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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a non-profit corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA and ROBERT M. GATES, SECRETARY OF DEFENSE, in his official capacity,

Defendants.

Case No. CV04-8425 VAP (Ex)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR REVIEW OF MAGISTRATE JUDGE'S DISCOVERY RULING

DATE/TIME: EXPEDITED RULING REQUESTED; DISCOVERY MATTER

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I.

INTRODUCTION AND BACKGROUND

The Court is already well-acquainted with the nature and history of this case.

The current motion by the government involves but three requests for admissions, requests for admissions 3, 4, and 5. By way of background, Plaintiff Log Cabin Republicans asked the defendants to admit, in request for admission no. 1, that President Obama had made a certain speech on a certain date and the defendants admitted that request.

Request No. 2 then asked:

> 2. Admit that on June 29, 2009, during his speech in front of an audience attending the Lesbian, Gay, Bisexual and Transgendered Pride Month Reception held at the White House, President Barack Obama stated, "As I said before – I'll say it again – I believe 'don't ask, don't tell' doesn't contribute to our national security. In fact, I believe preventing patriotic Americans from serving their country weakens our national security."

The defendants admitted this request.

Requests 3, 4, and 5 then asked:

> 3. Admit that DADT does not contribute to our national security.
>
> 4. Admit that DADT weakens our national security.
>
> 5. Admit that discharging members pursuant to DADT weakens our national security.

The defendants' responses to requests 3, 4, and 5 were identical:

> Response: Defendants object to this request, as it does not call for facts, the application of law to fact, or an opinion about facts or the application of law to fact. See Fed. R. Civ. P.

36(a)(1)(A). Defendants further object to this request because the terms "weakens" and "national security" as used in this context are vague and ambiguous. To the extent a further response is required, Defendants note the responses to requests for admission 1 and 2 supra, but deny this request because 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).

Contending that these responses were inadequate, Plaintiff Log Cabin Republicans moved for an order deeming these requests as admitted or, in the alternative, for further responses. The defendants opposed the motion.

The motion to compel further responses to the requests for admissions 3, 4, and 5 (as well as other requests for admissions and other discovery requests) came for hearing before Magistrate Judge Eick on March 15, 2010. At the hearing, Magistrate Judge Eick questioned defendants' counsel about the objections to requests for admissions 3, 4, and 5 in the following discussion:

> THE COURT: Let me ask you about some of the requests for admission. I'd like to ask you about request for admission three. It says: 'Admit that DADT does not contribute to our national security.' You object saying that the request does not call for facts, the application of law to fact or an opinion about facts or the application of law to facts.
>
> MR. FREEBORNE: Correct, your Honor. What they're seeking to do - -
>
> THE COURT: But it seems to the Court that it does. Are you saying that this request calls for a pure legal opinion?
>
> MR. FREEBORNE: Well, it's not a question of fact. I mean what they're seeking to do - -

THE COURT: An application of law to fact?

MR. FREEBORNE: We don't believe it falls into any of those categories.

THE COURT: An opinion about fact?

MR. FREEBORNE: It does not.

THE COURT: All right.

MR. FREEBORNE: It's - -

THE COURT: Doesn't it ask for an opinion that, as a matter of fact, the policy does not contribute to our national security?

MR. FREEBORNE: Your Honor, what they seek to do is juxtapose President Obama's statements on the one hand, which we acknowledge, and use that to form the basis for an admission that the policy somehow runs afoul - - or is either unlawful or unconstitutional.

THE COURT: I understand that. But regardless of whether these were President Obama's words or not, to the extent the discovery is relevant, they're entitled to ask for requests for admission on the basis of it. And your objection is that it's not a fact, it's not an opinion about a fact; it appears to the Court that it is. That's why I'm asking.

You're not suggesting it's a legal conclusion?

MR. FREEBORNE: Well, what I'm suggesting is it's not a fact. What they're seeking to do is use President Obama's policy statement - -

THE COURT: Regardless of their probing, their intent to set up some juxtaposition, they may well have that intent. And to the extent the only purpose served by these requests would be

to attempt to put the defense in an embarrassing conflict of fact, that would not be a legitimate purpose of discovery. But to the extent that these requests are material to their claims, then it is not a proper objection to them to say they may have some subjective motive that we don't like.

Let me go on with regard to the response because I don't understand the last part of the response either, just like I didn't understand the first part of the response. The last part of the response is: To the extent a further response is required, defendants note the responses to requests for admission one and two, supra, but deny this request because 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.

Beginning with the word 'because', that appears to the Court to be a *non sequitur* in the context of this response. The request is not asking about 1993 or a [r]ational basis; it's asking whether the policy does or does not contribute to national security.

