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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, Plaintiff, v. UNITED STATES OF AMERICA AND ROBERT M. GATES, Secretary of Defense, Defendants.	Case No. CV04-8425 (VAP)(Ex) DEFENDANTS' OPPOSITION TO PLAINTIFF'S *EX PARTE* APPLICATION FOR AN ORDER THAT CERTAIN REQUESTS FOR ADMISSION BE DEEMED ADMITTED OR FOR FURTHER RESPONSES Discovery Cutoff: Mar. 15, 2010 Pretrial Conference: June 7, 2010 Trial: June 14, 2010

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INTRODUCTION

Prompted again by the Court's March 4, 2010 order declining to extend the discovery deadline, Plaintiff seeks yet more *ex parte* relief. On Friday, Plaintiff applied *ex parte* for an order compelling Defendants to comply with its 30(b)(6) deposition Notice. And now, on Monday, it applied for *ex parte* relief regarding Defendants' responses to certain requests for admission. The Court should reject the application out of hand.

Plaintiff persists in failing to point out that the parties met on February 18, 2010 and discussed all of Plaintiff's discovery motions, including Plaintiff's contemplated motion regarding requests for admission. Recognizing that all such motions were ripe for review, undersigned counsel suggested that all such motions be consolidated into one brief and that the parties jointly move for an extension of the discovery deadline to allow for orderly briefing on all issues. Counsel for Plaintiff objected to such an approach and appeared ready to file discovery motions on all issues pursuant to the deadlines set forth in L.R. 37-1. For reasons only Plaintiff knows and for which it alone is responsible, Plaintiff failed to do so with regard to the 30(b)(6) deposition Notice–and with respect to the requests for admission. Plaintiff alone is responsible for its delay in bringing timely motions; its persistent use of *ex parte* procedures to remedy Plaintiff's self-made emergencies is contrary to the letter and spirit of the local rules, and should not be tolerated.

But even if the application is considered, Plaintiff is unable to show any irreparable harm that would result. The requests for admission Plaintiff seeks to have admitted are improper on their face. Requests 3, 4, 5, 10, 13, 14, and 15 seek to juxtapose the President's remarks regarding his intent to seek a repeal of the "Don't Ask, "Don't Tell" statute and whether the statute satisfies review under the rational basis test. Such an attempt is improper and is appropriately subject to the objections lodged by the Government. While Defendants have admitted that the

President made the remarks attributed to him, it is Congress' determination in 1993 that the Court must look to in determining the constitutionality of the statute. And with respect to the requests pertaining to the experience of foreign militaries, which form the remainder of Plaintiff's application, the Government has appropriately objected to the term "openly gay and lesbian service members" because, as acknowledged by the reports Plaintiff references, very few service members reveal their sexual orientation to colleagues and supervisors, even though permitted to do so. The connection Plaintiff seeks to draw between whether service members are permitted to reveal their sexual orientation and unit cohesion is thus a false connection–and one properly subject to objection. Plaintiff cannot therefore show that it would be irreparably harmed if its motion is not heard; the challenged responses to the requests are wholly proper.

BACKGROUND

The procedural history of this issue follows what has become an all too familiar pattern in this case: Plaintiff failed to bring a timely motion and now seeks *ex parte* relief.

On January 28, 2010, Defendants served Plaintiff with objections and responses to Plaintiff's first set of Requests for Admission ("RFAs"). Plaintiff sent Defendants a letter, on February 11, disputing certain of Defendants' RFA responses. On February 18, the Court held a status conference in this matter. Following the Conference, Defense counsel approached Plaintiff's counsel and proposed that the three discovery issues that would require motion practice–the disputes concerning the document requests, the 30(b)(6) notice, and the RFAs -- be consolidated into one motion. Defense counsel also suggested that the parties ask the Court to extend the discovery deadline to allow for orderly briefing.

Plaintiff's counsel rejected Defense counsel's proposal, stating that Plaintiff wanted instead to complete discovery by the Court's March 15 deadline. Yet Plaintiff's counsel did not take the actions necessary for the 30(b)(6) deposition

Notice or RFA disputes to be resolved by the discovery deadline. Rather, it did nothing on either of the disputes until March 3rd, when Plaintiff sent Defendants its portion of a joint stipulation regarding the 30(b)(6) Notice. On March 4, the Court announced that it would not extend the discovery deadline or trial date in this case. Later that same day, Plaintiff's counsel wrote to Defense counsel that Plaintiff intended to seek *ex parte* applications regarding the 30(b)(6) deposition Notice and RFA disputes. Plaintiff responded with a letter objecting to Plaintiff's misuse of the *ex parte* process.

