

ORIGINAL

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COURT OF CLAIMS
OF OHIO

IN THE OHIO COURT OF CLAIMS

2014 AUG 13 PM 3:18

STEVEN LISS

Plaintiff

v.

CLEVELAND STATE UNIVERSITY

Defendant

Case No. 2013-00139

Judge Patrick M. McGrath
Magistrate Holly T. Shaver

CLEVELAND STATE
UNIVERSITY'S MEMORANDUM
IN OPPOSITION TO MOTION
TO COMPEL THE DEPOSITION
OF PRESIDENT RONALD M.
BERKMAN, PH.D.

I. OVERVIEW

Steven Liss's motion to compel President Berkman to appear for a lengthy deposition is both procedurally and substantively baseless. As a procedural matter, he cannot be forced to appear for a deposition through a Rule 30(A) notice *because he is not a party*. As a substantive matter, even Mr. Liss's own authorities recognize that high-ranking government officials like President Berkman can be deposed in run-of-the-mill lawsuits only after their would-be interrogators demonstrate that *they have something meaningful to say and that no one else can testify to the same thing*. President Berkman signed just two letters concerning Mr. Liss. One formalized his acceptance of the Dean of Student Life's recommendation that Mr. Liss be laid off as part of a reorganization; and the other formalized his acceptance of the Director of the Office of Diversity's recommendation that Mr. Liss's internal grievance be denied. The Dean is available for a deposition, the Director has already been deposed, and President Berkman *has no independent recollection of either matter*. (Affidavit of Ronald M. Berkman, Ph.D. at ¶¶3-4) In other words, President Berkman's deposition would accomplish nothing.

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II. RULE 30(A) MEANS WHAT IT SAYS.

Rule 30(A) says this:

The attendance of a *witness* deponent may be compelled by the use of subpoena as provided by Civ. R. 45. The attendance of a *party* deponent may be compelled by the use of notice. . . .

(Emphasis added) If there ever was any doubt as to what those two sentences meant, the Ohio Supreme Court laid it to rest in 1998. In *State ex rel. The V Companies v Marshall*, 81 Ohio St.3d 467 (1998), 1998-Ohio-329, the Court considered Jefferson County Auditor John Patrick Marshall's notice to take the deposition of Paul Voinovich, who was then the President and Chief Executive Officer of The V Group. It found the notice invalid because "Marshall failed to subpoena Voinovich for the deposition" and Rule 30(A) states that "the attendance of a non-party witness deponent should be compelled by the use of subpoena." 81 Ohio St.3d at 469-70. President Berkman likewise cannot be compelled to attend a deposition through a Rule 30(A) notice.

III. PRESIDENT BERKMAN IS A HIGH-RANKING GOVERNMENT OFFICIAL, AND HE CAN BE DEPOSED ONLY WITH RESPECT TO MATTERS OF WHICH HE HAS "FIRST-HAND KNOWLEDGE" THAT IS "NOT AVAILABLE FROM ANOTHER SOURCE."

A. President Berkman's Role at Cleveland State

President Berkman arrived at Cleveland State in 2009 with much hope and promise. At the time, the *Plain Dealer* editorial board declared that Cleveland State needed to be "at the forefront of waking up Cleveland's sleepy downtown and of helping to revitalize its economic fortunes." It also recognized that President Berkman was wise "to focus on health care as a prime economic driver in a city of world-renowned hospitals" and "to use the brightest minds . . . to find ways of attracting more talent and new businesses to Cleveland."

See www.cleveland.com/opinion/index.ssf/2009/10/cleveland_state_university_pre.html (accessed on August 13, 2014). President Berkman's mission was, in short, not just to transform a public university but to transform the city and the region. Just two years into his presidency, Cleveland State's funded research—much of it healthcare related—had risen “from \$14.3 million” to “\$55.5 million.” And by the four-year mark, town and gown partnerships had brought an arts campus to Playhouse Square, and “a \$45 million Center for Innovation in Health Professions” was scheduled to open in 2015.¹ Large, urban public universities do not run themselves. They require constant leadership from committed chief executives like President Berkman, whose taxpayer-funded time is better spent building a stronger university and a stronger region than it is answering irrelevant questions about two letters he does not even recall signing.

