UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA,

Plaintiff,

– against –

ALTITUDE EXPRESS, INC., d/b/a Skydive Long Island, and RAY MAYNARD,

Defendants.

Index No.: CV-10-4334 (JFB)(ARL)

DECLARATION OF SAUL D. ZABELL IN OPPOSITION OF REQUEST FOR THE ADMISSION OF EXPERT TESTIMONY AND PAYMENT OF PREPARATION FEES OWED BY DEFENDANT PREPARATION [*SIC*]

SAUL D. ZABELL, ESQ., an attorney duly admitted to practice before this Court, hereby affirms under penalty of perjury as follows:

1. I am a managing principal of Zabell & Associates, P.C., and attorney for Defendants in the above-captioned case. I submit this declaration in opposition of Plaintiff's Request for the Admission of Expert Testimony. For the reasons set forth in the accompanying affirmation and upon the documents attached hereto, this motion should be denied in its entirety.

EXHIBIT

2. Attached hereto as "Exhibit A" is a true and accurate copy of Kenji Yoshino's written expert report.

3. Attached hereto as "Exhibit B" is a true and accurate copy of a May 18, 2012 letter sent to Gregory Antollino, Esq.

4. Attached hereto as "Exhibit C" is a true and accurate copy of a decision in Reit v. Post Properties, Inc., 09 CIV. 5455 RMB KNF, 2010 WL 4537044 (S.D.N.Y. Nov. 4, 2010).

5. Attached hereto as "Exhibit D" is a true and accurate copy of a decision in E.E.O.C. v. Johnson & Higgins, 1999 WL 32909 at *2 (S.D.N.Y. 1999)

6. Attached hereto as "Exhibit E" is a true and accurate copy of a decision in Flaherty v. Connecticut, 2006 WL 4475013 (D. Conn. 2006)

7. Attached hereto as "Exhibit F" is a true and accurate copy of a decision in McCulloch v. Hartford Life & Acc. Ins. Co., 2004 WL 2601134

Dated: Bohemia, New York
August 3, 2012

By: _____

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EXHIBIT A

Kenji Yoshino
c/o New York University School of Law
40 Washington Square South
New York, NY 10012

Gregory Antollino, Esquire
Attorney at Law
18-20 West 21st Street, Suite 802
New York, NY 10010

RE: Zarda v. Altitude Express

May 17, 2012

Dear Mr. Antollino:

You have asked me to render a written opinion with respect to the above-mentioned employment discrimination case. With this report, I enclose my curriculum vita. I have not previously been deposed or testified as an expert. The fee for my services is $400 per hour.

As my vita indicates, I have done significant research in the field of civil rights, particularly focusing on gay identity and gender identity. One of my contributions to the field is the book *Covering: The Hidden Assault on Our Civil Rights*, published in 2006. This book received numerous awards, including the Randy Shilts Award for Gay Non-Fiction; the Myers Outstanding Book Award from the Gustavus Myers Center for the Study of Bigotry and Human Rights; and the Stonewall Honor Book Award. The book has been assigned as a "first-year common read" book at four campuses, meaning that it has been read by all incoming freshmen at those colleges. My work on civil rights has also been published in the *Columbia Law Review*, the *Harvard Law Review*, the *Stanford Law Review*, and the *Yale Law Journal*. I have also published in more popular venues, such as the *L.A. Times*, the *New York Times*, and the *Washington Post*. One major theme throughout my work is that law's contribution to civil rights must be complemented by sociological, psychological, and cultural perspectives. I focus a great deal on non-legal disciplines in my work, as my book *Covering* exemplifies.

To prepare this report, I relied on the following materials: (1) the video record of the skydiving jump in question; (2) the audio record of Raymond Maynard's termination of Donald Zarda; (3) the Amended Response to Demand for Interrogatories, dated April 7, 2011; the deposition transcript of the testimony of Rosana Orellana, dated November 9, 2011; (4) the deposition transcript of the testimony of David Kengle, dated November 9, 2011; (5) the deposition transcript of the testimony of Richard M. Winstock, dated December 8, 2011; (6) the deposition transcript of the testimony of Raymond Maynard, dated December 14, 2011; and (7) the Supplemental Reponse to Demand for Interrogatories, dated January 31, 2012.

Background

Donald Zarda, a skydiving instructor, was terminated by his employer, Raymond Maynard of Altitude Express, Inc. (doing business as Skydive Long Island). Maynard ended Zarda's employment after receiving a complaint from David Kengle, the boyfriend of one of Zarda's passengers in a tandem jump. The passenger, Rosana Orellana, made two complaints about Zarda to Kengle. She alleged that (1) while preparing for the jump in the plane, Zarda touched her hip and rested his head on her neck in a manner that led her to believe he was "sexually harassing" her, Orellana Deposition at 89; and (2) during the jump, Zarda stated that he was gay and that he had recently ended a relationship with another man. Kengle repeated these complaints to Maynard. Maynard terminated Zarda on these grounds.

Opinion

Based on my review of the above-mentioned materials, I am of the opinion that the Raymond Maynard's termination of Zarda was based on both sex stereotyping and disparate treatment on the basis of sexual orientation.

1. The immediacy with which Maynard credited the harassment allegation reflects sex stereotyping

As psychology professor Madeline Heilman defines it: "A stereotype is a set of attributes ascribed to a group and believed to characterize its individual members simply because they belong to that group. In the case of sex stereotypes, these are attributes which are imputed to individual men and women simply by virtue of their sex." Madeline E. Heilman, Sex Discrimination and the Affirmative Action Remedy: The Role of Sex Stereotypes, in Women in Corporate Management 877, 879 (1997). Heilman elaborates: "Stereotyping is at its core a categorization process, and can be a work-saving cognitive mechanism . . . . The problem is that stereotypes about groups of people often are inaccurate or they are overgeneralizations which do not apply to the individual group member who is targeted." Id. In those cases, "stereotypes become the basis for faulty reasoning, leading to biased feelings and actions, disadvantaging (or advantaging) others not because of what they are like or what they have done but because of the groups to which they are deemed to belong." Id.

The assumption that all men will be sexually attracted to women, and prone to sexually harassing them, is a sex stereotype. In Sassaman v. Gamache, 566 F.3d 307 (2d Cir. 2009), the Second Circuit acknowledged that a heterosexual individual terminated for alleged sexual misconduct had a viable claim of discrimination based on sex stereotyping. In that case, the employer David Gamache terminated employee Carl Sassaman after a woman accused Sassaman of sexual harassment. In terminating Sassaman, Gamache stated: "you probably did what she said you did because you're male." Id. at 313 n.3. The court observed that "Gamache appears to have defended his decision to credit [the complainant] Brant's allegations of sexual harassment by pointing to the propensity of men, as a group, to sexually harass women. When employment decisions are based on invidious sex stereotypes, a reasonable jury could infer the existence of

discriminatory intent." Id. at 313. The court also noted that "[t]he allegation that defendants made minimal—if any—efforts to verify Brant's accusations could be construed by a reasonable jury as further evidence that Sassaman's forced resignation occurred under circumstances giving rise to an inference of discriminatory intent." Id. at 314.

In this case, employer Maynard terminated Zarda with similarly minimal efforts to assess the accusations against Zarda, raising the inference that he engaged in sex stereotyping. Maynard accepted Kengle's account of the jump in an uncritical manner.[1] In describing his termination of Zarda, Maynard testified: "We discussed the complaint from the gentleman about his girlfriend and that he made his girlfriend feel very uncomfortable with the way he was touching her on her legs, the way he was putting his head on her shoulder and just the girl was very, very uncomfortable for the entire jump and she even thought that maybe he was hitting on her and he was covering up this stuff by telling her that he was gay." Maynard Deposition at 196. Yet Maynard made no attempt to investigate this charge either with Orellana or with instructors on the plane who were witnesses to the interchange between Orellana and Zarda. Id. at 198-99. For at least three reasons, the claim that Zarda made sexual advances on Orellana is difficult to credit. In light of those reasons, the swiftness with which Maynard jumped to the conclusion that Zarda had made those advances reflects sex stereotyping on Maynard's part.

First, even assuming that Zarda touched Orellana's hips and placed his head on her shoulder, such actions were professionally justified by the need to ensure the safety of Orellana and Zarda. Richard M. Winstock, Chief Instructor for Altitude Express, testified that both actions are standard procedures for tandem jumps. Winstock observed: "If I were to ask a tandem student to put a harness on while I held it, they would basically just step into two round circles. I would pull it up to their inner groin or thigh and tighten the straps." Winstock Deposition at 15. Winstock further testified that skydiving requires the instructors to put their heads very close to the heads of their passengers: "You're strapped pretty closely. I can say that some instructors prefer the head—the passenger's head on the left side, some prefer it on the right side." Id. at 50. He continued: "Virtually no instructors that I know of like it right in front of them, and the reason for that is when the parachute opens, the head can literally knock you out or crack your teeth. Usually the passengers' head is to the right or left. When that happens, it causes you to put it a little closer to their head." Id.

Maynard himself acknowledged that an instructor would have to touch a passenger on the hips and to hold his head close to the passenger's head. After establishing that an instructor was "attached" to the passenger at the hips, plaintiff's counsel asked whether safety would require the instructor "to touch the attachments and see that they were in place." Maynard Deposition at 251. Maynard responded "Correct." Id. After reviewing Winstock's testimony about head position, plaintiff's counsel asked: "And so, therefore, would it be a fair statement that the mouth is very close to the ear on a tandem jump with a passenger and an instructor?" Maynard Deposition at 259. Maynard responded: "At times." Id.

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[1] Maynard relied on Kengle's account of the jump without making any effort to verify Orellana's accusations. Maynard Deposition at 185. When asked whether Kengle could have been lying to get a refund on his jump, Maynard responded that Kengle had "no reason to lie." Id. However, when asked whether Kengle, then an unemployed waiter, had cashed the refund check that Maynard had sent him, Maynard answered in the affirmative. Id. at 185-86.

The video record of the jump also shows no impropriety on Zarda's part. Perhaps for this reason, Maynard refused to release this videotape to Zarda when he requested it. Maynard Deposition at 185. After Maynard was required to surrender the videotape, it was shown during deposition to Kengle, Maynard, Orellana, and Winstock. Kengle and Maynard both alleged that Zarda touched his mouth in a manner that Kengle called "inappropriate" and Maynard alluded to as "creepy." Kengle Deposition at 54; Maynard Deposition at 281. Yet both Kengle and Maynard were tentative in these assessments. Kengle stated that the gesture had to be understood "in context," and Maynard stated: "I don't know what that meant at all." Kengle Deposition at 54; Maynard Deposition at 200. Orellana and Winstock detected no improper behavior. Orellana Deposition at 94; Winstock Deposition at 72. None of the witnesses detected any inappropriate touching whatsoever in the video recording.

