Rel: December 20, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1171028

Ex parte Avan Baggett and Michael Wade Hogeland

1180360

Ex parte Michael Wade Hogeland, Robert Miller, and Vanna Trott

PETITIONS FOR WRIT OF MANDAMUS

(In re: State of Alabama ex rel. Steve Marshall, Attorney General, Alabama Department of Environmental Management, and Mobile Baykeeper, Inc.

v.

Utilities Board of the City of Daphne)

(Baldwin Circuit Court, CV-17-901319)

MITCHELL, Justice.

These consolidated petitions for the writ of mandamus require us to consider the objections of four nonparty witnesses to subpoenas issued by the Utilities Board of the City of Daphne ("Daphne Utilities"). In case no. 1171028, two of the witnesses ask us to vacate an order entered by the trial court requiring them to produce certain electronic information. In case no. 1180360, three of the witnesses ask us to vacate an order entered by the trial court allowing subpoenas for their past employment records to be issued to their current employers. For reasons explained in this opinion, we deny the petition in case no. 1171028 and grant the petition and issue a writ of mandamus in case no. 1180360.

Facts and Procedural History

On November 16, 2017, the State of Alabama and the Alabama Department of Environmental Management ("ADEM") (hereinafter referred to collectively as "the State") sued Daphne Utilities alleging that Daphne Utilities, as operator of the Daphne Water Reclamation Facility, exceeded permitted discharge allowances on various occasions between November 2012 and October 2017 and, in some of those instances, did not

comply with ADEM's reporting requirements. The State requested, among other things, that the trial court "[o]rder [Daphne Utilities] to take action to ensure that similar violations of the ADEM [Administrative] Code, [Daphne Utilities'] [p]ermit, and the [Alabama Water Pollution Control Act] will not [occur] in the future."

Petitioners Michael Wade Hogeland, Avan Baggett, Robert Miller, and Vanna Trott are nonparty whistleblowers who were employees of Daphne Utilities at all times relevant to the complaint. All of those individuals reported to citizens' group Mobile Baykeeper, Inc., a plaintiff-intervenor in the underlying case, what they characterize as "data evidencing a pattern of under reporting of sewage spills by Daphne Utilities and its managers." Hogeland, Miller, and Trott ("the whistleblowers") claim that Daphne Utilities constructively terminated their employment in March 2018, and they have filed complaints with the United States Department of Labor related to Daphne Utilities' alleged discrimination and retaliatory discharge.

A. Subpoenas to Baggett and Hogeland

On April 5, 2018, Daphne Utilities issued separate nonparty subpoenas to Baggett and Hogeland, under Rule 45,

Ala. R. Civ. P., ordering Baggett and Hogeland to appear for depositions and to produce certain documents and items. Baggett and Hogeland moved on April 25, 2018, for a protective order relating to the requests for certain electronic information, asserting that such information was private, personal, and irrelevant to the underlying action and that the requests were issued as retaliation for Baggett's and Hogeland's whistleblower activities. On May 14, 2018, the trial court entered a protective order that set out ground rules for the production of the requested items but ultimately required Baggett and Hogeland to produce the electronic information. Neither Baggett nor Hogeland sought interlocutory review of that protective order.

On June 22, 2018, Daphne Utilities issued new subpoenas to Baggett and Hogeland seeking production of the same items requested by the April 5, 2018, subpoenas, including the electronic information that the trial court had already ordered Baggett and Hogeland to produce. Baggett and Hogeland renewed their April 25, 2018, motion for a protective order. The trial court denied that motion on July 20, 2018. In case

no. 1171028, Baggett and Hogeland ask us to issue a writ directing that the July 20, 2018, order be vacated.[1]

B. Subpoenas to Employers of Hogeland, Trott, and Miller

On January 23, 2019, Daphne Utilities issued notices of intent to serve subpoenas on Hogeland's and Trott's current employer, The Water Works & Sewer Board of the City of Prichard, and on Miller's current employer, Saraland Water and Sewer Services. The subpoenas that were attached to each notice directed each employer to produce, with regard to each whistleblower:

> "Any and all documents which in any way relate to the employment of [the respective whistleblower] ... including but not limited to, applications, offers, rejections, employment contracts, payroll records, job assignments, personnel file, disciplinary actions, reprimands, advancements, terminations, reasons for termination, or any other written material whatsoever, made at any time."

