UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Plaintiffs,	:	
v.	:	**Case No. 03-2006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.,	:	
Defendant.	:	

MEMORANDUM OF POINTS AND AUTHORITIES BY DEFENDANT FELD ENTERTAINMENT, INC. REGARDING THE SCOPE OF FURTHER DISCOVERY IN THIS CASE

This brief is submitted by defendant Feld Entertainment, Inc. ("FEI") in accordance with the direction of Magistrate Judge Facciola to the parties at the status conference on November 20, 2007 to brief the question of what the scope of remaining discovery should be following the recent summary judgment and discovery rulings of Judge Sullivan. Specifically, FEI requests that the Court enter a protective order pursuant to Fed. R. Civ. P. 26(c) terminating and prohibiting any further discovery regarding the allegations made by Archele Hundley, Robert Tom, Jr. and Margaret Tom, which relate solely to elephants located on the Red Unit of FEI's circus. The relief requested herein is consistent with and pursuant to Judge Sullivan's recent orders narrowing the scope of this case. See Order & Mem. Op. (8/23/07) (Docket # 172 & 173) ("Summ. Judg. Op."); Order (8/23/07) (Docket # 178) ("Discovery Order"); Order & Mem. Op. (10/25/07) (Docket # 212 & 213) ("Standing Op.").

I. JUDGE SULLIVAN'S ORDERS NARROWING THE CASE

On August 23, 2007, the Court granted FEI summary judgment as to the 21 elephants in its herd that are subject to a captive-bred wildlife ("CBW") permit. See Summ. Judg. Op. at 22-

23 ("Plaintiffs' conclusory allegations challenging the evidence with respect to all defendant's elephants are not sufficient to warrant further discovery on the only relevant issue regarding the elephants subject to the CBW permit – whether such elephants were born in captivity in the United States."). Judge Sullivan granted summary judgment on the CBW elephants notwithstanding the declarations submitted by plaintiffs from former Red Unit employees Archele Hundley and Robert Tom in opposition to FEI's motion for summary judgment. See Pls. Notice of Filing Supp. Aff. In Support of Their Opp. to Defs. Mot. for Summ. Judg. (11/22/06) (Docket # 113), Ex. LL (Robert Tom, Jr. Decl.) & Ex. MM (Archele Hundley Decl.). In so doing, Judge Sullivan eliminated the CBW elephants from the case and denied plaintiffs' request, pursuant to Fed. R. Civ. P. 56(f), for further discovery regarding relating to the care of these animals. See Summ. Judg. Op. at 22 (plaintiffs do not "provide any meaningful challenge or any reason for further discovery as to the elephants that defendant claims were born in captivity in the United States and subject to a CBW permit."); cf. Liss 56(f) Decl. ¶¶ 9-13 (seeking discovery regarding care of CBW elephants) (Ex. B to Opp. to Mot. for Summ. Judg.) (10/6/06) (Docket # 96). Thus, Judge's Sullivan's summary judgment decision was both a ruling on the merits of plaintiffs' claims as well as a limitation on discovery.

On that same day, Judge Sullivan also ruled on plaintiffs' motion to conduct an inspection of FEI's entire herd and all of its elephant facilities. Even though he deemed the inspection "highly relevant," Judge Sullivan ***prohibited*** any inspection of CBW elephants: "Consistent with the Court's ruling on the motion for summary judgment, however, plaintiffs are only entitled to inspect those elephants which are not subject to a valid captive-bred wildlife permit." See Discovery Order at 10. This ruling, as is any discovery ruling, rested on the standard of relevance set forth in Fed. R. Civ. P. 26(b)(1).

Shortly thereafter, Magistrate Judge Facciola held a status conference on September 19, 2007. FEI submitted a list identifying the names and location of its Pre-Act elephants remaining in the case. See Notice of Issues for Status Conference at 2 (9/19/07) (Docket # 188) (reiterating objections to discovery beyond the six elephants for which Rider claims emotional attachments required for standing). Magistrate Judge Facciola then ruled that "Pursuant to Judge Sullivan's [summary judgment] ruling, only the Pre-Act elephants remain at issue in this lawsuit. Plaintiffs will therefore be allowed to inspect each of the Pre-Act elephants." See Inspection Order at 2, ¶ 2 (9/25/07) (Docket # 195).

On October 25, 2007, Judge Sullivan narrowed the case further when he granted (in part) FEI's Motion for Reconsideration. Judge Sullivan entered partial summary judgment that excluded from the case an additional 26 Pre-Act elephants in FEI's herd for which Rider lacked standing. See Standing Op. at 5-7 ("[D]efendant's Motion for Reconsideration concerning the standing of Tom Rider is granted and plaintiffs' claims are limited to the six 'pre-Act' elephants identified above."). The six Pre-Act elephants remaining in this case are Susan, Lutzi, Jewell, Karen, Mysore and Nicole. Id.[1]

In the same Order, Judge Sullivan simultaneously denied plaintiffs' motion for leave to amend to add three more plaintiffs, Archele Hundley, Robert Tom, Jr. and Margaret Tom, who "recently worked for Ringling Brothers' 'Red Unit' during 2004-2006" and who alleged ***"the same ESA claims as the current plaintiffs in the case."*** Standing Op. at 9 (emphasis added). Those three witnesses' complaints related to the Red Unit elephants[2] as well as a former elephant

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[1] Plaintiffs also claim Rider has standing for a seventh Pre-Act elephant, Zina, which he evidently "forgot" to identify in his deposition despite his claimed strong "emotional attachment" to this elephant. Ex. 1, Dep. of Tom E. Rider at 11 (10/12/06) ("Rider Dep."). Plaintiffs, however, have taken no action to correct their alleged "mistake."

[2] Feld Entertainment operates three different traveling circus shows: the Blue Unit, the Red Unit, and the Gold Unit. Each unit has different animals, performers and employees. The Blue Unit is the only traveling unit which houses elephants to which Rider has alleged an emotional attachment, see supra page 3.

handler on the Red Unit named Sacha Houcke.[3] Hundley Decl. ¶ 1 ("I worked for Ringling's red unit from approximately April 20, 2006 through June 27, 2006.") & ¶¶ 5-10, 13-18, 23, 32 (complaints related to Sacha Houcke); Robert Tom Decl. ¶ 1 ("I worked on the red unit.") & ¶¶ 4-5, 10, 14, 23, 25-26, 32 (complaints related to Sacha Houcke). In contrast, Tom Rider worked on the Blue Unit nearly a decade earlier, has never worked on the Red Unit, and has no connection to the elephants on the Red Unit. See Rider Dep. at 8-9 & 244 (Rider stating under oath that he worked for Ringling from June 1997 until November 1999 and that he only worked on the Blue Unit); see also Notice of Issues for Status Conference at 2 (9/19/07) (Docket # 188) (identifying Red Unit elephants – none of which Rider worked with).

FEI opposed the motion to add these new plaintiffs because doing so would unravel the Court's recent orders narrowing this case and actually ***expand*** the scope of this case. (Standing Op. at 10). FEI further argued that "adding new plaintiffs would prejudice FEI's right to take complete and timely discovery as well as ultimately increase the expense and length of trial. Because the scope of this case now concerns only the six 'pre-Act' elephants to which Mr. Rider has become emotionally attached, defendant contends that adding new plaintiffs will necessarily require any trial to include testimony about eight more elephants, as well as numerous additional employees who work with these elephants on FEI's Red Unit." Id.

Judge Sullivan agreed:

> The Court agrees that defendant would be unduly prejudiced by amending the complaint to add three plaintiffs at this late stage. Defendant has already been granted partial summary judgment and the issues in this case have been narrowed. Despite plaintiffs' protestations to the contrary the Court agrees with defendant that adding three new plaintiffs would significantly expand the scope of this case and require substantial additional discovery. The Court rejects plaintiffs' contention that additional parties would not further complicate and lengthen this already protracted litigation and cause undue burden and expense to the defendant.

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[3] Mr. Houcke is no longer an FEI employee and is traveling with a circus currently touring France.

> . . .
> The Court rejected defendant's proposed counterclaim because plaintiffs would be prejudiced by the late expansion of the lawsuit and defendant's delay in filing its claim. The Court finds the same potential for prejudice here, and declines plaintiffs' invitation to expand this litigation now with the late addition of parties after so recently narrowing the scope of this case.

