Witt v. Department of the Air Force et al Doc. 69

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' REPLY MEMORANDUM IN SUPPORT OF PROTECTIVE ORDER REGARDING THE DEPOSITIONS OF UNIT MEMBERS**

INTRODUCTION

Plaintiff opposes the Air Force's motion for a protective order to prevent the depositions of unit members of the 446th Aeromedical Evacuations Squadron (the "446th AES"). None of plaintiff's arguments overcome the principle that disruption to the military has consistently limited the permissible bounds of litigation – at times preventing entire causes of action. To the contrary, plaintiff's opposition makes plain her intent to use these depositions in an attempt to discredit the commander of the 446th AES through the testimony of subordinates – an approach that is antithetical to good order and discipline. Nor does plaintiff deny the invasive nature of the depositions. Instead, she openly admits that the depositions would probe sexual orientations of members of the 446th AES. Such an approach is inconsistent with the rationale behind plaintiff's own case (personal privacy and autonomy), but more practically, it contravenes Air Force and Department of Defense ("DoD") regulations, which underscore that sexual orientation

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is a private matter. *See* DoD Directive 1304.26, attach. 2 § 8(a), p. 2-5; Air Force Instruction ("AFI") 36-3209 ¶ 1.15. Moreover, the noticed depositions would be unduly burdensome because their potential probative value is inseparable from the disruption that they would cause: they would search for testimony to contradict or discredit the unit commander or the unit climate surveys upon which she relies. Thus, plaintiff's opposition confirms the disruption, embarrassment, and undue burden that would result from the noticed depositions. Consequently, good cause exists for a protective order preventing the depositions of unit members. And, as explained below, none of plaintiff's counterpoints rebut the Air Force's showing of good cause.

I. Plaintiff Fails in Her Attempt to Distinguish the Military Immunity Case Law.

Plaintiff does not dispute the general principle that disruption of military affairs is so great a concern that it can preclude entire causes of action. Instead, plaintiff argues that the doctrine applies only to monetary claims. *See* Pl's Mem. in Opp. at 6-8 (Docket # 64); *id.* at 8 ("Suits for *money* are barred and that is all."). Plaintiff is wrong.

It is black letter law in the Ninth Circuit that principles of military immunity apply to more than simply claims for monetary relief. As explained in the Air Force's opening brief, Supreme Court and Ninth Circuit precedent have precluded entire causes of action due to the disruption that the litigation would cause to military affairs.[1] While several of those cases implicate claims for monetary damages, the type of relief sought was not the controlling principle. To the point, the Ninth Circuit recently affirmed the application of the *Feres* doctrine to bar a service member's request for injunctive relief, specifically a request for reinstatement. *See Lawrence v. Hawai'i Nat'l Guard*, 126 Fed. Appx. 835, 838 (Mar. 21, 2005). That decision made clear that when the challenge involves "an individual military personnel decision, not the constitutionality of a department-wide policy," the *Feres* doctrine would bar the claims. *Id.* Here, where the case is an as-applied challenge under heightened scrutiny, *see Witt v. Dep't of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008), plaintiff is necessarily challenging an individual

[1] *See United States v. Johnson*, 481 U.S. 681, 689-91 (1987); *United States v. Stanley*, 483 U.S. 669, 684 (1987); *United States v. Shearer*, 473 U.S. 52, 57 (1985) (plurality opinion); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983); *Feres v. United States*, 340 U.S. 135, 146 (1950); *Hodge v. Dalton*, 107 F.3d 705, 710 (9th Cir. 1997); *Christoffersen v. Wash. State Air Nat'l Guard*, 855 F.2d 1437 (9th Cir. 1988).

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military personnel decision. As a result, *Feres* principles apply – at a minimum to preclude the depositions of unit members of the 446th AES.

