10 OCAHO no. 1157

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

October 12, 2012

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 11B00111
MAR-JAC POULTRY, INC., Respondent.	)	

ORDER GRANTING OSC'S MOTION FOR PROTECTIVE ORDER

I. PROCEDURAL HISTORY

This is an action pursuant to the nondiscrimination provisions of the Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2006), in which the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC or the agency) is the complainant and Mar-Jac Poultry, Inc. (Mar-Jac or the company) is the respondent. OSC filed a complaint alleging in Count I that Mar-Jac engaged in document abuse against Edwin Morales and other similarly situated parties and in Count II that Mar-Jac engaged in a pattern or practice of discrimination in the hiring and employment eligibility verification process by imposing greater burdens on noncitizens than on citizens of the United States. Mar-Jac filed an answer denying the material allegations of the complaint and raising thirteen defenses, after which discovery and prehearing motion practice ensued.

Presently pending is OSC's Motion for Protective Order in which it seeks an order pursuant to 28 C.F.R. § 68.18(c) [1] precluding Mar-Jac from deposing German Bonilla, a former employee of OSC; Liza Zamd, co-counsel for OSC in this matter; and an unnamed DOJ official to be designated by OSC pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. The

[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2011).

motion was filed on July 23, 2012, the day the proposed depositions were scheduled to commence. By an interim order dated July 26, 2012 the taking of the depositions was enjoined sine die pending a determination as to whether they would be permitted to go forward. Mar-Jac filed a response in opposition on August 7, 2012 and OSC filed a reply on August 27, 2012. The motion is ripe for resolution.

II. BACKGROUND INFORMATION

A. OSC's Motion

By way of background, OSC's motion identified German Bonilla as a former employee who left the agency's employ in March, 2011. The motion stated that during Bonilla's tenure there as an Employment Opportunity Specialist (EOS), he was the person assigned under the direction of counsel to assess an initial submission made to the office by a charging party, Edwin Morales. Specifically, Bonilla was directed to contact Morales and obtain additional information about the circumstances surrounding Morales' initial submission, and to determine whether the information satisfied the requirements needed to state a charge pursuant to 28 C.F.R. § 44.101(a) (2011). Bonilla subsequently recommended that the Morales charge be accepted as complete effective December 13, 2010, and his recommendation was accepted. Bonilla's active involvement in the matter then ended and he left the employ of the agency a few months later.

The motion states further that following the acceptance of the Morales charge OSC notified Mar-Jac on December 23, 2010 that it would undertake an investigation, and that on February 16, 2011 the agency notified Mar-Jac that it was expanding its investigation to include a possible pattern and practice of document abuse against non-U.S. citizens. On June 9, 2011, OSC notified Mar-Jac that it had concluded its investigation and had reasonable cause to believe Mar-Jac engaged in a pattern and practice of document abuse against non-U.S. citizens, and on July 14, 2011, OSC filed the instant complaint.

OSC's motion identifies Liza Zamd as counsel for OSC in this matter, and describes her general responsibilities as including the investigation, assessment, and, if warranted, litigation of charges. Zamd was charged with the responsibility of investigating the Morales charge once it was complete and recommending whether or not to take enforcement action; she is currently one of two trial counsel assigned to the matter. OSC states further that the only likely candidates for the proposed Rule 30(b)(6) deposition would be either Zamd herself or some other supervisory OSC official who was also part of the deliberative chain concerning the underlying investigation and resultant enforcement action. OSC contends that Mar-Jac is seeking no less than "a free-wheeling examination of the documents, actions, impressions, beliefs, deliberations, and recommendations of Complainant's employees and officials," and asserts a variety of privileges, including the qualified executive privilege, investigatory files privilege, deliberative privilege,

work product privilege, informer's privilege, attorney-client privilege, and common interest privilege.

