Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN WASHINGTON
AT TACOMA DIVISION

MAJOR MARGARET WITT,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE AIR FORCE; ET AL.,

Defendants.

No. C06-5195 RBL

MOTION FOR PROTECTIVE ORDER PROHIBITING INTERFERENCE WITH NON-PARTY WITNESSES BY DEFENDANTS

NOTE ON MOTION CALENDAR: MAY 6, 2010

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Counsel for Plaintiff has interviewed and would like to continue interviewing current and former Air Force personnel who we believe have information that is relevant to this litigation. Not with standing the fact that the Defendants have unfettered access to these non-party fact witnesses, Defendants take the position that Plaintiff must first obtain permission from Air Force counsel before speaking with any current or former Air Force employees. Pursuant to this position, Air Force counsel have instructed Air Force personnel that they may not speak with Plaintiff's counsel about Air Force information unless an appropriate Department of Defense ("DoD") official has authorized communication on that matter. Defendants rely upon DoD

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regulations that are inapplicable to litigation in federal court where, as here, the federal government is a party. Further, no Federal Rule of Civil Procedure authorizes a party to impose burdensome conditions on opposing counsel attempting to interview non-party fact witnesses. Indeed, the Washington Rules of Professional Conduct prohibit such behavior by attorneys. Instructing non-party fact witnesses not to speak with opposing counsel unless a DoD official has authorized the interview violates RPC 3.4(a) and 8.4(d). Accordingly, Plaintiff moves for a protective order pursuant to Fed. R. Civ. P. 26(c) to prevent further interference with Plaintiff's factual investigation and to seek a curative instruction in writing to current unit members informing them that unit members may voluntarily speak with Plaintiff's counsel without Air Force permission and without fear of adverse employment consequences. Plaintiff has conferred in good faith with Defendants pursuant to the Court's September 2, 2009 Minute Order Regarding Discovery and Depositions, but was unable to resolve the matter without court intervention.

II. FACTS

During the course of discovery, Plaintiff's counsel has interviewed and seeks to continue interviewing current and former Air Force personnel who are familiar with issues that are relevant to the pending litigation. (Declaration of James E. Lobsenz (Dkt. No. 68), ¶ 2; Declaration of Sher Kung, ("Kung Decl."), ¶ 2.) The Ninth Circuit ordered a remand of this case so that the record could be developed and in so doing, stated the following:

> The Air Force attempts to justify the policy by relying on congressional findings regarding "unit cohesion" and the like, but that does not go to whether the application of DADT specifically to Major Witt significantly furthers the government's interest and whether less intrusive means would achieve substantially the government's interest. Remand is therefore necessary for the district court to develop the record on Major Witt's substantive due process claim.

Witt v. Department of the Air Force, 27 F.3d 806, 821 (9th Cir. 2008).

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Central to Plaintiff's case is her contention that prior to Major Witt's suspension in 2004, several gay and lesbian individuals served in the 446th Aeromedical Evacuation Squadron (AES) for many years; that their sexual orientation was well known to members of the 446th AES; and that no one was bothered by this fact; and that unit morale, discipline and cohesion did not suffer as a result. Plaintiff also contends that currently several gay and lesbian individuals serve in the 446th AES; that their sexual orientation is well known to members of the 446th; and that no one is bothered by this fact; that unit morale, discipline and cohesion does not suffer as a result; and accordingly, that the reinstatement of Major Witt, a known lesbian, will not negatively impact unit morale, cohesion or discipline.

To prepare for trial, counsel for Plaintiff has contacted non-party witnesses who have personal knowledge about whether Major Witt's presence in the 446th AES interfered with unit morale or unit cohesion, how members of her unit reacted to her suspension and discharge, how members of her unit react to the idea of her reinstatement, and whether unit members currently serve with gay and lesbian servicemembers and their reaction to such service. (Kung Decl. ¶ 6.) More than one current unit member of the 446th has expressed fear and hesitation in talking with Plaintiff's counsel because the Air Force instructed the unit members not to speak with Plaintiff's counsel without Air Force permission. (Kung Decl. ¶ 4.) Another current unit member is reluctant to testify because s/he fears repercussions from his/her supervisors for speaking with Plaintiff's counsel. (Kung Decl. ¶ 5.)

