Judge Ronald B. Leighton

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' MOTION FOR SUMMARY JUDGMENT** (Note Defendants' Motion on the Motion Calendar for August 13, 2010) **ORAL ARGUMENT REQUESTED**

INTRODUCTION

Plaintiff originally brought three constitutional challenges to the 'Don't Ask, Don't Tell' (DADT) policy, which is codified in statute, *see* 10 U.S.C. § 654, and implemented by the Air Force in Air Force Instructions (AFI) 36-3206, 36-3208, 36-3209. The Court of Appeals affirmed this Court's dismissal of plaintiff's equal protection claim and remanded the case for further factual development of plaintiff's substantive due process and procedural due process claims. Defendants argued to the Court of Appeals – and maintain now – that the remand to "develop the record on Major Witt's substantive due process claim," *Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008), inappropriately required discovery into the facts and circumstances of plaintiff's conduct; put simply, the details of plaintiff's conduct should be

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irrelevant to the issue at hand, and discovery into such conduct does not assist in an evaluation of Congress' stated rationale. Defendants have complied, however, with that remand order and assembled such a factual record, consisting of the original administrative record and the results of discovery. Based on the undisputed material facts now in the record, summary judgment should be entered for defendants on both remaining counts.

Defendants are entitled to summary judgment on plaintiff's substantive due process claims.[1] On appeal, the Court of Appeals expressed skepticism that DADT could be applied constitutionally to plaintiff, given her then unchallenged allegations that she had not disclosed her sexual orientation to other service members and had been discharged solely because of a single, private, long-term sexual relationship with a civilian woman 250 miles from base. The full record developed in this case, however, demonstrates that defendants are entitled to summary judgment under the Court of Appeals' three-part as-applied test.

First, defendants have an important governmental interest in unit cohesion and morale, as well as in preserving good order and discipline within military units.

Second, the record as developed supports the conclusion that plaintiff's discharge from the Air Force Reserve significantly furthers the interests Congress sought to advance. In contrast to the conduct that the Court of Appeals believed to be at issue, which, in its view, was remote to plaintiff's position as a military officer, the record reveals that plaintiff's conduct was not far removed from her position as a military officer. The Air Force Chief of Staff, the highest military officer in the Air Force, received an e-mail from a male civilian alleging that plaintiff had an affair with that civilian's wife. In discovery, the Air Force also learned that plaintiff engaged in several other sexual relationships during her service, including with other female military officers, and that she disclosed her sexual orientation to subordinate enlisted members of

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[1] As the President has stated previously, this Administration does not support DADT as a matter of policy and supports its repeal. Consistent with the rule of law, however, the Department of Justice has long followed the practice of defending federal statutes as long as reasonable arguments can be made in support of their constitutionality, even if the Department disagrees with a particular statute as a policy matter, as it does here. This longstanding and bipartisan tradition accords the respect appropriately due to a co-equal branch of government and ensures that subsequent administrations will faithfully defend laws with which they may disagree on policy grounds.

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her unit. When Congress enacted DADT in 1993, it could rationally have believed that such conduct – some of which involved other military personnel and some of which was, according to plaintiff herself, inconsistent with the standards expected of Air Force officers – could undermine unit cohesion and morale, good order and discipline.

Third, plaintiff's discharge was necessary because military personnel policies must be uniformly applied. Cases arising within the geographical boundaries of the Ninth Circuit must be governed by the same policies and standards as elsewhere. Applying two different personnel standards – based solely on geographical location – to military units subject to worldwide deployment at any time would create logistical problems, result in unfairness, and ultimately undermine military unit cohesion, morale, good order, and discipline. Given the clear direction in the DADT policy, and given the case law in other circuits, uniformity could only be achieved by discharge.

The as-applied analysis is satisfied, moreover, because the congressional findings in support of the DADT policy, *see* 10 U.S.C. § 654(a), apply to plaintiff's case. In those findings, Congress could have rationally determined that the DADT policy was appropriate due to the realities of military service, such as service members being subject to worldwide deployment and living and working in conditions with little or no privacy. *See* 10 U.S.C. § 654(a)(11)-(12). The Court of Appeals did not dispute those congressional findings, and those findings apply to the specific factual instances of plaintiff's military service. For instance, plaintiff was subject to worldwide deployment on short notice, and the living conditions on those deployments would entail limited privacy. Because the congressional findings in support of the policy were not disputed by the Court of Appeals and because Congress could have rationally concluded that those findings apply to specific facts such as those of plaintiff's military service, the as-applied analysis must be resolved in defendants' favor.