The motion was accompanied by exhibits identified as A) Complainant's Production Log (11 pp.); B) Complainant's Privilege Log (33 pp.); C) Complainant's Response and First Amended Response to Respondent's Request for Production (10 pp.); D) Complainant's Response, First Amended Response and Second Amended Response to Respondent's Interrogatories (49 pp.); E) Complainant's Response, First Amended Response and Second Amended Response to Respondent's Requests for Admission (32 pp.); E) Notices of Deposition Duces Tecum for German Bonilla and Liza Zamd, Notice of Deposition Duces Tecum for Rule 30(b)(6) OSC representative, Affidavit of Ray Perez (17 pp.); G) Chart of Bonilla/Zamd Deposition Topics and Related Interrogatories, Requests for Production and/or Requests for Admission (0 pp.);[2] H) Chart of 30(b)(6) Deposition Topics and Related Interrogatories, Requests for Production and/or Requests for Admission (4 pp.); and I) the Declaration of Seema Nanda (3 pp.).

B. Mar-Jac's Response

Mar-Jac's response contends that the requested depositions simply seek "the facts and records related to OSC's underlying investigation of Respondent and the facts and legal basis supporting the Complaint filed against the company." In support of the necessity for such depositions the company says that OSC has tried to "stonewall" its discovery process by failing to produce the files and records it relied upon in making its determination and that the company's due process and equal protection rights are violated by OSC's refusal to participate in discovery. The company says it is entitled to depose an OSC representative regarding agency policies, interpretations, and opinions related to the governing statute, including policies regarding investigations and enforcement actions.

Mar-Jac urges that OSC's objections to the depositions of its employees are exaggerated, that discovery has been too one-sided, that the agency must comply with its discovery obligations, that no privileges are involved, and that OSC's objections are premature and conclusory. The company complains specifically that OSC has withheld from its production of documents its own investigatory files, the correspondence it had with other agencies about the matter, any witness statements and declarations, and the records it used in making determinations and assessing penalties. Finally, Mar-Jac points to other agencies that disclose their investigatory files and criticizes OSC's organizational structure for its failure to separate its attorneys from the investigatory functions as those other agencies do.

Mar-Jac's opposition was accompanied by Exhibits A) a letter dated August 1, 2012 transmitting

[2] In what appears to have been an oversight, no such chart was included.

new Deposition Duces Tecum Notices for Bonilla and Zamd and an Amended Notice of Deposition Duces Tecum 30(b)(6) (14 pp.); B) the Declaration of J. Larry Stine dated August 6, 2012 (3 pp.); C) the Declaration of Rhoda Klein sworn August 6, 2012 (4 pp.); D) a Memorandum dated December 2010 from German Bonilla to Elizabeth I. Hack (2 pp.); and E) an email exchange dated June 22 and 26, 2012 (2 pp.).

III. STANDARDS APPLIED

OCAHO rules, like the Federal Rules of Civil Procedure, do not explicitly preclude deposing opposing counsel. *See* 28 C.F.R. §§ 68.18(a), 68.22(a). Our case law has generally looked to case law in the federal courts for guidance as to when such depositions may be appropriate. *United States v. Nw. Airlines, Inc.*, 3 OCAHO no. 452, 583, 584 (1992).[3]

Courts have generally required a party seeking the deposition of opposing counsel to establish three elements: 1) that no means exist to obtain the information other than deposing opposing counsel, 2) that the information sought is relevant and non-privileged, and 3) that the information sought is crucial to the preparation of the case. *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (noting that deposition of opposing counsel is "a negative development in the area of litigation"); *accord Nw. Airlines*, 3 OCAHO no. 452 at 585; *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628 (6th Cir. 2002); *see also Nguyen v. Excel Corp.*, 197 F.3d 200, 209 (5th Cir. 1999); *Boughton v. Cotter Corp.*, 65 F.3d 823, 830 (10th Cir. 1995).

Such depositions are disfavored for a number of reasons. Once counsel is deposed, for example, the likelihood is enhanced that he or she will be designated as a witness and then disqualification of counsel necessarily becomes an issue. *See, e.g.*, *Johnson v. Couturier*, 261 F.R.D. 188, 193 (E.D. Cal. 2009) (observing that once counsel is deposed, the designation of counsel as a witness "would soon be forthcoming"); *Jennings v. Family Mgmt*., 201 F.R.D. 272, 276-77 (D.D.C. 2001); *Marco Island Partners v. Oak Dev. Corp*., 117 F.R.D. 418, 420 (N.D. Ill. 1987); *In re Arthur Treacher's Franchisee Litig.*, 92 F.R.D. 429, 439 (E.D. Pa. 1981) (recognizing that an attorney's testimony at a deposition may lead to grounds for removal of the attorney as counsel

[3] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific *entire* volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

for a client).