Second, Orellana's deposition testimony suggested a susceptibility to misinterpret Zarda's actions. Orellana testified: "I'm claustrophobic, I need my own space." Orellana Deposition at 93. Although he questioned whether she was claustrophobic in a clinical sense, Kengle corroborated that Orellana does not like to feel "boxed in." Kengle Deposition at 58-59. Yet as Winstock testified, tandem skydiving means that "we're violating [the passenger's] personal space to make them safe." Winstock Deposition at 82-83. Orellana, who had never been skydiving before, could well have been particularly sensitive to having her personal space invaded in this manner.

Maynard correctly stated that it is explained to all passengers that "there will be close contact with another person." Maynard Deposition at 18. Paragraph Thirteen of Altitude Express's release form warns passengers that they will be in "close proximity" with their instructors.[2] Orellana signed the entire waiver and initialed Paragraph Thirteen. Orellana Deposition at 36. However, she stated that she "probably didn't read" beyond the first page of the waiver, which did not contain Paragraph Thirteen. Id. at 36. Asked why she did not read the full waiver, she answered: "I'm not gonna read a packet when I go skydiving." Id. at 37.

Of course, Orellana did not sign away her right to object to inappropriate touching. Yet the record reveals no such contact. What the record does reveal is why Orellana might have viewed professional contact as inappropriate touching—namely, her heightened need for personal space and her failure to acquaint herself with the warning that this personal space would be invaded for her safety. During his deposition, Maynard was asked what he would say to a person who said "I don't like to be touched, do you think I should go up on a skydive?" Maynard Deposition at 17. Maynard responded: "I would say, then maybe you should not skydive." Id.

The final reason to question whether Zarda made sexual advances on Orellana is that Zarda is gay. Zarda's sexual orientation was common knowledge at Altitude Express. As Winstock testified: "A good portion of the instructors, if not all of them, and all video guys and coaches and everyone that works there referred to Don as gay Don." Winstock Deposition at 32.

[2] Paragraph 13 read: "If I'm making a student jump, I understand that I will be wearing a harness which would need to be adjusted by the jump master and my jump is a tandem jump. I understand that the tandem master will attach my harness to his and that this will put my body in close proximity to tandem master. I specifically agree to this physical conduct between the tandem master and myself." Orellana Deposition at 71.

In his deposition, Maynard affirmed that he knew Zarda was gay. Maynard Deposition at 249. When asked whether it was logical, in light of Zarda's sexual orientation, to assume that Zarda was making sexual advances on Orellana, he responded "I don't know." Maynard Deposition at 197. In other words, Maynard credited Kengle's allegation that Zarda had made sexual advances on Orellana over the common knowledge that Zarda was gay.

When confronted with the allegation that Zarda had made sexual advances on a passenger, Maynard seized on that account despite significant evidence to the contrary. This evidence included (a) the fact that Zarda's actions were professionally justified; (b) the fact that Orellana was prone to misconstruing Zarda's actions due to her heightened need for personal space and her inattention to the warning that tandem skydiving would intrude on that space; and (c) the fact that Zarda's sexual orientation was in tension with a sexual advance on an individual of the opposite sex. Maynard's systematic disregard of this evidence suggests that he read Zarda's actions through a frame in which men accused of sexual harassment are presumed to have engaged in it. This is a sex stereotype.

2. Zarda's Disclosure of his Sexual Orientation and Past Relationship Were Treated As Inappropriate, When Similar Disclosures By His Heterosexual Colleagues Were Not.

The second ground on which Maynard terminated Zarda was that Zarda revealed his sexual orientation and, in Maynard's terms, spoke about his "personal life" and "escapades" with Orellana. Maynard Deposition at 236. Maynard stated that he was not terminating Zarda on the basis of sexual orientation. Id. However, any examination of what Maynard considered inappropriate behavior demonstrates a double standard on the basis of sexual orientation.

When asked what Zarda had revealed, Orellana clarified: "I remember him telling me, I hope I didn't make you uncomfortable on the plane, I'm gay, and I remember him telling me that he had recently broken up with his boyfriend, and that's all I remember from the conversation." Orellana Deposition at 50. Zarda did not gratuitously disclose his sexual orientation to Orellana. Rather, he stated that he was gay because he perceived that Orellana mistakenly believed that he had "sexually harass[ed]" her. Orellana Deposition at 89. Orellana acknowledged that Zarda connected the disclosure of his sexual orientation to his perception that she was uncomfortable. Orellana Deposition at 51. Moreover, according to Orellana, Zarda did not discuss any of his personal "escapades," but simply stated that he had ended a relationship with another man. Given that Orellana was implicitly calling his sexual orientation into question, this statement about his past relationship may be viewed as an attempt to bolster his statement that he was gay.

Maynard stated that this was not a case of sexual orientation discrimination because "if Richie Winstock was telling some chick of his escapades, he would be in the same situation." Maynard Deposition at 226. However, as demonstrated above, Zarda was not discussing his "escapades," but rather his identity and one past relationship. So the proper question would be whether the heterosexual Winstock would be able to speak about a personal relationship without that relationship being misdescribed as an "escapade." The answer, of course, is yes.

Defendant's attorney asked Winstock whether it was ever appropriate to discuss private relationships with passengers. Winstock testified that he would do so in certain circumstances:

> Over the years, I personally find that women, female passengers, usually older, when they're extremely nervous, and [they're] mothers, I have to calm down my passengers, especially when they're extremely nervous I have to, otherwise it's a safety issue, and like I said earlier, our job is to land safely, and I want to home to my three kids. Every passenger is different. So when you're dealing with an older woman who is a mother, I say, I'm married, I have three children, I want to go home to my family, it's okay.

Winstock Deposition at 109-10. In other words, Winstock stated that he would bring up his relationship status only when it would serve a professional purpose—in this case calming the nerves of a passenger in the interests of safety.

Just as Winstock soothed nervous mothers by saying that he had a wife and children, Zarda negated Orellana's fears that he had made a sexual advance on her by saying that he was gay and had recently ended a relationship with another man. Neither instructor introduced his relationship history for gratuitous reasons; both adduced this history to ensure that their passengers' agitation would not become a safety issue. Yet when Zarda used a reassurance strategy analogous to that used by Winstock, Zarda was terminated.

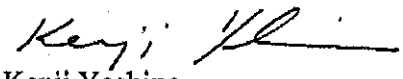
The academic and popular literature on gay identity amply demonstrates that gay individuals are permitted much less leeway than straight individuals to speak of their identity or their relationships. Psychologist Gregory M. Herek notes that "[s]elf-disclosing gay people are likely to be regarded as inappropriately flaunting their sexuality, whereas heterosexuals' self-disclosures about their sexual orientation are usually considered not noteworthy because everyone is presumed to be heterosexual." Gregory M. Herek, Why Tell If You're Not Asked? Self Disclosure, Intergroup Contract, and Heterosexuals' Attitudes Toward Lesbians and Gay Men, in Out in Force: Sexual Orientation and the Military (Gregory M. Herek, Jared B. Jobe, Ralph M. Carney eds. 1996). Bruce Bawer similarly notes: "most heterosexuals are constantly alluding to their personal relationships without even realizing it, let alone considering it inappropriate; they only notice it, and consider it inappropriate, when a homosexual does the same thing." Bruce Bawer, A Place at the Table: The Gay Individual in American Society 21 (1994). When gay people are given less latitude to speak about their identity or their relationships than straight individuals, that is discrimination on the basis of sexual orientation.

Conclusion

The incidents underlying this case can be described as an unfortunate confluence of sex stereotyping and differential treatment on the basis of sexual orientation. Orellana wrongly believed that Zarda was sexually harassing her. To negate that incorrect belief, Zarda disclosed that he was gay. He was then subjected to disparate treatment because of his sexual orientation.

To permit these interlocking forms of disparate treatment to stand would be to place all gay individuals in an untenable Catch 22. When gay individuals are falsely accused of sexually harassing someone of the opposite sex, their most immediate rejoinder is likely to be a disclosure of their sexual orientation. If that sexual orientation is a separate ground for termination, gay individuals are put to a terrible choice. They must either remain silent and risk termination as sexual harassers or speak up and risk termination because they have "flaunted" their sexual orientation. One purpose of laws against discrimination on the basis of sex and sexual orientation is to ensure that gay individuals need not choose either unconscionable alternative.

Respectfully submitted,



Kenji Yoshino
Chief Justice Earl Warren Professor of Constitutional Law

EXHIBIT B

Counseling and Advising Clients Exclusively on Laws of the Workplace

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May 18, 2012

***VIA* ELECTRONIC MAIL**

Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010

Re: Zarda v. Altitude Express, Inc., *et al.*
Case No.: CV-10-4334 (JFB)(ARL)

Dear Mr. Antollino:

Pursuant to Fed. R. Civ. P. 45 enclosed please find a subpoena *ad testificandum* which we intend to serve upon Kenji Yoshino on Wednesday May 23, 2012.

Kindly contact me should you have further questions regarding the enclosed.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

Encl.

cc: Client

AO 88A (Rev. 06/09) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of New York

DONALD ZARDA
Plaintiff

v.

ALTITUDE EXPRESS, INC., d/b/a SKYDIVE LONG ISLAND, and RAY MAYNARD
Defendant

Civil Action No. CV 10-4334 (JFB)(ARL)

(If the action is pending in another district, state where:

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Kenji Yoshino
New York University School of Law, 40 Washington Square South, New York, NY 10012

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: Zabell & Associates P.C. 1 Corporate Drive, Suite 103 Bohemia, New York 11716	Date and Time: 06/11/2012 10:00 am

The deposition will be recorded by this method: Stenographer

☑ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

Any and all documents used and/or referred to in production of the Expert Report of Kenji Yoshino (including fees for services rendered and invoices) generated in connection with the above-referenced matter.

