

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ONE WISCONSIN INSTITUTE, INC, *et al*,

Plaintiffs,

v.

Case No. 3:15-cv-324

GERALD C. NICHOL, *et al*,

Defendants.

**DEFENDANTS' RESPONSE TO MOTION FOR LEAVE TO TAKE
ADDITIONAL DEPOSITIONS**

The Court should deny the plaintiffs' motion for leave to take more than fifteen depositions. The plaintiffs have not justified the need to exceed the agreed-upon number of depositions. There simply is not enough time for the plaintiffs to take all the depositions they seek when there are barely two weeks left in the discovery period—which the defendants have already agreed to extend from April 11 to April 22, and with over twenty depositions left to take, including several that require travel to out-of-state locations. This time and resource crunch is a creature of plaintiffs' own making, resulting from their decisions to wait till now to take most the depositions, to dramatically alter the case only six weeks before trial rather than filing a separate case,

and to devote many of their depositions to an issue affecting a very small number of voters.

The issue of the appropriate number of depositions dates is not new: it was raised in the Joint Preliminary Pretrial Conference Report filed on August 6, 2015. The defendants proposed allowing fifteen depositions, with the plaintiffs being allowed to seek leave for more as the case proceeded. (Dkt. 27:3.) But the plaintiffs took only five depositions during August, September, October, November, December, January, February, and March. (Dkt. 143 ¶ 2.) Now, on the eve of the close of discovery and as trial approaches, the plaintiffs seek to expand the number of depositions. The prejudice to the defendants is not simply allowing depositions to be taken, but in imposing a schedule under which each side will be taking and defending a deposition every day until discovery closes—including numerous out-of-state depositions of experts.

While this fact alone would be enough to deny the motion, it is also relevant that the plaintiffs' problem is of their own making. The plaintiffs have chosen to allocate six of their fifteen depositions to the witnesses from the Wisconsin Department of Transportation, Division of Motor Vehicles ("DMV"), tasking a Rule 30(b)(6) deposition and requesting five additional depositions of individual employees. (Dkt. 143 ¶¶ 2–3.) These depositions relate primarily to the new claims in the Second Amended Complaint filed

last month. (Dkt. 141.) The plaintiffs would have more than enough depositions if they had simply filed a new lawsuit against the DMV, rather than trying to “reinstate” their claims relating to the individual denials of ID cards into this case.

FACTS

I. Proceedings from the filing of the case until February of this year

The parties filed a Joint Preliminary Pretrial Conference Report on August 6, 2015. (Dkt. 27.) In that report, the plaintiffs asked for thirty depositions and, notably, a trial that would take place on February 15, 2016. (Dkt. 27:2–3.) The defendants proposed “that each side be permitted 15 depositions without seeking leave of Court.” (Dkt. 27:3.) The defendants’ position has always been that the plaintiffs should use the depositions allotted and then justify the need to exceed the allotted depositions.

On August 16, 2015, the Court entered a Pretrial Conference Order that rejected the plaintiffs’ proposal and provided “[a]bsent written agreement of the parties or a court order to the contrary, all discovery must conform with the requirements of Rules 26 through 37 and 45.” (Dkt. 29:3.) Discovery was to close on April 11, 2016, and the trial scheduled for May 16, 2016. (Dkt. 29:3, 5.) The defendants have maintained their position that fifteen depositions is the appropriate number.

The plaintiffs have only taken five depositions from August of 2015 through today: Rule 30(b)(6) depositions of the Government Accountability Board (“GAB”) and the DMV, and three depositions of GAB employees (Kevin Kennedy, Michael Haas and Diane Lowe). (Dkt. 143 ¶ 2.)

II. The plaintiffs’ Second Amended Complaint

On February 26, 2016, the plaintiffs moved for partial reinstatement of voter ID claims (the “Motion to Reinstate”) “to the extent they challenge the multiple abuses of discretion by state officials and employees in implementing and enforcing the voter ID provisions of Act 23, including the voter ID Petition Process administered pursuant to Wis. Admin. Code Trans. § 102.15(5m).” (Dkt. 131:1.) The motion centered on the DMV’s “extraordinary proof” procedure for obtaining an ID card even without the required documentation, such as a birth certificate, referred to as the “IDPP.”

According to the plaintiffs’ Motion to Reinstate, 1,062 people used the IDPP from September of 2014 until the end of 2015. (Dkt. 132:13.) Of these 1,062 individuals, only 198 failed to secure an ID. (Dkt. 132:13–14.) To summarize, there were only 1,062 people who needed to go beyond the traditional method of simply providing a birth certificate to obtain the free State of Wisconsin ID card, of which over 80% were able to secure an ID card. Even if it is assumed that all 198 were denied an ID for improper reasons

(and the DMV disputes this is the case), the plaintiffs' claims related to the IDPP affect a very small number of Wisconsin voters.