As the Supreme Court has long recognized, "'[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian,'" *Parker v. Levy*, 417 U.S. 733, 744 (1975) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)), and the rights of service members "'must perforce be conditioned to meet certain overriding demands of discipline and

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duty.'" *Id.* (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)). Thus, like other constitutional rights, the liberty interest identified by the Court of Appeals in *Witt* can, in appropriate circumstances, be outweighed by unique military interests. *See United States v. Marcum*, 60 M.J. 198, (C.A.A.F. 2004) ("[w]hile service members clearly retain a liberty interest in certain intimate sexual conduct, this right must be tempered in the military setting.") (internal quotation marks and citation omitted)). That is the case here, where the facts set forth in the full record satisfy the Court of Appeals three-part "as applied" test, and thus demonstrate that the application of the DADT statute to plaintiff is constitutional.

Summary judgment is also appropriate as to plaintiff's procedural due process claims. Plaintiff received an honorable discharge from the Air Force Reserve, which is not itself stigmatizing. Additionally, plaintiff's discharge certificate contains no potentially stigmatizing information. Furthermore, plaintiff has received a full hearing before an Air Force discharge board. Thus, she has not been deprived of any process that she is due.

Finally, it is appropriate on summary judgment to limit the scope of potential relief available to plaintiff. As a matter of plaintiff's pleadings, as well as under the undisputed facts learned through discovery, plaintiff is not entitled to injunctive relief. The injunctive relief sought in plaintiff's complaint (prevention of her discharge and of a negative impact on her promotion potential) has been mooted. It is no longer appropriate for the Court to enjoin plaintiff's discharge from the Air Force Reserve because plaintiff already has been discharged, and she did not pursue her request for preliminary injunctive relief to prevent her discharge on appeal. In addition, no further injunctive relief would be available to plaintiff because she no longer meets the minimal annual requirements to practice nursing and hence to be qualified as an Air Force flight nurse. Thus, the most that remains of plaintiff's case is her request for declaratory judgment that her discharge was unconstitutional; for the reasons outlined above, and explained further below, plaintiff is not entitled to that relief because summary judgment should be entered for defendants.

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STATEMENT OF FACTS

The record at this stage of the proceedings is very different than the record previously before this Court and the Court of Appeals. The prior record was based on the allegations in plaintiff's complaint as well as the sworn statements in support of her motion for preliminary injunctive relief. Those allegations and statements indicated that plaintiff was suspended from the Air Force Reserve due to a single, long-term same-sex relationship from 1997 to 2003, with a woman who was neither a service member nor a civilian employee of the military.[2] As described by plaintiff, the two women lived together 250 miles away from McChord Air Force Base, where plaintiff worked part-time as a flight nurse in the Reserve.[3] Under the standard of review governing dismissals under Rule 12(b)(6), the Court of Appeals accepted those allegations as true when it determined the scope of remand.[4]

The Court of Appeals explicitly directed that, on remand, the parties develop a factual record to determine "whether justification exists for the application of the [DADT] policy as applied to Major Witt."[5] By so directing, the Court of Appeals made clear that, in its view, the facts of Witt's conduct would be relevant to the as-applied analysis. Indeed, the Court of Appeals expressed some skepticism that the facts presented in the complaint – that Plaintiff was in a "committed and long-term relationship" "hundreds of miles from base" and that "[w]hile serving in the Air Force, Major Witt never told any member of the military that she was homosexual" – could implicate the concerns that led to enactment of DADT.[6]

Defendants maintain that the facts and circumstances of the plaintiff's conduct are

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[2] *Witt v. Dep't of the Air Force*, 527 F.3d 806, 809 (9th Cir. 2008) ("Major Witt was in a committed and long-term relationship with another woman from July 1997 through August 2003."); *id.* at 809 ("Major Witt's partner was never a member nor a civilian employee of any branch of the armed forces, and Major Witt states that she never had sexual relations while on duty or while on the grounds of any Air Force base").

[3] *Witt*, 527 F.3d at 809-10 ("During their relationship, Major Witt and her partner shared a home in Spokane, Washington, about 250 miles away from McChord Air Force Base.").

[4] *Witt*, 527 F.3d at 810 ("We must presume those facts to be true for purposes of this appeal.").

[5] *Witt*, 527 F.3d at 819.

[6] *Witt*, 527 F.3d at 819, 821 n.11.

