SUPERIOR COURT OF WASHINGTON FOR BENTON COUNTY

JULIE M. ATWOOD,

Plaintiff,

v.

MISSION SUPPORT ALLIANCE, LLC, STEVE YOUNG, an individual, and DAVID RUSCITTO, an individual,

Defendants.

No. 15-2-01914-4

MISSION SUPPORT ALLIANCE, LLC'S MOTION TO QUASH THE SUBPOENA FOR TESTIMONY AND DOCUMENTS FROM FORMER GENERAL COUNSEL

Requested Motion for Shorten Time
Noting Date: February 3, 2017
Time: 1:30 p.m.

I. INTRODUCTION AND RELIEF REQUESTED

Pursuant to CR 26(c)(1) and CR 45(c), Defendant Mission Support Alliance ("MSA") seeks an order preventing the deposition of its former in-house General Counsel, Sandra Fowler. Deposing opposing legal counsel is strongly disfavored and is generally prohibited except in certain limited circumstances that are not applicable here. Plaintiff has multiple other means of obtaining relevant information regarding her claims; MSA's former General Counsel's relevant knowledge is privileged; and the information sought is not crucial to Plaintiff's preparation of her case. MSA has provided its relevant information regarding Plaintiff's claims and made its employees with relevant factual, non-privileged information available for depositions. MSA has also provided information regarding other complaints wholly unrelated to Plaintiff for a period of five years (2010 through the date the Complaint was filed). MSA respectfully requests the Court grant its motion and quash Plaintiff's subpoena for the deposition and production of documents of its former General Counsel.

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II. STATEMENT OF RELEVANT FACTS

A. Plaintiff's Complaint.

Plaintiff was an MSA employee from February 2010 through September 2013. Complaint, ¶ 2.3. During this entire time, Sandra Fowler was General Counsel in charge of legal affairs for MSA. Declaration of Stanley Bensussen ("Bensussen Decl."), ¶ 2.

Almost two years after her employment ended, on August 21, 2015, Plaintiff filed her complaint against Defendants. Complaint. Plaintiff's causes of action include the following claims:

- Against MSA and Young for intentional discrimination "in violation of the Washington Law Against Discrimination, RCW 49.60, et seq., for disparate treatment, creation of a hostile work environment, and retaliation on the basis of gender and for engaging in protected activity" (Complaint, ¶¶ 3.2. 3.3);

- Alternatively, against Young for "aiding, abetting, encouraging, or inciting the commission of an unfair discriminatory practice against the Plaintiff in violation of the Washington Law Against Discrimination, RCW 49.60.220, for disparate treatment, creation of a hostile work environment, and retaliation on the basis of gender and for engaging in protected activity," (Complaint, ¶ 3.4); and

- Against MSA "for wrongful discharge in violation of public policy for reporting violations of time accounting on a government contract in violation of state, federal, and municipal laws and policies, and in violation of public policy for opposing, or being perceived as opposing, discrimination in violation of the Washington Law Against Discrimination." (Complaint, ¶ 3.7).

Plaintiff's primary allegation regarding an adverse employment action stemmed from a single day – the day her employment at MSA ended. Complaint, ¶¶ 2.43-2.55.

B. Discovery in this Case.

1. Plaintiff's Written Discovery and Defendants' Responses Thereto.

The same day she served the complaint, Plaintiff served MSA with her First Set of Interrogatories and Requests for Production of Documents. Declaration of Denise L. Ashbaugh ("Ashbaugh Decl."), ¶ 9. Those discovery requests sought extensive information and documents. *Id.* MSA provided responses to the First Discovery Requests on October

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30, 2015, and continued to supplement its production over the next few months as responsive documents were located. *Id.*

On March 24, 2016, Plaintiff served her Second Set of Interrogatories and Requests for Production of Documents on MSA. *Id.*, ¶ 10. Again, MSA provided responses to the discovery in a timely manner and produced documents. *Id.*

On July 18, 2016, Plaintiff served her Third Set of Interrogatories and Requests for Production of Documents on MSA. *Id.*, ¶ 11. MSA provided responses on August 31, 2016. *Id.*

Likewise, on August 31, 2016, Plaintiff served her First Interrogatories and Requests for Production of Documents to Young. Mr. Young provided responses on September 30, 2016. *Id.*, ¶ 12.

