THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JONATHAN N. WATERS	)	Case No. 14 CV 1704
	)	
Plaintiff,	)	Judge James L. Graham
	)	
v.	)	Magistrate Judge Terence P. Kemp
	)	
MICHAEL V. DRAKE, M.D., et al.	)	
	)	
Defendants.	)	
	)	
	)	

REPLY MEMORANDUM OF DEFENDANTS MICHAEL V. DRAKE, M.D., JOSEPH E. STEINMETZ, Ph.D. AND THE OHIO STATE UNIVERSITY IN SUPPORT OF MOTION TO STAY DISCOVERY

I. INTRODUCTION.

In evaluating a motion to stay discovery, the Court must balance the burden of discovery with hardship imposed by delaying discovery. Here, plaintiff's Memorandum in Opposition only confirms that the balance strongly favors granting defendants' Motion to Stay Discovery:

1. Plaintiff does not dispute that his contemplated discovery is broad, will require a substantial diversion of attention and resources from university operations, and implicates sensitive and unique privacy concerns relating to Ohio State students and the Title IX investigation.

2. Plaintiff has not identified a single hardship that he would encounter from a stay of discovery.

3. Defendants' Motion for Judgment on the Pleadings ("MJOP") raises purely legal determinations which justify issuing a stay of discovery.

4. Courts within this Circuit have granted stays of discovery when a pending dispositive motion involved purely legal determinations, and plaintiff has failed to articulate why this case should be treated any differently.

Defendants' Motion to Stay discovery should be granted.

II. LAW AND ARGUMENT

Defendants' MJOP is set for hearing on April 10, 2015. Defendants' Motion to Stay is set for hearing the same day. To the extent the Court intends to hear argument and take the Motion for Judgment on the Pleadings under advisement, defendants state the following as to why discovery should be stayed pending a ruling.

A. Plaintiff Has Failed To Identify Any Prejudice He Will Suffer By A Temporary and Brief Stay Of Discovery.

As an initial matter, plaintiff appears to dispute the standard governing a stay of discovery. *See* Pl.'s Mem. In Opp. Mot. To Stay, Doc. #17, at 4 ("Defendants also argue for a stay because the burden of contemplated discovery supposedly outweighs its benefits. This, too, is insufficient reason to halt discovery."). Plaintiff's argument is at odds with the law. It is well-established that a stay of discovery is appropriate where the burden of the contemplated discovery outweighs the hardship worked by a delay of discovery. *Wagner v. Mastiffs*, Nos. 2:08-cv-431, 2:09-cv-0172, 2009 WL 5195862, *1 (S.D. Ohio Dec. 22, 2009) (Kemp, M.J.) ("In ruling upon a motion for stay, the Court is required to weigh the burden of proceeding with discovery upon the party from whom discovery is sought against the hardship which would be worked by a denial of discovery."); *U.S. ex rel. Am. Systems Consulting, Inc. v. ManTech Advanced Systems Int'l*, No. 2:08–CV–733, 2011 WL 1667479, *3 (S.D. Ohio May 2, 2011) ("In determining whether or not to grant a stay of discovery, a court weighs the burden of

proceeding with discovery upon the party from whom discovery is sought against the hardship which would be worked by a denial of discovery."); *Dominion Transm., Inc. v. Detweiler*, No. 2:11–CV–836, 2013 WL 941314, *1 (S.D. Ohio Mar. 11, 2013).

Applying the appropriate standard, it is clear that not only does the balancing weigh in favor of a stay in this matter, but also that plaintiff will not be harmed at all by a temporary and brief stay of discovery. Plaintiff does not set forth any hardship that he would suffer if the Court granted defendants' Motion to Stay. He has not indicated any deadline he might not satisfy if discovery is stayed until the MJOP is resolved. Moreover, he has already completed briefing on the MJOP without any discovery, and the Court is poised to rule on the pending MJOP without additional discovery. Plaintiff's sole argument in opposition is that he has a right to the expeditious resolution of his claims. *See* Pl.'s Mem. In Opp. Mot. To Stay Disc., Doc. # 17, at 4-5.