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irrelevant to an evaluation of Congress' justification in this matter. Under the legal rubric set forth by the Court of Appeals, however, the facts developed on remand are relevant because, among other things, they respond directly, and are contrary, to the Court of Appeals suggestion that plaintiff's conduct was remote from her position as a military office. In fact, the full record reveals that her conduct was much more closely connected to her military service than the Court of Appeals believed. In addition to the relationship described in her complaint, plaintiff had a sexual relationship with a married civilian woman that began in October 2003.[7] It was only after this relationship was reported to the Air Force by the woman's husband that the Air Force suspended and discharged plaintiff.[8] In addition to her relationships with these two civilian women, plaintiff had sexual relationships with two female Air Force officers during her service in the Air Force.[9] In at least two instances prior to her discharge, moreover, plaintiff told enlisted members of her squadron that she was a lesbian.[10]

Other facts, either revealed through discovery or contained in the administrative record, are important for purposes of summary judgment.[11] While in the Reserve, plaintiff was subject to worldwide deployment on short notice.[12] Those deployments could be together with service members outside of her specific squadron – or even outside of the Air Force.[13] Not surprisingly,

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[7] Margaret Witt Dep. at 113, line 2, to 114, line 22 (Ex. A).

[8] E-mail from Pat McChesney to Gen. John Jumper (June 14, 2004) (Ex. B).

[9] Margaret Witt Dep. at 72, line 14, to 73, line 2 (Ex. A).

[10] *See* Pl.'s Response to Interrog. No. 7 (Feb. 15, 2010) (Ex. C) (identifying SMSgt James Schaffer and Msgt Jenaro Wirth as persons to whom plaintiff acknowledged that she was a lesbian before her discharge); *see also* Declaration of Margaret Witt ¶ 16 (Apr. 13, 2006) (Docket No. 9) ("With the exception of Senior Master Sergeant James Schaffer, I never told anyone in the military about my relationship with my partner.").

[11] Although the discharge board's task did not include making findings regarding the "as applied" test – because that test did not exist at the time of the board's decision – significant facts were developed in the administrative record and should be considered now in determining whether Witt's discharge satisfies the Court of Appeals' "as applied" test.

[12] Janette Moore-Harbert Dep. at 184, line 2, to 185, line 6 (Ex. D); Mary Walker Dep. at 74, lines 8-18; 147, lines 3-16 (Ex. E); Margaret Witt Dep. at 28, line 24, to 29, line 17 (Ex. A).

[13] Janette Moore-Harbert Dep. at 185, lines 14-20 (Ex. D); Decl. of Janette Moore-Harbert ¶ 11 (Ex. F); Mary Walker Dep. at 148, line 17, to 150, line 3. (Ex. E).

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Congress considered such possibilities and made specific findings in that regard when it enacted the DADT statute.[14] Those specific findings as to worldwide deployment and to the living conditions on deployment, moreover, are corroborated by an expert witness retained by plaintiff.[15]

STANDARD OF REVIEW

Summary judgment is proper when, viewing the facts in the light most favorable to the nonmoving party, "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one which is "relevant to an element of a claim or defense and whose existence might affect the outcome of the suit." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Thus, an unsupported assertion that a genuine issue of material fact exists, or the "mere existence of a scintilla of evidence in support of the non-moving party's position" is not sufficient to preclude summary judgment. *Triton Energy Corp. v. Square D Co.,* 68 F.3d 1216, 1221 (9th Cir. 1995). Once the moving party has satisfied its burden, it is entitled to summary judgment if the nonmoving party fails to present, by affidavits, depositions, answers to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

ARGUMENT

I. Defendants Satisfy an As-Applied Analysis, and Summary Judgment Should Be Entered in Their Favor.

A. The Court of Appeals' Three-Factor Test is Satisfied Here.

Plaintiff's discharge is justified under the as-applied analysis contemplated by the Court

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[14] *See, e.g.,* 10 U.S.C. § 654(12) ("The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.").

[15] Nathaniel Frank Dep. at 202, line 25, to 204, line 11 (agreeing with the congressional factual findings at 10 U.S.C. § 654(a)(5)-(12)) (Ex. G).

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of Appeals. The Court of Appeals articulated an as-applied version of intermediate scrutiny to govern due process challenges to the DADT statute. *See Witt*, 527 F.3d at 819; *see also Sell v. United States*, 539 U.S. 166, 178-180 (2003). That test examines (1) whether there is an important governmental interest; (2) whether the governmental action significantly furthers that interest; and (3) whether the governmental action is necessary to further that interest, *i.e.*, whether less intrusive actions would be unlikely to achieve substantially the same result. *See Witt*, 527 F.3d at 818. The record here, with the benefit of discovery, demonstrates that each of those factors is satisfied here, and that the liberty interest identified in *Witt* is thus outweighed by the military interests that Congress rationally could have sought to protect through enactment of the DADT statute.

1. There Is No Dispute That Defendants Have Met the First Factor Because There Is an Important Government Interest.

The first factor under the Court of Appeals' formulation is whether the Air Force advances an important governmental interest. The Air Force has such an interest in unit cohesion and morale, and preservation of good order and discipline. The Court of Appeals already has held that "it is clear that the government advances an important governmental interest." *See Witt*, 527 F.3d at 821. Similarly, in discovery, plaintiff has admitted that the Air Force has an important governmental interest in unit cohesion and morale. *See* Pl.'s Response to Req. for Admis. No. 1 (Feb. 15, 2010) (Ex. H). It is undisputed, then, that the first factor is satisfied here.

