

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., a New Jersey membership corporation; SOCIETY OF AMERICAN LAW TEACHERS, INC., a New York corporation; COALITION FOR EQUALITY, a Massachusetts association; RUTGERS GAY AND LESBIAN CAUCUS, a New Jersey association; PAN NICKISHER, a New Jersey resident; LESLIE FISCHER, a Pennsylvania resident; MICHAEL BLAUSCHILD, a New Jersey resident; ERWIN CHEMERINSKY, a California resident; and SYLVIA LAW, a New York resident,

Plaintiffs-Appellants,

v.

DONALD H. RUMSFELD, in his capacity as U.S. Secretary of Defense; ROD PAIGE, in his capacity as U.S. Secretary of Education; ELAINE CHAO, in her capacity as U.S. Secretary of Labor; TOMMY THOMPSON, in his capacity as U.S. Secretary of Health and Human Services; NORMAN Y. MINETA, in his capacity as U.S. Secretary of Transportation; and TOM RIDGE, in his capacity as U.S. Secretary of Homeland Security,

Defendants-Appellees.

No. 03-4433

DECLARATION OF SHARON E. FRASE

I, Sharon E. Frase, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am an attorney at Heller, Ehrman, White & McAuliffe LLP, attorneys for the Plaintiffs-Appellants in this action. I make this declaration in support of Plaintiffs' Motion for Clarification or Alternatively for Reconsideration of the Court's January 20, 2005 Order.

2. On Friday, January 14, 2005, the government filed with the Court, and served on Plaintiffs, a Motion to Stay the Mandate with supporting declarations.

3. The following Monday, January 17, was a national holiday and the Court was closed for business. On Tuesday, January 18, I telephoned Phyllis Ruffin in the Office of the Clerk of the Court, who is the case manager for the above-captioned appeal. Ms. Ruffin was not available. I left Ms. Ruffin a voicemail message in which I notified her that Plaintiffs planned to file a response to the government's stay motion. In the message I also asked Ms. Ruffin to confirm her agreement with my calculations that a response filed on January 27 would be timely under the Federal Rules of Appellate Procedure and the Court's rules.

4. On Wednesday, January 19, Ms. Ruffin returned my call. She left me a voicemail message in which she acknowledged my statement that Plaintiffs would be responding to the government's stay motion. While Ms. Ruffin did not explicitly confirm the January 27 return date I had mentioned in my message to her, she indicated that Plaintiffs could file a response. Furthermore, she said

nothing to indicate that the Court intended to rule on the stay motion prior to Plaintiffs' filing of a timely response.

5. On Wednesday, January 26, counsel for Plaintiffs received a copy of a January 20, 2005 Order entered by the Court, staying the mandate in this appeal until further order of the Court. The Order stated that mandate was stayed pursuant to Federal Rule of Appellate Procedure 41(d)(2). Above this, the Order listed January 28, 2005 as the due date for an "Answer." This was consistent with the voicemail message from Ms. Ruffin acknowledging that Plaintiffs intended to file a response.

6. On January 27, Plaintiffs filed their Opposition to the Motion to Stay the Mandate with the Court.

7. As well, on Thursday, January 27, the government notified the Court and Plaintiffs that it had identified a factual error in the Declaration of Major General Jack Rives, which it had submitted in support of its stay motion. The government informed the Court that it intended to submit a corrected declaration and a motion for leave to file the corrected declaration with the Court as soon as possible.

8. The government filed its Motion for Leave to File Amended Declaration, together with the amended Rives Declaration, on Friday, January 28.

9. After close of business that day, counsel for Plaintiffs learned that career service personnel from at least one member of FAIR had been contacted by military recruiters, who asserted that the Court had entered a “final” order staying the mandate in this appeal until the Supreme Court decided a petition for a writ of certiorari to be submitted by the government.

10. The next business day, Monday, January 31, I contacted the Clerk’s office to seek clarification regarding the January 20 Order. When I could not reach Ms. Ruffin, I spoke with another case manager, LaShawn Hand. Ms. Hand informed me that she interpreted the Order as an interim order staying the mandate only pending resolution of the government’s stay motion. I informed Ms. Hand that military recruiters had asserted the contrary to certain Plaintiffs, and pointed out language in the Order citing to Rule 41(d)(2) rather than Rule 41(d)(1). Ms. Hand stated that she would call chambers to confirm her interpretation. The substance of this conversation was memorialized in Plaintiffs’ January 31 letter to the Court enclosing Plaintiffs’ Statement of Opposition in Response to Appellees’ Motion for Leave to File Amended Declaration.

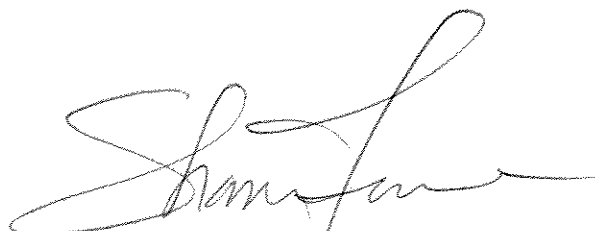
11. On February 2, Ms. Hand contacted me and informed me that the Court indeed intended the January 20 Order as a final order pursuant to Rule 41(d)(2). I then noted that the Order was therefore inconsistent with Federal Rule of Appellate Procedure 27(a)(3)(A), because it was issued before the conclusion of

the 8-day period for the opposing party to respond to a stay motion, and without notice to the parties that the Court intended to rule before the expiration of this period. Ms. Hand explained that she would contact chambers again to seek further clarification.

12. I called Ms. Hand and spoke with her a second time on February 2, and informed her of the conversation that I had on January 19 with Ms. Ruffin.

13. I also spoke on February 2 with Ms. Ruffin. After explaining the details of my conversations with Ms. Hand, I asked Ms. Ruffin if she had any further information or insight. Ms. Ruffin referred me to the language in the Order that stays the mandate until further order by the Court. She also confirmed that she received my voicemail message on January 18, in which I informed her that Plaintiffs would file a response to the government's motion. Finally, she confirmed that she sent Plaintiff's response to the Court.

Executed on February 2, 2005
in New York, New York.



Sharon E. Frase