

ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 0:02-60019-CIV  
HIGHSMITH/TURNOFF

NIGHT ROY  
FILE  
JUL 10 2003  
CLARENCE MADDOX  
CLERK, USDC / SDFL / MIA

MEGHAN BUSSELL )  
)  
)  
Plaintiff, )  
)  
vs. )  
)  
MOTOROLA, INC. and )  
ADECCO EMPLOYMENT SERVICES, INC. )  
)  
)  
Defendants. )  
\_\_\_\_\_)

**DEFENDANT ADECCO EMPLOYMENT SERVICES, INC.'S  
OMNIBUS REPLY BRIEF IN SUPPORT OF ITS *NUNC PRO TUNC* MOTION FOR  
LEAVE TO FILE A RESPONSE TO PLAINTIFF'S STATEMENT OF DISPUTED  
FACTS & RESPONSE TO PLAINTIFF'S MOTION TO STRIKE**

COMES NOW Defendant Adecco Employment Services, Inc. ("Adecco" or "Defendant") and files this reply and response and respectfully requests the Court to grant its *Nunc Pro Tunc* Motion for Leave to File a Response to Plaintiff's Statement of Disputed Facts. Furthermore, Adecco requests the Court deny Plaintiffs' Motion to Strike Adecco's Response to Plaintiff's Statement of Disputed Facts<sup>1</sup> for the reasons set forth below.

**STATEMENT OF RELEVANT FACTS**

On May 5, 2003, Adecco filed a Motion for Summary Judgment, including a Statement of Undisputed Facts. A month later, on or about June 2, 2003, Plaintiff filed an Opposition

<sup>1</sup> In the interest of preventing confusion, Adecco is treating the pleading entitled "Plaintiff's Motion to Strike Defendant Adecco's Response to Bussell's Statement of Facts, and to Strike Reference to Hearsay Evidence and Reliance on *Zaben* Case in its Reply Memorandum" as two separate Motions to Strike and responding to them separately as they concern two entirely unrelated issues.

*12/10/03*

Brief<sup>2</sup> and a Statement of Disputed Material Facts in support thereof. Adecco filed a Reply Brief<sup>3</sup> in support of its Motion for Summary Judgment on June 25, 2003. Because Plaintiff's Statement of Disputed Material Facts contained facts that were immaterial, facts that were not genuinely in dispute, legal conclusions, arguments and opinions, and egregiously mischaracterized the record evidence, Adecco also filed a response to Plaintiff's Statement of Disputed Material Facts on June 25, 2003.

Two days later, on or about June 27, 2003, Plaintiff's counsel wrote a letter (Exhibit A) to Defense counsel and stated in pertinent part:

The Local Rules do not allow or contemplate that a party moving for summary judgment is allowed to file a response to the non-moving party's statement of facts, but rather clearly only allow the filing of a ten-page reply memorandum. S.D. Fla. L.R. 7.1C (stating that no other filings may be made). Accordingly, your 15-page response to Plaintiff's Statement of Disputed Material Facts is inappropriate and should be stricken.

Upon receiving Plaintiff's counsel's letter, Defense counsel once again consulted the local rules of this Court and determined that the Local Rules governing motions for summary judgment and memoranda of law, in general, are not clear as to whether a movant may file a response to a non-movant's statement of disputed material facts without leave of court. *See* Local Rules 7.1 and 7.5. Therefore, out of an overabundance of caution, and in a good faith effort to comply with the Local Rules of this Court, on or about June 30, 2003 Adecco filed a *Nunc Pro Tunc* Motion for Leave to File its Response to Plaintiff's Statement of Disputed Material Facts. Defense counsel served the Motion for Leave by mail on Saturday, June 28, 2003 in accordance with Fed. R. Civ. P. 5(b)(2)(B). On the next business day, Monday, June,

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<sup>2</sup> Plaintiff requested and received a lengthy extension of time to file her response to Defendants' motions for summary judgment.

30, 2003, Adecco faxed a courtesy copy to all counsel of record.<sup>4</sup> Defendants did not foresee the need for an additional conference with Plaintiff's counsel concerning the *Nunc Pro Tunc* Motion for Leave as counsel's June 27<sup>th</sup> letter made it quite clear that Plaintiff was opposed to Defendant's Response to Plaintiff's Statement of Disputed Material Facts. Indeed, as indicated in counsel's June 27<sup>th</sup> letter, Plaintiff filed a Motion to Strike the pleading on June 30, 2003.