(These documents are hereinafter referred to as "the employment records.")

[1]Baggett and Hogeland refer to the July 20, 2018, order as the "July 19, 2018," order. Although the materials before us indicate that the order was entered on July 20, 2018, whether it was issued on July 19, 2018, or July 20, 2018, is immaterial to the issue presented.

On January 24, 2019, the whistleblowers filed a motion for a protective order or, in the alternative, a motion to quash the subpoenas ("motion to quash"). On February 4, 2019, the trial court granted the whistleblowers' motion to quash in part and denied it in part.[2] Specifically, the trial court denied the request to quash the subpoenas but ordered that the parties take steps to protect certain personal information contained in the employment records. In case no. 1180360, the whistleblowers seek mandamus relief from the trial court's order.

Standard of Review

Both petitions ask this Court to issue a writ of mandamus to the trial court directing it to vacate discovery orders issued to nonparties.

> "It is well established that mandamus is a drastic and extraordinary writ to be issued only

[2]It appears from the materials before us that the trial court initially denied the motion to quash and that the denial prompted the whistleblowers to file a motion to reconsider. That motion to reconsider references a January 31, 2019, order denying the motion to quash. That order is not included in the materials before us, but it appears not to matter for present purposes. The February 4, 2019, order, which is included in the materials before us, expressly applies to the motion to quash, not the motion to reconsider (which the trial court denied), and thus supersedes any prior order denying the motion to quash.

> when there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court."

Ex parte Alfab, Inc., 586 So. 2d 889, 891 (Ala. 1991).

Case No. 1171028

We deny Baggett and Hogeland's petition. The July 20, 2018, order denying Baggett and Hogeland's renewed motion for a protective order is not the only order compelling them to produce the electronic information. The May 14, 2018, order -- from which neither Baggett nor Hogeland sought interlocutory review and which is not before us -- imposes the same requirements. Moreover, nothing in the July 20, 2018, order expands Baggett's or Hogeland's discovery obligations beyond what the May 14, 2018, order imposes. Therefore, vacating the July 20, 2018, order would have no effect on Baggett's or Hogeland's obligations. We decline to issue a writ of mandamus under such circumstances.

Case No. 1180360

To obtain mandamus relief, the whistleblowers must establish, among other things, that they have a "clear legal right" to the order they seek. Because discovery matters are

within a trial court's discretion, the success of the whistleblowers' petition is dependent upon a conclusion that the trial court clearly exceeded that discretion when it entered its February 4, 2019, order refusing to quash the subpoenas that Daphne Utilities intended to serve upon the whistleblowers' employers. Ex parte Crawford Broad. Co., 904 So. 2d 221, 224 (Ala. 2004).

A trial court's discretion in discovery matters, though wide, is not boundless. Rule 26, Ala. R. Civ. P., places limits on what is discoverable. Discovery must be "relevant to the subject matter involved in the pending action," "proportional to the needs of the case," and "reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1), Ala. R. Civ. P. When (1) proposed discovery does not meet these criteria; (2) the discovery sought is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive"; or (3) "the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought," the trial court must limit the "frequency

or extent of use of the discovery methods." Rule 26(b)(2)(B), Ala. R. Civ. P.

