

An employee, a citizen of State A, has sued his former employer, a corporation incorporated and with its headquarters in State B, in a federal district court in State A. The employee claims that the employer fired the employee because of his disability in violation of federal law. During discovery, the employee learned that the employer had previously been investigated for discriminatory practices. After the employer was served with process, the employee served the employer with a request to produce documents related to the discrimination investigation.

The employer failed to produce the requested documents at the initial planning conference. Sixty days later, the employer still had not responded or produced the documents. Without attempting to confer with the employer's attorney, the employee filed a motion in the federal court in State A to compel the employer to produce the requested documents. The employer was properly served with the motion.

The employer will likely succeed in defending against the motion to compel on which of the following grounds?

- A. The employee did not serve the employer with a subpoena when he requested the documents' production.
- B. The employee failed to include a certification of good-faith conferral with the motion.
- C. The employee should have filed the motion in State B, where the employer is incorporated and headquartered.
- D. The employer still has time to respond to the discovery request.

Explanation:

FRCP 37 allows a party to file and serve a **motion to compel** a [required disclosure](#) or a **response to a discovery request** (eg, request for production). This motion must include a certification that the movant has, in good faith, conferred or attempted to confer with the noncompliant party or nonparty (ie, **certification of good-faith conferral**).* The motion also must be **filed in the proper court**:

- A motion to **compel a party** must be filed with the court in which the **action is pending**.
- A motion to **compel a nonparty** must be filed in the court where the **discovery is or will be taken**.

Here, the employee properly filed the motion to compel the employer (defendant) to produce the requested documents in the federal court in State A—where the action is pending (**Choice C**). However, the employee's attorney did not confer or attempt to confer with the employer's attorney before filing the motion to compel. As a result, no certification of good-faith conferral was included with the motion. Therefore, the employer will likely succeed in defending against the employee's motion on this ground.

*Good-faith conferral is required because the court wants the parties to resolve a discovery issue on their own before using judicial resources to do so.

(Choice A) A subpoena is required to obtain documents or things in a nonparty's possession. But since the employer is a party to the action, the employee was not required to serve the employer with a subpoena when he requested the documents' production.

(Choice D) The employer no longer has time to respond to the employee's request for production. That is because a [response](#) must be served in writing within 30 days after the parties' initial planning conference if a request for production was served before that conference (as seen here).

Educational objective:

A motion to compel must include a certification that the movant has, in good faith, conferred or attempted to confer with the noncompliant party or nonparty. A motion to compel a party must be filed with the court in which the action is pending, while a motion to compel a nonparty must be filed in the court where the discovery is or will be taken.

FRCP = Federal Rule of Civil Procedure.

References

- Fed. R. Civ. P. 37(a) (motion-to-compel requirements).
- 8B Charles Alan Wright et al., Federal Practice and Procedure § 2285 (3d ed. 2020) (explaining the requirements for a motion to compel required disclosures or discovery responses).

Requirements for motion to compel disclosure or discovery response

Filing requirements

- Certification of good-faith conferral
- Filed in proper court
 - where action is pending (to compel party) *or*
 - where discovery is or will be taken (to compel nonparty)



Service requirement (same for all other motions)

- Personal delivery
- Leave at office with clerk or in conspicuous place
- Leave at dwelling with resident of suitable age & discretion
- Mail to last known address
- File with court's electronic-filing system *or*
- Deliver by other means consented in writing