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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KIRK C. FISHER,)	CIVIL NO. 11-00589 ACK-BMK
)	
Plaintiff,)	Honolulu, Hawaii
)	August 12, 2013
vs.)	10:07 A.M.
)	
LOUIS KEALOHA, et al.,)	Plaintiff's Motion for
)	Permanent Injunction and
Defendants.)	Plaintiff's Motion for
)	Summary Judgment

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ALAN C. KAY,
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Te-Hina Ickes Donald Wilkerson 1003 Bishop Street, Suite 703 Honolulu, HI 96813
For the City Defendants:	D. Scott Dodd Office of Corporation Counsel-Honolulu 530 S King St Ste 110 Honolulu, HI 96813
Amicus Brady Center to Prevent Gun Violence:	Mark M. Murakami Damon Key Leong Kupchak Hastert 1003 Bishop Street, Suite 1600 Honolulu, HI 96813
	Phillip A. Rubin Covington & Burling LLP 1201 Pennsylvania Ave N W Washington, DC 20004-2401
Amicus Hawaii Defense Foundation:	Alan A. Beck (By Telephone) 4780 Governor Drive San Diego, CA 92122

1 APPEARANCES CONTINUED:

2 Official Court
3 Reporter:

Cynthia Ott, RMR, CRR
United States District Court
300 Ala Moana Blvd, Room C-270
Honolulu, Hawaii 96850

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25 Proceedings recorded by machine shorthand, transcript produced
with computer-aided transcription (CAT).

1 MONDAY, AUGUST 12, 2013 10:07 A.M.

2 THE CLERK: Calling the Case of Civil 11-00589ACK-BMK,
3 Kirk Fisher versus Louis Kealoha, et al. This hearing has been
4 called for plaintiff's permanent injunction and plaintiff's
5 motion for summary judgment. Counsel, appearances, please.

6 MS. ICKES: Good morning, Your Honor. Te-Hina Ickes
7 and Don Wilkerson on behalf of Plaintiff Kirk Fisher.

8 THE COURT: Good morning.

9 MR. DODD: Good morning, Your Honor. Scott Dodd on
10 behalf of Defendants Kealoha and City and County of Honolulu.

11 THE COURT: Good morning.

12 MR. RUBIN: Good morning, Your Honor. Phillip Rubin
13 and Mark Murakami on behalf of amicus Brady Center to Prevent
14 Gun Violence.

15 THE COURT: Good morning. Please be seated.

16 THE CLERK: Judge, we also have Mr. Beck by phone.
17 Should he identify --

18 MR. BECK: Alan Beck for the amicus curiae Hawaii
19 Defense Foundation, Your Honor.

20 THE COURT: Good morning. The court is troubled that
21 no defendant, no attorney has addressed the recent United
22 States Supreme Court decision in Descamps versus United States
23 regarding modified categorical approach, reversing the Ninth
24 Circuit and resolving a circuit split.

25 This decision came down more than a month or around a

1 month before each attorney filed an additional pleading or
2 brief in this case and yet none of you have referred to it. So
3 you're obviously not prepared to argue this morning.

4 Ms. Ickes, do you wish to say anything more about the
5 city's request to file plaintiff's deposition as an exhibit?

6 MS. ICKES: Yes, Judge. Just -- well, I know the
7 court is aware that I filed an opposition midday on Friday,
8 unless the court has further questions.

9 THE COURT: I've seen the opposition and I sympathize
10 with you, but I don't think you're going to suffer any
11 prejudice as a result of it.

12 MS. ICKES: Well, if -- if the court doesn't have any
13 questions, I'll just rest on my submission.

14 THE COURT: Very well.

15 MS. ICKES: Thank you.

16 THE COURT: I'm going to give you an opportunity to
17 respond to it.

18 MS. ICKES: Should I just stay here, Judge --

19 THE COURT: Not today. I mean, by way of an
20 additional --

21 MS. ICKES: Briefing. Yes, understood, Judge.

22 THE COURT: Thank you. Also I wanted to ask you, in
23 your amended complaint, you referred to the Fifth Amendment,
24 the court, if you recall, already dismissed --

25 MS. ICKES: Yes, Judge.

1 THE COURT: The Fifth Amendment.

2 MS. ICKES: I do recall that. And, unfortunately, I
3 don't have that section of the file with me. I believe the due
4 process claims if, as far as they related to the Fifth
5 Amendment were dismissed by the court. And if I refer to them
6 in the first amended complaint, that obviously would have been
7 in error, and we would be proceeding on the Fourteenth
8 Amendment only rather than the Fifth Amendment. And I think I
9 may have continuously referred to it as the Fifth Amendment.

10 But so far as the court dismissed those claims, I do
11 recall that being the case.

12 THE COURT: I just wanted to clarify that. Thank you.

13 So as I said, we're not going to proceed with argument
14 today. All counsel have failed to address the United States
15 Supreme Court decision of Descamps versus United States 133 S.
16 Ct. 2276, 2281 (2013), which was filed June 20th, 2013. And
17 this will likely be controlling in the determination of whether
18 plaintiff was convicted for a crime of violence under 18 USC
19 922(g) (9) and HRS 134-7B. Particularly troubling to the court
20 when you have amicus curiae and you don't keep up with the
21 Supreme Court decisions.

22 Secondly, defendants have belatedly requested to file
23 an additional exhibit consisting of a deposition of plaintiff
24 taken on April 17th, 2013, which includes statements by
25 plaintiff that he pushed his wife causing her to fall backwards

1 on the ground. Other statements regarding the counseling he
2 received on the probation condition that he, "attend substance
3 abuse assessment and shall participate in counseling and/or
4 treatment until clinically discharged or as directed by the
5 probation officer."

6 These are matters that this court will have to
7 consider in this case. In view of the foregoing, the court
8 will grant defendant's request to submit plaintiff's deposition
9 as an exhibit. Additionally, the court will grant all counsel
10 an opportunity to file supplemental briefs within 10 days that
11 should address the foregoing, provided that counsel for
12 plaintiff and defendants are limited to briefs of no more than
13 10 pages and counsel are limited to no more than five pages.

14 Additionally, defendants, by providing the parties an
15 opportunity to file additional briefs, the court finds that
16 there's no prejudice to plaintiff with the allowance of
17 plaintiff's deposition as an exhibit, as you will have an
18 opportunity to respond to that. Actually, that was brought up
19 last year in the court's motion for reconsideration so it
20 should be no surprise, and it's questionable why the defendant
21 waited until the last minute to make that request.

22 Additionally, defendant's motion for summary judgment
23 under Local Rule 56.1(i) which was alluded to I think on page
24 three of their opposition and which I don't think the other
25 parties were even aware of is denied without prejudice. Notice

1 of hearing requirements and Rule 56.1(i) have not been met and
2 the court declines to require the parties to address
3 defendant's motion. It was submitted as part of their
4 opposition three weeks before this hearing.

5 So the court will set another hearing for argument in
6 this case on plaintiff's two motions, and that will be
7 September 17, that's a Tuesday, at 10 a.m.

8 Does any party wish to say anything at this point?

9 MR. RUBIN: Your Honor, would it be possible for our
10 amicus Brady Center to address our argument that the court need
11 not rely on the modified categorical approach at all?

12 THE COURT: Yes.

13 MR. RUBIN: Thank you, Your Honor.

14 THE COURT: I think that's what you've already done.
15 No, I'm not going to hear you now. You may argue that in your
16 supplemental brief.

17 MR. RUBIN: Yes, Your Honor. Thank you.

18 THE COURT: Yes, ma'am.

19 MS. ICKES: Judge, can I clarify something on the
20 supplemental briefing? Just to my understanding, I just want
21 to make sure I submit precisely what the court wants and
22 nothing -- nothing extra.

23 No more than 10 pages regarding whether or not there's
24 no prejudice to the plaintiff as to the motion for leave to
25 file the deposition transcript, is that what the supplemental

1 brief is limited to?

2 THE COURT: No.

3 MS. ICKES: As well as the new case.

4 THE COURT: I want you to address the Supreme Court
5 decision which you failed to address.

6 MS. ICKES: Yes, Judge. Understood. Just wanted to
7 clarify.

8 THE COURT: As well as the matters in the deposition
9 that might affect your client.

10 MS. ICKES: Thank you.

11 THE COURT: Thank you. We'll see you again on the
12 17th.

13 (The proceedings concluded at 10:16 a.m., August 12, 2013.)

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