

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

**DECLARATION OF SHER KUNG
IN SUPPORT OF MOTION FOR
SANCTIONS DUE TO
SPOILIATION OF EVIDENCE**

NOTE ON MOTION CALENDAR:
AUGUST 6, 2010

ORAL ARGUMENT REQUESTED

Pursuant to 28 U.S.C. § 1746, I, Sher Kung, hereby declare as follows:

1. I am counsel for the plaintiff and have personal knowledge of the facts contained in this Declaration.
2. Attached hereto as Exhibit A is a chronology of events relevant to this motion, created to aid the court in following the timeline of events.
3. Attached hereto as Exhibit B is a true and correct copy of excerpts from the deposition of Lieutenant General Charles E. Stenner, dated May 17, 2010.
4. Attached hereto as Exhibit C is a true and correct copy of excerpts of Defendants' Objections and Responses to Plaintiff's First Requests for Admission, Interrogatories, and Requests for Production.

1 5. Attached hereto as Exhibit D is a true and correct copy of excerpts from the
2 deposition of Colonel Mary L. Walker, dated January 8, 2010.

3 6. Attached hereto as Exhibit E is a true and correct copy of excerpts from the
4 deposition of Colonel Janette Moore-Harbert, dated February 25, 2010.

5 7. Attached hereto as Exhibit F is a true and correct copy of excerpts from the
6 deposition of Captain Jill Robinson, dated March 16, 2010.

7 8. Attached hereto as Exhibit G is a true and correct copy of document AF027162,
8 the CDI memo from Colonel Janette Moore-Harbert to Lieutenant Colonel Patrick Kearney,
9 dated 24 January 2008, which was produced by Defendants (*filed under seal*).

10 9. Attached hereto as Exhibit H is a true and correct copy of documents AF027164-
11 AF027168, a the Incident Report Summary issued by McChord AFB, which includes a
12 transcription of the Tacoma Police Report, which was produced by Defendants (*filed under seal*).

13 10. Attached hereto as Exhibit I is a true and correct copy of document AF027163,
14 the Investigating Officer's Report from Lieutenant Colonel Patrick Kearney to 446 AES/CC,
15 dated 4 February 2008, which was produced by Defendants (*filed under seal*).

16 11. Attached hereto as Exhibit J is a true and correct copy of AF027091 and
17 AF027098, excerpts from the "AFRC Courts-Martial and Serious Incident Report," dated
18 January 2008, which was produced by Defendants (*filed under seal*).

19 12. Attached hereto as Exhibit K is a true and correct copy of AF027136, excerpts
20 from the "AFRC Special Interest Cases," dated May 2008, which was produced by Defendants
21 (*filed under seal*).

22 13. Attached hereto as Exhibit L is a true and correct copy of excerpts from the
23 deposition of Major General Eric Crabtree, dated March 24, 2010.

24 14. Attached hereto as Exhibit M is a true and correct copy of AF001613, a memo
25 from Major General Duignan to 4 AF/CC, dated July 7, 2004, which was produced by
26 Defendants.

 15. Attached hereto as Exhibit N is a true and correct copy of AF000153, a letter
dated July 27, 2004, from James Lobsenz to Major Adam Torem.

1 16. Attached hereto as Exhibit O is a true and correct copy of excerpts of Plaintiff's
2 Second Set of Requests for Production of Documents and Things.

3 17. On May 10, 2010, government counsel, Sarah Dunne and I participated in a
4 telephonic conference to discuss outstanding discovery matters. Attached hereto as Exhibit P is
5 a true and correct copy of a letter dated May 11, 2010, from Sarah Dunne to Bryan Diederich,
6 memorializing the May 10 conversation.

7 18. Attached hereto as Exhibit Q is a true and correct copy of a letter dated May 12,
8 2010, from Bryan Diederich to Sarah Dunne.

9 19. Attached hereto as Exhibit R are true and correct copies of Defendants' cover
10 letters for supplemental productions of documents, dated June 11, 16, and 18.

11 20. Attached hereto as Exhibit S is a true and correct copy of a letter dated June 24,
12 2010, from Bryan Diederich to Sarah Dunne.

13 21. On July 1, 2010, government counsel, Sarah Dunne and I participated in a
14 telephonic conference to discuss our understanding of Defendants' actions to locate, search and
15 preserve documents as detailed in their June 24 letter. Attached hereto as Exhibit T is a true and
16 correct copy of a letter dated July 2, 2010 from Sarah Dunne to Bryan Diederich, memorializing
17 the conversation.

18 22. Attached hereto as Exhibit U is a true and correct copy of a letter dated July 9,
19 2010, from Bryan Diederich to Sarah Dunne.

20 23. Attached hereto as Exhibit V is a true and correct copy of a letter dated July 14,
21 2010, from Sarah Dunne to Bryan Diederich.

22 24. Attached hereto as Exhibit W is a true and correct copy of a memorandum dated
23 June 21, 2010, from the Air Force to Major Margaret Witt, including attachments.

24 25. Attached hereto as Exhibit X is a true and correct copy of a records request dated
25 June 28, 2010, and an Honorable Discharge certificate sent to Plaintiff.

26 26. Attached hereto as Exhibit Y is a true and correct copy of excerpts from the
deposition of Major Margaret Witt, dated May 24, 2010.

1 27. Attached hereto as Exhibit Z is a true and correct copy of AF000402, the cover
2 page of the Record of Board Proceedings of Major Margaret Witt dated 28 & 29 September
3 2006, which was produced by Defendants.

4 28. Attached hereto as Exhibit AA is a true and correct copy of AF001612, a
5 memorandum dated 7 July 2004, from Major General Eric Crabtree to Adam Torem, which was
6 produced by Defendants.

7 29. Attached hereto as Exhibit BB is a true and correct copy of AF000009, a
8 memorandum dated 5 Nov 2004, from Colonel Mary L. Walker to Major Margaret Witt, which
9 was produced by Defendants.

10 I declare under penalty of perjury that the foregoing is true and correct, and that this
11 Declaration was executed on July 22, 2010 in Seattle, Washington.

12
13 /s/ Sher S. Kung
14 _____
15 Sher Kung, WSBA # 42077
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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2010, I electronically filed this *Declaration of Sher Kung in Support of Motion for Sanctions Due to Spoliation of Evidence* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Peter Phipps

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Attorneys for Defendants

DATED this 22nd day of July, 2010.

AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON FOUNDATION

By: /s/ Nina Jenkins

Nina Jenkins

Legal Program Assistant

901 Fifth Avenue #630

Seattle, WA 98164

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EXHIBIT A

Witt v. U.S. Air Force et al.Chronology of Significant Events In Support of
Plaintiff's Motion for Sanctions Due to Spoliation of Evidence

<u>Date</u>	<u>Subject</u>	<u>Source</u>
June 14, 2004	A third party civilian notifies the Air Force that Maj Witt has engaged in homosexual conduct	Kung Decl. Ex. Y (16:1-17:23)
?	Col Crabtree receives "order" from Air Force Reserve Headquarters concerning Maj Witt	Kung Decl. Ex. L (14:21-15:17, 16:6-10)
?	Crabtree seeks authorization from Maj Gen Duignan, 4 th AF, forwarding him evidence of the allegations	Kung Decl. Ex. L (28:13-22, 29:16-23)
July 7, 2004	Maj Gen Duignan authorizes a fact-finding inquiry after review of evidence	Kung Decl. Ex. M
July 7, 2004	Crabtree appoints Maj Adam Torem to conduct a fact-finding inquiry	Kung Decl. Ex. AA
July 27, 2004	James Lobsenz gives notice of his representation of Maj Witt to the JAG investigation officer	Kung Decl. Ex. N
July 27, 2004	Defendants are on notice that Witt intends to challenge any adverse actions. Defendants do not put a litigation hold on any key decision makers.	Kung Decl. Exs. P, Q, S, T, U, V
Nov 5, 2004	Witt is suspended from duty and is notified of the administrative discharge action against her	Kung Decl. Ex. BB
Oct 2005	Col Moore-Harbert becomes commander of 446 th AES	Kung Decl. Ex. E (18:16-18)
Apr 12, 2006	Witt files complaint in District Court, naming as defendants the Dept of the Air Force, Secretary of Defense, Donald Rumsfeld, Dept of the Air Force Michael Wynne, and Commander of the 446 th AES, Col Mary Walker.	Dkt. No. 1
Apr 24, 2006	Witt files declarations of fellow 446 th AES members in support of the Complaint	Dkt. Nos. 9-18

Apr 24, 2006	Defendants do not put a litigation hold on party defendants, key decision makers, or any 446 th AES unit members. Defendants instruct someone at Air Force Reserve Headquarters and someone at the 446 th Air Wing to segregate Maj Witt's personnel file, the inquiry file, and documents relating to her discharge proceedings	Kung Decl. Exs. P, Q, S, T, U, V
Sept 28-29, 2006	Witt Discharge Board Proceedings at Robins AFB	Kung Decl. Ex. Z
July 10, 2007	Secretary of the Air Force directs that Witt be discharged with an Honorable discharge	Dkt. No. 84 (Dunne Decl. Ex. C)
July 12, 2007	Reserve Order issued discharging Witt with "Honorable Conditions Discharge"	Dkt. No. 84 (Dunne Decl. Ex. D)
Sept 2007	Crabtree leaves McChord	Kung Decl. Ex. L (10:4-5)
Oct 23, 2007	Domestic incident at the residence of SM-C and SM-D	Kung Decl. Ex. E (84:5-11); Ex. F (40:2-23); Ex. H
Oct 23, 2007	Defendants supplement Ninth Circuit record with July 10 Action document but fail to disclose the July 12 Reserve Order	Dkt. No. 84 (Dunne Decl. Ex. C)
Oct 25, 2007	McChord Incident Report Summary issued containing transcription of Tacoma Police Report concerning domestic incident, in which SM-C makes homosexual statement.	Kung Decl. Ex. H
?	Moore-Harbert receives police report	Kung Decl. Ex. E (84:5-11); Ex. F(45:2-17)
?	Moore-Harbert consults with JAG officer about administrative action based on possible fraternization	Kung Decl. Ex. E (84:18-21)
Nov 5, 2007	Oral argument in Ninth Circuit	Dkt. No. 49-2

Jan 24, 2008	Moore-Harbert orders LTC Patrick Kearney to investigate fraternization between SM-C and SM-D, attaching a Police Blotter	Kung Decl. Ex. G
?	Moore-Harbert issues SM-C a Letter of Admonishment and SM-D a Letter of Counseling	Kung Decl. Ex. E (86:20-25); Ex. K
?	Moore-Harbert meets with SM-C and Robinson. Moore-Harbert tells SM-C that Robinson did not out her.	Kung Decl. Ex. F (44:12-45:21)
May 21, 2008	Ninth Circuit issues its decision requiring an individualized analysis under DADT	Dkt. No. 49-2
May 21, 2008	Defendants do not put a litigation hold on party defendants, key decision makers, or any 446 th AES unit members	Kung Decl. Exs. P, Q, S, T, U, V
June 10, 2009	Defendants searched and gathered documents related to this case, and confirmed that previously segregated documents were maintained	Kung Decl. Ex. U
Feb 23, 2010	Plaintiff propounds a Second Set of Requests for Production of Documents and Things to Defendants	Kung Decl. Ex. O
May 10, 2010	Parties discuss outstanding discovery matters	Kung Decl. ¶ 17, Ex. P
June 1, 2010	The Court grants Plaintiff's motion to compel production of documents	Dkt. No. 91
June 21, 2010	Air Force notifies Maj Witt of the amended order to correct the characterization of her discharge	Kung Decl. Ex. W
June 28, 2010	Air Force issues an Honorable Discharge certificate to Maj Witt	Kung Decl. Ex. X
July 1, 2010	Parties discuss file preservation and confirm that Defendants did not place litigation holds on Defendants' key decision-makers or 446 th AES members	Kung Decl. ¶ 21, Exs. T, U, V

EXHIBIT B

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MAJOR MARGARET WITT,
Plaintiff,

vs

FILE NO.
C06-5195 RBL

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

Defendants.

-----/

DEPOSITION OF
LIEUTENANT GENERAL CHARLES EDWIN STENNER, JR.

Monday, May 17, 2010
8:50 a.m.

Taken by counsel for the Plaintiff at:

Robins Air Force Base
Warner Robins, Georgia

Stenographically Reported By:

Gaye D. Traynor
Certified Court Reporter-B2209
State of Georgia

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1 this deposition?

2 A Other than...

3 Q Other than counsel?

4 A No.

5 Q Okay. And for how long did you speak with
6 counsel?

7 A Over a period of two days, probably four or
8 five hours.

9 Q Okay. Do you understand that Major Witt is
10 seeking reinstatement to the Air Force Reserve, sir?

11 A I do not know.

12 MR. PHIPPS: Objection: Calls for a legal
13 conclusion.

14 BY MS. DUNNE:

15 Q Have you read the decision issued in this case
16 by the 9th Circuit in May of 2008?

17 A No.

18 Q What do you understand this case is now
19 about --

20 MR. PHIPPS: Objection.

21 A (No response.)

22 BY MS. DUNNE:

23 Q -- since the 9th Circuit issued its ruling?

24 MR. PHIPPS: Objection: Calls for a legal
25 conclusion, beyond personal knowledge, foundation.

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1 MR. PHIPPS: If I instruct you not to answer,
2 and every now and then I may have to interrupt an
3 answer if it treads into an area of privilege. But, in
4 general, my objections simply preserve our ability to
5 raise that later. It would be convenient if we had a
6 Judge every time there was a deposition, but I'm
7 objecting.

8 THE WITNESS: Okay. Okay. You give me the
9 question again.

10 BY MS. DUNNE:

11 Q So I'm going to restate the question. What do
12 you think the parties are disagreeing over right now?

13 MR. PHIPPS: And I object: Lack of foundation
14 and seeks a legal conclusion.

15 THE WITNESS: I really don't know what the
16 disagreements are about. Okay.

17 BY MS. DUNNE:

18 Q Now, I'm going to ask you some questions with
19 respect to key individuals. Do you know Major General
20 Robert Duignon? Am I pronouncing that right?

21 A Duignon, D-U-I-G-N-O-N. Yes.

22 Q How would you characterize your relationship
23 with him?

24 A He preceded me in one of the jobs I had as the
25 Plans and Programs so I knew him. And then he worked for

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 me briefly when I took the job that I've got now.

2 Q Okay. When did he work for you? What dates?

3 A From June of 2008 until he retired in February
4 of 2009.

5 Q February 2009. Were you friends?

6 A Acquaintances.

7 Q Acquaintances. How frequently do you speak
8 with General Duignon --

9 A Duignon.

10 Q -- Duignon now since he's retired.

11 A I have not spoken to him since he retired.

12 Q Have you ever spoken to General Duignon
13 regarding Major Witt?

14 A No.

15 Q Have you ever spoken to the General -- General
16 Duignon regarding this litigation?

17 A No.

18 Q Do you know General John Jumper?

19 A Only by virtue of his position as the Chief of
20 Staff.

21 Q So if you know him at all, it's only
22 professionally?

23 A I've never had a conversation with him.

24 Q So you've never spoken to him regarding
25 Major Witt or this litigation?

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1 **A** **No.**

2 **Q** How about General James Sherard? Do you know
3 him?

4 **A** **Yes.**

5 **Q** How would you characterize your relationship?

6 **A** **He was my boss.**

7 **Q** Oh. When was he your boss?

8 **A** **For the entire period of time that he was the**
9 **Chief of Staff or the Chief of the Air Force Reserve.**

10 **Q** So I think he was between -- I'm going to say
11 2000 to 2004, but I might be wrong on that.

12 **A** **He actually had a six-year tenure.**

13 **Q** Six-year?

14 **A** **So whatever period of time that covers.**

15 **Q** Okay. And would you characterize your
16 relationship? Are you friends?

17 **A** **Acquaintances.**

18 **Q** Acquaintances. Do you still socialize after
19 -- since he's retired?

20 **MR. PHIPPS: Objection: Characterization.**

21 **THE WITNESS: Can you say that one more time?**

22 **BY MS. DUNNE:**

23 **Q** Yes. Are you friends with General Sherard?

24 **A** **Acquaintances.**

25 **Q** Acquaintances. Have you spoken to him since

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1 he retired in 2004?

2 A Yes.

3 Q How frequently do you speak with him?

4 A Very infrequently. Maybe twice.

5 Q Okay. Have you ever spoken to General Sherard

6 regarding Major Witt?

7 A No.

8 Q Have you ever spoken to General Sherard

9 regarding this litigation?

10 A No.

11 Q My next question is, do you know Lieutenant

12 General John Bradley?

13 A I do.

14 Q How would you characterize your relationship?

15 A Friends.

16 Q Friends? How frequently do you speak with

17 General Bradley?

18 A Very infrequently.

19 Q Since he's retired in 2008, how often have you

20 spoken?

21 A Maybe twice.

22 Q Have you ever spoken to General Bradley

23 regarding Major Witt?

24 A No.

25 Q Have you ever spoken to General Bradley

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 regarding this litigation?

2 A No.

3 Q Do you know General Crabtree?

4 A I do.

5 Q How would you characterize your relationship
6 with him?

7 A Boss.

8 Q Are you also friends as well?

9 A Acquaintance.

10 Q Acquaintance. How frequently do you speak
11 with General Crabtree?

12 A Weekly.

13 Q Weekly?

14 A Minimum.

15 Q Have you spoken to General Crabtree regarding
16 Major Witt?

17 A No.

18 Q Have you spoken to General Crabtree regarding
19 this litigation?

20 A No.

21 Q Have you ever met Major Margaret Witt?

22 A No.

23 Q What do you know about Major Margaret Witt?

24 A Only what I've seen regarding this -- this
25 circumstance.

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1 Q Okay. So I'm going to try to ask a bunch of
2 questions then to get at -- because I don't want to know
3 what work product you've been given.

