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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. CV 04-08425-VAP (Ex) Date: July 1, 2010

Title: LOG CABIN REPUBLICANS, a non-profit corporation -*v*- UNITED STATES OF AMERICA and ROBERT M. GATES, SECRETARY OF DEFENSE, in his official capacity

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PRESENT: HONORABLE VIRGINIA A. PHILLIPS, U.S. DISTRICT JUDGE

Marva Dillard Courtroom Deputy	None Present Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None	None

PROCEEDINGS: MINUTE ORDER GRANTING IN PART AND DENYING DEFENDANTS' MOTIONS IN LIMINE (IN CHAMBERS) **[Motions filed June 18, 2010 (Docket Nos. 178, 179 & 180)]**

Defendants United States of America and Secretary of Defense Robert Gates ("Defendants") filed three Motions in Limine on June 18, 2010: "To Exclude Expert Testimony," "To Exclude Certain of Plaintiff's Proposed Exhibits," and "To Exclude Lay Witness Testimony." Plaintiff Log Cabin Republicans ("Plaintiff") filed timely opposition to each motion, and Defendants filed replies. Having reviewed and considered all papers filed in support of and in opposition to the motions, and having heard the arguments advanced by counsel at the hearing conducted at the

Pretrial Conference on June 28, 2010, the Court hereby rules on each motion as follows.[1]

Motion in Limine to Exclude Expert Testimony

Defendants seek to exclude all testimony from the seven persons designated by Plaintiff to testify as expert witnesses at trial. Defendants argue Federal Rules of Evidence 402 and 702 bar the proposed testimony, as it is neither relevant nor reliable. In the alternative, Defendants contend Plaintiff should only be allowed to call one expert witness per topic as the proposed testimony will otherwise be unnecessarily cumulative.

Defendants' argument is based in part on their mischaracterization of the witnesses' prior testimony in this case. For example, they argue that "[t]he primary opinion Dr Korb offers is that DADT is unconstitutional." (Mot. at 2.) Although defense counsel asked Dr. Korb his opinion regarding the constitutionality of the statute, he did not testify that he was retained in order to opine on this subject.

Federal Rule of Evidence 702 provides in relevant part that "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue a witness qualified as an expert may testify if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." (Emphasis added.)

All seven of Plaintiff's proposed expert witnesses are qualified to offer their respective opinions. At least two have testified before other federal courts on similar, if not identical, subjects. All have demonstrated their expertise through research, publication, experience, employment -- including military or government service --, or some combination of these.

Defendants' objections to the methods employed by the proposed witnesses are not well-taken either. Qualified expert witnesses with training in the fields of law,

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[1]Defendants have violated the Court's Standing Order

sociology and military history are not precluded from testifying simply because the methodology employed is not that used by experts in other fields, such as the "hard sciences."

Finally, Defendants contend that no expert testimony should be permitted in this trial because Plaintiff's challenge to DADT is a facial one. It cites Goldman v. Weinberger, 475 U.S. 503 (1986), in support of this contention, but in that case, expert testimony on the desirability of religious exceptions to the military dress code. Id. at 509. This argument also overlooks the clear authority of Lawrence v. Texas, 539 U.S. 558 (2003), where the Supreme Court went beyond the legislative history of the Texas statute under examination.

As stated on the record during the hearing on the Motion, an expert's report is not admissible by the proponent of the evidence, but the witness may testify about the basis for his or her opinions, and on cross-examination any of the material upon which the opinions were based may be admitted for impeachment purposes. The Court denies the request for an order excluding any testimony from the designated expert witnesses, and the request for a finding that the proposed testimony is unduly cumulative.

Motion in Limine to Exclude Lay Witnesses

Defendants seek to bar the testimony of 12 of the 14 lay witnesses Plaintiff has designated to testify at the court trial in this case.

First, Defendants contend that eight of the witness were not revealed in the initial disclosures or in responses to Defendants' interrogatories. [2] In considering whether the failure to disclose witnesses who are expected to testify at trial, the Court must determine whether such failure was "substantially justified or harmless."

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[2]Nine law witnesses are identified in Defendants' motion as Mike Almy, Jenny Kopfstein, Anthony Loverde, Joseph C. Rocha, Stephen Vossler, Alexander Nicholson, Craig Engle, Jamie Ensley and C. Martin Meekins. The parties informed the Court they have resolved their dispute regarding the testimony of Mr. Engle and Plaintiff will not be calling him as a witness in this case.

Fed. R. Civ. Proc. 39(c)(1). Applying the five factors generally used to make that determination with the facts presented here, the Court finds the balance weighs in favor the Plaintiff.

For the reasons set forth on the record at the hearing on this Motion, the Court finds the failure to disclose the witnesses earlier was substantially justified. Defendants have known of Plaintiff's attempted notification since May 20, 2010, at the latest. Plaintiff must make the witnesses available for deposition before the date of trial.

Defendants also object to the introduction of testimony at trial from any of their three witnesses designated under (Fed. R. Civ. Procedure 30(b)(3). To the extent that such a witness would consist of the witness's personal opinion or anecdotal testimony regarding their working relations with service members who are, or are suspected to be, homosexual, that testimony appears to be inadmissible in this case.

To the extent this Motion is based on Defendants' contention that such evidence is barred in a case mounting a facial challenge to a statute or regulation, that argument is rejected for the reasons set forth on the record at the hearing and for the reasons set forth above.

Motion in Limine to Exclude "Certain of Plaintiff's Exhibits"

Finally, Defendants move to exclude (1) "documents that were created by groups or individuals who actively advocate for the repeal of DADT"; (2) "articles from newspapers, magazines, and blogs, unofficial transcripts from television programs," etc.; (3) "documents created by government contractors" (4) "documents not previously disclosed to defendants and which, in large part, relate to the particular facts and circumstances of individual service members who were discharged under DADT"; and "the remainder of [Plaintiff's] exhibits, such as, among other things, LCR's experts' reports, email exchanges by non-parties, non-party letters, articles, and other documents that do not fall within the other four categories." (Mot. at 3.) In other words, although entitled as one to exclude "certain" exhibits, Defendants actually move to exclude all of Plaintiff's proposed trial exhibits.

As noted above, expert reports and the underlying supporting materials are not admissible by the party calling that witness, but may (and usually should) be marked for identification for purposes of reference at trial, particularly for purposes of cross-examination. Moreover, as also stated above, the Court also rejects Defendants' argument that the facial nature of the Plaintiff's challenge makes all evidence other than the legislative history of the statute inadmissible.

To the extent Defendants' Motion challenges such materials as polling materials, those objections may be well-taken and should be raised during this non-jury trial.

The objections directed to the nondisclosure of exhibits designated by Plaintiff appear to be meritless, for the most part. As Plaintiff correctly points out, most of those exhibits were published by, prepared by, or in the custody of the Government, which cannot fairly complain of their admission at trial. To the extent the defense is objecting on the basis of relevance, those objections will be taken up during this bench trial.

For these reasons and those set forth on the record during the hearing on this Motion, the Court DENIES the Motion.

IT IS SO ORDERED.