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 05/18/2012

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk | *Attorney's signature*

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Defendants ALTITUDE EXPRESS, INC., d/b/a SKYDIVE LONG ISLAND, et al., who issues or requests this subpoena, are:
Saul D. Zabell, Zabell & Associates P.C., 1 Corporate Drive, Suite 103, Bohemia, New York 11716
SZabell@Nylaborlaws.com
(631)-589-7242

Civil Action No. CV 10-4334 (JFB)(ARL)

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* Kenji Yoshino

was received by me on *(date)* _____.

☐ I served the subpoena by delivering a copy to the named individual as follows: _____

_____

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____

_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____.

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

EXHIBIT C

2010 WL 4537044
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. New York.

Glenn REIT, Plaintiff,
v.
POST PROPERTIES, INC., et al., Defendants.

No. 09 Civ. 5455(RMB)(KNF). | Nov. 4, 2010.

Opinion

MEMORANDUM and ORDER

KEVIN NATHANIEL FOX, United States Magistrate Judge.

*1 In this personal injury action, the plaintiff deposed Dr. Martin Barschi, a board certified orthopaedic surgeon, and Dr. William B. Head Jr., a board certified neurologist, to probe the opinion testimony each is expected to offer, on behalf of the defendants, at the trial of this action. Prior to the deposition, the plaintiff served Dr. Head with a subpoena, pursuant to Rule 45, accompanied by a "Rider," seeking documents to be produced at his deposition. Dr. Head produced his appointment book, data related to his work in the past two years and billing records limited to work he performed as an expert.

Before the Court is the defendants' application, made pursuant to Fed.R.Civ.P. 26(b)(4)(C), for the Court to fix a reasonable amount that the plaintiff must compensate the defendants' expert witnesses, for responding to the plaintiff's discovery demands. The defendants request that Dr. Barschi be paid $2,960, which includes: (1) $1,100 for two hours of deposition testimony, at an hourly rate of $550; (2) $1,200 for three hours preparation time for his deposition, at an hourly rate of $400; (3) $600 for three hours of travel time, at an hourly rate of $200; and (4) $60 to compensate him for mileage, tolls and parking fees. With respect to Dr. Head's deposition scheduled for March 12, 2010, but cancelled by the plaintiff on March 11, 2010, due to a medical emergency of the attorney scheduled to conduct the deposition, the defendants request that Dr. Head be paid $6,842.02, which includes: (1) $3,850 for seven hours of reserved deposition testimony time, at an hourly rate of $550; (2) $2,000 for five hours preparation time for his deposition, at an hourly rate of $400; (3) $547.50 in fees for copying two years of appointment pages and billing summaries (730 pages, at a rate of $0.75 per page); and (4) $444.52, an administrative fee, for "twenty-one hours for three employees to comply with subpoena (collection of billing summaries, redacting all treating patients names from two years of schedules and printing sheets for two years)." Additionally, the defendants request that Dr. Head be paid $2,387.50 for the April 23, 2010 deposition, which includes: (5) $2,018.50 for three and two-thirds hours of deposition time, at an hourly rate of $550; (6) $108 in additional copying fees (144 pages, at a rate of $0.75 per page); (7) $100 for one-half hour of travel time, at an hourly rate of $200; and (8) $161 for round trip car service fare.

The plaintiff contends the defendants' requests are unreasonable and proposes to pay Dr. Barschi $962.50, which includes: (a) $400 for two hours of deposition time, at an hourly rate of $200; (b) $262.50 for one and one-half hours of preparation time, at an hourly rate of $175; and (c) $300 for travel time, at an hourly rate of $100 per hour. The plaintiff proposes to pay Dr. Head $1,289.60, which includes: (a) $900 for three hours of deposition time, at an hourly rate of $300; (b) $375 for one and one-half hours of preparation time, at an hourly rate of $250; and (c) $14.60 in copying fees for 730 pages, at a rate of $0.02 per page.

Legal Standard

*2 The Federal Rules of Civil Procedure provide that "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial." Fed.R.Civ.P. 26(b)(4)(A). "Unless manifest injustice would result, the court must require that the party seeking discovery: (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4) (A) or (B)." Fed.R.Civ.P. 26(b)(4)(C). "The determination of a reasonable fee and for what services, including preparation, falls solely withing [the court's] province." *Lamere v. N.Y. State Office for the Aging,* 223 F.R.D. 85, 93 (N.D.N.Y.2004); *see* 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2034 (3d ed.2010). In determining the reasonableness of an expert witness's fees,

courts consider the following factors: (1) the witness's field of expertise; (2) the education and training required to provide the expert insight which is sought; (3) the prevailing rates of other comparably respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the fee actually charged to the party who retained the expert; (6) fees traditionally charged by the expert on related matters; and (7) any other factor likely to assist the court in balancing the interests implicated by Rule 26. *See e .g., Feliciano v. County of Suffolk,* 246 F.R.D. 134, 136 (E.D.N.Y.2007); *Frederick v. Columbia Univ.,* 212 F.R.D. 176, 177 (S.D.N.Y.2003); *Edin v. Paul Revere Life Ins. Co.,* 188 F.R.D. 543, 546 (D.Ariz.1999); *Jochims v. Isuzu Motors, Ltd.,* 141 F.R.D. 493, 495–96 (S.D.Iowa 1992).[1] "The district courts in the Second Circuit have consistently held that time spent by an expert preparing for a deposition is compensable under Rule 26(b)(4) (C)," and that "time spent traveling to and from the deposition, and the expenses incurred during travel, so long as they are reasonable, are compensable under Rule 26(b)(4)(C)." *New York v. Solvent Chem. Co.,* 210 F.R.D. 462, 471–72 (W.D.N.Y.2002). "The general rule ... is that compensation for travel time should be half the regular hourly amount charged." *Mannarino v. United States,* 218 F.R.D. 372, 377 (E.D.N.Y.2003).

"While a party may contract with any expert it chooses, the court will not automatically tax the opposing party with any unreasonable fees charged by the expert." *Grady v. Jefferson County Bd. of County Comm'rs,* 249 F.R.D. 657, 662 (D.Colo.2008) (quoting *Kernke v. Menninger Clinic, Inc.,* No. 00–2263–GTV, 2002 WL 334901, at *1 (D.Kan.2002)) (alteration omitted). In determining reasonable fees, courts must keep in mind that "the underlying purpose of Rule 26(b)(4)(C) is to compensate experts for their time spent participating in litigation and to prevent one party from unfairly obtaining the benefit of the opposing party's expert work free from cost." *Goldwater,* 136 F.R.D. at 339 (citing *United States v. City of Twin Falls, Idaho,* 806 F.2d 862, 879 (9th Cir.1986)). "The party seeking reimbursement of deposition fees bears the burden of proving reasonableness. If the parties provide little evidence to support their interpretation of a reasonable rate, the court may use its discretion to determine a reasonable fee." *Solvent Chem. Co.,* 210 F.R.D. at 468 (citation omitted).

Dr. Barschi

*3 In support of their application for Dr. Barschi's fees, the defendants submitted a copy of his curriculum vitae indicating: he is a graduate of New York Medical College, New York, New York; he is licensed to practice in New York State, he received his internship training at Cedars–Sinai Medical Center, Los Angeles, California, and residency training in orthopedic surgery at Montefiore Hospital Medical Center, Bronx, New York, and in general surgery at Cedars–Sinai Medical Center. Dr. Barschi is certified by the American Board of Independent Medical Examiners and the American Board of Orthopedic Surgery, and he is a fellow of various organizations pertaining to surgery, orthopedic surgery and sports medicine. Dr. Barschi's hospital appointments include Montefiore Hospital Medical Center and Albert Einstein College of Medicine in the Bronx, New York, White Plains Hospital Center and St. Agnes Hospital in White Plains, New York, and New York Medical College in Valhalla, New York. Dr. Barschi is a member of various professional organizations and currently holds an appointment as Chief Medical Officer, Scarsdale Public School District. The defendants contend that Dr. Barschi charged them $1,100 for the plaintiff's independent medical examination and that he typically charges $800 per hour for related matters. They assert:

> In conferring with other comparably respected orthopedic surgeons regarding depositions [sic] fees, we were advised the following:
>
> 1. Dr. Alan Zimmerman, Lido Beach, NY: $500.00 an hour for deposition testimony;
>
> 2. Dr. Robert Orlandi, Bronx, NY: $600.00 an hour for deposition testimony; and
>
> 3. Dr. Frank Hudak, Queens, NY: $800.00 an hour for deposition testimony.

The plaintiff contends the defendants failed to offer any proof regarding "the amount they charge others for similar work," and they offer merely their counsel's representation respecting the fees charged by three orthopedists, "with nothing ... to establish that these other doctors are comparable to the defendants' experts or that the rates they charge are 'prevailing.' " Additionally, the plaintiff maintains that, contrary to the defendants' assertion that Dr. Barschi charged them $1,100 for the plaintiff's independent medical

examination, resulting in a five-page report, and that he usually charges $800 per hour for unspecified "related matters," Dr. Barschi testified at his deposition that he is paid between $500 and $600 for an independent medical examination and about $250 per hour for reviewing records. Moreover, Dr. Barschi testified that his usual fee for performing an independent medical examination includes reviewing all the records, conducting the examination and writing a report, which means that his usual $500 to $600 fee for an independent medical examination falls into the $200 per hour range. According to the plaintiff, since Dr. Barschi's usual hourly rate appears to be in the vicinity of $200, that is what he should be paid for his deposition time. Additionally, the plaintiff requests that Dr. Barschi not be paid for his preparation time "because of his transparent effort to exaggerate the charge," and his travel time "should be billed at no more than $100 per hour." The plaintiff proposes $962.50 as a reasonable fee to compensate Dr. Barschi.

*4 In its August 19, 2010 order, the Court informed the defendants that their submissions regarding reasonable experts' fees, through which they identified three orthopedic surgeons and two neurologists whose fees for deposition testimony, the defendants maintain, establish the reasonableness of Dr. Barschi's fees, lacked data about the education, training and experience of those identified specialists and did not state the hourly rates that each charges for preparing to give deposition testimony. The Court cautioned the defendants that, absent this information, its ability to assess fully whether the identified specialists are appropriate comparators is limited and directed them to supplement their submissions with competent evidence addressing these matters. In response, the defendants failed to provide the Court with any evidence requested in the Court's order. Instead, the defendants reiterated the assertions from their previous submissions, adding a list of the plaintiff's alleged injuries: concussion, central annular tear C5, C6, C6–7 disc herniation, C6–C7, C4–C5, C3–C4 narrowing, dizziness and nausea, and, in addition, *inter alia,* difficulty sleeping, slurring and stuttering speech, blurry vision, extreme sensitivity to sound, daily headaches, violent emotional swings, pain in the neck, numbness in his head and balance problems. The defendants contend that Dr. Barschi testified he performs surgeries, primarily arthroscopies of the knee and shoulder and open and closed fracture reductions. He also treats patients with neck and back problems, but does not perform surgeries in those areas, although he assists neurosurgeons who operate on such patients.