In its response to the whistleblowers' motion to quash in the trial court, Daphne Utilities attempted to justify its requests for the employment records by stating that, "[u]pon information and belief, although [the whistleblowers] were employed by Daphne Utilities during the time frames referenced in the complaints, [the whistleblowers], unbeknownst to Daphne Utilit[ies], also were employed or working for [sic] other entities." The information requested by the subpoenas, according to Daphne Utilities, was "needed to properly investigate potential for bias, issues related to credibility, and other issues related to the testimony of the same." Daphne Utilities did not provide any evidence to the trial court suggesting that any of the whistleblowers worked elsewhere while they were employed by Daphne Utilities; nor has Daphne Utilities explained why the whistleblowers' alleged "moonlighting" speaks to their credibility.

Daphne Utilities also relies on a justification that it did not raise in the trial court. While Daphne Utilities continues to maintain that its requests for the employment

records are justified by concerns of potential witness bias, it now also claims that its requests are justified by the State's requests for relief, namely, that Daphne Utilities be ordered "to take action to ensure that similar violations ... will not [occur] in the future." Daphne Utilities explains: "Daphne Utilities (and ADEM) need[] to understand if moonlighting contributed to the alleged violations, or not, in order to determine whether Daphne Utilities' current policy and procedures are sufficient, and if not, in order to revise its policies and procedures to prevent any future issues." Daphne Utilities' brief at 4.

We will consider only whether the subpoena requests were a legitimate vehicle by which to determine potential witness bias. Almost nothing in the materials before us suggests that the employment records sought by Daphne Utilities are relevant to the merits of the underlying action.[3] Additionally, Daphne

[3]Although not argued before the trial court, Daphne Utilities makes fleeting arguments in its brief that the employment records are relevant to the merits of the underlying action because, to the extent they show that the whistleblowers were moonlighting, such moonlighting could have affected their work and caused some of the alleged violations. At the time the trial court issued its February 4, 2019, order, a Daphne Utilities' brief from May 4, 2018, in an unrelated case alleged that Hogeland had been involved in 1 of the 59 unpermitted discharges alleged in the complaint.

Utilities' new argument that it needs the employment records to comply with the relief requested by the State is due to be rejected. That argument is premature because the relief requested by the State, which Daphne Utilities invokes in support of its subpoena request, has not been awarded. And even assuming such relief is eventually awarded, Daphne Utilities has provided no reason to support its assertion that the employment records will be necessary to comply with such relief. Importantly, the parties requesting such relief have given no indication that the employment records will be needed to obtain the relief they seek. Evidence that provides insight into witness credibility or bias, however, is admissible. See Rules 607 and 616, Ala. R. Evid. We will therefore consider whether the trial court was within its discretion to permit Daphne Utilities to subpoena the

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Daphne Utilities does not tie Miller or Trott to any of the alleged discharges. Nothing in this opinion prevents Daphne Utilities from seeking testimony or documents from the whistleblowers concerning their respective roles in any of the alleged discharge or reporting violations. To the extent, however, that the trial court based its February 4, 2019, order on a finding that Hogeland's alleged involvement in an unpermitted discharge justified access to the employment records, it exceeded its discretion.

employment records in an effort to determine potential witness bias.

In assessing the propriety of the trial court's order, we first consider the whistleblowers' request that we apply the test for discovery of records similar to the employment records that was adopted by the Court of Civil Appeals in Ex parte Liberty Mutual Insurance Co., 92 So. 3d 90, 102 (Ala. Civ. App. 2012),[4] and applied in a plurality opinion in HealthSouth Rehabilitation Hospital of Gadsden, LLC v. Honts, 276 So. 3d 185, 199 (Ala. 2018). That test recognizes a presumption against the disclosure of such records and imposes a burden on parties seeking their production to make a specific showing of why the material sought is discoverable. In HealthSouth, Justice Sellers, the author of the opinion, in which Chief Justice Stuart concurred, articulated this test as follows:

> "'"There exists a strong public policy against disclosure of personnel files."' Ex parte Liberty Mut. Ins. Co., 92 So. 3d 90, 102 (Ala. Civ. App. 2012) (quoting In re One Bancorp Sec. Litig., 134 F.R.D. 4, 12 (D. Me. 1991)). For that reason,

[4]The Liberty Mutual court expressly adopted this test from In re One Bancorp Securities Litigation, 134 F.R.D. 4, 12 (D. Me. 1991), but the bulk of it can be traced back to In re Hawaii Corp., 88 F.R.D. 518, 524 (D. Haw. 1980).

