Taking Rule 30(b)(6) Corporate Depositions: Strategies for Success

Moderator/Speaker: Walt Auvil

Speaker: Cyrus Mehri

Speaker: Robert Schug

Complaint

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

LAURA W. CAIN,

Plaintiff,

v.

Civil Action No. 09-C-434
Judge _____

REM COMMUNITY OPTIONS, LLC,
a West Virginia corporation,
NATIONAL MENTOR SERVICES, LLC,
and THE MENTOR NETWORK,

Defendants.

COMPLAINT

1. Plaintiff is and at all times relevant hereto has been a resident of Wetzel County, West Virginia.

2. Defendant REM Community Options, LLC, is and at all times relevant hereto has been a corporation organized and existing under the laws of West Virginia, with its principal place of business in Benwood, Marshall County, West Virginia.

3. Upon information and belief, Defendant National Mentor Services, LLC, is a corporation which has ownership interests in Defendant REM Community Options, LLC, and which is legally responsible for the actions of REM Community Options, LLC, as described herein below.

4. Defendant The Mentor Network is, upon information and belief, a corporation which is a wholly owned subsidiary of Defendant REM Community Options, LLC. Upon information and belief, The Mentor Network is legally responsible for the actions of REM Community Options, LLC.

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5. Plaintiff was employed by the Defendants from June, 1998, until on or about December 29, 2008.

6. On December 10, 2007, Plaintiff was in an automobile accident while employed by Defendant and engaged in job duties with Defendants.

7. At the time of Plaintiff's on-the-job injury on December 10, 2007, Plaintiff held the position of Lead Therapeutic Consultant for Defendants. Plaintiff's duties included writing behavioral support plans for mentally retarded, mentally impaired, and developmentally disabled individuals.

8. Plaintiff had been employed in this position as a Lead for approximately four years and had received merit raises during her employment with Defendants in this position.

9. Plaintiff returned to employment after her December 10, 2007, automobile accident. Plaintiff returned to employment almost immediately after her automobile accident on December 10, 2007, but, between December 10, 2007, and July 8, 2008, Plaintiff was required to take time off on occasion for medical treatments and medical tests connected with injuries sustained on December 10, 2007.

10. Plaintiff's employment from December, 2007, until July, 2008, was subject to medical restrictions imposed by her physician in terms of both hours which she was permitted to work and the length of time she was permitted to perform certain job duties, including working on the computer. However, during this period, Defendants failed and refused to accommodate Plaintiff's restrictions and, in fact, required Plaintiff to do extra work over and above her normal work to "make up" for time she had missed.

11. As a direct result of Defendants' failure and refusal to accommodate Plaintiff's

restrictions, Plaintiff was placed off work by her treating physician on July 8, 2008.

12. On July 9, 2009, Defendants demanded that Plaintiff return to her place of employment and complete a variety of tasks which they had provided Plaintiff on a list. These tasks would have directly required Plaintiff to violate the restrictions which she was under from her physician. Plaintiff wrote on the list that she could not do these due to her medical restrictions and returned the list to the Defendants.

13. Upon Plaintiff's return to her home from her interaction with the Defendants at the Defendants' place of business in Sistersville on July 9, 2009, Plaintiff was contacted by her direct supervisor Everett Ross Mason, Program Director. Mason requested that Plaintiff obtain permission from her physician to complete the work duties listed on the documentation presented to the Plaintiff on July 9, 2009. Plaintiff explained that she would present this request to her treating physician but doubted that the physician would alter his work-related restrictions.

14. Plaintiff did present the request of the Defendants that she be permitted to perform the work-related functions set forth in the list, a true and exact copy of which is attached hereto as Exhibit A, which Defendants had presented to Plaintiff on July 9, 2009. The Plaintiff's treating physician refused to alter her job-related restrictions and refused to permit Plaintiff to perform the work described in the attached Exhibit A. From July 8 until December, 2008, the Plaintiff was receiving sick leave from Defendants.

15. Defendants issued to Plaintiff correspondence dated December 23, 2008. A true and exact copy of Defendants' December 23, 2008, correspondence to Plaintiff is attached hereto as Exhibit B, along with a true and exact copy of the envelope with cancellations reflecting the dates of delivery of Exhibit B and the delivery notification slip from the United States Postal

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Service reflecting delivery of Exhibit B.

16. By and through Exhibit C, Plaintiff responded to Defendants' correspondence of December 23, 2008. As reflected in Exhibit C, Plaintiff had been informed that the Defendants considered her to have "voluntarily resigned" as a result of her failure to respond to Exhibit B within the time frame Defendants provided. By and through Exhibit C, Plaintiff explained that she did not quit or voluntarily resign her position.

17. At some point before Plaintiff was released to return to employment in December, 2008, Plaintiff's position with Defendants was posted by and through Exhibit D, a true and exact copy of which is attached hereto.

18. In January, 2009, after Plaintiff requested permission to return to her previous position, a second posting was issued by Defendants, a true and exact copy of which is attached hereto as Exhibit E. The second posting limited applications to only persons currently employed by Defendants by and through the designation of the position as a "internal position opening."

19. Upon information and belief, Defendants' withdrawal of the position announcement set forth in Exhibit D and replacement of the same with the position announcement set forth in Exhibit B was an effort by Defendants to prevent the Plaintiff from successfully applying to return to her old position.

20. The actions of the Defendants, and each of them, in terminating the Plaintiff, and refusing to return the Plaintiff to her previous position, constitute discrimination against the Plaintiff due to the Plaintiff's filing of a workers' compensation claim, all of which is in violation of West Virginia Code § 23-5A-1.

21. The actions of the Defendants, and each of them, in terminating the Plaintiff, and

refusing to return the Plaintiff to her previous position, constitute discrimination against the Plaintiff due to the Plaintiff's filing of a handicap discrimination, all of which is in violation of West Virginia Code § 5-11 -1, et seq.

22. The actions of the Defendants, and each of them, in terminating the Plaintiff constitute discrimination against the Plaintiff based upon Plaintiff's record of disability in violation of West Virginia Code § 5-11 -1, et seq.

23. The actions of the Defendants in terminating the Plaintiff and refusing to allow the Plaintiff to return to her position are based upon Defendants' perception of the Plaintiff as handicapped in violation of West Virginia Code § 5-11 -1, et seq.

WHEREFORE Plaintiff demands against the Defendants, and each of them, damages for mental and emotional distress, punitive damages, damages for lost wages, the value of lost benefits, injunctive relief including, but not limited to, reinstatement, and such other and further relief as may upon the premises be appropriate.

LAURA W. CAIN,
Plaintiff by counsel,

Respectfully submitted:

WALT AUVIL
Counsel for Plaintiff
State Bar No. 190

Rusen & Auvil, PLLC
1208 Market Street
Parkersburg, WV 26101
(304) 485-3058

Complaint 4

STATE OF WEST VIRGINIA,

COUNTY OF WOOD, TO-WIT:

LAURA W. CAIN, the Plaintiff named in the foregoing and hereto annexed COMPLAINT, being first duly sworn, deposes and says that the facts and allegations therein contained are true, except insofar as they are therein stated to be upon information, and insofar as they are therein stated to be upon information, she believes them to be true.

LAURA CAIN

Taken, subscribed and sworn to before me this 29th day of August, 2009.

My commission expires: Nov 14, 2011.

OFFICIAL SEAL
STATE OF WEST VIRGINIA
NOTARY PUBLIC
Bobbie Hayes
651 Fourth Street
New Martinsville, WV 26155
My Commission Expires November 14, 2011

NOTARY PUBLIC

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Laura -

Missing Bi-Weeklys

PE 5-24-08
PE 6-7-08
PE 6-21-08
PE 7-5-08 Short Term Disability

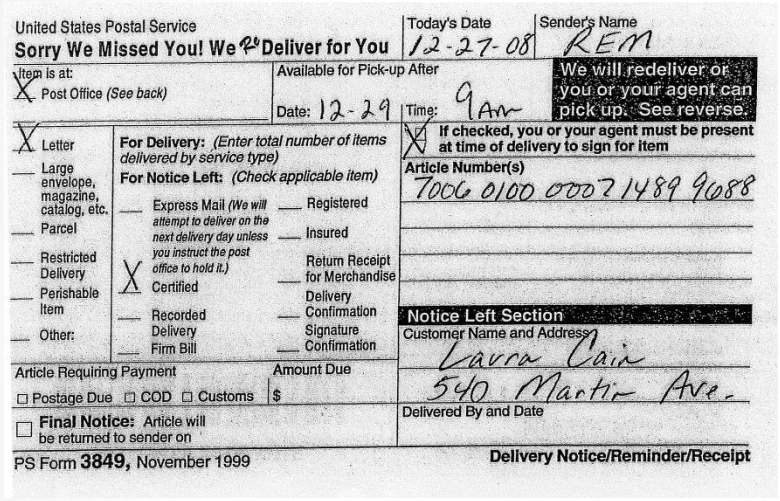
missing billing
7-1, 7-2, 7-3, 7-4, 7-5
7-7? 7-8?

We need the documents above before you go on leave.

Thx
Billie 7-8-08

EXHIBIT
tabbies
A

Complaint 5



United States Postal Service
Sorry We Missed You! We Tried to Deliver for You

Today's Date: 12-27-08
Sender's Name: REM

Item is at:
X Post Office *(See back)*

Available for Pick-up After
Date: 12-29
Time: 9 Am

We will redeliver or you or your agent can pick up. See reverse.

X If checked, you or your agent must be present at time of delivery to sign for item

For Delivery: *(Enter total number of items delivered by service type)*
For Notice Left: *(Check applicable item)*

- X Letter
- ___ Large envelope, magazine, catalog, etc.
- ___ Parcel
- ___ Restricted Delivery
- ___ Perishable Item
- ___ Other:

- ___ Express Mail *(We will attempt to deliver on the next delivery day unless you instruct the post office to hold it.)*
- X Certified
- ___ Recorded Delivery
- ___ Firm Bill
- ___ Registered
- ___ Insured
- ___ Return Receipt for Merchandise
- ___ Delivery Confirmation
- ___ Signature Confirmation

Article Number(s)
7006 0100 0002 1489 9688

Notice Left Section
Customer Name and Address
Laura Cain
540 Martin Ave.

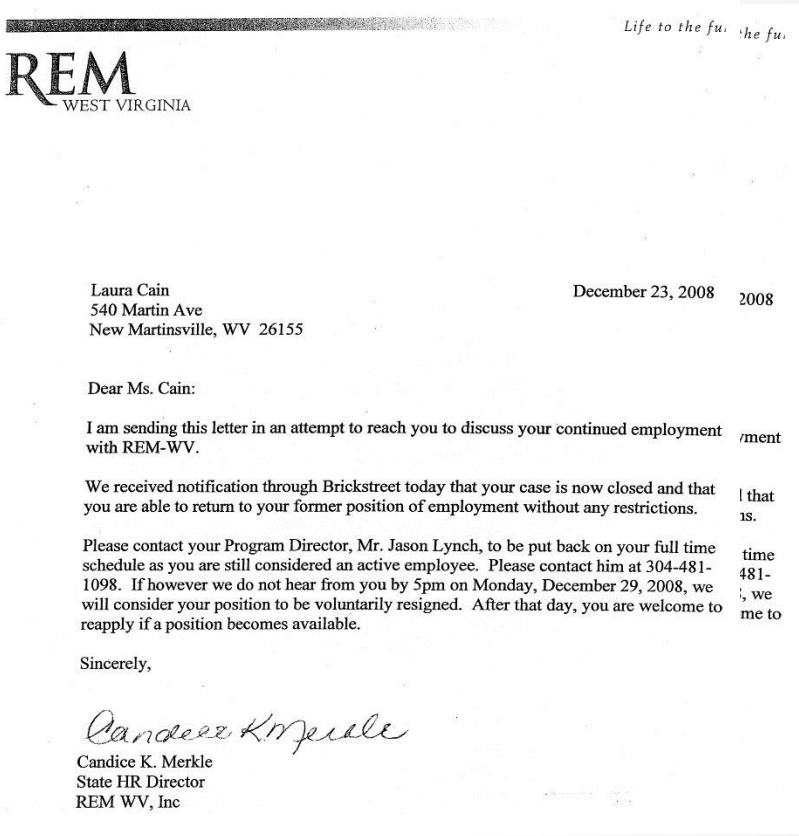
Article Requiring Payment
☐ Postage Due ☐ COD ☐ Customs
Amount Due
$

☐ **Final Notice:** Article will be returned to sender on

Delivered By and Date

PS Form **3849,** November 1999
Delivery Notice/Reminder/Receipt

EXHIBIT
tabbies
B



REM
WEST VIRGINIA

Life to the fu... ...he fu...

Laura Cain
540 Martin Ave
New Martinsville, WV 26155

December 23, 2008

Dear Ms. Cain:

I am sending this letter in an attempt to reach you to discuss your continued employment with REM-WV.

We received notification through Brickstreet today that your case is now closed and that you are able to return to your former position of employment without any restrictions.

Please contact your Program Director, Mr. Jason Lynch, to be put back on your full time schedule as you are still considered an active employee. Please contact him at 304-481-1098. If however we do not hear from you by 5pm on Monday, December 29, 2008, we will consider your position to be voluntarily resigned. After that day, you are welcome to reapply if a position becomes available.

Sincerely,

Candice K. Merkle
State HR Director
REM WV, Inc

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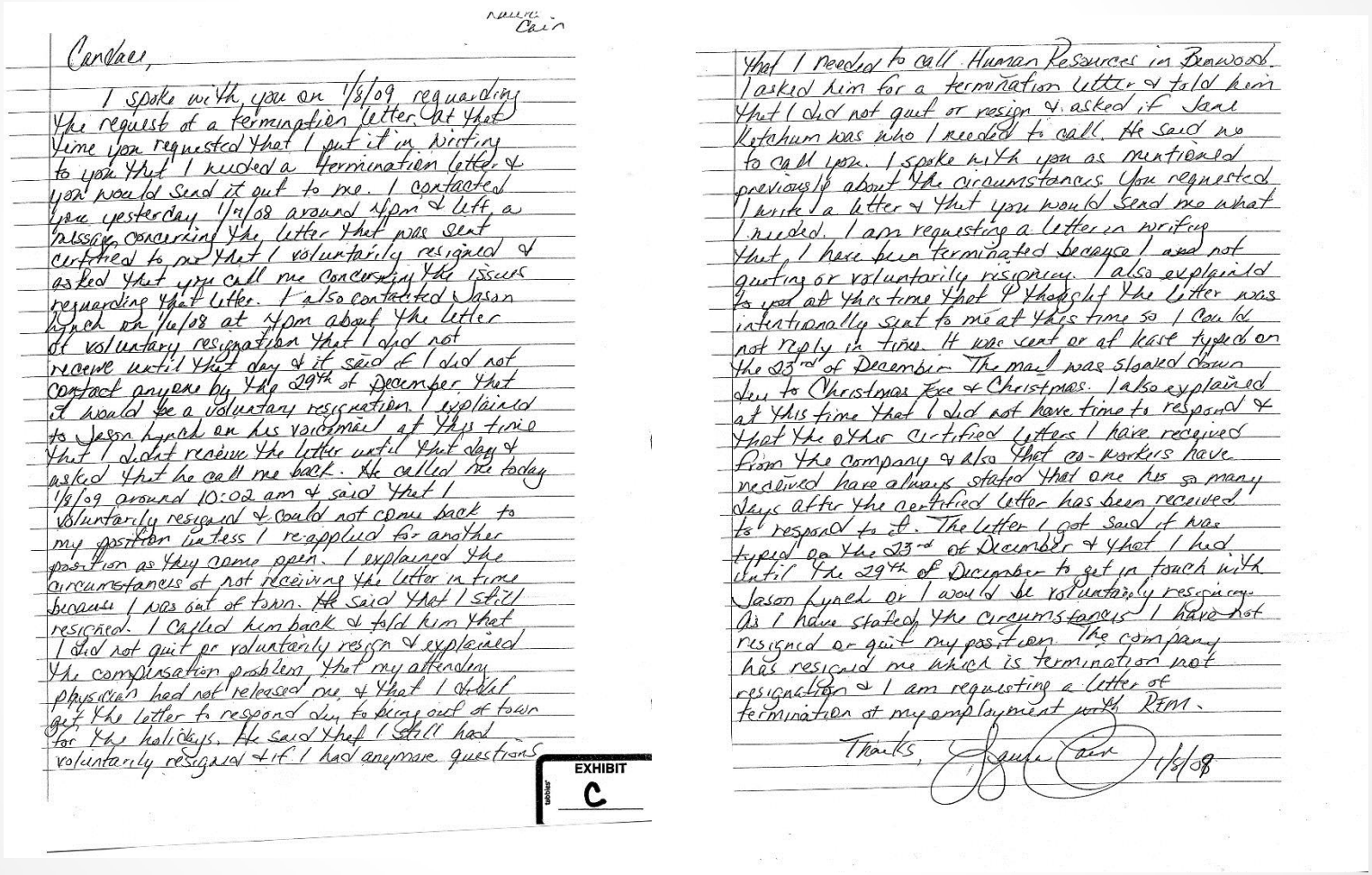

Name: Cain

Carlos,

I spoke with you on 1/8/09 requesting the request of a termination letter at that time you requested that I put it in writing to you that I needed a termination letter & you would send it out to me. I contacted you yesterday 1/9/08 around 4pm & left a message concerning the letter that was sent certified to me that I voluntarily resigned & asked that you call me concerning the issues regarding that letter. I also contacted Jason Lynch on 1/6/08 at 4pm about the letter of voluntary resignation that I did not receive until that day & it said & I did not contact anyone by the 29th of December that it would be a voluntary resignation. I explained to Jason Lynch on his voicemail at this time that I didn't receive the letter until that day & asked that he call me back. He called me today 1/8/09 around 10:02 am & said that I voluntarily resigned & could not come back to my position unless I re-applied for another position as they come open. I explained the circumstances of not receiving the letter in time because I was out of town. He said that I still resigned. I called him back & told him that I did not quit or voluntarily resign & explained the compensation problem that my attending physician had not released me & that I didn't get the letter to respond due to being out of town for the holidays. He said that I still had voluntarily resigned & if I had anymore questions that I needed to call Human Resources in Brentwood. I asked him for a termination letter & told him that I did not quit or resign & asked if Jane Ketchum was who I needed to call. He said no to call you. I spoke with you as mentioned previously about the circumstances. You requested I write a letter & that you would send me what I needed. I am requesting a letter in writing that I have been terminated because I did not quit or voluntarily resign. I also explained to you at this time that I thought the letter was intentionally sent to me at this time so I could not reply in time. It was sent or at least typed on the 23rd of December. The mail was slowed down due to Christmas Eve & Christmas. I also explained at this time that I did not have time to respond & that the other certified letters I have received from the company & also that co-workers have received have always stated that one has so many days after the certified letter has been received to respond to it. The letter I got said it was typed on the 23rd of December & that I had until the 29th of December to get in touch with Jason Lynch or I would be voluntarily resigning. As I have stated, the circumstances I have not resigned or quit my position. The company has resigned me which is termination not resignation & I am requesting a letter of termination of my employment with RSM.

Thanks, Jaquelin Cain 1/8/09

EXHIBIT C

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POSITION OPENING

LEAD THERAPEUTIC CONSULTANT

REM-Community Options is seeking a dedicated individual with a Bachelor's Degree in a Human Services Field to provide services to individuals served in the Tyler and Wetzel County area. The individual in this full-time position will develop training and support plans for people who may have developmental disabilities.

Please send letters of interest/resumes' to: REM-Community Options
Lead TC Position
244 South Wells Street
Sistersville WV 26175

DEADLINE TO APPLY: 2/4/09

INTERNAL POSITION OPENING

LEAD THERAPEUTIC CONSULTANT
Revised 1/28/09

REM-Community Options is seeking a dedicated individual with a Bachelor's Degree in a Human Services Field to provide services to individuals served in the Tyler and Wetzel County area. The individual in this full-time position will develop training and support plans for people who may have developmental disabilities.

Please send letters of interest/resumes' to: REM-Community Options
Lead TC Position
244 South Wells Street
Sistersville WV 26175

DEADLINE TO APPLY: 2/4/09

Defendants' Answer to Complaint

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

LAURA W. CAIN,

Plaintiff,

v. **Civil Action No. 09-C-434**

REM COMMUNITY OPTIONS, LLC,
A West Virginia limited liability corporation,
NATIONAL MENTOR SERVICES, LLC,
d/b/a THE MENTOR NETWORK,

Defendants.

DEFENDANTS' ANSWER TO COMPLAINT

Defendants REM Community Options, LLC, National Mentor Services, LLC, d/b/a The Mentor Network (collectively "Defendants"),[1] by and through their undersigned counsel, Bryan R. Cokeley and Vanessa L. Goddard, of the law firm of Steptoe & Johnson PLLC, he reby respond to Plaintiff's Complaint as follows:

ANSWER

In specific response to the allegations in the Complaint, Defendants state as follows:

1. Defendants admit the allegations contained in paragraph 1 of Plaintiff's Complaint.

2. Defendants admit the allegations contained in paragraph 2 of Plaintiff's Complaint.

3. Defendants admit the allegations contained in paragraph 3 of Plaintiff's Complaint.

[1] Defendants have modified the caption of this matter to accurately reflect the true nature of the Defendants.

4. Defendants deny the allegations contained in paragraph 4 of Plaintiff's Complaint.

5. Defendants admit that Plaintiff was employed by REM Community Options, LLC from approximately January of 1998 to April 2000 and was rehired on July 8, 2002, until on or about December 29, 2008, and deny the remaining allegations contained in paragraph 5 of Plaintiff's Complaint.

6. Defendants admit the allegations contained in paragraph 6 of Plaintiff's Complaint.

7. Defendants clarify that Plaintiff held the position of Lead Therapeutic Consultant/QMRP and admit the allegations contained in paragraph 7 of Plaintiff's Complaint.

8. Defendants admit that Plaintiff was promoted to the position of Therapeutic Consultant/QMRP approximately four years ago, that she received "merit" raises during her employment, and deny the remaining allegations contained in paragraph 8 of Plaintiff's Complaint.

9. Defendants admit that Plaintiff returned to work following her December 10, 2007, automobile accident, admit that Plaintiff took time off on occasion between December 2007 and July of 2008, and are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 9 of Plaintiff's Complaint.

10. Defendants admit that Plaintiff's doctor placed job limitations on her from June 9, 2008, to September 9, 2008, restricting her from lifting more than ten pounds, from working more than 40 hours per week, and specifying ten minute breaks after each half hour on the computer, although she could perform the duty of prolonged sitting at a desk. Defendants admit

Defendants' Answer to Complaint 2

that Plaintiff was asked to complete her late bi-weekly attendace calendars so that her employer had accurate payroll and benefit information as she began her leave of absence. Plaintiff was also requested to complete her billing, but upon her refusal, she was not required to do so. Defendants deny the remaining allegations contained in paragraph 10 of Plaintiff's Complaint.

11. Defendants admit that Plaintiff's treating physician placed her off work on July 8, 2008, and deny the remaining allegations contained in paragraph 11 of Plaintiff's Complaint.

12. Defendants incorporate their response to Paragraph 10 herein, admit that Plaintiff was provided a list of her missing bi-weekly attendance calendars and billings which she was asked to complete and deny the remaining allegations contained in paragraph 12 of Plaintiff's Complaint.

13. Defendants admit that Plaintiff was requested to complete her bi-weekly attendance calendars and billings and that Plaintiff was asked to contact her doctor to see if she could do her billings and deny the remaining allegations contained in paragraph 13 of Plaintiff's Complaint.

14. Defendants admit that Plaintiff received sick leave at the beginning of her leave of absence on July 8, 2008, and assert that she was placed on leave without pay in approximately September 2008 when she was placed on workers' compensation leave, and are without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 14 of Plaintiff's Complaint.

15. Defendants state that the documents at Exhibit B speak for themselves and admit the remaining allegations contained in paragraph 15 of Plaintiff's Complaint.

16. Defendants state that the document at Exhibit C speaks for itself and deny the remaining allegations contained in paragraph 16 of Plaintiff's Complaint.

17. Defendants state that the document at Exhibit D speaks for itself and deny the remaining allegations contained in paragraph 17 of Plaintiff's Complaint.

18. Defendants state that the document at Exhibit E speaks for itself and deny the remaining allegations contained in paragraph 18 of Plaintiff's Complaint.

19. Defendants deny the allegations contained in paragraph 19 of Plaintiff's Complaint.

20. Paragraph 20 of Plaintiff's Complaint contains a legal conclusion to which no responsive pleading is necessary, but to the extent that a response is required, Defendants deny the factual allegations and legal conclusions contained in paragraph 20 of Plaintiff's Complaint.

21. Paragraph 21 of Plaintiff's Complaint contains a legal conclusion to which no responsive pleading is necessary, but to the extent that a response is required, Defendants deny the factual allegations and legal conclusions contained in paragraph 21 of Plaintiff's Complaint.

22. Paragraph 22 of Plaintiff's Complaint contains a legal conclusion to which no responsive pleading is necessary, but to the extent that a response is required, Defendants deny the factual allegations and legal conclusions contained in paragraph 22 of Plaintiff's Complaint.

23. Paragraph 23 of Plaintiff's Complaint contains a legal conclusion to which no responsive pleading is necessary, but to the extent that a response is required, Defendants deny the factual allegations and legal conclusions contained in paragraph 23 of Plaintiff's Complaint.

Defendants deny any remaining allegations not specifically admitted herein.

Defendants' Answer to Complaint 3

FIRST DEFENSE

Some or all of Plaintiff's allegations fail to state a claim upon which relief can be granted.

SECOND DEFENSE

Defendant acted at all times in good faith and on the basis of legitimate, non-discriminatory and non-retaliatory reasons toward Plaintiff.

THIRD DEFENSE

Notwithstanding Plaintiff's allegations of illegal animus, Defendant nevertheless would have made the same employment decisions with regard to Plaintiff.

FOURTH DEFENSE

Plaintiff's claim for damages is barred, in whole or in part, due to her failure to mitigate her damages.

FIFTH DEFENSE

Plaintiff's damages, if any, may be limited, in whole or in part, by the doctrine of after-acquired evidence.

SIXTH DEFENSE

Plaintiff's Complaint may be barred, in whole or in part, because Defendants are not the proximate cause of damages, if any, allegedly suffered by Plaintiff.

SEVENTH DEFENSE

Plaintiff is not entitled to punitive damages because Defendants made good faith efforts to comply with the law and their actions were not arbitrary, capricious, or wilful, wanton, and reckless.

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EIGHTH DEFENSE

In the event of a damages award to the Plaintiff, Defendants are entitled to an offset for all interim earnings.

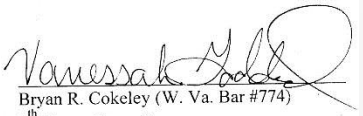
NINTH DEFENSE

Defendants reserve the right to assert such other affirmative defenses as may be available to it under the law and the evidence.

WHEREFORE, Defendants request judgment as follows:

1. That the Complaint be dismissed in all aspects;
2. That they be granted their costs and fees for this action, including reasonable attorney fees; and,
3. That they be granted such other and further relief as the Court may deem proper.

Dated this 21st day of October, 2009.



STEPTOE & JOHNSON PLLC
Of Counsel

Bryan R. Cokeley (W. Va. Bar #774)
7th Floor, Chase Tower
P. O. Box 1588
Charleston, WV 25326-1588

Vanessa L. Goddard (W. Va. Bar #7447)
United Center, Suite 400
1085 Van Voorhis Road
P.O. Box 1616
Morgantown, WV 26507-1616
(304) 290-0818

Attorneys for Defendants

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Defendants' Answer to Complaint 4

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

LAURA W. CAIN,

Plaintiff,

v. **Civil Action No. 09-C-434**

REM COMMUNITY OPTIONS, LLC,
A West Virginia limited liability corporation,
NATIONAL MENTOR SERVICES, LLC,
d/b/a THE MENTOR NETWORK,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing DEFENDANTS' ANSWER TO COMPLAINT was served on counsel listed below by mail in a properly addressed envelope, postage pre-paid, this 21st day of October, 2009.

Walt Auvil, Esq.
Rusen & Auvil, PLLC
1208 Market Street
Parkersburg, WV 26101
Counsel for Plaintiff

Vanessa L. Goddard (WVSB 7447)

151560.00131

Notice of 30(b)(7) Deposition

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

LAURA W. CAIN,

Plaintiff,

v. **Civil Action No. 09-C-434**

REM COMMUNITY OPTIONS, LLC,
a West Virginia corporation,
NATIONAL MENTOR SERVICES, LLC,
and THE MENTOR NETWORK,

Defendants.

PLAINTIFF'S FIRST NOTICE OF VIDEOTAPED 30(b)(7) DEPOSITION

Comes now the Plaintiff by and through counsel, and, pursuant to Rule 30(b)(7) of the West Virginia Rules of Civil Procedure, do hereby respectfully request that Defendants, designate one or more officers, directors or managing agents or other persons to testify on the matters designated below. The person or persons so designated shall testify on behalf of REM Community Options, LLC, to matters reasonably known or reasonably available to the above-named Defendants, on the 20th day of January, 2010, at the hour of 10:00 o'clock a.m., at Rusen & Auvil, PLLC, 1208 Market Street, Parkersburg, WV, 26101, and give binding testimony with regard to the following subjects:

1. All facts upon which Defendants base their denial of the allegations of Paragraph 4 of the Complaint.

2. All facts upon which Defendants base their denial of the allegations of Paragraph 5 of the Complaint to the extent the same are denied:

> "5. Plaintiff was employed by the Defendants from June, 1998, until on or about December 29, 2008."
>
> "Defendants admit that Plaintiff was employed by REM Community Options, LLC from approximately January of 1998 to April 2000 and was rehired on July 8, 2002, until on or about December 29, 2008, and deny the remaining allegations contained in paragraph 5 of Plaintiff's Complaint."

3. All facts upon which Defendants base their denial of the allegations of Paragraph 8 of the Complaint to the extent the same are denied:

> "8. Plaintiff had been employed in this position as a Lead for approximately four years and had received merit raises during her employment with Defendants in this position."
>
> "Defendants admit that Plaintiff was promoted to the position of Therapeutic Consultant/QMRP approximately four years ago, that she received 'merit' raises during her employment, and deny the remaining allegations contained in paragraph 8 of Plaintiff's Complaint."

4. All facts upon which Defendants base their denial of the allegations of Paragraph 10 of the Complaint to the extent the same are denied:

> "10. Plaintiff's employment from December, 2007, until July, 2008, was subject to medical restrictions imposed by her physician in terms of both hours which she was permitted to work and the length of time she was permitted to perform certain job duties, including working on the computer. However, during this period, Defendants failed and refused to accommodate Plaintiff's restrictions and, in fact, required Plaintiff to do extra work over and above her normal work to "make up" for time she had missed."
>
> "Defendants admit that Plaintiff's doctor placed job limitations on her from June 9, 2008, to September 9, 2008, restricting her from lifting more than ten pounds, from working more than 40 hours per week, and specifying ten minute breaks after each half hour on the computer, although she could perform the duty of prolonged sitting at a desk. Defendants admit that Plaintiff was asked to complete her late bi-weekly attendance calendars so that her employer had accurate payroll and benefit information as she began her leave of absence. Plaintiff was also requested to complete her billing, but upon her refusal, she was not required to do so. Defendants deny the remaining allegations contained in paragraph 10 of Plaintiff's complaint."

5. All facts upon which Defendants base their denial of the allegations of Paragraph 11 of the Complaint.

6. All facts upon which Defendants base their denial of the allegations of Paragraph 12 of the Complaint to the extent the same are denied:

Notice of 30(b)(7) Deposition

"12. On July 9, 2009, Defendants demanded that Plaintiff return to her place of employment and complete a variety of tasks which they had provided Plaintiff on a list. These tasks would have directly required Plaintiff to violate the restrictions which she was under from her physician. Plaintiff wrote on the list that she could not do these due to her medical restrictions and returned the list to the Defendants."

"Defendants incorporate their response to Paragraph 10 (sic) herein, admit that Plaintiff was provided a list of her missing bi-weekly attendance calendars and billings which she was asked to complete and deny the remaining allegations contained in paragraph 12 of Plaintiff's Complaint."

7. All facts upon which Defendants base their denial of the allegations of Paragraph 13 of the Complaint to the extent the same are denied:

"13. Upon Plaintiff's return to her home from her interaction with the Defendants at the Defendants' place of business in Sistersville on July 9, 2009, Plaintiff was contacted by her direct supervisor Everett Ross Mason, Program Director. Mason requested that Plaintiff obtain permission from her physician to complete the work duties listed on the documentation presented to the Plaintiff on July 9, 2009. Plaintiff explained that she would present this request to her treating physician but doubted that the physician would alter his work-related restrictions."

"Defendants admit that Plaintiff was required to complete her bi-weekly attendance calendars and billings and that Plaintiff was asked to contact her doctor to see if she could do her billings and deny the remaining allegations contained in paragraph 13 of Plaintiff's Complaint."

8. All facts upon which Defendants base their denial of the allegations of Paragraph 16 of the Complaint to the extent the same are denied:

"16. By and through Exhibit C, Plaintiff responded to Defendants' correspondence of December 23, 2008. As reflected in Exhibit C, Plaintiff had been informed that the Defendants considered her to have "voluntarily resigned" as a result of her failure to respond to Exhibit B within the time frame Defendants provided. By and through Exhibit C, Plaintiff explained that she did not quit or voluntarily resign her position."

"Defendants state that the document as Exhibit C speaks for itself and deny the remaining allegations contained in paragraph 16 of Plaintiff's Complaint."

9. All facts upon which Defendants base their denial of the allegations of Paragraph 17 of the Complaint to the extent the same are denied:

"17. At some point before Plaintiff was released to return to employment in December, 2008, Plaintiff's position with Defendants was posted by and through Exhibit D, a true and exact copy of which is attached hereto."

"Defendants state that the document as Exhibit D speaks for itself and deny the remaining allegations contained in paragraph 17 of Plaintiff's Complaint."

10. All facts upon which Defendants base their denial of the allegations of Paragraph 18 of the Complaint to the extent the same are denied:

"18. In January, 2009, after Plaintiff requested permission to return to her previous position, a second posting was issued by Defendants, a true and exact copy of which is attached hereto as Exhibit E. The second posting limited applications to only persons currently employed by Defendants by and through the designation of the position as a "internal position opening."

"Defendants state that the document as Exhibit E speaks for itself and deny the remaining allegations contained in paragraph 18 of Plaintiff's Complaint."

11. All facts upon which Defendants base their denial of the allegations of Paragraph 19 of the Complaint.

12. All facts upon which Defendants base their allegations as set forth at their Second Defense that:

"Defendant acted at all times in good faith and on the basis of legitimate, non-discriminatory and non-retaliatory reasons toward Plaintiff."

13. All facts upon which Defendants base their allegations as set forth at their Third Defense that:

"Notwithstanding Plaintiff's allegations of illegal animus, Defendant nevertheless would have made the same employment decisions with regard to Plaintiff."

14. All facts upon which Defendants base their allegations as set forth at their Fourth

Notice of 30(b)(7) Deposition

Defense that:

"Plaintiff's claim for damages is barred, in whole or in part, due to her failure to mitigate her damages."

15. All facts upon which Defendants base their allegations as set forth at their Sixth

Defense that:

"Plaintiff's Complaint may be barred, in whole or in part, because Defendants are not the proximate cause of damages, if any, allegedly suffered by Plaintiff."

LAURA W. CAIN,
Plaintiff by Counsel,

Respectfully Submitted:

_____
WALT AUVIL
Counsel for Plaintiff
State Bar No. 190

Rusen & Auvil, PLLC
1208 Market Street
Parkersburg, WV
(304) 485-3058

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

LAURA W. CAIN,

Plaintiff,

v. **Civil Action No. 09-C-434**

REM COMMUNITY OPTIONS, LLC,
a West Virginia corporation,
NATIONAL MENTOR SERVICES, LLC,
and THE MENTOR NETWORK,

Defendants.

CERTIFICATE OF SERVICE

The undersigned counsel for the Plaintiff hereby certified that on the ___ day of November, 2009, he served the foregoing and hereto annexed **PLAINTIFF'S FIRST NOTICE OF VIDEOTAPED 30(b)(7) DEPOSITION** upon Vanessa L. Goddard, counsel for Defendants, by depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

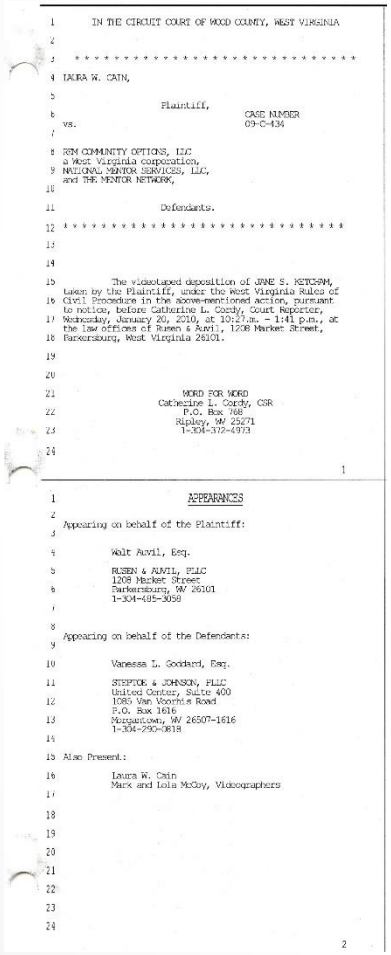
Vanessa Goddard
Steptoe & Johnson, PLLC
United Center, Suite 400
1085 Van Voorhis Road
P.O. Box 1616
Morgantown, WV 26507-1616

_____
WALT AUVIL
Counsel for Plaintiff
State Bar No. 190

Rusen & Auvil, PLLC
1208 Market Street
Parkersburg, WV
(304) 485-3058

30(b)(7) Deposition - Video 1

30(b)(7) Deposition – Transcript I



IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

* *

LAURA W. CAIN,

Plaintiff,

vs. CASE NUMBER 09-C-434

RSM COMMUNITY OPTIONS, LLC a West Virginia corporation, NATIONAL MENTOR SERVICES, LLC, and THE MENTOR NETWORK,

Defendants.

* *

The videotaped deposition of JANE S. KETCHAM, taken by the Plaintiff, under the West Virginia Rules of Civil Procedure in the above-mentioned action, pursuant to notice, before Catherine L. Cordy, Court Reporter, Wednesday, January 20, 2010, at 10:17a.m. - 1:41 p.m., at the law offices of Rusen & Auvil, 1208 Market Street, Parkersburg, West Virginia 26101.

WORD FOR WORD
Catherine L. Cordy, CSR
P.O. Box 768
Ripley, WV 25271
1-304-372-4973

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APPEARANCES

Appearing on behalf of the Plaintiff:

Walt Auvil, Esq.

RUSEN & AUVIL, PLLC
1208 Market Street
Parkersburg, WV 26101
1-304-485-3058

Appearing on behalf of the Defendants:

Vanessa L. Goddard, Esq.

STEPTOE & JOHNSON, PLLC
United Center, Suite 400
1085 Van Voorhis Road
P.O. Box 1616
Morgantown, WV 26507-1616
1-304-290-0618

Also Present:

Laura W. Cain
Mark and Lola McCoy, Videographers

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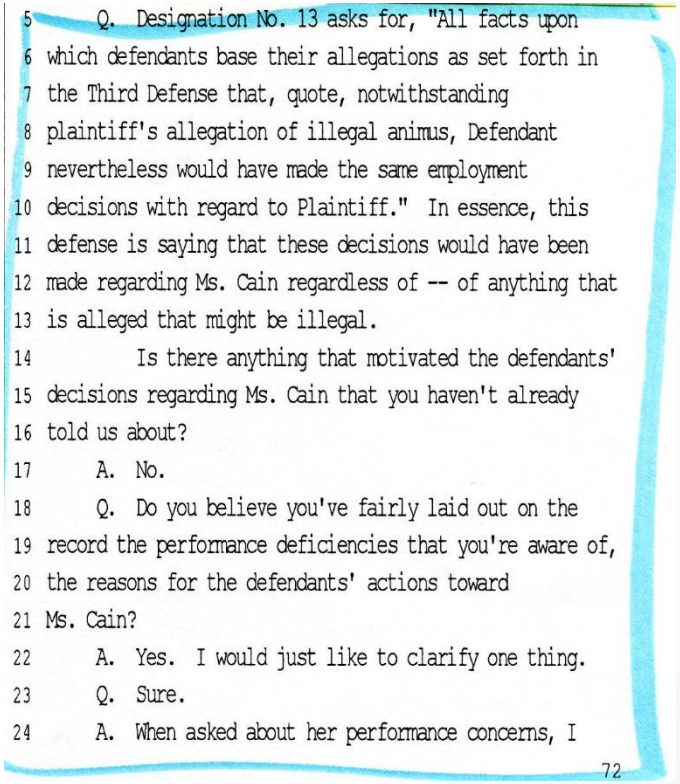

Q. Designation No. 13 asks for, "All facts upon which defendants base their allegations as set forth in the Third Defense that, quote, notwithstanding plaintiff's allegation of illegal animus, Defendant nevertheless would have made the same employment decisions with regard to Plaintiff." In essence, this defense is saying that these decisions would have been made regarding Ms. Cain regardless of -- of anything that is alleged that might be illegal.

Is there anything that motivated the defendants' decisions regarding Ms. Cain that you haven't already told us about?

A. No.

Q. Do you believe you've fairly laid out on the record the performance deficiencies that you're aware of, the reasons for the defendants' actions toward Ms. Cain?

A. Yes. I would just like to clarify one thing.

Q. Sure.

A. When asked about her performance concerns, I

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30(b)(7) Deposition - Video 2

30(b)(7) Deposition – Transcript 2

Q. Okay.
A. She did not return from her leave.
Q. So none of these deficiencies, whatever they may have been, none of those had any effect on terms of the defendants' decision to terminate her?
A. Correct.
Q. Nor did it have any effect on the defendants' decision not to allow her to return?
A. Correct.
What we had intended to do was deal with these performance issues upon her return.
Q. And that would have been on the progressive system that you talked about?
A. Yes.
Q. Okay. Designation 14 asks for, "All facts upon which defendants base their allegations as set forth in the Fourth Defense that plaintiff's claim for damages in bar-" -- "is barred in whole or in part due to her failure to mitigate her damages." Do you know what it means to mitigate damages?
A. Yes.

Q. Are there any other facts that the defendant bases its contention that -- upon which the defendant bases its contention that Ms. Cain didn't do what she could have done to possibly mitigate her damages?
A. To my knowledge, she didn't reapply with REM.
Q. Would she have been eligible to be rehired?
A. She certainly could have been eligible to be rehired. She did -- she -- she was not terminated for any performance or behavior that would have put her in the do-not-rehire category.
Q. There would have been no reason for her to be put in that category?

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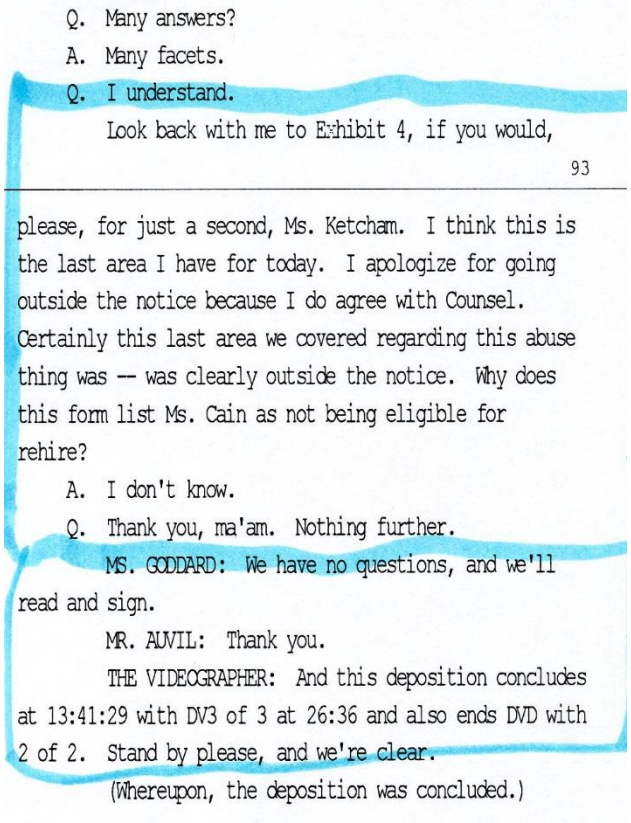
A. No.
The question would be what position was available.

30(b)(7) Deposition - Video 3

30(b)(7) Deposition – Transcript 3



Q. Many answers?
A. Many facets.
Q. I understand.
Look back with me to Exhibit 4, if you would,

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please, for just a second, Ms. Ketcham. I think this is the last area I have for today. I apologize for going outside the notice because I do agree with Counsel. Certainly this last area we covered regarding this abuse thing was -- was clearly outside the notice. Why does this form list Ms. Cain as not being eligible for rehire?
A. I don't know.
Q. Thank you, ma'am. Nothing further.
MS. GODDARD: We have no questions, and we'll read and sign.
MR. AUVIL: Thank you.
THE VIDEOGRAPHER: And this deposition concludes at 13:41:29 with DV3 of 3 at 26:36 and also ends DVD with 2 of 2. Stand by please, and we're clear.
(Whereupon, the deposition was concluded.)

Trial

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

BEFORE THE HONORABLE J.D. BEANE

* *

LAURA W. CAIN,

Plaintiff,

vs Case No. 09-C-434

REM COMMUNITY OPTIONS, LLC,

Defendant.

* *

COUNSEL:

Walt Auvil, Counsel for Plaintiff
Rusen & Auvil
1208 Market Street
Parkersburg, WV 26101

Brian R. Cokeley, Counsel for Defendant
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Vanessa Goddard, Esquire
Steptoe & Johnson
United Center, Suite 400
1085 Van Voorhis Road
PO Box 1616
Morgantown, WV 26507-1616

ALSO PRESENT:

Laura W. Cain, Plaintiff

Ross Mason, REM Community Options, LLC

COURT REPORTER:

Stacy Harlow, Certified Court Reporter

Trial 2

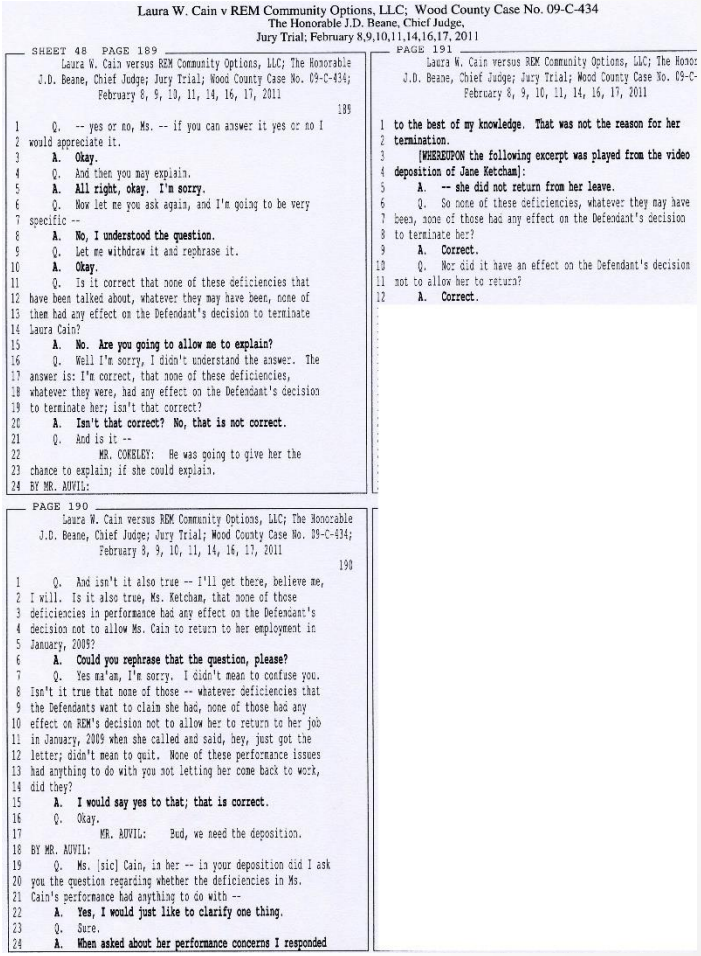
Q. All right, with regard to whether any of these issues, whether she turned in documents, she didn't turn in documents; whether she was where she said or wasn't where she said; whether she applied for another job and wasn't happy about it; even if any -- all of that was true, isn't it, in fact, Ms. Ketcham, that none of that had anything whatsoever to do with REM terminating her job?

