

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

Sheryl L. Szeinbach, :
 :
 Plaintiff : Civil Action 2:08-cv-822
 :
 v. :
 :
 The Ohio State University, : Magistrate Judge Abel
 :
 Defendant :

ORDER

This Order addresses unresolved questions about the admissibility of deposition testimony that counsel raised during the final pretrial conference. I am still not certain that I understand what objections plaintiff is pursuing. The first motion plaintiff filed on May 30 directed to objections to deposition testimony (doc. 321) was withdrawn, and plaintiff filed a replacement motion (doc. 331). Defendant's position is set out in its May 30 response to Doc. 321 (doc. 327) and in communications with plaintiff's counsel that are exhibits to plaintiff's filings. I will first address the parties' objections to Balkrishnan's trial deposition testimony.

Balkrishnan trial deposition.

Plaintiff's objections to Balkrishnan's testimony **OVERRULED**. Finding that the testimony is relevant, plaintiff's objections to the following testimony are **OVERRULED**:

- 151:1 to 152:14 (This is a trial deposition. Plaintiff's counsel asked the questions, and the witness answered them. Plaintiff cannot now decide she

does not like the answers and move to redact them from Balkrishnan's trial testimony.)

- 153:13 to 156:21 (This is a trial deposition. Plaintiff's counsel asked the questions, and the witness answered them. Plaintiff cannot now decide she does not like the answers and move to redact them from Balkrishnan's trial testimony.)
- 236:15 to 239:23 (This is a trial deposition. The witness answered the questions asked.)
- 409:3-12 (On direct examination, plaintiff's counsel asked a question calling for a hearsay answer.¹)
- 458:15 to 457:2 (Plaintiff's counsel asked Balkrishnan to read the document. To the extent plaintiff may now seek to exclude the testimony as hearsay, plaintiff invited the testimony.)
- 534:10 to 538:7 (On direct examination, plaintiff's counsel asked a question calling for a hearsay answer.²)
- 545:2 to 547:2 (This was a trial deposition. The witness answered the questions plaintiff's counsel asked.)

Plaintiff's objections to Balkrishnan's testimony SUSTAINED. Finding that the

testimony is relevant, plaintiff's objections to the following testimony are SUSTAINED:

- 487:22 to 489:2 (Defendants agree that this is not relevant.)
- 542:23 to 545:1 (Irrelevant. May confuse the jury as to the issues they are to decide.)
- 548:16-20 (Not responsive to the question asked.)
- 552:15 to 553:2 (Defendants agree that this is not relevant.)
- 553:2 to 554:21 (Irrelevant. Defendant's counsel asked Balkrishnan whether other College of Pharmacy professors made comments to him about Szeinbach. Balkrishnan then identified those professors and recounted their

¹Q. Do you think that any fellow faulty member might recommend that you actually lose your office in the division if you do this again?

A. Dr. Guill Wenitjes threatened me with that.

Q. Dr. Guill Wenitjes. Anybody else you think?

A. No. I only encountered meeting Dr. Wenitjes in the hallway where he threatened me.

²Plaintiff's counsel asked "what was the conversation at the dinner table [with Dr. Seoane] relating to Ohio State and the position?" Balkrishnan then recounted the conversation, as the question asked him to do.

negative comments about her. Although the evidence of bad relations between some other professors and Szeinbach is of some relevance to whether the actions of Balkrishnan and those professors harmful to Szeinbach were motivated by personal animosity, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice and misleading the jury about the issues they are to decide. Fed. Evid. R. 403.)

- 573:7 to 577:23 (Hearsay. Plaintiff raised a standing objection to hearsay at Vol. 2; 531:19-22.)
- 582:3-9 (Hearsay. Plaintiff raised a standing objection to hearsay at Vol. 2; 531:19-22.)
- 582: 12-18. Plaintiff objects on relevancy; defendant does not appear to take a position.
- 583:12-23 (Irrelevant. Defendant counsel asked Balkrishnan how many papers Seoane had published. Plaintiff's protected activity supporting Seoane in his assertion of his Title VII and OSU EEO rights is at issue, but the merits of faculty's Seoane tenure decision is not.)

Kostenbauder deposition.

Although plaintiff did provide the Court with some pages from Dr.

