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CALIFORNIA COURT OF APPEAL CLARIFIES SCOPE OF TRIAL COURTS' AUTHORITY TO ISSUE PROTECTIVE ORDERS AND IMPOSE SANCTIONS FOR MISUSE OF THE DISCOVERY PROCESS

In a case of first impression, the California Court of Appeal in Pratt v. Union Pac. R.R Co., Case No. C055656 (3d Dist., November 12, 2008), has held that the federal Railroad Labor Act ("RLA") does not preempt the California Civil Discovery Act's limitations on an employer's right to seek extra-judicial discovery under the terms of a collective bargaining agreement where: (1) the Discovery Act makes the same information equally available through the judicial discovery process; and (2) the extra-judicial discovery is a pretext to gain an unfair advantage in litigation. Although Pratt specifically addressed only the preemptive effect of the RLA on the Discovery Act, it has at least two broader implications for other types of civil actions in which parties attempt to use both judicial and non-judicial procedures to obtain the same information from their opponents. *First*, it confirms that the Discovery Act empowers a court to issue a protective order barring a litigant from pursuing information even through extra-judicial procedures that are independently permitted by other laws. *Second*, it clarifies that, if a party to a discovery dispute continues to maintain a legal position over the opponent's objection and a court later finds that position to be indefensible on the merits, the Discovery Act allows the court to sanction the litigant for misuse of the discovery process regardless of whether the position has been rejected by any previous controlling authority.

The plaintiff in Pratt, a locomotive engineer, sued his employer under the Federal Employers' Liability Act, 45 U.S.C. §§ 51, et seq. ("FELA"), and the Locomotive Inspection Act, 49 U.S.C. §§ 20701, et seq., for personal injuries suffered at work. Pratt, Slip Op. at 2. While the plaintiff was on medical leave and his suit was pending, the employer sent him an *ex parte* letter requiring him to provide additional medical information to support his request for an extension of his medical leave. Id. at 6. The plaintiff refused to provide the information and requested that the employer send any further communications to the plaintiff's litigation counsel rather than to the plaintiff directly. Id. The employer responded by issuing an *ex parte* "Notice of Investigation" that summoned the plaintiff to appear at a disciplinary hearing to determine whether he had failed to protect his employment status by refusing to provide the medical information. Id.

After several unsuccessful attempts to persuade the employer to continue the disciplinary hearing, the plaintiff moved for a temporary restraining order and a preliminary injunction to prevent the employer from holding the hearing or making further *ex parte* attempts to obtain the medical information. Pratt, Slip Op. at 7. The employer argued in opposition to the motion that the Superior Court lacked subject matter jurisdiction to grant the requested relief because: (1) the employer relied on a collective bargaining agreement as the source of its right to seek extra-judicial discovery of the medical information and to conduct the disciplinary hearing; and therefore (2) the RLA, which governs the construction of such agreements, preempted any provisions of the Discovery Act, Cal. Code Civ. Proc. §§ 2016.010, et seq., that might limit the employer's right to obtain the medical records through the judicial discovery process. Id.

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The Superior Court rejected the preemption argument and ruled that the employer had improperly circumvented available judicial discovery procedures in order to gain an unfair advantage in the civil action. Pratt, Slip Op. at 7. Based on that ruling, the Superior Court granted the temporary restraining order and preliminary injunction and awarded the plaintiff $5,000 in sanctions. Id.

The Court of Appeal affirmed. It began by noting that the employer had "failed to identify a provision in the collective bargaining agreement that authorizes its actions." Pratt, Slip Op. at 3. However, the Court of Appeal concluded that, "even if we assume there is such a provision," that still did not mean that the RLA preemption deprived the Superior Court of jurisdiction to prohibit the employer's actions because: (1) § 2017.020(a) of the Discovery Act "vests the trial court with discretion to grant a protective order that limits the scope of discovery if the court determines that the 'burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence;'" and (2) that statutory right is "independent" and "does not require interpretation or application of the collective bargaining agreement." Id. at 15, 23 (citations and internal quotations omitted).

The Court of Appeal found "persuasive" several federal district court holdings that Fed. R. Civ. P. 26 independently authorizes a federal court to prohibit extra-judicial discovery in a FELA action. Pratt, Slip Op. at 18-21. Relying on those holdings, the Court of Appeal reasoned that: "Just as it is inconceivable that Congress afforded injured workers the right to seek recovery under FELA but denied those same workers the protections of the federal rules [of civil procedure] during the pendency of FELA suits, it is equally inconceivable that Congress afforded injured workers the right to file their FELA claims in state court but denied them the right to invoke the state's civil discovery rules applicable to the state court litigation." Id. at 21.

The Court of Appeal next concluded that the Superior Court's order was not an abuse of its discretion under C.C.P. § 2017.010. Pratt, Slip Op. at 24-25. It affirmed the Superior Court's findings that, although the employer's "stated purpose in making extrajudicial requests" was "to determine whether [the plaintiff's] current medical condition supported an extension of his medical leave," that stated reason was "belied by" (1) its failure to explain why civil [judicial] discovery is inadequate to protect its business interests," and (2) its unexplained "insistence" on proceeding with the disciplinary hearing even after it later abandoned its extra-judicial attempts to obtain the medical information. Id.

Finally, the Court of Appeal affirmed the sanctions award under C.C.P. § 2023.010's grant of authority "to impose monetary sanctions for misuse of the discovery process, which is defined to include '[p]ersisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery." C.C.P. § 2023.010(a). Pratt, Slip Op. at 26. The Court of Appeal acknowledged that "there is no controlling appellate authority and [the employer's preemption] arguments have only been rejected by federal district courts" in reported decisions. Id. at 25. It nevertheless held that sanctions were permissible because the employer "persist[ed]" in its "*ex parte* demands for medical information" even after the plaintiff had objected and even though the employer "ha[d]

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been told by at least 12 state and federal court judges in previous FELA cases that its position on the [preemption] question raised in this appeal is without legal basis." Id. at 26-28.

The Court of Appeal's decision in Pratt clarifies two points that are significant not only for FELA cases, but also for other civil actions.

First, C.C.P. § 2017.010 empowers a court to issue a protective order barring the pursuit of information *either* (a) through the judicial discovery procedures available under the Discovery Act *or* (b) through extra-judicial procedures that are independently permitted under other laws if the same information is available under the Discovery Act's judicial procedures and the requesting party would not be significantly prejudiced by using those procedures instead. As Pratt illustrates, a court is especially likely to use this power to limit or prevent extra-judicial discovery methods that involve the use of coercive influence that have the effect of avoiding or nullifying the Discovery Act's protections against harassment or undue burden.

Second, unlike statutes and rules authorizing sanctions in some other contexts, C.C.P. § 2023.010(a) allows a court to conclude that a party's legal position lacks "substantial justification" regardless of whether the position has been rejected by any previous controlling authority. In addition, if a party continues to assert a position that lacks substantial justification after the opponent has objected to it, that alone may be sufficient to support a finding that the a party has "persist[ed]" in improperly seeking discovery. This means as a practical matter that, in any dispute regarding the scope of discovery, litigants and counsel must be prepared to reevaluate positions to which their opponents have objected during the meet and confer process and to consider modifying the positions that they recognize as especially weak or unlikely to prevail if a discovery motion is filed.

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