HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN WASHINGTON
AT TACOMA DIVISION

MAJOR MARGARET WITT,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE AIR FORCE; ET AL.,

Defendants.

No. C06-5195 RBL

PLAINTIFF'S MOTION FOR SANCTIONS DUE TO SPOLIATION OF EVIDENCE

NOTE ON MOTION CALENDAR: AUGUST 6, 2010

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiff respectfully requests entry of an order sanctioning Defendants for spoliation of evidence. Defendants have failed to produce certain documents and communications held by Defendants and key Air Force employees relevant to this litigation that Plaintiff knows existed at one time by virtue of deposition testimony and other evidence. Furthermore, when the parties met and conferred over these matters, Plaintiff learned that no litigation holds were ever put on Defendants, key decision-makers, or 446th Aeromedical Evacuation Squadron (AES) unit members' files. Plaintiff has no means of obtaining documents that were not preserved by Defendants. Accordingly, as set forth below, Plaintiff moves for relief from the Court in the form of evidentiary sanctions at summary judgment and trial, imposing adverse inferences against Defendants. Specifically, Plaintiff seeks two adverse inferences: 1) that command for the 446th AES is aware of other gay or lesbian members in the unit, and disciplined them for a lesser offense, but did not pursue any action against them under the Don't Ask Don't Tell Policy ("DADT"); and 2) that General Crabtree was ordered by Air Force Reserve Command Headquarters ("AFRC") to remove Major Witt from the Air Force.

II. FACTS

Central to Plaintiff's case are her contentions that: both prior to and after Major Witt's suspension in 2004, several gay and lesbian individuals served in the 446th AES for many years; their sexual orientation was and is well known to members of the 446th AES; no one was or is bothered by this fact; unit morale, discipline and cohesion have not suffered as a result; and finally, reinstatement of Major Witt, a known lesbian, will not negatively impact unit morale, cohesion or discipline.

Plaintiff's contentions are directly contrary to Defendants' expert's opinion and Colonel Moore-Harbert's deposition testimony. Defendants' expert, Lieutenant General Charles Stenner, testified multiple times in his deposition that military policies must be consistently applied. (*See e.g.*, Stenner Dep. (Ex. B of Declaration of Sher Kung ("Kung Decl. Ex. B") 73:5-7). Therefore, according to Stenner, the "uniform application of [DADT] is absolutely appropriate for and necessary for unit cohesion, good order and discipline." *Id*. at 72:19-21; *see also*, *id.* at 76:19-21; 78:11-15; 106:11-13. Stenner gave this opinion despite a complete lack of familiarity with Plaintiff, her career, her case, the 446th AES's culture, any specific DADT administrative

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proceeding in any AF unit, or the application of DADT in the 446th, in the U.S., or in foreign militaries.[1] Without the lost or destroyed evidence, Plaintiff's ability to challenge Stenner's generic opinion with specific instances that took place in the 446th and to challenge evidence offered by Defendants, such as Col. Moore-Harbert's testimony, is significantly hampered.

The extrinsic evidence obtained thus far suggests that the missing documents would have established the inferences requested in this motion. First, deposition testimony by a unit member indicates that the current commander of the 446th AES, Colonel Moore-Harbert, is aware that there are lesbian servicemembers currently serving in the unit. This piece of evidence is coupled with Moore-Harbert's own admission that she did not pursue any adverse action against them based on their sexual orientation. Second, documents suggest that the investigation into Major Witt's sexual orientation was not triggered by any allegation of her disruption to unit cohesion or morale, but rather by outside sources. This evidence is significant because it demonstrates the arbitrariness of the application of DADT, and that adverse actions taken against Major Witt were not for the purposes of advancing unit cohesion or morale. While extrinsic evidence survived to suggest Plaintiff's contentions are true, Defendants have lost or destroyed other evidence that would have directly proved these conclusions.

