

**Joseph C. STEFFAN,  
Plaintiff,**

**v.**

**Richard CHENEY, Secretary of Defense, et al.,  
Defendants.**

**Civ. A. No. 88-3669-OG.**

United States District Court,  
District of Columbia.

Nov. 15, 1989.

### **MEMORANDUM**

GASCH, District Judge.

This matter is before the Court on "Defendants' Renewed Motion for Rule 37 Sanctions and For Stay of All Proceedings in this Case Until Plaintiff Obeys this Court's Discovery Order." Defendants filed this motion after plaintiff refused to respond to defendants' deposition questions concerning whether or not plaintiff had engaged in homosexual acts. Defendants ask that plaintiff's suit be dismissed under Rule 37(b). In the alternative, they ask that the Court enter an order establishing as a fact that plaintiff has engaged in homosexual acts. For the reasons that follow, this Court dismisses plaintiff's suit.

#### **I. BACKGROUND**

This is an action for declaratory and injunctive relief brought against the Secretary of Defense, the Secretary of the Navy, the Superintendent of the Naval Academy, and the Commandant of Midshipmen. Plaintiff Joseph Steffan was formerly a midshipman at the United States Naval Academy. He was separated from the Naval Academy when he admitted that he was a homosexual. Plaintiff alleges that his separation violates the constitutional rights of free speech and association, due process, and equal protection. Plaintiff seeks a declaration that the Navy regulations under which he was forced to resign be declared unconstitutional. He also seeks an order requiring defendants to award him his diploma and reinstate him in the service.

On July 21, 1989, 733 F.Supp. 115, this Court denied defendants' motion to dismiss the Complaint under Rules 12(b)(1) and 12(b)(6). The Court ordered the parties to submit a briefing schedule for summary judgment motions to resolve the ultimate issue in this case--the lawfulness of the Navy's regulations. Pursuant to the proposed briefing schedule timely submitted by the parties and approved by the Court, defendants' motion for summary judgment was due September 18, plaintiff's motion for summary judgment was due October 23, defendant's reply brief was due November 20, and plaintiff's reply brief was due December 8.

Prior to submitting its motion for summary judgment, however, defendants sought to depose the plaintiff. On August 22, plaintiff received a notice calling for the deposition of Joseph Steffan on August 30. On that same day (August 22) plaintiff's counsel, Mr. Wolinsky, informed defendants that neither he nor his co-counsel could attend a deposition on August 30. Mr. Wolinsky also protested that defendants were reneging on an agreement reached while negotiating the briefing schedule whereby defendants agreed not to depose Steffan until after filing their motion on September 18. Mr. Wolinsky further

asserted that before allowing plaintiff to be deposed he would require (1) disclosure of certain documents sought in an earlier discovery request, and (2) the deposition of a Navy representative who was knowledgeable about the rationale for the Navy's policies concerning homosexuals.

Defendants denied the existence of such an agreement. In their view, plaintiff was simply demanding discovery concessions prior to agreeing to appear for a properly noticed deposition.

Plaintiff moved for a protective order. Defendants moved for sanctions under Rule 37(d) for plaintiff's failure to appear at his duly noticed deposition. At the request of counsel, the Court held a hearing to resolve the dispute and to determine whether sanctions were warranted. The hearing was held September 14. At its conclusion, the Court declined to impose sanctions but ordered that plaintiff's deposition be taken prior to defendants' submission of their motion for summary judgment. During the hearing, the following exchange between the Court and plaintiff's counsel took place:

THE COURT: I want to fix a date for discovery. The deposition of the plaintiff. What do you come up with?

MR. WOLINSKY: Your Honor, let me just be clear on one thing. They're trying to turn a status case into a conduct case. In the administrative proceeding that they initiated, they discharged my client on the basis of his status. If he is asked at a deposition have you ever engaged in conduct I'm going to direct him not to answer.

THE COURT: And I'll direct him to answer.

MR. WOLINSKY: And we will then see where we are.

THE COURT: You know where you are right now. You've got to answer it or I'll dismiss your case. When are you going to have his deposition?

Transcript of September 14, 1989, at 16-17. The Court then ordered plaintiff's deposition to be taken two days later, on September 16. Defendants' motion for summary judgment was to be submitted two weeks after receiving the deposition transcript.

