Witt v. Department of the Air Force et al Doc. 52

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MAJOR MARGARET WITT,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF THE AIR FORCE; ROBERT M. GATES, Secretary of Defense; MICHAEL B. DONLEY, Secretary of the Department of Air Force; and COLONEL JANETTE L. MOORE-HARBERT, Commander, 446th Aeromedical Evacuation Squadron, McChord AFB;

Defendants.

NO. C06-5195 RBL

JOINT STATUS REPORT

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020

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Plaintiff, by and through her attorneys of record James E. Lobsenz, Sarah Dunne, and Aaron Caplan, and defendants,[1] by and through their attorney of record Peter J. Phipps, hereby submit the following joint status report. The parties were unable to agree on the proposed plan for proceeding and accordingly this report sets out their respective positions.

A. PLAINTIFF'S PROPOSED SCHEDULE

Plaintiff proposes the following schedule for litigating this case.

1. Disclosure of Expert Witnesses

The parties will disclose any expert witnesses they intend to call at trial and comply with Fed. R. Civ. P. 26(2) by no later than December 1, 2009.

2. Discovery to Be Completed by April 8, 2010

Any interrogatories, requests for production, and requests for admission shall be served no later than February 8, 2010. Any and all depositions shall be noted and completed by April 8, 2010.

3. Dispositive Motions

Any dispositive motion shall be filed by no later than May 8, 2010, and noted for no later than the fourth Friday after May 8, 2010.

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[1] In this official-capacity action, the following substitutions are automatically effective pursuant to Federal Rule of Civil Procedure 25(d) to reflect the current officeholders: Robert M. Gates is substituted for Donald H. Rumsfeld in the office of Secretary of Defense; Michael B. Donley is substituted for Michael W. Wynne in the office of Secretary of the Air Force; and Colonel Janette L. Moore-Harbert is substituted for Colonel Mary L. Walker in the office of Commander, 446th Aeromedical Evacuation Squadron, McChord, AFB. See Fed. R. Civ. P. 25(d). Those substitutions are reflected in the caption of this filing.

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4. Trial

Plaintiff requests that a trial date be set for August or September of 2010. The parties currently anticipate that 6-8 days would be required for trial. Counsel with primary trial responsibility are: James E. Lobsenz and Sarah J. Dunne for the plaintiff, and Peter J. Phipps for the defendants.

5. Unavailable Dates

Trial counsel currently are unavailable for trial in the summer and fall of 2010 on the following dates:

James E. Lobsenz – none.

Sarah J. Dunne – none.

Peter J. Phipps -- none.

6. Scheduling Conference

Assuming the Court has trial dates available in August and September of 2010, the plaintiff does not believe that a scheduling conference will be needed.

B. DEFENDANTS' PROPOSED APPROACH TO THIS LITIGATION

1. Background

The Ninth Circuit's decision in this case announced a new, three-factor as-applied test for evaluating the military's "Don't Ask, Don't Tell" policy (the "DADT" policy) against substantive due process challenges. See Witt v. Dep't of Air Force, 527 F.3d 806, 818-19

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(9th Cir. 2008). After announcing that new legal standard, the Ninth Circuit then attempted to evaluate the three factors, to the extent it could on the record before it.

As to the first factor, an important governmental interest, the Ninth Circuit concluded that the interests at issue in DADT (unit cohesion and morale) satisfy that requirement. See Witt, 527 F.3d at 821 ("[i]t is clear that the government advances an important governmental interest.").

However, the Ninth Circuit determined that, on the record before it, it could not sufficiently evaluate the second and third factors (whether the governmental action significantly furthers the legitimate interests and whether the governmental action is necessary to further those interests). See Witt, 527 F.3d at 821. ("However, it is unclear on the record before us whether DADT, as applied to Major Witt, satisfies the second and third factors."). Accordingly, the Ninth Circuit vacated the district court's ruling and remanded the case to develop the record and evaluate those two remaining factors.

