Courts Apply Revised Rules, and Limit Discovery in Employment Litigation

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The recently amended federal discovery rules are dramatically changing the playing field in employment litigation, with courts across the country now quashing and narrowing what was previously commonplace discovery of employee personnel files, claims of discrimination by other employees, and subpoenas of plaintiff's records with other employers.

In the three months since Rule 26(b)(1) of the Federal Rules of Civil Procedure was amended, judges and litigants have started relying aggressively upon the amended rule's emphasis on "proportionality" as the driver in limiting discovery. As recently explained in the Southern District of New York, "the amended Rule [26] is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse by emphasizing the need to analyze proportionality before ordering production of relevant information." *Henry v. Morgan's Hotel Group,* 15-CV-1789 (ER)(JLC)(S.D.N.Y. Jan. 25, 2016).

Specifically, Rule 26(b)(1) was revised effective Dec. 1, 2015, to narrow the scope and limits of discovery by emphasizing proportionality. This has had a great impact in labor and employment litigation, where the amounts at issue are often modest in comparison to the litigation costs. Importantly, the revisions have deleted the broad language permitting discovery of information "reasonably calculated to lead to the discovery of admissible evidence."

Under the revised Rule 26(b)(1), six factors must be considered in the proportionality analysis: (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.

As a result, courts handling employment litigation have started limiting discovery to information relevant to the parties' specific claims and defenses (what happened to this particular plaintiff in this particular situation), as opposed to the traditionally broader scope that allowed exploration of the general subject matters of the case (such as "race discrimination" at the company, or the overall performance of the plaintiff during his or her career).

Limiting Discovery Relating to Prior Employers

In the *Morgan's Hotel Group* case, cited above, the defendant, after being sued by its former employee for race and sexual orientation discrimination and retaliation, served subpoenas on the plaintiff's former employers, contending that records from the plaintiff's prior employers were relevant because the plaintiff "held himself out as being an exceptional waiter, and relied upon his employment at these prior employers as evidence of his employable qualities." While courts commonly permitted such discovery in the past, the court granted the plaintiff's motion to quash the subpoenas, noting that even if the employee was not an exceptional waiter at his prior jobs, "it was not remotely apparent what difference that would make regarding the allegations of discrimination and retaliation he has made in this case."

Similarly, a federal court in California recently quashed third-party subpoenas that sought documents, including the complete employee/personnel file, from a former employer. *Loop AI Labs v. Gatti,* No. 15-CV-00798-HSG (DMR) (N.D. Cal. Feb. 29, 2016). There, an employer sued its former CEO for misappropriation of trade secrets and unfair competition, among other claims, and the employer issued third-party subpoenas, including one to a previous employer. The court rejected the employer's argument and determined that to the extent the employer sought to confirm details about the former employee's employment, such as the dates of employment and compensation, it did not need the contents of past personnel files to do so, and that it could obtain this information through less burdensome sources, including depositions. As a result, the court granted the employee's motion to quash, finding that personnel files were of minimal relevance and not proportional to the needs of the case.

Limiting Discovery Relating to Prior Complaints Against the Employer

Courts are also blocking discovery that plaintiff-employees seek against employers, applying the same new proportionality factors. For example, in *Torcasio v. New Canaan Bd. of Ed.*, No. 3:15CV00053(AWT) (D. Conn. Jan. 25, 2016), the court refused to grant extensive discovery sought by a former employee of prior lawsuits against the employer. The court sustained the defendant town's objections to requests that it produce other lawsuits or administrative charges against it, including pleadings, deposition transcripts, transcripts of any testimony and any other document. In light of the newly enacted proportionality factors set forth in Rule 26(b)(1), the court found that "the majority of documents sought in these requests appear to be of minimal importance in resolving the issues in this case ... and [m]aterials filed in previously filed court cases are likely accessible through public information sources to the plaintiff." In ruling that the employer did not need to produce such records, the court found that the "burden of obtaining, reviewing, redacting, and most likely sealing some of the other materials sought, such as third-party depositions in unrelated cases, would be substantial."

