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United States District Court,
District of Columbia.

Reginald MOORE et al., Plaintiffs,
v.
Michael CHERTOFF, Defendant.

Civil Action No. 00-953 (RWR)(DAR). | Aug. 10, 2006.

Attorneys and Law Firms

Jennifer I. Klar, John Peter Relman, Relman & Associates, PLLC, Deborah L. Boardman, E. Desmond Hogan, Sarah M. Berger, Hogan & Hartson, L.L.P., Washington, DC, for Plaintiffs.

Marina Utgoff Braswell, U.S. Attorneys Office for the District of Columbia, Benton Gregory Peterson, Assistant United States Attorney, Civil Division, Washington, DC, for Defendant.

Opinion

MEMORANDUM ORDER

RICHARD W. ROBERTS, District Judge.

***1** Plaintiffs sued the United States Secret Service alleging a pattern and practice of racial discrimination in employment. They sought to depose Sheryl Michaelson, an attorney with a law firm that the Treasury Department had previously retained to conduct an independent review of its hiring, training, diversity and other areas in the aftermath of an event sponsored by Treasury agents called the “Good Ol’ Boys Round-up.” Michaelson directed the review. The Department of the Treasury moved to quash the subpoena, arguing that Michaelson’s deposition could be sought pursuant to only 31 C.F.R. § 1.11 (*“Touhy* regulations”), which requires that certain procedures, including seeking permission from agency counsel, be followed in order to obtain testimony of an employee or contractor of the Department of the Treasury. The magistrate judge denied the motion to quash finding that it had not been shown that the *Touhy* regulations applied to Michaelson. Plaintiffs subsequently took Michaelson’s deposition, during which the defendant inquired into Michaelson’s employment status with the Department of the Treasury during her time as director of the policy review. Based on Michaelson’s deposition testimony, the defendant moved for the magistrate judge to reconsider her finding that the *Touhy* regulations did not apply to Michaelson, and filed a motion in limine to prevent plaintiffs from using Michaelson’s testimony for any purpose. (*See* Def.’s Mot. [192] for Reconsideration and Mot. [194] in Limine.) The magistrate judge denied the motion to reconsider as moot and denied the motion in limine because the defendant provided no authority for precluding use of Michaelson’s testimony even if the *Touhy* regulations should have been, but were not, complied with. (*See* Magistrate Judge Order [264] of Dec. 12, 2004.) The defendant now seeks reconsideration of the magistrate judge’s order denying his motion for reconsideration and motion in limine.

Defendant’s motion will be denied. The magistrate judge’s decision to deny as moot defendant’s motion for reconsideration of the ruling finding that the *Touhy* regulations did not apply to Michaelson was not clearly erroneous. *See* LCvR 72.2(c). Any determination of whether the *Touhy* regulations applied to Michaelson for the purpose of determining the proper procedures to follow for taking her deposition became moot when plaintiffs took Michaelson’s deposition. In addition, the magistrate judge’s denial of defendant’s motion in limine was not contrary to law. *See id.* The defendant provided to the magistrate judge, and provides now, no authority to support excluding use of an agency employee’s testimony taken in violation of an agency’s *Touhy* regulations.[1] Moreover, the defendant does not assert that any testimony given by Michaelson was irrelevant to this case or unfairly prejudicial to the defendant. *Cf.* Fed.R.Evid. 402 & 403. Accordingly, it is hereby

1 Nor does the defendant argue or demonstrate that agency counsel would have prevented Michaelson from testifying or in any way limited her deposition testimony.

***2** ORDERED that defendant’s motion [269] for reconsideration be, and hereby is, DENIED.