Strategies for deposing the CEO, avoiding the apex doctrine in employment litigation

By Robert B. Landry III; Robert B. Landry III, PLC; Baton Rouge, Louisiana

Rob Landry

Black's Law Dictionary (11th ed. 2019) defines a chief executive officer as "[a] corporation's highest-ranking administrator or manager, who reports to the board of directors." Not all CEOs and other high-level executives are created equal.

Some CEOs are involved in the day-to-day decision-making that affects employees. Others sit in loftier positions overseeing a vast array of corporate activities but with little or no knowledge of the decisions made about individual employees who are not their direct reports.

In employment litigation, CEOs may present a unique opportunity to probe client-specific facts as well as relevant corporate policies and systems that may have been ignored or were simply non-existent. But according to defense counsel, CEOs are busy people who find it difficult to make time for discovery depositions given their many corporate responsibilities. Requesting the deposition of a CEO or other high-ranking executive is reflexively met with a motion for protective order or a motion to quash.

Defendants argue that such depositions are a tactic of intimidation or harassment, and they raise the apex doctrine.

The apex doctrine is a common law doctrine that permits courts to balance a party's right to discovery with the corporate executive's right to be protected from harassment and burden. And while Fed. R. Civ. P. 26 requires a moving party to show good cause for a protective order, some courts will shift that burden to the party seeking an executive's deposition.

There is no Fifth Circuit precedent that applies the apex doctrine to strictly prohibit depositions of high-level executives.[1] Federal courts within the Fifth Circuit, however, limit those depositions to high-level executives whose conduct and knowledge at the highest corporate levels of the defendant are relevant in the case.[2] In other words, courts apply the apex doctrine to prevent executives with little or no knowledge or involvement in a dispute from being deposed simply because they are high-ranking executives.

Where executives have little or no knowledge — or where another lower ranking employee has equivalent knowledge — courts will generally apply the apex doctrine to bar or defer a CEO's deposition.[3] For example, *Pan American Life Ins. Co. v. Louisiana Acquisitions Corp.*, 2015 WL 4168435 (E.D. La. July 9, 2015), involved a request to depose a non-party parent company's CEO who had little knowledge of the case.

The court refused to allow the deposition to go forward because the plaintiff did not demonstrate that the executive had superior or unique knowledge or that a less burdensome means of obtaining the information — such as deposing lower-ranking executives — was unavailable.

Similarly, *Turner v. Novartis Pharmaceuticals*, 2010 WL 5055828 (E.D. La. Dec. 2, 2010), involved a request to depose high-level executives who had no personal knowledge of plaintiff's allegations of discrimination and some of whom were not even employed at the same time as the plaintiff and who provided no rationale as to relevancy.

Thus, if the executive does not possess unique, personal knowledge about a controversy, courts will regulate the discovery

process to avoid oppression, inconvenience, and burden.[4] The Fifth Circuit has recognized the need for first utilizing less-intrusive means before taking an apex deposition of an executive lacking unique personal knowledge.[5]

Those less-intrusive means might include a deposition through interrogatories, a wait-and-see approach wherein other witnesses are deposed first, or the deposition of a suitable lower-ranking substitute with equivalent knowledge.[6]

But what if an executive does possess unique personal knowledge relevant to your client's case? If so, that executive is not entitled to the apex doctrine's protection. There is no need for the court to examine whether less intrusive means of obtaining the information are available. Other employees should not be substituted for such executive.[7] In fact, differences between a knowledgeable CEO's testimony and the testimony of other employees may permit the opposing party to challenge witness credibility at trial.[8]

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In employment cases, high-level executives often are deposed where they have personal involvement in the employment dispute. For example, in *E.E.O.C. v. JBS USA, LLC*, 2012 WL 5328735, at *1-2 (D. Neb. Oct. 29, 2012), a CEO with a hands-on reputation was deposed because he had been briefed about the employment dispute at issue and had offered his opinions about it. Because he lived out of the country, the court permitted a deposition by telephone or video to mitigate any hardship.[9]

In *Weber v. FujiFilm Medical Systems U.S.A., Inc.*, 2011 WL 677278, at *3 (D. Conn. Jan. 24, 2011), top corporate executives who wrote and commented on a memorandum referencing the plaintiff's termination of employment were personally involved in and had unique knowledge of the reasons for and process of the plaintiff's termination. The *Weber* court found that the plaintiff met his burden to establish that their depositions were necessary and not merely apex depositions.[10]

