UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:08-cv-0827 LMB-JFA
CACI PREMIER TECHNOLOGY, INC.,	)	
Defendant,	)	

DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* TO PERMIT ADMISSION OF STATEMENTS OF CACI PERSONNEL PURSUANT TO FED. R. EVID. 801(d)(2)(D)

I. INTRODUCTION

The first trial of this action confirmed two things CACI[1] has been saying for years: (1) no witness (not even Plaintiffs) testified that a CACI employee said or did anything that had any effect on the treatment of these Plaintiffs; and (2) no document tied CACI personnel to any mistreatment of these Plaintiffs. Indeed, just as CACI predicted, Plaintiffs' case consisted of tarring three former CACI personnel, none of whom is alleged to have had input into Plaintiffs' treatment, with allegations of involvement in abusive treatment of detainees *other than Plaintiffs* or, for one of the former CACI employees, with alleged abusive treatment of an Iraqi policeman the U.S. Army asked him to interrogate after a military police soldier was shot. Plaintiffs' suggested implication is that if these three former CACI employees encouraged abuse of other detainees, the jury could infer that they *also* encouraged the abuse of detainees throughout the

[1] "CACI" refers to Defendant CACI Premier Technology, Inc.

hard site and Plaintiffs were abused as a result, notwithstanding the lack of evidence that these former CACI employees had input into the treatment of anyone they were not assigned to interrogate. Essentially, Plaintiffs tried the first case on the theory, prohibited by Federal Rule of Evidence 404(b), that "[e]vidence of [another] crime, wrong, or act . . . prove[s] a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b).

Having surveyed the evidence in the first trial, Plaintiffs have concluded that what the retrial of this action really needs is *more* evidence trying to tar these former CACI employees with alleged abuse of detainees other than Plaintiffs. This time, however, Plaintiffs seek to introduce evidence without whatever official endorsement supposedly comes from inclusion in a government report and without any details concerning the alleged facts Plaintiffs seek to admit.

Specifically, Plaintiffs want to admit testimony from Torin Nelson, a former CACI employee with a clear axe to grind against CACI, that Timothy Dugan told him, without further detail or corroboration, that he "cuffed a detainee to the eyebolt of the cell floor" and then forcefully kicked a nearby table. Dkt. #1686-1 at 3. Even more remarkably, Plaintiffs seek to admit testimony from Mr. Nelson that Steven Stefanowicz stated, without further detail, that "he had gotten a detainee to admit to being Osama bin Laden in disguise." *Id.* The statement allegedly made by Mr. Stefanowicz included nothing about interrogation techniques or detainee treatment. Nevertheless, Plaintiffs want to admit the statement (which appears likely to have been made in jest given its content) for the flimsy premise that such a confession "likely could only have been elicited by particularly harsh interrogation techniques." *Id.* That premise is too absurd to be worth mocking. It is worth noting, however, that Plaintiffs chose to leave this ambiguous statement open to speculation by not raising it with Mr. Stefanowicz during his *de*

bene esse deposition. Plaintiffs intentionally deprived Mr. Stefanowicz (and CACI) of any opportunity to either deny or explain the alleged statement.

Before even reaching the hearsay problem associated with these statements, and that problem is profound, the statements do not indicate torture or cruel treatment and are too vague and unconnected to Plaintiffs to be probative of any issue in this case. Rule 403 would bar admission as well.

Moreover, even if these supposed statements were relevant, and not barred by Rule 403, they are blatant hearsay. They are not, as Plaintiffs submit, party-opponent admissions under Rule 801(d)(2)(D). Plaintiffs acknowledge they seek to use the statements for the truth of the matter asserted. These statements, if they were made, do not involve matters within the scope of the alleged declarants' employment *by CACI* as required by Rule 801(d)(2)(D). As a number of courts have held, the "employer" against which a supposed admission can be used, as well as the scope of employment, are determined by who has the power to exercise control over the employee and what the employee was authorized by that employer to do. Importantly, and unlike the borrowed servant doctrine, Plaintiffs have the burden of establishing the power to supervise and control to implicate Rule 801(d)(2)(D). Plaintiffs also have the burden to produce independent evidence that the matters allegedly described by Messrs. Dugan and Stefanowicz were within the scope of their employment, which for Rule 801(d)(2)(D) means that they were activities in which Messrs. Dugan and Stefanowicz were authorized to engage. Plaintiffs can meet neither of these burdens, so exclusion on hearsay grounds would be required *even if* Plaintiffs' proposed evidence was not entirely lacking in probative value.

