UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

GNLV CORP.,

Defendant.

2:06-CV-01225-RCJ-(PAL)

ORDER

On June 2, 2009, this Court granted summary judgment for Defendant GNLV Corp. ("Defendant"). On June 12, 2009, Defendant filed a bill of costs. (Bill (#112)). Because Plaintiff U.S. Equal Employment Opportunity Commission ("Plaintiff") objected to the bill of costs, the Court treats Defendant's Bill of Costs (#112) as a motion and Plaintiff's Objection to the Bill of Costs (#113) as a response. *See* Local Rule 54-13(b)(3). With the Court's leave, Defendant filed a reply (#116). The Court held a hearing on April 26, 2010. The Court now issues the following order. IT IS HEREBY ORDERED that Defendant's Bill of Costs (#112) is GRANTED IN PART AND DENIED IN PART and costs shall be taxed against Plaintiff for $14,681.25.

I. BACKGROUND

On September 29, 2006, Plaintiff U.S. Equal Employment Opportunity Commission, ("Plaintiff"), filed suit against Defendant GNLV Corp., ("Defendant"), alleging violations of Title VII of the Civil Rights Act of 1964. (Compl. (#1)). Plaintiff alleged that Defendant subjected

its Black and female employees to a hostile work environment based on race and sex through intimidation, racial epithets, sexual advances, and abusive comments. (*Id.* at ¶ 9). On June 2, 2009, this Court granted Defendant's motion for summary judgment and the Clerk of the Court entered judgment for Defendant. (Order (#110); Judgment (#111)).

On June 12, 2009, Defendant filed a bill of costs. (Bill (#112)). The bill of costs requested the clerk to tax the following costs: (1) $878.00 for fees for service of summons and subpoenas, (2) $29,750.15 for fees of the court reporter for transcripts necessarily obtained, and (3) $270.00 for fees for witnesses. (*Id.*). GNLV requested $30,898.15 in total. (*Id.*).

II. LEGAL STANDARD

"Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law." Fed. R. Civ. P. 54(d)(1); *see also* Local Rule 54-1(a) ("Unless otherwise ordered by the court, the prevailing party shall be entitled to reasonable costs."). In Title VII actions, "the [Equal Employment Opportunity] Commission and the United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000e-5(k).

There is a presumption in favor of awarding costs, but the district court may refuse an award of costs at its discretion. *Ass'n of Mexican-American Educators v. California*, 231 F.3d 572, 591 (9th Cir. 2000). "That discretion is not unlimited. A district court must "specify reasons" for its refusal to award costs." *Id.* The following reasons are appropriate for denying costs: (1) the losing party's limited financial resources; (2) misconduct by the prevailing party; (3) the chilling effect of awarding costs on future litigants; (4) the complexity and closeness of the case; (4) the nominal or partial nature of the prevailing party's recovery; (5) the good faith of the losing party; (6) the public importance of the issue. *See id.* at 591–93 & n.15 (aggregated from the court's own holding and its examination of Ninth Circuit holdings, other circuit holdings, and Seventh Circuit dicta). In essence, the district court must explain why the case is extraordinary in order to justify refusal to award costs. *Id.* at 593.

///

"Every bill of costs and disbursements shall be verified and distinctly set forth each item so that its nature can be readily understood. The bill of costs shall state that the items are correct and that the services and disbursements have been actually and necessarily provided and made. An itemization and, where available, documentation of requested costs in all categories must be attached to the bill of costs." Local Rule 54-1(b). The party seeking costs bears the burden of proving the amount of compensable costs. *Allison v. Bank One-Denver*, 289 F.3d 1223, 1248–49 (10th Cir. 2002).

III. ANALYSIS

A. Award of costs

Plaintiff asks the Court to deny Defendant's claim for costs in its totality because the case was complex and close and because an award of costs would be against the interests of justice and public policy. (Pl.'s Obj. (#113) 2:4–10). Plaintiff argues that it filed the suit to vindicate the important public interest in eradicating workplace discrimination and that the chilling effect of an award of costs and the closeness and complexity of the case favor refusal to award costs. (*Id.* at 5:18–8:24). Plaintiff's rely mainly on the general purpose of Title VII and Plaintiff's role in enforcing it. If the Court were to accept Plaintiff's arguments regarding public importance and the chilling effect of an award of costs, Plaintiff would never pay costs for any action it brings unless, possibly, if the action was frivolous or brought in bad faith. In any suit by Plaintiff for Title VII violations, the same public importance and chilling effect elements are present. However, Congress clearly contemplated that Plaintiff would be liable for costs in unsuccessful actions. *See* 42 U.S.C § 2000e-5(k).

