

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE UNITED STATES OF AMERICA,)
)
)
 Plaintiff,)
)
)
 v.)
)
)
 JACK H. CASTLE, D.D.S., INC.)
 d/b/a CASTLE DENTAL CENTER, and)
)
 FAMILY DENTAL SERVICES OF)
 TEXAS, INC.,)
)
 Defendants.)
)
)
 _____)

Case No.: _____

**MEMORANDUM OF LAW IN
SUPPORT OF THE UNITED
STATES' EMERGENCY MOTION
FOR LEAVE TO FILE A
NOTICE OF DEPOSITION
TO PERPETUATE TESTIMONY**

I. INTRODUCTION

The United States of America ("United States") moves pursuant to Rule 30(a) of the Federal Rules of Civil Procedure for leave to file a notice of deposition, to perpetuate the testimony of Henry Krakow, before 30 days have elapsed from the filing of the action. Mr. Krakow, who is in the advanced stages of AIDS, may die or become incompetent to testify before 30 days have passed. The United States respectfully requests this court to order the deposition to take place by videotape on October 15, 1993.

Because of the emergency nature of this motion, the United States also moves, pursuant to Local Rule 6(I), that this court hear the motion at its earliest opportunity, rather than allowing the regular 20 days before hearing.

The United States initiated this action against Jack H. Castle, D.D.S., Inc. d/b/a Castle Dental Center and Family Dental

Services of Texas, Inc. ("Defendants"), pursuant to title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12181 (Supp. 1990). The complaint alleges that the Defendants, who lease and operate a chain of dental and orthodontic facilities, have violated title III of the ADA by excluding persons who have tested positive for the Human Immunodeficiency Virus (HIV) from receiving services from their facilities. The United States is asking for relief in the form of: an injunction requiring the Defendants to discontinue their discriminatory policy; compensatory damages on behalf of Harrison Totten, a man with HIV, who was excluded from one of the Defendants' offices in May and June of 1992; and civil penalties to vindicate the public interest.

The United States intends to introduce as evidence the testimony of Henry Krakow, another man who was excluded from one of the Defendants' offices in the spring of 1990. Mr. Krakow will testify that he was excluded from the services of Castle Dental Center because he had HIV, and that his exclusion from services was carried out, in part, by Jack H. Castle, D.D.S., a principal of both of Defendant corporations.

II. DISCUSSION

Federal Rule of Civil Procedure 30(a) provides that:

Leave of court, granted with or without notice, must be obtained . . . if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant
. . . .

Fed. R. Civ. P. 30(a). Pursuant to this rule, a plaintiff may take a deposition to perpetuate the testimony of a witness quickly, if the witness is in ill health and his or her testimony may be lost forever if not obtained before 30 days have passed. Id. advisory committee's note ("If a witness is aged or infirm, leave of court can be obtained."); see, e.g., Gibson v. Bagas Restaurants, Inc., 87 F.R.D. 60, 62 (W.D. Mo. 1980) (quoting Babolia v. Local 456, 11 F.R.D. 423, 424 (S.D.N.Y. 1951)); Munson Line, Inc. v. Green, 6 F.R.D. 14, 19-20 (S.D.N.Y. 1946), app. dismissed, 165 F.2d 321 (2d Cir. 1948).

In fact, in cases of illness and imminent death, not only are depositions permitted within 30 days of filing suit, the Federal Rules of Civil Procedure allow them to be taken even prior to the filing of a complaint, in order to perpetuate testimony that may otherwise be lost. See Fed. R. Civ. P. 27; see, e.g., Kurz-Kasch, Inc. v. United States, 115 F.R.D. 470, 471 (S.D. Ohio 1986) (deposition of witness, who had had two heart attacks and five pacemakers within last five years, permitted before action); In re Petition of Delta Quarries & Disposal Inc., 139 F.R.D. 68, 69-70 (M.D. Pa. 1991) (deposition of witness, who was in danger of dying, permitted before action); Windsor v. A Fed. Executive Agency, 614 F. Supp. 1255, 1264-65 (D.C. Tenn. 1983), aff'd without op., 767 F.2d 923 (6th Cir. 1985); Mosseller v. United States, 158 F.2d 380, 381 (2d Cir. 1946) (testimony permitted of injured son who "might die before the [time for bringing the suit] elapsed"); Petition of Ferkauf, 3 F.R.D. 89,

91 (S.D.N.Y. 1943) (early discovery is allowed "where, for one reason or another, testimony might be lost to a prospective litigant unless taken immediately").

Further, the purpose behind the 30-day rule is not applicable in this action. The purpose of the 30-day rule is to protect defendants who have not had the opportunity to learn about the action and to obtain legal counsel. Fed. R. Civ. P. 30(a) advisory committee's note; Gibson, 87 F.R.D. at 61. In this action the Defendants have already retained legal counsel and have had many months' notice of the possibility of this lawsuit. The United States notified the Defendants in January of 1993 of its investigation of the exclusion of Mr. Totten from a Castle Dental Center office. See Letter, dated 1/4/93, from Bebe Novich to William J. Rohrbach, attached as Exhibit A. Castle retained counsel at that time, and the United States has been in contact with this counsel. In addition, on September 20, 1993, the United States notified the Defendants of its intent to bring an action if settlement cannot be reached by October 4, 1993. See Letter, dated 9/20/93, from Bebe Novich to William J. Rohrbach, attached as Exhibit B.

Mr. Krakow's physician, Dr. Jane Corboy, believes that he is in danger of death or incompetency at any time, quite possibly within the next few weeks. See Declaration of Dr. Jane Corboy ("Corboy Dec.") (Exhibit C) ¶ 7. Mr. Krakow was diagnosed with HIV in October of 1989, and with AIDS in 1990. See Declaration of Henry Krakow ("Krakow Dec.") (Exhibit D) ¶ 3; Corboy Dec. ¶ 5.

Since his AIDS diagnosis, he has been seriously ill several times, including eight hospital stays in the last seven months. Id. Recently, Mr. Krakow was hospitalized for heart failure. Id. ¶ 6. He underwent surgery and suffered life-threatening complications. Id.

Mr. Krakow can testify to an event in which a Castle Dental Center employee physically threw him out of the Castle office, despite his being in great pain from an abscessed tooth, because of his HIV. See "Krakow Dec." ¶¶ 6, 7. Mr. Krakow can also testify that, after being thrown out of the Castle office, he brought his complaint to Jack H. Castle, D.D.S., a principal in both defendant corporations, who perpetuated the discrimination. See id. ¶¶ 8, 9.

Mr. Krakow's testimony may be relevant to many issues in this action, some of which cannot possibly be anticipated. Unfortunately, because of Mr. Krakow's ill health, there will not be another opportunity to obtain this testimony if it is not obtained now.

III. CONCLUSION

For the above reasons, the United States urges this court to grant leave and order that the deposition of Mr. Henry Krakow take place on October 15, 1993.

Respectfully submitted on October 4, 1993.

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