UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Robert Rieger, Plaintiff, vs. 3M Company, Defendant.	)	File No. 22-cv-994 (WMW-JFD) St. Paul, Minnesota April 12, 2023 2:31 p.m.

BEFORE THE HONORABLE JOHN F. DOCHERTY
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

(MOTION HEARING VIA ZOOM)

APPEARANCES VIA ZOOM

For the Plaintiff:	McCollum, Crowley, Moschet, Miller & Laak, Ltd. JACOB M. TOMCZIK, ESQ. 7900 Xerxes Avenue South Suite 700 Bloomington, Minnesota 55431
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P R O C E E D I N G S

IN OPEN COURT

(Via Zoom)

THE COURT: Good afternoon, everybody. I'm Magistrate Judge Docherty. We are here this afternoon for a hearing on the plaintiff's motion for a protective order in this case, Rieger v. 3M Company.

We are on Zoom. We are making a recording of this; however, just to set expectations, that recording is for the benefit of the court reporter. If she should have any difficulties, she has a resource that she can consult and check pronunciations and things like that. It's not something that's going to be available to counsel. That's probably the bad news. The good news is it's also not available to members of the public.

So, with that, Mr. Tomczik, you're the moving party. Why don't you lead us off. I come into this -- and I say this to everybody, so if you've heard this before, excuse me. I don't run these motions hearings as if this is, you know, an appellate court. I want to hear from both sides. I want both sides to make their points. And I think -- I think, but reserve the right to change my mind, that I'll be able to give you a decision at the end of today's hearing.

So, Mr. Tomczik, you have the floor, and why don't you let me know, you know, you having chosen the forum in which to bring suit and looking at the expense that would be incurred in going to Aberdeen, why don't you just sort of let me know how it is and what facts there are that overcome the heavy presumption that Minnesota is the appropriate place for this deposition. And also if you don't agree that that is, in fact, the standard, let me know that too with citation to authority. So the floor is yours, sir.

MR. TOMCZIK: Thank you, Your Honor. I think each of these cases needs to be looked at on its own merits and its own particular facts. Of the six plaintiffs that are part of this group, five of them -- well, four of them have already had their depositions taken in Minneapolis as requested by defense counsel. The fifth one was scheduled. We ran into some problems, and we need to reschedule his deposition. That one will be conducted in Minneapolis as well.

The only one we're seeking to do in Aberdeen is the deposition of Plaintiff Robert Rieger. And I do slightly disagree with the Court about the legal standard. There is nothing in the rules discussing where the depositions have to take place. There is some case law discussing a presumption that it would be in the forum jurisdiction. And one of the cases referenced by opposing

counsel is the case of *Archer Daniels Midland*. A massive corporation that's based out of Illinois brought suit in the great state of Minnesota, and the defendants in Minnesota said, Hey, you chose Minnesota, you've got to come to Minnesota for your depositions. The Court took a look at it and said, Based on all of the circumstances in this case, it would be burdensome to force the representatives of a massive corporation to come to Minneapolis for their depositions and that their depositions could be conducted in the jurisdiction where that corporation is based, which is Illinois.

Obviously Robert Rieger doesn't have the type of resources that a massive multimillion- or billion-dollar corporation like Archer Daniels Midland does. This would present a significant hardship to him. He would be forced to miss multiple days from work to be able to attend in-person depositions. We've offered --

THE COURT: Is that necessarily true, though? My understanding is that this newspaper in Aberdeen publishes Tuesday -- is it Tuesday through Saturday? -- and that with some good timing, that this could be done in a way that he either doesn't miss any work or misses a day of work?

MR. TOMCZIK: Well, that was something that was raised by Ms. Blanchard. And I'm not exactly sure how we would do it. I thought about it for a while. Presuming

we're going to start his deposition in the morning, he's going to have to drive up the day before. So if the -- he's delivering papers Friday night into -- for Saturday delivery, he could theoretically drive up here after he's done with that, arrive into town sometime Saturday, take his deposition on a Sunday. I'm not sure if he's going to be able to drive back Sunday night, but he could theoretically drive back Monday and then work Monday night into Tuesday morning. So, theoretically, if we schedule his deposition for a Sunday, I think it is feasible that we could do it without him missing days of work.

