

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

ZACKERY R. LOMBARDO,
Plaintiff,

v.

Case No.: 3:16cv392/MCR/EMT

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,
Defendant.

_____ /

ORDER

This cause is before the court upon a motion to compel documents, filed by Plaintiff Zackery R. Lombardo (“Lombardo”) (ECF No. 19), and a response in opposition thereto filed by Defendant Government Employees Insurance Company (“GEICO”) (ECF No. 22).

Background

In this action Lombardo claims that GEICO acted in bad faith toward Lombardo, its insured, by failing to fully investigate and settle within the policy limits all the claims arising out of an automobile accident he had with Alysia Macedo on April 10, 2012 (*see generally* ECF Nos. 1 (complaint), 11 (joint report)). As a result, Ms. Macedo filed a state-court lawsuit against Lombardo and ultimately, after Ms.

Macedo prevailed at trial, a final judgment was entered against Lombardo in the amount of \$172,965.91, or nearly \$73,000 more than Lombardo's policy limits of \$100,000. GEICO contends in this action that, with respect to the underlying accident and claims arising therefrom, it acted fairly and honestly with due regard for Lombardo's interests and fully investigated all of the claims arising out of the accident to determine how best to limit Lombardo's liability. GEICO notes that Lombardo denied any negligence on his part and that an accident reconstruction expert's findings supported Lombardo's position (*see generally* ECF Nos. 1, 11).

Discovery Dispute

The instant dispute relates to Lombardo's first request for production of documents ("RFP") number 9, which seeks:

All DOCUMENTS, and information, whether maintained electronically or in a physical file, relative to training, education, experience, licensure, pay level, job positions, responsibilities and duties associated with those job positions, any complaints, commendations, or other documentation of performance evaluations or reviews or similar assessments of responsibilities and performance of Andrea Thomas [the GEICO adjuster primarily responsible for handling Macedo's claim] for the years 2010 through entry of final judgment in the MACEDO CLAIM. Plaintiff does not seek production of Social Security numbers, telephone numbers, drug test results, information relating to the employees [sic] family, or any other protected health information.

Lombardo states that GEICO objected to RFP No. 9, in writing, as follows:

GEICO objects to Request No. 9 as it seeks the production of information that is derived, upon information and belief, solely from GEICO's employees' personnel files which is not relevant to the present bad faith litigation as required by Rule 26(b)(I) [sic], Federal Rules of Civil Procedure. 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 the Ms. Thomas's personnel file which are related to Ms. Thomas's handling of claim [sic] other than the underlying claim are likewise irrelevant as such involve the handling of claims based entirely on different facts and circumstances. How Ms. Thomas may have handled a claim which has no facts in common with that of the underlying claim is entirely irrelevant to the handling of *this* claim.

Additionally, GEICO objects to Request No. 9 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 Corp. v. Estate of Shelley, 827 So. 2d 936, 945 (Fla. 2002). Furthermore, GEICO objects to Request No. 9 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) of the Federal Rules of Evidence, providing that prior acts are not admissible to prove action in conformity therewith. See Jones v. Southern Pacific Railroad, 962 F.2d 447 (5th Cir. 1992) (holding generally that evidence of similar prior infractions by an employee were not admissible to demonstrate his negligence at the time of the loss). Any evidence of mishandling of other claims on the part of this individual, contained in his [sic] personnel file, would be precisely the type of improper propensity evidence F.R.E. 404(b) is designed to preclude, as its sole use would be for the Plaintiff to attempt to improperly argue that this individual must have mishandled the underlying claim based on his [sic] alleged mishandling of other claims.

Any documents reflecting GEICO's reviews or evaluations of any employee's handling of the underlying 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 claim was inadmissible under F.R.E. 407).

In addition, Plaintiffs' [sic] Request No. 9 calls for the production on [sic] 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, lithe 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. Berkerv, 714 So. 2d 1027 (Fla. 4th DCA), rev. denied, 717 So. 2d 528 (Fla. 1998).

(ECF No. 19 at 1–4).