Kostenbauder's deposition that contain questions and answers highlighted in yellow (doc. 294-5), plaintiff's May 30, 2014 motion (doc. 331) does not discuss what objections she has to the deposition testimony and the exhibits to the motion do not include Exhibit 4, which is described as setting out those objections. Nonetheless, the Court will attempt to resolve those objections based on the description of them in Exhibit 2 (doc. 331-1), which contains defendant's responses to plaintiff's objections.

Plaintiff's objections to Kostenbauder's deposition: SUSTAINED. Finding that the testimony is irrelevant, plaintiff's objections to the following testimony are SUSTAINED:

- 7:2-5 (Not relevant. Not required to object during the deposition. See, Rules 30(c)(2) and 32(d)(3), Fed. R. Civ. P.)
- 8:18-22 (States plaintiff's standing objection to hearsay testimony.)
- 12:5-9 (Defendant does not explain relevance.)
- 13:11-18 (Kostenbauder's discussions with Seoane about his case irrelevant to Szeinbach's case.)
- 17:3 to 18:9 (Irrelevant. Questions about criteria Kostenbauder applied to tenure review when he was on the faculty at the University of Kentucky.)
- 19:14-17 (Irrelevant. Asked whether he ever published research or wrote grants with Seoane.)
- 20:23 to 21:13 (Irrelevant. Asked whether he assisted Seoane in the preparation of EEO complaints.)
- 21:23 to 23:9 (Irrelevant. Asked whether he assisted Seoane in the preparation of his EEOC charge or his fourth year review.)
- 24:14-21 (Irrelevant.)
- 25:2-13 (Irrelevant. Asked whether he discussed with Seoane whether he should file a lawsuit.)
- 27:2-14 (Irrelevant. Asked about his involvement in the three lawsuits.)
- 29:1-10 (Irrelevant. Questions about expert in Seoane's case.)
- 29:17-24 (Irrelevant. Questions about expert in Seoane's case.)
- 32:20 to 33:4 (Irrelevant. Asked what he knew about Seoane's area of academic expertise.)
- 33:1- to 35:1 (Irrelevant. Asked about discussions he may have had about the meetings and votes on Seoane's tenure.)
- 63:11-18 (Irrelevant. Asked to identify Exh. 91, but he answered that he did not write the letter and did not know who did. Defendant offered no explanation of why the exhibit is relevant.)
- 85:17 to 89:8, 89: 16, and 89:19 to 90:11 (Irrelevant. Would lead to jury confusion. Asks about Dr. Au's interest in pursuing an allegation that Dr. Lee obtained duplicate funding for research. The Court has ruled that the Lee duplicate funding investigation is irrelevant to the issues in this lawsuit.)
- 93:22 to 94:19 (Irrelevant. Witness's views on merits of Seoane's fourth year tenure review not relevant to a disputed issue of material fact. Defendant argues the testimony is relevant to research misconduct charges against others but does not explain how or why.)
- 95:11-16 (Defendant made no proffer of relevance.)
- 97:21 to 99:19 (Irrelevant. Asked whether he ever talked with students about Balkrishnan and why he helped Seoane prepare a letter to support his fourth year review.)

- 100:14-101:2 (Irrelevant. No explanation from defendant why talking with anyone about Szeinbach's employment at OSU relevant. Whether witness ever looked at Seoane's dossier irrelevant.)
- 106:23 to 107:4 (Irrelevant. Hearsay. Testimony includes no direct statement attributable to Seoane or Szeinbach.)
- 111:10-21 (Irrelevant. Witness asked whether he ever discussed with Seoane his applying for a position some place other than OSU.)
- 112:8 to 113:10 (Irrelevant. Whether and how Szeinbach paid her attorney's bill for services not an issue for jury.)

Plaintiff's objections to Kostenbauder's testimony: OVERRULED.

