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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

STEVEN BRAUN,

Plaintiff, Appellant and Cross-  
Respondent,

v.

TOYOTA MOTOR SALES, U.S.A.,  
INC. et al.,

Defendants, Respondents and  
Cross-Appellants.

B234212

(Los Angeles County  
Super. Ct. No. BC398650)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Yvette Palazuelos, Judge. Reversed and Remanded.

The Cifarelli Law Firm and Thomas A. Cifarelli; Steven B. Stevens for  
Plaintiff, Appellant, and Cross-Respondent.

Morgan, Lewis & Bockius, Larry M. Lawrence and Robert Jon Hendricks  
for Defendant, Respondent, and Cross-Appellant Toyota Motor Sales, U.S.A., Inc.

Ballard Rosenberg Golper & Savitt, Linda Miller Savitt, Gordon N. Kojima  
and John J. Manier for Defendant and Respondent Randall W. Bauer.

The Arkin Law Firm and Sharon J. Arkin for Amicus Curiae Consumer Attorneys of California on behalf of Plaintiff, Appellant and Cross-Respondent.

Appellant Steven Braun, a former manager for Toyota Motor Sales, U.S.A., Inc. (Toyota), sued respondents Toyota and Randall Bauer (Bauer), his supervisor at Toyota, for sexual harassment and wrongful termination. The trial court granted Toyota's motion to compel production of any data storage files containing either photographs appellant might have taken of Bauer's office or photographs of appellant from 2000 through 2010. Because appellant had downloaded photographs covered by the order onto his home computer, in order to comply with the order, he had to produce his computer for inspection and copying. Before doing so, he deleted more than 42,000 files which he claimed were privileged under the right of privacy. He left on the computer more than 13,000 photographs covered by the order. Based on appellant's violation of the order compelling discovery, the trial court granted Toyota's motion for a terminating sanction. In this appeal, we conclude that the court did not abuse its discretion by ordering discovery of the data storage files in the first place, but that the court did abuse its discretion in terminating the action. We therefore reverse the judgment of dismissal and remand the case for the court to consider appropriate sanctions short of termination.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *Appellant 's First Amended Complaint*

The operative pleading is the first amended complaint. In it, appellant alleges the following facts. He began working for Toyota as a call center representative in 1994 and was promoted to manager around 2000, receiving

outstanding performance appraisals every year until 2007. Appellant, who is married and has three children, began receiving unwanted sexual attention from Bauer around 2000 or 2001. Bauer began staring and leering at appellant during meetings. Appellant ignored him.

After a promotion in 2000, appellant was supervised by Bauer, who began “engaging in a pattern of licentious staring, humiliating sexual innuendos in front of others, and a pervasive pattern of other actions” which included offers to give a massage and sexual advances. Appellant reported the harassment to the Toyota, but nothing was done. Appellant sought a transfer, but was unsuccessful.

After appellant rebuffed Bauer’s sexual advances during a business trip in November 2007, Bauer gave appellant a “dismal” performance appraisal, appellant’s first in his 15 years at Toyota. Appellant filed a complaint with the Department of Fair Employment and Housing, but an investigator hired by Toyota found no indication of discrimination or harassment. Ultimately, appellant left Toyota in June 2009.

On the basis of these allegations, appellant sued Toyota and Bauer alleging, inter alia, sexual harassment, constructive termination, retaliation, and discrimination.<sup>1</sup>

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<sup>1</sup> After appellant filed suit, the parties entered into a stipulation to stay the case pending the completion of an alternative dispute resolution program required of Toyota employees, referred to as T-ADR. Under the T-ADR program, the arbitrator’s decision was binding on Toyota but non-binding on appellant, and the outcome of the proceedings was confidential.

Appellant rejected the October 2009 decision of the arbitrator and moved for a protective order prohibiting respondents from disclosing the results of the arbitration. The trial court granted the motion, prohibiting all parties from publishing or disclosing the arbitration results.