During the course of the deposition, plaintiff was asked a series of questions concerning whether he had ever engaged in "homosexual acts" as that term is defined by the Secretary of the Navy.<sup>1</sup> Plaintiff denied having engaged in homosexual acts prior to entering the Naval Academy in 1983. Deposition of Joseph Steffan ("Steffan Depo.") at 41-42. At the direction of Mr. Wolinsky, plaintiff refused to answer any questions related to whether he engaged in homosexual acts while attending the Academy or since departing from the Academy, on the grounds of relevance and fifth amendment privilege. Steffan Depo. at 40-45, 129-30.

During the deposition plaintiff also admitted that since departing from the Naval Academy in May, 1987 he has been tested three times for the HTLV-3 antibody. Those tests were negative. When asked what prompted him to take the tests, Mr. Wolinsky objected to the question and directed his client not to answer, again asserting the grounds of relevance and fifth amendment privilege. *Id.* at 33-40. Steffan was also directed not to answer questions concerning whether two of his friends are homosexuals. *Id.* at 153.

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<sup>1</sup> Secretary of the Navy's Instruction 1920.6A defines a "homosexual act" as:

Bodily contact actively undertaken or passively permitted between members of the same sex for the purpose of satisfying sexual desires.

Plaintiff's refusal to answer these deposition questions, in light of the Court's directive at the September 14 hearing, prompted defendants to file a renewed motion for sanctions and to stay all proceedings until plaintiff complied. The issue was fully briefed. At the request of counsel, the Court held a hearing on November 8. That hearing was short-lived. The Court explained that whether plaintiff had engaged in homosexual conduct was the "key" question in this case because plaintiff sought restoration to duty. Transcript of November 8, 1989, at 3. The following exchange then took place:

MR. WOLINSKY: Your honor, the deposition--Mr. Steffan is not going to be answering those questions.

THE COURT: All right. That's the clea[r] resolution then of what's before me at this point.

MR. WOLINSKY: Fine. Then I would ask your honor to enter an order of dismissal and we will take our appeal.

Id. at 4. This Memorandum elaborates the Court's reasons for finding that dismissal is warranted.

## II. DISCUSSION

It is elementary that in considering whether to award sanctions this Court must first determine that the information defendants seek is properly discoverable. Plaintiff insists that information concerning any homosexual conduct he may have engaged in either during or since his enrollment at the Naval Academy is not properly discoverable, for two reasons: it is wholly irrelevant, and it is privileged.

### *A. Relevancy under the Federal Rules*

Plaintiff maintains that whether Steffan engaged in homosexual acts during or since being admitted to the Naval Academy is irrelevant to any claim or defense in this action.<sup>2</sup> The complaint alleges that Steffan was recommended for discharge from the Academy solely on the basis of his statements that he is homosexual. Throughout the administrative proceeding that gave rise to this lawsuit no evidence of homosexual conduct emerged, and Steffan was never asked whether he had engaged in homosexual conduct. Defendants in their answer do not plead as a defense that plaintiff is not entitled to relief because he engaged in homosexual conduct. In short, plaintiff maintains that evidence of homosexual conduct is irrelevant in an action challenging a separation based on status.

Defendants first argue that whether plaintiff engaged in homosexual conduct while a midshipman is necessary for the proper judicial resolution of this case. In their view, if plaintiff did participate in homosexual acts while attending the Naval Academy, then the application of the Navy's regulation in this case must be upheld under *Dronenberg v. Zech*, Slip Op., No. 81-0933 (D.D.C. Oct. 6, 1982) (Gasch, J.) (upholding Navy regulation mandating discharge for homosexual conduct), *aff'd*, 741 F.2d 1388 (D.C.Cir.1984), and *Beller v. Middendorf*, 632 F.2d 788 (9th Cir.) (upholding earlier version of same regulation), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1980). On the other hand, if plaintiff did not participate in homosexual acts while attending the Naval Academy, then the relevant caselaw is *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir.1989) (upholding Army regulation prohibiting reenlistment of an admitted homosexual, even though Army offered no evidence of homosexual conduct), *Woodward v. United States*, 871 F.2d 1068, 1075 (Fed.Cir.1989) (upholding Navy's right to release admitted homosexual reservist from active duty and rejecting the "claim that homosexuality is constitutionally protected under the right of privacy"), and *Rich v. Secretary of the Army*, 735 F.2d 1220

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<sup>2</sup> Plaintiff denied having engaged in homosexual acts prior to entering the Naval Academy in 1983. Steffan Depo. at 41-42.



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Plaintiff points to 10 U.S.C. § 925 (criminalizing heterosexual and homosexual sodomy in military context) and Md. Ann. Code art. 27, §§ 553 sodomy), and argues that plaintiff's risk of prosecution is more than just "fanciful." Focusing on the various balancing tests enunciated by the courts, plaintiff argues that his asserted privilege should be

the information "goes to the heart" of the lawsuit. E.g., *Black Panther Party v. Smith*, 661 F.2d 1243, 1272 (D.C. Cir. 1981), cert. granted and vacated on other grounds, 458 U.S. 1118, 102 S.Ct. 3505, 73  
<sup>4</sup> *International Union v. National Right to Work*, 590 F.2d 1139, 1152

have failed to satisfy this stringent test.

Defendants attack plaintiff's claim to privilege on several grounds. They point out that the merely "fanciful."

Defendants argue that plaintiff has failed to show any serious threat to his fifth amendment rights. In particular, since departing from the Naval Academy in April 1987, plaintiff has resided primarily in two --North Dakota and New York. Neither sta

therefore argue that plaintiff should at least be required to testify about homosexual acts committed since his departure from the Naval Academy.

"crucial." They point out that the Naval Investigative Service ("NIS") was actively seeking information concerning plaintiff's homosexual conduct, but plaintiff through his resignation effectively preempted any

lacks jurisdiction to initiate court-martial proceeding against a discharged serviceman); cf. *Toth v.*

ex-serviceman to trial by court

unfair to allow plaintiff to use the fifth amendment as both sword and shield to conceal information that is highly relevant to this suit which seeks reinstatement.

fully aware of this potential result. See Steffan Depo. at 35-36, 38-39.<sup>5</sup> Dismissal by a district court is proper where a party has been given a "crystal clear warning" of the sanction it could expect. *Founding Church of Scientology of Washington, D.C. v. Webster*, 802 F.2d 1448, 1459 n. 15 (D.C.Cir.1986), cert. denied, 484 U.S. 871, 108 S.Ct. 199, 98 L.Ed.2d 150 (1987).

This Court has also taken into consideration the possibility of lesser sanctions than dismissal. Although some courts have stayed a civil action until the plaintiff is no longer in danger of prosecution, e.g., *Black Panther Party*, 661 F.2d at 1274; *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1206 (Fed.Cir.1987) (court stayed plaintiff's obligation to respond for three years); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1089 (5th Cir.1979) (same), neither defendants nor plaintiff endorses this alternative. Defendants suggest that the Court enter an order under Rule 37(b)(2)(A) establishing as a fact that plaintiff has engaged in homosexual acts, and then dismissing the case pursuant to *Dronenburg v. Zech*, 741 F.2d 1388 (D.C.Cir.1984) (in which the Court upheld a Navy regulation mandating discharge for homosexual conduct). But this Court will not go so far. There is certainly no indication that plaintiff would prefer this alternative to dismissal for failure to comply with discovery. Nor is the Court persuaded that such an alternative is warranted under the law.

### III. CONCLUSION

The Court finds that information regarding plaintiff's past homosexual conduct is highly relevant to the relief plaintiff seeks. Defendants' need for the information is therefore substantial. Plaintiff cannot utilize his fifth amendment privilege as a sword to frustrate defendants' right to obtain relevant information or prepare a defense where plaintiff himself has initiated the lawsuit. Plaintiff has refused, and continues to refuse, to answer questions the Court holds are clearly relevant and properly discoverable. Plaintiff's complaint is therefore dismissed.

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<sup>5</sup> In directing plaintiff not to answer during his deposition, Mr. Wolinsky stated at one point:

[N]ow I recognize that Judge Gasch has stated that the case will be dismissed if I directed Mr. Steffan not to answer, and with all respect to the Court, I disagree as to whether that can be done, and I believe that once the issue is fully briefed to the Court, for Judge Gasch, he will agree with me. If he does not, I believe that when the issue is presented to an appellate court, the appellate court will agree with us, and on that basis, that is the basis for my direction.

Steffan Depo. at 38-39.