Judge Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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| MAJOR MARGARET WITT<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF THE AIR FORCE, et al.<br><br>Defendants. | No. C06-5195 RBL<br><br>**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**<br><br>**ORAL ARGUMENT REQUESTED** |

## INTRODUCTION

Plaintiff's motion for summary judgment in this action challenging her discharge under the military's so called 'Don't Ask, Don't Tell' ("DADT") statute, 10 U.S.C. § 654, should be denied.[1] Plaintiff's motion for summary judgment devotes only three pages to argument, *see* Pl.'s Mot. for Summ. J. at 22-24, all of which focus on the premise that no evidence exists for defendants' positions in this case. As made clear by defendants' motion for summary judgment,

[1] As the President has stated previously, the Administration does not support the DADT statute 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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however, there is ample evidence to demonstrate that defendants meet the standard required on remand by the Court of Appeals in this case. The existence of that evidence – much of which comes from plaintiff herself or her own witnesses – means that plaintiff's arguments fail, and summary judgment cannot be entered in her favor.

Plaintiff devotes the vast majority of her motion to a recitation of facts that overstates the evidence, and cannot be relied upon for summary judgment. These errors include misconstruing the testimony of senior military officials and relying on purportedly expert testimony that is not tailored to plaintiff or the Air Force Reserve. Plaintiff also attempts to use statements by her former co-workers to support her case against discharge. But those co-workers are not military commanders, and the military cannot operate by a unit referendum process in which disciplinary policies and outcomes are determined by the individual opinions of a few unit members. This is especially true here where those individual unit members were unaware (and some remain unaware) of the specific facts and circumstances of plaintiff's conduct in violation of the DADT statute. And, in any event, those few individuals could not purport to speak for other units with which plaintiff would potentially deploy.

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 (1974) (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 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) ("While service members clearly retain a liberty interest to engage in certain intimate sexual conduct, this right must be tempered in a 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.



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Plaintiff's claims for back pay, retirement credit, and reinstatement to her former position, – all of which she raises for the first time in her motion – are also inappropriate. This Court lacks jurisdiction to entertain plaintiff's claims for compensation for constructive service in the form of back pay and retirement credit. Those claims for relief fall within the exclusive jurisdiction of the Court of Federal Claims, and, in any event, such relief is not available as a matter of law. In addition, as made clear in defendants' motion for summary judgment, plaintiff cannot return to her former position as an Air Force flight nurse – she is no longer qualified to serve in that position because she has not been employed or worked voluntarily as a registered nurse for the necessary number of hours per year. And an order purporting to reinstate plaintiff to a particular position in a specific Air Force unit would be inconsistent with the deference that courts owe to core military affairs. Thus, even if plaintiff were successful on issues of liability, none of her newly-requested remedies are appropriate.

## ARGUMENT

### I. Plaintiff's Arguments For Summary Judgment Fail as a Matter of Law.

#### A. Plaintiff Misapplies the Ninth Circuit's Test on Remand and Fails to Undermine the Importance of the Governmental Interests That Were Before Congress When it Enacted the DADT Statute.

Plaintiff attempts to undermine the importance of the government's interest in military unit cohesion by claiming that there is no evidence that "primary group cohesion" enhances military effectiveness. *See* Pl.'s Mot. at 22. Whatever plaintiff means by "primary group cohesion," her argument is misdirected because the DADT statute was addressed to the cohesion of military units in the unique context of the armed services. *See* 10 U.S.C. § 654(a)(5)-(12). Moreover, plaintiff's argument about military effectiveness is foreclosed by the Court of Appeals's order and rationale for remand. The Court of Appeals evaluated the first factor of its as-applied test regarding the government's interest, *Witt*, 527 F.3d at 821, and concluded that the DADT policy "advances an important governmental interest," one that "concerns the management of the military." Furthermore, in setting forth the remaining factors for remand, the Court of Appeals specified that the important governmental interests that it found to be at issue



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here are "'unit cohesion' and the like." *Id.* The Court of Appeals also recognized the substantial deference that the judiciary owes to Congress in matters relating to Congress's authority to raise and support armies. *Id.*; *see also Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

Plaintiff has made several admissions to the same effect regarding the importance of the government's interest in military unit cohesion and morale. Plaintiff admitted that the "Air Force has an important governmental interest in the unit cohesion and morale of its service members," that "unit cohesion and morale are furthered by minimizing potential distractions, disturbances, or risks to unit cohesion and morale," and that sexual tension within a unit could "distract or disturb unit cohesion and morale." *See* Pl.'s Response to Req. for Admis. Nos. 1-3 (Feb. 15, 2010) (Ex. A). The declaration of Elizabeth Kier, an Associate Professor of Political Science at the University of Washington, on which plaintiff relies to argue to the contrary, is irrelevant to this as-applied determination. Professor Keir admits to never having read the DADT statute; her own research and her testimony in this case contradict the position she now takes in her declaration; and she did not take into account the evidence before Congress on which it reasonably could have relied when it enacted the DADT statute. *See* Kier Dep. at 41:16-23; *see also id.* at 118:20-119:15 (identifying study that found there *is* correlation between social cohesion and military performance) (Ex. B); Elizabeth Kier, *Homosexuals in the U.S. Military: Open Integration & Combat Effectiveness*, 23 INT'L SEC. 1, 18-19 (1998) (noting that "some analysts do argue that unit cohesion enhances military effectiveness"); *id.* at 8 ("Primary group cohesion is . . . one of the many factors that may influence a military's performance.").

At the time of the enactment of the DADT statute, Congress held lengthy hearings and considered evidence gathered from military commanders, gay rights activists, experts in military personnel policy, and interested civilians and members of the Armed Forces. *See generally* S. Rep. No. 112, 103d Cong., 1st Sess., 1993 WL 286446 (1993). Among other testimony, General Norman Schwarzkopf, U.S. Army (Ret.), testified that unit cohesion "is the single most important factor in a unit's ability to succeed on the battlefield." *Id.* at 275. Congress's legislative findings reflect its judgment in 1993 that, among other things, "military life is fundamentally different from civilian life" because of "the extraordinary responsibilities of the



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armed forces, the unique conditions of military service, and the critical role of unit cohesion." *Id.* § 654(a)(8)(A). The "military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society." *Id.* § 654(a)(8)(B). Indeed, the government's interest in unit cohesion and morale is longstanding in the military context and is particularly implicated by the conduct of commissioned officers. *See generally* 10 U.S.C. §§ 933, 934. Thus, the evidence on which Congress reasonably could have relied at the time of the DADT statute's enactment disproves plaintiff's claim that "no evidence" supports the importance of the government interests at stake.