When considering whether to depose a CEO or other high-ranking executive, ask yourself whether the executive fits some or all of the following descriptions:

- The CEO was a decision maker in the adverse employment action taken against your client.[11]

- The CEO was briefed about a discriminatory pattern or practice or about the adverse employment action before it was taken.[12]
- The CEO commented on or discussed the adverse employment action with others.[13]
- The CEO was involved in pre- or post-termination strategizing, such as building an exculpatory paper trail of belated write-ups or a laundry list of exaggerated complaints.[14]
- The CEO interacted with the plaintiff and was familiar with the plaintiff's work.[15]
- The CEO was "hands-on" and involved in operational oversight or day-to-day supervision of the plaintiff.[16]

If some of these factors describe the defendant's CEO, then that individual likely is not an apex executive entitled to protection from the burden of a deposition.

If the defendant challenges the deposition, be prepared to provide the court with details about the executive's unique personal knowledge of the case. In addition, be sure to emphasize how the executive's testimony is both relevant and proportional to the case.[17]

For these reasons, it is helpful to serve written discovery at the earliest possible moment, targeting potential documents and electronically stored information that demonstrate the CEO's involvement with issues that impacted your client.

By utilizing these criteria and strategies in employment litigation, you may find yourself deposing the defendant's top corporate officer.

Endnotes

1. *McGee v. Arkel International, LLC*, 2013 WL 12228710, at *3 (E.D. La. Aug. 9, 2013) (allowing deposition of corporate CEO where defendants created a shell game

of witnesses who could not answer questions about relevant issues).

2. *Id.*
3. See also *Baine v. General Motors Corp.*, 141 F.R.D. 332 (M.D. Ala. 1991), involving a high-level General Motors executive who did not have unique special knowledge regarding an allegedly defective product; another lower-ranking executive was a suitable substitute.
4. *Robinson v. Nexion Health at Terrell, Inc.*, 2014 WL 12915533, at *2 (N.D. Tex. Apr. 16, 2014).
5. *Id*.
6. See e.g., *Pan American Life Ins. Co. v. Louisiana Acquisitions Corp.*, 2015 WL 4168435, at *4 (E.D. La. July 9, 2015).
7. See *Gaedeke Holdings VII, Ltd. v. Mills*, 2015 WL 3539658, at *4 (N.D. Tex. June 5, 2015) (deposition of a lower-ranking witness could not reasonably substitute for the questioning of a CEO with unique personal knowledge of the circumstances).
8. *Id*.
9. *JBS USA*, 2012 WL 5328735 at *2. In the age of COVID-19, the use of videoconference depositions naturally diminishes the burden on any CEO asked to give a deposition. To demonstrate that any burden has been mitigated, the plaintiff should argue that the CEO deponent will be able to give a deposition from the comfort of his own office or home and is not even being asked to travel.
10. *Weber*, 2011 WL 677278 at *3.
11. A decision-maker CEO should be deposed even if other company personnel were also decision makers. Differences between a knowledgeable CEO's testimony on the decision-making process and the testimony of other employees may permit the plaintiff to challenge witness credibility at trial. See *Gaedeke*, 2015 WL 3539658 at *4.
12. See *JBS USA*, 2012 WL 5328735 at *2 (CEO briefed about events constituting pattern or practice of discrimination against Muslim employees).
13. See *JBS USA*, 2012 WL 5328735 at *2 (CEO was deposed because he had been briefed about the employment dispute at issue and had offered his opinions about it); *Weber*, 2011 WL 677278 at *3 (executives deposed where they wrote about and commented on upcoming termination).
14. See *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 237 (5th Cir. 2015). A company's creation of an exculpatory paper trail is evidence that the employer's legitimate non-discriminatory or non-retaliatory reason for an adverse employment action is pretextual. CEO involvement in such an activity, especially directing the activity, should be more than enough reason for a deposition.
15. This may be highly relevant information where, for example, the plaintiff has been terminated for alleged poor performance.
16. See *JBS USA*, 2012 WL 5328735 at *2 (hands-on CEO deponent); see also *Gaedeke*, 2015 WL 3539658 at *4.
17. Fed. R. Civ. P. 26 proportionality considerations include whether the burden or expense of the discovery outweigh its likely benefit and the parties' relative access to relevant information. In employment cases, the employer generally has access to most of the relevant information, such as personnel files, email communications, and policy manuals. As discussed in footnote 9, the burden on any executive is diminished due to the current widespread use of videoconferencing for depositions. Other proportionality considerations may be applicable as well and should be briefed for the court.