

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE COUNTY, et al.,

Plaintiffs,

v.

Case No. 2:06-cv-00372-CNC

MERCER HUMAN RESOURCE
CONSULTING, INC.,

Defendant.

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S "RENEWED" MOTION
TO COMPEL A PRIVACY WAIVER FROM STUART PILTCH**

At the outset, Plaintiffs make the following obvious points requiring denial of this motion:

- Mercer defied the Court's instructions by serving a subpoena on Social Security Administration without asking the Court beforehand;
- Mercer served that subpoena months after the expert discovery deadline passed;
- Mercer never moved to compel the CIA to appear for deposition after the CIA filed lengthy objections invoking national security;
- Mercer received these objections on May 2 but didn't tell the Court at the hearing on May 9, and instead mentioned a short letter to the Court that in no way waived those CIA objections.

But Plaintiffs must also inform the Court of some bad news, as well as good news:

- The bad news is that Mr. Piltch's doctor from the Harvard Medical School faculty has informed Mr. Piltch that his cancer condition is potentially life-threatening, prompting Mr. Piltch to withdraw as an expert in this case.

While this is a sad turn of events, fortunately, the Plaintiffs have done what is prudent in a case of this magnitude:

- Plaintiffs designated a series of experts for trial, with – as the Court knows – the option to have any or all of them testify at trial.
- Plaintiffs hired two of the very best certified actuaries in the United States to do complex actuarial work and build the damage models that show from \$300 million to \$900 million in damages:
 - Kim Nicholl – who replaced Mercer as actuary for Milwaukee County and who is now the lead actuary for PricewaterhouseCoopers’ governmental sector practice;
 - Gene Kalwarski – former member of the board of directors of the national actuarial firm of Milliman & Roberts and, among other things, the new actuary for the City of San Diego in fixing its pension fund disaster.
- Dr. Mark Zmijewski, academic dean of the University of Chicago Graduate School of Business who developed the damage methodology.
- Mr. Piltch’s role was a secondary one:
 - Nicholl and Kalwarski did all the numerical calculations of damages;
 - Dean Zmijewski backed the methodology and framework for the damage models;
 - Mr. Piltch’s testimony was limited to assessments of custom and practice – points also independently covered by both Nicholl and Kalwarski;
 - Mr. Piltch did none of the damage calculation for the Plaintiffs.
- With this strong field of experts, the loss of Mr. Piltch does not hurt the Plaintiff’s ability to go to trial on January 12, 2008.
- Mr. Piltch’s opinions were not used in response to Mercer’s summary judgment motion.
- In contrast, Mercer designated only one purported actuarial expert – a retired professor whose only business practice was in the insurance area, not employee benefits.

- No leading actuarial firm has appeared as an expert for Mercer in this case of egregious malpractice and fraud.

It is the overwhelming nature of that expert evidence against Mercer that led to Mercer's sideshow attack on Mr. Piltch, where:

- Mr. Piltch's own expertise was expressly based on his decades of experience in the employee benefit industry and not on any work for the CIA.
- Mr. Piltch was not relying on a job he held just out of college almost three decades ago.
- Mr. Piltch's experience includes consulting for Fortune 500 companies such as Delta Airlines and Conagra, as well as the U.S. Department of Labor.
- Mr. Piltch voluntarily flew to Milwaukee to answer questions of this Court under oath. Mercer's counsel refused that opportunity to cross-examine him, preferring instead to smear him in this motion.

But the bottom line of this sideshow is that Mercer's motion is moot in light of Mr. Piltch's health and resignation. The remainder of this brief deals with these points in more detail and challenges the smear of Mr. Piltch that Mercer hopes will mislead the Court.

1.

Mercer's Motion Is Moot

On August 7th, Plaintiffs' counsel was told that Mr. Piltch must withdraw because his treatment for cancer left him physically unable to continue as an expert witness in this case. On August 8th, Plaintiffs' counsel received letters from Mr. Piltch and his doctor at Harvard Medical School confirming that his treatment for non-Hodgkins lymphoma required his withdrawal from the case. Those two letters are attached as Exhibit 1 to the Declaration of James Southwick.