Only when Plaintiffs discovery requests reached 89 interrogatories and 229 requests for production of documents did Defendants seek a protective order for abuse of discovery. *Id.*, ¶ 13. Despite this request, it has produced extensive and detailed answers to the matters related to Ms. Atwood's allegations. *Id.*

2. Depositions.

As of the date of this motion, Plaintiff has chosen to take Defendant Young, Cindy Protsman and Wendy Robbins (one two separate occasions) depositions. Ashbaugh Decl., ¶ 13. Plaintiff has noted the depositions of six (6) other fact witnesses in this matter to occur on February 6-7, 2017. *Id.* Included within these depositions are the two individuals who were present during the meeting ending Ms. Atwood's employment. *Id.* While one, Steve Cherry, was MSA's in-house counsel during that period of time, Defendants recognize that he will be able to provide relevant factual information not protected by the attorney-client privilege, due to his being present during that last meeting with Plainiff while she was employed by MSA. *Id.* As such, all ***factual*** relevant discovery is available to Plaintiff for this case without the need to depose MSA's former General Counsel. *Id.*

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C. Plaintiff Unnecessarily Subpoenas MSA's Former General Counsel for Her Deposition and Documents.

On Thursday, January 26, 2017 at 4:52 pm, Plaintiff served Defendants a Notice of Deposition for MSA's former general counsel, Sandra Fowler. Ashbaugh Decl., Ex. 1. Plaintiff did not, despite the Court rules requiring it, provide Defendants' counsel with the subpoena that was allegedly served on Ms. Fowler. Ashbaugh Decl., ¶ 2.

On Saturday, January 28, 2017, Defendants emailed Plaintiff noting that that MSA would be moving for a protective order (as it did not know a subpoena had been served), asking counsel for a meet-and-confer, and asking that counsel agree to stay the deposition until the Court had time to hear the motion. *Id.*, Ex. 2. Not hearing back, on Monday, January 30, 2017, Defendants reached out again to Plaintiff on the issue. *Id.*, Ex. 3. The same day, MSA learned not from Plaintiff, but instead from Ms. Fowler, that a subpoena was served asking not just for a deposition but also for production of documents. *Id.*, ¶ 4. The subpoena requested the following category of documents:

> 1. Any and all documents of any nature pertaining to any and all claims made by you against Mission Support Alliance, LLC or any individual manager of MSA, including but not limited to, all documents filed with any agency or any court, emails, correspondence, and notes. This request is intended to also include all documents pertaining to any settlement of any claims by you against MSA or its managers.
>
> 2. Any and all documents pertaining to, or mentioning, Julie M. Atwood.

Ashbaugh Decl., Ex. 4. The subpoena noted a different time for the deposition than the Notice of Deposition that was served on Defendants' counsel. *Id.*, ¶ 4. Despite learning of MSA's concerns, Plaintiff then served for the same date an amended notice of deposition and amended subpoena (for the first time) on Defendants. *Id.*, Ex. 5.

Thereafter, the parties had a meet and confer on the issue of Ms. Fowler's deposition. *Id.*, ¶ 6. During that discussion, MSA noted its concerns surrounding attorney-client privilege into discussions with MSA's former General Counsel regarding matters

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pertaining to Ms. Atwood. *Id.* MSA specifically noted that the only time that Ms. Fowler would have been made aware of facts surrounding Ms. Atwood would have been in her role as General Counsel where she was providing legal advise as counsel for the company or where someone was seeking legal advice regarding specific matters. *Id.* It was explained that as such, all knowledge that Ms. Fowler would have about Ms. Atwood would be protected attorney-client privilege. *Id.* It was also noted that any claims by Ms. Fowler against MSA, who voluntarily left MSA over two years after Ms. Atwood's employment ended, was nothing more than a fishing expedition designed to harass MSA. *Id.* Plaintiff certainly would like to bring in every single other unrelated issue into this case – apparently including witnesses who did not leave the company until *years after* her employment ended, but discovery does not allow such.

