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 **OPPOSITION TO PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER** **ORAL ARGUMENT REQUESTED**

I. INTRODUCTION

Plaintiff seeks a protective order allowing Plaintiff access to official government information on a informal basis by circumventing longstanding Department of Defense ("DoD") and Air Force regulations. Those regulations set out a mechanism designed to centralize procedures for the release of official information to insure that important government interests are protected. They are consistent with the government's obligations under the Federal Rules of Civil Procedure, and the government's instructions to its personnel reminding them to adhere to these rules are consistent with both its ethical obligations and its duties as a litigant. Accordingly, the motion should be denied because Plaintiff has failed to show good cause for an order requiring that these regulations not be followed.

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II. BACKGROUND

In this case, Plaintiff challenges her discharge from the United States Air Force Reserve for violations of the statutory proscription on homosexual conduct by service members. *See* 10 U.S.C. § 654. In response to formal requests pursuant to the Federal Rules of Civil Procedure, the government has made witnesses available for deposition, produced more than 25,000 pages of documents, and responded to interrogatories.

Plaintiff now seeks access to government information and personnel on an informal basis. Pursuant to 5 U.S.C. § 301,[1] the Secretary of Defense has promulgated regulations providing, among other things, that when personnel of the DoD, including military personnel, are asked for official information in connection with a litigation matter, those personnel must notify Department officials (or their designees) who then will decide whether, and under what conditions, to release such information upon receipt of a written request from the person seeking the information. *See* 32 C.F.R. § 97.6(c)(2)-(3). Personnel are prohibited from releasing official information without such permission. *See id.* at § (c)(2). The regulations further require that DoD components issue regulations to implement 32 C.F.R. § 97.1-.6. *See id.* § 97.5. Accordingly, the Air Force has implemented guidance applicable to Air Force Reserve personnel, *see* Air Force Instruction No. 51-301 § 9.2.1.1, which bars them from discussing official information without written permission to do so. *See id.* § 9.15. These regulations serve important purposes for the operation of the military. Among these purposes are ensuring that sensitive official information is not inadvertently released, that Air Force personnel do not inadvertently bind the Air Force, that information requests are honored in a way that does not interfere with the smooth operation of the military, and that information that is otherwise protected from disclosure by other statutes and regulations is not released.

Plaintiff's counsel has for the first time in connection with this motion identified in

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[1]Plaintiff incorrectly asserts that the regulations in question are "authorize[d]" by 5 U.S.C. § 301 and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). *See* Pl.'s Mot. at 5. The authority for federal regulations comes from the action of Congress and the President. The *Touhy* case found that it was proper for an agency official to follow regulations authorized by 5 U.S.C. § 301 to decline to produce documents in response to a subpoena issued by a federal court. *See Touhy*, 340 U.S. at 468.

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writing what information she seeks from unit members. Among other things, Plaintiff's counsel asserts that she wishes to ask not just generally about unit cohesion, morale and discipline, but also specifically about "whether members' sexual orientation has ever impacted or interfered with job performance . . . ." *See* Declaration of Sher Kung ("Kung Decl.") ¶ 6. Depending on which unit member is asked, information about job performance may be barred from disclosure by the Privacy Act. *See* 5 U.S.C. § 552(a). Likewise, Plaintiff's counsel intends to ask about the members' deployments, and their experience with other units when deployed overseas. *See* Kung Decl. ¶ 7. Plaintiff's counsel claims that she will not ask about information impacting national security, *see id.*, but deciding what information relates to national security is a matter left to the executive branch in the first instance. In such situations, the government has a strong interest in making sure that information is released in a controlled fashion subject to proper vetting and, thus, the government's regulations prudently require that requesters identify the nature of an information request and to whom the request is made. This allows the government the opportunity to explain the procedures to servicemembers, including that they are not obligated to submit to such informal requests for information. It also allows the government to instruct its personnel what information can be released and what (such as classified information or information protected by the Privacy Act) cannot. This process also protects individual members from having to decide what information can be released or not without the benefit of having access to (and potentially the presence of) government counsel when they are being questioned by non-government counsel.