Plaintiff has not established that this case is extraordinary in its complexity or closeness. In *Association of Mexican-American Educators*, the Ninth Circuit found a suit by educators against the State of California that implicated the state's educators and public education system to be extraordinarily complex and important. 231 F.3d at 593. In this case, Plaintiff sued a single employer for alleged violations at a single hotel and casino.

///

///

Finally, this case involves enforcement by a government agency, not a private litigant of limited financial means. Considerations of the financial status of the parties or the amount of the award do not favor refusing to award costs.

B. Procedural defects in bill of costs

Plaintiff also argues that Defendant's bill of costs must be rejected for failure to specifically itemize and identify costs. (Pl.'s Obj. (#113) 2:11–20). However, Defendant attached itemizations of its costs and documents supporting the costs in its attachments to its bill of costs. This complies with Local Rule 54-1(b). In fact, Plaintiff has used the documentation supporting Defendant's bill of costs to challenge the appropriateness of some of those costs. This is a strong indication that Defendant's itemizations and supporting documents are fulfilling their function—to give the opposing party a chance to review and challenge claimed costs.

C. Defendant is entitled to $14,681.25 in costs.

1. Defendant is entitled to $13,533.25 in deposition costs.

a. The depositions were necessarily obtained.

"A judge or clerk of any court of the United States may tax as costs . . . [f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case . . . ." 28 U.S.C. § 1920(2). Notably, the depositions must be necessarily obtained for use *in the case*, not for use at trial. *See Horning v. Washoe County*, 108 F.R.D. 364, 366 (D. Nev. 1985). And, under this Court's local rules, "[t]he cost of a deposition transcript (either the original or a copy, but not both) is taxable *whether taken solely for discovery or for use at trial*." Local Rules 54-4 (emphasis added). "Actual introduction or admission into evidence at trial is not a prerequisite for allowance." *Women's Fed. Sav. & Loan Ass'n v. Nevada Nat'l Bank*, 108 F.R.D. 396, 398 (D. Nev 1985). "If a deposition is necessary for a party's preparation for trial, its costs may be taxed." *Id.* "That is not true where the deposition was taken merely for the convenience of the attorney." *Id.* "The determination of necessity is made in light of the facts known at the time

of the deposition." *Id.*[1]

Defendant did not use the depositions of medical doctors Thompson, Manjooran, or Sohr in support of its motion for summary judgment. Plaintiff contends that their depositions were unnecessary because it did not intend to call any physicians in its case in chief and only sought damages for "garden-variety emotional distress under Title VII as opposed to severe emotional distress." (Pl.'s Obj. (#113) 11:11–16). But, Plaintiff sought "medical expenses not covered by the [Defendant's] employee benefit plan" as well as compensation for "emotional pain, suffering, inconvenience, loss of enjoyment of life, and humiliation." (Compl. (#1) ¶¶ D, E). Defendants contend it was reasonably necessary to depose the doctors of the alleged victims of the hostile work environment to determine the extent of the victim's physical and mental suffering and whether such suffering could be due to other stressors. (Def.'s Reply (#116) 8:7:17–8:26).

Plaintiff cites several cases in support of its proposition that Defendant did not need to depose these doctors because it only made claims for "garden-variety emotional distress." (Pl.'s Obj. (#113) 11:23–12:3). These cases are inapposite as they all involve the strict standard under Rule 35 of the Federal Rules of Civil Procedure for compelling a party to submit to a mental examination. *See Schlagenhauf v. Holder*, 379 U.S. 104, 118–20 (1964) (holding that, under Rule 35, a movant seeking to compel a mental or physical examination of another party must show good cause and that the other party put his mental or physical condition in controversy); *O'Sullivan v. Minn.*, 176 F.R.D. 325, 327 (D. Minn. 1997) (holding that plaintiff did not put her mental condition in controversy to compel mental examination under Rule 35 by alleging she suffered mental anguish, embarrassment and humiliation, or

---

[1] Plaintiff notes that the Ninth Circuit has stated: "If the depositions were merely useful for discovery then they were not taxable items and their expense should have been borne by the party taking them, as incidental to normal preparation for trial." *Indep. Iron Works, Inc. v. U.S. Steel Corp.*, 322 F.2d 656, 678 (9th Cir. 1963). This was dicta, however, because the Ninth Circuit held that the depositions in question were properly taxed because the lower court had held so after a hearing and the transcript of the hearing was not on the record so the Ninth Circuit had no basis to review the lower court's decision. *Id.* Furthermore, the Ninth Circuit noted that taxing costs for the depositions might have been proper because, though some of the depositions were not introduced, they might have been if the issue of damages was actually tried. *Id.*

