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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MAJOR MARGARET WITT,)	Docket No. C06-5195RBL
)	
Plaintiff,)	Tacoma, Washington
)	
vs.)	September 2, 2009
)	
UNITED STATES DEPARTMENT OF THE)	
AIR FORCE; DONALD H. RUMSFELD,)	
Secretary of Defense; MICHAEL W.)	
WYNNE, Secretary of the)	
Department of Air Force; and)	
COLONEL MARY L. WALKER,)	
Commander, 446th Aeromedical)	
Evacuation Squadron, McChord)	
AFB,)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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APPEARANCES- CONTINUED

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Proceedings recorded by mechanical stenography, transcript produced by Reporter on computer.

1 WEDNESDAY, SEPTEMBER 2, 2009 -9:30 A.M.

2 * * *

3 THE COURT: Please be seated.

4 THE CLERK: This is in Cause No. C06-5195RBL, Witt
5 versus Department of the Air Force, et al., Cause C06-5195RBL.
6 Counsel, please make their appearances.

7 MR. LOBSENZ: Good morning, Your Honor, Jim Lobsenz
8 for Major Witt. With me at counsel table is Sarah Dunne,
9 co-counsel. I think the last time we were here I was here
10 with Mr. Caplan. He's now a law professor in southern
11 California.

12 THE COURT: I talked with Mr. Caplan a couple months
13 ago and wished him well.

14 Mr. Lobsenz, good morning. Ms. Dunne, good morning.

15 MR. PHIPPS: I am Peter Phipps. I am with the United
16 States Department of Justice. I represent the defendant in
17 this case. With me at counsel table is Major Linnell Letendre
18 from the Air Force.

19 THE COURT: Good morning, Mr. Phipps. Good morning,
20 Major Letendre.

21 Upon review of the joint status report filed by the
22 parties, it is clear that there was a request for a status
23 conference. There's a difference of opinion as to how we
24 should proceed and on what schedule we should accomplish our
25 work.

1 I guess, Mr. Phipps, I am going to hear from you first. I
2 have to tell you, I am a little skeptical of doing sort of a
3 bifurcated motions practice. Part of that stems from my
4 scepticism about whether or not this is a case -- given the
5 Ninth Circuit's opinion -- that can be resolved in a summary
6 fashion at all. So go ahead.

7 MR. PHIPPS: Should I go first?

8 THE COURT: You bet.

9 MR. PHIPPS: First, to answer your question there,
10 there's basically three reasons why we made the proposal that
11 we made; and that proposal for review is for the initial
12 period of summary judgment briefing during which the discovery
13 would be stayed.

14 The first reason is the Ninth Circuit announced a new
15 legal standard, and so we are operating under a new legal
16 standard. As typical, when a case becomes an entirely new
17 case operating under a new legal standard, you can start with
18 dispositive motions in an effort to frame and narrow issues.

19 So just at the outset, since we view this as an entirely
20 new case, we think it is appropriate procedurally to have an
21 opportunity to make dispositive motions.

22 The second reason is related to the first reason, that
23 there's an entirely new legal standard, but it's a little more
24 specific; and that is that the Ninth Circuit's new legal
25 standard comes from a factually dissimilar area of the law.

1 It comes from the *Se11* decision, the United States Supreme
2 Court's decision in *Se11*; and that area of fact related to the
3 forcible administration of antipsychotic drugs to criminally
4 insane defendants so that they would be competent to stand
5 trial.

6 That's very different than the military's personnel policy
7 regarding homosexual contact. And on remand, the contours of
8 that general standard are going to need to be applied
9 carefully so that they reflect the realities of military life.
10 We think that it makes more sense to begin to frame those
11 issues at the outset so that we are looking at the standard on
12 remand as tailored to what the factual realities are here.

13 The third reason is that proceeding with discovery in this
14 case is uniquely problematic for the Air Force. To explain
15 this, I need to get into a little bit of the details of the
16 Ninth Circuit's decision.

17 THE COURT: I have to confess; for this status
18 conference I did not reread the Ninth Circuit's opinion. But
19 believe me, I read it more than once when it came out.

20 MR. PHIPPS: What the Ninth Circuit did was it
21 instituted an as-applied test for the "Don't Ask, Don't Tell"
22 policy. It identified three factors that should be looked at
23 in the as-applied context.

24 The first factor was whether there was an important
25 government interest in unit morale and cohesion.

1 As far as I can tell, the Ninth Circuit resolved that
2 first factor in the military's favor and said, yes, the
3 military does have an important government interest in unit
4 morale and cohesion.

