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ELECTRONICALLY  
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Deputy Clerk

**SUPERIOR COURT OF CALIFORNIA**  
**CITY AND COUNTY OF SAN FRANCISCO**

KAREN CLOPTON,

Plaintiff,

vs.

CALIFORNIA PUBLIC UTILITIES  
COMMISSION, MICHAEL PICKER,  
LIANE M. RANDOLPH, and Does 1-15,

Defendants.

Case No: CGC-17-563082

**Discovery**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF'S MOTION TO COMPEL  
FURTHER RESPONSES TO  
REQUEST FOR PRODUCTION OF  
DOCUMENTS, SET ONE**

Hearing Date: December 18, 2018

Time: 9:30 a.m.

Judge: Honorable Harold E. Khan

Department: 302

Action Filed: December 12, 2017

Trial Date: None set

## INTRODUCTION

Plaintiff Karen Clopton, a widely respected Chief Administrative Law Judge who received many awards and good evaluations, reported racial discrimination at the California Public Utilities Commission (CPUC). She confronted CPUC Commissioners and staff over their racially discriminatory statements and conduct directed towards her and other African-American CPUC staff. Not only did she complain about racial discrimination, she repeatedly and directly addressed racial issues with the Commissioners and staff as well as discussed their own implicit biases.

Plaintiff cooperated with state and federal investigations into the misconduct of CPUC Commissioners and staff involved in collusion between the CPUC and Pacific Gas & Electric Company (PGE).

Plaintiff also opposed the appointment, as an administrative law judge, of a Commission staff member who had unethical ex parte communications with PGE, whose relationship with PGE posed potential conflict of interest issues, and who wrote racist emails regarding black judges in the Administrative Law Judge Division.

Plaintiff advocated for the judicial independence of the CPUC's Administrative Law Judges (ALJs). The Commissioners, who are political appointees, advocated that plaintiff report directly to them instead of to the Executive Director. Plaintiff brought this proposed change in structure to the attention of State Legislators.

Her confrontation of racial discrimination and her whistle-blowing at the CPUC led to her being retaliated against and terminated.

In preparation for depositions and trial, plaintiff served defendant with requests for production of documents on June 27, 2018, over four and half months ago.

Plaintiff has held several meet and confer sessions and agreed three times to postpone filing a motion to compel further responses in order to provide defendant with time to collect the documents.

Plaintiff seeks an order compelling further responses to plaintiff's Request for Production of Documents, Set One on the grounds that defendant agreed to provide a

1 much of the requested documents, but has not produced many of them. Also defendant  
2 only partially provided documents in response to many requests. Defendant promised to  
3 produce all documents by October 15, 2018, but has not done so.

4 The requested documents are relevant. Defendant has not provided plaintiff with  
5 a statement, pursuant to California Code of Civil Procedure (CCP) § 2031.220, that it has  
6 provided all documents in response to the requests that are in its possession, nor a  
7 privilege log for documents that defendant claimed are privileged.

8 Plaintiff believes that she needs a court order with a deadline for the defendant to  
9 provide all requested documents.

#### 10 STATEMENT OF FACTS

11 Plaintiff filed her Complaint on December 13, 2017, and a First Amended  
12 Complaint on March 8, 2017, asserting retaliation claims under two California  
13 whistleblower statutes, a claim for discrimination based on race and a claim of  
14 retaliation.

15 On June 27, 2018, plaintiff served defendant CPUC with the Request for  
16 Production of Documents, Set One (RPD). On August 1, 2018, defendant served a  
17 written response with no documents. (JB Dec.<sup>1</sup>, ¶ 2.) On August 13, 2018, defendant  
18 agreed to extend plaintiff's time to file a motion to compel further responses to the RPD  
19 until October 12, 2018. (JB Dec., ¶ 3, Ex. A.) On August 23, 2018, defendant provided  
20 some of the responsive documents. (JB Dec., ¶ 4.)