The government information Plaintiff asks the Court to order that she be allowed to gather informally clearly falls within the DoD regulations and the Air Force's instructions governing access to official information. The DoD regulation defines "official information" to include all information "acquired by DoD personnel as part of the official duties." 32 C.F.R. § 97.3(d). The Air Force Instruction further specifies that "official information" includes "[p]ersonal observations by Air Force personnel of the morale, support, or fitness of any particular Air Force personnel . . . ." Air Force Instruction No. 51-301 § 9.2.6.5.

Accordingly, in the autumn of 2009, a Staff Judge Advocate gave a ten to fifteen minute

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presentation regarding the *Witt* litigation. *See* Declaration of Bradley V. Holmgren ¶¶ 4-6. The Staff Judge Advocate instructed members of the unit that, if they were contacted by opposing counsel, they should let him or Colonel Moore-Harbert know so that proper procedures could be followed. *See id.*

Plaintiff has failed to show good cause for the Court to issue the order requested. The government is entitled to follow its own regulations and Washington's ethical rules, which must be interpreted to avoid conflicting with federal law, provide no basis for setting aside the Air Force's and Department of Defense's regulations.

III. ARGUMENT

A. The Air Force is Entitled to Follow its Regulations.

At issue here is whether the DoD and the Air Force may remind their personnel to follow procedures established in accordance with Congressionally delegated powers to control releases of government information. The only question is whether one Ninth Circuit decision, *Exxon Shipping Co. v. U.S. Dep't of the Interior*, 34 F.3d 774, 779 & n.4 (9th Cir. 1994), interrupts and overrides the normal application of the DoD and Air Force regulations. It does not.

By statute, the heads of the military departments and other administrative agencies have the power to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. § 301. In *United States ex. rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951), the Supreme Court concluded that an agency official would not be subject to contempt liability for declining to produce information in response to a subpoena because agency regulations issued pursuant to this statute provided a separate procedure to follow in obtaining information. The Court thus recognized that federal agencies are empowered under § 301 to establish a *procedure* for the release of government information. *See also Chrysler Corp. v. Brown*, 441 U.S. 281, 310 & n.41 (1979). While courts have frequently held that the government may not use § 301 as a substantive reason to ultimately withhold information when it is a party to a litigation, no court has held that it must ignore procedural requirements promulgated under § 301.

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Pursuant to 5 U.S.C. § 301, DoD and the Air Force have implemented procedural regulations that govern the release of official information through information litigation requests. These regulations apply to "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. In the Air Force context, the definition of "official information" specifically 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. If an individual desires official information from current and former personnel, then that individual must first seek official permission to obtain that information:

> 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 (a) of this section.

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

Plaintiff cites a single case from the Ninth Circuit for her broad claim that these regulations are "not applicable in cases where the United States is a party to the legal proceeding." Pl.'s Mot. at 7 (citing Exxon Shipping Co. v. U.S. Dep't of the Interior, 34 F.3d 774, 779 & n.4 (9th Cir. 1994)). That reading is incorrect. In *Exxon Shipping*, "[t]he government instructed eight federal employees not to submit to depositions and restricted the testimony of two others." *See id.* at 775. Thus, in *Exxon Shipping* two conditions were necessary for the Ninth Circuit to deem that the regulations did not apply as written: (i) the government was a party to the litigation and (ii) the dispute dealt with formal litigation requests, specifically notices of depositions. Here, the second of those necessary conditions cannot be satisfied because this dispute does not relate to formal litigation requests governed by the Federal Rules of Civil Procedure. Rather, this dispute relates to Plaintiff's counsel's informal efforts to gather official information outside of the Rules of Civil Procedure that govern litigants

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in the federal courts. *Exxon Shipping*, however, holds only that § 301 does not authorize "agency heads to withhold documents or testimony from federal courts." *Id.* at 778. The government has withheld neither documents nor testimony from this Court and has complied with all formal requests for discovery under the Federal Rules. Plaintiff can cite no Rule of Civil Procedure that specifically requires litigants to allow informal interviews of potential witnesses. *See Pippinger v. Rubin*, 129 F.3d 519, 534 n.8 (10th Cir. 1997) (noting that plaintiff had "no legal right to speak 'informally' to any particular witness" in light of absence of provision governing such contacts in Rules of Civil Procedure and IRS regulations barring unauthorized discussion of litigation matters). *Cf. Benally v. United States*, 216 F.R.D. 478, 480 (D. Ariz. 2003). The government's regulations are not inconsistent with the Rules of Civil Procedure; Plaintiff must comply with them to obtain official information (which she has admittedly failed to do).