Plaintiff's counsel has also asked former and current unit members questions about their interaction with other units while on deployment. Based on deposition testimony and discovery responses, Plaintiff anticipates that Defendants intend to argue at trial that a known lesbian, Major Witt, cannot be allowed to serve in the 446th AES because she may deploy overseas and come in contact with other American servicemembers who do not wish to serve with a known American gay or lesbian servicemember. (Col. Mary E. Walker Dep. (Ex. D of Declaration of Sarah Dunne ("Dunne Decl.") 147:3-150:3 (government questions about deployment); Capt. Jill

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Robinson Dep. (Ex. E of Dunne Decl.) 69:17-70:12 (same); MSgt. Leah Crawford (Ex. F of Dunne Decl.) 31:3-25 (same); *see also* Defs.' Supplemental Objections and Resps. to Plaintiff's Interrogatory No. 12 (Ex. F of Dunne Decl.) at 3-4 (same)). Plaintiff intends to rebut this evidence by establishing that American servicemembers already serve overseas with several NATO allies (Britain and Canada, among others) who permit gay and lesbian individuals to serve openly, and that current members of the 446th have deployed overseas and not experienced any negative impact on morale or unit cohesion because of a current unit member's sexual orientation. In the course of gathering evidence on these points, we have asked and will ask servicemembers about any deployment overseas and whether they served with gay and lesbian members. We will not ask any questions that are privileged or that could impact national security. (Kung Decl. ¶ 7.) Specifically, we will not ask any questions about where specific personnel were deployed overseas or the nature or length of their mission. (*Id*.)

On April 14, 2010, Plaintiff received a letter from the Government stating that DoD regulations prohibit Plaintiff's counsel from contacting current or former Air Force employees to obtain information relevant to the present litigation unless Air Force counsel provide their consent. (April 14, 2010 Letter from Government ("April 14 Letter") (Dunne Decl. Ex. A at 5). The letter quoted the regulations as stating that "DoD [including Air Force] 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." (Dunne Decl. Ex. A at 6 (quoting 32 C.F.R. § 97.6(c)(2))). The April 14 letter continued, "[i]n light of these provisions, Air Force counsel has reminded employees of the need to comply with these procedures before official information can be released." (Dunne Decl. Ex. A at 6). The letter defined "official information" broadly to include things such as "[p]ersonal observations by Air Force personnel of the morale, support, or fitness of any particular Air Force personnel." (Dunne Decl. Ex. A at 5 (quoting Air Force Instruction ("AFI") 51-301, ¶ 9.2.6.5.)). At least some, if not all, of the

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information that Plaintiff seeks from Air Force personnel will be considered "official information." (Kung Decl. ¶¶ 2-3, 6.)

Section 301 of Title V of the United States Code and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951) authorize and provide authority respectively for each federal agency to promulgate regulations and procedures governing the release of agency information. The regulations for each agency – often referred to as *Touhy* regulations – promote the "smooth functioning of government operations" and ensure employee resources are not "commandeered" by private litigants in lawsuits not involving the United States as a party. *Exxon Shipping Co. v. U. S. Dep't of Interior*, 34 F. 3d 774, 779 & n.4 (9th Cir. 1994); *see also Boren Oil Co. v. Downie*, 873 F.2d 67, 70 (4th Cir. 1989) (noting that the policy behind the *Touhy* regulations is "to conserve governmental resources where the United States is not a party"). Section 301 of Title V expressly states that "[t]his section does not authorize withholding information from the public or limiting the availability of records to the public." Pursuant to 5 U.S.C. § 301, the DoD promulgated 32 C.F.R. §§97.1-.6, DoD Directive 5405.2, and Air Force Instruction (AFI) 51-301, Chapter 9. These regulations, directive and instruction constitute the DoD and Air Force specific *Touhy* regulations.

