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06-CV-05195-CMP

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CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MAJOR MARGARET WITT,

Plaintiff,

vs.

DEPARTMENT OF THE AIR FORCE;
DONALD H. RUMSFELD, Secretary of
Defense; MICHAEL W. WYNNE,
SECRETARY, Department of the Air
Force; and COLONEL MARY L.
WALKER, Commander, 446th
Aeromedical Evacuation Squadron,
McChord AFB;

Defendants.

C06 5195

JKA

NO.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

Injunctive Relief Requested

INTRODUCTION

1. This is a civil action for declaratory judgment and for injunctive relief to
restrain the United States Air Force and officials of the Air Force, from discharging Major

ORIGINAL

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF - 1
NO. 06-_____

**CARNEY
BADLEY
SPELLMAN**

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1 Margaret Witt, or from otherwise burdening or restricting her military career, on the
2 grounds that Major Witt has engaged in homosexual conduct, or that she has made a
3 statement that she is a homosexual.

4 JURISDICTION

5 2. Jurisdiction is invoked pursuant to 28 U.S.C. § 1331.

6 3. Jurisdiction is invoked pursuant to 28 U.S.C. § 1346 as an agency of the
7 United States is a defendant.

8 4. Plaintiff's claims for relief arise under the First and Fifth Amendment to
9 the United States Constitution, 10 U.S.C. § 654, and under AFI No. 36-3209, §§ 2.30 –
10 2.33 & 4.17.5. Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. § 2201.

11 PARTIES

12 5. The defendant, the DEPARTMENT OF THE UNITED STATES AIR
13 FORCE, is a branch of the armed forces of the United States of America, within which
14 plaintiff MAJOR MARGARET WITT is currently employed as an officer in the United
15 States Air Force Reserve.

16 6. Plaintiff MAJOR MARGARET WITT is currently assigned to 446th
17 Aeromedical Evacuation Squadron at McChord Air Force Base in Washington State,
18 where she is assigned duty as the Flight Nurse Examiner and Chief of the Standards and
19 Evaluations Section.

20 7. Defendant DONALD H. RUMSFELD is the Secretary of Defense.
21

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF – 2
NO. 06-_____

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1 (b) **Policy.** A member of the armed forces shall be separated from the
2 armed forces under regulations prescribed by the Secretary of the Defense
3 if one or more of the following findings is made and approved in
4 accordance with procedures set forth in such regulations:

5 (1) That the member has engaged in, attempted to engage in, or solicited
6 another to engage in a homosexual act or acts unless there are further
7 findings, made and approved in accordance with procedures set forth in
8 such regulations, that the member has demonstrated that –

9 (A) such conduct is a departure from the member's usual and customary
10 behavior;

11 (B) such conduct, under all the circumstances, is unlikely to recur;

12 (C) such conduct was not accomplished by the use of force, coercion, or
13 intimidation;

14 (D) under the particular circumstances of the case, the member's continued
15 presence in the armed forces is consistent with the interests of the armed
16 forces in proper discipline, good order, and morale; and

17 (E) the member does not have a propensity or intent to engage in
18 homosexual acts.

19 AIR FORCE REGULATIONS

20 13. Air Force Instruction ("AFI") No. 36-3209, "*Separation and Retirement*
21 *Procedures for Air National Guard and Air Force Reserve Members,*" §§ 2.30 – 2.33
provide as follows:

2.30.1. **Homosexual Conduct.** A member shall be discharged under this
section if one or more of the following approved findings is made:

2.30.1.1. The member has engaged in, attempted to engage in, or
solicited another to engage in a homosexual act or acts, unless there are
approved further findings that:

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- Such conduct is a departure from the member's usual and customary behavior;
- Such conduct, under all the circumstances, is unlikely to recur;
- Such conduct was not accomplished by use of force, coercion, or intimidation;
- Under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
- The member does not have a propensity or intent to engage in homosexual acts.

2.30.1.2. The member has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the member has demonstrated he or she is not a person who engages in, attempts to engage in, or intends to engage in, homosexual acts. A statement by a service member that he or she is a homosexual, or bisexual, or words to that effect, create a rebuttable presumption that he or she engages in, attempts to engage in, has a propensity to engage in, or intends to engage in, homosexual acts.

The service member shall be informed of this presumption and given the opportunity to rebut it by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in, homosexual acts. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it means a likelihood that a person engages in or will engage in homosexual acts. In determining whether a member has successfully rebutted the presumption, the following may be considered:

- Whether the member has engaged in homosexual acts;
- The member's credibility;
- Testimony from others about the member's past conduct, character, and credibility;
- The nature and circumstances of the member's statement; and

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- 1 ■ Any other evidence relevant to whether the member is likely to
2 engage in homosexual acts.

