

**IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO**

ARUN AGGARWAL, M.D.

Plaintiff,

v.

WRIGHT STATE UNIVERSITY, *et al.*

Defendants.

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Case No. 2015 CV 05481

Judge Mary Katherine Huffman

MOTION FOR DISSOLUTION OF TEMPORARY RESTRAINING ORDER

Defendants Wright State University (“WSU”), Wright State University Boonshoft School of Medicine (“BSOM”), Margaret Dunn, Albert Painter, Arthur S. Pickoff, and Alan P. Marco (only in his capacity as Associate Dean for Clinical Affairs at BSOM), (collectively “WSU Defendants”) respectfully move this Court, pursuant to Rule 65 of the Ohio Rules of Civil Procedure, for an order dismissing the temporary restraining order issued on October 20, 2015, because of Plaintiff’s failure to comply with procedural requirements and because this Court is not a proper venue. A memorandum in support is attached.

Respectfully submitted,

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Ohio Attorney General

s/ Michael C. McPhillips

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*Counsel for Defendants Wright State University,
Wright State University Boonshoft School of
Medicine, Margaret Dunn, Albert Painter, Arthur S.
Pickoff, and Alan P. Marco*

MEMORANDUM IN SUPPORT

Plaintiff Arun Aggarwal, M.D. was employed as a faculty member at Wright State University's Boonshoft School of Medicine. Aggarwal's faculty employment agreement with BSOM was conditioned upon, among other things, his obtaining and maintaining hospital faculty privileges necessary for his faculty role. In September 2015, BSOM officials learned that Aggarwal's clinical privileges and medical staff appointment at Dayton Children's Medical

Center had been terminated. Accordingly, BSOM notified Aggarwal that his faculty appointment was terminated effective September 14, 2015.

On October 20, 2015, Dr. Aggarwal obtained an ex parte temporary restraining order (“TRO”) in this Court, ostensibly in accordance with Rule 65 of the Ohio Rules of Civil Procedure and Local Rule 2.19. The TRO ordered “the Defendants enjoined from attempting to terminate the Plaintiff’s employment until constitutionally and contractually sufficient process is afforded. The Court further orders that the Defendants immediately notify the United States Customs and Immigration Services (“USCIS”) that the Plaintiff remains employed with BSOM and WSP.”

1. Standard for Dissolution of a TRO.

Rule 65 provides in part that, “[o]n two days’ notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.” Local Rule 2.19, in turn, states, “[n]o ex parte applications, orders or entries shall be submitted unless expressly authorized by law. All motions for temporary restraining orders shall be made and proceed in compliance with Civ. R. 65(A).” Because 1) Plaintiff failed to comply with the letter and spirit of the notice requirements in Rule 65 and Local Rule 2.19, and 2) obtained the TRO in an improper venue, the WSU Defendants respectfully request that the Court dissolve the TRO.¹

¹ The present Motion should not be construed as a Motion to Dismiss for Improper Venue pursuant to Civ.R. 12(B). Should this case remain in this Court, the WSU Defendants reserve the right to raise all defenses permitted by Civ.R. 12.

2. The TRO Should be Dissolved because Plaintiff did not Comply with Rule 65's Notice Requirements.

For the purposes of the present Motion, Civ.R. 65 provides in relevant part:

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required. The verification of such affidavit or verified complaint shall be upon the affiant's own knowledge, information or belief; and of a superior information and belief, shall state that he believes the information to be true.

(Emphasis added).

The text of subsection (2), quoted above, makes it clear that a Plaintiff seeking a TRO must do both of the following: a) provide written certification to the court regarding the efforts that were made to give notice of the TRO application, and b) provide reasons why he believes notice should not be required. Plaintiff's counsel did not comply with these requirements.

In support of the TRO, Plaintiff attaches the Affidavit of James P. Fleisher, Plaintiff's counsel. In the Affidavit, attorney Fleisher refers to various exhibits, including Exhibits G through N of the Complaint, which he identifies as "true and accurate correspondence between me, the Defendants, and/or the Defendants' counsel." (Fleisher Aff., ¶ 18). A review of Exhibits G through N indicates two things: 1) Plaintiff's counsel was fully aware of the most effective ways to contact Defendants and/or their counsel to notify them that he would be seeking an ex parte TRO; and 2) Plaintiff's counsel never contacted Defendants or their counsel through these means to notify them that he would be seeking an ex parte TRO.

Specifically, Plaintiff's counsel had an email address for Amy Golian, the Assistant Attorney General with whom he was corresponding about Dr. Aggarwal's matters; he regularly used that email address and contacted attorney Golian on correspondence with WSU officials. (Affidavit of Amy Nash Golian ¶ 3, 4; see also Exs. G, J, K, and M to Plaintiff's Complaint). Moreover, attorney Fleisher knew from telephone conversations that attorney Golian was temporarily assigned to work at the General Counsel's office at WSU, and he frequently contacted her at her temporary WSU telephone number. (Golian Aff. ¶ 5). However, nowhere in attorney Fleisher's "certification" does he indicate that he contacted or attempted to contact attorney Golian by email to indicate that he would be seeking an ex parte TRO, nor did he contact her at her known WSU telephone number to give such notice. The only "notice" that Plaintiff's counsel provided to the Defendants that he would be seeking an ex parte TRO is an 8:55 p.m. voice message left at the Columbus office of the Attorney General's Education Section. (Affidavit of Renee Matthewson, ¶ 1-4; Golian Aff. ¶ 7).

It would be unjust to let a TRO stand – ironically a TRO grounded on an alleged due process violation – when the fundamental requirement of attempting to provide notice to an adverse party before obtaining an ex parte order has been so blatantly violated. Accordingly, the TRO should be dissolved.

3. This Lawsuit Should be Dismissed in its Entirety Due to Improper Venue

Irrespective of the inadequate notice issue, this lawsuit should be dismissed in its entirety due to improper venue.

Civ.R. 3 provides in relevant part:

Proper venue lies in any one or more of the following counties: (1) The county in which the defendant resides; (2) The county in which the defendant has his or her principal place of business; (3) A county in which the defendant conducted activity that gave rise

to the claim for relief; (4) A county in which a public officer maintains his or her principal office if suit is brought against the officer in the officer's official capacity (6) The county in which all or part of the claim for relief arose . . . [or] (12) If there is no available forum in divisions (B)(1) to (B)(10) of this rule, in the county in which plaintiff resides, has his or her principal place of business, or regularly and systematically conducts business activity.²

Wright State University, BSOM, and Defendant Wright State Physicians, Inc. are all located in Fairborn, in Greene County, Ohio. The principal place of business for all of these entities is in Greene County. The claims for relief arise out of Dr. Aggarwal's employment in Greene County. All of the individually named defendants – Alan P. Marco, Margaret Dunn, Albert Painter, and Arthur Pickoff – have been sued in their official capacities and each of them has their principal office in Greene County.

In the case caption, Dr. Aggarwal indicates that his address is in Dayton, Ohio, presumably in Montgomery County. However, Civil Rule 3 makes clear that the residence of the Plaintiff only becomes relevant for venue purposes “[i]f there is no available forum in divisions (B)(1) to (B)(10)” of the rule. Since there is no available forum in Greene County under subsections (B)(1), (2), (3), (4), and (6), Montgomery County is not a proper venue under Rule 3.³

4. Conclusion

For the reasons discussed above, Defendants respectfully request that the Court dissolve the TRO issued on October 20, 2015.

² Subsections (5) and (7) through (11) of Rule 3 address special situations that are not relevant to the present action.

³ In the caption to the Complaint, Plaintiff lists Greene County addresses for all of the Defendants except for Margaret Dunn, the current Dean of the BSOM. For Dean Dunn, Plaintiff mysteriously lists an address at Miami Valley Hospital in Dayton that has no relationship to this lawsuit. Dean Dunn's BSOM office is at 725 University Boulevard in Fairborn, in Greene County.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General

s/ Michael C. McPhillips

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*Counsel for Defendants Wright State University,
Wright State University Boonshoft School of
Medicine, Margaret Dunn, Albert Painter, Arthur S.
Pickoff, and Alan P. Marco*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *Motion for Dissolution of Temporary Restraining Order* was served upon the following individuals via

U.S. Mail and email this 23rd day of October, 2015:

James P. Fleisher, Esq.
Curtis G. Moore, Esq.
Bieser, Greer & Landis, LLP
400 PNC Center, 6 N. Main Street
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s/ Michael C. McPhillips

MICHAEL C. MCPHILLIPS (0065329)
Assistant Attorney General

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Judge Mary Katherine Huffman

AFFIDAVIT OF AMY NASH GOLIAN

I, Amy Nash Golian, being duly cautioned and sworn, depose and state that I am competent to testify to the facts contained herein, that I have personal knowledge of the facts contained herein, and that the facts contained herein are true and accurate to the best of my belief.

