UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-1285 (RCL)
v.	)	
GALE A. NORTON, et al.,	)	
Defendants.	)	

DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTION FOR PROTECTIVE ORDER QUASHING PLAINTIFFS' NOTICE OF DEPOSITION OF ROBERT HATFIELD

Plaintiffs' opposition to Defendants' October 20, 2005 motion for a protective order has not undermined the need or justification for a protective order. Indeed, Plaintiffs do not cite one precedent that contradicts or refutes the ample grounds set forth in Defendants' motion justifying a protective order. To the contrary, Plaintiffs' opposition underscores why a protective order regarding Mr. Hatfield's deposition is warranted.

I. Plaintiffs Are Not Entitled To Take Discovery Related To Purported Retaliation

Defendants acknowledged that discovery related to records management is permitted under the Court's orders, see Def. Mot. at 2, 4, and have not contended that Plaintiffs may not question Mr. Hatfield about retaining, safeguarding and protecting individual Indian trust records. To the extent that Plaintiffs would restrict their questioning to the topic of current records preservation efforts, Defendants would not oppose a deposition of Mr. Hatfield, consistent with the Court's prior rulings.

In their opposition, however, Plaintiffs reveal the true purposes of the noticed deposition: to question Mr. Hatfield regarding their allegations of retaliation against Ms. Deborah Lewis, a Department of the Interior appraiser, and Ms. Mary Johnson, a witness in the IT security hearing. *Plaintiffs' Opposition to Defendants' Motion for a Protective Order Quashing Plaintiffs' Notice of Deposition of Robert Hatfield and Supporting Memorandum of Points and Authorities* at 2-3 (Nov. 3, 2005) ("Pl. Opp."). They imply, without stating, that they seek discovery to promote contempt allegations. *See* Pl. Opp. at 3 & n.6 (citing Defendants' Motion). These are not proper subjects for discovery. Plaintiffs fail to make the necessary *prima facie* showing that could possibly entitle them to discovery related to their claims that the conduct of Robert Hatfield "and others" – who allegedly "acted in concert to retaliate against" Ms. Lewis and Ms. Johnson – violates the Court's Anti-Retaliation Order. *See Central Soya Co. v. Geo. A. Hormel & Co.*, 515 F. Supp. 798, 799 (W.D. Okla. 1980). And, although Plaintiffs fail to address any grounds for seeking criminal contempt, they conclude their brief by stating that "this Court is empowered to . . . impos[e] . . . punitive sanctions." Pl. Opp. at 4. The lack of a sound basis for discovery in support of possible contempt charges is revealed in Plaintiffs' filing, and supports Defendants' decision to move for a protective order in the face of Plaintiffs' initial refusal to disclose the subject matter of the noticed deposition of Mr. Hatfield.

A. Mary Johnson

Plaintiffs fail to articulate any basis, much less a *prima facie* showing, that Defendants have retaliated against Mary Johnson. See Pl. Opp. at 2-3. Contrary to Plaintiffs' claim that Defendants "cannot deny that all matters related to the despicable efforts to retaliate against Mary Johnson are equally within the scope of plaintiffs' discovery," Pl. Opp. at 3, Defendants deny both that there have been any efforts to retaliate against Ms. Johnson and that her dealings

with Interior are subject to discovery in this case. Plaintiffs have presented no basis for the Court to conclude otherwise.[1]

Significantly, Plaintiffs appear to be attempting to get in through the back door what they could not get in through the front. Although not readily apparent from the obtuse discussion of the purported - and groundless - allegation of "retaliation" against Ms. Johnson in their opposition brief, Plaintiffs' vague references to Ms. Johnson appear to relate to the appraisal of her property. See Pl. Ex. 1 at 3-4 (grievance letter), cited in Pl. Opp. at 2 n.5. This is evident from a review of Plaintiffs' Exhibit 1, and the fact, if nothing else, that Mr. Hatfield is an appraiser in the Navajo region who has recently reviewed an appraisal for Ms. Johnson. Thus, Plaintiffs seek to depose Mr. Hatfield on the subject of appraisals, or asset management, that, of course, the Court foreclosed in its previous orders. *Cobell v. Norton*, 226 F.R.D. 67, 76-81 (D.D.C. 2005); *see* Defendants' Mot. at 3-4. Plaintiffs are thus not permitted to question Mr. Hatfield regarding the vague allegations related to Mary Johnson.

B. Deborah Lewis

Assuming that Plaintiffs seek to develop only civil contempt allegations against Mr. Hatfield, the Court should not permit Plaintiffs to conduct discovery into those allegations when they have not established a *prima facie* case of contempt. An opposition to a motion for a protective order is certainly not the proper place for Plaintiffs to first make their allegations of contempt.

