

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

RUTHELLE FRANK, et al.,

Plaintiffs,

v.

Case No. 11-CV-1128

GOVERNOR SCOTT WALKER, et al.,

Defendants.

**DEFENDANTS' CIVIL L.R. 7(h) EXPEDITED NON-DISPOSITIVE
MOTION TO COMPEL DEPOSITION TESTIMONY OF RUTHELLE FRANK**

Defendants, by their undersigned counsel, hereby respectfully move the Court pursuant to Federal Rule of Civil Procedure 37 and Civil Local Rules 7(h) and 37 for an order compelling the deposition of the lead Plaintiff in this case, Ruthelle Frank.

Plaintiffs' counsel refuses to consent to Defendants' counsel deposing Ms. Frank, and Defendants are being prejudiced in preparing for trial. Plaintiffs' counsel has indicated in e-mail that Ms. Frank "is likely to be unavailable for trial[.]" Sixth Declaration of Clayton P. Kawski ("Sixth Kawski Decl."), ¶ 3; Ex. A. In other words, she likely cannot travel to Milwaukee in November to testify in person due to age or illness. Fed. R. Civ. P. 32(a)(4). Defendants believe that a live, in-person deposition would be the most efficient and least burdensome means to preserve her testimony for use at trial. Defense counsel is willing to travel to Ms. Frank's home to complete the deposition, if that works best for her. (*Id.*, ¶ 4.)

Plaintiffs object to Defendants deposing Ms. Frank in the instant case because she was deposed on April 12, 2012, in *Milwaukee Branch of the NAACP, et al. v. Scott Walker, et al.*, Case No. 11-CV-5492 (Dane County Circuit Court) ("NAACP"). A copy of the Complaint in

NAACP is being filed with the Sixth Kowski Declaration as Exhibit B. Defendants' counsel in *NAACP*, Assistant Attorney General Carrie M. Benedon, participated in that 2012 deposition of Ms. Frank by telephone conference. (Sixth Kowski Decl., ¶ 6.)

There are several reasons that Ms. Frank should be deposed in this case to preserve her testimony. First, Ms. Frank was not a party in *NAACP*. She is a party in this case, and is the lead Plaintiff *and* a putative class representative for Classes 1 and 5. *See* Dkt. #31, ¶¶ 108, 124. Defendants are prejudiced when Plaintiffs' counsel will not permit the lead Plaintiff and a putative class representative to be deposed.

Second, *NAACP*, unlike this case, did not involve claims arising under the U.S. Constitution and the Voting Rights Act of 1965. The claims in *NAACP* were based upon the Wisconsin Constitution. (Sixth Kowski Decl., Ex. B at 29-31.) *NAACP* also was not a putative class action under Federal Rule of Civil Procedure 23. Defendants believe that they should be permitted to probe Ms. Frank about the facts that form the legal bases for her instant federal law claims, particularly since she is allegedly unavailable to testify at trial.

Finally, *NAACP* did not include all of the same Defendants as the instant case. In *NAACP*, the defendants were Governor Scott Walker and the individual members of the Government Accountability Board. (Sixth Kowski Decl., Ex. B at 2-3.) In this case, the Defendants include the same Defendants as in *NAACP*, but additionally include Kevin J. Kennedy, Nathaniel E. Robinson, Mark Gottlieb, Lynne Judd, Kristina Boardman, Donald D. Reincke, Tracy Jo Howard, Sandra M. Brisco, Barney L. Hall, Donald J. Genin, Jill Louise Geoffroy, and Patricia A. Nelson. (Dkt. #31 at ¶¶ 31-35.) Plaintiffs' refusal to consent to a deposition of Ms. Frank directly prejudices these additional defendants because they have not been permitted to depose Ms. Frank in *any* case.

Plaintiffs and Defendants met and conferred on September 16, 2013, in person and again via e-mail on September 19 and 20, 2013, regarding this proposed deposition and have reached an impasse. (Sixth Kowski Decl., ¶ 7; Ex. A.) See Civil L.R. 37.

For all the reasons stated above, Defendants respectfully request that the Court promptly grant this motion and order that Ms. Frank may be deposed by Defendants. Because time is of the essence, Defendants respectfully request that the Court rule upon this motion by October 8, 2013, to allow sufficient time to complete the deposition prior to trial.

Dated this 24th day of September, 2013.

Respectfully submitted,

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