**B. Contrary to Plaintiff's Summary Assertions, the Record Contains Ample Evidence to Support Plaintiff's Discharge Under An As-Applied Analysis.**

Plaintiff contends that there is no evidence that unit cohesion and morale would be harmed by gays and lesbians serving openly as a general matter or by her continued service in the 446th AES. *See* Pl.'s Mot. at 23. In support of these arguments, plaintiff relies solely on her putative expert witness, Professor Kier. *See id.* But, by her own admission, Professor Kier has no opinion on the issues critical to this as-applied remand:

> Q: Are you offering any opinion regarding the application of the Don't Ask/Don't Tell policy as it was applied specifically to Margaret Witt?
> A: No.
> Q: Are you offering any opinion about whether the specific discharge of Margaret Witt under the Don't Ask/Don't Tell policy had some effect on her unit's morale and cohesion?
> A: No.
> Q: Are you offering any opinion as to whether the specific discharge of Margaret Witt was necessary to promote unit morale and cohesion?
> A: No.

Kier Dep. at 13:20-14:7 (Ex. B). Thus, Professor Kier's narrowly circumscribed testimony cannot provide a basis for summary judgment in this as-applied context.

Plaintiff's assertion that no evidence exists that supports the constitutionality of the DADT policy as it was applied to her is disproved on its face by the facts set forth in defendants' motion for summary judgment. *See* Defs.' Mot. for Summ. J. at 5-15 (Docket # 118). Those facts include the congressional findings at the time of the enactment of DADT, *see* 10 U.S.C. § 654(a)(5)-(12), on which Congress reasonably could have relied, in combination with the



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testimony from plaintiff's squadron commander, Colonel Janette Moore-Harbert. *See id*. Indeed, the inaccuracy of plaintiff's claim that no evidence exists for her discharge under the DADT policy is refuted by several facts that come directly from plaintiff and her own witnesses. Contrary to the allegations before the Court of Appeals on the earlier motion to dismiss, plaintiff's conduct in violation of the DADT statute was not far removed from her position as a military officer. The Court of Appeals accepted as true, at that stage of the litigation, plaintiff's untested complaint allegation that plaintiff was in a relationship with a woman who "was never a member nor a civilian employee of any branch of the armed forces." *Witt*, 527 F.3d at 809. The record now shows, however, that plaintiff also had relationships at different times with two female Air Force officers. *See* Margaret Witt Dep. at 72:14 - 73:2 (Ex. C). The record also shows that plaintiff had an extra-marital relationship with a different civilian woman, that relationship prompted a complaint to the Air Force from the woman's husband who also was a civilian, and that complaint from the civilian community is what triggered an investigation into plaintiff's conduct. *See* Defs.' Opp. to Pl.'s Mot. for Sanctions at 6 (Docket # 124). Also, contrary to the allegation before the Ninth Circuit that plaintiff, while serving in the military, "never told any member of the military that she was homosexual," the record now is clear that plaintiff told two enlisted members of her unit. *See* Pl.'s Response to Interrog. No. 7 (Feb. 15, 2010) (Ex. A). Thus, plaintiff's particular conduct in violation of the DADT policy was the type of conduct that Congress rationally could have determined when it enacted DADT in 1993, could undermine unit cohesion, morale, good order, and discipline.

The negative impact of the type of conduct in which plaintiff engaged when she violated the DADT policy was not lost on plaintiff's own witness, Major General (Ret.) Dennis Laich. General Laich explained that in the military context particularly, extra-marital sexual relationships create unnecessary distractions that negatively affect unit cohesion and morale:

> Q: What about extra-marital sexual relations? Are those to your understanding consistent with the concept of officership or being a good officer?
> A: No.
> Q: Why not?
> A: Uhm, I think first of all that those, uhm – uhm, types of relationships are not only discouraged or looked upon negatively in the military, but in our



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> society as a whole and they can create some problems or distractions in an organization.
> And if the leader of the organization, assuming that you're asking the question around the command, it compromises integrity, candor, in the organization.

Laich Dep. at 62:25 - 62:12 (Ex. D). Building on General Laich's assessment, plaintiff herself admitted that extramarital sexual relationships are inconsistent with the high standards necessary to serve as an Air Force officer. *See* Witt Dep. at 46:8-13 (Ex. C) ("Q: Okay. From your understanding of the term 'officership,' are extramarital sexual relationships consistent with that concept? A: Officership? Q: Yeah. A: No."). Hence, as established by plaintiff's own evidence, plaintiff's continued presence in the unit presented a potential distraction, putting unit cohesion and morale at risk.

Plaintiff's conduct in violation of the DADT statute also involved other Air Force officers. *See* Witt Dep. at 72:14-73:2 (Ex. C); *see also* Pl.'s Resp. to Interrog. No. 7 (Feb. 15, 2010) (Ex. A). That type of conduct heightens the risk to unit cohesion, morale, good order, and discipline that Congress reasonably intended to guard against when it enacted the DADT statute. Plaintiff's disclosure of her sexual orientation to two enlisted members of her unit similarly made unit cohesion a particular issue in her case. *See* Pl.'s Resp. to Interrog. No. 7 (Feb. 15, 2010) (Ex. A) (identifying SMSgt James Schaffer and MSgt Jenaro Wirth as persons to whom plaintiff acknowledged that she was a lesbian before her discharge). Plaintiff's disclosure improperly placed those enlisted unit members in a position of choosing between loyalty to plaintiff as an officer in their unit, on the one hand, or adherence to the Air Force's policies and regulations on the other. According to another of plaintiff's witnesses, Dr. Nathaniel Frank, placing unit members in a situation where they may fear having to make such a choice is a type of conduct that would pose a direct risk to unit cohesion and morale:

> Q: So do you think if certain unit members are placed in a position where they may have to, quote, "tell on their friends," that's adverse to furthering unit cohesion and morale?
> A: I think the fear of having to do that could be adverse to morale in the unit.

Frank Dep. at 197:10-15 (Ex. E).

In sum, evidence that came directly from plaintiff and her witnesses demonstrates that,



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because of the particular circumstances of plaintiff's conduct in violation of the DADT policy, plaintiff's continued service could pose the type of risk to unit cohesion, morale, good order, and discipline, that Congress rationally could have anticipated in 1993 when it enacted the DADT statute. *See* 10 U.S.C. § 654(15).[2]

**C. Plaintiff's References to General Practices of Some Foreign Militaries and the Undertaking of a Study to Repeal the DADT Policy Do Not Undermine the Importance of the Government's Interests.**

Plaintiff asserts that no evidence exists regarding the third *Witt* factor, whether the application to her of the DADT policy is necessary to further unit cohesion and morale. *See* Pl.'s Mot. at 23-24. Plaintiff bases her argument on the experiences of some foreign militaries and on misconstrued statements of the Secretary of Defense.

Plaintiff argues that because at least 23 foreign militaries have permitted gay and lesbian service members to serve openly, those policies could be applied to the United States military. *See id.* at 19. It is far from clear that the experience of foreign militaries is relevant to the *constitutionality* of DADT. Plaintiff's evidence in this regard seems aimed principally at undermining the policy judgments that are committed to the political branches of the United States government. More to the point, plaintiff's argument is irrelevant to the as-applied analysis ordered by the Court of Appeals. Plaintiff offers no evidence as to how foreign militaries would treat her particular situation that included, for example, conduct in violation of the DADT statute that involved other members of the Air Force and that prompted a complaint from the civilian community. Thus, plaintiff's reliance on the experiences of foreign militaries is irrelevant to the specific as-applied inquiry required on remand.

Plaintiff overreaches in her reliance on the Secretary of Defense's recent testimony before the Senate Armed Services Committee. *See id.* at 21-22. Plaintiff points to the Secretary's

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[2] This evidence concerning the nature of plaintiff's conduct demonstrates that the facts before the Court now are different from the uncontested assertions plaintiff presented to the Court previously, and on which the Court of Appeals relied in concluding that *Lawrence v. Texas*, 539 U.S. 558 (2003), required an as-applied analysis on remand. *See Witt*, 527 F.3d at 809-10 (stating the facts that the Court of Appeals "presume[d] . . . to be true for the purposes of this appeal").



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statements that the military would study the repeal of the DADT policy to find ways to minimize any negative impacts. *See id.* But a study of how to implement a repeal in a global or uniform manner says nothing about whether there is a less restrictive means of implementing the DADT statute now in force with respect to plaintiff's particular conduct. The government's defense against plaintiff's as-applied challenge is not contrary to the Secretary's statements regarding a global repeal of the policy. Rather, the government has focused on the critical problems associated with a lack of uniformity in application of the current DADT policy. Application of the Ninth Circuit's decision to bar plaintiff's discharge notwithstanding the particular circumstances of her violations of DADT would pose a risk of conflicting applications of U.S. military personnel policies in different jurisdictions. *See Cook v. Gates*, 528 F.3d 42, 60 (1st Cir. 2008); *Able v. United States*, 155 F.3d 628, 631-36 (2d Cir. 1998) (upholding the constitutionality of the DADT policy); *Richenberg v. Perry*, 97 F.3d 256, 260-62 (8th Cir. 1996) (same); *Thomasson v. Perry*, 80 F.3d 915, 927-31, 934 (4th Cir. 1996) (*en banc*) (same).

The separate and distinct legal standard created by the Ninth Circuit for application of the DADT statute does not change the facts before Congress on which it reasonably could have relied or the importance of uniform personnel policies in the military. Because service members are subject to worldwide training missions and deployments, uniform personnel policies across the various jurisdictional lines are critical, and exceptions to such policies pose a particular risk to unit cohesion, morale, good order, and discipline in the military context. *See generally* Defs.' Supp. Resp. to Pl.'s Interrog. 12(d) (Ex. F). A reservist from Washington State can find herself deployed to Afghanistan with reservists and with service members from active components deployed from other states, and there is no meaningful distinction among those military personnel. In light of that need for uniformity in military personnel policies, there is no less restrictive means available for responding to plaintiff's particular conduct in violation of the DADT statute. An accommodation provided to plaintiff in the circumstances of her case would be non-uniform with respect to service members in other jurisdictions, including in units with which she could be deployed. As explained by General Charles E. Stenner, Jr., such a non-uniform application of a military personnel policy would pose a risk to unit cohesion and morale.



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*See* Stenner Dep. at 73:5-8 (Ex. G).

## II. Plaintiff's Factual Account is Flawed and Does Not Support Summary Judgment in Her Favor.

Plaintiff's factual recitation mischaracterizes statements from military leadership, includes irrelevant and factually inaccurate testimony of purported experts, and sets forth unsupported speculation by and about former and current military service members. The majority of the evidence upon which plaintiff relies is irrelevant and would be inadmissible at trial. *See Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) ("A trial court can only consider admissible evidence in ruling on a motion for summary judgment."). And plaintiff's factual recitation ignores the fact finding Congress conducted when it enacted the DADT statute. Those congressional findings deserve the highest degree of deference from this Court. *See Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); *Rostker*, 453 U.S. at 70. Thus, plaintiff fails to meet her burden to establish facts sufficient to entitle her to summary judgment.

### A. Plaintiff's Use of the Testimony of Military Leadership is Inaccurate.

Plaintiff asserts that General Eric W. Crabtree, "never heard anyone make any negative comments about Major Witt." Pl.'s Mot. at 4. But plaintiff fails to mention that General Crabtree's testimony was limited by the specific time period identified by plaintiff's counsel in his deposition question – the time before May 18, 2004 – a time before plaintiff was investigated for conduct violating the DADT statute. *See* Crabtree Dep. at 24:2-10 (Ex. H). By this limitation, General Crabtree's answers cannot stand for the proposition that he *never* heard any complaints about plaintiff. Indeed, before the Air Force received a report of plaintiff's conduct, General Crabtree had no specific knowledge of plaintiff whatsoever:

> Q: Okay. So did you know anything at all about Major Witt, other than that's a name of somebody that's in one of my squadrons, before the Summer of 2004.
> A: No.

