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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ISABEL MEZA, HECTOR AGUIRRE, FRANCISCO HERNANDEZ, and MAXIMO VILLAREAL,	)	
Plaintiffs,	)	04-2397 D/P
v.	)	
BURLISON GIN CO., INC., KELLEY ENTERPRISES, and RICHARD KELLEY,	)	
Defendants.	)	

ORDER DENYING PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

Before the Court is Plaintiff Isabel Meza's Motion for Protective Order, filed on October 1, 2004 (Dkt 23). Meza is requesting that the Court order his deposition to be conducted telephonically, or as two alternatives, either in the Southern District of Texas prior to the discovery deadline or in the Western District of Tennessee during the week before trial. The defendants filed their response on October 18, 2004. For the reasons stated below, Meza's motion is DENIED.

I. BACKGROUND

Plaintiffs are migrant workers, who reside in southern Texas. In the fall of 2002, Plaintiffs were employed by Defendant Kelley

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Enterprises as agricultural employees in Burlison, Tennessee.[1] It is from this employment that Plaintiffs claim Defendants violated their rights under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 et seq., and a Tennessee statute prohibiting deceptive representations in procuring employees, T.C.A. § 50-1-102.

The matter presently before the Court is a discovery dispute concerning the deposition of Meza. On August 19, 2004, Defendants sent notice for Meza's deposition, set for October 14, 2004 in Memphis, Tennessee. Thereafter, the parties discussed the deposition on numerous occasions, but they were unable to reach an agreement on certain factors, namely whether the deposition could be conducted telephonically and, if not, where it should take place. In response to these disagreements, Meza filed this Motion for Protective Order, seeking the Court to order that his deposition be conducted telephonically, or as two alternatives, either near his residence in the McAllen Division of the U.S. District Court for the Southern District of Texas prior to the discovery deadline or in the Western District of Tennessee during the week before trial. Anticipating further depositions sought by Defendants, the motion also requests identical orders on any potential depositions of the remaining plaintiffs.

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[1] Although Plaintiffs claim all three defendants employed them during that time period, only Kelley Enterprises admits to having employed the plaintiffs. This disagreement is not relevant to the matter at hand.

Meza opposes going to Memphis for a deposition. He claims that because of his status as a migrant worker, he would suffer great hardship from being required to leave work for four days to travel to Tennessee to appear for his deposition. Despite this claim made in his memorandum supporting the motion, Meza did not supplement the memorandum with any sworn statements supporting the claim.

Defendants make several arguments why Meza has not shown good cause for the Court to issue a protective order. First, they claim that Meza should have submitted an affidavit, verifying the hardships he claims in his motion. Second, they contend that because Meza filed this suit in the Western District of Tennessee, he should be required to come to this district to be deposed.

In addition to arguing that they have a right to depose Meza face-to-face in order to adequately prepare for trial and that a telephonic deposition requiring a translator would be particularly difficult, Defendants also contend that the alternatives proposed by Meza are not acceptable. Defendants oppose going to Texas for the deposition because of the expense of traveling for an action brought by Meza. Additionally, they resist deposing Meza one week prior to trial because it would not give them adequate time to prepare for trial.

II. ANALYSIS

Federal Rule of Civil Procedure 30(b)(7) permits the use of telephonic depositions. This rule provides that "parties may

stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means." Fed. R. Civ P. 30(b)(7)