3 **NOTE:** This list is not exhaustive; any other relevant evidence may also be
4 considered.

5 2.30.1.3. The member has married or attempted to marry a person
6 known to be of the same biological sex (as evidenced by the external
7 anatomy of the persons involved).

8 2.30.2. A member being discharged for homosexual conduct is
9 entitled to a board hearing. See Chapter 4 for procedures and paragraph
10 4.17.5. for special instructions.

11 2.30.3. A commander is not required to initiate discharge
12 proceedings, a board is not required to recommend discharge, and a
13 discharge authority is not required to approve a discharge for homosexual
14 conduct if the commander, board, or discharge authority determines, by a
15 preponderance of the evidence, that:

- 16 ■ The member engaged in or attempted to engage in homosexual acts,
17 made statements, or married or attempted to marry a person known
18 to be of the same biological sex for the purpose of avoiding or
19 terminating military service, and

- 20 ■ Separation of the member would not be in the best interest of the
21 armed forces.

22 2.30.5. Following a board hearing, the discharging authority will
23 process the case under paragraph 4.22. If the member waives the board, the
24 discharge authority will make appropriate findings and take final action or
25 forward the case as applicable. If the member waives the board and the
26 discharge authority recommends a characterization of service less favorable
27 than that recommended by the initiating commander, the discharge
28 authority must include in the case file a statement of the reasons for the less
29 favorable characterization.

30 2.30.6. Preprocessing counseling and rehabilitation and retention of
31 members with lengthy service to qualify for retired pay are not applicable
32 in cases involving homosexual conduct.

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1 2.30.7. Nothing in this instruction:

- 2 ■ Limits the authority of the SAF to take appropriate action to ensure
3 compliance with the provisions of this section.
- 4 ■ Precludes retention of a member for a limited period of time in the
5 interest of national security as authorized by SAF
- 6 ■ Authorizes a member to seek Secretarial review.
- 7 ■ Precludes discharge, in appropriate circumstances, for another
8 reason set forth in this instruction.
- 9 ■ Precludes administrative disciplinary action (e.g., a letter of
10 reprimand), nonjudicial punishment, or court-martial if
11 circumstances warrant.

12 2.30.8. See para. 1.18 regarding recoupment of advanced
13 educational assistance, special pay, or bonuses. A member shall be
14 discharged under this section if one or more of the following approved
15 findings is made.

16 **2.31. Member Burden of Proof.** The member shall bear the burden of
17 proving, by a preponderance of the evidence, that retention is warranted
18 (see 2.30.1.1 and 2.30.1.2).

19 **2.32. Determination of Actions.** Nothing in this instruction requires that
20 a member be processed for separation when a determination is made by the
21 member's commander that:

22 2.32.1. The member engaged in acts, made statements, or married or
23 attempted to marry a person known to be the same biological sex for the
24 purpose of avoiding or terminating military service; and;

25 2.32.2. Separation of the member would not be in the best interest of
26 the Air Force.

27 **2.33. Guidelines for Fact Finding.** Commanders shall refer to the
28 guidelines for fact finding inquiries into homosexual conduct when
29 determining whether to initiate an inquiry into the alleged homosexual
30 conduct (**Attachment 11**).

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1 The complete text of AFI 36-3209 is appended to the Declaration of Counsel James E.
2 Lobsenz as Appendix A.
3

4 14. AFI No. 36-3209, § 4.17.5 provides as follows:

5 4.17.5 *Special Instructions in homosexual conduct cases:*

6 4.17.5.1. In cases involving homosexual conduct, if the board finds
7 that one or more of the circumstances warranting separation per paragraphs
8 2.30 or 3.20 is supported by the evidence, they recommend separation
9 unless they find retention is warranted under the limited circumstances
10 described in those paragraphs. The burden of proving that those limited
11 circumstances justify retention rests with the member, except in cases
12 where the member's conduct was solely the result of a desire to avoid or
13 terminate military service. Findings regarding the existence of those
14 limited circumstances warranting detention are required only if the member
15 *clearly and specifically raises such limited circumstances and if the board*
16 *or separation authority relies on such circumstances to justify the member's*
17 *retention.*

18 4.17.5.2. In cases involving homosexual conduct, if the board finds
19 the evidence does not support, by a preponderance of the evidence, any of
20 the circumstances warranting separation under paragraph 2.31 or 3.20, it
21 recommends retention (unless the case involves another basis for separation
of which the member has been duly notified).

