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

NOTE ON MOTION CALENDAR: June 18, 2010

INTRODUCTION

Defendants request this Court to strike the last sentence on the first page (the "3.4(a) sentence") of its May 17, 2010, order (the "Order"), which finds that Defendants acted "contrary to" Washington Rule of Professional Conduct 3.4(a) by instructing non-party former and current Air Force employees to obtain Air Force permission before speaking with Plaintiff's counsel. Plaintiff opposes Defendants' request to delete the 3.4(a) sentence for the reasons set forth below.

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A. Washington Rule of Professional Conduct 3.4(a) Is Integral To The May 17 Order

To the extent that Defendants question the underlying legal basis of this Court's May 17 Order by stating that the *Touhy* regulations in the context of informal witness interviews have *never* been found "inappropriate" or inapplicable (Defs. Mot. At 2 (Dkt No. 92)), Defendants' assertion is inaccurate. *Exxon Shipping Co.*, 34 F. 3d 774, 779, n. 4-5 (9th Cir. 1994) (holding that the *Touhy* regulations do not apply when the U.S. is a party to the litigation); *McElya v. Sterling Med., Inc.*, 129 F.R.D. 510, 514-15 (W.D. Tenn. 1990) (rejecting application of the very Department of Defense regulations at issue here to informal witness interviews and any aspect of discovery); *United States v. The Boeing Co.*, 189 F.R.D. 512, 516-18 (S.D. Ohio 1999) (Boeing did not comply with *Touhy* process before interviewing and retaining former Department of Defense (DoD) official as expert and Court held that Boeing had not needed to comply with the DoD *Touhy* regulations before contacting and retaining the former official as an expert witness).

Because the *Touhy* regulations do not apply when the United States is a party to litigation (formal or informal discovery), the Court then had to analyze whether the conduct at issue by Air Force counsel comported with other law or state ethical rules. This Court carefully reviewed the legal and factual arguments submitted by both parties concerning Plaintiff's Motion (Dkt No. 77) and reached the finding that placing conditions on informal non-party witness interviews is not consistent with the Washington Rules of Professional Conduct. Had the Washington Supreme Court adopted ABA Model 3.4(f) which in fact permits counsel to condition interviews of non-party fact witnesses who are employees or relatives of a party, the Air Force could have conditioned such interviews and asked their employees to refrain from voluntarily speaking to Plaintiff's counsel. But the Washington Supreme Court did not adopt 3.4(f). Put simply, considering whether the *Touhy* regulations applied was not the end of the Court's inquiry. To justify the relief ordered, the Court then had to consider whether the conduct was noncompliant with other law or court rules. Far from representing merely "a further finding" (Defs. Mot. at 2),

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this Court's inclusion of the 3.4(a) sentence justifies the remedy ordered by this Court in the Order and, therefore, is necessary to the integrity of the Order.

B. Examining the Differences Between Plaintiff's Proposed Order and the Court's May 17 Order Demonstrate this Court has Already Taken Defendants' Assertion of Good Faith Into Account When Issuing Its May 17 Order.

Defendants argue against the applicability of Washington Rule of Professional Conduct 3.4(a) to their actions because they were performed in good faith. (Defs. Mot. at 2). The fact that this Court did not adopt Plaintiff's proposed order in its entirety indicates that the Court already implicitly took good faith into account when issuing its ruling on May 17. In their moving papers, Defendants fail to acknowledge that Plaintiff's proposed order contained the following sentence which the Court changed in its actual Order:

> The Court further FINDS that the Defendants' instruction to the non-party former and current Air Force employees requiring Air Force counsel consent before non-party former and current Air Force employees may voluntarily speak with counsel for Plaintiff concerning this litigation violates Washington Rules of Professional Conduct 3.4(a) and 8.4(d).

(Pl. Proposed Or. at 1) (Dkt. No. 77-2). The Court's May 17 Order adopted part of this sentence, but changed "violates" to "is contrary" and deleted any reference to Rule 8.4(d). By softening the language from "violates" to "is contrary," the Court signaled its view that any action taken by Air Force counsel was in conflict with Rule 3.4(a), but was likely not an intentional or willful violation of Rule 3.4(a). The Court also eliminated any reference to Rule 8.4(d) which states it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." Both of these changes were materially significant and demonstrate the Court's decision to presume good faith on the part of Air Force counsel.

C. The Disturbing Pattern of Grossly Negligent Conduct Provides an Additional Reason for Denying Defendants' Motion

Defendants' remaining argument boils down to their speculation that this Court's failure to strike the 3.4(a) sentence will result in their facing ethical issues or "collateral attacks." (Defs. Mot. at 2.) However, Washington is not a mandatory reporting state pursuant to the Washington

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Rule of Professional Conduct 8.3. *See* WASH. RULES OF PROF'L CONDUCT 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct . . . *should* inform the appropriate professional authority." (emphasis added)); WASH. RULES OF PROF'L CONDUCT 8.3 cmt. [1] ("Lawyers are not required to report the misconduct of other lawyers…."). Further, based on the facts of which Plaintiff is aware to date concerning this specific conduct of conditioning informal non-party witness interviews, Plaintiff does not intend to report this Court's May 17 Order to the Washington State Bar or any other state bar. (Dunne Decl. ¶ 2.)

