

THE DAILY RECORD

LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Over-Zealous Discovery In Discrimination Case Results In Federal Rule 45 Sanctions

BY NORA A. JONES, ESQ., EDITOR

Did the defendant comply with Federal Rule of Civil Procedure 45 during discovery? Was notice properly given to plaintiff regarding third-party subpoenas?

In an employment discrimination action where plaintiff alleged wrongful termination by the defendant Family Dollar Stores, U.S. Magistrate Judge Jonathan W. Feldman reviewed evidence pertaining to the parties pretrial motions around third-party subpoenas in *Laurie Trout v. Family Dollar Stores of New York*. Upon review of the procedural rules and factual history, the U.S. District Court for the Western District of New York determined that the defendant had overstepped the boundaries of the discovery process by failing to limit the scope of the subpoenas and by setting return dates of four to eight days, while only giving plaintiff notice of such requests at the same time that the subpoenas were being served. Finding a violation of Fed.R. Civ. P. 45, the Court ordered that previously issued subpoenas be quashed and the defendant pay reasonable attorney fees incurred in prosecuting the motion to quash.

The Parties, The Pleadings

Laurie Trout was working as a manager of the Sodus and Auburn Family Dollar Stores in early 2000 when her doctor advised her to take a week off due to complications of her pregnancy. The plaintiff asserted that her supervisor insisted that she return to work after only a couple days off.

Shortly thereafter, Trout suffered a miscarriage. Her supervisor again allegedly insisted she return to work sooner than medically advisable. Subsequently, Trout was diagnosed with pre-cancerous cells of her cervix.

After undergoing corrective surgery, doctors treating Trout restricted the amount of lifting she could do and advised her to take four weeks off from work. Allegedly, Trout's supervisor required her to return to work two weeks early and ordered her to lift heavy boxes, despite the defendant's knowledge of the lifting restrictions.

When Trout began hemorrhaging at work, she alleges that she was denied permission to leave until the end of her shift, at which time she was terminated.

The defendant disputes plaintiff's allegations and contends that Trout's termination had nothing to do with her pregnancy or medical condition. The defendant asserts that the



U.S. MAGISTRATE JUDGE
JONATHAN W. FELDMAN

WHAT THE COURT RULED

Laurie Trout v. Family Dollar Stores of New York,
U.S. District Court Western District of New York

INDEX NO. 01-CV-6021

ISSUE: During pretrial discovery, did the defendant abide by Federal Rule of Civil Procedure 45 in providing adequate notice to the plaintiff of intended third-party subpoenas? Did it follow procedural rules in regard to the time and scope of requested documents in an employment discrimination action?

RULING: The Court found that the defendant's service of subpoenas on third-parties did not provide adequate notice to the plaintiff, and included requests that were too broad in scope in light of the nature of the case.

ATTORNEY FOR PLAINTIFF: J. Nelson Thomas, Esq.

ATTORNEYS FOR DEFENDANT:

Robert A. Doren, Esq. and Cathy Lovejoy Maloney, Esq.

plaintiff had failed to follow company policy in writing two checks to Family Dollar, and she had insufficient funds to cover the checks. The defendant further alleges that Trout lied about having taken care of the bad checks and was terminated when it became aware of that fact.

Pre-trial Discovery

The defendant served subpoenas on several third-parties, seeking bank records from various banks, Sheriff's Department records regarding plaintiff's marital and family problems and criminal record, public assistance records, and past employment records.

The subpoenas at issue were mailed (and in some cases faxed) to plaintiff's counsel at or just before the time they were personally served on the third-parties. The "return date" on the subpoenas was between four and eight days from the date of service, and noted "or as soon as possible" for the stated return.

The plaintiff's attorney sent letters to each of the third-

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party recipients stating that there was a dispute over the subpoenas and asked that no documents be turned over until the issue was resolved by the Court.

Defense counsel sent each of the third-parties his own letter, stating in pertinent part: "A subpoena has been properly served ... and you are obligated under law to comply with the subpoena. Mr. Thomas [plaintiff's counsel] does not have authority to veto your obligation to properly respond to the subpoena. The court can later issue an order precluding the use of such documents in this proceeding should that be warranted..."

The plaintiff's counsel then refused to allow Trout to be deposed until the subpoena issues were resolved. Plaintiff moved to quash the subpoenas, suppress documents already produced, and for sanctions for violation of Fed. R. Civ. P. 45.

The defendant filed a cross-motion to compel plaintiff's appearance at a deposition and sanctions for non-appearance.

The court stayed plaintiff's deposition until the subpoena motion could be resolved.

Rule 45

Fed. R. Civ. P. 45(b)(1) provides, in relevant part, that "prior notice of any commanded production of documents ... shall be served on each party in the manner prescribed by Rule 45(b)."

Citing the notes to the 1991 amendments to the Federal Rules, the court wrote, "The Advisory Committee Notes ... indicate that this subsection was added to 'afford other parties an opportunity to object to the production of inspection, or to serve a demand for additional documents ... When production or inspection is sought independently of a deposition, other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced.'"

Cases interpreting this subsection of Rule 45 include *Murphy v. Board of Educ. of Rochester City Sch. Dist.*, 196 FRD 220 (WDNY 2000); *Biocore Medical Tech. v. Khosrowshahi*, 181 FRD 660 (D. Kansas 1998); and *Schweizier v. Mulvehill*, 93 FSupp2d 376 (SDNY 2000). Each of these cases held that "prior notice" means prior to service of the subpoena on the third-party, not prior to document production.

"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," wrote the court, citing *McCurdy v. Wedgewood Capital Management Co.*, 1998 WL 964185 at *7 (ED Pa 1998).

Court's Analysis

"Defendant's actions here demonstrate a deliberate attempt

to ignore both the rule and the spirit of Rule 45," wrote Judge Feldman.

"A remedy for a Rule 45 violation is necessary because the misuse of the subpoena power causes harm not only to the opposing party but also to the public at large," continued Judge Feldman, citing *McCurdy* and quoting from *Potomac Electric Power Co. v. Electric Motor Supply, Inc.*, 190 FRD 372, 380 (D Md 1999), "when an attorney misuses his or her power under Rule 45 ... public confidence in the integrity of court processes is eroded."

Where a violation is discovered prior to the receipt of any documents, courts will simply strike the subpoena. "These remedies are of course inadequate when the documents have already been wrongfully obtained," continued Judge Feldman, citing *Spencer v. Steiman*, 179 FRD 484, 489 (ED Pa 1998).

Determining the amount of prejudice suffered by the plaintiff as a result of documents produced and sought, the court must consider the relevance of the requested documents.

The defendant used the court's process to subpoena, without either temporal or subject matter limitation, all of plaintiff's personal bank records, public assistance file, reports and documents in possession of the Seneca County Sheriff's Department pertaining to plaintiff and all documents in the possession of plaintiff's former employers."

"Given the limitless scope of the subpoenas, the potential for discovery abuse is obvious," wrote Judge Feldman. "This Court has previously commented on the disturbing pursuit of 'scorched earth' discovery practices." The court went on to describe its prior decision where it "reject[ed] as deplorable the notion that a litigant can delve without restriction or restraint into the most private and personal aspects of an individual's life ..." *Murphy v. Board of Education*, 196 FRD at 227."

Based on this analysis, the court in the instant case determined that an award of attorney's fees would be appropriate.

Therefore, the court ordered that the plaintiff be awarded reasonable and necessary attorney fees and costs incurred in prosecuting the motion to quash the subpoenas. It also ordered that previously issued subpoenas to which plaintiff objected be quashed, and defense counsel destroy any documents already received.

To insure future discovery in the case is reasonable, the court also ordered that the deposition of the plaintiff be supervised by the court, and that following the deposition, the defense counsel should seek court approval for third-party subpoenas regarding specific information relevant to the case.

"The proposed subpoenas shall be limited in both scope and time consistent with the admonitions contained in this Decision and Order," concluded Judge Feldman.