Witt v. Department of the Air Force et al Doc. 128

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

Major Margaret Witt, Plaintiff, vs. United States Department of the Air Force, et al., Defendants.	NO. C06-5195 RBL PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT **Oral Argument Requested**

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A. INTRODUCTION

Defendants refuse to apply the intermediate scrutiny ordered by the Ninth Circuit, fail to offer even a scintilla of evidence to show that they can carry their burden of proof, and fail to raise a material issue of fact to show (1) that unit cohesion has any effect on military effectiveness or readiness; (2) that the open service of gays and lesbians has a negative effect on unit cohesion; (3) that Witt's reinstatement to the 446th would have a negative effect on the unit cohesion of the 446th AES, and (4) that there is no less restrictive alternative to Witt's discharge that would prevent a negative impact on the unit cohesion of the 446th. Defendants attempt to argue that there must be uniformity between the legal rules operable in all the circuit courts of the United States is nothing more than an attempt to ignore the fact that the military authorities are obligated to obey the orders of the courts. This Court should deny their motion for summary judgment, and grant the plaintiff's motion for summary judgment.

B. FACTS

Plaintiff incorporates the factual record laid out in her own motion for summary judgment. (Docket No. 102).[1] In addition, plaintiff notes the following inaccuracies in defendants' statement of the facts, and presents the following additional facts.

Defendants imply that plaintiff's expert Prof. Nathaniel Frank substantially agrees with the content of each of the[] findings made by Congress in 10 U.S.C. § 654(a). *Defendants' Motion For Summary Judgment* (hereafter "DMSJ"), at 14, *ll.* 1-17. But in truth, Professor Frank testified that he strongly disagreed with the key findings in subsections 13[2] & 15[3]. *Dep. Frank,*

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[1] This includes Docket Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 65, 66, 67, 68, 103,104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117,

[2] This "finding" states: "The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service."

[3] This "finding" states: "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 armed forces' high standards of morale, good order and discipline, and unit cohesion that are of the essence of military capability."

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204:12-24.[4]

Defendants note that if Witt were deployed overseas she might end up being placed in living conditions that would entail little privacy." DMSJ, at 14, *ll.* 25-27. But defendants present no evidence whatsoever that anyone in the 446th AES, or in any other unit, would be bothered by having to share quarters with Witt. Defendants simply fail to offer any evidence to contradict the evidence offered by Witt that knowledge that Witt is a lesbian makes "absolutely no difference" to her fellow servicemembers.[5] Defendants similarly ignore the unrebutted evidence that female members of the 446th have no concerns about the possibility of having to share close living quarters with Witt. *See, e.g.*, the declarations of Mueller, ¶ 10,[6] Carlson, ¶ 10,[7] Brinks, ¶ 9,[8] Thomas, ¶ 10,[9] Schindler, ¶¶ 9, 12,[10] Scott, ¶ 9[11]. This is completely consistent with Prof. Frank's testimony that in general "women tend to be less concerned about homosexuality than men." *Dep. Frank*, 173:5-8.[12]

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[4] With respect to finding number 15, Frank testified that when he "spoke to the general who was the first head of the military working group that wrote the blueprint for 'Don't Ask, Don't Tell,' about this finding," the general told him "he had no idea where that came from and from my more than ten years of research, there has never been any basis whatever for a finding like this. [¶] So findings number 13 and 15, I think, are a joke. They are a political expression of hostility to homosexuality that are not grounded in any facts." *Dep. Frank*, 205:8-25. And consistent with Frank's opinion that they are not "grounded in any facts," the defendants in this case have not offered any evidence at all to support these so-called "findings" which are actually conclusions of law.

[5] All of the female declarants from the 446th have stated that Witt's lesbianism makes "absolutely no difference to them." *Schindler*, ¶ 12, *Brinks*, ¶ 12, *Thomas*, ¶ 13, *Mueller*, ¶ 13, *Carlson*,¶ 15.

[6] "I am completely comfortable in doing so and would not feel that my privacy would, in any way, be impinged by sharing these confined quarters with Major Witt."

[7] Same as Mueller.

[8] Same as Mueller.

[9] Same as Mueller.

[10] "I have shared confined quarters, such as showers and toilet facilities that allowed for minimal privacy with Major Witt. At no time did I feel uncomfortable with Major Witt's presence in these confined quarters or feel that my privacy was, in any way, impinged."

[11] "I have shared sleeping quarters with Major Witt. In October of 2003 during a mission to New Zealand I shared a room with her. There were no problems. I did not feel my privacy was infringed upon, and I would have no reservations about sharing living quarters with her again. . . ."

[12] Prof. Frank testified that his position was "that discomfort or opposition among service members to someone who may be openly gay does not actually rise to the level of threatening unit cohesion, but this is to say that even if you're not convinced of that, that positive attitudes are not necessary for openly gay service to work effectively, you should realize that among women, that resistance isn't even there. So to the extent that one might believe that concerns about privacy threaten cohesion, which apparently is the Justice Department's interpretation of Congress' intent, that need not be a concern because women tend to be less concerned about that to begin with." Dep. Frank,, 173:16 – 174:6.

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1 Defendants portray Witt as having conceded that she "told enlisted members of her squadron
2 that she was a lesbian." DMSJ at 6, *ll.* 11-12, citing to Witt's response to Interrogatory No. 7
3 (Feb. 15, 2010).[13] In fact, the precise truth is more nuanced: when these individuals made
4 statements to her revealing the fact that they assumed that Witt was a lesbian, Witt did not deny
5 or contradict that assumption, and thereby "acknowledged" the truth of their assumptions.
6 At his deposition Professor Greenwald explained that people can be made aware that another
7 person is gay without being expressly verbally told this fact:
8
> A. It's well-known that gays give off all sorts of information suggesting to others that they are homosexual. People differ in their ability to pick this up. But it is very common for people to make inferences that another person is gay without ever knowing that explicitly, without ever being told. There were many indications in the material I saw about the 446th that indicated that this was happening there.
>
> * * *
>
> Q. When you say that gays give off all sorts of information suggesting that they are homosexual, what sorts of information are you talking about?
> A. It's actually a long list, I believe. It includes clothing choices, jewelry choices, hair styles, tone of voice, and behavior in terms of who one affiliates with. There's more than that, but I think those are the main things.
>
> * * *
>
> Q. And it's possible that someone could reach an inference and not actually know that someone is gay; right?
> A. Yes. That was my point.
> Q. So when you say that people were informally aware, does it mean that they drew an inference but didn't necessarily know?
> A. I would not use the language that way. If you draw an inference, you do know in the way that I think about this. I think you're making a distinction between assuming the truth of something and knowing on the basis of factual evidence that it is true. But both of those are forms of knowing.

9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26

[13] That interrogatory inquired about "all 'conversations' that you had with any member of the 446th . . . regarding either your status as a homosexual or any conduct defined" as homosexual conduct. Witt's response reads as follows: "[A]ssuming that the term 'conversations' is intended to cover 'one-way' remarks from another to me. I have spoken with the following individuals acknowledging that I am a lesbian: Ret. SMSgt. James Schaffer and MSgt. Jenaro Wirth. The following individuals have volunteered supportive remarks to me that were based on the assumption that I was a lesbian but I neither confirmed nor denied them: TSgt. Matt Edminister. Lt. Col. Julia Scott often made references to my partner under her assumption that she was my partner, but I never affirmatively acknowledged my sexual orientation to her.

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Dep. Greenwald, at 24:22 - 25:23, 26:9-20. Prof. Greenwald's testimony is borne out by the testimony of several members of the 446th who have stated that they knew or were aware of the presence of several gays and lesbians in the unit even though they had never been "told" by these servicemembers.[14]

At her deposition Major Witt testified that when she entered the Air Force she did not consider herself to be a lesbian, and explained that when she eventually began to think of herself as having a sexual identity, she was "programmed" by DADT not to talk about such things:

> Q. . . . Prior to entering the Air Force, did you think of yourself as homosexual?
> A. No.
> Q. Did you think of yourself as a lesbian?
> A. No.
> Q. And why was that? Why was that? Was there some sort of sexual identity that you had other than those two?
> A. I didn't have a sexual identity. I never wanted to label myself because then you're put in a box? So I'm sorry. ***I've spent over 20 years not talking about anything like this and being programmed not to talk about anything like this.*** So I will do my best here.
> Q. I guess my other point is, had you – Prior to entering the Air Force, had you engaged in heterosexual activity before entering the Air Force?
> A. Yes.
> Q. Okay. And at the time that you first entered the Air Force, did you know what the Air Force's policy was regarding homosexuality and homosexual acts?
> A. No.

Dep. Witt, 11:17 – 12:15.

Consistent with this pattern of behavior, and contrary to what defendants have alleged, Major Witt did *not* testify at her deposition that she "told" enlisted members of her squadron that she was a lesbian. In fact, she testified that she did *not* do that. *Dep. Witt*, 73:22 – 74:17.[15]

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[14] *See, e.g*, the declarations of Heidi Smidt, ¶¶ 5-6; Judith Krill, ¶¶ 4-5; Rod Boultinghouse, ¶¶ 6-7; Heather Julian, ¶ 8; and the deposition testimony of Jill Brinks Robinson, 37:16-38:8; Ed Hrivnak, 28:2-13.

[15] Q. Did you ever tell any member of the 446th Wing that you were gay or lesbian or words to that effect?
MR. LOBSENZ: Well, that makes me more inclined to object to the form because of "words to that effect." Ordinarily, I would never object to the form of a question where the question is, "Did you tell." But given this case and the particular issues in this case, I think it might be helpful if you understood that I'm objecting to the form of the question, "tell," particularly if you add "or words to that effect" simply because there are so

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1 C. ARGUMENT

2 3 1. **DEFENDANTS SIMPLY REFUSE TO USE THE INTERMEDIATE SCRUTINY STANDARD ORDERED BY THE NINTH CIRCUIT AND CONTINUE TO ARGUE THAT THE RATIONAL BASIS TEST APPLIES.**

4 Although defendants pretend that they are applying the constitutional standard which the 5 Ninth Circuit held applicable to this case, in fact they eschew intermediate scrutiny and 6 consistently argue that the application of the DADT to Major Witt meets the rational basis test. 7 For example, defendants argue that "[w]hen Congress enacted DADT in 1993, it *could* 8 *rationally have believed* that" conduct like Witt's could undermine unit cohesion. DMSJ at 3, *l.* 9 1-4 (italics added). Similarly, they argue that "Congress *could have rationally concluded* that 10 [the] findings [in 10 U.S.C. § 654(a)] apply to specific facts such as those of the plaintiff's 11 military service . . ." *Id.*, at 3, *ll.* 22-23 (italics added).[16]

12 But the Ninth Circuit explicitly *rejected* the defendants' contention that rational basis review 13 was appropriate: "We cannot reconcile what the Supreme Court did in *Lawrence* [*v. Texas,*] 14 539 U.S. 558 (2003)] with the minimal protections afforded by traditional rational basis 15 review." *Witt v. Department of the Air Force*, 527 F.3d 806, 816 (9th Cir. 2008). The *Witt* 16 opinion notes that *Lawrence* had criticized and overruled *Bowers v. Hardwick*, 478 U.S. 186 17 (1986) precisely because *Bowers* failed to recognize that judicial review of a law restricting a 18 due process liberty interest "does not sound in rational basis review." *Id.* at 817. Thus *Witt* 19 unambiguously rejects the very test that defendants now seek to have this Court employ:

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21 many ways to communicate things without telling vocally, if you understand me. So with that objection on the record, you go ahead.

22 BY MR. PHIPPS: Do you need clarification on what I mean by "tell"?

A. Yes, please.

23 Q. I will say "tell" means verbalize or in writing or other form of direct, expressive communication initiated by you.

24 A. ***No.*** (Emphasis added).

[16] *See also id.* at 8, *l. 28*: "Congress could have rationally concluded"; *id.* at 9, *ll.* 14-15 (same phrase, which 25 defendants falsely attribute, without any citation, to the Ninth Circuit Court of Appeals, despite the fact that the Court never used that phrase); *id.* at 10, *l.* 19 (same phrase); *id.* at 12, *l.* 27: "Congress could rationally have 26 adopted the fifteen congressional findings") *id.* at 13, *ll.* 25-26: "Congress could have rationally contemplated"; and *id.* at 15, *l.* 6: "Congress could have rationally predicted".

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> Under rational basis review, the Court determines whether governmental action is so arbitrary that a rational basis for the action cannot even be conceived *post hoc.* If the [*Lawrence*] Court was applying that standard -- "a paradigm of judicial restraint," *[FCC v.]Beach [Communications, Inc.,]* 508 U.S. [307,] at 314, 113 S.Ct. 2096 [(1993)] -- it had no reason to consider the extent of the liberty involved. Yet it did, ultimately concluding that the ban on homosexual sexual conduct sought to "control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." *Lawrence,* 539 U.S. at 567, 123 S.Ct. 2472. ***This is inconsistent with rational basis review.***

Witt, 527 F.3d at 817 (emphasis added).

