

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

RENAE BAROS,

Plaintiff,

v.

**MICHAEL CHERTOFF, SECRETARY
DEPARTMENT OF HOMELAND
SECURITY,**

Defendant.

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EP-05-CA-0336-HLH

**PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION FOR PROTECTIVE ORDER
AND REQUEST FOR IN CAMERA INSPECTION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff, RENAE BAROS, by and through her Attorneys, and files this Response in opposition to the Defendant’s Motion for Protective Order and Request for In Camera Inspection, and in support of would show as follows:

I. FACTS

For the purposes of this Response Plaintiff will not argue with the Defendant’s summary of the facts but does not agree that they are accurate or complete. Defendant asserts that the information sought by Plaintiff is not subject to discovery because it is not relevant to the claims or defenses of either party, it is privileged information and the potential for harassment outweighs any probative value the information may have.

Plaintiff disagrees with Defendant’s assertion that the information sought is not subject to discovery for the reasons stated above and hereby provides its detailed argument as follows:

II. ARGUMENT AND AUTHORITIES

A. Scope of Discovery

Defendant's assertion that the scope of discovery is limited by Rule 26(b)(1) of the Federal Rules of Civil Procedure, and that in 2000, the scope of discovery was narrowed from matters which are "relevant to the subject matter involved in the pending action" to any matter "relevant to the claim or defense of any party." is correct and unrefuted. However, Defendant has overlooked the statement in the Fed.R.Civ.P.26, Advisory Committee Notes, 2000 Amendment, which states under the amended provisions the Court would determine "whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action.", and further states "The good-cause standard warranting broader discovery is meant to be flexible". The Amendment also states "information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable." (emphasis add).

B. Issues In Dispute

First, the Defendant has identified the following issues in written discovery at issue: Request for Admission number 26, Request for Production Numbers 1, 7, 17, as well as the issues of the taking of depositions, of Patricia Kramer (Caucasian female,) Curtis Compton (Caucasian male) and the completion of a deposition of Brock Nicholson (Caucasian male) .

The Plaintiff (Hispanic female) asserts that there are three additional issues with respect to written discovery. Requests for Admission number 25, Request for Interrogatory number 21 and Request for Production 25. (See Def. Ex. 3. Def. Mot. For Prot.Ord). The Plaintiff's requests for Interrogatories and the Defendant's responses are attached as Exhibit 1.

Plaintiff asserts that the disputed written discovery requests are highly relevant and material to her case, well within the bounds of appropriate discovery under Rule 26(b)(1) and are "relevant to the claim or defense of any party."

Specifically, this case involves the (1) alleged discrimination (gender and race/national origin)

against the Plaintiff, by the Defendant in her non-selection for promotions (2) retaliation by the Defendant for her filing claims of sexual harassment (gender discrimination) against a superior and (3) for engaging in statutorily protected activity, filing an EEO complaint against her employer when the Defendant suspended the Plaintiff for 10-days during the pendency of this complaint, over an issue that was part of this complaint.

At the onset of discovery in this case and at the status conference held by the current Judge when the case was reassigned to him, the Defendant made their concerns known about the Plaintiff's anticipated exploration in discovery. The Defendant is concerned that matters pertaining to the "House of Death" (as the media has dubbed the matter) would be explored by the Plaintiff. Plaintiff thought she had made it clear that she is NOT seeking to get into any areas of the substantive issues involved in the House of Death matters, except where those issues are relevant to the credibility of Ms. Kramer or Mr. Compton, or would show a discriminatory animus towards females and Hispanics in general or the Plaintiff specifically.

In their instant pleading, the Defendant argues that Kramer and Compton's disciplinary history is protected from Disclosure under the Privacy Act claiming that the probative value of the information sought is outweighed by the harassment and hardship which would result on the individuals. The Defendant also makes the argument that Ms. Kramer and Mr. Compton's legal positions in other pending civil suits against them individually could be jeopardized. The Defendant fails to note that it is also a Defendant in those civil suits and has a major stake in suppressing any unfavorable information about the bigotry and credibility of both Ms. Kramer and Mr. Compton since their actions in those civil suits may have created substantial liability for the Defendant. That something unfavorable to Ms. Kramer or Mr. Compton might come out in this case that could cause harm to them in another case is not a valid reason for the Defendant to withhold this requested

information. The probative value of an Agency determination that either Ms. Kramer or Mr. Compton was not credible or an Agency determination that Ms. Kramer was found to have engaged in practices that resulted in unequal treatment clearly bolsters the Plaintiff's discrimination claims.

