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

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER PROHIBITING INTERFERENCE WITH NON-PARTY WITNESSES BY DEFENDANTS

NOTE ON MOTION CALENDAR: MAY 7, 2010

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Defendants oppose the motion for a protection order prohibiting witness interference, claiming Plaintiff should be compelled to comply with burdensome Department of Defense ("DoD") *Touhy* regulations and procedures before conducting any informal discovery, while Defendants retain unfettered access to non-party fact witnesses. In making this argument, Defendants try but fail to limit the application of binding Ninth Circuit authority by restricting the holding to formal discovery. Moreover, the speciousness of Defendants' argument is made clear by Defendants' reiteration of their position that any questioning of unit members about sexual orientation is "corrosive to unit discipline and morale." This entire case rests on whether sexual orientation affects unit morale and discipline. Defendants should not be allowed to limit and constructively withhold Plaintiff's and this Court's access to evidence.

A. Defendants' Cannot Limit the *Exxon* holding to Formal Discovery.

In its Opposition, Defendants concede that Ninth Circuit controlling precedent holds that agency *Touhy* regulations do not apply when the United States is a party (Opp'n at 5). But Defendants try to limit the holding of *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 780 (9th Cir. 1994), by claiming that, while agency *Touhy* regulations do not apply in litigation against the United States with respect to "formal" discovery (i.e., depositions), agency *Touhy* regulations always apply to "informal" discovery (i.e., informal witness interviews). This attempt to limit binding precedent fails for several reasons.

First, in *Exxon*, the Ninth Circuit instructs district courts to apply the federal rules of discovery when deciding discovery issues raised in litigation involving the United States and to disregard the regulations promulgated pursuant to 5 U.S.C. § 301. 34 F. 3d at 780. Defendants' assertion that no court has held that "it must ignore procedural requirements promulgated" under 5 U.S.C. § 301 during litigation is simply wrong because *Exxon* has held just that.

Second, although Defendants assert that *Pippinger v. Rubin*, 129 F.3d 519, 534 n. 8 (10th Cir. 1997), is the only reported case to address agency *Touhy* regulations and informal witness interviews (Opp'n at 8), Defendants are mistaken because they fail to cite a case which addresses informal witness interviews and the actual DoD *Touhy* regulations at issue here, 32 C.F.R. 97 *et*

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seq. See McElya v. Sterling Med., Inc., 129 F.R.D. 510, 511 and 514-15 (W.D. Tenn. 1990). In *McElya*, the United States attempted to require the plaintiff to comply with DoD *Touhy* regulations during formal and informal discovery. Akin to the circumstances here, the United States in *McElya* sought to place limitations on plaintiff's counsel ability to conduct informal witness interviews of individuals connected to the U.S. Navy who might have knowledge concerning the case. 129 F.R.D. at 514-15. The district court rejected the government's arguments and held that discovery in the case "should proceed solely pursuant to the Federal Rules of Civil Procedure without application" of the DoD *Touhy* regulations. *Id.* at 515. *See also U. S. v. Boeing Co.*, 189 F.R.D. 512, 517 (S.D. Ohio) (finding that DoD *Touhy* regulations do not apply when the government is a party to the litigation); *Alexander v. F.B.I.*, 186 F.R.D. 66, 70 n.2 (D.D.C. 1998) (finding that plaintiff party does not have to follow the DoD *Touhy* procedure during discovery when the United States is a party).

These holdings are consistent with the Supreme Court's holding that the United States as a litigant is subject to the Federal Rules of Civil Procedure. *U. S. v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958); *see also Mosseller v. U. S.*, 158 F. 2d 380, 382 (2d Cir. 1946) (U.S. sits in same position as ordinary litigant). Because the Defendant government sits in the same position as Plaintiff in this litigation, it cannot burden Plaintiff with nonreciprocal discovery procedures.

Defendants attempt to further distinguish *Exxon*, *Boeing Company* and *Alexander* by arguing that Plaintiff has prematurely sought relief from this Court because she has not complied with the DoD *Touhy* regulations and thus there has been "no final decision about whether to provide the information plaintiff seeks." This is a specious argument given that Defendants expressly concede in their opposition that "the government's position *has been and continues to be* that it is, in fact, corrosive to unit discipline and morale" to question Air Force employees about unit members' sexual orientation. (Opp'n at 10 n. 3) (emphasis added)[1].