> '"[d]iscovery of such files is permissible"' only if (1) '"'the material sought is "clearly relevant,"'"' and (2) '"'the need for discovery is compelling because the information sought is not otherwise readily obtainable.'"' Id. A plaintiff '"must first make an initial fact-specific showing,"' and '"[g]eneral allegations ... do not suffice to render [personnel] records discoverable."' Id."

276 So. 3d at 199 (ellipses and brackets in original). Daphne Utilities has only generally alleged that the employment records would provide insight into the whistleblowers' credibility and has not made a "fact-specific showing" in support of those allegations. Therefore, an application of the test set out in Liberty Mutual would lead us to conclude that the trial court exceeded its discretion when it refused to quash the subpoenas. For present purposes, however, we need not decide whether it is appropriate to adopt the Liberty Mutual test, because Daphne Utilities' subpoenas are due to be quashed under our traditional discovery rules.

The subpoenas at issue here are neither proportional to the needs of this case nor reasonably calculated to lead to the discovery of admissible evidence. Daphne Utilities states its interest in the employment records as follows: "[The employment records] will aid in evidencing whether [the whistleblowers], all intimately involved in the violations

alleged against Daphne Utilities, were working for Daphne Utilities, which is not only relevant to ADEM's claims against Daphne Utilities, but [the whistleblowers'] biases against Daphne Utilities." Although Daphne Utilities has provided the Court with a reasonably detailed list of what it anticipates the employment records will reveal, that list does not explain how any portion of the employment records may reveal the whistleblowers' bias. Instead, Daphne Utilities asserts that the requested employment records will help it determine whether the whistleblowers were employed by their current employers at the same time they were employed by Daphne Utilities and will help Daphne Utilities create "an employment timeline." Daphne Utilities' brief at 11.

Subpoenaing employers for employment records of their employees is a highly disproportional method of establishing "employment timelines." The whistleblowers claim that Daphne Utilities is using the subpoenas as a tool for harassment. Regardless of Daphne Utilities' intentions, the whistleblowers' concerns about the impression those subpoenas may leave on their employers are understandable. See Warnke v. CVS Corp., 265 F.R.D. 64, 69 (E.D.N.Y. 2010) ("'[B]ecause

of the direct negative effect that disclosures of disputes with past employers can have on present employment, subpoenas in this context, if warranted at all, should only be used as a last resort.'" (quoting Conrod v. Bank of N.Y., No. 97 Civ. 6347, July 30, 1998 (S.D.N.Y.) (not selected for publication in F. Supp. 2d))); Graham v. Casey's Gen. Stores, 206 F.R.D. 251, 256 (S.D. Ind. 2002) ("[Plaintiff] has a legitimate concern that a subpoena sent to her current employer under the guise of a discovery request could be a tool for harassment and result in difficulties for her in her new job."). The potential for a subpoena issued to a nonparty employer to be used as a tool for harassment increases when that subpoena demands sensitive materials such as the employment records here. See Burch v. P.J. Cheese, Inc., No. 2:09-CV-1640-SLB, Aug. 20, 2010 (N.D. Ala.) (not selected for publication in F. Supp. 2d) (finding that a plaintiff had a "legitimate privacy interest in his employment records held by his current employer" that had been subpoenaed by the defendant and concluding that, because the requested records were mostly irrelevant, the subpoena appeared to constitute "'a fishing

expedition' or 'tool for harassment,' [rather] than a reasonably calculated discovery request").

The case for proportionality becomes even weaker when one considers that Daphne Utilities could obtain the "employment timeline" information it seeks from the whistleblowers themselves rather than through the employment records. The whistleblowers argued before the trial court that any discoverable information Daphne Utilities requested was available through less intrusive means and now suggest that they themselves would be able to provide any relevant employment information through depositions or document requests.