(1) Dr. Barschi's Field of Expertise

According to Dr. Barschi's testimony, he is an orthopedic surgeon specializing primarily in surgeries that "have to do with arthroscopies of the knees and shoulder" and, secondarily, fracture surgeries. All the plaintiff's alleged injuries, enumerated by the defendants in their submissions, appear to concern the plaintiff's neck and head. The defendants do not explain, by competent evidence, the connection between the witness's expertise in knee, shoulder and fracture orthopedic surgery and the plaintiff's alleged neck and head injuries, in light of the fact that no allegations appear to have been made and no evidence submitted to the Court that the plaintiff suffered knee or shoulder injuries or had any fractures. Thus, it is not readily apparent, based on the parties' submissions on this motion, how Dr. Barschi's field of expertise is relevant to the plaintiff's injuries or what it is the defendants sought to elicit from Dr. Barschi.

(2) Education and Training Required to Provide the Insight Sought

Although Dr. Barschi indicated in his report that he examined the plaintiff "for an orthopedic independent medical evaluation," the defendants failed to provide the Court any evidence of what particular insight was sought that occasioned their retaining Dr. Barschi. Therefore, absent that information, the Court is not able to assess the education and training required to provide that insight.

(3) Prevailing Rates of Other Comparably Respected Available Experts

*5 While the defendants assert that Dr. Zimmerman, Dr. Orlandi and Dr. Hudak are comparably respected orthopedic surgeons, charging hourly rates of $500, $600 and $800, respectively, for deposition testimony, they failed to submit any evidence in support of those assertions, as they were instructed to do by the Court's August 19, 2010 order. The defendants did not make citation to any case law to demonstrate what the prevailing rates of other comparably respected available experts are in this or any other judicial district. The defendants cite only two cases, in which the courts held $400 per hour for preparation time and $550 per hour for deposition time to be reasonable fees for a

neuroradiologist and a neurologist, who is the head of the stroke service at New York Presbyterian Hospital, *see Marin,* 2008 WL 5351935, at *3, and $375 per hour to be a reasonable fee for deposition time for an expert in toxicology and medical toxicology, see Frederick. 212 F.R.D. at 177. However, these cases do not establish the prevailing rates of experts comparable in their area of expertise to Dr. Barschi, namely orthopedic surgery, with a speciality in knee and shoulder arthroscopy and closed and open fracture reductions. Consequently, absent any information on prevailing rates of other comparably available experts, this factor weights against the defendants.

(4) The Nature, Quality and Complexity of the Discovery Responses Provided

The deposition transcript pages submitted by the defendants to the Court, namely page Nos. 18–20, contain only colloquy concerning Dr. Barschi's specialty. The transcript page Nos. 33–40, submitted by the plaintiff, contain colloquy about Dr. Barschi's rates. The defendants failed to provide any other evidence to the Court that would explain the nature, quality and complexity of the discovery provided by Dr. Barschi through his deposition. With respect to this factor, the defendants direct the Court's attention, erroneously, to the plaintiff's alleged injuries. However, the plaintiff's allegations alone do not explain what questions were put to Dr. Barschi or the nature, quality or complexity of Dr. Barschi's responses.

(5) The Fee Actually Charged to the Party Who Retained the Expert

The defendants state that Dr. Barschi charged them a flat fee of $1,100 for an independent medical examination of the plaintiff, resulting in a five-page report.

(6) Fees Traditionally Charged by the Expert on Related Matters

Dr. Barschi testified that he charges an average of $400 for an initial worker's compensation independent medical examination, which includes reviewing a patient's history and medical reports, conducting an examination and writing a report. He also testified, at his deposition, that he usually charges between $500 and $600 for conducting an independent medical examination for a law firm or for a third-party agency, and that his general hourly rate for reviewing records is $250. Therefore, it would appear that the $1,100 fee Dr. Barschi charged the defendants, for an independent medical examination of the plaintiff, was in excess of what he usually charges for an independent medical evaluation. Notwithstanding this unexplained discrepancy, the defendants failed to indicate the number of occasions on which Dr. Barschi has been compensated for preparing for, and providing deposition testimony on, related matters or at what rate. The mere assertion that "[w]e have been informed by Dr. Barschi that he typically charges $800.00 per hour for related matters," without more, does not suffice to support the reasonableness of the fees charged.

(7) Any Other Factor Likely To Assist the Court in Balancing the Interests Implicated by Rule 26

***6** The information provided by the defendants is scant and lacks any evidentiary support for their request that Dr. Barschi be compensated at the amount they urge. The Court finds that the reasonable hourly rate for Dr. Barschi's deposition testimony is $250, *see Hose v. Chicago & N. Western Transp. Co.,* 154 F.R.D. 222, 227 (S.D.Iowa 1994) (expert neurologist's "participation in a deposition more closely parallels his work reviewing medial records ... than his work performing neurological testing."); and that his $250 hourly fee for reviewing medical records in preparation for his deposition is reasonable. *See Packer v. SN Servicing Corp.,* 243 F.R.D. 39, 44 (D.Conn.2007) (finding that $300 per hour rate charged for both preparation and deposition time was reasonable). In light of the Court's finding that a $250 hourly rate is a reasonable fee for Dr. Barschi's deposition testimony, his reasonable hourly travel time rate is $125. *See Mannarino,* 218 F.R.D. at 377. Dr. Barschi's "auto expenses" of $60, which include the mileage, bridge tolls and parking garage charge are reasonable.

The defendants have failed to meet their burden of showing the reasonableness of Dr. Barschi's request for $2,960. Accordingly, the Court finds that $1,685 is a reasonable fee for Dr. Barschi, which includes: (a) two hours of deposition testimony, at an hourly rate of $250; (b) three hours preparation time, at an hourly rate of $250; (c) three hours travel time, at an hourly rate of $125; and (d) $60 in travel expenses.

Dr. Head

In support of their application for Dr. Head's fees, the defendants submitted a copy of his curriculum vitae

indicating: he received his medical degree at the University of Southern California; his internship training was at St. Vincent's Hospital in Staten Island, New York; his residency training in psychiatry was at Columbia Presbyterian Medical Center, New York, New York and his neurology residency training at Mt. Sinai Hospital in New York, New York. Dr. Head is affiliated with Beth Israel Medical Center in New York City and Hospital of the Good Samaritan in California. He is certified by the American Board of Psychiatry and Neurology[2] and licensed to practice in New York, New Jersey, California and Massachusetts. He also serves as a medical arbitrator for the New York City Board of Education and as an impartial specialist for the New York State Worker's Compensation Board. The defendants contend Dr. Head charged them $2,575 for an independent medial examination of the plaintiff, and they "have been informed by Dr. Head that he typically charges $800 per hour for related matters if conducted in his office." They assert:

> In conferring with other comparably respected neurologists regarding depositions
>
> [sic] fees, we were advised the following:
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> 1. Dr. Paul Slotwiner, Brooklyn, NY: $500.00 p/hr for deposition testimony; and
>
> 2. Dr. Murthy Vishnubhakat, Manhasset, NY: $625.00 p/hr for deposition testimony.

*7 The plaintiff contends a discrepancy exists between Dr. Head's testimony that he charges $1,100 for a neurological independent medical examination and the $2,575 that he charged the defendants, for the independent medical examination of the plaintiff. Similarly, Dr. Head seeks $400 per hour for preparation time, but he testified that "his usual charge for record review is just $300." The plaintiff argues that Dr. Head's administrative and copying fees are problematic. For example, he charged the plaintiff for his employees' time spent redacting patients' names from the records, although the documents produced at his deposition were not redacted. Similarly, since the documents produced were computer printouts, it is unclear to the plaintiff why Dr. Head also charged for making copies of those documents. Furthermore, the plaintiff contends, Dr. Head offered no explanation of how he arrived at the administrative fee of $444.52 for 21 hours' work, and, according to the plaintiff, given that the administrative fee includes charges for redacting that was never done, those fees should be disallowed.

In its August 19, 2010 order mentioned above, the Court directed the defendants to supplement their submissions with competent evidence about the education, training and experience of the two neurologists identified as other comparably respected experts. The defendants failed to comply with the Court's order. Instead, they contend that Dr. Head testified that, according to the American Board of Psychiatry and Neurology, he is one of only 465 individuals in the United States who are independently certified in both fields. They maintain that Dr. Head testified to charging a $750 hourly fee for giving deposition testimony, $1,300 for performing a neuropsychiatric evaluation, $1,100 for performing a psychiatric evaluation, $1,000 for performing a neurological evaluation and a $450 hourly fee for reviewing medical records.

(1) Dr. Head's Field of Expertise

According to his testimony, Dr. Head is certified in both psychiatry and neurology. Dr. Head's expertise in neurology appears to be directly relevant to the neurological examination of the plaintiff, in light of the plaintiff's alleged injuries to his neck and head.

(2) Education and Training Required to Provide the Insight Sought

The defendants did not explain what particular insight they sought when they retained Dr. Head. However, it appears from Dr. Head's report that the plaintiff's treatment history, for the alleged injuries, shows continuous treatment with the plaintiff's neurologist. Therefore, it is reasonable to infer that the defendants sought to have an independent medical examination conducted, by their own neurologist, in order to obtain their own insight into the plaintiff's condition. Dr. Head's education and training in neurology, but not his education and training in psychiatry, appears to be appropriate for performing a neurological examination of the plaintiff.

(3) Prevailing Rates of Other Comparably Respected Available Experts

*8 Although the defendants asserted that Dr. Slotwiner and Dr. Vishnubhakat are comparably respected neurologists,

charging hourly rates of $500 and $625, respectively, for deposition testimony, they failed to submit any evidence in support of those assertions, as they were instructed to do through the Court's August 19, 2010 order. Absent this information, the Court is not able to assess fully whether the identified experts are comparably respected available experts. The defendants did not make citation to any case law to demonstrate what the prevailing rates of other comparably respected available neurologists are in this or any other judicial district. This factor weighs against the defendants.

