UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOE,	:	
	:	Case No. 18-cv-11776
Plaintiff,	:	
	:	Hon. Arthur J. Tarnow
v.	:	Mag. Elizabeth A. Stafford
	:	
UNIVERSITY OF MICHIGAN, *et al.*,	:	**DEFENDANTS'**
	:	**EMERGENCY MOTION**
Defendants.	:	**FOR RECONSIDERATION**
	:	

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Defendants move pursuant to Rule 7.1(h) of the Local Rules of the United States District Court for the Eastern District of Michigan for reconsideration of the Court's May 1, 2019 Order: (1) requiring the President of the University of Michigan to attend the conference to be scheduled at a date to be determined in May 2019; and (2) declining to refer settlement discussions in this matter to a colleague on the Court. In support of this motion, defendants rely upon the attached brief in support.

Counsel for defendants conferred with counsel for plaintiff on May 3, 2019 and explained the nature of this motion and its legal basis. Counsel for defendants requested, but did not obtain, concurrence in the relief sought in this motion.

WHEREFORE, defendants respectfully request that the Court grant defendants' emergency motion for reconsideration of the Court's May 1, 2019 Order and (1) permit the University to bring, in lieu of the University's President, another University administrator with full settlement authority to the upcoming conference, and (2) refer this matter to another member of the Court to the extent the purpose of the conference is to discuss settlement.

Respectfully submitted,

May 6, 2019

/s/*Joshua W. B. Richards*
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Plaintiff,	:	
	:	Hon. Arthur J. Tarnow
v.	:	Mag. Elizabeth A. Stafford
	:	
UNIVERSITY OF MICHIGAN, *et al.*,	:	**BRIEF IN SUPPORT OF**
	:	**DEFENDANTS'**
Defendants.	:	**EMERGENCY MOTION**
	:	**FOR RECONSIDERATION**
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CASES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES PRESENTED

Whether the Court should grant reconsideration of its May 1, 2019 Order and:

(1) Permit the University to bring, in lieu of the University's President, another University administrator with full settlement authority to the upcoming conference, to the extent the purpose of the conference is to discuss settlement; and

Proposed Answer: Yes.

(2) To the extent the purpose of the upcoming conference is to discuss settlement, refer this matter to another member of the Court to conduct the conference given that a stated purpose of the conference is to discuss issues involving the University's sexual misconduct policy that the Court may ultimately be required to rule upon, particularly with respect to any injunctive relief requested by the plaintiff.

Proposed Answer: Yes.

RELEVANT AUTHORITY

Cases

Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006)

Bonner Farms, Ltd. v. Fritz, 355 F. App'x 10 (6th Cir. 2009)

Flaim v. Med. Coll. of Ohio, 418 F.3d 629 (6th Cir. 2005)

Freedman v. State of Md., 380 U.S. 51 (1965)

In re Stone, 986 F.2d 898 (5th Cir. 1993)

Printz v. United States, 521 U.S. 898 (1997)

United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341 (6th Cir. 1998)

United States v. U.S. Dist. Court for N. Mariana Islands, 694 F.3d 1051 (9th Cir. 2012), *as amended* (Oct. 16, 2012)

Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383 (1988)

Constitutional Provisions

Mich. Const. Art. 8, § 5

U.S. Const. amend. X

INTRODUCTION

On May 1, 2019, the Court held a telephonic status conference at which the Court ordered the President of defendant the University of Michigan (the "University") to appear in person at a conference to be held at a date to be determined in May 2019. Despite requests for clarification, the purpose of this conference remains unclear. The Court has suggested that the conference is for settlement purposes, while at other times it has suggested that the purpose is to discuss the University's sexual misconduct policy, which the Court expects the University's President to defend on behalf of the University, even though that policy is not in the record before the Court and no motion pertaining to the policy is pending. In either case, the University respectfully submits that it would be improper to require the University's President to attend the conference.

Defendants respectfully request that the Court reconsider its May 1, 2019 Order (the "Order") and permit the University to bring, in lieu of the University's President, another University administrator with full settlement authority to any upcoming settlement conference. While the University acknowledges the Court's inherent authority to require the participation of a party representative with full settlement authority at a settlement conference, the Court exceeded the bounds of its discretion by specifically requiring the University's President to attend the conference when: (1) the University assured the Court that another administrator

with full settlement authority would be available for the conference; and (2) the President has no duty or responsibility to defend the University's sexual misconduct policy in the manner suggested by the Court.

In addition, because this Court will be the ultimate decision-maker on the equitable relief plaintiff seeks in this civil action involving the University's sexual misconduct policy – the very same policy to be discussed at the conference – the University respectfully requests that the Court reconsider its decision declining to refer this matter to another member of the Court to the extent the purpose of the conference is to discuss settlement.

LEGAL STANDARD

A party seeking reconsideration of an Order issued by this Court ordinarily "must demonstrate a palpable defect by which the court has been misled and must also show that correcting the defect will result in a different disposition." *United States v. Harper*, No. 13-20246, 2016 WL 465495, at *1 (E.D. Mich. Feb. 8, 2016);[1] *see also* Local Rule 7.1(h)(3).

"[S]ubject to the abuse-of-discretion standard, district courts have the general inherent power to require a party to have a representative with full

[1] Unpublished cases are attached as Exhibit B to the accompanying Declaration of Joshua W. B. Richards, Esq. (the "Richards Declaration").

settlement authority present – or at least reasonably and promptly accessible – at pretrial conferences." *In re Stone*, 986 F.2d 898, 903 (5th Cir. 1993).

ARGUMENT

I. Respectfully, the Court's Stated Reasons for Requiring the University's President to Attend the Upcoming Conference Constitute an Abuse of Discretion.

During the telephonic status conference on May 1, 2019, and in response to the University's counsel's inquiry as to the purpose for requiring the University's President to attend the upcoming conference, the Court explicitly and emphatically stated two grounds for requiring the University's President to attend: (1) to ensure that the University will be capable of approving any changes to the University's sexual misconduct policy (or any other agreements reached during the settlement conference) without needing to be later approved by any other University official;[2] and (2) to "defend" the University's sexual misconduct policy pursuant to what the Court stated is "part of [the President's] qualifications for the job" (May 1, 2019 Tr. at 10:17-24).[3] Requiring the University's President to attend the conference for either reason constitutes an abuse of discretion.

---

[2] The Court explained: "I don't want anything that we decide to have to be reviewed by the President which as I understand university structure, this is the kind of decision that ultimately would have to be at least okayed by the President." (May 1, 2019 Tr. at 8:23-9:1.)

[3] The transcript of the May 1, 2019 telephonic status conference is attached as Exhibit A to the Richards Declaration.

