1998 WL 52035
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United States District Court, N.D. New York.

D. Drew ABRAMS, Individually and on behalf of all other persons similarly situated; Thomas W. Loucks, Individually and on behalf of all other persons similarly situated, Plaintiffs,
v.
GENERAL ELECTRIC COMPANY, Defendant.

No. 95–CV–1734 (FJS).
|
Feb. 2, 1998.

Attorneys and Law Firms

Mcnamee, Lochner, Titus & Williams, P.C., Albany, Counsel for the Plaintiffs, Joseph M. Gaug, Esq.

Epstein, Becker & Green, P.C., New York, Counsel for the Defendant, Ronald M. Green, Esq., of Counsel.

MEMORANDUM DECISION AND ORDER

SCULLIN, D.J.

Introduction

***1** This is an action brought pursuant to the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 et seq., the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et seq., and the New York Human Rights Law ("HRL"), Executive Law §§ 290 et seq., alleging that the Defendants unlawfully discriminated against the Plaintiffs during a reduction-in-force ("RIF") layoff from the General Electric ("GE") Power Systems plant in Schenectady, New York in May of 1995. Presently before the Court is the appeal of a discovery order issued by Magistrate Judge Ralph W. Smith, Jr., ordering a non-party witness, David Genever–Watling, to comply with a deposition subpoena served upon him by the Plaintiffs.

Background

Non-party witness David Genever–Watling was the president of GE Powers Systems when the RIF that is the factual basis of this lawsuit occurred. Genever–Watling is evidently no longer a corporate officer of the Defendant. Plaintiff personally served Genever–Watling on August 6, 1997 at his residence in Menands, New York, noticing a deposition to occur at the offices of the Plaintiff's counsel. At some point after this service, Genever–Watling moved to Texas, where defense counsel maintains he now resides.

On September 16, 1997, two days before the noticed deposition and six weeks after its service, the defense counsel in this action contacted the Plaintiff's counsel and informed him that Mr. Genever–Watling would not appear at the September 18 deposition and requested a telephone deposition instead. Plaintiff refused this request and sought intervention from Magistrate Judge Smith seeking an order compelling Mr. Genever–Watling to comply with the Plaintiff's deposition subpoena, and travel to this jurisdiction at his own expense.

In his Order, Magistrate Judge Smith found that Mr. Genever–Watling was properly subpoenaed on August 6, 1997 and should have complied with the subpoena pursuant to its terms, or sought appropriate intervention with the court pursuant to a motion to quash or modify under Rule 45(c)(3)(A). Moreover, Magistrate Judge Smith noted that he found the defense counsel's conduct to be unprofessional and intolerable in light of the circumstances, in keeping with defense counsel's apparent history of dilatory and vexatious discovery tactics in this matter.

Discussion

The applicable standard of review for this appeal is set forth in Rule 72(a) of the Federal Rules of Civil Procedure and the Federal Magistrates Act, 28 U.S.C. §§

631–639 (1988). Pretrial rulings involving discovery are generally considered non-dispositive and are reviewed under the "clearly erroneous or contrary to law" standard of review. 28 U.S.C. § 636(b)(1)(A); Fed.R.Civ.P. 72(a). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948). Pursuant to this highly deferential standard of review, magistrate judges are afforded broad discretion in resolving discovery disputes, and reversal is appropriate only if that discretion is abused. *See Conway v. Icahn,* 16 F.3d 504, 510 (2d Cir.1994).

I. NON–PARTY SUBPOENA

***2** Defense counsel argues that because Mr. Genever–Watling a non-party and now neither resides, works, or transacts business within 100 miles of the place of deposition, that the Court does not have the authority to compel him to obey the Plaintiff's subpoena. Defense Counsel argues that Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure precludes such an occurrence and the Magistrate was clearly erroneous by finding otherwise.

Rule 45(c)(3)(A)states:

> On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it
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> ...
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> (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or ...

Fed.R.Civ.P. 45(c)(3)(A). Subsection (ii) sets forth a standard for the Court to follow in determining whether to quash or modify a subpoena. However, Mr. Genever–Watling has not made a motion to quash; timely or otherwise. Thus, the Magistrate was not clearly erroneous by failing to apply 45(c)(3)(A)(ii).

The applicable provisions to Plaintiff's original motion are Rule 45(b)(2) and (c)(3)B)(iii). Rule 45(b)(2) provides;

> (2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. S 1783.

Fed.R.Civ.P. 45(b)(2). In this case, the subpoena in question was personally served on Mr. Genever–Watling within the Northern District of New York, so it met the requirements of Rule 45(b)(2). Furthermore, Rule 45(c)(3)(B)(iii) provides:

> (B) If a subpoena
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> ...
>
> (iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf

> the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

***3** Fed.R.Civ.P. 45(c)(3)B)(iii). This section gives the Magistrate discretion to protect a non-party in from undue hardship in complying with a properly issued subpoena. Based on the circumstances present in this case, including the witnesses' own dilatory conduct, the Court finds that Magistrate Judge Smith did not abuse his discretion by not modifying the subpoena or compensating the witness.

II. RULE 11 SANCTIONS

Rule 11 of the Federal Rules of Civil Procedure mandates that by presenting a pleading, motion, or paper to the Court, the attorney is certifying that to the best of that attorney's knowledge, information and belief, the legal contentions within that motion are warranted by existing law. *See* Fed.R.Civ.P. 11(b). Failure to adhere to the strictures of Rule 11(b) can subject the offending attorney, law firm, or party to sanctions. *See* Fed.R.Civ.P. 11(c).

On the second page of the Notice of Appeal (Dckt.# 156) filed on behalf of Mr. Genever–Watling, the argument contained therein purports to set forth a direct quote from Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure. However, that quote bears no resemblance to the actual rule. Perhaps more alarming is the fact that even if the passage is considered a paraphrase, it still conveys a different meaning than the plain meaning of Rule 45(c)(3)(A)(iii). It is the opinion of this Court that this constitutes sanctionable conduct under Rule 11 on the part of the defense counsel. Since, Magistrate Judge Smith is more familiar with the history of this litigation, the Court will leave to Magistrate Smith's discretion the decision of whether to take further action on this incident in accordance with Rule 11(b)(1)(B).

Conclusion

After carefully reviewing the order issued on November 20, 1997, by Magistrate Judge Smith in this action, the parties' submissions and the applicable law, it is hereby

ORDERED that Mr. Genever–Watling's appeal of Magistrate Judge Smith's order is DENIED and this action is remanded back to Magistrate Judge Smith for further proceedings.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp., 1998 WL 52035