IP 01-1412-C K/H Richmond v. UPS Logistics Gp.
Judge Tim A. Baker Signed on 4/25/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

RICHMOND, DALE E,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
UPS SRVICE PARTS LOGISTICS D/B/A UPS LOGISTICS GROUP,	)	CAUSE NO. IP01-1412-C-H/G
	)	
Defendant.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DALE E. RICHMOND	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CAUSE NO. IP01-1412- C -K/H
	)	
UPS SERVICE PARTS LOGISTICS) d/b/a UPS LOGISTICS GROUP,	)	
	)	
Defendant	)	

ENTRY ON PLAINTIFF'S EMERGENCY MOTION TO QUASH NON-PARTY SUBPOENAS DUCES TECUM

I. Background

Plaintiff Dale E. Richmond filed suit alleging violations of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et. seq., the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et. seq., and the Employees Retirement and Income Security Act of 1974, 29 U.S.C. § 1001 et. seq. On or about February 21, 2000, Richmond began his employment with Defendant UPS Service Parts Logistics. Richmond worked there until his termination on July 11, 2001.

Upon completion of preliminary discovery, Defendant served non-party subpoenas duces tecum on six of Richmond's previous employers and temporary employment agencies dating back to 1994. The subpoenas requested:

> Any and all documents pertaining to Plaintiff which in any way constitute, evidence, contain, discuss or refer to, directly or indirectly:
>
> (1) any and all applications for employment and related documentation;

(2) any and all resumes and/or other records of employment history;

(3) the entire personnel file concerning Plaintiff's employment;

(4) offers of employment;

(5) terms, benefits, and conditions of employment;

(6) employment contracts, if any;

(7) job requirements;

(8) evaluations, reviews, appraisals and/or other communications of any kind, whether formal or informal, relating to the job performance, conduct, and/or behavior of Plaintiff;

(9) formal and/or informal warnings to, reprimands of, and/or discipline regarding Plaintiff; and

(10) salary, wages, earnings, compensation, commissions, bonuses, benefits of any kind, and/or any other form of income or renumeration provided or due Plaintiff.

[Pl.'s Br., p. 3].

Richmond objects to these requests, claiming they are irrelevant to his claims, not reasonably calculated to lead to the discovery of admissible evidence, overbroad, and lack specificity. [Pl.'s Br., pp. 3-4]. In addition, Richmond notes that much of the information sought in the subpoenas is readily obtainable through the authorizations for the release of his medical records and tax returns. Id. at 2. Defendant responds that the information sought is directly relevant to the claims and defenses presented in this case, and that little (if any) of the information sought is confidential. [Def.'s Br., p. 2].

Before the Court is Richmond's emergency motion to quash non-party subpoenas duces tecum served on his previous employers and employment agencies. For the reasons set forth below,

Richmond's emergency motion to quash non-party subpoenas duces tecum is GRANTED IN PART and DENIED IN PART.

II. Discussion

A. Standard on Motion to Quash

Federal Rule of Civil Procedure 26 permits discovery into "any matter, not privileged, that is relevant to the claim or defense of any party." Sykes v. Target Stores, 2002 WL 554505, *1 (N.D. Ill. Apr. 15, 2002), quoting Fed. R. Civ. P. 26 (b)(1).[1] Discoverable information is not limited to that which would be admissible at trial. Id. Information is relevant for purposes of Rule 26 "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

The implementation of amended Rule 26 did not necessarily impact the so called "liberal discovery" standard as evidenced by cases interpreting the post-amendment rule. See, e.g., Hooker v. Norfolk Southern Ry. Co., 204 F.R.D. 124, 126 (S.D. Ind. 2001) (referencing a "liberal discovery standard"); White v. Kenneth Warren & Son, Ltd., 203 F.R.D. 364, 366 (N.D. Ill. 2001) ("Liberal discovery is permitted in federal courts to encourage full disclosure before trial."); Anderson v. Hale, 2001 WL 503045, *3 (N.D. Ill. 2001) ("Information is generally discoverable under the Federal Rules of Civil Procedure. The minimal showings of relevance and admissibility hardly pose much of an

[1] Richmond's motion to quash cites to the discovery standard in Rule 26 as it was written prior to its most recent amendment in 2000. Prior to that amendment, Rule 26 provided for the discovery of non-privileged information "relevant to the subject matter involved in the pending action."

obstacle for an inquiring party to overcome, even considering the recent amendment to Rule 26 (b)(1).").

