IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STACEY KALBERMAN,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	Civil Action No.:
	*	2012CV216247
GEORGIA GOVERNMENT TRANSPARENCY AND CAMPAIGN FINANCE COMMISSION, f/k/a GEORGIA STATE ETHICS COMMISSION, HOLLY LABERGE, in her Official capacity as Executive Secretary of the Georgia Transparency and Campaign Finance Commission,	*	
	*	
Defendants	*	

DEPARTMENT OF LAW RESPONSE TO PLAINTIFF STACEY KALBERMAN'S MOTION FOR SANCTIONS

Introduction

The attorneys from the Georgia Department of Law acted honestly, ethically, and professionally throughout the course of this litigation. They stayed well within the boundaries of appropriate attorney conduct while also vigorously defending their clients to the best of their abilities, as is required by law and by the Georgia Bar Rules of Professional Conduct. In spite of that, the Plaintiff attempts to elevate a simple discovery dispute (after Plaintiff already prevailed at trial) into

a sanctionable offense, and also hold Department of Law attorneys responsible for the non-production of email messages that they never received or even knew existed during the litigation. Plaintiff's filing follows press appearances by Holly LaBerge, the current Executive Secretary of the Ethics Commission—appearances made with the stated intention of improving her public reputation and establishing her own right to sue under the whistleblower statute.[1] Plaintiff also suggests that two pretrial filings from the Department of Law were improper because they did not explicitly reference documents that were not produced. These allegations, however, are also meritless because Plaintiff was aware through other discovery of the facts reflected in the unproduced documents, and her attorneys made a strategic choice not to seek additional information relating to them. Moreover, the documents now revealed by Ms. LaBerge did not impact the legal arguments made in either of those motions. The Department of Law should not be held responsible for the litigation choices of its opponents or the alleged discovery violations of its clients.

[1] In statements during and relating to her media appearances, Ms. LaBerge and her private attorney have made specific and public representations regarding the conduct of Department of Law attorneys. Ms. LaBerge's private attorney has also written letters on her behalf that discuss in considerable detail her allegations about the details of the Department of Law's representation, and has shared those letters with members of the media. In particular, see Mr. Parks' letter of August 13, 2014 (Ex. D), which was released to the press and contained in an article in the Atlanta Journal-Constitution on August 15, 2014. She has therefore waived the attorney-client privilege with respect to the Department of Law's representation of her in this matter.

Statement of Facts[2]

On June 8, 2012, Plaintiff Stacey Kalberman filed suit claiming that she was wrongfully terminated from her job as Executive Secretary of the Georgia Government Transparency and Campaign Finance Commission ("Ethics Commission"). The Defendants in the case were the Ethics Commission and its current Executive Secretary, Holly LaBerge, in her official capacity. Executive branch agencies in Georgia are represented in litigation by the Georgia Department of Law, and attorneys Bryan Webb and Laura McDonald were assigned to handle the Kalberman litigation. Mr. Webb and Ms. McDonald have a combined 37 years of experience as attorneys, including 29 years of service at the Department of Law.

Discovery proceeded in the case, including requests for production, interrogatories, and depositions of relevant witnesses. Ms. Kalberman's attorneys also sought via subpoena the private email accounts of Ms. LaBerge and two of her colleagues. Mr. Webb, responding to concerns from the three Ethics Commission staffers that personal emails unrelated to the case would be revealed under the subpoena, negotiated an agreement with Plaintiff's counsel whereby each of the Commission employees targeted by the subpoenas would review and produce all work-related emails from their personal accounts. Mr. Webb communicated these requirements to Ms. LaBerge and her colleagues. *See* Affidavit of Brian K. Webb

[2] This Brief offers a limited recitation of the relevant facts, but the failure to disagree with any fact set forth in Plaintiff's brief should not be understood as agreement.

at ¶¶ 14-16. In response to this request, each employee provided a set of documents to Mr. Webb, and represented to him that they had, without exception, produced all work-related documents from their personal email accounts. *Id.* at ¶ 19. He in turn produced to Plaintiffs in full the three sets of documents provided by Ms. LaBerge and the other respondents. *Id.* at ¶ 21. Mr. Webb did not limit the production by suggesting search terms or other limiting parameters, and he did not withhold any emails that the Commission employees gave to him. *Id.* at ¶¶ 16, 21.

As discovery moved forward, one deponent, Elisabeth Murray-Obertein, testified in her August 1, 2013 deposition that Ms. LaBerge had told her that two high-level staffers from the Governor's office—Chief of Staff Chris Riley and Executive Counsel Ryan Teague—had contacted her while she was on vacation to pressure her to resolve the Deal case favorably. Murray-Obertein Dep. at 54:21-56:3. Even after the Murray-Obertein deposition, which focused in part on allegations of pressure on Ms. LaBerge, no discovery was sought from Governor Deal or his staff.

Following Ms. Murray-Obertein's deposition, Mr. Webb questioned Ms. LaBerge about the allegations of pressure. It was only then that, Ms. LaBerge revealed to him a document entitled Memorandum of Record. In that document, dated more than a year earlier, Ms. LaBerge detailed text messages from Mr. Riley on July 16 and 17, 2012, and a telephone call with Mr. Teague on July 16 of that

year. The Memorandum of Record was not responsive to any requests for documents set forth by Ms. Kalberman and her attorneys, so it remained unproduced, although, as discussed above, the underlying facts contained in the Memorandum were known to the Plaintiff and her attorneys. As Ms. LaBerge has since communicated in follow-up correspondence relating to an Open Records request covering the Memorandum of Record, she printed the document without saving it on her work computer, her personal computer, or any other piece of equipment. *See* Ex. A, Jul. 18, 2014 Email H. LaBerge to J. Fleischer at 3. Ms. LaBerge did not include her Memorandum in the Commission's investigative file. Webb Affidavit at ¶ 67.

Ms. LaBerge has since alleged in a television news interview that she also forwarded texts from Mr. Riley and Mr. Teague to her personal email address, but those emails were not included in the set of documents that she provided to Mr. Webb in response to her agreement to produce all work-related emails. Had they been produced or otherwise revealed to Mr. Webb, he would have produced them as work-related emails. *Id.* at ¶ 67.

As the Kalberman case neared trial, the Department of Law filed a Motion in Limine seeking to exclude testimony relating to LaBerge's tenure at the Ethics Commission—including the ultimate resolution of the Deal case, as well as Ms. LaBerge's treatment of several employees and her alleged retaliation against them.

See Defs' Motion in Limine at 4-5. Such evidence, the Department of Law attorneys argued, was not relevant to Plaintiff Kalberman's termination more than a year earlier. This Court denied the Motion. Department of Law attorneys also filed a Motion to Quash the subpoena for the trial testimony of Governor Deal, for reasons including that Plaintiff had not shown any evidence that he knew anything about Ms. Kalberman's firing and Plaintiff's failure to seek discovery from the Governor through less onerous means. The Court granted the State's motion. The Department of Law did not move to quash Plainitff's subpoenas for trial testimony by Mr. Riley or Mr. Teague, but Plaintiff never called either as a witness. Plaintiff never sought pre-trial discovery from Mr. Riley or Mr. Teague.

Plaintiff was successful at trial, and the jury awarded her $700,000 in non-economic damages. The case subsequently settled for $1.15 million, which included backpay and attorneys fees. Following the Plaintiff's verdict in the Kalberman case, the State chose to settle three remaining whistleblower lawsuits for former Ethics Commission employees Sherilyn Streicker, John Hair, and Elisabeth Murray-Obertein. The latter two lawsuits were based in part on claims of retaliation by Ms. LaBerge for testimony offered and actions taken by Mr. Hair and Ms. Murray-Obertein in the Kalberman and Streicker litigation. On July 11, 2014, Ms. LaBerge, who apparently resented the settlement of the four cases—regardless or perhaps because of the fact that the latter two were based on claims

against her—attempted to lay the foundation for a future whistleblower claim of her own, claiming in correspondence sent to the Ethics Commission that her reputation had been harmed by the settlements and that she had additional information that would have helped support the Ethics Commission's case that Ms. Kalberman's firing was not improper. *See* Ex. B, Jul. 11, 2014 Ltr. L. Parks to Ethics Comm.