Moreover, in Paragraph 20 of the Preamble and Scope section of the Washington RPC's, it states that "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." Paragraph 20 further provides that the RPCs are "not designed to be a basis for civil liability." While Plaintiff does not understand what Defendants mean by "collateral attacks," the language of the RPCs cited above and Washington case law make clear that actions or conduct that it is inconsistent with the RPCs does not create a cause of action or civil liability. *Hizey v. Carpenter*, 119 Wn. 2d 251, 259-260 (1992) (holding that a violation of the RPCs does not create a cause of action and that a violation of the RPCs may not constitute evidence of malpractice).

While Defendants' request to amend this Court's May 17 Order appears benign on its face, there has been a disturbing pattern of behavior on the part of Defendants that is grossly negligent, if not reckless. Within the next two weeks, Plaintiff plans to file a motion for sanctions regarding spoliation of evidence with this Court. Plaintiff has learned through deposition testimony and other discovery that relevant documents have gone missing and that Air Force files and electronic discovery have not been preserved for this case because Air Force counsel never implemented any litigation holds at any time. (Dunne Decl. ¶ 3-4 and Ex. A at 5-6.)

Just this past Friday on June 9, Plaintiff's counsel brought to Defendants' attention the fact that Plaintiff's counsel realized last week that Defendants made a material omission to the

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Ninth Circuit. On October 24, 2007, roughly three weeks before oral argument on November 5, Defendants submitted a *Consented Motion to Supplement the Record* ("Consented Motion") which provided the Ninth Circuit a document, entitled "Action by the Secretary of the Air Force" dated July 10, 2007 (hereinafter "SAF Action") directing Plaintiff be discharged "with an Honorable discharge." (Dunne Decl. Ex. C at 15.) In the Consented Motion, Defendants state that "[a]s the attached document shows, the Director of the Air Force Review Boards Agency, acting on behalf of the Secretary of the Air Force, directed that Witt be honorably discharged." (Dunne Decl. Ex. C at 12.)

The Defendants told the Ninth Circuit that the Ninth Circuit needed to see this document in order to have a complete record of what had transpired:

> In considering this appeal, the Court should have before it the document showing the completion of the administrative discharge proceeding, which occurred while the appeal was pending.

Consented Motion, ¶ 7 (Dunne Decl. Ex. C at 13.) The Defendants represented that "the attached document show[ed] the completion of the Air Force's proceeding to discharge Witt." (*Id.)*

In fact, the attached July 10, 2007 document did *not* show completion of the discharge proceeding. Curiously, this Consented Motion did not include the actual discharge order. What type of discharge and the language on the actual order was a material issue before the Ninth Circuit. Indeed, the Ninth Circuit remanded the procedural due process claim precisely because it did not have the actual discharge document in front of it. *Witt v. Dep't of Air Force*, 527 F. 3d 806, 812-13 (9th Cir. 2008). An examination of the Air Force regulations covering types of service characterizations reveals three kinds: Honorable, Under Honorable Conditions (or a General discharge), and Under Other Than Honorable Conditions. (Dunne Decl. Ex. E at 28.)

What Defendants failed to make known to the Ninth Circuit is that, at the time they submitted the *Consented Motion* and at the time of oral argument, Defendants had already discharged the Plaintiff, but they had not given her an Honorable Discharge. Defendants issued Plaintiff's actual discharge order, *two days after* the SAF Action, on July 12, 2007. (Dunne Decl.

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Ex. D at 17) (hereinafter "Discharge Order"). Moreover, the July 12, 2007 Discharge Order shows that Plaintiff was discharged effective October 1, 2007, and that she received "an Honorable Conditions Discharge," or what Plaintiff believes is a General discharge. (*Id.*) While Plaintiff anticipates Defendants will argue the July 12, 2007 Order contains merely a typo that can be corrected to ensure the record is clear Plaintiff received an Honorable discharge, we have asked Defendants to provide Plaintiff with an explanation as to why the actual Discharge Order was not presented to the Ninth Circuit on October 24, 2007, or at oral argument on November 5, 2007.

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CONCLUSION

As the current Chairman of the Joint Chiefs of Staff has recently recognized in testimony to the U.S. Senate, the Don't Ask Don't Tell Policy has affected both the integrity of individual service members and the institution of the military itself.

> Speaking for myself and myself only, it is my personal belief that allowing gays and lesbians to serve openly would be the right thing to do. No matter how I look at this issue, I cannot escape being troubled by the fact that we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens. For me personally, it comes down to integrity – theirs as individuals and ours as an institution.
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> -- *Admiral Mike Mullen, Chairman Joint Chiefs of Staff Testimony to U.S. Senate Committee on Armed Services, February 2, 2010*

For the foregoing reasons, this Court should deny Defendants' Motion to Amend the Order of May 17, 2010, and should not delete the sentence that refers to an ethical rule that protects the integrity of our bar and the courts of our state.

DATED this 14th day of June, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2010, I electronically filed *Plaintiff's Opposition to Defendants' Motion to Amend the Order of May 17, 2010* 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 14th day of June, 2010.

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