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Office of Administrative Law Judges
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Issue Date: 18 April 2006

CASE NO.: 2006-SOX-4

In the Matter of

LISA C. BLANTON,
Complainant

v.

BIOGEN IDEC, INC.,
Respondent

RULING AND ORDER
ON MOTION TO COMPEL DEPOSITION AND MOTION FOR PROTECTIVE ORDER QUASHING DEPOSITION OF CEO

Procedural Matters

A hearing is scheduled, on June 20 through June 27, 2006, in New York City, in the above-styled matter, brought under the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514(A)(hereinafter "SOX" or the "Act"). Factual discovery is scheduled to end on May 1, 2006.

On April 14, 2006, the Respondent, through counsel, filed a Motion For Protective Order seeking to bar the noticed videotaped deposition of Mr. James C. Mullen, Chief Executive Officer and President of Biogen Idec, Inc. ("Biogen Idec"), now scheduled for April 20, 2006, at 9:30 A.M. E.D.T., at the offices of Krokidas & Bluestein, LLP, 600 Atlantic Avenue, Boston, Massachusetts. The deposition was noticed on April 6, 2006, after informal efforts to schedule it had failed. The Complainant is Ms. Lisa C. Blanton, a former Biogen Idec Associate Director, Medicare & Medicaid in National Accounts (later Associate Director, Government Reimbursement). On April 14, 2006, the Complainant, through counsel, filed a Motion to Compel Deposition.

The parties aver that eight of ten noticed depositions of Respondent employees or former employees have been scheduled and there remain five more such persons potentially to be deposed.[1] It appears some of those depositions were taken earlier this month and that a number of those depositions are tentatively scheduled for mid-to-late April 2006.

[1] Respondent cites F.R.C.P. 30(a)(2)(A)(stating that "[a] party must obtain leave of court . . .[if] a proposed deposition would result in more than ten depositions being taken").

Facts

It appears that Mr. Mullen had also served as the Chairman of the Respondent's Compliance Committee to which the Complainant had complained about company practices. Biogen Idec employs about 3,400 people worldwide and is headquartered in Boston, Massachusetts. Mr. Mullen's Affidavit states that: he has no firsthand knowledge of Ms. Blanton's alleged protected activity as described in her complaint; he did not make the decision to terminate her and did not "come to understand the particular reasons for her termination" until after the fact; Ms. Blanton did not report "directly" to him or "to my knowledge" to anyone who directly reported to him; he had little direct contact with Ms. Blanton; he had no "direct knowledge" of any dispute involving her and the Amevive IV/IM formulations; he did not "specifically recall" the reimbursement memorandum Ms. Blanton allegedly authored or "recall" discussing the same with others; he did not "believe" he read the memorandum; he has "no knowledge" of letters, dated January 5, 2005, and January 28, 2005, from her lawyers to Biogen Idec or to the company's lawsuit against her, and believes those matters were handled by "our counsel"; and, he believes employees Robert Hamm, Brian McGinty, and Scott Donnelly have the most knowledge of the facts relevant to her termination.

Law

Title 29, C.F.R. Part 18, sets forth the Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges. When those rules are inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter controls. 29 C.F.R. § 18.1(a). The Federal Rules of Civil Procedure (FRCP) apply to situations not controlled by Part 18 or rules of special application. Further, an administrative law judge may take any appropriate action authorized by the Rules of Civil Procedure for the District Courts. 29 C.F.R. § 18.29(a)(8).

Part 18, provides for the following discovery methods: depositions; written interrogatories; production of documents; and, requests for admissions. 29 C.F.R. § 18.13. Discovery may be had into any relevant matter not privileged, regardless whether it may be ultimately admitted into evidence, if reasonably calculated to lead to the discovery of admissible evidence.[2] 29 C.F.R. § 18.14(a) and (b). Although neither the general Rules of Practice and Procedure nor the FRCP define "relevancy," the Federal Rules of Evidence (FRE) defines it as, "… evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FRE Rule 401; see also 29 C.F.R. § 18.401. It is not a ground for objection that the information sought will not be admissible at the hearing if it appears "reasonably calculated to lead to the discovery of admissible evidence." 29 C.F.R. § 18.14(a).