On April 19, 2010, Plaintiff's counsel responded to the Government citing to controlling Ninth Circuit authority holding that *Touhy* regulations did not apply to cases, such as this one, where the federal government is a party. (April 19 Letter from Sarah Dunne ("April 19 Letter") (Dunne Decl. Ex. B at 8.) Because the DoD *Touhy* regulations did not apply, Plaintiff's counsel further noted that the Air Force counsel's instruction to employees that they could not reveal any official information to Plaintiff's counsel without Air Force permission ran afoul of the Federal Rules of Civil Procedure and the Washington Rules of Professional Conduct (RPC). (Dunne Decl. Ex. B at 9.) To remedy the violations of the RPCs and prevent future violations, Plaintiff's counsel asked that Defendants instruct Air Force counsel to issue a curative instruction to Air Force employees in writing, stating that unit members do not need permission to speak

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voluntarily with Plaintiff's counsel and that unit members will not suffer adverse employment consequences by speaking with Plaintiff's counsel. (Dunne Decl. Ex B at 9.)

On April 21, 2010, the Government responded in writing by reiterating that the Government can place conditions on informal witness interviews involving former or current Air Force employees pursuant to the DoD *Touhy* regulations. (April 21 Letter from Government (Dunne Decl. Ex. C at 11). The parties then conducted a meet and confer by telephone on April 21 in an attempt to resolve the issue, but were unsuccessful. (Dunne Decl. ¶ 10.)

III. ARGUMENT

Plaintiff seeks a protective order to ensure that Plaintiff can continue to exercise its ability to conduct discovery, including interviews of Air Force employees on non-privileged matters relevant to this litigation without government interference. District courts have broad latitude to grant protective orders which protect a party from annoyance, embarrassment, oppression, or undue burden or expense. *See* Fed. R. Civ. P. 26(c)(1). The Supreme Court held that courts have "broad discretion [] to decide when a protective order is appropriate and what degree of protection is required." *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002) (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984)). Rule 26(c) authorizes a district court to grant a protective order where "good cause" is shown. *See San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999).

A. Defendants' Actions Are Not Supported By Law Or Precedent

To support their assertion that Plaintiff must receive Defendant Air Force's permission to contact *any current or former* Air Force employees while Defendants on the other hand may have unlimited access to non-party witnesses, Defendants cite three regulations: 32 C.F.R. § 97.6, DoD Directive 5405.2, and Air Force Instruction 51-301, chapter 9. (Dunne Decl. Ex. A at 5). These regulations indeed purport to require litigants to obtain DoD permission and comply with DoD procedures (i.e., put in writing to the government the nature of the testimony or

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information sought) before DoD will determine, in its discretion, whether to withhold or release limited information in response to the written request. *See, e.g.*, 32 C.F.R. § 97.6(c). The regulations were promulgated pursuant to 5 U.S.C. § 301 and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). *See* 32 C.F.R. § 97.6(c)(2); DoD Directive 5405.2, ¶ 6.3.2; AFI 51-301, ¶ 9.5.

The Ninth Circuit and other courts have widely recognized, however, that regulations promulgated under *Touhy*, including the principal regulation cited by Defendants here, 32 C.F.R. § 97.6, are not applicable in cases where the United States is a party to the legal proceeding. *Exxon Shipping Co.*, 34 F. 3d at 779 & n.4, 5 (holding that *Touhy* regulations do not apply when the U.S. is a party to the litigation); *Alexander v. F. B. I.*, 186 F.R.D. 66, 70 & n.2 (D. D.C. 1998) (holding that plaintiffs need not follow 32 C.F.R. § 97.6 in their efforts to elicit testimony from DoD employees); *United States v. The Boeing Co.*, 189 F.R.D. 512, 517-18 (S.D. Ohio 1999) (holding that 32 C.F.R. § 97.1 *et seq.* "should not apply where the Government is a party to the litigation"). As the Supreme Court stated, "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *United States v. Reynolds*, 345 U.S. 1 (1953). Indeed, this "would create a significant separation of powers problem." *Alexander*, 186 F.R.D. at 70. Thus, when the federal government is a party, *Touhy* regulations do not apply and the United States "is placed in the same position as a private litigant" subject to the Federal Rules of Civil Procedure. *Exxon Shipping Co.*, 34 F.3d at 776 n.4; *Boeing Co.*, 189 F.R.D. at 517 (same).