2. The Second Factor Is Satisfied Because Plaintiff's Suspension and Discharge Significantly Furthered Unit Cohesion, Morale, and Good Order and Discipline.

In evaluating whether the second factor of this test has been satisfied, this Court is to inquire "whether the application of DADT specifically to Major Witt significantly furthers the government's interest." *Witt*, 527 F.3d. at 821. In enacting DADT, Congress found that it is "necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy." 10 U.S.C. § 654(a)(12). Congress could have rationally concluded in 1993

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that, in light of those military realities, DADT served to prevent harmful distractions between service members.

The commander of the 446th AES since October 2005, Colonel Janette Moore-Harbert, confirmed that unit members in the 446th AES are subject to world-wide deployments, making it impossible to know whether the members will be stationed in settings with little or no privacy. Janette Moore-Harbert Dep. at 184, lines 10-14 (Ex. D); Decl. of Janette Moore-Harbert ¶ 12 ("The living conditions for deployed members varies with the location to which they find themselves posted" including some areas in which "personnel are housed in tents sheltering multiple persons, usually of the same sex.") (Ex. F). As noted above, the Court of Appeals appeared to believe that such lack of privacy could not pose a risk of distraction in the circumstances of this case because, according to the facts presented in the complaint, plaintiff was in a "committed and long-term relationship" "hundreds of miles from base" and, "[w]hile serving in the Air Force, Major Witt never told any member of the military that she was homosexual." *Witt*, 527 F.3d at 819. As such, the Court of Appeals questioned how Congress could have rationally concluded that application of a policy resulting in discharge in such circumstances would substantially further the important governmental interest Congress found to be at issue. In fact, however, plaintiff engaged in conduct that does implicate the concerns Congress articulated and in conduct that was not remote from her position as a military officer.

Plaintiff disclosed her sexual orientation to two enlisted members. *See* footnote 10, *supra*. She also had relationships with two other female Air Force officers, and she lived with one of these officers. See Margaret Witt Dep. at 72, line 14, to 73, line 17 (Ex. A). Indeed, this revelation is contrary to what appears to have been a fundamental impression held by the Court of Appeals in its opinion, that the plaintiff "never told any member of the military that she was homosexual," *Witt*, 527 F.3d at 810, and that her sexual activities "hundreds of miles away from base did not affect her unit." *Id.* at 821. Plaintiff's history of engaging in same-sex relationships in the military demonstrates that her deployment could pose the type of risk of distraction that Congress rationally could have anticipated when it adopted DADT. *See* 10 U.S.C. §§ 654(15), 654(b)(1)(B), 654(b)(2). Col. Moore-Harbert testified that Major Witt's deployment could give

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rise to such distractions. *See*, *e.g.*, Janette Moore-Harbert Dep. at 184, lines 23-24; *id.* at 185, lines 2-6; *id.* at 187, lines 4-6 (Ex. D); *see also* Decl. of Janette Moore-Harbert ¶ 19 ("I believe that Major Witt's return to the 446th AES would present an unacceptable risk to unit cohesion and morale. This is particularly true in terms of the risk of distraction from the mission for both members of the 446th AES and other U.S. Armed Forces units with which Maj Witt would deploy.") (Ex. F).

In addition, one of the sexual relationships in which plaintiff engaged was with a married civilian woman whose husband complained directly to the Chief of Staff of the Air Force. Whether it occurs on or off base and with civilians or other service members, "[a]dultery is clearly unacceptable conduct" in the military, Manual for Courts-Martial, United States (2008 ed.), Part IV, ¶ 62c(1). It "reflects adversely on the service record of the service member," *id.*, and "[d]isciplinary action and courts-martial for criminal adultery are not infrequent," *United States v. Green*, 39 M.J. 606, 609 (A. Ct. Crim. App. 1994). Plaintiff's relationship with a married woman is thus relevant here for two reasons. First, her willingness to engage in conduct that she acknowledged to be inconsistent with the standards of conduct required of Air Force officers, *see* Margaret Witt Dep. at 46, lines 8-13; 114, *id.* lines 19-22 (Ex. A); *see also* Dennis Laich Dep. at 62, line 22, to 63, line 12 (Ex. I), and that frequently leads to disciplinary action and courts-martial, *Green*, 39 M.J. at 609, further evidences a willingness to engage in the type of conduct that Congress could have rationally concluded could give rise to distractions within her unit. Second, regardless of the sexual orientation of those involved, adulterous behavior, especially by an officer, is likely to be prejudicial to good order and discipline. As the military court in *Green* explained, the risk that other service members will find out about an officer's adultery can harm good order and discipline in two ways:

> First, [such] conduct would tend to reduce the other soldiers' confidence in his integrity, leadership, and respect for law and authority. Second, the example he provided would tend to cause the other soldiers to be less likely to conform their conduct to the rigors of military discipline.

