

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ARAB AMERICAN CIVIL RIGHTS
LEAGUE, et al.,

Plaintiffs,

v.

Case No. 17-10310
Honorable Victoria A. Roberts

DONALD TRUMP, et al.,

Defendants.

**ORDER DENYING WITHOUT PREJUDICE PLAINTIFFS’
MOTION FOR EXPEDITED DISCOVERY [Doc. 43]**

I. INTRODUCTION and BACKGROUND

Plaintiffs’ lawsuit challenges the constitutionality of President Donald Trump’s Revised Executive Order 13780 (“REO”) issued on March 5, 2017. Section 2 of the REO would ban entry into the United States – for 90 days – of individuals from Iran, Libya, Somalia, Yemen, Sudan and Syria, all predominantly Muslim countries. Section 6 would set the number of admissible refugees. The REO would reduce the number of refugees to be admitted into the United States (in 2017) to 50,000 and suspend the U.S. Refugee Admissions Program for 120 days, after which the program would be conditionally resumed for individual countries. The REO would also direct some cabinet secretaries to suspend entry of nationals from countries who do not meet adjudication standards under the Immigration and Nationality Act. Homeland Security lists these countries as Iran, Libya, Somalia, Sudan, Syria, and Yemen.

On March 29, 2017, Judge Derrick Watson of the United States District Court for the District of Hawaii issued a preliminary injunction prohibiting the government from

enforcing Sections 2 and 6 of the REO. Judge Watson relied on evidence beyond the REO itself, including information extensively available in the public record, and reasoned the REO was likely motivated by anti-Muslim sentiment and thus breached the Establishment Clause of the First Amendment. A similar conclusion was reached by Judge Theodore Chuang of the United States District Court for the District of Maryland in enjoining Section 2(c) of the REO. Judge Chuang also relied on evidence beyond the REO in rendering his ruling. No discovery had been conducted in either case before the judges' rulings.

On March 16, 2017, Plaintiffs filed a Motion for Expedited Discovery. [Doc. 43]. While no motion for preliminary injunction is pending, Plaintiffs say the requested discovery is directly relevant to their ability to demonstrate likelihood of success on the merits of a motion for injunctive relief which they intend to file.

Defendants oppose the motion. They argue: (1) no motion for preliminary injunction is pending, hence there is no need for this expedited request; (2) Plaintiffs fail to establish they will suffer irreparable harm if the request is not granted; (3) the requested discovery is not narrowly tailored; (4) the burden on Defendants to produce discovery at this juncture substantially outweighs Plaintiffs' need for it; and (5) the discovery requests raise substantial executive privilege concerns.

For the reasons stated, Plaintiffs' Motion for Expedited Discovery is **DENIED WITHOUT PREJUDICE.**

II. DISCUSSION

Federal Rule of Civil Procedure 26(d)(1) governs the timing of discovery and provides that:

“A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.”

The Advisory Committee Notes to Rule 26 indicate that discovery before the Rule 26(f) conference “will be appropriate in some cases, such as those involving requests for preliminary injunction.” Fed. R. Civ. P. 26(d) 1993 Advisory Committee Notes. Neither the Rule nor the Note provides guidance to a court on the appropriate standard to apply in considering a request for expedited discovery.

Many federal courts, including those in the Sixth Circuit, limit expedited discovery to circumstances showing “good cause.” See, e.g., *Fabreeka Int’l Holdings, Inc. v. Haley*, No. 15-12958, 2015 WL 5139606, at *5 (E.D. Mich. Sept. 1, 2015). Under this standard, the party seeking discovery must demonstrate the need to deviate from the normal timing of discovery. *Gen. Ret. Sys. of the City of Detroit v. Onyx Capital Advisors, LLC*, No. 10-11941, 2010 WL 2231885, at *3 (June 3, 2010).

Jurisdictions differ as to what factors to consider under the good cause standard, but generally they include: (1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for the request; (4) the burden to comply; and (5) how far in advance of the typical discovery process the request was made. *Oglala Sioux Tribe v. Van Hunnik*, 298 F.R.D. 453, 455-56 (D.S.D. 2014); *Apple Inc. v. Samsung Elecs. Co.*, 768 F. Supp. 2d 1040, 1044 (N.D. Cal. 2011). An important inquiry in determining if good cause exists is whether “the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.” *Fabreeka*, 2015 WL 5139606, at *5 (citation omitted).

As noted above, Plaintiffs say the requested discovery is directly relevant to their ability to demonstrate likelihood of success on the merits for a forthcoming motion for preliminary injunction. Specifically, they seek evidence to support their allegations that: (1) prior to the election, “Candidate Trump . . . worked with others . . . to develop a pretext in order to *disguise* his religious animus and *justify* action targeting Muslims once he became President” [Doc. 43, PgID 617 (emphasis in original)]; (2) “*prior to the inauguration*, Congressional staffers were involved in communications demonstrating that the [REO] was motivated by religious animus, or confirming that nationality was used as a pretext for targeting Muslims [*id.*, PgID 620 (emphasis in original)]; and (3) “the proffered national security justification [for the REO] is a pretext that is unsupported by any real evidence” [Doc. 61, PgID 947].

The fact that Plaintiffs have yet to file a motion for preliminary injunction, does not mean that the Court cannot order expedited discovery. See *Oglala Sioux*, 298 F.R.D. at 455-56 (allowing expedited discovery upon finding that the requested discovery would help plaintiffs prepare their motion for preliminary injunction); *Meritain Health Inc. v. Express Scripts, Inc.*, No. 4:12-CV-266, 2012 WL 1320147, at *2 (E.D. Mo. Apr. 17, 2012) (granting plaintiffs’ request for expedited discovery upon finding that the discovery sought “will assist them in establishing their claims in the preliminary injunction hearing”); *Apple Inc.*, 768 F. Supp. 2d 1040, 1044 (N.D. Cal. 2011) (noting that it previously allowed plaintiff expedited discovery in support of its anticipated preliminary injunction motion).

