

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

**March 1, 2021**

**Christopher M. Wolpert**  
**Clerk of Court**

In re: BO ZOU,

Petitioner.

No. 21-5002  
(D.C. No. 4:19-CV-00554-JFH-JFJ)  
(N.D. Okla.)

**ORDER**

Before **TYMKOVICH**, Chief Judge, **PHILLIPS** and **CARSON**, Circuit Judges.

Bo Zou, proceeding pro se, requests a writ of prohibition requiring United States Magistrate Judge Jodi F. Jayne to disqualify herself from Zou's pending civil action in the United States District Court for the Northern District of Oklahoma. A writ of prohibition is an appropriate vehicle to challenge a judge's refusal to disqualify herself. *See Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir. 1995) (per curiam) ("[M]andamus is an appropriate vehicle by which to challenge a district court's denial of a recusal motion."); *Sangre de Cristo Cmty. Mental Health Serv., Inc. v. United States (In re Vargas)*, 723 F.2d 1461, 1468 (10th Cir. 1983) (equating writs of probation and writs of mandamus). However, the petitioner "must demonstrate a clear abuse of discretion, or conduct by the district court amounting to a usurpation of judicial authority." *Nichols*, 71 F.3d at 350. Prohibition, like mandamus, "is available only upon a showing of a clear and indisputable right to relief." *Id.*

Zou argues that the magistrate judge's rulings against him on numerous discovery-related disputes demonstrate bias. Zou ignores the magistrate judge's rulings in his favor, but regardless, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion," *Liteky v. United States*, 510 U.S. 540, 555 (1994). Zou also misunderstands many of the magistrate judge's typical case-management procedures as evidence of bias, which they are not.

Zou has not demonstrated his entitlement to prohibition relief. We therefore deny his petition. We grant his motion to proceed *in forma pauperis*.

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BO ZOU,

Plaintiff,

v.

LINDE ENGINEERING NORTH  
AMERICA, INC.,

Defendant.

Case No. 19-CV-554-JFH-JFJ

**OPINION AND ORDER**

Before the Court are numerous pending discovery motions and/or motions referred to the undersigned for disposition. (ECF Nos. 18, 40, 42, 51, 54, 60, 80, 86, 89, 94).<sup>1</sup>

**I. Defendant's Request for Special Discovery Management Order (ECF No. 80, Part VIII.F, referred by ECF No. 92)**

In the Status Report filed July 24, 2020, Defendant requests that both parties be limited to four fact witness depositions and that Plaintiff be required to seek leave of Court before serving any additional written discovery requests on Defendant. ECF No. 80 at 8-9.<sup>2</sup> Upon referral of this issue, the Court gave Plaintiff the opportunity to respond. ECF No. 103. Plaintiff objects to any limits on the number of depositions, arguing that all ten proposed deponents have relevant information and that ten depositions is proportional to the needs of the case. Plaintiff also argues that Defendant should not be permitted to change its original position, which was that each party could conduct a range of six to ten fact-witness depositions. *See* ECF No. 16 at 5.

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<sup>1</sup> Plaintiff's Motion for Contempt (ECF No. 89) has not been expressly referred but relates to Defendant's alleged discovery failures. The Court rules on this motion pursuant to General Order 05-09, which refers all discovery matters in civil cases to the assigned magistrate judge.

<sup>2</sup> The Court addresses Defendant's request to prohibit or limit further written discovery in the context of the Motion for Protective Order addressed *infra* Part VII.

Federal Rule of Civil Procedure 26(b)(2)(A) provides that “[b]y order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.” Rule 26(b)(2)(C)(i) and (iii) provide that the Court must limit discovery if it determines that the proposed discovery is “unreasonably burdensome or duplicative” or “outside the scope permitted by Rule 26(b)(1),” *i.e.*, not relevant or proportional to the needs of the case. Proportionality requires consideration of “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues; and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1).

This is an employment discrimination case that will turn on whether Plaintiff was subject to discriminatory treatment during a reduction in force. The Court is familiar with Plaintiff’s theory of the case, Defendant’s defenses, and the damages at issue, based on: (1) the Court’s review of written discovery requests by both parties, (2) Plaintiff’s proposed deponents and Plaintiff’s description of their proposed testimony, and (3) the two Joint Status Reports setting forth detailed factual summaries. After consideration of the likely benefit of ten fact witness depositions, compared to the burden and expense of permitting that number of depositions, the Court finds Plaintiff’s requested number to be excessive and finds Defendant’s proposed limit to be reasonable and proportional.

Contrary to Plaintiff’s arguments, Defendant permissibly changed its position regarding the number of depositions that should be allowed between the time of filing the original Joint Status Report on January 8, 2020, and the second Status Report, on July 24, 2020. The district judge first assigned to the action did not set a schedule or rule on any issues presented in the original Joint Status Report. When the case was reassigned to a new district judge, he ordered a

new report for the purpose of setting a schedule. The reassigned district judge was well within his discretion to order a new status report and refer any discovery management issues presented therein. In turn, Defendant was entitled to propose new discovery limits and deadlines, based on developments in the case during this time.

Defendant's Request for Special Discovery Management Order (ECF No. 80, Part VIII.F) is GRANTED. Exercising its discretion under the above rules, the Court initially limits both parties to four fact witness depositions. The parties may seek relief from this deposition limit, but only after conducting the number of authorized depositions and upon a showing of good cause.

## **II. Defendant's Motion to Quash and for Protective Order (ECF Nos. 51, 54)**

These motions seek a protective order pursuant to Federal Rule of Civil Procedure 26(c), for the purpose of preventing the ten depositions noticed by Plaintiff for the week of June 23, 2020. The Court granted Defendant's motion to stay the depositions pending the Court's ruling on this Motion to Quash and for Protective Order. *See* ECF No. 58.