- 29:14 (Relevant. No need to redact the name "Seoane".)
- 30:3-5 and 30:9 (Relevant. Jury will know about Seoane's case, because Szeinbach alleges in the EEOC charge that OSU retaliated against her for her protected activity on behalf of Seoane.)
- 38: 23 to 39:9 (Relevant. Defendant argues the testimony is relevant to research misconduct charges against others. Witness denies knowledge of receiving ORI self-plagiarism policies.)
- 40:7-16, 41:3-4, and 41:11-42:20 (Relevant. Asked whether received letter from *Clinical Therapeutics* telling Szeinbach it was inappropriate for her and him both to have written letters, but not disclosing they were married.)
- 46:3-14 and 46:23-47:4 (Relevant to research misconduct charges against others.)
- 68:3-15, 69:7-8, and 69:15-19 (Relevant. Plaintiff advances no grounds to exclude.)
- 76:21 to 77:2 and 77:14-23 (Relevant. Defendant argues that the questioning is relevant to research misconduct charges against other and goes to the witness's credibility.)
- 82:1-19 and 83:1-6 (Relevant to research misconduct charges against others.)
- 101:24-105:24 (Relevant as background to the bad feelings between Balkrishnan and Szeinbach. Not offered for the truth of the matter asserted by the extrajudicial declarants.)

Plaintiff's Rule 32 objections to the deposition testimony of Pedersen and

Schneider.

These objections were originally asserted in footnote 13 to plaintiff's May 21, 2014 motion regarding deposition testimony. Doc. 306, PageID 23568.³ The objections are not repeated in plaintiff's May 30 motion (doc. 321), and I assume the objections are abandoned. Alternatively, if plaintiff still intends to make the objections, they are OVERRULED because his briefs offer no explanation for the objections and set out no facts that would demonstrate the applicability of Rule 32(1)(A)-(C).

During the final pretrial conference, plaintiff's counsel did say that the depositions were taken before 2:08-cv-822 was filed. However, the parties agreed the depositions could be used in this case, and they were filed in this case. They were used by both parties when they briefed motions for summary judgment. Seoane's counsel, who has always represented Szeinbach, took the depositions. It was an adversarial deposition. If Szeinbach believed areas were not covered in the depositions that are relevant to her claims or defendant's defense to those claims, then she had the opportunity to take their depositions on those topics after she filed suit. She chose not to. Plaintiff cannot now reverse course and, on the eve of trial, seek to keep them out.

If plaintiff had objections to specific testimony by Pedersen or Schneider, she failed to set them out in either her May 21 or May 30 motions (docs. 306, 321, and 331) or the exhibits attached to them. Any such objections are waived.

³The footnote refers to an email that was attached as Exhibit F to Doc. 306. Doc. 306-1, PageID 23595. That email merely states that plaintiff's "objects to OSU's proposed trial testimony of Balkrishnan, Pedersen, and Schneider.

Caroline Whitacre deposition.

Beginning in August 2008, Dr. Whitacre has been Vice President for Research at OSU. (Whitacre Dep., 11:14-21, Doc. 90-1, PageID 4590.) Defendant has made objections to portions of Whitacre's deposition plaintiff has selected to offer in evidence.

Whitacre deposition testimony to which defendant has not made an objection.

Defendant has made no objection to plaintiff's offering the following testimony:

- 11:15-24
- 2:1-24
- 13:1-13
- 50:5-8
- 51:15-23
- 52:4-22

Defendant's objections to Whitacre's testimony: SUSTAINED:

- 53:9-19 (Irrelevant to preceding testimony. Defendant asks that the name "Jan Neiger" be redacted. Deposition testimony should end with: ". . . to be the prerogative of the vice president for research.")

Defendant's objections to Whitacre testimony: OVERRULED:

- 54:4-22 (Relevant. Not privileged. Defendant argues that the testimony is privileged. The testimony does begin with plaintiff's counsel asking whether Whitacre "received legal advice that stopped the meeting", and the witness responding, Yes. That answer does not reveal the legal advice. It merely tells the jury that after seeking legal advice, OSU canceled the meeting. The remainder of the testimony does not disclose any legal advice.)
- 55:10-12, 24, 56:2-58:10, 60:3-6, 11-24, and 61:1 (Defendant objects on the grounds that there was no foundation established for the questions and that Whitacre is not an expert. Plaintiff's counsel asked Whitacre whether publication practices described in a letter deviated from commonly accepted practices. Later questioning is about Dean Brueggemeier's response to the letter. The objection that Whitacre is not an expert is without merit. She is OSU's Vice President for Research. She administers the University's research misconduct policies. She is qualified to testify about them and how they relate,

generally, to similar policies of journals and other universities. Plaintiff's counsel established an adequate foundation for the witness's expertise and ability to answer the question.)