Put simply, Defendants have no valid basis in law for their assertion that they may, at their discretion, condition or prevent Plaintiff from speaking with current or former Air Force employees. Nothing in the Federal Rules of Civil Procedure authorizes a party to impose burdensome conditions on another party relating to discovery concerning non-party fact witnesses. Indeed, courts have specifically held there is no compelling reason to permit the federal government to impose different procedures for discovery (i.e., *Touhy* regulations) than the ones outlined in the Rules of Civil Procedure. *In re Bankers Trust Co.*, 61 F.3d 465, 470-71

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(6th Cir. 1995) (finding no reason "to discard the relatively straightforward discovery methods outlined in the Federal Rules of Civil Procedure simply because the Federal Reserve has attempted to mandate a different procedure"). Moreover, the Federal Rules of Civil Procedure "strongly favor full discovery." *Exxon Shipping Co.*, 34 F.3d at 779 (citing Rule 26(b)(1) for the principle that parties may obtain discovery regarding any matter that leads to non-privileged, relevant evidence).

The underlying statute pursuant to which agency *Touhy* regulations were promulgated, 5 U.S.C. § 301, plainly states that it "does not authorize *withholding* information from the public or *limiting* the availability of records to the public." 5 U.S.C. § 301 (2006) (emphasis added). The Ninth Circuit and other federal courts have repeatedly held that 5 U.S.C. § 301 does not authorize a federal agency to withhold or limit discovery, testimony, or documents in federal litigation unless protected by a privilege or consistent with the Federal Rules of Civil Procedure. *See, e.g.*, *Exxon Shipping Co.*, 34 F.3d at 777-78; *Houston Bus. J., Inc. v. U.S. Dep't of the Treasury*, 86 F.3d 1208, 1212 (D.C. Cir. 1996) (same); *The Boeing Co.*, 189 F.R.D. at 516-17 (same); *Alexander*, 186 F.R.D. at 69-70 (same).

B. Washington Rules of Professional Conduct Prohibit Counsel from Interfering with Non-Party Witness Interviews By Opposing Counsel

Given that the *Touhy* DoD regulations do not apply when the United States is a party, Defendants have no authority to require Air Force counsel "consent" before Plaintiff's counsel may conduct ex parte interviews with current and former Air Force employee non-party witnesses. *See* (Dunne Decl. Ex. A at 5) (stating that Plaintiff counsel's communications with current and former Air Force employees is "inappropriate" unless Air Force counsel have "consent[ed]" to such interviews first). Indeed, Washington ethical rules governing attorney conduct prohibit such interference as detailed below.

All counsel litigating cases in the Western District of Washington are subject to the Washington Rules of Professional Conduct. *See* Local General Rule 2(e)(2) at 2; *Avocent*

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Redmond Corp. v. Rose Elecs., 491 F. Supp.2d 1000, 1003 (W.D. Wash. 2007) (GR 2(e) governs standards of professional conduct for attorneys practicing before the Western District); *In re Cellcyte Genetic Corp. Securities Litigation*, 2008 WL 5000156 *2 (W.D. Wash. Nov. 20, 2008) (same). In addition, attorneys for the U.S. Department of Justice are subject to the state attorney ethical rules and local rules of any federal court before which they appear pursuant to the McDade Amendment, or 28 U.S.C. § 530B(a).

Rule 3.4(a) of the Washington Rules of Professional Conduct prohibits a lawyer from obstructing another party's access to evidence and also precludes a lawyer from assisting another person in doing such an act. The Washington Supreme Court has specifically held that opposing counsel may conduct ex parte interviews with non-party witnesses, including current employees. *Wright v. Group Health Hosp.*, 103 Wn.2d 192, 203 (1984); *Jones v. Rabonco, LTD.*, 2006 WL 2401270 (W.D. Wash. 2006) (noting that the Washington Supreme Court held that opposing counsel may conduct ex parte interviews with current and former employees). Moreover, Comment [5] to RPC 3.4 explicitly notes that Washington did not adopt the ABA Model Rule 3.4(f), that expressly defines circumstances under which counsel may ask employees other than a client to refrain from speaking with opposing counsel, because the Model Rule 3.4(f) would be "inconsistent with Washington law." *See* Washington Comment [5]; ABA Model Rule 3.4(f) (permitting a lawyer to request an employee or other agent of the client "to refrain from voluntarily giving relevant information to another party"); *see also* Informal Ethics Opinion No. 1020 (Dunne Decl. Ex. H) (opinion of Rules of Professional Conduct Committee that prosecutor cannot discourage witnesses from speaking with defense counsel nor may a prosecutor make his presence a condition of the witness interview).

Rule 8.4(d) prohibits "conduct that is prejudicial to the administration of justice." The government's attempt to prohibit non-party fact witness interviews without their consent interferes with the Plaintiff's ability to gather evidence to support her case. Defendants, on the other hand, have not been obstructed in their attempts to gather evidence for trial and have had

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unfettered access to the non-party fact witnesses. "It is a basic part of the underlying philosophy of the procedure established by the Federal Rules that a trial, rather than being a contest, shall be an endeavor to ascertain the truth and an effort to attain justice." *Fay v. United States*, 22 F.R.D. 28, 31 (E.D.N.Y. 1958). At present, current unit members erroneously believe, because the Air Force counsel has told them so, that they cannot speak voluntarily with Plaintiff's counsel unless they receive Air Force counsel consent first. The few unit members who have disregarded this instruction have expressed their fear and hesitation in speaking with us because they are doing so without command's permission. (Kung Decl. ¶ 4.)

C. Government Attorneys Cannot Avoid State Ethical Rules By Having Agency Government Attorneys Provide Instructions That They Themselves Could Not Give.

In its April 21 letter, the Government reiterated its knowledge that "Air Force counsel has reminded" current unit members that they cannot speak to opposing counsel about "official information" without Air Force permission. (Dunne Decl. Ex. C at 11). The Government further asserted that the Department of Justice could not require Air Force counsel to issue a curative instruction. (*Id.* at 13.) This is incorrect. Department of Justice attorneys litigating this case cannot violate or attempt to violate the Washington Rules of Professional Conduct "through the acts of another," or in this instance Air Force co-counsel. See Rule 8.4(a) (noting that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct "through the acts of another"). Rule 8.4(a) does not allow Department of Justice attorneys to avoid ethical obligations by claiming they cannot require their client's in-house attorneys to obey ethical rules. Moreover, while Plaintiff has no knowledge as to why Major Linell Letendre is no longer the Air Force counsel of record for this matter (*see* Dkt. No. 60 at 6), Plaintiff notes that Major Letendre has been a licensed member of the Washington Bar Association since 2001 and therefore subject to the Washington Rules of Professional Conduct. (Dunne Decl. ¶ 11.) Major Letendre's replacement, Lieutenant Colonel Todi Carnes (*see* Dkt. No. 63 at 12), is not a member of the Washington bar. (Dunne Decl. ¶ 11.) Plaintiff asserts that

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whether this is a coincidence or not is irrelevant because Rule 8.4(a) requires Department of Justice attorneys to take affirmative steps to ensure that they do not violate the Rules of Professional Conduct, that they do not knowingly assist others who do, and that they cannot do so through acts of another, such as Air Force counsel or personnel.

D. Good Cause Exists For Granting A Protective Order

Good cause exists for a protective order. Good cause is shown when "the party seeking protection [carries] the burden of showing specific prejudice or harm will result if no protective order is granted." *Phillips*, 307 F.3d at 1210-11. If no protective order is granted in this case, Air Force employees will be under the misconception that federal regulations prohibit them from speaking with Plaintiff's counsel unless a DoD official approves of the interview. As a result, Plaintiff will be hindered in her ability to seek the discovery to which she is lawfully entitled. The discovery will be directly relevant to this litigation, and will include, for example, the effect of the Don't Ask, Don't Tell policy on unit cohesion and morale. A protective order requiring Defendants to cure their defective and legally incorrect instruction to Air Force personnel is necessary so that Plaintiff can obtain effective discovery.

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IV. CONCLUSION

Plaintiff has shown good cause for a protective order. Plaintiff respectfully asks that the Court grant Plaintiff's motion and enter the Proposed Order.

DATED this 27th day of April, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2010, I electronically filed *Plaintiff's Motion for Protective Order Prohibiting Interference with Non-Party Witness by Defendant* and *Proposed Order* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 27th day of April, 2010.

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