Mr. Piltch confidentially told the Plaintiffs he was diagnosed with cancer earlier this year. Until he withdrew, Mr. Piltch told the Plaintiffs he would stay in the case and testify at trial so long as his health permitted. Unfortunately, Mr. Piltch's health worsened to the point where he could not proceed. The County and the Pension System regret to report this situation, as Mr. Piltch's testimony would have aided the jury's understanding of Mercer's failings in its communications with Milwaukee County and the Employee Retirement System.

Mr. Piltch's withdrawal does not diminish Plaintiffs' ability to successfully try this case. Contrary to Mercer's assertion that Mr. Piltch was "the key actuarial expert hired by the Plaintiffs", the Plaintiffs key actuarial experts are now, and have always been, Kim Nicholl and Gene Kalwarski, both of whom submitted reports concerning Mercer's failure to act as a reasonable actuary, calculated the Plaintiffs' damages, and will testify at trial to the gross deficiencies in Mercer's actuarial work and the harm it caused the Plaintiffs.

Ms. Nicholl is a credentialed actuary and the leader of PriceWaterhouseCoopers' Public Sector Retirement Consulting practice; Mr. Kalwarski is a credentialed actuary, was a member of the Board of Directors of Milliman & Roberts, and is the founder and president of Cheiron, an actuarial consulting firm. Both have achieved the highest level of national accreditation an actuary can receive. Their resumes are attached as Exhibits 2 and 3 to the accompanying Southwick Declaration. Unlike Ms. Nicholl and Mr. Kalwarski, Mr. Piltch did not do any analysis of the Plaintiffs' damages and is not an actuary credentialed by a national organization.

Moreover, the expert work of actuaries Nicholl and Kalwarski is supported by Dr. Mark Zmijewski, an academic dean of the University of Chicago Graduate School of Business, who is also serving as an expert witness for the Plaintiffs. Dr. Zmijewski's resume is attached as Exhibit 4 to the Southwick Declaration. Thus, despite the loss of Mr. Piltch and the perspective he would have brought as the founder and president of an employee benefit firm serving some of the largest companies in the United States – ConAgra, Coca-Cola, and Delta Airlines, as well as the United States Departments of Labor and Justice -- Plaintiffs remain more than ready to begin trial on January 12, 2009, as previously ordered by the Court.

To dispel Mercer's false allegations that Mr. Piltch was the lead actuary, the expert reports of Ms. Nicholl, Mr. Kalwarski, and Dean Zmijewski are attached as Exhibits 5, 6, and 7 of the Southwick Declaration.

2.

If The Motion Were Not Moot, It Should Be Denied

While the overriding fact of Mr. Piltch's withdrawal moots the instant motion, if Mr. Piltch had not withdrawn, the motion should have been denied because:

- it is untimely and inconsistent with the Court's April 14, 2008 Order; and
- the Plaintiffs cannot force Mr. Piltch to sign a waiver. Any motion to compel a waiver must be directed to Mr. Piltch, not the Plaintiffs.

On April 14, 2008, the Court heard argument on Mercer's motion to compel a waiver of Mr. Piltch's privacy interests in records at the CIA. Mercer had sought CIA records through a FOIA request. At the hearing, Mercer's counsel agreed to limit the information it requested from the CIA:

We would certainly limit the request . . . But we would certainly limit the inquiry to did he take and pass the actuarial exams that he testified he took and passed in the – 25 years ago in the early 1980s. That’s all we’re interested in.

(4/14/08 transcript at p. 10:18-24, Exhibit 8 to Southwick Declaration.)

At the hearing on April 14th the Court ruled that Mercer needed to pursue the records through a subpoena to the CIA:

Here the defense has not demonstrated that it has made a direct inquiry of the agency which has the information concerning Mr. Piltch by way of subpoena. And in light of that the court believes that at least one more hurdle needs to be cleared before it should determine whether or not to require Mr. Piltch to execute a waiver. And therefore, it is the decision of the court that the defendant’s motion to compel is denied without prejudice. You may renew your request in due course.

(4/14/08 transcript at p. 14:21 – 15:4.)

Following the April 14, 2008 hearing, Mercer served a subpoena on the CIA for a deposition concerning the CIA’s administration of actuarial exams to Mr. Piltch and for documents. The CIA responded with a long letter of objection on May 2, 2008, stating:

- “Third, some of the records and information you request, if they exist, may be protected from unauthorized disclosure under the Privacy Act of 1974 . . . For such records, you must provide us with Mr. Piltch’s signed consent or obtain an order from a court of competent jurisdiction directing CIA to provide the information; a subpoena is not legally sufficient.”
- “Fourth, some of the records and information you seek, should they exist, may be classified pursuant to Executive Order 12958 . . . *Indeed, whether or not the CIA might have some of the records and information you seek may be classified pursuant to executive Order and thus protected from discovery.*” (emphasis added)

- “Fifth, some of the records and information you seek, should they exist, may be protected from unauthorized disclosure, including in civil discovery, under Section 102A(i)(1) of the National Security Act . . . These sections require the director of CIA to protect intelligence sources and methods from unauthorized disclosure, and *exempt CIA from the provisions of any law* requiring the “publication or disclosure of the organization, functions, *names*, official titles, salaries, or numbers of personnel employed by the Agency.” (emphasis added)
- “Please note that the objections noted in this letter are neither exclusive nor exhaustive. CIA reserves the right to make further objections to the subpoena as necessary.”

As Mercer knows, the CIA’s reply to neither confirm nor deny Mr. Piltch’s employment is the CIA’s standard response. *CIA v. Sims*, 471 U.S. 159, 167 (1985); *Hunt v. CIA*, 981 F.2d 1116, 1118 (9th Cir. 1992). Those cases confirm that the CIA’s response to neither confirm nor deny information is routine and within its rights via statute. In fact, the CIA’s response has its own name - the “Glomar Response”. *See Hunt*, 981 F.2d at 1118 (“The CIA’s refusal to confirm or deny the existence of records is known as a ‘Glomar Response.’”). *See* Pls.’ Br. in Opp. To Def.’s Mot to Compel Discovery of Stuart Piltch’s Training at the CIA, March 28, 2008, p. 3. The CIA’s Glomar Response to Mercer’s subpoena does not support Mercer’s allegations of perjury, which is meant to harass Mr. Piltch and shift the focus of this case away from Mercer’s failings.

Indeed, rather than pressing to depose the CIA concerning the actuarial tests administered to Mr. Piltch and requested by their subpoena, Mercer abandoned pursuit of its CIA subpoena. Mercer never returned to this or any other court to compel testimony or documents from the CIA.

Instead, on July 7, 2008, Mercer issued a subpoena to the Social Security Administration requesting “documents sufficient to identify all employers of Stuart S. Piltch, listed by name, location, and dates of employment, from January 1, 1979 to December 31, 1986.” Mercer’s current motion seeks to compel a waiver from Mr. Piltch of his privacy rights with the SSA.

If it were not moot by Mr. Piltch’s withdrawal, Mercer’s motion should be denied because the subpoena to the SSA violated the Court’s discovery deadlines. Mercer’s subpoena to the SSA was issued nearly four months after the Court’s discovery cut-off of March 13, 2008. Mercer never sought nor received leave to pursue this discovery after the March 13, 2008 discovery cut-off and the motion should be denied for this reason alone.

The current motion is not a “renewal” of any prior request. Mercer does not seek a waiver of Piltch’s privacy rights with the CIA, even though that was the request it made previously. This motion seeks a different waiver of different rights with a different agency. Mercer seeks new discovery from the SSA concerning Mr. Piltch’s employment during an eight year period – not his actuarial training and exams with the CIA. This latest request does not come within the Court’s April 14 Order and should be denied as untimely and improper. Additionally, for the reasons stated in response to Mercer’s prior motion to compel a waiver, Plaintiffs cannot compel Mr. Piltch’s signature on a waiver.

See Pls.' Br. in Opp. To Def.'s Mot to Compel Discovery of Stuart Piltch's Training at the CIA, March 28, 2008, p. 8-9.

3.