The information that Ms. LaBerge believed would have been helpful to the defense was the Memorandum of Record that she had drafted and the emails containing her texts with Mr. Riley and Mr. Teague. Ms. LaBerge also went on television to publicize her allegations and attempt to clear her "toxic" reputation. Plaintiff Kalberman, apparently disagreeing that the Memorandum of Record would have strengthened the Ethics Commission's side of the case, objected to the fact that the Memorandum had not been produced. Plaintiff Streiker, on the other hand, finalized the settlement documents for her related whistleblower case two days after Ms. LaBerge made her allegations. Plaintiff moved for sanctions against Ms. LaBerge and/or the Department of Law on August 8, 2014 on the basis of failure to include the Memorandum of Record in the Commission's investigative file and failure to produce the emails containing the text messages between Ms. LaBerge and the Governor's staff members.

Argument

I. The Department of Law Did Not Withhold Any Responsive Documents.

The Plaintiff's brief refers to documents within the "exclusive possession" of Defendants and the Department of Law, and suggests that those documents were intentionally withheld. *See, e.g.*, Pl. Br. at 8. Those assertions are false, at least with respect to Department of Law attorneys.

Specifically, Plaintiff first complains that email messages relating to the conversations between Ms. LaBerge and the Governor's office were not produced. Those emails, however, were unknown to the Law Department during the litigation. Therefore, if any emails were wrongly or intentionally withheld, it was not by Mr. Webb or any other Department of Law attorney.[3]

Production of the Memorandum of Record drafted by Ms. LaBerge is a different question altogether—this is a discovery dispute of the sort that happens between attorneys every day in the ordinary course of litigation. While Plaintiff's attorney may disagree about whether the Memorandum was responsive, one noted attorney and former State Bar President has stated that it would have been legal malpractice to produce the document because it was not responsive to any of Plaintiff's discovery requests. Technical legal disputes of this sort are not the stuff

[3] Plaintiff's motion also identifies potential violations of the Open Records Act by Ms. LaBerge. *See, e.g.*, Pl. Br. at 4-6, 14, 16. These are not the only potential violations of the Open Records Act allegedly committed by Ms. LaBerge in this context. *See* Ex. C, Jul. 23, 2014 Ltr. T. Clyde to J. Milsteen. As Plaintiff acknowledges, however, these potential violations are "not before this Court." *Id.* at 16.

that sanctions are made of. Notwithstanding the choices made by their client, Department of Law attorneys acted completely within the bounds of their professional obligation to zealously represent the State of Georgia. Consistent with their ethical responsibilities, the attorneys produced every responsive document that they were aware of.

A. Ms. LaBerge Did Not Produce the Emails from Her Personal Account.

Ms. LaBerge did not turn over to her attorneys all requested documents in this case despite instructions to do so. On March 22, 2013, Plaintiff subpoenaed Google and other email providers for the entire contents of the personal email accounts of Ms. LaBerge and two other Ethics Commission employees. The three employees objected, raising with their attorneys at the Department of Law the reasonable concern that personal and confidential email entirely unrelated to the Deal investigation or the Kalberman suit would be revealed if Google complied with the subpoena. The Department of Law filed a motion to quash the subpoenas on that basis, and ultimately reached an agreement with Plaintiff's counsel that the three employees would themselves find and produce all work-related emails in their personal accounts. Webb Affidavit at ¶ 12-15. The agreement did not contain search terms or any other parameters beyond requesting all work-related emails. *Id.* at ¶ 16. In response to that agreement, Ms. LaBerge and her two colleagues each identified responsive documents from their individual accounts

and provided them to Mr. Webb, who in turn produced each set of documents to Plaintiff's attorney exactly as it was given to him. *Id.* at ¶ 19, 21. Mr. Webb was surprised and dismayed—to put it mildly—when he subsequently saw Ms. LaBerge's television presentation of work-related emails that had not been produced to him. *Id.* at ¶¶ 57-59.

In correspondence with the Department of Law and others, Ms. LaBerge has already provided two conflicting explanations of why she did not produce the emails. In a letter from her personal attorney to the Department of Law, Ms. LaBerge's attorney states that Ms. LaBerge informed Mr. Webb that she had forwarded work-related text messages to her personal e-mail account and that "Mr. Webb told Ms. LaBerge that the forwarded texts were not responsive to the subpoena if they did not contain the search terms the parties were using." Ex. D, Aug. 13, 2014 Ltr. L. Parks to J. Milsteen. As noted above, and as is clear from a review of the produced documents, there were no search terms—the agreement was to produce ***all*** work-related emails. And in any event, that explanation differs from the first explanation offered by Ms. LaBerge for not producing the emails: "She was told by the Office of the Attorney General that the e-mails containing the text messages were not responsive to the subpoena because the 'e-mails' did not originate from Chris Riley or Ryan Teague." Ex. E, Jul. 16, 2014 Ltr. L. Parks to B. Webb.

Nonsense. Mr. Webb did not advise Ms. LaBerge about any limitations on the request for work related emails from her personal account. Moreover, he repeatedly asked her to confirm that she had provided all correspondence relating to the case, and she never provided the emails or text messages in response to that request either. Mr. Webb's contention is confirmed in correspondence relating to an open records request that sought, *inter alia*, "[a]ny and all e-mails sent to or received by holly.laberge@gmail.com . . . containing communications, information, documents, discovery requests, files, or data relating to the case of Stacey Kalberman . . . ." Ex. F, Jul. 23, 2013 Email Thrasher, Liss, & Smith to H. LaBerge. Ms. LaBerge responded that she had already produced all the requested documents in discovery: "Each of the items requested below has already been submitted to you in the context of the discovery of the cases. We have given you all the information that we are in possession of regarding the Stacey Kalberman, Sheri Streicker, and Nathan Deal cases." Ex. G, Jul. 26, 2013 Email H. LaBerge to Thrasher, Liss, & Smith LLC. Ms. LaBerge's written response to an open records request clearly encompassing the emails in question demonstrates her understanding that she had been required to produce, without exception, all work-related emails. Her response also demonstrates a decision to keep those emails and texts private even in the face of a request that clearly applied to them.

Ms. LaBerge's explanation about the text messages themselves has also shifted during the course of her media campaign. She advised a member of the media in response to an open records request as follows: "Per your ORA request, I currently only have access to the text messages on my current handheld device." Ex. A, Jul. 18, 2014 Email H. LaBerge to J. Fleischer. In contrast, 20 days later on August 6, 2014 Ms. LaBerge issued a press release that provided screen shots of the text messages. *See* Ex. H, Aug. 6, 2014 LaBerge Press Release. The concern that animated Ms. LaBerge to release the messages that had apparently eluded her in both their email and text formats during discovery is forthrightly described in her press release: Media stories "called into question Ms. LaBerge's claims that she felt pressured by the Governor's Office to dismiss the Deal Complaints or settle them on terms favorable terms [sic] to the Governor." *Id.*

Ms. LaBerge's choices throughout the litigation are telling, as she

- did not produce the text messages or the email copies of the relevant messages in response to a straightforward request for production in litigation;
- did not produce to her attorneys in the Law Department the email copies in response to a discovery agreement with Plaintiff's counsel relating to personal email accounts;

- and did not produce the text messages in response to an open records request from the media.

Ms. LaBerge did, however, find and produce the original text messages once she believed that her preferred narrative was being undermined by the media. The contrast is clear.

Mr. Webb, on the other hand, did not know about the email messages until the news report of them, and had been previously assured by Ms. LaBerge that she had produced all correspondence in her possession relating to the Deal investigation. Webb Affidavit at ¶¶ 22, 26-26, 41-43, 61-62. Because he did not know about these messages, he could not have produced them. He did, however, produce an email that proved very favorable to the Plaintiff in the *Kalberman* litigation, a June 6, 2011email from a Commission member asking Ms. LaBerge whether she would be interested in the Executive Secretary position—prior to the time when Ms. Kalberman left the Commission. *Id.* at ¶¶ 17-18, 20.

The contrast is clear. It would make no sense to produce a document that would serve as key evidence of pretext to the opposing side of the case, but withhold emails regarding conversations that took place a year after Ms. Kalberman's termination and reflecting information that would be available from multiple witnesses. Indeed, as described in more detail below, Ms. Murray-Obertein testified about those conversations both at trial and during her deposition.

To summarize, Mr. Webb and the Department of Law share the concerns of the Plaintiff that the emails were not produced. Our attorneys depend on their clients to be honest and forthcoming in their discovery responses, and any deviation from that course engenders serious institutional concerns both for the Department of Law and for the Courts. At this point in time, the Department of Law can only assure the Court that if it had been given those emails, it would have turned them over.

B. The Memorandum Was Not Responsive to Any of the Plaintiff's Discovery Requests.

The Memorandum of Record created by Ms. LaBerge is a different question. It was, to put it simply, not responsive to any of the discovery requests set forth by the Plaintiff. To produce that document in spite of its nonresponsive nature would have been inappropriate and a failure by Department of Law attorneys to properly represent their client. And, to be clear, Plaintiff's only claim about the Memorandum arises from Ms. LaBerge's failure to include it in the investigative file.