Id. at 11-12. Judge Sullivan's order is clear. He has narrowed this case down to the six Blue Unit elephants for which Rider alleges standing, he has prohibited the expansion of this case to the Red Unit, he has rejected the "substantial additional discovery" that would become necessary to step beyond Rider's claims, and he has ruled that FEI should not be prejudiced in such a manner at this stage of the proceedings. Id. Indeed, Judge Sullivan's rulings would be rendered superfluous if, as plaintiffs apparently contend, Red Unit discovery was already relevant to their case whether or not Hundley *et al.* are plaintiffs.

Accordingly, FEI seeks a protective order that would prohibit the precise type of discovery that Judge Sullivan has ruled is beyond the scope of this case. Specifically, FEI asks that all discovery related to the allegations made by Archele Hundley, Robert Tom and Margaret Tom be prohibited, which would necessarily preclude any depositions of those three witnesses, Mr. Houcke and any other Red Unit employees regarding their claims. The burden faced by FEI is substantial since it would entail four additional depositions, one of which would be in Europe.[4]

II. LEGAL STANDARD

The scope of discovery permitted by Federal Rule of Civil Procedure 26 is admittedly broad. That broad discovery, however, is not boundless. Crawford-El Britton, 523 U.S. 574, 598 (1998) ("Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly.").

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[4] The relief requested herein is no different than what the Court has already prohibited with regard to the inspections. Indeed, once the Standing Order and Opinion was issued, the parties revised the inspection schedule to include only the Blue Unit and the CEC, not the Red Unit or Williston. See Consent Motion for Time Extension (10/15/07) (Docket # 204) (setting Blue Unit inspection date) & Notice of Filing That The Parties Have Agreed to Conduct the Florida Inspection on November 29 (10/29/07) (Docket # 215) (setting CEC inspection for same date held for Red Unit inspection prior to Standing Order).

All discovery sought must be both relevant *and* it must be reasonably calculated to lead to the discovery of admissible evidence. See Fed. R. Civ. P. 26(b)(1); see also Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 103 F.3d 1007, 1012 (D.C. Cir. 1997) ("the relevance standard of Rule 26 is not without bite"); Tequila Centinela, S.A. de C.V. v. Bacardi & Co. Ltd., 242 F.R.D. 1, 6 (D.D.C. 2007) ("discovery of matters not 'reasonably calculated to lead to the discovery of admissible evidence' are not within the scope of discovery"); Smith v. Café Asia, No. 07-261, 2007 U.S. Dist. LEXIS 73071, at *3-4 (D.D.C. Oct. 2, 2007) (Facciola, J.) ("[R]elevancy alone does not entitle a requesting party to *carte blanche* in discovery. As with most things in life, Rule 26 is not an all-or-nothing proposition. One important constraint is the admissibility of the discovery being sought.") (internal citations omitted).

The Court has narrowed this case and limited the claims to a half-dozen elephants that were on the Blue Unit with Rider. Consistent with that ruling, it has the further ability to issue FEI a protective order that ensures that any further discovery remains related to those six elephants and not be expanded to the Red Unit, which involves entirely different elephants and entirely different personnel with the exception of one employee, Alex Vargas, who has worked on both units and was already deposed by plaintiffs. Judge Sullivan narrowed the case in such a manner notwithstanding that Ms. Hundley and the Toms have made the same ESA claims as plaintiffs. FEI has shown good cause and the Court should issue a protective order terminating any further Red Unit discovery. See Fed. R. Civ. P. 26(c) ("[u]pon motion by a party or by the person from whom discovery is sought" and "for good cause shown," a district court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"); Friends of the Earth v. U.S. Dep't of Interior, 236 F.R.D. 39, 41 (D.D.C. 2006) ("To show good cause for entry of a protective order, the movant

must articulate specific facts to support its request and cannot rely on speculative or conclusory statements.") (internal citations omitted).

To permit Red Unit discovery to continue as plaintiffs seek would be a *de facto* overruling of Judge Sullivan's orders rejecting plaintiffs' prior efforts to expand the scope of this case beyond Rider to the Red Unit. The discovery should be prohibited to avoid circumvention of the numerous orders the Court has issued and to protect FEI from the undue prejudice and burden such an expansion would cause.

Plaintiffs' attempt to broaden discovery by analogizing to employment discrimination and retaliation cases, even assuming such an analogy applies to this ESA citizen suit,[5] which it does not, is of no moment. Evidence of other acts of discrimination or retaliation are only discoverable if relevant to the plaintiff's allegations: "other claims of discrimination against a defendant are discoverable if limited to the same form of discrimination claimed by plaintiff, ***if limited to the same department or agency where plaintiff worked***, and if limited to a reasonable time before and after the discrimination complained of." Mitchell v. Nat'l R.R. Passenger Corp., 208 F.R.D. 455, 456 (D.D.C. 2002) (Facciola, J.) (emphasis added); see also Pleasants v. Allbaugh, 208 F.R.D. 7 (D.D.C. 2002) (Facciola, J.) (in employment discrimination cases, "courts remain concerned about fishing expeditions, discovery abuse, and inordinate expenses involved in overbroad and far-ranging discovery requests and ***have therefore limited discovery to the issues involved in the particular case***.") (internal citations omitted and emphasis added).

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[5] Plaintiffs' employment discrimination and retaliation analogy incorrectly assumes that motive and intent are elements of their claims, which they are not. See Willingham v. Ashcroft, 226 F.R.D. 57, 61 (D.D.C. 2005) (Facciola, J.) ("prior acts of discrimination or retaliation are relevant to establish motive and intent"). As previously argued to the Court, motive and intent are irrelevant under the ESA's citizen suit provision. See 16. U.S.C. § 1540(g)(1)(A) (no mens rea specified for citizen suits); Reply in Support of Def.'s Cross Motion to Enforce Prior Court Orders at 5 (12/8/06) (Docket # 118) ("The ESA contains no intent or motive element – either a defendant engaged in certain conduct or it did not, and either that conduct constitutes a taking or it does not. The defendant's intent is not part of any burden of proof or element of any claim under the ESA."). Therefore, plaintiffs should not be permitted to conduct Red Unit discovery on this basis.

Just as evidence of discrimination in one department, division, or office of a company is irrelevant to whether discrimination occurred in another, Red Unit evidence regarding elephants excluded from this case is irrelevant to the treatment of the elephants on an entirely different traveling unit, *i.e.* the Blue Unit. See Glenn v. Williams, 209 F.R.D. 279, 281 (D.D.C. 2002) (Facciola, J.) ("discovery in Title VII actions may be appropriately limited to employment units, departments, and sections in which there are employees who are similarly situated to the plaintiff"); Pleasants, 208 F.R.D. at 15 (discovery limited to particular division(s) in which plaintiff worked); White v. U.S. Catholic Conference, No. 97-1253, 1998 U.S. Dist. LEXIS 11832, at *15 (D.D.C. May 22, 1998) (Facciola, J.) (discovery limited to office in which plaintiff worked). Further, as previously argued and recognized by Judge Sullivan, the Red Unit involves different personnel and different elephants than the Blue Unit, which again, would make such evidence irrelevant in the employment discrimination and retaliation context because it involves different "decision makers," or in this case, different caregivers. See Willingham, 226 F.R.D. at 61 ("discovery in the ordinary course should be restricted to the acts of the persons claimed to have discriminated or retaliated against plaintiff") (Facciola, J.); Marshall v. District of Columbia Water & Sewage Auth., 214 F.R.D. 23, 26 (D.D.C. 2003) (Facciola, J.) ("[Plaintiff's] request sweeps too broadly because it potentially involves complaints that have nothing to do with plaintiff's department or the persons he accuses of discriminatory conduct."); Pleasants, 208 F.R.D. at 9 ("discovery should be reasonably related to the circumstances involved in the alleged discrimination … and the individuals who are allegedly involved in that conduct") (internal citations omitted). Therefore, even if plaintiffs' employment discrimination and retaliation

analogy is applicable to this case, which it is not, the Court should terminate all discovery related to the Red Unit because it is irrelevant to issues as narrowed by Judge Sullivan.[6]

Moreover, narrowly tailored discovery is particularly warranted in this case because the only remedy available under the ESA citizen suit provision is injunctive relief. See 16 U.S.C. § 1540(g)(1)(A) ("any person may commence a civil suit ... to enjoin any person"); Califano v. Yamasaki, 442 U.S. 682 (1979) (an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs"). Judge Sullivan's ruling that Rider's alleged injury-in-fact is limited to the six Pre-Act elephants to which he alleged an emotional attachment necessarily limited the scope of any injunctive relief to the same six elephants. See Lewis v. Casey, 518 U.S. 343, 357 (1996) (***"The [injunctive] remedy must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established"***) (emphasis added).[7] Because Red Unit elephants cannot be subject to any injunctive relief ordered by the Court, discovery should be limited accordingly.

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[6] Moreover, the Court's recent opinions make clear that this case is not analogous to a pattern or practice class action. Rider does not have standing to bring a "class action" lawsuit challenging FEI's treatment of all of its elephants and discovery must be tailored in accordance with the scope of the case. Cf. Willingham, 226 F.R.D. at 61 ("This is not a national class action in which all the African Americans who make up a national class are claiming a national pattern or practice and therefore legitimately inquiring as to how all African Americans are disciplined compared to their white or Hispanic colleagues. It is an individual action where plaintiff is obliged to prove that she was the victim of racial discrimination or retaliation. How superiors disciplined other people anywhere in the country in the DOJ or the DEA for the 15-year period plaintiff demands cannot possibly make any more likely that the persons who disciplined her were motivated by a discriminatory or retaliatory animus.").

Further, because motive and intent are not elements of plaintiffs' claim, see supra n. 5, "pattern or practice" evidence is not applicable. Cf. Williams v. Johanns, 245 F.R.D. 10 (D.D.C. 2007) (Facciola, J.) (evidence of pattern or practice discoverable in individual discrimination case because it may be used to demonstrate motive and intent).

[7] In Lewis, the Supreme Court further explained: ***"But standing is not dispensed in gross***. If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the court for review. That is of course not the law. As we have said, ***'nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.'"*** Lewis, 518 U.S. at 358 n. 6 (quoting Blum v. Yaretsky, 457 U.S. 991, 999 (1982)) (emphases added).

III. REQUEST FOR RELIEF

In accordance with the above orders and Fed. R. Civ. P. 26(c), FEI requests that the Court enter an order immediately prohibiting any and all discovery related to the claims made by Ms. Hundley, Robert Tom, Jr., and Margaret Tom. These issues are not related to and do not affect any of the six elephants remaining in the case. Any such discovery would not, and could not, be reasonably calculated to lead to the discovery of admissible evidence. Judge Sullivan ruled that FEI should not be put to this burden and expense. Yet because plaintiffs continue to insist that this discovery should be permitted and that these witnesses should testify at trial, FEI has had to direct its time and energy away from the issues in this case – whether a taking has occurred for the six elephants left – and prepare to depose Ms. Hundley, the Toms and Mr. Houcke.

FEI has subpoenaed Ms. Hundley and the Toms for their depositions on December 16, 17, and 18, 2007. It will prepare papers necessary to the process for deposing Mr. Houcke in France. Because of the urgency of this matter, FEI requests a ruling immediately so it may focus its attention to the six elephants that remain in controversy in this case. A proposed form of order is attached.

Dated this 30th day of November, 2007.

Respectfully submitted,

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[PROPOSED] ORDER

Upon consideration of the Memorandum of Points and Authorities by Defendant Feld Entertainment, Inc. Regarding the Scope of Further Discovery in This Case, the plaintiffs' memorandum, and for good cause shown, it is this ________ day of December, 2007,

ORDERED that all discovery regarding the allegations made by Archele Hundley, Robert Tom, Jr. and Margaret Tom is TERMINATED; and it is further

ORDERED that Archele Hundley, Robert Tom, Jr. and Margaret Tom are stricken from plaintiffs' witness list disclosures regarding persons with information relevant to this case.

____
MAGISTRATE JUDGE FACCIOLA