

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
(Southern Division)

JAMES L. SMITH,	:	
	:	
Plaintiff	:	
	:	
v.	:	Civil Action No. 07-XXX (PJM)
	:	<i>(Names changed for privacy)</i>
EMPLOYER, INC.,	:	
	:	
Defendant.	:	

**PLAINTIFF’S OPPOSITION TO MOTION TO DISQUALIFY AND TO  
SUPPRESS EVIDENCE AND CROSS MOTION TO COMPEL DEPOSITIONS**

A motion to disqualify counsel is a serious matter. This one, though, is ill-founded and appears to be interposed to gain a litigation advantage. Whatever defendant Employer’s motivation, its position is not supported either by the rule it cites – Rule 4.2 of the Maryland Rules of Professional Conduct – or by the decisions in *Camden v. State of Maryland*, 910 F. Supp. 1115 (D. Md. 1996), and *Zachair Ltd. v. Driggs*, 965 F. Supp. 741 (D. Md. 1997).

Employer purports to be concerned that plaintiff’s counsel intruded into the realm of privileged attorney-client communications by interviewing three witnesses. That was certainly true in *Camden*, but it is not true here. In *Camden*, the individual in question (Richard Redmond) had extensive dealings with defense counsel, was designated as defendant’s “principal contact person” for plaintiff’s counsel, prepared and signed defendant’s response to plaintiff’s EEOC complaint, and was identified by defendant as someone with knowledge of relevant facts. As a consequence, Richmond was able to disclose to plaintiff “certain communications between himself and [defendant’s]

attorneys, as well as confidential communications prepared by or based on advice of counsel, including counsel's appraisal of the strength of [plaintiff's] case.” *Camden*, 910 F.Supp, at 1118. In *Zachair*, in which Judge Davis followed *Camden*, the individual to whom plaintiff’s counsel spoke was the former General Counsel of defendant, who purchased his release as a defendant in the case by talking with plaintiff’s counsel.

In the present case, in contrast, the three individuals who are the subject of Employer’s motion – Bernie Jones, Al Johnson and Ellis Brown – had no involvement in the allegedly discriminatory decisions affecting plaintiff, had minimal dealings with defendant’s counsel (in fact, Jones and Johnson had not even spoken to defense counsel when they were contacted in the autumn of 2005), never had any responsibilities for the defense of this case, and were not identified by defendant as persons having knowledge of relevant facts in Employer’s discovery responses. None of the three asserts that plaintiff’s counsel tried to question them about communications with defense lawyers, and counsel has assured Employer that they did not. <sup>1</sup>

In *Camden* (decided in 1996), the Court surveyed the law on *ex parte* contacts with corporate employees and concluded that the “best approach” was that set forth in a draft of the Restatement of the Law Governing Lawyers, which barred contact with a person “who supervises, directs or *regularly* consults with a lawyer” concerning the matter. *Camden*, 910 F.Supp, at 1121 (emphasis added). And in 2002, Rule 4.2 in Maryland was narrowed to cover (among others) corporate employees “who supervise,

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<sup>1</sup> Defendant also wrongly implies that plaintiff tried to conceal the existence of these contacts with witnesses. To the contrary, Plaintiff provided defendant with signed and unsigned statements reflecting the substance of the interviews in responses to defendant’s document requests, and identified each witness (summarizing his knowledge) in response to defense interrogatories.

direct, or *regularly* communicate with the organization’s lawyers concerning the matter” (emphasis added).

The three individuals interviewed here did not “supervise” or “direct” defense counsel concerning this case; nor did they “regularly” consult with counsel about this matter, as was true in *Camden*. Nor are they otherwise covered by Maryland Rule 4.2, as defendant concedes in part. Employer nonetheless suggests a rule that would prohibit informal contact with any potential witness who still works for the defendant company. This is wrong, and defendant’s approach would unnecessarily complicate and make more expensive routine employment litigation by causing plaintiffs to depose virtually every potential witness – often exceeding the presumptive limit contemplated by the rules of procedure (here, for example, defendant identified seventeen potential witnesses, not including the three at issue in this Motion).

Employer first raised the charge of unethical conduct two days before plaintiff’s counsel was to begin taking depositions, then used it unilaterally to declare a suspension of all discovery (including eight properly noticed depositions). This was improper, particularly in light of the specious nature of the charge. Plaintiff’s counsel (Richard Davis and Sally Miller) have represented employees in civil rights cases for 18 and five years, respectively, and take their ethical obligations seriously. Neither has ever before been accused of a violation, and there is no basis for this accusation. Defendant’s motion should be denied.

## **I. BACKGROUND**

### **A. The Claims at Issue**

Defendant Employer manufactures, markets and services commercial widgets. Plaintiff James Smith worked for Employer as a District Manager, supervising service technicians and sales staff in the greater D.C. area. Smith had a long record of successful service, including recognition as one of the most profitable District Managers in the company. [Complaint, ¶¶ 4-6] In Smith's performance appraisal for 2004, his boss, Tim Jackson, praised his management style: "I find Jim to be a seasoned, experienced and fully engaged leader in his job." [See 2004 Annual Appraisal, attached as Tab 1]

Then, on May 2, 2005, without any warning or opportunity to address putative concerns, Jackson told Smith, "I don't like your management style," and summarily fired him. [Smith deposition, attached as Tab 2, at 165-66] At the time, Smith was 58 years old and had worked for Employer for 33 years. [Complaint, ¶ 11]

Smith and other older managers were routinely subjected to age based comments by senior executives, such as "when are you old guys going to retire," and Jackson's boss – Vice President Billy Roberts – stated his preference for "getting rid of the old blood" during a meeting to discuss organizational changes. [Tab 2, 222-24; see also, Tab 5] In addition, Smith was fired just one month after he complained – both to the Human Resources department and to Jackson – that Employer was paying a younger, less accomplished manager significantly higher compensation. [Tab 2, at 269] Records produced by defendant in discovery confirm that this younger manager, who was hired in 2002, was paid \$30,000 more than Smith in salary and annual bonus in his first full year with the company.<sup>2</sup>

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<sup>2</sup> Because this record was stamped by defendant as "Confidential" and contains salary and bonus information concerning current employees, and because Plaintiff does not believe