# MINUTES



CASE NUMBER: CIVIL NO. 05-00479SPK-LEK
CIVIL NO. 05-00496SPK-LEK
[CONSOLIDATED]

CASE NAME: U.S. Equal Employment Opportunity Commission vs. Lockheed Martin, dba Lockheed Martin Logistics Management, Inc.

Charles Daniels vs. Lockheed Martin, dba Lockheed Martin Logistics Management, Inc.

ATTYS FOR PLA:

ATTYS FOR DEFT:

INTERPRETER:

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JUDGE: Leslie E. Kobayashi REPORTER:

DATE: 06/01/2006 TIME:

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COURT ACTION: EO: **COURT ACTION:**

On May 24, 2006, the parties submitted their respective letter briefs pursuant to Local Rule 37.1 in the above matter. Plaintiff-Intervenor Charles Daniels ("Plaintiff") and Plaintiff Equal Employment Opportunity Commission ("EEOC") (collectively "Plaintiffs") submitted their letter brief jointly. A discovery conference was held on May 25, 2006.

The discovery issues before the Court are as follows: (1) whether the witnesses must be produced by Defendant Lockheed Martin dba Lockheed Martin Logistics Management, Inc. ("Defendant") or served with subpoena for their depositions by Plaintiffs; (2) where the depositions may be taken; and (3) whether Defendant must produce personnel files for Plaintiff's co-workers. After careful consideration of the letter briefs and pertinent case law, and for the reasons set forth below, this Court DENIES Plaintiffs' requests to compel depositions without subpoena, to compel witnesses to submit to deposition in Hawai`i, and to compel production of personnel files.

Plaintiffs seek to take the depositions of Vonne Hamilton, Jacquie Jones-Mounts and Dick Mullen in Hawai`i at the office of Plaintiff's counsel. (Pls.' 5/24/06 Letter at 4.) Plaintiffs conclude that "these three witnesses are 'managing agents' of Defendant for the limited purposes of this litigation and therefore do not have to be subpoenaed for their depositions." (Id. at 2.) These witnesses "are located respectively in Marietta, Georgia, Dallas, Texas and Forth Worth, Texas . . . ." (Id. at 4.)

Defendant, on the other hand, argues that Plaintiffs are required to serve the witnesses with subpoenas, and points to Federal Rule of Civil Procedure 45(b)(2), which states that "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 . . . specified in the subpoena[.]" Fed. R. Civ. P. 45(b)(2). The witnesses in question reside in Texas and Georgia, and Defendant objects to their depositions taking place in Hawai`i and without regard to the availability of its attorney. (Def.'s 5/24/06 Letter at 3.)

Plaintiffs argue that the witnesses whose depositions they seek are Defendant's "managing agents" for purposes of the subject litigation. (Pls.' 5/24/06 Letter at 4.) The methods to take a corporate party's deposition are:

> The Federal Rules of Civil Procedure provide two methods by which a corporate party to a proceeding may be deposed: (1) Rule 30(b)(1) provides for the deposition by notice of a corporation through a particular officer, director or managing agent of the corporation; and (2) Rule 30(b)(6) provides for the deposition of the corporation by notice setting forth "with reasonable particularity" the matters on which the examination of the corporation's most knowledgeable person will take place. United States v. Afram Lines (USA), Ltd., 159 F.R.D. 408, 413 (S.D.N.Y.1994); GTE Prods. Corp. v. Gee, 115 F.R.D. 67, 68 (D.Mass.1987). When an employee named in a deposition notice "is a director, officer, or managing agent of [a corporate party], such employee will be regarded as a representative of the corporation." Moore v. Pyrotech Corp., 137 F.R.D. 356, 357 (D.Kan.1991); United States v. One Parcel of Real Estate at 5860 North Bay Rd., 121 F.R.D. 439, 440-41 (S.D.Fla.1988). This means that under Rule 32(a), depositions of corporate officers under Rule 30(b)(1), as well as Rule 30(b)(6) depositions, may be used at trial against the corporate party. Coletti v. Cudd Pressure Control, 165 F.3d 767, 773 (10th Cir.1999); Crimm v. Missouri Pac. R.R. Co., 750 F.2d 703, 708-09 (8th Cir.1984).

Cadent Ltd. v. 3M Unitek Corp., 232 F.R.D. 625, 627-28 (C.D. Cal. 2005) (alteration in original). In determining whether or not the witnesses are "managing agents", certain factors must be considered:

> Determining whether a person is a "managing agent" is answered "pragmatically and on a fact-specific basis." Dubai, 2002 WL

1159699, at *2. Courts in this district generally consider five factors in determining whether a person is a managing agent:

> 1) whether the individual is invested with general powers allowing him to exercise judgment and discretion in corporate matters; 2) whether the individual can be relied upon to give testimony, at his employer's request, in response to the demands of the examining party; 3) whether any person or persons are employed by the corporate employer in positions of higher authority than the individual designated in the area regarding which the information is sought by the examination; 4) the general responsibilities of the individual respecting the matters involved in the litigation; and 5) whether the individual can be expected to identify with the interests of the corporation.

JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., Inc., 220 F.R.D. 235, 237 (S.D.N.Y. 2004) (quoting Dubai Islamic Bank v. Citibank, N.A., No. 99 Civ. 1930, 2002 WL 1159699, at *3 (S.D.N.Y. May 31, 2002)). Further, the "burden is on the examining party to establish the status of the witness, but this burden is 'modest' and any doubts are resolved in favor of the examining party." Id. (citation omitted).