emotional distress but not claiming a diagnosable medical or psychological condition); *Lahr v. Fulbright & Jaworski, L.L.P.*, 164 F.R.D. 204, 210–11 (N.D. Tex. 1996) (holding that plaintiff put her mental condition in controversy for a compelled examination under Rule 35 by asserting a claim for intentional infliction of emotional distress, but not by alleging damages of emotional distress from a hostile work environment); *Smith v. J.I. Case Corp.*, 163 F.R.D. 229, 231 (E.D. Pa. 1995) (holding that a "claim of embarrassment, without more, does not place plaintiff's mental condition 'in controversy' within the meaning of [Rule] 35, and it is not 'good cause' for requiring plaintiff to submit to six hour psychiatric examination."); *Turner v. Imperial Stores*, 161 F.R.D. 89, 98 (S.D. Cal. 1995) (holding that plaintiff did not place her mental condition in controversy by claiming damages for humiliation, mental anguish, and emotional distress alleged to have resulted from discrimination under Rule 35). Because Plaintiff sought damages for mental anguish, the source and extent of the alleged victims' mental suffering was at issue. Defendant reasonably found depositions of the alleged victims' doctors necessary.

b. Defendant is entitled to $11,578.25 for transcripts of depositions it conducted.

"The cost of a deposition transcript (either the original or a copy, but not both) is taxable whether taken solely for discovery or for use at trial." Local Rule 54-4. Defendant's invoices contain charges for both originals and certified copies of transcripts. (*See* Bill of Costs (#112) Attachment 2). Defendants have now filed an affidavit stating that Prestige Court Reporting provides a certified copy of an original transcript at no extra charge so that the total charged on the invoices for an original and a certified copy is the same as the amount charged for just the original. (Def.'s Reply (#116) Ex. 1 at ¶ 4). However, one of the depositions conducted by Defendant was not done through Prestige Court Reporting. The September 19, 2008 deposition of William Eric Sohr, M.D. was conducted by Merit Reporting & Video and charged Defendant for an original and a certified copy of the deposition. (Bill of Costs (#112) at Attachment 2 part 2 at 4). Because there is no indication that the $666.75 charged is the same as the price for an original alone, the Court will allow all the deposition transcript fees

charged by Defendant less $666.75. Thus, Defendant is entitled to $11,578.25 for the original deposition transcripts it obtained from depositions it conducted.

c. Defendant's costs for real time hookups and real time pages are not taxable.

For the depositions conducted by Defendant, Defendant includes subtotals for "Real time hookup" and "Retained realtime Pages." (*See* Bill of Costs (#112) at Attachment 2). This Court's local rules do not provide for taxing of costs for real time transcription. *See* Local Rule 54-4. Real-time transcription costs are not taxable unless they are necessary. *Maurice Mitchell Innovations, L.P. v. Intel Corp.*, 491 F. Supp. 2d 684, 688 (E.D. Tex. 2007). Defendant notes that real-time transcription allows both parties to operate more efficiently. (Def.'s Reply (#116) 6 n.1). Defendant contends that real-time transcription is convenient, but not that it was necessary. Defendant has not suggested a need for expedited transcription. Therefore, Defendant is not entitled to costs for real-time hookups and transcripts.

d. Defendant is entitled to $1,955.00 for deposition reporter fees.

Plaintiff contends that without more detail, it cannot determine if the $2,320.00 in appearance fees for the deposition reporter are reasonable. (Pl.'s Obj. (#113) 13:19–24). "The reasonable expenses of a deposition reporter and the notary or other official presiding at the deposition are taxable, including travel, where necessary, and subsistence." Local Rule 54-4. Defendant paid a reporter for fifteen depositions. (Bill of Costs (#112) at Attachment 2 part 1 at 2–4). Ten were full-day depositions charged at $160 a day. Four were half-day depositions charged at $80 a day. One was a half-day deposition charged at $35 a day. In total, $1,955.00 of Defendant's alleged deposition costs were due to appearance by the reporter. (Bill of Costs (#112) at Attachment 2).

Rather than argue that these costs are unreasonable, Plaintiff contends it lacks enough information to make that determination. But Plaintiff does not suggest what other information is needed. Plaintiff has the rates charged for each deposition. If Plaintiff believes that these rates are excessive, it may so argue. But it has not. Therefore, Defendant's costs for reporter

///

fees are reasonable and should stand. Defendant is entitled to $1,955.00 for deposition reporter fees.

e. Defendant's costs for copies of deposition exhibits are not taxable.

Plaintiff asserts that costs for exhibits in depositions are not taxable. (Pl.'s Obj. (#113) 12:12–22). The local rules do not mention exhibits to depositions. *See* Local Rule 54-4. "Copying costs are recoverable under § 1920(4) if the copies were necessarily obtained for use in the case." *Robinson v. Alutiq-Mele, LLC*, 643 F. Supp. 2d 1342, 1354 (S.D. Fla. 2009). "The prevailing party cannot recover for copies made merely for counsel's convenience and the burden rests on the prevailing party to show the requested costs are recoverable." *Id.* "[S]ince neither party has demonstrated how these exhibits were used in the depositions, and neither the local rules nor 28 U.S.C. § 1920 explicitly provide for the costs associated with the reproduction of exhibits for depositions, the court declines to award these costs." *Bell v. Columbia St. Mary's, Inc.*, No. 07-CV-81, 2009 WL 959637, *3 (E.D. Wis. April 8, 2009).

f. Defendant's costs for shipping and handling of deposition materials are not taxable.