Following a telephonic hearing, the Court granted the motion as "the most efficient means of providing a comprehensive resolution to the matter" and directed the plaintiffs to file an amended complaint by March 25, 2016. (Dkt. 139:2.) The plaintiffs filed a Second Amended Complaint on March 25, 2016, which added four new plaintiffs and also added officials from the Wisconsin Department of Transportation and the DMV as defendants. (Dkt. 141.)

III. The scheduling of depositions for March and April of 2016

On March 7, 2016, counsel for the plaintiffs identified thirteen individuals they would like to depose: the defendants' two experts (Trey Hood and Nolan McCarty), five clerks who had submitted declarations in support of the defendants' motion for summary judgment (Diane Hermann-Brown, Tim McCumber, Constance McHugh, Kathleen Novack and Susan Westerbeke), and seven DMV employees involved in the IDPP (Jim Miller, Ann Perry, Susan Schilz, Leah Fix, David Okonski, and Becky Beck). On March 9, 2016, counsel for the defendants similarly asked for depositions of witnesses, including the plaintiffs' five experts.

On March 11, 2016, counsel for the defendants confirmed by email the schedule for the depositions of the defendants' two experts and the plaintiffs' five experts. The schedule, as confirmed in a March 15 email, is as follows:

| Date | Expert (Pl. or Def.) | Location |
|-------------|-----------------------------|------------------|
| April 7 | Burden (Pl.) | Madison |
| April 7 | Hood (Def.) | Georgia |
| April 8 | Mayer (Pl.) | Madison |
| April 13 | Minnite (Pl.) | Philadelphia |
| April 14 | McCarty (Def.) | New Jersey |
| April 14 | Ghitza (Pl.) | Chicago |
| April 20 | Lichtmann (Pl.) | Washington, D.C. |

As can be seen, the expert depositions will require extensive travel by attorneys and will take place throughout the month of April, necessitating an extension of the discovery period to April 22 to complete depositions.

On March 15, 2016, counsel for the defendants sent an email offering dates for the five clerks who had submitted declarations in support of the defendants' summary judgment motion.

On March 21, counsel for the plaintiffs selected eleven deponents that would make up its remaining ten depositions, later deciding that they would depose Clerk Constance McHugh rather than Ann Perry of the DMV. On March 24, the plaintiffs first contacted the defendants about a deposition of Jessica Garrels, a Wisconsin resident who lives in Laos.

The defendants have subsequently worked with the plaintiffs to find mutually agreeable dates for the plaintiffs' ten remaining depositions, some of

the potential additional depositions should the Court grant the motion, and the depositions the defendants are taking. As of now, the deposition schedule for depositions that will occur regardless of the Court's ruling on this motion looks as follows:

| Date | Deponent (Party Taking) |
|-------------|--------------------------------|
| April 5 | Becky Beck (Pl.) |
| April 7 | Barry Burden (Def.) |
| April 7 | M.V. Hood III |
| April 8 | Kenneth Mayer (Def.) |
| April 11 | Susan Schilz (Pl.) |
| April 11 | David Okonski (Pl.) |
| April 11 | Andrea Kaminski (Def.) |
| April 12 | Diane Hermann-Brown (Pl.) |
| April 12 | Leah Fix (Pl.) |
| April 13 | Anita Johnson (Def.) |
| April 13 | Scott Trindl (Def.) |
| April 13 | Lorraine Minnite (Def.) |
| April 14 | Nolan McCarty (Pl.) |
| April 14 | Yair Ghitza (Def.) |
| April 19 | Jim Miller (Pl.) |
| April 19 | Constance McHugh (Pl.) |
| April 20 | Alan Lichtmann (Def.) |
| April 20 | Kathleen Novack (Pl.) |
| April 21 | Cassandra Silas (Def.) |
| April 21 | Johnny Randle (Def.) |
| April 22 | David Walker (Def.) |
| April 22 | Nannette Mayze (Def.) |

This schedule does not include the deposition of Jessica Garrels, which the defendants believe should count against the plaintiffs' limit of 15 and has been suggested for the evening of April 18 or 19. Further, this schedule does not include the depositions of Neil Albrecht and David Apointe (one of the new plaintiffs) because those dates are not yet set.

ARGUMENT

I. The plaintiffs have not justified expanding the number of depositions past fifteen, particularly when discovery is about to close.

The Court should not allow the plaintiffs to take fifteen depositions in the last three weeks of discovery. The plaintiffs took five depositions over the first eight months of discovery and now seek to take three times that many in the closing weeks. Even if the proposed depositions were necessary, the plaintiffs have not provided sufficient justification for needing additional depositions this close to trial after failing to take advantage of the many months over which depositions could have been taken.

As an initial matter, the plaintiffs do not explain why the Garrels deposition does not count against the limit even though it is clearly a deposition under Rule 30. The plaintiffs will have to decide whether to use Ms. Garrels as one of their fifteen and, if so, which other deponent should be replaced.