Nonetheless, Rule 26(b)(2) "empowers district courts to limit the scope of discovery if 'the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.'" Patterson v. Avery Dennison Corp., 281 F.3d 676, 681 (7th Cir. Feb. 26, 2002), quoting Fed. R. Civ. P. 26(b)(2). See also Cook, Inc. v. Boston Scientific Corp., 2002 WL 406977, *1 (N.D. Ill. Mar. 15, 2002), citing Fed. R. Civ. P. 26(b)(2) ("Discovery may be limited if the Court determines it is unreasonably cumulative or duplicative, or if the burden or expense of the proposed discovery outweighs its likely benefit.") (internal quotations omitted).

The scope of non-party subpoenas under Rule 45 is as broad as permitted under the discovery rules. See Jackson v. Brinker, 147 F.R.D. 189, 193-94 (S.D. Ind. 1993) ("[t]he scope of material obtained by a Rule 45 subpoena is as broad as permitted under the discovery rules. . . if the material is relevant, not privileged, and is, or is likely to lead to, admissible evidence, it is obtainable by way of a subpoena.") (internal citations omitted); Fed. R. Civ. P. 45 advisory committee note to the 1991 amendment. The party opposing discovery has the burden of showing the discovery is overly broad, unduly burdensome, or not relevant. Wauchop v. Domino's Pizza, Inc., 138 F.R.D. 539, 543 (N.D. Ind. 1991). To meet this burden, the objecting party must "specifically detail the reasons why each [request] is irrelevant...." Schaap v. Executive Indus., Inc., 130 F.R.D. 384, 387 (N.D. Ill. 1990).

B. Compliance with Local Rules

Local Rule 37.1, entitled "Informal Conference to Settle Discovery Disputes," provides:

> The Court may deny any discovery motion (except those motions brought by a person appearing pro se and those brought pursuant to Rule 26 (c), Federal Rules of Civil Procedure, by a person who is not a party), unless counsel for the moving party files with the Court, at the time of filing the motion, a separate statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorney(s) on the matter(s) set forth in the motion.
>
> The statement shall recite, in addition, the date, time, and place of such conference and the names of all parties participating therein. If counsel for any party advises the Court in writing that opposing counsel has refused or delayed meeting and discussing the problems covered in this rule, the Court may take such action as is appropriate to avoid unreasonable delay.

In addition, Local Rule 26.2, entitled "Filing of Discovery Materials," in subsection (b) states in pertinent part:

> If disclosures, interrogatories, *requests*, answers, responses or depositions are to be used at trial or are necessary to a pretrial motion which might result in a final order on any issue, the portions to be used shall be filed with the Clerk at the onset of the trial or at the filing of the motion insofar as their use can be reasonably anticipated.

See Long v. Anderson University, 204 F.R.D. 129, 133 (S.D. Ind. 2001).

In this case, although Defendant did not move to strike Richmond's brief, Defendant correctly notes that Richmond did not submit to the Court a statement showing his compliance with Local Rule 37.1. In addition, neither party attached as exhibits the non-party subpoenas giving rise to this motion, as contemplated by Local Rule 26.2's reference to "requests." "Failure to comply with the local rules is not merely a 'harmless technicality,' but can be a 'fatal' mistake." Servin v. GATX Logistics, Inc., 187 F.R.D. 561, 563 (N.D. Ill. 1999), quoting Waldridge v. American Hoechst Corp., 24 F.3d 918, 923 (7th Cir. 1994). However, "[w]here a previous error is the result of negligence or other nonculpable conduct . . . the dispute is better decided on the merits than on procedural grounds." Fisher v. National

Railroad Passenger Corporation, 152 F.R.D. 145, 149 (S.D. Ind. 1993) (Tinder, J.).

