

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-cv-80655-ROSENBERG/HOPKINS

JAMES TRACY,

Plaintiff,

v.

FLORIDA ATLANTIC UNIVERSITY
BOARD OF TRUSTEES a/k/a FLORIDA
ATLANTIC UNIVERSITY; et al.

Defendants.

/

**DEFENDANT UNIVERSITY'S MOTION TO COMPEL
COMPLIANCE WITH SUBPOENA**

Defendant, FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES a/k/a FLORIDA ATLANTIC UNIVERSITY (“Defendant University”) by and through undersigned counsel, and pursuant to Rule 45, *Federal Rules of Civil Procedure*, hereby moves the Court to compel Steven J. Tyman, CPA, to comply with the subpoena duces tecum for records issued to him on June 16, 2017, and in support states:

Background

1. Since March, 2017, Defendant University has been working to secure documents and information related to income or compensation Plaintiff may have received related to his outside activities for use in connection with this matter. The Court has heard arguments regarding Plaintiff’s tax returns, held that they are relevant and ordered Plaintiff to produce copies of his tax returns.

2. Defendant University served Plaintiff with a request for production seeking copies of Plaintiff’s tax returns for 2012-2016. Plaintiff objected to the requests on the basis of relevance and, during his deposition on May 2, 2017, Plaintiff refused to answer questions about

his tax returns. Plaintiff was also evasive when asked about his income for the period 2012 – 2016, repeatedly asking “[w]hat do you mean by income?” even after the term was clarified by Defendant University’s counsel. *See* Volume I of Plaintiff’s deposition transcript attached as **Exhibit “1” at 74:21-75:19.**

3. Following Plaintiff’s deposition, on May 31, 2017, Plaintiff amended his responses to Defendant University’s First Request for Production, and produced a copy of his 2012 tax return. However, Plaintiff claimed his 2013 – 2016 tax returns were not in his possession, custody, or control. *See Exhibit “2.”*

4. On June 8, 2017, Defendant University filed a Motion to Compel Answers to Tax Related Questions and Production of Tax Records. [D.E. 137] Because Plaintiff was evasive in his responses to tax-related questions during his deposition, and had failed to produce documents in discovery, Defendant University asked this Court to enter an order requiring Plaintiff to respond to questions regarding his tax returns and produce full copies of his tax returns for years 2013 – 2016.

5. A hearing was conducted on Defendant University’s Motion on June 12, 2017. [D.E. 141] *See* a transcript of the June 12, 2017 hearing attached as **Exhibit “3.”** Plaintiff had produced his 2013 and 2014 tax returns prior to the hearing, but the 2015 and 2016 returns were still missing. Exh. “3” at 33: 15 – 1. At the hearing, Judge Hopkins ruled that the tax returns were relevant. Exh. “3” at 36:22. Once relevance was established, Plaintiff’s counsel agreed to reconvene Plaintiff’s deposition, and stated that he had “no objection to asking about the income on the tax returns.” Exh. “3” at 38:6 – 9. During the hearing, Judge Hopkins acknowledged it was reasonable to ask questions about “the income and who it was received from and the details of all of that.” Exh. “3” at 39: 3 – 23.

3. Plaintiff has also been evasive in his written discovery responses when asked for documents or information related to monies he's received for his outside activities. For example, in Defendant University's Second Request for Production of Documents, Defendant University sought all documents reflecting compensation received in connection with a book to which Plaintiff had contributed. In his response to Request No. 4, Plaintiff objected to the term "compensation" and attempted to limit the term to the IRS's definition – any payment made by an employer to an employee for services rendered in the course of an employer's business. *See* Plaintiff's responses and objections to Defendant University's Second Request for Production as **Exhibit "4."** The IRS definition is under-inclusive compared to the term's ordinary meaning.

Tax-Related Information Requested

4. In preparation for the continuing deposition of Plaintiff¹, on June 16, 2017, Defendant University served a Notice of Service of Subpoena informing Plaintiff that a subpoena to produce documents would be served on Plaintiff's tax preparer, Steven J. Tyman, CPA ("Tyman"), and attaching the subpoena. *See Exhibit "5."*

5. Defendant University's subpoena to Tyman commanded that he produce all documents provided to him by Plaintiff, and all correspondence with Plaintiff, from January 1, 2012 to present that showed the income received by Plaintiff for Plaintiff's benefit. *See Exh. "5."*

6. Despite the fact that Plaintiff's counsel did not move to quash or modify the subpoena, Tyman informed counsel for Defendant University that he could not produce documents responsive to the subpoena without receiving either the Plaintiff's consent or a Court order.

¹ Plaintiff's continuing deposition is scheduled for July 26, 2017.

7. Plaintiff's counsel have indicated that Plaintiff does not consent to Tyman producing the requested records because they believe the subpoena seeks privileged communications and information not relevant or proportionate to the needs of the case, and because Defendant University has now received all of Plaintiff's tax returns.

8. This Court has already held that during the continuing deposition of Plaintiff, Defendant University may ask questions about Plaintiff's income, who it was received from, and related details. Due to Plaintiff's evasiveness in discovery about his income over the years 2012 – 2016, Defendant University believes that Plaintiff may have received some monies Plaintiff and/or his tax preparer believe to be non-taxable that may not be reflected on his tax returns.

9. In preparation for Plaintiff's continuing deposition, therefore, Defendant University needs not only Plaintiff's tax records, but also the documents that Plaintiff sent his tax preparer in order to capture all the sources of payments made to Plaintiff during the relevant time period. Without this information, Defendant University will not be able to get a complete picture of Plaintiff's income while he was employed at FAU (which is relevant to his outside activities) or after his termination (which is relevant to mitigation of damages). Defendant University's request is proportional to the needs of the case because these issues surrounding Plaintiff's income go to the very heart of Plaintiff's claims and Defendant University's defenses.

WHEREFORE, Defendant, Florida Atlantic University Board of Trustees a/k/a Florida Atlantic University, respectfully requests that the Court enter an Order requiring Steven J. Tyman, CPA, to comply with the subpoena duces tecum for records issued to him on June 16, 2017, and to grant such other relief as the Court deems just and appropriate.

CERTIFICATE OF GOOD FAITH CONFERENCE

Pursuant to S.D. Fla. Local Rule 7.1(a)(3), the undersigned conferred with all parties who are affected by this motion and Plaintiff's counsel do not agree with the relief requested herein.

Respectfully submitted,

/s/ Holly L. Griffin

G. Joseph Curley
Florida Bar No. 571873
Email: gcurley@gunster.com
Keith E. Sonderling
Florida Bar No. 57386
Email: ksonderling@gunster.com
Holly L. Griffin, Esq.
Florida Bar No. 93213
Email: hgriffin@gunster.com
Gunster, Yoakley & Stewart, P.A.
777 S. Flagler Drive, Suite 500 East
West Palm Beach, FL 33401
Telephone: 561-655-1980
Facsimile: 561-655-5677
Attorneys for FAU Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 19, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Holly L. Griffin

Holly L. Griffin

SERVICE LIST
Tracy v. Florida Atlantic University Board of Trustees, et al.
Case No. 16-cv-80655-ROSENBERG/HOPKINS

Louis Leo IV, Esq.
Email: louis@floridacivilrights.org
Florida Civil Rights Coalition, P.L.L.C.
4171 W. Hillsboro Blvd., Suite 9
Coconut Creek, FL 33073
Telephone: 954-478-4226
Facsimile: 954-239-7771
Attorney for Plaintiff, James Tracy

Steven N. Blickensderfer, Esq.
Email: sblickensderfer@carltonfields.com
Richard J. Ovelmen, Esq.
Email: rovelmen@carltonfields.com
Carlton Fields Jorden Burt, P.A.
100 SE Second Street, Suite 4200
Miami, Florida 33131
Telephone: (305) 530-0050
Facsimile: (305) 530-0055
Co-Counsel for Plaintiff, James Tracy

G. Joseph Curley, Esq.
Florida Bar No. 571873
Email: gcurley@gunster.com
Keith E. Sonderling, Esq.
Florida Bar No. 57386
Email: ksonderling@gunste.com
Holly L. Griffin, Esq.
Florida Bar No. 93213
Email: hgriffin@gunster.com
Gunster, Yoakley & Stewart, P.A.
777 S. Flagler Drive, Suite 500 East
West Palm Beach, FL 33401
Telephone: 561-655-1980
Facsimile: 561-655-5677
Attorneys for FAU Defendants

Joel Medgebow, Esq.
Email: joel@medgebowlaw.com
Medgebow Law, P.A.
4171 W. Hillsboro Blvd., Suite 9
Coconut Creek, FL 33073
Telephone: 954-478-4226
Facsimile: 954-239-7771
Attorney for Plaintiff, James Tracy

Robert F. McKee, Esq.
Email: yborlaw@gmail.com
1718 E. 7th Avenue, Suite 301
Tampa, FL 33605
Telephone: 813-248-6400
Facsimile: 813-248-4020
*Attorney for Florida Education Association,
United Faculty of Florida, Robert Zoeller, Jr.,
and Michael Moats*