21 On September 11, 2018, Jane Brunner, plaintiff's counsel, sent a meet and confer  
22 letter regarding documents that defendant did not provide. (JB Dec., ¶ 5, Ex. B.) On  
23 September 18, 2018, the parties held a meet and confer conference call. The parties  
24 agreed that defendant would provide responses to RPD Nos. 2, 3, 6, 7, 8, 9, 10, 11, 14, 16,  
25 18, 19, 20, 22, 24, 25, 28, 30, 31, 32, 33, 40, 41, 43, 45, 46, 49, 50, 52, 57, 58, 59, 61, 62,  
26 63, 64, 69, 73 and 75, by producing some documents by September 28, 2018, and the  
27

28 <sup>1</sup> Declaration of Jane Brunner in Support of Plaintiff's Motion to Compel Further  
Responses to Request for Production of Documents, Set One ("JB Dec.").

1 the remainder no later than October 15, 2018. (JB Dec., ¶ 6, Ex. C.) Defendant's counsel  
2 also agreed to get back to plaintiff regarding RPD Nos. 21, 23, 24, 34, 36, 37, 39, 42, 55  
3 and 56. (*Id.*) Defendant's counsel stated that CPUC would not agree to provide any  
4 documents for RPD No. 47. (*Id.*) Plaintiff also agreed to narrow several requests, which  
5 she did on September 20, 2018. (JB Dec., ¶ 7, Ex. D.)

6 The parties agreed to extend the deadline for plaintiff to file a motion to compel  
7 to November 15, 2018. (JB Dec., ¶ 8, Ex. E.)

8 Defendant produced some documents on September 28, 2018, but it did not  
9 provide any documents that it agreed to produce by October 15, 2018. (JB Dec., ¶ 9.) On  
10 October 19, 2018, plaintiff's counsel emailed defendant's counsel requesting that she let  
11 her know when the documents had been mailed. Defendant's counsel replied without  
12 answering whether or not defendant had sent the documents. (JB Dec., ¶ 10, Ex. F.)  
13 Again, on October 23, 2018, plaintiff's counsel requested that defendant's counsel let  
14 her know if they had sent the documents. (*Id.*) On October 23, 2018, defendant's  
15 counsel responded that they had not sent the documents. (*Id.*) On October 25, 2018, the  
16 parties held another meet and confer call. At this time defendant's counsel stated she  
17 would only provide documents related to the whistleblower claims and would not  
18 produce any documents related to plaintiff's termination. (JB Dec., ¶ 11.) She did not  
19 have a date when she would provide the whistle blowing documents. (*Id.*)

20 On October 29, 2018, defendant again produced some responsive documents.  
21 (JB Dec., ¶ 12.) On October 30, 2018, the parties agreed to another extension for  
22 plaintiff to file the motion to compel, to November 20, 2018. (JB Dec., ¶ 12, Ex. G.)

23 On August 3, 2018, plaintiff served form interrogatories on defendant. On August  
24 30, 2018, defendant requested an extension to respond until September 24, 2018, to  
25 which plaintiff agreed. Two days after receiving defendant's response, on September 28,  
26 2018, plaintiff's counsel sent a meet and confer letter asking for updated interrogatory  
27 responses by October 8, 2018. (JB Dec., ¶ 13.) On October 8, 2018, defendant's counsel  
28 requested a meet and confer call for that week, which plaintiff agreed to. (*Id.*) On

1 October 10, 2018, defendant requested to change the call to the following week of  
2 October 15, 2018, but then never set up the call. (*Id.*) On October 19, 2018, plaintiff's  
3 counsel requested a meet and confer call regarding the form interrogatories. (*Id.*) On  
4 October 25, 2018, the parties held another meet and confer conference call and  
5 discussed the outstanding document responses, but defendant's counsel was not ready  
6 to discuss the disagreement over defendant's responses to plaintiff's form  
7 interrogatories. (*Id.*)

8 Defendant requested a protective order in order to provide some of the  
9 documents. (JB Dec., ¶ 14.) On September 4, 2018, plaintiff sent a draft protective order  
10 to defendant. (*Id.*) Two months later on November 6, 2018, defendant responded by  
11 providing the model protective order from the Northern California District Court. (*Id.*)  
12 On November 7, 2018, plaintiff agreed to defendant's protective order. (*Id.*)

13 On November 7, 2018, plaintiff's counsel emailed defendant's counsel to inform  
14 her, as agreed, that plaintiff would file her motion to compel on November 20, 2018,  
15 and set the hearing date for December 18, 2018. (JB Dec., ¶ 15.) The following day, on  
16 November 8, 2018, defendant sent an email, with additional responsive documents,  
17 stating that it would produce more documents and an amended response, but did not  
18 provide the date that it would produce these new documents and responses. (*Id.*)

19 On November 13, 2018, the parties held another meet and confer phone call, at  
20 which time defendant stated that it was not ready to produce the documents subject to  
21 the protective order. (JB Dec., ¶ 16.) The rest of the outstanding issue did not resolve.

