

United States District Court, D. Connecticut.

Juan BARRERA, José Cabrera Daniel Chavez, José Duma, José Llibisupa, Isaac Maldonado, Edgar Redrovan, Nicholas Segundo Sanchez, Juan Carlos Simbaña, and Danilo Brito Vargas, Plaintiffs,

v.

Mark BOUGHTON, Alan Baker, José Agosto, Richard Dejesus, James A. Fisher, James Lalli, Craig Martin, Joseph Norkus, John Does, City of Danbury, James Brown, Richard McCaffrey, Ronald Preble, John Does and the United States, Defendants.

No. 3:07-cv-01436-RNC.

May 8, 2009.

Plaintiffs' Memorandum of Law in Support of Motion to Compel Discovery

Clifford Chance US LLP, Joel M. Cohen (phv03297), [Elizabeth Goergen](#) (phv03300), Siham Nurhusein (phv03298), [Lawrence Bluestone](#) (phv03296), 31 West 52nd Street, New York, New York 10019, Telephone: (212) 878-8000, Fax: (212) 878-8375; Jerome N. Frank Legal Services Organization, Yale Law School, [Christopher N. Lasch](#), Supervising Attorney, (ct27139), [Michael J. Wishnie](#), Supervising Attorney, (ct27221), [Ramzi Kassem](#), Supervising Attorney, (ct27537), Ari Holtzblatt, Law Student Intern, Heide Irvani, Law Student Intern, Elizabeth Simpson, Law Student Intern, Rebecca Heller, Law Student Intern, Dror Ladin, Law Student Intern, 127 Wall Street, New Haven, CT 06511, Telephone: (203) 432-4800, Facsimile: (203) 432-1426, michael.wishnie@yale.edu, christopher.lasch @yale.edu, ramzi.kassem@yale.edu, Counsel for Plaintiffs.

May 8, 2009

Day Laborer Plaintiffs^[FN1] move this court pursuant to [Rules 26\(a\)](#) and [37\(a\) of the Federal Rules of Civil Procedure](#), and Local [Rule 37\(b\)](#) for an Order compelling Federal Defendants^[FN2] to “[p]roduce all documents relating to the employment of all officers and/or employees of the United States of America, the Department of Homeland Security, and/or Immigrations and Customs Enforcement that were present during the investigation, questioning, arrest and/or detention of the Danbury 11^[FN3] including but not limited to each person's personnel file and documents relating to overtime, disciplinary actions, performance reviews, hiring, promotions, demotions, transfers, and terminations” [hereinafter “personnel records”] as requested by Day Laborer Plaintiffs in Plaintiffs' Request for Production of Documents dated December 24, 2008. Federal Defendants refused to produce the files and continue to fail to fulfill their discovery obligations despite repeated requests for responses by Day Laborer Plaintiffs.

FN1. The Day Laborer Plaintiffs are Juan Barrera, José Cabrera, Daniel Chavez, José Duma, José Llibisupa, Isaac Maldonado, Edgar Redrovan, Nicholas Segunda Sanchez, and Juan Carlos Simbaña.

FN2. Federal Defendants are James Brown, Richard McCaffrey, Ronald Preble, John Does, and the United States of America.

FN3. The Danbury 11 are Day Laborer Plaintiffs and Manuel Morocho Alvaraein and Jose Luis Marca Fernandez.

The Federal Defendants' personnel records are relevant, reasonably calculated to lead to the discovery of admissible evidence, and clearly bear on issues involved in this case. The production of these documents is relevant to proving the various claims that Day Laborer Plaintiffs have made, in particular ICE Defendants' willful violation of Day Laborer Plaintiffs' Constitutional rights and the liability of ICE Defendants' superiors for failure to properly supervise and train them. This Court should order that the requested documents be produced.

