

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 16-cv-80655-ROSENBERG/HOPKINS

JAMES TRACY,

Plaintiff,

v.

FLORIDA ATLANTIC UNIVERSITY
BOARD OF TRUSTEES a/k/a FLORIDA
ATLANTIC UNIVERSITY; et al.

Defendants.

**DEFENDANT UNIVERSITY'S RESPONSE IN OPPOSITION
TO PLAINTIFF'S MOTION TO CONTINUE RULE 30(b)(6) DEPOSITION OF
DEFENDANT FLORIDA ATLANTIC UNIVERSITY AND CROSS MOTION
FOR PROTECTIVE ORDER AND ADMONISHMENT**

Defendant, FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES a/k/a FLORIDA ATLANTIC UNIVERSITY ("Defendant University") responds to the Motion to Continue Rule 30(b)(6) Deposition of Defendant Florida Atlantic University filed by the Plaintiff on August 1, 2017 and moves this Court for a protective order and admonishment of counsel.

On July 28, 2017, Defendant University produced a corporate representative with knowledge of areas identified on Plaintiff's Notice of Taking Deposition ("Notice"). Plaintiff alleges that Defendant University's designated corporate representative was not adequately prepared to answer Plaintiff's questions. To the contrary, a review of all relevant portions of the deposition transcript demonstrates that Defendant University's corporate representative responded to all noticed areas of inquiry. Further, Plaintiff accuses Defendant University of failing to prepare its corporate representative for lines of questioning which were outside the scope of the Notice and which could not be reasonably anticipated. Finally, Plaintiff should not be permitted to take additional testimony as their questioning is cumulative. However, if the

Court is inclined to grant Plaintiff's motion, Defendant University moves this Court for a protective order and for admonishment of counsel for abusive discovery tactics.

Defendant University's Corporate Representative Answered All Noticed Areas of Inquiry

Defendant University identified Dr. Diane Alperin as its corporate representative. Dr. Alperin has worked for Defendant University since 1979. She has worked in the Provost's office since approximately 1998. During this time, Dr. Alperin was responsible for the personnel portfolio. She also participated in collective bargaining. Dr. Alperin's knowledge of the areas identified on Plaintiff's Notice are vast and she was adequately prepared to address them.

Plaintiff cherry-picks portions of testimony to support his allegations that Dr. Alperin was not adequately prepared. However, a review of all relevant testimony demonstrates that Dr. Alperin addressed the areas of inquiry identified in Plaintiff's motion. For instance, when asked about Defendant University's policies on blogging, Dr. Alperin testified that Defendant University does not have a policy on blogging. *See* Exhibit "A" at 9:19-21; 10:22-13:3.

Next, when asked about instructions provided to faculty, Dr. Alperin testified in general regarding instructions provided across Defendant University to all faculty. *See id.* at 30:9-32:19. However, as Dr. Alperin noted, deans and individual directors within various colleges and departments provide their own reminders to faculty. Defendant University has a total of 10 colleges, with at least 45 departments that provide instruction regarding the Conflict of Interest/Outside Activity policy in the Collective Bargaining Agreement. Dr. Alperin was able to testify regarding the general instructions provided regarding the policy at issue and was able to speak to documents produced in this case, including instructions given within Plaintiff's department and within the Department of Civil, Environmental and Geomatics Engineering. *See id.* at 30:9-32:19; 45:4-48:8.

Plaintiff further confuses issues by alleging that Dr. Alperin was unprepared because she had not reviewed the assignment and category definitions in over a year. Dr. Alperin testified that the assignment and activity category definitions are related to a faculty member's annual assignment and are completely unrelated to the Conflict of Interest/Outside Activities Policy. *See id.* at 125:12-16; 126:1-128:20. Accordingly, the questions were completely outside the scope of the Notice and Defendant University could not reasonably anticipate such questions.

Similarly, Dr. Alperin provided an explanation for when Defendant University determined Plaintiff's blogging activity was a reportable activity. Dr. Alperin testified that since Plaintiff was asked to submit the form in 2013, Defendant University suspected at that time that Plaintiff's blogging was professional activity requiring him to submit a report. *See id.* at 72:7-73:16. Additionally, this inquiry was outside of the scope of the Notice.