A. Defendants Did Not Preserve Evidence That Moore-Harbert Knows There are Lesbians Serving Under Her Command and That She Has Allowed Them to Serve.

Plaintiff seeks to refute Moore-Harbert's opinions[2] by showing that she has allowed a known lesbian to continue serving in the unit. Moore-Harbert testified that she learned that two

[1] Stenner admitted that he had no knowledge of Major Witt, her Air Force career, the unit culture of the 446th AES, or this case.[1] *Id.* at 32:9-17 (unaware that Witt was seeking reinstatement; had not read 2008 Court of Appeals Witt decision); *id.* at 34:18-38:20 & 41:22-42:2 (had not spoken to anyone in command about Witt or this litigation); *id.* at 38:21-40:2 (no knowledge of Witt or her career); *id.* at 42:3-20 (no knowledge of 446th AES culture); *id.* at 88:21-22 (no research on the effects of Witt's reinstatement); *id.* at 102:4-21 (no knowledge of inconsistent application of DADT in the 446th AES). In addition, he acknowledged that he had not researched the application of DADT in the U.S. military, or the open service of gays in foreign militaries. *Id.* at 114:8-115:10 (no knowledge or research on open service in foreign militaries); *id.* at 58:7-59:13, 82:16-83:11, 88:7-22, 99:13-100:4 (no research on uniform application of DADT). Stenner has never been involved in a servicemember's discharge under DADT. *Id.* at 44:4-21. Indeed, Stenner testified that he has never served with a gay servicemember to his knowledge nor does he have any relatives or friends who are gay. *Id.* at 45:2-7. Despite his lack of knowledge on these subjects, Stenner repeatedly echoed the same general statement that "if [Witt] weren't discharged, then policies had not been uniformly applied." *Id.* at 94:25-95:1; *see id.* at 94:1-95:1, 96:16-97:3, 97:24-99:11. He based this opinion on 38 years of general military experience alone. *Id.* at 58:21-24.

[2] Defendants named Moore-Harbert as an individual who holds the opinion that Major Witt's known sexual orientation would negatively affect unit cohesion, morale, and discipline, and that Major Witt's reinstatement with the 446th AES would likely have a negative impact on unit morale, cohesion or discipline, (Defs. Objcts and Resps to Pls First Reqs. for Admis, Interrogs and Req for Produc Nos 3 and 9 (Kung Decl. Ex. C at 46-49). Although Defendants identified Colonel Mary Walker as also holding this opinion, at her deposition when asked if she had

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female servicemembers, Servicemember-C ("SM-C") and Servicemember-D ("SM-D")[3], were living together when she received a police report of a conflict between the two. (Moore-Harbert Dep. (Kung Decl. Ex. E) 84:5-11. However, she refused to acknowledge that she was aware that the two servicemembers were romantically involved with each other.[4] *See id.* at 85:2-15, 92:20-93:6. Indeed, Moore-Harbert testified that she was "never told" that SM-C and SM-D were in a sexual relationship. *Id.* at 83:23-84:1. When asked if Moore-Harbert had ever suspected *anyone* in the Air Force of being gay or lesbian, she testified, "I don't know." *Id.* at 80:7.

In contrast to Moore-Harbert's testimony, Captain Jill Robinson testified that Moore-Harbert knew SM-C and SM-D were romantically involved. Robinson testified that SM-C suspected Robinson of outing SM-C by up-channeling information about the domestic violence incident between SM-C and SM-D. (*See* Robinson Dep. (Kung Decl. Ex. F) 40:8-41:1). Robinson testified that she and Moore-Harbert met with SM-C together, and that Moore-Harbert explained to SM-C that Robinson did not out SM-C. *See id.* at 42:23-45:21. With only the deposition testimony of Robinson and Moore-Harbert, whether or not Moore-Harbert knew that SM-C is a lesbian is a classic "he said, she said" situation.

