Witt v. Department of the Air Force et al Doc. 125

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN WASHINGTON
AT TACOMA DIVISION

MAJOR MARGARET WITT,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE AIR FORCE; ET AL.,

Defendants.

No. C06-5195 RBL

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SANCTIONS DUE TO SPOLIATION OF EVIDENCE

NOTE ON MOTION CALENDAR: AUGUST 13, 2010

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Witness testimony and documents produced by Defendants prove that key relevant documents are missing despite Defendants' statements to the contrary. Moreover, Defendants cannot ignore discovery obligations by claiming they were only ever responsible for preserving documents that support their theory of the case. The record is clear that Defendants received notice multiple times and yet to this day, there is no evidence that the Air Force instructed Defendants, key decision-makers, or unit members with potentially relevant evidence concerning Major Witt and her discharge to preserve their files. Defendants have recklessly failed to comply with their discovery obligations and this behavior warrants sanctions.

A. Missing Police Blotter

1. Document Showing Moore-Harbert Knew Unit Members Were Engaging in Homosexual Conduct is Missing.

Defendants curiously assert that Plaintiff cannot prove the attachment to Colonel Moore-Harbert's memo is missing. (Dkt 124 at 7-8.) Put simply, Defendants produced the memo without the attachments. Defendants have never identified the numbered documents in their production that would constitute the missing attachment to Moore-Harbert's memo. Plaintiff has obtained a copy of the incident report generated by the Tacoma Police Department concerning the two unit members which shows that SM-C made a statement to the police that the two unit members were "dating," engaged in a sexual relationship. While text on the incident report indicates the McChord military police department received a copy of the incident report, only the missing attachment would conclusively prove that Colonel Moore-Harbert *herself* had seen the incident report and therefore had knowledge of the information contained within the incident report about SM-C and SM-D dating. Plaintiff has provided the Court with other documents produced by Defendants to prove Plaintiff's belief as to what the missing memo attachment, or police blotter, likely contains.

2. Defendants Intentionally Disregarded the Rules of Discovery Despite Repeated Notice.

Defendants contend that sanctions would be no deterrent because there was no obligation to retain documents relating to Defendants' actions, specifically Colonel Moore-Harbert, concerning gay 446th unit members from 2006 until 2010; Defendants had no notice that unit members' conduct might be relevant to Plaintiff's case. Defendants are wrong. As of April 2006, Plaintiff identified 9 unit members who had relevant information about Major Witt and the gay-friendly culture pervasive in the 446th AES. (Dkt 10-18.) As set forth in her initial filings, Plaintiff sought to

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prove her unit knew of other gay unit members engaged in same-sex relationships and that homosexual conduct was tolerated despite Don't Ask Don't Tell (DADT). (Dkt 8 at 20.)

Moreover, Defendants have had notice since April 2006 that Major Witt was making a facial and as-applied substantive due process challenge to DADT, which was only limited to an as-applied challenge by the Ninth Circuit in May 2008. Even then, the Ninth Circuit instructed the parties to put on evidence of whether the presence of Major Witt, a known lesbian, would affect unit cohesion and morale. Whether there are other known lesbians already serving in the unit and the fact that command tolerates lesbians engaging in homosexual conduct is obviously relevant in proving whether Major Witt's presence would have a negative effect.

Defendants admit that SM-C's discipline files would have only been destroyed by 2009 and that SM-C's files would still have existed as of May 2008 when the Ninth Circuit issued its decision. (Dkt 124 at 8). Even if the Court were to agree that Defendants had no notice until May 2008 that an issue might be whether the 446th would tolerate a known lesbian, Defendants intentionally ignored their discovery obligations while they considered appellate options and did not preserve documents until June 2009 when the mandate was issued. (Dkt 116-1 at 39.) Even then they still refused to put a litigation hold on Defendants, key decision-makers or unit members with possibly relevant information concerning Major Witt and her discharge. (Dkt 116-1 at35-36, 41.) [1]

Defendants' theory of the case is that DADT is applied in a uniform manner and that the civilian courts should defer to the judgment of the military when it comes to applying DADT to servicemembers. (Dkt 24 at 24 & Dkt 118 at 5-6). Defendants concede that from the start of this case they took no steps to preserve discovery except what would benefit their theory of the case. (Dkt 124 at 3.) Even when it was documents within her personnel and inquiry file that they supposedly preserved, Defendants still managed to "lose" the two key non-privileged documents that would benefit Plaintiff's theory of the case as discussed more fully below in section B. Indeed, in the first paragraph of their motion for summary judgment, Defendants make clear their deliberate and intentional attitude concerning their discovery obligations -- they believe discovery was

[1] Defendants cite *Gippetti v. United Parcel Serv.*, 2008 WL 3264483 *3 (N.D. Cal. Aug. 6, 2008), for the point of "no notice" until document requests are served. But in *Gippetti*, there was evidence prior to the document request that Gippetti had asked for certain documents. However the Court refused to admit it because it was based on hearsay. Moreover, the Court believed that the missing documents were not even relevant to Gippetti's case even if they did exist. Unlike in *Gippetti*, Defendants here received notice as early as April 2006 that Plaintiff asserted the 446th is a gay-friendly unit, making the conduct of other gay servicemembers in the unit relevant to whether her discharge for being gay advanced unit cohesion and morale.

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"inappropriately required" in this case (Dkt 118 at 1.)

Parties do not get to decide the rules of discovery – courts do. As has already previously been noted in prior pleadings, when the United States is a party it stands in the same shoes as any other litigant. (Dkt. 82 at 3); *Mosseller v. U.S.*, 158 F.2d 380, 382 (2d. Cir. 1946).

3. The Missing Document Prejudices Plaintiff's Ability to Prove Her Case.

Defendants further assert that Plaintiff has not been prejudiced by their failure to produce the missing attachment to Colonel Moore-Harbert's memo. (Dkt 124 at 9.) This is a specious argument. The missing document would provide a key piece of evidence to help establish that Colonel Moore-Harbert condones the open service of lesbian servicemembers. While Plaintiff has access to other documents which indicate what information the missing attachment may contain, Plaintiff has no proof that Colonel Moore-Harbert reviewed or had access to those other documents. It would be useless to confront a witness about other documents they have never seen and Defendants know this. Plaintiff has provided these other documents to this Court to help prove that her request for an adverse inference is warranted. Under controlling Ninth Circuit precedent, she must show that Defendants were more likely than not threatened by the missing evidence. *Akiona v. U.S.*, 938 F.2d 158, 161 (9th Cir. 1991). The fact that the missing document could prove that their key witness provided false testimony under oath makes it a threatening document to Defendants.

4. Plaintiff seeks Relevant, Appropriate Relief for Defendants' Destruction of Documents

Defendants also assert that the relief sought by Plaintiff is "irrelevant to these proceedings." (Dkt 124 at 10.) Defendants are incorrect. The missing document would help establish that SM-C and SM-D were "dating" and in a same-sex relationship. Indeed, they lived together. (Dkt 116-1 at 81, 83 & 86.) Defendants quibble with the suggested language offered for the adverse inference because it says "aware of other gay and lesbian members" without mentioning homosexual conduct. (Dkt 124 at 10.) While Plaintiff disagrees with Defendants as a matter of law and believes that homosexual status and conduct are the same thing, Plaintiff clarifies her request for an adverse inference that states as follows: "that command for the 446th AES is aware of other gay and lesbian members in the unit who engage in homosexual conduct, and disciplined them for lesser offenses, but did not pursue any action against them under DADT." (new language underlined).

B. Missing Personnel and Inquiry Documents

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1. Crabtree Confirms the McChesney Email String is Not the Missing Document

Defendants assert that no documentary evidence is missing from Major Witt's personnel and inquiry file because "it is reasonable to conclude the email produced by Defendants constitutes the document to which General Crabtree referred." (Dkt 124 at 5-6.) Defendants assert that the email sent by Pat McChesney to General John Jumper ("McChesney email chain") is the missing written order received by General Crabtree from Air Force Reserve Command Headquarters ("AFRC") and also the missing document sent from General Crabtree to General Duignan. (*Id.* at 6-7). In making this argument, Defendants fail to alert this Court to the fact that General Crabtree testified, not once, but twice during his deposition that he never saw the McChesney email. (Dunne Decl. Ex. A at 6-8; 26:13-19; 31:21-32:2.) Accordingly, the email chain offered by Defendants cannot constitute the missing documents pursuant to their own witness' testimony.

Moreover, the redacted McChesney email chain also cannot constitute the written order received by General Crabtree because Judge Advocates ("JAG officers") do not have command authority over wing or unit commanders. (Michelle McCluer Decl.¶7.) JAG officers are advisors, not commanders (with the exception of one JAG position in the Air Force). (*Id.*) A JAG officer has no authority to order an inquiry under the Don't Ask Don't Tell Policy. (*Id.*) Most of the addressees on the McChesney email chain contain the "JA" notation, which signifies that they are JAGs or civilian attorneys in the Pentagon. (*Id*. at ¶8.)

Finally, Plaintiff requested Defendants produce an unredacted copy of the McChesney email chain to confirm whether it is the missing order, but Defendants failed to do so. (Dunne Decl. ¶7 & Dkt 116-1 at 41.) If the McChesney email chain were the missing document, one assumes Defendants would have provided an *in camera* copy to the Court for its review at a minimum.

2. The Missing Order Would Establish Undue Command Influence

Defendants concede, by their silence in their opposition, that the documents missing from Plaintiff's inquiry file, the written order to General Crabtree and the materials sent to General Duignan, should have been retained pursuant to their own document retention policies even absent a lawsuit. (Dkt 115 at 11 & n.12) (noting that even if a lawsuit had never been filed, these two documents still should have been preserved in the inquiry file). Given that the missing documents should have been retained consistent with retention policies, Defendants then contend that the

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written order from AFRC to General Crabtree – the key document initiating this entire case – is not relevant to any material facts. Specifically, they argue that General Crabtree could not have been ordered to remove Major Witt from the Air Force. Defendants hope this Court will ignore a very real reality that can occur in the military called "undue command influence."

The adverse inference sought by Plaintiff lends factual support to the ultimate conclusion that AFRC exercised undue command influence on General Crabtree by ordering him to initiate a fact-finding inquiry and to recommend the discharge of Plaintiff. Undue command influence results when a commander directs a subordinate to dispose of a case in a certain way or tries to influence the discretion a commander has to decide punishments.[2] Undue command influence undermines morale and unit cohesion. It is a material fact in dispute as to whether the suspension and discharge of Major Witt advanced unit cohesion and morale and whether DADT is applied in an arbitrary manner with no purpose of advancing unit cohesion. Without access to the missing documents, Plaintiff can only use circumstantial evidence to prove undue command influence occurred and that unit cohesion and morale was negatively affected by this.

Defendants failed to inform the Court that they also produced a second email chain to Plaintiff. This email chain reflects that McChesney's email was forwarded to senior staff for General Jumper with "SENSITIVE" markings and contains the following language: "My response to Mr. McChesney, for the Chief, will be that this was forwarded to the *right office for appropriate action*." (Dunne Decl. Ex. B at 17.) (emphasis added). The next email in the chain contains the statement that "IT is also very sensitive." (*Id.*). "The Chief" referenced in the email chain is General John Jumper, Chief of Staff for the Air Force at the time. In addition, this email chain was received by Major Steve Geringer, the JAG identified by Defendants (Dkt 124 at 3), three days after McChesney sent his email to General Jumper. As a recipient of the email chain, Major Geringer could read the comments made by General Jumper's staff concerning this matter. Major Geringer is also the JAG who advised General Crabtree concerning Major Witt's separation, (Dunne Decl. Ex. A at 10; 44:2-17), and also the same JAG who reviewed the investigator's report and provided a recommendation to Crabtree urging Plaintiff's discharge. (Dunne Decl Ex C at 21 & D at 23-4.) In short, rather than have a different JAG, who had not been exposed to General Jumper's influence

[2] Colonel Moore-Harbert exercised her command discretion when she decided to discipline SM-C and SM-D only for fraterinization and not under DADT. General Crabtree never had the opportunity. (Dunne Decl. Ex. A at 8-9; 32:15-33:3.) ("it doesn't matter what my opinion was, because I've been directed to do this").

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and his staff's commentary on the matter, do an independent review, the same JAG conducted the legal review. This additional email chain and its recipients, coupled with the fact that the military did not assign an independent JAG to provide the legal recommendation for discharge, helps prove the missing documents more likely than not threatened to negatively impact Defendants' case.

3. Plaintiff seeks Appropriate Relief

Defendants assert that the language used by Plaintiff in her request for an adverse inference – specifically the use of "remove" – is incorrect as a matter of law. Accordingly, the Plaintiff clarifies her request with more precise language to the following: "that General Crabtree was ordered by Air Force Reserve Command Headquarters to initiate a fact-finding inquiry against Major Witt and to recommend her discharge from the Air Force." (new language underlined.)

C. Attorneys Fees are Warranted for the Missing Moore-Harbert Document.

As put in writing to Defendants, Plaintiff did not seek relief under Rule 37 for the missing Crabtree documents because such motion has no purpose if the documents were already destroyed. (Dunne Decl. Ex. E at 27.) Plaintiff sought to avoid unnecessary motion practice. Plaintiff did move to compel concerning the missing Moore-Harbert document because Defendants would not reveal whether personnel documents still existed. Defendants concede that the Court may grant attorney fees against the United States for failure to comply with orders issued pursuant to Rule 37. (Dkt 124 at 11.) Defendants contend that, although they were ordered to produce the missing Moore-Harbert document, the fact that they had previously destroyed the missing document before the June 1, 2010 Order issued means they should not be sanctioned under Rule 37. (Dkt 124 at 11.) If what Defendants were arguing was true, no party would ever have an incentive to produce relevant documents when they could simply be destroyed while the litigation was pending but before the other side moved to compel their production.

CONCLUSION

For the reasons set forth in her moving papers and this reply, Plaintiff believes she has established the reckless destruction of relevant documents and accordingly seeks adverse inferences and attorney fees.

DATED this 6th day of August, 2010.

Respectfully submitted,
By: __/s/ Sarah A. Dunne_____
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CERTIFICATE OF SERVICE

I hereby certify that on August 06, 2010, I electronically filed *Plaintiff's Reply In Support of Motion for Sanctions Due to Spoliation* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 6th day of August, 2010.

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

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