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United States District Court,
S.D. Ohio,
Eastern Division.

EQUAL EMPLOYMENT OPPURTUNITY COMMISSION, Plaintiff,
v.
HONDA OF AMERICA MFG., INC., Defendant.

No. 2:06-cv-0233. | Feb. 28, 2007.

Attorneys and Law Firms

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Opinion

ORDER

TERENCE P. KEMP, United States Magistrate Judge.

***1** This is an employment action in which the EEOC initially asserted a discrimination claim on behalf of Monica Ways, a former employee of Honda of America. Ms. Ways has subsequently intervened in the case. On February 1, 2007, Honda filed a motion to quash deposition notices which were issued by Ms. Ways. Both Ms. Ways and the EEOC have filed responses, and Honda has replied. For the following reasons, the motion to quash will be granted.

I.

The facts underlying the motion to quash are fairly straightforward. During the time that Ms. Ways worked for Honda, she was under the direct or indirect supervision of two more highly-placed officials, Koki Hirashimi and Tadashi Nogouchi. Wishing to take testimony from those two individuals, she noticed their depositions. The deposition notice requested them to appear at Ms. Ways' counsel's office in Dayton, Ohio. Neither of the deponents is currently employed by Honda of America. According to affidavits filed by Honda, Mr. Hirashimi left Honda of America's employ in 2005 and now works for Honda Motor Company, Ltd. in Japan. Mr. Nogouchi left Honda's employ in 2004 and now works for Mobilityland Corp., also in Japan. Neither has any ongoing relationship with Honda of America. Although the plaintiffs asserted in their memoranda that Mr. Hirashimi is still a director of Honda of America, that statement was not supported by evidence, and Honda attached to its reply memorandum Mr. Hirashimi's resignation letter effective March 31, 2005.

There apparently is some corporate relationship between Honda Motor Company, Ltd., Honda of America, and Mobilityland. The latter two may each be wholly-owned subsidiaries of Honda Motor Company, Ltd. However, all are separate corporations. It is with these facts in mind that the instant motion to quash will be decided.

II.

The proper resolution on Honda's motion to quash turns on the way in which Fed.R.Civ.P. 37(d) is interpreted. That rule provides that "[i]f ... an officer, director or managing agent of a party ... fails ... to appear before the officer who is to take [a] deposition, after being served with the proper notice" the Court may impose sanctions against the non-appearing party. Because of the availability of such sanctions under Rule 37(d), a deposition notice, unaccompanied by a subpoena, is ordinarily sufficient to compel the appearance of a corporate opponent's officers, directors, and managing agents at a deposition. Other witnesses who do not fall into the category of officer, director, or managing agent, may be compelled to appear and testify at a deposition only if the procedures set forth in Fed.R.Civ.P 45 are followed. Here, Honda contends that because neither of the two deponents are currently officers, directors, or managing agents of Honda of America, the deposition

notices served by Ms. Ways are simply ineffective to compel their appearance at the deposition.

The responsive memoranda devote considerable argument to the question of whether the Court can properly issue an order preventing the plaintiffs from taking the depositions of Messrs. Hirashimi and Nogouchi. That is not the issue, however, and the cases cited in support of the proposition that the Court should rarely bar a litigating party from taking a deposition are simply inapposite. The question is not whether the plaintiffs are entitled to take these depositions, but whether they can compel the two deponents to appear in Dayton, Ohio by virtue of the deposition notices which were issued. The Court now turns to that question.

***2** The general rule relating to depositions of non-party witnesses, including persons who may either have or have had a relationship with a corporate party, can be stated as follows. If the witness is not an officer, director, or managing agent of a corporate opponent, "[s]uch a witness must be subpoenaed pursuant to Rule 45 ... or, if the witness is overseas, the procedures of the Hague Convention or other applicable treaty must be utilized." *Stone v.. Morton International,* 170 F.R.D. 498, 503 (D.Utah 1997). The determination as to whether a deponent is an officer, director, or managing agent of a corporate party is made at the time the deposition is noticed, rather than at the time that the events in question occurred. *In re Honda Motor Co., Inc., Dealership Relations Litigation,* 168 F.R.D. 535 (D.Md.1996). The burden is on the party noticing the deposition to demonstrate that the deponent is an officer, director, or managing agent of the corporate opponent. *Id.* However, this burden has been described as "modest" and may require nothing more than a showing that it is a "close question" as to whether the needed relationship exists. *See Boss Mfg. Co. v. Hugo Boss AG,* 1999 WL 20828 (S.D.N.Y. January 13, 1999).