### *Plaintiff's Photographs of Bauer's Office*

During discovery, appellant produced photographs he had taken of Bauer's office and objects in the office that he believed constituted evidence of sexual harassment, including a photograph of "the Palito de Pan," a Toyota marketing doll. When deposed in July 2009, he admitted that he touched a few items on Bauer's desk when he took the photographs. He could not recall the specific date he took the photographs and no longer had the memory card that contained them. However, he had downloaded the photographs from his camera to his home desktop computer. He had not altered them or any of their metadata, which he described as "[d]ata about data."<sup>2</sup>

### *Demand For Inspection*

On June 30, 2010, Toyota served on appellant a demand for inspection of the camera he used to take the photographs of Bauer's office. Toyota also demanded that he produce for inspection and copying "ANY data cards, flash drives, memory cards, or other data storage media" containing "photographs depicting Randall Bauer's office [including objects in the office]." Finally, for a ten year period, January 1, 2000 through December 31, 2010 (which included the period during which Bauer allegedly harassed appellant), Toyota demanded that plaintiff produce for inspection and copying "ANY data cards, flash drives, memory cards, or other data storage media containing ANY or ALL electronic versions of or electronic data constituting the photographs, videos, or digital films depicting [appellant]."

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<sup>2</sup> Toyota's counsel requested that appellant "not do anything to alter, damage, delete, change anything on the computer, because we may need to have some further inspection of it." Appellant's attorney stipulated that, although appellant ultimately might not allow respondents to inspect his computer, he was "on notice that you may request that at some point in time."

On July 30, 2010, appellant served objections to the demands on the grounds of attorney-client privilege and invasion of privacy. He also asserted that the information sought was irrelevant, not reasonably calculated to lead to the discovery of admissible evidence, and that the requests were vague, ambiguous and overly broad.

*Toyota's Motion to Compel*

On August 18, 2010, Toyota moved to compel further responses. As here relevant, Toyota explained that it was requesting “the camera and data storage media used to take and store photographs showing Defendant Bauer[’s] office, including photographs previously produced by Plaintiff in this case,” because “Plaintiff has submitted photographs he took of [Bauer’s] office and objects contained within that office as evidence of the harassment he allegedly suffered. [Toyota] is entitled to inspect the camera(s) used to take those photographs and the data cards.”

With respect to the request for production of all data storage containing photographs or videos of plaintiff from 2000 through 2010 (the period of alleged harassment), Toyota explained: “[Toyota] alleges that Plaintiff engaged in, and sometimes initiated, much of the conduct which he now claims offended him and that Plaintiff was not offended by the alleged conduct. Thus, discovery of the photographs, videos and digital films of Plaintiff during the relevant period are reasonably calculated to lead to the discovery of admissible evidence regarding whether Plaintiff was offended as he alleges.” According to Toyota, “[d]epictions of Plaintiff engaging in the same or similar conduct which purportedly offended him are relevant to test Plaintiff’s claim.”

As for plaintiff's objections that the requested discovery violated his right to privacy, Toyota contended that appellant could not "rely upon privacy objections to prohibit [Toyota] from conducting discovery into matters that he has put at issue in this litigation," and that the information sought "[does] not fall under any of the traditionally and typically protected categories of information, such as financial information or trade secrets."

In his opposition to the motion to compel, appellant argued that the requests for all photographs, videos, and films from the past ten years were not reasonably calculated to lead to the discovery of admissible evidence and were "harassing." He further argued that Toyota had failed to present any facts to support its argument that the requested material would yield evidence regarding whether appellant was offended by certain conduct. Finally, he argued that the requested material would violate the privacy rights of third parties, including family members and friends, who were neither parties nor witnesses in the lawsuit.

#### *The Trial Court's Ruling on the Motion to Compel*

At the January 5, 2011 hearing on Toyota's motion to compel, the court issued a tentative ruling. In relevant part, the tentative ruling granted Toyota's request for production of the camera and its storage, and for production of every storage device containing any photographs, videos or films of appellant for the last ten years. The court reasoned that the requests were reasonably calculated to lead to admissible evidence because appellant could not remember the date he took the pictures of Bauer's office, and because the discovery would allow Toyota to determine "whether certain photographs were deleted or altered."

