

**UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

AMERICANS UNITED FOR)	CIVIL NOS.	4-03-CV-90074 RP-TJS
SEPARATION OF CHURCH AND)		4-02-CV-90447 RP-TJS
STATE, CAROL DELP, ARDENE)		4-03-CV-90101 RP-TJS
McKEAG and DOROTHY REDD,)		
)		
Plaintiffs,)		
vs.)	ORDER	
)		
PRISON FELLOWSHIP MINISTRIES, et)		
al.,)		
)		
Defendants.)		

Before the Court is Plaintiffs' Expedited Motion for Leave to Take Two Additional Depositions and Compel Production of Related Documents (Clerk's No. 251), filed August 23, 2005. A memorandum in support of that motion was filed at the same time, as was a Declaration of Alex J. Luchenitser, one of plaintiffs' attorneys, to which were annexed Exhibits A through O inclusive.

Defendants, State of Iowa, Prison Fellowship Ministries, Inc. (PFM) and InnerChange Freedom Initiative, Inc. (IFI) filed a Joint Resistance to Plaintiffs' Expedited Motion on August 29, 2005 (Clerk's No. 254). Plaintiffs then filed their reply brief in support of their motion on August 30, 2005 (Clerk's No. 255).

The Court conducted a hearing on the pending motion at the United States Courthouse, Des Moines, Iowa, on September 1, 2005. Alex J. Luchenitser, Heather L. Weaver and Dean Stowers appeared for plaintiffs; Gordon Allen, Deputy Iowa Attorney General, and Loraine Wallace, Assistant Iowa Attorney General, appeared on behalf of the State of Iowa; Anthony F. Troy, Robert A. Angle, Megan C. Rahman and Brent R. Appel appeared on behalf of PFM and IFI.

On April 29, 2005 (Clerk's No. 212), District Judge Robert W. Pratt filed a Memorandum and Order on Cross Motions for Summary Judgment, granting in part and denying in part those pending motions. Within that memorandum, Judge Pratt set forth a comprehensive recitation of the factual procedural background of this case. That discussion will not be repeated in this order.

It is in the context of Judge Pratt's order, however, that plaintiffs, in part, seek the expedited relief now at issue.

Stated succinctly, because the parties have exhausted the maximum number of depositions that the Court has allowed in this case plaintiffs seek permission to take two additional depositions pursuant to Fed. R. Civ. P. 30(b)(6). One of those depositions is sought from an appropriate person with the Iowa Department of Corrections (IDOC), and related to the IDOC's issuance in 2005 of a Request for Proposal and identified as "RFP # FY05-FY06 Values Based Pre-Release Program" coupled with proposed inquiries into related subject areas.

The second deposition sought is of a nonparty, Emerald Correctional Management (Emerald), which apparently submitted a proposal to IDOC in June 2005 for a Values Based Pre-Release Program. Emerald is located in Scott, Louisiana, located approximately 140 miles west of New Orleans, Louisiana.

Additionally, during oral arguments, one of plaintiffs' counsel indicated that in addition to seeking the Rule 30(b)(6) deposition from Emerald, it "might be necessary" to take the deposition of a former Emerald employee now living in the state of Florida. Because that person is no longer employed by Emerald, any deposition sought would not be pursuant to Rule 30(b)(6); it would require, likely, subpoena of that potential witness in the state of Florida.

As the result of the 2005 Request for Proposal issued by IDOC, both IFI and Emerald submitted bids to operate the program. IDOC awarded the contract to IFI. Plaintiffs now want to inquire further of both IDOC and Emerald regarding the bidding process and related issues, and in particular whether the programming proposed by Emerald was “secular or religious,” and the amount of time Emerald would be required to “get a program up and running in Iowa if a contract were to be awarded to them (sic).”

Discovery closed in this case on May 21, 2004. See Court’s order of April 23, 2004 (Clerk’s No. 87). It is plaintiffs’ contention that subsequent to the close of discovery, and apparently because of the ongoing supplemental discovery responses by the State of Iowa, there are new factual developments that mandate these additional depositions.

