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Judge Ronald B. Leighton

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA

MAJOR MARGARET WITT,

Plaintiff,

 14 UNITED STATES DEPARTMENT OF THE AIR FORCE, et al.,
 15

v.

Defendants.

No. C06-5195 RBL

DEFENDANTS' MOTION TO AMEND THE ORDER OF MAY 17, 2010

(Note Defendants' Motion on the Motion Calendar for June 18, 2010)

Defendants have fully complied with the Court's order for a curative instruction dated May 17, 2010 (Docket #87), but now respectfully request that the Court amend one sentence of the findings in support of that order.

By way of background, the Court's order required "counsel for defendants to issue a curative instruction in writing to all current unit members of the 446 AES" with a specified text. *See* Order at 2. The Air Force has done so already, going well beyond that which the Court directed. The Air Force issued a curative instruction signed by two Air Force counsel and the commander of the 446th Aeromedical Evacuation Squadron. *See* Declaration of Lt. Col. Todi S. Carnes ¶ 5 (copy attached as Ex. 1). The Air Force sent the curative instruction via U.S. Mail not just to every current member of the 446th AES, but also to any former members who were

members at the time the Air Force briefed the 446th AES regarding the DoD and Air Force 1 regulations. See id. ¶ 6, Attach. The Air Force also emailed the curative instruction to the 2 official email address of every current member of the unit. See id. Moreover, the Air Force 3 posted a copy of the curative instruction in the squadron's bulletin board. See id. 4 Having already taken these actions in response to the Court's order, defendants 5 nonetheless respectfully request that the Court delete one sentence of that order, specifically, the 6 last sentence on the first page of the order: 7 The Court further FINDS that the Defendants' instruction to non-party former and 8 current Air Force employees requiring Air Force consent before non-party former and current Air Force employees may voluntarily speak with counsel for Plaintiff 9 concerning this litigation is contrary to Washington Rules of Professional Conduct 10 3.4(a). Order at 1. Defendants seek this amendment to the Court's order to avoid any potential issues, 11 ethical reporting, or collateral attacks that individual Air Force counsel may otherwise encounter. 12 Three reasons support defendants' request. First, the requested deletion is of a further finding, 13 which is not necessary to the integrity of the Court's order, or for compliance with the Court's 14 order. Second, Air Force personnel were acting in good faith in their original instructions. See 15 Carnes Decl. ¶ 2-3; Declaration of Maj. Linell Letendre ¶ 2-3 (copy attached as Ex. 2). 16 Moreover, they were acting pursuant to federal regulations, which in the context of informal fact-17 gathering, have never been found by any court to be inappropriate. Third, Washington Rule of 18 Professional Conduct 3.4(a) speaks only of "unlawful" efforts at obstructing access to evidence. 19 Defendants submit that in these circumstances with the presence of valid and lawful Department 20 of Defense and Air Force regulations, Air Force personnel should not as a consequence thereof 21 be confronted with potential ethics issues for actions taken in good faith. 2.2 Accordingly, defendants respectfully seek amendment of May 17, 2010 order through 23 deletion of the one identified sentence. 24 25 26 27

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1	Dated: June 1, 2010	Respectfully submitted,
2 3		TONY WEST Assistant Attorney General
4		VINCENT M. GARVEY
5		Deputy Branch Director
6		/s/ Peter J. Phipps
7		PETER J. PHIPPS BRYAN R. DIEDERICH
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1 2	UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA		
3	CERTIFICATE OF SERVICE		
4	I hereby certify that on June 1, 2010, I electronically filed the foregoing Defendants'		
5 6	Motion to Amend the Order of May 17, 2010, with the Clerk of the Court using the CM/ECF		
7	system which will send notification of such filing to the following persons:		
 8 9 10 11 12 13 14 15 16 17 	James E. Lobsenz, Esq. Carney Badley Spellman, P.S. 701 Fifth Avenue, Suite 3600 Seattle, WA 98104 Tel: (206) 622-8020 Fax: (206) 622-8983 E-mail: lobsenz@carneylaw.com Sher S. Kung, Esq. American Civil Liberties Union of Washington 705 Second Avenue, Suite 300 Seattle, WA 98104 Tel: (206) 624-2184 E-mail: dunne@aclu-wa.org Sher S. Kung, Esq. American Civil Liberties Union of Washington 705 Second Avenue, Suite 300 Seattle, WA 98104 Tel: (206) 624-2184 E-mail: skung@aclu-wa.org		
 18 19 20 21 22 23 24 	/s/ Peter J. Phipps PETER J. PHIPPS United States Department of Justice Civil Division, Federal Programs Branch P.O. Box 883, Ben Franklin Station Washington, DC 20044 Tel: (202) 616-8482 Fax: (202) 616-8470 E-mail: peter.phipps@usdoj.gov Attorney for Defendants		
25 26 27 28			