Moreover, Defendants are wrong when they state that both *Boeing Company* and *Alexander* involve situations where a "final substantive decision" was made implying that the

[1] Plaintiff has made clear through deposition questions and through filings that she contends her reinstatement to the unit will not have a negative impact on unit morale or cohesion because the unit culture is tolerant of gay and lesbian service members. (Mot. at 3 (Dkt. No. 77); *see also* Pl. Opp'n at 2 (Dkt. No. 64).)

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parties had complied with the DoD *Touhy* regulations before the district courts ruled. In *Boeing Co.*, Boeing sought to use a former DoD official as an expert witness and did not comply with the *Touhy* process before contacting and retaining its expert witness; the government objected on multiple grounds including that Boeing failed to comply with the DoD *Touhy* process before seeking relief from the court. *Boeing Co.*, 189 F.R.D. at 516. In *Alexander*, the district court erroneously instructed plaintiffs to comply with the DoD *Touhy* regulations at an April 28 status conference (186 F.R.D. at 70 n.2), and plaintiffs complied by issuing both a subpoena on May 6 and then *Touhy* requests on May 11 and May 12 (*Id.* at 67). The district court then later retracted this instruction and noted that the DoD *Touhy* procedural requirements do not apply when the United States is a party. *Id.* at 70 n. 2.[2]

Accordingly, this Court should apply controlling Ninth Circuit precedent, supported by other reported case law, and permit *ex parte* informal witness interviews.

B. Informal Discovery is Consistent with FRCP and Promotes Judicial Economy.

Although Defendants assert that informal witness interviews are a discovery tool that falls "outside" the Federal Rules of Civil Procedure (Opp'n at 5), this Court has previously noted the importance of *ex parte* witness interviews and the fact that such interviews are supported by Rule 26(b)(1). *Wolber v. Kitsap Mental Health Servs.*, 2006 WL 1734079 *2 (June 22, 2006) (Rule 26(b)(1) permits a party to discover the "identity and location of persons having knowledge of discoverable matter."). Indeed, courts have long recognized the "time-honored…principles…that counsel for all parties have a right to interview an adverse party's witnesses (the witness willing) in private, without the presence or consent of opposing counsel." *Int'l Bus. Machs., Corp. v. Edelstein*, 526 F.2d 37, 42 (2d Cir. 1975) (also detailing the differences in purpose between the deposition and an informal interview); *see also Doe v. Eli Lilly & Co., Inc.*, 99 F.R.D. 126, 128 (D.D.C. 1983) (noting the FRCP "have never been thought to preclude the use of such venerable, if informal, discovery techniques as the *ex parte* interview of a witness who is willing to speak").

[2] Defendants' assertion that *In re Bankers Trust* case does not involve *Touhy* regulations for the Federal Reserve promulgated pursuant to 5 U.S.C. § 301 and that § 301 is not even cited in the opinion puzzles Plaintiff. It appears that Defendants have not read the case. The Sixth Circuit notes that the Federal Reserve's *amicus* brief cites § 301as one of the enabling statutes for the regulation at issue. *In re Bankers Trust*, 61 F.3d 465, 470-71 (6th Cir. 1995).

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In so holding, courts have reasoned that informal witness interviews are "less costly than depositions, less likely to entail logistical or scheduling problems; it is conducive to spontaneity and candor in a way depositions can never be; and it is a cost efficient means of eliminating non-essential witnesses." *Eli Lilly*, 99 F.RD. at 128; *see also* FRCP 1 (stating that the FRCP should be "construed and administered to secure the just, speedy, and inexpensive determination of every action"). In essence, Defendants' argument boils down to the notion that Defendants should have unfettered access to Air Force personnel fact witnesses, while Plaintiff is required to use formal discovery (i.e., depositions) that are expensive, timely and unnecessary. *See Gen. Steel Domestic Sales, Inc. v. Steel Wise, LLC*, 2009 WL 185614 *11 (D. Colo. Jan. 23, 2009). This assertion flatly contradicts the idea that the United States sits in the same position as a private litigant when it is a party. *Exxon*, 34 F.3d at 776 n. 4.

