

Subject: Fwd: Judge Rose's granting Defendants' Motion to Strike in Newman v. University of Dayton, et. al. Case No. 3:17-cv-00179 -TMR
From: Peter Newman
To: peter_snow, rose_chambers, "Dunlevey, Karen T. (Dayton)"
Date: 09/28/2017 01:43 PM

Pete:

You never responded to my September 11, 2017 message. Please respond at your earliest opportunity.

Thank you, Peter Newman

----- Forwarded message -----

From: **Peter Newman** <newmanlawgroup@gmail.com>

Date: Mon, Sep 11, 2017 at 12:49 PM

Subject: Judge Rose's granting Defendants' Motion to Strike in Newman v. University of Dayton, et. al. Case No. 3:17-cv-00179 -TMR

To: peter_snow@ohsd.usacourts.gov

Cc: "Dunlevey, Karen T. (Dayton)" <Karen.dunlevey@jacksonlewis.com>

Pete:

This follows up on our brief telephone conversation on Friday regarding the above referenced procedural matter.

As we discussed, in light of Judge Barrett's August 25, 2017 decision in *Nokes v. Miami University*, 2017 U.S. Dist. LEXIS (copy attached), I respectfully submit that Judge Rose erred in granting Defendants' Motion to Strike Plaintiff's Memorandum in Opposition in our case, but reached the right result in granting me leave to file a revised Memorandum in Opposition. To prevent defense counsel from accusing me of having an improper *ex parte* communication with the court, I am copying Karen Dunlevey on this message.

The following is the chronology of events leading up to Judge Rose's granting Defendants' Motion to Strike:

- July 14, 2014, Defendants filed their Motion to Dismiss
- August 23, 2014, I filed Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss
- August 25, 2017, Defendants filed their Motion to Strike Plaintiff's Memorandum in Opposition.

Shortly after Defendants filed their Motion to Strike, I was doing some research for my Memorandum in Opposition to Defendants' Motion to Strike and ran across Judge Barrett's August 25, 2017 decision in *Nokes v. Miami University*. This is how I found it:

- I did a general LEXIS search of "motion to dismiss" within the Sixth Circuit;
- I sorted by date (newest-oldest);
- I then found *Nokes* as one of the most recent cases from the Southern District of Ohio involving a motion to strike.

Judge Rose's decision is significant because he not only denied plaintiff's motion to strike, but he

also provided the following summary of the case law followed by every district court in the Sixth Circuit holding that orders striking non-pleadings such as memoranda are not a proper use of Rule 12(f):

Ultimately, the Court is firmly convinced that Defendants' memorandum violated Local Rule 7.2; however, the Court is less convinced that the proper course of action is to "strike" the document. Again, the local rules are silent on whether courts should "strike" non-enumerated memoranda filed without leave. Furthermore, the Federal Rules of Civil Procedure provide no mechanism for "striking" documents other than pleadings. Fed. R. Civ. P. 12(f). Even though parties (and sometimes even courts) frequently refer to all court filings as "pleadings," such usage is imprecise and incorrect.⁷ The only documents that qualify as "pleadings" are enumerated in Fed. R. Civ. P. 7(a) (e.g., complaint, answer, crossclaim, etc.); memoranda are not listed. Thus, orders "striking" non-pleadings such as memoranda are not a proper usage of Rule 12(f). Johnson v. Wolgemuth, 257 F. Supp. 2d 1013, 1024 (S.D. Ohio Mar. 10, 2003) (Rice, J.) (declining to "strike" expert report at summary judgment phase; reasoning that Rule 12(f) only allows matters contained within the "pleadings" to be stricken, so "the remedy is not to strike [the] affidavit; it is simply to ignore it"); Maxum Indem. Co. v. Drive W. Ins. Servcs, No. 1:13- cv-191, 2014 U.S. Dist. LEXIS 196740, at *6 (S.D. Ohio June 13, 2014) (Bowman, M.J.) (denying motion to strike; agreeing with other courts in Sixth [*24] Circuit holding that "motions to strike are inapplicable" where a non-pleading is the subject of the motion to strike); Dawson v. City of Kent, 682 F.Supp. 920, 922 (N.D. Ohio 1988)("The federal rules make only one reference to a motion to strike in Rule 12(f). This rule relates only to pleadings and is inapplicable to other filings."); Johnson v. Manitowoc Boom Trucks, Inc., 406 F. Supp. 2d 852, 864 (M.D. Tenn. Dec. 13, 2005) (declining to rule on motion to strike, because "[m]otions to strike relate only to 'pleadings,' a term which is narrowly defined by Rule 7(a) of the Federal Rules of Procedure"). Accordingly, the Court DENIES the Motion to Strike (Doc. 27). (See the attached copy of the case at p. 7).

In the face of Judge Barrett's summary of the law within the Sixth Circuit, I am sure you can understand how surprised I was when Judge Rose issued his August 30, 2017 Entry and Order granting Defendants' Motion to Strike.

I suggest that the Court consider issuing a corrected Entry and Order, denying Defendants' Motion to Strike and giving Plaintiff leave to file a revised Memorandum in Opposition. Otherwise, Judge Rose's original Entry and Order will appear as an aberration.

Peter.

Peter K. Newman, Esq.

The Newman Law Group LLC:

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Nokes v. Miami Univ._ 2017 U.S. Dist. LEXIS 136880.pdf