

1999 WL 543196

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United States District Court, N.D. Illinois, Eastern
Division.

Sharon ANDERSON, et al., Plaintiffs,
v.
Mario CORNEJO, individually and in his official
capacity, et al., Defendants.

No. 97 C 7556.

|
July 22, 1999.

MEMORANDUM OPINION AND ORDER

HART, J.

*1 This case presently involves claims by 46 African-American women that they were improperly searched when going through customs at O'Hare International Airport in Chicago, Illinois. Presently named as defendants are 38 employees of the United States Customs Service. The pending claims are: (1) equal protection claims that plaintiffs were treated less favorably than similarly situated persons who were not African-American women; (2) claims that the searches and seizures were unconstitutional because not supported by reasonable suspicion; (3) procedural due process claims that plaintiffs were not informed of their rights and were kept "incommunicado;" and (4) claims by two plaintiffs that physician-assisted body cavity searches violated Fourth Amendment protections. Pending for ruling are motions to compel discovery filed by both sides.

I. Defendants' Motion to Compel

A. Defendants' Interrogatory No. 4

In their initial motion, defendants complain that plaintiffs have not provided sufficient detail in response to Interrogatory No. 4 which requests details regarding each plaintiff's search that is a subject of this lawsuit. In their reply, however, defendants withdraw this part of the motion except as to those plaintiffs who have not answered the interrogatory. Those four plaintiffs (Jefferson,¹ Miller, Hendricks, & Clarke (9/27/97 search)) shall answer Interrogatory No. 4 within two weeks.

B. Defendants' Interrogatory No. 6

In Interrogatory No. 6 of their second set of interrogatories, defendants ask plaintiffs to identify the "innocent factors unique to African-American women" that are referred to in the complaint as being purported justifications for the searches of plaintiffs. Defendants complain that plaintiffs' responses do not identify any unique factors. Whether plaintiffs' responses identify any "unique" factors will not be resolved on the present motion. Plaintiffs' answers are what they are. Whether the factors identified are truly unique or of any legal significance is not an issue to decide on a discovery motion. Questions going to the merits of the justifications for the searches must await summary judgment or trial. Further, any issues regarding whether, because of waiver, plaintiffs will later be barred from relying on factors not specified in the interrogatory response cannot be resolved at the present time. Such issues can only be resolved at the time, if any, that plaintiffs attempt to rely on additional factors. The motion to compel will be denied to the extent it concerns Interrogatory No. 6.

C. Defendants' Document Request No. 8

Document Request No. 8 provides:

Produce all airline tickets, credit card receipts, credit card statements, cash receipts, canceled checks or money orders, travel agency itineraries, or any other documents in any plaintiff's possession evidencing plaintiff's

presence on an international airline flight arriving at O'Hare Airport on the dates claimed in "Plaintiffs' More Definite Statement."

II. Plaintiffs' Motion to Compel

A. Plaintiffs' Document Request No. 4

This request provides:

***2** Plaintiffs concede that these types of documents are discoverable as to those plaintiffs for whom defendants have not been able to locate a search record and therefore a question exists as to the date and time of the search alleged. As to those plaintiffs for whom defendants have found the records of Customs and no question exists as to the date of the alleged search, plaintiffs contend the documents are not discoverable because not likely to lead to admissible evidence.

It is assumed that plaintiffs are cooperating with regard to documents of those plaintiffs for whom a question exists as to their arrival date. As to whether the documents are otherwise discoverable, it is held that, to the extent plaintiffs' possess them, plaintiffs must provide airline tickets and travel agency itineraries for all plaintiffs. Whether a search is proper is an objective question based on the information known by the law enforcement officer. *See Ornelas v. United States*, 517 U.S. 690, 695–96 (1996); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). The officers' actual, subjective reasons for the search are not pertinent to the Fourth Amendment analysis. *Id.* Presumably, every plaintiff possessed an airline ticket at the time she was searched and it is likely that many were also in possession of an itinerary. It could be inferred from such possession that the searching officer saw these documents. If the officer is found to have seen the document, then it is part of the factual circumstances surrounding the search and part of that officer's knowledge and can be considered in determining whether the search was proper, regardless of whether the officer actually relied on such information in deciding to conduct the search. Unless the tickets were purchased at the airport, credit card receipts or other evidence of payment for airline tickets is not likely to be possessed by an airline passenger at the time she returns to the United States.

Except as to those plaintiffs for whom a question exists as to the date of their return to the United States, enforcement of Document Request No. 8 will be limited to providing airline tickets and itineraries. To the extent that a particular plaintiff never had or no longer possesses one or both items, she must so state in response to this document request.

Please provide a copy of any and all policies of the United States Customs Service for the past 10 years relating or referring to: (a) the detention, searching of belongings and strip searching of individuals suspected of trafficking in illegal narcotics; (b) the use of dogs by Customs for the purpose of detecting the presence of contraband; (C) PAU [Passenger Analysis Unit] and Pat Personnel and their role, function and/or responsibility in identifying persons, detaining persons and/or strip searching persons.