The Court has now placed limits on the number of fact-witness depositions pursuant to Rule 26(b)(2)(A), as requested by Defendant. Plaintiff shall inform Defendant of his four requested deponents no later than one week from the date of this Order, and the parties shall confer regarding these depositions. With the limits imposed, the parties may be able to resolve further disputes, and the Court denies the current motion without prejudice to refile. The Court finds inadequate justification to conduct these depositions at the courthouse, as requested by Defendant, and will permit any depositions to proceed at the office building selected by Plaintiff.

Defendant's Motion to Quash and for Protective Order (ECF No. 51, 54) is DENIED as moot, without prejudice to refile.

**III. Plaintiff's Motion to Compel and for Sanctions (ECF No. 60)**

This motion relates to Plaintiff's third set of requests for production and second set of Interrogatories, which were served on April 6, 2020. Plaintiff moves to compel Request for Production ("RFP") 1, 2, 3, & 5 and Interrogatory ("ROG") 20.

RFP 1, 2, 5 – Denied. The Court granted Plaintiff's motion to compel ESI, including emails relevant to the case, by identifying two custodians and ordering Defendant to search certain terms. The Court outlined the scope of proportional ESI discovery, and this is an attempt by Plaintiff to circumvent that ruling with additional requests. Further, with respect to RFP 2, Defendant already produced responsive documents and has re-run its search to determine if further responsive documents exist.

RFP 3, ROG 20 – Denied. Plaintiff now has the entire employment history for Sharp and Duncan. Defendant has explained that the word "tenured" did not refer to any specific promotion, but instead referred to these two employees being senior to Plaintiff at the time of the reduction in force. Defendant need not produce further documents or provide further explanation.

Plaintiff's Motion for Sanctions is premised on Defendant's delay in producing a signed verification, which has now been produced.

Plaintiff's Motion to Compel and for Sanctions (ECF No. 60) is DENIED.

**IV. Plaintiff's Motion to Compel and for Sanctions (ECF No. 86) and Plaintiff's Motion for Contempt (ECF No. 89)**

This motion relates to Plaintiff's fourth set of requests for production, which were served on May 11, 2020. Plaintiff moves to compel RFP 5 and 6.

RFP 5 – Denied. This request for communications between Defendant and ICC has already been denied by the Court, and the Court maintains its prior ruling.

RFP 6 – Denied. Defendant is not withholding responsive documents and represented that it will produce any responsive documents in its possession, custody, or control.

Plaintiff's requests for sanctions and contempt are based on Defendant's alleged perjury in discovery responses, falsifying documents, failing to meet deadlines, and failing to produce documents ordered by the Court. The Court has reviewed the correspondence between the parties, including emails from Plaintiff requesting additional documents or discovery, and responding emails from Defendant. Following is an example of a response from Defendant:

On RFP's 2, 3, 4, and 7, you cannot agree to narrow the request for production and then attempt to have Defendant "follow Plaintiff's requirements" as set forth in the original RFP's. We have complied with the Court's order and produced all documents as ordered by the Court. On RFP 21, as I've said repeatedly, we do not have any additional documents responsive to this request. For the balance of your email, we have produced all email correspondence that references you, your performance, your complaint, and your termination in compliance with the Court's order.

ECF No. 94-1.

Upon review of the correspondence submitted by both parties and Defendant's discovery responses, the Court finds no grounds for imposing sanctions upon Defendant or holding Defendant in contempt. The Court finds no cogent or persuasive argument that Defendant has misled the Court, fabricated evidence, failed to comply with Court orders, or otherwise engaged in anything resembling sanctionable or bad-faith litigation conduct.

Plaintiff's Motion to Compel and for Sanctions (ECF No. 86) and Plaintiff's Motion for Contempt (ECF No. 89) are DENIED.

**V. Plaintiff's Motion for Change of Magistrate Judge (ECF No. 40)**

Plaintiff's Motion for Change of Magistrate Judge, which expressly references 28 U.S.C. § 455(a), was referred to the undersigned. Plaintiff seeks the undersigned's disqualification based on the following: (1) displaying a "high favoritism to Defendant and antagonism to Plaintiff" in

the undersigned's ruling on discovery motions on May 19, 2020; and (2) permitting Defendant to submit an *ex parte* letter to the Court in support of its assertion of privilege. See ECF No. 4.

The recusal statutes require a judge to disqualify himself if "his impartiality might reasonably be questioned," or if "he has a personal bias or prejudice concerning a party." 28 U.S.C. § 455(a) & (b)(1). A judge must recuse himself when there is the appearance of bias, regardless of whether there is actual bias. *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 659 (10th Cir. 2002). "The test is whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." *Id.* The "recusal statute should not be construed so broadly as to become presumptive or to require recusal based on unsubstantiated suggestions of personal bias or prejudice." See *Switzer v. Berry*, 198 F.3d 1255, 1258 (10th Cir. 2000). The decision to recuse is committed to the sound discretion of the district court, and the movant bears a substantial burden to demonstrate the judge is not impartial. *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir.1992).

The undersigned has no relationship with Defendant, its lawyers, or its witnesses. Plaintiff's assertions of bias are based on the undersigned's substantive discovery rulings. The undersigned will briefly address these frivolous arguments. First, a review of the May 19, 2020, discovery Order reveals no bias in favor of Defendant or against Plaintiff. The undersigned granted Plaintiff's motion to compel in part and ordered Defendant to produce a significant amount of ESI over its objection. The undersigned found that language used by Plaintiff in a letter to a third party was threatening and inappropriate, caused the Court concern about Plaintiff's abuse of the discovery process, and warranted a limited protective order regarding third-party subpoenas. However, these rulings were based on the facts and law presented, rather than based on bias. Second, permitting *ex parte* submission of allegedly privileged documents does not show favoritism. In the motion to compel, Plaintiff successfully argued that Defendant's assertion of



work-product privilege was improper, based on information in Defendant's privilege log. The Court agreed with Plaintiff and ordered Defendant to produce the documents to Plaintiff, or submit further information *ex parte* in support of its privilege assertion. Defendant elected to produce the documents to Plaintiff rather than further pursue its privilege assertion, and Plaintiff prevailed on this issue. The undersigned's impartiality cannot reasonably be questioned based on discovery rulings or other facts.

