

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

Dr. Denise Gates, :  
 :  
 Plaintiff : Civil Action 2:08-cv-27  
 :  
 v. : Judge Frost  
 :  
 Ohio University., *et al.*, : Magistrate Judge Abel  
 :  
 Defendants :

**Discovery Conference Order**

On June 8, 2009, I held a telephone discovery conference with plaintiff Dr. Denise Gates and counsel for defendants concerning plaintiff's June 4, 2009 motion to compel discovery. On the morning of June 9, one of our court reporters, Gina Wells, called my office to advise me that Dr. Gates had called her and asked her to tell me that she (Dr. Gates) would not appear for her deposition that had been duly noticed for June 10, 2009. I then scheduled a telephone conference for the afternoon of June 9 to discuss Dr. Gates' attendance at her deposition.

June 8 conference. Plaintiff's June 4, 2009 motion to compel (doc. 117) is one page. It identifies some discovery she maintains defendants have failed to provide her, but it does not include the specific discovery requests she wanted the court to order defendants to respond to or make a further response to and it did not include defendants' responses to those discovery requests. I asked her to supplement her motion with that information. (On June 9, plaintiff filed defendants' responses to her various discovery requests, but she

did not identify the specific discovery requests at issue or otherwise supplement her motion to compel.)

Defendants' counsel maintained that some discovery requests had not been served on them until less than 30 days ago. Defendants' counsel agreed to bring the responses to those discovery requests to Dr. Gates' deposition on June 10. (Dr. Gates asserted that the discovery responses were due June 8, but she did not support that assertion by providing proof of service.)

Defendants' counsel asked the court to consider their second motion to compel discovery (doc. 110), because they needed plaintiff's responses to their clients' discovery requests before Dr. Gates' deposition. Dr. Gates agreed to bring her further discovery responses to the deposition on June 10. (On June 9, the Clerk of Court received from Dr. Gates a box of materials that plaintiff said are responsive to defendants' discovery requests.)

Dr. Gates said that she thought it was unfair that two defendants' counsel and a representative of defendants would likely attend her deposition. Dr. Gates has previously been represented by counsel, but both lawyers withdrew. To some extent, she finds herself unrepresented at the deposition by choice. She asked whether she could have a friend attend the deposition, and I said that she could. I did advise her that the friend could not represent her, because the friend would not be a lawyer who had entered an appearance on her behalf in the case.

June 9 conference. After being told of Dr. Gates' communication to Gina Wells, I scheduled a telephone conference to discuss Dr. Gates' attendance at her deposition. Dur-

ing that conference, Dr. Gates said that she was afraid to attend the deposition because defense counsel had threatened her with physical violence. I assured her that the deposition was being taken as noticed at the courthouse, that everyone had to go through security to enter the courthouse, and that if she nonetheless feared for her physical safety I would have a court employee attend the deposition to make sure that no harm came to her.

Even with those assurances, Dr. Gates was adamant that she would not attend the deposition. She asked whether the deposition could be taken by telephone, but I explained to her that in my experience the depositions of the parties are always taken in person. It is important that the lawyer taking the deposition and the deponent see each other so that they can effectively and accurately communicate with each other. This is a document intensive case, and the examiner needs to be able to show Dr. Gates documents he is questioning her about and she needs the opportunity to review them before giving testimony about them under oath. An in person deposition also gives the lawyers an opportunity to see the deponent's demeanor and gauge how a jury would react to her testimony.

Dr. Gates expressed her opinion that I was biased against her because of her race and that I had consistently ruled against her and ruled for defendants. I told her that the court is neutral, fair and impartial.

In plaintiff's May 26, 2009 motion for disclosure from Judge Abel (doc. 113), Dr. Gates wanted to know why one of my law clerks contacted her to arrange a telephone conference requested by defendants' counsel. Southern District of Ohio Civ. Rule 37.1 encourages the parties to request informal telephone conferences with the judge to resolve

discovery disputes without unnecessary motions practice. Defendants' counsel called my office to request a telephone discovery conference and my law clerk scheduled it. There was no communication between defendants' counsel and me or my office about the merits of the discovery dispute.

In plaintiff's June 4, 2009 motion for a mistrial (doc. 116), Dr. Gates complains that I've participated in *ex parte* communications with defense counsel and demonstrated bias against her in a number of instances. None of those assertions is factually accurate. There have been no *ex parte* communications between defense counsel and me or my office about any matter of substance. Any *ex parte* communications have been strictly limited to scheduling telephone conferences. I have ruled promptly on motions, whether filed by plaintiff or defendants. I have ruled on the merits of all the discovery and scheduling disputes without respect to persons and in full conformity with the controlling law.

I concluded the June 9 conference by telling Dr. Gates that it was important that she attend her June 10 deposition. The only way to obtain the relief she seeks in the complaint is to prosecute this lawsuit. Both sides are entitled to a fair opportunity to learn what the other knows about the facts relevant to the claims and defenses of the parties. Defendants have the right to depose Dr. Gates, and she has the duty to submit to deposition. Failure to attend her deposition can result in dismissal of her lawsuit. Rules 37(b)(2)(A)(v), 37(d)(1)(A)(i) and 37(d)(3).

s/Mark R. Abel \_\_\_\_\_  
United States Magistrate Judge