The degree to which the proposed proceedings are undefined compound the Court's error in ordering the University's chief executive officer to appear personally. For example, and for obvious reasons, settlement negotiations do not occur in open court. *See, e.g.*, Fed. R. Evid. 408. But based on the Court's statements about policy and the Court's views about the President's duty to defend policy choices, it is not clear what type of proceeding the Court would be ordering the President to attend, and whether that proceeding would be on or off the record. And if the Court intends only to oversee private settlement discussions, that is an additional reason why the University should be able to send a senior official with full settlement authority.

A. Respectfully, Requiring the University's President to Attend a Settlement Conference Constitutes an Abuse of Discretion When the University Has Committed to Bring Another Official with Full Settlement Authority to a Settlement Conference.

Counsel for the University represented to the Court that the University would bring another University administrator with full settlement authority to the conference and whose agreement to any terms would not need to be later approved by any other University official. (*See* May 1, 2019 Tr. at 8:18-20, 9:25-10:4, 10:12-15.) The University's proposal satisfied the first of the Court's articulated purposes for requiring the University's President to attend a settlement conference.

The University's President is the chief executive officer of an extraordinarily complicated three-campus enterprise with annual budgeted revenues of more than $8 billion, including more than 61,000 students, roughly 28,000 employees, a nearly $4 billion academic medical center, and a $1.5 billion research budget. The President's daily schedule reflects those myriad responsibilities and more. The obligations on the President's time arise and are set months in advance. It would be a significant burden on the University for the President to be diverted from his duties as an officer of the State of Michigan and the constitutionally-created University to attend a settlement conference in this matter. The University is involved in approximately sixty current pending litigation matters. Requiring the President to attend settlement conferences in these matters is impractical and unnecessary when the President has delegated full settlement authority to other University officials. This concern is particularly acute here where an administrator with authority delegated by the President is competent to perform the task at hand with no articulable prejudice to the Court or the parties.

While the Court has discretion to require that *a party representative with full settlement authority* attend a settlement conference, *see* Local Rule 16.6, that discretion is not unbounded. Requiring the attendance of a high-ranking official at a settlement conference "is a power to be very sparingly used." *See In re Stone*, 986 F.2d 898, 900, 904-05 (5th Cir. 1993) (holding on petitions seeking writs of

mandamus that district court abused its discretion by requiring a high-ranking government official to attend settlement conferences and requiring district court to "adjust [its] directives accordingly").

While the Sixth Circuit has not spoken directly on the impropriety of requiring a specific high-ranking government official to attend a settlement conference, the Fifth and Ninth Circuits have squarely addressed this issue on petitions for writ of mandamus. In both instances, these Courts of Appeals ruled that requiring a high-ranking official to attend a settlement conference constitutes an abuse of discretion when a district court does not "consider less drastic steps." *See id.* at 905; *United States v. U.S. Dist. Court for N. Mariana Islands*, 694 F.3d 1051, 1061 (9th Cir. 2012), *as amended* (Oct. 16, 2012) (granting petition for writ of mandamus because district courts "should consider less drastic steps before" requiring "the government to send a [particular] representative with full settlement authority to a pretrial conference").

Stone and *Northern Mariana Islands* both involved officials from the United States Department of Justice in whom ultimate settlement authority was vested *by regulation*. *See id.* Here, there are no such regulations casting the President of the University for purposes of this proceeding, and therefore even less reason to insist on his attendance. *Cf. Sequal Techs., Inc. v. Stern*, No. 10CV2655 DMS NLS, 2012 WL 474464, at *2 (S.D. Cal. Feb. 14, 2012) (denying motion to require

president to attend settlement conference and holding that "there is no good cause to require [Plaintiff] to bring any particular representative to the Mandatory Settlement Conference, so long as the representative it chooses has the requisite [settlement] authority"); *Turner v. City of Detroit*, No. CIV.A. 11-12961, 2012 WL 4839139, at *2 (E.D. Mich. Oct. 11, 2012) (explaining that the "apex doctrine" protects high-ranking officials from having to testify when other persons within an organization can "provide the necessary information"); Fed. R. Civ. P. 16(c)(1) ("If appropriate, the court may require that a party or its representative be present or ***reasonably available by other means*** to consider possible settlement.") (emphasis added).

In this case, the Court has already acknowledged that the University's President "can delegate. Obviously, with such a large institution there are all sorts of delegations made." (May 1, 2019 Tr. at 9:17-19.) And the Court has already acknowledged that any official the University would send to a settlement conference would possess full settlement authority:

> **[COUNSEL]:** Respectfully, your Honor, if the Court's concern is that the person at the conference will not have authority to make an agreement without consulting with the President, I can assure the Court that the person at the conference will have that authority.
>
> **THE COURT:** I believe you 100 percent.

(May 1, 2019 Tr. at 9:25-10:5.) Given the Court's findings, it would, respectfully, be an abuse of discretion for the Court not to take less drastic steps than ordering the University's chief executive officer.

In the event this Court has determined in its discretion that it is in the interest of justice to hold a conference with attendance by the parties,[4] the Court's authority to require attendance by a specific party representative must be supported by reasons that satisfy the abuse of discretion standard. The Court has not done so here, and has accordingly abused its discretion. The University respectfully urges the Court to reconsider its Order.

B. Respectfully, Requiring the University's President to Attend a Conference to Defend the Policy Pursuant to the Court's Understanding of the President's Responsibilities Constitutes an Abuse of Discretion.

The Court's second stated reason for requiring the University's President to attend the conference also represents an abuse of discretion. The Court asserts that the University President's responsibilities require him to "defend" the University's sexual misconduct policy, *see* May 1, 2019 Tr. at 10:17-24, but, respectfully, the Court does not define the President's responsibilities: the Regents of the University of Michigan do. *See* Mich. Const. Art. 8, § 5. The Court's conscription of the

[4] The University further notes for the record that the Court has ordered a representative from the University to attend the conference, but has not ordered the plaintiff to attend in person.

University's President – an officer of the state – to perform a task the President would not otherwise be required to perform by the Regents is "fundamentally incompatible with our constitutional system of dual sovereignty" and violates the Tenth Amendment. *See Printz v. United States*, 521 U.S. 898, 935 (1997); U.S. Const. amend. X; *see also Strahan v. Coxe*, 127 F.3d 155, 169 (1st Cir. 1997) ("[T]he commands of the Tenth Amendment apply to all branches of the federal government, including the federal courts . . . .").

Federal district courts have very narrow jurisdictional power and authority limited by the U.S. Constitution (including separation of powers), federal statutes (which create district courts) and a variety of doctrines (like mootness and standing) fleshing out the requirement that district courts only may rule on judicial questions arising in specific cases or controversies that otherwise clear applicable federal jurisdictional hurdles. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Thus, for example, and respectfully, this Court lacks Article I power to rewrite Title IX with respect to the University's policies, lacks Article II power to promulgate Title IX regulations for the U.S. Department of Education, and significantly, and again respectfully, this Court lacks power under Article 8, Section 5 of the Michigan Constitution to write University policy or supervise its President, who is an Ex Officio Member of the Board of Regents. *See* Mich.