Concerns have similarly been expressed about the resultant potential for delay, disruption, harassment, and unnecessary distractions into collateral matters. *Simmons Foods, Inc. v. Willis*, 191 F.R.D. 625, 630 (D. Kan. 2000). The risk of encountering privilege and work product issues is another major source of concern. *See Cendant Corp. v. Shelton*, 246 F.R.D. 401, 404-07 (D. Conn. 2007); *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc*., 117 F.R.D. 83, 85 (M.D.N.C. 1987) (finding attorney depositions often serve no legitimate purpose and only embroil the court and parties in controversies over privilege and work product issues).

IV. Discussion and Analysis

First, as to the deposition of German Bonilla, the deposition notice was served upon OSC, and Bonilla is a former agency employee whose attendance OSC is no longer in a position to compel even were it so inclined. In addition, it does not appear that any useful purpose would be served by deposing Bonilla when the entire extent of his participation in this matter was limited to the completion of the Morales charge. Mar-Jac contends that it is necessary to depose Bonilla "on the facts and information related to how the original Charge was incomplete and the facts obtained by OSC that made the Charge complete as this is relevant to the case." But how Bonilla's testimony can be characterized as "relevant" let alone "crucial" to the preparation of Mar-Jac's defense is unclear where Bonilla had no role at all in the decision to widen the scope of OSC's investigation and has no personal knowledge respecting the merits of this litigation.

When the relevance of the information sought is not apparent, the party seeking discovery has the burden of showing it to be relevant. *AFSCME Counsel 79 v. Scott*, 277 F.R.D. 474, 477 (S.D. Fla. 2001) (quoting *Dean v. Anderson*, No. 01-2599, 2002 WL 1377729 at *2 (D. Kan. June 6, 2002)). The complaint filed in this matter initiated a de novo proceeding in which the issue to be determined is whether Mar-Jac engaged in hiring practices that violate 8 U.S.C. § 1324b; the complaint does not provide an occasion to litigate the adequacy of the Morales charge or of OSC's investigation of that charge. As is well established in our case law, even where an underlying charge is found to be wholly without merit, OSC may still expand an investigation on its own initiative pursuant to 8 U.S.C. § 1324b(d), and may then pursue a pattern and practice claim. *United States v. Robison Fruit Ranch, Inc.*, 4 OCAHO no. 594, 23, 25-26 (1994). The potential relevance of the Morales charge to this de novo proceeding is thus marginal at best,[4] and notwithstanding the wide-ranging constitutional arguments made by Mar-Jac, an

[4] *Cf. EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005) (courts may not limit EEOC's suit to claims made in the administrative charge, nor is the agency's finding of probable cause to sue judicially reviewable).

administrative investigation adjudicates no legal rights and full due process rights do not attach at the early stage of an administrative process. *Hannah v. Larche*, 363 U.S. 420, 441-42 (1960); *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 98 (2d Cir. 1997); *Gold v. SEC*, 48 F.3d 987, 991-93 (7th Cir. 1995); *Georator Corp. v. EEOC*, 592 F.2d 765, 768-69 (4th Cir. 1979) (stating that "[w]hen only investigative powers of agency are utilized, due process considerations do not attach").

Second, as to Bonilla and Zamd as well as to any OSC designee, no showing has been made that Mar-Jac exhausted all other means of obtaining the information it seeks. *See Ed Tobergte Assoc. Co. v. Russell Brands, LLC*, 259 F.R.D. 550, 555-56 (D. Kan. 2009) (noting that proponent of the deposition must show attempts to exhaust other means of obtaining the information). Taking the deposition of opposing counsel should be the last resort, not the first. The record reflects that OSC filed its initial responses to Mar-Jac's Requests for Production, Interrogatories, and Requests for Admission on May 23, 2012 and supplemented them after discussion with counsel by amended responses made on June 27, 2012. Mar-Jac then issued the subject deposition notices. Why Mar-Jac elected to issue deposition notices instead of filing a motion to compel discovery as provided in 8 C.F.R. § 68.23 is unelaborated in the company's response to OSC's motion for protective order. The response makes clear however, that the notices were issued because the company was dissatisfied with OSC's responses to its discovery requests. At best the deposition notices were issued prematurely without any attempt at all to use the ordinary and conventional means provided in the rules to compel discovery. Mar-Jac implicitly acknowledged this fact when it finally did file a motion to compel.[5]