[Pause]

A. Laura Cain did not return --

Q. Can you answer that question --

A. I'm getting there.



Laura W. Cain v REM Community Options, LLC; Wood County Case No. 09-C-434
The Honorable J.D. Beane, Chief Judge,
Jury Trial; February 8,9,10,11,14,16,17, 2011

SHEET 48 PAGE 189

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Q. -- yes or no, Ms. -- if you can answer it yes or no I would appreciate it.
A. Okay.
Q. And then you may explain.
A. All right, okay. I'm sorry.
Q. Now let me you ask again, and I'm going to be very specific --
A. No, I understood the question.
Q. Let me withdraw it and rephrase it.
A. Okay.
Q. Is it correct that none of these deficiencies that have been talked about, whatever they may have been, none of them had any effect on the Defendant's decision to terminate Laura Cain?
A. No. Are you going to allow me to explain?
Q. Well I'm sorry, I didn't understand the answer. The answer is: I'm correct, that none of these deficiencies, whatever they were, had any effect on the Defendant's decision to terminate her; isn't that correct?
A. Isn't that correct? No, that is not correct.
Q. And is it --
MR. COKELEY: He was going to give her the chance to explain; if she could explain.
BY MR. AUVIL:

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Q. And isn't it also true -- I'll get there, believe me, I will. Is it also true, Ms. Ketcham, that none of those deficiencies in performance had any effect on the Defendant's decision not to allow Ms. Cain to return to her employment in January, 2009?
A. Could you rephrase that the question, please?
Q. Yes ma'am, I'm sorry. I didn't mean to confuse you. Isn't it true that none of those -- whatever deficiencies that the Defendants want to claim she had, none of those had any effect on REM's decision not to allow her to return to her job in January, 2009 when she called and said, hey, just got the letter; didn't mean to quit. None of these performance issues had anything to do with you not letting her come back to work, did they?
A. I would say yes to that; that is correct.
Q. Okay.
MR. AUVIL: Bud, we need the deposition.
BY MR. AUVIL:
Q. Ms. [sic] Cain, in her -- in your deposition did I ask you the question regarding whether the deficiencies in Ms. Cain's performance had anything to do with --
A. Yes, I would just like to clarify one thing.
Q. Sure.
A. When asked about her performance concerns I responded

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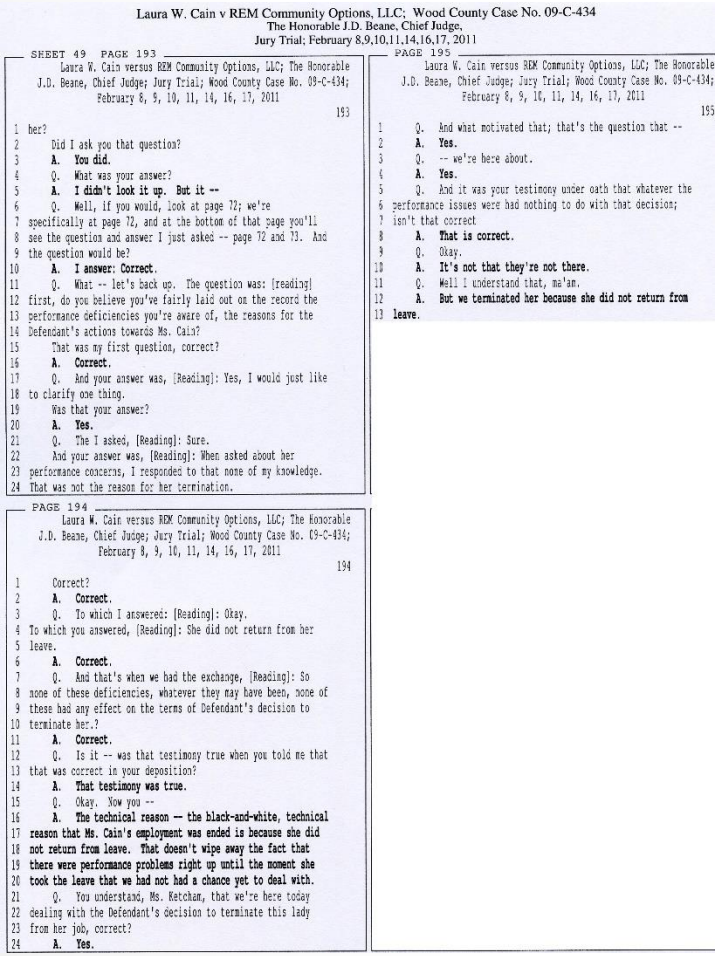
Laura W. Cain versus REM Community Options, LLC; The Honor J.D. Beane, Chief Judge; Jury Trial; Wood County Case No. 09-C- February 8, 9, 10, 11, 14, 16, 17, 2011

to the best of my knowledge. That was not the reason for her termination.
[WHEREUPON the following excerpt was played from the video deposition of Jane Ketcham]:
A. -- she did not return from her leave.
Q. So none of these deficiencies, whatever they may have been, none of those had any effect on the Defendant's decision to terminate her?
A. Correct.
Q. Nor did it have an effect on the Defendant's decision not to allow her to return?
A. Correct.

Trial 3



Laura W. Cain v REM Community Options, LLC; Wood County Case No. 09-C-434
The Honorable J.D. Beane, Chief Judge,
Jury Trial; February 8,9,10,11,14,16,17, 2011

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Laura W. Cain versus REM Community Options, LLC; The Honorable J.D. Beane, Chief Judge; Jury Trial; Wood County Case No. 09-C-434; February 8, 9, 10, 11, 14, 16, 17, 2011

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her?
Did I ask you that question?
A. You did.
Q. What was your answer?
A. I didn't look it up. But it --
Q. Well, if you would, look at page 72; we're specifically at page 72, and at the bottom of that page you'll see the question and answer I just asked -- page 72 and 73. And the question would be?
A. I answer: Correct.
Q. What -- let's back up. The question was: [reading] first, do you believe you've fairly laid out on the record the performance deficiencies you're aware of, the reasons for the Defendant's actions towards Ms. Cain?
That was my first question, correct?
A. Correct.
Q. And your answer was, [Reading]: Yes, I would just like to clarify one thing.
Was that your answer?
A. Yes.
Q. The I asked, [Reading]: Sure.
And your answer was, [Reading]: When asked about her performance concerns, I responded to that none of my knowledge. That was not the reason for her termination.

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Laura W. Cain versus REM Community Options, LLC; The Honorable J.D. Beane, Chief Judge; Jury Trial; Wood County Case No. 09-C-434; February 8, 9, 10, 11, 14, 16, 17, 2011

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Correct?
A. Correct.
Q. To which I answered: [Reading]: Okay.
To which you answered, [Reading]: She did not return from her leave.
A. Correct.
Q. And that's when we had the exchange, [Reading]: So none of these deficiencies, whatever they may have been, none of these had any effect on the terms of Defendant's decision to terminate her.?
A. Correct.
Q. Is it -- was that testimony true when you told me that that was correct in your deposition?
A. That testimony was true.
Q. Okay. Now you --
A. The technical reason -- the black-and-white, technical reason that Ms. Cain's employment was ended is because she did not return from leave. That doesn't wipe away the fact that there were performance problems right up until the moment she took the leave that we had not had a chance yet to deal with.
Q. You understand, Ms. Ketcham, that we're here today dealing with the Defendant's decision to terminate this lady from her job, correct?
A. Yes.

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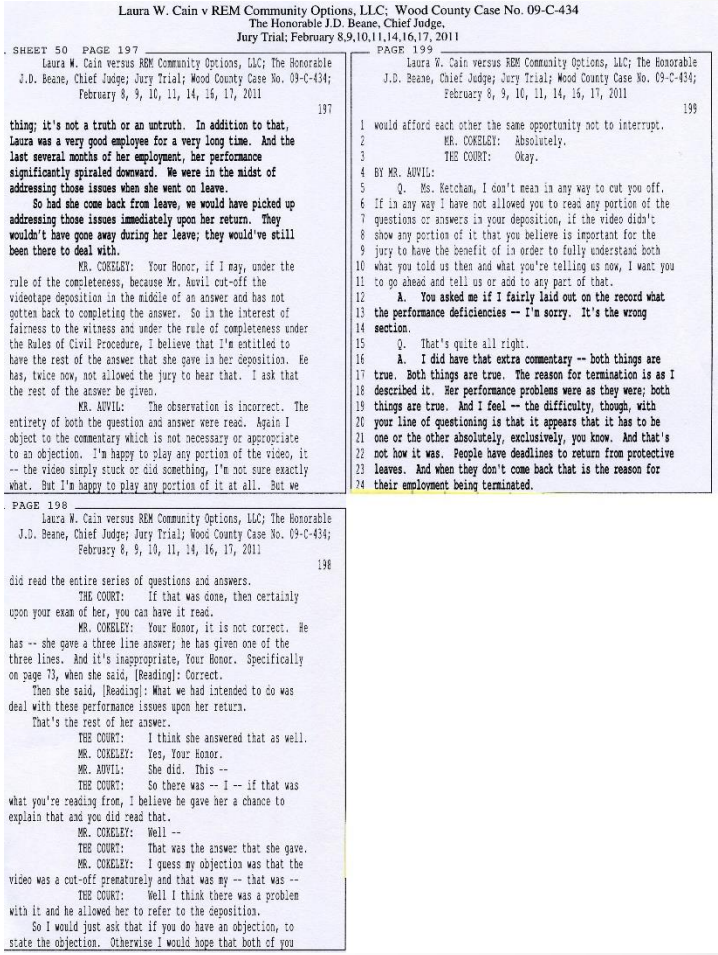
Q. And what motivated that; that's the question that --
A. Yes.
Q. -- we're here about.
A. Yes.
Q. And it was your testimony under oath that whatever the performance issues were had nothing to do with that decision; isn't that correct
A. That is correct.
Q. Okay.
A. It's not that they're not there.
Q. Well I understand that, ma'am.
A. But we terminated her because she did not return from leave.



Laura W. Cain v REM Community Options, LLC; Wood County Case No. 09-C-434
The Honorable J.D. Beane, Chief Judge,
Jury Trial; February 8,9,10,11,14,16,17, 2011

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Laura W. Cain versus REM Community Options, LLC; The Honorable J.D. Beane, Chief Judge; Jury Trial; Wood County Case No. 09-C-434; February 8, 9, 10, 11, 14, 16, 17, 2011

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thing; it's not a truth or an untruth. In addition to that, Laura was a very good employee for a very long time. And the last several months of her employment, her performance significantly spiraled downward. We were in the midst of addressing those issues when she went on leave.
So had she come back from leave, we would have picked up addressing those issues immediately upon her return. They wouldn't have gone away during her leave; they would've still been there to deal with.
MR. COKELEY: Your Honor, if I may, under the rule of the completeness, because Mr. Auvil cut-off the videotape deposition in the middle of an answer and has not gotten back to completing the answer. So in the interest of fairness to the witness and under the rule of completeness under the Rules of Civil Procedure, I believe that I'm entitled to have the rest of the answer that she gave in her deposition. He has, twice now, not allowed the jury to hear that. I ask that the rest of the answer be given.
MR. AUVIL: The observation is incorrect. The entirety of both the question and answer were read. Again I object to the commentary which is not necessary or appropriate to an objection. I'm happy to play any portion of the video, it -- the video simply stuck or did something, I'm not sure exactly what. But I'm happy to play any portion of it at all. But we

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did read the entire series of questions and answers.
THE COURT: If that was done, then certainly upon your exam of her, you can have it read.
MR. COKELEY: Your Honor, it is not correct. He has -- she gave a three line answer; he has given one of the three lines. And it's inappropriate, Your Honor. Specifically on page 73, when she said, [Reading]: Correct.
Then she said, [Reading]: What we had intended to do was deal with these performance issues upon her return.
That's the rest of her answer.
THE COURT: I think she answered that as well.
MR. COKELEY: Yes, Your Honor.
MR. AUVIL: She did. This --
THE COURT: So there was -- I -- if that was what you're reading from, I believe he gave her a chance to explain that and you did read that.
MR. COKELEY: Well --
THE COURT: That was the answer that she gave.
MR. COKELEY: I guess my objection was that the video was a cut-off prematurely and that was my -- that was --
THE COURT: Well I think there was a problem with it and he allowed her to refer to the deposition.
So I would just ask that if you do have an objection, to state the objection. Otherwise I would hope that both of you

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would afford each other the same opportunity not to interrupt.
MR. COKELEY: Absolutely.
THE COURT: Okay.
BY MR. AUVIL:
Q. Ms. Ketcham, I don't mean in any way to cut you off. If in any way I have not allowed you to read any portion of the questions or answers in your deposition, if the video didn't show any portion of it that you believe is important for the jury to have the benefit of in order to fully understand both what you told us then and what you're telling us now, I want you to go ahead and tell us or add to any part of that.
A. You asked me if I fairly laid out on the record what the performance deficiencies -- I'm sorry. It's the wrong section.
Q. That's quite all right.
A. I did have that extra commentary -- both things are true. Both things are true. The reason for termination is as I described it. Her performance problems were as they were; both things are true. And I feel -- the difficulty, though, with your line of questioning is that it appears that it has to be one or the other absolutely, exclusively, you know. And that's not how it was. People have deadlines to return from protective leaves. And when they don't come back that is the reason for their employment being terminated.

Post -Trial Review of Punitive Damages

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

BEFORE THE HONORABLE J.D. BEANE

* *

LAURA W. CAIN,

Plaintiff,

vs Case No. 09-C-434

REM COMMUNITY OPTIONS, LLC,

Defendant.

* *

HEARING REGARDING DEFENDANT'S MOTION FOR POST-TRIAL REVIEW OF PUNITIVE DAMAGES

Proceedings held before the Honorable J.D. Beane, Chief Judge, on the Fourth Floor of the Wood County Judicial Building, No. 2 Government Square, Parkersburg, West Virginia, on June 8, 2011.

COUNSEL: Walt Auvil, Counsel for Plaintiff
Rusen & Auvil
1208 Market Street
Parkersburg, WV 26101

Brian R. Cokeley, Counsel for Defendant
Steptoe & Johnson
7th Floor, Chase Tower
707 Virginia Street East
P.O. Box 1588
Charleston, WV 25326-1588

ALSO PRESENT: Laura W. Cain, Plaintiff

Ross Mason, Representative of Defendant

COURT REPORTER: Stacy Harlow, Certified Court Reporter

As the Court will recall, far from benevolent, the Defendant got on the witness stand. Their first witness, the state director, contradicted her own sworn testimony under oath and in her 30(b)(7) deposition. That began the case so we immediately have at the inception of the case the state director, the head of this Defendant's organization, telling the Court and the jury that in a deposition when she was the representative for the Defendant -- she was given full opportunity to review the questions in advance -- and was asked about what the situation was regarding the Plaintiff's termination, she had totally misrepresented what it was. And, in fact, it was the opposite of what she said under oath and that she had never told anyone it was the opposite until trial.

Rem Cmty. Options v. Cain

Rem Cmty. Options v. Cain

Supreme Court of Appeals of West Virginia
November 16, 2012, Issued, Filed
No. 11-1236

Reporter: 2012 W. Va. LEXIS 852; 2012 WL 5834891
REM Community Options, LLC, Defendant Below, Petitioner vs Laura W. Cain, Plaintiff Below, Respondent
Notice: Memorandum decisions are subject to the rehearing procedures set forth in Revised Rule 25. Unless otherwise provided, the memorandum decision is not final until the Court has issued a mandate under Rule 26.SEE WEST VIRGINIA RULE 21 OF APPELLATE PROCEDURE FOR CITATION OF MEMORANDUM OPINIONS.
Prior History: [*1] (Wood County 09-C-434).
Disposition: Affirmed.

Core Terms

punitive damages, termination, award of punitive damages, damages, accommodation, workers' compensation, mail, return to work, disability, eligible, factors, rehired, malice, rights, physical limitations, defendant's conduct, reasonable relation, settlement, instruct
Judges: CONCURRED IN BY: Chief Justice Menis E. Ketchum, Justice Robin Jean Davis, Justice Brent D. Benjamin, Justice Margaret L. Workman, Justice Thomas E. McHugh.

Opinion

MEMORANDUM DECISION

Petitioner REM Community Options, LLC ("REM"), defendant below, appeals an award of punitive damages in an employment discrimination case. Petitioner is represented by Bryan R. Cokeley, Vanessa L. Goddard, and Robert L. Bailey. Respondent Laura W. Cain, plaintiff below, is represented by Walt Auvil.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Ms. Cain asserted that her former employer, REM, terminated her employment in retaliation for her filing a workers' compensation claim and because of her disability due to an injury received in the course of her employment. [*2] At trial, the jury found in favor of Ms. Cain on both theories of liability and awarded her $76,000 in lost back wages, $100,000 for emotional distress, and $450,000 in punitive damages. After a post-trial analysis, the circuit court upheld the award of punitive damages by order entered on July 25, 2011. REM reports that it has paid the lost wages and emotional distress damages, as well as Ms. Cain's attorney's fees. In the instant appeal, REM only appeals the award of punitive damages.

When reviewing an award of punitive damages, we apply a de novo standard of review to the award and to the circuit court's ruling approving, rejecting, or reducing such award. Syl. Pt. 16, *Peters v. Rivers Edge Min., Inc.*, 224 W.Va. 160, 680 S.E.2d 791 (2009).

REM argues that even when viewing the evidence in a light most favorable to Ms. Cain, the punitive damages claim should have failed as a matter of law, and the issue should not have been submitted to the jury, because Cain failed to present evidence that REM acted with malice. *See*, Syl. Pt. 4, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895) (requiring "gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference [*3] to civil obligations affecting the rights of others" for the imposition of punitive damages); Syl. Pt. 7, *Alkire v. First National Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996) (holding that "a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award under *Mayer v. Frobe*" is the first step in our punitive damages jurisprudence paradigm).

In its "Findings of Fact and Conclusions of Law with Respect to Punitive Damages" order entered on July 25, 2011, the circuit court found that plaintiff did present sufficient evidence to support the award of punitive damages. Upon a de novo review of the record on appeal, the parties' arguments, and the circuit court's well-reasoned order, we agree with the circuit court's findings of fact and conclusions of law. We hereby adopt and incorporate by reference the circuit court's July 25,

2011, order. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

REM argues that when awarding punitive damages, the jury was prejudiced by statements and argument of plaintiff's counsel. However, we find that even if counsel had not made the complained-of [*4] statements and argument, there was still more than sufficient evidence to warrant the imposition of punitive damages. Accordingly, REM has asserted no meritorious grounds for reversal.[1]

Affirmed.

ISSUED: November 16, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

LAURA W. CAIN, Plaintiff, v. REM COMMUNITY OPTIONS, LLC, a West Virginia corporation, NATIONAL MENTOR SERVICES, LLC, and THE MENTOR NETWORK, Defendants.

