

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

NAZEEH YOUNIS,)
)
 Plaintiff,)
)
 vs.) No. 07-cv-02356-DV
)
)
 PINNACLE AIRLINES, INC.,)
)
 Defendant.)

ORDER GRANTING PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER

Before the court is the February 1, 2008 motion of the plaintiff, Nazeeh Younis, seeking a protective order requiring that the defendant, Pinnacle Airlines, Inc. ("Pinnacle"), take his deposition by written interrogatories, by telephone, or, in the alternative, for Pinnacle to pay all reasonable expenses he incurs in traveling from his residence to the Western District of Tennessee. The motion is brought pursuant to Federal Rule of Civil Procedure 26(c). Pinnacle has filed a response in opposition to the motion. The motion was referred to the United States Magistrate Judge for a determination. For the following reasons, Younis' motion for a protective order is granted.

BACKGROUND

This is an employment discrimination case in which Younis, a former pilot with Pinnacle, alleges violations of Title VII and 42 U.S.C. § 1981. (Def.'s Mem. Supp. Resp. 1 (citing Compl. ¶ 6).)

This action was initially filed in the Western District of Wisconsin before being transferred to the Western District of Tennessee, Western Division, for lack of venue in Wisconsin. (*Id.* at 2.) Younis was scheduled to have his deposition taken on January 28, 2008, but the deposition was cancelled when Younis' counsel advised Pinnacle that Younis lacked the financial resources to travel from the United Arab Emirates ("UAE"), where he is currently unemployed and living with his parents, to the United States for a deposition. (Pl.'s Mem. Supp. 2.) Younis and Pinnacle have attempted to arrange a mutually agreeable alternative that would allow Younis' deposition to be taken, but the parties have failed to reach an agreement. (*Id.*)

Younis argues that it would be unduly burdensome and expensive for him to attend a deposition in the Western District of Tennessee. (*Id.* at 3.) He claims in his unsworn declaration that flights from Dubai, UAE to Memphis, Tennessee, United States, range in price from \$1,501 to \$4,534. (Unsworn Decl. of Nazeeh Younis ¶ 6.) Younis alleges that his continuing unemployment since his termination from Pinnacle would make the cost of booking a ticket on even the cheapest flight unduly burdensome. (Pl.'s Mem. Supp. 6.) He further claims that Pinnacle's interest in taking an in-person deposition is far outweighed by the hardship that would be imposed on himself if required to travel to the United States. (*Id.* at 7.) Because Pinnacle only has a minimal interest in taking

his deposition in the United States, Younis argues that a deposition conducted over the phone or using written interrogatories should be required. (*Id.* at 6-7.) In the alternative, should a deposition in the United States be needed, he contends that Pinnacle is in a better position to bear the financial expenses of such a trip from the UAE to the United States, and, accordingly, Pinnacle should be required to pay the reasonable travel expenses incurred by Younis during such a trip. (*Id.* at 7.)

In opposition, Pinnacle argues that Younis cannot avoid appearing for his deposition in his chosen forum. (Def.'s Mem. Supp. Resp. 4.) Because Younis has indicated he does not have access to a notary public, Pinnacle contends that it would be unable to adequately take his deposition, either telephonically or through written interrogatories, in accordance with 28 U.S.C. § 1746, which prohibits making unsworn declarations in a deposition. (*Id.* at 5.) Pinnacle also states that it is entitled to take Younis' deposition in-person. (*Id.* at 5-6.) Lastly, Pinnacle argues that Younis has failed to demonstrate sufficient hardship that would justify his not being required to travel to the Western District of Tennessee for a deposition. (*Id.* at 7-8.)