I don't know if that's what was contemplated, that we're going to start doing the deposition on a Sunday. But Your Honor is right, it is theoretically possible.

THE COURT: And I'm not contemplating that I'm going to direct the deposition. You know, I'm not going to get into that level of detail as to when the deposition is taken, but I just did want to know that if I included, you know, something along the lines of counsel have to meet and confer with an eye towards minimizing days off work, that there would be -- it wouldn't be a futile exercise, and it doesn't sound like it would be futile?

MR. TOMCZIK: We could theoretically do it Sunday. Depending on how we schedule it, we could theoretically miss maybe one day of work. Mr. Rieger did indicate that if he's

missing shifts from work, that he's likely to lose his job. Counsel is right, I didn't submit an affidavit of his employer, didn't think it was necessary for a motion like this.

THE COURT: And Mr. Rieger believes it is likely that he would lose his job, but he doesn't -- it's not just that there isn't an affidavit from his employer, it's also that Mr. Rieger doesn't cite like a company policy or a conversation he's had with a supervisor. And, I mean, is this newspaper really an organization that doesn't have a mechanism in place by which employees can take time off?

MR. TOMCZIK: I'm afraid I can't speak eloquently --

THE COURT: Okay.

MR. TOMCZIK: -- as to the personnel policy of the local newspaper.

THE COURT: All right.

MR. TOMCZIK: Even if we're able to get around the employment issue, there's still the health concerns. This is something that was included in the initial complaint about the difficulty he would have making the drive for this. If I can turn a little --

THE COURT: Can I -- I just --

MR. TOMCZIK: Of course.

THE COURT: That confused me a little bit. I did,

you know, read everything related to this motion before this hearing. I did not go back and look at the complaint. Are you saying -- and I just don't remember -- that there was a reference to Mr. Rieger's health concerns in the complaint?

MR. TOMCZIK: I believe it was issued -- or I believe it was addressed in the defense opposition. If you can bear with me for a moment, Your Honor.

THE COURT: Yeah, no problem. And here's what's behind the question is that I noted that the defense said, Well, Mr. Rieger hasn't raised health as an issue before this final filing with regard to this motion. If I'm hearing you right, there was a reference to health in the complaint that opened the lawsuit, and I just wanted to make sure that is correct, because, as I say, while I reviewed a lot, I did not review the complaint.

MR. TOMCZIK: So there is a reference at the bottom of page 3 of defendant's memorandum in opposition indicating that in the amended complaint, Mr. Rieger references the same conditions he raises in this motion; diabetes, atrial fibrillation, and claims he experienced these same issues during his employment. So it's not -- his health concerns aren't a brand new issue.

THE COURT: Okay. Fair enough. Understood.

MR. TOMCZIK: If I may briefly turn to the relative inconvenience, and, frankly, expense is the only

real issue that it seems to be for 3M, is this idea of how many people have to travel from Minneapolis out to Aberdeen for this deposition. As I submitted in my declaration, there are qualified and certified court reporters in Aberdeen. There's qualified and certified videographers there as well. I have no idea why we would need to bring court reporters -- why we have to go through one specific court reporter service, this TSG. That was never made clear to me, at least, in the motion papers.

Counsel raises the issue that TSG doesn't have a location within 100 miles of Aberdeen. They don't have a location within 100 miles of Minneapolis either. Their closest office is Chicago. You can go on their website and find that. Typically, these services are a network. They go and if you schedule a deposition, and this outfit advertises handling and coordinating depositions throughout the world, they go and they find a court reporter that will accept the assignment. It's most likely going to be somebody local in Aberdeen. So this additional expense, I don't think it's supported.

If we go and -- there's the argument that we also have to bring a corporate representative. I don't know why we have to have a corporate representative travel to Aberdeen for this deposition. There has been a corporate rep for some of the depositions, but there wasn't a

corporate rep for Vaughn Wingo's deposition. There wasn't a corporate rep for Desiree Holler's deposition. I don't know why we need a corporate rep for this one. And so mostly it's just the inconvenience and some expense.