Honda argues that a former corporate employee is clearly not an officer or director of a corporation once his or her formal relationship with the corporation has terminated, and that such a person can also never qualify as a "managing agent." As a general rule, that statement is true. *See, e.g., Mitchell v. American Tobacco Co.,* 33 F.R.D. 262 (M.D.Pa.1963) (holding that it is obvious that the deposition of a retired officer of a corporation (in that case, the former president) may not be taken simply by notice). However, there are a handful of cases holding that, under particular circumstances, someone who has terminated his or her relationship with a corporate party might still be considered to be a "managing agent" for purposes of Rule 37(d). The question then becomes whether any of these exceptions applies in this case.

The EEOC cites two decisions in support of its position that Messrs. Hirashimi and Nogouchi might still be considered to be managing agents of Honda of America. *See Libbey Glass, Inc. v. Oneida, Ltd.,* 197 F.R.D. 342 (N.D.Ohio 1999); *Boston Diagnostics Development Corp. v. Kollsman Mfg. Co.,* 123 F.R.D. 415 (D.Mass.1988). For the following reasons, the Court concludes that these cases are either inapplicable or are not persuasive on the issue of whether deposition notices suffice in this case to compel the attendance of these two witnesses.

The *Libbey* decision appears to have relied on the case of *Independent Production Equip. v. Loew's, Inc.,* 24 F.R.D. 19 (S.D .N.Y.1959) for the proposition that a former corporate employee who maintains some relationship with, or an identity of interest with, a corporate party in litigation may be compelled to appear at a deposition by way of a deposition notice. The *Loew's* case relied, in turn, on a decision from the Seventh Circuit Court of Appeals, *O'Shea v. Jewel Tea Co.,* 233 F.2d 530 (7th Cir.1956) as authority for that same proposition. *O'Shea,* however, did not deal with deposition notices, but rather the completely separate question of whether a former corporate employee could be treated as a hostile witness at trial. Further, as noted in *Colonial Capital Co. v. General Motors,* 29 F.R.D. 514 (D.Conn.1961), the "peculiar facts" of the *Loew's* case radically limit its value as a general precedent in this area. Rather, at most, *Loew's* stands for the proposition that a witness may be considered to be a managing agent of a corporation after his resignation only if he still exercises some control or judgment over the daily affairs of the corporation or if the resignation was effected in order to avoid the possibility that the witness could be deposed through service of a deposition notice. *See JSC Foreign Economic Association Technostroyexport v. International Development Trade Services,* 220 F.R.D. 235 (S.D.N.Y.2004); *see also In re Honda American Motor Co. Inc., Dealership Relations Litigation, supra* (confirming that the general rule may be inapplicable if the resignation occurred in order to prevent an employee from being deposed). At a minimum, therefore, if the deposition notices are to be given effect in this case, the plaintiffs must show that the two witnesses are still involved in the corporate business of Honda of America, *see Pettyjohn v. Goodyear Tire and Rubber Co.,* 1992 WL 168085 (E.D.Pa. July 9, 1992), or that they resigned precisely in order to avoid having their depositions taken in this case.

***3** Neither of those facts have been demonstrated here. First, there is no evidence that the decisions made by Mr. Nogouchi in 2004 or Mr. Hirashimi in 2005 to go to work either for the parent company of Honda of America or a sister subsidiary were related in any way to this litigation or a desire to avoid being deposed. Plaintiffs have not suggested that this is the case. Further, there is no evidence that either gentleman has retained any control or authority over day-to-day business decisions of Honda of America. The mere fact that they work for related corporations is insufficient to establish that type of control. Plaintiffs have not cited a single case, nor has the Court's own research located any cases, holding that simply because a witness works for a related corporation, that witness can both be deemed to be a managing agent of a different corporation and can be compelled to appear at a deposition through the service of a deposition notice on that corporation. In short, there is simply no factual basis upon which the Court can determine either that Messrs. Nogouchi and Hirashimi ought to be classified as "managing agents" of Honda of America or that any other exception to the general rule requiring such witnesses to be subpoenaed to a deposition, rather than noticed, applies here. Consequently, the motion to quash is well-taken and will be granted.

III.

For the foregoing reasons, the motion of defendant Honda of America, Inc. to quash and/or for a protective order (# 43) is granted.

Any party may, within ten (10) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. § 636(b)(1)(A), Rule 72(a), Fed.R.Civ.P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due ten days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.