Analysis
As of: Nov 11, 2012

DR. STEFANIE PERKINS, Plaintiff, -against- MEMORIAL SLOAN-KETTERING CANCER CENTER, WILLIAM BRIETBART, M.D., ANDREW ROTH, M.D., Defendants.

02 Civ. 6493 (AKH)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2003 U.S. Dist. LEXIS 5500; 91 Fair Empl. Prac. Cas. (BNA) 801

April 1, 2003, Decided
April 4, 2003, Filed

SUBSEQUENT HISTORY: Summary judgment granted, in part, summary judgment denied, in part by, Motion to strike granted by, in part, Motion to strike denied by, in part *Perkins v. Mem'l Sloane-Kettering Cancer Ctr., 2005 U.S. Dist. LEXIS 22541 (S.D.N.Y., Sept. 30, 2005)*

DISPOSITION: Court ruled that audio tapes be deposited in safe deposit box controlled by both sets of counsel, and kept there until completion of discovery.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employee filed an employment discrimination lawsuit, claiming that defendant doctors discriminated against her based on sex, harassed her, and then retaliated against her for complaining about the harassment. The parties asked the court to determine a discovery dispute that involved tape-recorded conversations between the employee and defendant employer's employees.

OVERVIEW: Defendants, the employer and the doctors, served *Fed. R. Civ. P. 33, 34* discovery requests upon the employee, asking her to identify and produce any tape-recorded conversations that might have existed. Defendants claimed that the employee taped some conversations surreptitiously. The employee responded that she would produce such tapes as she had but only after her counsel took the depositions of six employees. Courts were split as to how to regulate discovery of video and audio tapes. The party who surreptitiously taped and continued to have access to such tapes had decided advantage over the unaided recollections of the witnesses who had been taped. The court found that neither side should have been advantaged at the expense of the other. The tapes should have been equally unavailable, until after all depositions of the affected parties or witnesses had been taken.

OUTCOME: The court ordered the parties to deposit all taped conversations with any witness or party containing any matter relevant to the lawsuit into a safe deposit box that was jointly controlled by both sets of counsel, there to remain until the completion of discovery.

COUNSEL: [*1] For Stefanie Perkins, PLAINTIFF: Joshua Friedman, Law Offices of Joshua Friedman, New York, NY USA.

For Memorial Sloan-Kettering Cancer Center, William Breitbart, Andrew Roth, DEFENDANTS: Joel E Cohen, McDermott Will & Emery, New York, NY USA.

JUDGES: ALVIN K. HELLERSTEIN, United States District Judge.

OPINION BY: ALVIN K. HELLERSTEIN

OPINION

MEMORANDUM & ORDER REGULATING USE OF TAPED CONVERSATIONS

ALVIN K. HELLERSTEIN, U.S.D.J.:

The parties, using the procedure outlined by my Chambers Rule 2E, have asked me to determine their discovery dispute. The case arises from an employment discrimination lawsuit, with plaintiff claiming that defendants Dr. Brietbart and Dr. Roth discriminated against her based on sex, harassed her, and then retaliated against her for complaining about the harassment. The specific discovery dispute involves tape-recorded conversations between plaintiff and various of defendant Memorial Sloan-Kettering Cancer Center's employees.

Defendants served *Rule 33* and *Rule 34* discovery requests upon plaintiff, asking her to identify and produce any tape-recorded conversations that might exist of certain meetings that she had with identified employees and officers [*2] of defendant, generally and on identified dates. Defendant claims that plaintiff taped some conversations surreptitiously. Plaintiff responded that she would produce such tapes as she had but only after her counsel took the depositions of six such employees.

I rule that plaintiff and defendant promptly deposit all taped conversations with any witness or party containing any matter relevant to this lawsuit into a safe deposit box that is jointly controlled by both sets of counsel, there to remain until the completion of discovery, and that in the interim neither party have in her or its possession no such tapes, or notes or transcripts of such tapes.

Courts are split as to how to regulate discovery of video and audio tapes. Some allow the party who caused the tape to be made to defer production until after the deposition of the witness or party whose statements or activities were recorded. *See, e.g., Poppo v. Aon Risk Servs., Inc.*, No. 00 Civ. 4165 (HB), 2000 U.S. Dis. LEXIS 17588 (S.D.N.Y. Dec. 6, 2000) (basing such deferral on the proposition that the recording constitutes material prepared for litigation until after the witness has been deposed). Production at that time is [*3] required in order to avoid surprise and possible misuse of tapes at the trial. Other courts treat such tapes like any other item of discovery, and order production before depositions in the interest of a level playing field for all parties and full disclosure of all information relevant to the claims or defenses of the parties. *See, e.g., Stark v. Photo Researchers, Inc., 77 F.R.D. 18, 20 (S.D.N.Y. 1977)*; *Roberts v. Americable Int'l, Inc., 883 F. Supp. 499* (E.D.Ca. 1995). *Compare DiMichel v. South Buffalo Ry. Co., 80 N.Y.2d 184, 604 N.E.2d 63, 590 N.Y.S.2d 1 (N.Y. 1992), with Tai Tran v. New Rochelle Hosp. Med. Ctr., No. 19, 99 N.Y.2d 383, 786 N.E.2d 444, 2003 N.Y. LEXIS 183, 756 N.Y.S.2d 509 (N.Y. Feb. 20, 2003).*

There is much to commend both points of view. The party who surreptitiously tapes and continues to have access to such tapes has decided advantage over the unaided recollections of the witnesses who have been taped. The integrity of the tape itself can lead down paths of digressive discovery: expensive, wasteful, and provocative. On the other hand, witnesses who have the ability to consult a tape before they testify can too easily fabricate and deliver [*4] contrived versions of their fair recollections.

I therefore rule that neither side should be advantaged at the expense of the other. The tapes should be equally unavailable, until after all depositions of the affected parties or witnesses have been taken. And placing them in a locked box, jointly controlled by the adverse counsel, makes those tapes equally unavailable to either side, and protects their integrity to whatever extent

as presently exists.

SO ORDERED.

Dated: April *1*, 2003

ALVIN K. HELLERSTEIN

United States District Judge

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