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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

LIFE TECHNOLOGIES CORPORATION,
Petitioner,
v.
THE SUPERIOR COURT OF SAN
MATEO COUNTY,
Respondent;
TIMOTHY H. JOYCE,
Real Party in Interest.

A136187

(San Mateo County
Super. Ct. No. CIV494692)

By the Court:¹

The parties are familiar with the procedural history of this case and its extensive record. We therefore do not recite it here. The underlying suit is based upon real party Timothy H. Joyce’s complaint against “petitioner Life Technologies Corporation (LTC) for wrongful termination, claiming, among other things, that he was discriminated against on the basis of his age and retaliated against because he complained about such discrimination.” (*Life Technologies Corporation v. Superior Court* (2011) 197 Cal.App.4th 640, 644.) Joyce was an in-house attorney at LTC. LTC’s answer puts Joyce’s performance at issue.

¹ Before Marchiano, P. J., Dondero, J., and Banke, J.

The present petition challenges an order of respondent, San Mateo County Superior Court, requiring production to Joyce of several categories of communications which LTC alleges are subject to the lawyer-client privilege. (Evid. Code, § 952.)² The superior court held the privilege applicable to certain of the communications, but found the privilege was waived (§ 912) or was made inapplicable by application of section 958. As to others, the court found the privilege inapplicable both because the dominant purpose of each communication did not fall within the privilege, and by the application of section 958.

For the following reasons, we grant the petition in part.

While “an attorney plaintiff may not establish a claim through the disclosure of privileged information” (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 791, italics omitted), section 958 provides “[t]here is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.” “[T]he statute is not a general client-litigant exception allowing disclosure of *any* privileged communication simply because it is raised in litigation. [Citations.] Evidence Code section 958 only authorizes disclosure of relevant communications between a client . . . and an attorney charged with professional wrongdoing (*Schlumberger Limited v. Superior Court* (1981) 115 Cal.App.3d 386, 392-393 . . . ; *Miller v. Superior Court* (1980) 111 Cal.App.3d 390, 392-393) This approach gives the attorney a meaningful opportunity to defend against the charge, but does not deter the client from confiding in other attorneys . . . about the dispute.” (*Brockway v. State Bar* (1991) 53 Cal.3d 51, 63-64; see also *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378, 383-384.)

The superior court found section 958 applicable because Joyce’s performance was at issue with regard to LTC’s reasons for his termination. The record before us, however, is insufficient to support the application of section 958 at this stage of the litigation.

With that conclusion in mind, we review the remainder of superior court’s ruling.

² All further statutory references are to the Evidence Code unless otherwise indicated.

The first group of communications, the “Bowersox Memos,” are, as described succinctly in real party Joyce’s opposition “communications between Plaintiff’s former supervisor (Frazier) and outside counsel (Bowersox), dated December 4, 2008, January 13, 2006, [and] January 26, 2009.” Finding waiver of the lawyer-client privilege in LTC’s letter to the Equal Employment Opportunity Commission (§ 912), the superior court limited its waiver ruling “to the portions necessary to understand the criticisms by Mr. Bowersox as reflected in his notes and reports. Confidential or sensitive material might be redacted. A protective order is already in place in this case and might be modified to provide additional protections.”

Given this careful limitation, the superior court did not abuse its discretion in ordering disclosure.

The remaining communications are various e-mail chains. As to some, Joyce conceded the applicability of the lawyer-client privilege; however, the superior court applied section 958 to find the privilege inapplicable. As we have noted, the record before us is insufficient to support application of section 958. It was therefore error to order disclosure of these otherwise concededly privileged e-mails.

Applying the long-settled analysis of *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, the court found the dominant purpose of certain other e-mails not to be within the lawyer-client privilege, and held the communications to be between supervisor and employee. Those factual findings, on this record, are supported by substantial evidence (*Holm v. Superior Court* (1954) 42 Cal.2d 500, 507, disapproved on other grounds in *Suezaki v. Superior Court* (1962) 58 Cal.2d 166, 176). Unlike the limitation it placed on disclosure of the “Bowersox Memos,” however, the order erroneously failed to provide for further limitation or redaction. (*General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1191.)

For example, the e-mail of November 26, 2008, is described in the record to contain a summary of Joyce’s “meeting with another in-house attorney regarding a specific legal project” The e-mails of December 4, 2008, include discussions of “instructions from scientists” and “legal work performed by . . . outside counsel.”

The e-mails of June 27 concern the performance evaluations of other members of Joyce's team, with no evidence the third parties were notified their personnel information might be subject to disclosure.

We gave the parties notice that we might choose to act by issuing a peremptory writ in the first instance. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-180.) No useful purpose would be served by issuance of an alternative writ and oral argument.

We therefore direct issuance of a peremptory writ of mandate commanding respondent, in *Joyce v. Life Technologies Corp.* (Super Ct. San Mateo County, No. CIV494692) to do the following with regard to its order of July 30, 2012.

- 1) Set aside the portions of the order finding section 958 applicable.
- 2) Maintain those portions of the order concerning the "Bowersox Memos."
- 3) Deny production of all communications whose production was ordered solely on the basis of the applicability of section 958.
- 4) Maintain those portions of the order finding certain e-mail communications not to be protected by the lawyer-client privilege because they are between supervisor and employee rather than attorney and client. But, as with the limitation placed on production of the "Bowersox Memos," add limitations on production of these e-mails to the portions necessary to understand the supervision and evaluation of Joyce's performance, and provide for the use of redaction and protective orders to limit disclosure of third party communications, third party personnel information, trade secrets or other confidential or sensitive material contained in those e-mails.

This opinion is final as to this court immediately. The stay previously imposed shall remain in effect until issuance of the remittitur.