IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Roberto Muniz, et al.	:	Case No. 3:09-CV-02865
Plaintiffs,	:	Judge Jack Zouhary
v	:	
	:	
United States Border Patrol, et al.	:	
Defendants.	:	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL AND FOR SANCTIONS

I. Introduction

Both requests for relief in Plaintiffs' new motion are meritless. Plaintiffs argue that this Court should sanction Defendants for failing to produce certain investigatory documents during the discovery phase of this case, but an examination of their discovery requests reveals that the documents in question are not responsive. Moreover, even if the documents were responsive, Plaintiffs cannot plausibly argue that the information in them would have had any impact on the presentation of this case at trial. This is because Plaintiffs made Border Patrol agents' use of alleged racial slurs the centerpiece of their case at trial, asking approximately 90 questions of Border Patrol agent witnesses about the use of racially charged terms. Thus, any further evidence of this well-plowed topic – even if admissible -- would clearly have been cumulative with the

evidence at trial, and would not have either shown that any of the stops identified by Plaintiffs were unlawful, or that the Border Partol had a pattern of unlawful stops – especially as the Plaintiffs utterly failed to show that a even single stop was racially motivated.

At the outset, it is important to appropriately frame the scope of this purported discovery dispute. On July 24, 2015, Defendants complied fully with this Court's Order requiring Defendants' post-trial production. Defendants sent one set of documents to both the Court and Plaintiffs' counsel.. Defendants sent a second set of privileged documents to the Court only for an *in camera* review. During a telephonic status conference on September 17, 2015, the Court stated that it had reviewed both sets of documents and indicated that it would not rely on them in making its ruling in this case. Nevertheless, the Court permitted Plaintiffs' counsel to conduct an "attorney's eyes only" review of the documents submitted for *in camera* review. ECF No. 246. On September 23, 2015, Plaintiffs conducted the "attorney's eyes only" review of these documents. ECF No. 247 at 2. Following that review, Plaintiffs' filed the instant motion to compel and for sanctions.

Accordingly, Plaintiffs' motion—and this response—address only the documents that Defendants produced *in camera* as part of the post-trial production. The deadline for raising any concerns with Defendants' discovery productions in this case—including the assertion of the attorney-client privilege over training materials that Plaintiffs reviewed previously following their prior attorneys' eyes only review in 2012—has long since passed. The discovery cutoff in this case was prior to trial; and Plaintiffs never moved to compel production or to challenge Defendants' assertion of the attorney-client privilege.[1] Thus, Plaintiffs' motion to compel and for

[1]Of the 21 documents that were included in the *in camera* review, Plaintiffs had already seen 10 of them as part of the "attorney's eyes only" review in 2012, and never moved this Court to compel their disclosure.

sanctions must hinge on the 11 documents first produced as part of the Court's post-trial production order.

II. Argument

A. Defendants complied fully with their discovery obligations under the Federal Rules of Civil Procedure and this Court's Orders.

1. The investigative documents were not responsive to Plaintiffs' discovery requests.

Plaintiffs argue that Defendants should be sanctioned for not producing documents relating to investigations relating to the alleged use of racial slurs. Pls.' Mot. 2-4. Those documents are:

- **R.3-1**: an anonymous complaint dated March 1, 2012, stating that a former Patrol Agent in Charge ("PAIC") of the Sandusky Bay Station lied during his deposition in this case when he said that the term "wet" was not a derogatory term, and the subsequent investigation; a complaint by a May 10, 2013 complaint by a Border Patrol agent alleging that he was subjected to harassment, and the subsequent investigation.

- **R.3-2:** the same May 10, 2013 complaint by a Border Patrol agent as indicated in R.3-1, and the subsequent investigation and counseling for using the term "wet" by the former Assistant Patrol Agent in Charge ("APAIC").

- **R.3-3:** the same May 10, 2013 complaint by a Border Patrol agent as indicated in R.3-1 and R.3-2, and the subsequent investigation and counseling concerning the complaining agent's admitted use of the term "wet."

It is axiomatic that Defendants only failed to comply with their discovery obligations if these documents are responsive to one of Plaintiffs' requests for production of documents under Rule 34 of the Federal Rules of Civil Procedure. In their motion, Plaintiffs argue that the documents are responsive to their Second Set of Discovery Requests, specifically Requests 26-29. *See* Pls. Mot. 6; *see also* Pls. Mot. Ex. 2, ECF No. 247-2 (Defendants' Responses to Plaintiffs' Second Set of Discovery Requests). The pertinent discovery requests identified by Plaintiffs are:

- **REQUEST FOR PRODUCTION 26.** Please provide copies of all written complaints and oral complaints reduced to writing filed with any Border Patrol employee regarding the conduct of Sandusky Bay Station Border Patrol Agents between October 1, 2008, and September 30, 2011.

- **REQUEST FOR PRODUCTION 27.** Please provide copies of all written complaints and oral complaints reduced to writing filed with the Department of Homeland Security Office of Civil Rights – Civil Liberties regarding the conduct of Sandusky Bay Station Border Patrol Agents between April 1, 2009, and September 30, 2011, and/or that were provided to anyone at the Sandusky Bay Station or the Detroit Border Patrol office that supervises the Sandusky Bay Station

- **REQUEST FOR PRODUCTION 28.** Please provide all documents regarding the results of any investigations regarding the complaints listed in Requests for Production 26 and 27 *supra.*

- **REQUEST FOR PRODUCTION 29.** Please provide any documents showing disciplinary actions against any Border Patrol Agents stationed at the Sandusky Bay Station. The time period covered by this request is October 1, 2008 through September 30, 2011.

The documents that Defendants provided in response to the Court's post-trial production order as R.3-1, R.3-2, and R.3-3 are simply not responsive to these discovery requests. Requests 26, 27, and 29 define the responsive time period as documents filed between October 1, 2008 and September 30, 2011 (the time period for Request 27 narrower, April 1, 2009 – September 30, 2011). It is beyond plausible dispute that the documents produced to the Court as R.3-1, R.3-2, and R.3-3 fall outside of that responsive time period. The earliest document produced in the set labeled R.3-1 is a complaint dated March 1, 2012, and the second complaint in that set is dated May 10, 2013; both clearly outside the responsive time period. Likewise, the complaints included in R.3-2 and R.3-3 were initiated on May 10, 2013, again outside of the responsive time period. Further, Request 28 addresses documents relating to investigations resulting from Requests 26 and 27. Because none of the complaints are responsive to Requests 26 and 27, the investigations relating to those complaints are also not responsive to Request 28. Thus,

Defendants did not violate their discovery obligations under the Federal Rules by not producing the documents included in the post-trial production as R.3-1, R.3-2, and R.3-3.

To the extent that Requests 26 and 27 may be interpreted to cover conduct that occurred prior to September 30, 2011, even if the complaint was filed outside of the responsive time period, the documents are still not responsive. The first complaint concerning the former Patrol Agent in Charge is imprecise, but appears to allege that he lied during his deposition in this case when he testified that the term "wet" is not an offensive term. In other words, the anonymous complainant is not complaining about the former PAIC's alleged use of the term, but rather his deposition testimony that the term is not offensive. Because the deposition took place on January 25, 2012, which is outside the responsive period, the documents relating to this investigation are not responsive. Likewise, the complaint by the Border Patrol agent against the former PAIC and former APAIC, which was filed on May 10, 2013, alleges essentially the same thing, that the former PAIC and APAIC—during an undesignated time period—used alleged slurs to belittle people (although the agent does not claim that it was used to belittle him, and admitted to using the same term himself). Again, however, there is no indication in these documents that the agent is complaining about any specific conduct of his former supervisors that occurred prior to September 30, 2011. Moreover, it seems unlikely that an individual allegedly aggrieved by the conduct of his supervisors would wait nearly two years (or even longer) to file a complaint.[2] Thus, even under this alternative interpretation of the Requests, which Defendants do not believe is what Plaintiffs meant, the documents submitted post-trial as R.3-1, R.3-2, and R.3-3 are not

[2] Additionally, it is important to note that the Border Patrol agent who filed the complaint was a Defendant in this case until September 18, 2015, when the Court entered an order dismissing all of the Defendants, except for the United States Border Patrol. ECF No. 246. He was also included in Defendants' Initial Disclosures. Plaintiffs opted not to either depose him or call him as a witness at trial. Thus, Plaintiffs' argument that they were denied a "key witness" in this case is baseless.

responsive, and Defendants did not violate their discovery obligations under the Federal Rules by not producing them.

2. Plaintiffs' challenge to Defendants' assertion of privilege over Border Patrol training materials is not timely.

Plaintiffs also argue that Defendants have improperly withheld "routine policy statements and training materials" on the basis of privilege, and argue that the Court should order their production. Pls.' Mot. 5. As addressed above, however, Plaintiffs had already reviewed most of the training materials produced as part of the post-trial production during the August 6, 2012, "attorney's eyes only" review of Defendants' documents. *See* ECF Nos. 171, 172. Following that review of Defendants' training materials in August 2012, Plaintiffs took no further action to challenge Defendants' privilege designations or to compel production of those documents—and the discovery deadline has long since passed. The 8 documents containing training materials that Defendants submitted as part of the post-trial production, but not as part of the earlier "attorney's eyes only" review conducted by Plaintiffs in 2012, are highlighted in the September 21, 2015 e-mail that Defendants' counsel sent to both the Court and Plaintiffs' counsel.[3] These 8 training materials cover the same topics as the materials provided previously as party of the "attorney's eyes only" review in 2012, and Defendants assert that they are protected from disclosure because they are privileged. Because Plaintiffs never took action to compel production of Defendants training materials when they had the opportunity to do so in 2012, there is absolutely no reason for this Court to take the extraordinary measure of requiring Defendants to produce these training materials to Plaintiffs now, after trial. Moreover, Plaintiffs have not articulated how the absence of these documents prejudiced the presentation of their case at trial.

[3] The document identified in the letter as R.1-19 is actually divided into two separate documents, R.1-19(a) and R.1-19(b).

B. The documents produced pursuant to this Court's Post-Trial Discovery Order were cumulative of both documents produced during discovery and the evidence presented at trial.

Plaintiffs can also not plausibly argue that the information in either the investigative files or the training materials in any prejudiced their presentation of their case at trial. As discussed above, the investigatory files are entirely cumulative with the evidence that was the centerpiece of Plaintiffs' trial: that Border Patrol agents use racially insensitive terms. In fact, by Defendants' count, Plaintiffs' counsel asked dozens of questions of Defendants' witnesses concerning the use of racialy insensitive terms. This theme was the centerpiece of Plaintiffs trial strategy, but ultimately failed to establish any connection between Plaintiffs' allegations of racial profiling and the actual evidence concerning the witnesses' encounters with Border Patrol agents specifically, and the practices of the Sandusky Bay Station generally. Additionally, Plaintiffs do not even argue that the additional training materials would have made any difference in their presentation of their case at trial. And any argument along these lines would be without merit, because Plaintiffs already had access to the training materials Defendants had produced in discovery. Accordingly, Plaintiffs are not entitled to sanctions, or to further post-trial discovery, and the Court should deny the instant motion.

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III. Conclusion

The Court should deny Plaintiffs' motion in its entirety.

Dated: October 19, 2015

Respectfully submitted,

/s/Colin A. Kisor
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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2015, I filed the foregoing Response electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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