

Kash v. Precision Spine, Inc., Not Reported in Fed. Supp. (2024)

2024 WL 6980536

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United States District Court, N.D. Georgia, Atlanta
Division.

Charissa KASH, Plaintiff,

v.

PRECISION SPINE, INC., Defendant.

CIVIL ACTION FILE NO. 1:23-cv-05665-SCJ-JKL

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Signed 06/04/2024

Attorneys and Law Firms

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LLP, Atlanta, GA, for Defendant.

ORDER

JOHN K. LARKINS III, United States Magistrate Judge

*1 This is an employment discrimination case arising under the Americans with Disabilities Act, 42 U.S.C. § 12111 et seq. (the “ADA”) and Section 510 of the Employee Retirement Income Security Act, 29 U.S.C. § 1140 (“ERISA”). The case is before the Court on Defendant Precision Spine, Inc.’s Motion to Transfer Venue to the District of New Jersey Pursuant to 28 U.S.C. § 1404(a). [Doc. 9.] For the reasons that follow, the motion is **DENIED**.¹

I. BACKGROUND

Defendant is a manufacturer and distributor of medical and surgical spinal treatment devices and products. [Doc. 1 ¶ 3.]

It is a New Jersey corporation, headquartered in Parsippany, New Jersey. [*Id.* ¶ 2; Doc. 91-at 13.]

Plaintiff Charissa Kash resides in Atlanta, Georgia, within the Northern District of Georgia. [Doc. 1 ¶ 5.] On May 26, 2022, Defendant hired Plaintiff as a Regional Vice President. [*Id.* ¶ 10.] In that role, she worked remotely from her home in Atlanta and traveled for work. [*Id.* ¶¶ 5, 10.] When she started working for the company, she signed an employment agreement, which she executed electronically from her home in Atlanta. [See Doc. 9-2 (employment agreement)]; (Decl. of Charissa Kash ¶ 4.²) As relevant here, the employment agreement contained a New Jersey choice of law provision:

Choice of Law. This Agreement shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey.

[Doc. 9-2 at 10.]

According to Plaintiff, shortly after she began working for Defendant, she had eye surgery. [Doc. 1 ¶ 12.] Due to complications from the procedure, her eyesight deteriorated quickly and she was rendered legally blind. [*Id.* ¶ 13.] Despite her limited eyesight, she continued to perform her job. [*Id.* ¶ 15.]

Plaintiff alleges that things changed, however, when Defendant learned how serious her condition was. [Doc. 1 ¶ 18.] On July 15, 2022, Plaintiff traveled to New Jersey for a management meeting to make a presentation to the company’s CEO, vice president, “peers,” and “management.” [*Id.* ¶ 19.] So she could see the information she was presenting to the group, Plaintiff planned to read from her personal laptop because she could change the font and color settings, while her direct manager was to simultaneously use his computer to project the actual presentation to the group. [*Id.* ¶¶ 20-21.] But when it came time for her to make the presentation, management refused to allow her to use her laptop. [*Id.* ¶ 23.] She was told to move closer to a television on which the presentation appeared, but she could not read the text of the presentation on that screen. [*Id.* ¶ 24.] Plaintiff “tried to explain what was happening” but “her explanations of her deteriorating condition were met with derision.” [*Id.* ¶ 25.] Her manager became irritated and warned her that he was “going to be pissed if [she made] this meeting longer than it ha[d] to be.” [*Id.* ¶ 26.] Two other members of

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management also joked that she was deaf, blind, and incoherent. [*Id.* ¶ 27.] Three days later, on July 18, 2022, Defendant terminated her employment. [Doc. ¶ 28.]

*2 According to Plaintiff, she traveled to Defendant's New Jersey headquarters just once, on July 15, 2022, for the management meeting. (Kash Decl. ¶ 8.) She was at her home in Atlanta when she received a telephone call from her manager and an HR representative informing her that her employment had been terminated. (*Id.* ¶ 9.)

On December 11, 2023, Plaintiff filed her complaint in this District alleging discrimination in violation of the ADA and ERISA. [Doc. 1.] On April 18, 2024, Defendant moved to transfer this case to the District of New Jersey. [Doc. 9.] Plaintiff has filed a brief in opposition to the motion [Doc. 10], and Defendant has filed a reply [Doc. 11]. The motion is now ripe for adjudication.

II. DISCUSSION

Defendant asks this Court to transfer Plaintiff's claims to the District of New Jersey under 28 U.S.C. § 1404(a). [Doc. 9.] Defendant contends that the choice of law provision in the employment agreement is, in essence, a choice of forum clause that selects New Jersey as an appropriate forum. Defendant also argues that New Jersey would be a more convenient forum for witnesses and that most of the key events underlying this action occurred in that district.

Section 1404(a) provides that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.” Typically, “a district court considering a § 1404(a) motion ... must evaluate both the convenience of the parties and various public-interest considerations” and “decide whether, on balance, a transfer would serve the convenience of the parties and witnesses, and otherwise promote the interest of justice.” *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 63 (2013) (internal quotation marks omitted). It is ultimately within the court's discretion, however, whether to transfer a case. *See Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 985 (11th Cir. 1982) (“[T]he decision whether to transfer a case is left to

the sound discretion of the district court and is reviewable only for an abuse of that discretion.”).

In analyzing a motion to transfer, the Court must first determine whether the plaintiff originally could have brought the case in the alternative venue. *Life Ins. Co. of the Sw. v. Covington-Campanella*, No. 20-81767-CV-MIDDLEBROOKS, 2021 WL 3398527, at *1 (S.D. Fla. Feb. 11, 2021). If so, then the Court must weigh nine private and public interest factors to determine whether transfer would serve convenience and the interest of justice. *Id.*; *see also Atl. Marine Constr. Co.*, 571 U.S. at 63; *Pulijala v. Cuccinelli*, No. 1:20-CV-00822-JPB, 2021 WL 9385877, at *1 (N.D. Ga. Jan. 22, 2021). The factors are:

- (1) the convenience of the witnesses; (2) the location of relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) a forum's familiarity with the governing law; (8) the weight accorded a plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances.

*3 *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 n.1 (11th Cir. 2005); *see also Frey v. Minter*, 829 F. App'x 432, 436 (11th Cir. 2020). “The plaintiff's choice of forum should not be disturbed unless it is clearly outweighed by other considerations.” *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 260 (11th Cir. 1996) (quoting *Howell v. Tanner*, 650 F.2d 610, 616 (5th Cir. 1981)). “Finally, the party (or parties) seeking transfer bear the burden of establishing that the Section 1404(a) factors weigh in favor of transfer.” *Huntley v. Chicago Bd. of Options Exch.*, 132 F. Supp. 3d 1370, 1372 (N.D. Ga. 2015); *see In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989) (“[I]n the usual motion for transfer under section 1404(a), the burden is on the movant to establish that the suggested forum is more convenient.”).

A. Venue Is Proper in This District and in the District of New Jersey

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Under the first prong of this analysis, the Court must determine whether this case could have been brought in the District of New Jersey— *i.e.*, if New Jersey “has subject matter jurisdiction over the action, venue is proper, and the parties are amenable to service of process” there. *Hight v. U.S. Dep’t of Homeland Sec.*, 391 F. Supp. 3d 1178, 1183 (S.D. Fla. 2019).

Venue for an employment discrimination claim brought under the ADA is governed by the venue provision of the Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e-5(f)(3). *See* 42 U.S.C. § 12117(a) (establishing that “[t]he powers, remedies, and procedures set forth in [42 U.S.C. §] 2000e-5 ... shall be the powers, remedies, and procedures this subchapter provides ... to any person alleging discrimination on the basis of disability in violation of any provision of this chapter”). Title VII’s venue provision states that an action

may be brought in [1] any judicial district in the State in which the unlawful employment practice is alleged to have been committed, [2] in the judicial district in which the employment records relevant to such practice are maintained and administered, or [3] in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, [4] but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office.

Id. § 2000e-5(f)(3).

The parties do not appear to dispute that Plaintiff could have filed this action in the District of New Jersey, and the Court agrees. Defendant is headquartered in New Jersey and it is amenable to service of process there. [Doc. 1 ¶¶ 2, 4.] Likewise, Plaintiff alleges that the unlawful employment practice occurred (at least in part) in New Jersey, when she traveled to a management meeting there and was allegedly prevented to use her computer to allow her to see and make her presentation. [*Id.* ¶¶ 19, 23.] It is also likely that employment records relating to the case are located in New Jersey. Thus, venue would be proper in the District of New Jersey.³

B. The Employment Contract Does not Contain a Choice of Forum Provision

Before discussing the relevant factors, the Court addresses Defendant’s argument that the New Jersey choice of law provision in Plaintiff’s employment agreement constitutes a “forum selection clause” that selects New Jersey as a forum in which any action must be brought. [Doc. 9-1 at 13, 15.] To the contrary, the employment agreement does not contain a forum selection provision. “[A] choice of law provision is not the equivalent of a forum selection clause.” *Soroka v. Lee Techs. Servs., Inc.*, No. 1:06-CV-710-TWT, 2006 WL 1734277, at *4 n.2 (N.D. Ga. June 19, 2006). A forum selection provision specifies the jurisdiction or venue in which an action may (if the clause is permissive) or must (if mandatory) be brought. A choice of law clause serves an entirely different purpose—specifying the applicable law. Here, the choice of law provision simply states that New Jersey law governs Plaintiff’s employment agreement. It says nothing whatsoever about where actions should be or must be brought. Thus, there is no forum selection clause at play in this case.⁴

^{*4} On reply, Defendant changes tack (slightly) to argue that even if the clause is not a forum selection provision, it still favors transferring the case because the parties agreed that New Jersey law would govern any disputes arising from the employment contract. [Doc. 11 at 3-4.] This is not persuasive. The fact that the parties chose New Jersey law to apply to the employment agreement is irrelevant here because Plaintiff’s claims arise exclusively under federal law. As a result, it is doubtful that the parties or the Court will have to concern themselves with substantive New Jersey state law. But even if New Jersey law somehow does become applicable here, Defendant gives no reason that this Court would be unable to apply New Jersey law. *Cf. Alcaras v. Hatteras Yachts, Inc.*, No. 14-22115-CIV, 2014 WL 5461993, at *4 (S.D. Fla. Oct. 27, 2014) (“Choice of law, although relevant, is by no means dispositive of a motion to transfer, especially where as here, no complex issues of foreign law are presented and the outcome of the case may well turn on factual rather than legal issues.”) (quoting *O’Neill v. Stanwood Corp.*, 577 F. Supp. 1001, 1003 (S.D.N.Y. 1984)).

Accordingly, the choice of law clause in Plaintiff’s employment agreement does not support transferring this case to the District of New Jersey.

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C. The Relevant Factors Do Not Favor Transfer of Venue

The Court next addresses each of the relevant factors that the Eleventh Circuit identified:

1. The Convenience of the Witnesses

“The most important factor in considering a motion to transfer is the convenience of the witnesses.” *Huntley*, 132 F. Supp. 3d at 1372. Under this factor, “it is not so much the convenience of the witnesses but the possibility of having their testimony at trial that is important.” *Combs v. Fla. Dep’t of Corr.*, 461 F. Supp. 3d 1203, 1209 (N.D. Fla. 2020). “Although the convenience of party witnesses is relevant, the critical determination under this factor is the convenience of the forum to key non-party witnesses on a defendant’s liability.” *Weintraub v. Advanced Corr. Healthcare, Inc.*, 161 F. Supp. 3d 1272, 1280 (N.D. Ga. 2015). “Thus, the court must consider whether transferring a case would increase or decrease the probability of important witnesses being able to testify at a trial.” *Combs*, 461 F. Supp. 3d at 1209.

Defendant argues the witnesses who would be inconvenienced by litigating this case in Georgia are its own employees who allegedly discriminated against Plaintiff—all of whom it represents work in its New Jersey office. [Doc. 11 at 14.] “In cases where witnesses are employees of a party, however, their convenience is entitled to less weight because the respective party will be able to compel their attendance and testimony at trial.” *Combs*, 461 F. Supp. 3d at 1208 (N.D. Fla. 2020); *see also Kitzel v. Tunnell Gov’t Servs. Inc.*, No. 8:22-CV-2733-VMC-AAS, 2023 WL 2330669, at *6 (M.D. Fla. Mar. 2, 2023) (ignoring the convenience of witnesses who were employees of the defendant because the defendant can compel their attendance at trial). So even though most of the key fact witnesses may reside in New Jersey, this factor is neutral.

2. The Location of Relevant Documents and the Relative Ease of Access to Sources of Proof

The second factor “examines the location of sources of documentary proof and other tangible materials, and the ease with which the parties can transport them to trial.” *Trinity Christian Ctr. of Santa Ana, Inc. v. New Frontier Media, Inc.*, 761 F. Supp. 2d 1322, 1327 (M.D. Fla. 2010). “Since the predominance of electronic discovery in the modern era, most courts have recognized that the physical location of relevant documents is no longer a significant factor in the transfer inquiry.” *Weintraub*, 161 F. Supp. 3d at 1283 (collecting cases). Courts find that this factor does not weigh in favor of transfer if a party fails to demonstrate why its “documents cannot be easily provided via electronic production.” *Id.* Here, Defendant has not argued, much less shown, that it faces any difficulty in producing the necessary materials or relevant documents during discovery or having them available at trial. Thus, this factor does not support transfer.

3. The Convenience of the Parties

*5 “Where a transfer merely shifts the burden of inconvenience from one party and its witnesses to another party and its witnesses, courts will not disturb a plaintiff’s choice of forum.” *Zurich Am. Ins. Co. v. Renasant Ins. Co.*, No. 8:10-CV-1769-T-17EAJ, 2011 WL 722972, at *7 (M.D. Fla. Feb. 23, 2011). Plaintiff resides in this District, while Defendant is headquartered in New Jersey. “Because both parties reside in the respective districts, this factor is neutral.” *Kitzel*, 2023 WL 2330669, at *6; *Weintraub*, 161 F. Supp. 3d at 1282 (“[B]ecause there are advantages and disadvantages to either party depending on the venue, this factor does not weigh for or against transfer.”).

4. The Locus of Operative Facts

“To determine the locus of operative facts, courts look to where the events from which the claim arises occurred.” *Kitzel*, 2023 WL 2330669, at *6 (citation omitted). Here, the relevant events occurred both in New Jersey and in Georgia. The meeting that precipitated Plaintiff’s termination and, presumably, the actual decision to terminate her employment occurred in New Jersey. But Plaintiff worked in this District, she presumably sought medical treatment for her alleged disability here, and she was in her home office within this

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District when Defendant informed her that it had terminated her employment. *Hale v. Iancu*, No. 3:19-CV-1963 (VLB), 2021 WL 9405460, at *8 (D. Conn. Feb. 23, 2021) (concluding that teleworking employee's home district was a locus of operative facts because it was "the judicial district in which the unlawful employment practice would be felt"). Because operative facts straddle this District and the District of New Jersey, this factor is neutral.

5. The Availability of Process to Compel the Attendance of Unwilling Witnesses

The next factor—the availability of process to compel the attendance of unwilling witnesses—"is relevant only if a party demonstrates, as a threshold matter, that a particular witness would otherwise be unwilling to testify at trial." *Kitzel*, 2023 WL 2330669, at *7 (citation omitted). Here, "there is no evidence that either party will be deprived of live testimony of any witness due to an individual's distance from either forum." *Trinity Christian*, 761 F. Supp. 2d at 1329. This factor is therefore neutral.

6. The Relative Means of the Parties

Defendant does not address the relative means of the parties (despite having the burden to show that transfer is warranted). But Defendant is a corporate entity while Plaintiff is an individual. Thus, this factor weighs against transfer. *Kitzel*, 2023 WL 2330669, at *7.

7. A Forum's Familiarity With the Governing Law

As discussed above in the context of the choice of law provision, this case involves claims only under federal law, which this Court is just as capable of applying as the District of New Jersey. Thus, this factor is neutral.

8. The Weight Accorded a Plaintiff's Choice of Forum

In general, "the Court must afford plaintiff's chosen forum a substantial degree of deference" particularly "where, as here,

plaintiff has filed suit in [her] home state." *Rice v. PetEdge, Inc.*, 975 F. Supp. 2d 1364, 1374 (N.D. Ga. 2013) (citations omitted). Moreover, the ADA incorporates Title VII's special venue provision that explicitly authorizes an employee to sue in the judicial district in which the employee would have worked but for the alleged unlawful employment practice. Thus, this factor weighs against transfer.

9. Trial Efficiency and the Interests of Justice, Based on the Totality of the Circumstances

*6 The final factor, which examines the interests of justice, "is a separate element of the transfer analysis that relates to the efficient administration of the court system." *Combs*, 461 F. Supp. 3d at 1215 (quoting *Rsch. Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.*, 626 F.3d 973, 978 (7th Cir. 2010)). "In analyzing this factor, courts consider: (1) where the action is more likely to be expeditiously and efficiently litigated; (2) judicial economy and docket congestion in the competing districts or divisions; (3) each party's ability to enforce a judgment; (4) whether transfer would allow for a consolidation of litigation; (5) the relationship of each community to the controversy; and (6) any obstacles to a fair trial that the parties may encounter in the competing venues." *Id.*

Defendant does not argue that any of these considerations would be better served by transferring this case to the District of New Jersey. Since the burden is on Defendant to show transfer is justified, this factor weighs against transfer.

10. Weighing the Factors

In sum, the relevant factors are either neutral or weigh against transferring this case to the District of New Jersey. As a result, Defendant has failed to carry its burden of showing that transfer is warranted.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Transfer Venue to the District of New Jersey Pursuant to 28 U.S.C. § 1404(a) [Doc. 9] is **DENIED**.

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The Court also notes that the parties have not filed their certificates of interested persons and corporate disclosure statements (which should have been filed at the time of their first appearances) or their joint preliminary planning report and discovery plan, and the time for doing so has passed. *See* LR 3.3, 16.2, NDGa. The Court therefore **ORDERS** the parties to file their certificates of interested persons and corporate disclosure statements no later than **June 7, 2024** and to file their joint preliminary planning report and discovery plan no later than **June 21, 2024**.

IT IS SO ORDERED this 4th day of June, 2024.

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Footnotes

- ¹ A magistrate judge may rule on any non-dispositive pretrial matters referred to him or her by the district court. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). Courts in this district have determined that a motion to transfer venue simply changes the forum and, thus, is a non-dispositive matter within a magistrate judge's authority. *See, e.g., Buchanan v. PCC Airfoils, LLC*, No. 1:20-CV-4108-TCB-CCB, 2021 WL 5445458, at *2 n.1 (N.D. Ga. Feb. 8, 2021) (magistrate judge order transferring case to Southern District of Georgia based on *forum non conveniens*); *King/Morocco v. Audi of Grapevine*, No. 1:18-CV-5000-LMM-JFK, 2018 WL 11214829, at *3 (N.D. Ga. Nov. 2, 2018) (magistrate judge order transferring case to the Northern District of Texas under venue provisions of Title VII); *accord Geico Marine Ins. Co. v. Amzim Marine Servs., LLC*, 641 F. Supp. 3d 1292, 1305 n.4 (M.D. Fla. 2022) (“Because a motion to transfer venue does not address the merits of the case but merely changes the forum, it is a non-dispositive matter that does not require a report and recommendation.”).
- ² The Declaration of Charissa Kash is attached to her response to the motion to transfer and is docketed at docket entry 10, pages 14-16.
- ³ There is also no dispute that venue is proper in the Northern District of Georgia because Plaintiff would have worked in this district but for the alleged unlawful employment practice.
- ⁴ In its reply, rather than own up to its mistaken assertion that the employment agreement contains a choice of forum provision, Defendant appears to stand on this argument. [See Doc. 11 at 2-3 (stating that “***even if this Court were to accept the Plaintiff’s arguments regarding the Choice of Law provision*** the private and public interest factors ... weigh in favor of transferring this matter to the District of New Jersey.”) (emphasis added).] This strikes the Court as dangerously close to advancing a frivolous argument. The Court is not aware of any law—and Defendant has certainly not pointed to any—that supports interpreting a choice of law clause like the one at issue in this case as a forum selection provision.

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