### **ARGUMENT & CITATION OF AUTHORITY**

According to Plaintiff, Adecco's Response to Plaintiff's Statement of Disputed Facts should be stricken because of Defendant's failure to "confer" pursuant to Local Rule 7.1 (A) before filing it and because it fails to comply with Local Rule 7.1 (C). Otherwise, Plaintiff has cited no other authority in support of her Motion to Strike. These arguments are an insufficient basis to strike these pleadings.

#### **Adecco Had No Duty To Confer Regarding a Pleading Filed as Part of its Motion for Summary Judgment**

Local Rule 7.1 (A) (3)(a) states in pertinent part that "[p]rior to filing any motion in a civil case, *except... for summary judgment, ...counsel for the moving party shall confer....*" (emphasis added). Accordingly, Adecco, as the movant, is not required to confer regarding its Motion for Summary Judgment. To the extent Adecco's response to Plaintiff's Statement of Disputed Material Facts is part of Defendant's Motion for Summary Judgment, Defendant was

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<sup>3</sup> The substantive portions of Defendant's Reply Brief were two pages over the 10-page limit expressly imposed by Local Rule 7.1 (C)(2). Accordingly, Defense counsel conferred with all counsel of record to determine whether they objected to a reply brief that exceeded the 10-page limit and they did not object.

<sup>4</sup> Contrary to Plaintiff's assertions at page 3 of her Response to Adecco's *Nunc Pro Tunc* Motion for Leave, Defendant did not file the June 30<sup>th</sup> motion within "minutes" of receiving Plaintiff's counsel's conferral letter which he sent three days earlier on June 27, 2003.

not under any duty to confer before filing it.<sup>5</sup> Furthermore, Local Rule 7.1 concerns motions. Adecco's response to Plaintiff's statement of disputed facts was not a "motion," but merely a responsive pleading.<sup>6</sup> Furthermore, Defendant did not hold an additional conference regarding its *Nunc Pro Tunc* Motion for Leave because Plaintiff's June 27<sup>th</sup> letter made it abundantly clear that she opposed any attempt by Adecco to file a response to her statement of disputed material facts. Accordingly, Plaintiff's assertions that that Adecco was required to confer before filing a responsive pleading in support of its Motion for Summary Judgment are without merit given a plain reading of Rule 7.1(A). As such, her Motion to Strike Adecco's Response to her Statement of Disputed Material Facts cannot be sustained on these grounds and should be denied.

**The Local Rules Do Not Prohibit the Filing of a Response to a Non-Movant's Statement of Disputed Material Facts**

Plaintiff asserts that Adecco is prohibited from filing a response to her Statement of Disputed Material Facts under Local Rule 7.1 (C). This assertion is not supported by a plain reading of the rule which states in pertinent part:

The movant may, within five days after service of an opposing memorandum of law, serve a reply memorandum in support of the motion, which reply memorandum shall be strictly limited to rebuttal of matters raised in the memorandum in opposition.... No further or additional memoranda of law shall be filed without prior leave of Court.

Nowhere in this rule is a response to a statement of disputed facts prohibited. Moreover, the rule is ambiguous, stating only that "no additional *memorandum of law*" may be filed without leave from the Court. It makes no reference to purely responsive pleadings that are not memoranda of law. Moreover, there is case law sustaining a movant's filing of additional documents with its

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<sup>5</sup> Similarly, Plaintiff was under no duty to confer with Defendant about filing an opposition brief in response to Defendant's Motion for Summary Judgment.

reply brief. Valdivieso v. Atlas Air, Inc., 305 F.3d 1283, 1285 at n.3 (per curiam) (11<sup>th</sup> Cir. 2002) (Motion to strike affidavit, filed with reply brief, pursuant to Local Rule 7.5 denied). Plaintiffs fail to cite any contrary authority.

Nevertheless, upon receiving counsel's June 27<sup>th</sup> letter, Adecco filed its *Nunc Pro Tunc* Motion for Leave in an effort to comply with the reading of the rules advanced by Plaintiff. Adecco admittedly did not seek prior permission because it was of the opinion none was required. Needless to say, given Plaintiff's contrary reading of the rule, Adecco made a good faith effort to cure the purported defect within three (3) business days of its initial filing on June 25<sup>th</sup> and within one (1) business day after Plaintiff's counsel's June 27<sup>th</sup> notification to undersigned counsel of his objection. Adecco's pleading should not be stricken for its reading of an ambiguous rule, especially when it moved quickly to remedy any alleged procedural error.