Despite the Ninth Circuit's explicit rejection of a constitutional test which asks "whether DADT has some hypothetical, posthoc rationalization in general," *id.* at 819, the defendants simply persist in characterizing the proper question as "whether Congress could have rationally predicted" that someone like Major Witt "would create an unacceptable risk" to the standard of unit cohesion believed to be necessary for military performance. DMSJ at 15, *ll.* 6-7.

The proper test is not what a "rational" 1993 Congress could have hypothetically predicted would be the effect, 17 years later, of allowing a lesbian officer like Witt to serve in some hypothetical military unit. The proper test is whether defendants can prove to the satisfaction of this Court that allowing Witt to serve in the 446th today would in fact cause harm to unit cohesion which could not be remedied by any means other than her discharge.[17] While defendants argue that the enactment of general "findings" in 1993 shows that application of the policy to Witt is constitutionally permissible, the Ninth Circuit rejected this contention as well, noting that Congress obviously never made any findings regarding Major Witt:

> The Air Force attempts to justify the policy by relying on congressional findings regarding "unit cohesion" and the like, but that does not go to whether the application of DADT specifically to Major Witt significantly furthers the government's interest and whether less intrusive means would achieve substantially the government's interest.

[17] In 1993, Major Witt was not in the 446th AES and was not stationed at AFB McChord. She was at Scott AFB in Illinois and was a member of the 375th AES. *Decl. Witt,* ¶ 3 (Docket #9).

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1 *Witt*, 527 F.3d at 821 (footnote omitted).[18]

2 **2. THE DEFENDANTS HAVE ONLY THEMSELVES TO BLAME FOR THE**
3 **LACK OF "GEOGRAPHIC UNIFORMITY" SINCE THEY CHOSE NOT TO SEEK SUPREME COURT REVIEW. THE MERE FACT THAT THERE ARE**
4 **TWELVE CIRCUITS DOES NOT JUSTIFY REFUSAL TO FOLLOW THE LAW OF THIS CIRCUIT.**

5 Defendants bemoan the fact that Witt's "continued military service would result in the
6 application of a different personnel policy to her than to other service members, such as those in
7 the First Circuit, where the DADT statute was upheld as constitutional." DMSJ at 12, *ll.* 1-4,
8 citing *Cook v. Gates*, 528 F.3d 42, 60 (1st Cir. 2008). They contend that this situation causes
9 "perceived unfairness to other service members. . ." *Id.* Major Witt agrees that the existence of
10 different rules is likely to be perceived as unfair by those gay and lesbian servicemembers
11 residing in the First Circuit who, like the Cook plaintiffs, were discharged under DADT because
12 of their orientation. In Witt's view, the First Circuit decision is erroneous and hopefully
13 someday it will be overturned and a uniform rule allowing gays and lesbians to serve openly will
14 be adopted in all of the circuits.

15 Witt, however, did not have the option of seeking certiorari in *Cook* since she was not a party
16 to that case. And since Witt prevailed in the Ninth Circuit in this case, she had no occasion to
17 seek certiorari in her own case. But the defendants had the opportunity to seek certiorari in this
18 case and decided not to. The existence of a circuit split is, of course, a powerful reason for a
19 party to seek, and for the Supreme Court to grant certiorari review. *See, e.g., Rotella v. Wood*,
20 528 U.S. 549, 553 (2000). Since the defendants *chose* not to seek certiorari, preferring instead to
21 return to this Court and to try this case under the intermediate-scrutiny, as-applied standard
22 adopted by the Court, they cannot complain about the circuit split. Defendants have only
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24 [18] Even if Congress were to pass a law tomorrow, containing specific "findings" that Major Witt's reinstatement
25 to the 446th AES would likely have a significant negative impact on unit cohesion," it would still be constitutionally erroneous to review this determination by asking whether Congress' specific judgment as to
26 Witt was "rational." The proper test would still be, is this Court convinced that reinstatement of Witt would cause such a harm and that the harm could not be avoided by any means.

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themselves to blame for the fact that the current split between two circuits went unreviewed.[19]

In any event, the fact that a circuit split currently exists is not a justification for attempting to ignore the fact the *Witt* intermediate scrutiny as-applied standard is presently the law of this Circuit and thus it governs the trial of this case. As General Laich said during his deposition, the armed forces obey the orders of the federal courts and they apply them, even if the orders from courts in different parts of the country set forth different ("non-uniform") legal rules.[20] "[A]s to the argument that Major Witt's continued service would mean that the Air Force personnel policies would not be uniformly applied across geographical boundaries, this argument is a red herring. The Air Force has the ability to amend its personnel policies to comply with the court's decision." *Deposition General Dennis John Laich*, at 151:11-17. Since the military is subject to the law and to the orders of the courts like everyone else, General Laich stated the obvious: "The fundamental conclusion here is that if Congress and/or the courts interpret that law to mean a certain thing and the military is subject to or affected by that law, they will comply with that law." *Id.* at 153:6-10. Even if the law "would [not] be uniform in its application across every geographical boundary if different courts reach different results," the military would still "comply with the law organizationally" by applying different rules in different parts of the

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[19] Defendants assert that if Witt's discharge were to be overturned, "uniform application would be replaced by a region-by-region application of the DADT statute," and that "to avoid that result it was necessary that [she] be discharged and that she remain discharged." DMSJ, at 12, *ll.* 20-22. This strange argument ignores the fact that at the time Witt was discharged *there was no circuit split* because no circuit court had ruled on the post-*Lawrence* constitutionality of the DADT statute. Moreover, since the Ninth Circuit decision was rendered *before* the First Circuit rendered its decision in *Cook*, it was the First Circuit that created a circuit split. According to the defendants' logic, in order to insure nationwide uniformity, the First Circuit should not have ruled against the Cook plaintiffs; instead, it should have followed the Ninth Circuit's approach thereby ensuring a "uniform" rule.

[20] At his deposition, counsel for the defendants asked General Laich about the consequences of having a non-uniform Congressional policy by posing this hypothetical: "So if Congress were to repeal the statute only with respect to Florida do you see any problems associated with unit cohesion and morale that could follow from that geographic based repeal?" *Dep. General Dennis John Laich*, 150:7-10. General Laich first noted that such a limited repeal would be advantageous to the country because "in the State of Florida you would have the benefit of the service of gay or lesbian servicemembers who might not otherwise be inclined to or have the opportunity to serve." *Id.* at 150:19-22. Significantly, he then noted that the fact that there would be one rule in one State and a different rule in the other 49 states would *not* pose a logistical problem for the armed forces: "[T]he fact is that the services make regulations and policies subject to the law. So if Congress passed a law that says in Florida you can do this, my understanding of the relationship between the military and the law is that the military would accommodate the sense of Congress and the law." *Id.* at 151:3-8.

country simply because the military is "subject to the law." *Id.* at 152:11-14.

Finally, it should be noted that nothing stops the Air Force from applying the so-called Witt standard all across the country. It is simply the Defendants *choice* not to apply the legal standard articulated by the Ninth Circuit in other geographic areas. The *Cook* decision does not *require* the defendants to provide less rigorous constitutional scrutiny to the discharges of gay and lesbian servicemembers within the First Circuit. Defendants are free to apply the *Witt* standard to all the other parts of the country, and given the fact that defendant Gates has testified before a Senate committee that the Department of Defense is currently preparing for the complete repeal of DADT (*see* Docket #112, Appendix A, Bates No. 2911), the Defendants' failure to apply the *Witt* standard to servicemembers in other parts of the country is inexplicable.

3. COURTS DO NOT GIVE DEFERENCE TO CONGRESS WHEN MAKING "AS-APPLIED" JUDGMENTS BECAUSE THERE IS NOTHING TO GIVE DEFERENCE TO.

Defendants persist in making nonsensical arguments about the need to give deference to Congress' determination in this case. Citing to *Turner Broadcasting System v. F.C.C.*, 520 U.S. 180, 195 (1997), defendants argue that the findings and predictive judgments of Congress are entitled to substantial deference. DMSJ at 13, *ll.* 16-17. But *Turner* involved a *facial* challenge to a statute, not an as-applied challenge. *Turner*, 520 U.S. at 195. The whole point of avoiding the question of a statute's *facial* constitutionality in favor of an as-applied judicial determination is that the courts avoid the question of whether Congress' judgment was erroneous in *all* cases, in order to focus more narrowly on the facts of the specific case and the specific individual to whom the statute is being applied. This is "the preferred course of adjudication since it enables courts to avoid unnecessarily broad constitutional judgments." *Witt*, 527 F.3d at 819, quoting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447 (1985). Moreover, unlike judicial review of the conduct of civilian authorities, judicial review of the acts of military

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authorities is conducted precisely because it causes *less* interference and allows the military greater flexibility. *Parker v. Levy,* 417 U.S. 733, 760-61 (1974). *Accord United States v. Marcum*, 60 M.J. 198, 206 ("we consider the application of Lawrence to Appellant's conduct. . . it's application must be addressed in context and not through a facial challenge").

In the present case, defendants suggest this Court should defer to Congress' judgment, but since Congress made no judgment as to how to apply DADT to Major Witt, there is nothing to defer to. Defendants ignore this and simply pretend that Congress' 1993 judgment about the overall composition of the armed forces amounted to a judgment about how Major Witt's return to AFB McChord would affect the unit cohesion of the 446th AES.

4. DEFENDANTS DID NOT DISCHARGE WITT FOR ADULTERY AND THE ADMINISTRATIVE DISCHARGE BOARD MADE NO FINDINGS ON THE SUBJECT. THE FACT THAT THE DEFENDANTS ARGUABLY "COULD HAVE" FILED COURT MARTIAL ADULTERY CHARGES IS IRRELEVANT TO THIS CASE.

Defendants note that at her deposition the plaintiff admitted that in October of 2003 she had engaged in a sexual relationship with a married civilian woman roughly 1-2 months before that woman separated from her husband. DMSJ, at 6, citing *Dep. Witt*, 113:21 – 114:22. Eventually, the civilian woman obtained a final decree of divorce in December of 2004. Major Witt and that civilian woman have remained in a committed relationship and are still in that relationship today, nearly seven years later. *Decl. Margaret Witt in Support of Opposition to Defendants' Summary Judgment Motion* ("DWOSJ"), ¶ 8.

Defendants point out that an act of adultery "frequently leads to disciplinary action and courts-martial," and that "adulterous behavior by an officer is likely to be prejudicial to good order and discipline." DMSJ, at 10, *ll.* 17-21. They proceed to argue that "by reducing th[e] risks [of adulterous behavior], plaintiff's discharge furthers unit cohesion, morale, and good order and discipline." *Id.* at 11, *ll.* 4-5.

Whatever the merits of the abstract argument that some hypothetical administrative

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1 discharge might have been justified because an act of adultery might have created a unit morale
2 problem, such an argument has no relevance here because the Air Force never sought to take
3 disciplinary action, or to file court-martial charges, or to seek an administrative discharge on
4 those grounds. In fact, the only time adultery was ever mentioned was when the appointed
5 investigator, Major Adam Torem, confirmed that no one was interested in taking any
6 disciplinary action on these grounds. Major Torem's investigative report, which defendants
7 have placed in the record, clearly states:

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> Despite her probable commission of adultery . . ., a violation under the UCMJ, it is my understanding that *it was never the intention of 446 AW/JA to pursue criminal prosecution of Maj Witt for any such offense.* Even so, if Maj Witt's immediate commander reviews the evidence and determines that the adulterous behavior described is sufficiently aggravating, then a general discharge may be warranted (see AFI 36-3209, para A2.2.2). In this case, the characterization of Maj Witt's service could be used as a negotiating tool to avoid any insistence on her behalf of pursuing the matter to an administrative discharge board.

13 Docket #119-5, at pp. 28-29. Moreover, Witt's immediate commander, Colonel Mary Walker,
14 did *not* decide to recommend that a general discharge be given due to the adulterous behavior.
15 No mention of it was made in the Notification of Initiation of Separation Action sent to Major
16 Witt. Docket #119-3, at p. 31 ("discharge action is being initiated against you for homosexual
17 conduct"). The Notification included "a description of the reasons for this discharge action" in
18 an attached "Statement of Reasons." *Id.* The Statement of Reasons referenced only
19 "Homosexual Conduct, AFI 36-3209, CHAP 2, PARA 2.30.1" and stated: "You made oral
20 statements claiming that you were a homosexual, or words to that effect, and you engaged in
21 homosexual sexual relationships." *Id.* at p. 36.

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5. DEFENDANTS HAVE FAILED TO RAISE A MATERIAL ISSUE OF FACT AS TO WHETHER ALLOWING GAYS AND LESBIANS TO SERVE OPENLY WOULD CAUSE A DECREASE IN UNIT COHESION.

24 Defendants have not presented even a scintilla of evidence to support the proposition that
25 allowing gays and lesbians to serve openly in the armed forces would harm unit cohesion.
26

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Instead, defendants rely *solely* on the Congressional "finding" in 10 U.S.C. § 654(a) that such a presence would "create an unacceptable risk" to unit cohesion in general. Although the Ninth Circuit has held that the constitutionality of DADT must be determined on a case-by-case as-applied basis, defendants eschew this burden and attempt to rely on the opinion of Congress. The defendants have failed to identify any witness who is prepared to testify that the open presence of gays and lesbians in the armed forces *will in fact* cause a decrease in unit cohesion.[21]

6. DEFENDANTS HAVE FAILED TO RAISE A MATERIAL ISSUE OF FACT AS TO WHETHER REINSTATING MAJOR WITT WOULD CAUSE A DECREASE IN UNIT COHESION WITHIN THE 446th.

When asked, General Stenner confirmed that he knows "nothing" about Major Witt's Air Force career; had never read her personnel file; knew "nothing" about the 446th unit members and their social interaction with Major Witt since she had been discharged; was unable to describe the unit culture of the 446th; and had no opinion on the subject of whether or not the reinstatement of Major Witt would negatively affect unit morale or cohesion. *Dep. Charles Stenner*, 39:4-23, 42:3-20, 91:13-21. Similarly, when asked, Colonel Moore-Harbert testified that no one has ever even suggested to her that Major Witt's reinstatement would have a negative impact on the unit morale or discipline. *Dep. Moore Harbert,* at 123:16-20 ("I don't remember hearing that from anybody."). Moore Harbert acknowledged that she had "no evidence" that anyone would be uncomfortable if Witt returned to the unit. *Id.* at 187:7-10. While she said she had "a concern" that Witt's return might make someone uncomfortable, she acknowledged she had "no evidence" that Witt's return would cause any decrease in unit cohesion. *Id.* at 186:9-13.

Since *no evidence* exists on this point, the defendants cannot carry their burden of proof to

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[21] Their expert witness, General Charles Stenner, did not even know that U.S. allies such as Canada, the United Kingdom, and Germany, allow gays and lesbians to serve openly; he is unaware of any instance where U.S. service members had failed to treat a NATO soldier respectfully because the NATO soldier was gay or lesbian; he has never done any research on those foreign militaries that do allow gays and lesbians to serve openly; and he has no knowledge of how those militaries carried out their day-to-day logistics, living arrangements, showers, dining facilities for their soldiers. *Deposition Charles Stenner*, at 114: 8 – 115:6, 116:8-19.

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meet the test set by the Ninth Circuit. Thus, they are not entitled to summary judgment, and plaintiff Witt is entitled to summary judgment on her cross-motion.

7. DEFENDANTS HAVE FAILED TO RAISE A MATERIAL ISSUE OF FACT AS TO WHETHER THERE IS A LESS RESTRICTIVE ALTERNATIVE TO WITT'S DISCHARGE WHICH WOULD ENSURE CONTINUED GOOD UNIT COHESION.

a. Evidence of How Colonel Moore-Harbert Applies DADT Within the 446th Proves that there are Less Intrusive Means to Achieve Defendants' Interests Than Discharging Major Witt.

Defendants argue that Major Witt must be discharged because the uniform application of its military rules is "essential to unit cohesion and morale." DMSJ, at 11, *ll.* 15-16. Stated differently, allowing Major Witt, a known lesbian, to continue to serve would allegedly disrupt unit morale because "that would mean that Air Force personnel policies were not uniformly applied" and that would supposedly disrupt unit cohesion." *Id.* at *ll.* 24-28. To support this point, Defendants provide the opinion of General Charles Stenner. *Id.*

In offering General Stenner's opinion, Defendants utterly ignore the fact that not only is there a lack of uniformity in the legal rules applicable in the First and Ninth Circuits, there is a lack of uniformity within the Ninth Circuit and within the 446th AES itself, because defendant Moore-Harbert does not apply DADT uniformly.[22] Defendant Moore-Harbert permits known lesbians to continue to serve (i.e., SM-C and other members of the 446th). Captain Jill Robinson has testified that she was present when Moore-Harbert told servicemember C that Robinson had not outed her. *Dep. Robinson*, 39:20 – 51:22. Thus, although she has known for several years now that C is a lesbian, Moore-Harbert has never initiated any suspension or discharge of either C or D (C's roommate and domestic partner). Thus, technically Moore-Harbert has been continuously violating the Air Force regulation that requires the initiation of discharge proceedings when there is credible information that a

[22] At his deposition General Stenner conceded that when he formulated his expert opinion regarding the need for uniformity in the application of DADT he had no knowledge of the fact that Colonel Moore-Harbert, had failed to apply DADT in a uniform manner and had failed to initiate separation proceedings against servicemember C even though Moore-Harbert knew C was a lesbian and had been in a dating relationship with another lesbian member of the 446th. *Dep. Stenner*, 100:18 – 101:16.

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servicemember is gay or lesbian. Undoubtedly Moore-Harbert chose not to follow the regulation because servicemember C was a highly qualified, experienced, well-respected member of the squadron who did her job and who caused no unit cohesion or morale problems whatsoever. But the disparate treatment of Major Witt and servicemember C simply demonstrates that there is no need for uniformity. Not only is there no need for uniformity between application of the rule in different geographic parts of the country; there is no need for uniformity *within* the very same unit. Moore-Harbert's treatment of C demonstrates that it was not only entirely possible to have a known lesbian serve in the 446th without causing any problems, *it has already happened and it continues to be the case today.* The presence of C in the unit, a widely known lesbian, demonstrates that it does not undermine unit cohesion to have a known lesbian serving in the unit.

The fact that Moore-Harbert choose instead to pretend that she didn't know servicemember C was a lesbian simply illustrates the pressures upon commanders faced with having to implement DADT.[23] They can choose, as General Crabtree has consistently done, to apply DADT by proceeding with administrative discharges even though they know that the

---

[23] As General Laich stated in his Rule 26(a)(2) expert witness report, unit commanders, like the enlisted servicemembers they command, generally think DADT is "senseless," but because they are required to apply DADT they are routinely put in a difficult position that requires them to choose between acting dishonestly so as to retain good soldiers whom they know are gay and lesbian, or acting in conformity with DADT and thereby causing the discharge of good soldiers whose sexual orientation is not causing any problem whatsoever:

> I have discussed DADT and the concepts of unit cohesion, morale, good order and discipline with a wide range of service members before and after my retirement. There is a general theme in their views with the same differences based on age, rank, and assignment. The vast majority of young enlisted service members think DADT is senseless, detracts from military readiness, and that the open service of gays and lesbians would have no adverse impact on unit cohesion, morale, good order and discipline. The majority of junior and mid-grade NCOs and company grade officers hold the same view as the young enlisted soldiers with one significant difference: they express frustration that DADT places them in a moral dilemma in that they are, or may be forced to, pursue discharge of a fully qualified, experienced, well-respected member of their formation due to that person's sexual orientation, thereby degrading the combat readiness of the unit. In the alternative, if the leader chooses not to pursue discharge, that individual will be viewed by subordinates and/or peers as a leader who does not uphold standards; a no-win situation into which we force the young uniformed leaders of American sons and daughters.

