

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,)	
)	
Plaintiffs,)	Civil Action No. 96-1285 (RCL)
)	
v.)	
)	
GALE A. NORTON, et al.,)	
)	
Defendants.)	

**MEMORANDUM OF THE UNITED STATES IN RESPONSE TO
PLAINTIFFS' MOTION THAT SECRETARY NORTON BE DEEMED TO HAVE
CONCEDED PLAINTIFFS' MOTION OF JANUARY 13, 2004 ASSERTING
VIOLATIONS OF COURT ORDERS**

On January 13, 2004, Plaintiffs moved for an order that Secretary Gale Norton and twelve non-party individuals show cause why they should not be held in civil and criminal contempt for alleged violations of the temporary restraining order entered June 27, 2003, the preliminary injunction issued July 28, 2003, and the Order of December 21, 1999. The temporary restraining order and the preliminary injunction addressed the security of the Department of the Interior's computer systems to protect against unauthorized access to Individual Indian Trust Data (IITD) through the internet, and the preliminary injunction required certifications for systems housing or providing access to IITD which were connected to the internet. The December 21, 1999 Order required Defendants to file quarterly reports, and Plaintiffs alleged that certain reports were inaccurate to the extent that the reports discussed security of the Department of the Interior's information technology systems.

On January 27, 2004, the United States filed a comprehensive response (the "Response") opposing Plaintiffs' motion and showing that the motion was utterly baseless. Plaintiffs have now filed a motion requesting that Secretary Norton be deemed to have conceded Plaintiffs' motion because Secretary Norton's personal attorney did not file a second, redundant memorandum also showing that Plaintiffs' motion was without merit. Plaintiffs' motion to default "Citizen Norton," and the companion motion to default eleven non-party individuals, has met the considerable challenge of being even more frivolous than the contempt motion itself. The responsive memorandum filed by the United States addressed all issues raised by Plaintiffs' motion, and Secretary Norton is entitled to rely on that response. Plaintiffs simply have no basis to claim that she had to file a separate brief in her personal capacity or risk default. Moreover, the motion filed by Plaintiffs is so lacking in specificity that Secretary Norton could not present an individual response, and Plaintiffs' assertion that she was required to do so is inconsistent with her due process rights.

A. The Government's Response Addressed All Issues

The Government's Response addressed all issues raised in Plaintiffs' motion. The Response demonstrated that Plaintiffs' contentions that one or more orders had been violated rested on misrepresentation and misinterpretation of four reports on which Plaintiffs relied. Response at 7-14, 24, 28-32. The Response demonstrated that Plaintiffs had not established that Defendants violated any of the orders at issue, which was sufficient to require that Plaintiffs' motion be denied. Response at 14-32, 34-35. The Response also demonstrated that all of the orders in question were addressed solely to Defendants and, therefore, Secretary Norton and the twelve non-party individuals personally could not be held in civil contempt even if an order had

been violated. Response at 36-37. The Response also showed that Plaintiffs had not even attempted to fulfill their evidentiary burden to show the elements of criminal contempt. Response at 40-41. In sum, the Response covered every issue raised by the Plaintiffs' contempt motion directed to Secretary Norton, in any capacity. The arguments made in the Government's brief are before the Court, and Secretary Norton may rely on them, whether or not she filed an additional response.

Plaintiffs' contention that Secretary Norton conceded the motion because her personal counsel did not file a one-sentence pleading adopting the Response or a longer memorandum echoing the Response is without merit. The argument assumes that Secretary Norton personally is a party to this case. That assumption is incorrect. The Court has found that Secretary Norton is a defendant solely in her official capacity, and that she is represented by the Department of Justice. Order of April 15, 2003, Exhibit 1. On September 16, 2003, the Court reiterated that "Defendant Norton is a party to the present suit solely in her official capacity as the Secretary of the Interior, not in her individual capacity." Order of September 16, 2003, Exhibit 2, quoting Order of April 15, 2003. The Court ordered the Clerk to return papers that had been filed on behalf of Secretary Norton in her personal capacity. Secretary Norton plainly was entitled to rely upon these orders and to treat the Plaintiffs' January 13, 2004 motion as being directed to her in her official capacity. The Government responded to all the allegations as to her.