In the instant motion, Lombardo states that Andrea Thomas was the primary insurance adjuster involved in the handling and defense of Ms. Macedo’s claim against him, including the conducting of all settlement discussions. Lombardo characterizes all of GEICO’s objections as “boilerplate” and argues that each objection is either “without merit or asserted for dilatory purposes” (ECF No. 19 at 8). In support, Lombardo cites a host of district court cases, contending that “on at least eleven (11) prior occasions, courts have compelled GEICO to produce the requested personnel records in bad faith lawsuits, overruling similar, if not identical, objections” (*id.* at 9) (citations omitted).

In response to the motion to compel, GEICO agrees with Lombardo as to the content and wording of his RFP No. 9 (*compare* ECF No. 19 at 1–2 *with* ECF No. 22 at 2), but interestingly GEICO states that it objected to Lombardo’s RFP as follows:

GEICO objects to Plaintiffs’ Request No. 9 as the information and materials requested is [sic] confidential, privileged, vague, ambiguous, overly broad, not properly limited in time and scope, and not reasonably calculated to lead to the discovery of admissible evidence. Pursuant to Florida law, Plaintiff must establish that the confidential information

contained in the requested personnel files in [sic] reasonably calculated to lead to the discovery of admissible evidence, and that all such information is needed to prosecute Plaintiff's claims.

The documents contained within the personnel files at issue which are unrelated to claims handling are clearly irrelevant to the sole issue in this action of whether GEICO handled the underlying claim in good faith. The documents contained within the personnel files at issue which are related to GEICO's employees handling of claims, other than the underlying claim, are likewise irrelevant as they involved the handling of claims based on entirely different facts and circumstances. How these individuals may have handled a claim which has no facts in common with that of the underlying claim is entirely irrelevant to either individual's handling of this claim.

Any documents reflecting GEICO's reviews or evaluations of any GEICO's employee's handling of this claim would also be inadmissible. Such documents would constitute improper evidence of subsequent remedial measures pursuant to Rule 407, Federal Rules of Civil Procedure. Moreover, such documents would clearly have been prepared by GEICO in anticipation of bad faith litigation arising from the claim and would reflect the thought processes and opinions of GEICO and/or GEICO's counsel regarding the issues to be raised in such litigation. Such "opinion work product" enjoys a near absolute immunity and can be discovered in only rare and extraordinary circumstances. *See Ford Motor Co. v. Hall-Edwards*, 997 So. 2d 1148, 1152–53 (Fla. 3d DCA 2008) ("[A]n attorney's mental impressions, conclusions, opinions, or theories concerning the client's case are opinion work-product and are absolutely privileged.").

In addition, Plaintiffs' [sic] Request No. 9 calls for the production on [sic] 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 1027 (Fla. 4th DCA), *rev. denied*, 717 So. 2d 528 (Fla. 1998).

(ECF No. 22 at 2). As can be seen, the only paragraph of GEICO’s response recited by the parties that matches is the last one, which begins the words “In addition” and ends with a citation to the *Woodward v. Berkery* case. Because neither party provided a copy of GEICO’s response to the RFP, the court is unclear as to how GEICO actually responded in opposition to it. Nevertheless, the parties have made their current positions clear in the motion to compel and response thereto, and the court is able to resolve this discovery dispute despite the parties’ inconsistent representations of GEICO’s response to the RFP.

Discussion

The court notes that, of the eleven cases cited by Lombardo wherein courts ordered the production of personnel files, many contain little or no analysis (*see, e.g.*, ECF No. 19, Exhs. 2, 3, 4, 5, 8, 9), and all, save one, were decided before Rule 26 was

substantially amended in late 2015. *See* Fed. R. Civ. P. 26 (as amended, eff. Dec. 1, 2015). Nevertheless, those cases (and others that do contain analyses) generally stand for the proposition that some information relative to training, education, experience, licensure, job positions, responsibilities, and duties associated with those job positions, as well as complaints, commendations, or other documentation of performance evaluations or reviews, or similar assessments of responsibilities of the primary claims adjuster(s), is relevant and discoverable in bad faith actions such as this. What is more, it appears to the undersigned that those same courts would likely reach the same general conclusions even under the new standards of discovery. Indeed, as noted *supra*, at least one court has ordered the production of claims adjusters' personnel files after the effective date of the amendments to Rule 26, although the changes to the rule were not discussed in the court's decision. *See Gonzalez, et al., v. GEICO*, No. 8:18cv2400T-30TBM (M.D. Fla. Jan. 13, 2016) (noting, "[i]t is undisputed that GEICO's claims handling is directly at issue in this bad faith litigation" and ordering production of the primary adjusters' personnel files, to include "[p]erformance evaluations or reviews; complaints, criticisms, commendations, or other reviews for work performed adjusting claims; documents establishing quotas in relation to settlements or claim adjustments; documents relating