Exxon Shipping is inapplicable here for another reason. In *Exxon Shipping*, after receiving formal litigation requests, the government reached a final decision to not provide information (in the form of witness testimony). Here, there has been no final decision about whether to ultimately provide the information Plaintiff seeks, nor could there be because the Plaintiff has explicitly declined to comply with the regulations. Each of the cases cited by Plaintiff is thus off point. They each involve situations in which a government agency has made a final substantive decision to deny a request for information in connection with a litigation. *See United States v. The Boeing Co.*, 189 F.R.D. 512, 517-18 (S.D. Ohio 1999); *Alexander v. F.B.I.*, 186 F.R.D. 66, 70 (D.D.C. 1998). *In re Bankers Trust Co.*, 61 F.3d 465, 470-71 (6th Cir. 1995) is even further afield. In that case, the government was not a party, but had issued regulations prohibiting third-party litigants from releasing documents relating to government supervision of banks. Those regulations were not adopted pursuant to 5 U.S.C. § 301 (indeed, 5 U.S.C. § 301 is not even cited in that case) and the case says nothing about the power of agencies to establish internal procedures dealing with requests for litigation-related information.

In short, Plaintiff fails to justify her disregard for the plain application of the government's regulations regarding access to official information.

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B. The Government's Instructions Do not Violate Washington Ethical Rules.

Because the government's instructions are lawful, Plaintiff's claim that they violated Washington state ethical rules lacks merit.[2]

1. The Government's Instructions Do Not Violate Rule of Professional Conduct 3.4.

The ethical conduct of attorneys practicing before this Court generally is governed by Local General Rule 2(e) ("Standards of Professional Conduct"), which provides in pertinent part:

> In order to maintain the effective administration of justice and the integrity of the Court, attorneys appearing in this District shall be familiar with and comply with the following materials . . .
>
> (2) The Washington Rules of Professional Conduct, as promulgated, amended, and interpreted by the Washington State Supreme Court (the "RPC"), and the decisions of any court applicable thereto; . . . . In applying and construing these materials, this Court may also consider the published decisions and formal and informal ethics opinions of the Washington State Bar Association, the Model Rules of Professional Conduct of the American Bar Association and Ethics Opinions issued pursuant to those Model Rules, and the decisional law of the state and federal courts.

This Court has broad discretion to interpret and apply this local rule. *See, e.g., Avocent Redmond Corp. v. Rose Electronics*, 491 F. Supp. 2d 1000, 1003 (W.D. Wash. 2007) (*quoting Miranda v. S. Pac. Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983) ("District courts have broad discretion in interpreting and applying their local rules.")). In applying and interpreting the Washington Rules of Professional Conduct, this Court may consider a variety of materials and authorities, including Washington ethics opinions, and those of other states, as well as the decisional law of state and federal courts. All such precedents may be helpful in interpreting the Rules of Professional Conduct, but ethics opinions and state court cases "should be relied upon only to the extent that they are compatible with federal law and policy." *Grievance Comm. for the S. Dist. of N. Y. v. Simels*, 48 F.3d 640, 645 (2d Cir. 1995) (declining to follow a local ethics

[2]For this reason, the government does not focus on Plaintiff's arguments that the Department of Justice cannot allow the Air Force to do that which the Department of Justice could not do directly, nor does it focus on Plaintiff's speculation about the reassignment of Major Linell Letendre to other duties. Because there is nothing unlawful or unethical about the government's conduct, there is no reason to determine who is responsible for the conduct.

