

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CYNTHIA ARTIS, et al.,

CASE NO. 01:400 (EGS)

:

Plaintiffs,

:

v.

:

:

ALAN GREENSPAN,
CHAIRMAN OF THE BOARD
OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,

:

:

:

:

Defendant.

:

:

:

**DEFENDANT'S MOTION AND MEMORANDUM REGARDING PLAINTIFFS'
FAILURE TO SATISFY ADMINISTRATIVE COUNSELING REQUIREMENTS**

I. INTRODUCTION

After extensive discovery on the sufficiency of counseling, the relevant facts remain the same as in the Board's initial motion to dismiss, filed on October 1, 2001. Plaintiffs' own deposition testimony and the testimony of the Board's EEO counselors make clear that Plaintiffs failed and refused to engage meaningfully in the counseling process, and expose as baseless Plaintiffs' claim that they were blocked from raising issues with the Board's EEO counselors.

Pursuant to the Court's September 26, 2002 Order, the parties conducted extensive discovery on these counseling issues. The Board took the depositions of ten Plaintiffs,¹ and Plaintiffs took the depositions of both Board counselors and others involved in the administrative

¹ Plaintiffs stipulated that they would rely for their exhaustion claim exclusively on the Plaintiffs whom they produced for depositions. See Amended Plaintiff's Stipulation Regarding Non-Reliance Upon Some Plaintiffs' Involvement in the Counseling Process to Meet the Administrative Exhaustion Requirement (Per Court Order of October 27, 2003) (attached hereto as Exhibit "A").

processing of the case. This discovery confirmed that: (1) Plaintiffs affirmatively refused to provide the counselors with specific information regarding their claims, and (2) Plaintiffs were not prevented or inhibited from providing any information during any counseling sessions. This memorandum addresses the results of this discovery; it does not repeat the evidence from other sources presented in the brief supporting the Board's October 1, 2001 motion to dismiss, which is incorporated herein by reference.

II. FACTUAL BACKGROUND

The lengthy history of this case is recited in prior filings.² Plaintiffs initiated the 1997 counseling at issue here as part of their unsuccessful effort to forestall dismissal of their earlier case against the Board, Artis I.³ During an initial group session on January 15, 1997, Plaintiffs met with Rosemarie Nelson, a designated EEO counselor. See Deposition of Cynthia Artis ("Artis Dep.") at 100:22-101:8; 141:7-10.⁴ During this session, Plaintiffs provided only generalized allegations of "class" discrimination. They refused to provide any details regarding any specific incidents of alleged discrimination. Cynthia Artis summed up Plaintiffs' unified objection to providing specific information in her deposition: "[W]e don't counsel on individual things that happened to each one of us." Artis Dep. at 151:13-19. The other Plaintiffs echoed Ms. Artis's testimony. See Section III.A., *infra*. The Board's counselors, Rosemarie Nelson and Millie Wiggins, subsequently met

² Per the August 8, 2005 Order, this brief focuses on "the sufficiency of plaintiffs' compliance with administrative counseling requirements and whether any alleged deficiencies should be excused by the futility doctrine." See August 8, 2005 Order at 5. For a detailed discussion of the history of this case and its predecessor, Artis v. Greenspan, 158 F.3d 1301 (D.C. Cir. 1998) ("Artis I"), the Board refers the Court to pages 5 through 14 of its October 1, 2001 Motion to Dismiss (this motion and its exhibits are attached hereto as Exhibit "B" for ease of reference).

³ In Artis I, Plaintiffs made the same argument they make here – that the Board obstructed counseling. The court found instead that it was the "plaintiffs [who] declined to cooperate with the Board." See Artis I, 158 F.3d at 1307 (affirming district court dismissal).