*Id.* at 13:23-14:1.

The first thing that General Crabtree recalled hearing about plaintiff was that "a complaint has been filed through the chief of staff of the Air Force's Office alleging that Major



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Witt was involved with a woman in the Spokane area." *Id.* at 14:23-25. Plaintiff's counsel did not ask General Crabtree questions regarding the as-applied analysis relevant to this remand, such as whether plaintiff's particular conduct in violation of DADT would pose a risk to unit cohesion and morale. General Crabtree's response to such an inquiry is that extra-marital relationships by servicemembers "have the potential to impact the good order, and discipline within the affected unit." Declaration of Eric W. Crabtree ¶ 3 (Ex. I).

Plaintiff also attempts to rely on a statement by a former commander of the 446th AES as the sole support for the bold assertion that a different former commander of that unit, engaged in "unprofessional sexual conduct." *See* Pl.'s Mot. at 3, 13-14. Aside from its complete irrelevance to the inquiry on remand, the statement upon which plaintiff relies is a rumor, is hearsay, and is inadmissible.

Plaintiff ignores key testimony of the current commander of the 446th AES, Colonel Janette Moore-Harbert. Plaintiff attempts to use the testimony of one unit member to prove that Colonel Moore-Harbert knew the same-sex sexual orientation of two other members of the 446th AES. *See* Pl.'s Mot. at 14-16. But that unit member relies on suspicion and, in any event, such evidence is irrelevant because the DADT statute does not apply based on sexual orientation, but rather applies only to same-sex conduct. *See* 10 U.S.C. § 654(b).

Plaintiff mischaracterizes Colonel Moore-Harbert's testimony regarding the effect that plaintiff would have on the 446th AES. Plaintiff disregards the clarification by Colonel Moore-Harbert of her position that she was concerned about minimizing potential distractions to unit cohesion and morale. *See* Moore-Harbert Dep. at 188:17-189:5 (explaining that her job is to eliminate distractions so unit members are able to deploy). Colonel Moore-Harbert's clarification is the essence of command judgment as applied to plaintiff.

Plaintiff makes a similar effort to misapply the Secretary of Defense's testimony before the Senate Armed Services Committee. *See* Pl.'s Mot. at 21-22. Again, as explained above, the examination of a global repeal of the DADT statute is a very different situation than the current analysis of the constitutionality of the DADT policy as applied to the particular circumstances of plaintiff's discharge for violation of that policy. A failure to uphold the discharge of plaintiff



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under application of the current DADT policy could pose a threat to military unit cohesion and morale, the interests on which Congress reasonably could have relied to enact the statute. Further, the non-uniform application of the DADT statute, in and of itself, is unfair, creates impracticalities associated with transfers and deployments, and poses its own risk to unit cohesion by applying the DADT policy differently across geographical lines. *See* Defs.' Supp. Resp. to Pl.'s Interrog. 12(d) (Apr. 12, 2010) (Ex. F).

**B. Plaintiff's Motion for Summary Judgment Attempts in Several Places to Improperly Use Expert Testimony.**

Plaintiff's reliance on two putative expert witnesses, Professor Elizabeth Kier and Professor Anthony Greenwald, is fraught with errors, and ultimately their testimony does not support plaintiff in this as-applied context.

Based on Professor Kier's report, plaintiff argues that Defense Department studies have failed to find any adverse effect on unit cohesion. *See* Pl.'s Mot. at 18. Plaintiff also relies on social science research as summarized by Professor Kier in her report. *See id.* at 19. By premising her arguments on the lack of Department of Defense studies or social science research, plaintiff ignores the record that Congress considered when enacting the DADT statute. In January 1993, President Clinton directed the Secretary of Defense to review the military policy then in force. *See* 29 Weekly Comp. Pres. Doc. 112 (1993). The Defense Department studied the issue and met with groups and individuals holding a wide spectrum of views. *See* S. Rep. No. 103-112, at 269-70. At the same time, Congress undertook its own extensive review, holding multiple hearings over several months and receiving testimony from military commanders, gay rights activists, experts in military personnel policy, and many interested civilians and members of the Armed Forces. *See id.* As part of its legislative decision-making process, Congress examined the historical background of the military's policy on same-sex sexual conduct, the role of unit cohesion in developing combat readiness, and the experience of foreign militaries, and then it came to articulate policy findings in 10 U.S.C. § 654(a). *See id.*

Plaintiff also relies on Professor Kier to point to the experiences of at least 23 foreign militaries that permit gay and lesbian service members to serve openly. *See* Pl.'s Mot. at 19. As



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demonstrated above, these opinions are not useful to the specific as-applied inquiry required on remand. Plaintiff offers no evidence as to how foreign militaries would treat her situation, involving conduct in violation of the DADT statute that involved other officers in the Air Force and placed enlisted unit members in a quandary of choosing between loyalty to her as an officer in their unit or to the military statutes and regulations.

Plaintiff perpetuates her errors by relying on Professor Anthony Greenwald to attempt to apply principles of social psychology to this case, where Professor Greenwald admitted that he never conducted research of military organizations. *See* Greenwald Dep. at 22:19-21 (Ex. J). In offering opinions about attitudes surrounding the integration of minority groups, Professor Greenwald focused only on plaintiff's sexual orientation. But that is not the relevant inquiry here. The DADT statute does not authorize discharge based on sexual orientation; it applies to conduct, and Professor Greenwald offered no opinion as to how the specific instances of plaintiff's conduct in violation of the DADT statute would affect unit cohesion and morale. Plaintiff also attempts to rely on opinion polls cited by Professor Greenwald in an addendum to his expert report. *See* Pl.'s Mot. at 20-21.[3] Those polls suffer from the same deficiencies as plaintiff's other social science research – their conclusions about the presence of openly gay service members are not tailored to the specific facts of plaintiff's situation. As such, these materials do not bear on the specific remand inquiry as to "whether a justification exists for the application of the policy as applied to Major Witt." *Witt*, 527 F.3d at 819.

**C. Plaintiff's Evidence of Other Unit Members' Views Does Not Entitle Her to Summary Judgment.**

The Supreme Court has made clear that "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state . . . ." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). Rather, "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Id.* Accordingly, the

[3] That addendum was not received by defendants by the expert report deadline, or even during the discovery period, but rather first appeared as an attachment to plaintiff's summary judgment motion. *See* Greenwald Decl. at 43-49 (Docket # 111).