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CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
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opinion's interpretation of a New York ethics rule, after concluding the interpretation was contrary to federal law and policy); *see also Cord v. Smith*, 338 F.2d 516, 524 (9th Cir. 1964) (declining to apply state's interpretation of California ethics rule after finding it inconsistent with duties of attorneys in federal court); *In re Congoleum Corp.*, 426 F.3d 675, 691 (3d Cir. 2005) (recognizing that New Jersey ethics rule and its ABA counterpart permit a client to waive an attorney's concurrent conflicts but concluding, in the context of "the complexities of [a federal] bankruptcy proceeding" that the client waivers at issue there did not constitute informed consent within the court's interpretation of the rule); *United States v. Plumley*, 207 F.3d 1086, 1095 (8th Cir. 2000) (agreeing with those courts that have concluded the interpretation of state disciplinary rules as they apply to federal criminal practice "should be and is a matter of federal law'") (quoting *Simels*, 48 F.3d at 645-46).

Washington RPC 3.4 states that a lawyer may not "*unlawfully* obstruct another parties' access to evidence." Here, the government's instructions to its personnel are consistent with properly promulgated regulations long pre-dating this litigation. The government is not aware of any case holding that the government is barred from restricting the release of information through informal mechanisms when it is a party to a litigation and the only reported federal case on the matter holds to the contrary. *See Pippinger*, 129 F.3d at 534 n.8. Thus, the government has not acted "unlawfully."

Plaintiff's citation to *Wright v. Group Health Hosp.*, 691 P.2d 564 (Wash. 1984), lends no support to her position. In *Wright*, a large health care cooperative issued an instruction to its employees that, in connection with a malpractice action, they were not to discuss the malpractice case with anyone other than the cooperative's outside counsel. *See* 691 P.2d at 566. The Washington Supreme Court concluded that the instruction was improper and that opposing counsel was entitled to interview any employee who was willing to voluntarily speak to opposing counsel. *See id.* at 570. The *Wright* Court did not consider the question whether an employee could be ordered not to speak when some other obligation—such as a non-disclosure agreement or a statute or regulation—barred them from doing so.

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CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
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Moreover, subsequent cases suggest that *Wright*'s holding does not extend to situations in which confidential information might be disclosed. *Loudon v. Mhyre*, 756 P.2d 138 (Wash. 1988), decided after *Wright*, concluded that Defendants' counsel was not permitted to conduct *ex parte* interviews with Plaintiff's former physicians because of the risk of interfering with information protected by Washington State's statutory prohibition on disclosing information protected by physician-patient confidentiality. 756 P.2d at 140. The *Loudon* Court noted that *ex parte* interviews of this nature would risk the inadvertent release of confidential information and place the subjects of the interviews in the difficult position of being forced to determine for themselves what information was statutorily protected and what was not. *See id.* at 140-41. The *Loudon* Court distinguished *Wright* on the grounds that it "was not concerned with the fiduciary confidential relationship which exists between a physician and patient." *Id.* at 142.

Similarly, *Wright* does not speak to the relationship between the government and members of the military, who in the course of their duties obtain information that may be classified, sensitive or the release of which may otherwise be disruptive to military functions. DoD's and the Air Force's regulations help to assure that official information is released in a controlled manner and in a way that prevents members of the military from being, like the physicians in *Loudon*, left in the uncertain position of deciding for themselves what information may be released safely. Because the government has done no more than direct its personnel to comply with the law before speaking to Plaintiff's counsel, Plaintiff has failed to show a violation of RPC 3.4.

2. The Government's Instructions Do Not Violate Washington Rule of Professional Conduct 8.4(d).

Though Plaintiff did not raise the issue in her letter request to meet and confer on this issue, she now asserts that the government's instructions violate Washington Rule 8.4(d). That rule generally prohibits conduct "prejudicial to the administration of justice." But Plaintiff cites no authority for the proposition that requesting that Air Force personnel follow Air Force regulations is, in fact, prejudicial to the administration of justice. Quite the contrary, Rule 8.4 explicitly contemplates that "[a] lawyer may refuse to comply with an obligation imposed by law

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upon a good faith belief that no valid obligation exists." *See* RPC 8.4, cmt. 4. Here, the law not only does not *impose* the obligation Plaintiff suggests, it actually requires the opposite; there is no valid obligation requiring the government or its attorneys to instruct government personnel to ignore regulatory requirements.[3]

3. The Government's Instructions are Not Inconsistent with Its Obligations Under 28 U.S.C. § 530B(a).

Plaintiff's motion fails to identify any way in which the government has acted in a manner inconsistent with either the rules of this Court or the Washington Rules of Professional Conduct. Accordingly, there can be no violation of 28 U.S.C. § 530B(a). *Cf. United States v. Talao*, 222 F.3d 1133, 1139-40 (9th Cir. 2000) (noting existence of 28 U.S.C. § 530B(a), but finding no violation of California ethical guidelines).