On the evening of Friday, March 5, Plaintiff filed its *ex parte* application concerning the 30(b)(6) notice, and on Monday, March 8, Plaintiff filed the *ex parte* application concerning the RFA responses that is currently before the Court.

II. Standard for *Ex Parte* Relief

As already noted by the Government, *see* Dkt. 120, at 6, Judge Phillips strictly counsels that "*ex parte* applications [are to be used] solely for extraordinary relief," Dkt. 68, at 5, and that counsel are to be guided by *Mission Power Engineering Co. v. Continental Casualty, Co.*, 883 F.Supp. 488 (C.D. Cal. 1995). Because of the abuses in cases such as this, the Court in *Mission Power* set forth a stringent standard for obtaining *ex parte* relief. The party seeking relief must establish that it "is without fault in creating the crisis that requires *ex parte* relief, or that the crisis occurred as a result of excusable neglect." *Id*. at 492. And if it is able to make that showing, the party must then show that its cause "will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures." *Id* at 492. Neither exists here.

A. Plaintiff Created this Crisis by Failing to Bring a Timely Motion

On February 18, 2010, Defense counsel informed Plaintiff's counsel that the parties' dispute over the RFAs would have to be decided on motion and

proposed combining the motion with the parties' other pending discovery disputes. Plaintiff counsel rejected Defense counsel's suggestion but took no action concerning the RFAs until filing this *ex parte* application on March 8, one week before the discovery deadline.

Plaintiff attempts to excuse its delay by shifting the blame to Defendants. But Plaintiff's allegation that Defendants kept it from filing a timely motion is unfounded and unsupported by the procedural history and Local Rules. On February 18, following the Court's status conference, counsel for the parties discussed by telephone the pending discovery disputes, including the dispute concerning the RFAs.

The conversation that counsel for the parties had on February 18 satisfied the meet-and-confer requirement found in Local Rule 37-1. Rule 37-1 requires the moving party to provide a letter setting forth its position, as Plaintiff did on February 11. It does not, however, require a letter from the non-moving party. The non-moving party's responsibility, rather, is to "confer in a good faith effort to eliminate the necessity for hearing the motion or to eliminate as many of the disputes as possible." L.R. 37-1. Defense counsel fulfilled this requirement during the parties' telephone conversation, and Plaintiff's suggestions to the contrary are false.

In addition, even if Plaintiff's counsel felt that Defense counsel had not satisfied the meet-and-confer requirement during the February 18th telephone conversation, Plaintiff's counsel had a responsibility to inform Defense counsel of its concern in a timely manner, rather than wait three weeks to spring the issue on Defense counsel in a last minute *ex parte* application.

Plaintiff's counsel appears to have made the decision to put off initiating motions concerning the 30(b)(6) notice and RFAs based on a mistaken belief that

the Court would extend the discovery deadline. But Plaintiff counsel's mistake does not entitle Plaintiff to *ex parte* relief. Because this is a situation of Plaintiff's own making, the *ex parte* application should be denied on this ground alone.

III. Denying Plaintiff *Ex Parte* Relief Will Not Cause Irreparable Harm

But even if the application were considered, Plaintiff cannot show that it would be irreparably harmed if its motion is not heard. Defendants' objections and responses to the challenged requests for admission are in accord with Rule 36:

A. Requests for Admission 3, 4, 5, and 10

The above-referenced requests for admission follow a sequence of requests that ask the Government to admit that President Obama in fact made a series of comments expressing his intent to seek repeal of the DADT statute. The Government has admitted that the President in fact made the statements. The above-referenced requests then attempt to use the President's statements to suggest that the DADT statute is somehow legally invalid or unconstitutional. While acknowledging the President's statements in each response, the Government objected to each request as improper, noting that the President's statements are not to be interpreted in any way as a judgment about the legality of the policy.

The responses properly asserted that the constitutionality of the law must be determined at the time of enactment, by noting that "it was rational for Congress to have concluded at the time the statute was enacted in 1993 that DADT was necessary 'in the unique circumstances of military service,' 10 U.S.C. § 654(a)(13)." *See* Appendix A to Pl's Ex Parte App., at 2. And it is the judgment of Congress in 1993 that determines whether the statute has a rational basis. Absent a repeal of the DADT statute, the statute must be reviewed at the time of enactment and is not subject to challenge on the ground of changed circumstances.