⁴ The deposition excerpts cited herein are attached hereto as Exhibit "C."

one-on-one with those of the Plaintiffs who were willing to meet, to obtain more details about their claims. The counselors' reports of these sessions reflect that the counselors asked for specific information but Plaintiffs again refused to disclose any details regarding any alleged acts of discrimination.⁵

A second group meeting occurred on February 13, 1997. Several Plaintiffs, Plaintiffs' attorney, Walter Charlton, Board EEO counselors and an attorney for the Board attended. Again, Plaintiffs refused to provide any specifics of the alleged discrimination. As Plaintiff Artis testified, "[n]othing of substance relating to the class action issues occurred [at the February meeting] except that the same issues presented in 1995 [in the failed Artis I case] were once again reiterated." Artis Dep. at 217:20-218:22. After the February 13th session, Plaintiffs refused to extend the counseling period or participate in any additional counseling. See Deposition of Mildred Wiggins ("Wiggins Dep." at 268:18-20) ("Each one that I contacted [after February 13] gave me that same statement, that no further counseling would commence").

III. ARGUMENT

A. Plaintiffs Failed To Cooperate In A Good Faith Effort to Resolve Their Claims of Discrimination During The 1997 Counseling Sessions.

Plaintiffs' refusal to provide specific information during the group and individual sessions in 1997 establishes that they did not "provide details and dates" regarding instances of discrimination they experienced in order to "try to informally resolve the matter," as they are

⁵ For example, Plaintiff Earnestine Hill told the EEO counselor that she would "not specifically point out particular incidents that have occurred." See Exhibit 7 to the Board's October 1, 2001 Motion to Dismiss at 34. Plaintiff Georgianna Terrell provided no information regarding incidents of discrimination she had experienced, stating that "if this complaint had not been brought up as a class complaint, she would not be part of it." Exhibit 7, at 43. Plaintiff Love-Blackwell told the counselor that she would "not divulge personal incidents" due to the class nature of the complaint. Id. at 9-10.

required to do in order to exhaust administrative remedies. See Artis I, 158 F.3d at 1306. During the group sessions on January 15 and February 13, 1997, Plaintiffs were entirely unwilling (or unable) to provide any information concerning the substance of their claims. When asked about Plaintiffs' overall refusal to provide details on what had happened to them during the 1997 sessions, Ms. Artis testified:

Q: . . . And do you recall any of the Plaintiffs making statements in your presence that they would not be providing information on a personal basis because their complaint is a class complaint?

A: Yes. I believe all of them said that. All of us said that.

Artis Dep. at 205:12-18. The testimony of the other Plaintiffs confirms that they uniformly refused to provide individual details during the 1997 counseling sessions:

- When asked whether she had given the EEO counselor “any piece of information, about a person, a date, an event” that the counselor could have “followed up on, either to investigate, chase down, pursue,” Sharon Ellis testified, “I don’t believe so.” Ellis Dep. at 107:16-22; see also Ellis Dep. at 93:17-21.
- Donna Love-Blackwell specifically told Ms. Nelson that she “didn’t wish to divulge” any personal incidents during her individual counseling session, and testified that she did not say anything during the February 1997 group session. Love-Blackwell Dep. at 188:10-22 and 121:18-122:1.
- Kathleen Matthews testified: “Q. And you didn't want to discuss issues regarding your individual circumstances, correct? A. We weren't there for that.” Matthews Dep. at 105:19-21; see also Matthews Dep. at 108:4-11 (“Q. So you were not interested in the meeting in providing information relating to your personal circumstances, correct? A. That wasn't the purpose of the meeting”).
- Yvette Williams testified that she would not “reveal names” during the one counseling session she attended. Williams Dep. at 85:6-7.
- Earnestine Hill testified that during her counseling session, she never identified any white individuals who were paid more or given more training than she was, or any occasions where she was treated differently than white employees. Hill Dep. at 260:11-262:17.
- Sharon Logan testified that she was there at the January 15, 1997 session for “class” issues and stated during her deposition, “[w]hy would I be there for individual issues?” Logan Dep. at 87:3-9.