The Ninth Circuit's decision in *Lawrence v. Hawai'i Nat'l Guard* does not stand alone. The Ninth Circuit previously denied claims for reinstatement by national guard members in part because "[t]o permit judicial review of the internal military decision[s] . . . would seriously impede the military in performance of its vital duties." *Christoffersen*, 855 F.2d at 1444. The majority of other circuits agree and apply principles of military deference to claims for injunctive relief, where those claims would risk disruption to the military:

> The Fifth, Seventh, Eighth, Ninth, and D.C. Circuits have characterized the governing rule as allowing equitable challenges to personnel decisions only when they constitute facial challenges to the constitutionality of military regulations, and not in cases of discrete individualized actions.

Dibble v. Fenimore, 339 F.3d 120, 126 (2d Cir. 2003). As summarily explained by the Eighth Circuit, which is in accord with the Ninth Circuit, fact-specific inquiries pose a far greater disruption to military affairs:

> There is a vast difference between judicial review of the constitutionality of a regulation or statute of general applicability and judicial review of a discrete military personnel decision. In the first instance, a legal analysis is required; one which courts are uniquely qualified to perform. The second involves a fact-specific inquiry into an area affecting military order and discipline and implicating all the concerns on which *Feres* and *Chappell* are premised.

Watson v. Ark. Nat'l Guard, 886 F.2d 1004, 1010 (8th Cir. 1989). Because plaintiff's opposition makes clear that she intends to make a fact-specific inquiry, the principle of avoiding disruption to the military is heavily implicated. For that reason, good cause exists to apply those same principles here to prevent the noticed depositions of unit members.

Nor is this result affected by the two cases that plaintiff most emphasizes: *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), and *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991). In those two instances, injunctive causes of action were permitted against the military. In line with the Ninth Circuit's general rule, however, neither of those cases involved significant disruption to military affairs, and neither sought depositions of service members. By plaintiff's own characterization, the first case, *High Tech Gays*, dealt with "gay and lesbian ***civilian employees*** of the government [who] sought injunctive relief from the

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denial of security clearances on constitutional grounds." Mem. in Opp. at 8-9 (emphasis added). The Air Force has not argued that the *Feres* doctrine applies to cases involving civilian employees. To the contrary, the Air Force recognizes the difference between suits by civilians and suits by service members. *See Meir v. Owens*, 57 F.3d 747, 749 (9th Cir. 1995) ("The protection against employment discrimination provided by Title VII applies to civilian employees of the military . . . Title VII does not protect military personnel." (citations omitted)). The *Pruitt* case is also unhelpful to plaintiff. That case did not proceed to discovery, nor did it involve a fact-specific inquiry. *Pruitt*, 963 F.2d at 1165. The First Amendment claim was evaluated without discovery and the equal protection claim was remanded for consideration under rational basis review. Rational basis review, however, does not require a fact-specific inquiry. *See Heller v. Doe*, 509 U.S. 312, 320-21 (1993); *Doe v. United States*, 419 F.3d 1058, 1063 (9th Cir. 2005). Without a fact-specific inquiry, there was no need to consider disruptions to military affairs, and thus *Pruitt* lends no support to plaintiff. As these cases make clear, the dividing line is not the relief sought, but rather the degree of disruption to the uniformed military.

II. Plaintiff Misconstrues the Ninth Circuit's Remand.

Plaintiff suggests that the Ninth Circuit's remand order permits the depositions that she seeks. *See* Mem. in Opp. at 1. Plaintiff over-reads that remand order. In remanding this case, the Ninth Circuit did not announce that it was overruling its *Feres* doctrine precedents. Quite the contrary, the Ninth Circuit emphasized that the district court should be mindful of the deference owed to the government in military affairs. *See Witt*, 527 F.3d at 821. And on remand the Ninth Circuit specified ***what*** the relevant inquiries are (the evaluation of the second and third *Witt* factors). The Ninth Circuit did not say ***how*** those inquiries should be made. Instead, the question of how to conduct those inquiries is answered by existing law. For instance, if this case were an Administrative Procedure Act case, the questions on remand would be evaluated on the administrative record, not through discovery. By way of governing law here, Supreme Court precedent on *Feres* principles explains that service member depositions are highly disruptive:

> A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters. ***Whether a case***

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> ***implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands.*** Even putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking), the mere process of arriving at correct conclusions would disrupt the military regime.