The local rules only allow shipping and handling costs for court-ordered filings of depositions. Local Rule 54-5. Section 1920 does not allow for shipping and handling costs. "Shipping and handling charges by the stenographer are not taxable." *Robinson v. Alutiq-Mele, LLC*, 643 F. Supp. 2d 1342, 1354 (S.D. Fla. 2009); *see also E.E.O.C. v. Con-Way Freight, Inc.*, No. 4:07-CV-1638, 2010 WL 577289, at *2 (E.D. Mo. Feb. 11, 2010); *Avila v. Willits Env't*, No. C 99-03941, 2009 WL 4254367, at *6 (N.D. Cal. Nov. 24, 2009). Therefore, Defendant is not entitled to costs for shipping and handling.

g. Defendant's costs for a witness signatures are not taxable.

Signature procurement is an ordinary business expense and signature procurement fees are not taxable. *Menasha Corp. v. News America Mktg. Instore, Inc.*, No. 00 C 1895, 2003 WL 21788989, at *1–3 (N.D. Ill. July 31, 2003).

h. Defendant's costs for "production" are not taxable.

The cost of production of deposition transcripts is taxable. Local Rule 54-4. But, it

is not clear what Defendant's charge for "Production" refers to. (*See* Bill of Costs (#112) at Attachment 2 part 2 at 4). To the extent it refers to production of exhibit copies, mini transcript, or CDs, it is not taxable. Defendant bears the burden of establishing its entitlement to costs. Therefore, Defendant is not entitled to $15.00 for production.

i. Defendant has failed to establish its costs for ordering transcripts from depositions conducted by Plaintiff.

For the depositions conducted by Plaintiff, Defendant includes single totals for each deposition. The descriptions of services for these totals include "Copy Regular," "Mini Copy Regular," "Black & White Exhibits," "ASCII Disk/CD," "Read & Sign Letter," "Photocopies," and "Shipping & Handling," (*See* Bill of Costs (#112) at Attachment 2). Plaintiff asserts that these costs are not taxable. (Pl.'s Obj. (#113) 9:15–22). As discussed above, Defendant is entitled to costs for a copy of the deposition transcripts, but not mini copies, exhibit copies, signature fees, or shipping and handling. Costs for ASCII discs of transcripts are not taxable unless Defendant shows they are necessary. *Maurice Mitchell Innovations, L.P. v. Intel Corp.*, 491 F. Supp. 2d 684, 688 (E.D. Tex. 2007). Nor are costs for photocopies without a showing of necessity. 28 U.S.C. § 1920(4). Defendant has not shown any of these itemized costs to be necessary. Defendant has only provided total costs, not subtotals for the individual services. The Court cannot determine how much Defendant's incurred solely to obtain copies of the deposition transcripts. Therefore, Defendant is not entitled to costs stemming from depositions conducted by Plaintiff.

2. Defendant is entitled to $270.00 in witness fees.

"The rate for witness fees, mileage, and subsistence are fixed by statute (see 28 U.S.C. 1821). Such fees are taxable even though the witness did not testify if it is shown that the attendance was necessary, but if a witness is not used, the presumption is that the attendance was unnecessary." Local Rule 54-5(a). Defendants did not use medical doctors Sohr and Thompson's testimony in its motion for summary judgment but included $45.00 for each of their attendance in its bill of costs. However, as discussed above, these witnesses were deposed. "Fees for the witness at the taking of a deposition are taxable at the same rate

as for attendance at trial." Local Rule 54-4. Plaintiff does not dispute that these witnesses attended depositions. Thus, the witness fees are proper.

3. Defendant is entitled to $878.00 in service fees.

Plaintiff argues that the fees for service of subpoenas on medical doctors Thompson and Manjooran should not be included in the bill of costs because the depositions of these witnesses was unnecessary. (Pl.'s Obj. (#113) 14:9–18). As discussed above, deposition of these witnesses was reasonably necessary at the time. Therefore, Defendant properly included service fees for serving subpoenas on these witnesses in its bill of costs.

IV. CONCLUSION

Accordingly, IT IS ORDERED that Defendant's Bill of Costs (#112) is GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED that costs shall be taxed against Plaintiff for $14,681.25. The Clerk of the Court shall tax costs accordingly.

DATED: This 24 day of May, 2010.

Robert C. Jones
UNITED STATES DISTRICT JUDGE