[to] compensation, including bonuses, to the adjustment of claims and settlements; and any documents in any way related to the adjustment of [the underlying claim(s)]”).

However, some courts, including the *Gonzalez* court, have fully or partially limited the required production to documentation that is specifically related to settlements or the adjustment of claims, while others have required a more expansive production. *Compare, e.g., id.* and *Cardenas v. GEICO*, No. 8:09cv2357-T-23TBM (M.D. Fla. July 29, 2010) (ordering production, from the personnel files of various claims adjusters, complaints, criticisms, or commendations for work performed adjusting claims; documents establishing quotas in relation to settlements or claim adjustments; and documents relating to compensation for settlements and adjusting claims¹) and *McPartland v. GEICO*, No. 6:09cv268-Orl-35GJK (M.D. Fla. Jan. 12, 2010) (ordering the production of claims adjusters’ entire personnel files “with the exception of any personal matters not related to claim handling”), *with Bottini v. GEICO*, No. 13cv365/EAK/AEP (M.D. Fla. Dec. 19, 2013) (ordering GEICO to produce “all documents and information, whether maintained electronically or in a physical file, relative to training, education, experience, licensure, job positions,

¹ The court noted that any privacy concerns could be addressed by way of redaction and a confidentiality agreement and that if GEICO had a claim of privilege as to any document its production could be accompanied by a privilege log.

responsibilities and duties associated with those job positions, and any complaints, commendations, or other documentation of performance evaluations or reviews or similar assessments of responsibilities” of a claims adjuster, exclusive of information pertaining to her pay levels); and *King, et al., v. GEICO*, No. 8:10cv977-T-30AEP (M.D. Fla. Jan. 3, 2013) (compelling, among other things, production of documents relating to “job performance” and claims handling).

The undersigned concludes that Lombardo’s RFP No. 9 is overly broad and that only documents from Ms. Thomas’ personnel file that are related to settlement and claims handling/adjustment are relevant to Lombardo’s claim and proportional to the needs of this case, considering the factors set forth in Fed. R. Civ. P. 26(b)(1).

The court will therefore order GEICO to respond to Lombardo’s RFP No. 9, but only to the extent as the RFP is modified/narrowed below. Any privacy concerns may be addressed by way of redaction and a confidentiality agreement, and if GEICO has a legitimate claim of privilege as to any document its production should be accompanied by a properly prepared and detailed privilege log.

Accordingly, it is **ORDERED**:

1. Plaintiff's "Motion to Compel Documents Related to GEICO's Employee's Job Performance and Request for Attorney's Fees and Costs" (ECF No. 19) is **GRANTED in part**. Defendant shall, within **FOURTEEN (14) DAYS** of the date of this order, produce to Plaintiff documents responsive to Plaintiff's Request for Production No. 9, as modified below:

All DOCUMENTS, and information, whether maintained electronically or in a physical file, relative to training, education, experience, licensure, ~~pay level~~, job positions, responsibilities, and duties associated with ~~those job positions~~ claims handling (to include adjusting and settling); any complaints, commendations, or other documentation of performance evaluations or reviews or similar assessments of responsibilities and performance of Andrea Thomas in her capacity as a claims handler for the years 2010 through entry of final judgment in the MACEDO CLAIM. 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.

2. No attorney fees or costs are awarded to either party.

DONE AND ORDERED this 23rd day of February 2017.

/s/ Elizabeth M. Timothy
ELIZABETH M. TIMOTHY
CHIEF UNITED STATES MAGISTRATE JUDGE