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military has never been operated as a democracy – service members' views, while important, do not determine military policy or strategy. Courts, when reviewing the military's "considered professional judgment," accord deference to that judgment. *See Roby v. U.S. Dep't of the Navy*, 76 F.3d 1052, 1056 (9th Cir. 1996). Courts give similar deference to the military judgments of Congress, to which the Constitution assigns the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, cl. 14; *see Rostker v. Goldberg*, 453 U.S. 57 (1981); *cf. Holder v. Humanitarian Law Project,* 130 S. Ct. 2705, 2727 (2010) (affording deference to executive decisions in areas of national security).

Ignoring these significant considerations of deference to the military, plaintiff presents the Court with several declarations from some of the members of plaintiff's former squadron that opine that unit cohesion and morale would not suffer if plaintiff were allowed to continue to serve. But plaintiff's approach wrongly suggests that constitutional adjudication in this context would be dependent on the opinions of other unit members, and the evidence upon which she relies is insufficient to support summary judgment in her favor.

**1. Speculation by Unit Members about Cohesion and Morale is Insufficient to Overcome Defendants' Evidence.**

Plaintiff submitted testimony from nineteen current and former members of the 446th AES who hold the view that they personally would be pleased to serve alongside Plaintiff. *See* Pl.'s Mot. at 2 n.1. Even if the majority of these declarants were current members of the 446th AES – and they are not – their testimony would not support the conclusion that plaintiff's discharge was unrelated to the rationales of unit cohesion and morale on which Congress reasonably could have relied in 1993 when it enacted DADT. The 446th AES includes approximately 150 service members. *See* Moore-Harbert Decl. ¶ 6 (Ex. F to Defs.' Mot. (Docket # 118-1)). The fact that nineteen people express no reservations about serving with plaintiff says nothing about the remainder, let alone the considered judgment of Congress.

Plaintiff also submits opinions by the declarants about how *other* unit members would feel about serving with plaintiff. Unlike unit commanders who are charged with leading the unit and are trained to exercise military judgment over issues that may affect unit cohesion, morale,



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good order, and discipline, however, these unit members engage in mere speculation. Several current or former unit members express the opinion – in similar language – that "if command were to announce that [plaintiff] was lesbian and that she was remaining in the service, her continued presence in the Air Force would not have any negative impact on her unit morale, discipline, or combat readiness, and no negative impact whatsoever on me." *See* Oda Decl. ¶ 12 (Docket # 18); *see also, e.g.*, Brinks Decl. ¶ 12 (Docket # 16); Schaffer Decl. ¶¶ 14 & 15 (Docket # 12); Mueller Aff. ¶ 13 (Docket # 110); Schindler Decl. ¶ 12 (Docket # 14); Thomas Decl. ¶ 13 (Docket # 17); Scott Decl. ¶ 14 (Docket # 13); Carlson Decl. ¶ 15 (Docket # 15); Boultinghouse Decl. ¶ 11 (Docket # 106). This testimony would be inadmissible speculation if offered at trial. A witness generally may testify only to matters about which he or she has personal knowledge. *See* Fed. R. Evid. 602. When a witness testifies as to what someone would have done under other circumstances, she is speculating – she has no personal knowledge of what would happen under a hypothetical set of facts. *See, e.g.*, *Evanston Bank v. Brink's, Inc.*, 853 F.2d 512 , 515 (7th Cir. 1988). Plaintiff cannot rely on such inadmissible evidence in her summary judgment motion. *See Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181-82 (9th Cir. 1988).

Even if the Court were to indulge the witnesses' hypothetical testimony, it would not be reliable evidence because the declarants did not have full knowledge of the facts. As has been shown by Defendants' Motion for Summary Judgment, the facts in this case are more complicated than appeared in plaintiff's pleadings. *See* Defs.' Mot. for Summ. J. at 5-7 (Docket # 118). Among other things, no one disputes that the events leading to plaintiff's discharge for violation of the DADT statute were set in motion by an external complaint about plaintiff's relationship with a married woman. *See* Defs.' Opp. to Pl.'s Mot. for Sanctions at 6 (Docket # 124). Plaintiff admits that this behavior was inconsistent with good officership, and her own expert witness testified that such behavior is unacceptable for a military officer. And plaintiff did not previously provide the full facts to the unit members who supported her case with sworn statements. At the time several of the unit members made their declarations, plaintiff had not told them that her conduct in violation of the DADT statute involved a married woman.



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*See* Witt Dep. at 124:14-125:14 (Ex. C). Nor did plaintiff tell any of her squadron mates who were deposed in this case the full facts that prompted the Air Force's investigation of her. *See* Crawford Dep. at 27:6-17 (Ex. K); Julian Dep. at 47:17-23 (Ex. L); Robinson Dep. at 64:12-14 (Ex. M); Winslow Dep. at 56:13-20 (Ex. N). Although plaintiff has now apparently disclosed these facts to some witnesses, their testimony does not and cannot predict the reactions of other unit members. The Court cannot, on this record, determine how the unit members would react to the full record of plaintiff's conduct. Accordingly, the limited evidence presented by plaintiff here is not reliable and should be excluded. *See* Fed. R. Evid. 403. Because only admissible evidence may be considered in connection with a motion for summary judgment, *see Beyene*, 854 F.2d at 1181-82, plaintiff is not entitled to summary judgment.

