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Court Allows Subpoena to Third Parties Seeking Confidential Info Regarding Prior Bad Acts

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By **Jeffrey Campolongo** | November 29, 2018

This column is typically devoted to changes and developments in employment law, summary judgment opinions, new rules or regulations and so on. Every once in a while it is good to peek in on the actual practice of law. If battles are typically won in the trenches, then it can be said that

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employment cases are won (and lost) during discovery. There is certainly plenty for the lawyers to fight over during discovery, so it is best to equip yourself with some relevant case law.

Take, for example, the recent opinion from the U.S. District Court for the Eastern District of Pennsylvania in the matter of *Paramo v. ASPIRA Bilingual Cyber Charter School*, No. 17-CV-3863 (E.D. Pa. Sept. 21, 2018) (Surrick, J.). The matter came before the court on a motion to quash and motion for protective order by the defendants in the case. The defendants objected to the service of subpoenas on certain third parties. The subpoenas sought production of case files and materials from two lawyers and to compel the deposition of an independent investigator, along with her investigative file.

Lucila Paramo worked for defendant ASPIRA Bilingual Cyber Charter School and ASPIRA Inc. (ASPIRA) from August 2011 to June 2015. The last position Paramo held was interim chief academic officer. In November 2014, she helped a co-worker, Jimena Alzate, file an internal sexual harassment complaint against the company's CEO, Alfredo Calderon. Per the complaint, Paramo informed ASPIRA's human resources director of her co-worker, Alzate's complaint, and provided a written statement to human resources from Alzate about the alleged harassment. Paramo demonstrated her full support of her co-worker's sexual harassment complaint by aiding Alzate throughout ASPIRA's internal investigation process, the complaint alleged.

Thereafter, ASPIRA commenced a "campaign of retaliation against Paramo for opposing unlawful sexual harassment in the workplace in an effort to force her to resign from her position of employment. Immediately following the complaint of sexual harassment, the defendant began excluding Paramo from participation in meetings and stripping her of the responsibilities that she previously held as Interim CAO." Paramo claimed that ASPIRA retaliated against her and ultimately fired her

based on the assistance she provided to her co-worker. Eventually, Paramo filed a lawsuit complaining that ASPIRA's retaliatory actions violated Title VII and the Pennsylvania Human Relations Act.

During discovery in the case, Paramo notified ASPIRA of her intent to serve subpoenas on two attorneys, Patricia Pierce and Brendan Burke. The subpoenas sought discovery from these attorneys on the basis that they had information about the alleged harassment underlying Paramo's case, as well as past incidents of harassment and retaliation at ASPIRA. Attorney Pierce served as counsel for another ASPIRA employee who sued the company several years ago alleging similar harassment and retaliation claims against Calderon and the company. Burke was counsel for an insurer in a case against ASPIRA alleging that it failed to pay insurance deductibles related to a settlement. The opinion noted that both subpoenas sought the lawyers' entire files from their respective cases against ASPIRA, excluding attorney-client privileged communications, work product and any confidential settlement agreements.

Paramo also sought to subpoena an independent investigator named Linda Field who was hired by ASPIRA to investigate the sexual harassment complaint that Paramo filed for Alzate. Paramo sought to compel Field to appear for a deposition and to produce documents such as her investigation files, resume and background information. ASPIRA had already produced Field's final report of the investigation.

ASPIRA moved to quash the three subpoenas and moved for a protective order. The court noted at the outset that standing to challenge a third-party subpoena such as these requires a showing by ASPIRA that it has a "personal right or privilege" with respect to the subject matter of the subpoena. This relatively low threshold was met because the arguably confidential information sought related to lawsuits ASPIRA is, or was a party to.

The court went on to examine whether the subpoenas sought information that was relevant under Rule 26 and/or privileged under Rule 45. For a request to fall within the scope of Rule 26, the subpoenaing party has the burden to show that the discovery is "relevant to any party's claim or defense and proportional to the needs of the case." This is the revised relevance standard requiring proportionality under the federal rules, as amended in 2015. Note, this is not the standard for relevance as defined in state court, which is that a party may obtain discovery regarding any nonprivileged, which is relevant to the subject matter involved in the pending action, so long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

With respect to the subpoenas for Pierce and Burke, the court found that past incidents of alleged retaliation by ASPIRA and alleged harassment by ASPIRA's agents were clearly relevant to Paramo's current claims against it. Citing *Aman v. Cort Furniture Rental*, 85 F.3d 1074, 1086 (3d Cir. 1996) and *Jimmy v. Elwyn,* Civ. A. No. 11-7858, 2014 WL 630605, at *6 (E.D. Pa. Feb. 18, 2014). At the very least, the court wrote, these subpoenas are likely to shed light on ASPIRA's alleged history of retaliating against individuals who bring harassment complaints.

As it concerned the subpoena to compel the deposition and investigative notes of investigator, Linda Field, the court deemed it relevant to the extent witnesses who were deposed in this case testified that they feared speaking freely during the Field investigation because they feared retaliation by the company. It is entirely relevant whether Field subsequently interviewed ASPIRA employees about whether they feared retaliation and, if so, why, the court said.

ASPIRA also sought to quash the subpoenas under Rule 45, arguing that privileged or protected information should not be disclosed. The court found two fundamental problems with this argument. First, the subpoenas themselves specifically requested non-privileged materials. A subpoena requesting nonprivileged records, "by definition, … does not raise any privilege concerns." See *Davis v. General Accident Insurance Company of America*, Civ. A. No. 98-4736, 1999 WL 228944, at *4 (E.D. Pa.

Apr. 15, 1999). Second, ASPIRA could not shield disclosure simply because the records contained a confidential settlement agreement. “An agreement between two parties to keep materials confidential cannot block the disclosure of those materials to third parties in discovery,” the court wrote.

Lastly, the subpoena directed to Field could not be quashed based on some nebulous “private investigator’s privilege” as no such privilege exists. The subpoena, while specifically excluding privileged communications in the first place, would be valid even if it did include communications between ASIPIRA’s counsel and Field. ASPIRA made no claim that the private investigator operated at the direction of an attorney or in anticipation of litigation. A critical line from the opinion makes clear that confidentiality may be important to an internal investigation, but a plaintiff’s interest in building her case in federal court is paramount.

The *Paramo* decision will be quite useful for plaintiffs employment lawyers seeking to gather evidence of other “bad acts” by an employer, even if those acts have been cloaked in confidentiality. The decision is also instructive on the ability to get into the thoughts and mental impressions of an ‘independent’ investigator hired by the employer, particularly in harassment cases. Practitioners should keep the *Paramo* decision handy during depositions and when anticipating motion practice.

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