---

[1] Equally unfounded is Plaintiffs' claim that Mrs. Johnson is "suffering as a consequence of [Secretary] Norton's failure to ensure the integrity of electronic trust records and other breaches of trust . . . ." Pl. Opp. at 3. Plaintiffs cite no evidence from the 59-day evidentiary hearing at which Mrs. Johnson testified in support of this claim. Indeed, neither Mrs. Johnson nor any other witness connected Mrs. Johnson's asserted problems with the state of IT security or any specific breach of trust.

Contempt proceedings are, by nature, collateral matters. While the scope of civil discovery permitted by Fed. R. Civ. P. 26(b)(1) may be broad, it is not infinite. Before the parties and witnesses expend the time and cost of discovery on a collateral matter, the Court should first determine that there has been a *prima facie* showing of civil contempt. In the absence of such a showing, Plaintiffs should not be allowed to engage in the discovery fishing expedition they are poised to undertake in the hope of reeling in evidence in support of their claims. Plaintiffs ignore the cases cited in Defendants' motion (at 5-6) in asserting that Defendants "cite no relevant authority that supports their claim that plaintiffs are barred from . . . discovery . . . with respect to violations of the Anti-Retaliation Order . . . ." Pl. Opp. at 3. The Court should not ignore them.[2]

Plaintiffs not only fail to address that case law, but fail to make out a *prima facie* case of any sort of contempt. In the analogous context of Title VII discrimination cases, a *prima facie* showing has been described as follows:

> In order to establish a prima facie case of retaliation, a plaintiff must show that (1) he engaged in protected activity, (2) he was qualified for the promotion, (3) the employer took an adverse personnel action, and (4) a causal connection existed between the protected activity and the adverse action. The initial burden is not great, as the plaintiff need only establish facts adequate to permit an inference of retaliatory motive.

Forman v. Small, 271 F.3d 285, 299 (D.C. Cir. 2001) (citations omitted). Plaintiffs have not made such a showing here.[3]

---

[2] Defendants responding to complaints have the ability to challenge the legal and factual sufficiency of plaintiffs' allegations by filing a motion to dismiss in lieu of an answer before being required to respond to discovery. Fed. R. Civ. P. 12. Requiring Plaintiffs to demonstrate a *prima facie* case of civil contempt before allowing them to proceed with discovery would serve a similar purpose and promote judicial economy.

[3] Defendants are also unaware of any basis for relying on an unsworn, hearsay letter – (continued...)

Plaintiffs fail to show a connection between Mr. Hatfield's actions as supervisor of Ms. Lewis and her role as Plaintiffs' witness. Plaintiffs allege that Mr. Hatfield's actions toward Ms. Lewis constitute retaliation simply because she is a witness. That cannot be the test of retaliation because, if it were, witnesses would be unconstrained in their conduct by virtue of the fact that any discipline automatically would constitute retaliation. To demonstrate retaliation, Plaintiffs must show that Mr. Hatfield took action not because of Ms. Lewis's conduct as an employee but because of her testimony. Plaintiffs have not made that showing. *Cf. United States ex rel. Yesudian v. Howard University*, 153 F.3d 731, 736 (D.C. Cir.1998) (to prevail on a whistleblower claim, "employee must demonstrate that: (1) he engaged in protected activity . . . and (2) he was discriminated against 'because of' that activity"; second element requires employee to show: (a) "the employer had knowledge the employee was engaged in protected activity"; and (b) "the retaliation was motivated, at least in part, by the employee's engaging in [that] protected activity").

Plaintiffs ignore the fact that despite Ms. Lewis's criticism of the appraisal work done at the Navajo Region Appraisal Office in her December 2, 2004 affidavit, she began work there for Mr. Hatfield six months later. Pl. Exh. 1 at 4 (grievance letter). Despite her affidavit, she transferred to the office whose work she had criticized. Id. Plaintiffs do not allege that her transfer was an act of retaliation. Now, eleven months after providing her testimony to Plaintiffs, she claims retaliation, which is not only unsupported, but too remote in time. See Clark County School Dist. v. Breeden, 532 U.S. 268, 273-74 (2001) ("cases that accept mere

---

[3](...continued)
Deborah Lewis's grievance to Mr. Hatfield, Plaintiffs' Exhibit 1. The letter, from a labor union representative and not from Ms. Lewis, is devoid of direct evidence and Plaintiffs offer no supporting affidavit. The exhibit constitutes evidence of nothing and especially does not constitute a *prima facie* showing of retaliation.

temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close'").

Finally, Plaintiffs certainly have not met this Court's requirement set out more than three and a half years ago that "you need to specify by person so that each of them can respond to what the specifications would be and what the evidence would be so that each of them can have an opportunity to have due process." *Cobell v. Norton*, Civ. Action No. 96-1285 (RCL), Transcript of March 15, 2002 Status Hearing, at 23:7-10. The Court should, accordingly, disregard these new and unsubstantiated charges as a basis for discovery.

For these reasons, Mr. Hatfield should be afforded the protection of this Court, and no questions should be allowed regarding the Deborah Lewis matter.

No matter how unfounded, Plaintiffs also appear to be attempting to establish criminal contempt on the part of Mr. Hatfield "and others." Pl. Opp. at 4 (citing the Court's power to impose "punitive sanctions"). Plaintiffs apparently seek to hold Mr. Hatfield "and others" in contempt for past conduct that cannot necessarily be cured, such as his reprimand of Ms. Lewis for insulting Mr. Hatfield and disregarding his direction as her supervisor. Such conduct, if established that it could not be purged, could only lead to criminal, and not civil, contempt. Thus, as with Plaintiffs' proposed discovery related to Ms. Ronnie Levine, this discovery is an effort to expand this litigation into yet another collateral proceeding.[4] Because Plaintiffs – in

[4] Defendants' hereby incorporate by reference the arguments supporting their motion for a protective order concerning civil and criminal contempt in the Levine-related discovery. *Memorandum of Points and Authorities in Support of Defendants' Motion for a Protective Order Quashing Plaintiffs' Amended Notices of Deposition Served Sept. 29, 2005* at 3-5 (Oct. 7, 2005) [Dkt. No. 3186]; *Defendants' Reply in Support of Motion for a Protective Order Quashing Plaintiffs' Amended Notices of Deposition Served Sept. 29, 2005* (Oct. 31, 2005) [Dkt. No.

(continued...)

opposing Defendants' motion for a protective order to quash Plaintiffs' deposition notices seeking discovery in the Levine matter – urge the Court to disregard the Court of Appeals' binding ruling in *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003) (*Cobell VIII*), it is reasonable to anticipate that in this situation Plaintiffs could trample on the due process rights of Mr. Hatfield, whom Plaintiffs may directly accuse of criminal as well as civil contempt. Because Plaintiffs could seek to establish grounds for criminal contempt sanctions, to permit them to use the broad discovery provisions of the Civil Rules would thwart the care that has been taken in the crafting of the Federal Rules of Criminal Procedure to protect the due process rights of accused individuals. The Court should, therefore, grant the government's motion and enter the protective order as proposed.

II. Defendants Have Not Proposed A New Discovery Standard

Finally, Plaintiffs devote much of their opposition belittling Defendants' proper response to Plaintiffs' refusal to identify the subjects to be addressed in the deposition. Plaintiffs contend that Defendants have "conjure[d] up another baseless standard that they say plaintiffs must meet before discovery can be taken. . . ." Pl. Opp. at 1. According to Plaintiffs, Defendants "will permit discovery only if they can comprehend the nature and scope of the discovery sought." *Id.* These contentions are simply false. Defendants have neither set forth a "standard" to be met nor asserted that a notice for the taking of a deposition is required to specify the subject matter of the examination. With no indication of any limit to the scope of the deposition, and given Plaintiffs' stated scope of depositions related to the Levine matter, Defendants rightfully relied upon rulings of this Court that forbid discovery into particular subject matters to preclude inquiry into those

---

[4](...continued)
3204] .

subject matters with Mr. Hatfield.[5] Moreover, Plaintiffs' past refusal to abide by the limits imposed by the Court on the Anson Baker deposition justify this motion for a protective order. Plaintiffs' opposition reveals that here too they would seek discovery beyond the scope permitted by this Court's rulings and other applicable precedent discussed above. Defendants' good faith objections, as stated plainly in Defendants' motion and further elaborated upon here, constitute an effort to provide for efficient management of discovery, consistent with the past orders of the Court.

CONCLUSION

For all the foregoing reasons, the Court should grant Defendants' motion for a protective order by limiting any deposition of Robert Hatfield to questions regarding current records management.

DATED: November 14, 2005

Respectfully submitted,
ROBERT D. McCALLUM, JR.
Associate Attorney General
PETER D. KEISLER
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

Robert E. Kirschman, Jr.
ROBERT E. KIRSCHMAN, Jr.
(D.C. Bar No. 406635)
Assistant Director
JOHN R. KRESSE
Trial Attorney
Commercial Litigation Branch

[5] Although not required by the rules, if Plaintiffs in good faith had been forthright about the subjects to be addressed in the proposed deposition during the parties' "meet and confer" discussion, Defendants' motion for a protective order could have been limited and focused upon the relevant issues.

Civil Division
Mailing Address:
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Phone (202) 307-3242
Fax (202) 514-9163

CERTIFICATE OF SERVICE

I hereby certify that, on November 14, 2005 the foregoing *Defendants' Reply in Further Support of Motion for Protective Order Quashing Plaintiffs' Notice of Deposition of Robert Hatfield* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
Fax (406) 338-7530

/s/ Kevin P. Kingston
Kevin P. Kingston