Given its concerns, MSA set forth its position that the subpoena presented not only issues that would disclose attorney-client privilege and/or work product (in both categories the categories of documents and deposition questions), it was also not calculated to lead to the discovery of admissible evidence. *Id.* Plaintiff noted her disagreement and MSA therefore again asked Plaintiff to stay the deposition until the Court had time to hear its motion to quash on a regular briefing schedule. *Id.* Plaintiff refused to agree to stay the deposition. *Id.*

The following day, on Tuesday, January 31, 2017, MSA emailed Ms. Fowler regarding MSA's position and notified her that because it appeared that she had already spoken with Plaintiff and/or counsel for Plaintiff, that MSA continued to maintained its attorney-client privilege for all communications with her as General Counsel for the company, despite her no longer being employed there. *Id.*, ¶ 7. MSA also informed Ms. Fowler that MSA would be moving to quash the deposition. *Id.* Ms. Fowler noted that if she were ordered to appear for her deposition, she would also be available on Friday, February 17 or March 3 to do so. *Id.*, ¶ 8.

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MSA moves now to quash the improper subpoena to Ms. Fowler.

III. ISSUE PRESENTED

Whether the Court should quash the deposition of MSA's former General Counsel when any knowledge General Counsel would have regarding Plaintiff's claims would be protected MSA attorney-client privilege and any discovery into her own claims would be beyond the proper scope of discovery?

IV. ARGUMENT

A. The Court Has Broad Discretion to Enter an Order Prohibiting The Deposition of MSA's Former General Counsel During the Time of Plaintiff's Employment.

MSA brings this motion pursuant to CR 26(c)(1) and CR 45(c)(3)(A). CR 26(c)(1) provides that a court may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including an order "that discovery not be had." Likewise, pursuant to CR 45(c)(3)(A), on a timely motion, the court by which the subpoena was issued *shall* quash or modify the subpoena if it, among other things, requires disclosure of privileged or other protected matter and no exception, or waiver applies. The trial court has broad discretion to manage the discovery process in a fashion that will implement the goal of full disclosure of *relevant* information and at the same time afford the participants protection against harmful side effects. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 231 (1982), *aff'd* 467 U.S. 20 (1984). Moreover, the Court has the express authority to limit discovery if it determines that the discovery sought is obtainable from other sources that are more convenient or less burdensome. CR 26(b)(1)(A). As discussed below, this Court should exercise its discretion to bar Plaintiff from deposing Ms. Fowler, as Plaintiff cannot establish that the extraordinary step of deposing MSA's former General Counsel is warranted.

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B. Deposing Opposing Counsel is Highly Disfavored and is Allowable Only in Limited Circumstances Not Applicable Here.

Although the civil rules do not expressly forbid deposing in-house (or former in-house) counsel, the practice is strongly disfavored and allowed only in very limited circumstances, not applicable here. "The taking of opposing counsel's depositions should be permitted only in limited circumstances" and "the party seeking the deposition must demonstrate its propriety and need before the deposition may go forward." *Am. Cas. Co. of Reading, Pa. v. Krieger* 160 F.R.D. 582, 588 (S.D. Cal. 1995); *see also Bybee Farms LLC v. Snake River Sugar Co.*, 2008 WL 820186 (E.D. Wash. Mar. 26, 2008) ("[C]ourts disparage the practice of deposing an attorney in a matter in which he is acting as counsel.").[1] As the leading case on attorney depositions explains:

> Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation. It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony; ... Moreover, the "chilling effect" that such practice will have on the truthful communications from the client to the attorney is obvious.

Shelton v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986); *see FMC Tech., Inc. v. Edwards*, No. C05-0946C, 2007 WL 836709 at *2 (W.D. Wash. Mar. 15, 2007) (referring to *Shelton* as the "leading case on attorney depositions").

To avoid the burden and disruption of deposing counsel except in truly exceptional circumstances, the Eighth Circuit in *Shelton* established a rigorous three-part test that places the burden on the party seeking an attorney deposition to show that "(1) no other means

[1] While Washington's appellate courts have not addressed the propriety of deposing opposing in-house counsel, there is a well-developed body of persuasive federal authority on the issue. *See, e.g., Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 739 (2007) ("Where a state rule is identical to its federal counterpart, analyses of the federal rule provides persuasive guidance as to the application of our comparable state rule."); *Gillett v. Connor*, 132 Wn. App. 818, 823 (2006) (observing that CR 26 is substantially the same as the corresponding federal rule in turning to federal cases for guidance on discovery dispute).