39 M.J. at 610. Further, an officer who engages in adultery risks compromising her stature as an officer. *See* Dennis Laich Dep. at 62, line 19, to 63, line 9 (Ex. I) (explaining that an extramarital

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affair "compromises integrity"). The risks of such behavior were enunciated long ago by Congress in Articles 133 and 134 of the Uniform Code of Military Justice, which subject service members, regardless of sexual orientation, to courts martial for adultery in certain circumstances. By reducing those risks, plaintiff's discharge furthers unit cohesion, morale, and good order and discipline.

3. Witt's Discharge Was Necessary.

The third factor in the Court of Appeals' test is whether the "intrusion [is] necessary to further' an important governmental interest." *Witt*, 527 F.3d at 819. This factor was later refined so that it can be satisfied by proving that "a less intrusive means must be unlikely to achieve substantially the government's interest." *Id*. Here, no less intrusive application of the DADT statute can be achieved due to the military's need for uniform application of its personnel rules.

As has been recognized by the Supreme Court, a compelling interest in the uniform application of rules exists where granting accommodations "would seriously compromise [the government's] ability to administer the program." *See Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418, 435-36 (2006). With respect to the Air Force, the uniform application of its rules is essential to unit cohesion and morale. As explained by Lieutenant General Charles E. Stenner Jr., the Chief Commander of the Air Force Reserve:

> To further unit cohesion, morale, good order, and discipline, the Air Force, an institution globally organized and globally assigned, needs a uniform personnel policy, not different personnel policies for separate geographical regions. This need for uniformity extends to the homosexual conduct policy; it cannot be applied differently in various geographical regions without disruptions to unit cohesion, morale, good order, and discipline.

Defs.' Supp. Resp. to Pl.'s Int. 12(d) (Ex. J). Thus, permitting plaintiff's continued service would undermine unit cohesion and morale by resulting in the non-uniform application of policy. *See id.* ("Major Witt's discharge from the Air Force Reserve furthers basic military functionality as well as unit cohesion, morale, good order, and discipline because if she were not discharged, that would mean that Air Force personnel policies were not uniformly applied across geographical boundaries, which would disrupt unit cohesion, morale, good order, and discipline.").

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Plaintiff's continued military service necessarily would result in the application of a different personnel policy to her than to other service members, such as those in the First Circuit, where the DADT statute was upheld as constitutional. *See Cook v. Gates*, 528 F.3d 42, 60 (1st Cir. 2008). The potential perceived unfairness to other service members in *other* units could not be avoided. *See* Nathaniel Frank Dep. at 168, line 11, to 170, line 17 (Ex. G). The commander of the 446th AES since October 2005, Colonel Janette Moore-Harbert, confirmed that unit members in the 446th AES are subject to world-wide deployments. Janette Moore-Harbert Dep. at 184, lines 10-14 (Ex. D). Creating an exception to the military's policies for plaintiffs in the Ninth Circuit, moreover, would pose severe logistical problems. Plaintiff could not be transferred, deployed, or sent on a training mission outside of the geographical boundaries of the Ninth Circuit without either (i) subjecting her to discharge under the fully constitutional application of the DADT statute in other jurisdictions or (ii) placing the commander of the unit outside of the Ninth Circuit in an untenable position of attempting to enforce the statute with respect to troops based in that jurisdiction but tolerating an obvious and open violation by troops from the Ninth Circuit.

As summarized by General Stenner: "A policy that's not applied uniformly degrades. A policy that is applied uniformly sustains unit cohesion, good order and discipline and ultimately readiness for the war fighter." Charles E. Stenner, Jr. Dep. at 73, lines 5-8 (Ex. K). Thus, the Air Force has a strong interest in the uniform application of its personnel policies, including the DADT statute. But if plaintiff had not been discharged or if her discharge were overturned, that uniform application would be replaced by a region-by-region application of the DADT statute. To avoid that result, it was necessary that plaintiff be discharged and that she remain discharged.

B. The As-Applied Analysis Is Also Satisfied Because the Congressional Factual Findings in Support of the DADT Statute Apply to Plaintiff's Military Service.