Daphne Utilities balks at the whistleblowers' offer to provide Daphne Utilities what it claims to be seeking. First, Daphne Utilities argues that, because it is seeking information to show that the whistleblowers violated Daphne Utilities' company policy, the whistleblowers will not be a "reliable source of the information." Daphne Utilities' brief at 24. Thus, Daphne Utilities asks us to assume, without evidence, that the whistleblowers will simply refuse to comply with any valid subpoena request. We will not make that

assumption. Second, Daphne Utilities argues that directing their requests to the whistleblowers would be futile because the whistleblowers "do not likely have copies of their own employment files." Id. Although the whistleblowers may not have copies of all the employment records sought by Daphne Utilities, it is likely that the whistleblowers would be able to provide Daphne Utilities with the periods during which each of them worked for his or her current employer. And this, after all, is the information Daphne Utilities claims to be searching for in the employment records. For these reasons, the subpoena requests to the whistleblowers' current employers for the employment records are disproportional to Daphne Utilities' stated need to establish an "employment timeline."

In addition, Daphne Utilities' subpoenas are not reasonably calculated to lead to the discovery of witness bias. Daphne Utilities claims that it will be able to search out witness bias in the employment records by discovering the days on which the whistleblowers supposedly "moonlighted." But the subpoena requests are not limited to the time frame during which the whistleblowers were employed by Daphne Utilities. Instead, the subpoenas seek "[a]ny and all

documents ... made at any time." Daphne Utilities offers no basis for why the employment records created after the whistleblowers stopped working for Daphne Utilities would be relevant. Most importantly, however, Daphne Utilities fails to offer any cogent reasoning for why the "employment timeline" that it hopes to develop through employment records would offer any admissible evidence of witness bias.

It is clear that the whistleblowers are entitled to a writ of mandamus. The subpoenas noticed by Daphne Utilities to be served on the whistleblowers' current employers are neither proportional to the needs of the case nor reasonably calculated to lead to the discovery of admissible evidence. For those reasons, the whistleblowers have a clear right to the relief they requested from the trial court. Because the whistleblowers are not parties to the underlying action, they have no right of appeal or adequate remedy other than a writ of mandamus. See Mars Hill Baptist Church of Anniston, Alabama, Inc. v. Mars Hill Missionary Baptist Church, 761 So. 2d 975, 980 (Ala. 1999) ("One must have been a party to the judgment below in order to have standing to appeal any issue arising out of that judgment."). The trial court failed to

grant the relief to which the whistleblowers were entitled, and the whistleblowers have properly invoked this Court's jurisdiction. The whistleblowers are entitled to have their petition for a writ of mandamus granted.

Finally, it is important to emphasize that this decision does not impose a categorical prohibition against inquiries into potential moonlighting by the whistleblowers, especially inquiries directed to the whistleblowers themselves. We hold only that, based on the materials before this Court, the trial court exceeded its discretion in permitting the subpoenas to be issued to the whistleblowers' current employers.

Conclusion

Because a favorable decision resulting from a review of Baggett and Hogeland's petition for a writ of mandamus would not actually alter Baggett and Hogeland's already existing discovery obligations, we deny the petition for the writ of mandamus in case no. 1171028. We grant the whistleblowers' petition in case no. 1180360, however, because Daphne Utilities' subpoenas demanding employment records from the whistleblowers' employers are not proportional to the needs of the case and are not reasonably calculated to lead to the

discovery of admissible evidence. We therefore vacate the trial court's February 4, 2019, order and direct the trial court to issue an order quashing those subpoenas.

1171028 -- PETITION DENIED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, and Stewart, JJ., concur.

1180360 -- PETITION GRANTED; WRIT ISSUED.

Shaw, Wise, and Stewart, JJ., concur.

Parker, C.J., and Bolin, Bryan, Sellers, and Mendheim, JJ., concur in the result.