Plaintiff's Motion for Change of Magistrate Judge (ECF No. 40) is DENIED.

**VI. Plaintiff's Motions for Chinese (Mandarin) Translator (ECF Nos. 18, 42)**

Upon filing his Complaint, Plaintiff requested a Chinese translator. The district judge originally assigned to the case stated in a minute order: "There are no hearings set at this time, and the plaintiff's Complaint is coherent and is filed in English. As the litigation progresses, if a translator becomes necessary for purposes of accommodating plaintiff's accent (e.g. during deposition, court hearings) or for any other reason, the Court will consider a renewed motion for appointment of a translator." ECF No. 9. In his first renewed motion, Plaintiff "requests that the Court find a Chinese (Mandarin) translator for the case hearing and trial because of plaintiff's some English accent." ECF No. 18. In his second motion, requests a translator at a hearing requested by Plaintiff in ECF No. 41. These two motions were referred to the undersigned.

The Court has not scheduled or conducted any pretrial hearings. Plaintiff's briefs demonstrate his strong command of the English language, and Plaintiff has fully and adequately represented himself on all issues. Plaintiff has suffered no prejudice based on the Court's failure to appoint a translator. To the extent Plaintiff requests a translator for purpose of the specific hearing requested in ECF No. 41, the motion is denied as moot, because the district judge did not schedule a hearing on the motion.

To the extent Plaintiff is requesting that the Court appoint a translator for trial, depositions, or hearings that may be scheduled in the future, the Court denies the motion. *Pro se* parties in civil cases are generally not entitled to a court-provided translator. See *Desulma v. Goolsby*, No. 98CIV.2078(RMB)(RLE), 1999 WL 147695, at \*1 (S.D.N.Y. Mar. 16, 1999) (“In general, a pro se civil plaintiff is not entitled to an interpreter or translator.”); *Vargas-Rodriguez v. Ortiz*, No. CV 18-2628(RMB), 2019 WL 2366968, at \*6 (D.N.J. June 5, 2019) (collecting cases). Plaintiff elected to file the lawsuit, Plaintiff is not indigent, and Plaintiff shall be required to locate and provide his own translator for future court proceedings at which he desires the presence of a Chinese translator.<sup>3</sup>

#### **VII. Defendant’s Motion for Protective Order (ECF No. 94)**

In this motion for protective order, which was filed August 11, 2020, Defendant seeks a protective order that (1) requires Plaintiff to seek leave of Court before filings any further pleadings or motions; (2) requires Plaintiff to seek leave of court before serving Defendant with any additional discovery requests or notices of depositions; and (3) excuses Defendant’s obligation to respond to ECF Nos. 85, 86, and 89. ECF No. 94 at 6-7. On August 12, 2020, by minute order, the Court excused Defendant’s response obligations and prohibited Plaintiff from filing further motions on a temporary basis, until the Court had the opportunity to rule on Defendant’s motion for protective order. ECF No. 95.<sup>4</sup> The Court then ordered Plaintiff to respond to the motion for protective order, and Plaintiff filed a substantive response. ECF No. 104. Plaintiff argues that

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<sup>3</sup> This ruling may be revisited at the time of any scheduled hearing or trial, or upon assessing the difficulty of conducting proceedings if Plaintiff fails to provide his own translator. This ruling will not be revisited for purposes of depositions.

<sup>4</sup> This minute order was not intended as a permanent filing restriction or other sanction. Instead, it was intended to pause Plaintiff’s filings while the Court resolved the motion for protective order and numerous other motions. This effort was largely unsuccessful, as Plaintiff filed six different “objections” following the Court’s minute order. ECF Nos. 100-105.

Defendant has been “abusing protective orders” and that Defendant has blatantly misled the Court on numerous occasions. *Id.* at 1.

The Court may issue a protective order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense in responding to discovery. Fed. R. Civ. P. 26(c)(1); *Boughton v. Cotter Corp.*, 65 F.3d 823, 829-30 (10th Cir. 1995) (“Rule 26(c) is broader in scope than the attorney work product rule, attorney-client privilege and other evidentiary privileges because it is designed to prevent discovery from causing annoyance, embarrassment, oppression, undue burden or expense not just to protect confidential communications.”).

Defendant has adequately shown the need for protection from undue burden in relation to Plaintiff’s discovery practices. To be clear, Plaintiff has filed non-frivolous discovery motions, including his original motion to compel discovery responses. However, following the Court’s ruling on his first motion to compel, Plaintiff filed several frivolous motions to compel burdensome and repetitive discovery requests that directly contradict this Court’s orders. In total, Plaintiff has now issued eleven different sets of discovery, including five sets of requests for production. Plaintiff has also filed frivolous motions for sanctions and contempt, accusing Defendant of deceitful and sanctionable discovery conduct without justification. Plaintiff has also objected to every unfavorable ruling issued by the Court, requiring Defendant to respond to frivolous objections. This has posed an undue burden on Defendant and the Court’s docket.

Based on Plaintiff’s conduct to date, the Court finds good cause for issuance of a limited protective order pursuant to Rule 26(c)(1) to manage discovery, avoid unnecessary expense, and avoid burdensome discovery-related motion practice. The Court issues a protective order that prohibits Plaintiff from: (1) issuing any further written discovery requests to Defendant, either in the form of interrogatories or requests for production, absent leave of Court; or (2) filing further motions for contempt or sanctions in relation to any of Defendant’s written discovery responses.

Defendant is excused from filing responses to ECF Nos. 85, 86, and 89, which the Court finds to be frivolous discovery-related motions that do not require a response.

The Court lifts the prohibition on Plaintiff's ability to file motions. *See* ECF No. 95. At this time, the Court declines to impose any permanent filing restrictions as a sanction under Federal Rule of Civil Procedure 11 or to invoke the Court's inherent powers to control abusive litigation conduct. *See generally Hutchinson v. Hahn*, No. 05-CV-453-TCK PJC, 2007 WL 2572224, at \*5 (N.D. Okla. Sept. 4, 2007) (explaining Rule 11 sanctions, court's inherent power to impose sanctions, and notice requirements prior to imposing sanctions). The Court declines to do so for two reasons. First, Defendant's motion was styled as one for protective order and did not expressly reference "sanctions" in the title, causing a potential notice problem. Second, the motion was automatically referred to the undersigned because it was styled as a motion for protective order. Any motion for Rule 11 sanctions, or sanctions under the Court's inherent power, are within the province of the district judge, absent an express referral. If Defendant seeks to impose sanctions against Plaintiff under Rule 11 or otherwise, it shall file a properly styled motion that clearly triggers procedural rules governing such motions.


#### **VIII. Conclusion**

It is hereby ORDERED that:

1. Defendant's request for special discovery management limitations (ECF No. 80, Part VIII.F, referred by ECF No. 92) is GRANTED. The Court imposes a discovery management limit of four (4) fact witness depositions for both parties.
2. Defendant's Motion to Quash and for Protective Order (ECF Nos. 51, 54) are DENIED without prejudice to refiling.
3. Plaintiff's Motion to Compel and for Sanctions (ECF No. 60) is DENIED.
4. Plaintiff's Motion to Compel and for Sanctions (ECF No. 86) and Plaintiff's Motion for Contempt (ECF No. 89) are DENIED.
5. Plaintiff's Motion for Change of Magistrate Judge (ECF No. 40) is DENIED.

6. Plaintiff's Motions for Chinese (Mandarin) Translator (ECF Nos. 18, 42) are DENIED.
7. Defendant's Motion for Protective Order (ECF No. 94) is GRANTED in part, and the Court enters the following protective order. Plaintiff is prohibited from:
- (1) issuing any further written discovery requests to Defendant, absent leave of Court; and
  - (2) filing any further motions for contempt or sanctions in relation to any of Defendant's current discovery responses.<sup>5</sup>
8. The Court declines to impose the sanction of filing restrictions at this time, and the temporary restriction imposed by ECF No. 94 is lifted.

**SO ORDERED** this 21st day of September, 2020.

  
JODI F. JAYNE, MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT

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<sup>5</sup> The Court's prior Protective Order, which requires Plaintiff to seek leave of court to issue third-party subpoenas and avoid threatening or harassing behavior to third parties, also remains in place. See ECF No. 37 at 10.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**BO ZOU,**

**Plaintiff,**

**v.**

**LINDE ENGINEERING NORTH  
AMERICA, INC.,**

**Defendant.**

**Case No. 19-cv-00554-JFH-JFJ**

**ORDER**

Before the Court is the Motion for Objecting to the Court Order to Refer “Plaintiff’s Motion for Change of Magistrate Judge” to Magistrate Judge Herself (“Motion”) [Dkt. No. 85] filed by Plaintiff Bo Zou (“Plaintiff”). Plaintiff filed a Motion for Change of Magistrate Judge [Dkt. No. 40] citing 28 U.S.C. § 455(a). Dkt. No. 40 at 1. The cited statute governs the recusal of “any justice, judge, or magistrate judge of the United States . . . .” 28 U.S.C. § 455(a). Additionally, the statute provides that the judge “shall disqualify *himself* in any proceeding in which his impartiality might reasonably be questioned.” *Id.* (emphasis added). The statute does not provide a means for a district judge to disqualify a magistrate judge. Therefore, this Court appropriately referred the Motion for Change of Magistrate Judge to Magistrate Judge Jayne to be considered pursuant to Section 455. Dkt. No. 83.

As an initial matter, the Motion is moot as Judge Jayne has already considered Plaintiff’s Motion for Change of Magistrate Judge. Dkt. No. 109. Furthermore, Plaintiff cites no authority for his position that the Court should reassign a different magistrate judge to his case. *See* Dkt. No. 85 at 1. Judge Jayne has determined recusal is not appropriate here, and Plaintiff is not entitled to choose the judge assigned to his case. “Litigants, either civil or criminal, have no right to choose

the judge to whom their case is assigned, unless for some reason that particular judge is disqualified from hearing the case.” *United States v. Burney*, No. 07-cr-137, 2012 WL 273922, at \*3 (S.D. Ohio Jan. 31, 2012); *McCuin v. Texas Power & Light Co.* 714 F.2d 1255, 1265 (5th Cir. 1983) (“Judges do not choose their cases, and litigants do not choose their judges.”).

Furthermore, the Court has reviewed Plaintiff’s Motion for Objecting to Magistrate Judge’s Opinion and Order, and Motion to Deny or Remove Magistrate Judge’s Injunctions [Dkt. No. 114] wherein Plaintiff argued Judge Jayne’s decision to not recuse herself was clearly erroneous and contrary to law. *See* Dkt. No. 114 at 9-11. The Court concluded Judge Jayne’s decision was not clearly erroneous or contrary to law.

**IT IS THEREFORE ORDERED** that Plaintiff’s Motion for Objecting to the Court Order to Refer “Plaintiff’s Motion for Change of Magistrate Judge” to Magistrate Judge Herself [Dkt. No. 85] is **DENIED**.

**IT IS FURTHER ORDERED** that the case remains stayed pending resolution of this Court’s ruling on Defendant’s Motion for Sanctions [Dkt. No. 112]. *See* Dkt. No. 130.

DATED this 14th day of December, 2020.

  
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JOHN F. HEIL, III  
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**BO ZOU,**

**Plaintiff,**

**v.**

**LINDE ENGINEERING NORTH  
AMERICA, INC.,**

**Defendant.**

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**Case No. 19-CV-554-JED-JFJ**

**ORDER**

Before the Court are: (1) Plaintiff's motions to compel written discovery responses from Defendant (ECF Nos. 22, 24, 30, 31); (2) Plaintiff's motion to compel responses to a third-party subpoena issued to Alex Alexandrov, of ICC Northwest ("ICC"), which is within Plaintiff's response to Defendant's motion to quash (ECF No. 25 at 9);<sup>1</sup> and (3) Defendant's motion to quash the subpoena to ICC and for sanctions or a protective order (ECF No. 19, 20).