Const. Art. 8, § 5. The University emphasizes these fundamental principles because they highlight why the Court's explicit stated purposes for ordering the University's chief executive to attend proceedings are not in accord with the law.

First, whether a policy change is "wise" or unwise as a policy matter is for Congress, the Department of Education, or the University of Michigan to decide – not for the Court. *See Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 496 (D.C. Cir. 2008) ("It is not the Judiciary's place to micro-manage an employer's . . . policies.") (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.")); *see also infra.*, n.6 (collecting cases holding that courts should not rewrite state law). But the Court has specifically premised its ruling on this very basis:

> **THE COURT:** For example, ***it might be wise*** that the Cross-Examination could be done by an independent person or trained, independent person or a lawyer but not by the accused.

(May 1, 2019 Tr. at 6:14-17 (emphasis added)). The Court did not examine the policy – which is not in the record – and suggest the policy was not lawful; it instead suggested that "it might be wise" for the University to change a policy the Court has not seen. Moreover, the Sixth Circuit's decision in *Doe v. Baum*, 903 F.3d 575, 583 (6th Cir. 2018), explicitly provides universities a choice between allowing the parties or their agents to conduct cross-examination. Ordering the

President into Court in order to instruct him regarding the Court's views on the wisdom of University policies where binding Circuit precedent provides the University with a choice in the matter is not a proper exercise of federal judicial power.

Second, under the Michigan Constitution, it is the Regents, not the Court, who have authority to supervise the University's President. *See* Mich. Const. Art. 8, § 5 ("Each board shall, as often as necessary, elect a president of the institution under its supervision. He shall be the principal executive officer of the institution, be ex-officio a member of the board without the right to vote and preside at meetings of the board."). The Court's explicitly stated basis for its Order would, respectfully, usurp the Board's authority to supervise the President. Thus, when asked about the basis for the Court's decision, the Court cited its views of the President's job qualifications, why he was hired, why he retains his position, and what the Court considers to be his job responsibilities:

> I don't have to explain myself, but I will. And it's I think the President, part of his qualifications for the job when he was hired and when he continued in the job, is the public [scrutiny][5] that the university is regularly under and he should be a part of this [process] so that he can defend whatever is [agreed] to and explain to the media, to the public, and perhaps most importantly to the faculty and the students. **So he shall be here**.

[5] The bracketed terms in this quotation correct errors in the transcript.

(May 1, 2019 Tr. at 10:16-24 (emphasis added).)

The next stated basis for the Order has the Court prioritizing the President's work obligations: "Let me say this. This should be more important to him than almost anything going on at the university." (May 1, 2019 Tr. at 14:19-21.) Reducing the incidence of sexual misconduct, providing fair processes, and supporting students who have been subject to sexual assault are critically important goals for the *entire* leadership of the University. But, respectfully, it is not for the Court to set the priorities and specific obligations of the President of the constitutionally created University.

C. Respectfully, the Proceedings Throughout This Matter Provide Additional Reasons Why the University's Chief Executive Officer Should Not Be Personally Ordered to Attend Future Proceedings.

The uncertainty as to the purpose of the upcoming conference leaves the University with even more concern, given other problematic instances in this case.[6] Confusion has already arisen in this case from discussions in chambers, without a court reporter present, leaving the lawyers, litigants, and (it would, respectfully, appear) the Court further in dispute and uncertain as to what the Court has required, which has necessitated further communications with the Court's staff, not-insignificant burdens on the litigants, and a follow-up telephonic conference.

[6] (*See, e.g.*, ECF No. 20, June 11, 2018 Tr. at 5:14-17, 6:13-17.)

(*See* May 1, 2019 Tr. at 9:13-14 ("And both of you, it doesn't matter what was said at that conference.")); *see also* 28 U.S.C. § 753.

For these and other reasons, the University continues to object to the Court's Order that it expose its chief executive officer to an uncertain, ill-defined process.[7]

II. Respectfully, the Court Should Refer This Matter to Another Member of the Court to Conduct Settlement Discussions.

During the telephonic status conference on May 1, 2019, the Court also expressed an intention to facilitate changes to the University's sexual misconduct policy in furtherance of settlement to avoid protracted litigation.[8] (*See* May 1, 2019 Tr. at 11:24-12:5.)

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[7] As the University informed the Court's staff on May 3, 2019, "the schedule for the President of the University is set weeks, often months, in advance and he is not available at either of the times proposed by the Court. The President does have some availability at other times, but the University also wishes to advise the Court that it intends to file a motion on Monday for reconsideration of the Court's order requiring the President to appear on the basis that the Court's stated reasons for requiring his attendance are not in accord with the law."

[8] Given that under the Constitution of the State of Michigan, the University is a branch of the Michigan state government, Mich. Const. Art. 8, § 5, the Court should proceed with caution in taking on a legislative or administrative function by actively presiding over attempts to change the internal policies of a state entity, particularly where the proposed changes are not squarely required by authority from the Court of Appeals. *See, e.g.*, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("[M]indful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewrit[ing] state law to conform it to constitutional requirements . . . .") (marks omitted); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) ("[W]e will not rewrite a state law to conform it to constitutional requirements."); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d

The Court should avoid conducting a settlement conference itself, when, as here, the Court (and not a jury) could be the ultimate decision-maker on a claim for equitable relief in a case involving the very same policy. *See Bonner Farms, Ltd. v. Fritz*, 355 F. App'x 10, 18 (6th Cir. 2009) ("[T]he determination of equitable defenses and equitable remedies is a matter for the court to decide, not the jury.") (quoting *Smith v. World Ins. Co.*, 38 F.3d 1456, 1462 (8th Cir. 1994)); *S.E.C. v. Bravata*, 3 F. Supp. 3d 638, 643 (E.D. Mich. 2014) ("[T]he Court, not a jury, must decide" equitable remedies).

Plaintiff seeks equitable relief from the Court in his First Amended Complaint. (*See* ECF No. 28 at 34.) That requested relief could require the Court to decide challenges to the University's sexual misconduct policy. *See Bonner Farms*, 355 F. App'x at 18; *Bravata*, 3 F. Supp. 3d at 643. Indeed, the Court has already heard argument and entered equitable relief in this case once.

341, 362 (6th Cir. 1998) ("We will not, however, rewrite the [state agency's] guidelines to cure their substantial infirmities."); *see also Consol. Cigar Corp. v. Reilly*, 218 F.3d 30, 56 (1st Cir. 2000) (stating courts must "take care not to trample legislative or executive province of state authorities by making unduly substantive additions or changes to laws and regulations"), *rev'd in part on other grounds sub nom., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Freedman v. State of Md.*, 380 U.S. 51, 60-61 (1965) ("How or whether [a State] is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide."); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 638 (6th Cir. 2005) (federal court review of university disciplinary procedures is "circumscribed," and "limited to determining whether the procedures used . . . were constitutional").