Moreover, even if plaintiff could establish how her own unit would react to her continued service, plaintiff would not be entitled to summary judgment. Plaintiff's motion ignores that the DADT statute applies to the entire military, not just to the 446th AES, and even the testimony from plaintiff's own witness indicates that the evidence on that score is, at the very least, subject to dispute. *See* Pl.'s Mot. at 21:5-13; *see also* Bonnie Moradi & Laura Miller, "Attitudes of Iraq and Afghanistan War Veterans Towards Gay and Lesbian Service Members," 36 Armed Forces & Soc'y 1, 7-8 (2010).[4] Thus, even if plaintiff were to successfully establish that no one in the 446th AES would be opposed to her continued service – which she has not done – she has not provided evidence as to what impact her continued service, notwithstanding the circumstances of her conduct in violation of the DADT statute, might have on other units of the Air Force (or

[4] Although plaintiff cites the Moradi and Miller article, Dr. Greenwald admitted that he had not read the actual study at the time of his deposition. *See* Greenwald Dep. at 13:7-14:18. Moradi and Miller note specific limitations on their report, and they recommend that those limitations be addressed by "efforts within the military to gather systematic data from randomly drawn samples about the presence of lesbian and gay personnel and their impact on objective indicators of unit cohesion, readiness, morale and effectiveness . . . ." Moradi & Miller, *supra*, at 20. The Department of Defense is currently conducting a comprehensive survey of over 400,000 service members on service with gays and lesbians, to obtain information from a broad cross section of the armed services. *See* Michael Carden, "'Don't Ask, Don't Tell' Surveys Hit Servicemembers' Inboxes," Am. Forces Press Serv., July 7, 2010 (*available at* http://www.defense.gov/news/newsarticle.aspx?id=59934). That survey may be more reliable than Moradi and Miller's sample of 540 service members, and may have different results. But it cannot be used by plaintiff for summary judgment purposes because its results will not be known until after trial in this matter.



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other branches of the military) with whom plaintiff might serve.

In short, because plaintiff's evidence with respect to her own unit is insufficient to eliminate a material dispute, she is not entitled to summary judgment.

**2. Plaintiff's Purported Evidence of the Sexual Orientation of Other Unit Members is Irrelevant and Speculative.**

Plaintiff's evidence alleging that other members of her unit are gay or lesbian is both irrelevant and speculative. Plaintiff claims that "[m]any squadron members readily acknowledge that several gays and lesbians have served in the 446th in the past without any problems, and many are serving in the unit right now with the full knowledge and acceptance of their fellow service members." Pl.'s Mot. at 9.

This is not what the evidence shows. The evidence plaintiff cites shows that many people "assume," "believe," or "suspect" that other members of the 446th AES were gay or lesbian. *See, e.g.,* Schmidt Decl. ¶¶ 4-6 ("there were five or six members in our squadron that I *believed* to be gay or lesbian") (emphasis added) (Docket # 105); Krill Decl. ¶ 4 ("I *suspected* that there were 5-10 gay and lesbian members serving in the unit") (emphasis added) (Docket # 104); Hrivnak Dep. at 28:2-23 (Ex. O); Robinson Dep. at 37:16-38:8 (Ex. M).

In any event, this evidence is irrelevant. The DADT statute and regulations at issue here do not bar service by gay or lesbian service members because of their sexual orientation. The statute and regulations address conduct. Moreover, distinction based on the specific facts and circumstances of an individual's case is a necessary result of the as-applied analysis that the Court of Appeals has required in this case. Successful service by other gays or lesbians in the military would not alter in any way the as-applied analysis of the facts and circumstances of plaintiff's specific conduct in violation of the DADT statute. In addition to being irrelevant, the evidence on which plaintiff relies is speculative. As admitted by one of the witnesses presented by plaintiff as an expert, a person's inference that another person is gay or lesbian can be wrong. *See* Greenwald Dep. at 26:2-11 (Ex. J). Indeed, to apply the DADT statute based on merely the assumption that a service member is gay or lesbian would be contrary to the DADT policy. *See generally* AFI 36-3209, Attach. 11.



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Plaintiff also provides a declaration from a former member of the 446th AES who testified that she is lesbian. Lisa Chisa declares that she told several members of the 446th AES that she was a lesbian during a party in her home in 2005. *See* Chisa Decl. ¶ 8. But she also admits that she "was no longer in the Air Force at the time and did not have to worry about being outed and discharged." *Id.* ¶ 9. Furthermore, evidence about some unit members' reactions to revelations that former unit members have acknowledged their sexual orientation is irrelevant to the as-applied analysis here involving the particular circumstances of plaintiff's conduct in violation of the DADT policy.

Plaintiff also submits an anonymous declaration of a member of the 446th AES who claims that it is widely known that she is gay or lesbian. *See* Doe Decl. ¶ 3 (Docket # 108). Due to the anonymity of the witness, it is difficult to probe fully the testimony, but the testimony demonstrates on its face that it is inadequate to support summary judgment. Doe testified that the members of the 446th AES who knew about her sexual orientation were "close friends in the 40th/446th AES." *Id.* ¶ 3. That a handful of close friends did not have a problem serving with Doe does not undermine Congress's reasonable reliance on evidence before it in 1993 when it enacted the DADT statute, even if that were relevant somehow to the as-applied determination regarding plaintiff's conduct here in violation of the DADT statute. Accordingly, the evidence says nothing about the issues before the Court on this remand.

**3. The Court Should Ignore the Testimony of Non-Unit Members Who Did Not Serve With Plaintiff.**

In applying the Ninth Circuit's test, the military experience of Sgt. Perry Watkins throughout his years of service in the 1970s and 1980s has no impact on the as-applied test the Court of Appeals has required on remand. That test is specific to the facts and circumstances surrounding plaintiff's discharge; the experience of a separate individual serving in a different military branch in a different decade, and subject to a now-defunct sexual conduct policy, has no bearing on the instant case.

For the same reasons, plaintiff's notational reference to the military experience of Lt. Robin Chaurasiya is inapposite to this Court's inquiry. *See* Pl.'s Mot. at 18 n.28. In her



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declaration, Lt. Chaurasiya does not purport to have any connection to, or knowledge of, plaintiff, or plaintiff's unit in any way. Further, plaintiff cannot seriously claim, nor can the Court conclude, that the experience of an individual service member that is completely unrelated to plaintiff or the 446th AES would provide conclusive evidence as to the experience of other services members in all units of the military.

## III. Plaintiff Is Not Entitled to the Relief She Requests.

In her summary judgment proposed order, plaintiff requests three forms of relief that she has not previously sought in this action. Specifically, she seeks (i) an award of "back pay to cover the period of her suspension . . . to the date of her reinstatement," (ii) "credit towards retirement for continuous service in the U.S. Air Force Reserve from November 5, 2004 to the date of her reinstatement," and (iii) "reinstate[ment] . . . to her former position in the United States Air Force in the 446th [AES]." *See* Pl.'s Proposed Order at 1-2 (Docket # 102-1).[5] This Court cannot grant the relief that plaintiff now seeks.