The witnesses, as described in the letter briefs and at the discovery conference, are: Vonne Hamilton, Defendant's "Human Resources Investigator . . . [who investigated] the complaints. Ms. Hamilton interviewed [Plaintiff], his harassers, witnesses and management officials on Whidbey Island and drafted a recommendation to Defendant . . . on how to respond to the complaint of harassment."; Jacquie Jones-Mounts, "Defendant's Manager of Affirmative Action Programs in Greenville, South Carolina, who took over the investigation into [Plaintiff's] complaints from Ms. Hamilton . . . . [and] became Defendant's contact person for [Plaintiff] and his witnesses regarding Defendant's response to the complaints."; and Dick Mullen, "[Plaintiff's] second line supervisor on Whidbey Island . . . . [who] conducted Defendant's initial investigation/response to [Plaintiff's] complaint." (Pls.' 5/24/06 Letter at 3.) Based on the information provided, the Court concludes that the second and fifth factors favor a finding that the witnesses are managing agents, and the remainder of the factors militate against such a finding. On balance, this Court cannot conclude that the witnesses at issue are managing agents for purposes of Rule 30(b)(1). These witnesses are corporate employees who are percipient witnesses to the investigation conducted into Plaintiff's complaints of racial harassment.

Thus, if Plaintiffs seek to take these individuals' depositions, they must do so by subpoena under Rule 30(a)(1) of the Federal Rules of Civil Procedure.

As to the location of the depositions, the party noticing the deposition generally has the right to choose the location. See, e.g., 7 Moore's Federal Practice § 30.20[1][b][ii] (3d ed. 2005) ("[C]ertain ground rules may create obligations or limitations regarding deposition location. . . . The deposition of a nonresident defendant is generally conducted at the defendant's 'place of residence.'"). This right to select the deposition location is not without limitation. For instance,

> the following factors may overcome the initial presumption that a deposition of a corporation normally should be taken at the corporation's principal place of business: (1) the location of counsel for the parties in the forum district; (2) the number of corporate representatives a party is seeking to depose; (3) the likelihood of significant discovery disputes arising, which would necessitate resolution by the forum court; (4) whether the persons sought to be deposed often engage in travel for business purposes; and (5) the equities with regard to the nature of the claim and the parties' relationship.

Id. While the witnesses are not corporate witnesses within the meaning of Rule 30(b)(1) or 30(b)(6), and must be subpoenaed for their depositions, unless Defendant otherwise agrees to produce these employees, the presumption nevertheless is that their depositions will be taken near their place of residence. No factors appear to exist that would overcome this presumption.

Turning to the issue of the personnel files, Plaintiffs must demonstrate that these files are relevant and thus subject to discovery. Rule 26(b)(1) provides that the scope of discovery is generally "any matter, not privileged, that is relevant to the claim or defense of any party . . . ." Fed. R. Civ. P. 26(b)(1). While "relevancy is broadly construed," Alexander v. Fed. Bureau of Investigation, 194 F.R.D. 316, 325 (D.D.C. 2000), that requirement nevertheless should be "firmly applied." Herbert v. Lando, 441 U.S. 153, 177 (1979) ("To this end, the requirement of Rule 26(b)(1) that the material sought in discovery be 'relevant' should be firmly applied, and the district courts should not neglect their power to restrict discovery . . . ." (citing Fed. R. Civ. P. 26(c))). Once relevance is established as to the discovery being sought, then the objecting party has "the burden of 'show[ing] why discovery should not be permitted.'" Alexander, 194 F.R.D. at 325-26 (quoting Corrigan v. Methodist Hosp., 158 F.R.D. 54, 56 (E.D. Pa. 1994)) (alteration in original).

Plaintiffs submit that they seek "production of Mr. Daniels's co-worker's (sic) personnel files, as a means of locating witnesses and developing evidence regarding the alleged discrimination, harassment, retaliation and investigation." (Pls.' 5/24/06 Letter at 5.) Defendant argues that personnel files contain sensitive and private information, and that Plaintiffs have not demonstrated a sufficient basis to require production. (Def.'s 5/24/06 Letter at 4.) The Court agrees.

The type of information being sought by Plaintiffs is relevant to the claims and defenses in this action. However, there is barely any indication that the personnel files contain such information and there are far less invasive means to seek it, such as interrogatories or by requesting specific documents. A demand for the wholesale production of employees' personnel files because these records may contain relevant information is not warranted. See, e.g., Hogan v. Robinson, No. CV-F-03-6408 AWI LJO, 2006 WL 1049979, at *4 (E.D. Cal. Apr. 20, 2006) ("When addressing a privacy objection to disclosure of personnel information, a court should consider the relevancy of

the sought after information." (citing Onwuka v. Fed. Express Corp., 178 F.R.D. 508, 517 (D. Minn. 1997); Raddatz v. The Standard Register Co., 177 F.R.D. 446, 447-48 (D. Minn. 1997))).

Plaintiffs' requests to compel depositions of witnesses without subpoena, and to take place in Hawai`i, and to compel production of the personnel files are therefore DENIED.

**IT IS SO ORDERED.**

Cc: all counsel

Submitted by: Warren N. Nakamura, Courtroom Manager