**I. Background**

Plaintiff, appearing *pro se*, sued his former employer, Defendant Linde Engineering North America, under Title VII of the Civil Rights Act for age discrimination, race discrimination, and retaliation. Plaintiff worked for Defendant for less than a year from October of 2018 to August of 2019. Plaintiff, who is Asian American, alleges he was "treated differently than other similarly situated White and younger employees." ECF No. 1 at 2. He further asserts a retaliation claim, alleging that on "5/10/19 I communicated with vice president, Mr. David Close and highlighted

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<sup>1</sup> In the interest of efficiency and preserving resources of the parties and ICC, the Court excuses Plaintiff's failure to file a separate motion and will address Plaintiff's motion to compel the ICC documents on the merits. The Court denies the motion and finds no need for ICC to file a response brief.



the unfair treatment. However, in less than three months of my complaints I was selected for a company wide reduction in force.” *Id.* Plaintiff further explained the factual bases for his claims in the Joint Status Report. Plaintiff states that: (1) he was excluded from trainings and project meetings while younger engineers named Kenny Sharp and Dustin Duncan were not; (2) he was retaliated against by his supervisor, Jerry Gump, after complaining about unfair treatment by Gump, and after reporting “big mistakes” by Sharp in relation to specific projects; and (3) he was selected for a reduction in force based on his race, age, and in retaliation for raising complaints. ECF No. 16 at 1-3.

Plaintiff has issued at least two sets of discovery requests, including requests for production, interrogatories, and requests for admission. *See* ECF Nos. 22-1 (47 requests for production); ECF No. 30-1 (10 additional requests for production); 30-2 (17 interrogatories); 30-3 (13 requests for admission). Defendant has produced documents and a privilege log. Defendant lodged numerous objections to Plaintiff’s discovery requests, and Plaintiff filed the two pending motions to compel complete responses from Defendant.

Plaintiff also issued a third-party subpoena to Mr. Alex Alexandrov, of ICC Northwest (“ICC”). By email from ICC’s in-house counsel to Plaintiff, ICC objected to the subpoena. ECF No. 19-10. Defendant filed the pending motion to quash based on procedural deficiencies. Defendant also seeks sanctions or a protective order, due to threatening language by Plaintiff in an email sent to ICC’s in-house counsel. In his response to Defendant’s motion to quash, Plaintiff moved to compel responses from ICC.

## **II. Plaintiff’s Motions to Compel Discovery Responses from Defendant**

As an initial matter, the Court declines to deny the motion based on any failure to meet and confer as to specific requests and reaches the merits of the motions.

**A. First Motion to Compel (ECF No. 22)**

**RFP 2, 3, 4, 7, 36**: Granted, as limited by Plaintiff. Plaintiff limited requests 2, 3, 4, and 7 to “cryogenic piping class specifications C40 and C60 on March 2 & 3, 2020.” ECF No. 22 at 4. Plaintiff limited RFP 36 to production of two “shop skid” photographs for an XTO project, which were sent to Plaintiff by email from Eric Cantos. Plaintiff argues these piping specifications and photographs are relevant to showing that his work performance was excellent, while younger engineers made mistakes on projects. Defendant contends these documents are irrelevant and that they are confidential information of Defendant and its customers.

Plaintiff’s general work performance in comparison to younger employees that were not laid off may be relevant to the issue of pretext. *See Pippin v. Burlington Res. Oil And Gas Co.*, 440 F.3d 1186, 1193 (10th Cir. 2006) (explaining methods of demonstrating pretext in RIF case, where plaintiff argued that RIF was manipulated in light of plaintiff’s “good performance”). These requests are specific, not overbroad, and Plaintiff has already viewed these documents. Defendant shall only be compelled to produce the documents subject to a protective order, in order to protect any confidential information and prevent use of the information for purposes other than the litigation.

**RFP 6**: Granted, no objection.

**RFP 9-14**: Denied. These broad requests for Plaintiffs’ email communications with other individuals and/or groups of individuals are aimed at discovering performance-related information that will permit comparison between Plaintiff and younger employees.

Although performance information is relevant, these requests are vague and an overly broad fishing expedition that will result in production of significant amounts of irrelevant business communications. It is unclear whether Plaintiff is requesting Defendant search for only those

emails where all listed individuals were included as recipients, or all emails between Plaintiff and each listed individual. Under either interpretation, the majority of emails that would be searched for, reviewed, and produced are unlikely to contain any specific or clear performance-related information, such as a performance review. Instead, Plaintiff appears to be seeking all emails about a significant number of particular projects, so that he can show younger engineers made technical mistakes. While there may be some relevant performance-related information within these requested communications, the Court finds the requests vague, facially overbroad, and not proportional to the needs of the case, considering all Rule 26(b)(1) factors.

The Court cannot discern or craft reasonable limits to place on RFP 9-14 that would render the requests reasonable and proportional. Further, Plaintiff was terminated during a RIF and not for performance-related issues. Although performance information may be relevant to the issue of pretext, it is of less importance to the needs of the case than discussion of Plaintiff following his complaint, as requested in RFP 15-19.

**RFP 15-19:** Granted in part and denied in part. These broad requests are for email communications sent by numerous employees that mention Plaintiff. According to Plaintiff, these requests are aimed at: (1) determining Defendant's "internal response" after Plaintiff's complaint in May 2019, and (2) whether Gump "asked other employees to isolate Plaintiff from the emails." ECF No. 22 at 6. Discussion of Plaintiff after his complaints about Gump are directly relevant to retaliation and other issues in the case, and it is not overly speculative that relevant information regarding Plaintiff would be contained in internal communications following such complaint.

