

E-Filed 5/3/11

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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA
8 SAN FRANCISCO DIVISION
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10 MICHAEL D. ALMY; ANTHONY J.
11 LOVERDE; and JASON D. KNIGHT,

No. C 10-05627 RS

Plaintiffs,

**ORDER GRANTING MOTION FOR
LEAVE TO FILE FIRST AMENDED
COMPLAINT AND DENYING
MOTION TO TRANSFER**

v.

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13 UNITED STATES DEPARTMENT OF
14 DEFENSE; ROBERT M. GATES,
15 Secretary of Defense; DEPARTMENT OF
16 THE AIR FORCE; MICHAEL B.
17 DONLEY, Secretary, Department of the Air
Force; DEPARTMENT OF THE NAVY;
and RAY MABUS, Secretary, Department
of the Navy,

Defendants.
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I. BACKGROUND

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22 Plaintiffs Michael Almy, Jason Knight, and Anthony Loverde filed suit challenging their
23 discharges from the United States military under 10 U.S.C. section 654, the provision commonly
24 referred to as "Don't Ask Don't Tell" (DADT). In their complaint as presently pleaded, plaintiffs
25 seek reinstatement to active duty and credit toward retirement for the time each would have served
26 had he not been discharged. Defendants the United States Departments of Defense, the Air Force,
27 and the Navy, and their respective Secretaries Robert Gates, Michael Donley, and Ray Mabus move
28 to transfer the suit to the Court of Federal Claims, or alternatively to dismiss, on the grounds that

1 plaintiffs' complaint encompasses claims for money damages over which this Court lacks subject
2 matter jurisdiction. In addition to opposing the motion to transfer, plaintiffs move for leave to
3 amend their complaint in an attempt to establish unambiguously that their suit seeks only
4 declaratory and injunctive relief. Pursuant to Civil Local Rule 7-1(b), the motions are suitable for
5 disposition without oral argument and the hearing on May 5, 2011 is vacated. For the reasons stated
6 below, plaintiffs' motion for leave to file their first amended complaint is granted and defendants'
7 motion to transfer is denied.

8 Prior to being discharged in 2006 under DADT, Almy served for thirteen years in the Air
9 Force. Loverde, also discharged under DADT, was an Air Force service member until 2008.
10 Knight served five years in the Navy. He was discharged under DADT in 2005, recalled to active
11 duty in 2006, and discharged again under DADT in 2007. Plaintiffs contend that, had they not been
12 discharged, they would have remained on active duty to this day. They further maintain that they
13 are not requesting lost wages through this suit, but instead desire reinstatement to active duty. In
14 their complaint, plaintiffs challenge the constitutionality of DADT on substantive due process, equal
15 protection, and First Amendment grounds. They seek declaratory judgment that the DADT statute
16 is unconstitutional facially and as applied to each of them. Plaintiffs also request mandatory
17 injunctions requiring their respective former branches of the military to reinstate them to active duty
18 and to give them credit toward retirement for the time each would have served had he not been
19 discharged.

20 II. DISCUSSION

21 As a suit against the United States or its agencies requires the waiver of sovereign immunity,
22 plaintiffs instituting such an action must identify specific statutory authorization for their claims.
23 *See Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008). In this case, plaintiffs
24 contend that the Court has subject matter jurisdiction over their suit under the Administrative
25 Procedures Act (APA). The APA provides that an action may be maintained against the United
26 States by a person "adversely affected or aggrieved by agency action within the meaning of a
27 relevant statute." 5 U.S.C. § 702. The waiver of sovereign immunity under the APA, however,
28 only applies to suits where: (1) the claims are for other than money damages; (2) an adequate

1 remedy for the claims must not exist elsewhere; and (3) the relief sought must not be expressly or
2 impliedly forbidden by another statute. *See United States v. Park Place Assocs.*, 563 F.3d 907, 929
3 (9th Cir. 2009).