Ms. LaBerge revealed the Memorandum of Record to Mr. Webb only after he questioned her following Elizabeth Murray-Obertein's deposition testimony concerning the events described in that document. *See* Webb Affidavit at ¶¶ 28-36. The Memorandum was provided to Mr. Webb following their conversation—

albeit more than a year after its apparent drafting. Here too, Ms. LaBerge has provided inconsistent statements about when she shared her Memorandum with the Department of Law. One television reporter wrote to Ms. LaBerge, "***please confirm if you are positive*** about the June 2013 date as to when you turned the memo over to the AG's office." Ex. I, Jul. 18, 2014 Email J. Fleischer to H. LaBerge at 2. Ms. LaBerge responded and assured the reporter that she had given the Memorandum to Mr. Webb "at the very end of June 2013" and that she had no explanation for why he had not shared it with anyone else in the Law Department until August or September. Ex. I, Jul. 18 Email H. LaBerge to J. Fleischer at 2. In a recent letter to the Department of Law, however, Ms. LaBerge's story is that she had informed Mr. Webb about the Memorandum in June 2013, but that he "instructed her not to provide the Memo," and waited 30 days to call her and communicate that he was '"ready to see the Memo."' Ex. D, Aug. 13, 2014 Ltr. L. Parks to J. Milsteen. These written accounts from Ms. LaBerge are not reconcilable with one another.

Ms. LaBerge's shifting explanations aside, the Memorandum of Record proved to be unresponsive to any of plaintiff's document requests—to the surprise of Mr. Webb and the other attorneys with whom he consulted on the matter.[4] *See*

[4] The decision that the specific document (the so-called "Memorandum of Record") was not responsive to the request to produce in the Kalberman case was made by Mr. Webb, who consulted with his Division Director, the Solicitor General and the Chief Deputy Attorney General, who collectively have over 77 years of experience in the Law Department.

Webb Affidavit at ¶¶ 37-39. To be sure, Mr. Webb and other attorneys from the Department of Law ***did tell Ms. LaBerge that the document was responsive to United States Department of Justice subpoenas***. *Id.* at ¶ 51. Department of Law attorneys also advised Ms. LaBerge that if she were directly questioned about the document or the events it described she was to testify truthfully. *Id.* at ¶¶ 52-55; *see also* Affidavit of Laura W. McDonald at ¶ 11. There was no action or intent to keep the document out of the public eye. It simply was not responsive in discovery based on the requests propounded by Plaintiffs.

Plaintiff's First Request for Production of Documents and Things to Defendant Holly LaBerge sought "correspondence" between Ms. LaBerge and "any other person(s) … and/or entity(ies)/agency(ies)/department(s) of the government of the State of Georgia, concerning any issue related to this lawsuit . . . ." Plaintiff's First Request for Production of Documents and Things to Defendant Holly LaBerge, Request No. 2, at 4. The Memorandum of Record was a note that Ms. LaBerge drafted for her own purposes rather than a means of communication to anyone else, and thus does not fit into the definition of "correspondence." As former State Bar President and noted litigator Benjamin Easterlin explains in his affidavit, that term "necessarily requires an exchange between two or more people." Affidavit of Benjamin F. Easterlin IV at ¶6. Because the Memorandum cannot reasonably be considered correspondence, it

was not responsive to Plaintiff's request. And Plaintiff does not now argue that it was.[5]

Of course, the Memorandum would have been responsive to a request for all documents "relating to" correspondence, but that was not the request set forth by the Plaintiff's attorneys. Indeed, because the Memorandum was relevant (even if not crucial, given that Plaintiff did not choose to pursue other evidence relating to the conversations it described), it would have been simpler if there had been a broader request. But as Mr. Easterlin's affidavit states, it would have been improper—no less than malpractice—for the Department of Law to intentionally produce a document not actually requested by counsel. *See* Easterlin Affidavit at ¶6. The Department of Law is required to represent its clients with "zeal in advocacy upon the client's behalf," and therefore responded fully and truthfully to the Plaintiff's discovery requests without also going beyond them. Georgia Rule of Professional Conduct 1.3, comment 1. Again, Plaintiff has not chosen to argue that the Memorandum should have been produced in response to this request, but the Department of Law addresses the issue for the Court's convenience.

Plaintiff instead suggests that it was an error not to produce the Memorandum as part of the Investigative File for the Deal case. That too would have been improper; in fact, it would have injected the Department of Law into

[5] Plaintiff also suggests that it was an error not to list the Memorandum on a privilege log. But the Memorandum was not withheld for reasons of privilege; it simply was not responsive to the requests set forth by the Plaintiff.

the substantive work of its client. Had Mr. Webb demanded after he received the Memorandum that it be produced as a supplemental response to the Plaintiff's request for the investigative file, that production itself would been an untruthful response; the Memorandum was not a part of the file. Webb Affidavit at ¶ 34. The Ethics Commission and its staffers determine the contents of the agency's investigative files; that is not a decision for their lawyers to make. Mr. Webb and the Department of Law turned over everything that was given to them as part of the investigative file, and to insist that additional documents be included merely for the sake of having a way to produce them would have constituted an untruthful representation about the contents of the file. *See* Webb Affidavit at ¶¶ 7-8. Ms. LaBerge now claims to be very interested in the release of the Memorandum, an odd contention from someone who intentionally did not create an electronic copy of the document, did not share it with her attorneys until more than a year after she created it,[6] and chose to store it separately rather than including it in the investigative file. Webb Affidavit at ¶ 32-36.

II. Plaintiff Knew About the Communications at Issue And Could Have Chosen to Seek More Detail About Them or Set Them Before This Court with More Specificity.

Remarkably enough given all the ink that has been spilled on this issue, the Memorandum of Record describes events that were already known to Plaintiffs in

[6] Even according to Ms. LaBerge's conflicting statements about when and how she handed over the Memorandum, that act would have been very nearly a year after the Memorandum's creation.

the Kalberman and Streicker cases. Contrary to the assertions in Plaintiff's brief, it is simply not true that Department of Law attorneys had exclusive knowledge of conversations alleged to have taken place between Ms. LaBerge and members of the Governor's staff during her beach vacation. All parties to the litigation, including the Plaintiff and her attorney, were aware of those communications.

Elisabeth Murray-Obertein specifically testified that Ms. LaBerge had received pressure from Chris Riley, Ryan Teague, or both while on vacation prior to the hearing in the Deal case. Ms. Obertein stated as follows in her August 1, 2013 deposition:

Q: Who was [Ms. LaBerge] pressured by to assess that dollar amount number?

A: I believe she was pressured by Chris Riley or somebody in the Governor's Office, because she told me that – She was at the beach, of course. She always goes out of town the week before a disaster happens, and she told me that – I believe it was Chris Riley, or it could have – No. It could have been Ryan [Teague] or both could have called her on a cell phone while she was at the beach.

Q: Someone from the Governor's inner circle at least?

A: Called and pressured her about taking a low number.

Murray-Obertein Dep. at 55-56 (Aug. 1, 2013). The plaintiff and her attorney thus received direct and specific deposition testimony about the conversations. The fact that they chose not to pursue that line of argument was necessarily a matter of strategy rather than a question of knowledge.

Following the testimony by Ms. Murray-Obertein that Ms. LaBerge had been pressured by Deal staffers while on vacation, Plaintiff's attorney could have asked her further questions; she could have re-opened the deposition of Ms. LaBerge; she could have questioned Ms. LaBerge on that issue at trial; and she could have called Mr. Teague and Mr. Riley for testimony, either in depositions or at trial. But Plaintiff's attorney chose to do none of these things—perhaps for good strategic reasons given that the trial ultimately resulted in a successful verdict for the Plaintiff. Given that she had the opportunity to pursue this line of argument and chose not to, Plaintiff's attorney should not be able to suggest to the Court that the attorneys in this office deprived her—and the Court—of "relevant material central to the case." Pl. Br. at 3.