Olga Esquivel-Gonzalez deposition.

The portions of Olga Esquivel-Gonzalez's deposition plaintiff wants to offer in testimony are set out in Doc. 324, PageID 24055. Defendant's counsel's May 29, 2014 letter to plaintiff's counsel states that defendant wants him to redact 316:21-317:10, which it describes as testimony about OSU's position statement filed in response to Seoane's EEOC charge. (Doc. 321-1, PageID 24022.) I can find no response to that request. Further, neither plaintiff nor defendant have briefed any other issues that may still exist regard Esquivel-Gonzalez's testimony. Any such objections have now been waived.

Esquivel-Gonzalez's deposition testimony ends at page 206. Plaintiff proposes offering only two portions of the deposition that refer to OSU's position statement filed with the EEOC in response to Seoane's 2007 charge of discrimination: 119:10-22 and 178:1-10. I agree that OSU's legal response to Seoane's EEOC charge of discrimination is not relevant to any issues in this lawsuit. To the extent that they may be some evidence supporting plaintiff's claim, the testimony's potential to mislead the jury about the central disputed factual and legal issues and to risk mini-trials on tangential issues outweighs any evidentiary value the testimony may have. Fed. Evid. R. 403.

Robert A. Buerki deposition.

Plaintiff has identified the portions of Dr. Buerki's deposition he wants to offer in evidence. (Doc. 324, PageID 24060 and Doc. 325, PageID 24086.) I cannot tell whether these disclosures were timely made on or before May 12, 2014. (See, January 7, 2014 Scheduling Order, Doc. 228, PageID 19593.) I can find no response by defendant to these disclosures.

Defendant argues that plaintiff filed her notice to use the deposition testimony of Buerki 19 days after the deadline for doing so and is prejudicing OSU's ability to adequately prepare for trial. Defendant maintains that Buerki's testimony is not relevant because it relates to his participation on the Promotion and Tenure Committee for the tenure of Dr. Seoane-Vazquez or it is related to faculty squabbling incidents that the Court has already found to be inadmissible. Defendant further argues that Buerki lives within the jurisdiction of the U.S. District court for the Southern District of Ohio, Eastern Division. Plaintiff did not attempt to serve the subpoena on Buerki until May 15, 2014. According to OSU, despite numerous failed attempts to serve the subpoenas on the proposed trial witnesses, plaintiff delayed in seeking leave to use the deposition testimony, depriving OSU of an adequate opportunity to review plaintiff's assertions that she is unable to secure the witnesses' testimony at trial.

- 11:13 to 12:5 (Relevant. Relates to Dr. Buerki's history at OSU. He earned his Ph.D. in 1972 and has been at OSU for 44 years).
- 20:16 to 21:19 (Irrelevant. This testimony concerns conversations that Dr. Buerki may have had regarding Seoane-Vazquez.)
- 67:1-3 (Relevant. Dr. Buerki had no problems getting along with plaintiff.)
- 67:1 to 68:21 (Irrelevant. Concerns background history at OSU prior to and leading up to plaintiff's hiring.)

- 72:1-8, 16-19 (Relevant. Concerns Dr. Buerki's impressions of plaintiff.)
- 72:24 to 73: 12, 8-24 (Relevant. Regarding people around the country talking about issues related to Seoane-Vazquez and plaintiff and the investigations.)
- 74:1-16 (Relevant. People around the country asking about what was going on at OSU.)
- 76:4-21 (Irrelevant. Concerns Dr. Buerki's impressions of Seoane-Vazquez. The merits of Seoane-Vazquez's underlying complaints are not at issue.)
- 91:21 to 92:16 (Relevant. Received Dr. Balkrishnan's emails related to his concerns about plaintiff's articles and the investigation.)
- 93:5-21 (Relevant. Concerns who Dr. Buerki talked to about the emails sent by Balkrishnan.)
- 95:2-6 (Irrelevant. Dr. Buerki did not recall seeing the journal editorial concerning Dr. Balkrishnan.)
- 97:9 to 98:3 (Relevant. Dr. Buerki reviewed journal editorial regarding Balkrishnan and acknowledged that it is considered bad practice to fail to properly cite a previous publication.)
- 217:6-22 (Relevant. Concerns people around the country being aware of the lawsuits at OSU. Dr. Buerki did not know that their claims were Title VII claims. He knew they were "equal opportunity concerns.")
- 229:1-18 (Relevant. Dr. Buerki did not witness plaintiff hissing or spitting or acting inappropriately toward Dr. Balkrishnan.)
- 231:17 to 232:1 (Relevant. Concerns plaintiff's support of Seoane-Vazquez.)
- 234:14-18 (Irrelevant. Concerns allegations that plaintiff's disruptive behavior was causing a loss of productivity in the department; Buerki said she did not engage in disruptive behavior in division meetings.)
- 241:18-24 (Irrelevant. Asks Dr. Buerki whether his belief that issues should be handled internally was shared by his colleagues. He did not know.)
- 242:6-20 (Relevant. Testimony that the larger community had knowledge of lawsuits and that the issues at OSU made it look bad.)
- 243:8-12 (Relevant. Buerki had discussions with people at Wisconsin concerning what was happening at OSU.)
- 244:10-16 (Irrelevant. Concerns whether Dr. Buerki was asked to retain emails by OSU HR/Legal Department.)
- 245:1-3 (Irrelevant. Concerns whether Dr. Buerki was asked to retain emails by OSU HR/Legal Department.)

Joseph F. Dasta.

Dr. Dasta has not been deposed. Plaintiff wants to present his testimony from Austin, Texas, where Dasta teaches, by video-link.

Plaintiff's counsel said at the final pretrial conference that Dasta would testify about a communication to him by Dr. Hayton that disclosed the existence of the CII's Szeinbach research misconduct investigation. Plaintiff has emailed me the email chain which plaintiff maintains discusses that investigation.⁴ Defendant has not yet had an opportunity to present argument on the relevance of Dasta's proposed testimony. Defendant's counsel has suggested that plaintiff's counsel delay decision on whether Dasta is needed as a witness until after he examines Hayton. If Hayton admits making the communication to Dasta, there would be no need for Dasta to testify. (Doc. 323-1, PageID 24045.)

Jack Fowble.

Jack Fowble is identified by plaintiff as a witness whose testimony she would like to present by deposition testimony. (Doc. 325 PageID 24073.) However, I could not find any designated pages of the transcript plaintiff intends to offer. Nor could I find any communications between plaintiff's and defendant's counsel about Fowble's testimony.

⁴It's a little difficult to read the chain. It appears to begin with a June 2, 2007 email from Joseph Dasta to Dev S. Pathak that includes the following:

BTW, the latest with Sheryl is that she apparently duplicated a previous article on allergic rhinitis to the one in this link of April 2007.

http://www.theperj.org/journ/view_article.php?article_id=466

Bill Hayton says that an OSU committee is being formed to formally investigate.

Kent Summers.

Plaintiff moves to present Dr. Summers' testimony by video-link. (Doc. 326, PageID 24087-88.) Defendant has not had an opportunity to respond to this motion.

Plaintiff's May 30, 2014 motion regarding video-link testimony (doc. 323).

During the final pretrial conference, plaintiff's counsel said that he wanted to present the testimony of Dale Vandre, Robert McGrath, Joseph Dasta, William Hayton, and Matthew Platz⁵ by video-link. In support of the motion, plaintiff submits a May 28, 2014⁶ letter that requests defense counsel's assistance in securing these witnesses' testimony for trial.

During the May 28 final pretrial conference, I asked defendant's counsel to provide supplemental affidavits from the subpoenaed witnesses describing their schedules over the period when plaintiff is presenting her case (June 3-12) and their availability to testify during that period. I also asked defendant's counsel to find out whether the witnesses who will testify in the defense case could be available to testify on June 11 or June 12. Defendant has provided supplemental affidavits from Dr. Hayton (Doc. 322, PageID 24032), Dr. Vandre (doc. 328, PageID 24095-96) and Dr. McGrath (doc. 336, PageID 24489).

⁵Platz has apparently not been served with a subpoena for his trial testimony. During the final pretrial conference, plaintiff's counsel said he believed Platz was in Hawaii. His deposition was taken.

⁶Through typographical error, the letter is misdated "May 28, 2012".

s/Mark R. Abel
United States Magistrate Judge