(4) The Nature, Quality and Complexity of the Discovery Responses

The deposition transcript pages submitted by the defendants to the Court, namely page Nos. 20, 21, 82, 99, 100 and 115, contain only colloquy concerning Dr. Head's qualifications and rates. The defendants failed to provide any other evidence to the Court that would explain the nature, quality and complexity of the discovery provided by Dr. Head through his deposition. Therefore, it is impossible for the Court to ascertain the nature, quality and complexity of the discovery Dr. Head provided based solely on the submitted transcript excerpts.

(5) The Fee Actually Charged to the Party Who Retained the Expert

The defendants state that Dr. Head charged them $2,575 for an independent medical examination of the plaintiff, resulting in a nineteen-page report.

(6) Fees Traditionally Charged by the Expert on Related Matters

Although Dr. Head testified that he usually charges an hourly rate of $750 for deposition testimony and $450 for reviewing medical records, the defendants provided no evidence indicating the number of occasions on which Dr. Head prepared for and provided deposition testimony on related matters and at what rate. Dr. Head also failed to explain why he usually charges substantially more for deposition testimony than for reviewing medical records.

(7) Any Other Factor Likely To Assist the Court in Balancing the Interests Implicated by Rule 26

The defendants have not explained why Dr. Head charged copying fees, as the documents in question sought in response to the plaintiff's subpoena, pursuant to Rule 45, and in connection with Rule 26(b)(4) of the Federal Rules of Civil Procedure, were computer printouts. They also failed to explain why Dr. Head charged an administrative fee for his employees' redaction of patients' names from the documents produced, given the plaintiff states that "Dr. Head called his office from the deposition room to complain to his staff that they had not redacted as instructed," and the defendants admit that the documents produced "were inadvertently not redacted by his office." Most importantly, the defendants fail to make citation to any case law for the proposition that Rule 26(b)(4)(C) "preparation time" includes copying fees or administrative fees associated with the time an expert's employees spend collecting documents sought in connection with the expert's deposition.

***9** Rule 26 requires that a disclosure of the identity of any expert witness that may be used at trial must be accompanied by a written report, which, among other things, must contain: "(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case." Fed.R.Civ.P. 26(a)(2)(B). "[T]he time spent collecting documents within the scope of documents required to be produced pursuant to Fed.R.Civ.P. 26(a)(2)(B) in connection with an expert's report should not be compensated." *Packer*, 243 F.R.D. at 43–44.

Federal Rule of Civil Procedure 34 provides that, "[a]s provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection." Fed.R.Civ.P. 34(c). Thus, a subpoena *duces tecum*, pursuant to Rule 45, is an appropriate discovery mechanism against a nonparty expert witness. *See, e.g., Expeditors Int'l of Washington, Inc. v. Vastera, Inc.*, No. 04 C 0321, 2004 WL 406999, at *3 (N.D.Ill. Feb.26, 2004). "Under Federal Rule of Civil Procedure 45, a party issuing a subpoena is not required to bear the subpoenaed nonparty's cost of compliance. Rather, '[a] nonparty can be required to bear some or all of the expenses where the equities of the particular case demand it.' " *In re World Trade Center Disaster Site Litig.*, No. 21 MC 100, 2010 WL 3582921, at *1 (S.D.N.Y. Sept.14, 2010) (citation omitted). Courts consider the following factors when determining each party's share of the compliance cost: "(1) whether the nonparty has an interest in the outcome of the case; (2) whether the nonparty can more readily bear the costs; and (3) whether the litigation is of public importance."

Id. "The public interest in litigation is a factor that typically requires the nonparty to absorb costs." *Id.* at *2.

At the time the plaintiff served his Rule 45 subpoena on Dr. Head, no report had been produced to the plaintiff, as required by Rule 26(a)(2)(B). Since the documents sought by subpoena are required to be produced pursuant to Rule 26, costs and expenses in connection with them are not compensable. *See Packer,* 243 F.R.D. at 43–44. Moreover, it appears that the plaintiff determined to issue the subpoena to Dr. Head because the defendants failed to comply timely with Rule 26(a)(2)(B), by submitting Dr. Head's report accompanied by the documents required by Rule 26. Dr. Head has no interest in the outcome of this litigation and given the procedural posture of this case, as a nonparty expert witness, no reason has been proffered by the defendants why he cannot more readily bear the cost associated with complying with the subpoena. Although there does not appear to be any public interest in this litigation, the remaining factors do not support imposing Dr. Head's copying and administrative fees on the plaintiff.

***10** Dr. Head charged for three and two-thirds hours of deposition time. The plaintiff contends Dr. Head should be paid for three hours of deposition time. The defendants failed to submit competent evidence, such as the transcript pages indicating the deposition's starting and ending time, to support Dr. Head's request for compensation for three and two-thirds hours of deposition time. In light of the conflicting claims on this issue, the Court finds that Dr. Head should be paid for three hours of deposition time. Additionally, Dr. Head charged $3,850 for seven hours of time "reserved" for the March 12, 2010 deposition that was cancelled at "5:45p.m. on March 11," because "the attorney who had prepared to depose Dr. Head had a medical emergency that afternoon." The defendants failed to make citation to any case law that supports their request that Dr. Head be compensated for his "reserved" time. They also failed to submit any evidence to show how Dr. Head's scheduling of patients was affected by this cancellation or that he was unavailable to do any other work on March 12, 2010. *See Itar–Tass Russian News Agency v. Russian Kurier, Inc.,* No. 95 Civ. 2144, 1996 WL 490700, at *1 (S.D.N.Y. Aug. 28, 1996) (quoting *McHale v. Westcott,* 893 F.Supp. 143, 151 (N.D.N.Y.1995)). Absent any evidence that manifest injustice would result from failing to pay Dr. Head for the time he "reserved" for the March 12, 2010 deposition, the Court finds that charge to be unreasonable.

As they failed to submit evidence in support of their request for Dr. Head's fees, the defendants did not meet their burden of showing that Dr. Head's requested fees are reasonable. Although Dr. Head appears to be a qualified expert certified in both psychiatry and neurology, his qualification in psychiatry is irrelevant in this case, because Dr. Head conducted no psychiatric examination of the plaintiff. Additionally, while Dr. Head appears to be a qualified expert, his curriculum vitae and his testimony do not reveal that he is a preeminent expert in the field of neurology, that he possesses unique knowledge or training that other experts in this field do not possess, or that he was required to testify on a highly technical or unusual area of expertise. *See, e.g., Casiano,* 2008 WL 3930558, at *2 (finding a $400 hourly fee for deposition testimony reasonable for an orthopedist who "does not have exceptional qualifications nor is he being required to testify on an unusual or highly technical area of expertise."); *Hose,* 154 F.R.D. at 227 (reducing expert neurologist's deposition testimony fee from $800 hourly to $400). Therefore, the Court finds that $400 is a reasonable hourly fee for Dr. Head's preparation time as well as his deposition time. Thus, the reasonable fee for Dr. Head's travel time of one-half hour is $100. *See Mannarino,* 218 F.R.D. at 377.

Dr. Head charged for the cost of round trip car service use, $161, without explaining from where he was traveling when he went to the deposition conducted in the plaintiff's counsel's office, in Brooklyn, New York. Dr. Head's curriculum vitae heading indicates his New York, New York, address, and his New Jersey address, under the rubric "Addresses," and his mailing address, in Staten Island, New York. Dr. Head's invoices indicate that he receives correspondence in all three locations listed in his curriculum vitae. Thus, what Dr. Head's travel route on the deposition day was, is not clear. The Court finds that Dr. Head's request for $161 in travel expenses, without more, is not reasonable and will be disallowed, for lack of detailed travel information.

***11** Accordingly, Dr. Head's reasonable fee is $3,300, which includes: (a) three hours of deposition testimony, at a $400 hourly rate; (b) five hours preparation time, at a $400 hourly rate; and (3) $100 for one-half hour of travel time.

CONCLUSION

For the foregoing reasons, the Court finds that the defendants failed to meet their burden of demonstrating that the expert fees requested by Dr. Barschi and Dr. Head are reasonable. The Court finds that the reasonable fees the plaintiff must pay, pursuant to Fed.R.Civ.P. 26(b)(4)(c), are: (1) $1,685 for Dr. Barschi; and (2) $3,300 for Dr. Head.

SO ORDERED.

Footnotes

1 Some courts also consider "the cost of living in [a] particular geographic area." *See e.g., Goldwater v. Postmaster Gen. of the U.S.*, 136 F.R.D. 337, 340 (D.Conn.1991); *Coleman v. Dydula*, 190 F.R.D. 320, 324 (W.D.N.Y.1999); *Marin v. United States*, No. 06 Civ. 552, 2008 WL 5351935, at *1 (S.D.N.Y. Dec. 22, 2008); *Casiano v. Target Stores*, No. CV 2006–6286, 2008 WL 3930558, at *1 (E.D.N.Y. Aug.21, 2008). However, like the Iowa district court, the Court "does not believe that the cost of living in a particular geographic area is directly relevant to a reasonable fee and, in any event, this factor is frequently, at least indirectly, calibrated into prevailing market rates." *Jochims*, 141 F.R.D. at 496.

2 Dr. Head's invoices dated March 25, 2010, and May 4, 2010, indicate in their headings that, in addition to being certified in psychiatry and neurology, he is also "UCNS Certified in Behavioral Neurology and Neuropsychiatry." However, this information does not appear in Dr. Head's curriculum vitae.

End of Document

EXHIBIT D

1999 WL 32909
United States District Court, S.D. New York.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,

v.

JOHNSON & HIGGINS, INC., Defendant.

No. 93 Civ. 5481 LBS AJP. | Jan. 21, 1999.

Opinion

OPINION AND ORDER

PECK, Magistrate J.

***1** The issue before the Court is the amount plaintiff EEOC should pay to defendant J & H's experts for the experts' time and expenses in connection with their depositions taken by the EEOC.

The factual background to this case is set forth in several prior judicial opinions, familiarity with which is assumed. *See EEOC v. Johnson & Higgins, Inc.*, 93 Civ. 5481, 1998 WL 778369 (S.D.N.Y. Nov. 6, 1998) (Peck, M.J.); *EEOC v. Johnson & Higgins*, 5 F.Supp.2d 181 (S.D.N.Y.1998); *EEOC v. Johnson & Higgins, Inc.*, 887 F.Supp. 682 (S.D.N.Y.1995), *aff'd*, 91 F.3d 1529 (2d Cir.1996), *cert, denied*, 118 S.Ct. 47 (1997).