4 What do you know about her career in the Air
5 Force -- the Regular Air Force?

6 A Nothing.

7 Q Okay. What do you know about her career in
8 the Air Force Reserve?

9 A Nothing.

10 Q Okay. Have you, yourself, done any research
11 on Major Margaret Witt?

12 A No.

13 Q Have you interviewed anyone who served with
14 Major Witt about Major Witt?

15 A No.

16 Q Have you questioned anyone who served with
17 Major Witt about Major Witt?

18 A No.

19 Q Have you read any news articles about
20 Major Witt?

21 A No.

22 Q Have you read her person -- any documents from
23 her personnel file?

24 A No.

25 Q Have you ever communicated to Colonel Janette

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 Moore-Harbert about Major Witt?

2 A No.

3 Q Do you know who Colonel Janette Moore-Harbert
4 is?

5 A No.

6 Q It's Janette, J-A-N-E-T-T-E. And it's
7 Moore-Harbert, M-O-O-R-E hyphen H-A-R-B-E-R-T.

8 A Let me go back. I've seen that name.

9 Q Okay.

10 A Okay?

11 Q Have you ever directed one of your staff to
12 communicate with Colonel Moore-Harbert about Major Witt?

13 A No.

14 Q Have you ever directed one of your staff to
15 communicate with Colonel Moore-Harbert about this
16 litigation?

17 A No.

18 Q Do you know what unit Major Witt was assigned
19 to?

20 A Yes.

21 Q What is that unit?

22 A 446th AES.

23 Q And what's the home base for the 446th AES?

24 A McChord.

25 Q And not the nickname. Could I get the full

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 name?

2 **A Of the base?**

3 **Q Uh-huh.**

4 **A McChord Air Force Base.**

5 **Q Okay.**

6 **A Well, okay, they are currently a joint base so**
7 **it's McChord-Lewis, and I can't tell you the way that**
8 **would be...**

9 **Q It's now joint base Lewis-McChord.**

10 **A Okay.**

11 **Q I'm not so much of a fan of any name.**

12 **Sir, what do you know about the 446th AES?**

13 **What's its primary mission?**

14 **A Aeromedical evacuation.**

15 **Q Do you know which airlift wing the 446th is**
16 **connected to? I would think of it as its host unit, if**
17 **I'm saying that right.**

18 **A It's the active-duty wing of McChord, and I**
19 **can't give you the number.**

20 **Q Okay. It's the 62nd Airlift Wing.**

21 **A Okay.**

22 **Q Have you ever communicated with anyone in the**
23 **62nd Airlift Wing about Major Witt?**

24 **A No.**

25 **Q Have you ever communicated with anyone in the**

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 62nd Airlift Wing about this litigation?

2 A No.

3 Q What do you know, if anything, about the 446th
4 unit members and their social interactions with Major Witt
5 since she's been discharged?

6 A Nothing.

7 Q I have to ask these questions.

8 Have you ever served in the 446th AES?

9 A No.

10 Q Have you ever served with the 446th AES?

11 A No.

12 Q Have you ever visited the 446th at joint base
13 Lewis-McChord?

14 A Yes.

15 Q And when was that?

16 A It was last year, 2009. And I can't tell you
17 exactly when.

18 Q Uh-huh. Could you describe the unit culture
19 of the 446th AES?

20 A No.

21 MR. PHIPPS: Objection: Foundation but...

22 BY MS. DUNNE:

23 Q Have you ever served with the 4th Air Force?

24 A No.

25 Q Have you ever served...

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1 commanders missions and how they executed those missions.

2 Q Did you do anything else?

3 A No.

4 Q No? Other than Major Witt, have you had any
5 experience with investigations, suspensions or discharges
6 of any service member on the grounds that they were
7 suspected of being gay or lesbian?

8 A No.

9 MR. PHIPPS: Objection: Characterization.

10 BY MS. DUNNE:

11 Q Have you ever served on an administrative
12 discharge board that was hearing a case involving
13 homosexual conduct?

14 A No.

15 Q Have you ever participated in a fact-finding
16 inquiry with respect to a service member concerning
17 homosexual conduct?

18 A No.

19 Q Have you ever served with a service member
20 that you knew to be gay or lesbian?

21 A No.

22 Q And by that, I mean they told you?

23 A No.

24 Q Have you ever served with a service member
25 that you suspected might be gay or lesbian?

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 **A No.**

2 **Q Do you have any friends that are gay or**
3 **lesbian that you know of?**

4 **A No, no.**

5 **Q Do you have any relatives that you know of**
6 **that are gay or lesbian?**

7 **A No.**

8 Q I'm asking this question in your personal
9 capacity only. What is your opinion of the "Don't Ask;
10 Don't Tell" policy?

11 **A It's an Air Force policy.**

12 Q Is there anything else? Do you have any other
13 opinion besides it's an Air Force policy in your personal
14 capacity? This is your personal feelings.

15 **A I don't think I can separate my personal**
16 **feelings from my official capacity.**

17 Q Do you plan to provide an expert opinion to
18 the Court on the current "Don't Ask; Don't Tell" policy in
19 your official capacity?

20 MR. PHIPPS: Objection: Vague.

21 **A (No response.)**

22 **BY MS. DUNNE:**

23 Q Do you plan to provide an expert opinion to
24 the Court as to the efficacy of the current "Don't Ask;
25 Don't Tell" policy?

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 **A** **It degraded.**

2 **Q** Degraded.

3 Same question but with respect to good order.

4 **A** **Degraded.**

5 **Q** Same question but with respect to discipline.

6 **A** **Degraded.**

7 **Q** **Is there anything else -- you just shared**
8 **those experiences. Is there anything else that helped**
9 **form the opinion you state in D (1)?**

10 **A** **My experiences. Or that's what I said the**
11 **first time.**

12 **Q** **Uh-huh.**

13 **A** **I think that's my experience.**

14 **Q** **Have you done any particular research to**
15 **support the opinions that you stated in here?**

16 **A** **No.**

17 **Q** **So tell me if this is an accurate, fair**
18 **characterization; that your opinion in D (1) is based on**
19 **your 38 years of service in the military.**

20 **A** **Yes.**

21 **Q** **Besides your 38 years of experience in the**
22 **military, there's nothing else that the opinion you state**
23 **in D (1) is based on?**

24 **A** **No.**

25 **Q** **Have you ever asked Commanders or service**

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 members how they felt about a uniform homosexual conduct
2 personnel policy?

3 A No.

4 Q Have you ever asked any Commanders or service
5 members whether they would accept a discretionary
6 personnel policy concerning homosexual conduct?

7 A No.

8 Q What if a different branch of the military
9 allowed certain service members to serve openly? Would
10 that be disruptive to unit morale and cohesion for Air
11 Force Reserve units?

12 A The key point is a policy that's applied
13 uniformly. That's what I'm talking about.

14 Q And so my question is a little bit different.
15 Let's say that a different branch, the Army or the Navy,
16 allowed certain service members who are gay or lesbian to
17 serve openly, that is, people could know they were gay or
18 lesbian. Would that be disruptive to unit morale and
19 cohesion for Air Force Reserve units?

20 A Don't know.

21 Q Don't know?

22 A The application of a policy -- uniform
23 application of a policy is what I'm talking about in here
24 as far as good order and discipline.

25 Q So if the Army had a policy that allowed

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 don't object to the openly gay service member because the
2 policies have been applied properly and uniformly?

3 MS. DUNNE: Objection: Vague. Objection:
4 Calls for a legal conclusion.

5 THE WITNESS: Any policy that exists that is
6 applied uniformly is good for the unit cohesion, good
7 order and discipline and all of the other pieces and
8 parts of how to generate a capability for the war
9 fighter.

10 BY MS. DUNNE:

11 Q Uh-huh. So I hear that, is it fair to say
12 that your objection is not with the fact of their
13 homosexuality. It's whether or not the policies are being
14 applied appropriately, correct?

15 MR. PHIPPS: Objection: Characterization.

16 THE WITNESS: Uniformly.

17 MR. PHIPPS: I'm going to object based on
18 characterization.

19 THE WITNESS: Uniform application of the
20 policy is absolutely appropriate for and necessary for
21 unit cohesion, good order and discipline.

22 BY MS. DUNNE:

23 Q Let me ask this. Is it your understanding
24 that if Air Force conduct policies are applied uniformly
25 and regularly as to homosexual conduct, that would

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1 necessarily result in no gay or lesbian members serving
2 openly?

3 MR. PHIPPS: Objection: Vague, calls for
4 legal conclusion, calls for speculation.

5 THE WITNESS: A policy that's not applied
6 uniformly degrades. A policy that is applied uniformly
7 sustains unit cohesion, good order and discipline and
8 ultimately readiness for the war fighter.

9 BY MS. DUNNE:

10 Q Do you understand what I mean when I say the
11 term "serve openly." So gay or lesbian service members
12 serving openly. Do you understand when I use that term?

13 MR. PHIPPS: Objection: Vague.

14 A (No response.)

15 BY MS. DUNNE:

16 Q What -- how would you define a service member
17 who is gay or lesbian, i.e., engages in acts with a member
18 of the same sex but they are serving in their unit and
19 everyone knows of their sexual orientation? What's the
20 phrase you would use because I'm using...

21 A The other option is for you to define what you
22 mean by openly gay. So I'm -- because...

23 Q So, sir, when I say openly gay and lesbian,
24 that means somebody who's serving within their unit that
25 other unit members and the Commander know they're gay or

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 MR. PHIPPS: Objection: Assumes facts not in
2 evidence.

3 A (No response.)

4 BY MS. DUNNE:

5 Q You may answer the question.

6 A And the question was, whether I consider
7 myself highly qualified --

8 Q Highly qualified --

9 A -- prior to 1981?

10 Q -- prior to 1981.

11 A No.

12 Q What if you learned that discharge hearing
13 boards prior to 1981 would consider the service member's
14 fitness to serve and his effect on unit cohesion and
15 morale in deciding whether to retain or discharge the
16 service member who had admitted to homosexual conduct?
17 Would this alter your opinion that you're giving here
18 today?

19 A My opinion goes to the uniform application of
20 a policy. I stand on the fact that that uniform
21 application is what leads to good order and discipline.

22 Q Is it fair to say that you're not opining that
23 the military can't logistically have a discretionary
24 conduct policy concerning gays because it already had one
25 historically?

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 MR. PHIPPS: I'm going to object so I don't
2 interject again after we go to a question.

3 BY MS. DUNNE:

4 Q Have a uniform policy today; didn't have one
5 prior to 1981. Are you testifying today that you think it
6 is better for unit cohesion and morale to have a uniform
7 policy?

8 MR. PHIPPS: I'm going to object to
9 characterization and vagueness.

10 THE WITNESS: Okay. I'm not -- you know, how
11 you use the word uniform is appropriate. I believe the
12 uniform application of that policy is absolutely
13 necessary to sustain and maintain good order and
14 discipline, unit cohesion and subsequent readiness of
15 an individual unit.

16 BY MS. DUNNE:

17 Q Okay. Is there anything -- let me ask you
18 this: Do you believe the U.S. military is incapable of
19 having discretionary conduct policies -- physically and
20 logistically can't have a discretionary conduct policy?

21 A I do. I believe that the policy has to be
22 uniformly applied cross the board.

23 (Plaintiff's Exhibit 5 marked for
24 identification.)

25 BY MS. DUNNE:

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1 Q So that unit is not -- that unit that may be
2 currently allowing gays and lesbians to serve openly is
3 not consistent with current Air Force homosexual conduct
4 policies?

5 MR. PHIPPS: Objection: Calls for a legal
6 conclusion.

7 THE WITNESS: The uniform application of a
8 policy is required.

9 BY MS. DUNNE:

10 Q Okay. Looking back to Exhibit 2, I'm looking
11 at specifically paragraph 2 -- D (2). It's on page 3 and
12 goes over to page 4.

13 I'm going to get into a little bit more what
14 we were just talking about, the differences between the
15 components.

16 So you state in D (2): Because there must be
17 a seamless integration between the Air Force Reserve and
18 the Regular component, there is a need for parity in their
19 personnel policies, including the homosexual conduct
20 policy. It is exception for unit cohesion, morale, good
21 order, and discipline that similar rules of conduct apply
22 to Air Force Reservists and to Regular active-duty
23 members. Is that -- is that your opinion?

24 A It is.

25 Q What's the basis for your opinion?

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1 **A My experience.**

2 **Q Can you -- so, please, describe what in your**
3 **38 years of service helps you come to the opinion that you**
4 **came to in D (2).**

5 **A Having worked in all three components --**

6 **Q Uh-huh?**

7 **A -- or with all three components. Working in**
8 **two, working with the third and having moved many times,**
9 **that experience in the seamless integration of those three**
10 **components is absolutely essential for good order and**
11 **discipline.**

12 Q I'm going to break that apart a little bit so
13 the Court -- what do you mean by seamless integration?

14 **A I mean the ability to train to the same**
15 **standards and execute working together is seamless**
16 **integration.**

17 Q Are there challenges that the Regular Air
18 Force and the Reserves face in creating seamless
19 integration?

20 **A Always challenges as far as how to ensure we**
21 **are trained and ready. The financial challenges, airspace**
22 **challenges. But execution-wise it works very well.**

23 Q And maybe I'll ask it this way. What are the
24 -- and can you explain a little bit more? What are the
25 differences between the Reserves and the Regular Air

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1 geographic region, I mean the state of Washington -- would
2 not be consistent with uniform -- with a uniform
3 application of policy across all geographic regions where
4 the Air Force serves?

5 **A I don't know that. I don't know.**

6 **Q You don't know? Okay.**

7 **I'm going to turn to your third opinion that**
8 **specifically involves Major Witt. In D (3) on page 4**
9 **states: Major Witt's discharge from the Air Force**
10 **Reserves furthers basic military functionality as well as**
11 **unit cohesion, morale, good order and discipline because**
12 **if she were not discharged, that would mean that Air Force**
13 **personnel policies were not uniformly applied across**
14 **geographical boundaries, which would disrupt unit**
15 **cohesion, morale, good order, and discipline.**

16 **What's the basis for that opinion?**

17 **A My experience.**

18 **Q Is there anything particular in your**
19 **experience that leads you to that opinion?**

20 **A No specific instance.**

21 **Q Have you done any research? Read any studies?**

22 **A No.**

23 **Q When you say "basic military functionality,"**
24 **what do you mean?**

25 **A I mean execution of the mission.**

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 Q How does Major Witt's discharge promote unit
2 cohesion as you've just defined it?

3 A The uniform application of the policies that
4 led to the actions that have been taken are what are most
5 important for unit cohesion, good order and discipline.

6 Q Is there any other way in which her discharge
7 promotes unit cohesion?

8 MR. PHIPPS: Objection: Scope of expert
9 testimony, foundation.

10 THE WITNESS: Uniform application. I'll go
11 back to that. The personnel policies that exist.
12 Uniform application of those policies is necessary for
13 good order and discipline and unit cohesion.

14 BY MS. DUNNE:

15 Q And I'm just trying to understand the basis
16 for your opinion or, I guess, just trying to understand as
17 Peter just said, the scope.

18 So you're only testifying -- you know what:
19 Let me strike that.

20 There's no other -- besides the uniform
21 application of the policy, you're not testifying as to any
22 other basis as to how her discharge promotes unit
23 cohesion; is that correct?

24 A I can -- I can go back to this, and it would
25 be pre-discharge. If she weren't discharged, then the

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 **policies had not been uniformly applied.**

2 Q So it sounds like because I'm trying to --
3 trying to make sure we get this accurate -- so it sounds
4 like from what you just said, you're testifying it's your
5 opinion that because there wasn't a uniform -- or, sorry.

6 You're testifying that -- I'm trying to see if
7 there's anything else that you're testifying with respect
8 to how her discharge promotes unit cohesion. And it
9 sounds to me like you're just saying that it's the uniform
10 application of personnel policies, and that's it. There's
11 nothing else.

12 This is what I'm trying to understand, if
13 there's anything else that you have to testify about with
14 respect to unit cohesion, how her discharge promotes unit
15 cohesion besides the application of -- besides the uniform
16 application of conduct policies.

17 **A I believe that to be true.**

18 Q Okay. How do you define "unit morale"?

19 **A How the unit feels about itself and how they**
20 **perceive they're doing the job and how they get along.**

21 Q How do you define "good order" in terms of a
22 unit?

23 **A Proper procedures, proper implementation of**
24 **standards.**

25 Q And how do you define "discipline" as you've

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 used it -- the term here in D (3)?

2 **A The ability to be consistent, to be**
3 **disciplined about and to be consistent with the execution**
4 **of the jobs that are outlined for each unit.**

5 Q Okay. Okay. So getting back to unit morale,
6 how does her -- how does Major Witt's discharge further
7 unit morale?

8 **A The discipline that was in the system and the**
9 **process that was followed to the conclusions were within**
10 **the guidelines and the standards and the processes and the**
11 **execution of those personnel policies.**

12 Q Is your opinion based on the -- when I say the
13 unit, the 446th? Or do you mean the 446th and other units
14 within the Air Force Reserves?

15 **A I'm talking about all units.**

16 **Q And specific to the 446th, is it correct to**
17 **say that Major Witt's discharge furthers unit morale**
18 **because it's consistent with the uniform application of**
19 **conduct policies?**

20 **A That uniform application of that led us to the**
21 **proper application of the standards that were there.**

22 **Q Is there anything -- is there anything else**
23 **about Major Witt's discharge that furthers unit morale?**

24 **MR. PHIPPS: Objection: Foundation, scope of**
25 **expert opinion.**

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 THE WITNESS: The discharge being the end
2 state. Uniform application of the personnel policies
3 and the processes sustain good order and discipline.

4 BY MS. DUNNE:

5 Q Are you providing any -- do you plan to
6 provide any expert testimony on how Major Witt's -- if --
7 or I should say the reinstatement of Major Witt may
8 further or not further unit morale?

9 MR. PHIPPS: Objection: Vague, misleading.

10 THE WITNESS: Due process took us to the
11 discharge board. And the uniform application of those
12 personnel policies --

13 BY MS. DUNNE:

14 Q Uh-huh?

15 A -- is what I'm talking about.

16 Q And so just to answer this question, do you
17 plan to provide any testimony to the Court as to whether
18 Major Witt's reinstatement furthers or does not further
19 unit morale?

20 MR. PHIPPS: Objection: Vague, misleading and
21 the document speaks for itself.

22 THE WITNESS: No, I don't.

23 BY MS. DUNNE:

24 Q And then how does Major Witt's discharge
25 further unit good order? And I'm saying unit. You say

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1 good order here. Is that -- let me rephrase that.

2 How does Major Witt's discharge further good
3 order for the unit?

4 A If we look at what it was that I stated, if
5 she were not discharged, we would not have been through
6 the uniform application of the personnel policies.

7 Q Is there any other reasons that you plan to
8 testify to as to how Major Witt's discharge furthers unit
9 good order besides the uniform application of the policy?

10 A The discharge -- and, again, I'll just read it
11 to you -- if she were not, that would mean the Air Force
12 personnel policies were not uniformly applied.

13 Q Uh-huh. And how does Major Witt's discharge
14 further unit discipline?

15 A If she had not been discharged, we would not
16 have applied uniformly the policies and processes that
17 need to be followed.

18 Q Is there any other reasons in your opinion
19 that Major Witt's discharge furthers unit discipline
20 besides the application of the uniform policy?

21 MR. PHIPPS: Objection: Scope of expert
22 opinion, foundation.

23 THE WITNESS: Personnel policies and the
24 uniform application thereof led to an appropriate
25 action which sustains unit morale and good order and

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 discipline.

2 BY MS. DUNNE:

3 Q So it sounds like there's no other reasons
4 that Major Witt's discharge furthers unit discipline
5 besides the uniform application of the conduct policies?

6 MR. PHIPPS: Objection: Characterization,
7 scope of expert opinion, lack of personal knowledge.

8 THE WITNESS: The discharge board did what
9 they did based on the facts that they had and sustained
10 good order and discipline in appropriately applying
11 those policies.

12 BY MS. DUNNE:

13 Q Uh-huh. For the -- for your opinion with
14 respect to how Major Witt's discharge furthers unit
15 morale, was the basis of your opinion your 38 years of
16 experience in the military?

17 A The good order and discipline and the morale
18 was sustained and maintained because we applied the
19 personnel policy that in my 35 -- 38 years is most
20 appropriate.

21 Q And so to get at that opinion that you just
22 stated, is there anything else besides your 38 years of
23 military experience that allows you to offer that opinion
24 to the Court?

25 Were there research studies that you've looked

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1 at? Any academic studies that you can -- that you
2 reviewed in forming the opinions that you set forth in
3 Exhibit 2?

4 A No.

5 Q With respect to D (2), your opinion that you
6 gave in paragraph D (2)?

7 MR. PHIPPS: This is Exhibit...

8 A (No response.)

9 BY MS. DUNNE:

10 Q I'm sorry, Exhibit 2, and then I'm
11 specifically looking at paragraph D, subsection 2, pages 3
12 and 4. Besides your experience of 38 years in the
13 military, is there any other research that you've done to
14 support the opinion that you give in paragraph D (2)?

15 A No.

16 Q No. Have you interviewed service members?

17 A No.

18 Q Sir -- okay. There has been testimony in this
19 case that there are several members of the 446th who are
20 gay and lesbian, and other unit members are aware of their
21 sexual orientation.

22 There's also been testimony that the current
23 Commander of the 446th knows of their sexual orientation.
24 And, for example, that Commander disciplined one same-sex
25 couple within the unit for fraternization but did not

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1 evidence before the witness.

2 THE WITNESS: I don't know about those.

3 BY MS. DUNNE:

4 Q So given that you don't know about those, so
5 let's assume -- okay, let's assume you learn this, right,
6 because this is what's going to come at trial. I mean,
7 the Judge -- let's just assume. We'll raise it as a
8 hypothetical right now.

9 Let's say that we're dealing with the 446th
10 and that hypothetically you learned the current Commander
11 knows there are gays and lesbians in the unit. They've
12 been disciplined for fraternization but not under "Don't
13 Ask; Don't Tell," same-sex couples.

14 How do you reconcile your opinions given today
15 with her behavior?

16 A Who's behavior?

17 Q The Commander.

18 MR. PHIPPS: I'm going to object as
19 misleading.

20 THE WITNESS: I don't know anything about what
21 it is you're saying.

22 BY MS. DUNNE:

23 Q So what if you did learn? Because the Judge
24 may ask you. What if you did learn, sir, that the current
25 unit has gay and lesbian members who have been disciplined

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1 Q Are you aware that there's testimony in this
2 case from multiple unit members that believe her discharge
3 negatively affected unit morale and cohesion?

4 A No.

5 Q If you were made aware of such testimony that
6 they had testified that basically they love Major Witt,
7 she does a great job, they don't care about her sexual
8 orientation, they think her discharge was wrong, they
9 don't have any problem with her being reinstated, does
10 that change your opinions at all that you gave here today?

11 A I stand on the opinions that I gave that a
12 uniform policy -- a uniform application of a policy is
13 necessary for good order and discipline.

14 Q Are you aware that the only evidence thus far
15 that Major Witt's discharge furthers unit cohesion and
16 morale is a statement made by the current Commander and
17 then your opinion here today?

18 MR. PHIPPS: Objection: Characterization,
19 misleading.

20 THE WITNESS: My opinion stands that we
21 followed a process that got us to a point, and it was
22 the uniform application of that process that leads to
23 the good order and sustains the good order and
24 discipline.

25 BY MS. DUNNE:

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 THE WITNESS: I don't know.

2 BY MS. DUNNE:

3 Q Do you know if Canada is a member of NATO?

4 MR. PHIPPS: Same objection.

5 THE WITNESS: I don't know for 100 percent
6 certainty.

7 BY MS. DUNNE:

8 Q I guess I'll ask it this way. Do you know if
9 the United States military performs joint operations with
10 the Canadian military?

11 A Yes, we do.

12 Q Do you know whether or not Canada allow -- the
13 Canadian military allows their service -- allows gay and
14 lesbians to serve openly in their military?

15 A I don't know.

16 Q You don't know? I'm going to ask about the
17 French military. Do you know if the French military
18 allows gays and lesbians to serve openly?

19 A I don't know.

20 Q I'm going to ask about the German military.
21 Do you know whether the German military allows gay and
22 lesbian service members to serve openly?

23 A I don't know.

24 Q I'm going to ask about the United Kingdom. Do
25 you know if the United Kingdom allows gays and lesbian

Deposition of Lt. Gen. Charles Edwin Stenner, Jr. 5-17-10

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1 members to serve openly?

2 A I don't know.

3 Q Have you done any research on foreign
4 militaries and their personnel conduct policies with
5 respect to homosexuality?

6 A I've not.

7 Q Has the United States conducted any joint
8 military operations with Canada or the United Kingdom in
9 the last seven years?

10 A Yes, we have.

11 Q Can you give me -- what would those be? And
12 you don't have to name all of them. I'm thinking of two
13 in particular: Wars.

14 A How about OEF and OIF.

15 Q And for the record, could you explain what
16 those acronyms stand for?

17 A OEF is Operation Enduring Freedom and are
18 those contingency operations in Afghanistan.

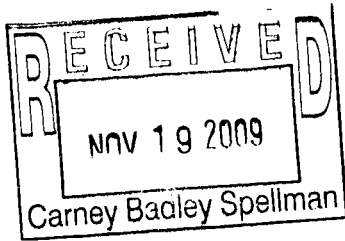
19 And OIF is Operation Iraqi Freedom, and those
20 are by definition in Iraq.

21 Q When conducting joint military operations,
22 would U.S. service members ever serve side by side with
23 their NATO allied service members --

24 A Yes.

25 Q -- on a particular mission or assignment?

EXHIBIT C



Judge Ronald B. Leighton

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MAJOR MARGARET WITT,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
THE AIR FORCE, et al.,

Defendants.

No. C06-5195 RBL

**DEFENDANTS' OBJECTIONS AND
RESPONSES TO PLAINTIFF'S FIRST
REQUESTS FOR ADMISSION,
INTERROGATORIES, AND
REQUESTS FOR PRODUCTION**

Pursuant to Rules 33, 34, and 36 of the Federal Rules of Civil Procedure, defendants the Department of the Air Force; Robert M. Gates, the Secretary of Defense; Michael B. Donley, the Secretary of the Air Force; and Colonel Janette Moore-Harbert, the commander of the 446th Aeromedical Evacuation Squadron, McChord Air Force Base, hereby submit the following objections and responses to Plaintiff's First Requests for Admission, Interrogatories, and Requests for Production to Defendants.

GENERAL OBJECTIONS

1. Defendants object to the definitions and instructions in Plaintiff's First Requests for Admission, Interrogatories, and Requests for Production to Defendants to the extent that they conflict with or purport to expand upon Defendants' obligations under the Federal Rules of Civil

1 If your response to this Request for Admission was "DENY" then pursuant to Rule 36(a)(4) state
2 in detail why you cannot truthfully admit it and answer the following interrogatory:

3 **OBJECTION:** Defendants object to this instruction to the extent that it purports to
4 impose an obligation that is not contained in Rule 36(a)(4). Instead, Rule 36(a)(4) requires a
5 detailed statement of "why the answering party cannot truthfully admit or deny it," only as an
6 alternative to admitting or specifically denying the statement. Fed. R. Civ. P. 36(a)(4).

7 **INTERROGATORY NO. 3**

8 Identify each person who either currently serves, or who has previously served, in the 446th
9 Aeromedical Evacuation Squadron, who is of the opinion that the presence of a known lesbian
10 within the 446th in the past had, or in the future would have, a negative impact on unit cohesion,
11 unit moral or unit discipline, and state all the facts known to defendants regarding such opinion.

12 When identifying each such person give their full name, rank, present duty assignment, present
13 address, or if not known the person's last known address, any known telephone number (home
14 and cell phone) and any known present email address (personal or military).

15 **RESPONSE:** Defendants incorporate by reference their objections to Request for
16 Admission No. 3 as objections to this interrogatory.

17 Defendants further object to this interrogatory because it asks two discrete questions:
18 (i) an identification of the persons who holds an opinion that the presence of a "known lesbian" in
19 the 446th Aeromedical Evacuation Squadron would have a negative impact on unit cohesion, unit
20 moral or unit discipline and (ii) an identification of all facts known to defendants regarding such
21 an opinion. Accordingly, this inquiry constitutes two separate interrogatories under Rule 33(a).

22 Defendants also object to this interrogatory as overly broad to the extent that it seeks
23 information for time periods predating Margaret Witt's assignment to 446th Aeromedical
24 Evacuation Squadron.

25 Defendants further object to this interrogatory as overly broad to the extent that it seeks
26 "all facts known to defendants regarding such opinion."

27 Moreover, defendants object to this interrogatory to the extent that it seeks the disclosure
28 of personal information protected by the Privacy Act.

1 Subject to and without waiving these objections and the General Objections, defendants
2 identify Colonel Janette Moore-Harbert and state that she is of the opinion that the presence of
3 Margaret Witt, a known lesbian, would negatively affect unit cohesion, morale, and discipline.

4
5 If your response to Request for Admission No. 3 was "DENY" then respond to the following
6 Request for Production:

7 **REQUEST FOR PRODUCTION NO. 3**

8 Produce every document which contains evidence supporting your denial.

9 **RESPONSE:** Defendants incorporate by reference their objections to Request for
10 Admission No. 3 and Interrogatory No. 3 as objections to this request for production.

11 Defendants further object to this request for production to the extent that it seeks sensitive
12 information regarding the status and/or evaluation of the readiness of military forces.

13 Defendants also object to this request for production to the extent that it seeks documents
14 that are outside of defendants' possession, custody, or control.

15 Subject to and without waiving these objections, the General Objections and any
16 applicable privileges, defendants are unaware of any documents responsive to this request, *i.e.*,
17 that contain evidence of which persons hold opinions described in Request for Admission No. 3.

18
19 **REQUEST FOR ADMISSION NO. 4**

20 Admit or deny the truth of this statement: Defendants are unaware of the existence of any person
21 who either currently serves, or who has previously served, in the 446th Aeromedical Evacuation
22 Squadron, who has ever made any complaint of any kind regarding Major Witt's conduct or
23 character.

24 **RESPONSE:** Defendants object to this request for admission as unduly burdensome to
25 the extent that it presupposes or requires information gathering that would be contrary to the
26 chain-of-command functionality of the military and/or that would compromise unit morale and
27 unit cohesion – Congress's stated goals underlying 10 U.S.C. § 654.

28 Defendants also object to this request for admission because plaintiff's use of the term

1 Subject to and without waiving these objections and the General Objections, defendants
2 state that no substantive answer is required to this interrogatory because their response to Request
3 for Admission No. 8 was not an admission.

4
5 **REQUEST FOR ADMISSION NO. 9**

6 Admit or deny the truth of this statement: The reinstatement of Major Witt to service within the
7 446th Aeromedical Evacuation Squadron would likely have a negative impact upon unit morale,
8 cohesion or discipline.

9 **RESPONSE:** Defendants object to this request for admission as unduly burdensome to
10 the extent that it presupposes or requires information gathering that would be contrary to the
11 chain-of-command functionality of the military and/or that would compromise unit morale and
12 unit cohesion – Congress’s stated goals underlying 10 U.S.C. § 654.

13 Defendants object to the term “negative impact” as vague, capable of multiple meanings,
14 and potentially misleading because it is unclear whether it refers to a person’s overall impact or
15 whether it refers to the specific impact of a particular act or attribute of that person.

16 Defendants object to plaintiff’s use of the term “unit” because it is vague and ambiguous,
17 as to whether that term as used by plaintiff refers to only members of the 446th Aeromedical
18 Evacuation Squadron or whether it applies to other groups of military personnel who on a given
19 assignment are required to work together as a unit.

20 Subject to and without waiving these objections and the General Objections, defendants
21 admit the statement.

22
23 If your response to this Request for Admission was “ADMIT” then answer the following
24 interrogatory:

25
26 **INTERROGATORY NO. 9**

27 Identify every person known to defendants who holds the opinion that the reinstatement of
28 Major Witt to service within the 446th Aeromedical Evacuation Squadron would likely have a

1 negative impact on the unit morale, cohesion or discipline of the 446th Aeromedical Evacuation

2 Squadron. When identifying each such person give their full name, rank, present duty assignment,
3 present address, or if not known the person's last known address, any known telephone number
4 (home and cell phone) and any known present email address (personal or military).

5 **RESPONSE:** Defendants incorporate by reference their objections to Request for
6 Admission No. 9 as objections to this interrogatory.

7 Defendants further object to this interrogatory's request that defendants identify "every
8 person known to defendants" as overly broad and unduly burdensome to the extent that it requires
9 an identification of any person, however unrelated to the facts of this litigation, who holds such an
10 opinion. Defendants likewise object to this interrogatory as inconsistent with Federal Rule of
11 Civil Procedure 26(a) governing the disclosure of expert testimony and the Court's pretrial
12 scheduling order setting an expert disclosure date of March 17, 2010. Defendants also object to
13 this interrogatory to the extent that it seeks to learn information protected by the work-product
14 doctrine.

15 Moreover, defendants object to this interrogatory to the extent that it seeks the disclosure
16 of personal information protected by the Privacy Act.

17 Subject to and without waiving these objections and the General Objections, defendants
18 identify Colonel Janette Moore-Harbert.

19
20 If your response to Request for Admission No. 9 was "ADMIT" then respond to the following
21 Request for Production:

22 **REQUEST FOR PRODUCTION NO. 9**

23 Produce every document which contains evidence supporting your admission.

24 **RESPONSE:** Defendants incorporate by reference their objections to Request for
25 Admission No. 8 and Interrogatory No. 8 as objections to this request for production.

26 Defendants further object to this request for production to the extent that it seeks sensitive
27 information regarding the status and/or evaluation of the readiness of military forces.

28 Defendants also object to this request for production to the extent that it seeks documents

EXHIBIT D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MAJOR MARGARET WITT,)	
)	
Plaintiff,)	
)	
v.)	No. C06-5195 RBL
)	
UNITED STATES DEPARTMENT OF)	
THE AIR FORCE, et al.,)	
)	
Defendants.)	
_____)	

DEPOSITION OF COLONEL MARY L. WALKER

* * *

January 8, 2010

1120 N.W. Couch

Portland, Oregon

Cheryl L. Vorhees, CSR, RPR
Court Reporter

1 Q Let me read her comments from this OER from
2 Exhibit 13 into the record. "Exceptional flight nurse
3 sith superb clinical skills in the aeromedical
4 evacuation patient movement system; always ready to
5 volunteer and support the mission whether in-garrison
6 at home station or at deployed location; exhibited
7 remarkable leadership skills as chief of Stan Eval,
8 meticulously monitoring crew members, currency,
9 qualification and proficiency ensuring 100 percent of
10 squadron taskings met and outstandingly performed;
11 member is unable to participate since November 2004
12 due to pending administrative discharge."

13 Is there anything in those comments that of
14 your personal knowledge you can say I disagree with?

15 A No.

16 Q Okay. Have you ever held the opinion that
17 Major Witt's presence in the 446 has a negative impact
18 on unit cohesion or morale?

19 A No.

20 Q Have you ever held an opinion that if she
21 were reinstated to the unit that she would by being
22 reinstated have a negative impact on unit cohesion or
23 morale?

24 A Never thought about it.

25 Q I think that I'm done. My practice is now if

EXHIBIT E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MAJOR MARGARET WITT,)	
)	
Plaintiff,)	
)	
v.)	No. C06-5195 RBL
)	
UNITED STATES DEPARTMENT OF THE)	
AIR FORCE, et al,)	
)	
Defendants.)	

DEPOSITION UPON ORAL EXAMINATION OF
COLONEL JANETTE MOORE-HARBERT

TAKEN AT

Carney Badley Spellman
701 Fifth Avenue, Suite 3600
Seattle, WA 98104

FEBRUARY 25, 2010

THURSDAY, 9:00 A.M.

Reported by:

MARIE WHITE, CSR # WH-IT-EM-*29906

1 Q. Okay.

2 A. I remember when I pinned on O-6, but I literally --
3 there's so many time elements that are all together
4 during that period of time.

5 Q. Mm-hmm.

6 A. I don't remember the exact date.

7 Q. What was it you remembered in '06, when you became a
8 full colonel?

9 A. Yes, when I actually got -- the date, yes, in 2006.

10 Q. You said when I pinned on?

11 A. Yes.

12 Q. That is the phrase for --

13 A. That is the phrase for when you get promoted to O-6.

14 Q. Okay.

15 A. Yes.

16 Q. And when were you -- my understanding is you were made

17 Commander of the 446th some time in 2005?

18 A. Correct, in October of 2005.

19 Q. October?

20 A. Yes.

21 Q. You have been the Commander of the 446th ever since
22 then?

23 A. Yes, Commander, and I am also the Senior Air Reserve
24 Technician, too.

25 Q. I'm going to ask you some questions. Go back now.

1 Q. I don't care whether they --

2 A. Again, when I look at from the standpoint of an
3 association, no, I do not remember anybody that I have
4 had as a connection with. It is again it is possible
5 that they were, I just -- it is not something that I'm
6 asking or recognizing.

7 Q. So first of all, no one ever came to you who was in the
8 military and said I am gay or lesbian; right?

9 A. That's correct.

10 Q. At any point in your career has anyone in the Air Force
11 or any other branch of the service come to you and say
12 that they suspect that a person is gay or lesbian?

13 A. I don't remember that happening.

14 Q. Really?

15 A. I don't remember that happening.

16 Q. You don't remember?

17 A. Someone coming to me to say that I believe that this
18 person is gay.

19 Q. In your thirty-two years do you remember having any
20 responsibilities that caused you to learn that somebody
21 was gay or lesbian other than Major Witt?

22 A. To learn that?

23 Q. Yes.

24 A. I don't remember of that happening.

25 Q. And using suspect the way I said it, that is that it

1 crosses your mind to think this person probably is of
2 this sexual orientation. In thirty-two years other
3 than Major Witt have you ever suspected any other
4 person in the Armed Forces to be gay or lesbian?

5 MR. PHIPPS: Objection, characterization and
6 form.

7 A. I don't know.

8 Q. You don't remember ever suspecting any such person?

9 MR. PHIPPS: Objection, vague.

10 A. My focus is I focus on the fact that I try to keep
11 myself professional. I am not interested in finding
12 out.

13 Q. I am not asking if you're interested.

14 A. And from the standpoint of I don't lead myself down
15 that line of trying to say I am going to suspect one
16 way or the other.

17 Q. So are you saying that you actively prevent yourself
18 from considering the possibility whenever you meet
19 anyone, you just don't want to consider it?

20 A. I don't think that is an important avenue unless it
21 brought to me specifically against that criteria that
22 we discussed with the military.

23 Q. Okay.

24 A. That there is a concern.

25 Q. How about outside the military?

1 Q. Okay, but so in the case of your husband's friend,
2 apparently, your husband's friend was living with
3 another man, and that was one of the things that caused
4 you to suspect?

5 A. Yes. And that was many years ago.

6 Q. Okay. And are you telling me that you in your
7 thirty-two years in the military have never had
8 occasion to learn that a woman in the military was
9 living with another woman in the military in what
10 appeared to be a relationship?

11 A. In my thirty-two years of being in the military
12 assuming that because two woman are living together
13 does not in my mind assume that they're gay.

14 Q. That isn't quite what I asked. But in the thirty-two
15 years that you have been in the military have you had
16 occasion to have it be made known to you that two women
17 are living together and having a relationship?

18 A. No.

19 Q. That has never happened?

20 A. Not that I can remember.

21 Q. What about SM-C ?

22 A. Okay, what about SM-C ?

23 Q. It never happened? You never learned that
24 SM-C was living with another woman and having a
25 relationship with another woman?

1 A. I was never told that she was having a relationship.

2 Q. Did you learn that she was living with another woman?

3 A. My understanding was that they were renting from each
4 other.

5 Q. How did you learn that they were renting and living
6 together?

7 A. There was a report that came in regarding a conflict
8 that occurred, an argument that occurred that involved
9 the police.

10 Q. Wasn't it a Domestic Violence Report?

11 A. That was what was brought to me.

12 Q. Wasn't it a Domestic Violence Report?

13 A. I don't know.

14 Q. Didn't it state that right on the report?

15 A. I don't remember if it said domestic violence. I know
16 that the concern was was because of the conflict that
17 came between the two of them.

18 Q. What did you learn about that incident?

19 A. I reported, I talked to the JAG about the issue, my
20 concern was fraternization of an officer and an
21 enlisted.

22 Q. You were concerned --

23 A. And that was my concern.

24 Q. You were concerned that an officer shouldn't live with
25 an enlisted person under their Command?

1 A. That's correct. It is a fraternization issue.

2 Q. Does it cross your mind that they were having a sexual
3 relationship?

4 A. Did it cross my mind?

5 Q. Yes.

6 A. No, my focus was fraternization.

7 Q. It didn't cross your mind?

8 A. My focus was fraternization.

9 Q. Did it cross your mind?

10 A. My focus was fraternization.

11 Q. Did it cross your mind that they were having a sexual
12 relationship?

13 I don't care what your focus was.

14 Did it cross your mind?

15 A. No, because my issue was fraternization.

16 Q. Okay, and did you learn how they came to be living
17 together?

18 A. I had someone that I actually had initiation of what
19 was called a command directive investigation on the
20 issue of fraternization. And I don't know how they
21 came together. The issue was the fact that the
22 fraternization issue of the two of them renting, one
23 renting from the other, the officer and the enlisted,
24 was inappropriate.

25 Q. Didn't you learn that -- what is the name of the other

1 woman? It was Carlson and the other woman was?

2 A. SM-D .

3 Q. SM-D ?

4 A. That's correct?

5 Q. Did you learn how where SM-D had been
6 before she was with the 446th?

7 A. No.

8 Q. You never learned that?

9 A. She was -- she came into our squadron as a [REDACTED]
10 [REDACTED]. And the only thing in that I knew
11 was that she was also what is called a [REDACTED]
12 [REDACTED].

13 Q. You didn't learn why she came and transferred to the
14 446th?

15 A. No, I was unaware why she came, she came over and was
16 hired as the [REDACTED].

17 Q. So no one ever suggested to you that she came in order
18 to live with SM-C ?

19 A. Nope.

20 Q. Okay. Did you discipline either of these people?

21 A. Yes, I did.

22 Q. Who did you discipline?

23 A. I gave SM-C , it's SM-C now, a
24 Letter of Admonishment for the fraternization issue.

25 And SM-D got a Letter of Counseling.

1 A. He confirmed fraternization.

2 Q. That is not what I am asking.

3 A. I don't have the Police Report in front of me. He
4 confirmed fraternization.

5 Q. Okay. To you that means that he confirmed they lived
6 together in the same house?

7 A. He confirmed that an officer and an enlisted were
8 living together.

9 Q. Anything else he confirmed?

10 A. Not in the CDI.

11 Q. Did he confirm they had a domestic incident?

12 A. I don't have the report in front of me to be able to
13 refer to.

14 Q. Who did he interview?

15 MR. PHIPPS: Objection, foundation.

16 A. Again I don't have the report.

17 Q. You don't remember who he interviewed?

18 A. It more than likely would have been the parties
19 involved. But I don't have it in front of me.

20 Q. Okay. And after you got the report did you at that
21 point have any reason to suspect that either one of
22 these women was a lesbian?

23 A. Suspect based off of the criteria that we talked about
24 suspect?

25 Q. Suspect the way that I have consistently asked you the

- 1 question about suspect. Did it cross your mind?
- 2 A. And in this particular instance, I am using suspect
- 3 based off of the criteria.
- 4 Q. Okay, but I'm not. I'm asking you after you read this
- 5 report did it cross your mind?
- 6 A. I don't know.
- 7 Q. SM-C is still with the unit?
- 8 A. Yes, she is.
- 9 Q. Did this incident cause in your opinion any morale
- 10 problems in the unit?
- 11 A. I don't know that the information went out in the unit
- 12 regarding this. This is not something that we will
- 13 discuss --
- 14 Q. You think nobody else knows it?
- 15 A. I have no idea. I don't go out and tell the unit of
- 16 the incident?
- 17 Q. So you have no sense of whether anyone else in the unit
- 18 knows about it?
- 19 A. That's correct.
- 20 Q. When you gave the Letter of Admonishment to
- 21 SM-C was anyone else present?
- 22 A. There was. I can't remember who it was.
- 23 Q. Did you instruct whoever it was to keep it secret and
- 24 not tell anyone?
- 25 A. Well, it's an action that occurs between a Commander

EXHIBIT F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

MAJOR MARGARET WITT,)	
)	
Plaintiff,)	
)	
vs.)	C065195RBL
)	
UNITED STATES DEPARTMENT OF)	
THE AIR FORCE; COLONEL MARY L.))	
WALKER, Commander 446th)	
Aeromedical Evacuation)	
Squadron, McChord Air Force)	
Base; and JAMES G. ROCHE,)	
SECRETARY, DEPARTMENT OF THE)	
AIR FORCE,)	
)	
Defendants.)	

DEPOSITION UPON ORAL EXAMINATION OF JILL ROBINSON

APPEARANCES:

FOR THE PLAINTIFF:	JAMES E. LOBSENZ CARNEY, BADLEY, SPELLMAN 701 FIFTH AVENUE, SUITE 3600 SEATTLE, WASHINGTON 98104
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FOR THE DEFENDANTS:	PETER J. PHIPPS STEPHEN J. BUCKINGHAM U.S. DEPARTMENT OF JUSTICE 20 MASSACHUSETTS AVENUE NW WASHINGTON, DC 20044
---------------------	--

MARCH 16, 2010

Robinson Jill 03-16-2010

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1 with her partner, or... Yeah.

2 Q How did you first learn about the alleged domestic
3 violence incident?

4 A I saw bruises on SM-D's arm.

5 Q Did then did you ask SM-D about that?

6 A Yes.

7 Q What did she say?

8 A Myself and Leslie Pellegrini were in the office and
9 asking her about it, and she stated that she's fine,
10 that she was fine. And bruises were there. And it came
11 back to be centered on SM-C that had caused the
12 bruises. And then from there, I believe what was
13 transpired was there ended up being an exercise that
14 went overseas to Hawaii that the majority of the
15 squadron went on, and then at that point somebody had
16 stated that I had gone in and up-channeled information
17 related to SM-C up the chain of the Air Force. And
18 SM-C approached me about it asking why. And I had no
19 part of up-channeling of any information. So... There
20 was an accusation made that I had turned her in, I had
21 access to Col. Moore-Harbert's office while she was gone
22 as the commander on this deployment and floated this
23 upward.

24 Q So, is this right, SM-C basically approached you,
25 approached you and accused you of outing her?

Robinson Jill 03-16-2010

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1 A Yes.

2 Q You said that it began with a discussion I guess
3 somewhere in the building in the office about bruises.
4 At that point, did you know prior to that day that
5 SM-C lived with SM-D ?

6 A Yes.

7 Q Prior to that day, did you believe SM-C and SM-D to
8 be having a relationship?

9 A Yes.

10 Q And I take it that's something SM-C never told you;
11 right? She never said, "I am a lesbian"?

12 A Correct.

13 Q And SM-D never said, "I am a lesbian"?

14 A Correct.

15 Q But it's something you believed?

16 A Correct.

17 Q Prior to this day that you saw the bruises on
18 SM-D , did you know anything about how SM-C
19 and SM-D had come to be together?

20 A I believe it was started as, I believe -- and this is
21 where I can be wrong, that it was on a deployment
22 overseas.

23 Q That they met?

24 A Yes.

25 Q Had you ever been to their house that they shared?

Robinson Jill 03-16-2010

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1 A Yes.

2 Q Had you been to their house prior to there domestic
3 violence incident?

4 A Yes.

5 Q One thing I didn't understand is you mentioned something
6 about an exercise that the whole unit was on, an
7 exercise; is that what you said?

8 A Yes. There was -- I forgot the -- I don't remember the
9 name of it. But it was over in Hawaii. And so
10 Col. Moore-Harbert was over there along with many other
11 people. And there was only a few people in the squadron
12 back here just coming in to do their requirements.

13 Q So, I don't understand. What happened while you were in
14 Hawaii that's related to this?

15 A I wasn't in Hawaii. I was at the squadron.

16 Q Okay.

17 A And so what came back was while I was at the squadron,
18 SM-C was also there, and all doing our own independent
19 things. And then I got a call while I was at home from
20 her stating that information had gotten back to people
21 in Hawaii that I had up-channeled information.

22 Q Oh, I see.

23 A And so, I -- Yeah, I spent a good couple hours talking
24 to SM-C about it, and I don't...

25 Q So, at this point, when most of the unit is in Hawaii,

Robinson Jill 03-16-2010

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1 you and SM-C are not in Hawaii?

2 A Correct.

3 Q And when you're saying you spent a couple hours talking
4 to SM-C, is that in person or over the phone?

5 A Over the phone.

6 Q I take it in this conversation SM-C is upset?

7 A Yes.

8 Q Angry at you?

9 A Maybe. Confused. Not understanding why I got
10 information.

11 Q And because you're the executive assistant, you have
12 access to the commander's desk; is that right?

13 A I do not.

14 Q You do not?

15 A I do not.

16 Q But SM-C thought you did?

17 A Correct. Or there was, there was a belief assumed that
18 I did, therefore I was the one that was responsible for
19 the information getting out there, and that I had
20 up-channeled it.

21 Q So, you told SM-C, I take it, "I did not up-channel
22 it. I did not tell Moore-Harbert anything"?

23 A I -- Right. I mean, Col. Moore-Harbert was over there,
24 and I went through the whole explanation of my access,
25 my inability to get access to that information. I don't

Robinson Jill 03-16-2010

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1 have access to her office. Don't have access to the
2 information that she thought was forwarded upward.

3 Q So, you told SM-C this?

4 A Correct.

5 Q And what did she say?

6 A I felt as though I lost a friendship.

7 Q Did she say whether she believed you or not when you
8 said, "I didn't do this"?

9 A No, I don't believe that she actually said anything. It
10 was a matter of I was put in a place to convince.

11 Q Then what happened?

12 A I spoke to Col. Moore-Harbert about it when she got
13 back --

14 Q What did --

15 A -- and asked her to explain it to SM-C, that I don't
16 have this information.

17 Q And was she willing to do that?

18 A Yes.

19 Q Did she do that?

20 A I believe she did.

21 Q What makes you say you believe that she spoke to --

22 A -- because I was there when the three of us talked.

23 Q So --

24 A -- And so it was explained in her office that while this
25 allegation was there, that I wasn't the source, that I

Robinson Jill 03-16-2010

45

- 1 didn't have access.
- 2 Q Did Col. Moore-Harbert explain what was the source of
- 3 her information?
- 4 A No.
- 5 Q Did she mention the police report?
- 6 A The police report was part of what the source was, but I
- 7 don't recall her actually explaining it to SM-C about
- 8 the specific police report. I remember the
- 9 conversations that when reports come through with
- 10 domestic violence and the police officers arrive at the
- 11 house and they're military, it still gets crossed over
- 12 to the military side. So, that I recall is information,
- 13 and so...
- 14 Q That information that the police share their reports
- 15 with the military, was that information, did it come
- 16 from Col. Moore-Harbert or someone else?
- 17 A I believe it came from Col. Moore-Harbert.
- 18 Q In this three-person conversation, did you form an
- 19 opinion as to whether SM-C was convinced that you were
- 20 not the person who outed her?
- 21 A I don't think she'll ever be convinced.
- 22 Q You don't?
- 23 A (Non-verbal negative response.)
- 24 Q So, did it permanently damage the friendship?
- 25 A Uh-huh.

EXHIBIT G

(filed under seal)

EXHIBIT G

(filed under seal)

For document refer to Exhibits G-K to Declaration of Sher Kung in Support of Motion for Sanctions due to Spoliation of Evidence.

EXHIBIT H

(filed under seal)

EXHIBIT H

(filed under seal)

For document refer to Exhibits G-K to Declaration of Sher Kung in Support of Motion for Sanctions due to Spoliation of Evidence.

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EXHIBIT H

(filed under seal)

For document refer to Exhibits G-K to Declaration of Sher Kung in Support of Motion for Sanctions due to Spoliation of Evidence.

EXHIBIT I

(filed under seal)

EXHIBIT I

(filed under seal)

For document refer to Exhibits G-K to Declaration of Sher Kung in Support of Motion for Sanctions due to Spoliation of Evidence.

EXHIBIT J

(filed under seal)

EXHIBIT J

(filed under seal)

For document refer to Exhibits G-K to Declaration of Sher Kung in Support of Motion for Sanctions due to Spoliation of Evidence.

EXHIBIT J

(filed under seal)

For document refer to Exhibits G-K to Declaration of Sher Kung in Support of Motion for Sanctions due to Spoliation of Evidence.

EXHIBIT K

(filed under seal)

EXHIBIT K

(filed under seal)

For document refer to Exhibits G-K to Declaration of Sher Kung in Support of Motion for Sanctions due to Spoliation of Evidence.