PREVENTING SUBPOENAS SERVED UPON PLAINTIFF'S CURRENT EMPLOYER

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There is nothing that strikes fear into an employment plaintiff more than the thought of the employer whom the plaintiff is suing contacting and poisoning the plaintiff's current employer. In most cases the plaintiff is claiming that he or she was wrongfully terminated, and has suffered a period of great uncertainty and grief prior to landing a replacement job. The last thing the plaintiff needs is for a subpoena to be served on the current employer because the very service of the subpoena exposes the plaintiff to be a litigant, a complainer, and perhaps a whistleblower. Many plaintiffs immediately become fearful of repercussions with their new employment. Sadly, sometimes those fears are realized.

There are few situations where the employment defendant has any need whatsoever for personnel files from an employer who subsequently retains the plaintiff for employment. Certainly, in a non-compete or trade secret action, such information could be directly relevant. Without question, an employee's subsequent earnings are relevant when the employee asserts that he or she is currently underemployed. Sometimes there is a direct issue of material fact as to whether the employee quit or was terminated, and a subsequent application for employment will demonstrate the employee's own representations about the separation. But even in those situations, it is inconceivable that an employee's entire personnel records, evaluations, disciplinary history, medical files, and the like could possibly have any relevance to the case at bar. The relevant information can be obtained by other, less intrusive means, and therefore broad and indiscriminate subpoenas demanding all employment information cause far more prejudice and damage to the employee than any prospective probative value.

The legal analysis begins with the longstanding acknowledgment that a person's interest in preserving the confidentiality of sensitive information contained in his personnel files has been given forceful recognition in both federal and state legislation governing the recordkeeping activities of public employers and agencies.[1] To the extent that such records are sought to demonstrate other subsequent bad acts of an employee, such evidence of "other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such a person acted in conformity therewith."[2]

Courts from jurisdictions throughout the U.S. have ruled that evidence of performance at other employers is inadmissible. In New Jersey, Courts have addressed *N.J.R.E.* 404(b) in a variety of contexts, holding that records from other employers may not be used to infer bad conduct with the subject employer.[3] A number of Federal Courts have addressed the exclusion of 404(b) directly with regard to records from other employers. For example, in *Zubalake v. UBS Warburg, LLC,*[4] the Court denied defendant's attempt to introduce plaintiff's negative performance appraisal from a prior employer to show that she had demonstrated the same performance deficiencies there as she had with defendant. This prohibition carries equal weight whether dealing with prior employment or subsequent employment.[5]

Despite the authority holding evidence related to performance at other employers irrelevant, many defendants serve the subpoenas upon plaintiff's current employer anyway,

usually without warning. One of the most common reasons given by defendants is that they are entitled to discover information about plaintiff's subsequent employment actions because it can support its affirmative defense of after-acquired evidence. This argument, however, has no support of legal authority, and is factually absurd.

The after-acquired evidence doctrine was solidified by the U.S. Supreme Court in *McKennon v. Nashville Banner Publishing Company.*[6] Under this theory, after-acquired evidence of wrongdoing, which otherwise would have resulted in the employee's discharge can be used by an employer to limit a prevailing plaintiff's remedies.[7] Such remedies, however, are limited. The Court required that the employer "first establish that the wrongdoing was of such severity that the employee would have been terminated on those grounds alone if the employer had known of it *at the time of the discharge*."[8] The Supreme Court made it clear that if the employer is able to meet that threshold, the employee will not be entitled to an award of front pay or to the equitable relief of reinstatement.[9] At the same time, absent "extraordinary equitable circumstances that affect the legitimate interests of either party," the plaintiff would be entitled to an award of backpay.[10] The available backpay award, however, was limited, as the Court held that it was to be calculated from the date of the unlawful discharge only until the date when the wrongdoing, that would have legitimately led to the employee's termination, was discovered.[11]

The New Jersey Supreme Court has acknowledged the after-acquired evidence doctrine, and has carefully delineated its ambit and limitations.[12] In so ruling, the New Jersey Supreme Court made clear that the after-acquired evidence doctrine may not be used to establish liability, but only to limit front pay or equitable reinstatement.[13] In light of the contours of the definition of after-acquired evidence, it is inconceivable that evidence of behavior at a subsequent employer could ever satisfy the requirements of after-acquired evidence, because, by definition, the information must be information that the employer could have known at the time of discharge but did not. While the doctrine could therefore apply to actions of the employee *during* employment, it could never logically apply to actions that took place *after* employment.

