IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CYNTHIA ARTIS, et al.,

Plaintiff,

v.

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

Defendant.

No. 01-0400 (EGS)

DEFENDANT'S REPLY REGARDING PLAINTIFFS' FAILURE TO SATISFY ADMINISTRATIVE COUNSELING REQUIREMENTS

The sole issue at this juncture is whether plaintiffs have established either that they exhausted their administrative remedies by providing specific information to EEO counselors about timely instances of discrimination, or that such exhaustion should be excused on the ground that counseling would have been futile because of the defendant's alleged actions and policies. Plaintiffs' Response to Defendant's Motion, filed October 11, 2005 ("Response") fails to identify testimony from any plaintiff either showing that she provided the EEO counselors with specific information regarding timely instances of alleged discrimination or that she was prevented in any manner from doing so by the Board. Instead, plaintiffs throw up their usual smokescreen of irrelevancies and unsupported, conclusory assertions.[1]

While plaintiffs heavily rely on the lawyer-written affidavit of Rosemarie Nelson regarding instructions she allegedly received from the EEO Office not to counsel class issues, they ignore her deposition testimony. But that testimony will not just go away. In it, she

[1] Plaintiffs also complain that the Board failed to produce any documents in response to the Court's order. As stated in Defendant's Response to Court Ordered Production of Documents ("Defendant's Responses"), served on

unequivocally states that she never kept any plaintiff from raising any issue, and that her instructions were to meet with plaintiffs individually, not to refuse to counsel on class issues.[2] Plaintiffs provide no support for their allegations regarding the existence of any "scheme" to thwart their rights, and, more importantly, do not identify a single instance in which Ms. Nelson or anyone else acted in accordance with any such scheme.[3]

According to plaintiffs, the scheme to deprive them of their right to pursue a class complaint consisted of "the refusal to counsel on group issues, the failure to notify plaintiffs of their extended [*sic*] rights and the destruction of Board records." Response at 10; <u>see</u> Response at 2-6 (detailing these alleged failures). This must be the substance of plaintiffs' "futility" argument, as they identify no other policy, practice, or action by the Board that would excuse their failure to exhaust administrative remedies. Taking these issues one by one, it is clear that their allegations are either unsupported, incorrect, or irrelevant.

<u>Refusal to counsel class issues</u>. In defendant's Motion and Memorandum filed September 8, 2005 ("Memorandum"), defendant provided the Court with specific citations to *plaintiffs' own testimony* that they were not prevented from raising *any* issue with the

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plaintiffs on September 8, 2005, a copy of which is attached as Exhibit 1, all responsive documents had previously been produced.

[2] <u>See</u> defendant's Motion and Memorandum filed September 8, 2005 ("Memorandum") at 7-9, quoting Ms. Nelson's testimony. As we pointed out in defendant's Reply to Plaintiffs' Opposition to Motion to Dismiss Second Amended Complaint, filed November 9, 2001, at pp. 10-12, obtaining individual information regarding class claims is the only way to conduct "class" counseling. Moreover, as plaintiffs' counsel implicitly admitted in a contemporaneous letter to Ms. Nelson, dated January 23, 1997 (copy attached as Exhibit 2), Ms. Nelson never said she was instructed not to counsel class issues: "At that meeting, you made it eminently clear *without saying it* that you were acting under instructions, that your restrictions were such that you were not to counsel any class claims and to treat those complaints . . . as mere brand new individual complaints. . . You stated, throughout the session, that you were to counsel each of the persons 'individually.'" (emphasis added).

[3] In light of plaintiffs' accusation (Response at 8) that the Board selectively quotes from Ms. Nelson's testimony, defendant respectfully refers the Court to the entire transcript of Ms. Nelson's testimony, which we understand was filed by plaintiff in the "Bulk Filing" room (see Notice of Bulk Filing, filed March 22, 2005). Far from trying to discredit Ms. Nelson, defendant urges the Court to consider her testimony in its entirety. If anything, by accusing

counselors. Memorandum at 6. Plaintiffs' testimony was consistent with the counselors' testimony that plaintiffs could raise any issue they wanted to during the counseling sessions. Id. at 6-10. Despite the voluminous deposition testimony, plaintiffs' Response fails to cite any testimony contradicting the testimony cited in the Board's Memorandum.[4] That plaintiffs were never prevented from raising group or individual issues with the counselors remains uncontroverted.

Advice regarding rights. While the Response repeatedly *asserts* that plaintiffs were not advised of their rights by the counselors, see Response at 2-3, 8 and 9, it provides no citation to any testimony to that effect, and the record is to the contrary. See Nelson Dep., portions attached as Exhibit 4, at 149:16-150:21; 292:18-293:16; Wiggins Dep., portions attached as Exhibit 5, at 166:2-167:8 (describing advising counselees of their rights). The Board also produced to plaintiffs copies of "Counselee Rights and Responsibilities" memoranda that Ms. Wiggins provided to two plaintiff/counselees (attached as Exhibit 6), and Ms. Wiggins testified about one of the memoranda in her deposition, see Exhibit 5 at 166:2-167:8. Thus, plaintiffs are simply wrong when they claim, Response at 3, that they were never informed of their rights and that no document exists regarding notice of plaintiffs' rights.[5]

Even assuming *arguendo* plaintiffs were not informed of their rights, the Response

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Ms. Nelson of "willingly participating" in an alleged scheme and urging that her deposition be disregarded, it is plaintiffs who appear to be calling her credibility into question.