II. BACKGROUND

Plaintiffs identified two out-of-court statements supposedly made by former CACI employees Steven Stefanowicz and Timothy Dugan that Plaintiffs would like to admit at trial. Plaintiffs obtained trial testimony from Mr. Stefanowicz by *de bene esse* deposition, but did not ask him about the statement they now ascribe to him. Plaintiffs never sought Mr. Dugan's deposition, even though he was originally a named defendant who Plaintiffs voluntarily dropped via an amended complaint. Rather than ask these supposed declarants about their prior statements, or the facts about which they supposedly made statements, Plaintiffs seek to have a disgruntled former CACI employee, Torin Nelson, testify as to what Messrs. Dugan and Stefanowicz supposedly told him.

A. Plaintiffs' Proffer with Respect to Mr. Dugan

With respect to Mr. Dugan, this is what Plaintiffs seek to admit through Mr. Nelson:

> Mr. Nelson would have testified [at the first trial] that while he was roommates with Mr. Dugan, Mr. Dugan described an interrogation in which he – frustrated by what he perceived as a military interrogator's insufficiently aggressive approaches – cuffed a detainee to the eyebolt of the cell floor and then kicked a table next to the head of the immobile detainee with such force that it hit the ceiling of the cell and broke.

Dkt. #1686-1 at 3. This proffer regarding Mr. Dugan raises more questions than it answers:

- Is there any corroboration that the event Mr. Nelson would say Mr. Dugan described to him actually occurred?

  > No. MG Fay conducted an exhaustive investigation in which he and his team interviewed 173 witnesses and documented every act of detainee abuse he could substantiate, but the only allegation he made against Mr. Dugan is that he allegedly dragged a detainee (not one of these Plaintiffs) off a jeep and to an interrogation room. Ex. 1; Ex. 2 at 99:1-7, 107:3-7, 120:6-122:23.

- If Mr. Dugan actually made the statement alleged, and actually engaged in the conduct described, did it relate to any of these Plaintiffs?

> No. There is no similarity between the conduct Mr. Dugan supposedly described to Mr. Nelson and the abuse claimed by these Plaintiffs.

- Is there any suggestion that the conduct Mr. Dugan supposedly described to Mr. Nelson, if it occurred, resulted in injury to anyone?

  > No.

- If Mr. Dugan actually made the statement alleged, and actually engaged in the conduct described, was that conduct an interrogation approach authorized by the U.S. military chain of command and was it a violation of the law of nations?

  > There is no way of knowing if such an interrogation approach, if it in fact occurred, was approved by the U.S. Army. Because of the state secrets privilege, it cannot be determined who Mr. Dugan interrogated or what interrogation approaches were permitted for such detainees. This also makes it impossible to determine whether chaining a detainee's hands to an eyebolt in the interrogation room was for legitimate safety reasons based on the identity and conduct of the detainee in question. Moreover, "fear up harsh" was an authorized interrogation approach under the IROEs "for all detainees" (Ex. 3), and also an approved interrogation approach under the Army Field Manual (Ex. 4 at 68-69). If Mr. Dugan did the things Mr. Nelson would say he described, it is impossible to know if this approach was part of an approved interrogation plan. Plaintiffs proffer no facts from which it can be determined that the alleged conduct, if it occurred, was a law of nations violation as opposed to a legitimate, and Army-approved, safety precaution or interrogation technique.

B. Plaintiffs' Proffer with Respect to Mr. Stefanowicz

Plaintiffs' proffer with respect to Mr. Stefanowicz's supposed out-of-court statement is, if anything, even flimsier:

> Similarly, Mr. Nelson would have testified that, in a conversation with Mr. Stefanowicz shortly after Mr. Nelson arrived at Abu Ghraib, Mr. Stefanowicz bragged that he had gotten a detainee to admit to being Osama bin Laden in disguise – a plainly false "confession" that likely could only have been elicited by particularly harsh interrogation tactics.

Dkt. #1686-1 at 3.

None of the Plaintiffs allege that they were coerced into admitting they were Osama bin Laden in disguise, so this allegation does not relate to Plaintiffs. There is no corroboration

whatsoever that this described event even took place. None of the government reports contains such an allegation with respect to Mr. Stefanowicz or anyone else. Even more important, Plaintiffs do not allege that Mr. Stefanowicz said anything in this conversation about the approaches or techniques supposedly used in this supposed interrogation. Indeed, Mr. Nelson testified at trial that Mr. Stefanowicz was "a nice, amiable person" (Ex. 5 at 91:12-21), a character trait entirely consistent with making this alleged statement in jest. Nevertheless, Plaintiffs assert that the jury should be told that Mr. Stefanowicz told Mr. Nelson that he had gotten a detainee to admit to being Osama bin Laden and then to simply make up what happened during this supposed interrogation because, in Plaintiffs' view, the only rational inference from such a tale is that Mr. Stefanowicz must have used "particularly harsh interrogation tactics" on this alleged unknown (and unknowable) detainee.

III. ANALYSIS

A. The Out-of-Court Statements Plaintiffs Seek to Admit as Party-Opponent Admissions Are Irrelevant and also Barred by Rule 403

Federal Rule of Evidence 401 sets the general standard for relevance of trial evidence:

> Evidence is relevant if:
>
> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action.

Fed. R. Evid. 401.

However, Rule 404(b)(1) sets a separate standard for admission of evidence of specific facts of alleged wrongdoing because of the highly prejudicial nature of such evidence:

> Evidence of any crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

Fed. R. Evid. 404(b)(1). As explained in Rule 404's Advisory Committee Notes:

> Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

Fed. R. Evid. 404 advisory committee's note to 1972 proposed rules. Plaintiffs' proposed evidence is designed to cast a few former CACI interrogators as "bad men" so that CACI can be punished for that without regard to whether they have any connection to Plaintiffs' treatment. Rule 404(b)(1) does not permit such a result.

With respect to the out-of-court statement Plaintiffs ascribe to Mr. Dugan, there is no connection between the conduct Mr. Dugan supposedly described and any treatment of Plaintiffs. There is no corroboration that what Mr. Dugan supposedly described even occurred. But even if it did, there is no similarity to any abuse Plaintiffs allege, and no evidence that the described approach was unapproved, a violation of the IROEs, contrary to the law of nations, or resulted in injury to anyone. There is likewise no evidence of *when* this conduct supposedly occurred and whether Plaintiffs were even detained at Abu Ghraib at the time.

Plaintiffs' proffer with respect to Mr. Stefanowicz is even worse. Plaintiffs do not contend that Mr. Nelson would testify that Mr. Stefanowicz described *anything* about the treatment of this or any other detainee. Plaintiffs want Mr. Nelson to testify that Mr. Stefanowicz said that a detainee falsely admitted to being Osama bin Laden and ask the jury to simply make up its own story about what interrogation approaches were used, and then to make up a story that the made-up conduct by Mr. Stefanowicz in this interrogation somehow had something to do with Plaintiffs' treatment at Abu Ghraib prison. Plaintiffs want to have the jury make this illogical leap notwithstanding Mr. Stefanowicz's unrebutted testimony that he was

assigned to interrogate only a few detainees, that Plaintiffs were not among them, and that he had nothing to do with how these Plaintiffs were treated.

For these reasons, the hearsay statements Plaintiffs seek to offer can be excluded without even reaching the hearsay issue, as the statements are irrelevant to any issue in this case. They do not make it more likely that either Mr. Dugan or Mr. Stefanowicz had anything to do with how Plaintiffs were treated by U.S. Army MPs or interrogators. They do not make it more likely Messrs. Dugan and Stefanowicz conspired to commit detainee abuse on a scale that included these Plaintiffs, or that they assisted anyone in abusing these Plaintiffs. Moreover, even if some speck of probative value could be derived from these alleged statements, that speck of probative value – which is non-existent, really – is so outweighed by the risk of unfair prejudice that Rule 403 would exclude it anyway. Fed. R. Evid. 403.

B. Even If the Out-of-Court Statements Ascribed to Messrs. Dugan and Stefanowicz Were Relevant – They're Not – They Are Classic Hearsay Statements for Which No Exception Applies

Plaintiffs seek to offer the out-of-court statements of Messrs. Dugan and Stefanowicz for the purpose of showing that what they supposedly said actually occurred. That is classic hearsay. Plaintiffs argue that Federal Rule of Evidence 801(d)(2)(D) renders these out-of-court statements non-hearsay admissions of a party-opponent. Rule 801(d)(2)(D) has no application here.

Rule 801(d)(2)(D) provides as follows:

> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
>
> . . . .
>
> (2) An Opposing Party's Statement. The statement is offered against an opposing party and:

> . . . .
>
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed;
>
> . . . .

Fed. R. Civ. P. 801(d)(2)(D).

As an initial matter, Rule 801(d)(2)(D) treats employee statements as non-hearsay statements by the employer only when the employer had the power to exercise control and supervision over the employee as to the matters discussed. *See Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 970 (D.C. Cir. 2016) (alleged statement by employee of defendant while imprisoned was not a party-admission because the defendant did not have the power to exercise supervision and control over the employee's activities); *Lippay v. Christos*, 996 F.2d 1490, 1498 (3d Cir. 1993) (Rule 801(d)(2)(D) requires that the "party-opponent personally directed [the declarant's] work on *a continuing basis*" (internal quotations and citations omitted) (alteration in original)). Here, CACI has presented extensive evidence that the U.S. Army, and not CACI, had the power to supervise and control CACI employees in their dealings with detainees. And unlike the borrowed servant doctrine, *Plaintiffs*, as the proponent of the proposed evidence, have the burden of establishing that CACI had the power to supervise and control. *United States v. Vidacak*, 553 F.3d 344, 349 (4th Cir. 2009) (proponent of evidence has burden of proving admissibility); 30B Wright & Bellin, *Fed. Practice & Procedure* § 6775, at 198 (2017) ("The burden, as always, is on the party contending that a hearsay exemption applies.").

Beyond that, Rule 801(d)(2)(D) specifically conditions admission of statements of a party-opponent on a showing that is that the out-of-court declarant's alleged statement was "on a matter within the scope of [the employment] relationship." Fed. R. Evid. 801(d)(2)(D). The

Court has already concluded – in deciding these statements are inadmissible – that such conduct (if it occurred and violated the law of nations) would by definition be outside the scope of Messrs. Dugan and Stefanowicz's employment. *See* Dkt. #1631 at 93:23-25 ("That's part of the problem, too, is they're acting outside the scope of the contract and they're not protected within the scope of employment.").

Importantly, "not everything that relates to one's job falls within the scope of one's agency or employment" for purposes of Rule 801(d)(2)(D). *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 950 (7th Cir. 1998). "In order for a statement to constitute a party admission . . . the proponent for admission must produce independent evidence showing that the scope of the *declarant's* authority included the matters discussed in the alleged conversations." *Parker*, 181 F. Supp. 2d at 592 (quoting *Hassman v. Caldera*, No. 00-1104, 2000 WL 1186984, at *2 (4th Cir. Aug. 22, 2000)). Indeed, "[i]t is well established that 'Rule 801(d)(2)(D) requires the *proffering* party to lay a foundation to show that an otherwise excludable statement relates to a matter within the scope of the agent's employment.'" *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1566 (11th Cir. 1991) (quoting *Breneman v. Kennecott Corp.*, 799 F.2d 470, 473 (9th Cir. 1986)); *Parker v. Danzig*, 181 F. Supp. 2d 584, 592 (E.D. Va. 2001) (proponent of supposed admissions had burden of providing independent evidence that employee declarant had authority over the matter on which the employee spoke)

In *Precision Piping & Instruments, Inc. v. E.I. du Pont de Nemours & Co.*, 951 F.2d 613 (4th Cir. 1991), the Fourth Circuit held that Rule 801(d)(2)(D) did not exempt from the hearsay rules out-of-court statements by three managers employed by Borg-Warner concerning the reason Borg-Warner cancelled its contracts with the plaintiff. As the court explained, the relevant question for purposes of Rule 801(d)(2)(D) was not whether dealing with the plaintiff's

contracts was connected in some way to the managers' jobs. It was whether these managers, the purported declarants, "had the authority to hire and fire [the plaintiff]. If not, statements concerning [the plaintiff's] contracts with Borg-Warner were made outside the scope of their employment." *Id.* at 619-20. Thus, an employee's statements can qualify as admissions of its employer only if the matter described by the employee is conduct in which the employee was *authorized to engage*. *Id.* at 620 (holding that the statements of employee Zicherman about the reasons for the plaintiff's termination were inadmissible hearsay because Zicherman lacked the authority to terminate the plaintiff); *Parker*, 181 F. Supp. 2d at 592 (excluding testimony about out-of-court statements by defendant's employees concerning reason plaintiff was not recalled to work because the plaintiff "has not established that the recall decisions were within the scope of these individuals' authority").