C. Kramer and Compton as Comparative Employees

Defendant claims that the Plaintiff is seeking to use Ms. Kramer and Mr. Compton as comparative employees under a Title VII or *Douglas*-based analysis. The Defendant is partially correct. The Plaintiff concedes that case law does not support her claim of disparate treatment under the current Title VII interpretations since Ms. Kramer and Mr. Compton are not in "nearly identical" situations. The Plaintiff has been clear from the beginning that she seeks to carve out, create a new legal standard/position when federal law enforcement employees and staff are found to have engaged in being less than candid¹. The Plaintiff here, with regard to Ms. Kramer and Mr. Compton asserts that both engaged in conduct that goes directly to their credibility, Mr. Compton for making false statements in an official Agency investigation and Ms. Kramer for falsifying official government documents. Neither are "comparable" employees in terms of the usual Title VII sense as comparator employees (both Kramer and Compton were/are criminal investigator/management and supervisory officials for Immigration and Customs Enforcement (ICE) and the Plaintiff was an investigative assistant.) The Plaintiff asserts that all federal employees have an equal obligation to tell the truth, to not engage in making false statements or creating false documents. The Defendant (the Department of Homeland Security represented by the Department of Justice) is in the unenviable position of claiming that the higher up you are in position, title and grade the less accountable one is with regard to the truth. That is exactly what the Defendant did when it cited *Carr v Social Security*

¹ The Plaintiff does NOT admit to making any false statements or being less than candid in any situation that led to her 10-day suspension. The Defendant "discovered" in Plaintiff's deposition that Plaintiff's statements were not contrary to the video evidence but that the video did not capture all of the activity that had taken place. This though is a fact issue for later.

Admin., 185 F.3d 1318, 1326-1327 (Fed. Cir. 1999). (Def. Mot @ 5) as its authority for the justification that supervisory and management officials can be less than candid with impunity compared to a support staff employee. We, however, should not be surprised given the recent admissions of the Attorney General.

The Defendant further argues that there is a complete absence of similarities—both in duties and in conduct charged—between Plaintiff, Kramer and Compton. The only “duty” that should matter for our purposes in this argument is a duty to tell the truth. As to the conduct charged it is the Plaintiff’s contention that the Defendant engaged in “creative charging” because he was one of the good old white boys.

D. Deciding Official Brock Nicholson in Plaintiff’s 10 day suspension

The deciding official in the Plaintiff’s 10-day suspension was Brock Nicholson (Caucasian male). Plaintiff wants to inquire of him as to why she received a 10-day suspension for an alleged lack of candor charge when, according to a deposition taken in January 2007, in a matter before the Merit Systems Protection Board (MSPB), Kenn Thomas, ICE, Program Manager, (and now the Special Agent in Charge, Office of Professional Responsibility, ICE, San Diego) testified that Nicholson was the deciding official in Mr. Compton’s case and Mr. Nicholson objected to any serious disciplinary action for Compton when, *inter alia*, substantiated findings of making false statements in an official Agency investigation had been made². Mr. Thomas also testified that he had seen documentation that J.J. Johnson also had a part in the proposed action against Compton. (Mr. Johnson is the proposing official in the Plaintiff’s case. See Exhibit 2, relevant pages of January 11, 2007, deposition of Kenn Thomas in the matter of Michael Gutierrez v. Department of Homeland Security, MSPB Docket No: DA-0752-07-0097-I-1.)

² Let us not forget that the substantiated finding against Mr. Compton included the creation of a hostile work environment for another Hispanic female, misuse of a government vehicle, dereliction of duty, violence in the workplace toward a female Hispanic employee, and the making of false statements.

What the Plaintiff is going after here and trying to determine is, how is it possible that the same deciding official in both Mr. Compton and the Plaintiff's case came up with such serious differences in punishment. As is clear from Mr. Thomas' testimony the Defendant went to substantial lengths to "re-color" what happened regarding Mr. Compton and call it "conduct unbecoming" and impose a one-day suspension. The question here is why? Based purely on what Mr. Thomas has said, under oath the Plaintiff is entitled to ask Mr. Nicholson what his rationale was for dealing with Mr. Compton vs Plaintiff. The Plaintiff asserts that Mr. Nicholson's actions reflect his prejudice towards the Plaintiff, a Hispanic female.

Mr. Nicholson's involvement is also even more disturbing when it was discovered in a deposition of Mr. J.J. Johnson, in the aforementioned MSPB case that Nicholson was determined to keep, as the deciding official, the Plaintiff's disciplinary case where he issued a 10-day suspension to her. See Exhibit 3. Here you have the deciding official in the Plaintiff's case, determined to implement a 10-day suspension for alleged lack of candor with Internal Affairs and yet the same deciding official issues a one-day suspension to Compton for what is far more serious misconduct, including making false statements to an Agency investigator³. Is Mr. Nicholson prejudiced against Hispanic females, but will go out of his way with creative charging to protect the good old white boys? Absent the ability to examine Mr. Nicholson, we can only assume that he is a bigot based on the obviously disparate treatment between a Hispanic female, clerical employee and a Caucasian male supervisory special agent/criminal investigator. We are not afraid to ask the court to make new law here and find federal employees comparable when it comes to disciplining them in matters affecting their credibility. Further, whether they are comparable employees or not, if Mr. Nicholson is a bigot, he should not have been allowed to be the deciding official. The most favorable treatment of Mr.

³ We note also that the statutory minimum penalty for misuse of a government vehicle is a 30-day suspension. 31 USC 1349(b).

Compton by Mr. Nicholson and the hammering of Ms. Baros is so blatant it calls out for examination.

E. Patricia Kramer

Plaintiff asserts that Ms. Kramer is the responsible management official that discriminated against her because of her race and retaliated against her when she did not select the Plaintiff for a position as Special Agent and began to make her working environment difficult. Plaintiff asserts that her problems with Ms. Kramer began after she (Plaintiff) reported a management official to Internal Affairs for sexual harassment. The Plaintiff is entitled to depose Ms. Kramer on this basis alone without further justification; however, Ms. Kramer's disdain toward women in general in her office and towards Hispanic women led to 10 Hispanic females filing a Congressional Complaint that led to an internal investigation of Ms. Kramer's discriminatory practices by the Defendant. That investigation was conducted by Senior Special Agent Steven Cooper. The Plaintiff has asked for this document in discovery and is entitled to it since it will bolster the Plaintiff's claim of gender and racial discrimination. The report, authored by Mr. Cooper is one of the items that the Defendant has submitted to the Court *in camera*. In response to Request for Admission No. 23, (a follow up to Request for Admission No. 22) the Defendant admits that Cooper's investigation made findings of "inconsistent promotion or treatment" within the El Paso office. The Defendant denied that there was a finding of gender discrimination and hostile work environment. Request for Admission 23 stated:

Admit that Special Agent Steven W. Cooper's investigation established that allegations of discriminatory practices directed at females by Patricia Kramer had taken place as alleged by the July 30, 2002, letter to Congress. (emphasis added).

The Defendant's response danced around the admission. The finding of "inconsistent promotion or treatment" reeks of discrimination and the Plaintiff is entitled to this report. What it means, in the light most favorable to the Defendant is that it is a fact question for a jury?

Further, in the Defendant's response (Objection) to Interrogatory 22, the Defendant admits

that “a small portion of investigation pertained to Plaintiff and her allegations.” The Plaintiff must have this complete report as it deals with the Complaint to Congress by the ten female Hispanic women complaining about Ms. Kramer animus towards women and Hispanics. Whatever practices were engaged in by Ms. Kramer towards other Hispanic/females may very well be useful in demonstrating a discriminatory animus towards the protected classes to which the Plaintiff belongs.

The Plaintiff’s attorney, during his initial investigation of this case learned that during the time when Jesus Torres was the Acting Special Agent in Charge for the El Paso office, (May–July 2005) Torres received the OPR or IG Report of Investigation (Red Book) pertaining to Ms. Kramer. Mr. Torres reviewed the Red book and proposed her removal from the federal service for the falsification of government documents pertaining to informant payments⁴. Since the Defendant is relying upon Ms. Kramer’s denials of discriminatory conduct in this case the Plaintiff is entitled to any information in the Defendant’s possession that could challenge her credibility and integrity. If she falsified government documents to improperly pay government informants how can anything she would testify to be credible. The Plaintiff is entitled to make inquiries into this area and is entitled to a copy of the government’s investigation that goes directly to Ms. Kramer’s credibility.

The Plaintiff’s attorney has also developed information that Ms. Kramer referred to those who died in the so-called House of Death matter in a derogatory manner when she stated “they’re just Mexicans.” The Plaintiff is entitled to ask her about that comment and similar comments demeaning to the Plaintiff to determine whether she is in fact prejudiced against Hispanics and females.