- Plaintiffs also refused to let Ms. Nelson contact their supervisors as part of their investigation (See Hill Dep. at 135:7-13; see also Nelson Dep. at 96:15-97:19; 102:22-103:6 (Donna Dorey refused to let Nelson contact her supervisor); 112:9-11 (Donna Love-Blackwell also refused); 217:13-15 (Georgianna Terrell also refused); 118:13-119:11; 150:7-18; 168:19-169:2 (Plaintiffs’ general failure to allow Nelson to contact their supervisors)).

Plaintiffs’ conduct is antithetical to a good-faith effort to present a claim for possible administrative resolution. Plaintiffs themselves testified that they felt that counseling was a “meaningless exercise,” see Artis Dep. at 109:22-25; Carter Dep. at 40:13-16, and a “formality that they were just putting us through,” a “technical hurdle” to be overcome in order to proceed with litigation in court. Matthews Dep. at 125:21-24, 126:5-7.

As the Board argued in the initial motion to dismiss, the facts of this case recall Artis I. As in that case, Plaintiffs “failed to give the Board information to which plaintiffs alone had access – specific instances of Board-wide discriminatory personnel practices that affected members of the putative class.” Artis I, 158 F.3d at 1306-07. As in that case, Plaintiffs “provided no probative information of an Agency policy that created a pattern of discrimination despite division-level decision-making.” Id. at 1308. Plaintiffs gave the Board no opportunity to investigate their claims by following up on specific allegations or even by contacting supervisors. Therefore, they failed to comply with their administrative counseling obligations.

B. The Board Never Prevented Plaintiffs From Raising Issues In Counseling.

Plaintiffs’ failure to engage in good-faith counseling should not be excused, as they contend, on the ground that the counselors “refused” to counsel them with respect to class issues. This meritless claim is belied by Plaintiffs’ own deposition testimony and the testimony of the counselors (Ms. Nelson and Ms. Wiggins) who participated in the sessions. The testimony reveals that Plaintiffs were not prevented from saying anything they wanted to say or providing any

information whatsoever during any of the 1997 counseling sessions at issue. There is no support for any claim that active, cooperative participation in counseling sessions would have been “futile.”

1. Plaintiffs’ own testimony reflects that they were not inhibited from speaking their minds during the counseling process

No plaintiff testified that she was ever prevented from saying anything she wanted to the counselors. Indeed, their testimony establishes the contrary.

- *Artis*: With respect to the January 15 session, Plaintiffs “all had an opportunity to speak. Not everybody spoke, but most of them did say something.” (Artis Dep. at 143:24-144:8).
- *Hardy*: She said everything she intended to “every single time”; no counselor ever prevented her from saying anything she wanted to say during a counseling session (Hardy Dep. at 177:21-179:11; 201:5-9).
- *Hill*: Q: So was there anything that prevented you from saying anything that you wanted to to a counselor on the January 15, 1997, group session? A: No. (Hill Dep. at 205:15-18).
- *Matthews*: “[w]e weren’t restricted in what we could say.” (Matthews Dep. at 111:25-112:2).
- *Carter*: Q: During that [January 24, 1997 individual] counseling session were you in any way prevented from saying anything that you wanted to say? A: No. (Carter Dep. at 165:1-4).
- *Ellis*: She was not prevented from providing any specific information during the February 13, 1997 group counseling session (Ellis Dep. at 116:6-9).
- *Williams*: She was never prevented from saying anything she wanted to say during the one counseling session she attended. (Williams Dep. at 93:8-11).

2. The counselors’ testimony reflects that Plaintiffs were not inhibited during the counseling sessions

a. Rosemarie Nelson

Plaintiffs’ argument that actions of the Board’s counselors thwarted the counseling process is based solely on an affidavit submitted by Rosemarie Nelson when she was represented by Plaintiffs’ counsel in her separate (and now dismissed) case, in which Ms. Nelson claimed that she

was instructed by her supervisor, Sheila Clark, “not to counsel” Plaintiffs on class claims.