As a reasonable limit on Requests 15-19, which are vague and would require extensive ESI searches, the Court orders Plaintiff to provide the names of two custodians, or individuals within the company, whose email accounts are most likely to contain relevant information. Defendant

shall search these custodians' email accounts for the identifying terms listed in the current requests during the limited time period of May 6, 2019 (the date of the complaint) and August 17, 2019 (the date of termination). This is a proportional ESI search for the information requested in RFP 15-19, considering all Rule 26(b)(1) factors. The documents may be produced pursuant to a protective order.

**RFP 20, 23, 24:** Granted in part and denied in part. As to these requests, Plaintiff contends Defendant has improperly withheld certain documents as privileged, has lied about not possessing responsive documents, has doctored certain documents, and has otherwise engaged in bad-faith discovery conduct. Plaintiff requests various forms of relief, including physical inspection and production in different formats.

The Court finds Defendant has not engaged in any intentional misrepresentations to Plaintiff or other bad-faith discovery conduct. Defendant produced documents, cooperated with Plaintiff, and made efforts to understand his positions. Therefore, the Court denies Plaintiff's requests for physical inspection of the documents and/or for production of documents in any different format. The Court addresses Plaintiff's challenges to privilege assertions below.

**RFP 21:** Granted in part. Defendant is ordered to provide additional documents, if any exist, showing money contributed or any other financial benefits provided to Plaintiff in relation to insurance.

**RFP 26:** Granted. As explained and limited in Plaintiff's motion, this request seeks emails and meeting records discussing a specific project in which Sharp, a younger, retained employee, allegedly made mistakes regarding long pattern ball valves and short pattern ball valve issues. This was discussed in Plaintiff's internal complaint in May of 2019. The Court finds the information relevant to pretext, not overly broad, and proportional to the needs of the case, as limited by the

Court. Defendant shall conduct a reasonable search for emails, memos, or meeting records during January and February of 2019 discussing Sharp, the Crestwood project, and ball valve issues. These documents may be produced pursuant to a protective order.

**RFP 27:** Denied. This request is vague and not a proper request for production.

**RFP 28:** Denied. Based on Plaintiff's behavior in relation to ICC, which is discussed below, the Court has concerns about providing Plaintiff the last known addresses and phone numbers of eight of Defendant's former employees. The Court shares Defendant's concerns that Plaintiff will harass the individuals during the discovery process. Further, Plaintiff failed to explain what relevant information these individuals may have. Under these circumstances, the Court finds Defendant's interest in protecting third parties' personal information and privacy outweighs Plaintiff's need to obtain the personal contact information.

**RFP 32:** Granted in part. Defendant shall provide job descriptions, if any exist, for the positions held by Kenny Sharp and Dustin Duncan during the time of Plaintiff's employment, if not previously provided. With these limitations, the Court overrules Defendant's vagueness and other objections.

**RFP 33, 34:** Denied as to all salary information. Plaintiff does not allege he was treated differently than younger employees in terms of salary. Granted as to documents showing any promotions or demotions of these employees. These documents may be produced pursuant to a protective order. The date range is limited to Plaintiff's span of employment.

**RFP 35:** Moot. Defendant has represented it has no responsive documents.

**RFP 37-38:** Granted. Defendant shall produce all non-privileged responsive documents, to the extent any have been withheld.

**RFP 42:** Granted in part. Defendant shall provide responsive organizational charts that were current and in existence during the time of Plaintiff's employment. Defendant may redact other departments. With these limitations, the Court overrules Defendant's vagueness and other objections.

**PRIV 0004, 0005, 0006:** Plaintiff challenges whether these documents are subject to the work product privilege. The privilege log reflects these are internal, pre-suit communications between Defendant's employees regarding Plaintiff's internal complaint three months prior to the RIF. Defendant's description is not sufficient to establish a "work product" privilege. Defendant may either produce the documents, or submit the documents *in camera* to the Court for review, along with an explanation via *ex parte* letter to the Court as to why these notes and memorandum qualify for a work product privilege.

**PRIV 290-291:** Plaintiff challenges certain redactions of names from this email under the "Pipe Engineer" heading. According to the privilege log, names are redacted to protect "personal privacy information." With respect to the redactions under the heading "Pipe Engineer," any interest in protecting these individuals' names is outweighed by the importance of the information to the case. Defendant shall produce the document without that redaction. Other redactions of names of individuals in other departments may remain.

**B. Second Motion to Compel (ECF No. 30)**

**RFP 6, 7:** Denied. Plaintiff seeks his former counsel's correspondence with Defendant for the purpose of explaining to the Court how former counsel "cheated" in relation to settlement negotiations. *See* ECF No. 30 at 3. This is not relevant to claims or defenses asserted in this case.

**RFP 9:** Denied. Plaintiff has failed to show the relevance of Defendant's communications with "job recruiters" following his termination. This is further explained in Part III below.

**ROG 13**: Denied. Plaintiff's request for all discrimination claims against Defendant for the past eight years is facially overbroad and seeks irrelevant information. Defendant has adequately responded to this interrogatory by responding that there have been no discrimination claims against Gump in the past three years.

**ROG 14**: Denied. Defendant adequately responded by referring to business records previously produced regarding the May 2019 investigation, as permitted by Rule 33(d).

**ROG 15**: Denied. This request seeks "facts to support a termination of the Plaintiff after he was terminated." This request is vague, but it appears to be aimed at attorney mental impressions and other privileged information. Defendant will be required to disclose its witness and exhibit lists in due course.

**RFA 7, 8, 10, 12**: Denied. These requests for admission are vague, confusing, and not capable of being admitted or denied.

**C. Motions for Sanctions (ECF Nos. 24, 31)**

Defendant has complied timely and in good faith to all discovery requests. Further, Defendant lodged good-faith objections to the discovery requests, although some were overruled by the Court. The Court denies Plaintiff's motions for sanctions.

