2002 WL 1626163
Only the Westlaw citation is currently available.
United States District Court,
D. Connecticut.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
v.
BEAUTY ENTERPRISES, INC., et al.

Civ. No. 3:01CV 378(AHN). | May 21, 2002.

Opinion

RULING ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER

HOLLY B. FITZSIMMONS, Magistrate Judge.

***1** Defendant Beauty Enterprises, Inc. ("BEI"), moves for a protective order, pursuant to Fed.R.Civ.P. 26(c), requiring the claimant-deponents to give their depositions in English, without the aid of an interpreter. The Commission opposes defendant's motion and seeks permission to allow the depositions in this case to go forward with a federally certified interpreter when requested. Oral argument was held on February 21, 2002.[1]

Background

This Title VII case involves BEI employees' claims of national origin discrimination (in particular, an English-only rule), retaliation, and constructive discharge. The Commission's complaint seeks class-wide relief and was filed on behalf of fifteen Hispanic charging parties and other similarly situated individuals.

BEI noticed the first depositions of five charging parties, with intent to schedule additional depositions of the remaining charging parties and other similarly situated individuals. On October 19, 2001, the Commission wrote defendant's counsel, requesting that BEI provide a federally certified interpreter for the depositions.

> In order to ensure the rights of the above claimants in these depositions and to ensure that the depositions are an efficient use of the parties' time, the Commission will attend the depositions with a qualified, federally certified interpreter available to the claimants. We insist that any testimony of the individuals who requested interpretation be conducted through the interpreter and will oppose any attempt to proceed otherwise. As the Commission believes that it is Defendant's responsibility in this case to provide an interpreter for depositions noticed by the Defendant, the Commission reserves its right to seek reimbursement of costs for the interpreter at the appropriate time.

[Doc. # 24, Ex. A].

BEI filed its Motion for Protective Order on October 25, 2001. [Doc. # 24].

DISCUSSION

BEI concedes that "a non-English speaking person is entitled to give a deposition in the language that he speaks and to have an interpreter assist him in that regard. The same right probably exists for a person whose English skills are so seriously limited that he cannot possibly understand the bulk of the questions posed to him." [Doc. # 25 at 6]. However, BEI contends that "[n]either of these situations is present here." *Id.*

In support of its claim that the charging parties have "adequate command" of English, BEI provided affidavits from its supervisors and its benefits administrator stating, in relevant part, that "they are absolutely certain that each of the charging parties is comfortably bilingual and perfectly capable of understanding questions posed to them in English and answering those questions in English." [Doc. # 25 at 8].

Nevertheless, at oral argument, BEI admitted that the question of fact regarding the English proficiency of the charging parties is an ultimate issue in this case.[2] Defendant argued that the Commission has an interest in "staking out" positions on proficiency and that seeking an interpreter is a litigation strategy. BEI argued that the presence of a federally certified interpreter will be costly and lengthen the depositions. BEI believes that the deponents will avail themselves of the opportunity to use the interpreter if he/she is present, and that a deponent's response, "I don't understand," will open the door for the interpreter to participate in the proceeding. However, BEI's counsel stated he didn't know how he could challenge the witness if he/she stated "I don't understand." Strategically, BEI admitted, this would be problematic.

***2** The Commission asserts that "deponents' limited English proficiency requires that they have assistance of a federally certified interpreter at their depositions." *Id.* at 11.[3] The Commission represented that "each and every one of the charging parties and claimants in this case either does not speak English or his or her primary language is Spanish."[4] [Doc. # 32 at 9]. The Commission contends that none of the charging parties "speak English with the level of fluency required for a deposition." *Id.* at 10. Few of the charging parties have a formal education; most obtained a GED and spent most of their lives in Puerto Rico. The Commission insists that the charging parties need the full range of language to articulate their claims and respond to questions under oath. Without an interpreter, the Commission argues the depositions will result in a choppy record and unreliable responses that will disadvantage both plaintiff and defendants.[5]

The Commission believes that the issue in the case is whether the charging parties have the English language proficiency *necessary* to do their jobs. While it is a disputed issue of fact whether the charging parties speak proficient English,[6] the Commission contends it is not a material issue and that the only claim that requires evidence of language skill is the disparate impact claim.[7] The Commission further argues that BEI employees do not need to speak while doing their jobs. In other words, their jobs do not require English proficiency at all. *Id.* at 9.

