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 **DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO AMEND THE ORDER OF MAY 17, 2010**

Defendants have moved for very narrow relief. In their motion to amend, they respectfully submitted that the Court should strike from its May 17, 2010 order the following sentence: "The Court further **FINDS** that the Defendants' instruction to non-party former and current Air Force employees requiring Air Force consent before non-party former and current Air Force employees may voluntarily speak with counsel for Plaintiff concerning this litigation is contrary to Washington Rules of Professional Conduct 3.4(a)." Order at 1. Plaintiff's arguments in opposition to this motion seeking narrow relief are misguided because Plaintiff's motion could be resolved without finding a violation of Rule 3.4. For that reason, Plaintiff's recitation of law misses the mark and is far too broad. Likewise, Plaintiff's charges of other alleged lapses are not

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(202) 616-8482

relevant to this motion.[1]

I. The Relief Plaintiff Sought Could Have Been Granted Without Reference to Rule 3.4.

Plaintiff originally sought relief from the Court from Defendants' directive to Air Force service members to consult with Air Force counsel before consenting to informal interviews with Plaintiff's counsel. Regardless of the parties' respective positions concerning the law in regards to the question presented, in the context of disputes concerning formal discovery mechanisms, regulations of this sort have been held inapplicable without resort to state law or ethics rules. Courts have reasoned, as the Ninth Circuit did in *Exxon Shipping Co. v. U.S. Dep't of the Interior*, that the text of 5 U.S.C. § 301 does not authorize an agency decision to withhold information in a litigation context. *See* 34 F.3d 774, 776-78 (9th Cir. 1994). Thus, it was within the Court's purview to find, without more, that Defendants' orders were inconsistent with the case law's interpretation of 5 U.S.C. § 301's grant of authority and order them rescinded. Accordingly, consideration of Washington Rules of Professional Responsibility was not, as Plaintiff asserts, "integral" to the decision the Court reached.

Moreover, while Defendants do not wish to re-litigate the substantive issues in the original motion, they wish to emphasize the context in which decisions were made. Specifically, prior to this Court's order, no court had held that regulations like those at issue here were inapplicable to "informal" discovery (*i.e.*, "discovery" taking place outside the Rules of Federal Procedure governing the ordinary course of litigation), such as the interviews at issue here. The cases Plaintiff cites are not to the contrary. Two of the cases concern the power of the Government to limit formal testimony in civil proceedings. *Exxon Shipping* considered a situation in which government employees were *subpoenaed* to testify at depositions and the specific regulations at issue pertained only to testimony or the production of documents *in response to formal litigation requests*. *See* 34 F.3d at 775; *see also* 52 Fed. Reg. 37145 (Oct. 5,

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[1]Beyond the differences that exist between the parties over the necessity of the one sentence in the Court's May 17, 2010 Order, there appears to be no disagreement that the Air Force complied with the Court's order and, in fact, did more than the Court required by way of curative measures.

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1987) (Department of Interior regulations at the time); 55 Fed. Reg. 42347 (Department of Agriculture regulations in effect at the time); 40 C.F.R. § 2.401 (EPA regulations in effect at the time); 53 Fed. Reg. 41318 (Oct. 21, 1988) (Department of Commerce regulations in effect at the time); 52 Fed. Reg. 37145 (Oct. 5, 1987) (Department of Health & Human Services regulations in effect at the time). Likewise, in *United States v. Boeing Co.*, 189 F.R.D. 512, 513 (S.D. Ohio 1999), the question was whether Department of Defense *Touhy* regulations barred Plaintiffs from calling a former Department employee as an expert witness.

McElya v. Sterling Medical, Inc. comes closest to being on point, but its facts are different than those presented here. In *McElya*, the Government told counsel for plaintiffs "not to undertake to talk with witnesses connected with the navy who might have knowledge about this case, on penalty of being criminally prosecuted." 129 F.R.D. 510, 514-15 (W.D. Tenn. 1990). Nothing of the sort happened here, of course, and, more importantly, the court in *McElya* found that

> Ethical obligations will necessarily place certain limitations on counsel's attempts to interview witnesses, and the navy's *ability to give instructions to its current personnel concerning voluntarily talking with adverse counsel is still intact*.