Civil Action No. 09-C-434

Judge J. D. Beane

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO PUNITIVE DAMAGES

1) LAURA CAIN was formerly employed by REM COMMUNITY OPTIONS, LLC as [*5] a Lead Therapeutic Consultant She was employed from 1998 until December 29, 2008, a period of over ten years.

2) It is undisputed that on December 10, 2007, LAURA CAIN was involved in an automobile accident while on the job. Plaintiff's Exhibits 6, 7 and 8.

3) Following her injury in the automobile accident, Laura Cain filed a workers compensation claim.

4) Laura Cain continued working following her accident until her physical limitations prevented her from performing the duties of her job without accommodation. This occurred on June 30, 2008.

5) Following her termination from employment by REM, Laura Cain filed the instant action alleging workers compensation discrimination pursuant to *West Virginia Code §23-5A-1 et seq.*, and handicap discrimination pursuant to *West Virginia Code §5-11-1, et seq.*

6) The Court instructed the jury as to punitive damages as requested by the Plaintiff. While the Defendant objected to instructing the jury on punitive damages, there was no objection to the instruction concerning punitive damages given by the Court.

7) Following a jury trial, the jury returned a verdict in favor of Laura Cain and awarded her $76,000 in lost wages, $100,000 for emotional distress [*6] and $450,000.00 as punitive damages. Defendant has challenged the punitive damage award.

8) West Virginia punitive damage jurisprudence includes a two-step inquiry: first a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award is required under *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895); second, if a punitive damage award is justified, then a the punitive damage award must be reviewed to determine if it is excessive. *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1996); *Community Antenna Service v. Charter Comm. IV*, 227 W. Va. 595, 712 S.E.2d 504 (W.Va. 2011).

9) With regard to the initial inquiry which must be undertaken concerning punitive damages, "[i]n actions of tort, where gross fraud, malice, oppression, or wanton, willful or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous." *Syl. pt 4, 40 W. Va. 246, 22 S.E. 58. Accord Syl. pt 1, O'Brien v. Snodgrass*, 123 W. Va. 483,16 S.E.2d 621 (1941). A wrongful act, done under a bona fide [*7] claim of right, and without malice in any form, constitutes no basis for such damages." *Syl. pt 3, Jopling v. Bluefield Waterworks & Improvement Co.*, 70 W. Va. 670, 74 S.E. 943 (1912).

10) "The foundation of an inference of malice is the general disregard of the rights of others, rather than an

[1] We note that REM does not assign any error regarding the *amount* of punitive damages the jury awarded. *See* Syl. Pt. 7, *Alkire* (holding that the second step in our punitive damages jurisprudence paradigm is an examination of whether the award is excessive). The circuit court conducted a post-trial analysis pursuant to *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), and concluded that the amount of the award is not excessive.

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intent to injure a particular individual." *Addair v. Huffman*, 156 W. Va. 592, 603, 195 S.E.2d 739, 746 (1973).

11) Additionally, "[i]n determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true. *Syl. pt 5, Poe v. Pittman*, 150 W. Va. 179, 144 S.E.2d 671 (1965). See also *Syl. pt 5, Orr v. Crowder.*, 173 W. Va. 335, 315 S.E.2d 593 (1983).

(12) "In determining whether there is sufficient evidence to support a jury verdict, the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which **[*8]** the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Moreover, "[c]ourts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption." *Addair v. Majestic Petroleum Co., Inc.*, 160 W. Va. 105, 232 S.E.2d 821 (1977).

13) It is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting and the finding of the jury upon such facts will ordinarily not be disturbed. *Syl. Pt 12, Peters v. Rivers Edge Mining*, 224 W.Va. 160, 680 S.E.2d 791 (2009).

14) "When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. **[*9]** If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
>
> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
>
> (4) As **[*10]** a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.
>
> (5) The financial position of the defendant is relevant." *Syllabus point 3, Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897(1991).15) "When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:
>
> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant, based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.16) With respect to this inquiry concerning punitive damages, the evidence at trial cited by Plaintiff concerning Plaintiff's termination from her employment at REM was sufficient for the jury to reasonably find and determine that:
>
> a. Following her injury on December 10, 2007, Laura Cain continued to work although

her physical limitations and time off from her **[*11]** job while seeking medical treatment due to the injury prevented her from performing at her former exemplary level without accommodation.

b. On June 24, 2008, Laura Cain requested accommodations for the physical problems she was experiencing due to her on-the-job injury in December, 2007.

c. REM required Laura Cain to continue to work after she presented to REM a doctor's slip stating that her physical condition precluded her from working; REM further declined to reduce Laura Cain's billable hour requirement (Trial Transcript 486-487.)

d. Laura Cain began to work overtime to meet her billable hours requirements which resulted in further physical difficulties, necessitating that she have time off from the workplace in June 2008 due to her inability to perform her job duties without accommodation. (Trial Transcript 489.)

e. Laura Cain requested and was placed on medical leave from her position at REM as a result of her on-the-job injury beginning on June 30, 2008 through her termination on December 29, 2008.

f. On June 30, 2008, Jason Lynch and Ross Mason requested that Laura Cain come to the office for a meeting called for the purpose of discussing Ms. Cain's alleged performance deficiencies. **[*12]** They met with Laura Cain for two and one-half hours while her daughter waited for her. Ms. Cain was extremely upset during this meeting and "profusely" sobbed. Trial Transcript 416-417.)

g. REM resisted Laura Cain's requests to be paid accrued sick leave and Plaintiff had a number of discussions with management regarding sick leave before it was finally paid to her. (Trial Transcript 441-442.)

h. On July 8, 2008, Defendant requested that Laura Cain return to work contrary to her physician's instructions; this attempt occurred on the same day that REM had written a letter to the Plaintiff confirming that she had requested a medical leave of absence due to a serious medical condition which rendered her unable to perform her job without accommodation. (Plaintiff's Exhibit 36; Trial Transcript 152-153.)

i. Jason Lynch, Plaintiff's direct supervisor began to report to his superiors on Laura Cain's performance beginning on July 1, 2008. Three weeks after REM received written documentation of Laura Cain's need for accommodations in the work place, Laura Cain's proposed termination was first mentioned. (Trial Transcript 306; See also, Plaintiff's Exhibit 24.)

j. In July 2008, Jane Ketcham, the **[*13]** West Virginia State Executive Director for REM received a request to terminate Laura Cain. (Transcript 234-235.)

k. REM admitted that during the nearly eleven years Laura Cain worked for REM, there was "not one shred of documentation of any type of disciplinary action of any kind in Laura Cain's personnel file..." (Trial Tr. 18.)

l. No later than August 20, 2008, an FMLA form completed by Laura Cain's physician was provided to REM which outlined Ms. Cain's physical limitations and prognosis.

m. Laura Cain received temporary total disability benefits from West Virginia Workers Compensation during September and October, 2008. She was on FMLA leave from August 18, 2008 through November 10, 2008, (Trial Transcript 170; Plaintiff's Exhibit 52.)

n. Based upon the stated belief that Laura Cain had been released to return to work, REM mailed Laura Cain a letter on December 23, 2008 by certified mail which required her to respond before December 29, 2008 or else she would be considered to have "voluntarily resigned". (Trial Transcript 202-205.) The post office was closed for two of the six days between December 23rd and 29th, December 25th, Christmas Day and Sunday, December 29th.

o. Laura Cain **[*14]** received this letter from REM on January 6, 2009. She immediately contacted her direct supervisor to explain that she had just received this letter and that it was not her intention to resign. She also corresponded with the Defendant's Human Resources Director for the State of West Virginia about this matter. (Trial Transcript 205-206, 217.)

p. Following the phone call on January 6, 2009, Laura Cain informed her supervisors

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that she intended to return to work even though she hadn't been released by her physician because she needed the job. (Trial Transcript 417.)

q. REM declined to reconsider the termination of Plaintiff and to reinstate Laura Cain, but informed her she was eligible to be rehired.

r. REM denied that Laura Cain was terminated and maintained that "she didn't return from leave" and that she "didn't bother to come back to work."

s. Defendant was dishonest in informing the Plaintiff and leading her to believe that she was eligible to be rehired by Defendant when in fact the documents created by Defendant recording Laura Cain's termination indicated the opposite: that Laura Cain was not eligible to be rehired by REM.

t. Jason Lynch (Laura Cain's director supervisor) informed **[*15]** Laura Cain that she was eligible to be rehired, but on two different personnel forms indicated that she was not eligible for rehire because she had not provided or billed correct services to clients and had not turned in proper mileage reimbursement. (Trial Transcript 324.) This matter was first raised with Plaintiff on June 30, 2008 after Plaintiff requested accommodations at her job due to her injury. (Trial Transcript 476.)

u. Later, Candice Merkle, Defendant's State Human Resource Manager, stated that Laura Cain was not eligible to be rehired because she had not provided a doctor's release permitting her to return to work. (Trial Transcript 730.)

v. Jason Lynch also testified that he had received five complaints about Laura Cain from clients and presented those complaints in writing. All five complaints were dated on the same day or within a day or two, but Jason Lynch could not explain why they were all received so close in time. (Trial Transcript 356-364.) These complaints were never shown to Laura Cain while she worked for REM. ((Trial Transcript 368-372.)

w. During her employment with REM, Laura Cain applied for the Assistant Program Director position, a position which would have **[*16]** accommodated her physical limitations. Jason Lynch and Ross Mason failed to show up for the first interview. A second interview focused on why another employee had not applied for the job instead of Plaintiff's qualifications. (Trial Transcript 464-468.)

x. After posting a vacancy for the Plaintiff's former position, REM changed the requirements so that the Plaintiff could not reapply for this position by restricting the opening to internal applicants. This change was made only after Defendant became aware that Plaintiff had inquired about the posting of her old job.

y. REM introduced into the trial its contention that Laura Cain had been living with a married man, Jerry Rice. The evidence at trial did not support this fact, which the jury may have reasonably viewed as an unfair and malicious attack upon the Plaintiff. Further, Defendant has not explained why factual allegations set forth in its post-trial motions on this issue were not offered into evidence at the trial of this matter.

z. The testimony from the employees of REM (Jason Lynch, Ross Mason, Jane Ketcham and Candice Merkle) was contradictory, and at times the witnesses were evasive and combative. This likely impacted the **[*17]** jury's evaluation of their credibility.17) Based upon the foregoing, the jury could properly have found based upon the evidence and testimony at trial that, despite the fact that Laura Cain had not been released to return to work, REM demanded that she report to her employer within six days of mailing a letter by certified mail on December 23, 2008, or that she respond by December 29, 2008. The jury could quite properly and reasonably have concluded that this illogical requirement imposed on the plaintiff by REM during the Christmas holiday week was motivated by malice and indifference to the Plaintiff's rights and without regard to any basic notion of fairness.

Similar to the Plaintiff in the *Peters* case, *supra.*, when Laura Cain contacted REM on January 6, 2009, instead of putting her back to work, REM terminated her employment. The jury clearly concluded that all of this conduct on the part of REM was calculated and intentional and that it was unfair to the Plaintiff. The facts and inferences in this case do not point so strongly and overwhelmingly in favor of REM to lead to the conclusion

that the jury was wrong in reaching this conclusion. In fact, the facts and inferences in this **[*18]** case point strongly support the jury's conclusion.

Although the defendant had a duty under the law to return Laura Cain to her employment following her absences related to a workers' compensation covered injury, REM terminated Plaintiff's employment on December 29, 2008, and before Laura Cain had a reasonable opportunity to obtain the certified mail from the post office and respond to it. Thus Plaintiff has met the first hurdle of sustaining the jury's award of punitive damages.

18) Dealing next with each of the factors set forth in *Garnes*, *supra*,, the Court concludes as follows:

> **(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.**As to the amount of punitive damages awarded by the jury, the Court notes that the evidence at trial was sufficient for a jury to conclude that the Plaintiff, Laura Cain was severely harmed by the conduct of the Defendant, REM as the plaintiff lost her **[*19]** job, suffered economic losses, including the loss of her and her daughter's home. At times Plaintiff had no gas money and her father and her uncle helped support her and her daughter as she had difficulty supporting her child. The Defendant would not consider her for another position despite her exemplary service to the company. Throughout this litigation, the Defendant vigorously denied any wrongdoing. Moreover, the Defendant is an organization whose stated purpose is to assist individuals with disabilities. Thus, in this case, the punitive damages bear a reasonable relationship to the harm which has occurred to the plaintiff.
>
> **(2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts [*20] to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.**The evidence shows that Defendant persisted in its actions towards the Plaintiff throughout the time that she sought accommodation and continuing throughout the litigation and trial. At all times, the Defendant minimized the impact of its misconduct upon the Plaintiff, and asserted that she was to blame, even defending its actions in sending her certified mail of her duty to notify them of her intention to keep her job over the Christmas holiday. From this evidence and all the other evidence adduced at trial, this jury, being a rational trier of fact had sufficient evidence before it to conclude that REM's conduct was reprehensible and warranted the imposition of punitive damages. The Defendant did not offer any reasonable settlement in this matter prior to the trial of this case.
>
> **(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.**The Plaintiff introduced the expert testimony of Clifford Hawley who opined to a reasonable **[*21]** degree of accounting certainty that Laura Cain suffered past and future economic damages in the amount of $408,129.00, in response to which the jury could reasonably determine that there was sufficient evidence to show that the Plaintiff's damages were caused by REM's willful and malicious conduct, and that this sum was in effect "saved" by REM. Thus, the punitive damages awarded herein penalized REM and eliminated this cost savings. This award will likely act as a deterrent to REM in the future.

Based on the evidence presented at trial, the jury could reasonably conclude that the manner in which Laura Cain was treated was the way that REM did business. As the testimony of Barbara Day [another former REM employee] demonstrated, the defendant did not insist that its billings conform to the level demanded from

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Plaintiff, lending credibility to the Plaintiff's claim that REM could have accommodated her physical limitations.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages. The ratio of punitive damages to compensatory damages ($450,000 to $176,000) is 2.5 to 1 which is well within the acceptable range prescribed by the |*22| West Virginia Supreme Court of Appeals.

(5) The financial position of the defendant is relevant." *Syllabus point 3*, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897(1991). The Defendant's financial position showed gross revenues of $44,976,899 for fiscal year 2009 as indicated in its financial statement, Plaintiff's Exhibit 61. Thus, the punitive award is approximately one percent of Defendant's annual revenue. The punitive damage award is not excessive, and further, is reasonable in light of the financial position of the Defendant, according to the evidence presented at trial. Defendant admitted its revenues had grown, compared to the revenues reflected in Plaintiff's Exhibit 61, but it offered no current financial data during or after trial.

(6) The costs of the litigation; The Plaintiff incurred substantial costs in the prosecution of this action, including paying an expert witness, depositions, and other miscellaneous expenses totaling over seven thousand dollars ($7000) to date. These expenses were paid by the Plaintiff despite the fact that she was unemployed.

(7) Any criminal sanctions imposed on the defendant for his conduct; There was no evidence of any criminal |*23| sanctions imposed on the defendant for any misconduct.

(8) Any other civil actions against the same defendant, based on the same conduct; and There was no evidence of any other civil actions against the defendant for any misconduct.

(9) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff. There was sufficient evidence as outlined herein from numerous witnesses, including Defendant's own employees, for the jury to determine that Defendant, through the actions of its officers, employees or agents clearly committed the civil wrongs of failing to reinstate the Plaintiff to her former position within the company, and that her pursuit of workers' compensation benefits and the Plaintiff's handicap or disability were motivating factors in Plaintiff's discharge.

The Plaintiff adduced evidence from witnesses, including current and former employees of Defendant, from which the jury could reasonably conclude that Defendant's conduct was reprehensible and self-serving, such as mailing an important letter to Laura Cain and imposing an unduly short |*24| time-frame (six days from mailing) for her to take action to try to retain her job over the Christmas holiday.

In this case, the jury could reasonably conclude that REM specifically disregarded the rights of Laura Cain, who was injured on the job and filed a workers compensation claim, which caused the Defendant to perceive Plaintiff as an impediment to the productiveness of the company.

(19) Also of relevance to this determination is the testimony in this case which made clear that REM and its agents were disdainful of Laura Cain's workers compensation claim and the limitations imposed following her injury; that REM refused to accommodate Laura Cain's limitations; that despite an admission from its corporate representative that Laura Cain had not been terminated for any performance based reason, REM concocted reasons to support its decision to terminate Laura Cain after this litigation commenced; that REM attempted to portray Laura Cain as a generally immoral person. Instead of accommodating Laura Cain's condition in the workplace, which Defendant admitted it could have done, a reasonable jury could clearly conclude that REM chose, instead, to disregard the law. Thus, this punitive |*25| damage award is appropriate under the facts adduced at the trial in this matter.

(20) The testimony presented to the jury in this case also supported a finding that Defendant was aware that

it had the option to require Laura Cain to undergo a fitness for duty examination, but instead, Defendant relied solely upon a Workers Compensation evaluation or "IME" conducted for the purpose of determining the degree of permanent partial disability Laura Cain had sustained in support of its demand that Laura Cain return to work. (Trial Transcript 805-806.)

(21) In this case there was ample evidence presented to prove that REM terminated Laura Cain's employment in retaliation for filing a workers compensation claim. In fact, that is what the jury decided. Further, the jury also found that the purported "legitimate" reason that the defendant proffered at trial to explain the termination was a pretext to cover its illegal retaliatory motive to terminate Laura Cain for receiving or attempting to receive workers' compensation benefits and for her handicap or disability. This illegal retaliatory motive was apparent at trial when representatives of REM offered contradictory testimony concerning the purported |*26| reasons for Laura Cain's termination.

(22) It is also clear from the testimony at trial that REM was well aware of the anti-retaliation provisions of the workers' compensation statutes. (Trial Transcript at pp. 156-158.) The Defendant willfully, wantonly and maliciously disregarded Ms. Cain's rights and retaliated against her for receiving or attempting to receive workers' compensation benefits.

Based upon all of the foregoing and the totality of the evidence, the Court **FINDS** that the punitive damages award is not excessive and it is accordingly **ORDERED** that the jury's verdict is hereby sustained.

This *Order* is a final appealable order and there is no just reason for delay and judgment is entered herein in favor of Plaintiff against Defendant pursuant to W.Va. R. Civ P. 54(b). Jurisdiction is retained to enforce this order and other orders of the Court and for such other matters as may be addressed in collection of the amounts due to Plaintiff in this action.

ENTER: 7-25-2011

/s/ J.D. Beane J.D. BEANE, JUDGE

"Outside the Scope = ?"

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

KIMBERLY ALLOWATT

Plaintiff,

v.

Civil Action No. 15-C-445
Judge: Jeffrey B. Reed

HIGHMARK WEST VIRGINIA INC., a West Virginia Corporation

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER REGARDING 30(B)(7) DEPOSITION

Defendant terminated the 30(b)(7) deposition of Highmark West Virginia, Inc., and, through its Motion for Protective Order pending before this Court, seeks a ruling from this Court that defense counsel may terminate a 30(b)(7) deposition when defense counsel determines that questioning by plaintiff's counsel is outside the scope of the 30(b)(7) notice of deposition. The sole authority cited for this extraordinary proposition is a 1985 Federal Rules decision from the District Court of Massachusetts and a positive reference to that case in a hornbook. All other authority, and all other commentators reviewing the Rule, have rejected Defendant's position, and held that in a 30(b)(7) deposition, as in all other depositions, testimony should be taken so long as the deposition is not conducted to harass or abuse a witness and so long as the testimony sought does not invade a privilege, such as the attorney-client privilege. To hold otherwise is to invite an endless series of disputes to be resolved by the Court over questioning during 30(b)(7) depositions before the deposition can proceed, rather than reserving for later resolution by the Court the determination of whether the testimony sought is within the scope of the 30(b)(7) deposition (and thus the testimony of the corporate representative on behalf of the corporation) or outside the scope of the 30(b)(7)

Document that was represented to be the original of this copy was filed in the office of the Circuit Clerk of Wood Co., WV on

APR 2 0 2016

Carole Jones, Circuit Clerk

Closing

- **30(b)(6) affords the opportunity to give the party bearing the burden of proof a fixed target.**
- **If you impeach the 30(b)(6) evidence, you impeach the corporation AND the witness.**
- **30(b)(6) often results in the "voluntary" elimination of defenses.**

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KIMBERLY ALLOWATT

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notice (and, therefore, only the testimony of the individual deponent). There is no legal or practical reason to adopt such a position and it is contrary to the great weight of authority.

The Defendant's Motion should be denied and the Court should order that Defendant's 30(b)(7) testimony be taken, subject to objection by defense counsel where appropriate. If the Court, upon subsequent evaluation, determines that Plaintiff's questioning is outside the scope of the 30(b)(7) notice, then the Court could hold that such testimony is not the testimony of the corporate Defendant but, rather, merely the testimony of the individual deponent.

PROCEDURAL HISTORY

Before providing the Notice of 30(b)(7) Deposition, which is Exhibit A to Defendant's Motion, Plaintiff provided a draft notice to counsel for the Defendant and sought from counsel for Defendant agreement as to the timing and location of the 30(b)(7) deposition ultimately conducted on March 15th in this matter. Only after Defendant's review of the notice, and Defendant's agreement to the date and time of the notice was the final Notice prepared and served.

Because of Defendant's inaccurate characterization of the 30(b)(7) deposition, Plaintiff attaches the entire condensed transcript, interrupted as it was by Defendant terminating the same after a little over an hour of actual testimony by the designated witness.[1]

The 30(b)(7) deposition began with Plaintiff providing to the deponent, Highmark HR representative Rhonda Poling, a series of exhibits, including the Complaint, Defendant's Answer, Plaintiff's Notice of 30(b)(7) Deposition, Defendant's Designations and Responses to Plaintiff's

[1] The deposition began at 10:09 a.m. and was terminated by the Defendant at 1:20 p.m. However, much of this time period was taken up with off the record conferences between counsel and between defense counsel and his clients. An hour of the time was a lunch break. A significant portion of the 75 page transcript is colloquy between counsel regarding the 30(b)(7) issue now before the Court.

First Notice of Videotaped 30(b)(7) Deposition and a series of documents which had been produced by the Defendant, the last of which were marked as Deposition Exhibit 5. Deposition Exhibit 5 was composed in part of documents which the deponent identified as the investigative file which she had compiled in response to the Plaintiff's complaint of on the job harassment and discrimination by Plaintiff's direct supervisor, Eliezer Kanal. Plaintiff's complaint to Ms. Policy is attached as Exhibit B to the complaint which initiated this civil action. Poling TR 5-15.

Plaintiff's counsel inquired of Ms. Poling as to her preparedness to respond to the Notice of 30(b)(7) Deposition and informed her that if at any time she wished to review any documents to respond to the questions, she was more than welcome to do so before she answered. Plaintiff's counsel also informed Ms. Poling that if at any time she felt that it would be helpful to her to discuss the questions with her attorney, either in or out of the presence of Plaintiff or her counsel, that she could request to do so at any time and would be allowed to discuss even pending questions with her attorney and return only when she felt she had her best and fullest answer to the question posed. Poling TR 16-17.

Plaintiff then proceeded to the designations within the Notice of Deposition and began with designation 12 of the Notice of 30(b)(7) Deposition, which referred to the allegations of paragraph 17 in the Complaint and Exhibit B to the Complaint referred to therein. Poling TR 17-24. Inquiry then focused on Exhibit B to the Complaint, which Ms. Poling testified she was familiar with and had had meetings with the Plaintiff regarding. Poling TR 27-30. At pages 29-30 of the deposition, defense counsel first raised the issue of whether the questioning was within the scope of the 30(b)(7) Deposition. Plaintiff's counsel pointed out a designation which was on point within the Notice of Deposition and questioning proceeded regarding Exhibit B. Poling TR 30-33.

At deposition page 33, Ms. Poling requested permission to go off the record to locate a document in order to aid her in answering a question. This was done at her request. The next objection by defense counsel regarding an inquiry allegedly outside the scope of the 30(b)(7) notice of deposition was when Plaintiff inquired as to whether Ms. Poling – who worked with Plaintiff for over twenty years – knew that Plaintiff had been off work for open heart surgery and whether others in Plaintiff's work area at Highmark generally knew that as well. The witness said she did not know. The entirety of that exchange is composed in one page of transcript. Poling TR 46.

Plaintiff's inquiry about the allegations set forth in Exhibit B to the Complaint (September 29, 2014 Memorandum from the Plaintiff to Employee Relations), related to 30(b)(7) designation 12, in which Plaintiff incorporated the allegations of paragraph 17 of the Complaint, which, in turn, incorporated the allegations of Plaintiff's September 29 complaint against Kanal (Exhibit B). Exhibit B included allegations that Plaintiff was subjected to misconduct by Kanal because Kanal had a problem working with women, that he treated the Plaintiff like a second class citizen, abusing her with unprofessionalism and intimidation. Ms. Poling acknowledged that she investigated the allegations of Plaintiff's September 29th complaint for Defendant. Nevertheless, when she was questioned about the allegations in the Plaintiff's September 29th complaint, defense counsel objected that the matter was outside the scope of the 30(b)(7) notice. Poling TR 48-49.

The following examination led to defense counsel terminating the 30(b)(7) deposition:

"Q. Okay. So what I'm understanding then is that Ms. Allowatt comes to you, makes a three-page typed complaint about her direct supervisor -- which we have as Exhibit B, correct?
"A. Correct.
"Q. -- alleging harassment, discrimination, various forms of mistreatment by him of her. Correct?
"A. Those were her claims.

"Q. And that the first time you contacted Mr. Kanal about those allegations was about three or four days after Ms. Allowatt had resigned?
"A. That's correct.
"Q. Which would have been a little bit over -- well, no, no. Not quite two months after she made her detailed complaint in Exhibit B. Correct?
"A. That's correct.
"Q. Okay. So if we look at the allegations in Ms. Allowatt's complaint, which you never spoke to Mr. Kanal about until after she had resigned, we see on page 2 of Exhibit B that she alleges that Mr. Kanal on her first day back from open heart surgery, told her that he wasn't sure what he was going to do with her. Do you see that allegation?

"A. Yes.
"Q. And that he further said to her in this meeting, which she alleges happened on September 8th, that the only reason he had been doing her job for the past 12 weeks is because she was out for surgery and on short-term leave. Do you see that allegation?
"A. Yes.
"Q. Did Mr. Kanal say those things to her on September 8th, 2014?
"A. This is what Kim reported to me.
"Q. Ms. -- Ms. Poling, please answer my question. My question is, did Mr. Kanal say to Ms. Poling on September 8th, 2014, that he wasn't sure what he was going to do with her, yes or no?
"A. I did not witness this, Mr. Auvil. This is what Ms. Allowatt reported to me.
"Q. But, ma'am, you were the person who's been identified as being in charge of this investigation. You're also the person who's been identified to respond on behalf of Highmark to the allegations in this memo. And so what I need to do is, is it accurate that on September 8th, 2014, Mr. Kanal said to Ms. Allowatt that the -- that he wasn't sure what he was going to do with her?
"MR. DELLINGER: Objection. Asked and answered.
"Q. Is that accurate as to what he said or not?
"MR. DELLINGER: Objection. Asked and answered.
"You can answer again.
"A. As reported to me, this is what I've been told.
"Q. Well, do you have any reason to dispute that that is what he told her on September 8th, 2014?
"A. No.
"Q. Next allegation is that Mr. Kanal told Ms. Allowatt that the only reason he'd been doing her job for the past 12 weeks was because she was out for surgery and on short-term leave. Did he say that to her on September 8th, 2014?
"A. I can't confirm that he stated that to her.
"Q. Do you have any reason to believe that Ms. Allowatt is incorrect when she reports that that is what Mr. Kanal said to her on September 8th, 2014?
"A. Mr. Auvil, this is what Ms. Allowatt reported to me. I was not witness to this

conversation, and I can't confirm that Mr. Kanal stated that.

"Q. Do you have any basis upon which to dispute Ms. Allowatt's allegation that on September 8th, 2014, Mr. Kanal said to her that the only reason he'd been doing her job for the past 12 weeks is because she was out for surgery and on short-term leave?

"A. I have no basis to dispute it." Poling TR Page 53-56.

That answer by Ms. Poling was the last answer to a substantive question which defense counsel allowed the witness to answer in this deposition. That answer appears at page 56 of the deposition transcript after the questions and answers set forth above, each of which placed Defendant in an increasingly compromising position as to liability on both the Plaintiff's gender and handicap discrimination claims. The final question asked - which resulted in the Defendant filing the Motion before this Court - is as follows:

"Q. Okay. Well, my next question, ma'am, is, is it your position that this -- that making these statements to Ms. Allowatt by her direct supervisor, that on her first day returning for work, that he wasn't sure what he was going to do to her and the only reason he'd been doing her job for the past 12 weeks is because she was out for surgery and on short-term leave-- are those statements appropriate statements to make to a subordinate employee returning from medical leave?

"MR. DELLINGER: I'm going to object. What subject matter is that related to?

"Q. You may answer.

"MR. DELLINGER: No. She may not until you identify the subject matter it's related to.

"Q. You can answer, ma'am.

"MR. DELLINGER: Not until you identify the subject matter.

"Q. Ms. Poling?

"MR. DELLINGER: At this point, if you're not going to identify the subject matter that that is corresponding to, then you need to adjourn the deposition and go to the Court for a ruling. Because I'm not going to allow her to answer a question unless it's responsive to a subject matter." Poling TR 56.

A reasonable inference is that Defendant did not like the direction that Ms. Poling's testimony was going in at this point of the deposition and chose to use the issue of the testimony being "outside the scope" of the notice as an excuse to terminate the deposition and attempt to regroup before further damaging testimony was adduced. Colloquy between counsel went on from

page 57 of the deposition transcript to page 64 of the deposition transcript, at which point Plaintiff's counsel inquired of Ms. Poling as to whether his examination of her was annoying or harassing her. Ms. Poling responded, "No, sir. You're not annoying at all." Poling TR 64.

After breaking for lunch at that point, counsel returned and Plaintiff's counsel provided extensive authority to counsel for the Defendant discussing and refuting Defendant's purported legal basis for terminating the deposition. However, despite this exchange, Defendant refused to proceed, terminated the 30(b)(7) deposition and now seeks a protective order from this Court.

ARGUMENT

Numerous courts and commentators have discussed the issue of the proper approach to claims that testimony sought at a 30(b)(6) deposition (renumbered as 30(b)(7) under the West Virginia Rules of Civil Procedure) is outside the scope of the notice. In "Rule 30(b)(6) at 45: Is it Still Your Friend?" By Eric Kinder and Walt Auvil - December 3, 2015, Section of Litigation, Pretrial Practice & Discovery, American Bar Association - the authors discussed the issue:

> There is a split of authority as to whether a party using Rule 30(b)(6) is required to adhere to the limits of the designations in the notice or whether they may inquire as to any subject permissible under Federal Rule of Civil Procedure 26(b)(1). Some courts have held that inquiry should be limited to the matters stated with reasonable particularity as designations in the 30(b)(6) notice. Paperelli v. Prudential Ins. Co., 108 F.R.D. 727 (D. Mass. 1985). The majority view, however, is that there is no such limitation. Bracco Diagnostics Inc. v. Amersham Health Inc., No. 03-6025 (SRC), 2005 WL 6714281 (D.N.J. Nov. 7, 2005); Cabot Corp. v. Yamulla Enters., 194 F.R.D. 499 (M.D. Pa. 2000); Detoy v. City & Cnty. of S.F., 196 F.R.D. 362 (N.D. Cal. 2000). This view holds that testimony is not limited to the subject matter in the notice because limiting the scope of the deposition to what is noticed would frustrate the objectives of Rule 26(b)(1). The scope of the deposition is determined solely by relevance under Rule 26. Detoy, F.R.D. at 366.
>
> One issue that always concerns defense attorneys is what to do when a 30(b)(6) deponent is asked a question that is outside the scope of the notice. While defense counsel have a number of options, courts have been clear that merely instructing the

witness not to answer is not one of those options. Even where the court held that a 30(b)(6) deposition should be limited to the topics set forth in the notice, defense counsel must seek a protective order rather than simply instructing the witness not to answer the question. Paperelli, 108 F.R.D. at 731. The more commonly accepted approach was detailed in Detoy, in which the court instructed counsel to note on the record that the deponent's answers to such questions were beyond the scope of the notice, were not intended as answers of the designating corporation, and did not bind the designating corporation; prior to trial, counsel could request jury instructions that such answers were merely answers or opinions of the individual fact witness, and not admissions of party. Detoy, 196 F.R.D. at 367; see also EEOC v. Caesar's Entm't, Inc., 237 F.R.D. 428, 432 (D. Nev. 2006) (stating counsel should note that answers to questions beyond the scope of the 30(b)(6) are merely the opinions of the individual fact witness).

Courts have concluded that questions and answers exceeding the scope of the 30(b)(6) notice do not bind the corporation and are merely treated as the answers of the individual deponent. Id.; King v. Pratt & Whitney, a Div. of United Techs. Corp., 161 F.R.D. 475, 476 (S.D. Fla. 1995) ("[I]f the deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party's problem."). Where a 30(b)(6) deposition routinely strays from the confines of the notice, defense counsel should ask the court to exercise its discretion to count the deposition as both an authority 30(b)(6) deposition and an individual deposition for purposes of the applicable limitation on the number of depositions.

In "Rule 30(b)(6)", Committee on Pretrial Practice & Discovery, Section of Litigation, American Bar Association, Summer 2003, by Jonathan I. Handler, Page 5, the author noted:.