29 C.F.R. § 18.22(e) allows for suspension of a deposition when a party or deponent objects on grounds of improper questioning, bad faith in the conduct of the deposition, or

[2] Under Rule 26, Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any matter... relevant to the subject matter in the pending action ..." F.R.C.P. 26(b)(1).

oppression. If a deposition is so suspended, the objecting party must immediately move the administrative law judge for a ruling. The judge may then limit the scope or manner of taking the deposition. I inform counsel that while I expect not to see such a rare motion filed, the procedure is open to them.

Finally, an administrative law judge may issue any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. 29 C.F.R. § 18.15(a). Further, where applicable, an administrative law judge may take any appropriate action authorized by the Rules of Civil Procedure for United States District Courts, pursuant to 28 U.S.C. § 2072. 29 C.F.R. § 18.29(a)(8).

Parties' Contentions

In an erudite Memorandum of Law In Support of Motion, the Respondent argues that the deposition of its CEO is highly burdensome and unnecessary until such time that the Complainant can show he has relevant information that is unique or superior to the many others she asked to depose. Counsel argues that courts recognize the potential for harassment and disruption of corporate business if parties can "routinely" depose high-level (or "apex") executives who have no personal knowledge of relevant and material facts and thus require the requestor to utilize other, less-intrusive methods to initially demonstrate that the executive has unique or superior relevant personal knowledge. Noticeably, only one of the twelve cases cited for the proposition was decided after the enactment of SOX, in 2002.[3] Moreover, a number of cases cited in support are products liability claims, where the CEO was unlikely to have "superior and unique" knowledge.

In response to the Motion for Protective Order, the Complainant, through counsel, has set forth with specificity the matters which they wish to question Mr. Mullen about. (Complainant's Motion to Compel, page 24). The Respondent claims that most of the seven areas of inquiry are irrelevant and seeks to demonstrate why. The Complainant argues that the deposition is necessary "to obtain evidence that is relevant to her claims" and to develop evidence to support the elements of her claim.

Discussion of Facts and Law

Because of the broad scope of discovery in federal civil litigation, "it is exceedingly difficult to demonstrate an appropriate basis for an order barring the taking of a deposition." *Naftchi v. New York Medical Center, et al*., 172 F.R.D. 130 (S.D. NY 1997) *citing*, 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure:* Civil 2D section 2037, at 494-95 (1994)(hereinafter "Wright"). "Nor, in ordinary circumstances, does it matter that the proposed witness is a busy person or professes lack of knowledge of the matters at issue, as the party seeking the discovery is entitled to test the asserted lack of knowledge." (Wright, section 2037 at page 500). The *Naftchi* court noted a "corporate officer lacking personal familiarity" exception, citing *Thomas v. IBM Corp*., 48 F.3d 478 (10th Cir. 1995)(A very low level clerk who performed administrative duties sought to have the IBM Chairman deposed, in

[3] *Evans v. Allstate Ins. Co*., 216 F.R.D. 515 (N.D. Okla. 2003)(Policy holders challenging denial of claims of which the senior company executives had no unique knowledge).

an age discrimination case, where the former failed to comply with the court's procedural rules, among other things).

As noted in pre-SOX litigation, complainants "often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer." *Hollander v. American Cyanamid Co*., 895 F.2d 80, 85 (2d Cir. 1990)(Cited by the Complainant along with many other cases recognizing a broad right of discovery). This is especially true in SOX litigation which introduced an entirely new milieu of corporate litigation that differs substantially from products liability litigation or insurance claim litigation. While an "apex" rule may persist, one can anticipate much greater scrutiny in its application to SOX cases, where the reasonableness of belief that a covered SOX violation occurred is central.

