

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

In re FEDEX GROUND PACKAGE)
SYSTEM, INC., EMPLOYMENT)
PRACTICES LITIGATION)
) CAUSE NO. 3:05-MD-527 RM
) (MDL-1700)
)
) THIS DOCUMENT RELATES TO
) ALL CASES

OPINION AND ORDER

I. PROCEDURE

On August 10, 2005, this multidistrict litigation case was transferred to the Northern District of Indiana pursuant to 28 U.S.C. § 1407 to perform consolidated pretrial proceedings. Plaintiffs' main contention for many of their claims is that Fedex was treating them as independent contractors when they were actually employees. As a result, Plaintiffs seek a number of remedies that revolve around this issue including injunctive relief and damages. On November 15, 2005, this Court entered an initial scheduling order where discovery on liability and damages was bifurcated.

Also, on November 29, 2005, this Court provided a supplemental scheduling order in which this Court provided that class certification briefing was to proceed in three waves. After several extensions of the discovery deadline, all discovery pertaining to those first three waves had to be completed by January 31, 2007.

On June 29, 2007, after the initial discovery deadline closed, and after the briefing of the first three waves of class certification had begun, it became apparent that a new fourth wave of class certification would be required for recently transferred cases. Even though discovery had

closed, this Court allowed the parties to perform additional limited discovery, but only as it pertained to the new wave. Later on March 20, 2008, a fifth wave of class certification was added, and the parties were also allowed to perform discovery as to the fifth wave as well.

The current dispute is a discovery dispute. On May 9, 2008, Plaintiffs filed a motion to compel discovery. Plaintiffs seek to compel a document produced to Fedex from the Internal Revenue Office (IRS) and depose one Fedex executive regarding a recent IRS audit. On May 27, 2008, Fedex filed a response in opposition to Plaintiffs' motion, and on June 10, 2008, Plaintiffs filed a reply in support of their motion. This Court now enters its ruling on this motion pursuant to its referral order and 28 U.S.C. § 636(b)(1)(A).

II. ANALYSIS

A. Facts

Sometime in 1995, the IRS issued an assurance letter to Fedex regarding its independent contractor "driver model." During a 2006 deposition of Sallie Ford (Ford), Plaintiffs learned that the IRS was currently auditing Fedex's driver model for a more recent year, but that the audit was not finished. In December of 2007, the IRS issued a "Notice of Proposed Assessment" (NOPA). Plaintiffs seek to compel the production of this document, and Plaintiffs seek to conduct a second limited deposition of Ford regarding the developments of the IRS audit since her 2006 deposition.

B. Legal Standards

Fed. R. Civ. P. 26 (b)(1) permits discovery into "any matter, not privileged, that is relevant to the claim or defense of any party." Relevant information need not be admissible at trial so long as the discovery appears reasonably calculated to lead to the discovery of admissible

evidence. Fed. R. Civ. P. 26 (b)(1). For the purpose of discovery, relevancy will be construed broadly to encompass "any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case." Chavez v. Daimler Chrysler, 206 F.R.D. 615, 619 (S.D. Ind. 2002) (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351(1978)). This Court has broad discretion when deciding whether to compel discovery and may deny discovery to protect a party from oppression or undue burden. Fed. R. Civ. P. 26(c); Sattar v. Motorola, Inc., 138 F.3d 1164, 1171 (7th Cir. 1998) ("[D]istrict courts have broad discretion in matters related to discovery."); Gile v. United Airlines, Inc., 95 F.3d 492, 495-96 (7th Cir. 1996) ("The district court exercises significant discretion in ruling on a motion to compel."). In ruling on a motion to compel, "a district court should independently determine the proper course of discovery based upon the arguments of the parties." Id. at 496.

C. Plaintiffs' Motion to Compel

The threshold issue of any discovery dispute is whether the discovery sought is relevant to issues in the litigation. Fedex does not claim that the discovery is irrelevant to the main issue of whether the Fedex drivers are independent contractors or employees, but that it is not relevant to any "new issues" presented in wave five. Fedex essentially argues that this Court only allowed discovery akin to wave five because of its nature of being new lawsuits not previously before this Court. Fedex also points to the parties' memoranda in which they requested the ability to perform discovery for waves four and five and how the memorandums specifically request that discovery only be completed on "new" issues.

Fedex misconstrues this Court's order. Despite the contents of the parties' briefs where they sought to perform limited discovery with the new waves, this Court's order did not specify

that the parties could only perform discovery of new issues presented in wave five. The only limitation from this Court was that the parties had leave to perform “limited” discovery. See Doc. No.s 766, 1118. The requirement that the discovery Plaintiffs seek be limited is clearly met in these circumstances. Plaintiffs seek only one targeted document and one very specific supplemental deposition of Ford, which is clearly not the type of large, wholesale discovery the parties engaged in prior to January 31, 2007.

The only remaining requirement is that the discovery bear on an issue in this litigation. Fedex claims that the NOPA would not be admissible as evidence, but admissibility is not pertinent to answering whether something is discoverable.¹ The key question is whether the NOPA “bears on, or . . . reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case.” Chavez, 206 F.R.D. at 619. The main issue in this litigation, including in wave five cases, pertains to the classification of Fedex drivers, and the NOPA and the supplemental deposition bear on the IRS’s consideration of this issue. While this Court is not now deciding whether the discovery sought is admissible, it is relevant for discovery purposes and, therefore, appropriate for discovery.

Furthermore, this Court also finds that Plaintiffs have established “good cause” to seek disclosure of the NOPA even if this Court’s order did not allow discovery in wave five on old issues. Discovery closed on January 31, 2007, yet the NOPA document did not come into existence until approximately a year later in December of 2007. Consequently, it was impossible

¹Fedex argues that Plaintiffs should not have access to the document because they may seek to use the document in support of summary judgment in the first four waves in which briefing has completed or is nearly completed. While Plaintiffs may seek to use the document, whether they may supplement their motions and briefs with the document is separate issue. Plaintiffs would need to file a motion for leave to supplement, and at that time, this Court will consider whether there is “good cause” to accept and consider the document. But the only question before the Court at this time is whether the document is discoverable.

for the Plaintiffs to have sought the document prior to the close of discovery. Simply put, the Plaintiffs are justified in seeking the NOPA document and information about the circumstances surrounding it.

Consequently, the only issues remaining are whether Fedex has articulated some justification for not disclosing the NOPA. The frequency or extent of the discovery methods otherwise permitted shall be limited by the court if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C). Fedex essentially makes two arguments pursuant to part (iii) of Fed. R. Civ. P. 26(b)(2)(C) that: 1) it would be unduly burdensome to compel a corporation, such as Fedex, to turn over documents that reflect communications between it and the IRS; and 2), that it would be redundant and burdensome to allow Ford to be deposed a second time.

First, Fedex argues that producing the NOPA is a confidential communication, and its disclosure would interfere with the fundamental public policies encouraging dialogue between corporations and government agencies. Even though the NOPA is a an IRS document, there is no special privilege that prevents a parties' documents created by or for the IRS from being discoverable. See Poulus v. Naas Foods, Inc., 959 F.2d 69, 74 (7th Cir. 1992). However, some Courts have recognized that some parties will be hesitant to provide accurate and complete information to the IRS if they are later forced to produce the tax information in a judicial proceedings. See e.g. Shaver v. Yacht Outward Bound, 71 F.R.D. 561, 563 (N.D. Ill. 1976).

Consequently, public policy may argue against the disclosure of tax documents. However, because the documents are not privileged, the Court will weigh the relevancy of these documents against the burden for producing them. Fedex may be relieved of its obligation to produce the tax documents if it can show that the relevancy of the tax documents is slight and it will be needlessly harmed by their public disclosure.

This Court finds that the relevancy of the NOPA document outweighs any harassment or embarrassment that Fedex will suffer if the NOPA is disclosed. First, and most importantly, Fedex has placed at issue the IRS's opinion of its driver model. See Paulos, 959 F.2d at 75 (indicating that party opposing discovery put the topic of discovery at issue was crucial factor). Plaintiffs indicate, and Fedex does not deny, that they have frequently pointed to the IRS's opinion from the mid 90's to support its position in this litigation. Fedex cannot credibly argue that the IRS documents were discoverable when it was favorable to Fedex's position but now when it may not support Fedex's position they are not discoverable. Fedex also claims that the NOPA does not contradict the IRS documents from the mid 90's. If so, then there is no prejudice to Fedex. And if there is a change, the new position and the factors that lead to the new position might lead to relevant evidence in this litigation.

Second, the NOPA is not available from another source. Under 26 U.S.C. § 6103, the IRS cannot disclose the information, and as a consequence, the only source of the NOPA is Fedex. Finally, the Plaintiff's request is very limited. Plaintiffs do not seek all of Fedex's tax documents. Instead, Plaintiffs seek one document, the NOPA, and a limited deposition, which is the full extent of their request.²

²Furthermore, it is not clear whether Fedex has concerns regarding the public disclosure of the NOPA, but

Fedex's also argues that Ford should not be subject to a second deposition because it is redundant and, as a result, burdensome. However, because the documents were created after Ford's deposition, Plaintiffs clearly could not have questioned Ford at her first deposition regarding the results of the NOPA.

Consequently, Plaintiffs shall be able to depose Ford, but only to conduct a **very narrow** and **targeted** deposition of Ford. The deposition shall **only** relate to issues generated from the NOPA and most recent IRS audits.

III. CONCLUSION

Because the Plaintiffs' discovery requests are limited and subject to wave five discovery and because Fedex's privacy concerns are outweighed by the discovery's relevancy to issues in this litigation, Plaintiffs' motion to compel is **GRANTED** [Doc. No. 1283].

SO ORDERED.

Dated this 21st Day of August, 2008.

S/Christopher A. Nuechterlein
Christopher A. Nuechterlein
United States Magistrate Judge

those concerns could be addressed, or may already be addressed, by a protective order from this Court.