4.17.5.3. *Nothing in the procedure on homosexual conduct cases:*

Limits the authority of the Air Force personnel Council to take appropriate
action in a case to ensure compliance with the provisions of this instruction.

Precludes retention of a member for a limited period in the interests of
national security IAW AFI 31-501 or other pertinent instructions.

Authorizes a member to seek Air Force Personnel Council review, unless
otherwise authorized by instruction.

Precludes separation for another reason in appropriate circumstances set
forth in this instruction.

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1 Precludes trial by court martial in appropriate cases.

2 4.17.5.4. Additional special guidance on homosexual conduct cases is
3 provided in paragraphs 2.31 and 3.20.

4 **OPERATIVE FACTS**

5 15. Major Witt graduated from Pacific Lutheran University in Tacoma,
6 Washington with a Bachelors of Science degree in Nursing in August of 1986. (She later
7 received a Masters degree in Physical Therapy from Eastern Washington University in
8 1998.) Upon graduation from Pacific Lutheran she went to work as an Operating Room
9 Staff Nurse at Tacoma General Hospital in September of 1986, and worked there until
10 March of 1987.

11 16. Major Witt entered the Air Force on March 27, 1987 when she began her
12 "officer training" (Military Indoctrination for Medical Service Officers "MIMSO"), and was
13 commissioned as a Second Lieutenant on April 11, 1987. She was promoted to first
14 Lieutenant on April 11, 1989; to Captain on April 11, 1991; and to Major on October 1,
15 1999. As of October 1, 2003 she became eligible for promotion to Lieutenant Colonel.

16 17. Her initial duty assignment was Operating Room Staff Nurse and Officer In
17 Charge of Sterile Central Supply at Castle Air Force Base, California, with an additional
18 duty as Health Promotions Officer for a base of over 5000 active duty and retired
19 individuals.

20 18. In June of 1990 she was transferred to Wiesbaden, Germany where she served
21 as Operating Room Staff Nurse at the 7100 Combat Support Wing Medical Center. In

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1 August of 1992 she was transferred to Scott Air Force Base, Illinois where she served as
2 Flight Nurse, Nurse Scheduler, Medical Aircrew Training Officer, Flight Nurse Evaluator,
3 and eventually as Chief of Medical Aircrew Standards and Evaluations, with the 375th
4 Aeromedical Evacuation Squadron. Aeromedical Evacuation Squadron personnel are
5 responsible for inflight management and care of ill and injured patients transported by
6 military aircraft.

7 19. On December 16, 1995 Major Witt transferred from active duty to reserve
8 duty, and was reassigned to McChord Air Force Base, Washington to the 446th Aeromedical
9 Evacuation Squadron. With the 446th Major Witt served as Flight Nurse, Flight Nurse
10 Examiner, Director of Weight Management and Physical Fitness, Officer in Charge of
11 Ground Training, and starting on April 4, 2004, as Standards and Evaluations Flight
12 Commander. Her assignment gave her management responsibility for over 200 flight nurses
13 and medical technicians.

14 20. Over the course of her 19+ years with the Air Force, Major Witt has received
15 the following medals: Meritorious Service Medal, Air Medal, Aerial Achievement Medal,
16 Air Force Commendation Medal, Air Force Achievement Medal, Air Force Outstanding
17 Unit Award With Valor, Combat Readiness Medal, National Defense Service Medal, Armed
18 Forces Expeditionary Medal, Air Force Overseas Ribbon Long, Air Force Longevity
19 Service, Armed Forces Reserve Medal, Small Arms Expert Markmanship Ribbon, and Air
20 Force Training Medal.
21

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1 21. In January of 2003 she was deployed to Seeb Air Force Base, Oman in
2 support of Operations Southern Watch and Enduring Freedom. As noted in her Air Medal
3 citation dated May 14, 2003 and awarded by President George W. Bush:

4 “Major Margaret H. Witt distinguished herself by meritorious achievement
5 while participating in sustained aerial flight as Medical Crew Director,
6 320th Air Expeditionary Aeromedical Evacuation Squadron, 320th
7 Expeditionary Operations Group, 320 Air Expeditionary Wing, from 12
8 January 2003 to 17 February 2003. During this period Major Witt provided
9 aeromedical evacuation services for multi-national coalition forces engaged
10 in the global war on terrorism. Her airmanship and courage directly
11 contributed to the successful accomplishment of important missions under
12 extremely hazardous conditions and demonstrated her outstanding
13 proficiency and steadfast devotion to duty. Major Witt’s professional skill
and dedication contributed immensely to the wing’s operational
aeromedical evacuation and airlift capability in support of Operations
ENDURING FREEDOM and SOUTHERN WATCH. Her commitment to
mission readiness and unrivaled clinical skills ensured the delivery of
outstanding medical care to 150 patients during 18 sorties on C-130, KC-
135 and C-17 aircraft while operating in an austere, hostile environment.
The professional ability and outstanding aerial accomplishments of Major
Witt reflect great credit upon herself and the United States Air Force.”

14 (Copy attached as Appendix A.)

15 22. Seven months later in December of 2003 Major Witt was awarded an Air
16 Force Commendation Medal for her action in saving the life of a DOD employee who
17 collapsed aboard a commercial flight:

18 “Major Margaret H. Witt distinguished herself by outstanding achievement
19 as Flight Nurse Examiner, 446th Aeromedical Evacuation Squadron,
20 McChord Air Force Base, Washington. On 28 February 2003, Major Witt
21 distinguished herself by coming to the aid of a critically ill passenger on
board a commercial aircraft en route home from Seeb Air Force Base.
Major Witt rendered emergency medical care to a 60 year old Department
of Defense civilian who had collapsed on the floor of the aircraft. Using
only the most basic medical equipment, Major Witt rendered life sustaining

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1 supportive care to the patient, consulted with the aircraft commander and
2 made the recommendation that the aircraft divert to the nearest airfield with
3 a hospital capable of caring for the patient. Her quick response to the
4 emergency, her nursing professionalism, and dedication to the care to the
5 patient without regard for her own personal injury and safety represent the
6 best traditions of Aeromedical Evacuation. The distinctive
7 accomplishments of Major Witt reflect credit upon herself and the United
8 States Air Force.”

9 (Copy attached, Appendix B.) She was also recognized by World Airways for her action.

10 23. Major Witt has consistently received exemplary evaluations in her annual
11 Officer Performance report. For example, in her most recent evaluation contains the
12 following assessments by Major Kenneth Winslow and Major Thomas M. Hansen:

13 “As OIC of Ground Training, demonstrated excellent organizational and
14 management skills by coordinating training and availability of airframes for
15 certification of all squadron flyers on six different opportune aircraft;
16 Instrumental in communicating and coordinating with multiple other
17 aeromedical units for cross-certification opportunities increasing overall
18 worldwide capabilities and mission readiness of each squadron member;
19 Excellent mentor – created multiple unique training scenarios for students
20 in initial upgrade training and requalification – often sought out by peers
21 for advice on career advancement and educational opportunities; crated
oversheets for certifications and training to streamline process and assure
continuity of documentation; Takes on new responsibilities – stepped up to
create schedule and bid for quarterly mission buys to assure quality training
opportunities would be provided for returning deployed, and remaining,
squadron members.

“Outstanding squadron and Air Force representative – hand picked to
coordinate humanitarian mission and patient transport with multiple
civilian, military, government and DOD agencies assuring continuity of
care; Recognized leader – submitted by peers and selected by superiors as
Officer of the Quarter Spring of 2003; Voluntarily assumed overall
responsibility for multiple sections within the squadron during unit
mobilization assuring continuity and standards were maintained for new
students, continuation training, and evaluations.”

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1 (Copy attached, Appendix C.)

2 24. In September of 2003, defendant Colonel Mary L. Walker notified Major
3 Witt of her receipt of the Officer of the Quarter Award for 2003 Third Quarter, stating that
4 "The Officer of the Quarter Award is given only to those individuals who have demonstrated
5 exceptional professionalism, leadership and service to our country. This Award is
6 recognition for superior dedication not only to the United States Air Force, but to the civilian
7 community as well." (Copy attached, Appendix D).

8 25. Because of her outstanding record of achievement and service, Major Witt
9 was picked to be the "poster child" for the Air Force Nurse Corps recruitment flyer in 1993.
10 Photographs of Major Witt were included in the AF Nurse Corps recruitment flyer. (Copy
11 attached, Appendix E).

12 26. Major Witt has been a Volunteer Firefighter, and since 1999 she has been
13 employed as a nurse and physical therapist.

14 27. Sometime in the summer of 2004 the Department of the Air Force began
15 investigating an allegation that Major Witt had engaged in homosexual acts with a civilian
16 woman. In an interview with the Air Force investigator, the civilian woman stated that she
17 was a lesbian, that she and Major Witt had engaged in a committed and loving relationship
18 from July 1997 through October 2003.

19 28. On November 4, 2004 Major Witt was called to the office of her
20 commanding officer, defendant Colonel Mary L. Walker, where she was informed orally
21 that Colonel Walker would be initiating administrative separation proceedings against Major

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1 Witt under the provisions of Air Force Instruction No. 36-3209 on grounds of homosexual
2 conduct. Major Witt was advised that she could no longer report for reserve duty to
3 McChord Air Force Base, she could no longer earn pay and points towards a retirement
4 pension, that she could not participate in any duty pending resolution of her separation
5 action, and that she was no longer eligible for promotion. She was told that she would soon
6 receive written notice of Colonel Walker's action. Major Witt has been ineligible to report
7 for any duty since that date.

8 29. On November 9, 2004 Major Witt received by certified mail a memorandum
9 from Colonel Walker advising her in writing that Colonel Walker had initiated
10 administrative discharge proceedings pursuant to AFI No. 36-3209 on grounds of
11 homosexual conduct. Colonel Walker informed Major Witt that "you may not participate in
12 any pay or point activity pending resolution of separation action." (Copy Attachment,
13 Appendix F.) Major Witt has not received any pay since that date.

14 30. On March 6, 2006, Major Witt received a Letter of Notification from the Air
15 Force Reserve Command, Robbins Air Force Base, Georgia, signed by Lt. Col. Deborah S.
16 Divich, Deputy Chief, Military Personnel Division, Directorate of Personnel, informing her
17 that she was being administratively discharged on grounds of homosexual conduct pursuant
18 to AFI 36-3209, Chapter 2, paragraph 2.20, and that a discharge board hearing would be
19 scheduled if she requested one. (Copy attached, Appendix G.)

20 31. On March 15, 2006, Major Witt requested an administrative discharge board
21 hearing, and gave notice that she intended to resist discharge from the Air Force. (Copy

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1 attached, Appendix H). As of the date of the filing of this complaint, the date of Major
2 Witt's administrative discharge hearing has not been set. The hearing is scheduled to take
3 place at Robbins Air Force Base in Georgia.

4 **CLAIMS FOR RELIEF**

5 32. Any discharge of Major Witt pursuant to 10 U.S.C. § 654 and AFI No. 36-
6 3209 would violate the due process clause of the Fifth Amendment, by violating both
7 procedural due process, substantive due process, and the equal protection component of the
8 Fifth Amendment due process clause.

9 33. Any discharge of Major Witt pursuant to 10 U.S.C. § 654 and AFI No. 36-
10 3209 would violate the free speech clause of the First Amendment.

11 **PRAYER FOR RELIEF**

12 a. Plaintiff respectfully requests that this Court enter a preliminary injunction,
13 and a permanent injunction, restraining defendants from discharging plaintiff pursuant to 10
14 U.S.C. § 654 and AFI No. 36-3209, Chapter 2, ¶ 2.30.1 on the grounds that she has engaged
15 in homosexual conduct.

16 b. Plaintiff respectfully requests that this Court enter a preliminary injunction
17 and a permanent injunction, restraining defendants from discharging plaintiff pursuant to 10
18 U.S.C. § 654 and AFI No. 36-3209, Chapter 2, ¶ 2.30.1 on the grounds that she that she has
19 made a statement that she is a homosexual.
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1 c. Plaintiff respectfully requests that this Court enter a declaratory judgment
2 finding that any discharge of her pursuant to 10 U.S.C. § 654 and AFI No. 36-3209 would
3 violate the constitution.

4 d. Plaintiff respectfully requests that this Court enter a preliminary and a
5 permanent injunction, prohibiting defendants from failing to promote her, or from taking any
6 other action to hinder her career as an officer of the United States Air Force, where such
7 action is based upon the grounds that she is a homosexual, or that she has engaged in
8 homosexual conduct.

9 DATED this 12th day of April, 2006.

10 CARNEY BADLEY SPELLMAN, P.S.

11 By s/ James E. Lobsenz

12 James E. Lobsenz, WSBA #8787

13 Nicki McCraw, WSBA #20533

14 On Behalf of the American Civil Liberties
15 Union of Washington State

16 Attorneys for Plaintiff

17 CARNEY BADLEY SPELLMAN, P.S.

18 701 Fifth Avenue, Suite 3600

19 Seattle, WA 98104

20 Telephone: (206) 622-8020

21 Facsimile: (206) 622-8983

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1 THE AMERICAN CIVIL LIBERTIES UNION --
2 WASHINGTON STATE

3 By s/ Aaron Caplan

4 Aaron Caplan, WSBA #22525
5 ACLU Staff Attorney for Plaintiff
6 ACLU of Washington
7 705 Second Avenue
8 Seattle WA 98104
9 Telephone: (206)624-2184
10 E-Mail: caplan@aclu-wa.org

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