Facts and Proceedings

On September 19, 2006, ICE Defendants James Brown, Richard McCaffrey, and Ronald Preble, acting together with the Danbury Defendants,^[FN4] arrested Day Laborer Plaintiffs as part of an undercover sting operation designed to target day laborers in the area of Kennedy Park in Danbury, Connecticut. Amended Complaint at ¶ 61, [Dkt. No. 21] [hereinafter “Am. Comp.”]. Contrary to normal practice, the ICE Defendants participated in the operation even though they lacked any specific identifying information about any individuals targeted that day who might have violated federal immigration law. *See* Ex. B. (Transcript of Deposition of James Brown on February 20, 2009 at 104). The ICE Defendants participated in the arrest of Day Laborer Plaintiffs although no Day Laborer Plaintiff had an outstanding deportation or removal order, and no immigration warrants had been issued for any of them before their arrests on September 19, 2006. Am. Comp at ¶ 99. Day Laborer Plaintiffs were forcibly restrained and subsequently imprisoned by the ICE Defendants, and were detained for periods ranging from fourteen to thirty-four days. The United States did not bring criminal charges against the Day Laborer Plaintiffs, but placed them in civil removal proceedings based solely on statements obtained from the Day Laborer Plaintiffs themselves on the day of the arrest. *Id.* at ¶¶ 104, 106. Day Laborer Plaintiffs denied the allegations against them in the removal proceeding and moved to suppress the United States' evidence before the Immigration Judge; their motions were denied and Day Laborer Plaintiffs were subsequently either ordered removed or granted voluntary departure. *See* Ex. C. (Decision of Immigration Judge, Jan. 30, 2008). All of the Day Laborer Plaintiffs have appealed these rulings to the Board of Immigration Appeals. *See* Ex. D (Notice of Appeal of Decision of Immigration Judge, Feb. 28, 2008).

FN4. The “Danbury Defendants” are Mark Boughton, Alan Baker, José Agosto, Richard DeJesus, James A. Fisher, James Lalli, Craig Martin, Joseph Norkus, John Does, and the City of Danbury.

Day Laborer Plaintiffs allege that their arrests and subsequent detention were unlawful because the Federal Defendants seized, detained, and arrested them without probable cause and/or reasonable suspicion on the basis of racial and ethnic stereotype and perceived national origin. *Id.* at ¶ 244. Day Laborer Plaintiffs brought the current suit to vindicate their constitutional and civil rights, alleging claims against the ICE Defendants under the First, Fourth, Fifth and Fourteenth Amendments of the Constitution. *See* Am. Comp.

Federal Defendants moved to dismiss all claims against them on February 1, 2008. [Dkt. No. 51]. On the same date, the Individual Danbury Defendants^[FN5] brought a motion seeking to dismiss in part Plaintiffs' claims against them, and Danbury Defendants sought to disqualify Plaintiffs' counsel. [Dkts. No. 48, 50]. On July 3, 2008, Magistrate Judge Martinez denied Danbury Defendants' Motions to Disqualify Counsel. [Dkt. No. 95], and Defendants did not appeal. On September 25, 2008, Federal Defendants moved to stay discovery. [Dkt. No. 101]. On September 26, 2008, Individual Danbury Defendants moved to stay discovery. [Dkt. No. 102]. On October 20, 2008, Defendant City of Danbury also moved to stay discovery in this action. [Dkt. No. 104]. On December 10, 2008, Magistrate Judge Martinez denied all motions to stay discovery. [Dkt. No. 121]. Chief Judge Chatigny denied Federal Defendants' Motion to Dismiss in full and Danbury Defendants' Motion to Dismiss except as to one count on March 10, 2009. [Dkt. No. 129].

FN5. The “Individual Danbury Defendants” are Mark Boughton, Alan Baker, José Agosto, Richard DeJesus, James A. Fisher, James Lalli, Craig Martin, Joseph Norkus, and John Does.

Discovery Request in Dispute

Plaintiffs propounded their first Request for Production on December 24, 2009 and it was received by Federal Defendants on December 29, 2008. *See* Ex. E (Request for Production). In Item Twelve of this request, Plaintiffs requested that Federal Defendants “[p]roduce all documents relating to the employment of all officers and/or employees of the United States of America, the Department of Homeland Security, and/or Immigrations and Customs Enforcement that were present during the investigation, questioning, arrest and/or detention of the Danbury 11 including but not limited to each person's personnel file and documents relating to overtime, disciplinary actions, performance

reviews, hiring, promotions, demotions, transfers, and terminations.” [hereinafter “RFP #12”].

