

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

JANET JACKSON : CIVIL ACTION  
: :  
: :  
v. : :  
: :  
MILLS, et al. : NO. 96-CV-3751

MEMORANDUM ORDER

Presently before the court is defendants' Motion in Limine to Preclude Testimony of Alvert Bethea.

Plaintiff has identified Alvert Bethea as a witness to the events which plaintiff alleges resulted in violations of her constitutional rights on the night of May 20, 1995. Plaintiff has stated that she intends to call Mr. Bethea at trial to testify to what he witnessed that evening.

Defendants have twice attempted to depose Mr. Bethea. It appears that a subpoena for the first scheduled deposition was served on Mr. Bethea, although the certificate of service is not notarized or dated. Mr. Bethea did not appear for this deposition. He did, however, accept and cash a check for his appearance as a witness.

Counsel arranged for a second time to take Mr. Bethea's deposition. Plaintiff's counsel had communicated with Mr. Bethea who said he was available to be deposed at the time scheduled. Mr. Bethea also failed to appear for this deposition. Plaintiff claims that defense counsel was responsible for providing formal notice to Mr. Bethea of the deposition and failed to do so. There is no evidence in the record that Mr. Bethea was subpoenaed for this deposition. Mr. Bethea has since failed to respond to a

telephone message and letter from defendants' counsel requesting that Mr. Bethea contact counsel.

Defendants contend that plaintiff has failed to disclose information as required by Fed. R. Civ. P. 26(a). Defendants ask that the testimony of Mr. Bethea be precluded under Fed. R. Civ. P. 37(c).

Defendants have not demonstrated that plaintiff has any control over Mr. Bethea or in any way encouraged him not to appear for deposition or communicate with defense counsel. Plaintiff's counsel has cooperated with defendants' counsel in trying to secure a deposition of Mr. Bethea and making available plaintiff's counsel's notes of her meeting with Mr. Bethea.

Defendants have not justified the imposition of a sanction on plaintiff. Mr. Bethea is another matter. The unexcused failure of an individual to obey a properly served subpoena may be treated as a contempt of court. See Fed. R. Civ. P. 45(e). Should Mr. Bethea defy a properly served subpoena for his appearance hereafter, upon presentation of an appropriately documented application, the court will take action against him. Should it appear that Mr. Bethea is evading service, it is quite unlikely that he will be permitted to testify at any trial without first submitting to a defense deposition.

**ACCORDINGLY**, this                    day of November, 1997, upon consideration of defendants' Motion in Limine to Preclude Testimony of Alvert Bethea (Doc. #55), **IT IS HEREBY ORDERED** that said Motion is **DENIED**; and, **IT IS FURTHER ORDERED** that the

discovery deadline notwithstanding, defendants shall have fourteen (14) days to depose Alvert Bethea.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**