Rule 26(a)(2) Expert Witness Report of Major General (Ret) Dennis John Laich, attached to *Lobsenz Declaration* as Appendix A.

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servicemember in question is fully qualified and is not causing any problems. Alternatively, they can lie, as Moore-Harbert has done, and falsely pretend that they have no knowledge that the servicemember is gay or lesbian, and thus they retain a good servicemember at the expense of disobeying the regulations which are on the books.

b. Defendants Have Failed to Present Any Evidence to Contradict the Fact That Many Gays and Lesbians Have Served in the 446th For Decades, and That Despite the Fact That Their Presence is Well Known, Their Presence Has Caused No Problems.

Plaintiff has put in the record the testimony of over a dozen members of the 446th, all of whom have attested that the sexual orientation of their fellow servicemembers is of no concern to them, and that they have served with people they have known or believed to be gay and lesbian without encountering any difficulties or problems. Defendants have offered nothing to contradict this evidence.

c. Defendants Have Failed to Present Any Evidence to Contradict The Fact That The Armed Forces of Twenty-Three Other Countries Allow Gays and Lesbians to Serve Openly Without Experiencing any Unit Cohesion or Military Readiness Problems.

Defendants have offered no evidence to contradict the evidence that twenty-three countries have abandoned bans on openly gay and lesbian military service and that none of these countries have encountered any problems whatsoever. Consistent with the expert opinion provided by Professors Kier and Frank, General Laich has testified:

> Since 1993, we have seen -- we've seen a number of militaries change their policy with regard to the open service of gays and lesbians. Several of those Britain, Canada, and Australia, that most informed observers of these issues would agree are culturally most analogous to the United States of any countries in the world based on history, language, and tradition, have opened their militaries to open gay service, none of them have seen a deterioration of morale, discipline, good order, or unit cohesion.
>
> All of them wrestled around with some of the same arguments that we are today. And all of them have said that it's a non-event.
>
> Their move from policies and regulations analogous to what the U.S. military policy with regard to open service is today, they changed, heard the same arguments that are being offered today and have been since 1993, and their

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> experience is that it's a non-event.
>
> I hold that opinion as a result of not only personnel discussions that I've had with officers from two of those three countries, but also a seminar or a conference that was held last month in Washington, D.C. sponsored by the Brookings Institute and the Palm Center, of which it was unambiguously confirmed by senior representatives from those countries that their transition from policies analogous to Don't Ask/Don't Tell to open service have been non-events and fundamentally have enhanced readiness in their militaries.

Dep. General Laich, 83:14 - 84:18.

In response, the Defendants have offered nothing. Their own expert witness, General Stenner, concedes he has no knowledge whatsoever about these military personnel policies of our allies, or of their experience in allowing gays and lesbians to serve openly. *Dep. Stenner*, 114: 8 – 115:6, 116:8-19.

8. DEFENDANTS ADMIT THAT WITT'S DISCHARGE WAS NOT TRIGGERED BY ANY NEED TO SAFEGUARD THE UNIT COHESION OF THE 446th. THEY ADMIT THAT THEY CREATED THE THEORETICAL POTENTIAL FOR A UNIT COHESION PROBLEM BY INITIATING HER SEPARATION. THUS, THERE WAS AN OBVIOUS LESS RESTRICTIVE ALTERNATIVE – THEY COULD HAVE DONE NOTHING, IN WHICH CASE NO ONE IN THE 446th WOULD EVER HAVE KNOWN ABOUT HER SEXUAL ORIENTATION.

In a recently filed brief (Docket #124), Defendants concede that the process of discharging Major Witt was not initiated because there was a perception that her presence in the unit caused any unit cohesion problem:

> The only alleged material fact that Plaintiff identifies concerning the supposed "order" is that "the investigation into Major Witt's sexual orientation was not triggered by any allegation of her disruption to unit cohesion or morale, but rather by outside sources." *See* Pl's Mot. at 2. But that point of fact is not in dispute.

Defendants' Opposition to Plaintiff's Motion for Sanctions, at 6, *ll.* 11-14.

Defendants thereby have conceded that the issue of the theoretical possibility of some harm to unit cohesion would never have even arisen had they not initiated separation proceedings. Had Major Witt not been suspended by Colonel Walker and ultimately discharged, no one in her unit would have ever heard anything about either Witt's former civilian partner Jensen or her

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current civilian partner. It was only because General Crabtree was ordered to commence separation proccedings that the members of the 446th learned in November that Major Witt was a lesbian. Neither Walker, nor Moore-Harbert, nor anyone else in the 446th would ever have known anything about Witt's sexual orientation, or about her relationships, if the Air Force had simply ignored the McChesney e-mail to General Jumper.

In sum, there was an obvious "less restrictive alternative." The alternative was *to do nothing*. Instead, the Air Force took action which insured that Witt's fellow members of the 446th would learn the facts which – the defendants allege, without offering even a scintilla of proof – have caused "an unacceptable risk" to the unit cohesion of the 446th. It is well settled that government actors cannot bootstrap their way into satisfaction of a requirement of showing a necessity for action. A government actor who creates a necessity for action where there was no such necessity, cannot claim that there no longer exists any less restrictive alternative, when the plain facts are that had the actor done nothing there would never have been any need for any further action at all. Just as police cannot justify the Fourth Amendment violation of shooting and killing a suspect by creating the danger that the suspect will hurt someone by attempting to escape by driving at high speeds, (*See. e.g., Haugen v. Brousseau,* 351 F.3d 372, 394 (9th Cir. 2003)(a high speed police vehicle "chase itself cannot create the danger that justifies shooting a suspect who, under Garner, may not otherwise be shot"), military authorities cannot create the alleged danger of a decrease in unit cohesion by doing the very thing that "Don't Ask, Don't Tell" directs gay servicemembers not to do: Telling. Here the defendants told the members of the 446th of Witt's sexual orientation, and now to deny the obvious fact that the alleged problem of the potential for a negative reaction by fellow unit members could have been entirely avoided by having chosen not to tell them.

9. WITT'S PROCEDURAL DUE PROCESS CLAIM SHOULD NOT BE DISMISSED. THE DEFENDANTS CLEARLY VIOLATED AFI 36-3209.

Defendants motion to dismiss Witt's procedural due process claim should be denied,

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1 (and in fact summary judgment should be granted in favor of Witt on that claim), because there
2 are no material facts in dispute. As a matter of law, the initiation of the separation proceeding in
3 this case was ordered by either General Robert Duignan, or by someone else who relayed an
4 order from General John Jumper. In either case, the investigation into Witt's sexual orientation
5 clearly was not ordered by Witt's squadron commander as required by AFI 36-3209.