2. Defendants' Proposed Approach

Due to the change in the legal standard (to an as-applied, three-factor test) for substantive due process challenges, defendants seek to set aside a period of stayed discovery, during which the parties would have the opportunity to move for summary judgment primarily on legal grounds, with additional factual support that could be supplied without the need for formal discovery. Under this approach, sworn statements and judicially noticeable materials could appropriately supplement the record so that evaluating both remaining factors of the Witt analysis could be done without the need for formal discovery. Defendants submit that this approach may resolve the matter without the need for discovery, and in the event that

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
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SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020

it does not such an approach has a strong likelihood of clarifying what discovery may be needed for either of the two remaining factors.

For that reason, defendants propose a schedule that sets aside a period for initial motions on legal principles with some factual supplementation, followed by discovery with respect to any remaining points, if necessary. Specifically, defendants propose a summary judgment briefing schedule as follows:

Opening briefs due by October 16, 2009;

Opposition briefs due by November 20, 2009; and

Reply briefs due by December 18, 2009.

During that period set aside for briefing all formal discovery would be stayed. If summary judgment is not awarded to either side following that briefing and any hearing on it scheduled by the Court, then defendants propose the commencement of discovery. In short, discovery is best pursued after the initial summary judgment briefing is resolved because that may eliminate altogether or minimize discovery.

In the event discovery becomes necessary, defendants propose the following discovery schedule:

(a) Discovery Completion and Scope

Written discovery (interrogatories, requests for production, and requests for admission) shall be served no later than six months after the commencement of discovery. Any and all depositions shall be noted and completed no later than seven months after the commencement of discovery.

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Initial disclosures will be waived for both sides.

The following limits will apply to discovery: interrogatories will be limited to 25 per side; depositions will be limited to 10 per side; requests for admission will be limited to 40 per side; and requests for production will be limited to 40 per side.

(b) Disclosure of Expert Witnesses

Any expert witnesses will be identified consistent with Fed. R. Civ. P. 26(a)(2) no later than five months after the commencement of discovery.

(c) Dispositive Motions

Any subsequent dispositive motions, if necessary, shall be filed by no later than three months after the close of discovery.

(d) Trial

A trial date shall be set for a time no earlier than six months after the close of discovery, or three months after the resolution of any outstanding dispositive motions, whichever is later.

Defendants currently anticipate that six to eight days would be required for trial. Counsel with primary trial responsibility are: James E. Lobsenz for the plaintiff and Peter J. Phipps for the defendants.

(e) Unavailable Dates

Trial counsel currently are unavailable for trial in the summer and fall of 2010 on the following dates:

James E. Lobsenz – none; Sarah J. Dunne – none; Peter J. Phipps – none.

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(f) Scheduling Conference

If the Court seeks further clarification on the approaches proposed by the parties, then defendants believe that it would be advisable to have the parties attend a scheduling conference with the Court.

C. PLAINTIFF'S RESPONSE TO DEFENDANTS' PROPOSALS

1. Disagreement With Defendants' Suggested Approach for Two Rounds of Summary Judgment Briefing

The plaintiff objects to the defendants' proposal that resolution of this case should begin with an initial round of summary judgment briefing to be conducted before any formal discovery is conducted.

The plaintiff disagrees that it would be productive to have two rounds of summary judgment motions, one at the outset, and another round after discovery has been completed.

2. Disagreement With Defendants' Suggestion For A Stay of All Discovery Until First Round of Summary Judgment Motions is Completed

The plaintiff objects to the defendants' proposal that all discovery should be stayed until after resolution of an initial round of summary judgment motion and cross-motions is completed. It appears that the defendants would like to be able to advance factual assertions during the initial round of summary judgment motions which would be immune from any probing in discovery. The plaintiff submits that there is no reason why the

CARNEY
BADLEY
SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
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TEL (206) 622-8020

defendants should be allowed to submit declarations from witnesses who would simultaneously be immune from discovery. This approach is quite likely to simply result in subsequent motions pursuant to Fed.R.Civ.P. 56(f)(1) for denial of the summary judgment motions, or pursuant to Fed.R.Civ.P. 56(f)(2) for continuances to permit a party to take depositions and/or employ other discovery procedures which the defendants would have this Court forbid.

Second, if the defendants' approach is followed, there is a significant probability that the initial motion and cross-motion for summary judgment will both be denied, and as a consequence, the necessary discovery will simply be unnecessarily delayed by a period of several months.