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exist to obtain information other than to depose opposing counsel, (2) the information sought is relevant and non-privileged, *and* (3) the information is *crucial* to the preparation of the case." *Id.* at 1327 (emphasis added); *see also Massachusetts Mut. Life Ins. Co. v. Cerf*, 177 F.R.D. 472 (N.D. Cal. 1998) (holding the burden of establishing the criteria of the *Shelton* test lies with the party seeking to depose the other party's counsel); *American Cas. Co. of Reading, Penn. v. Kreiger*, 160 F.R.D 582 (S.D. Cal. 1995) (same); *In re Sause Bros. Ocean Towing*, 144 F.R.D. 111, 116-17 (D. Or. 1991) (same).

Shelton involved an individual plaintiff's notice to take the deposition of the corporate defendant's in-house counsel. Plaintiff wanted to ask defendant's in-house counsel about the existence of documents in defendant's possession. The Eighth Circuit held that plaintiff failed to make the requisite showing because the information sought could be obtained by means other than deposing the in-house counsel and the information was privileged, since the in-house counsel's knowledge of the existence of relevant documents was obtained in the course of her role as counsel to defendant and, therefore, was protected work product. *Id.* at 1328-29.

The *Shelton* test has been widely followed by federal district courts, including those in Washington, which have not hesitated to enter orders prohibiting depositions of opposing in-house counsel. *See, e.g., Bybee Farms LLC v. Snake River Sugar Co.*, No. CV-06-5007-FVS, 2008 WL 820186 (E.D. Wash. Mar. 26, 2008) (granting motion to quash deposition of defendant's in-house counsel in light of plaintiff's failure to make requisite showing under *Shelton); Caterpillar Inc. v. Friedemann*, 164 F.R.D. 76 (D. Or. 1995) (granting motion to quash subpoena to in-house attorney because of failure to satisfy the *Shelton* test); *In re Sause Bros. Ocean Towing, DiLorenzo v. Costco Wholesale Corp.*, 243 F.R.D. 413 (W.D. Wash. 2007) (holding party failed to demonstrate good cause to take deposition of other party's inside counsel where it did not meet the *Shelton* test); *Theissen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001) (upholding trial court's decision to refuse to

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allow deposition of defendant's corporate counsel where plaintiff satisfied only one of the three *Shelton* requirements).

The result should be no different here as Plaintiff cannot meet her burden under *Shelton*. Plaintiff has not identified any non-privileged, appropriately discoverable information she seeks from Ms. Fowler. To the extent Plaintiff seeks from Ms. Fowler information related to Ms. Atwood, she has had the ability to obtain the depositions of factual witnesses for the past year and half without impinging on MSA's attorney-client privilege communications with its former General Counsel. To the extent that Plaintiff seeks discovery into claims that Ms. Fowler may have against the company, that is well beyond the scope of allowable discovery and it too would necessarily reveal attorney-client privilege information underlying such claims that is not relevant or necessary to address in Plaintiff's case. Plaintiff cannot satisfy any of the *Shelton* factors, let alone meet her burden to satisfy all three factors, and as such, her deposition of MSA's former General Counsel should be quashed.

1. Plaintiff has the Ability to Obtain All Necessary Information Through Discovery Outside of a Subpoena to MSA' Former General Counsel.

While it is clear that Plaintiff's strategy is to simply throw as much mud at Defendants as possible in hopes that something will stick, this case is about – and should be confined to – Plaintiff's claims and allegations regarding ***her*** employment at MSA. Plaintiff was only employed for approximately three years with the company and only reported to Defendant Young for approximately one year. Complaint, ¶¶ 2.5, 2.44. Her employment ended with MSA in September 2013. Complaint, ¶ 2.44. As such, properly focusing on her claims, discovery to date has shown that has been ample means to inquire into the ***facts*** of her claims and Defendant's defenses other than to depose MSA's former General Counsel.

Plaintiff has propounded dozens of interrogatories, hundreds of requests for production, and most recently, requests for admission. Ashbaugh Decl., ¶¶ 8-12.