6 The separation proceeding in this case was commenced in violation of an Air Force
7 regulation which was intended to provide procedural protection to servicemembers like Witt.
8 Therefore, Witt's due process rights were violated and the separation proceeding was unlawful
9 right from the start.

10 Air Force Instruction (AFI) 36-3209, entitled *Separation and Retirement Procedures for Air*
11 *National Guard and Air Force Reserve Members*, sets forth the rules which govern
12 administrative discharges. In Chapter 1, "*Administrative Separation of ANG and Air Force*
13 *Reserve Members Not on Extended Active Duty,*" ¶ 1.22 provides as follows:

14
15 > **1.22. <u>Unit Commander's (or Equivalent) Responsibilities</u>**. The unit commander will:
16
> 1.22.1. Examine and evaluate any information received that indicates a member should be considered for separation or discharge. . . .
17
18
> 1.22.7. ***A unit commander who receives information that a service member has engaged in homosexual conduct will follow the guidance in attachment 11 to determine whether an inquiry is warranted,*** and if so, the type and extent of inquiry to be conducted. If the commander determines a basis for discharge exists (see 2.30 and 3.20), he or she must initiate administrative discharge action (unless the conduct warrants trial by court-martial).
19
20

21 (Bold italics added).

22 In Chapter, Section 2B, under the subtitle of "General Instructions," ¶ 2.33 also expressly
23 refers commanders to Attachment 11 as follows:

24
25 > **2.33. <u>Guidelines for Fact Finding</u>**. ***Commanders shall refer to the guidelines*** for fact finding inquiries into homosexual conduct ***when determining whether to initiate an inquiry*** into the alleged homosexual conduct (**Attachment 11**).
26

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1 (Bold italics added).

2 Attachment 11 *Guidelines* expressly limit the authority to initiate a fact finding inquiry to the

3 service member's commander:

4 > **A11.1. Responsibility:**
5 > A11.1.1. ***Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct.*** A commander may
6 > initiate a fact-finding inquiry only when he or she has received credible information that there is a basis for discharge. ***Commanders are***
7 > ***responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.***
>
8 > A11.1.2. ***A fact finding inquiry may be conducted by the commander***
9 > ***personally or by a person he or she appoints.*** It may consist of an examination of the information reported or a more extensive
10 > investigation, as necessary.

11 (Bold italics added).

12 The Attachment 11 *Guidelines* expressly define the term "Commander," and make it

13 unequivocally clear that the term means the accused member's immediate commander at the

14 squadron level. Under ¶ **A11.6. Definitions,** the Guidelines provide as follows:

15 > A11.6.2. Commander. A commissioned officer who occupies a position of command. ***Unless otherwise specified, usually refers to the***
16 > ***commissioned officer who is the member's immediate commander.***
17 > ***This usually is the squadron commander*** and includes squadron section commanders appointed on appropriate orders.

18 (Bold italics added).

19 The Guidelines limit the authority of the member's immediate commander to initiate a fact

20 finding inquiry by requiring that such inquiries only be initiated if the commander possesses

21 credible information:

22 > **A11.2. Basis for Conducting Inquiries.** A commander will initiate an
23 > inquiry ***only if he or she has credible information*** that a basis for discharge exists.

24 (Bold italics added). A basis for discharge exists if the member has engaged in a homosexual

25 act, said that he or she is a homosexual, or has married or attempted to marry a person of the

26 same sex. Guidelines, Attachment 11, ¶¶ A11.2.1, A11.2.2, & A11.2.3.

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Finally, 11.3.2. reaffirms the directive that it is only the member's unit commander that can make the decision whether to initiate a fact-finding inquiry:

> A11.3.2. ***Commanders*** shall exercise sound discretion regarding when credible information exists. ***They shall examine the information and decide whether an inquiry is warranted or whether no action shall be taken.***

(Bold italics added).

It is undisputed that Colonel Walker was Witt's immediate squadron commander and that she did not initiate the fact finding inquiry in this case. *Deposition Mary Walker*, 102:3-23.[24] The investigation into Witt's sexual orientation was ordered by some unknown person at AFRC who "directed [General Crabtree] to do an investigation." *Dep. Crabtree*, 14:21 – 15:17. The written order sent to Crabtree has apparently been lost. Crabtree, sought and obtained additional authority from General Robert Duignan to commence the investigation. *Id.*, 28:13-22; 29:16-23. Neither of the two people who ordered General Crabtree to start an investigation was the squadron commander of the 446th AES, and thus the Air Force regulation was clearly violated.

Of course not every agency violation of a regulation constitutes a due process violation. However, when a regulation is designed to protect the interests of the party before the agency, violation of such a regulation does constitute a due process violation:

> The Supreme Court has long recognized that a federal agency is obliged to abide by the regulations it promulgates. [Citations]. An agency's failure to follow its own regulations "tends to cause unjust discrimination and deny

[24] "Q. What I'd first like to direct your attention to is 11.1. That first page there, A11.1, it's entitled "Responsibility." Would you agree with me that this first sentence, let me read it, "Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct." It goes on after that, and if you feel that the rest of that is important to my question, you let me know. But I would like to ask you now, ***do you agree with me that the only person who could initiate fact-finding inquiries into homosexual conduct in this case was you?***

MR. PHIPPS: Objection. Foundation.

THE WITNESS: ***I agree.***

MR. PHIPPS: Calls for a legal conclusion and improper lay opinion.

Q. (By Mr. Lobsenz) ***And you didn't initiate this fact-finding inquiry, did you?***

A. ***No, I did not.***

Q. ***And you did not appoint Major Torem, did you?***

A. ***No, I did not.***"

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> adequate notice" and consequently may result in a violation of an individual's constitutional right to due process. [Citations]. ***Where a prescribed procedure is intended to protect the interests of a party before the agency, "even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed."***

Sameena, Inc. v. United States Air Force, 147 F.3d 1148, 1153 (9th Cir. 1998) (bold italics added). *Accord Lopez v. Fed. Aviation Admin.*, 318 F.3d 242, 247 (D.C. Cir. 2003).[25]

In this case, the regulation's express limitation of the authority to initiate fact finding inquiries into allegations of homosexual conduct is designed to protect the interest of Air Force members against abuse of authority and the meddling of commanders outside the member's immediate unit. Because the regulations are intended to protect service members like Major Witt, they "must be scrupulously observed." *Id.* In this case, they were blatantly violated. Within Major Witt's squadron, everyone was not only satisfied with her conduct, they agreed that her conduct was exemplary, that she was extremely knowledgeable, very well respected, and that she contributed in a very positive way to the morale and discipline of the unit. Instead of allowing her own squadron commander to decide "whether an inquiry is warranted *or whether no action shall be taken*," as directed by ¶ A11.3.2 (italics added), higher ranking officers outside the immediate chain of command interfered and made the determinations which the squadron commander was supposed to make. This violation of regulations intended to protect Major Witt and her immediate commander from such outside interference violated both AFI 36-3209 and the due process clause of the Fifth Amendment.

10. PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF IS NOT MOOT.

In support of their assertions that Plaintiff's requests for injunctive relief have been rendered moot, Defendants failed to cite binding Ninth Circuit precedent. Moreover, Defendants' assertions are fundamentally incorrect for the following reasons.

---

[25] "[T]his court has been careful to distinguish between procedural rules benefiting the agency [citation] and procedural rules benefiting the party otherwise left unprotected by agency rules [citation] . . . These distinctions are particularly visible in the employment context, where this court has long recognized that . . . agencies cannot 'relax or modify' regulations that provide the only safeguard individuals have against unlimited agency discretion in hiring and termination."

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1 First, in Plaintiff's Complaint, she requested injunctive relief prohibiting Defendants from
2 "failing to promote her, or *from taking any other action to hinder her career as an officer of*
3 *the United States Air Force*…." (Docket #1, Prayer for Relief (d), at 16) (emphasis added)).
4 By discharging Plaintiff, Defendants directly *hindered* Plaintiff's career as an Air Force
5 officer; the fact that Plaintiff now seeks to enjoin her actual discharge (as opposed to a
6 threatened discharge) is of no consequence. *Garcia v. Lawn, D.E.A.*, 805 F.2d 1400, 1403
7 (9th Cir. 1986) ("The government also suggests that because the precise action sought to be
8 enjoined is no longer a threatened discharge, but an actual discharge, the case is moot because
9 an injunction against transfer is no longer appropriate. Yet . . . the question is not whether the
10 precise relief sought at the time the application for an injunction was filed is still available.
11 The question is whether there can be any effective relief…."). Thus, Plaintiff's prayer for
injunctive relief is very much alive.

12 Second, Plaintiff's discharge does not moot her requests for injunctive relief because
13 courts may in fact "undo what has already been done" when the act "done" is the discharge of
14 an employee. The Ninth Circuit expressly decided this point in *Garcia* when considering a
15 challenge to an employment decision that had been made during the pendency of plaintiff's
16 action seeking injunctive relief:

17 > The question thus becomes whether we can now give appellant effective relief which would "undo" the effects of the alleged retaliatory [employment] action
18 > . . . What has happened since the district court's order is that the defendant has completed the acts which it threatened at the time the injunction was sought.
19 > This, however, does not render the matter moot. "It has long been established
20 > that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the
21 > status quo " . . . The result which the appellant sought in the district court and continues to seek here, is the continuation of his employment with the DEA . .
22 > . An order reinstating him to his prior position would have precisely that effect, returning matters to the status quo that existed at the time the original
23 > claim for injunction was filed.

24 *Id.* at 1402-03 (quoting *Porter v. Lee*, 328 U.S. 246, 251 (1946)). Further, faced with
25 challenges to military discharge decisions, civilian courts have ordered equitable relief in the
26 form of reinstatement. *See, e.g.*, *Yee v. United States*, 512 F.2d 1382 (Fed. Cl. 1975) (granting

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1 reinstatement to a former second lieutenant in the Air Force who alleged that he was
2 discharged improperly). It follows that, because this Court can order Plaintiff reinstated,
3 Plaintiff's requests for injunctive relief are not moot.

4 Further, the cases cited by Defendants in support of their position are inapposite. In
5 *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377 (9th Cir. 1978), the court considered a
6 challenge to the Secretary of Agriculture's decision to allow a private corporation to engage
7 in exploratory mining operations in a national forest. The court deemed the plaintiff's action
8 moot because, by the time the plaintiff's request for injunctive relief (to end the corporation's
9 operation) was heard, the corporation had already discontinued its operation. *Id* at 1379.
10 Hence, *Friends of the Earth* would be applicable to the case at hand *only if* Plaintiff had been
reinstated prior to this Court's review. Plaintiff has not been reinstated.

11 The second and final case cited by Defendants is similarly inapplicable. In *Rattlesnake*
12 *Coalition v. U.S. Environmental Protection Agency*, 509 F.3d 1095 (9th Cir. 2007), the court
13 dismissed the plaintiff's claim for injunctive relief—related to the preparation of
14 Environmental Assessments and Impact Statements prior to the implementation of a
15 wastewater facilities treatment plan— because the injury alleged could not be remedied: "The
16 injuries allegedly suffered by the [plaintiffs] include health problems and a decrease in the
17 enjoyment and value of their property . . . The [plaintiffs'] injuries cannot be redressed now
18 that the [wastewater treatment plant upgrade] is complete and the federal funds are
19 expended." *Id.* at 1103. In the case at hand, however, Plaintiff alleges an injury (discharge)
that can be redressed by this Court ordering reinstatement.

20 Finally, Defendants' assertion that equitable relief is not available to Plaintiff because
21 she can no longer satisfy the requirements for serving as a flight nurse in the Air Force
22 Reserve, misses the mark. Plaintiff is currently a registered nurse for the State of Washington
23 and is qualified to obtain a nursing position at any time. DWOSJ, ¶¶ 2 & 7. Moreover,
24 Plaintiff is currently enrolled in a two-year, post-graduate certification program for Nurse
25 Case Management and has assumed the authorship of two nursing textbooks; a nursing
26 degree was a prerequisite for both pursuits. *Id.*, ¶¶ 3 & 4. Additionally, in the spring of 2009,

Plaintiff accepted a position as a physical therapist at the Veterans Affairs Medical Center. *Id.*, ¶ 5. In her position, Plaintiff supervises and manages "Patient Care Services" (also known as "Nursing Services") in the Veterans Affairs Medical Center; her supervisors are both nurses; the majority of her group holds nursing positions; and, her job involves working with patients' medical conditions daily. *Id.* ¶5. Thus, plaintiff clearly can and does meet the qualifications for Air Force flight nurse.

D. CONCLUSION

For the reasons stated above, plaintiff asks this Court to deny the Defendants' motion for summary judgment, and to grant the plaintiff's motion for summary judgment.

DATED this 9th day of August, 2010.

/s/James E. Lobsenz
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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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