See, e.g., United States v. Jackson, 84 F.3d 1154, 1161 (9th Cir. 1996); *Montalvo-Huertas v. Rivera-Cruz*, 885 F.2d 971, 977 (1st Cir. 1989); *United States v. Teague*, 93 F.3d 81, 84 (2d Cir. 1996). Indeed, courts have found that even where Congress has determined that a previous enactment is no longer necessary, that finding does not render the statute unconstitutional. *See Smart v. Ashcroft*, 401 F.3d 119, 123 (2d Cir. 2005); *Howard v. U.S. Dept. of Defense*, 354 F.3d 1358, 1361-62 (Fed. Cir. 2004).

Moreover, Fed. R. Civ. P. 36 requires that requests be drafted in a manner that are "'simple and direct . . . and limited to singular relevant facts.'" *Safeco of America v. Rawstron*, 181 F.R.D. 441, 446 (C.D. Cal. 1998) (quoting *S.E.C. v. Micro-Moisture Controls*, 21 F.R.D. 164, 166 (S.D.N.Y. 1957). Interjecting vague and subjective phrases such as "national security," "essential", "contribute," and "weakens" into these requests violates the purpose of the rule. Defendants' objections and responses to requests 3, 4, 5, and 10 are entirely appropriate.[1]

B. Requests for Admission 81-117, 119

Requests 81-117 ask the Government to admit that "openly gay and lesbian service members" do not harm unit cohesion in those countries that permit gay and lesbian service members to acknowledge their sexual orientation. Defendants objected to the term "openly gay and lesbian" as vague and ambiguous. Plaintiff asserts that "[t]he government cannot claim the terms to be vague and ambiguous

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[1] Plaintiff's application also states that Defendants' objections and responses to requests 13, 14, and 15 are also improper, *see* Pl's Ex Parte App., at 4, but fails to explain the basis for its claim. Each of these requests is premised upon the mistaken assumption that the DADT statute somehow prohibits gay and lesbian service members from serving in the military, when the statute allows service by gay and lesbian service members. *See* Appendix A to Pl's Ex Parte App., at 4. The Government objected and corrected this mistaken premise in its response.

when 10 U.S.C. § 654 uses those very terms to define 'homosexual' and 'homosexual acts.'" Pl's *Ex Parte* App., at 6. But Plaintiff is wrong; nowhere in either of those definitions is there any reference made to "openly gay and lesbian."

The truth is that term is susceptible to a variety of meanings. Indeed, plaintiff's expert, Robert J. MacCoun, who authored the chapter on unit cohesion in the 1993 RAND study referenced by Plaintiff, Pl's *Ex Parte* App., at 9, states that "[w]ith respect to the hypothesized threat posed to military cohesion, an appropriate operational definition of openness is the extent to which someone's homosexual orientation is acknowledged by the individual, and known by a majority of the individual's colleagues and by supervisors." Robert J. MacCoun, *Sexual Orientation and Military Cohesion: A Critical Review of the Evidence* (1996).

Plaintiff references a Government Accounting Office ("GAO") Report issued in 1993, entitled *Homosexuals in the Military, Policies and Practices of Foreign Countries*, which studied the experience of Canada, Germany, Israel, and Sweden. But that report found that even though gay and lesbian service members in those countries were permitted to acknowledge their sexual orientation to colleagues and supervisors, service members were "reluctant to openly admit their sexual orientation for a variety of reasons." *Id.* at 3. The 1993 RAND study, which studied Canada, France, Germany, Israel, the Netherlands, and Norway, similarly found that "in all countries, openly homosexual service members were appropriately circumspect in their behavior while in military situation; they did not call attention to themselves[.]" RAND Study, at 103. That study also found that a change in policy permitting gay and lesbian service members to reveal their sexual orientation "produced little real change in practice because almost no service members or candidates for service revealed a homosexual orientation." *Id.*

at 104. There is, in short, no uniform understanding of what it means to be "openly gay and lesbian" in this context, and Defendants' objections are thus entirely proper.

Moreover, even with respect to the impact of allowing "openly gay and lesbian" service members to serve in foreign militaries, as noted in its response, the Government is without sufficient information to admit or deny such requests based upon the GAO, RAND, or other studies that it is aware of on this subject. As the Court is aware and as has been public announced, the Department of Defense is currently conducting a 9-month review of the policy, but that process is just getting underway, and has not produced any study of the kind that would permit Defendants to admit or deny Plaintiff's requests. The Government's responses to the Requests for Admission posed by Plaintiff were thus entirely proper.

CONCLUSION

Plaintiff's *ex parte* application should thus be denied.

Respectfully submitted,

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/s/ *Paul G. Freeborne*

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