

PI defendant can obtain plaintiff's CORI report

Discovery appropriate for impeachment purposes

By: Eric T. Berkman ◉ May 4, 2017



The defendant in a personal injury case could obtain the plaintiff's entire adult Criminal Offender Record Information (CORI) report for impeachment and trial strategy purposes, a U.S. magistrate judge has decided.

Plaintiff Kelly Harden, a union construction worker who was hurt on the job, brought a personal injury suit against the subcontractor he was working for, among other defendants.

During a deposition, Harden admitted that he had a criminal record from the 1990s but denied being convicted of any felonies during the past decade or any misdemeanors during the previous five years.

The defendant subcontractor, Robie Window Systems, Inc., moved for an order compelling the state to comply with a subpoena for the plaintiff's CORI records. Harden sought to quash, arguing that the defendant couldn't make a showing that his records would lead to the discovery of admissible evidence. Harden also argued that if the defendant only intended to use the CORI information for impeachment purposes, any records going back more than 10 years should be protected.

But U.S. Magistrate Judge Donald L. Cabell disagreed.

The Massachusetts CORI statute, G.L.c. 6, §172, "does contemplate circumstances under which members of the public may obtain CORI information, and a specific Massachusetts regulation explicitly contemplates that an attorney may with a valid court order obtain from the [Department of Criminal Justice Information Services] a non-client's CORI," wrote Cabell, denying the plaintiff's motion to quash. "With this background in mind, and given the defendants' showing of the potential relevance of the plaintiff's CORI, I find that the defendants are entitled to discover the plaintiff's adult criminal record information."

However, the judge went on to place strict limits on the handling and dissemination of the records once defense counsel obtained them.

The 6-page decision is *Harden v. Boston Scientific Corp., et al.*, Lawyers Weekly No. 02-192-17. The full text of the ruling can be found at [here](#).

No stone unturned

Defense counsel Mark B. Lavoie of Salem described discovery of the plaintiff's CORI records as a "step in the process" and emphasized that they'd proceed as directed by the judge.

"This is really about leaving no stone unturned," he said.

But Harden's lawyer, Amato A. DeLuca of Providence, questioned the judge's reading of the CORI statute.

"What the court decided is based on the statute, which allows for discovery of this kind of information," he said.

"But the statute also provides that the information you're going to receive from the state regarding the individual whose record you're requesting is only for the last 10 years and not in perpetuity for your entire life. There's no restriction on the time within which the defendants can obtain the records regarding my client, and there should have been."



At the same time, DeLuca said he wasn't surprised by the defendant's request, since in his experience it's common for defense attorneys to seek to come up with any "dirt" that will somehow affect either liability or damages in a case.

"If you've got issues on liability from the defendant's point of view or a really bad damages case — and Kelly Harden is totally disabled because of the fall [he suffered on the job] — then you look for other ways to undermine the plaintiff's case, and this is one of them," he said. "But the fact that someone has a criminal record doesn't mean he's a bad person or isn't telling the truth, especially for someone like Kelly, who's been on the straight and narrow for a long time and has really made changes in his life."

Matthew A. Slater, a Boston civil litigator who defends tort cases, said he was surprised at the lengths the defendants took over a 6-month period, including multiple motions and subpoena practice, to obtain these records in a personal injury suit.

"To me that indicates that they know or have reason to believe that the plaintiff was untruthful in his testimony about prior convictions and they want to establish his dishonesty at trial, or they simply want to impeach him on the prior convictions that may exist," he said.

Meanwhile, said Slater, the plaintiff's vigorous opposition to disclosing his criminal records probably caused the defendants to suspect that "where there is smoke there is fire" and that the plaintiff may not have been truthful in his deposition.

Slater also said the fact that a federal magistrate judge required CORI disclosures, albeit with certain limitations, should not be taken lightly by the bar.

"Others may try to use this decision in furtherance of carte blanche CORI disclosures," he said. "I think that the main takeaway is that CORI records are generally discoverable, but courts need to fashion case-specific orders to ensure that the confidential and personal information of the plaintiff is not compromised and unnecessarily disclosed."

Boston civil litigator Alan E. Brown called Cabell's order a "helpful reminder" for attorneys to follow carefully the procedures set forth in Rule 45 of the Federal Rules of Criminal Procedure for obtaining a court order.