Stanley, 483 U.S. at 683-84 (emphasis added). Thus, the relevant inquiries on remand must be conducted in accordance with the principle that military affairs should not be disrupted. The testimony from the commander of the 446th AES is that unit member depositions would be disruptive. *See* Decl. of Col. Janette Moore-Harbert ¶¶ 20-21 (Mar. 4, 2010) (copy attached to Motion at Ex. 2). For that reason, the testimony of members of the 446th AES should not be permitted (the remand inquiries can be evaluated on the depositions of commanders, expert opinion, written discovery, and documentary evidence).

III. Thus Far Plaintiff Has Disregarded Controlling Air Force Regulations.

Plaintiff also submits a declaration from a former unit member – the same one who stated that the commander cried – as to the instructions given by the 446th with respect to communications regarding this litigation. *See* Decl. of James Schaffer ¶ 12 (undated) (Docket #65). Without attaching any credibility to that declaration, it proffers nothing more than the unexceptional fact that the Air Force was reminding unit members of its regulations regarding testimony and official information, which are common for executive branch agencies.

At a general level, the term "official information" means "all information of any kind . . . [that] was acquired by DoD personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the U.S. Armed Forces." 32 C.F.R § 97.3(d); *see also* DoD Directive 5405.2, ¶ 3.4. More specifically, the Air Force definition extends to "[p]ersonal observations by Air Force personnel of the morale, support, or fitness of any particular Air Force personnel, family member, or contractor." AFI 51-301, ¶ 9.2.6.5.

Under the DoD and Air Force regulations, if an individual desires official information from current and former employees, then that individual must first seek official permission to obtain that information:

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> If official DoD information is sought, through testimony or otherwise, by a litigation request or demand, the individual seeking such release or testimony must set forth, in writing and with as much specificity as possible, the nature and relevance of the official information sought. Subject to subparagraph (c)(5), ***DoD personnel may only produce, disclose, release, comment upon, or testify concerning those matters that were specified in writing and properly approved by the appropriate DoD official designated in paragraph 6.1.***

See 32 C.F.R. § 97.6(c)(2) (emphasis added); *see also* DoD Directive 5405.2, ¶ 6.3.2; AFI 51-301, ¶ 9.5.

These regulations make clear that plaintiff should not have made repeated efforts over time through unofficial channels to contact present and former unit members for sworn statements about unit affairs, morale, cohesion, and discipline. Plaintiff has used such information in support of her preliminary injunction motion, *see* unit member declarations (Docket ##10-18) and, as the recent declaration of plaintiff's counsel attests, those efforts have continued throughout this litigation, *see* Decl. of James E. Lobsenz ¶ 2 (undated) (Docket #65). Those efforts are contrary to governing regulation – further demonstrating the degree of disruption that plaintiff's discovery efforts cause the Air Force. Thus, any sworn statements from unit members implicating "official information" have been obtained outside of the proper channels, and they should be stricken from the record. *See* W.D. Wash. Civ. R. 7(g).

IV. Plaintiff Fails to Distinguish Applicable Case Law.

Plaintiff also attacks the Air Force's case citations for the standard of review for protective order motions. *See* Mem. in Opp. at 10-12. The standard of review comes largely from the text of Civil Rule 26(c), and the case citations were not intended as factual analogs, but simply as articulations of the appropriate standard of review. Plaintiff's effort to distinguish those cases factually is no more effective than if a litigant tried to distinguish the controlling summary judgment standard in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), by arguing that *Celotex* had no applicability outside of wrongful death claims arising out of asbestos exposure.

CONCLUSION

For the foregoing reasons as well as those in the Motion, good cause exists to issue a protective order to preclude plaintiff from deposing members of the 446th Aeromedical Evacuation Squadron, and the Motion should be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2010, I electronically filed the foregoing Defendants' Reply Memorandum in Support of Protective Order Regarding the Depositions of Unit Members, with the Clerk of the Court using the CM/ECF system which I understand will send notification of such filing to the following persons:

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