5 There's two factors that remain, whether or not the policy
6 promotes unit morale and cohesion and whether it's necessary
7 to promote unit morale and cohesion. I am paraphrasing; I
8 don't mean to take all of the life out of the legal analysis,
9 but that's a general sketch.

10 So we are at this position where the Ninth Circuit has
11 recognized that there's an important government interest in
12 unit morale and cohesion; that is the government's, pursuant
13 to the constitutional analysis of the Ninth Circuit case.

14 If we commence with discovery into the specific facts of
15 this case by looking at what unit members think, we are
16 threatening -- we are jeopardizing the unit morale and
17 cohesion that, in its constitutional analysis, the Ninth
18 Circuit said the government -- the military -- has an
19 important government interest in.

20 So the military is in a bit of a catch-22. By proceeding
21 to discovery, we may well have to sacrifice our important
22 government interest as recognized by the Ninth Circuit as
23 being an important government interest in its constitutional
24 analysis.

25 This issue is exacerbated in this context because we are

1 looking at reservists, and reservists are not full-time --
2 typically not full-time military service members, and so they
3 come for weekends, a few weeks a year, typically. And to then
4 begin to take a controversial political social issue, and then
5 have them deal with the discovery burdens of that in their
6 limited time, it's already a risk to unit morale and cohesion
7 and it's exacerbated because they've got less time to focus on
8 what really is their primary mission.

9 So for those reasons, we thought it would be appropriate
10 to begin to conduct -- to start off with summary judgment
11 briefing, wherein what we would do is lay out the government's
12 position with respect to these three factors, attempt to give
13 them some legal dimension, apply them to the context of the
14 military without sacrificing that important government
15 interest that the Ninth Circuit recognizes we have.

16 So that's what underlies our position.

17 THE COURT: I think I understand better your
18 position; thanks.

19 Mr. Lobsenz or Ms. Dunne.

20 MR. LOBSENZ: Well, Your Honor, it seems to me that
21 it was Mr. Phipps' last point on discovery that may be
22 problematic, which is where the rubber hits the road, and the
23 government just doesn't want any discovery. I have heard that
24 message from the government clearly -- loud and clear.

25 Ms. Dunne and I were asked to meet with the Solicitor

1 General of the United States in April, and we heard that
2 message loud and clear that discovery is a big problem; but we
3 never heard any specifics as to why, and it boils down to they
4 don't like the Ninth Circuit's decision.

5 THE COURT: Let me ask you -- and I don't want to
6 tread on tactics if you can tell me -- it really is curious --
7 I'm a curiosity seeker here I guess. It's an interesting
8 case, a fascinating case. What kind of discovery do you
9 anticipate? Have you had an opportunity to sort of map it out
10 and cogitate about what you want to do?

11 MR. LOBSENZ: I have thought about it. Part of the
12 difficulty of thinking about it is not knowing what the
13 government is going to argue. I have sort of this ancient
14 experience from the *Watkins* case from like three decades back.
15 I know what they argued then, and I have some suspicions that
16 I am going to see similar things. There were different legal
17 rules that applied then. At that time we got lots of
18 affidavits from people who were like Joint Chiefs of Staff
19 or --

20 THE COURT: I guess that's what I am talking about.
21 I am familiar with what happened at the congressional level,
22 who came and testified, what they testified to.

23 MR. LOBSENZ: I don't see that as being particularly
24 relevant.

25 THE COURT: Okay.

1 MR. LOBSENZ: I suppose it might be, but if it
2 becomes relevant it's because the government is going to come
3 in here and tell you it's relevant; I'm not sure why. The
4 opinion couldn't be clearer that the three-factor test has to
5 be as applied to Major Witt and the 446.

6 THE COURT: Is it so clear as to the 446? Obviously
7 O'Scannlain and Kleinfeld -- we have mobility within our
8 forces, and which --

9 MR. LOBSENZ: O'Scannlain and Kleinfeld were writing
10 dissents from denial of certs, so I take the position that it
11 really should be focused on the 446. The government may
12 disagree. Your Honor may disagree, but I think that's going
13 to be my position.

14 So I see, perhaps because I am just guessing, a useless
15 round of summary judgment that they want to do where they
16 bring in some affidavits from some people that have no
17 familiarity with either Major Witt or the 446.

18 THE COURT: Given the nature of the question, I don't
19 see how I can summarily decide the issue at all. That's my
20 concern, is that -- as I have sort of ruminated about where we
21 go from here. On an as-applied analysis, I agree with you; I
22 think it's as to Major Witt.

23 MR. LOBSENZ: I guess I half agree with you.

24 THE COURT: Well, we are making progress.

25 MR. LOBSENZ: My thought is that you grant summary

1 judgment to Major Witt if they don't come up with some shred
2 of evidence that she causes a problem in 446, and I have
3 always been skeptical that they have been able to do that. We
4 have already on file something like 14 declarations from
5 people who said not only was she not a problem, but many of
6 them said suspending her and discharging her -- that caused a
7 problem, that made us angry.

8 One person in his declaration said he was so disgusted he
9 didn't enlist for another term; and I think the name -- I want
10 to say Major Madison, but that might not be the right name.
11 But the woman who communicated to Major Witt that you are
12 being suspended said, I believe at the time -- maybe it was
13 Faith Mueller. Someone said "I was so disgusted I wanted to
14 take off my uniform." I see some possibility that the
15 government won't be able to come up with anyone to say that
16 she ever caused a problem.

17 And I just don't know. The types of discovery I envision
18 are limited to people within the 446 at that time, unless they
19 persuade you that something else is relevant. Colonel Walker,
20 who is the person who made the decision, that's somebody I
21 would like very much to get answers from because I suspect
22 that she will say at the time that I issued the orders to
23 suspend her, I had no personal knowledge and no hearsay
24 knowledge that she had ever caused a problem with anyone in my
25 unit. I don't see how judicially noticeable facts are going

1 to help you in a summary judgment motion.

2 The other thing I want to say, briefly, is that in the
3 beginning I thought we were going to agree totally on a
4 schedule. We had a schedule mapped out, and I was led to
5 believe no problem. But this proposal for a round first, and
6 then after a ruling, leaves everything indefinite. There's no
7 actual trial date. No one can plan for anything.

8 I just don't want to repeat my point that it's been almost
9 five years, and we would like to move the case along.

10 THE COURT: I understand. Mr. Phipps.

11 MR. PHIPPS: I would like to just touch on a few
12 points that I think bear on both the discovery issue and then
13 maybe give a preview of some summary judgment issues that we
14 think would be appropriate to decide at this point in time or
15 after briefing.

16 First, on the discovery issue, I think it's very important
17 to recognize that the realities of military life -- a unit
18 referendum approach to personnel decisions is not how the
19 military works. You don't poll members of a unit and say, "do
20 you like this person, do you not like that person?"

21 THE COURT: But doesn't the question of unit cohesion
22 and morale necessarily lend itself to that kind of a survey
23 approach? You are looking for -- the assumption is that the
24 presence of a homosexual member of the military in the 446, or
25 whatever, might have different consequences than -- I am going

1 to stereotype here -- but the Alabama National Guard infantry
2 branch out in Afghanistan or Iraq doing patrol. I think
3 there's -- having paid attention to the debate and what was
4 being said during the discussion about "Dont Ask, Don't Tell,"
5 I remember those kind of distinctions being made.

6 MR. PHIPPS: And I think that there's a few points
7 that bear. One is that that decision wouldn't be given to a
8 democratic vote of a unit. It would depend on unit
9 leadership. Then I think there's a really important point to
10 understand, and that is that the military's functionality is
11 not based on separate rules, based on separate regions,
12 separate rules based on reserve status or active duty status.

13 THE COURT: Didn't you already lose that fight in the
14 Ninth Circuit?

15 MR. PHIPPS: No, I don't believe that's the case.
16 The Ninth Circuit wants an as-applied analysis, but I think
17 what we would intend to put in would be a recognition that
18 this need for uniform standard necessarily affects the bounds
19 of the as-applied analysis that can be applied. And by that
20 what I mean is it's fundamentally problematic if there begin
21 to crop up different rules for different components of the
22 military regarding a personnel policy. That in itself is
23 harmful to unit cohesion and morale.

24 THE COURT: Is there any reason why discovery has to
25 be suspended during the time that that issue gets ferreted

1 out? My reading of the circuit opinion leads me in a certain
2 direction on that issue, but I obviously am prepared to be
3 persuaded.

4 MR. PHIPPS: And I think the reason is the reason
5 that I had touched on before, which is discovery is going to
6 interfere with unit morale and cohesion, which is not just a
7 legitimate government interest, but an important government
8 interest. So we find ourselves in this position of if we go
9 down this road, the military has already lost something; we've
10 already had something compromised here.

11 THE COURT: Is the nature of your concern that if the
12 Court decides some of the legal issues the way the government
13 wants them to be decided, then the intrusion on a unit, or
14 multiple units, will be minimal because we will simply talk to
15 the ranking officer who will inform us as to what the impact
16 on his or her unit would be to have an openly avowed gay
17 person in the unit?

18 MR. PHIPPS: That's the direction that we are
19 heading. And essentially to make this as-applied analysis, we
20 are going to look at the legitimacy of the congressional
21 findings, which the Ninth Circuit has not disputed their
22 legitimacy, and then through the leadership officer's transfer
23 back so that it is applicable to Major Witt.

24 That, we believe, can be done summarily through
25 affidavits, declarations, only a few people; and then the

1 judicially noticeable facts of congressional record and other
2 sorts of evidence.

3 So we think that this presents itself readily for summary
4 judgment in the sense that we look at what the leadership
5 officials say, and essentially what they are going to be doing
6 is building a bridge between the congressional findings and
7 Major Witt; and that's the as-applied analysis.

8 MR. LOBSENZ: From here, Your Honor, I just want to
9 say that on page 821 of the Ninth Circuit's decision that says
10 "Remand is required for the District Court to develop the
11 record on Major Witt's substantive due process claim," I don't
12 see how the record can be developed --

13 THE COURT: I agree with you, Mr. Lobsenz. It's an
14 interesting approach, but I think that the best way to proceed
15 here is to schedule a trial date to give dates for conducting
16 discovery, dates, deadlines. It's kind of like a speed limit;
17 it's a ceiling, not a floor. You can bring the summary
18 judgments as soon as you are ready and want to flesh out the
19 issues that have been proposed.

20 I know I need to be careful what I ask for, but this is
21 obviously an important issue. It's an issue of wide public
22 interest. Major Witt has been out in the cold, as it were,
23 for a lengthy period of time. She has a right to her day in
24 court; and I intend to -- subject to the powers of persuasion
25 by counsel that some summary disposition is appropriate, I

1 intend to give her her day in court.

2 My question to you, Mr. Lobsenz, is that I thought that
3 your August, September 2010 was a little slow, but I was
4 looking at May. I don't know whether that's doable from the
5 perspective of either side. What I am looking at is the week
6 of May 24th and June 1st as a trial date, and then we will
7 back up all of those dates from then.

8 MR. LOBSENZ: I think we can live with that, but
9 there's some question about the availability of experts. I
10 don't really know what experts the government has in mind. We
11 had our expert at the time we filed the lawsuit. I also don't
12 know how long it will take the government. I anticipate there
13 are some special problems with the fact that the people with
14 the information may not still be in court and are scattered
15 all over the world.

16 THE COURT: Sure.

17 MR. LOBSENZ: I don't know if you know where Colonel
18 Walker is these days; I don't think she's at McChord any more.
19 If these people are in Afghanistan or other parts of the
20 globe, that's one thing. We can certainly live with speeding
21 it up a little bit.

22 THE COURT: Mr. Phipps, recognizing that I am not
23 going to pursue the two-track approach for motion practice,
24 any specific hardships that you can anticipate if we were to
25 assign a May 24th trial date?

1 MR. PHIPPS: Your Honor, I think that our most
2 important is a remnant issue from before, would be that we
3 would like the opportunity to fully brief dispositive motions
4 before that time, and if possible, get determinations on those
5 dispositive motions before that time.

6 Just kind of backtracking, I don't know where that
7 calendar would put us; but assuming that that leaves enough
8 time for such dispositive motion practice, probably then at
9 the close of discovery, I think that would work.

10 THE COURT: Recognize that I am pretty liberal when
11 it comes to extensions of time. You get along. I think you
12 respect each other. You certainly respect what we are about
13 here. I don't see any reason why we can't solve every problem
14 we need to solve in order to move this case along.

15 If it turns out that May 24th is too ambitious, then we
16 will adjust that schedule. I am not going to prevent somebody
17 from developing the case that they believe they are entitled
18 to develop simply because we ran out of time, but I am
19 cognizant of how long this matter has been pending.

20 If this were a case that were coming in -- if this was a
21 status conference following a case filing in June, we'd be
22 trying to get you out the end of May or early June. We don't
23 have the problems that some of the other districts around the
24 country have.

25 So I am going to give you a trial date of May 24th, and an

1 order will issue from this Court that will back up -- the
2 discovery cutoff would be January 26th. If you need more
3 time, we will give you more time. Dispositive motion cutoff
4 would be February 25th. That would be in the normal -- is the
5 trial date the 26th or the 24th?