And I don't think the record really supports a finding that this should -- that this must be in Minneapolis if we weigh -- if we weigh all of these concerns.

THE COURT: Mr. Tomczik, I mean, you could have filed this lawsuit in South Dakota; correct?

MR. TOMCZIK: Correct.

THE COURT: All right. So, I mean, this is -- Minnesota is your chosen forum.

MR. TOMCZIK: Yes, it is, Your Honor. We have been advised that several of these witnesses that we are going to depose are located in Aberdeen and that their depositions will need to take place in Aberdeen. It seems like we can coordinate schedules on that, and if we're going to be in Aberdeen anyhow, we can schedule Mr. Rieger's in Aberdeen at that time.

THE COURT: All right. Ms. Blanchard, over to you. I've, as I say, read the moving papers. I've seen the estimates of mileage and money and 82-minute flights and all the rest of it. Over and above expense and inconvenience, is there anything else you want to bring to my attention with respect to your opposition to this motion for a

protective order?

MS. BLANCHARD: I don't have much to add, Your Honor. I think we were pretty thorough in our opposition brief. To respond to a couple of the points that Mr. Tomczik made, I wanted to clarify that the matter of Mr. Rieger's health, it's a part of his claims, but it has -- it was not previously raised as a potential bar to his ability to travel to Minneapolis until the motion. And from our perspective, Mr. Rieger has the burden to prove that there's a compelling showing that he would be unduly burdened by appearing in his chosen forum. And when you look at the evidence that he submitted in support of meeting that burden, it's just not there.

And one of that -- when you look to his health, specifically, his declaration takes issue with long travel and so he could certainly take a flight to minimize the travel time. We're not trying to be incredibly unreasonable here. We're willing to be flexible with Mr. Rieger with scheduling and get creative so that we can either avoid or minimize any disruption to his work schedule. This really comes down to Mr. Rieger has chosen Minneapolis as his forum, and he is asking for multiple individuals to travel to him rather than the other way around. And --

THE COURT: Let's talk about that, and I feel a little uncomfortable getting into questioning how you

litigate your case, but Mr. Tomczik did raise it. You know, do you really need to take a corporate rep and a videographer to Aberdeen, for example, if the deposition of Mr. Rieger was going to be held there?

MS. BLANCHARD: Yeah, so our -- that -- you know, those are strategic calls on the part of the client. We have had videographers present at all of the plaintiff's depositions, would like to continue to do that, and corporate representatives have attended where we've felt that that adds value from a strategic perspective, and certainly we would recommend doing so here.

THE COURT: All right. What about the TSG? You made much of the fact that, Well, goodness, they don't even have an office within 100 miles of Aberdeen, and Mr. Tomczik is now saying, Well, they also don't have an office within 100 miles of Minneapolis. A, why do you need TSG as opposed to all other court reporters in the world; and, B, is there really a difference between engaging TSG for work in Aberdeen versus engaging TSG for work in Minneapolis?

MS. BLANCHARD: Yes, Your Honor. It's not the fact that they don't have a physical location near Aberdeen, it's that they don't have any personnel who are able to take the -- to provide the stenography and videography services within 100 miles of Aberdeen. My understanding is that they are a preferred vendor of 3M, and so there are particular

processes that they have gone through in order to invoice and be approved for providing services.

They have already provided services for the other four depositions, and so there's also a level of consistency there with the level of service, the type of things that they can provide, such as, same-day rough drafts.

We could -- certainly there are court reporters and likely videographers available in Aberdeen, but, you know, if possible, we like to stay with the same company for a matter of consistency. But at the end of the day, even if we do engage local court reporters or videographers, there's still a matter of there's at least two individuals traveling to Aberdeen in order to take Mr. Rieger's deposition and also the matter of needing to engage some sort of conference room for -- for the deposition to occur.

THE COURT: All right. All right. Anything else you think is important for me to have in mind when I'm considering the decision?

