The Legal Intelligencer

Employment Law

Courts Work to Protect Employees From Harassing Discovery Tactics

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Do plaintiffs in employment cases have a legitimate privacy interest in information regarding their subsequent employment? Nowadays, most courts say yes. An increasing number of courts have frowned on the employer's practice of subpoenaing employment records from a plaintiff's subsequent (or in some cases, current) employer. The growing list of cases has recently gotten longer. As reported in The Legal on Feb. 27 ("Former Worker Quashes University's Subpoena"), U.S. Magistrate Judge Karoline Mehalchick of the Middle District of Pennsylvania quashed a subpoena served by the employer, University of Scranton, on a former employee's current employer. The case is *Kimes v. University of Scranton*, 2015 U.S. Dist. LEXIS 21703 (M.D. Pa. Feb. 24, 2015).

The practice is quite common. In most employment discrimination cases, management-side attorneys will routinely subpoena records from the plaintiff's subsequent (or current) employer under the guise that information is needed to substantiate the plaintiff's attempt to mitigate his or her damages. At least, that is what was alleged by the defendant in the *Kimes* case. However, in studying the reported cases more closely, employers have advanced all sorts of arguments for subpoenaing the records of the plaintiff's subsequent (or current) employer, such as to formulate a possible after-acquired evidence defense, to investigate any previous disciplinary problems, and to confirm if a plaintiff has a penchant for bringing frivolous claims. (See *U.S. Equal Employment Opportunity Commission v. Princeton HealthCare System*, No. CIV.A. 10-4126 PGS, (D.N.J. May 9, 2012).)

In some Americans with Disabilities Act cases, employers will even demand records from previous and subsequent employers just to see if the claimant made similar requests for accommodations from these other employers. These types of subpoenas are akin to broadcasting to a large group of businesses that the defendant views the plaintiff as an "untrustworthy troublemaker"; therefore, so should you.

The court in *Princeton HealthCare* answered the lead question of this article in the affirmative. Individuals in employment cases do, indeed, have privacy interests regarding their subsequent

employment. "Courts ... have recognized that because of the direct negative effect that disclosures of disputes with past employers can have on present employment, subpoenas in this context, if warranted at all, should be used only as a last resort," according to the opinion. Using some very strong language, the *Princeton HealthCare* court recognized that a plaintiff may have "a legitimate concern that a subpoena sent to her current employer under the guise of a discovery request could be a tool for harassment and result in difficulties in her new job" such that in order "to overcome this legitimate concern," a defendant "must present independent evidence that provides a reasonable basis for it to believe that [a plaintiff] has filed complaints, grievances, lawsuits, or charges relating to her employment with ... [other employers]."

Not surprisingly, the discovery practice of rotely sending out subpoenas to current employers continues. It is not, however, without its risks. In *Conrod v. Bank of New York*, No. 97-CIV-6347 (S.D.N.Y. July 30, 1998), defense counsel was sanctioned for serving a subpoena on the plaintiff's current employer without notice, which "caused plaintiff to worry about her continued employment relationship, in a manner amounting to harassment." The key issue here is "notice."

Federal Rule of Civil Procedure 45(b)(1) provides, when a subpoena "commands the production of documents ... then before it is served, a notice must be served on each party." The purpose of requiring prior notice is "to afford other parties an opportunity to object to the production or inspection and to obtain the materials at the same time as the party who served the subpoena," as in *Coleman-Hill v. Governor Mifflin School District*, 271 F.R.D. 549, 552 (E.D. Pa. 2010). (See also 1991 Advisory Committee Notes to Federal Rule of Civil Procedure 45, "The purpose of such notice is to afford other parties an opportunity to object to the production or inspection." And, according to *McCurdy v. Wedgewood Capital Management*, (E.D. Pa. Nov. 16, 1998), "By failing to receive prior notice of the information sought from the non-party, a party is deprived of its greatest safeguard under the rule, i.e., the ability to object to the release of the information prior to its disclosure."

Oftentimes in situations involving subpoenas served on current employers, plaintiffs counsel has little or no time to object to the third-party subpoena since Rule 45's notice provision has been interpreted to mean "contemporaneous notice." Obviously, once the subpoena is served, the cat is out of the bag and the employee has been exposed. In this jurisdiction, this practice is almost always grounds for quashing the subpoena, but it does not eliminate the harassment and embarrassment cast on the employee.

Plaintiffs attorneys are cautioned to be vigorously proactive in these situations. One such way is to address the issue in advance of the Rule 16 conference or to include a provision for advance notice of subpoenas in the Rule 26(f) report. Another alternative is to redact identifying information about the current or subsequent employers from disclosures to employer's counsel. Unless and until an agreement is reached concerning the service of subpoenas, plaintiffs attorneys are wise to resist full disclosure. It is also crucial to educate the court and your adversary about the strong public policy that protects the privacy interests of plaintiffs in employment cases. It should never be taken for granted that the plaintiff must turn over every bit of conceivable information about that employee's current employment.

In the event disclosure is required and/or subpoenas are permitted to be served, counsel should insist that the scope of the production be narrowly tailored to the realm of permissible discovery. If the defendant is seeking evidence of mitigation, service of the subpoena must be a last resort following voluntary production of wage records, payroll data, offer letters, etc. If the defendant is

seeking the plaintiff's entire personnel file or complete employment record, then the request should be winnowed down to only the information necessary to prove a legitimate defense of the case.

It behooves plaintiffs counsel to cooperate in producing documents such as W-2s, 1099s, pay stubs, benefits statements and the like, in order to demonstrate complete good faith. In fact, the earlier in discovery these documents are produced, the more likely a court will be to quash a subpoena seeking everything under the sun.

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