The Court's justification for declining to make such a referral in this case was that another judge "would have to start over in terms of understanding the scope of the conference, the scope of at least the Doe case." (May 1, 2019 Tr. at 13:19-21.) Respectfully, however, this justification does not reflect the reality that: (1) the University's current policy is not even in the record before the Court, so the Court does not have any familiarity with the current policy yet either; and (2) the features of that policy that plaintiff objects to, which would be the subject of the proposed conference, are also limited; and (3) the case law governing the issues is narrow and recent: the Sixth Circuit's recent opinions in *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) and *Doe v. University of Cincinnati*, 872 F.3d 393 (6th Cir. 2017). A colleague on the Court could get up to speed on these issues in very short order.

To encourage a full exchange of ideas, and more importantly to eliminate the potential for influencing the Court's views on a matter the Court may ultimately be required to rule upon, the University respectfully requests that the Court reconsider its decision and refer this matter to another member of the Court to conduct the upcoming conference to the extent its purpose is to discuss settlement.

CONCLUSION

Defendants respectfully request that the Court grant defendants' motion for reconsideration of the Court's May 1, 2019 Order and (1) permit the University to

bring, in lieu of the University's President, another University administrator with full settlement authority to the upcoming conference, and (2) refer this matter to another member of the Court to the extent the purpose of the conference is to discuss settlement.

Respectfully submitted,

May 6, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2019, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to:

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dgordon@deborahgordonlaw.com

/s/*Joshua W. B. Richards*
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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Plaintiff,	:	
	:	Hon. Arthur J. Tarnow
v.	:	Mag. Elizabeth A. Stafford
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UNIVERSITY OF MICHIGAN, *et al*.,	:	
	:	
Defendants.	:	
	:	

DECLARATION OF JOSHUA W. B. RICHARDS, ESQ.

I, JOSHUA W. B. RICHARDS, declare as follows:

1. I am admitted to practice before this Court.

2. I am a partner at the law firm Saul Ewing Arnstein & Lehr LLP, counsel for defendants in this proceeding.

3. I submit this declaration in support of defendants' emergency motion for reconsideration.

4. In support of defendants' emergency motion for reconsideration, I attach true and correct copies of the following exhibits:

a. Exhibit A: Transcript of the May 1, 2019 telephonic status conference; and

b. Exhibit B: Unpublished cases cited in defendants' emergency motion for reconsideration, which include:

i. *Sequal Techs., Inc. v. Stern*, No. 10CV2655 DMS NLS, 2012 WL 474464 (S.D. Cal. Feb. 14, 2012);

ii. *Turner v. City of Detroit*, No. CIV.A. 11-12961, 2012 WL 4839139 (E.D. Mich. Oct. 11, 2012); and

iii. *United States v. Harper*, No. 13-20246, 2016 WL 465495 (E.D. Mich. Feb. 8, 2016).

I declare that the foregoing is true and correct.

Respectfully submitted,

May 6, 2019

/s/*Joshua W. B. Richards*
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Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOE,

Plaintiff,

v.

UNIVERSITY OF MICHIGAN, ET AL.,

Defendants.
_____/

HONORABLE ARTHUR J. TARNOW

No. 18-11776

MOTION HEARING

Wednesday, May 1, 2019

Appearances:

FOR THE PLAINTIFF: DEBORAH GORDON, ESQ.
FOR THE DEFENDANT: JOSH RICHARDS, ESQ.
PATRICK NUGENT. ESQ.
BRIAN SCHWARTZ, ESQ.

\- - -

To obtain a certified transcript, contact:
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Official Federal Court Reporter
Theodore Levin United States Courthouse
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I N D E X

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Detroit, Michigan

Wednesday, May 1, 2019

2:30 p.m.

- - -

THE COURT: Good afternoon.

MS. GORDON: Good afternoon, Judge Tarnow.

THE COURT: Who is do we have, please?

MS. GORDON: Deborah Gordon on behalf of the plaintiff.

MR. RICHARDS: And Josh Richards, your Honor, for the university and Patrick Nugent joins me in my office. He's on the briefs as well.

THE COURT: And?

MR. SCHWARTZ: Brian Schwartz.

THE COURT: We are on the record. It's my understanding there was a request for this phone conference for a clarification of the meeting that we will have in a couple weeks and we have to pick a date for that meeting.

MR. RICHARDS: Yes, your Honor.

THE COURT: Please identify yourself when you speak because there are three voices that sound similar for the defendant unless -- if you can coordinate it and all three of you speak at the same time saying the same thing, we have a baritone here if you have the rest of the harmony down.

MR. RICHARDS: For the university, your Honor, yes,

we made the request for clarification because when we read the e-mail from the Court, it wasn't clear to us whether the Court had changed its view on the Cross-Examination issue and if that was the case, we wanted a chance to discuss that. And, in addition, as the Court just alluded to, to discuss the purpose of the Status Conference to be set in a couple weeks.

THE COURT: Okay. Is that it for the reason for this conference, those two items?

MR. RICHARDS: From the university's end, this is Mr. Richards, your Honor, yes.

THE COURT: What about from the plaintiff's end?

MS. GORDON: Yes, I have no issues, Judge.

THE COURT: Okay. Both requests are reasonable and I'm going to add another thing to the agenda and that is, if and when, not if, but when we have the conference, is there any objection to also touching on the other case where the same attorneys are involved and the same defendant, different plaintiff, the [redacted] came?

MS. GORDON: None from plaintiff, Judge.

MR. RICHARDS: Brian Schwartz. I'm not sure what not issues will be raised.

THE COURT: I am not sure what issues will be raised but I can conceive that there could be none because I note that there is a hearing on the 14th in front of Magistrate Mazoub and everything might be resolved in the [redacted] case on that

date. But if not or if there is anything remaining, that should be discussed or could be discussed and save some time and paper and electronic bites.

MR. SCHWARTZ: I agree that would make sense. Hopefully everything will be resolved with the Magistrate. But if not, I'm sure we could use that time.

THE COURT: Now, in terms of the Cross-Examination issue, what are your thoughts? And I will ask Ms. Gordon first whether it looks like you are going to be able to resolve it.

MS. GORDON: Judge --

THE COURT: Or is it worthwhile waiting and talking about it at the meeting?

MS. GORDON: So per your prior instruction, I am prepared by tomorrow is my cut-off date to send to defense counsel my listing of concerns with the new policy which you had instructed we do and then you said they would have seven days to respond at which point we will have some better idea whether we are going to be able to agree on the process and whether we will simply go forward on the process or we will need the Court's assistance. So I am ready to go on that and I have a draft.

THE COURT: Okay. Stop. Stop. You don't have to say it again.

MS. GORDON: Okay.

THE COURT: Who is going to speak for the defendant?

MR. RICHARDS: Josh Richards, your Honor.

THE COURT: Do you have any problem with keeping to the schedule?

MR. RICHARDS: No, your Honor. That schedule is fine with the university.

THE COURT: Okay. And I am going to include it as a topic that we are going to talk about at the conference with the President because I may have over simplified the definition of Cross-Examination being congruent with the criminal case. And on further consideration, I don't want you guys to agree fully with me and then my having to tell you that it may not be congruent to the extent that -- and this is something I want the two of you to talk about -- what limitations on the Cross-Examination which would protect both parties. For example, it might be wise that the Cross-Examination could be done by an independent person or trained, independent person or a lawyer but not by the accused.

MS. GORDON: May I, Judge?

THE COURT: Sure.

MS. GORDON: Okay. So I have taken all of that into account. I heard what you said. I am working off of the university's current January 2019 policy language. They have given some thought already to whether they want to have a third party do the questioning. Their current policy does not allow for that. I would say that Doe versus Baum (ph) did allow for

that. But to the extent the university is not allowing for that, I am willing to live with that. I mean, I don't care. It's fine with me. So I am taking into account what you said but I am also very cognizant, perhaps moreso, of what Doe versus Baum (ph) says and what the university's new policy says. So everything I'm going to send to defense counsel is going to be based on what they currently have and where I think there are due process problems with what they currently have.

THE COURT: Okay. What about the defense? Who is this.

MR. RICHARDS: Josh Richards. On that particular point, your Honor, I agree with Ms. Gordon that Doe versus Baum leaves it to institutions' discretion as to whether the cross-examination will be performed by the party because, of course, Cross-Examination is permitted for both parties, or by a representative of that party.

THE COURT: Okay. Well, then let's continue with the schedule we have. Now, the only thing left to discuss today is when are we going to meet?

MR. RICHARDS: Your Honor, Josh Richards. Before we move on to procedural matters, I would like to address with the Court the purpose of the Court's request that the President attend. And I would like to note that the President is not the university official who has primary responsibility for the policy.

THE COURT: And that would be the chief counsel? Who is that person who would have that responsibility?

MR. RICHARDS: I would have to check with my client as to who the right person would be, your Honor, but it is certainly not the President.

THE COURT: Well, you can check with the President and whoever else you have to check with and when you find the right person, you can bring her or him along with the President and then everyone will be complete in terms of people with authority. And obviously the ultimate authority is the President.

MR. RICHARDS: Your Honor, that may be true --

THE COURT: He might not be the person with the most hands-on experience and authority, but he is the one who is going to have to approve whatever the four of you decide on and whatever I might add to that decision.

MR. RICHARDS: So a few things on that point, your Honor. First, the President can delegate the ultimate authority that the Court is referring to to someone else who can attend the conference and is willing to do so. What I am trying to figure out is what is the Court's purpose in requiring the President to attend?

THE COURT: I don't want anything that we decide to have to be reviewed by the President which as I understand university structure, this is the kind of decision that

ultimately would have to be at least okayed by the President.

MS. GORDON: Excuse me, Judge. If I could just chime in on one point here. The reason this is set up the way it is is that you ask Mr. Richards at the Status Conference these very questions. You wanted to know who was responsible for the policy. And he ended up saying after a discussion a little bit of, some stuff we are hearing now, he did say ultimately it's the President.

MR. RICHARDS: That's not what I said.

MS. GORDON: That was my recollection.

THE COURT: Ms. Gordon, Ms. Gordon --

MS. GORDON: Yes.

THE COURT: And both of you, it doesn't matter what was said at that conference. I don't think there is any dispute to the statement that I just made that the ultimate authority in an university on a question of this kind of policy has to be the President of the university. Yes, he can delegate. Obviously, with such a large institution there are all sorts of delegations made. But I don't think he would characterize himself as a figure head. And I think he would, and I would agree, that the person down the line in charge of discipline or however it's structured knows more about the day-to-day operation and so on. But that person reports to the President and the President will be here.

MR. RICHARDS: Respectfully, your Honor, if the

Court's concern is that the person at the conference will not have authority to make an agreement without consulting with the President, I can assure the Court that the person at the conference will have that authority.

THE COURT: I believe you 100 percent.

MR. RICHARDS: That being the case --

THE COURT: No, no. I have not changed my mind because while that person will have the authority, and it's mildly surprising or more than mildly surprising you don't even know who that person is or their job title, I want the President here. He will be here.

MR. RICHARDS: Again, your Honor, I am asking the Court to articulate the reason for the President being there in light of the university's offer to produce somebody who will have authority.

THE COURT: I don't have to explain myself, but I will. And it's I think the President, part of his qualifications for the job when he was hired and when he continued in the job, is the public strict any that the university is regularly under and he should be a part of this parentheses so that he can defend whatever is dread to and explain to the media, to the public, and perhaps most importantly to the faculty and the students. So he shall be here.

I was tempted to quote an appellate judge I saw on C-Span

once -- no, it wasn't that. It was a Judge, an appellate Judge when I was still practicing and he, the Judge, asked the question, that I thought was very simple and I said this is the answer. Why wouldn't the person want the information that I was asking for? And the Judge pushed back in his seat so he would be off microphone and said, I gave up the big bucks to ask the questions, and you don't get to ask the questions. I waived that rule. I answered your question. And if you start another sentence with again, I will again repeat myself.

MR. RICHARDS: Josh Richards. I understand the Court. I want to clarify that the Court is ordering that the President appear.

THE COURT: If you need to say that, that's fine. If you want me to put it in writing so the media has it, it will be something like, the President has been requested to participate in a discussion of a proposed rule and has chosen not to appear. Therefore, I order that he appear. Is that what you want?

MR. RICHARDS: I am not asking the Court to put it in writing. I am simply asking the Court to make it clear so when I explain it to my client I can explain to my client precisely what the situation is.

THE COURT: You can. And I made it clear. And you can order a transcript. I am asking that he participate so that the result is not another two years of arguing about

discovery in this case and every subsequent case and arguing about timeliness of motions to dismiss or summary judgment or anything else legalistic when my sense is that both sides have a common goal and, that is, to provide fairness to the accuser and fairness to the accused.

MR. RICHARDS: Josh Richards. I certainly degree with the Court's final statement with respect to fairness. And in the light of the Court's order I have two additional, I guess, procedural questions. The first is if the purpose of the conference in light of the fact that there is no pending motion is to discuss resolution of the claims, then one of the requests that I made in my first e-mail to your law clerk was that the Court consider referring this matter to a colleague. The claims in this case are sufficiently complex and frankly uncertain at this point that I don't think it's outside the realm of possibility that some questions in this case will be for the Court. And if that is the case, I think it would be proper for another colleague of your Honor to facilitate the discussion that your Honor is proposing that the parties have.