6 THE CLERK: The 26th. The 25th is a holiday. 26th
7 is Tuesday.

8 MR. LOBSENZ: I guess I worry too much.

9 THE COURT: You want to go back to August or
10 September?

11 MR. LOBSENZ: I just want to alert the Court to one
12 thing now. There is a criminal conspiracy trial set for
13 January 19th in Federal Court that has, I think, five or six
14 defendants, and I am counsel. And criminal cases -- I don't
15 really see that case ever settling, but I also don't
16 necessarily see this going to trial then. So it might turn
17 out that it's not a problem. But if I already have a trial
18 then, I thought I would just tell you that you probably would
19 see motions for extension of time about the summary judgment
20 stuff because it would be right in the middle of that trial.

21 THE COURT: Jean, what do we have in September, after
22 Labor Day?

23 THE CLERK: September 13th or the 20th.

24 THE COURT: Let's go September 13th. What
25 intermediate days would we get for the discovery calendar?

1 THE CLERK: Discovery would be May 17th, and
2 dispositive motions deadline would be June 15th.

3 THE COURT: The trial date is September 13th. A six-
4 to eight-day trial is what everybody predicts. Discovery
5 cutoff would be May 17th. Dispositive motion cutoff would be
6 June 15th. As I said, that's a ceiling, not a floor. You can
7 let the motions begin if that's what we need to do.

8 MR. LOBSENZ: Could I have one more additional
9 request? In the order, could you set a cutoff date for
10 disclosure of experts?

11 THE CLERK: It will be March 17th.

12 THE COURT: March 17th; it's the normal part of our
13 order.

14 Mr. Phipps.

15 MR. PHIPPS: Your Honor, we were interested in having
16 some limits placed on the scope of discovery at the outset. I
17 know that there's limits in the Rules of Civil Procedure that
18 already apply; 10 depositions, 25 interrogatories, limits on
19 requests for admission, production of documents. Those are
20 set at 40. In that this case doesn't implicate insurance or
21 damages, we were hoping the Court would waive the initial
22 disclosure requirements so we could get straight to the core
23 discovery. Anything that would be gained by initial
24 disclosures could be --

25 THE COURT: Well, let me say if the parties agree

1 that initial disclosures -- the lay down provisions are not
2 required, not necessary here or wouldn't be helpful, that's
3 fine with me. I will tell you that my natural reaction to
4 limits on discovery is going to be negative. Again, because
5 of the import of this case to developing law and to, I guess,
6 the development of the culture in many ways, this is an issue
7 that is of huge importance, and if somebody comes in and says
8 I want to take an 11th, 12th, or 13th deposition, whether
9 that's the government or plaintiff, I am going to receive that
10 request favorably.

11 If there are specific problems, they are going to need to
12 come through the appropriate exercise of rights and
13 limitations as provided in the rules.

14 Mr. Lobsenz.

15 MR. LOBSENZ: I think the normal limits on discovery
16 are fine in this case. I don't anticipate doing a lot. I
17 just don't like arbitrary limits.

18 THE COURT: I don't either. Let me also say, that if
19 you don't want to file papers and you just want to pick up the
20 phone, pick up the phone. You know, we are very good here
21 about humble decision making. That doesn't necessarily mean
22 we get it right; you just get a fast service.

23 Okay, so if you need to pick up the phone and call about
24 an ongoing dispute, and you don't want to write a 15-page
25 memorandum that I don't want to read anyway, pick up the phone

1 and call.

2 But you need to know -- and again, this is where I put in
3 my order that if you want to know how the Court is going to
4 decide discovery issues, look at the American College of Trial
5 Lawyers Code of Pre-Trial Conduct, because it describes both
6 the letter and the spirit of the discovery rules and the level
7 of cooperation that the Court expects from officers of the
8 court.

9 I don't think there's a chance that that's going to be an
10 issue -- a serious issue in this case; but if you want to know
11 what the Court is going to say, it's pretty well scripted
12 there. We, and the College, spend a lot of time and effort
13 trying to inform our colleagues and the bar and the judiciary
14 as to how best to comport oneself when it comes to discovery
15 disputes and how judges ought to resolve those issues.

16 So I am a committed disciple of those, of both the Code of
17 Pre-Trial Conduct and the Code of Trial Conduct, although the
18 Code of Trial Conduct really has probably less relevance to us
19 than the Pre-Trial.

20 You can get that online, and there's a reference in the
21 scheduling order that will come out that will have that
22 website.

23 Anything further at this time?

24 MR. LOBSENZ: No.

25 THE COURT: Mr. Phipps.

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MR. PHIPPS: Nothing from the defendant, Your Honor.

THE COURT: All right, very well.

Court will be in recess.

(Proceedings concluded at 10:00 a.m..)

* * * * *

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

/S/ Teri Hendrix

September 9, 2009

Teri Hendrix, Court Reporter

Date