Finally, given the fact that Plaintiff's counsel is asking certain current unit members who are gay or lesbian to speak with counsel about unit culture and how sexual orientation does not affect unit morale, it is particularly appropriate in the context of this case for counsel to conduct informal interviews without government attorneys present before issuing a subpoena for the unit member's testimony. Recently, one interview was conducted with a current unit member and his/her privately retained attorney. (Dunne Reply Decl. ¶ 4.) The potential witness wishes to consider whether to testify at trial and tell the truth about the 446th AES unit culture and his/her sexual orientation in light of the fact that his/her testimony may subject him/her to potential retaliation by the Air Force and discharge under 10 U.S.C. § 654. By conducting an informal *ex parte* interview rather than a deposition, the service member is protected from the possibility of government retaliation and discharge until s/he decides to testify.

C. There is no Conflict Between the DoD *Touhy* Regulations and State Ethical Rules Because the DoD *Touhy* Regulation Do Not Apply.

Defendants' entire argument for why they have not violated state ethical rules rests on the premise that the DoD *Touhy* regulations apply during "informal discovery" but not "formal discovery." If the regulations applied to informal discovery, then there would be an alleged conflict between federal regulations and state ethical rules. Ninth Circuit precedent from over 15 years ago and other federal cases from across the nation, however, establish that *Touhy*

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regulations do not apply to either formal or informal discovery when the United States is a party. Accordingly, Defendants' contention that the DoD *Touhy* regulations conflict or trump state ethical rules, (Opp'n at 7-8, 10) fails as a matter of law.

D. Sexual Orientation is Not a Matter of National Security or Classified Information.

Since the DoD *Touhy* regulations do not provide a valid basis for prohibiting *ex parte* interviews by Plaintiff, Defendants then argue that concerns of national security and the fear that Air Force personnel would inadvertently release confidential information require Air Force counsel at each interview. (Opp'n at 9.) Plaintiff does not believe a unit member's sexual orientation is classified information or raises a concern of national security and apparently the President of the United States agrees. (Dunne Reply Decl. Ex. A at 7 (noting in Request for Admission that the President has stated Don't Ask Don't Tell actually weakens our national security and has recognized that skilled gay and lesbian service members are either discharged or are "encumbered and compromised" in their service because they are forced to "live a lie").)

E. The Air Force Counsel Instruction Violated State Ethical Rules.

Because there is no valid privilege asserted to prohibit *ex parte* interviews, the Air Force's instruction to the unit members that they must contact Air Force counsel and follow *Touhy* regulations (that by well-settled law did not apply) squarely violated Rule 3.4(a) of the Washington Rules of Professional Conduct and the fact that Air Force counsel and other personnel gave the instruction (*see* Holmgren Decl. ¶¶ 4-5) does not allow the Department of Justice to avoid responsibility pursuant to Rule 8.4(a) and 8.4(d).[3]

The Court may determine that the state ethical rules were violated, but that the violation were not willful or done in bad faith. In that event, the fact still remains that unit members are currently under the mistaken impression that they cannot voluntarily speak to Plaintiff's counsel if they wish to without contacting Air Force counsel first. Because this instruction was given without any valid legal basis, Plaintiff respectfully requests a curative instruction so that going forward she may continue to gather evidence for summary judgment and trial.

[3] Defendants are correct that Plaintiff's counsel did not include a reference to Rule 8.4(d) in her letter, but the parties met and conferred by phone and discussed Rule 8.4(d), along with other RPCs. (Dunne Reply Decl. ¶¶ 5-6.)

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CONCLUSION

Based on the foregoing reasons, including the arguments and evidence presented in the moving papers, Plaintiff respectfully asks this Court to grant her motion and enter Plaintiff's Proposed Order.

DATED this 7th day of May, 2010.

Respectfully submitted,
AMERICAN CIVIL LIBERTIES UNION
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By: __/s/ Sarah A. Dunne_____

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2010, I electronically filed *Plaintiff's Reply Memorandum In Support of Plaintiff's Motion for Protective Order Prohibiting Interference with Non-Party Witness by Defendant* 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 7th day of May. 2010.

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