Discovery in this case, however, has elucidated this statement and established that no nefarious instructions were given.

In her deposition, Ms. Nelson explained that she did not mean that she was told to prevent the counseling of class issues, but simply that after the initial group session she was to conduct individual sessions rather than group sessions. As an initial matter, Ms. Nelson testified as follows about her instructions from the EEO Office or the Board with respect to counseling individuals in this case “[M]y instructions were to counsel. I – to conduct counseling.” Nelson Dep. at 53:4-5. She elaborated:

Q. And was there any discussion about limiting the scope of your counseling?

A. When I entered into counseling with any complainant, anyone that came to me, if I was doing counseling, they could talk to me about anything that they wanted. That was the way I approached counseling. . . . [W]hen I counseled the complainants had the right to – I would take as much time that was needed for them to be able to raise any type of issues that they wanted to talk about.

Nelson Dep. at 53:8-15. When specifically asked whether EEO Director Sheila Clark instructed her not to counsel on class issues, she testified:

No, I don't remember if I was not – we knew it was a class and it was going to be presented as a class. So I was assuming that there would be class issues being presented.

Nelson Dep. at 54:3-6. Pressed by Plaintiffs’ counsel, she reiterated:

Q. Well, isn't it a fact that the EEO director instructed you not to counsel on the class issues? [objection omitted]

A. I just – I can't recall being told how to approach this counseling other than approaching it by collecting information that it's a class and then also collecting information about individual incidents. I mean, they were allowed to talk about whatever – the complainant[s] were allowed to talk to me whatever they wanted to talk about.

Nelson Dep. at 120:16-121:4.⁶ Ms. Nelson further explained that the counselors were to do individual sessions rather than group sessions:

Q [D]o you recall saying on January 15th, 1997 [or] . . . on February 13th, 1997, which is the date of the second session . . . that you had been instructed not to counsel on class action issues?

A I don't remember stating that at an open session. I don't remember –

Q Do you remember stating it at all?

A You know, I do know that we were supposed to meet with everyone individually and these would be conducted as individual counseling sessions.

Nelson Dep. at 58:11-59:3.⁷ She believed that individual counseling sessions were advisable, especially after the January group session made clear that it was “way too difficult” to get information at the group sessions. Nelson Dep. at 207:5-6.

Ms. Nelson testified explicitly that she never prevented any Plaintiff from saying anything she wanted in counseling. Nelson Dep. at 208:4-7. She went on:

Q: And did you do anything that would prevent the complainants who came to you for counseling from doing anything or saying anything that they wanted to say in support of class counseling?

A: No, I did not prevent them from saying anything.

Q: Did you do anything to obstruct the complainants in this case from class counseling?

A: Oh, no.

⁶ See also Nelson Dep. at 54:15-18 regarding instructions from Sheila Clark: “I don't – right now I do not recall what type of instructions I might have been given. I just remember ‘you are going to come into this room and you are going to be a counselor on this issue.’”

⁷ In her affidavit, she stated that after the January 1997 counseling session, she was “instructed to follow up on each complaint” and try to obtain the very details that Plaintiffs refused to provide during the session. See Nelson Aff. at ¶ 48. (Ms. Nelson’s affidavit is attached to Plaintiffs’ Opposition to the Board’s October 1, 2001 Motion to Dismiss). This is consistent with her deposition testimony.

Q: Did you do anything to obstruct these individuals from counseling of any kind?

A: No.

Nelson Dep. at 224:17-225:19.⁸

Ms. Nelson's testimony echoes Plaintiffs' own testimony, set forth above, that it was *they* – not she – who inhibited the counseling process by refusing to provide pertinent information.⁹

b. Millie Wiggins

The other counselor, Millie Wiggins, also testified that she never inhibited Plaintiffs from providing information during the counseling sessions:

Q: In any of the counseling sessions with the Plaintiff in this case in 1997, did you do anything to prevent any of the counselees from saying anything they wanted to say?