Responding to the tentative decision at the hearing, appellant's counsel objected to the requests for every storage device containing images of appellant

from 2000 to 2010, because the requests were not simply for images but for every storage device that might contain those images (e.g., cameras, computers, and flash drives). Compliance with the request for storage devices would involve disclosing “very invasive information about his entire family for ten years.” According to counsel, the court’s tentative ruling would require appellant to give Toyota his computer for “unlimited access to everything that’s on that computer.” Counsel offered to produce photographs of appellant alone, or with his family members’ faces blacked out, in order to protect privacy interests.

In response, counsel for Toyota raised an additional rationale for its need for the data at the hearing, asserting that the photographs were relevant to appellant’s emotional distress claim in order to see whether appellant had lost weight over time and to examine his demeanor in the photographs to see if he appeared “psychologically affected by the alleged harassment.”

Appellant’s counsel offered to examine the computer and move for a protective order, but she reiterated her position that Toyota’s discovery request ostensibly was based on appellant’s inability to remember the date of the photographs he took of Bauer’s office and that production of all the data on the computer was not justified by that fact.

The court stated that appellant should have explained earlier why he did not want to produce his entire computer – that is, he should have gone through the computer and submitted a declaration explaining exactly what was on the computer that he did not want to produce or request a protective order against producing it. Appellant’s counsel asked if appellant could produce the photographs instead of the entire computer in order to protect his privacy interests, but the court adopted its tentative order requiring production of the camera and its storage, and for production of every storage device containing any photographs, videos or films of

appellant for the last ten years, which included appellant's computer. The court gave appellant 30 days to comply.

*Appellant's Ex Parte Motion*

On January 11, 2011, appellant applied ex parte for an order modifying the court's order compelling discovery. He stated that he was "willing to produce all photographs, in electronic format, depicting [himself] from January 2000 to the present," but asked that the court not require him to allow Toyota "full and unlimited access to his home computer for inspection and copying." He again argued that allowing Toyota "unfettered access to all information on his computer is a severe invasion of [his] privacy rights, as well as the privacy rights of his wife, his three daughters (ages 7, 10 and 13), and third parties not related to this action." He further contended that it would lead to the disclosure of privileged attorney-client communications and documents constituting attorney work product. Appellant explained that his family did not have another computer for personal use and used the home computer to pay bills, prepare tax documents, maintain medical records, conduct volunteer activities with the children's school, do homework, and to conduct a private business with numerous clients. The computer thus contained appellant's clients' personal information, including bank account numbers, account passwords, social security numbers, home addresses and phone numbers, and private information of children and teachers at the school.

The court denied the ex parte motion, stating that appellant should have examined the computer earlier to determine "what private information [is] in there." The court stated that, at the previous hearing, appellant was unable to

explain what private information was on the computer “except to speculate because you hadn’t done a review, and you couldn’t tell me with any specificity.”<sup>3</sup>

### *Toyota’s Motion for Terminating Sanctions*

On February 7, 2011, appellant purported to comply with the court’s order by delivering to Toyota’s counsel his camera and his computer, which contained over 13,000 photographs, including the photographs of Bauer’s office and photographs depicting himself from 2000 through 2010. However, he also served objections which suggested that he was withholding certain evidence. He did not inform Toyota that he had deleted any files.

In late March 2011, Toyota filed a motion for terminating sanctions, contending that appellant destroyed evidence in violation of the court’s discovery order. Included with the motion was the declaration of Eric Lundberg, a computer forensic engineer. He stated that more than 42,000 files on appellant’s computer were intentionally overwritten on February 6, 2011, using CCleaner, a program designed to permanently delete and overwrite files. Lundberg was unable to restore or retrieve the content of the overwritten files. In addition, certain files one would expect to find (such as “Recent Folder Activity, Link Files, Recycle Bin Info Files, Temp Folders, and Internet Cache Folders”) were missing and could not be restored or retrieved. Lundberg found remnants of other files, including fragments of appellant’s resume, an interview schedule dated November 17, 2006, with IndymacBank, and documents related to “the creation and management of an apparent money management firm of [appellant’s],” as well as emails that appeared to have been sent from a “Toyota.com” email address.