In addressing the scope of the examination under Rule 30(b)(6), at least one court has held that parties must confine deposition questions to matters stated with 'reasonable particularity' in the deposition notice. See Paparellli v. Prudential Ins. Co. of Am., 108 F.R.D. 727, 728 (D. Mass. 1985). The court in Paparelli acknowledged that, because the Rule clearly states the notice must describe matters with 'reasonable particularity,' it is implied that the deposition is also subject to the same limitation. Permitting the discovering party to ask questions beyond the scope of the notice would render the 'reasonable particularity' requirement useless. However, the court nonetheless concluded it was improper to instruct a witness not to answer a question that exceeded the scope of the notice. The court stated that rather than instructing the witness not to answer, counsel should have, consistent with Rule 30(b)(d), suspended the deposition and immediately sought a protective order.

A Florida court interpreted the Rule quite differently. The court in King v. Pratt &

> Whitney held that, regardless of the information contemplated in the notice of deposition, the deponent must answer all relevant questions. See King v. Pratt & Whitney, 161 F.R.D. 475 (S.D. Fl. 1995). The court conceded that confining the questioning to the scope of the notice only slows the discovery process because questions outside the notice will eventually be answered through a re-notice of deposition. However, if the deposing party inquires into matters outside the scope of the notice of deposition about which the deponent has no knowledge, the court will not impose sanctions on the corporation. This view makes sense. The purpose of the 'reasonable particularity' requirement is to aid the responding party in preparing a witness on the designated topics, not to protect a corporate deponent from having to answer unexpected questions.
>
> When faced with a situation where the scope of questioning exceeds the topics described in the notice, the defending party should move for a protective order immediately and the court may then limit both the scope and the manner in which the deposition is taken as provided in Rule 26(c). The deponent may also consider stating on the record that the witness is answering questions outside the scope of the notice based only on personal knowledge and not as a 30(b)(6) witness. Counsel should also state on the record that the notice is designed to inform the deponent of the subjects about which he or she is required to testify and that the notice in question fails to do so.

In "Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6)," Litigation, Winter, 2003, Volume 29, Number 2, by Sidney I. Schenkier, United States Magistrate Judge for the Northern District of Illinois, Judge Schenkier discussed the topic:

> However, even if the defending attorney believes the question is beyond the scope of the Rule 30(b)(6) notice, the defending attorney must think twice – and then think again – before instructing the witness not to answer. Rule 30(d)(1) allows an instruction not to answer only when 'necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)' for protective order on the ground that the questioning was being conducted in bad faith or to harass. It is generally better to note the objection and have the witness testify subject to the objection – which, if the defending attorney's objection is meritorious, will result in the testimony's being that of the individual and not of the corporation. See generally Detoy v. City & County of San Francisco, 196 F.R.D. 362, 367 (N.D. Cal. 2000) (if corporation objects to questioning beyond scope noticed, corporation may request jury instructions to explain that answers of deponent were answers or opinions of individual and not admissions of corporation); King, 161 F.R.D. at 476 (S.D. Fla. 1995) (answers to questions outside those noticed will be governed by general deposition rules); but see Paparelli, 108 F.R.D. at 730 (party must confine

examination to matters stated in Rule 30(b)(6) notice).

In addition to the authorities and cases cited above, Plaintiff's counsel notes practical problems with the position urged by Defendant. If counsel for a party is to be the arbiter of whether questioning is within the scope of a 30(b)(7) notice of deposition and the consequence of counsel disagreeing as to whether questioning is within the scope of the notice or not is to terminate each such deposition until the Court rules on each such objection, the process of depositions will become intractable. It will require extensive involvement by the Court on an almost question-by-question basis to have the Court evaluate whether each question asked is within the scope of the notice or not.

This is the opposite of the approach to depositions which the Rules contemplate, which instead requires that deposition testimony be taken, subject to objection, with the exceptions being where suspending a deposition or instructing a witness not to answer is necessary in order to preserve a privilege or to protect a witness from harassment. No privilege was at issue herein and, in fact, the question which gave rise to the deposition being terminated was whether the head of human resources for Defendant believed that comments attributed to the Plaintiff's direct supervisor were appropriate. If a question of this nature is determined by the Court to justify terminating a deposition and seeking a protective order from the Court, little discovery can be expected to occur without the Court's intervention.

The obvious answer to this dispute -- the approach taken by all courts, which have considered the issue except for the single 1985 decision cited by Defendant -- is to take the testimony (within the limits of privilege and non-abuse of the deponent) subject to the objection of Defendant that the matters inquired into are outside the scope of the notice. If, upon later review, the Court determines that the matters inquired into were outside the scope of the notice, then that portion of the testimony

taken is, at most, the testimony of that witness alone and not the testimony of the corporation.

The other practical issue is this: The individual deponent designated to respond to the 30(b)(7) notice is subject to deposition on an individual basis as well and can, at that individual deposition, be asked each and every question to which defense counsel objected in the 30(b)(7) deposition. What does it serve either the Defendant or the Plaintiff to conduct two separate depositions of the same witness, one under the designation 30(b)(7) deposition and a second as an individual deposition? In fact, normally Defendants require that Plaintiff's counsel treat the 30(b)(7) deposition as the individual deposition of the designee, so as not to annoy or harass the witness with multiple depositions. Instead, Defendant in this case insists that the deponent be deposed twice, once in her 30(b)(7) capacity and then again in her individual capacity. Not only does this approach multiply expense and annoyance for the parties and the witness, but it accomplishes nothing in terms of discovery of relevant evidence nor the orderly preparation of the case in the most expeditious and least expensive manner possible.

For all of these reasons, Plaintiff respectfully requests that Defendant's Motion for Protective Order be denied, that the Court order that the Defendant produce the witness for re-deposition pursuant to Rule 30(b)(7) and that all objections, other than as to privilege, simply be placed on the record, subject to later ruling by the Court.

KIMBERLY ALLOWATT
Plaintiff by Counsel,

Respectfully submitted,

_____

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IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

KIMBERLY ALLOWATT,

Plaintiff,

v. **//** **Civil Action No.: 15-C-445**

HIGHMARK WEST VIRGINIA INC.,
a West Virginia Corporation,

Defendant.

ORDER

On April 26, 2016, this Court heard Defendant's Motion for Protective Order Pursuant to Rules 26 (c) and 30(d) of the West Virginia Rules of Civil Procedure and thereafter each party submitted a proposed order. Upon review and consideration of same, the argument and representations of respective counsel and of the entire record and for reasons more fully stated on the record, the Court DENIES Defendant's motion for protective order. The Defendants are ORDERED to proceed with the 30(b)(7) deposition as noticed by Plaintiff and such deposition shall be conducted with Defendant retaining the right to object to inquiries which it believes outside the scope of the 30(b)(7) notice on record but without further interruption of the deposition on this basis and may further assert objections respecting relevancy and admissibility, all of which the Court will address before trial but after the deposition has concluded. Defendant's objections and exceptions to the Court's ruling are preserved.

The Clerk of this Court shall mail certified copies of this Order to each counsel of record.

ENTER:

5-16-2016

ENTERED
O.B. No. 306
PAGE 337
MAY 16 2016
CAROLE JONES
CLERK CIRCUIT COURT

J.D. BEANE, Judge

#NELA16 1076

June 2016

Using 30(b)(6) Depositions to Win Equal Employment Opportunity Class Actions: A Few Practical Tips by Cyrus Mehri*

My firm believes that well-crafted equal employment opportunity (EEO) class actions can and have been successful notwithstanding the set back to our practice by *Wal-Mart Stores v Dukes*, 131 S. Ct. 2541 (2011).[1] Using 30(b)(6) depositions are essential for successful EEO class actions.[2]

My co-panelist Robert Shug has written an outstanding paper, A Beginner's Guide to Rule 30(b)(6) Depositions: Ten Common Questions Answered. The paper explains the federal procedural rule and key case law. This short paper provides some practical tips learned and should be used along with Shug's paper.

1. Thoughtfully Incorporate 30(b)(6) Depositions into your Case Management Plan

One trap to avoid in a case management plan is counting 30(b)(6) depositions toward your overall cap on depositions. Since the defendant can choose as many witnesses as it wants to testify about the topics set forth in your 30(b)(6) deposition, you will soon find yourself in a bind if your 30(b)(6) depositions count toward your deposition cap. For example, if you are allowed 10 depositions overall, the defendant could divide up your 30(b)(6) depositions for 7 people and you have lost most of your available depositions. If on the other hand, 30(b)(6) depositions are outside of the cap, then defendant will most likely be more sensible about the number of 30(b)(6) deponents. If you have to count them, argue that a 30(b)(6) is a single deposition, no matter how many witnesses the defendant names.

Some thought has to be given as to the timing of your 30(b)(6) depositions. Sometimes you have ample information from your pre-filing investigation and your own clients to schedule the 30(b)(6) depositions early in the discovery process. However, in most instances you will want at least a core set of documents produced by the defendant well before the 30(b)(6) so you can fully analyze them. For some topics, you will want to share the documents with your experts prior to the 30(b)(6) deposition so the expert can help you refine your questions.

2. Carefully Identify Your 30(b)(6) Deposition Topics

It is important not to make your deposition topics so broad that is easy for the defendant to object to the breadth of the topics. Instead, you should have a strong

[1] Cyrus Mehri and Michael D. Lieder, *Onward and Upward After Wal-Mart v. Dukes,* Trial Magazine (Apr. 2012)

[2] See generally, "Addressing the Ever Increasing Standards for Statistical Evidence: A Plaintiffs Attorney's Perspective" by Cyrus Mehri and Michael D. Lieder in *Adverse Impact Analysis: Understanding Data, Statistics and Risk* (Routledge, forthcoming Q1 2017)

rationale for every topic and provide reasonable particularity regarding the topic in the deposition notice. Input from your experts is important in identifying the topics.

In the EEO class context, you will likely have some deposition topics solely pertaining to the company's HR databases and recordkeeping. Your statistical expert is going to need to understand what computerized data exists and the relevant database systems so it is crucial to include these topics. Typically, we have one 30(b)(6) notice devoted to database issues so we can isolate these issues from the other topics such as corporate policies and practices.

Deposition topics pertaining to policies and practices are especially crucial in the post-*Dukes* environment where courts increasingly require plaintiffs to identify common questions of law or fact under Rule 23(a)(2) that are material to the outcome of the case. It is crucial that the topics are designed to maximize your chances of establishing commonality for your class certification motion. Be sure to establish the scope of the suspect policies and practices under the corporate structure by geography, pay grade, location.

If your case attacks a selection procedure, e.g. a promotion system or an evaluation system, it is important that you become familiar with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607 (1978), as you are shaping your 30(b)(6) topics. For example, if you suspect that the employer has not properly validated the selection procedure then it is important that one topic in the notice covers that issue.

If your defendant is a government contractor, it is important to research what reporting requirements the employer has and to include recordkeeping and reporting topics.[3] It is very possible you will find out in a 30(b)(6) that the company is failing to meet its obligations. Another often fruitful topic is the company's response to EEO complaints. In one 30(b)(6), we discovered that the HR department had close to 100 complaints and in all but one instance sided with the manager over the employee, making the entire system seem so one sided as to be flawed. In a class EEO case, typically the 30(b)(6) depositions have more impact on a successful class motion than regular fact witnesses. It is important to maximize your 30(b)(6) opportunity.

3. Alternatives to 30(b)(6) Depositions

If the defendant is cooperative, it may be more productive and less costly to have informal discovery concerning database issues, with the experts from both sides able to question someone familiar with the database directly. The attorneys should participate to take notes, ask follow-up questions where needed, and document the information learned afterward.

[3] See for example the July 31st, 2014 Fair Pay and Safe Workplaces Executive Order

4. Effectively Take the 30(b)(6) Depositions

At the outset of the deposition, it is important that the witness specifically identify which of the topics she is knowledgeable to testify about and which ones are left for other 30(b)(6) witnesses. Second, it is very common for the company to designate the witness as both a fact witness and a 30(b)(6) witness such as an HR executive. It is important to tell the witness that the testimony will be treated as 30(b)(6) testimony on behalf of the employer unless the witness specifically says otherwise. This way you will have a clean record.

A common employer trick is to identify a witness as a 30(b)(6) deponent, but fail to require the witness to prepare so she can speak knowledgeably about a topic. If that happens, it is important to get on the record exactly what the witness did to prepare for the deposition. The defendant is obligated to prepare the 30(b)(6) witness on the noticed topics. If you can establish that the employer has failed to properly prepare the 30(b)(6) witness on a given topic, then you have the predicate to move to compel supplemental witnesses. It is also important to go through all of your questions and identify to the judge that the witness repeatedly did not know the answer. If the employer wastes everyone's time with a completely unprepared 30(b)(6) deponent then it is possible that a sanctions motion is appropriate.

Most 30(b)(6) depositions should be primarily for the purpose of gaining admissions. Prepare thoroughly to obtain the desired answers.

Be alert to, and ask questions about, documents evidencing the deponent's testimony. Often a 30(b)(6) deposition reveals documents that have not been produced or have been spoliated.

Conclusion

In an EEO class action, 30(b)(6) depositions are one of the best tools for winning your case. They can provide "the glue" Justice Scalia called for to establish Rule 23(a)(2) commonality as set forth in *Dukes* -- with common suspect policies that impact the entire class. They can also set the stage for statistical reports that provide the common proof to obtain class certification and to win at trial. With that in mind, putting a lot of thought and energy into using this tool for a winning strategy is crucial for the success of your case. Our firm is available as a resource.

[*] Cyrus Mehri is a founding partner of Mehri & Skalet, PLLC. The firm litigates cases involving discrimination, civil and consumer rights violations, and corporate fraud. Mr. Mehri has served as co-lead class counsel in some of the largest and most significant race and gender cases in U.S. history: *Roberts v. Texaco Inc.* ($176 million; S.D.N.Y. 1997); *Ingram v. The Coca-Cola Company* ($192 million; N.D. Ga. 2001); *Robinson v. Ford Motor Company* ($10 million and 279 apprentice positions; S.D. Ohio 2005); *August-Johnson v. Morgan Stanley* ($47 million; D.D.C. 2007); *Amachoev v. Smith Barney* ($34 million; N.D. Cal. 2008); *Norflet v. John Hancock Life Insurance Co.* ($24 million; D. Conn. 2009), and *Carter v. Wells Fargo Advisors, LLC* ($32 million; D.D.C. 2011). The hallmark of these settlements is innovative programmatic relief.

A Beginner's Guide to Rule 30(b)(6) Depositions: Ten Common Questions Answered

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#NELA2016
National Employment Lawyers Association
2016 Annual Convention
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Rule 30(b)(6) of the Federal Rules of Civil Procedure is a plaintiffs' attorney's best friend. Most lawyers take at least one Rule 30(b)(6) deposition in every case, from individual breach of contract claims to nationwide wage-and-hour class actions. Instead of wasting our time and resources trying to pry information from a never-ending line of (conveniently) forgetful witnesses, Rule 30(b)(6) forces the defendant to track down the information we want and bring it to us (well...at least in a perfect world). The goal of these materials is to provide an introduction to Rule 30(b)(6) for new practitioners, and to answer a few of the common questions that arise in preparing for and taking a Rule 30(b)(6) deposition.

1. What is Rule 30(b)(6)?

Rule 30(b)(6) of the Federal Rules of Civil Procedure provides:

> ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6)

does not preclude a deposition by any other procedure allowed by these rules.

Rule 30(b)(6) was added as part of the 1970 amendments to the Federal Rules of Civil Procedure. Fed. R. Civ. P. 30(b)(6) advisory committee's note. Prior to the addition of the rule, some organizations engaged in a tactic called "bandying," in which each employee who was deposed would disclaim knowledge of the facts in question, explaining that a different employee would be the better person to ask. *See, e.g.*, 8A Charles Alan Wright, et al., Federal Practice and Procedure § 2110 (3d ed. 2014). Rule 30(b)(6) was aimed at solving this problem, as well as other related issues.

The Advisory Committee gave three main reasons for the adoption of Rule 30(b)(6). *See* Fed. R. Civ. P. 30(b)(6) advisory committee's note. First, the rule would reduce the difficulty in determining whether a particular employee is the "managing agent" of a party prior to the taking of the deposition. *Id.* Second, the rule would stop the practice of bandying, described above. *Id.* Third, and relatedly, Rule 30(b)(6) would prevent organizations from being subjected to a large number of depositions of their officers and other employees by an opposing party unsure of who within the organization has knowledge of the facts at issue. *Id.*

2. What are the Obligations of the Noticing Party?

The obligations of the party who wants to take a deposition under Rule 30(b)(6) are relatively easy to fulfill. The party simply notices or subpoenas the deposition of the entity to be questioned and lists the topics for questioning, either in the notice itself or in a separate attachment. *See* Fed. R. Civ. P. 30(b)(6).

The only significant burden on the noticing party is to describe the matters for examination "with reasonable particularity." *See id.* As one court put it, "to allow the Rule to effectively function, the requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute." *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000). A Rule 30(b)(6) notice is likely sufficient if the noticing party makes a "conscientious effort" to focus its intended inquiry on subject areas that are factually and temporally relevant to the claims at issue. *Id.* at 639.

Courts are most concerned with topics that are too broad or vague to allow the witness and their counsel to adequately prepare for the deposition. *See, e.g.*, *Federal Ins. Co. v. Delta Mech. Contractors, LLC*, 2013 WL 1343528, at *4 (D.R.I. Apr. 2, 2013) ("Delta's list of twenty-four topics are sufficiently broad and amorphous as to run afoul of the requirement that Rule 30(b)(6) topics must be described with reasonable particularity."). For example, some courts have found the

phrase "including but not limited to" or similar language indicative of an overbroad topic that subjects the noticed party to "an impossible task." *Id.*; *see also Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) ("Where, as here, the defendant cannot identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible.").

If the topics listed in the notice are overly broad or otherwise improper, the party subject to the notice may seek a protective order. *E.g.*, *New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, 242 F.R.D. 164, 165-66 (D. Mass. 2007). "What is not proper practice is to refuse to comply with the notice, put the burden on the party noticing the deposition to file a motion to compel, and then seek to justify non-compliance in opposition to the motion to compel." *Id.* at 166; *accord Robinson v. Quicken Loans, Inc.*, 2013 WL 1776100, at *3 (S.D. W.Va. Apr. 25, 2013) ("Consequently, once a Rule 30(b)(6) deposition notice is served, the corporation bears the burden of demonstrating *to the court* that the notice is objectionable or insufficient. Otherwise, the corporation must produce an appropriate representative prepared to address the subject matter described in the notice." (emphasis in original)).

Alternatively, some courts have also allowed the noticed party to produce a witness who is reasonably prepared to speak about the topics at issue, despite the fact that the notice may be somewhat overbroad. *See Fed. Ins. Co.*, 2013 WL 1343528, at *4 ("In effect, by choosing to list many broad topics, Delta, as the propounder of the notice, made a strategic decision to avoid the risk that a topic would come up outside the scope of the Rule 30(b)(6) notice, while accepting the risk that it is simply impractical to expect Rule 30(b)(6) witnesses to know the intimate details of everything."); *Adams v. AllianceOne, Inc.*, 2011 WL 2066617, at *10 (S.D. Cal. May 25, 2011) ("Faced with a broadly-worded deposition notice, Defendant cannot reasonably be expected to anticipate specific questioning and produce PMKs accordingly.").

3. Who Can Be Served with a Rule 30(b)(6) Notice?

A Rule 30(b)(6) deposition can be served on "a public or private corporation, a partnership, an association, a governmental agency, or other entity." Fed. R. Civ. P. 30(b)(6). The language in the rule is intentionally broad. In the 2007 amendments to the Federal Rules of Civil Procedure, the phrase "or other entity" was added to "ensure that the deposition process can be used to reach information known or reasonably available to an organization no matter what abstract fictive concept is used to describe the organization." Fed. R. Civ. P. 30, advisory committee's note. This includes, for example, "limited liability companies, limited partnerships, business trusts," as well as "more exotic common-law creations, or forms developed in other countries." *Id.*

4. Who Can Be Designated as a Rule 30(b)(6) Witness?

Technically, the party responding to a Rule 30(b)(6) deposition can designate anyone, as long as that person is prepared to testify on the topics for which they are designated. "The rule does not expressly or implicitly require the corporation or entity to produce the 'person most knowledgeable' for the corporate deposition." *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012); *accord Taza Sys., LLC v. Taza 21 Co., LLC*, 2012 WL 5381422, at *1 (W.D. Pa. Oct. 31, 2012). Instead, as explained more fully below, the organization "has the duty to identify a witness to testify on its behalf and to prepare that witness to state the organization's position, knowledge, subjective beliefs, and opinions on identified topics." *Id.*; *see also Harris v. New Jersey*, 259 F.R.D. 89, 92-93 (D.N.J. 2007). As long as the deponent is prepared, the noticing party "may not impose his belief . . . as to whom to designate." *Booker v. Mass. Dep't of Pub. Health*, 246 F.R.D. 387, 389 (D. Mass. 2007) ("[I]t is ultimately up to the corporation to designate its Rule 30(b)(6) witness.").

As a practical matter, organizations will usually designate a witness with at least *some* personal knowledge of the facts at issue. This reduces the chances of the witness being forced to answer "I don't know" to numerous questions, prompting an argument that the witness was not adequately prepared and potentially subjecting the organization to sanctions.

5. They Designated Three Witnesses! Can They Do That?

Yes. Because Rule 30(b)(6) notices will usually cover a variety of topics, defendants commonly designate multiple witnesses to provide testimony in different areas. *See* Fed. R. Civ. P. 30(b)(6) ("The named organization must then designate one or more . . . persons who consent to testify on its behalf ...."). In fact, courts have held that more than one witness *must* be designated when it is necessary to provide complete testimony. *See, e.g.*, *Elan Microelectronics Corp. v. Pixcir Microelectronics Co. Ltd.*, 2013 WL 4101811, at *5 (D. Nev. Aug. 13, 2013). In cases involving events that span a number of years, defendants sometimes also designate different witnesses to testify about different time periods.

6. What are the Obligations of the Noticed Party in Preparing the Witness?

The noticed party has significant obligations in adequately preparing its Rule 30(b)(6) witness. "A corporation has an affirmative duty to produce a representative who can answer questions that are within the scope of the matters described in the notice." *Harris*, 259 F.R.D. at 92. The organization is obligated to make a "conscientious, good-faith effort" to designate individuals who have knowledge of the matter sought, and to prepare those persons to testify fully, completely, and

unevasively. *Id.* (quoting *Mitsui & Co. v. Puerto Rico Water Res. Auth.*, 93 F.R.D. 62, 67 (D.P.R. 1981)).

Witnesses must be prepared to the extent that facts are "known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6). Contrary to popular belief, Rule 30(b)(6) does not require that the "person most knowledgeable" about a topic be designated to testify. *Taza Sys.*, 2012 WL 5381422, at *1. However, "[i]f the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers." *U.S. v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996). The obligation to adequately prepare Rule 30(b)(6) witnesses is "significant but appropriate," given that they speak for the corporation. *Berwind Prop. Grp. Inc. v. Envtl. Mgmt. Grp., Inc.*, 233 F.R.D. 62, 65 (D. Mass. 2005); *see also Seaga Mfg., Inc. v. Intermatic Mfg. Ltd.*, 2013 WL 3672964, at *2 (N.D. Ill. July 12, 2013) (noting that preparing a Rule 30(b)(6) witness is an "onerous and burdensome task," but one that "flows from the privilege of using the corporate form to do business").

To become adequately prepared, a witness may need to obtain information from current or past employees, company records, documents, prior deposition testimony, or other sources. *See Open Capital Group LLC v. Thermo Fisher Scientific Inc.*, 2015 U.S. Dist. LEXIS 120022, at *7-14 (D. Del. Sept. 8, 2015); *Taylor*, 166 F.R.D at 361-62; *Prokosch*, 193 F.R.D. at 639; *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 37 (D. Mass. 2001). In other words, a company is required to "create" a witness if necessary. *QBE Ins. Corp.*, 277 F.R.D. at 689. "Even if the documents are voluminous and the review of those documents would be burdensome, the deponents are still required to review them in order to prepare themselves to be deposed." *Calzaturficio*, 201 F.R.D. at 37. Any other interpretation of the rule would unfairly allow an organization to "sandbag" the deposition process, thereby preventing the issues in the case from being fully and fairly explored prior to trial. *Prokosch*, 193 F.R.D. at 639 (quoting *Taylor*, 166 F.R.D. at 362).

An organization may not refuse to produce a Rule 30(b)(6) witness by arguing that its corporate documents "state the company's position." *See Great Am. Ins. Co. of New York v. Vegas Const. Co.*, 251 F.R.D. 534, 539 (D. Nev. 2008). Likewise, the designated witness cannot simply reference or read from an outline prepared by their attorneys. *E.g.*, *In re Neurontin Antitrust Litig.*, 2011 WL 2357793, at *2, 4-7 (D.N.J. June 9, 2011). "A Rule 30(b)(6) deponent must explain the organization's interpretation of the documents, give the reasons for the interpretation, and stand subject to cross-examination." *F.D.I.C. v. 26 Flamingo, LLC*, 2013 WL 3975006, at *6 (D. Nev. Aug. 1, 2013).

7. What if the Witness is Unprepared?

If the Rule 30(b)(6) witness is unable to adequately respond to questioning during the deposition, then the responding corporation has a duty to designate supplemental witnesses. *Taylor*, 166 F.R.D. at 360 n.5; *Starlight Int'l Inc. v. Herlihy*, 186 F.R.D. 626, 638-39 (D. Kan. 1999).

If a party does not properly prepare its witness, refuses to produce a supplemental witness, or provides no witness at all, then a variety of sanctions may be warranted. Available remedies include a court order compelling the organization to provide an appropriate witness, an award of costs or attorneys' fees, preclusion of testimony, or (in the worst cases) entry of a default judgment. *See QBE Ins. Corp.*, 277 F.R.D. at 690 (describing available remedies).

In the most common scenario, a party's failure to properly prepare a Rule 30(b)(6) witness can be remedied by a motion to compel. If the court agrees that the witness was unprepared, the party will be ordered to produce an adequately prepped witness, with or without an award of attorneys' fees and costs as a sanction. *See, e.g.*, *See Open Capital Group LLC*, 2015 U.S. Dist. LEXIS 120022, at *11-14; *Fort Worth Empls.' Ret. Fund v. J.P. Morgan Chase & Co.*, 2013 WL 6439069, at *4 (S.D.N.Y. Dec. 9, 2013) (ordering the parties to confer regarding additional witnesses or "alternative forms of evidence"); *Nacco Materials Handling Grp., Inc. v. Lilly Co.*, 278 F.R.D. 395, 401 (W.D. Tenn. 2011) (ordering additional depositions, as well as fees and costs); *Wilson v. Lakner*, 228 F.R.D. 524, 530 (D. Md. 2005) (ordering additional depositions and permitting a motion for fees and costs); *Berwind Prop. Grp.*, 233 F.R.D. at 65 (ordering supplementation on certain topics, but declining to order another deposition); *Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.*, 2002 WL 1835439, at *2 (S.D.N.Y. Aug. 8, 2002) (ordering the production of a properly prepared witness); *Calzaturficio*, 201 F.R.D. at 36-42 (finding it "glaringly obvious" that witnesses were not educated, ordering additional depositions, and reserving determination on fees and costs).

But other sanctions (in addition to monetary sanctions) are also a possibility, with some courts holding that a party's failure to provide an adequate Rule 30(b)(6) witness is tantamount to a "failure to appear" under Rule 37. The rationale is that "[i]f that agent is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all." *Resolution Trust Corp. v. S. Union Co.,* 985 F.2d 196, 197 (5th Cir. 1993). In these circumstances, courts have the discretion to issue discovery sanctions, including the preclusion of testimony at trial, the treatment of certain facts as established, or even dismissal or default judgment. *See, e.g.*, *Banco Del Atlantico, S.A. v. Woods Indus. Inc.*, 519 F.3d 350 (7th Cir. 2008) (affirming district court's order dismissing plaintiffs' case for Rule 30(b)(6) violations); *Black Horse Lane Assoc., L.P. v. Dow*

Chem. Corp., 228 F.3d 275, 300-305 (3d Cir. 2000) (affirming award of monetary sanctions under Rule 37); *Reilly v. Natwest Markets Grp., Inc.*, 181 F.3d 253, 268-69 (2d Cir. 1999) ("Having determined that NatWest violated both Rule 30(b)(6) and Judge Sprizzo's order, we have little difficulty in concluding that barring Adams and Letzler from testifying about Reilly's work was proper."); *Kyoei Fire & Marine Ins. Co., Ltd. v. M/V Mar. Antalya*, 248 F.R.D. 126, 152-53 (S.D.N.Y. 2007) (treating disputed matter as established due to failure to produce a Rule 30(b)(6) witness); *Starlight Int'l*, 186 F.R.D. at 636-40, 651 (awarding sanctions).

In the event that the opposing party fails to comply with Rule 30(b)(6), the matter should be promptly brought to the attention of the district court. *See Gutierrez v. AT&T Broadband, LLC*, 382 F.3d 725, 733 (7th Cir. 2004) ("[W]e also note that the plaintiffs made a tactical decision not to insist that the defendants produce better witnesses after Baucom proved inadequate. Such a request very likely would have been viewed favorably had it been made prior to the close of discovery, with possible sanctions levied against the defendants for failing to provide an appropriate deponent in the first instance. Yet, the plaintiffs raised their dissatisfaction with Baucom after the close of discovery, in the midst of summary-judgment briefing, and with prior knowledge that better witnesses, like Ryczek, existed.").

8. <u>Are Questions Strictly Limited to the Topics in the Notice?</u>

No. The widely-accepted view is contained in *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995). There, the defendant terminated the deposition and brought a motion for a protective order after opposing counsel asked questions outside the scope of the 30(b)(6) notice. *Id.* The district court noted that counsel's conduct was understandable considering prior case law condoning this practice. *Id.* at 476 (citing *Paparelli v. Prudential Ins. Co.*, 108 F.R.D. 727 (D. Mass. 1985)). However, the court declined to follow this reading of Rule 30(b)(6). *Id.* The court concluded that "[i]f the examining party asks questions outside the scope of the matters described in the notice, the general deposition rules govern (i.e. Fed. R. Civ. P. 26(b)(1)), so that relevant questions may be asked and no special protection is conferred on a deponent by virtue of the fact that the deposition was noticed under 30(b)(6)." *Id.* "However, if the deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party's problem." *Id.*

The vast majority of courts follow the *King* rational. *See, e.g.*, *Am. Gen. Life Ins. Co. v. Billard*, 2010 WL 4367052, at *4 (N.D. Iowa Oct. 28, 2010) ("The conclusion reached in *King* has been unanimously accepted by courts addressing the issue since that time."). However, some courts have further held that, to prevent an "ambush" or admissions on topics for which the witness was not prepared, counsel may note on the record its contention that answers to questions beyond the scope of

the notice are fact witness testimony, not 30(b)(6) testimony. *See Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000) ("[C]ounsel shall state the objection on the record and the witness shall answer the question, to the best of the witness's ability"); *see also First Fin. Bank, N.A. v. Bauknecht*, 2014 WL 949640, at *3 (C.D. Ill. Mar. 11, 2014) ("Graymont may well wish to make clear which testimony is corporate testimony and which is not."); *Crawford v. George & Lynch, Inc.*, 2013 WL 6504363, at *5 (D. Del. Dec. 9, 2013) ("If the witness is called to testify at trial, then the trial judge is the proper authority to rule on objections to the scope or admissibility of the testimony."); *see also Whiting v. Hogan*, 2013 WL 1047012, at *12 (D. Ariz. Mar. 14, 2013) (same); *F.C.C. v. Mizuho Medy Co. Ltd.*, 257 F.R.D. 679, 682-83 (S.D. Cal. 2009) (same).

9. Do the Answers of the Witness Bind the Company?

Yes and no. The testimony of a Rule 30(b)(6) witness is certainly binding in the sense that it is the testimony of the corporation, given under oath. Accordingly, damaging testimony from a Rule 30(b)(6) witness will follow the organization throughout the proceedings and will be extremely hard to shake. *See, e.g.*, *Orthoarm, Inc. v. Forestadent USA, Inc.*, 2007 WL 4457409, at *2-3 (E.D. Mo. Dec. 14, 2007) (rejecting declaration as a "sham affidavit" at summary judgment because it "directly contradict[ed]" prior Rule 30(b)(6) deposition testimony); *Casas v. Conseco Fin. Corp.*, 2002 WL 507059, at *10-11 (D. Minn. Mar. 31, 2002) (granting summary judgment based on Rule 30(b)(6) testimony and refusing to consider contradictory affidavits).

However, many courts do not treat Rule 30(b)(6) testimony as "binding" in the sense of a judicial admission. These courts reason that "just as in the deposition of individuals, [the testimony] is only a statement of the corporate person which, if altered, may be explained and explored through cross-examination as to why the opinion or statement was altered." *Taylor*, 166 F.R.D. at 362 n.6; *accord A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001); *Dow Corning Corp. v. Weather Shield Mfg., Inc.*, 2011 WL 4506167, at *5 (E.D. Mich. Sept. 29, 2011); *Johnson v. Big Lots Stores, Inc.*, 2008 WL 6928161, at *3 (E.D. La. May 2, 2008); *A&E Prods. Grp., L.P. v. Mainetti USA Inc.*, 2004 WL 345841, at *7 (S.D.N.Y. Feb. 25, 2004). *But see, e.g.*, *Rainey v. Am. Forest and Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) ("Unless it can prove that the information was not known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition.").

10. How Can I Use Rule 30(b)(6) Testimony?

However you want! Under Rule 32(a)(3), "[a]n adverse party may use *for any purpose* the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4)." Fed.

R. Civ. P. 32(a)(3) (emphasis added). For example, testimony from a Rule 30(b)(6) witness can be used to support discovery, class certification, or summary judgment motions, and can be played (or read) for the fact-finder at trial.