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Defendants have answered the discovery requests in good faith providing thousands of documents and scouring key custodian's hard drives. Additionally, Plaintiff has already conducted three (3) depositions of fact witnesses, scheduled six (6) additional depositions, is consulting and closely working with MSA's former EEO Officer, and has close ties and is coordinating with DOE personnel (while DOE has objected to Defendants' discovery requests on them). *Id.*, ¶ 14. There is simply no need or justification to take MSA's former General Counsel's deposition on the issues in this case. This is especially true as the only time that MSA's former General Counsel would have been made aware of facts surrounding Ms. Atwood would have been in her role as General Counsel where she was advised as counsel for the company or where someone was seeking legal advice regarding specific matters. Ashbaugh Decl., ¶ 6. Through interrogatories, requests for production of documents, requests for admission and depositions of relevant non-attorney employees, Plaintiff has many other ways to obtain the information see seeks. Thus, Plaintiff cannot establish the first prong of the *Shelton* test that "no other means exist to obtain the information than to depose opposing counsel." *Shelton*, 805 F.2d at 1328.

Additionally, Plaintiff's subpoena regarding any and all claims made by Ms. Fowler against MSA is not proper discovery. Ms. Fowler voluntarily left MSA to work for another entity over two years ***after*** Ms. Atwood's employment ended. Ms. Fowler reported to Messrs. Bensussen and Johnson when she decided to leave MSA, neither of which were employed during Ms. Atwood's tenure with the company. Bensussen Decl., ¶ 2. Plaintiff's motion is nothing more than an ongoing attempt to improperly expand this case beyond her own claims and harass MSA. Ashbaugh Decl., ¶ 6. The subpoena presented not only addresses issues that could disclose attorney-client privilege and/or work product (in both categories of documents), it also is not calculated to lead to the discovery of admissible evidence.

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2. Any Knowledge MSA's Former General Counsel has Regarding Ms. Atwood's Claims is Privileged.

All of Ms. Fowler's knowledge regarding this case is privileged. She had no direct contact or communication with Plaintiff (up until Plaintiff and/or her counsel contacted her in this case), or anyone outside of MSA's employees or its outside counsel for purposes of giving or receiving legal advice in the context of her role representing MSA with respect to the current dispute. Ashbaugh Decl., ¶ 6. As a result, her knowledge regarding this case is wholly the result of attorney-client communications or is a reflection of judgments and evaluations that she made as a lawyer in the process of defending her client. *Id.* Thus, everything Ms. Fowler knows about this case is privileged so Plaintiff's cannot establish the second prong of the *Shelton* test that "the information sought is relevant and nonprivileged." *Shelton*, 805 F.2d at 1328.

Again, to the extent that Plaintiff seeks to take Ms. Fowler's deposition for purposes of solely inquiring into her own claims, that too could impinge on and necessarily require disclosure of attorney-client privilege for a subject that is well beyond the means of discovery in this case. That too should be prevented.

3. MSA's Former General Counsel's Testimony Is Not Necessary in this Case.

The information Plaintiff seeks is not crucial to their preparation of her case. MSA's position and basis for its decisions are well laid out in Defendants' answers and discovery responses and can – and have been – explored fully in deposition of MSA witnesses. In fact, MSA's former in-house counsel who was present on Ms. Atwood's last day of employment will be deposed on facts he knows regarding his interactions with Plaintiff. Moreover, all proper discovery mechanisms have been available to Plaintiff. In contrast, Plaintiff has failed to articulate any legitimate reason that obtaining information related to her claims from MSA's former General Counsel instead of through any of the myriad alternative sources (which have been exhaustive to date) would be crucial to the

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proper preparation her case. In consequence, Plaintiff cannot satisfy the third prong of the *Shelton* test.

Further, Ms. Fowler's own claims against MSA after voluntarily leaving for another position over two years after Plaintiff's employment ended is not crucial to her case. MSA has provided (and is supplementing) complaints wholly unrelated to Plaintiff of gender discrimination, retaliation and alleged misuse of funds for a period of five years (from 2010 through August 21, 2015). Discovery is not unlimited and MSA's production is more than appropriate.

V. CONCLUSION

Plaintiff cannot satisfy any of the three parts of the *Shelton* test. There is no reason to depart from the general preclusion prohibiting the deposition of in-house General Counsel. Plaintiff's subpoena for Ms. Fowler's deposition and production of documents is improper and MSA respectfully requests that that subpoena be quashed.

DATED: February 2, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served true and correct copies of the foregoing document upon the following, at the addresses stated below, via the method of service indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: February 2, 2017 at Richland, Washington.

Mark Beller, Paralegal

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