The substance of the subpoenas is not in dispute. Therefore, while attaching them to the briefs would have been helpful to the Court and in compliance with Local Rule 26.2, this shortcoming will not in this instance prevent or delay a ruling on the merits. Likewise, given the asserted "emergency" status of Richmond's motion, the Court will not in this instance require strict compliance with Local Rule 37.1. Accordingly, the Court will consider Defendant's motion to compel on its merits.

C. Merits of the Subpoenas

In its response brief, Defendant identifies five reasons why it is entitled to documents contained in the employment files of Richmond's previous employers. Each is addressed below.

1. Documents to prove After-Acquired Evidence Defense

Richmond's interrogatory responses reveal that Richmond has a criminal record consisting of both felony and misdemeanor convictions. [Def.'s Ex. B]. Defendant seeks to discover this information to establish the so-called after-acquired evidence defense discussed in McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 360 (1995). In McKennon, the Supreme Court concluded that where an employer discovers after termination that the employee engaged in wrongdoing, generally "neither reinstatement nor front pay is an appropriate remedy." See also Graham v. Casey's General Stores, 2002 WL 416949, *4, _ F.R.D. _, (S.D. Ind. Mar. 18, 2002), quoting Hartman Bros. Heating & Air Conditioning, Inc. v. N.L.R.B., 280 F.3d 1110, 1115-16 (7th Cir. Feb. 5, 2002) ("after-acquired evidence doctrine holds that there is no right to back pay if in the course of litigation over a discriminatory or otherwise unlawful discharge the employer unearths evidence that, had he

known it at the outset, would have caused him, without fault, to refuse to hire the employee") (internal quotations omitted). Such after-acquired evidence includes any misrepresentations Richmond may have made to previous employers about his criminal record or his employment history. See, e.g., O'Neill v. Runyon, 898 F. Supp. 777, 781 (D. Colo. 1995) (in determining whether after-acquired evidence doctrine barred relief in employment discrimination case, the question was whether, when employee filled out employment application, he lied about having no criminal convictions and thus, employee's belief about prior criminal proceedings was relevant); Charles v. Cotter, 867 F. Supp. 648, 658 (N.D. Ill. 1994) (evidence that plaintiff lied about his criminal history on employment applications and was terminated as a result thereof was admissible). If in fact Richmond was untruthful about his criminal convictions to his employers, this information may be used to attack his credibility. See Graham, 2002 WL 416949 at *4.

Therefore, Defendant is entitled to discover all employment applications or resumes Richmond provided to previous employers. In addition, Defendant may discover all evaluations, reviews, appraisals, reprimands, or other documents referencing any disciplinary action. Defendant is entitled to this information to determine whether Richmond was untruthful about: (1) his criminal history; (2) his qualifications; or (3) prior discipline, all of which are relevant to Richmond's credibility. [2]

[2] Defendant states it is entitled to the same documents addressed in this section because of Richmond's retaliation claim. [Def.'s Br., p. 5]. However, the Court declines to address this issue since these documents are ordered to be produced.

2. Documents relating to Richmond's skills/training/ability

In order for Richmond to demonstrate that he is substantially limited in the major life activity of working, he must show he is precluded from performing either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. See, e.g., Stein v. Ashcroft, 284 F.3d 721, 725 (Mar. 21, 2002), quoting Sutton v. United Air Lines, Inc., 527 U.S. 471, 491 (1999) (a plaintiff must show, "at a minimum," that she is "unable to work in a broad class of jobs."). See also 29 C.F.R. § 1630.2(j)(3)(I) ("[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."). As a result, Defendant states it is entitled to non-party discovery into Richmond's "training, skills, and abilities" by obtaining from his previous employers his job applications, resumes and employment history, personnel file, employment contracts, documentation of job requirements, evaluations, reviews, appraisals, reprimands, and discipline. [Def.'s Br., p. 5].