The documents which may prove who is telling the truth were destroyed or lost. Pursuant to the Court's June 1 Order Granting Plaintiff's Motion to Compel (Dkt. No. 91), and nine days after discovery closed, Defendants produced Moore-Harbert's memo regarding the domestic dispute between SM-C and SM-D. (Mem from Moore-Harbert to Kearney (Kung Decl. Ex. G at 73)). In it, Moore-Harbert ordered a command-directed investigation ("CDI") of SM-C for fraternization[5], and referenced an attachment to the memo, a Police Blotter. (Kung Decl. Ex. G at 73.) Curiously, Defendants did not produce the Police Blotter with the memo. Nevertheless, in the same document production, Defendants produced an Incident Report Summary from McChord, which contains a transcription of a police report from the same incident which states, "[SM-C] said they live together and had been dating for almost three years, but had recently

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"ever held the opinion that Major Witt's presence in the 446th has a negative impact on unit cohesion or morale," Colonel Walker answered, "No." (*See* Walker Dep. (Kung Decl. Ex. D) 145:16-19.

[3] The pseudonyms, "C" and "D" are used here to be consistent with the lettering given to the same individuals in previous briefing. (*See* Dkt. No. 84).

[4] Moore-Harbert adamantly emphasized that her "focus was fraternization," and thus only disciplined them for fraternization. *Id.* at 86:20-25, 84:18-85:15. She added that she did not remember ever learning that somebody other than Major Witt was gay or lesbian. *See id*. at 79:19-24.

[5] SM-D in contrast appears to have been investigated for assault. *See e.g.*, (Kung Decl. Ex. J at 84.)

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broken up." (McChord Incident Report (Kung Decl. Ex. H at 78)). Defendants also produced the subsequent Investigation Officer's Report which suggests that Kearney was provided "an off-base police report" which he then references as the "McChord Blotter." (Kearney Report (Kung Decl. Ex. I at 81)).

Because the Police Blotter attached to Moore-Harbert's CDI memo is missing, Plaintiff does not know whether the Police Blotter contained the same information about SM-C and SM-D dating as the McChord Incident Report, or whether it even was the *same* paperwork as the McChord Incident Report. Kearney's Report links a police report to the "McChord Blotter," thus supporting the inference that the Police Blotter referenced by Moore-Harbert *is* the McChord Blotter, which contains the homosexual admission by SM-C. If the Police Blotter is indeed the McChord Incident Report, this would be written evidence proving that Moore-Harbert's testimony was false, that she was aware SM-C and SM-D were involved in a same-sex relationship, and that Moore-Harbert consciously decided *not* to investigate either servicemember under DADT.

Although Moore-Harbert did not pursue a DADT investigation of SM-C or SM-D, Defendants produced other documents suggesting that JAG anticipated the commander would order a DADT investigation. Pursuant to the Court's June 1 Order and after the close of discovery, Defendants produced documents that appear to be monthly logs of Air Force Reserve disciplinary cases from December 2007 to June 2008. Significantly, the entries that concern SM-C state that she was investigated for "Homosexual act/statement." (AFRC Courts-Martial and Serious Incident Report (Kung Decl. Ex. J at 83-4); AFRC Special Interest Cases (Kung Decl. Ex. K at 86)).[6] Plaintiff believes that these particular records are created or maintained by JAG and that unit commanders would not have access to these documents. This extrinsic evidence helps support the notion that the Police Blotter that Moore-Harbert saw more likely than not showed that SM-C and SM-D were dating.

[6] The entry states: "Alleged homosexual statement/act while on active duty orders. In late October 2007, member [SM-C] called police upon her female roommate [SM-D] pushing/assaulting her. Member [SM-C] stated that the roommate and she had dated for three years but recently broke up. Awaiting further investigation into this incident."

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Further, taking into consideration Defendants' representation that no litigation holds were placed on email communications of Moore-Harbert (Kung Decl. Ex. T at 121-22), Plaintiff is left in the dark as to what other evidence may exist to support Plaintiff's contentions.[7]

B. Crabtree was Ordered to Initiate the Investigation Against Major Witt With No Evidence That Witt's Presence was Harmful to Unit Cohesion or Morale.

Major Witt's suspension and discharge from the 446th AES was unrelated to her effect on unit cohesion and morale. In his deposition testimony, Crabtree admitted that he never heard anyone make any negative comments about Major Witt, or voice any suspicions that she was a lesbian. (Crabtree Dep. (Kung Decl. Ex. L) 24:8-19). Yet, AFRC Headquarters "directed [him] to do an investigation" into Major Witt's sexual orientation. *Id.* at 14:21-15:17. Crabtree's own opinion as to whether to start a fact-finding inquiry was irrelevant because he had been directed to start one. *See id.* at 32:9-33:3. Although Crabtree confirmed that the order came down in written form, *see e.g., id.* at 16:6-10, this order, akin to other key documents, appears to be lost or destroyed.

Not only is the order from AFRC to Crabtree missing, Defendants have also failed to produce the documents that Crabtree then forwarded to General Duignan, the 4th Air Force Commander. Crabtree testified that following receipt of the written order from AFRC, he sought authorization from Duignan to proceed with the investigation. *See id.* at 28:13-22; 29:16-23. Because Duignan's memo authorizing the investigation states that he reviewed the evidence, Plaintiff knows that Crabtree or someone on his staff forwarded the allegations to Duignan. (Mem from Duignan to Crabtree (Kung Decl. Ex. M at 99)). However, as with other documents Defendants failed to preserve, Plaintiff is once again left to guess at what information was contained in Crabtree's communications.

C. Defendants Have Been on Notice to Preserve Documents Since July 2004.

On July 27, 2004, Plaintiff retained civilian counsel, James Lobsenz. At that time, counsel wrote a letter to Major Adam Torem, advising Torem that Mr. Lobsenz has been retained, requesting appointment of military co-counsel and requesting information regarding the investigation against Major Witt. (July 27, 2004 Ltr to Major Adam Torem (Kung Decl. Ex. N

[7] Plaintiff further draws to the Court's attention to the fact that there is no evidence that Defendants, key decision-makers, or 446th unit members were instructed to preserve and retain files containing possibly relevant evidence. Plaintiff can only speculate as to what emails or other documents may have existed to support her case.

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at 101)). Major Witt was suspended on November 4, 2004 and Defendants still had not initiated discharge proceedings as of March 2006.

On April 12, 2006, frustrated by Defendants' failure to take any action concerning her suspension, Plaintiff filed the complaint in this action, alleging that a suspension and discharge pursuant to 10 U.S.C. § 654 and AFI No. 36-3209 violates procedural due process, substantive due process, and the equal protection clause. (Complaint ¶ 32 (Dkt. No. 1)). In support of her Complaint for Declaratory and Injunctive Relief, Plaintiff filed nine declarations of fellow unit members (Dkt. Nos. 10-18). These unit members were identified as of April 2006 as significant individuals who had knowledge of Plaintiff's professional performance and effect on unit cohesion and morale, and of the unit culture of the 446th AES concerning gay and lesbian servicemembers. For example, one declarant stated, "Our squadron has always had gays and lesbians in it, and their presence is widely known, but until this decision to seek a discharge against Major Witt it has never been an issue." (Julian Decl. ¶ 13 (Dkt. No. 11)). Although SM-C was one of the nine members who submitted declarations in 2006, her records from 2007 and 2008 are missing.