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<sup>3</sup> Appellant filed a petition for writ of mandate seeking a stay of the discovery order; the petition was denied. (*Braun v. Superior Court*, case No. B230570, Feb. 4, 2011.)

Lundberg did not mention whether photographs or video files had been deleted, or whether he was unable to determine if such files had been deleted.<sup>4</sup>

Summarizing the contents of Lundberg's declaration, Toyota argued in its motion that appellant's intentional destruction of more than 42,000 computer files in violation of the court's order justified terminating sanctions. According to Toyota, although "we will never know exactly what those documents were, there is some remnant information that . . . makes clear that documents that were likely responsive to various prior discovery requests were at some point deleted from the computer" or not timely disclosed.<sup>5</sup> Toyota also argued that appellant had not been candid with the court in his ex parte application, when he stated that he did not use his home computer for work purposes.

As to why a terminating sanction was required, Toyota contended: "Any lesser sanction would permit Plaintiff to obtain a benefit by forcing Defendants to

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<sup>4</sup> At oral argument, counsel for Toyota stated that in his declaration, Lundberg said that he could not tell if photographic files had been deleted. We find no such statement in the declaration. Rather, Lundberg stated that he "attempted to recover or restore" the overwritten files and the files he believed to be missing, but was unable "to restore or retrieve the content of these files." Nothing was said about his inability to determine the type of files deleted – e.g., photographs or documents – or whether he tried to do so.

<sup>5</sup> The motion referred to specific discovery requests by Toyota and responses by appellant, and argued that appellant had engaged in a pattern of discovery abuse. However, the court sustained appellant's objections to the prior discovery requests and responses, on the ground (as stated in the objections) that the evidence was irrelevant, because the motion for terminating sanctions related to appellant's violation of the court's order to produce his computer. We therefore do not discuss that evidence. We note, however, that the court overruled the same objection to the following statement in the declaration of Toyota's counsel: "Defendant has previously been forced to file repeated discovery motions [later specified as 'six motions regarding over ten sets of discovery'] as a result of Plaintiff's refusal to participate in discovery in good faith. . . . Each of these motions has been granted and has resulted in a total of \$2,200 in discovery sanctions being awarded against Plaintiff and his counsel."

proceed to trial *without* the benefit of discoverable evidence that may have exonerated Defendants of Plaintiff's claims entirely. [Citations.] [¶] For example, an issue sanction finding that Plaintiff has not suffered any emotional distress, and/or that he staged the placement of the Palito de Pan in pictures to help his case would in some respects be appropriate. Some of the reasons for compelling the production of Plaintiff's computer included obtaining information to challenge Plaintiff's claims of emotional distress and weight loss and to establish that Plaintiff staged various photographs regarding the Palito de Pan doll. But these sanctions would be inadequate because they would not address the fundamental issue of liability, and the fact that some of the files Plaintiff destroyed (such as emails or notes) may have undercut liability by establishing – as Defendants have previously claimed – that Plaintiff has manufactured his claims with the assistance of a few disgruntled former employees.

“Issue and/or evidentiary sanctions would not, for example, return Defendants to ‘equal footing’ with Plaintiff with respect to what other emails involving his witnesses were deleted by Plaintiff – documents which could affirmatively establish that this case has been manufactured by Plaintiff. Defendant will never know what notes, emails, records, pictures or other files Plaintiff deleted that would have allowed them to impeach not only Plaintiff but also his witnesses. There is no sanction other than the termination of this case that can remedy that harm, which was entirely caused by Plaintiff's intentional destruction of evidence and violation of this Court's Order.”

In his written opposition, appellant argued, *inter alia*, that he complied with Toyota's discovery request in that he provided all the photographs Toyota sought, and that a terminating sanction would be inappropriate because no evidence directly relevant to his claims or Toyota's defenses case was destroyed. In a

supporting declaration, appellant stated that he removed from his computer the following confidential information, using a program he regularly used to clean his computer: attorney-client communications; attorney work product from the instant case; his family's monthly bills, bank account and tax information; medical and health information of his wife and daughters; confidential information pertaining to his business, including his bank account numbers, passwords, and intellectual property; confidential information of his business clients, such as social security numbers and bank account numbers; information related to his wife's Parent Teacher Association activities, including information regarding children and teachers; confidential communications with his wife regarding their children. He did not delete or alter the over 13,000 photographs that were the subject of Toyota's discovery request, but he placed all of them in an account for Toyota to access.