In contrast, in an age discrimination case against a former employer in the Western District of Kentucky, the court applied Rule 26(b)(1), as amended, and found that the plaintiff had satisfied his burden to demonstrate the relevance of severance agreements and other former employees who were terminated. *Hadfield v. Newpage Corp.*, No. 514CV00027TBRLLK (W.D. Ky. Feb. 3, 2016). In so ruling, the court noted that "[c]onsidering the spirit and purpose of the Civil Rules ... that threshold [of demonstrating relevance] is relatively low. The plaintiff was terminated along with seven other employees. The employer had offered all eight employees severance pay in exchange for a release of any potential claims, and seven of the terminated employees accepted that offer, but the plaintiff refused and instead brought the lawsuit. The court found that the severance agreements between the employer and the other employees possibly related

to the employer's contention that there was a reduction in force. Therefore, the plaintiff was entitled to discover why former employees decided to accept the employer's offers.

Personnel Files for Other Employees Can Be Blocked as "Fishing Expedition"

A federal court in Ohio recently used the amended rule to block discovery of the personnel files of other employees who were disciplined for the same conduct that allegedly led the employer to terminate the plaintiff. The court in *Marsden v. Nationwide Biweekly Admin.,* No. 3:14CV00399 (S.D. Ohio Feb. 8, 2016), rejected the plaintiff's argument that "there is reason to believe there are numerous other comparable employees treated more favorably than plaintiff" as insufficient, because the plaintiff did not provide any factual support to show the likely benefit to be obtained, or why the requests should not be considered a "fishing expedition." Although the plaintiff did not have access to all of the requested information, the court considered the other proportionality factors, "mainly defendants' resources and the burden and expense of production," and denied the plaintiff's motion to compel.

The 10-Deposition Limit in Employment Cases

In *Wertz v. GEA Heat Exchangers*, No. 1:14-CV-1991 (M.D. Pa. Dec. 16, 2015), the employer objected to the plaintiff's seeking more than 10 depositions in a discrimination case, exceeding the limits of Rule 30. The employer argued that the extra depositions were disproportionate to the needs of the case. The court specifically considered the advisory committee's note amendment to the rule, and determined that the employee plaintiff was permitted to take additional depositions related to his termination of employment because the plaintiff made a particularized showing as to why additional depositions were reasonable and necessary. In its proportionality analysis, the court found that merely averring that a case is "complex" is not sufficient to exceed the 10-deposition limit. But, in the *Wertz* case, the plaintiff was able to show that the information sought was only in the possession of the defendants and the employee the plaintiff sought to depose. The court was further persuaded by the employee's argument that the deposition would likely take only two hours, would not be cumulative or duplicative, and would not impose a burden that would outweigh the likely benefit.

Takeaways for Litigators

Given this new reality in employment litigation, and the emphasis on proportionality, management and plaintiffs' lawyers must focus on justifying the burden for any discovery that extends beyond the immediate circumstances of the wrongful conduct and damages claimed by the plaintiff, and the defenses thereto. No matter how many times parties have obtained discovery in the past for broad interrogatories as to similar misconduct by others, similar complaints by others, prior performance and personnel files, each discovery request is now subject to scrutiny under the revised rule and proportionality.

Whether propounding discovery requests, or answering them, litigators are well-served to consider these key questions (tracking the factors in revised Rule 26(b)(1):

- How important is this discovery to my client's claim or defenses? Will the client and counsel be prepared to fight and win a motion to compel on the requests?

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- How much money is at issue in this case? If the amount is small, courts are much more likely now to quash expensive and expansive discovery.
- Can this information be obtained from other sources more easily?
- Given the parties' resources, how burdensome is the requested discovery
- Will this discovery help resolve a disputed issue, or is it cumulative or tangential—such as records of a plaintiff's performance with past employers?
- Does the burden or expense of the proposed discovery outweigh its likely benefit? No longer will plaintiffs be allowed to seek discovery that will cost tens of thousands of dollars in management time and expert fees, if the case is worth roughly the same amount.

If these factors generally align in favor of the discovery, the request is solid and likely to be granted. If not, then the proponent may want to tailor it down to the issues in the case, and the answering party should consider moving to block the discovery, as illustrated in the cases cited here. •