MR. FREEBORNE: And we responded we believe it's appropriate to respond based upon the considerations that were before Congress in 1993 because - -

THE COURT: Not at all.

MR. FREEBORNE: - - that's the statute that's on the books.

THE COURT: Not at all. If the request is admit now, you may not say we deny it because of something that happened in 1993. You must give an unqualified admission or denial.

MR. FREEBORNE: And your Honor, but respect, the statute is on the books. That 1993 determination remains on the books, and so that's how we've responded.

THE COURT: Well, that just gets back to you want me to rule some way in opposition to what Judge Phillips concluded; they're just not entitled to any such discovery. But let's move on because I think we've exhausted request three.

Transcript of Proceedings, March 15, 2009, at 74, line 6 to 77, line 7. At the conclusion of the hearing, all of the motions were submitted.

On the following day, March 16, 2010, Magistrate Eick ruled on all of the discovery motions before him, including the motion to compel regarding the requests for admissions. He granted the motion in part. He ordered the defendants to unqualifiedly admit or deny requests for admissions 3, 4, 5 and 81-105, denied without prejudice the motion to deem these requests admitted, and denied the motion as to requests for admission 10, 13-15, and 106-119.

Following the decision by Magistrate Judge Eick on the motion regarding requests for admissions, Log Cabin Republicans elected not to appeal as to requests for admissions 10, 13-15, and 106-119, the defendants complied with the order as to requests for admissions 81-105, and the defendants have now appealed as to requests for admissions 3, 4, and 5.

II.

STANDARD OF REVIEW

The Court's standing order in this case, issued on November 4, 2008, sets forth the standard for review of an order from a magistrate judge. Under paragraph 8 of that order, the Court will modify an order by a magistrate judge "only where it has been shown that the Magistrate Judge's order is clearly erroneous or contrary to law." In addition, a motion to modify an order by a magistrate judge "must specify

which portions of the text are clearly erroneous or contrary to law and the claim must be supported by points and authorities." Id. See also Fed. R. Civ. P. 72(a).

III.

THE COURT SHOULD DENY THE MOTION

The Court should deny the defendants' motion for review of Magistrate Eick's order for any of several reasons.

First, the motion completely ignores the governing standard of review set forth in paragraph 8 of this Court's standing order. It makes no effort to show that the order was "clearly erroneous" or "contrary to law." This permeates all of the other reasons why the Court should deny the motion. For example, while the motion cites several district court cases from other parts of the country regarding a party's obligations in responding to requests for admissions, Motion at 2, line 15 to 3, line 6, it ignores the Ninth Circuit case cited on this point by Log Cabin Republicans in its motion to compel further responses to the requests for admissions, Marchand v. Mercy Medical Center, 22 F.3d 933, 938 (9th Cir. 1994), and, more importantly, does not even attempt to show that Magistrate Judge Eick's ruling was erroneous or contrary to law on the issue of a party's obligation to respond to requests for admissions.

Second, the motion does not address the government's two objections to these requests. Magistrate Eick's comments at the hearing and his order requiring unqualified admissions or denials of these requests indicate that he rejected the defendants' objections that the requests did not comply with Fed. R. Civ. P. 36(a)(1)(A) and that they were vague and ambiguous. The motion notes that defendants "stand by" these objections (Motion, at 4, n. 3) but does not argue that Magistrate Judge Eick's order was clearly erroneous or contrary to law on these points.

Third, the motion seeks, in effect, to reverse the Court's prior ruling

permitting discovery. Before the Rule 26(f) conference in this case on July 6, 2009, defendants argued that Log Cabin Republicans should not be allowed to conduct discovery because the only issue is whether Congress had a rational basis for the statute when it was enacted. Log Cabin Republicans cited authorities to the contrary and argued that it was entitled to challenge the constitutionality of the statute as it exists today, and should be entitled to conduct discovery as to issues bearing on the constitutionality of the statute, both then and now.

At the Rule 26(f) conference, the Court said: "I'm inclined to think that the topics plaintiff has set forth in terms of discovery, in terms of areas in which it wants to do discovery, seem appropriate." Transcript of Proceedings, July 6, 2009, at 6. Following the conference, on July 24, 2009, the Court ruled, over defendants' objection, that "Plaintiff is entitled to conduct discovery in this case to develop the basis for its facial challenge."

At the March 15 hearing on discovery motions, Magistrate Judge Eick quickly realized that defendants were trying to circumvent the Court's order allowing Log Cabin Republicans to conduct discovery. Transcript of Proceedings, March 15, 2009, at 43, line 14 to 48, line 1; at 76, line 2 to 77, line 7. Magistrate Eick said "I don't think I'm at liberty to do that." (id. at 47, line 25 to 48, line 1) and his order shows that he did not agree with defendants' position on this point.