D. Defendants Admit That No Litigation Holds Were in Place and Have Failed to Otherwise Preserve Relevant Evidence.

On February 23, 2010, Plaintiff propounded a Second Set of Requests for Production of Documents and Things to Defendants. Plaintiff requested, amongst other things, documents from Defendants, key decision-makers (including General Jumper, Major General Crabtree, Major General Duignan, Colonel Walker, Colonel Moore-Harbert), and relevant unit members relating to Major Witt's discharge. (Pls Second Set of Reqs for Produc of Docs and Things (Kung Decl. Ex. O at 103-06). Despite Defendants' production of over 27,000 pages of documents, (the vast majority of which concerned DOD documents relating to DADT from 1993 and not 446th AES files), Plaintiff did not receive various documents known to have existed. (Kung Decl. Ex. A at 7-9) (chronology of events visually depicting key missing documents).

On May 10, 2010, the parties discussed outstanding discovery matters because Defendants had not yet produced responsive documents to a number of Plaintiff's requests. At that time, Plaintiff's counsel asked whether the Air Force has ever asked Defendants, key decision-makers, and 446th AES unit members with relevant knowledge about Major Witt's

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suspension and discharge to retain any files or documents concerning Major Witt's suspension and discharge via a litigation hold. (Kung Decl. ¶ 15; May 11, 2010 Ltr to govt (Kung Decl. Ex. P at 108-10)). Government counsel subsequently confirmed that no litigation holds were put in place to prevent the destruction of documents that may be relevant to this case. (May 12, 2010 Ltr from the govt (Kung Decl. Ex. Q at 112)). On June 1, 2010, the Court granted Plaintiff's Motion to Compel Production of Documents (Dkt. No. 91). Following this Order, Plaintiff received several supplemental document productions from Defendants.[8]

On June 24, 2010, Government counsel contacted Plaintiff's counsel to re-address the issue of litigation holds in anticipation of this motion. Government counsel stated that at the onset of this litigation in April 2006 and again in May 2008, Air Force counsel segregated and held documents in "Major Witt's personnel file, the inquiry file, and any other documents concerning Major Witt relevant to her discharge proceedings." (June 24, 2010 Ltr from govt ("June 24 letter") (Kung Decl. Ex. S at 118-19)). On July 1, 2010, counsel for the parties conferred to discuss the Government's June 24 letter. Government counsel confirmed that no instruction was given to preserve files, including electronically stored information, that concern the application of DADT within the 446th AES, or files relating to Major Witt and her suspension and discharge. (July 2, 2010 Ltr to govt (Kung Decl. Ex. T at 121-22)). Furthermore, Plaintiff inquired into whether individuals other than AFRC, the commander of the 446th AES[9], and the Chief of Military Personnel of the 446th Air Wing, had segregated documents. *Id*. There is no evidence that any other unit members were ever told to personally segregate and hold documents and communications.

III. ARGUMENT

A. Legal Standard for the Imposition of Sanctions Due to Spoliation.

District courts may impose sanctions as part of their inherent power to manage the orderly disposition of cases, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991), and under Rule 37 against a party who "fails to obey an order to provide or permit discovery." Fed. R. Civ. P. 37(b)(2)(A); *see also Leon v. IDX Systems Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (finding that

[8] Defendants provided Plaintiff with documents marked "CONFIDENTIAL" on three separate occasions: June 11, 16 and 18 (*See* Kung Decl. Ex. R at 114-16).

[9] It is unclear whether Defendants are referring to Commander Walker or Commander Moore-Harbert in their June 24 letter.

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a court has inherent authority to impose sanctions to manage its docket and that Rule 37 authorizes a court to impose a wide range of sanctions when a party fails to comply with a discovery order). If a party fails to preserve evidence during litigation, a court may sanction the party for spoliation of evidence, including the imposition of corrective adverse inferences. *Akiona v. U.S.*, 938 F.2d 158, 161 (9th Cir. 1991).[10] To impose an adverse inference for the spoliation of evidence under its inherent power or Rule 37, a court need not find the responsible party acted in bad faith—all that the court must find is that the responsible party had notice of the evidence's "potential relevance to the litigation." *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (quoting *Akiona*, 938 F.2d at 161 (inherent power)); *see also Hyde & Drath v. Baker*, 24 F.3d 1162, 1171 (9th Cir. 1994) (Rule 37).[11]