Given the need to rule on the matter expeditiously, I can only state that I do not completely agree with the Respondent's assertions regarding relevance of the types of inquiries proposed by the Complainant. I agree that, absent unusual circumstances, it is true that inquiry into post-termination lawsuits brought by or against Biogen Idec will not be found relevant and admitted at the hearing. That line of inquiry is not permitted at the deposition absent a succinct preface showing how it may lead to the discovery of relevant evidence.

The Complainant's assertions and supporting facts lead me to conclude that appropriate inquiry may lead to the discovery of admissible evidence. Moreover, although the materials supporting the complaint and motions identify thirty-some witnesses who are or were Biogen Idec employees who may have relevant information; the Complainant has sought to depose less than half that number. The proposed deposition itself was to be conducted in a convenient location, i.e., in Boston.

Further, unlike the very low level clerk among 300,000 employees, in *Thomas v. IBM Corp.,* Ms. Blanton held what appears to be a high-level corporate position with significant potential impact on corporate earnings and regulatory compliance, in a corporation one one-hundredth the size of IBM. Thus, although Mr. Mullen may have had little direct contact with Ms. Blanton, unlike IBM's chairman in *Thomas,* the Complainant is entitled to test what he may have known about her and her relationship with Biogen Idec.

Although the Respondent is apparently attempting to assist arranging the depositions of certain former Biogen Idec employees, it is not clear that all may be available. If some, such as the former General Counsel, Mr. Bucknum and Mr. Foster, the former Vice President of Government Relations, are not deposed, the development of the Complainant's case might be impacted. Mr. Mullen was the chairman of the company's Compliance Committee with which Ms. Blanton filed complaints, according to the Complainant. Thus, it is all the more important to allow Mr. Mullen's deposition.

Finally, as the court observed of the affidavit, in *Naftchi,* Mr. Mullen's affidavit was "obviously prepared with considerable care." While denying "first-hand" knowledge of many matters, he does not assert that he lacks familiarity with any of the matters at issue in the case. Although he states that Ms. Blanton did not report directly to him or to anyone who did, the

Complainant points out that he likely had contact with employees who did have contact with her such as Ms. Woo and Mr. Bucknum. He states he had little direct contact with Ms. Blanton, but does not say he had not spoken with her or with other employees about her. He states he did not make the decision to terminate her, but does not state he knows nothing of the matter. In fact, he admits he has come to understand the particular reasons for her termination, although after the fact. Thus, as in *Naftchi*, I conclude there is no basis for altogether precluding a deposition of Mr. Mullen.

Ruling and Order

The Complainant's Motion to Compel Deposition is GRANTED. The Respondent's Motion for Protective Order is DENIED. Not being blind to the possibility of harassment, and recognizing Mr. Mullen's pre-existing commitments, obligations, and the possibility of disruption to the Respondent, I do however, place limitations upon his deposition:

1. Mr. Mullen may not be required to travel outside Boston for a deposition, unless it is convenient for him and the deposition may not be videotaped without the Respondent's consent;[4]

2. Inquiry into post-termination lawsuits brought by or against Biogen Idec is not permitted at the deposition absent a succinct preface showing how it may lead to the discovery of relevant evidence;

3. Inquiry into EEOC or MCAD complaints and or proceedings is not permitted at the deposition absent a succinct preface showing how it may lead to the discovery of relevant evidence;

4. To help focus the lines of inquiry, Complainant's questioning will be limited to no more than three hours;[5]

5. The deposition time and date, as noticed, April 20, 2006, is cancelled;

6. The Respondent shall designate, at the time of questioning, which testimony, if any, is subject to the earlier Protective Order; and,

7. The Respondent shall produce Mr. Mullen for examination at a time to be agreed upon by the parties, on or before May 1, 2006, or in default of agreement, fixed by the undersigned, upon application.

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RICHARD A. MORGAN
Administrative Law Judge

[4] Should the parties agree, a video teleconference deposition is permitted.
[5] The three hours shall not include time taken for breaks, discussion of objections or confidentiality by the Respondent, and, court reporting or teleconferencing equipment or technical issues. It shall include statements by Complainant's counsel establishing how a line of questioning may lead to discovery of relevant evidence.