

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

REGINALD G. MOORE, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Civ. No. 00-953 (RWR/DAR)
)	
JANET NAPOLITANO,)	
SECRETARY, U.S.)	
DEPARTMENT OF HOMELAND)	
SECURITY.)	
)	
Defendant.)	

The following ORDER will govern the contacts with putative class members initiated by the parties’ counsel until Plaintiffs’ October 27, 2011 Motion for Class Certification is ruled upon by this Court. This Order does not govern or preclude contact between counsel and putative class members concerning the Moore litigation when the putative class member initiates contact regarding the Moore litigation.

It is ORDERED that Defendant’s attorneys may initiate ex parte contacts with putative class members about this litigation and the facts underlying this litigation subject to the following conditions:

- (1) An Assistant United States Attorney (“AUSA”) who has entered an appearance in this case must be the individual to engage in communications with putative class members, except that Eacata Gregory of the Office of Chief Counsel of the Secret Service may be the individual to make the initial contact with putative class members as described in paragraphs (2)-(4), below. Together, Assistant United States Attorneys (“AUSAs”) who have entered appearances in this case and Ms. Gregory are referred to in this Order as “Defense Counsel.”¹ Recognizing that Ms. Gregory

¹ “Defense Counsel” refers only to an Assistant United States Attorney (“AUSA”) who has entered an appearance in this case and counsel Eacata Gregory of the Office of Chief Counsel of the Secret Service; “Defendant’s attorneys” refers generally to all attorneys for Defendant.

works in the building with some putative class members, Ms. Gregory may initiate no communications that relate to the substance of the Moore litigation or to the initial contact or otherwise seek to encourage a response to the written communication described in (4) below, without following the process provided in (2)-(4) below.

- (2) If Defense Counsel has access to the e-mail address of the putative class member Defense Counsel seeks to contact (including but not limited to all putative class members that are current employees), the initial contact will be made via e-mail;
- (3) If Defense Counsel does not have access to an e-mail address for the putative class member Defense Counsel seeks to contact, the initial contact will be made by telephone only to identify the Defense Counsel; to indicate that the Defense Counsel represents the Secret Service in the Moore, et al. v. Napolitano litigation; to state that the Defense Counsel would like to talk to the person contacted concerning the case, but that before any further discussions can occur the Defense Counsel is required by this Order to communicate certain information to the contacted person in writing; and to obtain an e-mail address or, if the contacted person has no e-mail address or does not wish to disclose it, to request a postal address;
- (4) Once an e-mail or postal address for the putative class member has been obtained, the putative class member will be sent the following information:
 - a. The United States Attorney's Office and the Office of Chief Counsel of the Secret Service represent the interests of the Defendant, the Secret Service, in the Moore, et al. v. Napolitano litigation.
 - b. You are a member of the putative plaintiff class in the Moore litigation. You do not need to have done anything up to this point, or do anything now, to be a class member. You do not need to make any decisions now regarding participation in this litigation.
 - c. The United States Attorney's Office and the Office of Chief Counsel of the Secret Service's interests are adverse to putative class members in the Moore litigation.
 - d. You have no obligation to respond to or provide information to the United States Attorney's Office or the Office of Chief Counsel of the Secret Service with respect to the Moore case. This includes, but is not limited to, your involvement with the Moore case or experiences related to the allegations of discrimination set forth in the Moore litigation. This is true no matter what position you have held in the federal government.
 - e. You may talk to a lawyer of your choosing or the attorney for the Plaintiffs in the Moore case before deciding whether to respond or provide information to the United States Attorney's Office or the Office of Chief Counsel of the Secret Service. If you would like to talk to the attorney for the Moore

Plaintiffs, you may contact attorney Jennifer Klar at (202) 728-1888, ext. 111 (office) or (703) 597-8600 (cell).

- f. The United States Attorney's Office and the Office of Chief Counsel of the Secret Service are taking the position that a class should not be certified.
- g. The information requested from you may be used by the United States Attorney's Office and the Office of Chief Counsel of the Secret Service to oppose class certification and/or the Plaintiffs' claims.

(5) Defendant's attorneys are prohibited from requesting or soliciting waivers, releases, or commitments to opt out of the litigation.

This Order does not preclude contacts with putative class members in the ordinary course of business or litigation other than the Moore litigation.

The only exceptions to paragraphs (1)-(5) above are laid out below, with alternative requirements.

Defendant's attorneys may ask putative class members to provide materials related to the Moore litigation if they would be asked to do so as part of the regular responsibilities and duties associated with their position, or for purposes related to the preservation or storage of documents, or similar matters provided that such matters are not directly related to the defense of the Moore litigation.

Defendant's attorneys will provide the notification in 4(b) to all putative class members who serve in the Secret Service as Deputy Assistant Directors or above (Assistant Directors, the Deputy Director, and the Director) and notify them that they have the right to recuse themselves from discussions of the Moore case; as putative class members assume these positions, they will be provided this information. After the 4(b) notice and opportunity for recusal is given, Defense Counsel, or the Chief Counsel, may brief putative class members who serve in the Secret Service as Deputy Assistant Directors or above regarding the substance of the Moore litigation.

However, if Defendant's attorneys seek to initiate communications with these putative class

members regarding their individual experiences (including as managers) for the purpose of defending the Moore case, Defendant's attorneys must follow the procedures set forth in (1)-(5) above.

If the Secret Service seeks to ask a putative class member questions in the context of an investigation by the Secret Service (such as by the Secret Service Office of Professional Responsibility/Inspection Division) arising from or directly related to the Moore litigation, the putative class member, at the time the interview is requested, will be provided the following information in writing: (1) the content of (4)(a-c) & (f-g) and (2) the following modification of 4(e): "You may talk to a lawyer of your choosing or the attorney for the Plaintiffs in the Moore case before deciding how to respond to this interview request. You are also entitled to have an attorney present at your interview, should you choose to do so. If you would like to talk to the attorney for the Moore Plaintiffs, you may contact attorney Jennifer Klar at (202) 728-1888, ext. 111 (office) or (703) 597-8600 (cell)." Additionally, when such an investigation is not criminal in nature, putative class members who are current employees will also be provided with an administrative warning that notifies the putative class member that failure to cooperate in the investigation could result in disciplinary actions.²

In addition, if the United States Attorney's Office, Civil Division, or the Secret Service Office of the Chief Counsel is negotiating an agreement relating to an employment claim of a putative class member and that negotiation includes a waiver or release that either could be

² The parties were unable to reach full agreement on the scope of this Order with respect to investigations by the Secret Service (such as by the Secret Service Office of Professional Responsibility/Inspection Division) and the Department of Homeland Security (such as by the Office of Inspector General). For this reason, Plaintiffs specifically note their reservation of the right to move *in limine* to exclude any statements made by or information received from class members in such proceedings, including but not limited to instances where cooperation is required by current employees and where the information in paragraphs 4(a-c), (e) (as modified with respect to investigations), and (f-g) are not given.

interpreted to affect the putative class member's claims in the Moore litigation or purports to exempt from the waiver or release the putative class member's claims in the Moore litigation, regardless of which party initiated the contact, the following information must be provided to the putative class member or his or her representative in writing: "You are a member of the putative plaintiff class in the Moore litigation. You do not need to have done anything up to this point, or do anything now, to be a class member. The enclosed waiver may affect your claims in the Moore litigation. You may talk to the attorney for the Plaintiffs in the Moore case regarding any affect on your claims in the Moore litigation before signing. The attorney for the Plaintiffs is Jennifer Klar, who may be contacted at (202) 728-1888, ext. 111 (office) or (703) 597-8600 (cell)." Failure to provide this information to the putative class member or his or her representative will result in any executed waiver or release being considered void for the purposes of the Moore litigation.

Reciprocally, it is ORDERED that Plaintiffs' counsel may initiate ex parte contacts with putative class members about this litigation and the facts underlying this litigation, subject to the following conditions:

- (1) Plaintiffs' counsel of record must be the individual to contact the putative class member;
- (2) If Plaintiffs' counsel has access to an e-mail address for the putative class member he/she seeks to contact, the initial contact will be made via e-mail;
- (3) If Plaintiffs' counsel does not have access to an e-mail address for the putative class member he/she seeks to contact, the initial contact will be made by telephone only to identify Plaintiffs' counsel; to indicate that he/she represents the Plaintiffs in the Moore, et al. v. Napolitano case; to state that he/she would like to talk to the person contacted concerning the case but that before any further discussion can occur Plaintiffs' counsel is required by this Order to communicate certain information to the contacted person in writing; and to obtain an e-mail address, or, if the contacted person has no e-mail address or does not wish to disclose it, to request a postal address;

- (4) Once Plaintiffs' counsel has obtained an e-mail or postal address for the putative class member, Plaintiffs' counsel will send to the putative class member the following information:
- a. Plaintiffs' counsel represents the interests of the Plaintiffs and a proposed class of African-American Secret Service Special Agents in the Moore, et al. v. Napolitano litigation.
 - b. You are a member of the proposed plaintiff class in the Moore litigation. You do not need to have done anything up to this point, or do anything now, to be a class member. You do not need to make any decisions now regarding participation in this litigation.
 - c. Plaintiffs' counsel's interests are adverse to the Secret Service in the Moore litigation.
 - d. You have no obligation to respond to or provide information to Plaintiffs' counsel.
 - e. You may talk to a lawyer of your choosing or the attorney for the Secret Service in the Moore case before deciding whether to respond or provide information to Plaintiffs' counsel. If you would like to talk to an attorney for the Secret Service, you may contact attorney Marina Braswell at (202) 514-7226, or Eacata Gregory of the Secret Service Office of Chief Counsel at (202) 406-5771.
 - f. Plaintiffs' counsel are taking the position that a class should be certified.
 - g. The information requested from you may be used by the Plaintiffs' counsel to support class certification or the Plaintiffs' claims.
- (5) Plaintiffs' counsel are prohibited from requesting or soliciting commitments not to opt-out of the litigation.

This Order is not intended to preclude Plaintiffs' Counsel from talking with Named Plaintiffs about this litigation. This Order does not govern Plaintiffs' Counsel's communications with putative class members regarding any other EEO complaint or litigation, including regarding tolling agreements of EEO complaints during the pendency of the Moore litigation.

SO ORDERED on this 25th day of January, 2013.


United States Magistrate Judge

Deborah A. Robinson
United States Magistrate Judge