At bottom, Plaintiffs are arguing that if the Court agrees with the United States that Plaintiffs' motion is without merit, it should nevertheless grant Plaintiffs' motion because Secretary Norton did not file a separate response. Plaintiffs' contention is clearly incorrect.

B. Plaintiffs' Motion Lacks Sufficient Specificity to Allow or Require a Separate Response by Secretary Norton

Plaintiffs' contention that Secretary Norton should be deemed to have conceded contempt liability would lack merit even if the United States had not filed an opposition. As movants for a show cause order, Plaintiffs have an initial burden of establishing a prima facie case. Until they do so, Defendants and the non-party individuals are not required to do anything. Plaintiffs' motion fell woefully short of discharging their burden.

As discussed in the Response, at 16 and 34, in order to require Defendants to respond to a charge of civil contempt, Plaintiffs have the burden of showing by clear and convincing evidence, that (1) a court order was in effect, (2) the order clearly and unambiguously required certain conduct by the respondents, and (3) the respondents failed to comply with the court's order. Plaintiffs' motion did not identify any order which required conduct by Secretary Norton in her personal capacity, and there is none. The December 21, 1999 Order (which was issued before she took office), the TRO and the Preliminary Injunction by their terms were directed to Defendants. Therefore, Plaintiffs' motion falls by its own weight because Plaintiffs have failed to make the threshold showing of an order which required certain conduct by her in her personal capacity.

Even if Plaintiffs had identified an order binding Gale Norton personally, Plaintiffs' motion was insufficient to require her, or even allow her, to present a response. Indeed, Plaintiffs' attempt to default her for not filing separate briefs runs afoul of due process. As noted in the Response, Plaintiffs failed to specify which acts taken by Secretary Norton allegedly violated the court orders in question. This Court has recognized that such a specification is

required even for civil contempt proceedings. After Plaintiffs had filed a motion accusing dozens of individuals of committing civil and criminal contempt, the Court directed Plaintiffs to lay out "individual defendant by individual defendant specifications of what the contempt proceedings would be for those 39 people so that they each have an opportunity to address what the evidence is and what you are citing against any of those 39." Transcript of March 15, 2002 Status Hearing, at 21:10-14. The Court concluded that "you need to specify by person so that each of them can respond to what the specifications would be and what the evidence would be so that each of them can have an opportunity to have due process." *Id.* at 23:7-10. Plaintiffs failed to particularize their allegations as to specific individuals in their January 13, 2004 motion. Accordingly, Plaintiffs did not meet the minimum measure of due process that this Court has already required for allegations of contempt. In the absence of specific allegations addressed to her personal behavior, Secretary Norton could neither present a written response nor show cause why she should not be held in contempt.

Plaintiffs' request that Secretary Norton be deemed to have conceded allegations that she committed criminal contempt is even more frivolous. First, Plaintiffs did not even attempt to establish the elements of criminal contempt. Criminal contempt requires an initial showing that evidence exists that, if believed, could establish beyond a reasonable doubt that (1) a clear and reasonably specific court order was in effect, (2) the order required certain conduct by a Named Individual, and (3) the Named Individual willfully violated the court's order. As discussed in the Response at 41, Plaintiffs failed to establish any of the elements. Plaintiffs' motion did not specify any evidence which, if believed, would establish beyond a reasonable doubt that she

willfully violated any order. Until she is provided with a prima facie case of criminal contempt, she cannot frame a response.

Requiring Secretary Norton to respond to charges of criminal contempt, as Plaintiffs request, would violate her rights of due process. The Court of Appeals made it abundantly clear that a criminal contempt proceeding is a criminal proceeding, and an accused is entitled to the full measure of due process rights guaranteed by the Constitution. *Cobell v. Norton*, 334 F.3d 1128, 1147 (D.C. Cir. 2003). A person accused of criminal liability cannot be deemed to have conceded liability by remaining silent.