THE COURT: Your request is noted. What is your second request?

MR. RICHARDS: My second request is much more nuts and bolts and it has to do with timing. The 16th which the Court has initially proposed as a date for the conference is as we noted in my response the date of the meeting --

THE COURT: You can stop. Here are the choices. Tuesday May 21st at 11:30. Is that available to you and your client or do you have to check?

MR. RICHARDS: I have to check, your Honor. I apologize.

THE COURT: Don't apologize. You are not clairvoyant. If that is -- the other choice is Thursday, May 23rd at 11:00 a.m. So the first choice is at 11:30 on the 21st, and the second choice is the 23rd at 11:00. And I trust that one of those dates will be suitable for all of you.

MR. RICHARDS: My first question -- Josh Richards for the record.

THE COURT: Pardon?

MR. RICHARDS: My first request with respect to the referral, your Honor --

THE COURT: It's noted. I am not going to refer it. And please don't ask me why. You don't want to hear why. And the reason is you would have to start -- you do want to hear why. The reason is whoever I referred it to would have to start over in terms of understanding the scope of the conference, the scope of at least the Doe case -- and this is a jury trial, am I right?

MS. GORDON: That's correct, Judge.

THE COURT: There is nothing other than make work in your suggestion. And so it is denied but is noted on the

record.

MR. RICHARDS: With respect to those due dates, your Honor, the May 21st date and the May 23rd date, in the event there is a conflict on the university's end with respect to some portion of that time, would attending by telephone be an option?

THE COURT: No. That is an easy question. It's not like you are a plane trip away. I won't tell you how fast I used to be able to get to U of M.

MR. RICHARDS: Again, your Honor --

THE COURT: It's less than an hour.

MR. RICHARDS: I wasn't referring to counsel. I was referring to the President.

THE COURT: I know. I am referring to Ann Arbor's relationship to Detroit. Counsel, he chose to have an Ann Arbor/Detroit case. I am talking about your client, specifically, the President.

MR. RICHARDS: I understand, your Honor.

THE COURT: Let me say this. This should be more important to him than almost anything going on at the university. I understand the importance of the Board Meeting, Regents meeting, and that is why I have no problem giving alternative dates. But I am not sure I would understand anything else being more important than resolving what is a hot button issue at every university in this country. So,

therefore, I would be looking for a very strong excuse for him not to be able to come on one of those two dates. And the question might be, which of the dates is more convenient for the plaintiff lawyer because your client could come on either date. Anything else?

MS. GORDON: No, Judge. Plaintiff will make -- we will make ourselves available whenever the date -- either date we are available we will clear our schedules if need be. Whatever will work for everybody else is fine.

THE COURT: All right. Anything from the defense?

MR. RICHARDS: No, your Honor.

THE COURT: Thank you.

MS. GORDON: Thank you for your time, Judge.

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C E R T I F I C A T I O N

I, Lawrence R. Przybysz, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

s/Lawrence R. Przybysz
Official Court Reporter

Date: May 3, 2019

- - -

Exhibit B

2012 WL 474464
Only the Westlaw citation is currently available.
United States District Court,
S.D. California.

SEQUAL TECHNOLOGIES, INC., Plaintiff,
v.
Michael STERN, Digiflo, Inc., Defendants.

Civil No. 10cv2655 DMS (NLS).
|
Docket No. 55.
|
Feb. 14, 2012.

ORDER DENYING EX PARTE MOTION FOR EQUAL PARTICIPATION OR CANCELLATION OF FEBRUARY 22, 2012, NOVEMBER 28, 2012 CASD COURT MANDATORY SETTLEMENT CONFERENCE

NITA L. STORMES, United States Magistrate Judge.

I. INTRODUCTION

***1** On June 20, 2011, the Court conducted an Early Neutral Evaluation ("ENE") but the case did not settle. [Docket No. 21.] On June 23, 2011, the Court issued a Scheduling Order that set Mandatory Settlement Conference Dates for February 22, 2012 and November 28, 2012. [Docket No. 22.] On February 13, 2012, Defendant Michael Stern ("Stern"), delivered to chambers an Ex Parte Motion for Equal Participation or Cancellation of February 22, 2012, November 28, 2012 CASD Court Mandatory Settlement Conference.[1] [Docket No. 55, ("Ex Parte Motion").]

1 Chambers staff forwarded the Ex Parte Motion to the clerk's office with directions that it be filed. Defendant Stern is specifically informed that chambers staff will not redirect chambers copies for filing in the future. Defendant Stern must file properly with the court any future court documents.

Stern notes that he attended the ENE in this case on behalf of himself and as President of Defendant Digiflo, Inc. ("Digiflo" collectively "Defendants"). Stern then claims that the ENE failed because Sequal "representatives had no economic authority, related to the economic affairs of their company." [Ex Parte Motion at 2.] Similarly, Stern argues that Sequal "uses the CASD court as a financial pressure tool on Digiflo & myself, to have our legal expenses to be [sic] as high as possible." Finally, Stern claims that "Plaintiff plan [sic] is to only show fake and inexpensive representation at mandatory, tax payer financed, settlement conferences." [*Id.*] Based on these assertions, Stern asks the court to: 1) Order Sequal to bring its President or CEO to the Mandatory Settlement Conference; 2) Consider cancelling the Mandatory Settlement Conferences; 3) Order Sequal to pay for Defendants expenses in attending the Mandatory Settlement Conferences; and 4) to allow the DigiFLO attorney to attend the Mandatory Settlement Conferences by telephone.

On February 13, 2012, Plaintiff Sequal Technologies, Inc. ("Sequal") filed an Opposition to the Ex Parte Motion. [Docket No. 56.] For the foregoing reasons, the Ex Parte Motion is Denied.

II. DISCUSSION

A. Stern Failed to Meet and Confer

The Chambers Rules state: "Appropriate ex parte applications must ... include a description of the dispute, the relief sought, reasonable and appropriate notice to the opposition and an attempt to resolve the dispute without the court's intervention." [Chambers Rules at 1.] Stern provides no statement that he attempted to resolve the dispute without court intervention. Sequal states that it was provided no notice that Stern would be seeking to: 1) vacate the November Mandatory Settlement Conference; 2) require particular Sequal representatives at the Mandatory Settlement Conference; 3) force Sequal to pay his costs to attend the Mandatory Settlement Conference; or 4) excuse personal attendance of defense counsel. [Opp at 3.] Accordingly, Stern failed to follow chambers rules and did not adequately meet and confer prior to submitting the Ex Parte Motion. The Ex Parte Motion could be denied on this ground alone. The Court will, nonetheless, address the substance of the Ex Parte Motion.