### A. The Court Lacks Jurisdiction to Award Plaintiff Back Pay and Retirement Credit Relief.

As to the back pay and retirement credit claims, plaintiff fails to identify a waiver of sovereign immunity that would allow this Court to provide that relief. The principle of sovereign immunity shields the United States and its agencies from suit except as it consents to be sued. *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit"); *Harger v. Dep't of Labor*, 569 F.3d 898, 903 (9th Cir. 2009). Such consent must be given unambiguously in statutory text through a waiver of sovereign immunity. *See Lane v. Pena*, 518 U.S. 187, 192 (1996); *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). Without a waiver of sovereign immunity, a court is without jurisdiction over claims against a federal agency or federal officials. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980).

Here, plaintiff does not identify a waiver of sovereign immunity that would allow her to

[5] Plaintiff has seemingly abandoned the remaining requests for relief she originally sought in her complaint, including a request for declaratory judgment. *See* Compl., Prayer for Relief (Docket # 1).



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recover for back pay or retirement credit, and no such waiver exists. Neither the Administrative Procedure Act ("APA") nor the Tucker Act in this context, permit plaintiff to proceed with her claims for back pay and retirement credit.

First, the APA does not waive sovereign immunity for plaintiff's newly-requested relief. For a district court to exercise jurisdiction over a claim under the APA, the plaintiff's claim must be for "relief other than money damages" and there must be "no other adequate remedy in a court." 5 U.S.C. §§ 702, 704; *see also Suburban Mortg. Assocs., Inc. v. Dep't of Housing & Urban Dev.*, 480 F.3d 1116, 1120 (Fed. Cir. 2007). Section 702 of the APA makes the statutory waiver of sovereign immunity contingent on the relief sought by a party against the United States:

> ***An action*** in a court of the United States ***seeking relief other than money damages*** and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (emphases added).

Plaintiff's claims for back pay and retirement credit constitutes money damages, and are therefore outside of the scope of the APA's waiver. First, because plaintiff has no statutory entitlement to compensation for constructive service, *see infra* note 6, her claims for back pay and retirement credit, which would undoubtedly be paid from the public treasury, constitute claims for money damages. *See Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061, 1066 (9th Cir. 2008); *see also DeGroat v. Townsend*, 495 F. Supp. 2d 845, 853 (S.D. Ohio 2007)*; Matsuo v. United Sates*, 416 F. Supp. 2d 982, 995 (D. Haw. 2006) (holding that where plaintiff is not statutorily entitled to compensation, any back pay sought resulting from an alleged constitutional violation constitutes a claim for money damages that must be litigated in the Court of Federal Claims); *see also* Declaration of Margaret H. Witt ¶ 25 (Docket # 9) (expressing concern that, if plaintiff does not accrue 20 years of credit towards retirement, she "will never earn a retirement pension"). As claims for money damages, plaintiff's requests for back pay and retirement credit fall outside of the scope of the APA's waiver of sovereign immunity.

Second, if plaintiff is able to state a claim for back pay or retirement credit, those claims



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would arise under the waiver of sovereign immunity contained in the Tucker Act. Under the Tucker Act, monetary claims against the United States founded upon the Constitution, acts of Congress, executive regulations, or contracts, and seeking amounts in excess of $10,000, must be brought in the Court of Federal Claims. *See* 28 U.S.C. § 1491(a); *Glines v. Wade*, 586 F.2d 675, 676, 681 (9th Cir. 1978), *rev'd on other grounds sub nom.*, *Brown v. Glines*, 444 U.S. 348, 361 (1980). Thus, if plaintiff intends to seek back pay or retirement credit under the jurisdictional provisions of the Tucker Act, she must bring those claims in the Court of Federal Claims; this Court would not have jurisdiction to entertain those claims.[6]

Section 1346(a)(2) of the Tucker Act, sometimes referred to as the "Little Tucker Act," likewise does not provide plaintiff a waiver of sovereign immunity that would allow her to proceed. The Little Tucker Act confers concurrent jurisdiction on federal district courts for certain claims for "money damages," as long as those claims do not exceed $10,000 in amount. *See* 28 U.S.C. § 1346(a)(2). Here, plaintiff's claims for back pay and retirement credit would exceed the $10,000 maximum for concurrent Little Tucker Act jurisdiction.[7] To proceed in this Court under the Little Tucker Act, therefore, plaintiff would need a formal waiver of her right to receive in excess of $10,000. Without such a formal waiver (which plaintiff has not submitted), plaintiff cannot proceed with her claims for "money damages" in this Court. *See United States v. Park Place Associates, Ltd.*, 563 F.3d 907, 927-28 (9th Cir. 2009).

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[6] It is far from clear that plaintiff could recover back pay and retirement credit even in the Court of Federal Claims. Discharged members of a reserve component are entitled to pay or benefits only for actual service. *See* 37 U.S.C. § 206(a). Established precedent from the Court of Federal Claims confirms that a reservist is precluded from receiving compensation under a theory of constructive service, even where that service member alleges an improper discharge. *See, e.g.*, *Greene v. United States*, 65 Fed. Cl. 375, 380 (2005); *Palmer v. United States,* 168 F.3d 1310, 1313-14 (Fed. Cir. 1999) ("[A] member who is serving in part-time reserve duty . . . has no lawful pay claim against the United States for unattended drills or for unperformed training duty."). Further, because a Reservist cannot state a claim for back pay based on constructive service, "claims for relief that are incident of and collateral to" a back pay claim, such as plaintiff's claim for constructive retirement credit, "must also be dismissed." *Greene*, 65 Fed. Cl. at 381 (citing *Palmer*, 168 F.3d at 1314). Thus, it may well be that plaintiff has no actionable claims for back pay and retirement credit, but to the extent that any such claims exist, they must be brought in the Court of Federal Claims, and not in this forum.

[7] Although plaintiff fails to state the specific amount of damages she seeks, she avers that she received a minimum of $780 per month as military pay for her reserve duty. *See* Declaration of Margaret H. Witt ¶ 27 (Docket # 9). Accordingly, her claim for back pay from the date of her suspension (November 2004) to the present, a period of 70 months, would on its face exceed $10,000.