## 22 LEGAL ARGUMENT

23 Plaintiff will address the general legal arguments dealing with all of the Requests  
24 for Production and then address the specific facts in relation to the individual requests.

### 25 **1. Defendant's Boilerplate Objections Failed to Comply with CCP §** 26 **2031.240(b).**

27 Defendant makes boilerplate (and improper) objections to many of the document  
28 requests. As a result, it is impossible for plaintiff to know whether any documents are  
withheld and, if so, which documents are withheld and for what reason(s). The

1 objections are ill-founded and disingenuous. The boilerplate objections are general and  
2 non-specific, so plaintiff is at a loss as to the basis of the objection.

3 For many of the responses, defendant failed to comply with CCP § 2031.240(b)  
4 which provides that the responding party who objects to any items or category of item  
5 must: (1) identify with particularity any documents, tangible thing, land, or  
6 electronically stored information (ESI) falling within any category of item in the demand  
7 to which objections is being made; and (2) set forth the extent of, and the specific  
8 ground for, the objection.

9 **2. In Requests for Production Nos. 2, 3, 6, 8, 10, 14, 19, 20, 21, 22, 24,**  
10 **30, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 45, 46, 53, 57, 63 and**  
11 **75, Defendant Objected that the Requests were not Reasonably**  
**Calculated to Lead to the Discovery of Admissible Evidence.**

12 Defendant objected and did not give a reason why plaintiff's RPD Nos. 2, 3, 6, 8,  
13 10, 14, 19, 20, 21, 22, 24, 30, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 45, 46, 53, 57, 63  
14 and 75 were not relevant and reasonably calculated to lead to discovery of admissible  
15 evidence. The scope of discovery in California is very broad. CCP § 2017(a) provides  
16 that, "any party may obtain discovery regarding any matter, not privileged, that is  
17 relevant to the subject matter involved in the pending action ... if the matter either is  
18 itself admissible in evidence or appears reasonably calculated to lead to the discovery of  
19 admissible evidence."

20 For discovery purposes, information is relevant if it might reasonably assist a  
21 party in evaluating a case, preparing for trial, or facilitating settlement. *Gonzalez v.*  
22 *Superior Court* (1995) 33 Cal.App.4<sup>th</sup> 1539, 1546. Admissibility at trial is not required.  
23 *Id.* Where there is some prima facie showing of relevance, the party opposing disclosure  
24 by discovery has the burden of establishing preliminary facts essential to its position. *Id.*  
25 at 1548. Any doubt regarding discoverability is generally resolved in favor of permitting  
26 discovery. *Colonial Life v. Superior Court* (1982) 31 Cal.3d 785, 790.

27 The information in these requests is relevant to showing that defendants  
28 discriminated and retaliated against plaintiff. Here are only a few examples of the type

1 of documents that plaintiff requested: any discipline given to plaintiff; complaints made  
2 by CPUC employees and/or commissioners regarding her; documents related to her  
3 termination; documents in response to her presentation of implicit bias; documents  
4 related to changing plaintiff's position to at-will; and any notes from the CPUC retreat.

5 The information sought by these document requests is clearly relevant and the  
6 Court should order the defendant to produce the documents requested.

7 **3. In Request for Production No. 6, Defendant Objected that the**  
8 **Request was Burdensome, Oppressive and Harassing.**

9 Defendant objected to plaintiff's RPD No. 6, stating it was burdensome,  
10 oppressive and harassing to produce the documents. In *West Pico Furniture Co. v.*  
11 *Superior Court* (1961) 56 Cal.2d 407, 417-418, the court explained the difference  
12 between an objection on the grounds of burden and an objection on the grounds of  
13 oppression. It stated, "Oppression must not be equated with burden. The objection  
14 based upon burden must be sustained by evidence showing the quantum of work  
15 required, while to support an objection of oppression there must be some showing  
16 either of intent to create an unreasonable burden or that the ultimate effect of the  
17 burden is incommensurate with the result sought." In this case, the defendant obviously  
18 cannot meet either of these requirements.