Two assertions in the Plaintiff's brief bear particular need for rebuttal. Plaintiff describes two motions by the Department of Law as "disingenuous," a characterization that is both untrue and offensive. *First*, Plaintiff's attorney suggests that "in considering the Motion in Limine, the Court did not have this critical, probative evidence that would have aided the Court in rendering its decision." Pl. Br. at 7. That is simply untrue. The Kalberman Response to the Motion in Limine specifically alleges that, according to Ms. Murray-Obertein's deposition testimony, "LaBerge was pressured by the Governor's office" to favorably settle the Governor's case. Pl. Resp. to Mot. in Lim. at 10. What's

more, the Department of Law did not dispute the assertion that LaBerge was contacted by the Governor's office. Instead, the Motion in Limine argued that evidence relating to the ultimate handling of the Deal case was not relevant to the question of whether Ms. Kalberman was terminated for improper reasons nearly a year earlier. *See* Defs' Motion in Limine at 5 ("Any evidence concerning the actions of Holly LaBerge, who became the Defendant's Executive Secretary in September 2001, after Plaintiff resigned from her employment, is not probative of the intent of the decision-makers."); see also *id.* at 7 ("Plaintiff's employment is a separate and distinct issue from the ultimate resolution of complaints against the Deal Campaign."). This Court disagreed, and Plaintiff's attorney went on to question Ms. Murray-Obertein extensively regarding the Deal case at trial.[7]

Moreover, counsel was plainly aware of Ms. Murray-Obertein's testimony about the calls to Ms. LaBerge at the beach, as she attempted to elicit testimony on those conversations during her examination of Ms. Murray-Obertein at trial. Mr. Webb raised a proper hearsay objection, which was sustained, but Plaintiff's counsel went on to rephrase the question in a non-objectionable manner, and in fact received testimony on the issue:

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[7] Plaintiff's extensive questioning at trial of Ms. Obertein relating to pressure on Ms. LaBerge to settle the Deal case favorably seems to belie the assertion that she "limited her questioning of the witnesses relating to the resolution of the Deal investigation." Pl. Br. at 9. This fact also refutes plaintiff's assertion that the Motion in Limine "unjustifiably expanded proceedings." Pl. Br. at 17. First, the Motion in Limine was rejected, and thus did not impact the proceedings at trial. Second, the only impact of the Motion had it been granted would have been to exclude the plaintiff's evidence relating to the resolution of the Deal case, thereby *contracting* the proceedings rather than expanding them.

Q: If you could tell me what Miss LaBerge –

A: Told me?

Q: -- conveyed to you in regard to being at the beach, I believe you said, and what she conveyed to you.

A: Yes. Miss LaBerge told me that the number that the Governor gave came straight from Ryan Teague, it did not come from Randy Evans, and that they number that they came up with was $2,250. And I said: That's completely outrageous; I'm ready to go to hearing on all of these cases.

Ex. J, Trial Testimony of Elisabeth Murray Obertein at 60-61.

Plaintiff's counsel then began to lead the witness, and the court cut him off sua sponte from the leading and testimonial question offered. *Id.* Counsel did not attempt to rephrase the question or otherwise seek non-objectionable testimony, although it was certainly available. Plaintiff's counsel also failed to seek testimony from Ms. LaBerge on her conversations with Governor Deal's staff. Ms. LaBerge's testimony regarding the conversations would clearly have been admissible, but her time on the witness stand came and went without a single question on the issue. These strategic trial decisions by Plaintiff's counsel belie the current assertion that this information would have been crucial to the case.

Nor did Plaintiff's counsel seek to depose or call to the stand Mr. Teague or Mr. Riley, the two members of the Governor's staff that Ms. LaBerge describes as pressuring her during her beach vacation. Both of these potential witnesses were on the "may call" list, and the Department of Law did not seek to quash their

subpoenas. Plaintiff's counsel could have called one or both of them to testify, but chose not to do so. It is remarkable that Plaintiff's attorney would level accusations against the Department of Law after she herself (1) heard sworn testimony from a third party regarding the conversations between Ms. LaBerge and Mssrs. Riley and Teague; (2) chose not to seek testimony from Ms. LaBerge about those conversations; and (3) chose not to seek testimony from Mr. Riley or Mr. Teague about those conversations. Had she believed that such information was important to her case she could have sought it.

The accusations regarding the motion to quash the subpoena for the Governor's testimony are misguided for the same reasons. Plaintiff's brief neglects to remind the Court that the Department of Law did not move to quash the subpoenas for testimony by Mr. Teague and Mr. Riley. Plaintiff was free to call one or both of them to testify and chose not to, in spite of Ms. Murray-Obertein's testimony that they had pressured Ms. LaBerge at the beach and had engaged in other conversations with her throughout the investigation. That alone demonstrates that the Department of Law had no intention of hiding the conversations at issue. If Ms. Kalberman's attorneys were "missing critical evidence that was highly probative of the case," they have no one to blame but themselves.

