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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

DECLARATION OF SARAH A.
DUNNE IN SUPPORT OF REPLY
MEMORANDUM FOR MOTION
FOR PROTECTIVE ORDER
PROHIBITING INTERFERENCE
WITH NON-PARTY WITNESSES BY
DEFENDANTS

NOTE ON MOTION CALENDAR:
MAY 7, 2010

ORAL ARGUMENT REQUESTED

Pursuant to 28 U.S.C. § 1746, I, Sarah Dunne, hereby declare as follows:

1. I am counsel for the plaintiff and have personal knowledge of the facts contained in this Declaration.
2. Attached hereto as Exhibit A is a true and correct copy of Defendants United States et al. Supplemental Responses to Requests 3, 4, and 5 of Plaintiff's First Set of Requests

1 for Admission propounded in *Log Cabin Republicans v. United States*, Case No CV04-8425
2 (C.D. Cal.).

3 3. Attached hereto as Exhibit B is a true and correct copy of an excerpt from the
4 deposition of Master Sergeant Stacey Julian, dated March 18, 2010.

5 4. On April 21, 2010, I conducted a witness interview of a current unit member of
6 the 446th AES who is a gay or lesbian service member. This service member has retained
7 private counsel to represent him/her during this litigation in the event s/he decides to testify and
8 tell the truth about the unit culture and his/her sexual orientation. His/her attorney was also
9 present when I conducted the interview.

10 5. On April 21, 2010, government counsel and I participated in a telephone
11 conference concerning the issue of non-party witness interference. We discussed the issue for
12 almost thirty minutes but were unable to reach a resolution amenable to both parties. Among the
13 issues we discussed was whether the DoD *Touhy* regulations were applicable in litigation
14 involving the United States as a party and if they were not, whether the conduct of the
15 Department of Justice attorneys and Air Force counsel violated Rule 3.4(a), 8.4(a) and (d), and
16 1.7(a) of the Washington Rules of Professional Conduct.

17 6. In particular, I discussed with government counsel the fact that Plaintiff's counsel
18 believed the *Touhy* regulations did not apply in litigation involving the United States based on
19 the case law and my prior experience as a trial attorney for the United States Department of
20 Justice. I further raised the point with government counsel that Plaintiff's counsel believed the
21 only basis for objecting to the interviews was because of some privilege, such as national
22 security. But I made the point that Plaintiff's counsel did not believe someone's sexual
23 orientation was a matter of national security. Because Air Force counsel had previously raised
24 the argument at the end of MSgt. Stacey Julian's deposition that the Air Force represented
25 current personnel in their "official capacity," (Julian Dep. 63:19-64:18), I also informed
26 government counsel that we believe any assertion of joint representation by the Government of
27 the Defendants and Air Force personnel was a conflict under Rule 1.7(a) because current unit
28 members may have interests adverse to Defendants. To support this, I shared with government
29

1 counsel that I knew of at least one current gay or lesbian unit member of the 446th AES who had
2 retained private counsel. Government counsel contended that it could not order its client to issue
3 a curative instruction and I asserted to government counsel that I did not believe DOJ could
4 avoid its ethical obligations based on this reason pursuant to 8.4(a) and 8.4(d). We also
5 discussed the fact that Washington had adopted Rule 3.4(a) but had not adopted Model Rule
6 3.4(f), as noted in Washington Comment [5].
7

8 I declare under penalty of perjury that the foregoing is true and correct, and that this
9 Declaration was executed on May 7, 2010 in Seattle, Washington.
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11 /s/ Sarah A. Dunne
12 Sarah A. Dunne, WSBA #34869
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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2010, I electronically filed *Declaration of Sarah A. Dunne in Support of Reply Memorandum for Motion for Protective order Prohibiting Interference Non-Party Witnesses by Defendants* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Peter Phipps
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Marion J. Mittet
Jamie.Mittet@usdoj.gov

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Bryan R. Diederich
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Attorneys for Defendants

DATED this 7th day of May. 2010.

AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON FOUNDATION

By: /s/ Nina Jenkins
Nina Jenkins
Legal Program Assistant
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EXHIBIT A

1 TONY WEST
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2 ANDRE BIROTTE, Jr.
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3 VINCENT M. GARVEY
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10 Attorney for Defendants United States
of America and Secretary of Defense

11 **UNITED STATES DISTRICT COURT**
12 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
13 **EASTERN DIVISION**

14 LOG CABIN REPUBLICANS,
15 Plaintiff,
16 v.
17 UNITED STATES OF AMERICA AND
ROBERT GATES, Secretary of Defense,
18 Defendants.
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No. CV04-8425 (VAP) (Ex)
DEFENDANTS'
SUPPLEMENTAL RESPONSES
TO REQUESTS 3, 4, AND 5 OF
PLAINTIFF'S FIRST SET OF
REQUESTS FOR ADMISSION

1 Pursuant to Federal Rules of Civil Procedure 26 and 36, and as directed by
2 the March 16, 2010 Order of the Magistrate Judge (Doc. 127), Defendants hereby
3 supplement their responses to Plaintiff's requests for admission ("RFAs").

4 Federal Rule of Civil Procedure 36(a)(4) directs that "when good faith
5 requires that a party qualify an answer or deny only a part of a matter, the answer
6 must specify the part admitted and qualify or deny the rest." The Court's Order
7 overruled Defendants' objections to Requests for Admission 3, 4, and 5 and
8 ordered the United States to "unqualifiedly admit or deny" the requests.