At a minimum, Secretary Norton has a due process right to know what she is personally accused of, whether the accusation is civil or criminal in nature, and whether the accusation pertains to her official or individual capacity. Yet the Plaintiffs' January 13, 2004 motion made no distinction between acts allegedly constituting civil contempt and acts allegedly constituting criminal contempt, or between acts of Secretary Norton in her official capacity versus acts in her individual capacity. Thus, to the extent that Plaintiffs' January 13, 2004 motion attempts to state a case against Secretary Norton personally, the allegations are insufficient to allow her to respond, and, in any event, she would not be required to respond on risk of default, even if the motion had stated a case against her personally.

Additionally, the Court must make an independent determination of whether a party requesting a contempt proceeding has stated a prima facie case, particularly when the party is alleging criminal contempt. As this Court recognized in *Landmark Legal Foundation v. EPA*, 272 F. Supp. 2d 70, 77 (D.D.C. 2003): "[I]t is the court that makes the initial decision whether a criminal contempt proceeding should take place." Plaintiffs' effort to default Secretary Norton is

an improper attempt to short-circuit the contempt process, to shift the burden of proof, and to deprive her of her rights of due process.

CONCLUSION

Plainly, neither a legal nor factual basis exists for Plaintiffs' motion. For the reasons stated above, the Court should deny Plaintiffs' motion and admonish Plaintiffs against filing such frivolous and reckless pleadings in the future.

Respectfully submitted,

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DATED: February 6, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on February 6, 2004 the foregoing *Memorandum of the United States in Response to Plaintiffs' Motion That Secretary Norton Be Deemed to Have Conceded Plaintiffs' Motion of January 13, 2004 Asserting Violations of Court Orders* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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/s/ Kevin P. Kingston
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

APR 15 2003

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ELOUISE PEPION COBELL, et al.,)
)
Plaintiffs,)
)
v.)
)
GALE A. NORTON, Secretary of the)
Interior, et al.,)
)
Defendants.)
_____)

Civil Action Number 96-1285 (RCL)


ORDER

Upon consideration of defendant Interior Secretary Gale A. Norton's motion for an order relating to service, plaintiffs' brief in opposition thereto, and the applicable law in this case, the Court finds that the motion should be denied. Defendant Norton is a party to the present suit solely in her official capacity as the Secretary of the Interior, not in her individual capacity. As a party in her official capacity, the Secretary is represented by the Department of Justice. Because the Secretary is not a party to the present suit in her individual capacity, it is only necessary that service of all pleadings and other filings in this suit be effected upon the Department of Justice attorneys representing the Secretary in her official capacity. Accordingly, it is hereby

ORDERED that defendant Norton's motion for an order relating to service [1907-1] be, and hereby is, DENIED.

SO ORDERED.

Date: APR 15 2003


Royce C. Lamberth
United States District Judge

UNITED STATES DISTRICT COURT
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 Defendants.)
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Civil Action Number 96-1285 (RCL)

FILED

SEP 16 2003


CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

It is hereby ORDERED that the motion submitted in the present case on September 9, 2003 by attorneys for Gale A. Norton in her individual capacity be stricken from the record in this case. On April 15, 2003, this Court issued an order determining that "Defendant Norton is a party to the present suit solely in her official capacity as the Secretary of the Interior, not in her individual capacity." The Court therein denied the motion of attorneys for Gale A. Norton in her individual capacity to receive copies of all service made in this case, noting that Secretary Norton is represented by the Department of Justice, upon whom service is to be made. Accordingly, the Clerk of Court shall return the above-mentioned motion to the attorneys who submitted it. In light of this Order, the Clerk of Court shall return the combined opposition brief and cross-motion submitted by plaintiffs.

SO ORDERED.

Date: 9-16-03


Royce C. Lamberth
United States District Judge

cc:

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