B. Depositions of High-Ranking Government Officials

“Generally, the burden is on the . . . movant to establish good cause for a protective order...” *Moore's Federal Practice* 26.105 (1996). And *ordinarily* courts do not preclude depositions in their entirety; instead, they permit depositions to go forward—with the witness's counsel objecting to improper questions as they are asked. But the depositions of high-ranking government officials are not “ordinary”; and the “ordinary” procedure does not apply. To stem abuse, the “ordinary” procedure is reversed when depositions of high-ranking government officials are in issue: before those depositions can even be held, the party seeking the discovery must demonstrate that the government official holds relevant

¹ See www.cleveland.com/metro/index.ssf/2013/01/cleveland_state_university_pre.html (accessed on August 13, 2014).

and non-privileged information that cannot be obtained elsewhere. “Because high-level government officials must be free to conduct their jobs without the constant interference of the discovery process, substantial case law states that *depositions of these officials normally should not be allowed unless they have relevant first-hand knowledge of matters not available from another source.*” *Schachter v United States*, Case No. C93-0213-DLJ (N.D. Cal., April 12, 1994), 1994 U.S. Dist. LEXIS 8034 (emphasis added). *Accord, Capitol Vending Co. v Baker*, 36 F.R.D. 45, 46 (D.C. 1964) (“[I]f the head of a government agency were subject to having his deposition taken concerning any litigation affecting his agency . . . , we would find that the heads of government departments and members of the President’s Cabinet would be spending their time giving depositions and would have no opportunity to perform their functions”); *see also Kyle Engineering Co. v Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979); *Wirtz v Local 30, International Union of Operating Engineers*, 34 F.R.D. 13, 14 (S.D.N.Y. 1963); *Simplex Time Recorder Co. v Secretary of Labor*, 766 F.2d 575, 586-87 (D.C. Cir. 1970).

Mr. Liss’s own cases recognize this rule. In *New York v Oneida Indian Nation of New York*, Case No. 95-CV-0554, 2001 WL 1708804 (N.D.N.Y. November 9, 2001), the court held that “a party may only obtain the deposition of a high level official *by showing that official has particularized first-hand knowledge that cannot be obtained from any other source.*” *Id.* at *3 (emphasis added). *See also State ex rel. Summit County Republican Party Executive Committee v Brunner*, 117 Ohio St.3d 1210, 1211 (2008) (“[T]rial courts should weigh the necessity to depose . . . an executive official against, among other factors, . . . the substantiality of the case . . . [and] *the degree to which the witness has first-hand knowledge or direct involvement.* . . .)(emphasis added). As to which officials are “cloaked with this protection,” the rule is “a

matter of degree.” *Oneida Indian Nation*, 2001 WL 1708804 at *4. A city commissioner, for example, may be compelled to appear for a deposition in order to prevent a mayor from testifying. *Id.*

In this case, Dean James Drnek recommended the reorganization that resulted in Mr. Liss’s termination; and Director of the Office of Diversity Donna Whyte recommended the denial of Mr. Liss’s internal grievance that challenged the reorganization. Dean Drnek is available for a deposition, and Director Whyte has already been deposed. Also on tap for a deposition is the former Interim Provost, George Walker, whose involvement was much less significant than Dean Drnek’s or Director Whyte’s but greatly more significant than President Berkman’s. There is no need for President Berkman to be deposed at all, but, if Mr. Liss remains confused as to the facts after he has taken the depositions of those officials with actual first-hand knowledge, President Berkman will agree to submit to a deposition on written interrogatories. *See, e.g., Capitol Vending*, 36 F.R.D. 45, 46 (noting that it would “be oppressive and vexatious to require [a NASA administrator] to submit to an interrogation that might last for several hours and that would, of course, disturb government business” but the taking of his deposition “on written interrogatories” would be permissible).

IV. A FOUR-HOUR DEPOSITION OF A UNIVERSITY PRESIDENT WHOSE INVOLVEMENT IS LIMITED TO SIGNING TWO LETTERS IS FOUR HOURS TOO LONG.

Mr. Liss may promise that his counsel will limit President Berkman’s deposition to four hours, but the depositions already taken in this case demonstrate that the questions are unlikely to concern substantive issues. Mr. Liss has an odd fascination with the personal habits of Willie Banks, Ph.D. and T.W. Cauthen, III, Ph.D., the consultant whom CSU hired

to evaluate the department. His motion to compel describes Dr. Cauthen as a “long-time friend [of Dr. Banks’s] with whom he had attended dances, balls and drag shows.” And his counsel’s deposition of Dr. Banks reflected a similar curiosity:

Q: So you’ve known [Dr. Cauthen] for at least ten years?