A: No.

⁸ Because Ms. Nelson testified that she did not refuse to counsel on class issues, any instruction not to do so, even had there been one – and there was not – is immaterial. Ms. Nelson testified:

But regardless [of instructions], when it came to me, I was going to conduct the sessions on the way I knew how to conduct a session. And they were advised about the representation and to bring forward any kind of material that they wanted to bring or discuss with me anything that they wanted to.

Nelson Dep. at 236:6-16. She reiterated:

[The affidavit] was written a long time ago, even based, *if I was told not to counsel on class issues, that wouldn't have made a difference when they came into my session. Because they could talk to me about everything, class or not.*

Nelson Dep. at 237:21-238:12 (emphasis added).

⁹ Plaintiffs refused to give Ms. Nelson permission to contact their supervisors. See Nelson Dep. at 96:15-97:19; 102:22-103:6 (Dorey); 112:9-11 (Love-Blackwell); 217:13-15 (Terrell); 118:13-119:11; 150:7-18; 168:19-169:2 (Plaintiffs' general failure to allow Nelson to contact their supervisors). Also, Plaintiffs Love-Blackwell, Terrell, Hill, and Henderson all told Ms. Nelson that they would not be providing information on a personal basis or any information that related to their individual circumstances (Nelson Dep. at 212:2-4 (Love-Blackwell); 216:5-14 (Terrell); 218:9-21 (Hill); 228:1-4 (Henderson)).

Q: Did you do anything to prevent any of the counselees from giving you any document or information they wanted to give you?

A: No, I did not.

Q: To your knowledge, did anyone on the Board as opposed to anyone on the side of the counselees, did anyone on the side of the Board do anything to prevent any of the counselees from giving any information or documents to you that they wanted to?

A: No.

Wiggins Dep. at 221:18-222:10.¹⁰

IV. **LEGAL ARGUMENT**

Far from supporting Plaintiffs' claim that their counseling efforts were "thwarted" by the Board, the discovery regarding counseling provides additional and compelling support for the Board's arguments in its initial motion to dismiss. Plaintiffs were not prevented from providing information in counseling sessions; to the contrary, despite requests for specific details, *Plaintiffs* refused to provide them, preferring instead to rely on generalized "class" allegations in order to bypass what they considered to be the "hurdle" of counseling. Plaintiffs' "futility" argument fails because they cannot present "objective and undisputed evidence of administrative bias that would render pursuit of an administrative remedy futile." See September 26, 2002 Order at 15-16. Plaintiffs' refusal to give the counselors information to investigate or follow up on their claims recalls the failed counseling in Artis I, and should lead to the same result of dismissal for failure to exhaust administrative remedies.

¹⁰ Ms. Wiggins also testified that she would have included specifics, if had been given to her, in her counselor's reports. Wiggins Dep. at 253:9-17. No plaintiff testified that she provided any timely, specific information to a counselor that was omitted from the counselors' reports, making Plaintiffs' repeated accusations about "missing" or "destroyed" counselors' notes utterly irrelevant.

The Board respectfully refers the Court to the legal argument in the brief supporting its October 1, 2001 motion to dismiss.

V. CONCLUSION

For the reasons set forth above and in the October 1, 2001 motion to dismiss, the Board respectfully requests that the Court dismiss Plaintiffs' claims due to their failure to comply with their administrative counseling requirements.

DATED: September 8, 2005

Respectfully submitted,

Kenneth
Paul
875
Washington,

/s/

M. Willner, D.C. Bar No. 415906
Hastings Janofsky & Walker, LLP
15th Street, NW
D.C. 20005

AND

John L. Kuray
Senior Counsel
BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM
20th & C Streets, N.W.
Washington, D.C. 20551
Telephone No. (202) 452-3789
Fax No. (202) 736-5615

Attorneys
Chairman

for Defendant Alan Greenspan,
an, Board of Governors of the Federal
Reserve System