Plaintiffs have made clear they seek the requested discovery to prove President Trump’s discriminatory animus in enacting the REO. That they have not made their

intention clear in a motion for injunctive relief does not weigh against them. However, the balance of the remaining factors does not tip in their favor.

Defendants characterize Plaintiffs' request as a "fishing expedition." They point to several places in the record where Plaintiffs suggest they already have ample evidence to prove they are likely to succeed on the merits of their claims. On this basis, Defendants contend that Plaintiffs' need for expedited discovery is minimal.

The Court disagrees with Defendants' characterization of Plaintiffs' request as a fishing expedition; a considerable amount, if not all, of the discovery sought by Plaintiffs appears to be relevant to their ability to demonstrate likelihood of success on the merits (i.e., relevant to whether the national security justification in the REO is pretext for targeting Muslims). However, Plaintiffs cannot establish that their need for the discovery justifies the expedited schedule requested. See *Onyx Capital*, 2010 WL 2231885, at *3.

This is a unique case where relevant information in the public domain is extensive. Similarly situated plaintiffs in other jurisdictions have successfully moved for preliminary injunctive relief based on publically available information alone. See *Hawai'i v. Trump*, No. 1:17-cv-00050, --- F. Supp. 3d ---, 2017 WL 1011673, at *13-15 (D. Haw. Mar. 15, 2017) (granting temporary restraining order barring enforcement of the REO), *converting temporary restraining order into preliminary injunction*, --- F. Supp. 3d ---, 2017 WL 1167383 (Mar. 29, 2017); *Int'l Refugee Assist. Proj. v. Trump*, No. 8:17-cv-00361-TDC, --- F. Supp. 3d ---, 2017 WL 1018235, at *3-4, *11-16 (D. Md. Mar. 16, 2017) (granting preliminary injunction barring enforcement of Section 2(c) of the REO);

Aziz v. Trump, --- F. Supp. 3d ---, No. 1:17-cv-116, 2017 WL 580855, at *3-5 (E.D. Va. Feb. 13, 2017) (granting preliminary injunction regarding original executive order).

If this case proceeded to hearing on a motion for preliminary injunction, this Court believes it would have sufficient information available to it to make a decision on the merits, as other courts have done. Accordingly, Plaintiffs have not shown that their need for expedited discovery outweighs the prejudice to Defendants if they were required to urgently produce the requested information.

Moreover, although most of the discovery requests are appropriately narrow, some are overly broad. Two particularly broad requests are Document Request number five and Interrogatory number five. The document request seeks:

“All documents and communications created prior to January 20, 2017 that constitute, refer to, or relate to communications with, or analysis by, Congressional employees or staff members regarding the Proposed Muslim Ban, or to enhanced vetting of, or temporarily prohibiting entry into the United States by, refugees and/or individuals from a list of countries to be identified.”

[Doc. 43-2, PgID 645 (emphasis omitted)]. Interrogatory number five seeks the name of every Congressional employee or staff member who has ever been involved in communications referring or relating to not only the Proposed Muslim Ban (a defined term), but also “enhanced vetting of, or temporarily prohibiting entry into the United States by, refugees and/or individuals from a list of countries to be identified.” [Doc. 43-3, PgID 655]. These requests are exceedingly overbroad.

In their reply brief, Plaintiffs clarify that the targeted period for these requests is between the November 2016 election and President Trump’s inauguration on January 20, 2017, and that they intended the requests to be “limited to documents involving ‘several’ Congressional staffers.” [Doc. 61, PgID 947]. However, the text of their

requests fails to set forth those limits. Going forward, Plaintiffs must be precise with the language in their requests, so that unnecessary disputes are avoided.

III. CONCLUSION

While the Court has no doubt that Plaintiffs' requested discovery is directly relevant to their claim that the REO was motivated by discriminatory religious animus, it is not clear that the requested information is essential for Plaintiffs to demonstrate likelihood for success on the merits of a motion for injunctive relief. Nor is it clear that Plaintiffs' need for the information substantially outweighs the burden on Defendants to produce at this juncture. The Court concludes that Plaintiffs do not establish that good cause exists for expedited discovery. *Fabreeka*, 2015 WL 5139606, at *5.

Under Rule 16(b), the Court must issue a scheduling order as soon as practicable" and – unless there is good cause for delay – “within . . . 60 days after any defendant has appeared.” Fed. R. Civ. P. 16(b)(2). Defendants appeared February 2, 2017. Sixty days from that date is April 3, 2017. Due to the nature of this case, good cause may exist to delay entry of a scheduling order. However, the Court is prepared to enter a scheduling order under Rule 16(b) that contemplates reasonably expedited discovery.

Moreover, the parties have yet to hold a Rule 26(f) conference, at which time they could develop a discovery plan and make and arrange for initial disclosures under Rule 26(a)(1). Some of those initial disclosures could well reveal much of the information requested by Plaintiffs in their expedited motion.

The Court plans to soon contact counsel to schedule a status conference by telephone.

Plaintiffs' Motion for Expedited Discovery [Doc. 43] is **DENIED WITHOUT PREJUDICE.**

IT IS ORDERED.

S/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: March 31, 2017

The undersigned certifies that a copy of this document was served on the attorneys of record by electronic means or U.S. Mail on March 31, 2017.

s/Linda Vertriest
Deputy Clerk