Third, under the defendants' approach, the briefing schedule for the initial round of summary judgment motions is too protracted and time consuming. If the defendants' approach is adopted, this Court is unlikely to issue any ruling on the first round of summary judgment motions until late December of this year at the earliest. If no discovery is permitted during this time frame, the predictable result is that the ultimate resolution of this case will be delayed by at least four months.

3. <u>Disagreement With Defendants Suggested Dates for Completion of Tasks According to an Unduly Protracted Schedule</u>

Assuming, *arguendo*, that the Court were to approve the defendants' suggestion that the parties complete an initial round of summary judgment motions to be followed by a period of discovery and then another round of summary judgment motions, the plaintiff

CARNEY BADLEY SPELLMAN

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TEL (206) 622-8020

would further object to the slow and dilatory pace of litigation which the defendants are suggesting.

Defendants are proposing a period of seven months for the completion of discovery, and this period is not likely to even begin until the end of this year or the start of 2010 at the very earliest. This means that at the very earliest, the discovery is not likely to be completed until the end of July, 2010. The defendants are proposing an additional three month period before the second round of summary judgment motions must be filed. These motions, then, are not likely to be completed until the end of October, 2010.

Defendants are proposing a trial date be set for three months after submission of the second round of summary judgment motions. That means that the trial is not likely to be until January 2011, at the earliest.

Finally, except for the initial round of summary judgment briefing, all of the defendants' proposed dates are completely indefinite. The defendants propose periods of time without any definite dates, because the commencement of their proposed periods of time depend upon the issuance of a Court ruling and no one can say when that ruling will be issued.

4. <u>There Has Been Too Much Delay Already</u>

The plaintiff was suspended from duty and administrative discharge proceedings were commenced by Colonel Walker on November 5, 2004. An administrative discharge

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hearing was not held until September 28-29, 2006. The Secretary of the Air Force approved and implemented plaintiff's discharge on July 10, 2007.

It has now been four years and nine months since the plaintiff was suspended. The defendants now propose a schedule that most likely would tack another 15 months (at least) onto this period of time, before her case came to trial. The plaintiff respectfully submits that there is no justification for adopting the slow and protracted schedule which the defendants propose.

5. Desirability of a Status Conference

Given the parties inability to agree on a proposed schedule for litigation of this case, this may be the unusual circumstance where it would be advisable for the Court to have the parties attend a Status Conference with the Court.

DATED this 21st day of August, 2009.

CARNEY BADLEY SPELLMAN, P.S.

By s/ James E. Lobsenz
James E. Lobsenz, WSBA #8787

Cooperating Attorney for the American Civil Liberties Union of Washington Foundation
Attorneys for Plaintiff
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Telephone: (206) 622-8020
Facsimile: (206) 622-8983
E-Mail: lobsenz@carneylaw.com

THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

By s/ Sarah A. Dunne
Sarah A. Dunne, WSBA #
Attorney for Plaintiff
ACLU of Washington Foundation
705 Second Avenue, Suite 300
Seattle, WA 98104
Telephone: (206) 624-2184
E-Mail: dunne@aclu-wa.org

By s/ Aaron H. Caplan
Aaron H. Caplan, WSBA #22525
Attorney for Plaintiff
Associate Professor
Loyola Law School Los Angeles
919 Albany Street
Los Angeles, CA 90015
Telephone: (213) 736-8110
Aaron.caplan@lls.edu

TONY WEST
Assistant Attorney General

VINCENT G. GARVEY
Deputy Branch Director

s/ Peter J. Phipps
PETER J. PHIPPS
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station
Tel: (202) 616-8482
Fax: (202) 616-8470
peter.phipps@usdoj.gov

CARNEY
BADLEY
SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

James E. Lobsenz	Lobsenz@carneylaw.com
Sarah A. Dunne	dunne@aclu-wa.org
Aaron H. Caplan	Aaron.caplan@lls.edu
Peter J. Phipps	Peter.phipps@usdoj.gov
Marion J. Mittet	Jamie.mittet@usdoj.gov

LILY LAEMMLE

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020