F. Curtis Compton

Mr. Compton is a Group Supervisor (GS) in ICE El Paso and has been since 2000. As such he has worked for Ms. Kramer. Mr. Compton, as a supervisor participated in numerous supervisor

⁴ It is unknown whether the proposed removal was ever given to Ms. Kramer since she retired from the service.

and management meetings. Mr. Compton would have personal knowledge of Ms. Kramer's attitude toward females in law enforcement positions. Deposition testimony of a witness in this case, Anita Trujillo⁵, establishes that Ms. Kramer was disdainful of women in the office and particularly Hispanic women who were in or wanted to be in law enforcement.

According to Ms. Trujillo, Mr. Compton harassed, assaulted, verbally abused and discriminated against her because she was a Hispanic female. Later, according to Ms. Trujillo, when she was reassigned to another Group Supervisor, Joe Bosarge, she was harassed by Bosarge. Upon his retirement, Bosarge told Ms. Trujillo he was sorry for the harassment but that it was done at the behest of Ms. Kramer.

The Defendant has also submitted to the Court the report prepared by Kenn Thomas about Curtis Compton's reported substantiated serious misconduct including the making of false statements. As referenced earlier, Mr. Thomas flatly stated that the Agency (Defendant) "re-colored" the results of the serious misconduct (including false statements) and labeled it "conduct unbecoming." Was Compton, like Joe Bosarge, simply doing the bidding of Ms. Kramer and harassing Hispanic females that Ms. Kramer did not like? Mr. Compton is the only one who can answer why he was harassing Ms. Trujillo. Mr. Bosarge has already apologized to Ms. Trujillo who was doing the bidding for Ms. Kramer before his retirement. If two Group Supervisors were harassing Ms. Trujillo on behalf of Ms. Kramer, it stands to reason that Ms. Kramer's dislike of the Plaintiff since she is Hispanic, female and reported another management official (Brian Pledger) to Internal Affairs for sexual harassment caused her to not select the Plaintiff for a promotion to a position she was most imminently qualified for and continued to not recommend or select the Plaintiff because she had engaged in statutorily protected activities.

⁵ Depositions of Anita Trujillo, Joe Bosarge and the Plaintiff have been taken by the Defendant. Because of costs the Plaintiff has not acquired copies of those depositions.

_____ Information developed during discovery evidences a special working relationship between Kramer and Compton thus Plaintiff believes that Kramer may have confided her discriminatory animus towards Hispanics, females, and/or those who file EEO complaints. Plaintiff should be allowed to examine Mr. Compton on these matters.

III. CONCLUSION

The Defendant's claim that the probative value is outweighed by the detrimental impact upon the lives of private persons. If Compton and Kramer, have engaged in past conduct that led to their predicament, this is simply a consequence of their choices in life. The Plaintiff has demonstrated that the credibility of Ms. Kramer is a critical issue. The Defendant has, heretofore, relied upon Ms. Kramer's affidavits in the investigation to deny any discrimination or retaliation on her part, yet the same Defendant was proposing to remove her from public service for falsifying documents. The Plaintiff is entitled to all requested information as to Ms. Kramer and should not be restricted in its deposition of Ms. Kramer, except to the extent already agreed to by counsel—no substantive matters pertaining to the House of Death will be explored.

With regard to Mr. Compton, the plaintiff is entitled to discovery whether the deciding official (Brock Nicholson) in both the Plaintiff and Mr. Compton's case is a bigot. If he is in fact a bigot, there should be no need to use a typical Title VII analysis of a "similarly situated" employee.

Mr. Compton's deposition should be allowed since he appears to be a confidant of Ms. Kramer and was doing her bidding. He would have knowledge and insight into her thoughts, prejudices and reasoning. Accordingly, the Defendant's Motion for a Protective Order should be denied.

Plaintiff requests Defendant's Motion be denied, and Defendant be required to provide Plaintiff's requested discovery including deposition testimony of Compton, Kramer and Nicholson.

CERTIFICATE OF CONFERENCE

Counsel for both parties discussed Plaintiff's discovery requests. The parties were unable to agree as to the discoverability of the matters. However, both parties agreed that Defendant would submit a Motion for Protective Order, to which Plaintiff would respond.

Respectfully submitted,

/s/ _____
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I CERTIFY THAT ON THE 14th DAY of August, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Eduardo R. Castillo, Assistant United States Attorney

/s/ _____
Cori A. Harbour

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EP-05-CA-0336-H

ORDER

On this date, came on to be considered Plaintiff's Response to the Defendant's Motion For Protective Order and Request For In Camera Inspection in the above-entitled and numbered cause. The Court, having considered Plaintiff's Response, is of the opinion that said Response is hereby GRANTED.

It is therefore ORDERED that the Clerk of the Court shall not seal the in camera exhibit filed by Defendant in this case.

SIGNED AND ENTERED this the ____ day of _____, 2007.

HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE