UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al*.,	)	
Plaintiffs,	)	Case No. 1:08-cv-827 (LMB/JFA)
v.	)	
CACI PREMIER TECHNOLOGY, INC.,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION *IN LIMINE* TO PERMIT ADMISSION OF STATEMENTS OF CACI PERSONNEL PURSUANT TO FED. R. EVID. 801(d)(2)(D)

At the April 2024 trial in this action, Plaintiffs sought to introduce as evidence statements that CACI interrogators made about their inhumane treatment of detainees at Abu Ghraib. These statements were relevant and would have constituted powerful evidence of CACI's role in the brutality perpetuated at Abu Ghraib. However, CACI objected that the statements of its then-employees were hearsay, and the Court sustained those objections, overruling Plaintiffs' argument that the statements constituted admissible, non-hearsay party-opponent statements under Federal Rule of Evidence 801(d)(2)(D), which provides that a statement is not hearsay when "[t]he statement is offered against an opposing party and . . . was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." As a result, Plaintiffs were deprived of important inculpatory evidence.

Plaintiffs recognize that the Court generally will address and rule on evidentiary issues, including questions regarding hearsay, as they arise during the course at trial. However, in order to avoid unnecessary objections and lengthy sidebars at trial, and in order for Plaintiffs to prepare their witnesses' testimony, Plaintiffs file this motion *in limine* to clarify the applicability of Rule 801(d)(2)(D) to the contemporaneous statements of CACI personnel about their work in connection with interrogations at Abu Ghraib. Such statements fall squarely within this Rule and cannot be precluded on the basis that they constitute hearsay.

Plaintiffs do not intend on re-litigating every single adverse ruling made during the prior trial, but are compelled to raise only a handful of those rulings that, Plaintiffs respectfully submit, were "clearly erroneous" and, if uncorrected, would result in "manifest injustice." *TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009) (citations omitted).

BACKGROUND

It is hard to imagine evidence more probative and powerful in this case than CACI's own statements about its treatment of detainees, including statements by CACI interrogators while at Abu Ghraib about abuses they inflicted.

Plaintiffs were prepared to introduce just such evidence at the prior trial in this action. On the very first day of trial, Plaintiffs called Torin Nelson, a former CACI interrogator who provided interrogation services at Abu Ghraib while Plaintiffs were detained and abused there and who interacted with each of the CACI personnel who were publicly implicated in instances of abuse against detainees and related misconduct. Indeed, one of those CACI employees—Tim Dugan—was Mr. Torin's roommate for a time. *See* ECF No. 1631 (April 15, 2024 Afternoon Trial Tr.) 88:8-14. Mr. Nelson would have testified about statements that both Mr. Dugan and CACI interrogator Steven Stefanowicz made regarding their treatment of detainees at Abu

Ghraib, but Plaintiffs were not able to introduce either statement because of hearsay objections by CACI that injected heightened—indeed non-existent—requirements for admissibility under Rule 801(d)(2)(D).

For example, Mr. Nelson would have testified 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. However, when Plaintiffs asked Mr. Nelson whether he had ever heard Mr. Dugan discuss his treatment of detainees, CACI objected. *See* ECF No. 1631 (April 15, 2024 Afternoon Trial Tr.) 88:21-22. In response to Plaintiffs' explanation that the testimony was a party-opponent admission, CACI insisted that Mr. Dugan "is not a party opponent" but "a low-level employee." *Id*. at 88:23-25. The Court sustained the objection, and Plaintiffs could not offer this testimony. *See id.* at 89:1-3.

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. However, as Mr. Nelson began to relay Mr. Stefanowicz's words, the Court instructed him to stop, and Plaintiffs requested a sidebar. *Id.* at 92:1-8. At the sidebar, Plaintiffs explained that the statement to be offered was an opposing party statement under Rule 801(d)(2)(D), but CACI protested that "[b]y the rule, it's [only] people who are in a position of authority" who could make such statements. *Id.* at 92:11-93:2. Plaintiffs disagreed, explaining that the rule "does not require the employee of the company to have speaking authority for the company," but the Court sustained the objection.

Although Plaintiffs did not have the opportunity to proffer the content of Mr. Stefanowicz's statement, the Court suggested that the statement might not be admissible under Rule 801(d)(2)(D) because it was "outside the scope of the contract." *Id.* at 93:15-94:8.

As explained below, Rule 801(d)(2)(D) is not cabined to statements of those "in a position of authority" and does not exempt statements of "low-level employee[s]": all that is necessary in order to be admissible against CACI is that the statements were made by CACI employees about a matter within their job responsibilities—namely, interrogation services. The above-described statements, and other statements that Plaintiffs may offer of CACI interrogators about their interrogation work, should be admitted at the re-trial of this action.

