

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

MICHAEL S. MURPHY,)	
)	
<i>Plaintiff</i>)	
v.)	No. 2:14-cv-400-JAW
)	
ASHTON CARTER, Secretary of the)	
Navy,)	
)	
<i>Defendant</i>)	

ORDER ON DISCOVERY DISPUTE

Following extensive, substantive errata sheet changes to the plaintiff’s deposition testimony, the defendant seeks to reopen the deposition in order to ask follow-up questions that his attorney contends he would have asked during the deposition had the plaintiff’s answers been as he subsequently altered them. The plaintiff opposes the request. In accordance with my order dated December 9, 2015, the parties have now filed letter briefs addressing this issue as well as copies of the transcripts of the defendant’s first and second depositions and his responses to the defendant’s first and second set of interrogatories. For the reasons that follow, I grant the defendant’s request, with some limitations.

The plaintiff is profoundly deaf, and has alleged that the defendant illegally discriminated against him based upon his deafness and his age. The depositions were conducted with the assistance of American Sign Language (ASL) interpreters. The changes made by the plaintiff to the transcripts of his depositions that are at issue are significant. His attorney describes them all as resulting from his difficulty in understanding English as translated into ASL. The attorney contends that, by agreement, the defendant’s second set of interrogatories propounded on the plaintiff was intended to “provide [the plaintiff] with the opportunity to more fully understand the

nature and scope of Defendant's inquiries." Because these interrogatories did not address the plaintiff's claim of age discrimination, his attorney suggests that the defendant should not be allowed to ask further questions about that claim at this time.

The defendant's attorney responds that the plaintiff's errata were received more than three months after the second deposition, that the second set of interrogatories was served in order to clarify the plaintiff's answers to the first set of interrogatories, and that the plaintiff told the ASL interpreters following the second deposition that the interpreter "did a really good job" and that he felt "comfortable" as a result.

Both sides agree that the defendant's request is governed by the First Circuit's opinion in *Pina v. The Children's Place*, 740 F.3d 785 (1st Cir. 2014). In that case, the First Circuit stated:

When witnesses make substantive changes to their deposition testimony, the district court certainly has the discretion to order the depositions reopened so that the revised answers may be followed up on and the reasons for the corrections explored.

Id. at 792. Here, many of the changes made by the plaintiff in his errata sheets were not mere "clarifications or corrections consistent with [his] earlier testimony," *id.*, but rather substantive and material. In some cases, a "no" became a "yes." As Judge Nivison of this court said recently:

Although a witness can make substantive changes, as a general rule, the inquiring party should not have to wait until trial to explore the reasons for the changes. A party should have the opportunity to explore the reasons for the changes in order to have sufficient time to investigate the veracity of the explanation before trial.

McCue v. City of Bangor, No. 1:14-cv-00098-GZS, 2015 WL 566575, at *2 (D. Me. Feb. 11, 2015). See generally *Glenwood Farms, Inc. v. Ivey*, 229 F.R.D. 34, 35 (D. Me. 2005).

The plaintiff's difficulties with English may well explain all of the changes, but the defendant is entitled to explore that explanation. More important, in this case, the defendant is also entitled to follow up on the changed answers. The court accepts the defendant's attorney's

statement, as an officer of the court, that he did not agree that a second set of interrogatories would be sufficient to explain the changes.

The defendant's attorney has also represented that he will attempt to retain the same ASL interpreter who assisted at the second deposition and that he will limit his direct examination to one hour on the record, and I impose those limitations accordingly. The court expects both sides to make every effort to conduct the reopened deposition as promptly as possible. As soon as the deposition is scheduled, the parties shall file a motion to extend the discovery deadline for that limited purpose only and to reset the remaining pretrial deadlines.

NOTICE

In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.

Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.

Dated this 28th day of December, 2015.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge