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TAKING A STAND AGAINST SUBPOENAS TO FORMER EMPLOYERS

Labor & Employment Section

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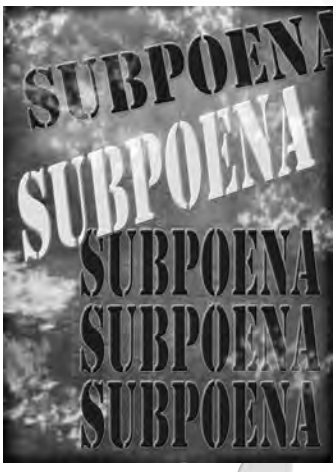
A recurring practice we see over and over again as plaintiffs' employment lawyers when litigating employment discrimination cases is the defendants' attempt to use non-party subpoenas to obtain irrelevant, confidential and private personnel information from plaintiffs' former employers. Not only do plaintiffs find these subpoenas overly intrusive and an invasion of privacy, but they fear that these subpoenas interfere with their future job opportunities. Defendants use non-party subpoenas to pry into plaintiffs' pasts without regard to relevance of the information sought.

It is important for all plaintiffs' attorneys to see through these classic fishing expeditions and oppose these tactics with full force. Depending on what information is sought in the non-party subpoenas, plaintiffs have strong, persuasive arguments with which to arm themselves to oppose these subpoenas.

The most common arguments opposing these subpoenas are based on overbreadth, relevance, and that the information sought is not reasonably calculated to lead to discovery of admissible evidence. For example, when a defendant broadly requests an employee's entire personnel file from a former employer, this is exceedingly overbroad and typically seeks irrelevant information. In these situations, undoubtedly plaintiffs should attack the subpoena.[1]



The key to remember in evaluating non-party subpoenas is whether the information actually sought will lead to *admissible* evidence.

One specific battle counsel should fight regarding non-party subpoenas to former employers is where a defendant seeks information regarding past wrongdoing (i.e., lying about or misrepresenting information on their employment application and resumes). Defendants will claim this information supports their after-acquired evidence defense. This defense allows employers to use evidence of wrongdoing on the part of a plaintiff that the employers learn of after-the-fact to limit damages awardable to plaintiffs.[2] Many courts will not permit defendants to obtain this information, especially early on in discovery, without some pre-existing factual basis showing that after-acquired evidence exists.[3] The mere possibility or belief by defendants that after-acquired evidence *may* exist is not sufficient.

Another time to challenge a subpoena to a former employer is when it seeks inadmissible character evidence, such as a plaintiff's previous discipline history or complaints and/or charges of discrimination against former employers. The rules of

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evidence prohibit the admissibility of character evidence to show that a person acted in conformity with that specific character trait. When an employer seeks information regarding a plaintiff's previous complaints or charges of discrimination, the motive is usually to show that the plaintiff is litigious, which is improper character evidence.[4] Moreover, a subpoena seeking the previous disciplinary history of a plaintiff with a former employer also forms the basis of improper character evidence.[5] The key to remember in evaluating non-party subpoenas is whether the information actually sought will lead to *admissible* evidence. If the subpoena seeks inadmissible character evidence, then plaintiffs should stand firm and vigorously defend against these subpoenas.

Of course, plaintiffs, just like defendants, have an obligation to confer in good faith to resolve discovery disputes before seeking court intervention. Nonetheless, plaintiffs' attorneys should take great care in reviewing non-party subpoenas to former employers and zealously represent their employee plaintiffs by applying these legal arguments to oppose such subpoenas.

[1] *Middleton v. Orange Park Medical Center, Inc.,* No. 3:00-cv-876-J-21HTS (doc.14, pg. 2); *Lopez v. State of Florida, et al,* No.3:00-cv-01188-RWN (doc. 26, pp.2).

[2] *McKennon v. Nashville Publishing Company,* 513 U.S. 352, 362-363 (1995).

[3] *Maxwell v. Health Center of Lake City, Inc.,* 2006 U.S. Dist. LEXIS 36774 (M.D. Fla. 2006); *Premer v. Corestaff Services, L.P.,* 232 F.R.D. 692, 693 (M.D. Fla. 2005); *Preston v. American Express Case,* No. 3:00-cv312-J-w5TJC (doc. 17, n. 3); Cute v. ICC Capital Management, No. 6:09-cv-01761-ACC-DAB (doc. 52, pp.5-7).

[4] Fed. R. Evid. 404; *Outley v. City of New York,* 837 F.2d 587, 592 (2d Cir. 1988); *Mathis v. Phillips Chevrolet, Inc.,* 269 F.3d 771, 775-775 (7th Cir. 2001).

[5] Fed. R. Evid. 404; *Chamberlain v. Farmington Savings Bank,* 2007 WL 2786421 (D. Conn. 2002); *Maxwell, supra,* n. 3.

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