

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA FLORIDA

ZACKERY R. LOMBARDO,

Plaintiff,

vs.

Case No.: 3:16-cv-392-MCR/EMT

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Defendant.

**PLAINTIFF'S MOTION TO COMPEL DOCUMENTS OF THREE ADDITIONAL
GEICO EMPLOYEES' FILES RELATED TO CLAIMS HANDLING AND
REQUEST FOR ATTORNEY'S FEES AND COSTS**

Pursuant to Federal Rules of Civil Procedure 34(b) and 37(a) and Local Rule 26(1)(D), Plaintiff moves this Court to compel GEICO to produce all documents responsive to Plaintiff's Second Request to Produce and for an award of reasonable expenses made necessary by this Motion.

Summary

Upon review of GEICO's claims file and based on the depositions taken to date in this case, Plaintiff served a Second Request for Production, dated June 2, 2017, which seeks the production of files, related to the claims handlings, including adjustment and settlement, of the following three GEICO employees: Mindy Thagard, Michael Conley, and John Walsh. Each employee's participation in the handling of the claim made against Plaintiff will be summarized below. On June 30, 2017, GEICO filed objections, most of which were already over ruled by this Court, and did not produce any responsive documents. Pursuant to Local

Rule 26(1)(D), the requests and objections are quoted below.

Local Rule 7.1 Certification

Prior to filing this motion, on July 19, 2017, counsel for Plaintiff conferred via telephone with counsel for GEICO, but the parties were unable to resolve the issue. Even if the requests were revised to match the revisions contained in the Court's Order (Dkt. 25), defendant counsel indicated GEICO would maintain the same objections. Counsel for Plaintiff did indicate she would seek fees for having to file this motion, particularly in light of the Court's prior Order (Dkt. 25)

This memorandum contains 3,745 words.

Discovery Plaintiff is Seeking and GEICO's Objections

Number 1 of Plaintiff's Second Request to Produce¹ seeks:

All documents and information, whether maintained electronically or in a physical file, relative to training, education, experience, licensure, job positions, responsibilities and duties associated with those job positions, any complaints, commendations, or other documentation of performance evaluations or reviews or similar assessments or appraisals of responsibilities and performance of Michael Conley for the years 2010 through 2014. Plaintiff does not seek production of Social Security numbers, telephone numbers, drug test results, information relating to the employees family, or any other protected health information.

GEICO's objections states:

GEICO objects to Request No. 1 as overly broad, unduly burdensome, seeking irrelevant materials, and not proportional to the needs of this case.

Additionally, GEICO objects to Request No. 1 to the extent that it seeks the production of any performance evaluations contained in any personnel files as the production of such would have a chilling effect on GEICO's evaluation of its

¹ During the telephone call between counsel, counsel for Plaintiff agreed to modify the request to comport with what the Court ordered (Dkt. 25) produced for Andrea Thomas.

employees and the operation of its business. Specifically, invading the confidentiality of GEICO's employees' performance evaluations would have a significant negative impact on GEICO's ability to candidly appraise the performance of its employees, thus devaluing the performance evaluations of both GEICO and its employees.

Moreover, the documents would be inadmissible pursuant to Rule 404(b), Federal Rules of Evidence, which provides that prior acts are not admissible to prove action in conformity therewith. See Jones v. S. Pac. R.R., 962 F.2d 447 (5th Cir. 1992) (holding generally that evidence of similar prior infractions by an employee were not admissible to demonstrate the employee's negligence at the time of the loss); accord Fisher v. Bumbo Jnt'l Trust, 2014 WL 12042519, at *2 (S.D.Fla. 2014). Any evidence contained in any of GEICO's employee personnel files which may show mishandling of other claims is precisely the type of improper propensity evidence F.R.E. 404(b) is designed to preclude, as the sole use of such evidence would be for the Plaintiff to attempt to improperly argue that GEICO's employees must have mishandled the underlying claim based on their alleged mishandling of other claims. Any documents reflecting GEICO's reviews or evaluations of any employee's handling of this claim would also be inadmissible. Such documents would constitute improper evidence of subsequent remedial measures pursuant to Rule 407 of the Federal Rules of Evidence. See Williams v. Asplundh Tree Expert Co., 71 Fed. R. Evid. Serv. 509, 2006 WL 2868923 (M.D. Fla. 2006) (holding that evidence of a recommendation of "corrective action" against an employee following loss giving rise to the claim was inadmissible under F.R.E. 407).

