

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **05-cv-00478-BNB-PAC**

EDWARD J. KERBER,
NELSON B. PHELPS,
JOANNE WEST,
NANCY A. MEISTER,
THOMAS J. INGEMANN, JR.,
Individually, and as Representative of plan participants
and plan beneficiaries of the QWEST PENSION PLAN,

Plaintiffs,

vs.

QWEST PENSION PLAN,
QWEST EMPLOYEES BENEFIT COMMITTEE,
QWEST PENSION PLAN DESIGN COMMITTEE,
QWEST COMMUNICATIONS INTERNATIONAL, INC.,

Defendants.

PLAINTIFFS' MOTION TO COMPEL DEPOSITION TESTIMONY and SANCTIONS

Pursuant to Fed.R.Civ.P. Rule 37(a), Named Plaintiffs hereby move for an order compelling Defendant Qwest Employees Benefit Committee member Felicity O'Herron to respond to deposition questioning related to uncovering evidence that Qwest Defendants have an intent and plan to engage in retaliatory conduct that would be a clear violation of ERISA Section 510, 29 U.S.C. Section 1140.

1. The following discussion occurred during the July 14, 2006 deposition of Ms. O'Herron during which deposition defense counsel instructed Ms. O'Herron *not* to answer:

Q: (By Mr. Kennedy) Okay. Just so we're clear, are there any plans to eliminate the life insurance for management retirees in the event that the retirees are successful in their lawsuit concerning the pension death benefit?

A: (By the deponent - Felicity O'Herron): Can I tell him I'm not going to answer?

(By defense counsel - Beth Kiovsky): Yeah. I'll instruct her not to answer. It's not

relevant to this case and you know it, Curtis.

MR. KENNEDY: Oh, it certainly is. I'll take that one up.

MS. KIOVSKY: What is the relevance? Why don't you tell me what the relevance is.

MR. KENNEDY: Well, I'll take it up. I'm not going to argue on the record.

MS. KIOVSKY: Well, I think -- fine. But you're basically not giving me any indication that this is in any way relevant to this lawsuit which relates to the pension death benefit.

MR. KENNEDY: Okay. I think I can tell you this: That if the company is looking into taking away the life insurance benefit because the Qwest retirees might be successful in this litigation, that is an *ipso facto* ERISA Section 510 violation.

MS. KIOVSKY: And that's a different lawsuit. So I'm going to instruct Ms. O'Herron not to answer.

MR. KENNEDY: We might want to take that as a potential claim in this case.

MS. KIOVSKY: Well, it's not a claim now.

MR. KENNEDY: We might want to get injunctive relief in the event that the company is considering engaging in –

MS. KIOVSKY: Well, Curtis, in this lawsuit I've let you fish around about a bunch of different things. When you're directly fishing for a completely separate claim from what exists in this already 52-page Second Amended Complaint, I'm going to instruct the witness not to answer. It's not relevant and she doesn't have to answer that.

MR. KENNEDY: Okay. We'll take that up with Judge Boland then.

MS. KIOVSKY: Okay. I think you should.

MR. KENNEDY: All right. And we will recess the deposition at this point.

MS. KIOVSKY: In our opinion, the deposition is concluded.

MR. KENNEDY: All right.

(The deposition adjourned at 5:17 p.m., July 14, 2006.)¹

2. Defendant Qwest Employees Benefit Committee (hereinafter "Committee") is, pursuant to ERISA §§ 3(21) and 3(16), 29 U.S.C. §§ 1002(21) and 1002(16), the named "fiduciary" and "administrator" of the Qwest Pension Plan. The Committee is comprised of Qwest officers, including deponent Felicity O'Herron, a Qwest Vice President.

3. In this civil action, *inter alia*, Named Plaintiffs have exercised their rights under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to seek an order that will clarify Qwest Pension Plan participants' rights to future Pension Death Benefits under the terms of the pension plan and for other declaratory, injunctive and appropriate equitable relief. Pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), Named Plaintiffs seek an order declaring Qwest Pension Plan Amendment 2003-5 effective December 1, 2003 which purported to eliminate the Pension Death Benefit for persons retiring on or after January 1, 2004 as illegal, in violation of the pension plan provisions which expressly provided for the full vesting of all benefits under the pension plan which were accrued upon each I.R.C. Section 420 transfer of pension assets, therefore, constituting a violation of ERISA Section 404(a), 29 U.S.C. § 1104(a).

4. Pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), Named Plaintiffs request this Court grant injunctive relief requiring Qwest, as plan sponsor, to insert language in the governing Plan documents memorializing the Pension Death Benefit is an entitlement, a protected and accrued benefit for Named Plaintiffs and the proposed class of plan participants.

5. Named Plaintiffs seek removal from the Committee, those persons, including

¹ The above deposition testimony and Local Rule 7.1 dialogue between counsel is taken verbatim from the excerpt of the transcript prepared by Deborah Mead, CSR (See Exhibit 1, O'Herron Depo. Tr. 6:4-8:3 filed herewith).

deponent Felicity O'Herron, who supported, assisted and acquiesced in and defended the plan sponsor's efforts to eliminate the Pension Death Benefit for persons retiring on or after January 1, 2004.

6. In paragraph 'M' of the prayer for relief, Named Plaintiffs specifically seek an order preventing Qwest's officers, employees and agents from retaliating against Named Plaintiffs (and their relatives) and the proposed class of plan participants and beneficiaries on the basis of the filing or prosecution of this action.

7. ERISA Section 510, 29 U.S.C. § 1140 provides in pertinent part:

"It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act (29 U.S.C. 301 et seq) . . ."

8. Upon information and belief, Named Plaintiffs are most concerned that Qwest leadership has a present intent and plan to carry out an egregious act of retaliation against management retirees after they prove successful in this proposed class action litigation. It is believed that Qwest leaders plan to reduce or take-away life insurance benefits, should the retirees succeed in this action to preserve and otherwise restore Pension Death Benefits.² Accordingly, an inquiry was made during the July 14, 2006 deposition of Committee member Felicity O'Herron, a person most likely to be intimately privy to such a scheme.

9. Local Rule 30.3C(a)(C) states the following abusive deposition conduct is prohibited: "Instructing a deponent not to answer a question except when necessary to preserve

² While the Pension Death Benefit is fully funded and paid out of the pension trust fund, life insurance is paid out of insurance policies purchased by the company using operating revenues. At least since the 1974 passage of ERISA, Qwest and its predecessor companies (i.e., U S WEST, Mountain Bell, etc.) have provided retirees with both the Pension Death Benefit and life insurance coverage.

a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under Fed.R.Civ.P. 30(d)(4).” None of those exceptions apply. Quite simply, it was totally inappropriate for defense counsel to instruct deponent Felicity O’Herron not to answer the question.

10. It is inappropriate to instruct a witness not to answer a question on the basis of relevance. See *Ralston Purina Company v. McFarland*, 550 F.2d 967, 973 (4th Cir. 1977), in which the Court held that “the action of plaintiff’s counsel in directing [his principal witness] not to answer the questions posed to him was indefensible and utterly at variance with the discovery provisions fo the Federal Rules of Civil Procedure. . . . the action of Plaintiff’s counsel in directing the deponent not to answer was highly improper.” 550 F.2d at 973. See also *RTC v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995) (RTC lawyer sanctioned \$3,000 for instructing client not to answer deposition questions on erroneous basis of attorney work-product).

11. Efforts under Local Rule 7.1 to resolve differences were unsuccessful. As revealed by the deposition transcript which is attached hereto as Exhibit 1, defense counsel expressed her opinion that the undersigned counsel should bring this dispute to the Court’s attention. Accordingly, there is an impasse which requires the Court’s intervention.

12. Under these circumstances, defense counsel’s assertion that she could instruct Ms. O’Herron to refuse to answer questions and then require Named Plaintiffs’ counsel to obtain this Court’s order directing the deponent to answer is the exact opposite of what the Federal Rules of Civil Procedure clearly require. See *Fondren v. Republic American Life Insurance Co.*, 190 F.R.D. 597, 600 (N.D. Okla. 1999).