The holdings in *Precision Piping* and *Parker* are consistent with decisions by courts all over the country on the scope of employment issue. In *Wilkinson*, 920 F.2d at 1566-67, the Eleventh Circuit held that the trial court committed reversible error in admitting, under Rule 801(d)(2)(D), a cruise line's cabin steward's alleged statements about the condition of a sliding glass door that injured the plaintiff. The court reached this conclusion because cabin stewards were not authorized to be in passenger areas such as the area where the door was located. *Id.* It mattered not whether the cabin steward had actual knowledge about the door's condition; he was not authorized to be around the door so his statements about the condition of the door, even if true and based on personal knowledge, were not within the scope of his employment. In that circumstance, the cabin steward's alleged statement was hearsay, and the plaintiff should have

called the cabin steward to testify about his observations rather than trying to smuggle those observations in through another witness's hearsay statement. *Id.*[2]

Here, Plaintiffs cannot provide any independent evidence that the events that Messrs. Dugan and Stefanowicz supposedly described even occurred. And even if they could make such a showing, they cannot show that such actions were within the scope of their employment. With respect to Mr. Dugan, Plaintiffs cannot identify the detainee that was supposedly involved, which means they cannot show that this mystery detainee (if he exists) was even assigned to Mr. Dugan. Absent such evidence, Plaintiffs cannot show that the event Mr. Dugan supposedly described, if it occurred, was part of his job duties, as opposed to a frolic and detour involving a detainee never assigned to Mr. Dugan. Plaintiffs similarly have no evidence as to whether the conduct Mr. Dugan described was part of an Army-approved fear up harsh interrogation approach, or whether Mr. Dugan acted in such a manner on his own and outside what he was authorized to do by the U.S. Army. *See Wilkinson*, 920 F.2d at 1566-67. With no facts about the event that Mr. Dugan supposedly described to Mr. Nelson, there is no foundation to establish that the event allegedly described by Mr. Dugan, if it occurred, was within the scope of his employment.

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[2] see also *Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745, 750 (6th Cir. 2005) (affirming exclusion of employees' statements regarding discrimination they allegedly suffered because their statements were made "solely to advance their own interests" and "[t]he scope of their employment did not include work assignments"); *Williams*, 137 F.3d at 951 (affirming exclusion out-of-court statements by defendants' employees concerning their employment conditions because "[n]one of the women were agents of Pharmacia for the purpose of making managerial decisions affecting the terms and conditions of their own employment"); *Hill v. Spiegel, Inc.*, 708 F.2d 233, 237 (6th Cir. 1983) (reversing trial court's admission of statements by managers of defendant concerning the reasons for the plaintiff's termination because "[t]he mere fact that each of these men was a 'manager' within the expansive Spiegel organization is clearly insufficient to establish that matters bearing on [the plaintiff's] discharge were within the scope of their employment.").

The same is true with respect to the statement ascribed by Mr. Nelson to Steven Stefanowicz. Plaintiffs, and apparently Mr. Nelson, have no facts other than Mr. Stefanowicz supposedly said that he got a detainee to falsely admit to being Osama bin Laden. The detainee involved is unknown, so it cannot be said that this event, if it occurred, happened as part of Mr. Stefanowicz's job duties. Moreover, Mr. Stefanowicz's authorized job duties did not involve procuring absurd, and facially false, confessions. Thus, even if this event occurred, Mr. Stefanowicz's statement would be no different from the managers' statements in *Precision Piping*, 951 F.2d at 619-20, or the cabin steward's statements in *Wilkinson*, 920 F.2d at 1566-67, statements about things that the employee was not authorized to do. Such statements are not party-admissions under Rule 801(d)(2)(D).

IV. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion.

Respectfully submitted,

/s/ John F. O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2024, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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