GEICO also objects to Request No. 1 as it seeks the production of information that is derived, upon information and belief, solely from Mr. Conley's GEICO employee personnel file, which is not relevant to the present bad faith litigation as required by Rule 26(b)(1), Federal Rules of Civil Procedure. Likewise, pursuant to Florida law, Plaintiff must establish that the confidential information contained in the requested personnel file or files at issue, which are unrelated to the claims handling, are clearly relevant to the issue in this action of whether GEICO handled the underlying claim in bad faith. The documents contained in Mr. Conley's personnel file which are related to Mr. Conley's handling of claims other than the underlying claim are likewise irrelevant as such involve the handling of claims based entirely on different facts and circumstances. Mr. Conley's involvement in other claims that have no facts in common with that of the underlying claim is entirely irrelevant to Mr. Conley's limited involvement in this claim.

Additionally, GEICO objects to Request No. 1 because the documents and information contained in GEICO's employees' personnel files are confidential and sensitive in nature and are not subject to discovery absent a showing by

Plaintiff that the personnel files sought are relevant to the present litigation and that disclosure of the same will not result in an undue invasion of the privacy of GEICO's employees. See CAC-Ramsay Health Plans, Inc. v. Johnson, 641 So.2d 434 (Fla. 3d DCA 1994); see also Alterra Healthcare Com. v. Estate of Shelley, 827 So.2d 936, 945 (Fla. 2002).

In addition, GEICO objects to the extent that Plaintiffs' Request No. 1 calls for the production of privileged financial information and/or materials of GEICO's employees. Florida Courts have repeatedly held that private individual financial information is not discoverable when there is no financial issue pending in the case to which the discovery applies. See Bd. of Trs. Of the Internal Improvement Trust Fund v. Am. Educ. Enters., LLC, 99 So.3d 450, 458 (Fla.2012); see also Friedman v. Heart Inst. of Port St. Lucie, 863 So.2d 189, 194 (Fla.2003); Aspex Eyewear Inc. v. Ross, 778 So.2d 481,481-82 (Fla. 4th DCA 2001) ("Ordinarily the financial records of a party are not discoverable unless the documents themselves or the status which they evidence is somehow at issue in the case."). Given that private individuals have a constitutionally guaranteed right to privacy, "the disclosure of personal financial information may cause irreparable harm to a person forced to disclose it, in a case in which the information is not relevant." Friedman v. Heart Inst. of Port St. Lucie, 863 So.2d 189, 194 (Fla.2003) (quoting Straub v. Matte, 805 So.2d 99,100 (Fla. 4th DCA 2002); see also Woodward v. Berkery, 714 So.2d 1 027 (Fla. 4th DCA), rev. denied, 717 So.2d 528 (Fla.1998).

GEICO also objects as Plaintiff could have obtained this information in a less burdensome matter--during Mr. Conley's June 8, 2017 deposition in this case.

Number 2 of Plaintiff's Second Request to Produce seeks:

All documents, and information, whether maintained electronically or in a physical file, relative to training, education, experience, licensure, job positions, responsibilities and duties associated with those job positions, any complaints, commendations, or other documentation of performance evaluations or reviews or similar assessments or appraisals of responsibilities and performance of Mindy Thagard for the years 2010 through 2013. Plaintiff does not seek production of Social Security numbers, telephone numbers, drug test results, information relating to the employees family, or any other protected health information.

GEICO's objection states:

GEICO objects to Request No. 2 as overly broad, unduly burdensome, seeking irrelevant materials, and not proportional to the needs of this case.

Additionally, GEICO objects to Request No. 2 to the extent that it seeks the production of any performance evaluations contained in any personnel files as the production of such would have a chilling effect on GEICO's evaluation of its employees and the operation of its business. Specifically, invading the confidentiality of GEICO's employees' performance evaluations would have a significant negative impact on GEICO's ability to candidly appraise the performance of its employees, thus devaluing the performance evaluations of both GEICO and its employees.