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Finally, if plaintiff could state a claim for back pay and retirement credit, the Court of Federal Claims could provide her with an "adequate remedy" within the meaning of APA section 704. Section 704 of the APA provides district courts with jurisdiction only over "final agency action ***for which there is no other adequate remedy in a court***. . . ." 5 U.S.C. § 704 (emphasis added). "The availability of an action for money damages under the Tucker Act . . . is presumptively an 'adequate remedy' for § 704 purposes." *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1349 (Fed. Cir. 2005). In addition to awarding monetary relief, the Tucker Act provides the Court of Federal Claims the authority to order reinstatement "as an incident of and collateral to" the entry of judgment in a party's favor. 28 U.S.C. § 1491(a)(2). Accordingly, if plaintiff has an extant claim for back pay or retirement credit, the Court of Federal Claims would be able to provide plaintiff the relief she seeks. Where "an adequate remedy is available under the Tucker Act in the Court of Federal Claims," a party "cannot proceed in the district court under the APA." *Suburban Mortg. Assocs., Inc.*, 480 F.3d at 1128.

In sum, for the first time in this litigation, plaintiff's proposed order seeks money damages for her substantive due process claim. By seeking such money damages, plaintiff has moved her action outside of the scope of the APA's waiver of sovereign immunity. Consequently, this Court must either reject the availability of plaintiff's newly-requested relief or dismiss this entire action for lack of jurisdiction.

**B. Plaintiff Is Not Entitled To Reinstatement, and Her Requested Relief Would Violate Principles of Military Deference.**

This Court should reject plaintiff's request for equitable relief in the form of an order purporting to reinstate her in the Air Force Reserve in the position of flight nurse in the 446th AES. Plaintiff's inability to meet the standards for serving as a flight nurse because of her failure to work as a registered nurse for the requisite number of hours per year precludes her appointment to that position. Further, any Court order directing the military to implement specific personnel assignments would intrude on "matters wholly internal to the military and inappropriate for judicial review." *King v. United States*, 50 Fed. Cl. 701, 710 (2001). Accordingly, plaintiff's request for reinstatement should be rejected.



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As explained in defendants' motion for summary judgment, plaintiff's discharge mooted the availability of the injunctive relief sought in her complaint, namely, an order that would "restrain[] defendants from discharging plaintiff." Defs.' Mot. for Summ. J. at 117-19 (Docket # 118). Plaintiff now requests that the Court reinstate her to a specific position in the Air Force Reserve, a position that requires detailed and extensive medical and professional expertise. The necessity of that expertise is reflected in Air Force requirements governing individuals serving in the capacity of flight nurse. *See, e.g.*, Air Force Instruction ("AFI") 36-2115 § 1.11.5, *available at* http://www.e-publishing.af.mil.

Plaintiff already has admitted facts indicating that she does not "actively practice nursing" as is required under AFI 36-2115 § 1.11.5. *See* Pl.'s Objections & Resps. to Defs.' Second Set of Interrogs. at 2-3 (Ex. O to Defs.' Mot. for Summ. J.). And prior to serving as an Air Force flight nurse, plaintiff would be required to satisfy several additional personnel requirements. *See generally* AFI 36-2115 § 1.11.5. Whether an individual meets Air Force requirements for service in a specific position is a question that falls outside the scope of judicial expertise. *See 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."). The Court, thus, is not positioned to decide whether plaintiff meets the requirements for service as an Air Force flight nurse, and it should reject plaintiff's request for an order purporting to reinstate her to that position.

In addition, matters relating to military assignments are generally inappropriate for judicial review. *See, e.g.*, *King*, 50 Fed. Cl. at 710 ("Assignments and reassignments are matters wholly internal to the military and inappropriate for judicial review."). The Supreme Court has long held that "judges are not given the task of running the [military]." *Orloff v. Willoughby,* 345 U.S. 83, 93 (1953). Rather, "[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters." *Id.* at 94; *see also Gilligan v. Morgan,* 413 U.S. 1, 10



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(1973) ("The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments," and "[t]he ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability."). Even if the Court determined that plaintiff's discharge was unconstitutional, therefore, the "ultimate responsibility" for making the determination whether plaintiff is qualified to return to service, and in what capacity, is vested in the military. Courts do not have the institutional competence to make the substantive determination that a particular individual is deserving of a specific position in a particular unit. *See Brookins v. United States*, 75 Fed. Cl. 133, 148 (Fed. Cir. 2007) (citing *Sanders v. United States,* 594 F.2d 804, 813 (Ct. Cl. 1979)).

**CONCLUSION**

For the foregoing reasons, the Court should deny plaintiff's motion for summary judgment.

Dated: August 9, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General

VINCENT M. GARVEY
Deputy Branch Director

*/s/ Peter J. Phipps*

PETER J. PHIPPS
BRYAN R. DIEDERICH
STEPHEN J. BUCKINGHAM
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 616-8482
Fax: (202) 616-8470
E-mail: peter.phipps@usdoj.gov

Mailing Address:
Post Office Box 883, Ben Franklin Station
Washington, D.C. 20044

Courier Address:
20 Massachusetts Ave., N.W.
Washington, D.C. 20001

*Attorneys for Defendants*

Of Counsel:
LT. COL. TODI CARNES
AFLOA/JACL Military Personnel Litigation
1501 Wilson Blvd, 7th Floor
Rosslyn, VA 22209-2403
(703) 588-8428

**UNITED STATES DISTRICT COURT**

**FOR THE WESTERN DISTRICT OF WASHINGTON**

**AT TACOMA**

## CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2010, I electronically filed the foregoing Defendants' Opposition to Plaintiff's Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system which I understand will send notification of such filing to the following persons:

James E. Lobsenz, Esq.
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Tel: (206) 622-8020
Fax: (206) 622-8983
E-mail: lobsenz@carneylaw.com

Sarah A. Dunne, Esq.
American Civil Liberties Union of Washington
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Tel: (206) 624-2184
E-mail: dunne@aclu-wa.org

Sher S. Kung, Esq.
American Civil Liberties Union of Washington
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Tel: (206) 624-2184
E-mail: skung@aclu-wa.org

/s/ *Peter J. Phipps*
PETER J. PHIPPS
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station
Washington, DC 20044
Tel: (202) 616-8482
Fax: (202) 616-8470
E-mail: peter.phipps@usdoj.gov
*Attorney for Defendants*