In support of the request for an interpreter, the Commission provided the affidavits of Elizabeth A. Marcus, lead investigator; Patricia M. Araujo, former bilingual investigator; Jeannette M. Jimenez, bilingual investigator; and Helen C. Rivera, bilingual paralegal; all assigned to the investigation of the EEOC's charges against defendants. [Doc. # 32, Ex. 4]. All of these affiants represent that they have had extensive personal interaction with the charging parties and unequivocally state that "without the services of an interpreter many of the deponents will be unable to understand more than basic questions, will be unable to express themselves fully and will not be able to provide adequate responses to questions asked and answered only in English." [Aff. Araujo ¶ I ("failure to provide an interpreter will prevent the deponents from testifying freely and openly at the depositions and will likely frustrate the deposition process."); Aff. Jimenez ¶ H; Aff. Rivera ¶ G]. Ms. Jimenez stated that

> In preparation for the making of this Affidavit I informally administered orally over the phone, some "voir dire" type questions to each of the deponents who were scheduled for deposition by BEI to determine whether an interpreter would be necessary-The questions I asked were taken from the following basic questions:
>
> (1) What is your name?; (2) Where do you live; (3) Are you married or single?; (4) What is your spouse's name?; (5) Do you have any children?; (6) How old are they?; (7)Where do they go to school?; (8) What kind of work do you do?; (9) Where did you go to school?; (10) Describe your formal education; (11) Did you study English in School?; (12) How far did you go in school?; (13) Can you read and write in Spanish?; (14) How long have you lived in the U.S.?; (15) How long did you live in Puerto Rico?; (16) Do you drive a car?; (17) How did you get to work yesterday?; (18) What language do you speak to your attorney?; (19) Have you previously used interpreters?
>
> ***3** In response to the individually applicable questions, Ms. Anjujar and Ms. DeJesus were unable to understand many of the questions asked, could not answer the questions with any detail and/or confused the questions asked and provided an inappropriate response to the questions. Where they did answer the questions, many of their responses were limited to "yes or no." Mr. Alvarez also had difficulty answering these questions, missing over a quarter of the questions asked either because he stated he did not understand the questions or because he responded to the question inappropriately. Mr. Acosta was able to answer most (all but 2 of the questions asked) of the questions but had difficulty answering the questions with any detail and often confused the question being asked—providing the answer to the question that was not asked. Ms. Berrios was able to respond to all the questions asked appropriately, although it was clear that her primary language is Spanish by her accent, word choice and grammatical errors.

[Aff. Jimenez ¶ F].

BEI provided that affidavits of Sallyanne Bailey, BEI Accounts Payable Manager [Doc. # 26]; Jimmy Adorno, BEI Nightshift Warehouse Manager [Doc. # 27]; Nelson Marquez, BEI Warehouse Supervisor [Doc. # 28]; Fabian Pineros, BEI Operations Manager [Doc. # 29]; Tom Buonocore, BEI Warehouse Supervisor [Doc. # 30]; and Ross Smith, BEI Assistant Warehouse Manager [Doc. # 31]. These BEI employees all know all or several of the claimant parties through their interaction at BEI and aver that the claimant parties have the English language skills to understand questions posed in English and to answer responsively in English without a translator.

28 U.S.C. § 1827(d)(1) states,

> The presiding judicial officer, ... shall utilize the services of the most available certified interpreter, ... in judicial proceedings instituted by the United States, if the presiding judicial officer determines on such officer's own motion *or on the motion of a party that such party* (emphasis added) (including a defendant in a criminal case), or a witness who may present testimony in such judicial proceedings—
>
> (A) *speaks only or primarily a language other than the English language* (emphasis added); ... so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony.

Defendant concedes that the Court Interpreters Act applies to civil proceedings initiated by the United States. 28 U.S.C. § 1827(j). However, BEI argues that the Act applies only to the Government's adversaries, the subjects of a judicial proceeding, not the Government's own clients. [Doc. # 25 at 10]. Defendant cites *Tagupa v. Odo,* 843 F.Supp. 630 (D. Hawaii 1994) for this proposition.[8] The *Tagupa* Court identified the issues presented as "whether an individual of 'Native Hawaiian' ancestry has a right to use the Hawaiian language in a civil judicial deposition regardless of their proficiency in English." Clearly, *Tagupa* is distinguishable from this case as the party requesting the assistance of an interpreter in *Tagupa* was a "practicing member of the Hawaii bar who is fluent in English and fully aware of the important role depositions play in ascertaining facts and identifying issues for trial." *Id.* The Court held, "plaintiff's contention that the Hawaii Constitution prohibits this Court from mandating that Mr. Tagupa give his deposition testimony in English is rejected." *Id.*

***4** The Commission states it is

> charged with the administration, interpretation and enforcement of Title VII, as amended, is an Agency of the United States and is expressly authorized to bring this action by federal law. *See* § 2000e–5(f)(l) and (3). Thus, this action is a judicial proceeding instituted by the United States which triggers the application of the Court interpreters Act and requires the availability of federally certified interpreters for the limited English proficient witnesses in judicial proceedings in this case.

[Doc. # 32 at 14].

Besides addressing the charging parties' non- or limited-English proficiency, the Commission further provided an affidavit from Dr. Roseann Duenas Gonzalez. Dr. Gonzalez asks the Court to consider that the charging parties have limited educational experiences in their primary language, Spanish; most have no direct education in English, and the types of positions they hold would not require any great degree of English proficiency to meet job requirements. [Aff. Dr. Gonzalez, Doc. # 32, Ex. 5 at 9–10]. Significantly, Dr. Gonzalez represents that, "according to the academic literature, even individuals who appear to possess a high degree of English fluency, in a situation that causes anxiety or fear such as giving testimony, will revert to the native or mother tongue." *Id.* at 10. "While some limited-English speakers can communicate in home language (language of a nontechnical nature), they cannot function in the complex register used in the courtroom." *Id.* at 11.