Moreover, the Court's order granting the motion to quash relies in large part on the fact that there was no evidence that the Governor had personal knowledge

of the decision about Ms. Kalberman's termination. *See* Mar. 31, 2014 Order at 4 ("Nothing in the record, save Plaintiff's assertions, suggests that Governor Deal was involved in the decisions related to Plaintiff's employment."). Plaintiff's counsel does not now set forth any more evidence that the Governor had personal knowledge of his staff's actions than was available at the time of trial, where plaintiff successfully relied on allegations of pressure from Deal staffers. In addition, this Court also rested its conclusion on the fact that Plaintiff's counsel never sought to obtain testimony from the Governor through less onerous means during discovery. That fact, of course, also remains the same.

Even apart from the particular facts of this case, the Department of Law has important institutional reasons to object to a subpoena for trial testimony from any high-level official who does not have direct knowledge about the questions at issue in the case. Setting aside the important separation of powers questions at issue, a precedent establishing that state officials could be called to testify, even absent any evidence that they had personal knowledge of the events in question, would introduce significant interference in the future conduct of business by state officials. *See* Br. in Supp. of Mot. to Quash at 4, 5. The Law Department argued on that basis, and as it has always done in the past, that because there was no evidence that the Governor had direct knowledge relevant to the allegations in the Plaintiff's complaint, he should not be required to attend the trial or be sworn as a

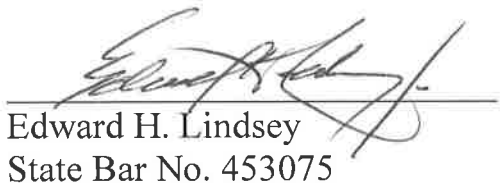
witness. *See id.* at 1; *see also* Ex. K, Mot. to Quash, *Simmons v. Strong*, OSAH-GOV-REF-0900349-60-MALAHI (filed Aug. 8, 2008) (moving to quash subpoenas seeking hearing testimony from Governor Sonny Perdue and Secretary of State Karen Handel because neither "has any personal knowledge at all" relating to the issues of the case). Nor does it appear that Plaintiff's attorney believed the Governor had any relevant knowledge; otherwise, as this Court noted in its Order, she would have sought deposition testimony or other pre-trial discovery.

In short, in suggesting that the Department of Law attorneys handling this case for Defendants were "disingenuous" in their filings before this Court, Plaintiff's attorney ignores significant facts about the progress of this litigation. On the one hand, Plaintiff's counsel's own knowledge of the conversations at issue and her own decision not to pursue additional evidence relating to those conversations demonstrate that the conversations at issue were not as crucial to Plaintiff's case as her attorney now suggests. On the other hand, the lack of any effort to bar the testimony of Mr. Teague and Mr. Riley, as well as the Department of Law's institutional role and consistent position objecting to trial subpoenas for state officials who lack relevant personal knowledge about a case, show that Department of Law attorneys carried out their duties well within the bounds of their professional and ethical obligations.

Conclusion

Because the attorneys acted within their ethical and professional responsibilities at all times during the *Kalberman* litigation, the Motion should be denied as to the Department of Law. Discovery disputes are an inescapable part of modern litigation, but good-faith disagreements between lawyers cannot serve as the basis of an action for sanctions (particularly by the winning party). Intentional discovery violations are a separate question, but as demonstrated above, no such violations were carried out or contemplated by Department of Law attorneys.

Respectfully submitted, this 22nd day of August, 2014.



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CERTIFICATE OF SERVICE

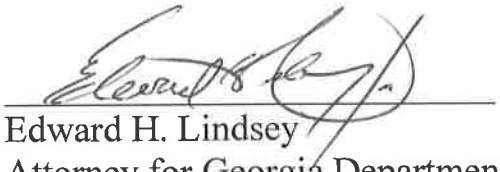
I hereby certify that on August 22, 2014, I caused to be electronically filed the foregoing DEPARTMENT OF LAW RESPONSE TO PLAINTIFF STACEY KALBERMAN'S MOTION FOR SANCTIONS to the following attorney of record via email and addressed to the following email addresses:

Kim Worth: kworth@tlsa.com

Alisa Pittman Cheek cleek@elarbeethompson.com

George Weaver gweaver@hw-law.com

This 22ndth day of August, 2014.



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