The practical problem facing plaintiffs is that, even if the evidence is not discoverable nor admissible, and even though the subpoena can normally be quashed, the service of the subpoena itself causes the damage to the plaintiff. For this reason, courts have made clear that such subpoenas should not be used to independently initiate discovery unless a defendant has some preexisting basis to believe after-acquired evidence exists before it can pursue discovery.[14] When a subpoena is served upon the plaintiff's present employer, the plaintiff can only prevent such discovery by filing a motion to quash and notifying the employer not to comply with the subpoena until the Court rules on the motion for protective order.[15]

With regard to subpoenas on current employers, courts in New Jersey and other jurisdictions have routinely been quashing such subpoenas. One District Judge, having already expressed concerns about the defendant serving a subpoena on the plaintiff's current employer, ruled:

> By issuing a subpoena to plaintiff's current employer, defense counsel caused plaintiff to worry about her continued employment relationship, in a manner amounting to harassment. *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.*[16]

Courts have been very sensitive to the legitimate concerns of plaintiffs that these subpoenas inflict additional damage on the already damaged plaintiff, and have quashed such subpoenas on that basis. Recently, the District of New Jersey in *Byrne v. Monmouth County Health Care Services,*[17] also a discrimination suit, ruled that a plaintiff need not disclose her current employer's name and address and that it was sufficient for the Plaintiff to provide the pay stubs and W-2 statements with the employer's name redacted, in order to avoid the Plaintiff from being embarrassed or facing potential oppression if her current employer became aware of her medical condition. The Court specifically noted that the plaintiff's fear of embarrassment and loss of her current job constitute good cause for a protective order.[18]

Other courts have denied or seriously restricted such subpoenas for similar reasons including unnecessary annoyance and embarrassment.[19] The Ninth Circuit Court of Appeals in *Rivera v. NIBCO, Inc.,*[20] stated that District Courts need not "condone the use of discovery to engage in fishing expeditions" and upheld a protective order issued by the District Court that barred discovery of the immigration status of plaintiff employees. The Ninth Circuit also pointed out another risk or danger from overreaching and intrusive discovery - that it can have "a chilling effect" on the national effort to eradicate discrimination in the workplace, where Title VII is dependent on private citizens' enforcement.[21]

Given the clarity of the law, it is frustrating and of great concern to plaintiffs that defendants continue to subpoena records from current employers without seeking leave of court. Hopefully, the Supreme Court Rules Committee will consider enacting a Rule which would prohibit subpoenas to be sent to current employers without leave of court. In the meantime, attorneys representing plaintiffs should consider the following steps to protect their clients:

1. Place a Notice in the Complaint advising that the plaintiff does not want his/her current employer contacted or subpoenaed without leave of court;

2. Contact opposing counsel as soon as identified and make written notice that the plaintiff does not want his/her current employer contacted or subpoenaed and ask for written assurances that opposing counsel will seek leave of court before issuing such a subpoena. If this request is refused, seek protective order;

3. Seek a protective order from any interrogatory, document request or deposition question that asks for the identity of the current employer unless an agreement has been made that no subpoena will be served without leave of court;

4. Understand that, under certain circumstances, the defendant is entitled to certain information regarding plaintiff’s payroll information and sometimes other documents specific to the case, and cooperate in providing authorizations or otherwise providing the information defendant is entitled to.