In its reply, Toyota again argued that only a terminating sanction was appropriate: "We will . . . never know what photos or other discoverable information existed on the hard drive. This lack of knowledge is the exact prejudice caused by [appellant's] willful destruction of evidence. And it is a prejudice that cannot be cured. That is why terminating sanctions must be granted."

At the hearing, the court issued a tentative ruling denying the motion for terminating sanctions, but giving Toyota its choice between two lesser sanctions: (1) striking appellant's claim for emotional distress and excluding evidence that Bauer displayed the Palito de Pan doll, or (2) monetary sanctions of \$79,595 to reimburse Toyota for the costs of the forensic analysis of the computer and attorney fees. The court's tentative reasoning was that the focus of Toyota's discovery requests was the production of the digital media storage of the digital

pictures, not “the production of the computer to discover any and all admissible evidence that may be contained therein.” The court noted that the aim of the discovery requests and its discovery order was “to compel production of the computer that has been unaltered to determine when certain pictures were taken or whether certain pictures were altered.”

At the hearing on Toyota’s motion, counsel for Toyota argued that a terminating sanction was required, because there was no way of knowing what had been deleted and whether evidence that vindicated Toyota was destroyed. Moreover, although Toyota’s discovery request focused on photographs of Bauer’s office and of appellant, the court’s order compelling discovery entitled Toyota to examine all of appellant’s computer files. Thus, according to Toyota, any sanction must take into account the prejudice to Toyota caused by not knowing whether key evidence that would undercut appellant’s claims was destroyed.

In reply, appellant’s counsel argued Toyota’s speculation that evidence harmful to plaintiff’s case had been destroyed did not justify a terminating sanction, and that terminating the case on that basis would be a windfall to Toyota.

After a lengthy colloquy with all counsel concerning the appropriate sanction, the court stated: “Okay. I’m going to terminate the case. I think . . . it isn’t a punishment [and] I agree with the defendants that there’s just no way I can put them back into the same position that they were in before . . . . [T]hey were entitled to look at the whole thing [referring to the computer and its files]. Whether ultimately they would be able to use it at trial is another question, but we can’t even get there.”<sup>6</sup> The court entered judgment in favor of respondents and dismissed the action with prejudice. Appellant filed a timely notice of appeal.

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<sup>6</sup> The court also stated that there was a prior protective order in place that would have protected appellant’s privacy concerns. Toyota’s counsel agreed. Appellant’s

## DISCUSSION

### I. The Order Compelling Discovery

Appellant contends that the trial court erred in its January 5, 2011 ruling overruling his privacy objections and granting Toyota's motion to compel discovery, and in not modifying that order upon appellant's ex parte application on January 11, 2011. We find no abuse of discretion.

A trial court's ruling on a motion to compel discovery is reviewed for abuse of discretion. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) ““Where there is a basis for the trial court's ruling and the evidence supports it, a reviewing court will not substitute its opinion for that of the trial court. [Citation.]” [Citation.] “The trial court's determination will be set aside only when it has been demonstrated that there was ‘no legal justification’ for the order granting or denying the discovery in question.” [Citation.] [Citation.]” (*Ombudsman Services of Northern California v. Superior Court* (2007) 154 Cal.App.4th 1233, 1241 (*Ombudsman*).

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attorney, however, stated that the protective order in place related to “work product and trade secret documents” in discovery materials produced a year earlier and did not apply to the private material on appellant's computer.