1. I am employed as the Assistant Section Chief of the Education Section of the Ohio Attorney General's Office in Columbus, Ohio.
2. Until May 2015, my primary work place as Assistant Section Chief was in Columbus, Ohio. However, in May 2015, the former General Counsel of Wright State University was placed on paid administrative leave; she subsequently retired. From May 2015 to the present, I have worked most days of the work week out of the General Counsel's Office at Wright State University. My primary duties during this time have been handling the legal matters of Wright State University until the position of General Counsel is filled.

3. During the periods that I have worked at the Wright State offices, I have maintained my Attorney General's email address, amy.golian@ohioattorneygeneral.gov. I had instant access to this email address whether I was working in Columbus, at Wright State, or was away from work in the mornings and evenings. I regularly check this email address in the early mornings before I begin my work day and in the late evening after work.
4. Plaintiff's counsel was aware of my Attorney General's email address. He regularly emailed me or cc'd me on emails pertaining to his client, Dr. Aggarwal, as evidenced by Exhibits G, J, K, M, and N of the attachments to Dr. Aggarwal's Complaint. All of these emails predated October 20, 2015. On October 22, 2015, Plaintiff's counsel also sent me a courtesy copy at this email address of a motion for a show cause order that he filed in this case.
5. Since I have been temporarily assigned to work at Wright State, I have used a telephone number in the WSU General Counsel's office as my primary point of telephone contact for Wright State matters. Plaintiff's counsel was aware of and regularly contacted me at this phone number to discuss matters regarding Dr. Aggarwal prior to October 20, 2015.
6. Prior to obtaining a temporary restraining order on October 20, 2015, Plaintiff's counsel did not notify me at amy.golian@ohioattorneygeneral.gov that he intended to go to Montgomery County Common Pleas Court on that date to seek an ex parte temporary restraining order in this case. Plaintiff's counsel also did not contact me or leave a message at the telephone number in the WSU General

Counsel's office on or before October 20, 2015 to indicate that he would be seeking an ex parte TRO.

7. The only contact that Plaintiff's counsel had with my office on or before October 20, 2015 to indicate that he would seek an ex parte TRO was a voice message left at 8:55 p.m. at the Education Section of the Attorney General's Office in Columbus on the evening of October 19, 2015. Plaintiff's counsel and I had not used this telephone number in our numerous communications prior to October 20, 2015.

Further affiant sayeth naught.


AMY NASH GOLIAN

Sworn to before me and signed in my presence this 23rd day of October, 2015.


Notary Public

My commission expires on Sept 24, 2019



TRACY SILVERT, Notary Public
In and for the State of Ohio
My Commission Expires Sept. 24, 2019

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Case No. 2015 CV 05481

Judge Mary Katherine Huffman

AFFIDAVIT OF RENEE MATTHEWSON

I, Renee Matthewson, being duly cautioned and sworn, depose and state that I am competent to testify to the facts contained herein, that I have personal knowledge of the facts contained herein, and that the facts contained herein are true and accurate to the best of my belief.

1. I am employed as an Administrative Professional 3 for the Education Section of the Ohio Attorney General's Office in Columbus, Ohio.
2. In my typical work day, I arrive at the office at 7:30 a.m. and one of the first things that I do is to check voice messages that have been left at the Education Section's General telephone number, (614) 644-7250, during the period between when the last Legal Secretary left the office on the previous work day (usually 5:30 p.m.) and when I arrive.
3. On the morning of October 20, 2015, I checked the voice messages that had been left on the aforementioned telephone number.

4. One message, which indicated that it was left at 8:55 p.m. on October 19, 2015, stated that the caller was calling because Dr. Aggarwal had received information that his immigration status and that of his family was in immediate jeopardy; that he would be seeking injunctive relief in Montgomery County on October 20th; and left a telephone number. The caller did not leave his name. I emailed this information to Amy Nash Golian.

Further affiant sayeth naught.



RENEE MATTHEWSON

Sworn to before me and signed in my presence this 23 day of October, 2015.

REBECCA ALBERS
Attorney at Law
Notary Public, State of Ohio
My Commission Expires on
Section 147.03



Notary Public *present*
My commission expires on _____