J & H seeks approximately $75,000 for the EEOC's depositions of J & H's seven experts. The EEOC opposes on the grounds that: (a) the experts' supporting bills are deficient —an issue that J & H remedied in its reply submissions, (b) the experts' rate are excessive, even though they are their regular rates and the rates they are charging J & H, and their preparation time was excessive in light of the short depositions taken by the EEOC, and (c) J & H employed duplicative experts.

For the reasons set forth below, the Court finds that while the EEOC's objections to the experts' fees are largely unpersuasive, certain reductions are necessary, and the Court awards J & H's experts $54,806.89.

ANALYSIS

Rule 26(b)(4) of the Federal Rules of Civil Procedure require the party deposing its adversary's expert to pay the expert's "reasonable" fees. Rule 26(b)(4) provides:

> (A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial....
>
> ....
>
> (C) Unless manifest injustice would result, [1] (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent responding to discovery under this subdivision; ...

Fed.R.Civ.P. 26(b)(4)(A), (C); *see generally, e.g.*, 8 Wright, Miller & Marcus, *Federal Practice & Procedure: Civil 2d* § 2034 (1994).

Moreover, as the EEOC concedes, "courts within this circuit have allowed experts to recover remuneration for deposition preparation...." (EEOC Br. at 4.) *See, e.g., Ohuche v. British Airways*, 97 Civ. 1853, 1998 WL 240481 at *1 (S.D.N.Y. May 11, 1998); *Bonner v. American Airlines, Inc.*, 96 Civ. 4762–63, 96 Civ. 6846, 1997 WL 802894 at *1 (S.D.N.Y. Dec. 31, 1997) ("the weight of authority appears to hold that Rule 26(b)(4)(C) permits recovery of fees for an expert's ... preparation time in connection with a deposition"); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 646 (E.D.N.Y.1997) ("The Court holds that Rule 26(b)(4)(C) encompasses a reasonable fee for time spent by an expert preparing for deposition ...."); *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 95 Civ. 2144, 1996 WL 490700 at *1–2 (S.D.N.Y. Aug. 28, 1996); *Bridges v. Eastman Kodak Co.*, 91 Civ. 7985, 1996 WL 47304 at *15 (S.D.N.Y. Feb. 6, 1996), *aff'd*, 102 F.3d 56 (2d Cir.1996), *cert. denied*, 117 S.Ct. 2453 (1997); *McHale v. Westcott*, 893 F.Supp. 143, 151 (N.D.N.Y.1995) (Pooler, D.J.); *Lancaster v. Lord*, 90 Civ. 5843, 1993 WL 97258 at *2 (S.D.N.Y. March 31, 1993) ("[s]ince the defendants chose to depose [plaintiff's expert] rather than to seek discovery through written interrogatories, Rule 26(b)(4)(C) applies, and plaintiff is entitled to reimbursement for [expert's] time spent preparing for and attending the deposition"); *American Steel*

Prods. Corp. v. Penn Cent. Corp., 110 F.R.D. 151, 153 (S.D.N.Y.1986) ("Defendants shall pay plaintiff's accounting expert a reasonable fee for his time spent in giving and in preparing for his deposition.").

*2 The Court will consider the EEOC's objections to J & H's experts' fees seriatim.

Alleged Failure to Separate Hours for Deposition Preparation from Deposition Hours

The EEOC complains that some of J & H's experts' bills do not separate deposition time from deposition preparation time. (*See* EEOC Br. at 3.) This argument is frivolous for several reasons. First, as noted above, the EEOC concedes that deposition preparation time is reimbursable, and J & H's experts charged the same hourly rate for preparation and deposition time. Second, since the EEOC knows how long each deposition lasted, it is a simple mathematical exercise to deduct that from the expert's total hours billed to determine how many hours were for deposition preparation. Third, in any event, J & H's reply papers include supplemental billing information separating deposition preparation time from deposition time. (*See* J & H Reply Br. at 3; Birkenstock 12/31/98 Aff. Exs. J, K.) This objection, therefore, is meritless.

The EEOC next contends that the experts' time spent preparing for the depositions is reimbursable, but the experts' time spent preparing, *i.e.*, educating, J & H's counsel is not. (EEOC Br. at 4 .) J & H does not dispute this proposition, but it is of no avail to the EEOC here. J & H has represented that "[n]one of the preparation time included in the experts' bills was spent preparing J & H's attorneys. Rather, all of the preparation time was used to prepare the experts for their depositions." (J & H Reply Br. at 4; Birkenstock 12/31/98 Aff. ¶ 2 & Exs. L–N.)

Finally, the EEOC contends that "[g]iven the brevity of each of these experts' depositions, [the] EEOC believes that the number of hours they seek renumeration for is excessive." (EEOC Br. at 4.) J & H responded:

> Finally, the EEOC argues, with perfect hindsight, that the amount of time J & H's experts spent in preparation for their depositions was excessive in light of the actual length of those depositions. Op. 4. Such an argument is nonsensical. Neither J & H nor its experts had any idea how long the depositions would last. Deposition preparation is not conducted by guessing as to the length of the deposition. Rather, it requires a substantive review of the relevant documents and issues that could be raised during the deposition. J & H's experts spent a reasonable amount of time preparing for their deposition. That the EEOC attorneys took, in some cases, two hours to ask their questions rather than seven, eight or thirteen is entirely irrelevant.

(J & H Reply Br. at 4.) The Court agrees with J & H. Except where the deposition is limited in advance in time or scope by Court order or the parties' agreement, what is reasonable preparation cannot depend in hindsight on the deposition's brevity.

The Court nevertheless is troubled by the preparation time billed by J & H expert Dr. Becker, who charged for 23 hours of deposition preparation time. (*See* EEOC Br. at 4 n. 2; Birkenstock 12/31/98 Aff. Ex. F.)[2] No other J & H expert billed for more than 9 hours of preparation time. (*See* Birkenstock 12/31/98 Aff. Exs. C–D, G–K.) Dr. Becker, however, was deposed for 2 days totaling 13 hours. (Birkenstock 12/31/98 Aff. Ex. F.) The Court therefore will reduce Dr. Becker's preparation time to 13 hours, *i.e.*, reduce his fee request by 10 hours at $350 per hour, a $3,500 reduction.

Travel Expenses

*3 The EEOC complains that the experts who traveled to their deposition did not provide receipts or a detailed list of their travel expenditures. (EEOC Br. at 3.) The EEOC therefore implicitly concedes that properly documented and reasonable travel expenses are reimbursable, and at least on the facts of this case, the Court agrees. *See, e.g., Ohuche v. British Airways*, 97 Civ. 1853, 1998 WL 240481 at *1 (S.D.N.Y. May 11, 1998) (granting recovery of expert's travel expenses); *Bonner v. American Airlines, Inc.*, 96 Civ. 4762–63, 96 Civ. 6846, 1997 WL 802894 at *1 (S.D.N.Y. Dec. 31, 1997) ("the weight of authority appears to hold that Rule 26(b)(4)(C) permits recovery of fees for an expert's travel time ... in connection with a deposition, along with

the expert's out-of-pocket expenses"); *Harbor Software, Inc. v. Applied Sys., Inc.*, 92 Civ. 8097, 1997 WL 187350 at *3 (S.D .N.Y. April 15, 1997) (granting recovery of expert's travel expenses); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 646 (E.D.N.Y.1997) ("Travel time has been held compensable."); *DeFelice v. American Int'l Life Assurance Co.*, 94 Civ. 8165, 1995 WL 753892 at *1 (S.D.N.Y. Dec. 19, 1995) (granting recovery for expert's travel expenses); *In re "Agent Orange" Prod. Liab. Litig.*, 105 F.R.D. 577, 582 (E.D.N.Y.1985) (Weinstein, D.J.).

J & H's reply papers cured the specificity and documentation problem of which the EEOC complains. (*See* J & H Reply Br. at 4–5 & Exs. referred to therein.) However, the Court finds the $970 for 2 nights in a hotel for Dr. Maister to be excessive—despite the high cost of New York hotel rooms—and reduces that amount to $400 (*i.e.*, a $570 reduction).[3] In all other respects, the Court rejects the EEOC's objections to J & H's experts' travel expenses.

The Experts' Hourly Rates

The "EEOC contends that Defendants' experts' rates are astronomical," ranging from $285 per hour to $12,000 per day. (EEOC Br. at 5–6.)

A recent decision in this Circuit has listed factors that different courts have considered in determining whether an expert fee request is reasonable:

> In determining whether an expert fee request is "reasonable," federal district courts have considered (1) the witness's area of expertise; (2) the education and training that is required to provide the expert insight that is sought; (3) the prevailing rates for other comparably respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the cost of living in the particular geographic area; (6) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26; (7) the fee being charged by the expert to the party who retained him; and (8) fees traditionally charged by the expert on related matters. None of the foregoing factors have talismanic qualities. Instead, they provide a guide for the Court to utilize in an effort to "calibrate the balance so that a [defendant] will not be unduly hampered in [its] efforts to attract competent experts, while at the same time, an inquiring [plaintiff] will not be unfairly burdened by excessive ransoms which produce windfalls for the [defendant's] experts."
>
> *4 *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 645 (E.D.N . Y.1997) (citations omitted); *accord, e.g., McClain v. Owens–Corning Fiberglas Corp.*, No. 89 C 6226, 1996 WL 650524 at *3–4 (N.D.Ill. Nov. 7, 1996); *Mathis v. NYNEX*, 165 F.R.D. 23, 24–25 (E.D.N.Y.1996); *Bowen v. Monahan*, 163 F.R.D. 571, 573 (D.Neb.1995); *U.S. Energy Corp. v. NUKEM, Inc.*, 163 F.R.D. 344, 345–46 (D.Col.1995); *Hose v. Chicago & N.W. Transp. Co.*, 154 F.R.D. 222, 224–25 (S.D.Iowa 1994); *Jochims v. Isuzu Motors, Ltd.*, 141 F.R.D. 493, 495–96 & n. 3 (S.D.Iowa 1992); *Dominguez v.. Syntex Labs., Inc.*, 149 F.R.D. 166, 167 (S.D.Ind.1993); *Goldwater v. Postmaster Gen. of the United States*, 136 F.R.D. 337, 339–40 (D.Conn.1991); 8 Wright, Miller & Marcus, *Federal Practice & Procedure: Civil 2d* § 2034 at 470–71 & n. 14 (1994); 6 James Moore, *Moore's Federal Practice* § 26.80[3] at p. 26–234.5 (3d ed.1998). The parties agree that this list summarizes the "applicable legal standard." (J & H Reply Br. at 6; EEOC Br. at 7.)

After listing the above factors, however, the EEOC essentially only discusses the third factor, rates for other experts. (EEOC Br. at 7–8)[4] To support its argument that J & H's expert's hourly rates are excessive, the EEOC presents a list of "type of expert" and hourly rates for experts sought to be hired by the EEOC in 1995. (LeCount–McClanahan 11/24/98 Aff. Ex. 9: Donovan Aff. ¶¶ 5–7 & Attach. 1.) That list has rates ranging from a low of $60 to a high of $500 per hour. (*Id.*) The list includes experts from all over the country, not just limited to New York, and many experts whose area of expertise obviously is different from J & H's experts (*e.g.*, a $60 an hour "programmer/database manager"). While the EEOC employee who compiled the list states that "[s]everal of the experts whose hourly rates were used to produce the attached lists have comparable credentials to the [J & H] experts in question" (Donovan Aff. ¶ 7), he does not identify who those "several" comparable experts are or the basis for his opinion.[5] For these reasons, the EEOC's so-called "comparables" chart is of no help to the Court.

Implicit in the above factors (and in the "manifest injustice" caveat) is that a "rich" party should not be allowed to agree to pay excessively high fees to its expert in order to prevent a "poorer" opposing party from being able to afford to depose the expert. *See, e.g., Pudela v. Swanson*, No. 91 C 3559,

1993 WL 532546 at *3 (N.D.Ill.Dec. 20, 1993) ("Plaintiffs may have less financial resources than defendants, but they are not 'indigent' ... [and] this court perceives no injustice in requiring them to pay the fees charged by their opponents' experts for time spent in testimony at deposition.") That, however, is not the case here. There is no disparity between J & H's and the EEOC's ability to afford experts. And because neither the EEOC nor J & H has provided the Court with any useful information about other factors, *see McClain v. Owens–Corning Fiberglass Corp.*, 1996 WL 650524 at *4 ("[t]he court may use its discretion, however, where the parties offer scant evidence in support of their positions" as to reasonable expert fees), the Court here will focus on the rate the expert usually charges and the rate the expert charges the retaining party (here, J & H), tempered by the Court's sense of what is unreasonable. Indeed, courts most often reduce expert fee requests when the expert seeks to charge the opposing party a higher rate than the expert charges the retaining party. *See, e.g., Sublette v. Glidden Co.*, No. Civ. A. 97–CV–5047, 1998 WL 398156 at *4 (E.D. Pa. June 25, 1998) (reducing expert fee from $600 per hour to the $200 the expert charged the retaining party); *Ohuche v. British Airways*, 97 Civ. 1853, 1998 WL 240481 at *1 (S.D.N.Y. May 11, 1998) (reducing expert fee where expert charged retaining party less than opposing counsel); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. at 646 (reducing expert's fee from $350 per hour to the $250 the expert charged retaining party); *Jochims v. Isuzu*, 141 F.R.D. at 496–97 (expert's fee reduced from $500 to $250, because, *inter alia*, "[i]t is double the highest hourly rate he is charging the Plaintiff" who retained him); *Draper v. Red Devil, Inc.*, 114 F.R.D. 46, 48 (E.D.Ark.1987) ("In the absence of proof as to the reason(s) why the expert charged counsel for the Plaintiff $110.00 and counsel for the defense $120.00 hourly, the fee will be determined at the rate of $110.00 per hour."); *Anthony v. Abbott Labs.*, 106 F.R.D. 461, 464–65 (D.R.I.1985) (expert fee reduced from $420 hourly to $250 hourly, the charge the expert "was content to charge a (friendly) litigant ... for his time"); *compare, e.g., Mathis v. NYNEX*, 165 F.R.D. at 26 ("The court is especially persuaded [that the expert's fee is reasonable] by the fact that [the expert] regularly charges the same rate for his consultative services and is charging plaintiff that rate for his expert services in this case.").

***5** Here, each of J & H's experts is billing the EEOC at the same rate he or she is billing J & H. (Birkenstock 12/31/98 Aff. Ex. V: Saunders Aff. ¶¶ 2–8.) Moreover, each expert is billing J & H and the EEOC at the expert's normal billing rate for similar work. (*See* J & H Reply Br. at 8–9; Birkenstock 12/31/98 Aff. Exs. G, Q, S, W.)

Nevertheless, the Court is troubled by Dr. Maister's rate of $12,000 per day. (Birkenstock 12/31/98 Aff. Exs. J, V.) Even assuming that he worked a 12 hour day, that results in an hourly rate of $1000 per hour, double that of any of J & H's other experts. Indeed, Dr. Maister's $25,464 bill is double the bill of J & H's next highest paid expert. (*See, e.g.*, Notice of Mot.) J & H's sole justification for the amount is that that is what the expert charges. That is not sufficient. The Court will reduce Dr. Maister's bill by $12,000. *See, e.g., Anthony v. Abbott Labs.*, 106 F.R.D. at 465 (expert's "chosen rate is not merely high—it is astronomical. It is so out of touch with the economic realities of the world beyond high-stakes ... litigation that it would be a denial of justice to permit it to stand."). The other J & H experts' hourly rates will not be reduced.

Duplicative Experts

Lastly, the EEOC argues that it should not have to pay expert fees for duplicative experts, or experts who may be precluded from testifying at trial as a result of the EEOC's pending motions in limine. (EEOC Br. at 9–10.) The EEOC has not cited a single case or other authority in support of this proposition. (*See id.*)

The EEOC had the choice of deposing all, some or none of J & H's experts. If the EEOC believed certain experts were redundant or were testifying on issues that were not relevant based on the current posture of the case, the EEOC was free to not depose those experts. Having availed itself of the experts' depositions, Rule 26(b)(4)(C) requires that the EEOC reimburse the experts for their time. *See Breisch v. City of New York*, 86 Civ. 2485, 1987 WL 9443 at *8 (S.D.N.Y. April 6, 1987) (although one of defendant's experts was found unqualified to testify at trial, plaintiffs must pay for deposing defendant's experts because "[a]lthough [defendants'] summary of [the expert's] expected testimony was specific, plaintiffs chose to go forward and demand [the expert's] deposition in response to the defendants' demand of depositions of plaintiffs' experts"; "it is not 'manifestly unjust' to require both parties to pay the opposing experts' fees for their depositions").

The Court does not need to decide, and expresses no opinion, as to whether the EEOC will be able to recover any of these costs from J & H after trial if an expert is precluded or if the EEOC is the "prevailing party" after trial. For now, however, the EEOC must pay J & H experts their reasonable fees for the depositions the EEOC chose to conduct.

CONCLUSION

For the reasons set forth above, the Court awards J & H expert fees of $54,806.89, computed as follows:

Amount sought by J & H	$75,676.89.
Less:	
1. J & H's Lorch reduction (J & H Reply Br. at 3 n. 3)	3,000.00
2. Reduction in Dr. Becker's preparation time (*see* page 5 above)	3,500.00
3. Reduction in Prof. Schwab's dinner time (*see* page 5 n. 2 above)	1,800.00
4. Reduction in Dr. Maister's hotel bill (*see* page 6 above)	570 .00
5. Reduction in Dr. Maister's rate (*see* pages 10–11 above)	12,000.00
TOTAL	$ 54,806.89

*6 The EEOC is to send reimbursement checks to J & H's experts, consistent with this opinion, within ten business days of this opinion.

SO ORDERED.

Parallel Citations

79 Fair Empl.Prac.Cas. (BNA) 210, 22 Employee Benefits Cas. 2906

Footnotes

1 The EEOC has not contended that the "manifest injustice" exception is relevant here.

2 The EEOC also challenged the 26 hours billed by Prof. Schwab, of which only 2.25 hours were spent in the deposition. (EEOC Br. at 4 n. 2.) Review of Prof. Schwab's breakdown bill reveals that only approximately 9 hours were for deposition preparation. (*See* Birkenstock 12/31/98 Aff. Exs. E & G.) The bulk of the remaining time was for travel. However, Prof. Schwab billed 4 hours from 8:30 p.m. to 12:30 a.m., for "check into hotel, dinner and review of cases in room." (*Id.* Ex. G.) The Court sees no reason why the EEOC should pay the expert's time for eating dinner. The Court accordingly disallows 4 hours of Prof. Schwab's time, which at $450 per hour is a reduction of $1,800. (Although part of the 4 hours was spent reviewing cases, J & H has not identified how much time was so spent, and the Court therefore disallows the entire 4 hours.)

3 The Court notes that another J & H expert, Prof. Schwab, paid $280 for a hotel room at the Sheraton, compared to Dr. Maister's $410 hotel room. (*See* Birkenstock 12/31/98 Aff. Exs. J, R.)

4 The EEOC also briefly discussed the second and fourth factors, but only in ipse dixit fashion. (*E.g.*, EEOC Br. at 8–9: "EEOC contends that none of defendant's experts have any extraordinary expertise or training that would warrant payment of an unusually large fee above those determined to be reasonable or comparable with similar experts given the issues in the case.")

5 The Court also observes that the Government often is able to get attorneys and experts to charge the Government a reduced rate, making those rates less useful as "comparables." *See, e.g.*, David Segal *Legal Fees Paid in Cachet*, Wash. Post, Jan 9, 1988, at D1, 1998 WL 2460999.

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EXHIBIT E

2006 WL 4475013
Only the Westlaw citation is currently available.
United States District Court,
D. Connecticut.

Joseph FLAHERTY et al.
v.
State of CONNECTICUT et al.

No. 3:04 CV 2140(JGM).[1] | Aug. 23, 2006.

Attorneys and Law Firms

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Opinion

RULING ON PLAINTIFF'S MOTION TO DEPOSE DEFENDANT'S EXPERT

JOAN GLAZER MARGOLIS, United States Magistrate Judge.

***1** On or about December 3, 2004, plaintiffs commenced this action in the Connecticut Superior Court for the Judicial District of Hartford; on December 20, 2004, defendants removed the lawsuit to federal court. (Dkt.# 1). On March 31, 2005, plaintiffs filed their Amended Complaint (Dkt.# 16), in which they alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, the Civil Rights Act of 1991, the Americans with Disabilities Act, as amended, and the Connecticut Fair Employment Practices Act, CONN. GEN.STAT. §§ 46a-60, 46a-64, 46a-69, 46a-73 & 46a-74. On June 24, 2006, defendants filed their Answer and Affirmative Defenses. (Dkt.# 19). On September 21, 2005, the parties consented to trial before this Magistrate Judge. (Dkt.# 23).

Under the latest scheduling order, discovery was to have been completed by May 3, 2006, with the last deposition being that of defendants' expert witness, Mr. Val Lubans, scheduled for May 1, 2006. (Dkts.42-43). A snafu developed regarding this deposition, however, resulting in the filing of plaintiff's Motion for Order to Depose Defendant's Expert on May 2, 2006. (Dkt.# 44).[2] On June 5, 2006, defendants filed their brief in opposition (Dkt. # 51.[3] *See also* Dkts.45-46, 48-49).

There is no dispute between the parties that counsel agreed to hold the deposition of defendants' expert, Val Lubans on May 1, 2006, with plaintiffs' counsel agreeing to pay Lubans' reasonable fee of testifying for a half day (up to four hours) of $600; plaintiffs' counsel appeared at the deposition with a check payable to Lubans for $600 (even though the deposition was probably going to be two hours long), but Lubans refused to go forward with the deposition unless plaintiffs' counsel reimbursed him for $2,400 of preparation time. (Dkt. # 44, Motion at 1-2; Dkt. # 44, Brief at 1-2, 3; Dkt. # 51, Objection at 1-3; Dkt. # 51, Brief at 1-2). Two proposals-that Lubans testify and leave the issue up to the court, or that each side contribute $1,200-were similarly rejected. (Dkt. # 44, Motion at 2; Dkt. # 44, Brief at 2). The parties do not dispute that Lubans' fee of $150/hour is reasonable. (Dkt. # 44, Brief at 3; Dkt. # 55, Objection at 3-4).

FED.R.CIV.P. 26(b)(4)(C) provides that "[u]nless manifest injustice would result," a party taking the deposition of another's expert witness shall pay "a fair portion of the fees and expenses reasonably incurred ... in obtaining facts and opinions from the expert." In *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 646 (E.D.N.Y.1997), Magistrate Judge Orenstein held that while "courts are divided as to whether such time [spent by experts preparing for depositions] is compensable" under Rule 26(b)(4)(C), "[m]ost courts have held in the affirmative." (multiple citations omitted). Such awards are especially appropriate "where the litigation is particularly complex and/or the expert must review voluminous records." *Id.* at 646-47 (multiple citations omitted). *See also Fee v. Great Bear Lodge of Wisconsin Dells, LLC*, 2005 WL 1323162, at *2 (D.Minn. Mar. 3, 2005)("there seems to be a general agreement that preparation time is recoverable, in complex cases.") (citations omitted). There can be no dispute that the records at issue here are voluminous (*see, e.g.*, Dkt. # 51, Exhs. A & C), and the issues raised are complex.

***2** In *Fee*, plaintiffs' expert spent in excess of forty hours preparing for a deposition that was less than five hours

long. 2005 WL 1323162, at *2. Magistrate Judge Erickson found this to be "clearly unreasonable," and allowed a total of ten hours preparation time, "which is approximately a two-to-one ratio, of time spent preparing, to the length of his deposition testimony." *Id.* at *3. *But see McCulloch v. Hartford Life & Acc. Ins. Co .*, 3:01 CV 1115(AHN), 2004 WL 2601134 (D.Conn. Nov. 10, 2004)(reducing twenty hours of preparation for an eight-hour deposition to two hours, despite review of more than 12,000 pages of documents and fourteen deposition transcripts). In this case, Lubans needed to review two ten-year-old documents that are 2.25# thick. It was entirely reasonable for Lubans to have reviewed these documents in detail, knowing that he was going to be questioned extensively about them. However, twenty-four hours of preparation is unreasonable, especially for a deposition that was going to last between two and four hours. It was equally unreasonable for Lubans to refuse to go forward, when at least two viable alternatives were offered-later submitting the issue to the Court for resolution, or having defense counsel pay half of the preparation fee. Giving all parties the benefit of the doubt that the deposition would have lasted four hours, Lubans is entitled to reimbursement for twelve hours of preparation, a ratio of three-to-one, given the age of the documents to be reviewed.

Therefore, plaintiff's Motion for Order to Depose Defendant Expert (Dkt.# 44) is *granted, such that Lubans' deposition shall be held and completed* ***on or before September 29, 2006*** *and plaintiffs shall reimburse him in the amount of $1,800 (12 hours preparation at $150/hour) plus $600 for the half-day deposition, for a total of $2,400.* [4]

Footnotes

1 This lawsuit has been consolidated with *Pimentel v. State of Connecticut,* 3:05 CV 749(JGM). (*See* Dkt. # 32).

2 A copy of the Notice of Deposition, dated April 28, 2006 was attached.

3 The following exhibits were attached: copy of "A Task Analysis Study of Entry-Level Law Enforcement in the State of Connecticut-June, 1966-Conducted for the Connecticut Police Officer Standards and Training Council" (Exh. A); copy of e-mail between counsel, dated March 9, 2006 (Exh. B); copy of "State of Connecticut Police Officer Standards and Training Council Job Task Analysis Project-Core Curriculum Statistics" (Exh. C); copy of Invoice (Exh. D); and copy of Lubans' résumé (Exh. E).

4 This discovery issue is one which counsel should have been able to resolve between themselves, without burdening the Court. Under the present scheduling order, all dispositive motions are to be filed by November 30, 2006. (*See* Dkts.47 & 50). If this schedule is not possible, counsel shall contact this Magistrate Judge's Chambers promptly.

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EXHIBIT F

2004 WL 2601134
Only the Westlaw citation is currently available.
United States District Court,
D. Connecticut.

Candace MCCULLOCH, Plaintiff,
v.
HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY, et al. Defendants

No. Civ. 3:01CV1115AHN. | Nov. 10, 2004.

Attorneys and Law Firms

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Opinion

ORDER

FITZSIMMONS, Magistrate J.

***1** The parties submitted letter briefs to the court concerning a dispute over payment of fees charged by plaintiff's expert, Mary Fuller. Ms. Fuller is a former UNUM employee who is designated as an expert to offer an opinion that Hartford's conduct in connection with the plaintiff's disability claim was in bad faith. A telephone conference was held on August 9, 2004.

The parties agreed that plaintiff's counsel would hold $4,000 from Hartford in escrow pending the completion of Ms. Fuller's deposition, which was conducted on July 13, 2004 and lasted 8 hours. By Hartford's calculation, plaintiff's counsel is entitled to payment of $2350, which includes paid time for travel and the lunch break. Plaintiff's counsel, however, requested a total of $7,727.60 for the deposition, which includes charges for over 20 hours of preparation time billed by Ms. Fuller at $200 per hour. Hartford objects to paying the additional amount on the grounds that: Rule 26(b)(4)(c) does not permit recovery for more than nominal preparation time by an expert witness; that the amount of time purportedly spent by Fuller is not reflected in her level of preparation and did not facilitate discovery by Hartford; that 20 hours is not reasonable considering the complexity of the case or subject matter of the deposition testimony; that the invoices are not sufficiently detailed; and that she is not entitled to charge a higher hourly rate to review the file in preparing for the deposition than she charged plaintiff to review the file in preparing her expert report. Hartford proposes that Fuller be reimbursed for 1 hour of preparation time at $150, for a total payment of $2500. Hartford requests that it be awarded the reasonable costs incurred in responding to plaintiff's request for a hearing on the matter, consisting of 5 hours at the hourly rate of $325.

Plaintiff's position is that the payment of the charged fees is warranted under *Pinto v. Plumcreek,* Civ. No. H–89–718 (D.Conn. Jan. 3, 1992), and *Danise v. Safety Kleen Corp.,* 1998 U.S. LEXIS 18759 (D.Conn. July 17, 1998). In *Pinto,* Magistrate Judge Smith found that plaintiff's expert was entitled to compensation for some, but not all, of the time spent preparing for the deposition. He ruled that 1.75 hours of time spent by plaintiff's expert reviewing documents and familiarizing himself with the basis of his conclusions was compensable. *Pinto v. Plumcreek,* Civ. No. H–89–718 at 3. In *Danise,* the expert was compensated for 1 hour of pre-deposition file review, and 1 hour of document compilation. *Danise v. Safety Kleen Corp.,* 1998 U.S. LEXIS 18759 at *2.

Fuller's invoice reflects charges for 20.7 hours for "deposition prep" at a rate of $200 per hour. 5.3 of those hours were charged for preparing for a deposition that was cancelled by plaintiff because the funds had not yet been put into escrow by Hartford. Plaintiff argues that reimbursement for the full 20.7 hours is warranted because Ms. Fuller reviewed over 12,000 pages of documents and 14 deposition transcripts in preparation for the deposition, and 20% of the documents were provided after the expert report was prepared.

***2** Hartford argues that the document review was necessary in order for Fuller to prepare her expert opinion and report, and therefore should not be reimbursed by Hartford. Hartford also argues that Fuller's deposition was not as useful as plaintiff asserts, evidenced by the fact that Fuller needed

to continually refer to her report in order to testify at the deposition.

The court has reviewed Fuller's expert report and portions of Fuller's deposition testimony. It is clear that Ms. Fuller reviewed plaintiff's medical records at length in order to prepare the expert report. While Hartford is not required to reimburse plaintiff's counsel for the time Fuller spent preparing the report and developing her expert opinion, Hartford is required to reimburse plaintiff' counsel for some of the time Fuller spent preparing for her deposition. Over 20 hours of preparation time, however, is excessive, and plaintiff has cited to no case in which more than 2 hours of preparation time has been reimbursed by opposing counsel. Based on precedent in this district, the court finds it reasonable for Hartford to reimburse plaintiff's counsel for 2 hours of preparation time at the rate of $200 per hour. The parties agree that Fuller should be compensated at a reduced rate of $75 per hour for travel time. Therefore, Hartford shall reimburse plaintiff's counsel in the amount of $2,750, as itemized below.

Activity:	Rate (in $):	Hours:	Total (in $):
Deposition	200	8	1600
Travel	75	9	675
Break	75	1	75
Preparation	200	2	400
TOTAL			$2750

Hartford's request that the costs of responding to the motion is DENIED. Plaintiff's counsel shall return the remaining $1,250 held in escrow to Hartford within 10 days of the docketing of this ruling.

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.

SO ORDERED

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