MR. TOMCZIK: No, Your Honor.

MS. BLANCHARD: No.

THE COURT: Okay. All right. Give me one moment, please. I'm going to set up a breakout room, and I'm going to ask Annika and Mr. Detwiler to join me in that room. Just one moment.

I will be back in a couple of minutes.

MR. TOMCZIK: Thank you.

(Recess taken at 2:48 p.m.)

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(2:50 p.m.)

IN OPEN COURT

THE COURT: Okay. Thank you for your patience. I am going to give a decision now. I don't anticipate filing a written order on this, so the transcript of what I am about to say for purposes of any further review will be the order of the Court.

The motion for a protective order is respectfully denied. The reasons are as follows:

Minnesota was the chosen forum of the plaintiff. Plaintiff now, having sued the defendant, expects defendant to travel to South Dakota for his deposition.

I have heard Ms. Blanchard's representations concerning expense and convenience, and I have two things to say about that. Number one, I consider that she has given a convincing response to Mr. Tomczik's assertion about the TSG reporting company and about its lack of a presence within 100 miles of either Aberdeen or Minneapolis, and I believe that Ms. Blanchard has explained that they don't have contract personnel or personnel in their network within 100 miles of Aberdeen, but apparently they do in

Minneapolis. They are also the reporting company that has been working on this case, and they are the reporting company that has a relationship with the client, 3M, whose invoicing practices are probably somewhat bureaucratic, and, therefore, it is probably of some value that the same court reporting company be used just from the point of view of economics.

Second of all, I do consider, under the cases that both parties actually have cited, that there is a presumption that depositions will be taken in the forum venue. And the forum venue here is the District of Minnesota.

Opposing that, Mr. Rieger has interposed, A, his employment situation and, B, his health. As to his employment situation, the evidence that he has put forth is a short affidavit. He indicates in that affidavit it is likely that he will lose his job if he misses a day of work. There's no information given that this is rooted in a policy of his employer, that Mr. Rieger has talked with a supervisor about this. There is no indication that this newspaper is alone among American employers in not having some mechanism by which employees can miss an occasional day of work with sufficient advanced notice and coverage and so forth and so on.

I will direct the parties, however, the lawyers on

both sides, to meet and confer and to make their very best efforts to minimize Mr. Rieger's time off of work, even if that means working weekends.

Mr. Rieger has also stated that he has health issues. He's identified diabetes and atrial fibrillation. These were raised late in the motion practice, although, it is apparently in the initial complaint in this case, and certainly some reasonable accommodation may need to be taken. He may need some rest time, for example, when he arrives in Minnesota, but that is not, in and of itself, a sufficient reason to require 3M to go to Aberdeen for this deposition.

I also take Ms. Blanchard's point. I am distinctly uncomfortable ever telling lawyers how to litigate their case, and if there is a decision that a corporate representative and a videographer are needed, that, it seems to me, is a matter for counsel's professional judgment, not my professional judgment, and, therefore, I am not going to second-guess that, and that means that I am going to count as legitimate the expense of transporting four people to Aberdeen, South Dakota, rather than one or two.

So for all of those reasons, the motion is respectfully denied. Counsel will meet and confer and will work out a way to get this deposition done that both allows

Mr. Rieger, if he needs it, time to rest up when he arrives in Minnesota and will minimize the time that Mr. Rieger needs to take away from work. I recognize that those two criteria are in some tension with each other, and that is a matter for Ms. Blanchard and Mr. Tomczik to do the best they can to work out and to strike a balance between those two competing interests.

Mr. Tomczik, I know you're disappointed, but over and above that, questions or requests for clarification?

MR. TOMCZIK: No, Your Honor.

THE COURT: Okay. Ms. Blanchard?

MS. BLANCHARD: No, Your Honor.

THE COURT: All right. Thank you all very much. We are adjourned. Take care.

MR. TOMCZIK: Thank you.

(Court adjourned at 2:55 p.m.)

* * *

I, Erin D. Drost, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter to the best of my ability.

Certified by: *s/ Erin D. Drost*

Erin D. Drost, RMR-CRR