WHEREFORE, Named Plaintiffs, pursuant to Fed.R.Civ.P., Rule 37(a), requests an order compelling Qwest Employees Benefit Committee member Felicity O'Herron to return for continuation of her deposition and to respond to the area of questioning not responded to, plus further deposition questioning, at the expense of Qwest Defendants and their counsel. In addition, Named Plaintiffs seek such other orders as the Court deems appropriate, including necessary injunctive relief to prevent Qwest Defendants from engaging in retaliatory action due to the retirees' exercise of their legal rights under ERISA. The undersigned counsel requests an award of attorney's fees and costs in connection with this motion.

Dated: July 21, 2006.

s/ Curtis L. Kennedy
Curtis L. Kennedy
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Denver, CO 80237-1741
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Facsimile: 303-843-0360
e-mail CurtisLKennedy@aol.com
Attorney for Named Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2006, a true and correct copy of the above and foregoing document, together with Exhibit 1 was electronically filed with the Clerk of the Court using the CM/ECF system and a courtesy copy was emailed to Defendants' counsel of record as follows:

Elizabeth I. Kiovsky, Esq.
Beth Doherty Quinn, Esq.
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Fax: 303-813-4501
BethK@bairdkiovsky.com (Beth Kiovsky, Esq.)
BDQ@bairdkiovsky.com (Beth Doherty Quinn, Esq.)
Counsel for Qwest Defendants

Sherwin S. Kaplan, Esq.
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Counsel for Qwest Defendants

Also, copy of the same was delivered via email to Named Plaintiffs as follows:

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/s/ Curtis L. Kennedy
Curtis L. Kennedy

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Case No. 05-CV-00478-BNB-PAC

EXCERPT FROM THE DEPOSITION OF FELICITY O'HERRON
JULY 14, 2006

EDWARD J. KERBER, NELSON B. PHELPS, JOANNE WEST, NANCY A.
MEISTER, THOMAS J. INGEMANN, JR., Individually, and as
Representatives of plan participants and plan
beneficiaries of the QWEST PENSION PLAN,

Plaintiffs,

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QWEST PENSION PLAN, QWEST EMPLOYEES BENEFIT COMMITTEE,
QWEST PENSION PLAN DESIGN COMMITTEE, QWEST COMMUNICATIONS
INTERNATIONAL, INC.,

Defendants.

Pursuant to Notice and the Federal Rules of
Civil Procedure, the deposition of FELICITY O'HERRON,
called by Plaintiffs, was taken on July 14, 2006,
commencing at 12:45 p.m., at 2036 E. 17th Avenue, Denver,
Colorado, before Deborah D. Mead, Certified Shorthand
Reporter and Notary Public within and for the State of
Colorado.

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2 order her to answer.

3 So I'll instruct her not to answer.

4 Q (By Mr. Kennedy) Okay. Just so we're clear,
5 are there any plans to eliminate the life insurance for
6 management retirees in the event that the retirees are
7 successful in their lawsuit concerning the pension death
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9 THE DEPONENT: Can I tell him I'm not going to
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C E R T I F I C A T E

1
2 I, Deborah D. Mead, Certified Shorthand
3 Reporter and Notary Public, do hereby certify that
4 previous to the commencement of the examination, the said
5 FELICITY O'HERRON was duly sworn to testify to the truth;
6 that the said testimony was taken in shorthand by me at
7 the time and place aforesaid and was thereafter
8 transcribed by me; that the same is a full, true, and
9 correct transcription of my shorthand notes then and
10 there taken.

11 I further certify that I am not attorney, nor
12 counsel, nor in any way connected with any attorney or
13 counsel for any of the parties of said action, nor
14 otherwise interested in the outcome of this action.

15 IN WITNESS WHEREOF, I have affixed my
16 signature and seal this 18th day of July 2006.

17 My commission expires June 18, 2009.
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21

22 Deborah D. Mead
23 Certified Shorthand Reporter
24
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