

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

Sheryl L. Szeinbach, :
 :
 Plaintiff : Civil Action 2:08-cv-00822
 :
 v. :
 :
 The Ohio State University, : Magistrate Judge Abel
 :
 Defendant :

Discovery Conference Order

On July 6, 2009, counsel for the parties participated in a discovery dispute conference with the Court. During the conference, the following rulings were made.

Student depositions. Plaintiff Szeinbach asks that the deposition of students be sealed and that any person viewing a student deposition sign an acknowledgment that the deposition is subject to the protective order and that the contents of the deposition cannot be disclosed to anyone not permitted to view it under the terms of the protective order. As stated in the May 8, 2009 Discovery Order, the students do have a privacy interest in their educational records which are protected by FERPA. *Seoane-Vazquez v. The Ohio State University*, 2:07-cv-775 (doc. 44, at pp. 6-7, 13-15). Any portion of a student deposition containing testimony about FERPA protected document should be sealed and accessed only by a person permitted to do so by and under the procedures adopted in the protective order.

Nonetheless, generally speaking, the testimony of witnesses may be read by the parties and other witnesses and is not subject to protection by a protective order. While I

recognize that the students have been put in an awkward situation by being fact witnesses in a dispute between members of the faculty, their position is no different than that of any other third party witness who has facts relevant to the resolution of a legal dispute.

To obtain a protective order, a party must make a showing of good cause under Rule 26(c), Fed. R. Civ. P. Rule 26(c) provides:

(c) Protective Orders.

- (1) **In General.** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
 - (A) forbidding the disclosure or discovery;
 - (B) specifying terms, including time and place, for the disclosure or discovery;
 - (C) prescribing a discovery method other than the one selected by the party seeking discovery;
 - (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
 - (E) designating the persons who may be present while the discovery is conducted;
 - (F) requiring that a deposition be sealed and opened only on court order;
 - (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way
 - (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

I find that plaintiff has not demonstrated good cause for an order that would require defendant's counsel to regulate access to the student depositions under the terms of the

protective order previously entered by the court.

At the same time, the students are entitled to some assurance that they will not be unreasonably burdened by their act of providing fact witness testimony in this lawsuit. Recognizing the students' interest in not being subjected to unnecessary annoyance, embarrassment or oppression, it is ORDERED that the students' depositions be filed under seal and that any person accessing the depositions must sign a log with the date that person accessed the deposition and stating the person's relation to the lawsuit. Further, if any student believes that use is being made of his or her testimony to punish the student for having given testimony as that student was required to do by law (or to deter the student from providing truthful testimony in the future), the student should inform the Court. The Court would consider that act a contempt of court and order the person who allegedly committed the act to show cause why he or she should not be charged with civil or criminal contempt of court.

Evidence of disparate enforcement of OSU's research misconduct policy. Dr. Sheryl Szeinbach's complaint alleges that OSU retaliated against her in her employment because she supported her colleague Enrique Seoane-Vazquez's charge that he was subjected to national origin discrimination. One series of acts of retaliation alleged involved Dr. Rajesh Balkrishnan falsely accusing Dr. Szeinbach of authoring a publication that contained "identical results just analyzing the data slightly differently." (Complaint, ¶ 40.) Despite his knowledge of the falsity of the accusation and the fact that the editors of the publication concluded that Szeinbach's reuse of the data set without a cross reference was an unintentional oversight, Balkrishnan filed a complaint against Szeinbach alleging

that she violated OSU's Interim Policy and Procedures On Misconduct in Research or Scholarly Activities. (Complaint, ¶¶ 52-53.) On June 5, 2007, OSU's Office of Research Compliance charged Szeinbach with research misconduct. (Complaint, ¶ 54.) Dean Robert Bruggemeier refused Szeinbach's request to dismiss the charge. (Complaint, ¶¶ 56-57.) On March 13, 2008, OSU offered to dismiss its investigation of the charge if Szeinbach agreed not to participate in the process to determine whether to grant Seoane-Vazquez tenure. (Complaint, ¶ 74.) At the time the complaint was filed, the charge remained pending. The complaint alleges that evidence that the above conduct is retaliatory includes the fact that OSU failed to discipline other professors for similar or greater violations of its research misconduct policy. (Complaint, ¶¶ 75-79.)

Plaintiff Szeinbach seeks discovery about an investigation of whether Dr. Robert Lee violated OSU's research misconduct policy by making duplicate grant applications to NIH. OSU is resisting the discovery on the grounds that it is not relevant to any issue in this lawsuit and that one document, an NIH investigation report, is subject to a confidentiality agreement between NIH and OSU.

Plaintiff's counsel has information that leads him to believe that there is evidence that Dr. Lee, individually, and a corporation he owned filed separate grant applications with NIH for research about a drug. The grant applications involved slightly different formulations of the drug. Plaintiff believes that there was about an 80% overlap in the applications.

A complaint about the alleged duplicate grant applications was made to OSU's Office of Research Compliance, but plaintiff asserts that no action was taken on it. OSU

states that NIH's Office of Management and Assessment ("OMA") conducted an investigation and found no violation of NIH's rules governing grant applications. In turn, OSU's Office of Research Compliance, relying on the OMA report, dismissed the complaint against Lee. Plaintiff responds that the Office of Research Integrity ("ORI") is the governmental agency responsible for enforcing NIH's overlap rules, and that the findings by OMA are meaningless. In any event, OMA's findings are not dispositive of whether there was a violation of OSU's research misconduct policy.

Plaintiff's counsel made the representation at the discovery conference that the Lee duplicate grant application charge was alleged in the complaint. It is not, although another research misconduct policy violation by Lee is alleged. (Complaint, ¶ 78.) Nonetheless, the specific allegations in the complaint are merely representative. The discovery sought is arguably directed at obtaining evidence that, if credited, would be at least some evidence that OSU applied its research misconduct policy to Szeinbach in a different manner than it did to other similarly situated faculty and in a manner that retaliated against her for support Seoane-Vazquez.

Defendant is ORDERED to produce for attorneys' eyes only all documents created or used in OSU's investigation of whether Lee violated its research misconduct policy and all documents it provided to NIH/OMA regarding the grant applications. OSU does not have to produce OMA's report of its investigation of whether the grant applications violated NIH's overlap rules. That report is relevant to the issues in this lawsuit. Plaintiff is free to serve NIH with a Rule 45 subpoena seeking the report.

In making this ruling, I recognize that OSU argues that Szeinbach suffered no

adverse consequence from the charge having been filed and its argument that at the end of the day the Lee charge will have no relevance to this lawsuit. But at this stage of the proceedings—with no evidence of record—I must make my ruling based on the allegations in the complaint. Should the discovery prove not to be relevant, I expect that to be the end of the matter. If it is arguably relevant, then counsel should consult about redacting the documents so that they can be shown during depositions to witnesses who would not otherwise have access to them and to experts.

s/Mark R. Abel _____
United States Magistrate Judge