Moreover, the documents would be inadmissible pursuant to Rule 404(b), Federal Rules of Evidence, which provides that prior acts are not admissible to prove action in conformity therewith. See Jones v. S. Pac. R.R., 962 F.2d 447 (5th Cir. 1992) (holding generally that evidence of similar prior infractions by an employee were not admissible to demonstrate the employee's negligence at the time of the loss); accord Fisher v. Bumbo Jnt'l Trust, 2014 WL 12042519, at *2 (S.D.Fla. 2014). Any evidence contained in any of GEICO's employee personnel files which may show mishandling of other claims is precisely the type of improper propensity evidence F.R.E. 404(b) is designed to preclude, as the sole use of such evidence would be for the Plaintiff to attempt to improperly argue that GEICO's employees must have mishandled the underlying claim based on their alleged mishandling of other claims. Any documents reflecting GEICO's reviews or evaluations of any employee's handling of this claim would also be inadmissible. Such documents would constitute improper evidence of subsequent remedial measures pursuant to Rule 407 of the Federal Rules of Evidence. See Williams v. Asplundh Tree Expert Co., 71 Fed. R. Evid. Serv. 509, 2006 WL 2868923 (M.D.Fla. 2006) (holding that evidence of a recommendation of "corrective action" against an employee following loss giving rise to the claim was inadmissible under F.R.E. 407).

GEICO also objects to Request No. 2 as it seeks the production of information that is derived, upon information and belief, solely from Ms. Thagard's GEICO employee personnel file, which is not relevant to the present bad faith litigation as required by Rule 26(b)(1), Federal Rules of Civil Procedure. Likewise, pursuant to Florida law, Plaintiff must establish that the confidential information contained in the requested personnel file or files at issue, which are unrelated to the claims handling, are clearly relevant to the issue in this action of whether GEICO handled the underlying claim in bad faith. The documents contained in Mr. Conley's personnel file which are related to Ms. Thagard's handling of claims other than the underlying claim are likewise irrelevant as such involve the handling of claims based entirely on different facts and circumstances. Ms. Thagard's involvement in other claims that have no facts in common with that of the underlying claim is entirely irrelevant to Ms. Thagard's limited involvement in this claim.

Additionally, GEICO objects to Request No. 2 because the documents and information contained in GEICO's employees' personnel files are confidential and sensitive in nature and are not subject to discovery absent a showing by Plaintiff that the personnel files sought are relevant to the present litigation and that disclosure of the same will not result in an undue invasion of the privacy of GEICO's employees. See CAC-Ramsay Health Plans, Inc. v. Johnson, 641 So.2d 434 (Fla. 3d DCA 1994); see also Alterra Healthcare Com. v. Estate of Shelley, 827 So.2d 936, 945 (Fla. 2002).

In addition, GEICO objects to the extent that Plaintiffs' Request No. 2 calls for the production of privileged financial information and/or materials of GEICO's employees. Florida Courts have repeatedly held that private individual financial information is not discoverable when there is no financial issue pending in the case to which the discovery applies. See Bd. of Trs. Of the Internal Improvement Trust Fund v. Am. Educ. Enters., LLC, 99 So.3d 450, 458 (Fla.2012); see also Friedman v. Heart Inst. of Port St. Lucie, 863 So.2d 189, I 94 (Fla.2003); Aspex Eyewear Inc. v. Ross, 778 So.2d 481,481-82 (Fla. 4th DCA 2001) ("Ordinarily the financial records of a party are not discoverable unless the documents themselves or the status which they evidence is somehow at issue in the case."). Given that private individuals have a constitutionally guaranteed right to privacy, "the disclosure of personal financial information may cause irreparable harm to a person forced to disclose it, in a case in which the information is not relevant." Friedman v. Heart Inst. of Port St. Lucie, 863 So.2d 189, 194 (Fla.2003) (quoting Straub v. Matte, 805 So.2d 99,100 (Fla. 4th DCA 2002); see also Woodward v. Berkery, 714 So.2d I 027 (Fla. 4th DCA), rev. denied, 717 So.2d 528 (Fla.1998).

GEICO also objects as Plaintiff could have obtained this information in a less burdensome matter--during Ms. Thagard's June 8, 2017 deposition in this case.

Number 3 of Plaintiff's Second Request to Produce seeks:

All documents, and information, whether maintained electronically or in a physical file, relative to training, education, experience, licensure, job positions, responsibilities and duties associated with those job positions, any complaints, commendations, or other documentation of performance evaluations or reviews or similar assessments or appraisals of responsibilities and performance of John Walsh for the years 2010 through 2014. Plaintiff does not seek production of Social Security numbers, telephone numbers, drug test results, information relating to the employees family, or any other protected health information.

GEICO's objection states:

GEICO objects to Request No. 3 as overly broad, unduly burdensome, seeking

irrelevant materials, and not proportional to the needs of this case.

Additionally, GEICO objects to Request No. 3 to the extent that it seeks the production of any performance evaluations contained in any personnel files as the production of such would have a chilling effect on GEICO's evaluation of its employees and the operation of its business. Specifically, invading the confidentiality of GEICO's employees' performance evaluations would have a significant negative impact on GEICO's ability to candidly appraise the performance of its employees, thus devaluing the performance evaluations of both GEICO and its employees.

Moreover, the documents would be inadmissible pursuant to Rule 404(b), Federal Rules of Evidence, which provides that prior acts are not admissible to prove action in conformity therewith. See Jones v. S. Pac. R.R., 962 F.2d 447 (5th Cir. 1992) (holding generally that evidence of similar prior infractions by an employee were not admissible to demonstrate the employee's negligence at the time of the loss); accord Fisher v. Bumbo Jnt'l Trust, 2014 WL 12042519, at *2 (S.D.Fla. 2014). Any evidence contained in any of GEICO's employee personnel files which may show mishandling of other claims is precisely the type of improper propensity evidence F.R.E. 404(b) is designed to preclude, as the sole use of such evidence would be for the Plaintiff to attempt to improperly argue that GEICO's employees must have mishandled the underlying claim based on their alleged mishandling of other claims. Any documents reflecting GEICO's reviews or evaluations of any employee's handling of this claim would also be inadmissible. Such documents would constitute improper evidence of subsequent remedial measures pursuant to Rule 407 of the Federal Rules of Evidence. See Williams v. Asplundh Tree Expert Co., 71 Fed. R. Evid. Serv. 509, 2006 WL 2868923 (M.D.Fla. 2006) (holding that evidence of a recommendation of "corrective action" against an employee following loss giving rise to the claim was inadmissible under F.R.E. 407).

GEICO also objects to Request No. 3 as it seeks the production of information that is derived, upon information and belief, solely from Mr. Walsh's GEICO employee personnel file, which is not relevant to the present bad faith litigation as required by Rule 26(b)(1), Federal Rules of Civil Procedure. Likewise, pursuant to Florida law, Plaintiff must establish that the confidential information contained in the requested personnel file or files at issue, which are unrelated to the claims handling, are clearly relevant to the issue in this action of whether GEICO handled the underlying claim in bad faith. The documents contained in Mr. Conley's personnel file which are related to Mr. Walsh's handling of claims other than the underlying claim are likewise irrelevant as such involve the handling of claims based entirely on different facts and circumstances. Mr. Walsh's involvement in other claims that have no facts in

common with that of the underlying claim is entirely irrelevant to Mr. Walsh's limited involvement in this claim.

Additionally, GEICO objects to Request No. 3 because the documents and information contained in GEICO's employees' personnel files are confidential and sensitive in nature and are not subject to discovery absent a showing by Plaintiff that the personnel files sought are relevant to the present litigation and that disclosure of the same will not result in an undue invasion of the privacy of GEICO's employees. See CAC-Ramsay Health Plans, Inc. v. Johnson, 641 So.2d 434 (Fla. 3d DCA 1994); see also Alterra Healthcare Com. v. Estate of Shelley, 827 So.2d 936, 945 (Fla. 2002).

In addition, GEICO objects to the extent that Plaintiffs' Request No. 3 calls for the production of privileged financial information and/or materials of GEICO's employees. Florida Courts have repeatedly held that private individual financial information is not discoverable when there is no financial issue pending in the case to which the discovery applies. See Bd. of Trs. Of the Internal Improvement Trust Fund v. Am. Educ. Enters., LLC, 99 So.3d 450, 458 (Fla.2012); see also Friedman v. Heart Inst. of Port St. Lucie, 863 So.2d 189, I 94 (Fla.2003); Aspex Eyewear Inc. v. Ross, 778 So.2d 481,481-82 (Fla. 4th DCA 2001) ("Ordinarily the financial records of a party are not discoverable unless the documents themselves or the status which they evidence is somehow at issue in the case."). Given that private individuals have a constitutionally guaranteed right to privacy, "the disclosure of personal financial information may cause irreparable harm to a person forced to disclose it, in a case in which the information is not relevant." Friedman v. Heart Inst. of Port St. Lucie, 863 So.2d 189, 194 (Fla.2003) (quoting Straub v. Matte, 805 So.2d 99,100 (Fla. 4th DCA 2002); see also Woodward v. Berkery, 714 So.2d I 027 (Fla. 4th DCA), rev. denied, 717 So.2d 528 (Fla.1998).

GEICO also objects as Plaintiff can obtain this information in a less burdensome matter-by deposing Mr. Walsh.

Description of the Participation of these Three GEICO Employees

A few days after the subject motor vehicle accident, GEICO employee, Mindy Thagard, was assigned to handle the bodily injury claim made against Plaintiff. She handled the claim until May 3. During that time period, Ms. Thagard wrote to Plaintiff and stated she had been assigned to handle the case, took the recorded statement of the claimant, Alysia Macedo, in which she learned that Ms. Macedo hit her head in the accident and was still

being treated for neck pain. Ms. Thagard then requested that Ms. Macedo sign releases to permit GEICO to obtain medical records, bills, and wage information. Ms. Thagard reviewed the police report, reviewed photographs of Plaintiff's vehicle, and made the determination that Plaintiff had zero liability for causing the accident, which she then communicated to Ms. Macedo and her insurance carrier. In addition, Ms. Thagard received a letter of representation from a Ms. Macedo's personal injury attorney, and even upon receipt of that letter, decided to close the claim on May 3 without waiting to ask for or receive any damages information or any additional liability information.

Mr. Conley was the supervisor on the claim made against Plaintiff from the time suit was filed to well beyond the underlying trial. When the claim went into suit, Mr. Conley gave directions the adjuster Andrea Thomas that included trying to get the claim resolved early through contact with Ms. Macedo's attorneys, tying up any loose ends on liability, and potentially seeking to bifurcate the trial on liability from the trial on damages. Mr. Conley conducted an 18-month review of the claim. He participated in the 60-day and 30-day trial reviews. Mr. Conley authorized the hiring of an accident reconstructionist before trial. Before mediation, he authorized GEICO to offer up to \$30,000 to resolve the case at mediation. Just before trial, Mr. Conley increased the reserve on the file to \$40,000.

Mr. Walsh is Mr. Conley's supervisor and he participated in the 60 day and 30 day trial reviews. During the 60-day trial review, the decision was made to serve a \$22,500 proposal for settlement to Ms. Macdeo. Later, while Ms. Macedo's \$50,000 proposal for settlement to Plaintiff was pending, Mr. Walsh entered a claims note indicating he believed the case against Plaintiff was a good case to try. During Mr. Conley's deposition, Mr.

Conley indicated he would not have used those same words to describe the case because there is risk with trial.

Brief Memorandum of Law

GEICO's objections are nearly identical to those previously overruled by this Court (Dkt. 25), and Plaintiff adopts the same arguments previously submitted (Dkt. 19). The objections should be overruled on the same basis and GEICO should be ordered to produce the same information for Ms. Thagard, Mr. Conley, and Mr. Walsh, as it was ordered to produce for Ms. Thomas.

This Court should similarly overrule the portion of the objection that asserts the same information could be obtained during deposition. While Ms. Thagard and Mr. Conley made some efforts to discuss what they recalled as far their prior claims handling, training, and work experience at GEICO at deposition, that does not mean Plaintiff is not entitled to discovery of requested information and must instead rely exclusively on the deposition testimony. Just like in an automobile accident case, where the defendant driver may say he saw fine out of his glasses and the plaintiff's vehicle came from nowhere, it is relevant for plaintiff to discover the defendant driver's eye examination records to see if those records support his testimony. In that situation, the plaintiff is not stuck relying on the fact that the defendant driver said he saw fine out of his eye glasses. Plaintiff should not be similarly hamstrung here.

Given GEICO's nearly identical objections, and in light of GEICO maintaining the objections after Plaintiff agreed to modify the requests to be consistent with what was produced for Ms. Thomas, Plaintiff submits the objections are not substantially justified and

requests entitlement under Rule 37(a)(5) for reasonable expenses incurred in bringing this Motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed Plaintiff's Motion to Compel Documents of Three Additional GEICO Employees' Files Related to Claims Handling and Request for Attorney's Fees and Costs with the Clerk of the Court using CM/ECF to Thomas J. Moody, Brentt E. Palmer, B. Richard Young, Young, Bill, Boles, Palmer & Duke, P.A., P.O. Drawer 1070, Pensacola, FL 32595 at bpalmer@flalawyer.net, ryoung@flalawyer.net, tmooddy@flalawyer.net and Elizabeth Munro, 1220 East 5th Ave., Tampa, FL 33605 at elizabethm@vanguardattorneys.com and courtdocuments@vanguardattorneys.com, on this 24th day of **July 2017**

/s/Stephanie Miles

STEPHANIE MILES

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