B. Stern Failed to Provide Good Cause for the Relief Requested

1. *No Good Cause Exists to Allow Stern to Choose Sequal's Representative*

***2** Stern first argues that Sequal should be forced to bring its President or CEO to the Mandatory Settlement Conference, based on an assertion that Sequal did not bring an appropriate representative to the ENE. The Order setting the ENE required: "In addition to counsel who will try the case, a party or party representative with full settlement authority must be present for the conference. In the case of a corporate entity, an authorized representative of the corporation who is not retained outside counsel must be present and must have discretionary authority to commit the company to pay an amount up to the amount of the plaintiff's prayer (excluding punitive damage prayers)." [Docket No. 20.] The ENE was attended by Matthew Klaben, Vice President, General Counsel and Secretary of Sequal, who possessed full settlement authority. [Opp. at 2.] There is nothing in the court record to indicate that Sequal failed in any way to comply with the Court Order. Accordingly, there is no good cause to require Sequal to bring any particular representative to the Mandatory Settlement Conference, so long as the representative it chooses has the requisite authority.

2. *No Good Cause Exists to Vacate the Mandatory Settlement Conferences*

Stern next argues that the February and November Mandatory Settlement Conferences should be vacated. As Sequal argues in Opposition, Stern presents no good cause for cancelling either the February or November Mandatory Settlement Conferences. Stern has simply asserted that Sequal intends to "only show fake and inexpensive representation" at the Mandatory Settlement Conference. Stern offers nothing to support this assertion.[2] Moreover, the Court, not Sequal, has ordered that the Mandatory Settlement Conferences take place and has determined that settlement conferences at these times would be valuable. Accordingly, Stern's allegations regarding Sequal's motivations in relation to the costs of this lawsuit are not relevant and good cause is lacking to cancel the Mandatory Settlement Conferences.

[2] Stern attached a document from Sequal, claiming it shows "plaintiff uses the CASD court as a financial pressure tool" [Ex Parte Motion, Ex. A.] Sequal asserts that Stern has improperly attached a settlement communication. The Court is without sufficient information as to whether the communication was improperly attached and expresses no opinion on that question. The Court does, however, note that it draws no inference from this communication that Sequal acted in any improper manner.

3. *No Good Cause Exists to Force Sequal to Cover Stern's Costs*

Stern also asks the Court to order Sequal to finance Defendants' costs of appearing at the Mandatory Settlement Conference. As Sequal argues, Defendants present no justification for the request to be relieved of the normal costs of defending a lawsuit.

4. *No Good Cause Exists to Allow Digiflo's Counsel to Appear Telephonically*

Finally, Defendants seek to allow Digiflo's counsel to appear by telephone at the Mandatory Settlement Conference. The only reason given is to "reduce our costs." As noted above, Defendants have provided no good cause why they should be relieved of the ordinary costs of defending this lawsuit.

III. CONCLUSION

For the reasons stated above, and Good Cause Not Appearing, It Is Hereby Ordered that the Ex Parte Motion is DENIED in its entirely.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 474464

End of Document

2012 WL 4839139
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

Pamela Willis TURNER, Plaintiff,
v.
CITY OF DETROIT, Defendant.

Civil Action No. 11–12961.
|
Oct. 11, 2012.

Attorneys and Law Firms

Alice B. Jennings, Edwards & Jennings, Detroit, Felicia Duncan Brock, I.A.B. Attorneys At Law, Dearborn, MI, for Plaintiff.

June C. Adams, Detroit, MI, for Defendant.

OPINION AND ORDER DENYING BING'S MOTION FOR RECONSIDERATION AND EMERGENCY MOTION TO STAY DEPOSITION (DKT.NOS.39, 40)

MARK A. RANDON, United States Magistrate Judge.

***1** Two motions are before the Court: (1) Dave Bing's motion for reconsideration of this Court's September 13, 2012 Order granting Plaintiff's motion to compel his deposition (Dkt. No. 39) and Bing's emergency motion to stay his deposition (Dkt. No. 40). The Court has reviewed the parties submissions (Dkt. Nos. 39, 40, 42, 43, 46, 49 and 51); a phone conference with counsel was held on October 9, 2012. Being otherwise fully advised, for the reasons indicated below, the Court: (1) denies the motions for reconsideration and stay of deposition; and (2) modifies its April 6, 2012 order to further limit the parameters of Bing's deposition.

I. BACKGROUND

On July 8, 2011, Plaintiff Pamela Turner filed this action for sex discrimination in violation of the Equal Pay Act and Michigan's Elliott Larsen Civil Rights Act. In an Amended Complaint (Dkt. No. 18), Plaintiff added claims of race discrimination. Plaintiff, an AfricanAmerican woman, was an executive level mayoral appointee holding the positions of Interim Director, and then Director, of Detroit's Water and Sewerage Department. Plaintiff alleges that she was paid significantly less than the two males who preceded her in the position and the white female who was hired after her departure. Plaintiff says that, on more than one occasion, she personally discussed her salary with Bing, Detroit's Mayor, and that Bing "directly made the decisions regarding [her] appointment and salary" (Dkt. No. 33, p. 2, ¶ 5).

After Defendant refused to produce Bing for a deposition, Plaintiff moved to compel. Following a hearing on April 6, 2012, this Magistrate Judge ordered Plaintiff to first submit interrogatories directed to Bing and to proceed with a deposition—limited to two hours—only if necessary after reviewing Bing's responses (Dkt. No. 25). Defendant produced Bing's responses to the interrogatories. Unsatisfied with Bing's answers, Plaintiff again demanded Bing's deposition; Defendant refused and Plaintiff filed a second motion to compel. Defendant failed to respond to this second motion and did not appear on the hearing date. On September 13, 2012, having reviewed Plaintiff's unopposed second motion, this Magistrate Judge ordered Bing to appear for deposition within fourteen days and sanctioned Defendant $1200.00. Bing's motions followed. [1]

1 Bing is represented by Miller, Canfield, Paddock and Stone. Citing its governing charter, the City of Detroit objects to Miller Canfield's "special appearance" on Bing's behalf (Dkt. No. 46).

II. ANALYSIS

Fed.R.Civ.P. 26(b) controls the scope of discovery, unless otherwise limited by order of the court. The Rule provides in pertinent part that:

> Parties may obtain discovery regarding ***any*** nonprivileged matter that is relevant to any party's claim or defense ... For good cause, the court may order discovery of any matter relevant to the subject matter

> involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed.R.Civ.P. 26(b)(1), emphasis added.

Similarly, Fed.R.Civ.P. 30 provides for broad access to persons during the discovery process. It says, in pertinent part:

> ***2 (a) When a Deposition May Be Taken**
>
> (1) A party may by oral questions depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

Fed.R.Civ.P. 30(a)(1).

Notwithstanding Rules 26(b) and 30, Bing says that he is not subject to deposition because, as Detroit's Mayor, he is a high-ranking official subject to the "apex doctrine." Bing cites *Devlin v. Chemed Corp.,* No. 04–74192, 2005 WL 2313859 (E.D.Mich. Sept.21, 2005); *Thomas v. International Business Machines,* 48 F.3d 478, 483–84 (10th Cir.1995)) and *Lewelling v. Farmers Ins. of Columbus, Inc.,* 879 F.2d 212, 218 (6th Cir.1989) as support for this proposition. "[T]he apex doctrine is the application of the rebuttable presumption that the deposition of a high-ranking corporate executive either violates Rule 26(b)(2)(C)'s proportionality standard or, on a party's motion for a protective order, constitutes "good cause" for such an order as an "annoyance" or "undue burden" within the meaning of Rule 26(c)(1). Should the deposing party fail to overcome this presumption, the court must then limit or even prohibit the deposition." *Performance Sales & Marketing LLC v. Lowes Companies, Inc.,* No. 5:07–CV–00140, 2012 WL 4061680 * 4 (W.D.N.C. Sept. 14, 2012)

In *United States v. Morgan,* 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941), the Supreme Court indicated that the practice of calling high ranking government officials as witnesses should be discouraged. Relying on *Morgan,* other courts have concluded that "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official action." *Simplex Time Recorder Co. v. Sec 'y of Labor,* 766 F.2d 575, 586 (D.C.Cir.1985); *see also In re United States (Holder*), 197 F.3d 310, 313 (8th Cir.1999)*; In re FDIC,* 58 F.3d 1055, 1060 (5th Cir.1995); *In re United States (Kessler),* 985 F.2d 510, 512 (11th Cir.1993). This rule is based on the notion that "high ranking government officials have greater duties and time constraints than other witnesses" and that, without appropriate limitations, such officials will spend an inordinate amount of time addressing pending litigation. *Kessler,* 985 F.2d at 512. But, this rule is has limits. The Court may permit depositions of high ranking officials where the official has first-hand knowledge related to the claim being litigated. *See Lewelling,* 879 F.2d at 21 (upholding the issuance of a protective order and sanctions against the plaintiff who sought to depose a corporate CEO who had no knowledge of facts pertinent to the plaintiff's claims, unless the CEO agreed to meeet to discuss settlement)*; see also Baine v. Gen. Motors Corp.,* 141 F.R.D. 332, 335 (M.D.Ala.1991)*; Church of Scientology of Boston v. IRS,* 138 F.R.D. 9, 12 (D.Mass.1990)*; Cmty. Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.,* 96 F.R.D. 619, 621 (D.D.C.1983). However, even in such cases, discovery is permitted only where it is shown that other persons cannot provide the necessary information. *Holder,* 197 F.3d at 314.

3** This Magistrate Judge finds no palpable defect in its Orders of April 6, 2012 and September 13, 2012 that would require a different result. [2] Plaintiff was Bing's choice to head the Detroit Water and Sewerage Department; she has also demonstrated that Bing has knowledge of the pertinent facts related to her claims and may have unique information regarding her salary. However, given Bing's lengthy responses to Plaintiff's interrogatories, and his time constraints as Mayor of Detroit, Bing's deposition shall be further limited to one (1) hour in duration. Bing's deposition must also be taken before or after regular business hours and take place at the Mayor's Offices. [3] With these limitations, Bing must be produced for deposition ***on or before October 26, 2012. In all other respects, the September 13, 2012 Order of this Magistrate Judge stands [4], subject to objection before the District Judge.

2 Motions for reconsideration may be granted pursuant to E.D. Mich. LR 7.1(g)(1) when the moving party shows (1) a "palpable defect," (2) that misled the court

and the parties, and (3) that correcting the defect will result in a different disposition of the case. E.D. Mich. LR 7.1(g)(3). A "palpable defect" is a defect which is obvious, clear, unmistakable, manifest, or plain. *Mich. Dep't of Treasury v. Michalec,* 181 F.Supp.2d 731, 734 (E.D.Mich.2002) (citations omitted). However, motions for reconsideration should not be granted when they "merely present the same issues ruled upon by the court, either expressly or by reasonable implication." E.D. Mich. LR 7.1(g)(3).

3 Bing may be represented by Miller Canfield at this deposition. The Court makes no finding as to the propriety of Mayoral representation by outside counsel (without law department approval) going forward.

4 Defendant must pay the $1200 sanctions ***on or before October 31, 2012.***

It is so ordered.

All Citations

Not Reported in F.Supp.2d, 2012 WL 4839139, 116 Fair Empl.Prac.Cas. (BNA) 428

2016 WL 465495
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan, Southern Division.

United States of America, Plaintiff/Respondent,
v.
James O. Harper, Defendant/Petitioner.

Criminal Case No. 13-20246
|
Civil Case No. 14-14385
|
Signed 02/08/2016

Attorneys and Law Firms

Kenneth R. Chadwell, U.S. Attorney's Office, Detroit, MI, for Plaintiff/Respondent.

David I. Lee, Detroit, MI, for Defendant/Petitioner.

ORDER DENYING MOTION FOR RECONSIDERATION

Sean F. Cox, United States District Judge

***1** On January 15, 2016, this Court issued an Opinion & Order denying Petitioner a § 2255 motion filed by Defendant/Petitioner James O. Harper. On January 29, 2015, Petitioner filed a Motion for Reconsideration. (Docket Entry No. 62).

Motions for reconsideration in civil cases are governed by Local Rule 7.1 of the Local Rules of the Eastern District of Michigan, which provides:

> (3) Grounds. Generally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties and other persons entitled to be heard on the motion have been misled but also show that correcting the defect will result in a different disposition of the case.

See Eastern District of Michigan Local Rule 7.1(h)(3). A motion for reconsideration does not afford a movant an opportunity to present the same issues that have been already ruled on by the court, either expressly or by reasonable implication. Nor does a motion for reconsideration afford the movant an opportunity to make new arguments that could have been, but were not, raised before the Court issued its ruling.

Unless the Court orders otherwise, no response to a motion for reconsideration is permitted and no hearing is held. Eastern District of Michigan Local Rule 7.1(h)(3). This Court concludes that, with respect to Harper's Motion for Reconsideration, neither a response brief nor a hearing is necessary.

Again, in order to grant a motion for reconsideration, the movant must demonstrate a palpable defect by which the court has been misled and must also show that correcting the defect will result in a different disposition of the case. After reviewing Harper's Motion for Reconsideration, this Court concludes that Harper has not met that standard.

Accordingly, the Court ORDERS that Harper's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2016 WL 465495

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