**III. Plaintiff's Motion to Compel Response to ICC Subpoena (within ECF No. 25 at 9)**

According to Plaintiff, ICC employed him prior to his employment with Defendant. ICC also offered Plaintiff a part-time job in January 2020, after his employment with Defendant ended. ECF No. 25 at 2. The subpoena to ICC requests: (1) Plaintiff's employment documents and information from March 1, 2018 to present; (2) ICC's communications with "job recruiters" about Plaintiff since September 1, 2019; and (3) ICC's employees' communications with Plaintiff since

September 1, 2019. ECF No. 19-2. Plaintiff offered the following explanation as to the relevance of these requests:

At the end of January, 2020, ICC wanted Plaintiff to sign a very “*strange*” part-time job contract. ICC specified about 20-40 hours per week for the part-time job on that contract. However, Plaintiff found that NOW there are not any jobs provided for Plaintiff to do. According to ICC’s reply, the part-time job will start at the end of 2020 and next year 2021, and also the part-time job is based on future “if” and “assumption.” So, Plaintiff wondered why ICC needs Plaintiff NOW to sign a future part-time job contract, why to specify 20-40 hours per week for the job on that contract, but, no 20-40 hours per week jobs provided for Plaintiff to do now; also, the jobs are based on future “if” and “assumption,” i.e. the job is not guaranteed. So, Plaintiff asked ICC Human Resources Director Ms. Jennifer Bean a few times to confirm whether there were any third parties to inquire about Plaintiff’s employment information, or request ICC to help do something on Plaintiff. However, ICC never answered Plaintiff’s requests about a third party, attaches [sic] as EXHIBIT “B.” After ICC refuses to reply to Plaintiff’s requests and questions, Plaintiff filed a third party Subpoena to ICC by certified mail [see EXHIBIT “C”], and served on Defendant by regular mail, respectively on February 18, 2020.

ECF No. 25 at 2-3.

As an initial matter, the Court declines to quash the subpoena based on the two procedural deficiencies raised by Defendant. With respect to Plaintiff’s failure to provide notice prior to serving ICC with the subpoena as required by Rule 45(a)(4), the Court finds no prejudice flowing to Defendant from this technical violation and declines to quash the subpoena on this basis. *See Fujikura Ltd. v. Finisar Corp.*, No. 15MC80110HRLJSC, 2015 WL 5782351, at \*4 (N.D. Cal. Oct. 5, 2015) (collecting cases declining to quash subpoena where party does not suffer prejudice from Rule 45 notice requirement). With respect to Plaintiff’s failure to cause service to be effected by someone who is “not a party,” as required by Rule 45(b)(1), the Court declines to quash the subpoena on this basis. The clerk of court signed the subpoena, and Plaintiff completed the subpoena and sent it via certified mail. Ordinarily, his attorney would have sent the subpoena, but Plaintiff appears *pro so*. Based on Plaintiff’s lack of attorney to send the subpoena on his behalf,



lack of prejudice to any party, and ICC's receipt of actual notice, the Court declines to quash the subpoena based on this technical violation. Were the court to quash the subpoena on either procedural basis, Plaintiff would likely re-serve the subpoena on ICC correcting these deficiencies, thereby resulting in further costs and delay. Plaintiff's motion to compel and substantive arguments are before the Court, as are ICC's written objections. The Court finds no need for further briefing from ICC and elects to reach the merits of the motion to compel in the interest of efficiency.

Plaintiff has failed to demonstrate the relevance of any documents requested from ICC. Documents related to his former employment with ICC clearly have no relevance to the issues presented in this lawsuit. The Court also cannot discern any relevance of ICC's communications with "job recruiters" regarding Plaintiff, or ICC's recent communications with Plaintiff. It appears Plaintiff is concerned that Defendant or other third parties have asked ICC to falsify records or somehow interfere with this lawsuit. Plaintiff states that he wishes to "ascertain [whether] any third parties . . . contact Plaintiff's former employer to inquire about Plaintiff's employment information, or to request ICC to do something on Plaintiff against Federal Law or State Law." *See* ECF No. 25 at 10. This is an overly speculative fishing expedition for information that may or may not exist and that has no discernible relevance to the current litigation. Accordingly, Plaintiff's motion to compel responses from ICC is denied, and ICC need not respond to the subpoena in any way.

#### **IV. Defendant's Motion to Quash and for Sanctions/Protective Order (ECF Nos. 19, 20)**

Defendant's motion to quash is denied for the reasons explained above, as the Court elects to excuse procedural deficiencies and rule on Plaintiff's motion to compel on the merits. Defendant also moved for sanctions or a protective order, based on threatening language in an

email from Plaintiff to ICC's in-house counsel. Although Plaintiff contends he was only threatening legal action, certain language could be viewed as threats to the safety of ICC and its employees. *See* ECF No. 19-10 ("For ICC, the best way is immediately to issue all the documents to me as I required. Perhaps, ICC and some ICC employees will be safe as long as ICC would like to get an agreement with me."). The Court will not countenance or tolerate any threatening behavior, and Plaintiff may not use the discovery power of this Court to intimidate, harass, or threaten third parties. If the Court becomes aware of any similar language or behavior by Plaintiff, Plaintiff is expressly warned that dismissal of his lawsuit may be the selected sanction. At this time, the Court declines to sanction Plaintiff but does issue a specific protective order as set forth below.

#### **V. Conclusion**

Plaintiff's motions to compel discovery from Defendant and for sanctions (ECF No. 22, 24, 30, 31) are granted in part and denied in part as set forth above.

Plaintiff's motion to compel responses to the ICC subpoena (ECF No. 25 at 9-10) is denied.

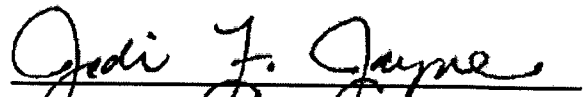
Defendant's motion to quash (ECF No. 19) is denied.

Defendant's motion for sanctions or protective order (ECF No. 20) is granted in part and denied in part. Based on language in the email from Plaintiff to ICC's counsel, the Court orders Plaintiff to: (1) disclose to Defendant any other third-party subpoenas that have been issued, if any; (2) seek leave of Court prior to issuing any further third-party subpoena; and (3) avoid any threatening or harassing behavior to other third parties in conducting discovery or otherwise prosecuting this case. Violations of this Order may result in sanctions, including dismissal.