Federal Defendants requested, and Plaintiffs consented to, several extensions such that a response was ultimately due on April 8, 2009 and was received by Plaintiffs on that date. *See* Ex. F. (Federal Defendants' Response to Plaintiffs' Requests for Production). Federal Defendants objected to RFP #12 only on relevancy grounds and did not list any responsive documents in their privilege log. *Id.*

Plaintiffs conferred with Federal Defendants on April 23, 2009 with regard to Federal Defendants' responses and objections to Plaintiffs' First Request for Production. During that conferral, Federal Defendants explained that they did not believe the personnel records requested were relevant to the claims at issue in this action, and that they would only produce documents responsive to this request pursuant to a court order. Defendants confirmed that they were asserting no privilege with regard to the files. Plaintiffs now file this motion for an order compelling discovery within thirty days of the due date of Federal Defendants' response, as required by Judge Martinez's Scheduling Order. [Dkt. No. 124].

Legal Argument

I. Plaintiffs are Entitled to Broad Discovery of Information Relevant to the Complaint

“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense...the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” [Fed. R. Civ. P. 26\(b\)\(1\)](#).

Courts have construed the term “relevance” broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case. [Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 \(1978\)](#). In a leading case, Judge Weinstein elaborated that “except for reasonable redactions of names and addresses to protect privacy or informer sources, plaintiffs in federal civil rights actions are presumptively entitled to recollections as well as documents on prior complaints and police history.” [King v. Conde, 121 F.R.D. 180 \(E.D.N.Y. 1988\)](#).

The general policy allowing broad discovery extends to personnel records. [McKenna v. Incorporated Village of North, 2007 WL 2071603 at *7 \(E.D.N.Y. 2007\)](#) (attached as Ex. G.). There, the court held that plaintiffs are presumptively entitled to discovery of personnel documents in a civil rights action against police officers. *Id.* If defendants “mak[e] a ‘substantial threshold showing’ that there are specific harms likely to accrue from disclosure of the specific materials,” a court must then balance the interests favoring and opposing confidentiality. *Id.* *See also* [MacNamara v. City of New York, 249 F.R.D. 70 at *80 \(S.D.N.Y. 2008\)](#). Citing the test established in *King*, the court stated that the police must specify which documents are privileged and the reasons for nondisclosure. *Id.* at *8.

Once the police have met the threshold burden, the court must balance their interest in confidentiality against factors favoring disclosure, such as the relevance to the plaintiff's case, the importance to and strength of the plaintiff's case, and the importance to the public interest. *Id.* at *8. *See also* [MacNamara, 249 F.R.D. at *80](#). Discussing the balancing process, Judge Sullivan stated that, “in light of the great weight of the policy in favor of discovery in civil rights actions and the normal presumption in favor of broad discovery, defendants' case for nondisclosure or restricted disclosure must be extremely persuasive.” *Id.* (citing [King, 121 F.R.D. at 195](#)).

In this case, Federal Defendants have not claimed that the personnel records are protected by any privilege, nor has it articulated any particular harm that would result from their disclosure. *See* Ex. F. Therefore, the issue before the court is whether the personnel files contain information that is relevant to Day Laborer Plaintiffs' claims, Federal Defendants' defenses, or to the subject matter involved in this action, and is reasonably calculated to lead to the discovery of

admissible evidence, and the court need not consider issues of confidentiality.^[FN6] See [McKenna, 2007 WL 2071603 at *9](#) (holding that because the police failed to establish any particular harm that would accrue if the records were disclosed, and made only a “generalized objection under New York Civil Rights Law” that the records were confidential, the plaintiffs were entitled to discover relevant information including any records of complaints of professional misconduct against the defendant police officers and their personnel records). See also [Barrett v. City of New York, 237 F.R.D. 39, 41-42 \(E.D.N.Y. 2006\)](#) (holding that all relevant materials which are reasonably calculated to lead to the discovery of admissible evidence should be discoverable.)

FN6. The Plaintiffs note that information of a personal nature included in the personnel files that is not relevant may be redacted, such as social security numbers, home addresses, telephone numbers, and medical information, prior to disclosure.

II. The Personnel Files are Relevant to Material Issues in this Case

The Federal Defendants' personnel records are relevant, reasonably calculated to lead to the discovery of admissible evidence, and clearly bear on issues involved in this case. The production of these documents is relevant to proving the various claims that Day Laborer Plaintiffs have made, in particular ICE Defendants' willful violation of Day Laborer Plaintiffs' Constitutional rights and the liability of ICE Defendants' superiors for failure to properly supervise and train them.

The personnel records requested by Day Laborer Plaintiffs are reasonably expected to contain, inter alia, information regarding any prior misconduct of and complaints against the federal agents who participated in the arrest, detention, or investigation of Day Laborer Plaintiffs. Indications of prior misconduct are relevant to the ICE Defendants' motive, intent, knowledge, or absence of mistake or accident and would be admissible under [Fed. R. Evid. 404\(b\)](#). See *generally Session v. Rodriguez*, 2008 U.S. Dist. LEXIS 43761 (2008) (Martinez, M.J.) (holding that prior complaints in a defendant's disciplinary history were relevant if the conduct was similar) (Attached as Ex. H). Indications of prior misconduct are also relevant to establish that the supervisors of ICE Defendants and other federal employees responsible for Day Laborers' arrest and detention are liable for failing to properly train and supervise them.^[FN7] See [Hayut v. State Univ. of N.Y., 352 F.3d 733, 753 \(2d Cir. 2003\)](#) (elaborating the test for supervisory liability in the Second Circuit).

FN7. On or before May 29, 2009, see Dkt. No. 124, Plaintiffs will seek to join supervisory ICE officers as defendants in this action for their failure to train and supervise ICE Defendants and other federal employees responsible for Day Laborer Plaintiffs' arrest and detention. Plaintiffs raise the relevancy of the personnel records at issue in this motion to Plaintiffs' claims against the New ICE Supervisor Defendants now because the Court's Scheduling Order Regarding Case Management Plan requires Plaintiffs file a Motion to Compel Discovery within thirty days of Defendants' production or waive the ability to move the Court, and dealing with the related issues at the same time may serve the interests of judicial economy. [Dkt. No. 124].

The personnel records requested by Day Laborer Plaintiffs are relevant if they contain any indication that Federal Defendants have engaged in or been investigated for conduct similar to their conduct in the current case. In the present case, Federal Defendants unlawfully detained and imprisoned Day Laborer Plaintiffs. ICE Defendants arrested the Day Laborer Plaintiffs without probable cause and/or seized them without reasonable suspicion, intentionally targeted them based on race, ethnicity, and perceived national origin, and intentionally or negligently inflicted emotional distress on them, among other violations. Am. Compl. ¶¶ 244, 247, 267, 272. ICE Defendants arrested Day Laborer Plaintiffs as part of a sting operation that was not preceded by investigation into or knowledge of their immigration status. Am. Compl. ¶¶ 64, 67, 70, 71. ICE Defendants confiscated Day Laborer Plaintiffs cell phones and prevented them from calling an attorney. Am. Compl. ¶ 95. In violation of ICE regulations, Defendant McCaffrey served as the arresting officer and the examining officer for Day Laborer Plaintiffs. ¶¶ 114, 115. ICE Defendants instructed Day Laborer Plaintiffs to sign documents without translating those documents to Day Laborer Plaintiffs. Am. Compl. ¶ 120. While in custody in Massachusetts, an unknown law enforcement agent questioned Day Laborer Plaintiffs as potential

suspects or witnesses in a murder investigation but did not offer Day Laborer Plaintiffs access to counsel or inform them of their *Miranda* rights. Am. Compl. ¶ 120.

Personnel records of ICE Defendants and other federal employees responsible for Day-Laborer Plaintiffs' arrest and detention are relevant to the extent they establish a history of discriminatory law enforcement activities or disregard for constitutional protections. *See, e.g., Unger v. Cohen*, 125 F.R.D. 67 at *70 (S.D.N.Y. 1989); *Moore v. City of New York*, 2006 WL 1134146 (E.D.N.Y. 2006) (Attached as Ex. I.); *Wisniewski v. Clafflin*, 2007 WL 1120464 at *4 (E.D.N.Y. 2007) (ordering production of relevant complaints in discipline records of defendant officers for *in camera* review) (Attached as Ex. J.). Additionally, prior complaints against ICE Defendants and other federal employees responsible for Day-Laborer Plaintiffs' arrest and detention or incidents of misconduct might lead to the discovery of names of individuals who could produce admissible evidence. *See, e.g., Unger*, 125 F.R.D. at *70; *Moore*, 2006 WL at *70 (E.D.N.Y. 2006). Finally, allegations of dissimilar misconduct involving false statements are relevant to credibility. *See, e.g., Giles v. Coughlin*, 1998 U.S. Dist. LEXIS 236 at *9 (S.D.N.Y. 1998) (citing *Hynes v. Coughlin*, 79 F.3d 285, 293-94 (2d Cir. 1996)) (attached as Ex. K.).

Many decisions within the Second Circuit hold that personnel records of law enforcement officers who are defendants in a civil rights suit are subject to discovery. For instance, in a 2008 decision, Magistrate Judge Martinez considered whether a defendant police officer's disciplinary history is discoverable. *Session v. Rodriguez*, 2008 U.S. Dist. LEXIS 43761 (2008) (Attached as Ex. H.). In that civil rights action against the police, the court held that "police internal investigations files are discoverable when they involve allegations of similar conduct." *Id.* at *4.

In a Section 1983 action alleging a police officer used excessive force, Judge Barbara A. Lee concluded that personnel records and records pertaining to civilian complaints were relevant and should be produced in their entirety. *Unger v. Cohen*, 125 F.R.D. 67 at *70 (S.D.N.Y. 1989). The court held the officer's training records, evaluations and disciplinary records were relevant because the offending conduct occurred while the officer was on-duty. *Id.* The conduct of the officer in *Unger* is similar to the conduct at issue in this case, including allegations of arrest without probable cause and denial of the opportunity to telephone a lawyer. *See id.* The personnel records of the defendant ICE agents and other federal employees responsible for Day-Laborer Plaintiffs' arrest and detention are similarly relevant to their on-duty conduct. *See id.* at *68-69. *See also McKenna*, 2007 WL at *9 (granting motion to compel production of defendant police officers' personnel records and any records of complaints of professional misconduct against them without stating grounds for relevance).

The court in *Unger* also held that civilian complaints were relevant because they might contain names of other individuals whose rights had been violated by the officer, which in turn might lead to admissible evidence. *Id.* at *69. Similarly, in the instant case, any records of prior misconduct by the defendant ICE agents and other federal employees responsible for Day-Laborer Plaintiffs' arrest and detention might lead to evidence relating to intent, knowledge, absence of mistake or pattern. On that theory, Judge Richard Cardinale ordered production of employment records concerning acts of police misconduct, including acts that occurred after the incident, because they might be relevant to issues of intent, absence of mistake or pattern. *Moore v. City of New York*, 2006 WL 1134146 (E.D.N.Y. 2006).

Finally, the personnel files are relevant to personal supervisor liability claims Day Laborer Plaintiffs intend to pursue against supervisors of ICE Defendants and other federal employees responsible for Day-Laborer Plaintiffs' arrest and detention. *See supra* note 7. The information in the personnel files about employee evaluations, prior misconduct, or other evidence of disregard for proper procedure should be produced because it is relevant to the questions of whether the supervisors created a policy or custom allowing such misconduct, whether they were negligent in supervising their subordinates, and whether the supervisors failed to act on information that constitutional rights were being violated. *See Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 753 (2d Cir. 2003) (holding relevant issues as to supervisor liability to include, *inter alia*, whether the supervisor: (1) created a policy or custom under which the violation occurred, (2) was grossly negligent in supervising subordinates who committed the violation, or (3) was deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated). Other Second Circuit

courts in analogous cases have found the personnel records of one defendant to be relevant to supervisory claims against that defendant's supervisor. *See, e.g., Ferguson v. City of New York*, 1997 U.S. Dist. LEXIS 14198, at *3 (S.D.N.Y. 1997) (Attached as Ex. L.) (holding personnel records subject to discovery on claims of supervisory liability for negligent hiring and negligent retention). Similarly, information in the personnel files of the Federal Defendants in this action pertaining to training is relevant to determine what policies and customs the supervisors established regarding constitutional rights and working with local police departments.

Conclusion

The personnel files are highly relevant to the claims presented in this case. Thus, the documents should be discoverable under [Fed. R. Civ. P. 34\(a\)](#). This Court has broad discretion to compel discovery under [Fed. R. Civ. P. 37](#) and so Federal Defendants should be ordered to produce all portions of the personnel files that contain relevant information.

DATED: May 8, 2009

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