9 The Court's Order has placed Defendants in an untenable position. Counsel
10 in this litigation represents the United States. However, the Executive and
11 Legislative Branches have yet to express a unified position on the subject matter
12 of Plaintiff's RFAs. For these reasons, it is Defendants' position that providing a
13 single-word, unqualified answer in response would be inaccurate, incomplete, and
14 inconsistent with the mandatory provisions of Rule 36(a)(4).

15 The President of the United States, who formulates the policy of the
16 Executive Branch, has stated, including in his State of the Union Address on
17 January 27, 2010, that 10 U.S.C. § 654, the statute enacting "Don't Ask Don't Tell"
18 ("DADT"), should be repealed. The President has further said that DADT does
19 not contribute to, and indeed weakens our national security, and he has stated that
20 "[w]e cannot afford to cut from our ranks people with the critical skills we need to
21 fight any more than we can afford - for our military's integrity - to force those
22 willing to do so into careers encumbered and compromised by having to live a
23 lie."

1 While this Administration contends that DADT is wrong as a matter of
2 policy and should be repealed, it also recognizes that this view does not abrogate
3 the President's responsibility to "take Care that the Laws are faithfully executed,"
4 U.S. Const., Art. II, Sec. 3. Moreover, the Department of Justice generally
5 defends the constitutionality of duly enacted statutes.¹ In enacting Section 654,
6 Congress determined in 1993 that DADT was necessary "in the unique
7 circumstances of military service," 10 U.S.C. § 654. The United States, in
8 defending the constitutionality of Section 654, has maintained that this
9 Administration's efforts to effect repeal do not compel the conclusion that Section
10 654 is unconstitutional. In the absence of the Court's order, counsel for the United
11 States would provide Plaintiff an answer that accurately reflects the Defendants'
12 position which a single-word response cannot convey. The Court's order does not
13 permit the United States to provide an answer that, in good faith, "specif[ies] the
14 part admitted and qualif[ies] or den[ies] the rest," Fed. R.Civ. Proc. 36(a)(4), in
15 view of the disagreement between the Executive Branch's view as articulated in
16 2010 and Congress' view as articulated in its 1993 enactment of Section 654.

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24 ¹ The Department of Justice has a longstanding and bipartisan tradition of
25 defending federal statutes where reasonable arguments can be made in support of
26 their constitutionality, even if the Executive Branch disagrees with a particular
27 statute as a matter of policy, as it does here.

1 Given that disagreement, the United States has no choice but to deny, for
2 purposes of this litigation, the requests for admission noted below, while
3 recognizing that these denials do not reflect the positions articulated by the
4 President. Accordingly, defendants, subject to their continuing objection, respond
5 as follows for the purposes of this litigation only:

6 3. Admit that DADT does not contribute to our national security.

7 **Response:** Deny.

8 4. Admit that DADT weakens our national security.

9 **Response:** Deny.

10 5. Admit that discharging members pursuant to DADT weakens our national
11 security.

12 **Response:** Deny.

13
14 Date: April 12, 2010

TONY WEST
Assistant Attorney General

15
16 ANDRÉ BIROTTE, Jr.
United States Attorney

17
18 VINCENT M. GARVEY
Deputy Branch Director

19 

20 PAUL G. FREEBORNE
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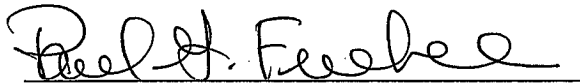
Counsel For Federal Defendants

1 **PROOF OF SERVICE**

2 I hereby certify that I served DEFENDANTS' SUPPLEMENTAL
3 RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSION
4 by electronic mail and regular mail upon the persons below on April 12, 2010:

5 Dan Woods
6 White & Case LLP
6 633 West Fifth Street, Suite 1900
7 Los Angeles, CA 90071-2007
7 Tel. (213) 620-7714

8 I declare under penalty of perjury that the above is true and correct.

9 

10 Paul G. Freeborne

EXHIBIT B

1 prevent it from happening would be granted; is that
2 right?

3 A. Yes, for a small moment.

4 Q. Small moment, what does that mean, a couple of days?

5 A. No, the conversation that she had, and I don't know who
6 she had it with, but it was with your office.

7 Q. Mm-hmm.

8 A. That there was a -- something was put in that they
9 wanted to try to stop depositions. I didn't know if it
10 was mine or all of them.

11 Q. I see.

12 A. But I didn't think that that would happen, so I
13 figured.

14 Q. But in any event the Air Force's attorneys never told
15 you that that attempt was made?

16 A. No.

17 MR. LOBSENZ: Thank you.

18 (Off the record)

19 COLONEL CARNES: I'd like to make a comment.

20 I do represent him in an official capacity.

21 MR. LOBSENZ: I'm not really sure what you
22 mean by that. But he isn't a party, and I don't
23 believe you represent witnesses.

24 COLONEL CARNES: In an official capacity, and
25 he is a member of the Air Force. And the Air Force is

1 my client.

2 MR. LOBSENZ: I agree with that, but he's
3 not. And I don't know that we need to have that
4 discussion here now, but it might turn into an issue
5 later. But I did feel that it was important for me to
6 say that I would complain to the Judge bitterly if you
7 in any way purported to give him legal advice. Because
8 I think that is a conflict there, you can't do that.
9 You represent the Air Force, but you don't represent
10 all the employees of the Air Force. You represent
11 those within the control group of the Air Force, which
12 is probably the Secretary of the Air Force and the
13 Assistant Secretary and maybe a few high-ranking
14 Generals, and that is it. You don't represent the
15 witnesses. But if we disagree about that, we can
16 either --

17 MR. BUCKINGHAM: At that time and place.

18 COLONEL CARNES: Resolve that issue.

19 (Deposition concluded)

20 (Signature reserved)

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