19 Furthermore, it is well established in California that the fact that "the response to  
20 an interrogatory may be expensive and burdensome does not justify a refusal to  
21 answer." *Alpine Water Company v. Superior Court* (1968) 259 Cal.App.2d 45, 55-56,  
22 418, citing *West Pico Furniture Co., supra*, 56 Cal.2d at 417-418. As the court reasoned  
23 in *West Pico Furniture Co.*, "The objection of burden is valid only when that burden is  
24 demonstrated to result in injustice." 56 Cal.2d at 418. The court concluded that, "the  
25 trial court is not empowered to sustain an objection in toto, when the same is predicated  
26 upon burden, unless such is the only method of rendering substantial justice." *Id.*

27 In response to defendant's objections, plaintiff agreed to narrow the request to  
28 include CPUC management, their staff, and specific individuals, who were either  
interviewed about plaintiff, during the retaliatory investigation that led to her

1 termination, or testified regarding plaintiff at the State Personnel Board (SPB) hearing,  
2 or were listed as a potential witness by defendant CPUC. Plaintiff also agreed to meet  
3 and confer regarding search terms. Defendant never responded to this offer.

4 The information sought by this document request, is clearly not burdensome,  
5 oppressive or harassing, and the Court should order defendant to produce the  
6 documents in response to plaintiff's RPD No. 6.

7 **4. For Request for Production Nos. 2, 3, 6, 7, 8, 9, 10, 11, 16, 18, 19, 20,**  
8 **21, 22, 23, 24, 28, 29, 30, 31, 32, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45,**  
9 **46, 47, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 68, 69,**  
10 **72 and 73, Defendant Objected that the Requests violated the**  
11 **Attorney-Client Privilege, Attorney Work Product Doctrine, and/or**  
12 **privacy rights of third-parties.**

13 Defendant objected to RPD Nos. 2, 3, 6, 7, 8, 9, 10, 11, 16, 18, 19, 20, 21, 22, 23,  
14 24, 28, 29, 30, 31, 32, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 51, 52, 53, 54, 55,  
15 56, 57, 58, 59, 60, 61, 62, 63, 64, 68, 69, 72 and 73 on the grounds that they call for  
16 information protected by attorney-client privilege and/or work product doctrine, or  
17 violated the privacy rights of third-parties.

18 Plaintiff has no way to determine if defendant has withheld documents based on  
19 a claim of privilege because defendant has not provided a privilege log listing any  
20 documents protected by the attorney-client privilege, nor did defendant provide the  
21 reason any document is privileged in relationship to a third-party.

22 Defendant bears the burden of demonstrating that the information requested  
23 falls within the zone of privacy protected by the State Constitution. Even if the  
24 defendant meets this burden, the Court must balance plaintiff's interest in discovering  
25 this information against the right to privacy at issue. (*Davies v. Superior Court* (1984)  
26 36 Cal.3d 291, 297, 303; *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 842.)

27 There is a general public interest in "facilitating the ascertainment of truth in  
28 connection with legal proceedings" (*Moskowitz v. Superior Court* (1982) 137 Cal.App.3d  
313, 316.) If these public interests in disclosure of private information are found to be  
compelling, the individual's right of privacy must give way and disclosure will be



1 required. (*Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 664).

2 The Court should order defendant to provide a privilege log, that includes  
3 detailed information requested under the CCP§§ 2031.240(b)(c) or produce all  
4 documents responsive to these requests.

5 **5. Defendant Agreed to Produce Responsive Documents for**  
6 **Numerous Requests, it did not Produce Agreed upon Documents,**  
7 **nor Confirm that it Produced all Responsive Documents in its**  
8 **Possession or Control.**

9 Defendant agreed to provide responsive documents to numerous requests, but  
10 did not produce all documents nor, pursuant to CCP § 2031.220, *et seq.*, has it  
11 confirmed that it has produced all responsive documents that are in the possession,  
12 custody, or control of all of the defendants.

13 The Court should order defendant to produce all agreed upon documents and to  
14 confirm that it has produced all documents responsive to the requests.

15 **6. Defendant Agreed to Meet and Confer Further with Plaintiff to**  
16 **Determine if it would Produce the Documents Requested in Nos.**  
17 **21, 23, 34, 36, 37, 42, 55, 56 and 73, yet Defendant Never Met and**  
18 **Conferred Again about these Requests, but Instead stated it will**  
19 **not Produce any Documents Related to Plaintiff's Termination.**

20 Defendant's counsel agreed to review with her client plaintiff's RPD requests Nos.  
21 21, 23, 34, 36, 37, 42, 55, 56 and 73 and discuss further with plaintiff's counsel whether  
22 they were going to provide the requested documents. During the October 25, 2018 call,  
23 defendant's counsel would not discuss the individual requests. She only stated that  
24 defendant would not provide any documents related to plaintiff's termination.

25 RPD Nos. 21 and 23 are for Michael Colvin's emails with negative comments  
26 about judges as well as documents relating to the meeting Mr. Colvin had with plaintiff.  
27 Plaintiff objected to Mr. Colvin's emails as being racist. After plaintiff objected to his  
28 racist emails and his appointment as an administrative law judge, she started getting  
negative comments made about her and her manner of behavior.

Plaintiff also requested all complaints made by employees against her. There was  
testimony at the SPB hearing that people made oral and written complaints. Reviewing

1 such complaints is critical to her allegations of discrimination and retaliation to show  
2 defendants' reason for terminating her was pretext for discrimination and retaliation.

3 Plaintiff also requested documents related to the investigation of her as well as  
4 notes from the retreat of the Commissioners. It was clear at the SPB hearing that even  
5 the CPUC witnesses thought the final investigative report did not reflect what they said.

6 The Court should order defendant to produce all documents responsive to these  
7 requests as they are all relevant to showing that defendant discriminated and retaliated  
8 against plaintiff and wrongfully terminated her because of her whistle-blowing activity.

9 **7. Defendant Refused to Provide Documents in Response to Request**  
10 **for Production No. 47.**

11 In RPD No. 47, plaintiff requested documents related to any complaints made by  
12 African-American employees to the CPUC regarding discrimination, from 2007 through  
13 2017.

14 Defendant objected to this request on the grounds that it was vague, ambiguous,  
15 overbroad, and seeks information which is not relevant to the pending litigation nor  
16 reasonably calculated to lead to discovery of admissible evidence, as well as that the  
17 documents are available to plaintiff through court records.

18 Plaintiff agreed to narrow the request to complaints of race discrimination by  
19 African-American professional employees of the CPUC. This document request is  
20 narrowly tailored and specific. CPUC's policies require the reporting of any  
21 discrimination to the EEO Officer, HR Director, or any supervisor or manager. The  
22 information sought by this request is clearly calculated to lead to relevant, admissible  
23 evidence. Plaintiff has a right to know if there is a history of discrimination at the CPUC.  
24 The scope of discovery in California is very broad. CCP § 2017(a) provides that, "any  
25 party may obtain discovery regarding any matter, not privileged, that is relevant to the  
26 subject matter involved in the pending action...if the matter either is itself admissible in  
27 evidence or appears reasonably calculated to lead to the discovery of admissible  
28 evidence."

1 The Court should order defendant to produce the documents responsive to RPD  
2 No. 47.

3 **8. The Court Should Award Sanctions to Plaintiff.**

4 Pursuant to CCP § 2023.030(a), this Court has the authority to impose a  
5 monetary sanction ordering that one engaging in the misuse of discovery process pay  
6 reasonable expenses, including attorney fees, incurred by anyone as a result of that  
7 conduct. The court may impose severe sanctions against defendant for not resolving the  
8 discovery issues in the four and half months by: (1) not providing many of the  
9 documents it agreed to provide; (2) not supplementing its response to all of the  
10 documents requests stating that it has provided all documents in its control, for each  
11 document request where defendant does not have an objection, or giving the reason for  
12 its inability to comply with the request; (3) objecting to most document requests with  
13 boilerplate objections; and (4) objecting that responsive documents are privileged  
14 without providing a reason the documents are privileged or by providing a privilege log.

15 **CONCLUSION**

16 For the foregoing reasons, plaintiff respectfully requests that her Motion to  
17 Compel Further Responses to Request for Production of Documents, Set One, be  
18 granted; that Court order the defendant to comply with CCP § 2031.240 (b); provide a  
19 privilege log for any documents the defendant objected to as privileged; and award  
20 sanctions to the plaintiff.

21 Dated: November 20, 2018

22 SIEGEL, YEE & BRUNNER

23 By: 

24 Jane Brunner

25 Attorneys for Plaintiff  
26 KAREN CLOPTON