Mercer's Perjury Allegations Are Unfounded

With respect to Mercer's allegations of perjury against Mr. Piltch, several points should be made. First, Plaintiffs assume Mr. Piltch told the truth at all times about his work and training with the CIA. As Plaintiffs predicted, the CIA asserted national security grounds in objection to Mercer's subpoena. Indeed, the CIA claims that it is not even required to confirm the very existence of Piltch's employment or records of employment.

Indeed, whether or not the CIA might have some of the records and information you seek may be classified pursuant to Executive Order and thus protected from discovery.

Exhibit 2 to Maggard Declaration, July 23, 2008, at p. 2.

Second, the only admissible evidence concerning whether Mr. Piltch worked for the CIA are Mr. Piltch's statements: in his sworn deposition, in his sworn declaration in opposition to Mercer's earlier motion to compel a waiver, and in his sworn testimony to the Court on April 19, 2008. Mr. Piltch's testimony has never changed.

Third, Mercer has not brought forward with any admissible evidence to challenge Mr. Piltch. The only evidence Mercer presents are two letters from a lawyer in the CIA. Both letters are inadmissible hearsay. Neither letter is a sworn statement. Neither letter says that the author has personal knowledge of whether Mr. Piltch worked for the CIA or the training he received at the CIA. Neither letter was filed in any court by the CIA.

Neither letter says Mr. Piltch never worked at the CIA. Instead, the letters were sent in an effort to avoid providing the discovery sought by Mercer's subpoena.

Mercer could have moved to compel a deposition and thereby created admissible evidence, but it intentionally decided not to do so. Without such evidence, Mercer's motion is not only unfounded, but seems aimed at a broader audience and an effort to divert attention away from the facts of its own wrongdoing in favor of an unfounded attack on Mr. Piltch, whose business is, of course, a competitor of Mercer's.

Fourth, even if considered admissible evidence of perjury, the two unsworn letters do not say three important things:

- Neither of the two CIA letters say Mr. Piltch did not work for the agency.
- Neither of the two letters say Mr. Piltch did not receive actuarial training through the CIA.
- Neither of the two CIA letters say the agency searched for records of Mr. Piltch's employment.

The CIA's May 2, 2008 letter listed numerous objections, which are set forth above. Rather than say Mr. Piltch never worked for the CIA, the letter says that not only are records of employment and names of employees classified, but whether or not the CIA even has records of employment need not be disclosed.

The CIA's second letter, dated May 8, 2008, does not retract any of the objections of May 2nd letter. In its entirety, the CIA's letter makes four points:

- "This letter sets out the substance of our telephone conversation of 7 May 2008, regarding Stuart Piltch."

- “As I stated to you in that conversation, a record of persons employed by the CIA is regularly made and preserved by the CIA.”
- “The CIA has not located any such records relating to Mr. Piltch.”
- “In other words, CIA has not located any record indicating that the CIA ever employed Mr. Piltch.”

The letter does not say any of the following:

- The letter does not say that the CIA’s objections to providing information were waived or dropped.
- The letter does not say that the CIA’s objection to acknowledging the existence of information was waived or dropped.
- The letter does not say Mr. Piltch never worked for the CIA.
- The letter does not say that the CIA searched its employment records.
- The letter does not say whether the CIA would reveal any classified information found concerning Mr. Piltch.

The only source of Mercer’s repeated claim that the CIA searched its records for references to Mr. Piltch is Mr. Maggard’s declaration. Mr. Maggard claims the CIA told him it searched for records, but Mr. Maggard’s statement is at odds with the May 8th letter. The letter says that it “sets out the substance” of the telephone conversation with Maggard. If the CIA searched for records, that fact would have been part of the “substance of the conversation.” Because the letter “sets out the substance” of the call and omits any reference to a search for records, the letter is at odds with Mr. Maggard’s declaration.

Conclusion

Mr. Piltch's withdrawal because he is battling cancer makes Mercer's motion moot. If Mr. Piltch's withdrawal had not mooted the motion, the motion should have been denied as untimely and in violation of the Court's discovery orders. Moreover, the Plaintiffs are not now and never have been in a position to compel a waiver from Mr. Piltch of his privacy rights. Finally, Mercer's allegations of perjury are not supported by the record.

Dated this 13th day of August, 2008.

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