The Court concluded in Section II C-1 that Defendant is entitled to Richmond's employment applications, resumes, and all evaluations, reviews, appraisals, reprimands, or other documents referencing any disciplinary action to establish the after-acquired evidence defense. However, Defendant's requests to obtain Richmond's entire personnel file, on its face, is overbroad and not reasonably calculated to lead to the discovery of admissible evidence. See, e.g., Thomas v. City of Durham, N.C., 1999 WL 203453, *2 (M.D.N.C. 1999) ("The Court agrees that a request for the entire personnel files of the employees is, on its face, an overbroad request."); Franzon v. Massena Memorial Hosp.,189 F.R.D. 220, 222 (N.D.N.Y. 1999) (finding request overbroad where it seeks "'any and all documents' and provides no meaningful limitations."). The request to obtain any

employment contracts Richmond may have entered into is likewise overbroad and not reasonably calculated to lead to the discovery of admissible evidence. Finally, Defendant is not entitled to documentation of "job requirements" because the determination of whether one is a qualified individual with a disability is determined at the time the employment decision was made. See Bay v. Cassens Transport Company, 212 F.3d 969, 974 (7th Cir. 2000).

3. Information relating to income from Social Security Disability benefits

Richmond's interrogatory responses reflect that he received Social Security disability benefits from approximately February 1996 to August 2000. [Def.'s Ex. C]. Defendant seeks information relating to these benefits. Richmond resists, and his motion to quash is proper in this respect for two reasons. First, this information is readily obtainable through the lesser-intrusive means of serving non-party subpoena to the Social Security Administration (SSA) or by reviewing information obtained from the release Richmond signed for Defendant to obtain his tax returns. Second, this information is completely irrelevant to any defense of this case. For instance, as addressed above, the determination of whether Richmond is disabled is made at the time the adverse employment decision was made. As to the impact on Richmond's claim for damages, any Social Security disability benefits he received prior to his termination are irrelevant to his claim for damages. However, if Richmond has received Social Security disability benefits during or subsequent to his employment at Defendant, this information can be discovered through either his tax returns or a subpoena to the SSA.

4. Documents relating to previously filed complaints, grievances, lawsuits, or charges

Defendant also seeks to discover whether Richmond filed any complaints, grievances, lawsuits, or charges with his former employers. As this Court has previously noted, "it is conceivable that Defendant could discover [plaintiff] filed previous frivolous claims that may go to her credibility and may be so compelling as to warrant their use at trial." Graham v. Casey's General Stores, 2002 WL 416949 at *5.

Graham is dispositive of this issue. Defendant is entitled to discover complaints, grievances, lawsuits, and charges filed by Richmond during his previous employment.

III. Conclusion

For the reasons set forth above, Richmond's emergency motion to quash non-party subpoenas duces tecum is GRANTED IN PART and DENIED IN PART. Richmond's motion is denied to the extent that Defendant is entitled to discover the following documents through its non-party subpoenas:

1. resumes;
2. applications for employment;
3. all evaluations, reviews, appraisals, reprimands, or any other documents referencing any disciplinary action; and
4. complaints, grievances, lawsuits, and charges filed by Richmond.

Richmond's motion is granted in all other respects.

Pursuant to Rule 26 (c), the parties are encouraged to enter into a mutually agreeable protective

order to govern the conduct of any further discovery.

So ordered.

DATED this 25th day of April, 2002.

_____

Tim A. Baker
United States Magistrate Judge
Southern District of Indiana

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