Judge Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MAJOR MARGARET WITT Plaintiff, v. UNITED STATES DEPARTMENT OF THE AIR FORCE, et al. Defendants.	No. C06-5195 RBL **DEFENDANTS' MEMORANDUM IN SUPPORT OF EXCLUSION OF CERTAIN EXHIBITS AND TESTIMONY**

The Court should exclude from evidence three exhibits[1] concerning potential changes to the statute and implementing regulations popularly known as the "Don't Ask, Don't Tell" (DADT) policy. These documents are inadmissible as irrelevant hearsay. *See* Fed. R. Evid. 402. Defendants request for similar reasons that the Court rule that Secretary of Defense Robert Gates need not appear personally in this Court to testify at trial about the same facts.

Plaintiffs have proposed that the Court admit into evidence three documents concerning statements made by Secretary Gates and others regarding the DADT policy. Two (Ex. 63 & 64) are transcripts of Congressional hearings at which Secretary Gates discussed the current study considering potential mechanisms for implementing a repeal of the DADT statute. *See* Ex. 63 at

[1]Plaintiff originally asked for the admission of proposed Exhibits 63, 64, 65 and 80. Proposed exhibits 65 and 80 appear to be the same document. Defendants understand that plaintiff now seeks the admission of proposed exhibit 80, but not 65.

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WITT-003461; Ex. 64 at WITT-003497. One (Ex. 80) is a transcript of a press conference at which Secretary Gates discussed recent changes to the regulations implementing DADT.

The Court should excluded as irrelevant plaintiff's proposed evidence regarding subsequent actual or potential changes to the DADT policy because they do not show that any fact of consequence is more or less likely. *Campbell v. Wood*, 18 F.3d 662, 685 (9th Cir. 1994).

First, evidence that the Department of Defense is considering how to implement a change should the law be repealed does not make any fact of consequence in this case more or less likely. Defendants understand that plaintiff believes that the fact that the Department of Defense has begun a study about how a repeal of DADT could be implemented is evidence that her discharge was not necessary because an alternative policy is possible. But the study remains pending, and Congress has made no ultimate determination regarding repeal.[2]

Second, the fact that the Department of Defense has changed the DADT implementing regulations is not relevant to any matter at issue in this case. Plaintiff apparently believes that the recent changes to the implementing regulations demonstrate that the application of the policy to her beforehand was not necessary. That the Department of Defense has changed the way that the policy is implemented in 2010 does not prove that the policy as implemented in the past was not necessary to advance the undisputedly important interests of military cohesion, morale, order and discipline. If one accepted plaintiff's view, any policy would be unconstitutional if the government could conceivably choose to later amend or repeal that policy.[3] Congress may (or it may not) choose to change or repeal the DADT policy at some point in the future. The fact that such a change is possible does not mean that the policy as applied in the past was not a constitutionally permissible choice. The Court should not permit plaintiff to bring in irrelevant

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[2]As the President has stated previously, the Administration does not support the DADT statute as a matter of policy and supports its repeal.

[3]This cannot be the law. In *Goldman v. Weinberg*, 475 U.S. 503 (1986), for example, the Supreme Court upheld the military's ban on the wearing of yarmulkes by military members in light of the military's important interests in order, discipline and uniformity. 475 U.S. at 508-09. Congress later decided to change the rule to allow such apparel. *See* 10 U.S.C. § 774. The fact that Congress ultimately decided to pursue *different* policy choices does not mean that the application of the original policy was unconstitutional. The Supreme Court had already held that it was constitutional. So too here.

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evidence to support this incorrect application of constitutional principles.[4]

To the extent that the documents are deemed relevant and admissible, defendants suggest that an appropriate approach is to admit the documents instead of requiring the Secretary of Defense to testify at trial.

CONCLUSION

For the forgoing reasons, defendants respectfully request that the Court exclude Exhibits 63, 64, and 80 from evidence.

Dated: September 3, 2010

Respectfully submitted,

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[4]The proposed exhibits are inadmissible under Federal Rule of Evidence 802. Secretary Gates's statements reported in the documents may be admissible hearsay as admissions of a party opponent, but the documents themselves are hearsay. *See* Fed. R. Evid. 805; *see also, e.g., Larez v. City of Los Angeles*, 946 F.2d 630, 642 (9th Cir. 1991) (press report of defendant's statements constitute hearsay); *Kallstrom v. City of Columbus*, 165 F. Supp. 2d 686, 693 (S.D. Ohio 2001) (news transcript is "classic hearsay"); *United States v. North*, 713 F. Supp. 1450 (D.D.C. 1989) (Congressional hearing transcripts are hearsay). Nevertheless, while the documents are technically hearsay, defendants agree that they appear to be accurate records of what the Secretary actually said.

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2010, I electronically filed the foregoing Defendants' Memorandum in Support of Exclusion of Certain Exhibits and Testimony, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

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