Plaintiff shall confer with Defendant regarding RFP 15-19 no later than five days from the date of this Order. Defendant shall produce supplemental documents no later than 30 days from the date of this Order.

Defendant shall submit its *ex parte* letter, with attached documents, no later than 10 days from the date of this Order, if desired.

**SO ORDERED** this 19th day of May, 2020.

  
JODI F. JAYNE, MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**BO ZOU,**

**Plaintiff,**

**v.**

**LINDE ENGINEERING NORTH  
AMERICA, INC.,**

**Defendant.**

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**Case No. 19-CV-554-JED-JFJ**

**ORDER**

Before the Court are several pending motions filed by pro se Plaintiff Bo Zou and Defendant Linde Engineering North America, Inc. The motions primarily relate to a discovery order entered by the Court on May 19, 2020 ("Discovery Order"). ECF No. 37.

**I. Plaintiff's Motions**

**A. Motion for Sanctions Related to Plaintiff's Email to ICC (ECF No. 34)  
(referred by ECF No. 43)**

Plaintiff requests sanctions against Defendant for obtaining and filing an email Plaintiff sent to third party ICC, because the email is protected by copyright law. This email was discussed by the Court in the Discovery Order and relates to discovery in this lawsuit. *See* ECF No. 37 at 10-11. The Court finds no legal violations or otherwise sanctionable conduct by Defendant in obtaining the email from ICC or filing it for the Court's consideration. The motion for sanctions is denied.

**B. Motion to Reconsider (ECF No. 38) (referred by ECF No. 43)**

The Court granted Plaintiff's motion to compel in several respects and ordered Defendant to supplement its document production. Plaintiff now moves the Court to reconsider the unfavorable aspects of the Court's ruling. Plaintiff repeats arguments raised in the motion to

compel and continues to allege Defendant has engaged in discovery misconduct and misled the Court. ECF No. 38. Plaintiff has not shown that the Court misapprehended the facts, Plaintiff's legal position, or the law governing the parties' discovery disputes. Therefore, the Court denies the motion to reconsider. *See Servant of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (explaining that a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law).<sup>1</sup>

**C. Motions for Hearing and Translator (ECF No. 45) (referred by ECF No. 46)**

Plaintiff requests an in-person, five-hour hearing on his motion to reconsider.<sup>2</sup> In its discretion, the Court declines to conduct a hearing on the motion to reconsider or permit any further presentation of evidence related to the Court's Discovery Order. Due to the Court's denial of a hearing, Plaintiff's request for a translator at the hearing is denied as moot.

**D. Motion to Strike and for Sanctions (ECF No. 59) (referred by ECF No. 61)**

Plaintiff moves to strike Defendant's response to the motion to reconsider (ECF No. 49), because Defendant failed to serve the response on Plaintiff. Plaintiff admits that he received notice of the response no later than June 19, 2020, four days after it was filed. Plaintiff filed a timely reply that the Court has considered. ECF No. 65. Defendant's response brief sets forth specific facts and arguments relied on by the Court in denying Plaintiff's motion to reconsider, and the

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<sup>1</sup> To the extent Plaintiff seeks reconsideration based on the Court's failure to await his reply brief in support of his motion to compel, the Court has now fully considered such brief. *See* ECF No. 38-1. Upon consideration of the reply, the Court reaches the same result and finds no grounds for reconsideration.

<sup>2</sup> Plaintiff also requested a hearing on his motion to reassign the undersigned judicial officer. ECF No. 41. That motion to reassign, and the corresponding request for hearing, are pending before the district judge.

Court finds no grounds for striking the document or sanctioning Defendant for any failure to serve Plaintiff with this document. The motion to strike and for sanctions is denied.<sup>3</sup>

## **II. Defendant's Motions**

### **A. Motion for Entry of Protective Order (ECF No. 44) (automatic referral by Northern District G.O. 05-09)**

The Court expressly contemplated entry of a blanket protective order permitting Defendant to designate certain documents as confidential. *See, e.g.*, ECF No. 37 at 6 (compelling production but stating documents may be produced pursuant to protective order). The Court finds that a blanket protective order will facilitate discovery and the flow of information at this stage of the proceedings. To the extent Plaintiff desires to challenge whether a confidentiality designation is proper, Defendant's proposed protective order permits such a challenge. *See* ECF No. 44-1 at ¶ 7. Accordingly, the motion for entry of a protective order is granted, and the Court will enter a protective order in the form attached as Exhibit 1 to Defendant's motion.

### **B. Motion for Extension of Time to Comply with Order (ECF No. 50) (referred by ECF No. 55)**

Defendant requests an extension of the supplemental production deadline set by the Court in its Discovery Order. Defendant requests additional time to complete ESI searches and requests that the Court postpone the deadline until entry of a protective order. There is no scheduling order in place, and Plaintiff has not shown any prejudice resulting from the extension. Defendant has shown good cause for the requested extension. Defendant shall have five days from the date of entry of the protective order to complete its production.

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<sup>3</sup> The Court finds no need to permit a response or reply brief before denying this motion.

### **III. Conclusion**

Plaintiff's motions addressed in this Order (ECF Nos. 34, 38, 45, 59) are DENIED. Defendant's motion for protective order (ECF No. 44) is GRANTED, and the Court enters Defendant's proposed protective order this date. Defendant's motion for extension of time (ECF No. 50) is GRANTED, and Defendant shall have five days from the date of entry of the protective order to complete its production.

The remaining motions pending before the undersigned (ECF Nos. 51, 54, 60) are not ripe for review and will be ruled on by separate Order. In the Joint Status Report to be filed July 24, 2020, the parties shall state whether the remaining discovery disputes pending before the undersigned have been narrowed or resolved in any manner.

**SO ORDERED** this 9th day of July, 2020.

  
JODI F. JAYNE, MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT