

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RALPH L. HERBST : CIVIL ACTION  
 :  
v. :  
 :  
GENERAL ACCIDENT INSURANCE :  
COMPANY : NO. 97-8085

MEMORANDUM ORDER

This is an employment discrimination case. Plaintiff alleged that he was terminated because of his age and disability in violation of the ADEA and ADA. A jury returned a verdict in defendant's favor and judgment was entered against plaintiff. Defendant submitted a Bill of Costs for \$24,900.57 to the Clerk of Court who ultimately taxed costs against plaintiff in the full amount requested. Plaintiff has appealed from the Clerk's order, challenging the entire amount taxed.

The court taxes costs "as of course" unless a statute, rule or court order dictates otherwise. See Fed. R. Civ. P. 54(d)(1). Costs are taxed by the Clerk subject to a de novo appeal to the court. See L. R. Civ. P. 54.1(b); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 157 F.R.D. 13, 15 (E.D. Pa. 1994). It is ultimately within the court's discretion to determine "whether and to what extent" costs should be awarded against the losing party. Peters v. Delaware River Port Auth., 1995 WL 37614, \*2 (E.D. Pa. Jan. 27, 1995). The court's review is guided

by 28 U.S.C. § 1920.<sup>1</sup> See In re Philadelphia Mortgage Trust, 930 F.2d 306, 307-10 (3d Cir. 1991).

In its Bill of Costs, defendant included a request for the recovery of witness fees which the Clerk granted in its entirety. Such recovery, including that of expert witness fees, is limited by 28 U.S.C. § 1821(b) which provides:

A witness shall be paid an attendance fee of \$40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

Defendant may recover \$40 each for the attendance of Thomas Crawford, Dr. Marc Sageman, Dr. John Pruitt and Dr. William Levy.

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<sup>1</sup> 28 U.S.C. § 1920 provides:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshall;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Defendant seeks expenses related to the discovery depositions of ten witnesses.<sup>2</sup> The Clerk awarded defendant all of the costs requested in connection with those depositions. Defendant has not shown that these depositions were necessary for trial, asserting only that they "were reasonably necessary to the development of this case at the time they were taken." Costs related to depositions are recoverable when the depositions are "reasonably necessary" for trial or actual trial preparation. See 28 U.S.C. § 1920(2); Burks v. City of Phila., 1998 WL 521705, \*4 (E.D. Pa. June 26, 1998); Marcario v. Pratt & Whitney Canada, Inc., 1995 WL 649160, \*1 (E.D. Pa. Nov. 1, 1995). A party may not, however, recover the costs of depositions for investigatory or discovery purposes which are not used or intended for use at trial. See Furr v. AT & T Technologies, Inc., 824 F.2d 1537, 1550 (10th Cir. 1987); Fulton Federal Savings & Loan Assoc. of Atlanta v. American Ins. Co., 143 F.R.D. 292, 296 (N.D. Ga. 1991) (deposition costs incurred for investigation or to aid party in thorough preparation not taxable); Hill v. BASF Wyandotte Corp., 547 F. Supp. 348, 351 (E.D. Mich. 1982) (costs of depositions for

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<sup>2</sup>Three of these witnesses were deposed during trial when proceedings were recessed. The court conditioned plaintiff's calling of these belatedly identified witnesses on their submitting to deposition before taking the stand to obviate any surprise or prejudice to defendant. Thus, although conducted during trial, the depositions were for purposes of discovery and presumably would have been taken during the discovery period had these witnesses been timely identified.

investigation or trial preparation not taxable). As it appears that the depositions were taken for purposes of discovery and defendant has not shown that they otherwise were necessarily obtained for use at trial, the costs of those deposition transcripts will be disallowed.

Defendant also seeks costs related to the videotape deposition of Dr. Timothy Michals taken during trial. A district court may tax the costs for videotaping a deposition, provided that the deposition was necessarily obtained for use in the case. See Fed. R. Civ. P. 30(b); Brown v. Kemper Nat'l Ins. Co., 1998 WL 472586, \*2 (E.D. Pa. July 27, 1998); Fitchett v. Stroehmann Bakeries, Inc., 1996 WL 47977, \*6-7 (E.D. Pa. Feb. 5, 1996); Marcario, 1995 WL 649160, at \*2 (citing Barber v. Ruth, 7 F.3d 636, 645 (7th Cir. 1993)). In such circumstances, the costs of a videotape or a deposition transcript may be taxed, but not both. Id. If the videotape was necessarily obtained for use in the trial, then the court will allow costs for the videotape and not the transcript. Id. In this case, defendant intended to introduce the videotape as evidence in place of live testimony by Dr. Michals.<sup>3</sup> Accordingly, the cost for the videotaping will be allowed and that for the deposition transcript will not.

Defendant seeks reimbursement of \$9,744 spent in

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<sup>3</sup>Most of the testimony of Dr. Michals, which involved plaintiff's psychological condition, was ultimately excluded upon objection of plaintiff. Nevertheless, the videotape reasonably and necessarily was made for use at trial.

obtaining daily transcripts of all trial proceedings. Defendant has not shown that these transcripts were necessarily obtained for use in the case, asserting only that "the trial transcripts were reasonably obtained for use in this case which involved complex issues and because trial extended over a long period of time." These costs will be disallowed. It appears only that the expedited daily transcripts were obtained for convenience of counsel. At all times, defendant had at least two, and often three, attorneys in the courtroom who, as deemed necessary, could take notes as did plaintiff's counsel. Trial proceedings consumed eight days which is not unusually lengthy, and this case was not unusually complex. See Card v. State Farm Fire & Cas. Co., 126 F.R.D. 658, 660 (N.D. Miss. 1989) (cost of trial transcripts not taxable when unnecessary for use in case and obtained for convenience of counsel).

In its Bill of Costs, defendant claimed substantial fees for exemplification and copies of papers under 28 U.S.C. § 1920(4). The Clerk taxed all such costs requested by defendant. Copying expenses are recoverable as taxable costs when they are "necessarily obtained for use in the case," whether or not offered into evidence at trial. See 28 U.S.C. § 1920(4); Hurley v. Atlantic City Police Dep't, 1996 WL 549298, \*3 (D.N.J. Sept. 17, 1996). The party seeking costs for copying, however, must provide evidence of the material copied so that the court can

determine whether each copy was in fact necessary. See, e.g., Hines v. Southeastern Pa. Transp. Auth., 1996 WL 460052, \*2 (E.D. Pa. Aug. 9, 1996).

Defendant's Bill of Costs contains receipts for copies of plaintiff's medical records and copies of documents produced to plaintiff during discovery. Defendant has neither itemized those copy costs sufficiently to allow the court to determine which copies were necessarily obtained for use in the case nor demonstrated how many copies were made or even how one of the copy services calculated its charges. See Nugget Distributors Cooperative of Am., Inc. v. Mr. Nugget, Inc., 145 F.R.D. 54, 57 (E.D. Pa. 1992). The court cannot conscientiously determine whether the rate charged per page or the number of copies made was reasonable. The court will allow the \$390.35 in copying costs for which defendant has provided such information and deny the remainder requested.

Defendant has claimed \$3,473.95 for preparation of trial exhibits, general trial materials and sixteen exhibit binders. This includes charges for copying plaintiff's trial exhibits, although plaintiff was required by the court's scheduling order to provide these at his expense to defendant prior to trial and there has been no claim that plaintiff failed to do so. The cost of further reproduction of these exhibits by defendant for the convenience of multiple counsel is not taxable.

The court cannot determine what "general trial materials" consisting of 3,382 pages were or the costs attendant to each. This amount will be disallowed. See Peters, 1995 WL 37614, at \*2. The cost of producing one set of exhibits for each party and the court was necessarily incurred, but defendant has not provided information from which the court can discern the cost for these three sets.<sup>4</sup> The court will allow the \$1,794.65 expended by defendant to prepare its trial exhibits.

Defendant also asks the court to tax plaintiff for \$1,083.39 paid for enlargements of documents for use as trial exhibits. Courts allow the recovery of costs for printing, enlarging and mounting of trial exhibits when those exhibits are helpful to the court and jury. See Farley v. Cessna Aircraft Co., 1997 WL 537406, \*6 (E.D. Pa. Aug. 1, 1997); Rogal v. American Broad. Cos., 1994 WL 268250, \*2 (E.D. Pa. June 15, 1994). Defendant has submitted receipts for one exhibit in the amount of \$53.50, a second exhibit in the amount of \$205.98 and other costs it asserts as related to enlargement of exhibits in the amounts of \$775.76 and \$48.15 respectively. Defendant has not provided any evidence of the material enlarged by the company providing the last two receipts and thus the court cannot determine that those enlargements in fact were necessary. As

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<sup>4</sup>Sixteen is not divisible by three. Defendant made additional copies which are not taxable.

defendant did utilize two enlarged exhibits at trial and has offered evidence sufficient to support taxation of costs for two such enlargements, the court will allow the \$259.48.

Defendant asked the Clerk to award costs associated with the service of three deposition and four trial subpoenas by private process servers. The Clerk allowed these costs in their entirety, taxing plaintiff an additional \$346.00. Courts are divided over whether private process server fees are allowable under 28 U.S.C. § 1920. See U.S. ex rel. Evergreen Pipeline Constr. Co. v. Merrit Meridian Constr. Corp., 95 F.3d 153, 172 (2d Cir. 1996); Alflex Corp. v. Underwriters Labs., Inc., 914 F.2d 175, 178 n.6 (9th Cir. 1990), cert. denied, 502 U.S. 812 (1991); Crues v. KFC Corp., 768 F.2d 230, 234 (8th Cir. 1985). Courts in this district have generally allowed such costs when limited to the fee that would have been incurred if the subpoenas had been served by the United States Marshall.<sup>5</sup> See Brown, 1998 WL 472586 at \*1; Fitchett, 1996 WL 47977 at \*8. The court will allow \$40 for service of each subpoena except the trial subpoena for Dr. Marc Sageman, for which the actual cost is represented to be \$30.

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<sup>5</sup> The current fee charged by the United States Marshall for a first attempt at service is \$40.00 plus 32½ cents per mile. Defendant has not claimed that more than one attempt was required to serve any subpoena and has made no showing of any mileage.

Plaintiff argues that any costs should be excused because of his inability to pay. A disparity in the financial resources of the parties is not a basis for refusing an award of costs. See Smith v. Southeastern Pa. Transp. Auth., 47 F.3d 97, 100 (3d Cir. 1995). Indeed, costs may be assessed even against a party who has proceeded in forma pauperis. See id. The court, however, may abate costs when the losing party is indigent or unable to pay the full measure of costs. See In re Paoli Railroad Yard PCB Litigation, 2000 WL 1137475, \*13 (3d Cir. Aug. 10, 2000).

Plaintiff has shown that he has modest income and limited assets, and that he has considerable debt including \$14,000 in costs for this litigation and \$18,000 owed on credit cards. Plaintiff, however, is employed and has not demonstrated that he is indigent or impecunious. He has not demonstrated an inability to pay the award of costs as reduced by the court herein.

Consistent with the foregoing, the court will tax costs against plaintiff in the amount of \$3,534.48 as follows:

I. Cost of Videotape Deposition

1. Dr. Timothy Michals \$660.00

II. Fees and Disbursements for Witnesses

2. Dr. Marc Sageman \$40.00  
3. Dr. John Pruitt \$40.00  
4. Dr. William Levy \$40.00  
5. Thomas Crawford \$40.00

III. Fees for Exemplification and Copies of Papers

6.	Fee for copying documents produced to plaintiff	\$60.03
7.	Fee for copying documents produced to plaintiff	\$19.26
8.	Fee for copying documents produced to plaintiff	\$41.41
9.	Fee for copying documents produced to plaintiff	\$157.29
10.	Fee for copying documents produced to plaintiff	\$108.88
11.	Fee for copying documents produced to plaintiff	\$3.48

IV. Defendant's Trial Exhibits

12.	Cost of Preparation	\$1,794.65
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V. Trial Exhibit Enlargements

13.	36x48 xerographic, mounted	\$53.50
14.	36x24 color enlargement	\$205.98

VI. Cost of Service of Deposition Subpoenas

15.	Dr. Marc Sageman	\$40.00
16.	Dr. John Pruitt	\$40.00
17.	Dr. William Levy	\$40.00

VII. Cost of Service of Trial Subpoenas

18.	Thomas Crawford	\$40.00
19.	Kathy Mallon	\$40.00
20.	Dr. John Pruitt	\$40.00
21.	Dr. Marc Sageman	\$30.00

Total: \$3,534.48

**ACCORDINGLY**, this            day of August, 2000, upon  
consideration of plaintiff's Motion to Appeal Decision of Court

Clerk on Issue of Taxation of Costs (Doc. #117) and defendant's response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in that the appeal is allowed and is sustained in part in that the Taxation of Costs by the Clerk is reduced to the amount of \$3,534.48.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**