In considering whether a party-deponent should be allowed to be deposed telephonically, case law reveals no consensus among the courts. Compare Jahr v. IU Int'l Corp., 109 F.R.D. 429, 431 (M.D.N.C. 1986)(stating that "leave to take telephonic depositions should be liberally granted in appropriate cases") and Rehau, Inc. v. Colortech, Inc., 145 F.R.D. 444, 446 (S.D.N.Y. 1993)(construing Rule 30(b)(7) liberally in granting plaintiff's motion that depositions of corporate officials be taken telephonically), with Clem v. Allied Van Lines Int'l Corp., 102 F.R.D. 938, 940 (S.D.N.Y. 1984)(finding that plaintiff's showing of hardship does not overcome a presumption that the plaintiff should appear for a deposition in his chosen forum in denying plaintiff's motion that his deposition be taken telephonically) and U.S. v. Rock Springs Vista Dev., 185 F.R.D. 603, 604 (D. Nev. 1999)(holding that absent a showing of hardship, a nonresident defendant should be required to attend a deposition in the chosen forum and distinguishing Jahr on the grounds that it dealt with a non-party witness). Under Jahr, the burden is placed on the deposing party to prove a high degree of prejudice which overcomes the presumptive validity of telephone depositions. Jahr, 109 F.R.D. at 432. Under Clem, the burden is placed on the party-deponent to establish such a level of extreme hardship that the court should not require him to appear in

the forum for his deposition. Clem, 102 F.R.D. at 940.

Other courts have, however, considered these cases and ultimately concluded that courts need to balance the hardship and prejudice to all parties in determining whether a deposition should be conducted telephonically. See Normande v. Grippo, No. 01-CIV-7441, 2002 WL 59427, at *1 (S.D.N.Y. Jan. 16, 2002)("Rather, courts must strive to achieve a balance between claims of prejudice and those of hardship . . . ."); Mercado v. Transoceanic Cable Ship Co., Civ. A. No. 88-5335, 1989 WL 83596, at *1 (E.D. Pa. Jul. 25, 1989) ("Where a real potential for prejudice can be shown, however, the court must balance the likelihood, nature and extent of such prejudice against the issues involved in the litigation and the inconvenience and cost of using alternative, more traditional methods of discovery.) This Court likewise concludes that such a balancing approach is appropriate in this case. Some of the factors the Court considers are:

> the financial hardship, the choice of the forum, the cost savings of a telephone deposition relative to the amount in controversy, whether the deponent is a party or non-party, the location of counsel, the complexity of the case, the difficulties in taking telephone depositions due to the use of exhibits, and any difficulties in traveling to the forum (such as medical reasons).

Houk v. Thomas & Betts, Corp., No. 03-2487 (W.D. Tenn. July 6, 2004)(order denying telephone depositions).

An analysis of these factors to the matter at hand, however, would be premature. Courts generally require supporting affidavits attesting to these types of facts. See Cobell v. Norton, 213

F.R.D. 43, 47 (D.D.C. 2003)(denying a motion for protective order because the plaintiff did not file an affidavit providing specific hardships to require a deposition to take place at his residence, instead of in the chosen forum); Dalmady v. Price Waterhouse & Co., 62 F.R.D. 157, 159 (D.P.R. 1973)("It is not sufficient that plaintiff's attorneys make naked assertions with respect to the financial and hardship conditions faced by him. Well prepared and complete affidavits on his part are necessary to corroborate and give substance to his attorneys' assertions."). Plaintiffs' counsel have asserted a number of hardships in their memorandum but failed to provide any affidavits to support these contentions.[2] Consequently, the Court cannot issue a protective order at this time.

III. Conclusion

For the reasons above, Plaintiff's Motion for Protective Order is DENIED. Plaintiffs may renew this motion after first filing supporting affidavits addressing the relevant facts.

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[2] For example, Plaintiff's memorandum states that he does not have the financial resources to travel to Memphis for a deposition, but there is no indication of his financial status, his earning capacity, costs (including fares, room, and board) involved in traveling to the deposition, and alternative methods of travel (such as by personal vehicle). Plaintiff also suggests that he cannot take four days off work to attend a deposition without risking losing his seasonal job, but he has not stated why he could not be deposed when the current seasonal job ends.

IT IS SO ORDERED.

[redacted]

TU M. PHAM
United States Magistrate Judge

10/25/04
Date

UNITED STATES DISTRICT COURT - WESTERN DISTRICT OF TENNESSEE

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This notice confirms a copy of the document docketed as number 33 in case 2:04-CV-02397 was distributed by fax, mail, or direct printing on October 27, 2004 to the parties listed.

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Honorable Bernice Donald
US DISTRICT COURT