Defendants dropped their objection to the 10-year period and provided various Customs manuals: the Personal Search Handbook, Detector Dog Training Manual, Passenger Analysis Unit Training Manual, Customs Service Concealed Narcotics (Body Cavity/Internal) Seizures Directive, Passenger Operations Division Handbook, and a superseded June 1986 Customs Directive. Defendants have also represented that they will provide copies of weekly e-mail messages stressing policies and directives that the Chicago area Chief Inspector sends to subordinates. As of the writing of plaintiffs' reply, the latter had not yet been provided.

***3** Plaintiffs argue that defendants should be required to inquire nationwide as to any responsive documents, including a search of e-mail. Defendants argue that the discovery request should be limited to O'Hare employees and their supervisors. Defendants' response is unclear concerning whether regional or national officials whose responsibilities would include supervisory or policymaking duties applicable to O'Hare have been included in any search for responsive documents.

The present lawsuit only involves search procedures that were applied at O'Hare. Plaintiffs argue that some defendants could have worked in other locales before being assigned to O'Hare and therefore could have

received different training or memoranda elsewhere. Such speculation is insufficient to justify a burdensome, nationwide search. If any defendant indicates at a deposition or otherwise that he or she received different instructions while working elsewhere, then additional and specific requests may be appropriate. At this point, however, defendants will not be required to search for documents or e-mail issued from or received at other local or regional Customs facilities. They will be required, however, to provide responsive documents issued by Chicago Region² or national officials that were either directed to O'Hare employees or regional or national in scope. These documents and the previously promised weekly e-mails shall be provided within three weeks.

B. Plaintiffs' Document Request No. 6
Document Request No. 6 is:

All documents (including without limitation, search logs, negative search details or otherwise) which relate or refer to identifying all persons who were subject to a search of themselves (strip search, pat down and/or searching or otherwise) and the reasons for it, for the past 5 years at O'Hare airport. Included with these documents should be the race, gender and ethnic origin of each person.

Defendants have agreed to provide these documents, but have or will redact the names of the persons searched, as well as other identifying information. Plaintiffs argue the identifying information should be included so that they can selectively interview some of those who were searched. Defendants argue that the "searchees" should not be subjected to such an invasion of privacy.

At this time, providing the redacted versions will suffice. If not done already, the redacted versions shall still be sufficient to identify if the same person was the subject of more than one search report. If, after examining the materials, plaintiffs desire to interview certain individuals, they may request identifying information as to those specific individuals. *Cf. Czajkowski v.. City of Chicago*, 1992 WL 57945 *2-3 (N.D.Ill. March 20, 1992). At that

point, if a dispute still exists as to disclosure of identifying information, an appropriate discovery motion may be presented to the court. At the present time, no opinion is expressed as to whether disclosure of any identifying information will be required or as to whether it would be appropriate to contact any identified search subjects.

C. Plaintiffs' Document Request No. 8

*4 The parties agreed that, in response to this request, defendants would provide complaints they received concerning racial profiling. As with Request No. 6, a dispute exists as to the redaction of information identifying the complainants. As was ruled regarding Request No. 6, plaintiffs must specify which complainants they desire to have identified and then seek to resolve the specific disputes with defendants before returning to court, if necessary.

D. Plaintiffs' Document Request No. 10

This request seeks training documents, including videotapes. The parties agreed that defendants would provide a list of videotapes and then attempt to agree on which ones should be produced. As of the writing of plaintiffs' reply, defendants had yet to provide the list of videotapes. Defendants shall provide that list within one week.

Defendants do not respond to the contention that they have not provided training documents from outside Chicago. Similar to the ruling as to Document Request No. 4, within three weeks defendants shall provide training documents of the national and Chicago Region offices or a statement that they have already provided all such documents.

E. Plaintiffs' Document Request No. 26

This request seeks:

All logs, daily field reports, or similar such documents which refer, relate and/or compile the

daily activities of all the defendants and/or agents who had contact with the plaintiffs as alleged, for the day of the respective searches.

Plaintiffs contend that work schedules of agents could help identify who searched some of the defendants. Defendants respond that no defendant has denied participating in a search. That is not responsive. Particular “searchers” must be identified. As to each plaintiff for whom (a) not all searchers have been identified and (b) the date of the search is known, defendants shall provide a list of searcher employees working during the pertinent time period and their pertinent logs.

F. Plaintiffs’ Document Request No. 29

This request seeks documents of the PAU unit as to persons selected to be searched. The PAU selects persons for searches based on information other than interviews of the passengers, such as flight and ticketing information. Defendants have agreed to provide the documents, but with information identifying the searchee being redacted. Even before redaction, the documents generally do not identify the searchee’s race. Defendants contend that plaintiffs contacting the searchees for interviews could result in public disclosure of novel investigative techniques. Presumably, defendants mean that the interviewers could disclose to people, including some who had contraband material, the reasons why they were selected to be searched and then, in the future, the searchees could seek to avoid falling within that criteria. One reason plaintiffs want to contact the searchees is to find out what their race is.

As was ruled regarding other requests, plaintiffs must first examine the redacted documents and then specify particular searchees for whom they desire identifying information and intend to contact. If the parties cannot agree as to whom such information will be provided and who may be contacted, then it would be appropriate to bring a further discovery motion.

G. Plaintiffs’ Documents Requests Nos. 33 & 34

*5 Initially, these requests were:

33. All documents that relate or refer to this

above-captioned case or any related case.

34. All documents, which relate or refer to any investigation of Customs and their search practice for the last 5 years.

After defendants objected that these requests were overly broad, plaintiffs refused to restrict No. 34 and, as to No. 33, submitted a new six-page version of the request. Defendants still complain that the requests are overbroad, that revised No. 33 belatedly includes requests not contained in the initial request for production, and that the requests should be limited to O’Hare.

Request No. 33 already requested all documents; the revised version details which possible documents and, as a result, is more narrow. Defendants shall respond to No. 33 within three weeks, but (as was set forth in prior rulings) may limit their response to documents from O’Hare, the Chicago Region, and the national office. Defendants are not required to produce documents which relate to investigations of customs for the last five years, unless those documents relate to security practices at O’Hare.

H. Plaintiffs’ Document Request No. 35

This request is for “All documents, which relate to or refer to any statistical data in connection with persons searched for the past 5 years.” Defendants limited their response to statistics for searches at O’Hare. They represent that all such data has been provided.

This case involves O’Hare; statistics for searches at other locations need not be provided.

Plaintiffs argue that there is other data based on references to “historical data” in a statement by a union president. Defendants represent that this historical data is Customs officials’ impressions of trends, not hard data. Therefore, no statistical reports of the so-called historical data would exist. Plaintiffs have represented that all O’Hare statistical data has been provided and that representation will be accepted.

I. Plaintiffs’ Request for Computer Database Information

Defendants contend that this information was provided after plaintiffs’ motion to compel was filed. Plaintiffs state in their reply that this is not true. They contend that

the information provided is still incomprehensible. Within one week, the parties shall meet to discuss this issue and within three weeks defendants shall provide an adequate description of the computer database.

J. Plaintiffs' Interrogatory No. 14

This interrogatory provides:

Identify all lawsuits (by date, case number and jurisdiction), citizen complaints, employee complaints through his or her union or to Customs itself, made against Customs or its employees, agents or supervisors within the past 2 years which related or referred to racially discriminatory acts or omissions.

Defendants object to this being a nationwide request and also contend that information about employment discrimination complaints is not likely to lead to discovery of evidence relevant to alleged discrimination in conducting searches. Those objections are well founded. Defendants shall respond within three weeks, but their response may be limited to lawsuits or complaints concerning discrimination in the treatment of passengers returning to the country through O'Hare.³

K. Plaintiffs' Interrogatory No. 16

*6 This interrogatory asks the race and sex of all supervisory Customs officials at O'Hare. Defendants shall answer this interrogatory within three weeks.

L. Plaintiffs' Interrogatory No. 17

Plaintiffs seek insurance information. Defendants do not address this interrogatory in their answer brief. Defendants shall answer this interrogatory within three weeks.

M. Plaintiffs Brown's, et al.'s Interrogatories and Document Requests

For seven plaintiffs, incident logs concerning their searches have not been located. The parties reached partial agreement regarding a photo line-up procedure for an attempt to identifying the officers who participated in each plaintiff's search. Within one week, the parties shall meet to attempt to resolve any such procedure. In the meantime, the order as to Document Request No. 26 provides information that plaintiffs may use to aid them in identifying the responsible defendants.

IT IS THEREFORE ORDERED that:

(1) Defendants' motion to compel plaintiffs to respond to their interrogatories and requests to produce documents [100] is granted in part and denied in part. Within two weeks from the date of today's order, plaintiffs shall (a) provide plaintiffs Jefferson's, Miller's, Hendricks's, & Clarke's (as to the 9/27/1997 trip) answer to Interrogatory No. 4; and (b) in response to Document Request No. 8, provide the airline tickets and itineraries of each plaintiff.

(2) Plaintiffs' motion to compel discovery [102] is granted in part and denied in part. Within three weeks, defendants shall respond (in the manner described herein) to Document Requests Nos. 4, 6, 10, 26, 29, 33, & 34, Interrogatories Nos. 14, 16, & 17, and the computer database requests. Within one week defendants shall provide the list of videotapes responsive to Document Request No. 10. Within one week, the parties shall meet to discuss the computer database issue and any photo line-up procedure.

All Citations

Not Reported in F.Supp.2d, 1999 WL 543196

Footnotes

¹ In their reply, defendants indicate Jefferson has not answered any interrogatory. Today's ruling, though, is limited to

those interrogatories that were the subject of the initial motion.

- ² The parties' briefs do not specify the structure of Customs. The term "Chicago Region" is being used to refer to any geographical or other hierarchical structure within which the O'Hare Customs office is included.
- ³ To the extent a Customs employee complained he or she was treated adversely for complaining about discrimination against passengers, the employee complaint would fall within the contours of documents to be provided.