The Court of Appeals' decision is also significant for what it did not do. Specifically, the Court of Appeals did not dispute that Congress could rationally have adopted the fifteen congressional findings in support of the DADT statute, 10 U.S.C. § 654(a)(1)-(15). Rather, the

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case was remanded to determine "not whether DADT has some hypothetical, post hoc rationalization in general, but whether a justification exists for the application of the policy as applied to Major Witt." *Witt*, 527 F.3d at 819. This remand instruction did not challenge the rationality of Congress' predictive judgments in 1993; it simply required as-applied factual support for those judgments. Thus, if the facts of plaintiff's military service or her conduct are the same as those contemplated in Congress' factual findings, then, *a fortiori*, Congress' predictive judgments also would apply to plaintiff.

In enacting DADT, Congress made the findings and predictive judgments that:

> (13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.
>
> (14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.
>
> (15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

10 U.S.C. § 654(a)(13)-(15). These findings and predictive judgments of Congress are entitled to substantial deference. *See Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997). That degree of deference is heightened further – to its apogee – because Congress was legislating in the area of military affairs. *See Weinberger*, 475 U.S. at 508; *Rostker v. Goldman*, 453 U.S. 57, 70 (1981); *see also Holder v. Humanitarian Law Project*, -- U.S. --, 2010 WL 2471055, at *22 (June 21, 2010) (affording deference to executive decisions in areas of national security). Consistent with these principles of deference, the Court of Appeals did not dispute the rationality of Congress' predictive judgments.

Thus, the heart of the remand inquiry focuses on the specific facts of plaintiff's military service and conduct. Here, the facts of plaintiff's case are the same as those Congress could have rationally contemplated in enacting DADT. Those congressional factual findings outline the military's goal of prevailing in combat, *see* 10 U.S.C. § 654(a)(4), the need for service members to make extraordinary sacrifices, *see id.* § 654(a)(5), and the critical importance of high morale,

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good order and discipline, and unit cohesion in the military, *see id.* § 654(a)(6)-(7). Those findings apply to plaintiff's military service. Indeed, even plaintiff's own expert witness, who opposes the policy generally, nevertheless substantially agreed with the content of each of these findings. *See* Nathaniel Frank Dep. at 202, line 14, to 203, line 15 (Ex. G) (confirming his general agreement with the accuracy of 10 U.S.C. § 654(a)(6)-(7)).

Congress also recognized the fundamental difference between military life and civilian life. *See* 10 U. S.C. § 654(a)(8). Plaintiff's expert witness agreed with this finding. *See* Nathaniel Frank Dep. at 203, lines 21-23 (Ex. G) (Q: Looking at finding 8 . . . do you agree or disagree with that finding? A: I agree."). Plaintiff's commanders likewise explained that service in the 446th AES is fundamentally different than civilian life. *See* Mary Walker Dep. at 150, line 11, to 151, line 5 (Ex. E); Janette Moore-Harbert Dep. at 148, lines 4-7 (Ex. D). Hence, that congressional finding applies to plaintiff.

Similarly, no dispute exists as to the accuracy of the next two congressional findings, which emphasize the applicability of the military standards of conduct even when off-base or off-duty. *See* 10 U. S.C. § 654(a)(9)-(10); Nathaniel Frank Dep. at 203, line 24, to 204, line 5 (Ex. G) ("Q: . . . And then on to finding IX. Do you agree or disagree with that finding? A: I agree. Q: And then finding 10, do you agree or disagree with that finding? A: I agree.").

Statutory findings 11 and 12 also accurately describe plaintiff's military service. Those findings focus on the military's potential for worldwide deployment, which could entail living and working conditions that would involve limited privacy. *See* 10 U. S.C. § 654(a)(11)-(12). Plaintiff's commanders, plaintiff's expert witness, and plaintiff herself acknowledged her potential for worldwide deployments as a member of the 446th AES. *See* Nathaniel Frank Dep. at 204, lines 6-11 (Ex. G); Janette Moore-Harbert Dep. at 175, lines 3-5, 184, line 2, to 185, line 6 (Ex. D); Decl. of Janette Moore-Harbert ¶¶ 10-11 (Ex. F); Mary Walker Dep. at 74, lines 8-18; 147, lines 3-16 (Ex. E); Margaret Witt Dep. at 29, lines 16-17 (Ex. A). Plaintiff's commanders also recognize the distinct possibility that when deployed plaintiff would be placed in living conditions that would entail little privacy. *See* Janette Moore-Harbert Dep. at 184, lines 2-14 (Ex. D); Decl. of Janette Moore-Harbert ¶ 12 (Ex. F); Mary Walker Dep. at 147,

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line 25, to 148, line 16. (Ex. E). In short, the facts that form the basis for Congress' predictive judgments also apply to the specifics of plaintiff's military service.

