

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

HILDA L. SOLIS, Secretary of Labor,)	
United States Department of Labor,)	
)	
Complainant,)	
)	OSHRC Docket No. 08-1104
v.)	
)	
IMPERIAL SUGAR COMPANY; IMPERIAL-)	
SAVANNAH, L.P.; and their Successors,)	OSHA Inspection No. 310988712
)	
Respondents.)	

COMPLAINANT’S MOTION FOR LEAVE TO TAKE THE DEPOSITIONS OF WITNESSES WHO WERE INTERVIEWED UNDER OATH BY THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION DURING THE INVESTIGATION

Pursuant to Rule 2200.56(a) of the Occupational Safety and Health Review Commission, and Rule 26(c) of the Federal Rules of Civil Procedure, Complainant moves for leave to take the depositions of certain witnesses who have previously been interviewed by the Occupational Safety and Health Administration (“OSHA”). As grounds for this Motion, Complainant shows as follows:

I. CERTIFICATION

Pursuant to Fed. R. Civ. P. 26(c)(1), the undersigned counsel hereby certify that Complainant has, in good faith, conferred with counsel for Respondents in an effort to resolve the dispute without court action.

II. WITNESSES AT ISSUE

Since May 2009, counsel for Complainant has conferred with counsel for Respondents to schedule the depositions of certain fact witnesses, who are managers or supervisors currently or previously employed by Respondents. However, counsel for Complainant was notified that

Respondents oppose the depositions of any witnesses who previously gave administrative depositions during the investigation by OSHA, prior to the present litigation. These witnesses potentially include the following individuals:

1. Donny Bryan, Capital Projects Manager (Refinery and Packaging) at Respondents' facility at Port Wentworth, Georgia (interviewed May 30, 2008);
2. Phillip Scott Glidewell, Risk Manager for Respondent Imperial Sugar Company (interviewed June 5, 2008);
3. Christopher S. Gordon, Process/Project Engineer at Respondents' facility at Port Wentworth, Georgia (interviewed May 28, 2008);
4. Deborah Haban, Director of Human Resources for Respondent Imperial Sugar Company (interviewed June 26, 2008);
5. Brian Harrison, Vice President of Sugar Technologies and former Vice President of Operations for Respondent Imperial Sugar Company (interviewed June 12, 2008);
6. Kay Hastings, former Senior Vice President of Human Resources for Respondent Imperial Sugar Company (interviewed June 15, 2008);
7. Michael Lastie, former Corporate Safety Manager for Respondent Imperial Sugar Company (interviewed June 14, 2008);
8. Aamir Mausooof, Refinery Operations Manager at Respondents' facility at Port Wentworth, Georgia (interviewed May 27, 2008);
9. Darren Pevey, Safety Manager at Respondents' facility at Port Wentworth, Georgia (interviewed May 28, 2008);

10. John Sheptor, President and Chief Executive Officer, Imperial Sugar Company, Sugar Land, Texas (interviewed for approximately 15 minutes on June 6, 2008, and interviewed again on June 11, 2008);
11. Douglas Sykes, Corporate Safety Manager, Imperial Sugar Company, Sugar Land, Texas (interviewed June 4, 2008);
12. Dwayne Zeigler, Senior Manager Planning, Port Wentworth, Georgia (interviewed May 29, 2008).

III. ARGUMENT

Under the rules of the Occupational Safety and Health Review Commission, Complainant is entitled to reasonable development of evidence in support of her case. See generally 29 C.F.R. 2200.52. The information sought by a party during discovery “may concern any matter that is not privileged and that is relevant to the subject matter involved in the pending case.” 29 C.F.R. 2200.52(b). In cases arising under the Commission rules, depositions may be used for “discovery, to contradict or impeach the testimony of a deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence or the Federal Rules of Civil Procedure . . .” 29 C.F.R. 2200.56(f). The United States Supreme Court has held that “the deposition-discovery rules are to be accorded a broad and liberal treatment,” since “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.” Hickman v. Taylor, 329 U.S. 495, 507, 67 S.Ct. 385, 392. The Court also stated that certain limitations to discovery do exist within the Federal Rules of Civil Procedure when a party seeks discovery in “bad faith,” intends to “annoy” the opponent, or addresses irrelevant or privileged information. *Id.*