Because the Court should interpret § 530B consistent with other federal law, there is no ground for finding that the government's position is contrary to § 530B in this case. Pursuant to § 530B(b), the Attorney General has promulgated regulations implementing § 530B, *see Stern v. United States Dist. Ct. for the Dist. of Mass.*, 214 F.3d 4, 20 (1st Cir. 2000), and those regulations make clear that § 530B is not to be "construed in any way to alter federal substantive, procedural or evidentiary law . . . ." 28 C.F.R. § 77.1(b). The substantive federal regulations at issue in this matter bar the informal interviews to which Plaintiff claims she is entitled under Washington RPC 3.4, 8.4 and the Washington Supreme Court's holding in *Wright*. But § 530B does not cede to state ethics authorities the discretion to trump valid federal laws. *See Stern*, 214 F.3d at 20; *see also United States v. Lowery*, 166 F.3d 1119, 1124-25 (11th Cir.), *cert. denied*, 528 U.S. 889 (1999) ("If Congress wants to give state courts and legislatures veto power over the admission of evidence in federal court, it will have to tell us that in plain language using clear terms."). Washington's ethics rules cannot displace federal regulations. Accordingly,

[3]Moreover, the factual premise of Plaintiff's argument critically misinterprets the government's position in this matter. Plaintiff claims that the government has "unfettered" access to members of the 446th AES. *See* Pl.'s Mot. at 9-10. But the government's position has been and continues to be that it is, in fact, corrosive to unit discipline and morale to interrogate or unit members about others' sexual orientation. Accordingly, it has not conducted such interviews.

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Washington's ethic rules do not establish good cause for the protective order Plaintiff seeks.

C. Plaintiff is Not Entitled to the Instruction She Seeks.

Finally, Plaintiff's claim that she is entitled to an instruction informing members of her former unit that they may speak to her counsel "without fear of adverse employment consequences," Pl.'s Mot. at 2, is in direct conflict with federal law and inconsistent with positions taken by Plaintiff's counsel elsewhere in this litigation. Plaintiff has made clear that she intends to proceed in this case by inquiring into the sexual orientation of other members of her unit. *See, e.g.*, Kung Decl. ¶ 6. If a unit member reveals his or her sexual orientation or identifies a unit member who has violated the statute, there could be adverse employment consequences by operation of 10 U.S.C. § 654, which is one reason that the government has been opposed to Plaintiff's focus on the orientation of her squadron members in this litigation.[4] Plaintiff is well aware of this concern: in producing documents, her counsel provided several documents in which names (and possibly other information) have been redacted because it might tend to disclose the identity of an individual subject to consequences under 10 U.S.C. § 654.[5] Likewise, if a servicemember were to improperly reveal information protected by the Privacy Act, there might be employment consequences for that member. Dangers like these are precisely why the government has a process for the disclosure of official government information and why the order Plaintiff seeks should not be issued in this case.

[4]The government filed a motion seeking a protective order earlier in this case in part because of Plaintiff's inquiries into the sexual orientation of other unit members. *See* Docket No. 63.

[5]Plaintiff has no good faith basis for obstructing the government's access to information relevant to her own theory of the case. If Plaintiff's view is that discovery into the sexual orientations of unit members is necessary and relevant, she cannot at the same time justifiably withhold documents related to unit members' sexual orientation.

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IV. CONCLUSION

For the forgoing reasons, the Court should deny Plaintiff's motion for a protective order.

Dated: May 5, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2010, I electronically filed the foregoing Defendants' Opposition to Plaintiff's Motion for a Protective Order 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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