Under the as-applied evaluation outlined on appeal, the Court of Appeals already has held that the first factor – that the government has advanced an important governmental interest – is satisfied here. *See Witt*, 527 F.3d at 821. As to the second factor, plaintiff's conduct with others is the type of conduct that Congress could have rationally predicted "would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(15). Plaintiff's separation from the military significantly furthers unit cohesion and morale by eliminating such an unacceptable risk. *Id.* As to the third factor, plaintiff's separation was necessary to further unit cohesion and morale. *See* 10 U.S.C. § 654(a)(13). The facts of plaintiff's military service were the same as those that could have rationally led Congress to predict that the DADT policy was "necessary in the unique circumstances of military service." *Id.* Thus, because plaintiff's military service had the same factual characteristics as those that Congress rationally used as a basis for the DADT policy, the policy was constitutionally applied to her. For these reasons, summary judgment should be entered for defendants upholding plaintiff's separation from the Air Force Reserve.

II. Plaintiff's Honorable Discharge Mandates the Dismissal of her Procedural Due Process Claim.

Plaintiff's procedural due process claim must fail because, as a matter of law, she cannot identify a life, liberty, or property interest of which she has been deprived. Here, plaintiff "does not allege that she has been deprived of a life or a property interest." *Witt*, 527 F.3d at 812. Rather, her "procedural due process claim rests on her assertion that her discharge papers will reflect the reasons for her discharge, and that this in turn will result in a stigma," potentially depriving her of a liberty interest. *Id.*

Under that standard, plaintiff has no procedural due process claim. The Secretary of the Air Force directed that plaintiff "be discharged from the United States Air Force with an Honorable discharge." *See* Action of the Secretary of the Air Force (July 10, 2007) (Ex. L). Air Force Reserve Command issued an order effectuating the Secretary's decision by relieving

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plaintiff from assignment and discharging her from the Air Force effective October 1, 2007. *See* Reserve Order (July 12, 2007) (Ex. M). Additionally, the Air Force has issued plaintiff a discharge certificate making clear that plaintiff received an Honorable discharge. *See* Form 256 (Ex. N). It is well established that an honorable discharge does not deprive an individual of a liberty, property, or life interest. *See Schultz v. Wellman*, 717 F.2d 301, 307 (6th Cir. 1983) ("Nor could there exist any liberty interest in this case since the appellant was honorably discharged. Such a discharge does not carry with it any of the stigma or restrictions on future employment which might conceivably trigger due process considerations."); *Sims v. Fox*, 505 F.2d 857, 862 (5th Cir. 1974) (holding that an Air Force Reserve Officer has no property interest in continued military employment).

Moreover, plaintiff's discharge certificate contains no information that would deprive her of a constitutionally protected liberty interest. *See* Form 256 (Ex. N). The liberty interest protected by the Due Process Clause in the employment context centers around concern for a person's reputation and good name. *See Jones v. Dep't of Navy*, 978 F.2d 1223, 1226 (Fed. Cir. 1992). To the extent that plaintiff claims that her reputation and good name have been harmed by information contained on the face of her discharge certificate, that claim fails because, as is evident from its face, plaintiff's discharge certificate contains no potentially stigmatizing information. *See* Form 256 (Ex. N). Thus, unlike those instances in which a discharge certificate contains reasons for discharge that a service member disputes, plaintiff's discharge certificate does not specify the reasons for her discharge or any other disputed information. *Cf. Rogers v. United States*, 24 Cl. Ct. 676, 683-84 (Cl. Ct. 1991) (holding that where plaintiff's discharge certificate indicated that the reason for his separation from service was drug related, and plaintiff contested the accuracy of that allegation, a stigma attached to plaintiff's discharge, entitling him to an appropriate adversarial hearing).

In addition, plaintiff has no procedural due process claim because she received a full hearing before an Air Force Reserve discharge board before the effectuation of her discharge. *See, e.g.*, Admin R. at AF000995-97. That discharge board, comprised of officers, convened on September 28-29, 2006, and at the hearing, plaintiff was represented by both military and civilian

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counsel. Plaintiff was permitted to make statements and submit the statements of other witnesses in support of her case – and plaintiff took advantage of those opportunities. *Id.* at AF000552-53. Having received that full opportunity to be heard before her discharge, plaintiff has no procedural due process claim. *See Beller*, 632 F.2d at 806 (holding that where "plaintiffs were allowed to introduce evidence to support their arguments that the Secretary should exercise his discretion to retain them . . . plaintiffs' liberty interests were protected").

III. Summary Judgment Should Be Entered Against Plaintiff With Respect to Her Requests for Injunctive Relief.

In the prayer for relief, plaintiff's complaint contains three requests for injunctive relief and one request for declaratory judgment. The requested injunctive relief has been mooted with the passage of time; hence plaintiff's case is at most an action for a declaratory judgment.