4 Defendants contend that, as pleaded, plaintiffs' claims seek not just specific relief but also
5 money damages. In particular, they argue that the request for service credit toward retirement
6 represents an attempt to obtain compensation, *i.e.*, money damages, for benefits of which they were
7 deprived because of their alleged wrongful discharges. Defendants also suggest that plaintiffs'
8 complaint does not expressly disavow all monetary relief including, for instance, allowances for
9 housing credits and rations and benefits such as medical care reimbursement during the periods they
10 were discharged. Consequently, defendants argue that plaintiffs' case must be transferred to the
11 Court of Federal Claims, which possesses exclusive jurisdiction to hear non-tort claims against the
12 federal government for damages greater than \$10,000. *See* 28 U.S.C. § 1491.

13 Plaintiffs, who have specifically disavowed "lost wages," dispute that their requests for
14 service credit toward retirement constitute claims for money damages. Moreover, their prayer for
15 relief makes no mention of monetary allowances or benefits. Nonetheless, in a professed attempt to
16 resolve all doubt regarding jurisdiction, plaintiffs move for leave to file a first amended complaint
17 that eliminates service credit from the prayer for relief. Additionally, in the proposed amended
18 complaint, each plaintiff now states that he "does not seek lost wages or other benefits that directly
19 flow from reinstatement in this lawsuit."

20 Under Federal Rule of Civil Procedure 15(a)(2), the court should freely grant leave to amend
21 "when justice so requires." In determining whether leave to amend is warranted, courts consider
22 five factors: (1) undue delay; (2) bad faith; (3) prejudice to the opposing party; (4) futility of the
23 amendment; and (5) whether previously allowed amendments have failed to cure deficiencies. *See*
24 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (citing *Foman v.*
25 *Davis*, 371 U.S. 178, 182 (1962)).

26 In their opposition to plaintiffs' motion for leave to amend, defendants concede that
27 jurisdiction in this Court under the APA would be proper over claims that "clearly and expressly
28 waive all money claims that directly flow from retroactive reinstatement and promotion."

1 Defendants still press their argument that plaintiffs’ proposed amended complaint does not
2 sufficiently disclaim certain monetary relief such as “back pay” and “health care allowances.”
3 Plaintiffs need not use defendants’ choice of language, however, in order to disclaim sufficiently
4 monetary damages. In this case, they have stated in clear terms that they do not seek lost wages,
5 lost benefits, or now, even retirement credit in the proposed amended complaint.

6 Additionally, defendants object to the fact that plaintiffs have not expressly stated that they
7 will not seek money damages in the future. In fact, in their motion for leave to amend plaintiffs
8 reserve the right to petition for retirement credit in a separate action in the Court of Federal Claims.
9 Defendants argue that it would be prejudicial, would cause delay, and, in essence, would be unjust
10 to allow plaintiffs “to split their cause of action.” They view plaintiffs’ amended pleading as an
11 attempt to circumvent the exclusive jurisdiction of the Court of Federal Claims, which defendants
12 contend would have jurisdiction over the entire suit were plaintiffs to include all relief they intend to
13 pursue in a single case.

14 The Federal Circuit, which reviews decision to transfer to the Court of Federal Claims, held
15 that a district court had jurisdiction over claims involving non-monetary relief while simultaneously
16 remanding other claims for a determination as to whether they were properly characterized as claims
17 for money damages requiring transfer. *See James v. Caldera*, 159 F.3d 573, 583-84 (Fed. Cir. 1998)
18 (holding that the district court possessed jurisdiction over claims by a former Army service member
19 to remove a bar to reenlistment, but remanding claims involving extension of enlistment for
20 determination on whether they involved money damages). The decision necessarily contemplates,
21 in certain circumstances, that the claims in a case may end up being split between the district court
22 and the Court of Federal Claims. In this case, any future suit by plaintiffs remains hypothetical.
23 Whether plaintiffs will be entitled to bring a separate suit in the Court of Federal Claims involves
24 issues that need not be decided now. By eliminating their claims for retirement credit from this suit,
25 plaintiffs acknowledge the risk that defendants may raise defenses to any future action. At present,
26 plaintiffs merely seek leave to amend to clarify that they seek declaratory and injunctive relief
27 through the action in this Court. Accordingly, leave to amend is granted.

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III. CONCLUSION

Plaintiffs' motion for leave to file a first amended complaint is granted. Defendants' motion to transfer is denied.

IT IS SO ORDERED.

Dated: 5/3/11



RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE