



- ◆ austin
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TEXAS ROSE COURT REPORTERS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

SMITH, SAM,)
)
Plaintiff.)
)
VS.) CIVIL ACTION
) NO.: 9-03DV-7654
)
ACME Container Company,) JURY
)
Defendant.)

ORAL AND VIDEOTAPED DEPOSITION OF
SALLY NEALEY
APRIL 13, 2005

ORAL AND VIDEOTAPED DEPOSITION of SALLY NEALEY, produced as a witness at the instance of the Defendants, and duly sworn, was taken in the above-styled and numbered cause on APRIL 13, 2005, from 3:05 p.m. to 3:45 p.m., before Mary Ann Smith, CSR, in and for the State of Texas, recorded by machine shorthand at the offices of Rabinowitz, Rabinowitz, Rabinowitz & Chan, LLP, 600 Travis, Suite 3400, Houston, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto; that the deposition shall be read and signed before any notary public.

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A P P E A R A N C E S

FOR THE PLAINTIFF:

SHIRK, WORK & FISH, LLC
BY: MR. TYE KNOTTS
101 Creek Street
10th Floor
Grand River, CA 90017
(218)867 - 5309

FOR THE DEFENDANT:

Rabinowitz, Rabinowitz,
Rabinowitz & Chan
BY: MR. THOMAS
600 Travis
Suite 3400
Houston, TX
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THE VIDEOGRAPHER:

Mr. Tim Carson

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I N D E X

Appearances
Sally Nealey
 Examination by Mr. Thomas
Witness Corrections
Witness Signature
Reporter's Certificate

E X H I B I T S

NUMBER	DESCRIPTION	PAGE
1	Acme Employee Handbook (rev. 10/2/1998)	6
2	Note from Smith to Nealey 4/1/2003	7
3	Note from Smith to Nealey 6/4/2003	9
4	Smith's June Expense Report	10
5	Smith's July Expense Report	10
6	Smith's August Expense Report	10

1 THE VIDEOGRAPHER: We are on the record. Today is
2 April 13, 2005, at approximately 3:05 P.M. This is
3 the video taped deposition of Sally Nealey in the
4 case of Sam Smith vs ACME Container Company.

5 SALLY NEALEY, the witness hereinbefore named,
6 having been first duly cautioned and sworn to testify the
7 truth, the whole truth and nothing but the truth, testified
8 on her oath as follows:

9 EXAMINATION

10 BY MR. THOMAS:

11 **Q. Good afternoon Ms. Nealey.**

12 A. Good afternoon.

13 **Q. Ms Nealey when were you hired by ACME Container?**

14 A. I was hired in May of 1999.

15 **Q. And what was your job description?**

16 A. Originally I was hired as a records clerk for the
17 HR and accounting departments. However, after about a year
18 I was moved to the sales department where I began working as
19 a sales assistant for several of the salespeople.

20 **Q. Okay. Ms Nealey, what was your working**
21 **relationship with Mr. Smith?**

22 BY MR. KNOTTS: Objection. Vague, vague as to
23 time.

24 **Q. Let me clarify. At anytime during your employment**
25 **with ACME, did you report to or have an ongoing working**

1 **relationship with Mr. Smith?**

2 A. Yes. I worked with Mr. Smith from the very
3 beginning of his employment with ACME.

4 **Q. And in what capacity did you work with Mr. Smith?**

5 A. My title was Sales Assistant, but basically I was
6 a secretary for Sam and two other sales people.

7 **Q. Okay. What sorts of things would you do in your
8 capacity as a Sales Assistant for Mr. Smith?**

9 A. In general I helped with all the sales people with
10 things like scheduling, letter writing, expense reports,
11 sales reports, and phone messages. Mr. Fillmore said it was
12 my job to keep the salesmen busy selling and not tied up
13 with things like administrative chores.

14 **Q. Who is Mr. Fillmore?**

15 A. Jack Fillmore is the Senior Vice President of
16 sales and marketing for ACME.

17 **Q. Do you and the other sales people report to Mr.
18 Fillmore?**

19 A. That use to be the case, but Mr. Fillmore passed
20 away due to a heart attack shortly after the Toy Company
21 account was lost.

22 **Q. Okay. Do you know who was involved with the
23 decision to hire Mr. Smith?**

24 A. I believe that Mr. Fillmore was the one who hired
25 him. I don't know if any of the other salesmen took part in

1 the hiring process. (Exhibit was marked for identification)

2 Q. Ms. Nealey, at this time I am going to show you a
3 seven page document previously marked as Exhibit 1 which
4 states at the top, ACME Container, Incorporated, Employee
5 Handbook. Would you please take a minute to look at that
6 document and tell me if you've ever seen that before?

7 A. I have.

8 Q. And is that the Employee Handbook for ACME
9 Container, Incorporated?

10 A. Yes, it is.

11 Q. Do you know if Mr. Smith kept a copy of that in
12 his office?

13 A. He did.

14 Q. How do you know that?

15 A. Because I filed it there.

16 Q. Did you handle all of Mr. Smith's filing for him?

17 A. Yes, I did.

18 Q. Do you recall if Mr. Smith ever signed an
19 employment or confidentiality agreement?

20 A. I believe that he would have executed an
21 employment agreement, yes. Um, with a confidentiality
22 clause. Mr. Fillmore insisted that all salesmen have formal
23 agreements.

24 Q. Did you have an employment agreement?

25 BY MR. KNOTTS: Objection, relevance.

1 A. Yes, I do.

2 Q. In your experience, if changes were ever made to
3 an employment agreement, would that change be made in
4 writing?

5 A. Absolutely. In fact, when we changed over from an
6 HMO to a PPO we all received a written notice of the change
7 and had to sign that we agreed to it.

8 Q. When you say 'we', did that include Mr. Smith and
9 the other salesmen?

10 A. Certainly. (Exhibit was marked for identification)

11 Q. The next document I'm going to show you will be
12 marked as Exhibit 2. It's a memo dated April 1, 2003,
13 addressed to Sally, and apparently signed by Sam. Can you
14 tell me if you've ever seen that document before?

15 A. I have seen this document.

16 Q. Do you recognize the handwriting on the document?

17 A. Yes, That is Sam's -- Mr. Smith's.

18 Q. And did he often write handwritten notes to you?

19 A. He did.

20 Q. And so you are quite certain that this is his
21 handwriting?

22 A. Yes, certainly.

23 Q. And if you could, I want to have you focus your
24 attention on some of the writing in this particular note.
25 Starting at line 3, where it states, "I must tell you -- to

1 you care me". Have you ever asked Mr. Smith what he meant
2 by this?

3 A. Yes, I am sure I did on that day.

4 Q. Do you recall on this particular instance what it
5 was he meant?

6 A. No, I don't, I don't, I am sure I just talked to
7 him and he explained it.

8 Q. During the months that you worked for Mr. Smith,
9 was it a common experience that you would get a note such as
10 this, that didn't quite make sense when you read it?

11 A. Yes, it was.

12 Q. Alright. If you look at the last sentence of this
13 memo, it says, "I'll be at the Odyssey at 2:00 p.m., see you
14 then." Can you tell me if it was Mr. Smith's practice to go
15 to the Odyssey on a regular basis?

16 BY MR. KNOTTS: Objection. Vague, calls for
17 speculation.

18 Q. You can answer.

19 A. He went there -- a couple times a week probably.

20 Q. What is the Odyssey?

21 A. It's a bar and grill.

22 Q. How often did Mr. Smith have lunch at the Odyssey?

23 A. He would probably go there two or three times a
24 week but it wasn't always just a lunch.

25 Q. Did you ever observe Mr. Smith to be under the

1 **influence of alcohol while he was at work?**

2 BY MR. KNOTTS: Objection. Calls for speculation.

3 A. On occasion, yes.

4 **Q. And has that been the case for the past year?**

5 A. Yes.

6 **Q. And what are some of the symptoms you observed**
7 **that led you to believe that he was intoxicated?**

8 A. Oh, probably slurring of his words, not making
9 sense when he would write me notes, incoherent -- pretty
10 much incoherent. (Exhibit was marked for identification)

11 **Q. Alright. The next document I'm going to show you**
12 **has been marked as Exhibit 3. It's a memo dated June 4,**
13 **2003, once again apparently addressed to Sally, signed Sam.**
14 **Can you tell me if you've ever seen that document before?**

15 A. Yes, I have.

16 **Q. Is that also Mr. Smith's handwriting?**

17 A. It is.

18 **Q. If you would please read the sentence that starts**
19 **with "Maybe".**

20 A. It says "Maybe we can meet at the Odyssey at 6:00
21 p.m., the cocktails I had at lunch are starting to wear off
22 - ha".

23 **Q. Was it common for Mr. Smith to make casual**
24 **references to drinking in memos or verbally throughout the**
25 **course of the day?**

1 A. He did so from time to time, yes drinking was
2 definitely a common theme with Sam. (Exhibits 4,5,6 were
3 marked for identification)

4 Q. Okay, I'd now like to give you three exhibits that
5 have been marked in order as Exhibits 4, 5, and 6. Can you
6 please identify these documents?

7 A. These are copies of Mr. Smith's expense reports.

8 Q. Looking at Exhibit 4, do you see any entries there
9 that the Odyssey?

10 A. I see, I see three on this report.

11 Q. Do you also see multiple entries for meals at the
12 Odyssey on Exhibits 5 and 6?

13 A. Yes.

14 Q. Do you know if ACME has a policy regarding
15 expensing alcoholic beverages?

16 A. It was prohibited. I think that the employee
17 handbook addresses this issue.

18 Q. If we go back to Exhibit 1, can you show me where
19 it states that?

20 A. Sure. It's here on page three. It says "under no
21 circumstances should the cost of alcoholic beverages be
22 included in meal expenses.

23 Q. Thank you. I want to change topics now and ask you
24 if you recall the 2002 Christmas Party.

25 A. Oh yes, I remember it quite well.

1 **Q. Why is that?**

2 A. Sam showed up hammered. Greg Able, one of the
3 other salesmen, almost had a fist fight with Sam when Greg
4 insisted on Sam giving up his keys and taking a taxi home.
5 In fact, Sam also asked me if I'd take him home and tuck him
6 into bed. Everyone thought he was just being a funny drunk,
7 but I didn't appreciate the humor.

8 **Q. Did anyone in management take notice of Mr.**
9 **Smith's behavior?**

10 A. I think so. The next day Sam was called into Mr.
11 Fillmore's office. I don't know what went on inside, but
12 when Sam returned he was swearing up a storm.

13 **Q. Next I want to discuss the Toy Company account.**
14 **Do you recall that this account was Mr. Smith's**
15 **responsibility?**

16 A. Yes. Sam was the one who got that account, but he
17 ended up causing us to lose it. Several employees lost their
18 jobs due to the cutbacks that were necessary after the Toy
19 Company account was lost. If you ask me, the stress of the
20 whole Toy Company incident caused Mr. Fillmore's heart
21 attack.

22 BY MR. KNOTTS: Objection, non-responsive. Ms.
23 Nealey, please listen and only answer the questions that you
24 are asked.

25 **Q. What happened that caused Toy Company to cancel**

1 **its contract with ACME?**

2 A. A few weeks after the contract was signed, Phil
3 Richardson over at Toy Company called Sam and told Sam that
4 the warning label had to be changed on the packaging. Phil
5 also sent Sam an email to this effect. However, at this same
6 time Sam called me and left me a message around AM one night
7 and told me that he was going on vacation for five days to
8 Mexico and asked me to cover for him. He never told me or
9 anyone else about the need to change the label. So when
10 Phil received the first 50,000 boxes, he was furious.

11 **Q. Is this when you lost the account?**

12 A. No. That came about a week later when Sam showed
13 up drunk to a meeting with Mr. Fillmore and Mr. Richardson
14 at Toy Company.

15 BY MR. KNOTTS: Objection hearsay.

16 **Q. How do you know Mr. Smith was drunk at that**
17 **meeting?**

18 A. When Sam and Mr. Fillmore got back to the office,
19 I overheard Mr. Fillmore yelling at Sam telling him that he
20 was sick and tired of dealing with an old drunk that his
21 irresponsibility had cost us hundreds of thousands of
22 dollars and that he should pack his things and get out.

23 **Q. Was this when Mr. Smith was fired?**

24 A. Yes.

25 **Q. No further questions. (Deposition adjourned)**

<hr/> <p style="text-align: center;">1</p> <hr/> <p>1 3:6 7:12 10:18</p> <p>10 3:10,11,12</p> <p>10/2/1998 3:6</p> <p>101 2:3</p> <p>10th 2:3</p> <p>13 1:10,14 4:2</p> <p>1999 4:14</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 3:7 7:12</p> <p>2:00 8:13</p> <p>2002 10:24</p> <p>2003 7:12 9:13</p> <p>2005 1:10,14 4:2</p> <p>218)867 2:4</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 3:9 7:25 9:12</p> <p>3:05 1:15 4:2</p> <p>3:45 1:15</p> <p>3400 1:17 2:7</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 3:10 9:12 10:5,8</p> <p>4,5,6 10:2</p> <p>4/1/2003 3:8</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 3:11 10:5,12</p> <p>50,000 12:10</p> <p>5309 2:4,8</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6 3:6,12 10:5,12</p> <p>6/4/2003 3:9</p> <p>6:00 9:20</p> <p>600 1:16 2:7</p>	<p>619)867 2:8</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>7 3:7</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>9 3:9</p> <p>90017 2:4</p> <p>9-03DV-7654 1:5</p> <hr/> <p style="text-align: center;">A</p> <hr/> <p>Able 11:2</p> <p>above-styled 1:14</p> <p>Absolutely 7:5</p> <p>account 5:21 11:13,14,16,19 12:11</p> <p>accounting 4:17</p> <p>Acme 1:6 3:6 4:4,13,25 5:3,16 6:4,8 10:14 12:1</p> <p>ACTION 1:4</p> <p>addressed 7:13 9:13</p> <p>addresses 10:17</p> <p>adjounred 12:25</p> <p>administrative 5:13</p> <p>affix 13:22</p> <p>afternoon 4:11,12</p> <p>agreed 7:7</p> <p>agreement 6:19,21,24 7:3</p> <p>agreements 6:23</p> <p>alcohol 9:1</p> <p>alcoholic 10:15,21</p> <p>Alright 8:12 9:11</p> <p>am 6:2 8:3,6 12:6</p> <p>Ann 1:15</p> <p>answer 8:18 11:23</p> <p>anyone 11:8 12:9</p>	<p>anytime 4:24</p> <p>apparently 7:13 9:13</p> <p>Appearances 3:1</p> <p>appreciate 11:7</p> <p>approximately 4:2</p> <p>April 1:10,14 4:2 7:12</p> <p>assistant 4:19 5:5,8</p> <p>attached 1:18</p> <p>attack 5:20 11:21</p> <p>attention 7:24</p> <p>August 3:12</p> <p>away 5:20</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>bar 8:21</p> <p>basically 5:5</p> <p>basis 8:15</p> <p>bed 11:6</p> <p>beginning 5:3</p> <p>behavior 11:9</p> <p>believe 5:24 6:20 9:7</p> <p>beverages 10:15,21</p> <p>boxes 12:10</p> <p>busy 5:12</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>CA 2:4</p> <p>cancel 11:25</p> <p>capacity 5:4,8</p> <p>care 8:1</p> <p>Carson 2:9</p> <p>case 4:4 5:19 9:4</p> <p>casual 9:23</p> <p>cause 1:14</p> <p>caused 11:20,25</p> <p>causing 11:17</p>
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