A: Yes.

Q: He’s a friend?

A: Yes.

Q: You have traveled together?

A: Yes.

Q: And some of that is social and some of that is for work, right?

A: Correct.

Q: What trips have you taken with T.W. Cauthen?

A: Atlanta. Cleveland. Those are the two that I can remember at the moment.

Q: Okay. Los Angeles? Do you recall being on a trip with T.W. to Los Angeles?

A: No.

Q: Never in California, to the best of your recollection?

A: Not that I can remember.

Q: Have you ever vacationed with T.W.?

A: Not that I can remember.

Q: When did you travel to Cleveland with T.W.?

A: December 2011.

Q: He came with you as part of the interview process?

A: No.

Q: So what was the occasion for the two of you to come to Cleveland in December of 2011?

A: He came also. There was another friend of ours.

Q: You have mutual friends?

A: Yes. And they came to help to find an apartment for me.

Q: And T.W. helped you find an apartment?

A: I had already found it. They came to look at it. I hadn't seen the apartment.

Q: In December of 2011, had you already accepted the job at Cleveland State?

A: Yes.

Q: T.W. came to help you move in?

A: No.

* * *

Q: How many other trips to Cleveland have you made with T.W.?

A: That's it.

Q: Where did you stay in December 2011?

A: I believe we had a room at the Radisson.

Q: And the two of you stayed together, right?

A: The three of us.

Q: The three of you. Who else came?

A: Our friend, Tony Wells.

Q: And the three of you stayed together at the Radisson, correct?

A: Uh-huh.

Q: How many times has T.W. visited you in Cleveland?

A: Just once after— just once.

Q: When was that?

A: April or May of 2012.

Q: And he stayed with you?

A: Correct.

Q: How many trips to Atlanta have you made with T.W.?

A: Oh, I don't know.

Q: Regular?

A: No.

Q: Well, it's more than one, right?

A: Yes.

Q: What trips to Atlanta with T.W. do you remember?

A: New Year's Eve or Christmas. I don't remember.

Q: Okay. There's a big party in Atlanta on New Year's Eve, right?

A: No. But I don't remember. I don't remember.

Q: You had a recollection of going to New Year's Eve with T.W.?

A: Yeah. But it's not New Year's Eve because— no. Because we were—I don't do New Year's Eve in Atlanta.

Q: Where do you do New Year's Eve?

A: In my apartment in Cleveland.

Q: But before you came to Cleveland, you were in Georgia, right? So where did you do New Year's Eves?

A: At my home.

Q: What other trips with T.W. Cauthen do you remember?

A: I don't.

Q: When you would go to Atlanta together, you stayed together, correct?

A: No.

Q: No? Where would you stay in Atlanta?

A: My old roommate's house.

Q: And where would T.W. stay?

A: At his old roommate's or with friends from Georgia Tech.

Q: What about those social events and parties? You've attended those with Mr. Cauthen, right.

A: Yes.

Q: You're nodding your head. You're social friends. You go to events and dances together, correct?

A: No.

Q: Have you ever been to the Boybutante Ball with Mr. Cauthen?

A: Yes.

Q: So and tell me what the Boybutante Ball is.

A: AIDS fundraiser based in northeast Georgia, in Athens, 25 years.

Q: It's a big dance, right?

A: It's a big fundraiser.

Q: But it's called a ball, right?

A: Uh-huh.

Q: And tell me what occurs at the ball.

A: There's a show.

Q: What kind of show?

A: A drag show.

Q: Okay.

A: And there's dancing and they raise money for AIDS support services in northeast Georgia.

Q: And you have attended the Boybutante Ball with T.W., correct?

A: Uh-huh.

Q: He dedicated his Ph.D. thesis to you, right?

A: I think it was one of the dedications.

Q: But it's true that he dedicated the Ph.D. thesis to you?

* * *

A: Not true.

Q: It's not true? What's not true about it?

A: . . . I was in his acknowledgements. I believe he actually dedicated it to his nephew and his family. I was in the acknowledgements section.

* * *

Q: You consider Mr. Cauthen a close friend?

A: Yes.

Q: Did you ever have a romantic relationship with him?

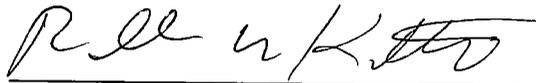
A: Nope.

(Banks deposition at 80-87) All of this is spectacularly irrelevant. Moreover, it is disturbing that Mr. Liss, himself a plaintiff in a discrimination suit, hopes to advance his case by needlessly and repeatedly trafficking in anti-gay stereotypes. Should the court order President Berkman to appear for a deposition, he too will likely be asked to discuss Dr. Banks's travel and dating habits, two topics of which he knows nothing at all.

V. CONCLUSION

President Berkman cannot be compelled to attend a deposition on the strength of a Rule 30(A) notice because he is not a party. Nor could he be compelled to attend a deposition even if he were properly subpoenaed. As everyone—including Mr. Liss—agrees, high-ranking government officials like President Berkman can be deposed in run-of-the-mill lawsuits only when they have something meaningful to say and then only when no one else can testify to the same thing. The two letters President Berkman signed will, no doubt, find their way into evidence; and Dean James Drnek, Director Donna Whyte and Interim Provost George Walker—who know far more about the subject matter of those letters than President Berkman—should be more than satisfactory deponents.

Respectfully submitted,



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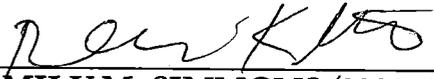
Counsel for Defendant

CERTIFICATE OF SERVICE

On August 13, 2014, we mailed a copy of this document via regular U.S. Mail

to:

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Mark Davies Griffin
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STEVEN LISS

Plaintiff

vs.

CLEVELAND STATE
UNIVERSITY

Defendant

Case No. 2013-00139

Judge Patrick M. McGrath
Magistrate Holly True Shaver

AFFIDAVIT OF RONALD M. BERKMAN, PH.D.

State of Ohio }
 } ss
County of Cuyahoga }

Ronald M. Berkman, Ph.D., after first being cautioned and sworn, states as follows:

1. I am the President of Cleveland State University, and I have held that position since 2009.

2. I had no role in responding to the interrogatories Mr. Liss served in this case, though I have now reviewed those responses, and I note that I am mentioned in three of them. The response to Interrogatory No. 3 identifies me as one of 28 individuals believed to have "relevant knowledge concerning or relating to the subject matter" of the complaint or of CSU's answer to that complaint. The response to Interrogatory No. 6 identifies me as one of five individuals who "participated in any way in any employment, promotion-related (including denial of promotion), raise, bonus, merit increase, commission, transfer, disciplinary, non-renewal or reassignment decision concerning" Mr. Liss. Finally, the

response to Interrogatory No. 7 identifies me as one of five individuals who "participated in any way in the termination decision concerning" Mr. Liss.

3. Those responses are correct. I signed two letters concerning Mr. Liss. In accordance with the Professional Staff Personnel Policies that applied to him, I signed a letter notifying him that I had accepted James Drnek's recommendation that he be laid off as a part of the reorganization of his department. In addition, as the last step in his internal grievance, I signed a letter notifying him that I had accepted Donna Whyte's recommendation that that grievance be denied.

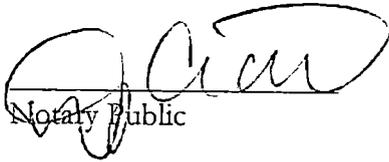
4. I did not prepare either letter myself, I have no independent recollection of either of those two events, and I have no other "relevant knowledge concerning or relating to the subject matter" of Mr. Liss's complaint.

Further, Affiant sayeth naught.

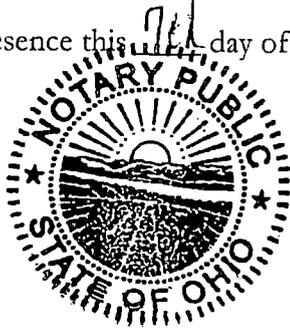


Ronald M. Berkman, Ph.D.

Sworn to and subscribed in my presence this ^{7th} day of August, 2014.



Notary Public



AMY N. CIARAVINO
Notary Public, State of Ohio, Cuy. Cty.
My Commission Expires 4-18-2016