On appeal, as evidence of the protective order, Toyota has cited us to portions of an exhibit attached to a declaration of its counsel that was filed in support of the motion to compel. The exhibit includes an exchange of letters between the parties regarding an attempt to reach an agreement on a “Stipulation of Confidentiality and Protective Order” in January and February of 2010. There are two proposed agreements included among the documents, one apparently prepared by appellant's counsel and the other by Toyota's counsel. Neither is signed by the attorneys or the court. Moreover, in the declaration to which they are attached, Toyota's counsel stated that “At the time I was required to file this motion . . . , the parties had not agreed to the terms of a confidentiality agreement or protective order.” In short, the record on appeal is insufficient to show that any preexisting protective order applied to appellant's personal computer files.

“While it is very broad, the right to discovery is not absolute, particularly where issues of privacy are involved. The right of privacy in the California Constitution (art. I, § 1), ‘protects the individual’s *reasonable* expectation of privacy against a *serious* invasion.’ [Citation.] While there are many different phrasings of the analysis that is performed when a discovery request seeks arguably private information, the constant theme among the decisions is that in deciding whether to permit discovery that touches upon privacy, ‘California courts balance the public need against the weight of the right.’ [Citation.] Drawing this ultimate balance requires a careful evaluation of the privacy right asserted, the magnitude of the imposition on that right, and the interests militating for and against any intrusion on privacy. [Citation.]” (*Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1250.)

As here relevant, appellant objected to the discovery request and the motion to compel on privacy grounds. However, other than noting that compliance with the request would compel him to produce all files of his home computer for inspection and copying, he failed to make an appropriate showing to substantiate his privacy objection. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 8:317, p. 8C-103 [explaining that, to assert a privacy objection to a discovery request, the most practical procedure is simply to object, but further stating, “Of course, at the hearing on the motion, you will have to justify the privacy claim.”].) Thus, although the trial court is required to weigh the privacy rights asserted against the need for discovery, appellant gave the court no information to weigh against Toyota’s stated need for discovery, which set forth reasonable grounds for disclosure. (See *id.* ¶ 8:322.1, p. 8C-106 [explaining that a party opposing the discovery of financial records on privacy

grounds should provide declarations explaining the details of the records so the court need not sift through them].)

Toyota's discovery request was made on June 30, 2010, and the motion to compel was filed on August 18, 2010. Appellant filed his opposition to the motion to compel more than four months later, on December 21, 2010. The hearing was not held until January 5, 2011. Yet, despite more than adequate time to inspect the computer, prepare appropriate objections, and move for a protective order, appellant failed to do so. Not until the date of the hearing did appellant's counsel offer to examine the computer.

The trial court's ruling is reviewed for abuse of discretion and it ““will be set aside only when it has been demonstrated that there was ‘no legal justification’ for the order granting or denying the discovery in question.” [Citation.]’ [Citation.]” (*Ombudsman, supra*, 154 Cal.App.4th at p. 1241.) Here, appellant failed to set forth any justification for his privacy objection, despite the passage of time between Toyota's initial discovery request and the hearing on the motion to compel production. The trial court did not abuse its discretion in finding that appellant had failed to justify his objection at the January 5, 2011 hearing, and in finding that the attempt to remedy the deficiency on an ex parte basis on January 11, 2011 was far too late.

## **II. Terminating Sanctions**

Appellant contends that the court erred in granting a terminating sanction. Although appellant's conduct in destroying files on his home computer in violation of the court's discovery order was willful and inexcusable, and although that conduct unquestionably deserves serious sanction, we conclude that imposition of a terminating sanction was an abuse of discretion.

“We review an 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.]” (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422.)

“A court, after notice and an opportunity for a hearing, may impose sanctions on a party, person, or attorney for misuse of the discovery process. (§ 2023.030.) Section 2023.030 describes the types of sanctions that a court may impose, including monetary, issue, evidence, terminating, and contempt sanctions. (*Id.*, subds. (a)-(e).) [Citation.]” (*Kayne v. The Grande Holdings Limited* (2011) 198 Cal.App.4th 1470, 1475.) “It is well established ‘the purpose of discovery sanctions “is not ‘to provide a weapon for punishment, forfeiture and the avoidance of a trial on the merits,” . . . but to prevent abuse of the discovery process and correct the problem presented.’” (*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 301.) “The trial court should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should “attempt[] to tailor the sanction to the harm caused by the withheld discovery.” [Citation.] The trial court cannot impose sanctions for misuse of the discovery process as a punishment. [Citation.] [¶] The discovery statutes evince an incremental approach to discovery sanctions, starting with monetary sanctions and ending with the ultimate sanction of termination. ‘Discovery sanctions “should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery.’” [Citation.]” (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992; see also 2 Witkin, Cal. Evidence (5th ed. 2012) Discovery,