[4] Plaintiffs' attachment of deposition testimony alleging (incorrectly) that that the Board failed to meet deadlines set by Administrative Judge Fellin in the Artis I case, alleged comments by Sheila Clark in 1995, and the many other references to the 1995 counseling are irrelevant, as Artis I already found that plaintiffs obstructed counseling and the Board met its requirements in 1995. In attaching deposition testimony that Ms. Wiggins canceled counseling sessions in February 1997, plaintiffs fail to inform that Court that Ms. Wiggins canceled them only because *plaintiffs* demanded it. Artis Dep. at 200:11-14 (portions attached as Exhibit 3).

[5] While defendant stated in Defendant's Responses that in 1997 it was not the Board's practice to include a copy of the notice of rights with the Counselor Reports, Exhibit 1 at 1, defendant did not state that it was the Board's practice not to inform complainants of their rights.

makes no allegation and cites to no testimony that this resulted in the deprivation of any right during the counseling process or thereafter. Throughout the counseling process, plaintiffs were fully represented by counsel, who was actively involved in the process and who was in a position to ensure that plaintiffs were aware of their procedural rights. The allegation of missing notice of rights must therefore be seen as the red herring that it is.

Destruction of records. Plaintiffs have claimed for months that the Board "destroyed" notes taken by counselors, and they now claim that the "destroyed records would have shown that complainants engaged in and completed their counseling in good faith." Response at 6. This too is a red herring. Plaintiffs have not identified any timely instance of discrimination that they discussed with counselors but that was omitted from the Counselors' Reports. The counselors themselves testified that the notes were used to prepare the reports, that the reports contain everything that was in the notes, and that the notes were not retained for that reason. Exhibit 5, Wiggins Dep. at 70:11-75:8; Exhibit 4, Nelson Dep. at 48:17-49:13. Thus, the destruction or loss of the notes is irrelevant, as there is no basis to assume that the notes contained any evidence that would support plaintiffs' claims.[6] Nor, in any event, is there any evidence that the notes were destroyed in bad faith, or any other basis to impose any sanction against defendant in connection with the destruction or loss of the notes. See

[6] It should also be noted that Plaintiffs are incorrect in asserting that all of the notes were destroyed. Some of the notes were preserved and were produced in discovery. See, e.g., Exhibit 5, Wiggins Dep. at 226:17-228:11 and Wiggins Dep. Ex. 2(C)(1) (copy of excerpt attached as Exhibit 7). The deposition testimony regarding the notes did not reveal any information in the notes that was not also in the report. For example, Artis testified that everything of substance in the report was accurate. Exhibit 3, Artis Dep. at 219:5-10. The only testimony plaintiffs attach to their Response (without citing it) is from plaintiff Williams who agreed with plaintiffs' counsel's leading questions stating that she told a counselor about her PMP that was not reflected in the report, Williams Dep. at 199:6-203:21 (portions attached as Exhibit 8); however, Williams had previously testified not only that nothing was omitted from the report, Exhibit 8, Williams Dep. at 154:1-10, but also that she did not tell the counselor the names or dates for any occasion when there was discrimination with respect to a PMP. Exhibit 8, Williams Dep. at 152:17-154:10.

Wyler v. Korean Air Lines Co., 928 F.2d 1167, 1174 (D.C. Cir. 1991) (routine destruction of radar tapes does not justify an adverse inference); see generally Defendant's Opposition To Plaintiffs' Motion To Compel Compliance, filed January 26, 2005, at pp. 10-14.

Mr. Taylor's "Admission." Finally, plaintiffs' claim that Barry Taylor's testimony and documents amount to a concession that counseling occurred is unavailing. Mr. Taylor's use of the term "counseling" to describe plaintiffs' meetings with counselors is merely descriptive of the fact that meetings took place, and not a determination of the legal sufficiency of the information provided – or not provided – by the plaintiffs in those meetings. It is for the Court, and not Mr. Taylor, to decide if plaintiffs have met the legal requirements for counseling, which clearly they have not.

In short, there was no scheme as plaintiffs allege. The only failure in the counseling process was plaintiffs' failure to provide the counselors with specific, timely instances of alleged discrimination as required by the counseling process. See Artis v. Greenspan, 158 F.3d 1301, 1306 (D.C. Cir. 1998) (making "vague allegations of discrimination" without providing "details and dates" is insufficient for counseling).[7] The plaintiffs' failure to comply with their counseling obligations requires that this case be dismissed.

DATED: October 24, 2005 Respectfully submitted,

There is no basis to assume that any of the missing notes contain information different than the reports that were prepared based on the notes.

[7] Plaintiffs claim that their document "Resubmission of Class Action Complaint", Attachment 9 to Response, put the defendant on notice as to their claims. Response at 5-6. Notice of claims is not sufficient to exhaust administrative remedies. Artis, 158 F.3d at 1306. Moreover, the "Resubmission" was a one-size-fits-all document, submitted in identical form for each plaintiff without any specific facts relevant to that plaintiff, which merely rehashed allegations made in the then-pending Artis I litigation. Plaintiffs not only testified, but *stipulated* that the "Resubmission" did not contain "any specific information for any of the Plaintiffs." Exhibit 3, Artis Dep. at 257:5-11; see also Exhibit 3, Artis Dep. 153:11-155:16, 180:2-9.

__________/s/___________________________

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