AMERICAN ARBITRATION ASSOCIATION

EMMANUEL D. KEPAS,

Claimant,

vs.

EBAY, INC., a Delaware Corporation,

Respondent.

ORDER ON EBAY'S MOTION FOR PROTECTIVE ORDER

Case No. 77 160 00465 06 JOJO

Arbitrator: Theresa L. Corrada

eBay, Inc. filed a Motion for Protective Order (along with a Memorandum in Support) seeking to prevent Kepas from taking the deposition of its President and Chief Executive Officer, Margaret C. Whitman. Kepas filed a Memorandum in Opposition to Respondent's Motion for Protective Order. eBay filed a Reply Memorandum in Support of eBay's Motion for Protective Order. On February 6, 2008, Kepas requested an expedited ruling because the deposition of Ms. Whitman had been noticed for February 11, 2008 in California. I conducted a telephone hearing on this issue on February 8, 2008 and issued a preliminary ruling.

The February 8, 2008 preliminary ruling was as follows: 1) that Ms. Whitman's deposition would not proceed on February 11, 2008; 2) that the remaining depositions scheduled for that week in California would proceed; and 3) that after those depositions, Kepas's counsel would notify me if any additional information came to light indicating that Ms. Whitman had specific information relevant to this matter. After the depositions, Kepas's counsel informed me via email, ". . . [W]e continue to believe that a deposition of Ms. Whitman is proper. However, based on our understanding of the preliminary oral ruling, a deposition of Ms. Whitman will not be allowed based on the information obtained from the depositions conducted during the week of February 11th."

The gist of eBay's Motion is that Ms. Whitman has no personal knowledge of any fact pertaining to this case, that "apex depositions" (depositions of CEO's) are allowed only when the CEO has unique or superior knowledge of discoverable information and all other means of obtaining the information have been exhausted. eBay argues that deposing its CEO, who is far removed from and has no personal knowledge of the events complained of in this lawsuit, is harassing and burdensome.

Kepas responds that he would limit the deposition to one hour, which is neither burdensome nor harassing. Kepas asserts that eBay has not provided any specific facts supporting its request for a protective order. Kepas asserts that Ms. Whitman has potentially relevant unique knowledge because: 1) she may have witnessed Dutton's inappropriate conduct at a Christmas party; 2) Dutton presented eBay's "mature audiences policies" to her; 3) Kepas asked her to review his complaint of sexual harassment; 4) Kepas may have worked with her

because his position required him to work with executive officers; 5) she might have spoken to others about Kepas's claims; 6) she might have participated in the decision to terminate his employment.

eBay filed a Reply, to which it attached the Affidavit of Margaret C. Whitman. Whitman stated under oath in the Affidavit that: 1) she had "no recollection of meeting with or speaking to Kepas at any time"; 2) she "was not involved in any disciplinary action directed at Kepas while he was employed by eBay"; 3) she "was not involved in any investigation concerning Kepas's allegations of harassment or discrimination"; 4) she "was not involved in the decision to terminate Kepas's employment with eBay"; 5) she had "no recollection of receiving Kepas's letter" and it was her "general practice" to "have such mail forwarded to eBay's legal department"; 6) she had "no recollection of speaking to Ms. Dutton concerning [eBay's mature audiences policies]" or "of meeting with Ms. Dutton at any time"; and 7) that she had "never witnessed inappropriate or sexually suggestive conduct by Ms. Dutton at any time."

Even though the Affidavit established that Whitman denied having any of the potentially relevant unique knowledge Kepas believed she may have had, Kepas was not deterred. He argued that the deposition should proceed to give him the opportunity to test the credibility of Whitman's claim of lack of knowledge or lack of recollection.

During the hearing, eBay's counsel estimated that eBay has over 1000 employees and that there are five to seven layers of management between Kepas's former position and the CEO of eBay. eBay's counsel stated that Whitman has an extremely demanding schedule and that it would be burdensome for eBay to have to make its CEO available for a deposition every time a former employee sued eBay. eBay's counsel admitted that he had not checked Whitman's schedule to see whether it was too full to accommodate a deposition. In my view, eBay's showing of any actual harassment or burden was minimal, especially given Kepas's offer to limit the deposition to one hour.

Rule 9 of the AAA's Employment Arbitration Rules states: "The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration." The parties' arbitration agreement likewise contains no limits on discovery and simply states: "The parties may conduct adequate pre-arbitration discovery as determined by the arbitrator." The Federal Rules pertaining to discovery state that discovery must be "reasonably calculated to lead to the discovery of admissible evidence." F.R.C.P. 26(b).

Applying these rules, if there was any reasonable possibility that Kepas could have obtained unique information relevant to this case in a deposition of Whitman, I would not have hesitated to order that the deposition proceed, regardless of her high position and demanding schedule. However, such is not the case. In her Affidavit, Whitman specifically denied all knowledge of any of the topics Kepas thought she may have known about. I am not convinced that Kepas's counsel could crack that shell simply by taking her deposition. Even assuming, for the sake of argument, that Whitman is lying in her Affidavit and actually read Kepas's letter about his discrimination claims and ordered his termination because of it, the chance that counsel

could elicit this information in Whitman's deposition is virtually nonexistent. This is especially the case where Kepas seemingly has no evidence to the contrary with which to confront her. Kepas would be more successful testing Whitman's credibility, not by attempting to get Whitman to contradict her affidavit and admit that she does have knowledge, but by finding *another witness* to testify, for example, that Whitman in fact *did* read Kepas's letter and *did* have input into his termination.

Kepas suggested that Whitman's "demeanor" might reveal untruthfulness that cannot be seen in an Affidavit. However, this argument seems to be an afterthought since Kepas's counsel admitted that they had not planned to videotape the deposition. Since Whitman will not testify at the hearing, her deposition would likely have been read into the record or submitted in written form to the Arbitrator. Thus, the Arbitrator would not have had the benefit of observing her demeanor anyway. Even if the deposition were videotaped, as the fact-finder I would be extremely reluctant to conclude that a witness was lying solely on the basis of his or her "demeanor."

In conclusion, the deposition of Whitman is not "necessary to a full and fair exploration of the issues in dispute." Therefore, eBay's motion is granted.

Both parties seek attorneys' fees. No such award is appropriate for Kepas, because he did not prevail. No such award is appropriate for eBay, either. The law in this area is not so well settled that Kepas should have known the outcome of this dispute. Furthermore, Kepas's arguments were made in good faith.

Dated this 7th day of March, 2008.

Theresa L. Corrada

Theresa L. Corrada, Arbitrator