Plaintiff's requests for injunctive relief were premised on facts that have since changed in ways that render those requests moot. At the time plaintiff filed her Complaint in April 2006, the Air Force had not discharged her. *See* Compl., Prayer for Relief (requesting *inter alia*, a "permanent injunction, restraining defendants from discharging plaintiff" and a "permanent injunction, prohibiting defendants from failing to promote her, or from taking any other action to hinder her career as an officer in the United States Air Force") (Docket No. 1). Shortly after filing her Complaint, plaintiff sought a preliminary injunction to prevent her discharge. *See* Pl.'s Mot. for Prelim. Inj. (Docket No. 8). This Court denied that motion and granted defendants' motion to dismiss. *See* Order dated July 26, 2006 (Docket No. 35). Plaintiff then appealed, and her appeal was docketed as an appeal of a denial of a preliminary injunction. *See* Order of U.S. Ct. of App. (Aug. 8, 2006) (*available at* District Court Docket No. 40 (Aug. 11, 2006)) (recognizing that the appeal was of a denial of a preliminary injunction and setting an accelerated briefing schedule). Plaintiff then petitioned the Court of Appeals to place her appeal on the regular briefing schedule by dropping her appellate rights to the denial of the preliminary injunction motion. *See* Order of U.S. Ct. of App. (Aug. 21, 2006) (*available at* District Court Docket No. 41 (Aug. 25, 2006)) (granting plaintiff's motion to strike the briefing schedule and concluding "that this is not a preliminary injunction appeal; appeal shall proceed in the usual

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course"). During the pendency of plaintiff's appeal, in the course of its regular personnel administration, the Air Force discharged her from service, effective October 1, 2007. *See* Action of the Secretary of the Air Force (July 10, 2007) (Ex. L); Reserve Order (July 12, 2007) (Ex. M).

Plaintiff's discharge moots the availability of her requested injunctive relief. The Air Force cannot be enjoined from doing something it already has done. Because the Air Force discharged plaintiff in 2007, the Court is no longer able to "restrain[] defendants from discharging plaintiff" or to "prohibit[] defendants from failing to promote her." Compl., Prayer for Relief. It is well established that "[w]here the activities sought to be enjoined have already occurred, and the appellate courts cannot undo what has already been done, the action is moot." *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978) (citations omitted); *Rattlesnake Coalition v. EPA*, 509 F.3d 1095, 1103 (9th Cir. 2007) (holding that where public works project had already been completed, plaintiffs lacked standing to enjoin a government agency to study the potential environmental impacts of the project). Here, the actions that plaintiff seeks to prevent already have occurred, and the Court cannot simply "undo what has already been done." *Friends of the Earth, Inc.*, 576 F.2d at 1379.

In addition to the fact that plaintiff's discharge has already occurred, plaintiff is no longer eligible to receive any other injunctive relief. For instance, even if her pleadings sought additional equitable relief, such as reinstatement, it would not be available to her because she cannot satisfy the requirements for serving as a flight nurse in the Air Force Reserve. Under Air Force regulations, a nurse cannot be assigned to an Air Force Reserve unit if that nurse does not "actively practice nursing." AFI 36-2115 § 1.11.5. To satisfy that condition, an individual must be "employed or working voluntarily in a position that requires a registered nurse" and must be able to verify 180 hours of active engagement in nursing per calendar year. *Id.* § 1.11.5.1. Yet, by her own admission, plaintiff cannot meet those requirements. Plaintiff's answers to interrogatories indicate that she was not actively engaged in the practice of nursing for the required 180 hours per annum in 2009 and 2010. *See* Pl.'s Objections & Resps. to Defs.' Second Set of Interrogs. at 2-3 (Interrogatory: "State the number of hours in each calendar year from 2005 to the present in which you were employed or worked voluntarily in a position that required

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the position-occupant to be a registered nurse. Response: Plaintiff estimates 90 hours in 2009, and 40 hours in 2010.") (Ex. O). Thus, in addition to mootness, prudential and comity concerns counsel against the entry of any order that would undermine the clear requirements of AFI 36-2115. *See, e.g.*, *Champagne v. United States*, 35 Fed. Cl. 198, 207 (Fed. Cl. 1996) ("When reviewing a determination of an individual's fitness for duty by a military service branch, courts routinely defer to the decisions of the military. It is well settled that the responsibility for determining who is fit or unfit for military service is not a matter for the courts to decide.") (citing *Orloff,* 345 U.S. 83). Consequently, no injunctive relief is available to plaintiff.

CONCLUSION

For the foregoing reasons, summary judgment should be entered for defendants.

Dated: July 22, 2010

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2010, I electronically filed the foregoing Defendants' Motion for Summary Judgment, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

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