Plaintiff further alleges that Dr. Alperin was unable to answer whether Defendant University was aware of similarly situated faculty members' blogs and whether they had been disciplined. Despite Plaintiff's characterization, Dr. Alperin testified that Plaintiff brought several pages to her attention at her last deposition and she spoke with Dr. Michelle Hawkins, Vice Provost, who followed up with the deans for any questions. *See id.* at 218:23-221:6. Dr. Alperin also confirmed that there were no notices of discipline as none were produced. *Id.*

Finally, Plaintiff alleges that Dr. Alperin did not know how Defendant University explained the Conflict of Interest/Outside Activity Policy to Plaintiff. Dr. Alperin had previously testified regarding instructions given to the Plaintiff. Dr. Alperin testified she was not aware of whether the Dean or Director met with Plaintiff, but that there was a discussion between the Dean and Director. *Id.* at 155:8-14. However, this area is also not identified on the Notice such to

provide Defendant University with adequate notice that Plaintiff intended to inquire about specific conversations between himself and his supervisors.

Defendant University identified the appropriate corporate representative for deposition. Dr. Alperin was adequately prepared for all areas of inquiry reasonably anticipated from Plaintiff's Notice. Accordingly, Plaintiff's Motion should be denied.

Defendant University Should be Granted a Protective Order and Plaintiff Should be Admonished for Abusive Discovery

Although Defendant University met its obligations in producing a corporate representative prepared to address all areas of inquiry listed on the Notice, if the Court is inclined to provide Plaintiff with additional time for further deposition of a 30(b)(6) witness, Defendant University respectfully requests a protective order. Plaintiff's deposition of the corporate representative was cumulative and Plaintiff's counsel was abusive and harassing the witness asking repetitive questions, raising his voice each time, mocking her responses, pointing fingers in her face, and otherwise acting in an unprofessional manner. The Court should watch the video of the deposition in order to truly understand the issues addressed herein. Defendant University is submitting the video as part of this motion and requests the Court review it.

Plaintiff's deposition of the corporate representative on July 31, 2017 was cumulative of questions raised in previous depositions. So far, ten and a half hours to question this witness. Needless to say, the questions are repetitive and it has become obvious when counsel doesn't like an answer, he badgers the witness to try to change it. During the hearing on Plaintiff's Motion for Leave to Take 30(b)(6) Deposition of Defendant University, this Court asked whether the Plaintiff had other topics that would be covered by a 30(b)(6) that Plaintiff would want to cover. *See Exhibit "B."* Rather than address new areas of inquiry or items that had not been addressed at

Dr. Alperin's deposition in her individual capacity, Plaintiff spent the majority of the deposition inquiring into areas already thoroughly covered by Dr. Alperin and other witnesses.

Despite the fact that Dr. Alperin adequately responded to each question raised, Plaintiff's counsel repeatedly asked the same questions to Dr. Alperin, becoming increasingly hostile each time. At one point in the deposition, Plaintiff's counsel began inquiring about the affirmation required of all faculty members when they accept their assignment through F.A.I.R. Dr. Alperin answered the same question repeatedly, but Plaintiff's counsel did not approve of her response. Exhibit "A" at 87:8-94:15. After badgering the witness repeatedly regarding her responses in increasing volumes, counsel for Defendant University was forced to ask Plaintiff's counsel to lower his voice, as he had been yelling at the witness. *Id.* This was not an isolated incident. On many other occasions Plaintiff's counsel repeatedly asked the same question of the witness, badgering her in a naked attempt to obtain a different response. *See* 160:25-165:2; 202:15-208:8; 228:11-21.

Plaintiff's counsel's behavior at this and other depositions is unacceptable. Defendant University and its corporate representative should not be subjected to continued harassment and abuse. Accordingly, if the Court is inclined to consider Plaintiff's Motion to Continue 30(b)(6) Deposition, Defendant University respectfully moves for a protective order, preventing any further deposition time and admonish of Plaintiff's counsel for his inappropriate behavior to prevent reoccurrence at other depositions in the future.

WHEREFORE, Defendant, Florida Atlantic University Board of Trustees a/k/a Florida Atlantic University, respectfully requests that the Court deny Plaintiff's Motion to Continue Rule 30(b)(6) Deposition of Defendant Florida Atlantic University, grant Defendant University a

protective order, admonish Plaintiff's counsel, and to grant such other relief as the Court deems just and appropriate.

Respectfully submitted,

/s/ Holly L. Griffin

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 3, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Holly L. Griffin

Holly L. Griffin

SERVICE LIST

Tracy v. Florida Atlantic University Board of Trustees, et al.

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