In Judge Pratt’s ruling on cross-motions for summary judgment (Clerk’s No. 212 at page 21), he noted “A factual matter over which the parties vigorously disagree is whether the state government engaged in a neutral and above-board selection process for a values-based program service provider, and whether the process still remains open to other service providers.” The order went on to state, *id.*, “Without question, the issue of secular purpose is a genuine issue on which a trier of fact could reasonably base a decision in favor of either party on whether a constitutional violation has occurred.” (citation omitted)

The Court grants in part and denies in part plaintiffs’ motion for leave to take two additional depositions. That part of its motion seeking to take an additional deposition from an employee of IDOC is granted. This deposition is being allowed in large part because the State of Iowa does not resist the taking of that deposition, and in fact notes to the Court that its ongoing supplemental discovery will provide the necessary documents for that deposition.

The Court denies, however, plaintiffs' request to take a Rule 30(b)(6) deposition from Emerald. It appears to the Court that the proposed discovery from that organization is based in large part upon a desire by plaintiffs to engage in opinion testimony that would be highly speculative and conjectural on the part of Emerald. Added to this is the very subjective nature of the requested discovery from Emerald, in particular seeking Emerald's own conclusions and opinions regarding whether its programming is secular or religious; and the quality of its programming. The fact plaintiffs might need to take, in addition to the Rule 30(b)(6) deposition from Emerald, a deposition from one of its former employees now located in Florida, also convinces the undersigned magistrate judge that this could turn into a not-so-limited discovery exercise.

Thus, the request to take two depositions really becomes a request to take three depositions. The specter of additional discovery and further depositions looms. Trial in this matter is now set for October 24, 2005. That trial date is a firm setting and resulted from the removal of this case from the Court's trial docket approximately one year ago to allow the Court to have sufficient time to rule on the parties' respective dispositive motions.

The fact remains, Emerald is in the context of this motion, a "disappointed" bidder with IDOC. To now open up that subject almost on the eve of trial invites further calamity.

For the same reasons, the Court is denying plaintiffs' Motion to Compel Production of Related Documents. This portion of plaintiffs' expedited motion arises from the serving of plaintiffs' supplemental discovery requests (arising out of new factual developments) to all defendants pursuant to Fed. R. Civ. P. 33 and Fed. R. Civ. P. 34, on or about August 5, 2005, along with a notice of a 30(b)(6) deposition directed to IDOC. See Exhibit H to the Declaration of Alex J. Luchenister.

First of all, plaintiffs did not seek leave of Court to serve additional discovery requests upon any of the defendants. While the Court recognizes the expedited nature of plaintiffs' requested relief, there has been no showing that the ongoing supplemental production of documents by defendants has been in any way deficient.

Plaintiffs simply have moved things out of sequence, and in technical violation of the order of this Court, and the Federal Rules of Civil Procedure.

The Court is satisfied that the taking of a deposition pursuant to Rule 30(b)(6) from Emerald is not designed to lead to the discovery of admissible evidence; it is more likely designed to lead to production of opinion testimony, and to create a scenario in which pretrial management will be thoroughly frustrated. This discovery is not necessary pursuant to Fed R. Civ. P. 26(b)(1).

The Court also is going to limit plaintiff's Rule 30(b)(6) deposition of an IDOC employee regarding these newly produced discovery matters to a five-hour period. This is consistent with plaintiffs' counsel's declarations in the moving papers that the two proposed Rule 30(b)(6) depositions could be accomplished in one day.

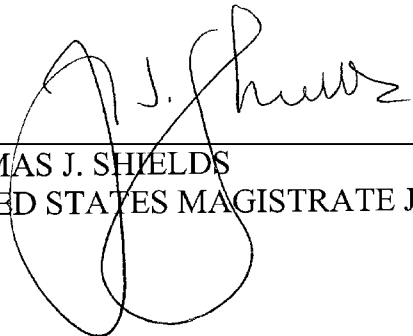
Given the fact that the parties have now briefed and argued substantial factual and legal positions in this case, and are very conversant with discovery, a five-hour limit for this deposition is entirely reasonable.

For the foregoing reasons, Plaintiffs' Expedited Motion for Leave to Take Two Additional Depositions and Compel Production of Related Documents is granted insofar as plaintiffs will be permitted to take an additional Rule 30(b)(6) deposition from a designated individual by the Iowa Department of Corrections; it is denied as to plaintiffs' request to take a deposition pursuant to Fed. R. Civ. P. 30(b)(6) from Emerald Correctional Management; and it is denied as to Plaintiffs'

incorporated Motion to Compel Production of Related Documents Pursuant to Supplemental Interrogatories and Requests for Production of Documents served on defendants on or about August 5, 2005.

IT IS SO ORDERED.

Dated this 2nd day of September, 2005.



THOMAS J. SHIELDS
UNITED STATES MAGISTRATE JUDGE