Finally, depositions are intended for discovering facts, not for purposes of previewing an opponent's legal strategy, *Coleman v. District of Columbia*, Nos. 09-CV-50, 11-CV-1322, 2012 WL 2870192, at *2 (D.D.C. July 13, 2012), much less for the purpose of generating ancillary satellite litigation unrelated to the merits of the case. Despite Mar-Jac's insistence that it is only seeking factual information, review of the subject matter set out in the deposition notices reflects that the breadth of the proposed inquiry is virtually unlimited. The notices to Bonilla and Zamd include, but are not limited to, conversations between the deponent and charging party, the documents they exchanged, other facts and documents relating to the charge and complaint, and any agency reports and findings. The notices also request production of the deponent's entire case files and any other relevant records or notes related to the investigation. The 30(b)(6) notice is even broader, containing 21 paragraphs of requests addressed not only to the minutiae of the filing of the Morales charge and the ensuing investigation, but also reflecting an intent "to explore the agency's regulations, policies, interpretations and opinions related to 8 U.S.C. § 1324b . . . its policies regarding investigations and enforcement actions, and any changes to the agency's interpretations or opinions based on amendments to the law, developments in case law or new guidelines or policies."

[5] Both parties filed motions to compel discovery and briefing is still in progress.

A party seeking to depose opposing counsel must not only show both propriety and need, it must also make a showing that the information sought will not invade the realm of attorney work-product or any attorney-client privilege. *W. Peninsular Title Co. v. Palm Beach Cnty.*, 132 F.R.D. 301, 302 (S.D. Fla. 1990); *accord Dunkin Donuts, Inc. v. Mandorico, Inc.*, 181 F.R.D. 208, 212 (D. Puerto Rico 1998). That showing has not been made here. In *SEC v. Buntrock*, 217 F.R.D. 441, 444-45 (N.D. Ill. 2003), the court observed that the respondent's 30(b)(6) notice was an inappropriate attempt to depose opposing counsel and to delve into the theories and opinions of the agency, stating that

> [t]hroughout his brief on this issue, Buntrock argues that he is entitled to discovery of the "facts" that support the SEC's allegations. But after a close reading of Buntrock's submissions in this matter, it becomes clear that Buntrock is after more than just "facts." Buntrock is seeking to discover the SEC's theories as to the underlying facts, how it intends to marshall those facts, and its belief as to the inferences that may be drawn from those facts . . . . [W]hat Buntrock describes as "facts" are not merely facts at all, but legal theories and explanations of those theories: the SEC's legal position in this case, and how it arrived at that position. He is certainly not entitled to that type of discovery (citations omitted).

So it is here as well. Mar-Jac's generalized assertions that its questions will be limited to non-privileged factual information are not sufficient to overcome the many risks inherent in deposing opposing counsel, *see Sterne Kessler Goldstein & Fox, PLLC v. Eastman Kodak Co.*, 276 F.R.D. 376, 384-85 (D.D.C. 2011), particularly when considered in light of the breadth of the deposition notices the company actually issued.

CONCLUSION

Unlike the allocation of proof for most discovery requests, a party seeking to depose opposing counsel has the burden to show the necessity for the deposition. *Guantanamera Cigar Co. v. Corporacion Habanos*, 263 F.R.D. 1, 8 (D.D.C. 2009). As explained in *Invesco Institutional, Inc. v. Paas*, 244 F.R.D. 374, 393 (W.D. Ky. 2007), moreover, a party must meet all three of the necessary elements so that failure as to any of them will defeat an effort to depose opposing counsel, citing *Simmons Foods*, 191 F.R.D. at 630-31 and *Desert Orchid Partners, LLC v. Transaction Systems Architects, Inc*. 237 F.R.D. 215, 217-20 (D. Neb. 2006). Mar-Jac established none of the required elements.

ORDER

OSC's motion for protective order is granted. The subject deposition notices are quashed.

SO ORDERED.

Dated and entered this 12th day of October, 2012.

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Ellen K. Thomas
Administrative Law Judge