

1992 WL 80527

Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern
Division.

ALLIANCE TO END REPRESSION, et al.,
Plaintiffs,
Chicago Cispes, Petitioners,
v.

CITY OF CHICAGO, et al., Defendants,
Federal Bureau of Investigation, Respondent.

Nos. 74 C 3268, 75 C 3295. | April 9, 1992.

Opinion

MEMORANDUM DECISION

JOAN HUMPHREY LEFKOW, Executive Magistrate
Judge:

*1 This ruling concerns petitioners' motion to permit supplemental discovery. The motion seeks discovery from respondent, Federal Bureau of Investigation (FBI), concerning interviews admittedly conducted by FBI of "Arab-Americans" during the time period surrounding the Persian Gulf War in early 1991. Petitioners assert, based on reports published in the *Congressional Record* and attached to petitioners' supporting memorandum, that FBI conducted interviews of individuals who were not suspected of criminal activity; rather, FBI selected individuals to interview based on their ancestry or national origin. The entries in the *Congressional Record* reported that the Arab-Americans interviewed were asked questions about their political beliefs. FBI vigorously opposes the motion for additional discovery.

This is the second occasion on which petitioners have sought this discovery. In April, 1991, while a ruling on the magistrate judge's report and recommendation concerning cross motions for summary judgment was pending, petitioners moved before Judge Williams to allow the discovery as further evidence that the controversy was not moot as FBI then contended. The district judge denied the motion with leave to reinstate after she had ruled on the objections. On October 2, 1991, the court ruled in favor of petitioners that the controversy was not moot.

Despite the favorable ruling, petitioners renewed their discovery motion, this time casting the need for discovery in terms of its relevance to open issues concerning relief,

namely whether additional training for FBI agents and employees would improve future compliance with the consent decree in this case. Petitioners argue that it has become clear as a result of a settlement conference with the court, that the parties are unable to settle the training issue. They represent that plaintiff ACLU advised the court at the settlement conference that it was important to discover whether the FBI had recently engaged in an intrusive, politically overbroad investigation in order to determine whether the FBI's training, which had changed after the 1988 CISPE investigation, was now adequate.

FBI makes several arguments in opposition. First, FBI suggests that the magistrate judge cannot entertain the motion because it is brought under Rule 72(b) of the Federal Rules of Civil Procedure. FBI asserts, "That Rule does not authorize discovery after a district court rules on objections to the report and recommendation of a Magistrate Judge on a dispositive matter." FBI seems to ignore the fact that the district judge has ruled on the objections and recommitted matters yet to be resolved—the issues of relief and discovery necessary for resolution of issues of relief—to the magistrate judge, expressly including the pending motion for supplemental discovery. Rule 72(b) permits the district judge to "recommit the matter to the magistrate [judge] with instructions." Moreover, 28 U.S.C § 636(b) specifies the matters a judge may refer to a magistrate judge and broadly includes "such additional duties as are not inconsistent with the Constitution and laws of the United States." *Id.* at subsection (b)(3). Inasmuch as FBI makes no argument that the order of referral violates § 636(b)(3), its argument is overruled.

*2 To the extent the argument is intended more simply to mean that there can be no discovery after a ruling on summary judgment, this argument lacks any basis in the rules or case law. Rule 56(d) explicitly permits the court in a case not fully adjudicated on a motion for summary judgment to "[direct] such further proceedings in the action as are just." Nor can FBI's argument that petitioners waived discovery by not including it in their objections to the report and recommendation be sustained. Although a number of comments could be made about this argument, the one most to the point is that Judge Williams has already deemed additional discovery appropriate as reflected in her statement in her memorandum opinion of October 2, 1991, page 29,

As recommended by the Magistrate Judge, the court will reopen discovery for the limited purpose of exploring what training regarding compliance with the requirements of the Consent Decree the FBI now provides, and what additional or different training might better assure future compliance. The court will then determine whether an order for notification and training is appropriate.

Next, FBI argues that the consent decree, paragraph 5 of the Agreement, permits discovery only on a verified petition showing reasonable grounds to believe that a violation of the decree has occurred or is occurring. Because no attempt to file such a petition has been made, FBI believes no discovery can be authorized. Turning from procedure to substance, FBI lastly argues that the pending petition concerns members of CISPES, who have no demonstrated connection with FBI's interest in Arab-Americans, and thus the discovery can have no bearing on whether the petitioners here have any basis to fear future investigation.

The proper focus here is not on the terms of the Agreement or the connection between the discovery and the CISPES petitioners but whether the as yet unspecified discovery concerning the Arab-American interviews is relevant in Rule 26 terms to whether additional or different training is needed to improve FBI's compliance with the consent decree. Petitioners' theory of relevance derives from FBI's position on the summary judgment motion that new training procedures put in place after the CISPES investigation eliminated any danger of recurrence. The court did not reject that view but opened the issue for further exploration. The recurrence of violations after the implementation of new training procedures is relevant because it would tend to lead the

court to believe that the new procedures were not as effective as FBI had hoped. It is not appropriate to limit petitioners' discovery to evidence of recurrence precisely concerning CISPES members. The very notion of governmental investigation of political beliefs implies that investigations will follow the controversial issues of the day, not issues that have been resolved or are presently on the back burner. Discovery confined to a recurrence of an investigation involving CISPES activists would likely produce nothing since all will presume that FBI will obey the rulings of the court and not engage in such activity in the future. The area of discovery sought on the motion is relevant to whether the FBI has in place effective training to prevent future violations of the decree. Therefore, some discovery will be allowed.

***3** Petitioners are given 30 days to propound discovery. Objections to particular requests may be timely asserted as appropriate under the rules governing discovery. Within the next 30 days, the parties are directed to meet together in the spirit of local Rule 12(k) in an effort to outline a scope of discovery adequate to the need but nevertheless limited to the training issue remaining to be resolved.