Defendants believe their Motion should be granted in its entirety. Even if defendants' MJOP is denied or only partially successful, however, the scope of the remaining issues will be clarified and/or narrowed by the Court's ruling, thus allowing both parties to more efficiently and effectively issue and respond to discovery and further plaintiff's desire for an expeditious resolution of his claims. By setting defendants' MJOP and defendants' Motion to Stay for the same hearing date, now April 10, the Court has placed the two motions in proper, coterminous sequence.

This Court has previously granted a stay of discovery where the opposing party had not indicated any hardship that would be caused by a delay of discovery. *See Miller v. Countrywide Home Loans*, No. 2;09-CV-0674, 2010 WL 2246310, at *3 (S.D. Ohio June 4,

2010) ("Also significant to the Court in reaching this conclusion is the fact that Mr. Miller has not indicated any hardship he will suffer from a delay of any discovery.") (Kemp, M.J.). The same is true here. Also, as in *Miller*, any delay will be brief as the MJOP has "been fully briefed and there should be no lengthy delay in [its] resolution." *Id.* For all of these reasons—and particularly because plaintiff has not identified a single hardship he will suffer by a delay—the balance weighs strongly in favor of a stay of discovery.

B. Mr. Waters Does Not Dispute That Discovery Will Be Burdensome.

Plaintiff concedes—as he must—that discovery will be burdensome. *See* Pl.'s Mem. In Opp. Mot. To Stay Disc., Doc. # 17, at 4 (agreeing that discovery imposes burdens on all parties). Plaintiff also concedes that defendants will have to address privacy concerns with regard to the Title IX investigation and protection of Ohio State students, *see id.* at 7, and that discovery will disrupt university operations. *See id.* at 6. Nevertheless, plaintiff concludes that defendants have offered no facts to explain the specific undue burdens caused by immediate discovery. Plaintiff's conclusion is erroneous.

Contrary to plaintiff's position, defendants have identified significant burdens arising from (1) privacy concerns with regard to the Title IX investigation and protection of Ohio State students, (2) diversion of attention and resources from university operations, (3) the likelihood that all or some of the contemplated discovery will become unnecessary based on the Court's ruling on the MJOP, and (4) the implication of the attorney-client privilege by plaintiff's contemplated discovery as to the General Counsel, Deputy General Counsel, and investigative task force of Ohio State. Plaintiff makes no effort to dispute these particular burdens.

This Court has previously recognized that "the Court is required to take into account any societal interests which are implicated by either proceeding or postponing discovery."

Wagner v. Mastiffs, No. 2:08-CV-431, 2009 WL 5195862, at *1 (S.D. Ohio Dec. 22, 2009) (internal citations omitted). Defendants have articulated significant and unique privacy concerns associated with discovery as it relates to the Title IX investigation and Ohio State's students, including Title IX complainants and witnesses. Plaintiff does not dispute the validity of such privacy concerns. *See id.* at 7. The societal interest in safeguarding the privacy of Title IX witnesses and complainants is well-established, and indeed, the Department of Education's Office for Civil Rights urges protection of these students in its official Title IX guidance. *See* Office for Civil Rights 2001 Revised Sexual Harassment Guidance: Harassment Of Students By School Employees, Other Students, Or Third Parties, at 17, available at http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (last visited February 19, 2015). Defendants' burden in protecting their students in this regard is unique and justifies a brief and temporary stay of discovery.

Moreover, plaintiff's reliance upon the apex doctrine is a misconstruction of this Court's decision in *Libertarian Party of Ohio v. Husted*, 302 F.R.D. 472, 475 (S.D. Ohio 2014); Pl.'s Mem. In Opp. Mot. To Stay, Doc. # 17, at 6. In *Libertarian Party*, the apex doctrine is discussed in terms of totally precluding the deposition of a party where the deposition is noticed solely to harass and is cumulative or duplicative of other testimony. But here, defendants did not raise the apex doctrine in their Motion to Stay, so it is odd that plaintiff would argue it. Rather, defendants seek a brief and temporary stay of discovery pending the Court's resolution of the MJOP which may eliminate or narrow the issues in this litigation, and thus the issues on which discovery is needed. Plaintiff's apex doctrine argument is irrelevant to the issues currently before this Court.

It is unfortunate that Mr. Waters also has resorted to inflammatory briefing on what was, at least at the Case Management Conference—and should have been—a non-contentious issue. Mr. Waters has now accused defendants of lying in court documents, for example falsely "plead[ing] poverty." *See* Pl.'s Mem. In Opp. Mot. To Stay, Doc. #17 at 2 and 5. That is not correct. What defendants actually did was to correctly note in their Motion to Stay that the cost of discovery is one factor that courts have considered in evaluating the burden of discovery, although not the sole factor. The other factors, in addition to cost, were also addressed by defendants.

It is left to this Court's discretion to balance the indisputable burdens with the likewise undisputed lack of prejudice to plaintiff. In light of these equities, a brief and temporary stay of discovery is appropriate.

C. A Stay Is Warranted Because Defendants' MJOP Involves Purely Legal Determinations.

A stay of discovery is also appropriate here because defendants' MJOP is based on issues that involve purely legal determinations:

> (1) **That Mr. Waters, as an unclassified, at-will employee, lacked the required property interest in his employment necessary to assert a due process claim.** *Christophel v. Kukulinsky*, 61 F.3d 479, 482 (6th Cir.1995) ("[U]nclassified civil servants have no property right to continued employment.")));
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> (2) **That the public name-clearing hearing Mr. Water was offered confirms he was not denied a name-clearing hearing.** *See Brown v. City of Niota, Tennessee*, 214 F.3d 718, 722-23 (6th Cir. 2000); *Cross v. Metro. Govt. of Nashville/Davidson Cty*., No. 3-12-1109, 2013 WL 1899169 (M. D. Tenn. May 7, 2013) ("The Sixth Circuit also requires that a plaintiff raising this claim must show that he requested a name-clearing hearing after he was fired and ***was denied that hearing***") (emphasis added);
>
> (3) **That Mr. Waters, as an unclassified, at-will employee, cannot state a claim for lack of substantive due process.** *See Slyman v. City of Piqua*, 494 F.

> Supp. 2d 732, 735 (S.D. Ohio 2007), *aff'd*, 518 F.3d 425 (6th Cir. 2008); *Bracken v. Collica*, 94 Fed. Appx. 265, 269 (6th Cir. 2004) ("[A]t-will employment hardly seems the sort of fundamental interest protected by substantive due process."); and
>
> (4) **That Mr. Waters cannot establish that Ms. Buchman, the former cheerleading coach terminated by Gene Smith, Athletics Director, was similarly situated, a required element of his disparate treatment claim.** *See Jones v. St. Jude Med. S.C., Inc.*, 823 F.Supp.2d 699, 732 (S.D. Ohio 2011), *aff'd*, 504 Fed. Appx. 473 (6th Cir.2012) ("a comparable employee must have dealt with the same supervisor).

Plaintiff disregards the approach set forth by the Sixth Circuit which permits stays of discovery pending a dispositive motion that involves only legal determinations. *See Gettings v. Bldg Laborers Local 310 Fringe Benefits Fund*, 349 F.3d 300, 304 (6th Cir. 2003) (affirming the district court's decision to stay discovery pending a motion involving only legal determinations); *see also City of Dayton v. A.R. Environmental, Inc.*, No. C-3-11-CF-00383, 2012 WL 1856537, at *1 (S.D. Ohio Mar. 6, 2012) (staying discovery because "Plaintiff's motion to dismiss presents only legal questions"). Instead, he generically, and mistakenly, argues that defendants' MJOP does not require "legal determinations" and that it instead raises factual issues. This is incorrect. In his opposition to the Motion to Stay, plaintiff does not dispute the four undisputed material facts identified by defendants in their Motion to Stay. He also fails to identify a single example of a material factual issue pending. Contrary to plaintiff's suggestions to this Court, discovery will not aid the Court in making any of the legal determinations at issue.

III. CONCLUSION

The Court currently has set defendants' Motion to Stay for hearing at the same time on April 10 as the hearing on defendants' Motion for Judgment on the Pleadings. Because plaintiff will not suffer any hardship by a brief and temporary delay of discovery, and because

defendants will endure undisputed and undue burdens in the course of discovery, a stay is appropriate pending the resolution of defendants' Motion for Judgment on the Pleadings.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically on February 19, 2015. Notice was also sent by operation of the Court's electronic filing system to all other counsel who have entered an appearance and any parties who have entered an appearance through counsel. The parties may access this filing through the Court's ECF system.

/s/ Michael H. Carpenter
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