



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-22912-CIV-LENARD/SIMONTON

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, and
JUAN SANCHEZ,

Plaintiffs,

XIOMARA GUERRERO; OFELIA
RODRIGUEZ; MARIBEL SUAREZ;
JORGE FIOL; ERNESTO HEDMAN;
HILARIO PINEDA; JUAN CARLOS
SUAREZ; and ALEXIS SILVA,

Intervenor Plaintiffs,

v.

AIRGUIDE CORPORATION, PIONEER
METALS, INC., and GOODMAN
GLOBAL HOLDINGS, INC.,

Defendants.

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ORDER GRANTING MOTION FOR PROTECTIVE
ORDER AND TO QUASH SUBPOENA

Presently pending before this Court is Amarillys E. Garcia-Perez, Esq.'s (hereafter Garcia-Perez), Emergency Motion For Protective Order and Motion To Quash Subpoena (DE # 78, filed 12/2/03). All discovery motions in this case are referred to the undersigned Magistrate Judge (DE ## 11, 19, 28). The motion is fully briefed (DE ## 85, 88, 89). On January 23, 2004, a hearing was held on the motion.¹ All oral rulings made at the hearing are incorporated in this Order. For the reasons stated at the hearing and

¹ After the hearing, and with the Court's permission, Defendants filed with the Court the complete transcripts of the depositions of Plaintiffs Pineda and Guerrero (DE # 93).

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below, the motion for protective order is granted and the subpoena for the deposition of Garcia-Perez is quashed.

I. The Complaint

The Equal Employment Opportunity Commission (hereafter EEOC), Intervenor Plaintiffs and Plaintiff Sanchez have brought these consolidated actions alleging hostile work environment sexual harassment and/or retaliation for engaging in protected activities, and related state law claims (DE ## 1, 30).

II. The Instant Motion

A. Movant's Position

Garcia-Perez, counsel for Intervenor Plaintiffs and Plaintiff Sanchez, moves for a protective order regarding her deposition set by Defendants and asks this Court to quash the subpoena for her deposition. Garcia-Perez states that Defendants' counsel has stated he wishes to depose her to clarify alleged inconsistencies between statements made by Intervenor Plaintiff Hilario Pineda at his deposition, and prior statements made through Garcia-Perez to the EEOC during the investigation of Pineda's charge. Garcia-Perez states that she has no personal knowledge concerning the communications between Pineda and Defendants which are the subject of the alleged inconsistencies, and that Garcia-Perez made the statements to the EEOC regarding said communications as Pineda's agent for the purposes of the investigation. Garcia-Perez asserts that any communications between Pineda and Garcia-Perez regarding those communications are protected from discovery by the attorney-client privilege, and that the notice of deposition was merely an attempt to harass counsel and the Intervenor Plaintiffs. Garcia-Perez further states that Defendants would be able to use any

inconsistencies between Pineda's position as set forth to the EEOC and Pineda's deposition testimony at trial on cross-examination of Pineda. Garcia-Perez notes that depositions of attorneys are disfavored (DE ## 78, 88).

B. Defendants' Position

Defendants assert that three of Garcia-Perez' statements of fact to the EEOC in the May 8, 2002 letter are demonstrably false: that Pineda had to drive Intervenor Plaintiff Guerrero to Guerrero's August 2001 unemployment appeal hearing because Guerrero did not have a driver's license; that a representative of Airguide told Pineda that if he did not immediately leave the hearing that he would be fired; and that Pineda was fired because of his anticipated testimony at the hearing. Defendants then assert that given the inaccuracy of the foregoing statements, it is highly questionable whether the representations made to the EEOC regarding the statements allegedly made to Garcia-Perez personally at the August 2001 hearing by an attorney representing Airguide are entirely accurate. Defendants contend that only sworn deposition testimony from Garcia-Perez can serve to enable Airguide to establish the truth of the allegations she made to the EEOC during the EEOC's internal investigation. Defendants state that at trial, they will have to call Garcia-Perez as a fact witness to impeach the credibility of both Pineda and Guerrero, because the representations made to the EEOC by Garcia-Perez are inconsistent with the facts disclosed during discovery. Defendants state that Garcia-Perez should appear for deposition and assert any privilege only with respect to any particular questions posed. Defendants also state that there is no blanket prohibition from deposing an attorney, and that Garcia-Perez has not shown good cause for the issuance of a protective order (DE # 85).

III. The Relevant Facts

1. Garcia-Perez's May 8, 2002 letter to the EEOC

Garcia-Perez's May 8, 2002 letter to the EEOC stated, in pertinent part, that Pineda had had to drive Guerrero to the unemployment hearing because she is not licensed to drive by herself and she is *taking anti-depressant medication (prescribed as a result of the alleged sexual harassment)* (emphasis added). In the letter, Garcia-Perez also stated that before the hearing began, Defendant Airguide's attorney, Mr. Barnum, asked Garcia-Perez whether Pineda was going to testify, and Garcia-Perez then responded that she was not sure. Barnum then said Pineda had to return to work and could not be at the hearing. The letter then stated that immediately afterwards, Santiago Zamudio took Pineda aside and said that he had to leave immediately or he would be fired, and that the warning issued on that day was in retaliation for anticipated testimony by Pineda at the hearing (Ex. B to DE # 78).

2. Pineda's Deposition Testimony

At his November 13, 2003 deposition, Pineda testified that he drove Guerrero to her August 27, 2001 unemployment hearing because while she had a driver's license, it was his car and he had not included Guerrero on the insurance. Pineda further testified that he stayed with her at the hearing because she was very nervous and upset and she didn't want to stay alone (DE # 89 at 184-85, DE # 93, Pineda deposition at 205-08). Pineda stated that Guerrero was not under a doctor's care that day, but it had been recommended that she see a psychiatrist, and that he did not remember if Guerrero was on medication that day (DE # 89 at 184-85). Pineda testified that he was not going to be a witness at the hearing (DE # 89 at 184). Pineda also testified that Airguide representative

Santiago Zamudio told Pineda at the hearing, in the presence of Jose Velazquez, another Airguide representative, that it was a problem for human resources that Pineda was at the hearing, and that after Pineda explained that Guerrero was upset and could not drive, that he had called work and that he would return to work immediately after the hearing, Zamudio told Pineda that if Pineda testified at the hearing, he would give Pineda a warning (DE # 89 at 193-94, 198). Pineda also testified that he told Zamudio that Guerrero did not drive, that she could only drive for a few blocks near their home, and that she did not know about direction, and that she was sick, nervous, and upset (DE # 89 at 199). Pineda testified that Zamudio did not tell him that he had to leave immediately or be fired (DE # 89 at 197). When Pineda arrived at Airguide later that day, after the conclusion of the hearing, he was suspended, and he was fired the following day (DE # 189 at 178).

3. Defendants' November 14, 2003 Letter to Garcia-Perez

Defendants' counsel sent a letter, dated November 14, 2003, stating the basis for the deposition to Garcia-Perez. In the letter, Defendants' counsel states that in the May 8, 2002 letter to the EEOC, Garcia-Perez stated that in connection with an unemployment compensation appeal proceeding held in downtown Miami on August 27, 2001, Pineda had to drive Intervenor Plaintiff Xiomara Guerrero (his then common-law wife and now legal wife) to the hearing because Guerrero was not licensed to drive by herself, but that Pineda testified at his deposition that that was not true. Defendants' counsel also stated that on that date Guerrero had an unrestricted driver's license. Defendants' counsel further stated that in the May 8, 2002 letter, Garcia-Perez stated that during the unemployment proceeding, Santiago Zamudio told Pineda that he had to leave

immediately or he would be fired, and that Pineda testified at his deposition that Zamudio never said that to him. Finally Defendants' counsel states that in the letter, Garcia-Perez stated that an attorney representing Airguide, Eric Barnum, at the hearing took Garcia-Perez aside and asked if Pineda was going to testify, and that Garcia-Perez indicated that she was not sure, and that Barnum then said Pineda had to return to work and could not be at the hearing (Ex. B to DE # 78).

IV. Analysis

Garcia-Perez's motion for a protective order and to quash the subpoena for her deposition is granted. Defendants have not made a sufficient showing to warrant the disfavored deposition of Plaintiffs' attorney.

Depositions of attorneys inherently constitute an invitation to harass the attorney and parties and to disrupt and delay the case. Moreover, deposing an attorney adds costs to litigation, places burdens upon attorneys, and threatens the attorney-client relationship. These presumptions may constitute good cause for obtaining a protective order, and the party seeking the deposition has the burden of overcoming these presumptions by showing the propriety and the need for the deposition. Courts should exercise great care before permitting the deposition of an attorney. The party seeking an attorney's deposition must demonstrate that the deposition is the only practical means of obtaining the information, and must show that the information sought will not invade the realm of the attorney's work product or any attorney-client privilege. Finally, the information sought must be relevant and its need must outweigh the danger of deposing a party's attorney. *West Peninsular Title Co. v. Palm Beach County*, 132 F.R.D. 301, 302 (S.D. Fla. 1990) citing *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 85

(M.D.N.C. 1987) and *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986).

A. The Deposition of Garcia-Perez Would Invade The Attorney-Client Privilege

Here, Defendants seek to depose Garcia-Perez to ascertain what her client, Pineda, told her about this case. This information goes to the heart of the attorney-client privilege. Defendants have not established that these attorney-client conversations are not privileged.²

B. Pineda's Deposition Testimony Does Not Contradict The Letter To The EEOC

Moreover, the information sought is not particularly relevant, as Pineda's deposition testimony does not significantly contradict Garcia-Perez's statements in the letter to the EEOC.

1. Pineda's Statement About Why He Drove Guerrero To The Hearing

Garcia-Perez's May 8, 2002 letter to the EEOC stated in pertinent part that Pineda had to drive Guerrero to the August 27, 2001 unemployment hearing because she was not licensed to drive by herself and she was taking anti-depressant medication which was prescribed as a result of the alleged sexual harassment.³

At his November 13, 2003 deposition, Pineda testified that he drove Guerrero to her August 27, 2001 unemployment hearing because while Guerrero had a driver's

² The undersigned also notes that Defendants' counsel did not attempt to impeach Pineda at his deposition with the May 8, 2002 letter and did not ask Pineda at his deposition what information he had provided to Garcia-Perez to transmit to the EEOC in the May 8, 2002 letter.

³ In her deposition, Guerrero testified that after she was fired from Airguide she was prescribed pills for depression (DE # 93, Guerrero deposition at 40). Guerrero was not questioned at her deposition concerning whether she was taking anti-depressant medication on August 27, 2001.

license, it was his car, he and Guerrero lived together, and he had not included Guerrero on the insurance, and because the night before the hearing, Guerrero started to become very nervous and upset in anticipation of the hearing. Pineda further testified that he stayed with her at the hearing because she was very nervous and upset and she didn't want to stay alone (DE # 89 at 184-85, DE # 93, Pineda deposition at 205-08). Pineda stated that Guerrero was not under a doctor's care that day, but it had been recommended that she see a psychiatrist, and that he did not remember if Guerrero was on medication that day (DE # 89 at 184-85). Pineda also testified that he told Zamudio, Airguide's representative, that Guerrero did not drive, that she could only drive for a few blocks near their home, that she did not know about direction, and that she was sick, nervous, and upset (DE # 89 at 199).

In the November 14, 2003 letter, Defendants' counsel asserted that in the May 8, 2002 letter to the EEOC, Garcia-Perez stated that in connection with an unemployment compensation appeal proceeding held in downtown Miami on August 27, 2001, Pineda had to drive Intervenor Plaintiff Xiomara Guerrero (his then common-law wife and now legal wife) to the hearing because Guerrero was not licensed to drive by herself, but that Pineda testified at his deposition that that was not true. Defendants' counsel also stated that on that date Guerrero had an unrestricted driver's license.

Pineda's deposition testimony does not conflict with Garcia-Perez's statements to the EEOC in any significant way. Garcia-Perez stated that Guerrero did not have a driver's license. While Guerrero did have a driver's license at the day of the hearing, Pineda testified that he drove Guerrero to the hearing because she did not drive, except for a few blocks near her home, and because Guerrero was sick, nervous and upset.

Pineda also testified that it was his car, and Guerrero was not included in the insurance. Garcia-Perez stated to the EEOC that Guerrero did not drive herself because she was taking anti-depressants. Pineda testified that he did not know whether Guerrero was on medication that day or subsequently. At Guerrero's deposition, Defendants did not ask her why she did not drive herself to the hearing or whether she was taking anti-depressant medication on the day of the hearing. Thus, Defendants have not shown how the information which they would seek to obtain from Garcia-Perez on this issue to use solely for the impeachment of Pineda at trial is necessary and would outweigh the disadvantages inherent in deposing Garcia-Perez.

2. What Zamudio Said To Pineda At The Hearing

In Garcia-Perez's May 8, 2002 letter to the EEOC, Garcia-Perez stated that at the hearing, Airguide's representative Zamudio took Pineda aside and said that he had to leave immediately or he would be fired (Ex. B to DE # 78).

At his deposition, Pineda testified that Airguide representative Santiago Zamudio told Pineda at the hearing, in the presence of Jose Velazquez, another Airguide representative, that it was a problem for human resources that Pineda was at the hearing. After Pineda explained that Guerrero was upset and could not drive, that he had called work and that he had would return to work immediately after the hearing, Zamudio told Pineda that if Pineda testified at the hearing, he would give Pineda a warning (DE # 89 at 193-94, 198). Pineda testified that Zamudio did not tell him that he had to leave immediately or be fired (DE # 89 at 197). When Pineda arrived at Airguide later that day, after the conclusion of the hearing, he was suspended, and he was fired the following day (DE # 189 at 178).