§ 255, p. 1232 [stating that the least drastic sanction is preferred, citing cases].) “A discovery sanction may not place the party seeking discovery in a better position than it would have been in if the desired discovery had been provided and had been favorable. [Citation.]” (*Rail Services of America v. State Comp. Ins. Fund* (2003) 110 Cal.App.4th 323, 332.)

Here, appellant’s conduct in destroying computer files that were subject to the court’s order compelling discovery is appalling. His excuse – that he believed disclosing photographic files alone complied with the order – is disingenuous. Such willful disobedience of the court’s order deserves serious sanction. However, a terminating sanction is not commensurate to the harm, and is not necessary to vindicate the purposes of discovery.

The trial court reasoned that pursuant to its order compelling discovery, Toyota was entitled to inspect all appellant’s computer files. Because appellant had destroyed all the files except the photographs he produced, no lesser sanction could restore Toyota to the position of obtaining all the computer files. Therefore, a terminating sanction was necessary, because no lesser sanction could cure the harm.

We recognize that fashioning an appropriate discovery sanction is no easy task. But this reasoning does not justify a terminating sanction. In essence, the court accepted Toyota’s argument that “we will never know” what was destroyed, that there might have been evidence favorable to Toyota, and that therefore Toyota was incurably prejudiced. On this record, however, Toyota’s reasoning elevates speculation into justification for terminating sanctions. There may well be cases in which the uncertainty over whether a party has destroyed evidence favorable to the other side results in prejudice that can only be cured by a terminating sanction, but this is not one of them.

In its discovery request, Toyota requested the data storage media containing photographs and videos of appellant from the previous 10 years to determine whether appellant was offended or distressed by Bauer's alleged harassment. Appellant produced more than 13,000 photographs responsive to this request. It is difficult to believe that the 13,000 photographs appellant produced were insufficient to satisfy the articulated purpose for the discovery. Certainly Toyota made no such showing. In any event, accepting the notion that appellant may have deleted some photographs that were responsive, terminating the action gave Toyota far more than was necessary to protect its interest in the discovery it was denied. Sanctions less than terminating the action, such as issue, evidentiary, and/or monetary sanctions tailored to the discovery violation, would suffice to cure any harm from destruction of photographs designed to provide evidence to defeat the claim for emotional distress. Of course, which sanction or sanctions to impose and the nature of their severity lies within the trial court's broad discretion.

Similarly, Toyota wished to determine whether appellant altered objects in Bauer's office before taking photographs, on the theory that appellant may have manufactured evidence suggesting harassment where none existed. But the harm from depriving Toyota of some such photographs can be cured short of terminating the action, such as by precluding appellant from introducing any evidence concerning allegedly offensive items in Bauer's office.

Toyota argues that appellant may have destroyed documents that were the subject of prior discovery requests and that such documents may have been damaging to appellant's case. But such empty speculation simply cannot support an order terminating the action. On this record, no reasonable inference exists that appellant destroyed evidence that cannot be cured by strong sanctions short of terminating the action.

In arguing to uphold the trial court's order, Toyota asserts that appellant engaged in a history of willful discovery abuse. However, the court sustained appellant's objections to the bulk of the evidence on which Toyota makes the assertion (see fn. 5, *ante*), and the court did not purport to rely on a history of discovery abuse to justify the terminating sanction.

The proper resolution of this case is to remand to the trial court to consider imposition of sanctions short of terminating the action. By mentioning certain possible sanctions short of terminating the action, we do not mean to restrict the trial court's discretion, but rather to make clear that the trial court retains broad discretion to fashion the appropriate remedy.

### **DISPOSITION**

The judgment is reversed, and the case is remanded for the trial court to consider sanctions short of terminating the action. The parties shall bear their own costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.