Respondents oppose the depositions of the above witnesses on the grounds that these witnesses were previously interviewed by OSHA under oath. Complainant is unaware of any

Commission rule or provision of the Federal Rules of Civil Procedure or the Federal Rules of Evidence which suggests that a previous sworn interview statement – or administrative deposition conducted **by the agency during an investigation** – precludes the taking of an individual’s deposition by attorneys in litigation that follows the issuance of citations. Further, Complainant is unaware of any federal or Commission case law that offers such a suggestion. The Federal Rules of Civil Procedure do not even preclude the deposing of a witness who has already been formally deposed in a matter, as long as the requesting party obtains leave of court to do so. FED. R. CIV. P. 30(a)(2)(A)(ii).

None of the above witnesses have been deposed in this case. Rather, all of these individuals were interviewed by OSHA investigators and officials following the fatal explosion at Respondents’ facility at Port Wentworth, Georgia, on February 7, 2008. The individuals listed above possess discoverable information in light of their supervisory roles and responsibilities concerning safety and plant operations, and due to their knowledge of conditions at Respondents’ facility. Complainant submits that any proposed deposition of these individuals would not simply result in a duplication of information already provided to OSHA. The statements culled from interviews by OSHA should in no way be viewed in the same light as a traditional litigation discovery process. These interviews were conducted before OSHA issued citations, before Respondents chose to contest the citations, before Complainant filed the first pleading in this litigation, before Respondents raised affirmative defenses in this matter, and before any formal discovery occurred in this case. Attorneys for Complainant are not in the same position as the OSHA investigators and officials who interviewed these individuals prior to the issuance of citations, and should not be precluded from seeking discoverable information merely because some of the potential witnesses were interviewed by OSHA during the investigation.

Counsel for Complainant advised Respondents' counsel that Complainant would endeavor wherever possible not to "cover the same ground" addressed in the previous administrative depositions conducted by OSHA. To date, Complainant has requested only to take the deposition of one of the twelve individuals listed above, Amir Mausooof. However, it is foreseeable that Complainant may seek to depose other individuals named above and would again encounter the Respondents' objection.

Complainant submits that her ability to conduct thorough discovery in this case should not be limited by previous interviews with individuals conducted by OSHA prior to the commencement of this action. There is no precedent for the position taken by Respondents. The information sought by Complainant in conducting depositions of the witnesses listed above is relevant, not overly burdensome, not repetitious, and not privileged. Instead, Complainant seeks to obtain information necessary to the development of her case, to determine credibility of potential witnesses, and to engage in a good faith effort to discover facts relevant to the claims and defenses in this case. Respondents have, thus far, provided no basis in law or fact to impede Complainant's ability to conduct the depositions of these relevant witnesses.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Complainant respectfully requests that the present Motion be granted.

Respectfully submitted, this 11th day of August, 2009.

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SOL Case No. 08-60093

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CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served may be served and filed electronically. I further certify that a copy of Complainant's Motion for Leave to Take the Depositions of Witnesses Who Were Interviewed Under Oath by the Occupational Health and Safety Administration During the Investigation was electronically served on August 11, 2009 on the following parties:

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ORDER

This matter comes before the undersigned for consideration of Complainant's Motion for Leave to Take the Depositions of Witnesses Who Were Interviewed Under Oath by the Occupational Health and Safety Administration During the Investigation. For good cause shown, Complainant's Motion is **GRANTED**.

Date: _____

HONORABLE COVETTE ROONEY
U.S. OSHRC JUDGE