Defendants' counsel said in the November 14, 2003 letter, that while in the May 8, 2002 letter, Garcia-Perez stated that during the unemployment proceeding, Zamudio told Pineda that he had to leave immediately or he would be fired, Pineda testified at his deposition that Zamudio never said that to him.

Again, while Pineda's testimony does not exactly match what Garcia-Perez told the EEOC, it is similar, especially when taken in context. Pineda was told that his presence at the hearing was a problem for Airguide and that if he testified at the hearing he would be given a warning. While he did not testify at the hearing, he was given a warning when he returned to work after the hearing later that morning. Thus, Defendants have not shown how Garcia-Perez's testimony is necessary and outweighs the disadvantages inherent in deposing Garcia-Perez.

3. Why Pineda Was Suspended When He Returned From The Hearing

In Garcia-Perez's May 8, 2002 letter to the EEOC, Garcia-Perez stated that the warning issued by Defendant Airguide to Pineda on that day was in retaliation for anticipated testimony by Pineda at the hearing (Ex. B to DE # 78).

At his deposition, Pineda testified that Airguide representative Santiago Zamudio told Pineda at the hearing, in the presence of Jose Velazquez, another Airguide representative, that it was a problem for human resources that Pineda was at the hearing. After Pineda explained that Guerrero was upset and could not drive, that he had notified work of his absence and that he had would return to work immediately after the hearing, Zamudio told Pineda that if Pineda testified at the hearing, he would give Pineda a warning (DE # 89 at 193-94, 198). Pineda also testified that he was not going to be a witness at the hearing (DE # 89 at 184). When Pineda arrived at Airguide later that day,

after the conclusion of the hearing, he was suspended, and he was fired the following day (DE # 189 at 178).

Garcia-Perez's statement to the EEOC that the warning issued by Defendant Airguide to Pineda on the day of the hearing was in retaliation for anticipated testimony by Pineda at the hearing is a reasonable inference from Pineda's deposition testimony. Pineda was told that his presence at the hearing was a problem for Airguide, he was told by Airguide's representative that if he testified he would receive a warning, and Airguide's counsel, when told that Garcia-Perez did not know if Pineda would be a witness at the hearing, told Garcia-Perez that Pineda had to return to work and could not be at the hearing. Thus, Defendants have not shown how Garcia-Perez's testimony is necessary and outweighs the disadvantages inherent in deposing Garcia-Perez.

4. The Conversation At The August 2001 Hearing Between Airguide's Counsel and Garcia-Perez

In the May 8, 2002 letter, Garcia-Perez stated that before the hearing began, Defendant Airguide's attorney, Mr. Barnum, asked Garcia-Perez whether Pineda was going to testify, and Garcia-Perez then responded that she was not sure. Barnum then said Pineda had to return to work and could not be at the hearing.

In the November 2003 letter, Defendants' counsel states that in her May 2002 letter, Garcia-Perez stated that an attorney representing Airguide, Eric Barnum, at the hearing took Garcia-Perez aside and asked if Pineda was going to testify, and that Garcia-Perez indicated that she was not sure, and that Barnum then said Pineda had to return to work and could not be at the hearing (Ex. B to DE # 78).

Defendants have not put forth any evidence indicating that this statement by

Garcia-Perez is not truthful, or indicated how this fact is relevant to the case.⁴ Garcia-Perez represented at the hearing that she does not intend to testify at trial to this fact. Thus, Defendants have not shown how Garcia-Perez's deposition testimony on this issue is necessary and outweighs the disadvantages inherent in deposing Garcia-Perez.

In conclusion, the undersigned notes that the determination that none of the alleged inconsistencies, either standing alone or taken together, are sufficient to warrant a deposition of Plaintiffs' counsel is supported by the fact that the deposition testimony of Pineda is less favorable to him than the prior representations made by counsel. Indeed, at the hearing, Defendant's counsel conceded that Pineda's deposition testimony was more favorable to Defendants than the representations which Garcia-Perez made to the EEOC on Pineda's behalf in the May 8, 2002 letter. Thus, this is not a situation where a party has made inconsistent statements which are significantly more favorable to the position of that party in the litigation. Furthermore, at the hearing, Garcia-Perez confirmed that she does not intend to testify as a witness for Plaintiffs at the trial.

Therefore, it is hereby

ORDERED AND ADJUDGED that Amarillys E. Garcia-Perez, Esq.'s Emergency

⁴The undersigned notes that while Defendants state that Garcia-Perez's version of the conversation with Barnum is not worthy of belief, Defendants have not proffered an affidavit from Barnum which controverts Garcia-Perez's account of the conversation.

Motion For Protective Order and Motion To Quash Subpoena (DE # 78, filed 12/2/03), is

GRANTED.

DONE AND ORDERED in Miami, Florida, this 26th day of January, 2004.



ANDREA M. SIMONTON
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

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