ANALYSIS

Under the Federal Rules of Civil Procedure, the location of a deposition is initially selected by the party noticing the

deposition. See FED. R. CIV. P. 30(b)(1). When a dispute arises as to the location of a deposition, the court has wide discretion regarding designation of the time and place of the deposition. See FED. R. CIV. P. 26(c)(1)(B); *Lomax v. Sears, Roebuck & Co.*, No. 99-6589, 2000 WL 1888715, at *3 (6th Cir. Dec. 19, 2000) (unpublished opinion). The court's broad discretion to designate a time and place for a deposition is derived from Rule 26(c), which allows a court, for good cause, to issue protective orders in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c)(1); See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1987 n.13 (2007)(discussing how Rule 26 confers broad discretion to set appropriate terms and conditions on discovery). In addition to allowing a court to set a time and place for a deposition, Rule 26(c) also grants the court similar discretion to specify terms for a deposition or prescribe different discovery methods in lieu of an actual in-person deposition. See FED. R. CIV. P. 26(c)(1)(B), (C).

As a general rule, plaintiffs are required to appear in the district forum for their depositions unless compelling and extreme circumstances exist that would prevent them from doing so. See *Clem v. Allied Van Lines Int'l Corp.*, 102 F.R.D. 938, 939-40 (S.D.N.Y. 1984); *Dollar Sys., Inc. v. Tomlin*, 102 F.R.D. 93, 94 (M.D. Tenn. 1984). The court must carefully weigh the relevant facts and determine if the plaintiff's special circumstances

outweigh any prejudice to the defendant, causing the general rule to "yield to the exigencies of the particular case." *Seuthe v. Renwal Prods., Inc.*, 38 F.R.D. 323, 324 (S.D.N.Y. 1965). Accordingly, in the case at hand, the court must consider whether the financial hardship that Younis' would experience in traveling to the United States for his deposition outweighs any possible prejudice to Pinnacle.

The general rule requiring a plaintiff to appear for a deposition in the district forum is based, in large part, on the notion that the plaintiff was the one who originally selected that forum. *See Dollar Sys., Inc.*, 102 F.R.D. at 94 (stating that a plaintiff cannot complain about appearing in the forum-district because "it selected that forum in the first instance"). Here, Younis originally selected the Western District of Wisconsin, not the Western District of Tennessee. Therefore, requiring him to travel to the Western District of Tennessee would conflict with the reasoning behind the general rule because Younis did not initially select a Tennessee forum. Pinnacle, however, has agreed to travel to Wisconsin, or anyplace else in the United States, to depose Younis. (Def.'s Mem. Supp. Resp. 4.) Accordingly, because Younis is a citizen of the United States, a resident of Wisconsin, and he chose to file his action in the United States judicial system, he should, at the very least, be required to make himself available for deposition at some place within the United States unless

compelling circumstances counsel otherwise.

Younis claims that requiring him to fly from the UAE to the Western District of Tennessee would place such a financial burden on him that the general rule should not apply. Specifically, he states that he has remained unemployed since his termination from Pinnacle in September of 2005 and requiring him to attend a live deposition in the Western District of Tennessee will likely prevent him from being able to pursue this action. (Pl.'s Mem. Supp. 6-7; Unsworn Decl. of Nazeeh Younis ¶¶ 4, 7.) Requiring an individual who has been unemployed for over two years to spend over \$1,500¹ and travel halfway across the world creates an undue financial burden when that expense may force a plaintiff to abandon his claims due to a lack of financial resources. Other courts have found, and this court agrees, that when a plaintiff lacks the finances to travel a long distance for a deposition, it is appropriate to order that the deposition take place telephonically or through written interrogatories. See *DePetro v. Exxon Inc.*, 118 F.R.D. 523, 524-25 (M.D. Ala. 1988) (not requiring plaintiff to travel from California to Alabama when she lacked financial resources); *Forde v. Urania Transp., Inc.*, 168 F. Supp. 240, 241

¹ The court notes that, according to Younis, this is the cheapest price of a flight from the UAE to Memphis, TN. Subject to availability, the actual price for a flight may be significantly higher. The total amount expended will also increase when the costs of food and lodging are added. As such, \$1,500 is being used as a bare minimum figure.

(S.D.N.Y. 1958) (not requiring plaintiff to travel from Barbados to New York solely for oral deposition when he lacked the finances).

Because he lacks the finances to travel to the United States solely for an oral deposition and requiring him to do so may force him to forego his claims, it is appropriate for him to be deposed over the telephone or by written interrogatories. The possible burden on Younis outweighs the prejudice that Pinnacle may experience by not getting to depose him in person. Pinnacle, however, argues that it would be unable to adequately take Younis' deposition while he is in the UAE over the telephone or by written interrogatories because he does not have access to a notary public and therefore cannot make a sworn statement as required for a deposition. (Def.'s Mem. Supp. Resp. 5.)

Under Rule 30 of the Federal Rules of Civil Procedure, a deposition taken either by telephone or written interrogatories is deemed to be taken in the place where the deponent answers the questions. FED. R. CIV. P. 30(b)(4). Therefore, any deposition of Younis while he is in the UAE will be deemed to take place in a foreign country. Rule 28 sets out the persons before whom a deposition may be taken, and it provides that a deposition may be taken in a foreign country:

(A) under an applicable treaty or convention; (B) under a letter of request, whether or not captioned a "letter rogatory"; (C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or (D) before a person commissioned by the court to administer any necessary

oath and take testimony.

FED. R. CIV. P. 28(b)(1)(A)-(D). As Pinnacle correctly points out, the UAE is not a signatory to Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters. (Def.'s Mem. Supp. Resp., Ex. B.) This only eliminates proceeding under subsection (b)(1)(A) of Rule 28. Younis could still make the necessary sworn statements before a person designated under subsections (b)(1)(C) or (D). For example, Younis could possibly be deposed before an appropriate official at the Consulate General of the United States in Dubai. As such, Younis could therefore properly be deposed via telephone or written interrogatories while he is in the UAE.

Should Pinnacle still wish to conduct an in-person deposition of Younis, it will be required to pay the reasonable travel expenses Younis incurs. In requiring Pinnacle to pay reasonable travel expenses for Younis from the UAE to the United States, the court notes that Pinnacle agreed to travel to anywhere in the United States that Younis could afford to fly to. Inherent in that offer is the fact that Pinnacle is willing to spend money for its attorney to travel and to procure a place to hold the deposition in any city that Younis might have chosen. The difference between the money that Pinnacle would spend to take a deposition in another U.S. city compared to the money it would spend to bring Younis to Memphis, TN, is surely not a significant amount. The court also notes that Pinnacle is a commercial airline and a business partner

with Delta and Northwest Airlines, and it may be able to more readily obtain a discounted airfare for Younis. With the aforementioned facts in mind, Pinnacle, as a large corporation, is better suited to bear the expenses related to deposing Younis in the United States.

CONCLUSION

After careful consideration of all the relevant facts, this court has determined that requiring Younis to appear for a live oral deposition in the United States would create an undue burden and expense. His unemployment and financial situation are compelling circumstances that call for an exception to the general rule requiring a plaintiff to appear for a deposition in the forum district. Accordingly, Younis' motion for a protective order is GRANTED.

Pinnacle may obtain discovery of Younis through one or more of the following methods:

(1) Pinnacle may depose Younis in-person in the Western District of Tennessee or any other location in the United States. If it chooses to do so, it is required to pay Younis' reasonable travel expenses up to, but not more than, two-thousand dollars (\$2000.00) or directly provide Younis with a plane ticket and lodging, provided that flight times and accommodations are reasonable. Younis shall pay any additional amount over \$2,000.00

(2) Pinnacle may depose Younis over the telephone or by using written interrogatories. If Pinnacle selects to proceed using the telephone or written interrogatories, Younis is responsible for making a good faith effort to locate an appropriate official in Dubai and notifying Pinnacle of dates and times when that official is available.

Pinnacle is ordered to notify Younis of which method or methods of discovery it will use within ten (10) days of the date of this order. If Pinnacle selects to proceed using the telephone or written interrogatories, Younis is ordered to make a good faith effort to locate an appropriate official in Dubai for the deposition within fifteen (15) days of receiving notification from Pinnacle. Any deposition of Younis must be completed within forty-five (45) days of the date of this order.

The court realizes that discovery is scheduled to be completed on March 28, 2008. Accordingly, the discovery deadline in the scheduling order is modified as to comport with this order and allow the parties time to comply with this order's deadlines to complete the deposition of Younis. All other deadlines remain the same.

IT IS SO ORDERED this 24th day of March, 2008.

s/ Diane K. Vescovo
DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