In reply, BEI states that "[t]he essential question-indeed, the heart of the present dispute-is whether these individuals, for whom Spanish is their primary or, more accurately, their native language, are nevertheless, proficient enough in English to be deposed in English without assistance from an interpreter." [Doc. # 33 at 2]. BEI dismisses Dr. Gonzalez's affidavit: "not only has she failed to talk to any of the subject individuals, she relies on facts for which the record offers not an iota of support." [Doc. # 33 at 9].

The Court has carefully weighed the arguments and affidavits presented and concludes that a court-certified interpreter should be present at the depositions of the claimant parties and similarly situated individuals when requested.

At oral argument, defendant indicated that BEI seeks to conduct each deposition without translation to show the claimant party's English proficiency. The Court believe that the mere presence of a court certified interpreter will not prevent defendant from making this record.

Where a claimant party understands a question in English, there will be no reason to request the interpreter's assistance. On the other hand, when a claimant party states he/she does not understand a question, it will be up to the defendant to ascertain whether this is a request for the assistance of an interpreter or a request to rephrase the question. A question may be withdrawn or the interpreter may translate the question into Spanish. The deponent may answer in English first and/or respond in Spanish—that will depend upon the individual and the question and cannot be mandated. Defendant may withdraw a question at any time. Each party is responsible for making the record it chooses. The Commission can create its own record through cross-examination.

***5** With discussion and with further articulation of defendant's goals in advance of the deposition, the parties should be able to work this out. The parties may notify the Court in advance of the dates for the depositions and may contact the Court if any issues arise. The parties may contact the Court to schedule a conference call to discuss the implementation of this ruling.

CONCLUSION

Accordingly, defendant's Motion for Protective Order [Doc. # 24] is DENIED. The Commission may provide a federally certified interpreter at its own expense at the depositions of the claimant parties and similarly situated individuals when requested. [Doc. # 32 at 19–20].

This is not a recommended ruling. This is a discovery ruling and order which is reviewable pursuant to the "clearly erroneous" statutory standard of review. 28 U.S.C. § 636(b)(1)(A); Fed.R.Civ.P. 6(a), 6(e) and 72(a); and Rule 2 of the Local Rules for United States Magistrate Judges. As such, it is an order of the Court unless reversed or modified by the district judge upon motion timely made.

Footnotes

[1] Considered were BEI's Motion for Protective Order [Doc. # 24]; Memorandum of Law [Doc. # 25]; Affidavit of Sallyanne Bailey [Doc. # 26]; Affidavit of Jimmy Adorno [Doc. # 27]; Affidavit of Nelson Marquez [Doc. # 28]; Affidavit of Fabian Pineros [Doc. # 29]; Affidavit of Tom Buonocore [Doc. # 30]; Affidavit of Ross Smith [Doc. # 31]; EEOC's Memorandum in Opposition [Doc. # 32]; and BEI's Reply Brief. [Doc. # 33].

[2] At oral argument, the Court asked the parties if a factual determination were required to determine whether the charging parties are proficient in English in order to decide the Motion for Protective Order. The parties disagreed.

[3] The Commission asserts that, "BEI offers the prospect of a costly (and truncated) deposition process which will require the parties to reschedule depositions that have not produced a fair and accurate examination of the deponents." [Doc. # 32 at 7]. "If depositions were to proceed without an interpreter available to the deponents, the Commission could arguably seek sanctions for lost time and expense by the frustration of the fair examination of the deponents." *Id.* n. 7 (citing Fed.R.Civ.P. 30(d)(3).

[4] At oral argument, the Commission offered to provide, on request, affidavits from the charging parties regarding their proficiency in addition to the affidavits already provided [Doc. # 32, Ex. 4, 5].

[5] For example, the Commission predicts that if asked, "How did the English–Only policy affect you?" a deponent might answer, "Bad ."

[6] The Commission vigorously asserts that the terms "speaks English," "reads English," and "writes English," are not adequately defined. [Doc. # 32 n. 11].

[7] The EEOC states that this Title VII action is more than an English–Only case, as the complaint also charges defendants with national origin discrimination, disparate treatment and impact, harassment, retaliation and constructive discharge.

[8] Citing no authority, BEI also argues that a civil deposition is not a "judicial proceeding" contemplated by the act. [Doc. # 25 at 10]. The Court disagrees. *See Whelchel v. Washington,* 232 F.3d 1197, 1209 (9th Cir.2000) (holding that a deposition is a judicial proceeding) (citing, Black's Law Dictionary 849 (6th ed.1990); *Alexander v. FBI,* 186 F.R.D. 21, 52 (D.D.C.1998) ("A deposition is an extension of a judicial proceeding.").