129 F.R.D. at 515 (emphasis added). In short, it appears that the *McElya* court concluded that while the Government could not condition the deposition testimony of government witnesses, *see* 129 F.R.D. at 514, and could not threaten opposing counsel, it could still instruct its employees regarding voluntary interviews. Moreover, the cases Plaintiff cites are not the entire universe of cases on the matter. In fact, one court has cited to similar regulations for the proposition that a plaintiff is not entitled to conduct informal interviews of government employees in the face of regulations barring discussion of litigation, even when the agency is a party. *See Pippinger v. Rubin*, 129 F.3d 519, 534 n.8 (10th Cir. 1997).

Defendants appreciate Plaintiff's counsel's statement and clarification that counsel thus does not intend to report this matter to any state bar. That, however, does not resolve the issue for the attorneys affected by this Order. The Air Force takes seriously compliance with professional conduct obligations, and the Court's order, as presently formulated, could lead to

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internal investigations, at a minimum. *See, e.g.*, Air Force Judge Advocate Policy Memorandum TJS-05 (Aug. 17, 2005) (Attached hereto as Ex. 1).

II. Plaintiff's Claims of Other Government Actions are Irrelevant to the Pending Motion.

Plaintiff raises in its opposition other instances of what it alleges are "grossly negligent" behavior by the Air Force as yet additional reasons to deny Defendants' motion. Plaintiff makes no causal connection between these other alleged actions and the present motion to amend. In short, it is a non sequitur for Plaintiff to argue that Defendants are not entitled to relief with respect to the current motion because Plaintiff may bring a motion[2] or take some other action about some other issue in the future.[3]

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[2] Plaintiff's counsel represents that they will soon file a motion regarding alleged spoliation of documents. Plaintiff casts aspersions on Defendants' conduct without first making any allegations that she has been prejudiced. Beyond its irrelevance, and notwithstanding Defendants' production in discovery of a record of Plaintiff's discharge board proceedings, the issue is premature and will be addressed in response to any motion by Plaintiff.

[3] Plaintiff's counsel also references the prior record before the Court of Appeals. Yet, as this Court recognized in its order extending summary judgment briefing, Defendants are working to clarify any misunderstanding with respect to Plaintiff's discharge paperwork. Suffice it to say for now that Defendants accurately represented that Plaintiff received an Honorable Discharge. *See* Declaration of SMsgt. Brian A. Pack ¶ 6 (Attached hereto as Ex. 2). The Secretary of the Air Force determined and directed that Plaintiff be discharged with an "Honorable" discharge. *Id.* ¶ 4. The decision of the Secretary of the Air Force was, in fact, the actual and final determination regarding the character of Plaintiff's discharge. *Id.* ¶¶ 4, 6. The electronic Military Personnel Data System, moreover, reflects that Plaintiff's discharge was "Honorable." *Id.* Any paperwork that followed after the Secretary's 10 July 2010 determination and related thereto was ministerial in nature. *Id.* In addition, any subsequent paperwork describing the Secretary's determination has now been amended to reflect the actual discharge directive of the Secretary of the Air Force that Plaintiff received an "Honorable" discharge. *Id.* ¶ 7.

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WASHINGTON, D.C. 20044
(202) 616-8482

Dated: June 18, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General

VINCENT M. GARVEY
Deputy Branch Director

/s/ *Peter J. Phipps*

PETER J. PHIPPS
BRYAN R. DIEDERICH
STEPHEN J. BUCKINGHAM
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 616-8482
Fax: (202) 616-8470
E-mail: peter.phipps@usdoj.gov

Mailing Address:
Post Office Box 883, Ben Franklin Station
Washington, D.C. 20044

Courier Address:
20 Massachusetts Ave., N.W.
Washington, D.C. 20001

Attorneys for Defendants

Of Counsel:
LT. COL. TODI CARNES
1777 N. Kent Street, Suite 11400
Rosslyn, VA 22209-2133
(703) 588-8428

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2010, I electronically filed the foregoing Defendants' Reply to Plaintiff's Opposition to Motion to Amend the Order of May 17, 2010, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following person:

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

Sarah A. Dunne, 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

/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