at 4. The Complaint alleges that some of the board
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1 | members contacted Mr. Whitmer and encouraged him to fire Plaintiff. *Id.* The Complaint asserts
2 | that Defendant Shannon Kelly, the Chief Human Resources Officer, also “encouraged Mr. Whitmer
3 | to fire Mr. Carlson.” *Id.*

4 | In support of Plaintiff’s motion, Mr. Whitmer filed an affidavit, stating that he objected to
5 | terminating Plaintiff’s employment. Dkt. 20, at 9. According to Mr. Whitmer, “under duress”
6 | from the board, he consulted Morton’s attorney, Julie Kebler, of the law firm Garvey Schubert
7 | Barer, regarding the legality of firing Mr. Carlson. Dkt. 20, at 8. He alleges that “[a]fter an
8 | extensive review of the situation, [Morton]’s attorney advised that [Morton] use Mr. Carlson’s
9 | prior bankruptcy and a court case in which a judge mentioned that Mr. Carlson ‘may’ have
10 | committed fraud . . . (but there was no evidence of a fraud) as a pretext for firing him.” *Id.* He
11 | asserts that he sought advice from the lawyers “to find out about the legality of firing Mr.
12 | Carlson for something he had never committed.” Dkt. 20, at 8. Mr. Whitmer asserts that he
13 | “was given a regimented process to follow as Mr. Carlson had no performance issues and it was
14 | well known regarding the [board’s] and communities’ dislike for Mr. Carlson being
15 | homosexual.” *Id.* Mr. Whitmer claims that the attorneys advised him to place Mr. Carlson on
16 | administrative leave “to make it appear an investigation was being conducted so Mr. Carlson
17 | would hopefully not bring a wrongful termination and discrimination suit against the hospital.”
18 | *Id.*, at 9. He maintains that no investigation was conducted and there was never any intention to
19 | do so. *Id.* Under threats from the hospital’s board regarding the security of his own job, Mr.
20 | Whitmer states that he was forced to fire Plaintiff “because of his sexual orientation.” *Id.* After
21 | a meeting between Mr. Whitmer and Plaintiff on January 5, 2015, Plaintiff’s employment was
22 | terminated on January 6, 2015. Dkt. 1, at 3-4. The board fired Mr. Whitmer on March 11, 2015.
23 | Dkt. 20, at 2.

1 The motion to strike the Affidavit of Mr. Whitmer (Dkt. 24), should be denied. There is no
2 showing that striking that affidavit is appropriate.

3 **B. PLAINTIFF’S MOTION REGARDING WAIVER OF THE ATTORNEY CLIENT**
4 **PRIVILEGE**

5 “The attorney-client privilege protects confidential disclosures made by a client to an
6 attorney in order to obtain legal advice . . . as well as an attorney's advice in response to such
7 disclosures.” *U.S. v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009)(*internal citation omitted*).
8 Corporations are entitled to assert the privilege. *Commodity Futures Trading Comm'n v.*
9 *Weintraub*, 471 U.S. 343, 348 (1985).

10 “Issues concerning application of the attorney-client privilege in the adjudication of federal
11 law are governed by federal common law.” *Ruehle*, at 608. Plaintiff makes both federal and
12 state law claims. Dkt. 1. Parties make no showing the analysis under Washington law would
13 different. Accordingly, federal common law will be applied.

14 Under federal law, the attorney-client privilege is “strictly construed” because “it impedes
15 full and free discovery of the truth.” *Ruehle*, at 607. Whether information is covered by the
16 attorney-client privilege is determined by an eight-part test:

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

22 *Ruehle*, at 607 (*internal citations omitted*). The party asserting the privilege, the Defendants
23 here, have the burden of proving each element. *Ruehle*, at 607.

24 The parties here do not contest the first seven elements, that Mr. Whitmer made
communications with and sought legal advice from Morton’s attorneys, in their capacity as
attorneys, relating to the firing of Mr. Carlson. Further, they do not contest that the

1 | communications were made in confidence by Mr. Whitmer in his role as Morton’s CEO and that
2 | Defendants are insisting on protection from disclosure. The parties dispute the last element,
3 | whether the protection of the privilege was waived. There are two types of waiver of the
4 | attorney-client privilege at issue here: express and implied.

5 | 1. Express Waiver

6 | “[V]oluntary disclosure of the content of a privileged attorney communication constitutes
7 | waiver of the privilege as to all other such communications on the same subject.” *Weil v.*
8 | *Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). “[T]he power to waive
9 | the corporate attorney-client privilege rests with the corporation’s management and is normally
10 | exercised by its officers and directors.” *Weintraub*, at 348. Other courts in this circuit have
11 | applied this rule in the context of a public sector entity, *See Galli v. Pittsburg Unified Sch. Dist.*,
12 | 2010 WL 4315768 (N.D. Cal. October 26, 2010), and the parties do not assert that any other rule
13 | should apply here. “[W]hen control of a corporation passes to new management, the authority to
14 | assert and waive the corporation’s attorney-client privilege passes as well.” *Weintraub*, at 349.
15 | “Displaced managers may not assert the privilege over the wishes of current managers, even as
16 | to statements that the former might have made to counsel concerning matters within the scope of
17 | their corporate duties.” *Weintraub*, at 349.

18 | To the extent that Plaintiff asserts that Mr. Whitmer expressly waived attorney-client
19 | privilege, Defendants point out that Mr. Whitmer’s Affidavit fails to state that any disclosure of
20 | the privileged communications occurred while Mr. Whitmer was still Morton’s CEO. Although
21 | Plaintiffs note that Mr. Whitmer’s deposition is scheduled within a week, they acknowledge that
22 | on the current record, Mr. Whitmer’s statements regarding the advice of counsel occurred after
23 | the termination of his employment in March of 2015. Dkt. 26, at 3. Accordingly, he did not
24 |

1 have the authority to waive the attorney-client privilege. At this stage, Plaintiff's motion that the
2 Court find that Morton expressly waived the attorney-client privilege through Mr. Whitmer
3 should be denied.

4 2. Implied Waiver

5 Under federal law, waiver of the attorney-client privilege "may be effected by
6 implication." *Weil*, at 24. In the Ninth Circuit,

7 An implied waiver of the attorney-client privilege occurs when: (1) the party
8 asserts the privilege as a result of some affirmative act, such as filing suit; (2)
9 through this affirmative act, the asserting party puts the privileged information at
information vital to its defense.

10 *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1326 (9th Cir. 1995) (*citing*
11 *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975)). Further, "an overarching consideration is
12 whether allowing the privilege to protect against disclosure of the information would be
13 manifestly unfair to the opposing party." *Id.* (*internal citations omitted*).

14 Defendants have arguably taken an affirmative act that put the privileged information at
15 issue. Plaintiff contends that the first and second prongs are met because, in its Answer,
16 Defendants assert that "Mr. Whitmer voluntarily terminated Mr. Carlson" on the grounds of the
17 alleged fraud. Dkt. 19, at 6 (*citing* Dkt. 10, at 3-4). He points out that Mr. Whitmer's testimony
18 is directly to the contrary. *Id.* Mr. Whitmer states that he was forced to fire Mr. Carlson because
19 of his homosexuality and that he sought advice of counsel on how to do so "legally." Defendants
20 have arguably placed the privileged information at issue.

21 Even if the Defendants had not affirmatively put into issue privileged information, the
22 information is sufficiently vital to Plaintiff's claims to meet the third prong of the test. Plaintiff
23 points out that without a finding of waiver, "Defendants will testify that it was Mr. Whitmer who
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1 made the decision to terminate Mr. Carlson based on the allegation of fraud.” Dkt. 19, at 7.
2 They further note that, “Mr. Whitmer will not be allowed to testify that he was instructed to use
3 the allegation of fraud as pretext and to avoid any indication that Mr. Carlson’s status as a
4 homosexual was the true basis for Mr. Carlson’s firing.” *Id.* “The privilege which protects
5 attorney-client communications may not be used both as a sword and a shield. Where a party
6 raises a claim which in fairness requires disclosure of the protected communication, the privilege
7 may be implicitly waived,” *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992)
8 (*internal citations omitted*), as it has been here.