ARGUMENT

A statement is not hearsay if the statement "is offered against an opposing party and … was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(D). "[A]dmissibility under [Rule 801(d)(2)(D)] should be granted freely," *Pappas v. Middle Earth Condo. Ass'n*, 963 F.2d 534, 537 (2d Cir. 1992); indeed, the Advisory Committee "call[ed] for generous treatment of this avenue to admissibility," Fed. R. Evid. 801 advisory committee's note.

To be admissible under this rule, "it need only be shown that the statement be related to a matter within the scope of [the declarant's] agency." *United States v. McCabe*, 2021 WL 12275317, at *2 (E.D. Va. Aug. 12, 2021) (quoting 5 Weinstein's Federal Evidence § 801.33 (2021)), *aff'd*, 103 F.4th 259 (4th Cir. 2024). Importantly, where an opposing party is a corporation, "[t]he corporation's agent *need not have authority* to make the statement at issue" for the statement to be admissible, so long as the statement is within the scope of the agent's duties. *United States v. Bros. Constr. Co. of Ohio*, 219 F.3d 300, 311 (4th Cir. 2000) (emphasis

added). Similarly, there is no requirement that the statement be consistent with the corporation's policies or desires, for "[t]he concern of Rule 801(d)(2)(D) is not whether the employee was carrying out the employer's wishes or whether the employee's statement was authorized," but only whether the statement was "about a matter within the scope of employment." *United States v. McCabe*, 103 F.4th 259, 276 (4th Cir. 2024) (quoting *United States v. Poulin*, 461 F. App'x 272, 282 (4th Cir. 2012)).

Here, statements like those Plaintiffs sought to introduce through Mr. Nelson—statements that were made in the course of interrogators' employment by CACI about the very conduct they were hired by CACI to perform—plainly qualify as non-hearsay statements of a party-opponent under Rule 801(d)(2)(D).

The objections that CACI lodged to such statements at the prior trial have no basis in law. CACI maintained that statements could not fall within the ambit of Rule 801(d)(2)(D) when made by "a low-level employee." *See supra* at 3. However, "[n]othing in Rule 801(d)(2)(D) prevents the out-of-court statements of low-level employees from coming into evidence as non-hearsay admissions of a party-opponent." *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1565 (11th Cir. 1991). Rather, "virtually any employee" can "make admissions binding on his or her employer." *Queensberry v. Norfolk & W. Ry. Co.*, 157 F.R.D. 21, 23 (E.D. Va. 1993) (quotation omitted); *see also Union Mut. Life Ins. Co. v. Chrysler Corp.*, 793 F.2d 1, 8 (1st Cir. 1986) (emphasizing that "there is nothing in Rule 801(d)(2)(D) that requires an admission be made by a management level employee" in admitting statement of "lower level employee"); *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 110 (M.D.N.C. 1993) ("[A]ny employee might bind the corporation pursuant to Fed. R. Evid. 801(d)(2)(D)."). Whether the interrogators in question were "low-level" is irrelevant: all that matters is whether the statements in question

were "about a matter within the scope of [their] employment." *McCabe*, 103 F.4th at 276. As the Court previously has recognized, CACI interrogators' work conducting interrogations is "undeniably related to and within the scope of their employment," because "[t]he entire purpose of their employment was to direct the interrogation of detainees at the Hard Site." *Al Shimari v. CACI Premier Tech., Inc.*, 324 F. Supp. 3d 668, 696 (E.D. Va. 2018) (Brinkema, J.).

CACI similarly objected that "[b]y the rule," only "people who are in a position of authority" could make statements admissible pursuant to Rule 801(d)(2)(D). *Supra* at 3. As explained above, the statement of "virtually any employee"—low-level or otherwise—can be admissible against his or her employer under this Rule. To the extent CACI meant that the statement must be authorized in some way by the company, that, too, is wrong: the Fourth Circuit has made plain that an employee "need not have authority to make the statement at issue," *Bros. Constr. Co. of Ohio*, 219 F.3d at 311, and "whether the employee's statement was authorized" by the corporation is not an appropriate inquiry for admission under Rule 801(d)(2)(D). *McCabe*, 103 F.4th at 276; *see also* 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 8:53 (4th ed. Aug. 2023 update) (Rule 801(d)(2)(D) "expresses an independent evidentiary judgment that 'speaking authority' should not be necessary when an agent or employee speaks on a matter within the scope of his duties").

Because statements made by CACI interrogators about their interrogation work while at Abu Ghraib are statements by "made by [CACI's] agent or employee" and concerned "a matter within the scope of that relationship and while it existed," Fed. R. Evid. 801(d)(2)(D), such statements should be admitted if offered against CACI at the upcoming retrial.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion *in limine* to permit admission of statements of CACI personnel pursuant to Fed. R. Evid. 801(d)(2)(D).

Respectfully submitted,

/s/ Charles B. Molster, III

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2024, I electronically filed the foregoing, which sends notification to counsel for Defendants.

/s/ Charles B. Molster, III
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