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' MOTION TO STAY DISCOVERY AND FOR RELIEF FROM THE DEADLINES IMPOSED BY THE COURT'S MINUTE ORDER OF APRIL 13, 2006** (Note Defendants' Motion to Stay Discovery on Motion Calendar for July 11, 2006)

Defendants, by and through undersigned counsel, respectfully move this Court pursuant to Rule 26(c) of the Federal Rules of Civil Procedure to stay all discovery, including the initial Rule 26(f) conference, initial disclosures required under Rule 26(a), and the Rule 26(f) Joint Status report, pending resolution of Defendants' Motion to Dismiss Plaintiff's Complaint. In accordance with Rule 26(c) of the Federal Rules of Civil Procedure, undersigned counsel certifies that he has conferred with plaintiff's counsel regarding this motion and that plaintiff's counsel does not consent to the requested stay of discovery.

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
P.O. BOX 883, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 616-8482

I. INTRODUCTION

Defendants have moved to stay all discovery in this case until after the Court rules on defendants' Motion to Dismiss (Docket Entry #24) because so doing promotes efficiency and avoids conducting needless discovery. There is a high likelihood that this case will be resolved without the need for discovery. Plaintiff's action challenges the constitutionality of a federal statute and regulation that establish the Air Force's "Don't Ask, Don't Tell" policy, see 10 U.S.C. § 654; Air Force Instruction 36-3209 (hereafter collectively referred to as the "DADT Policy"). Defendants have moved to dismiss plaintiff's action on the ground that the DADT Policy is constitutional as a matter of law. Even if plaintiff's action were to survive the motion to dismiss stage, it would be as a result of a significant change in governing law. Consequently, the precise legal contours of the remaining action would be unknown – further confusing the parties' ability to engage in meaningful fact discovery. Thus, in light of posture of the case, pressing forward with discovery would not advance the resolution of this litigation. Furthermore, a stay of discovery at this time would avoid the expenditure of time and resources on unnecessary discovery.

II. BACKGROUND

Plaintiff filed her complaint on April 12, 2006. (Docket Entry #1.) Shortly afterwards, the Court issued a minute order regarding initial disclosures, joint status report and early settlement on April 13, 2006. (Docket Entry #4.) According to that minute order, the deadline for the Rule 26(f) conference is June 28, 2006, initial disclosures are due July 5, 2006, and the Combined Joint Status report is due July 12, 2006.

The action has already progressed with two motions being fully briefed without any discovery. On April 24, 2006, plaintiff moved for a preliminary injunction. (Docket Entry #8.) On May 8, 2006, defendants responded to plaintiff's motion and, in the same filing, moved to dismiss plaintiff's complaint. (Docket Entry #24.) Plaintiff responded to defendants' filing by a reply brief to the preliminary injunction motion (Docket Entry #25) and by a brief in opposition to defendants' motion to dismiss (Docket Entry #28). In response the latter of plaintiff's filings,

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
P.O. BOX 883, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 616-8482

defendants replied in support of the constitutionality of the DADT Policy and their motion to dismiss. (Docket Entry #29.)

In accordance with the parties' duty to confer regarding discovery, the undersigned counsel for defendants initially called and left a message for plaintiff's lead counsel on June 20, 2006, and was able to speak with him on two subsequent occasions. Agreement not being achieved in those conversations, defendants file this motion to stay all discovery until after the Court has ruled on defendants' motion to dismiss. Pursuant to W.D. Wash. Civ. R. 7(d)(2)(A), defendants note this motion for consideration on July 11, 2006.

III. ARGUMENT

It is well settled that district courts have broad discretion to control the nature and timing of discovery, Herbert v. Lando, 441 U.S. 153, 177 (1979), including the discretion to deny discovery, see Munoz-Santana v. INS, 742 F.2d 561, 562 (9th Cir. 1984). See generally Hahn v. Star Bank, 190 F.3d 708, 719 (6th Cir. 1999) ("Trial courts have broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined."). Courts have consistently exercised such discretion to stay all discovery where it appears that the case can be resolved through a dispositive motion. See, e.g., Jarvis v. Regan, 833 F.2d 149, 155 (9th Cir. 1987); Petrus v. Bowen, 833 F.2d 581, 583 (5th Cir. 1987); B.R.S. Land Investors v. United States, 596 F.2d 353, 356 (9th Cir. 1979). And, where, as here, a motion to dismiss presents questions of law for which factual discovery is neither necessary nor appropriate, discovery should be stayed pending a resolution of the motion. See Florsheim Shoe Co. v. United States, 744 F.2d 787, 797 (Fed. Cir. 1984); Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984). Thus, pursuant to this rule, courts repeatedly have held that a stay of discovery is appropriate pending consideration of threshold, potentially dispositive motions. See, e.g., U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 79-80 (1988) ("It is a recognized and appropriate procedure for a court to limit discovery proceedings at the outset to a determination of jurisdictional matters"); Patterson v. United States, 901 F.2d 927, 929 (11th Cir. 1990) (holding that a district court did not abuse its discretion in entering protective order

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
P.O. BOX 883, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 616-8482

prohibiting discovery pending determination of motion to dismiss or for summary judgment).