9 Further, in considering the “overarching consideration” of fairness, it would be
10 manifestly unfair to deny Plaintiff access to the information regarding the basis for firing him
11 contained in the documents he seeks. The complete picture of what happened here is only
12 available if all the documents are turned over, including those with attorney-client
13 communications. Defendants have implicitly waived the attorney-client privilege as to the basis
14 for terminating Plaintiff’s employment.

15 **C. PLAINTIFF’S MOTION TO COMPEL**

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

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

22 Plaintiff’s motion for an order requiring that Defendants produce all documents related to the
23 evaluation of how to terminate Plaintiff’s employment, including those that contain the advice of
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1 counsel, (Dkt. 19) should be granted. Defendants have implicitly waived the attorney-client
2 privilege by placing the privileged communications at issue. “[R]aising a claim that requires
3 disclosure of a protected communication results in waiver as to all other communications on the
4 same subject.” *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010). Accordingly,
5 Plaintiff’s motion to compel should be granted.

6 **D. PLAINTIFF’S MOTION FOR ATTORNEYS’ FEES**

7 Pursuant to Fed. R. Civ. P. 37 (a)(5)(A)(ii), if a motion to compel is granted, the court must
8 award attorneys’ fees and costs, unless “the opposing party’s nondisclosure . . . or objection was
9 substantially justified.”

10 Plaintiff prevailed in his motion to compel. However, whether Defendants’ waived the
11 attorney-client privilege is a close question. Their non-disclosure and or objection to the
12 discovery sought was substantially justified. Accordingly, Plaintiff’s motion for attorneys’ fees
13 and costs (Dkt. 19) should be denied.

14 **E. OTHER MATTERS**

15 Defendants are currently represented by the law firm of Garvey Schubert Barer, the same
16 firm that Mr. Whitmer contacted regarding Plaintiff. The undersigned recognizes that the above
17 findings may now result in issues regarding Washington’s Rules of Professional Conduct
18 (“RPC”) 3.7 “Lawyer as Witness,” and perhaps others, including RPC 1.7 “Conflict of Interest:
19 Current Clients,” for the Defendants’ lawyers.

20 Trial is scheduled to begin on March 13, 2017, around three months from now. Dispositive
21 motions, if any, are to be filed by January 10, 2017. The discovery deadline has passed.

22 Plaintiff’s motion to compel was filed on the last possible day.
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1 The parties should be given time to consider the implications of this order. The Defendants'
2 counsel should inform the Court of whether they intend to continue to represent the Defendants
3 and both parties should inform the Court of whether an extension of time for all remaining
4 deadlines is appropriate on or before January 9, 2017.

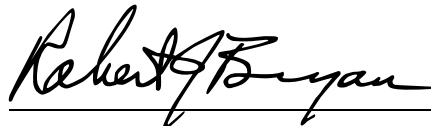
5 **III. ORDER**

6 Accordingly, it is **ORDERED** that:

- 7 • The Defendants' motion to strike (Dkt. 24) **is granted, in part, and denied, in part;**
- 8 • The Plaintiff's motion for an order that the attorney-client privilege has been waived
9 (Dkt. 19) **is granted;**
- 10 • The Plaintiff's motion to compel (Dkt. 19) **is granted;**
- 11 • Plaintiff's motion for attorneys' fees and costs (Dkt. 19) **is denied;** and
- 12 • The Defendants' counsel shall inform the Court of whether they intend to continue to
13 represent Defendants and both parties shall inform the Court of whether an extension
14 of time for all remaining deadlines is appropriate on or before **January 9, 2017.**

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

17 Dated this 14th day of December, 2016.

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20 ROBERT J. BRYAN
21 United States District Judge
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