The defendants persist, however, in trying to relitigate this issue, from page 3, line 18 through page 5, line 13 of the motion and explicitly do so on page 4, in footnote 4. The motion does so without once mentioning this Court's July 24 order, pretending, apparently, that the Court did not make that order. In any event, there is no reason for the Court, at this point and on this motion, to reverse its July 24 decision.

Indeed, the motion cites the same cases the defendants cited previously in their Rule 26(f) report and in the unsuccessful motion for interlocutory appeal, as well as in their opposition to the motion to compel. The defendants simply repeat

their position again and even basically admit it: "It is the Government's view that ...." Motion, at 4, n.4. The defendants have not done anything more than state their "view" – they have done nothing to show that Magistrate Eick's ruling was clearly erroneous or contrary to the law. Furthermore, the case cited by the defendants shows that Magistrate Judge Eick (and this Court) were correct in allowing discovery on matters after the enactment of DADT. Western & Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981) (Supreme Court examined evidence of whether the questioned law furthered the desired government objective post-enactment.)

Fourth, defendants' claim that they can only provide a qualified response because the Executive has one view and Congress has a different view makes no sense. The responses state: "To the extend a further response is required, Defendants note the responses to requests for admission 1 and 2, supra, but deny this request because it was rational for Congress to have concluded at the time that statute was enacted in 1993 that DADT was necessary 'in the unique circumstances of military service,' 10 U.S.C. § 654(a)(13). The defendants' response to the requests and the argument in the motion thus focuses on Congress' view in 1993.

With respect to this response, Magistrate Judge Eick astutely observed as follows:

> THE COURT: Let me go on with regard to the response because I don't understand the last part of the response either, just like I didn't understand the first part of the response. The last part of this response is: To the extent a further response is required, defendants note the responses to requests for admission one and two, supra, but deny this request because it was rationale 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.

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THE COURT: Well, that just gets back to you want me to rule some way in opposition to what Judge Phillips concluded; they're just not entitled to any such discovery. But let's move on because I think we've exhausted request three.

The motion avoids any mention of Magistrate Judge Eick's comments and again fails to explain what he identified as a non sequitur: responding in terms of Congress' view in 1993 when the requests for admission are not focused on Congress or that time period. The motion has done nothing to show that Magistrate Judge Eick's ruling was clearly erroneous or contrary to the law on this issue.

Fifth, the defendants are now taking a position inconsistent with

their position throughout discovery in this case. The defendants have consistently objected to discovery requests by Log Cabin Republicans that sought documents from any part of the United States government outside the Department of Defense. For example, in response to document request no. 56, which asked for certain reports prepared by the office of the Surgeon General, defendants responded:

> Defendants object to this request to the extent that it calls for documents that are in possession of the Office of the Surgeon General, which is part of the Department of Health and Human Services. Rule 34 does not require us to search for or produce documents from outside of the Department of Defense.... Because the Department of Defense, not Congress or any other governmental agency, is charged with administering 10 U.S.C. § 654 and the applicable regulation, discovery obligations do not extend beyond that Department.

Defendants made this same objection repeatedly throughout their discovery responses and argued it in opposition to the recent discovery motions. Magistrate Judge Eick accepted this argument by limiting the document production to documents "within the possession, custody or control of the Department of Defense...."

Now, the defendants seek to evade their obligation to answer or deny three requests for admission by referring to Congress' view. Whether they refer to Congress' view in 1993 or today is irrelevant, by their own prior statements in discovery that the defendants can only speak for the Department of Defense. Log Cabin Republicans is entitled to an unqualified admission or denial of requests 3, 4, and 5 by the Department of Defense.

Finally, and there is no reason not to address this issue, the government is seeking to evade an unqualified response because President Obama's statements have put it in a "lose-lose" situation of its own making. If they admit request no. 4 and admit that DADT "weakens out national security," that will undermine the defendants' position in this case. If, on the other hand, they deny request no. 4, the defendants will be disagreeing with the President, which may help them in this case but which may hurt them politically. That is the "elephant in the room" that the defendants have not mentioned but which is irrelevant to this Court's consideration of this motion because the defendants have to deal with admissions by the President in this litigation, just as a corporate defendant would have to deal with statements by a CEO that might be used against the company in discovery.

IV.

CONCLUSION

For the reasons shown in this memorandum, the Court should deny the defendants' motion for review of Magistrate Eick's ruling as to requests for admissions 3, 4, and 5.

It is vital that the Court affirm Magistrate Judge Eick's order immediately because the responses may be used by Log Cabin Republicans in opposition to the defendants' motion for summary judgment, which must be filed on April 5, 2010.

Dated: March 30, 2010

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