Two rationales support adverse inference sanctions. First, under the evidentiary rationale, the court may order an adverse inference based on the presumption that the spoliator is "more likely to have been threatened" by the evidence than is a party who preserves that evidence. *Akiona*, 938 F.2d at 161 (citing *Nation-Wide Check Corp. v. Forest Hills Distributors*, 692 F.2d 214, 218 (1st Cir. 1982)). Second, based on the deterrence rationale, the court may order an adverse inference for the purposes of deterring the destruction of evidence and providing an incentive to preserve relevant evidence. *Id.* ("The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial.").

B. Defendants Were Put on Notice That They Should Preserve Documents In Anticipation of Litigation As Early As July 2004.

Before this Court may impose sanctions, it must determine if Defendants had notice that lost or destroyed files may have potentially been relevant to anticipated or actual litigation. *United States v. Kitsap Physicians Servs.*, 314 F.3d 995, 1001 (9th Cir. 2002). While the Ninth Circuit has not explicitly defined "anticipated litigation," various district courts have fashioned several definitions for when "a party 'should know' that evidence may be relevant to future

[10] "Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence." *United Med. Supp. Co., Inc., v. U.S.*, 77 Fed.Cl. 257, 258, 274 (C.F.C. 2007) (ordering sanctions for spoliation of evidence against the United States government for repeatedly violating its obligation to preserve documents over a 5-year period).

[11] Because some of the lost or destroyed files were part of SM-C and SM-D's personnel files and were therefore subject to this Court's June 1 Order compelling production of these records, Plaintiff moves for relief pursuant to Rule 37, as well as under the Court's inherent power.

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litigation." *See e.g. Ameripride Servs., Inc. v. Valley Indus. Serv., Inc.*, 2006 WL 2308442 *4 (Aug. 9 2006 E.D. Cal.) (noting that the anticipated litigation date is when a potential claim was identified); *Hynix Semiconductor Inc. v. Rambus, Inc.*, 2006 WL 565893 *21, 24 (Jan. 5 2006 E.D. Cal.) (finding that anticipated litigation became probable when counsel was identified).

Defendants first received notice of anticipated litigation in July 2004, before Major Witt was even suspended by the Air Force, when Mr. Lobsenz contacted Major Adam Torem, the Judge Advocate General investigating Major Witt under DADT, and identified himself as counsel for Major Witt. On July 27, 2004, Mr. Lobsenz sent a letter to Major Torem, advising Torem that Mr. Lobsenz has been retained, requesting appointment of military co-counsel and requesting information regarding the investigation against Major Witt. (Kung Decl. Ex. N at 101). Defendants received written notice that Major Witt might challenge any suspension and discharge by her action to retain counsel. At that point in time, Defendants had a duty to preserve files, including electronically stored information, held by key decision-makers (e.g., Generals Crabtree, Batbie, Bradley and Jumper; Colonel Mary Walker) concerning the investigation and suspension of Major Witt. *IDX Systems*, 464 F.3d at 959.

Defendants claim that documents concerning Major Witt's suspension and discharge were retained; however, in the course of discovery, Plaintiff has not received any document that resembles the written order received by Crabtree from AFRC ordering him to take action against Major Witt. Nor has Plaintiff received the file that Crabtree forwarded to Duignan. There is no explanation for why these particular documents were not "segregated and held" from 2004 onward. Plaintiff remained on suspension as of April 2006 and Crabtree was still stationed at McChord at the time this lawsuit was filed. (*See* Crabtree Dep. (Kung Decl. Ex. L) 10:4-5).

C. Defendants Were Again Put on Notice That They Should Preserve Documents In April 2006 When This Lawsuit was Filed.

The filing of this lawsuit served as a second occasion to put Defendants on notice that they had an obligation to preserve potentially relevant evidence. *IDX Systems*, 464 F.3d at 959. In her Complaint (Dkt No. 1), Plaintiff alleged that her suspension under DADT violated substantive due process, the Equal Protection Clause, and procedural due process. Plaintiff also filed nine declarations by fellow 446th AES unit members in support of a motion for a preliminary injunction. These unit members, including SM-C, were identified as early as April

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2006 as having knowledge of Plaintiff's professional performance and Witt's effect on unit cohesion and morale. Moreover, one of the declarants stated that "[o]ur squadron has always had gays and lesbians in it, and their presence is widely known, but until this decision to seek a discharge against Major Witt it has never been an issue." (Julian Decl. ¶ 13 (Dkt. No. 11)). The Air Force was on notice that Plaintiff contended the 446th AES was a unit that tolerated open service of gays and lesbians and clearly any files supporting such a contention were relevant to the litigation and should be preserved for possible production. Discipline records that were created during this lawsuit concerning SM-C and SM-D and how command treated these servicemembers once it had knowledge of the same-sex relationship was highly relevant to the application of the DADT within the 446th and had a direct bearing on Major Witt's lawsuit.

Although the Complaint named Colonel Mary Walker in her official capacity as the commander of the 446th AES at the time of Major Witt's suspension in November 2004, by April 2006 the actual commander of the 446th AES was Colonel Moore-Harbert. In 2006, Air Force counsel would have known that, because Colonel Walker had been named in her official capacity and had retired by then, Air Force counsel would substitute in Colonel Moore-Harbert as a party Defendant because she replaced Colonel Walker.

D. Defendants Admit They Failed to Put Adequate Litigation Holds on Air Force Employees' Files with Potentially Relevant or Relevant Evidence.

Despite the onset of litigation, in or around April 2006, Air Force counsel only contacted someone at AFRC Headquarters and someone at the 446th Air Wing (not the 446th AES) and asked them to segregate and hold Major Witt's personnel file, the inquiry file, and any other documents concerning her discharge proceedings (which did not take place until September 2006). (June 24 ltr (Kung Decl. Ex. S at 118-19)). Sometime between September 2006 and May 2008, the Air Force also received and preserved a copy of Major Witt's discharge proceedings. *Id.* We have no evidence that Air Force counsel during this time personally supervised the segregation of any files or interviewed Defendants and 446th unit members with potentially relevant evidence to ensure they preserved existing files and understood to preserve any future communications or relevant evidence (i.e., discipline records for 446th AES who are gay or lesbian). *Id.* Once on notice of litigation, the failure to issue a litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.

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Pension Comm. v. Banc of America, 685 F.Supp.2d 456, 465 (S.D.N.Y. 2010); *see also Crown Castle USA Inc. v. Fred A. Nudd Corp.*, 2010 WL 1286366, at *13 (W.D.N.Y. March 31, 2010) (holding plaintiff grossly negligent for failing to implement a litigation hold, which led to the destruction of documents).

E. Plaintiff Has Been Prejudiced By the Loss or Destruction of Evidence.

As detailed above, the loss or destruction of relevant evidence such as documents concerning the investigation of fraternization between SM-C and SM-D and the written order to Crabtree from AFRC have hindered Plaintiff's ability to prove through direct evidence that command failed to apply DADT uniformly within the 446th AES and that command has condoned the open service of lesbian servicemembers. This critical evidence supports Plaintiff's overall contention that the reinstatement of Major Witt, a known lesbian, would have no effect on unit morale and cohesion and that DADT is applied in an arbitrary and capricious manner with no purpose of advancing unit cohesion.

F. The Court Should Sanction Defendants Because Plaintiff has Proven Through Other Evidence That the Missing Evidence More Likely Than Not Threatened Defendants' Legal Position and Needed to Be Covered Up.

Testimony by Captain Robinson contradicts that of Colonel Moore-Harbert, and the document that would resolve this conflict is missing. The document was in Defendants' possession, and they had notice and knowledge that this document was relevant to the ongoing litigation. It should not have been lost or destroyed. Similarly, Crabtree's own deposition testimony and other documents produced by Defendants prove that key documents are missing from Major Witt's personnel or inquiry files. Defendants' own document retention policy,[12] suggests that these documents should have been preserved absent a lawsuit in federal court, and yet the documents still ended up lost or destroyed. The evidentiary rationale set forth in Ninth Circuit precedent is squarely met by the facts presented here. *Akiona*, 938 F.2d at 161. Indeed, that a missing document would resolve whether Colonel Moore-Harbert knew that gays and lesbians served in her unit is indicative that Defendants are more likely to be threatened by the

[12] AFI 33-119, *Air Force Messaging*, 24 Jan. 2005, *available at* http://www.af.mil/shared/media/epubs/AFI33-119.pdf; AFI 33-322, *Records Management Program*, 07 Oct. 2003, *available at* http://www.e-publishing.af.mil/shared/media/epubs/AFI33-322.pdf; AFI 33-363, *Management of Records*, 01 Mar. 2008, *available at* http://ftp.fas.org/irp/doddir/usaf/afman33-363.pdf; AFI 33-364, *Records Disposition – Procedures and Responsibilities*, 22 Dec. 2006, *available at* http://www.e-publishing.af.mil/shared/media/epubs/AFI33-364.pdf.

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missing document. *Id.* Moreover, because Defendants did not institute proper litigation holds on Defendants, key decision-makers, and 446th AES unit members with potentially relevant evidence, Plaintiff is left to speculate what other lost or destroyed files, including electronically stored information, may have benefited Plaintiff's case.

The deterrence rationale that underlies Ninth Circuit precedent regarding spoliation sanctions also is satisfied. The Air Force's conduct throughout this matter has been grossly negligent or reckless. Defendants had three different occasions to preserve documents and institute proper litigation holds: when Major Witt retained counsel prior to her suspension in 2004, during the filing of the lawsuit in 2006, and after the decision issued by the Ninth Circuit in 2008. Despite numerous opportunities, Defendants have recklessly failed to retain and preserve relevant and possibly relevant evidence in the files of Defendants, key decision-makers, and 446th unit members.[13] Unless sanctioned by this Court, the Defendants and the Air Force will fail to understand the consequences of destroying evidence and not be deterred in future litigation from engaging in the same conduct. *Lewis v. Ryan*, 261 F.R.D. 513, 522 (S.D. Cal. 2009) (drawing adverse inference based on spoliation by government defendants to cure prejudice to current plaintiff and future litigants).

IV. CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court issue adverse inferences as set forth in the accompanying Proposed Order. To deter further inappropriate conduct by Defendants, Plaintiff also seeks attorney's fees for this motion.

DATED this 22nd day of July, 2010.

Respectfully submitted,
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By: /s/ Sarah A. Dunne
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[13] The Air Force has demonstrated a disturbing pattern of recklessness throughout this litigation. In 2007, Defendants made a material omission to the Ninth Circuit when they failed to supply the Ninth Circuit with the actual July 12, 2007, order discharging Major Witt with an "Honorable Conditions Discharge" and instead supplied the Appeals Court with the Secretary of the Air Force's July 10, 2007 Action recommending an Honorable Discharge. Since this was discovered and brought to the government's attention, Defendants have issued an amended order specifying that Plaintiff received an "Honorable Discharge" and a discharge certificate. (Kung Decl. Ex. W at 130-32 and Ex. X at 134-37.) Plaintiff's counsel has yet to receive an explanation as to why Defendants failed to produce the July 12 Order to the Ninth Circuit.

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2010, I electronically filed *Plaintiff's Motion for Sanctions Due to Spoliation of Evidence* and *Proposed Order* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 22nd day of July, 2010.

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