**Defendant's Pleading is Necessary to Aid the Court in Resolving the Case On the Merits**

Other than her citation to local procedural rules, Plaintiff has failed to come forward with any other basis for excluding this pleading. Indeed, Plaintiff does not even deny that her Statement of Disputed Material Facts improperly contains facts that are not disputed, arguments, legal opinions and conclusions, and egregious misstatements of fact. Defendant believes it was absolutely necessary for the Court's benefit to file a response as it did so that its Motion for Summary Judgment can be resolved based on the merits and not misstatements propounded by Plaintiff. *See Papanos v. Lufthansa German Airlines*, 1996 WL 33155438 at \*11 n.8 (S.D. Apr. 16, 1996) (court denied motion to strike opposition to summary judgment that was, in violation of local rules, ten pages in excess of page limit and filed without leave of court; court reasoned

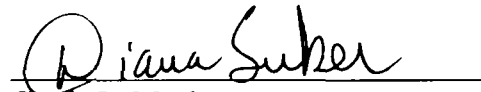
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<sup>o</sup> In contrast, Adecco did confer with counsel before filing its Motion to Exceed to Page Limit concerning its Reply

that, despite procedural errors, the pleading needed to be considered in the “interest of resolving [the] case on the merits”); Cooper v. Southern Company, 213 F.R.D. 683 (N.D. Ga. 2003) (plaintiffs’ motion to strike the defendants’ response to their statement of disputed facts denied) . Accordingly, Defendant respectfully requests the Court to grant Adecco’s *Nun Pro Tunc* Motion for Leave to File a Response to Plaintiff’s Statement of Disputed Facts and to deny Plaintiff’s Motion to Strike Adecco’s Response to her Statement of Disputed Facts.

Respectfully submitted this 10<sup>th</sup> day of July, 2003.

**McGuireWoods LLP**



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Brief as Defendant was asking the Court to take an affirmative action to which Plaintiff did not object.

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June 27, 2003

## Via Facsimile (404) 443-5773 and Mail

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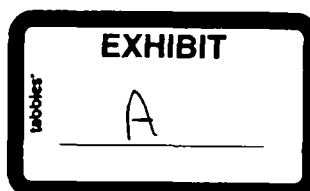
RE: *Meghan Bussell v. Motorola, et al.*, Case No. 02-60019  
Our File No. 1-1917

Dear Ms. Suber:

This is a conferral letter with respect to your submission of a 15-page Response to Plaintiff's Statement of Disputed Material Facts and your reliance on *Zaben v. Air Prods. & Chems., Inc.*, 129 F.3d 1453, 1455-57 (11<sup>th</sup> Cir. 1999), for the proposition that Pennington's statement to Karge that she would not allow Bussell to become a permanent Motorola employee because she complained of harassment and retaliation.

The Local Rules do not allow or contemplate that a party moving for summary judgment is allowed to file a response to the non-moving party's statement of facts, but rather clearly only allow the filing of a ten-page reply memorandum. S.D. Fla. L.R. 7.1.C (stating that no other filings may be made). Accordingly, your 15-page response to Plaintiff's Statement of Disputed Material Facts is inappropriate and should be stricken.

Your reliance on *Zaben* for the proposition that Pennington's statement is inadmissible hearsay is misplaced, as is your parenthetical that *Zaben* stands for the proposition that "comments by low-level supervisors repeating management's discriminatory comments are inadmissible hearsay" is a blatant misrepresentation of that case. In *Zaben*, the discriminatory comments that the employees were repeating were inadmissible hearsay, because the employee who made the comments (the declarant) was unidentified, and therefore no hearsay exception (or finding of non-hearsay) could be made. Conversely, here, Pennington (a management-level employee) made the comments, and consequently the comments are non-hearsay, because they



are admissions by a party-opponent. Fed. R. Evid. 801(d)(2)(A). This is not a situation in which a declarant is unidentified. Accordingly, I request that you submit a notice to the Court informing it that you are withdrawing Defendant's reliance on *Zaben* and that Defendant's argument should not be considered by the Court, or I will file the necessary motion with the Court to strike any reference to that case. Please inform me on or before 11:00 a.m. on Monday, June 30, 2003, whether and when you agree to submit such notice to the Court, and whether or when you agree to withdraw the Defendant's Response to Plaintiff's Statement of Material Facts.

Very truly yours,



Chris Kleppin




**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing DEFENDANT ADECCO EMPLOYMENT SERVICES, INC.'S OMNIBUS REPLY BRIEF IN SUPPORT OF ITS NUNC PRO TUNC MOTION FOR LEAVE TO FILE A RESPONSE TO PLAINTIFF'S STATEMENT OF DISPUTED FACTS & RESPONSE TO PLAINTIFF'S MOTION TO STRIKE was furnished this 10<sup>th</sup> day of July, 2003, via U.S. Mail, postage prepaid to counsel for each party to this action at the following addresses:

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