"As this case demonstrates, the court may require a party first to serve a subpoena on DCJIS and obtain its objection prior to issuing an order for criminal records," said Brown, referring to the defendant's apparent failure to follow this procedure in a prior attempt to obtain discovery of the plaintiff's CORI records.

Similarly, Brown noted that the court denied the defendant's initial motion seeking an order for the records because the defendant apparently hadn't certified its compliance with Local Rule 7.1(a)(2). That rule requires counsel for each side to confer in good faith in an attempt to resolve or narrow the issues in dispute before any motions can be filed.

"Even where counsel anticipates that reaching an agreement is unlikely, [it's] better to avoid any unnecessary criticism or delay by conferring as required," Brown said.

Impeachment purposes

On April 11, 2014, Harden, a union construction worker employed by Northeast Tradesmen, Inc., was doing work for defendant Robie Window Systems, Inc., a subcontractor on a construction project in Marlborough owned by defendant Boston Scientific, Inc.

Harden was allegedly standing on a ladder owned by Robie when the ladder suddenly collapsed. He fell to the ground, sustaining an apparently severe compound fracture of his heel.

According to Harden, the injury required multiple surgeries and left him permanently disabled.

Harden, a resident of Rhode Island, subsequently brought a diversity action in U.S. District Court against Robie, Boston Scientific and defendant Columbia Construction Company, the general contractor at the site.



Specifically, he claimed that Boston Scientific, the site owner, negligently failed to keep the premises in a reasonably safe condition. He also alleged that Robie and Columbia acted negligently in their failure to properly assemble, install, inspect or test the ladder.

During a seven-hour deposition in September 2016, Harden denied being convicted of any felonies in the prior 10 years or any misdemeanors in the previous five years.

However, he did acknowledge gun charges from the 1990s that didn't result in a conviction or a plea, a domestic arrest from the same time period and a conviction and prison sentence on extortion and larceny charges during the 1980s.

Robie subsequently moved for an order granting access to Harden's CORI records, but it was denied due to an apparent failure to comply with Local Rule 7.1(a)(2)'s mandatory good faith certification.

The defendant refiled its motion, but the court denied it again, stating that the proper course of action was for Robie to serve a subpoena on the DCJIS.

The defendant served the DCJIS with a notice of deposition and instructed it to turn over Harden's file. The DCJIS said it wouldn't comply absent a court order. The defendant then served the DCJIS with a subpoena. The department objected but said it would comply if ordered to do so by the court.

Harden then moved to quash the subpoena.

Limited use

In addressing Harden's motion, Cabell noted the defendant's assertion that the CORI statute authorizes an attorney of record in a civil case to request CORI information "for the purposes of witness impeachment or trial strategy."

The judge said that while this language may have appeared in *Howe v. Town of North Andover*, a 2011 U.S. District Court decision cited by the defendant in support of its motion, it does not appear in the current version of the statute.

Despite this, the judge said, the statute still contemplates circumstances where members of the public can obtain CORI information, and a Massachusetts regulation, 803 C.M.R. §207(3)(b), expressly contemplates an attorney with a valid court order obtaining a non-client's CORI for litigation purposes.

Cabell therefore concluded that the defendant was entitled to discovery of Harden's adult CORI records and granted the motion to compel the DCJIS to produce them.

However, the judge placed strict limitations on defense counsel's potential disclosure of the plaintiff's CORI records to the defendants or to potential witnesses, barred further dissemination of the records for any purpose and limited discovery to the plaintiff's adult record.

Harden v. Boston Scientific Corp., et al.

THE ISSUE: Can a defendant in a personal injury case obtain the plaintiff's adult Criminal Offender Record Information (CORI) report for impeachment and trial strategy purposes?

DECISION: Yes (U.S. District Court)

LAWYERS: Amato A. DeLuca of DeLuca & Weizenbaum in Providence and Robert T. Karns of Middletown, Rhode Island (Plaintiff)

Mark B. Lavoie of McDonough, Hacking & Lavoie in Salem, Curtis B. Dooling II and Robert R. Pierce of Pierce & Mandell in Boston and Joseph H. Aronson, Robert P. LaHait and Joseph R. Posner of Bonner, Kiernan, Trebach & Crociata in Boston (Defendants)

CABELL, DONALD L.

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