

**Eric Sanders**

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**Subject:** Activity in Case 1:09-cv-02544-BMC -VVP Delgado v. The City of New York et al Order on Motion for Protective Order

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**U.S. District Court**

**Eastern District of New York**

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**Case Name:** Delgado v. The City of New York et al

**Case Number:** 1:09-cv-02544-BMC -VVP

**Filer:**

**Document Number:** 17

**Docket Text:**

**ORDER granting in part and denying in part [15] Motion for Protective Order -- See annexed order for details. Ordered by Magistrate Judge Viktor V. Pohorelsky on 4/28/2011. (Newton, Joan)**

**1:09-cv-02544-BMC -VVP Notice has been electronically mailed to:**

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86c9f92cba8f043edd46969ae5475c27a11978bc032d470b19632f4531e]]

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
LUIS DELGADO,

Plaintiff,

- v -

THE CITY OF NEW YORK, et al.,

Defendants.  
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**ORDER**

CV-09-2544 (BMC)(VVP)

The defendants have moved for two items of discovery relief, a protective order limiting the scope of a deposition noticed by the plaintiff pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure and an order permitting the defendants to substitute a witness in the place of three other witnesses noticed for depositions by the plaintiff. As set forth below, the motion is granted in part and denied in part.

As to the Rule 30(b)(6) deposition, the defendants need not produce a witness for testimony on Management Information Systems as the plaintiff has not explained how testimony about that subject is likely to lead to evidence admissible at trial. The defendants also need not produce a witness to provide testimony regarding the handling by the Office of Equal Employment Opportunity of “investigations of members of the service accused of criminal offenses and/or serious misconduct involving sex offenses” if an affidavit by the director or other high official of that Office confirms counsel’s statement that the Office does not handle such investigations. As to the other two subjects about which the defendants have sought limitations, itemized as Subject Matter Nos. 2 and 3 in the defendants’ letter motion, the defendants’ objection that the request for testimony about those subjects is overly broad as to time is rejected. Although the Internal Affairs Bureau

("IAB") investigation was instituted prior to the apparently applicable limitations period, the investigation and prosecution of the disciplinary proceedings against the plaintiff did not terminate until a point that falls within the limitations period. The court may ultimately determine that the entire investigation constitutes continuing discrimination that would be actionable notwithstanding that some of the allegedly discriminatory conduct occurred outside the limitations period.<sup>1</sup> Thus, the request for testimony reaching back to January 1, 2003 with respect to the IAB investigation may well lead to evidence admissible at trial. As to testimony about Employee Management Division policies and procedures concerning the matters identified in the notice, the defendants need not provide a witness with knowledge about all the matters identified reaching back to January 1, 2003. Rather, the defendants must produce a witness (or witnesses) who can testify about each of the subjects for a period dating back from the present to one year prior to the point when the plaintiff alleges in the amended complaint that he was subject to a decision involving each of the matters identified. For example, the plaintiff alleges in paragraph 70 that he was placed on Level III Special Monitoring "some time in 2007." Thus, as to that subject, the defendants must produce a witness to testify about Level III Special Monitoring from June 2006 to the present.

As to the application to substitute a witness to testify in place of three other witnesses noticed by the plaintiff, the plaintiff asserts that each of the witnesses had personal involvement in decisions alleged by the plaintiff to have been taken with discriminatory

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<sup>1</sup>I emphasize that this decision is *not* a determination that the investigation and prosecution actually *do* constitute continuing discrimination. Rather, this decision simply recognizes that such a determination *could* be made by the court when the issue is ripe for decision.

intent, and points out that the defendants have offered no affidavits by those witnesses that they had no personal involvement in any of the decisions concerning the terms and conditions of the plaintiff's employment and treatment about which he complains. In the absence of any such affidavits, the court has no basis to deny the plaintiff the opportunity to depose the witnesses. Accordingly, the request to substitute another witness in their place must be denied.

**SO ORDERED:**

*Viktor V. Pohorelsky*

VIKTOR V. POHORELSKY  
United States Magistrate Judge

Dated: Brooklyn, New York  
April 27, 2011