The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-Cv-1297-MJP

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO SHOW CAUSE

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Plaintiffs seek to involve the Court unnecessarily in discovery issues that the parties have been actively discussing and attempting to resolve. Although Defendants informed Plaintiffs that they would be supplementing their initial disclosures based on the recently announced Department of Defense policy regarding service by transgender individuals, Plaintiffs have filed a motion to show cause, contending that Defendants are in civil contempt for violating the Court's March 14 and March 20 Orders. *See* Dkt. 243. Plaintiffs' claim that Defendants have violated this Court's Orders is incorrect, and Defendants have complied fully with their obligations under Rule 26. Accordingly, Plaintiffs' motion should be denied.

Although Defendants believe that they are in full compliance with the Court's Orders and with Rule 26, Defendants nevertheless have provided to Plaintiffs today supplemental initial disclosures that identify additional witnesses and documents that Defendants may rely upon to defend the new March 2018 Department of Defense ("DoD") policy.

DISCUSSION

Plaintiffs' motion to show cause should be denied because Defendants have fully complied with both the Court's Orders in this case and their obligations under Rule 26. The Ninth Circuit has recognized that civil contempt is appropriate only where a party disobeys a specific and definite court order by failure to take all reasonable steps within the party's power to comply. *In re Dual-Deck Video Cassette Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993). "A person should not be held in contempt if his action "'appears to be based on a good faith and reasonable interpretation of the [court's order].'" *Id.* (citation omitted). Furthermore, "'[s]ubstantial compliance' with the court order is a defense to civil contempt, and is not vitiated by 'a few technical violations' where every reasonable effort has been made to comply." *Id.* (citations omitted).

Plaintiffs contend that the Court should hold Defendants in contempt and that Defendants should "be forced to make an adequate disclosure of witnesses consistent with the Court's March 14 and March 20 Orders." Dkt. 243 at 4. But, by the plain terms of those Orders—which relate to now-rescinded policy statements—Defendants are not in violation of either Court Order.

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On March 14, 2018, the Court ordered Defendants to provide initial disclosures that would disclose "all information Defendants may use to support their claims or defense[s] with respect to the current policy prohibiting military service by openly transgender people (*i.e.*, the policy announced on Twitter by President Trump on July 26, 2017 and formalized in an August 25, 2017 Presidential Memorandum)." Dkt. 204. On March 20, 2018, the Court denied the Defendants' motion to clarify its March 14 Order, stating that it "expects Defendants to comply with its [March 14] Order," and that "[w]hile Defendants need not disclose the *substance* of any communications or documents upon which they intend to rely," their Second Amended Initial Disclosures were inadequate because Defendants failed to identify each individual likely to have discoverable information that they may use to support their claims or defenses. Dkt, 210 (emphasis in original).

On March 22, 2018, Defendants filed a response to the Court's March 20, 2018 Order explaining that:

> Defendants have identified in their initial disclosures, as amended and supplemented, all of the individuals and documents that they expect to use to support their defense of the policy that the Court has determined is currently at issue in this litigation (*i.e.*, the policy announced on Twitter by President Trump on July 26, 2017 and formalized in an August 25, 2017 Presidential Memorandum, *see* Dkt. 210 at 1). Defendants have determined not to use information that they have not identified in their initial disclosures in their defense of the current policy, including potentially privileged information about presidential deliberations. Given the Court's statements about Presidential deference, Defendants recognize that the Court may decide to take Defendants' decision into consideration in the pending summary judgment motions.

Dkt. 211 at 5. Defendants respectfully submit that this response fully complies with this Court's Orders, as well as their obligations under Rule 26(a)(1)(A). Rule 26(a)(1)(A) requires a party to provide to other parties non-privileged witnesses and documents that it "may use to support" its defenses, unless used for impeachment. *See* Rule 26(a)(1)(A)(i)-(ii). Because Defendants identified the known witness and documents that they might have used to support their defenses at that time—which were based on a now-rescinded policy—Defendants fully complied with their obligations under Rule 26(a)(1)(A). In addition, by making clear that Defendants would not use potentially privileged information to support their defense, Defendants' response

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addressed the concerns raised by the Court in its March 20 order. Finally, Defendants' response acknowledged the consequence of their decision—that they would not be "allowed to use that information or witness to supply evidence on a motion" for summary judgment. Fed. R. Civ. P. 37(c)(1).

Plaintiffs' real complaint is not that Defendants have failed to comply with this Court's Orders, but rather that Defendants have failed to timely supplement their initial disclosures in light of the new March 2018 Department of Defense ("DoD") policy. Once again, Plaintiffs are mistaken.

Less than six weeks ago, the President issued a memorandum revoking his 2017 memorandum "and any other directive [he] may have made with respect to military service by transgender individuals," thereby allowing the Secretaries of Defense and Homeland Security to "exercise their authority to implement any appropriate policies concerning military service by transgender individuals." Since the issuance of that memorandum, Defendants have compiled a lengthy administrative record, which was provided to Plaintiffs on April 25, 2018, reviewed tens of thousands of pages of documents in response to discovery requests served in multiple cases, produced more than 5,700 pages in Defendants' rolling production of documents in *Doe v. Trump*, and filed numerous briefs in the four transgender cases, including motions to dissolve the injunctions, motions to dismiss, and motions for protective orders.

On May 8, 2018, the parties held a lengthy conference call, where a number of discovery issues were raised. Declaration of Ryan Parker ("Parker Decl". Among other issues, Plaintiffs requested that Defendants supplement their initial disclosures in two days. *Id.* Defendants explained that they intended to supplement their initial disclosures, but likely could not do it in the two days Plaintiffs requested due to the deposition, filings, and document productions occurring in the related cases. *Id.* Despite Defendants' unequivocal commitment to supplement their initial disclosures, and without notifying Defendants of their intent to file it, Plaintiffs proceeded to file the instant motion. *See id.*

Although Defendants believe that they are in full compliance with the Court's Orders and with Rule 26, Defendants nevertheless have provided to Plaintiffs today supplemental initial

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disclosures that identify additional witnesses and documents that Defendants may rely upon to defend the new March 2018 DoD policy.[1] *See* Exhibit 1 to Parker Decl.

CONCLUSION

Because Defendants have fully complied with the Court's March 14 and 20, 2018 Orders, as well as their obligations under Rule 26, Plaintiffs' motion to show cause should be denied.

Dated: May 11, 2018

Respectfully submitted,

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[1] Defense counsel contacted Plaintiffs' counsel and asked whether Plaintiffs will withdraw their motion in light of the supplemental initial disclosures that Defendants provided this afternoon. Plaintiffs' counsel has indicated that they will respond to our question on Monday. Parker Decl.

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2018, I electronically filed the foregoing Opposition to Plaintiffs' Motion to Show Cause using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: May 11, 2018

/s/ Ryan Parker

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