Counsel for employers should not be prejudiced by any of the above. Courts will still permit appropriate discovery, where relevant. Defendants need to keep in mind that if their actions get the plaintiff fired from his/her new job, it could result in additional damages for lost wages. Furthermore, if the defendant has been advised in advanced that the plaintiff is greatly concerned about adverse consequences in his/her new job if the litigation is disclosed, the defendants might have to fend off a claim of post-termination retaliation, as recently defined in *Roa v. Roa*.[22]

If parties work together at the beginning of litigation, defendants should be able to receive all relevant evidence regarding the plaintiff's current employment without unnecessarily placing the plaintiff's current employment in real or perceived peril by serving subpoenas upon the Plaintiff's current employer.

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1. *Detroit Edison Co. v. National Labor Relations Board*, 440 U.S. 301, 319, fn.16 (1979)(citing numerous Federal and State laws protecting personnel information); *South Jersey Publishing Company, Inc. v. New Jersey Expressway Authority*, 124 N.J. 478, 498-499 (1991).
2. *N.J.R.E.* 404(b); *see also Harris v. Peridot Chem. (NJ), Inc.*, 313 N.J. Super. 257, 277-78 (App. Div. 1998).
3. *See, e.g. Diakamopoulos v. Monmouth Medical Center*, 312 N.J. Super. 20, 26-30 (App. Div. 1998), (improper in medical malpractice case to admit evidence of the termination of the defendant physician's privileges as a resident, where the termination was unrelated to the alleged malpractice).
4. 382 F. Supp. 2d 536, (S.D.N.Y. 2005), following the analysis of *Neuren v. Adduci, Mastriani, Meeks, and Schill*, 43 F.3d 1507, 1510-11 (D.C. Cir. 1995).
5. *Rauh v. Coyne*, 744 F. Supp. 1181, 1184 (D.D.C. 1990) (rejecting as violative of Rule 404 plaintiff's attempt to put on evidence of her good performance at prior and subsequent jobs); *EEOC v. Lexus Serramonte*, 237 F.R.D. 220, 223 (N.D. Cal. 2006 ("Work performance with other employers, either before or after the defendant employer, is inadmissible under Rule 404(a) [of the] Federal Rules of Evidence.").
6. 513 U.S. 352 (1995);
7. *Cicchetti v. Morris County Sheriff's Office*, 194 N.J. 563, 577 (2008).
8. *McKennon, supra*. 513 U.S. at 362-63.
9. *See id*. at 361-62.
10. *Id.* at 362.
11. *Id.*
12. *Cicchetti v. Morris County Sheriff's Office*, 194 N.J. at 577.
13. *Id.*
14. *Maxwell v. Health Center of Lake City*, 2006 U.S. LEXIS 36774 (M.D. Fla. 2006); *Premer v. Corestaff Services, L.P.*, 232 F.R.D. 692, 693 (M.D. Fla. 2005); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1071-72 (9th Cir. 2004).

15. Court Rules provide that the Court may quash a discovery subpoena if compliance would be oppressive or unreasonable. *R.* 1:9-2. The Rules permit this Court to enter a protective order, preventing discovery in order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. *R.* 4:10-3.

16. *Conrod v. The Bank of New York*, 1998 WL 430546, at *2 (S.D.N.Y. 1998)
17. 2008 U.S. Dist. LEXIS 1513 (D.N.J. 2008), 2008 WL 108894 (D.N.J. 2008).
18. *Id.*
19. *Gambale v. Deutsche Bank AG*, 2003 U.S. Dist. LEXIS 27412 (S.D.N.Y. 2003)(citing *Conrod v. The Bank of New York, supra*, 1998 WL 430546; *Warnke v. CVS Corporation*, 265 F.R.D. 64 (E.D.N.Y. 2010)(quashing Defendant's subpoena to current employer).
20. 364 F.3d 1057, 1072-73 (9th Cir. 2004).
21. *Id.* at 1064-1066.
22. 200 N.J. 555 (2010)