



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
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Secretary of Labor,

Complainant

v.

United Rentals North America, Inc., d/b/a  
United Rentals Pump Solutions Division,

Respondent.

OSHRC Docket No.: **15-2178**

**Order Denying Respondent's Motion For Protective Order**

United Rentals North America, Inc., d/b/a United Rentals Pump Solutions Division (United Rentals) moves for a protective order to sequester Robert Pinkston, a non-party, from depositions scheduled to be taken in this proceeding. Robert Pinkston, an employee of Mosaic Fertilizer, LLC (Mosaic) was injured falling into a cooler tank at Mosaic's manufacturing plant in Riverview, Florida, on April 22, 2015. Mosaic had contracted United Rentals to pump the cooler tanks in its plant. OSHA issued a Citation and Notification of Penalty to United Rentals on September 29, 2015, as an exposing employer. Mr. Pinkston subsequently filed a civil action against United Rentals.

On March 9, 2016, Mr. Pinkston moved to intervene in this proceeding. On March 24, 2016, I held a conference call with the parties regarding his motion to intervene. During the conference call, Mr. Pinkston stated he would like to attend the scheduled depositions.<sup>1</sup> On March 29, 2016, I denied Mr. Pinkston's motion to intervene but stated, "[U]nless a protective order is issued precluding Mr. Pinkston's presence during a deposition, pursuant to Fed. R. Civ.

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<sup>1</sup> Fed. R. Civ. P. 30(c)(1), revised in 1993, clarifies there is no sequestration of witnesses in a deposition: "The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615." (emphasis added). Rule 615 provides: "At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." The Advisory Note to the 1993 Amendment states, "The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party."

26(c)(1)(E), he would be able to observe any depositions which take place in this case.” (Order Denying Robert Pinkston’s Motion to Intervene, p. 3)<sup>2</sup>

Commission Rule 52(e)(5) provides, “In connection with any discovery procedures and where a showing of good cause has been made, the Commission or Judge may make any order including . . . [t]hat discovery be conducted with no one present except persons designated by the Commission or Judge[.]” Commission Rule 52 does not define “good cause.” The Court of Appeals for the Eleventh Circuit, in which this case arises, had held:

“Good cause” is a well-established legal phrase. Although difficult to define in absolute terms, it generally signifies a sound basis or legitimate need to take judicial action. In a different context, this court has identified four factors for ascertaining the existence of good cause which include: “[1] the severity and the likelihood of the perceived harm; [2] the precision with which the order is drawn; [3] the availability of a less onerous alternative; and [4] the duration of the order.” *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1205 (11th Cir.1985).

*In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987).

United Rentals contends good cause for a protective order exists for two reasons: (1) “If Pinkston attends the depositions of the Mosaic employees, then he will have the opportunity to tailor his testimony and, thereby, limit Respondent’s ability to determine what actually occurred in the case” and (2) since Mr. Pinkston has filed a civil action against United Rentals, “there is a great risk Pinkston—either consciously or subconsciously—will rely on the fact-witnesses’ testimony to bolster his version of events and his claims of liability against United Rentals.” (Motion, p. 5). I find neither of these contentions show good cause for a protective order.

First, the blanket assumption Mr. Pinkston will “tailor his testimony” is not specific enough to warrant a protective order.

To conclude otherwise would indicate that good cause exists for granting a protective order any time fact witnesses in a case are employed by the same employer or are employed by a party in the case. Such a conclusion is inconsistent with this court’s admonition that a district court may not grant a protective order solely on the basis of “stereotyped and conclusory statements.” *Id.*; see also *Tuszkiewicz v. Allen Bradley Co.*, 170 F.R.D. 15, 17 (E.D.Wis.1996) (denying \*307 a request for a protective order based on the fact that several fact witnesses were employed by the defendant and worked together because a finding of good

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<sup>2</sup> I now amend this sentence by substituting “Commission Rule 52(e)(5)” for “Fed. R. Civ. P. 26(c)(1)(E).” See Commission Rule 2(b) (“In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure.”).

cause based on this showing alone “would surely mandate the same result in all cases in which there was more than one fact witness on an issue and where the movant alleges that prejudice could result”); *BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154, 155, 160 (N.D.Ala.1986) (holding that the defendant's allegations regarding the need to preclude plaintiff's witnesses, some of whom were the plaintiff's employees, “from hearing or being exposed to deponents' testimony” did not constitute “anything more than ordinary garden variety or boilerplate ‘good cause’ facts which will exist in most civil litigation”). The district court therefore clearly abused its discretion in affirming the magistrate's sequestration order on the present record.

*In re Terra Int'l, Inc.*, 134 F.3d 302, 306-07 (5th Cir. 1998).

United Rentals seeks to exclude Mr. Pinkston from “the depositions of the Mosaic employees.” (Motion, p. 5) There is no basis for excluding “fact witnesses in a case [who] are employed by the same employer.” This is the “ordinary garden variety or boilerplate ‘good cause’ facts which will exist in most civil litigation.”<sup>3</sup>

Secondly, United Rentals is concerned Mr. Pinkston “will rely on the fact-witnesses’ testimony to bolster his version of events and his claims of liability against United Rentals.” (Motion, p.5) United Rentals has cited to no authority to support its contention good cause can be shown to exclude a witness from a deposition in one proceeding, based on the anticipation of a separate legal action. Here, the Secretary has offered to take the deposition of Mr. Pinkston before any of the scheduled Mosaic employees. The deposition will be under oath and transcribed.<sup>4</sup> Hypothetically, if Mr. Pinkston changed his testimony between the time of the deposition and the time of the potential civil action, the deposition will be available for impeachment purposes. Fed.R.Civ.P. 32(a)(8) provides:

A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the

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<sup>3</sup> United Rentals cites *Dade v. Willis*, 1998 WL 260270 (E.D.Pa. Apr. 20, 1998), in support of its argument. I find the case inapposite. In *Dade*, the plaintiff filed civil rights claims against two police officers who he alleged assaulted him. The court granted the plaintiff's motion to exclude the codefendants from each other's deposition. Here, Mr. Pinkston is not a defendant in this case and he has no codefendant. United Rentals has not identified any employee with whom Mr. Pinkston may potentially collude. United Rentals has shown no more than unfounded speculation that Mr. Pinkston would alter his subsequent testimony after attending the depositions of the other Mosaic employees.

<sup>4</sup> During the telephone conference call I held today informing the parties of my ruling, Counsel for Respondent informed me that Mr. Pinkston's deposition would not occur first due to his illness. Whether Mr. Pinkston is deposed first does not form the basis for my ruling. Therefore, the change in deposition schedule does not alter my ruling.

same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

Therefore, I **DENY** United Rentals' motion for protective order to exclude Mr. Pinkston from the scheduled depositions.

SO ORDERED.

**Date: April 26, 2016**

/s/  
**Judge Sharon D. Calhoun**  
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