This case presents no reason to deviate from the well-established practice of staying discovery during the pendency of a dispositive motion. Plaintiff's action is premised upon a conclusion that the DADT Policy, as codified in federal statute and regulation, is unconstitutional. Defendants' motion to dismiss defends the constitutionality of the DADT Policy, and discovery is unnecessary to the resolution of any of the constitutional challenges that plaintiff has brought. Thus, the issue before the Court is a purely legal dispute, and no factual discovery is needed at this point.

Moreover, it is unlikely that there will ever be a need for discovery in this case. Courts have repeatedly applied rational basis review in assessing the constitutionality of the DADT Policy. Holmes v. Cal. Army Nat'l Guard,124 F.3d 1126, 1133 (9th Cir. 1997); Philips v. Perry, 106 F.3d 1420, 1429 (9th Cir. 1997); Cook v. Rumsfeld, 2006 WL 1071131, at *8 (D. Mass. Apr. 24, 2006). And, as the Ninth Circuit has emphasized, that level of scrutiny does not require inquiry into the specific factual situations of a given plaintiff; rather, such inquiry into specific facts is an inappropriate "ratcheting up" of the level of constitutional scrutiny. See Doe v. United States, 419 F.3d 1058, 1063 (9th Cir. 2005); Russell v. Hug, 275 F.3d 812, 820 (9th Cir. 2002). Consequently, by the very nature of the action that plaintiff brings, there is no need for discovery, particularly at this time.

Further undermining the need for any discovery at this point, if plaintiff's action survives defendants' motion to dismiss, it would necessarily require a change in existing law. At this point, without knowing what that hypothetical change in the law might be, it is also impossible to know what information would be used to support either side's case or what information would be relevant – let alone likely to lead to the discovery of admissible evidence. Amidst such an unknown, if even extant, legal basis for plaintiff's action, it is impossible to engage in meaningful discovery at this stage.

In short, conducting discovery at this point would be serve no immediate purpose, and a stay of discovery will avoid the unnecessary waste of the parties' time and resources – and

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
P.O. BOX 883, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044
(202) 616-8482

possibly the Court's as well.

IV. CONCLUSION

For the foregoing reasons, this Court should stay all discovery in this case, including the schedule set forth in the Minute Order Regarding Initial Disclosures, Joint Status Report, and Early Settlement (Docket Entry #4) until the Court rules on defendants' Motion to Dismiss.

Dated: June 28, 2006

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

JOHN MCKAY
United States Attorney

VINCENT M. GARVEY
Deputy Branch Director

MARION J. MITTET
Assistant United States Attorney

/s/
PETER J. PHIPPS
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 616-8482
Fax: (202) 616-8470
E-mail: peter.phipps@usdoj.gov

Mailing Address:
Post Office Box 883, Ben Franklin Station
Washington, D.C. 20044

Courier Address:
20 Massachusetts Ave., N.W.
Washington, D.C. 20001

Attorneys for Defendants

Of Counsel:
MAJOR TRACEY ROCKENBACH
AFLOA/JACL Military Personnel Litigation
1501 Wilson Blvd, 7th Floor
Rosslyn, VA 22209-2403

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2006, I electronically filed the foregoing Defendants' Motion to Stay Discovery and for Relief from the Deadlines Imposed by the Court's Minute Order of April 13, 2006, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following person:

James E. Lobsenz
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Tel: (206) 622-8020
Fax: (206) 622-8983
E-mail: lobsenz@carneylaw.com

Aaron H. Caplan
American Civil Liberties Union of Washington
705 Second Avenue
Seattle, WA 98104
Tel: (206) 624-2184
E-mail: caplan@aclu-wa.org

Nicki McCraw
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Tel: (206) 622-8020
Fax: (206) 622-8983
E-mail: mccraw@carneylaw.com

/s/
PETER J. PHIPPS
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station
Washington, DC 20044
Tel: (202) 616-8482
Fax: (202) 616-8470
E-mail: peter.phipps@usdoj.gov
Attorney for Defendants