On the merits of the motion, a request to exceed the agreed-upon number of depositions is not judged solely on the burden caused by the additional depositions. As the Northern District of Texas held, a party must justify both the depositions within the limit and those that are over the limit. *Barrow v. Greenville Indep. Sch. Dist.*, 202 F.R.D. 480, 482–83 (N.D. Tex. 2001). Like the party *in Barrow*, had the plaintiffs “opted not to take other

depositions, [they] could have taken the ones in question without first obtaining leave of court. [They] should not be allowed to conduct ten (or, in this case, 15) depositions that were not subject to judicial review under the Rule 26(b)(2) standards and then only be required to challenge . . . the additional ones at issue.” *Id.* When judged in totality, the burden on the defendants is large and does not warrant exceeding fifteen depositions.

The plaintiffs are simply incorrect that the “burden that Defendants would incur as a result of these depositions would be slight” because there are only four additional depositions. (Dkt. 143 ¶ 8.) The defendants’ burden is the need to defend fifteen depositions in the course of three weeks, while simultaneously taking depositions of their own which the plaintiffs have scheduled for this same time period. The defendants simply do not have sufficient attorneys to cover fifteen plaintiff depositions in addition to the depositions the defendants need to take during this time (and are within their allotted amount). There are five Assistant Attorneys General assigned to this case who will be taking and defending these various depositions between their work on other cases.

In addition, the plaintiffs could have deposed many of these witnesses long ago. The plaintiffs are only now seeking to depose the defendants’ experts and the five clerks who submitted declarations in support of the defendants’ summary judgment motion now, even though the reports and

declarations were submitted in January. Had the plaintiffs used the time for discovery more efficiently, perhaps the defendants would have agreed to some additional depositions.

II. The plaintiffs are not entitled to additional depositions because they chose to devote six depositions to the “reinstated” claims that affect a very small number of Wisconsin voters.

While the burdens alone warrant denying the motion, the plaintiffs have not established the need to exceed the deposition limits. Every deposition can conceivably lead to relevant information, but “the purpose of the limitation in the rule is to force counsel to think long and hard about who they want to depose and to depose only those who are really important, so as to stay within the limit set by the rule.” *San Francisco Health Plan v. McKesson Corp.*, 264 F.R.D. 20, 21 (D. Mass. 2010). The plaintiffs here have not thought “long and hard” about who needs to be deposed so that they only depose those that are important.

The plaintiffs devote forty percent (six of fifteen) depositions to the DMV’s IDPP. While the plaintiffs can use their allotted fifteen depositions as they wish, their choice does not support a need to go beyond fifteen depositions. Even under the plaintiffs’ allegations, only 1,062 people used the IDPP from September of 2014 until the end of 2015. (Dkt. 132:13.) This is about 0.03% of the 3,387,048 registered voters in Wisconsin as of March 25,

2016.¹ Further, only 198 people— less than 0.01% of all Wisconsin voters and less than 20% of the 1,062 voters in the IDPP—failed to secure an ID after using the IDPP. (Dkt. 132:13–14.) Even under the most generous reading of the plaintiffs’ allegations, the IDPP affects a very small number of Wisconsin voters.

Even though the scope of the IDPP’s effects on the Wisconsin electorate is small, the plaintiffs want to depose five DMV fact witnesses about the IDPP over two clerks who submitted declarations in support of the defendants’ motion for summary judgment. (Dkt. 143:4.) The plaintiffs think discovery on the DMV’s decisions on issuing ID cards to the thousand voters who have used the IDPP takes priority over discovery of clerks who administer the other, numerous Wisconsin election laws they have challenged. This decision does not justify increasing the number of depositions.

The plaintiffs cannot use this many depositions on the DMV issue and then argue that the remaining witnesses have information they need to obtain by deposition. *Barrow*, 202 F.R.D. at 482–83. Cumulative depositions should be denied. *See Bell v. Fowler*, 99 F.3d 262, 271 (8th Cir. 1996) (affirming denial of extra depositions because “the additional depositions

¹ <http://www.gab.wi.gov/publications/statistics/registered-voters-2016-march-25>

simply would have been cumulative and would have served no proper purpose”). The plaintiffs do not explain why it is necessary to depose the DMV’s Director of Field Services, the Supervisor of the DMV’s Compliance, Audit and Fraud Unit (CAFU) and three agents in the CAFU. (Dkt. 143:3.) They likewise offer no reasons why a deposition of Ann Perry would not be cumulative of the six other DMV depositions.

Of course, the plaintiffs could have filed a new case regarding the IDPP, used the ten depositions on all of the proposed DMV witnesses, and still retained all fifteen depositions in this case to use as they desired. Having decided to cram the issue of the decisions on IDPP into this case with only two months before trial, they have to live by the deposition limits in this case.

Further, the plaintiffs do not explain why the deposition limit needs to be expanded to include Ardis Cerny, allegedly a “political activist who has engaged in aggressive election observing and communicated with legislators about the challenged provisions.” (Dkt. 143:4.)

CONCLUSION

For the foregoing reasons, the defendants ask this Court to deny the plaintiffs’ motion and restrict them to fifteen depositions.

Dated this 7th day of April, 2016.

Respectfully submitted,

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