

1 HONORABLE RONALD B. LEIGHTON
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6 UNITED STATES DISTRICT COURT
7 WESTERN WASHINGTON
8 AT TACOMA DIVISION
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10 MAJOR MARGARET WITT,
11 Plaintiff,

12 v.

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

15 Defendants.
16

No. C06-5195 RBL
PLAINTIFF'S MOTION IN LIMINE
TO EXCLUDE EVIDENCE

**NOTE ON MOTION CALENDAR:
AUGUST 27, 2010**

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18 **INTRODUCTION & FACTUAL BACKGROUND**

19 Plaintiff hereby moves in limine to prohibit Defendants from offering any documents or
20 testimony regarding Plaintiff's commission of adulterous acts with Laurie McChesney over five
21 weeks in late 2003. Not only is this evidence wholly irrelevant to the question of whether
22 Plaintiff was unconstitutionally discharged from the United States Air Force—the ultimate issue
23 in this case—but the admission of this sort of evidence will serve only to confuse the relevant
24 issues and waste the time of the Court and the parties. Plaintiff, therefore, respectfully requests
25 that the Court grant her Motion in Limine and, thereby, preclude Defendants from offering any
26 evidence of her adultery. Plaintiff's counsel has conferred in good faith with defense counsel to
27 see if the parties could resolve this matter pursuant to LR 7(d)(4), but were unable to reach
28 agreement.
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ARGUMENT

A. The Federal Rules of Evidence Prohibit the Admission of Irrelevant Evidence

Federal Rule of Evidence 402 provides that “[e]vidence which is not relevant is not admissible.” FED.R.EVID. 402. “Relevant evidence” means evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. FED.R.EVID. 401. Hence, if evidence of Plaintiff’s adultery does not affect the constitutionality of her discharge from the Air Force, then any such evidence is of no consequence to the determination of this action and is neither relevant nor admissible. *See Wall Data, Inc. v. Los Angeles County Sheriff’s Dep’t.*, 447 F.3d 769, 782 (9th Cir. 2006) (upholding a district court’s exclusion of evidence that was “irrelevant” because it “did not deal specifically with the action at hand”).

B. Evidence Concerning Plaintiff’s Adultery is Irrelevant and Inadmissible

Because Plaintiff was not discharged for having committed adultery, any evidence of such acts is irrelevant (i.e., of no consequence to the determination of this action) and, therefore, inadmissible. Defendants, nevertheless, seek to offer evidence of adulterous acts committed by Plaintiff to show that Plaintiff’s suspension and discharge significantly furthered unit cohesion, morale, good order, and discipline. In this vein, Defendants note that, at her deposition, Plaintiff admitted to having engaged in a sexual relationship with Laurie McChesney, a married civilian woman, roughly 1-2 months before Ms. McChesney separated from her husband, (Dkt. No. 118 at 6); that an act of adultery “frequently leads to disciplinary action and courts’-martial,” (*Id.* at 10); and that “adulterous behavior, especially by an officer, is likely to be prejudicial to good order and discipline.” *Id.* at 10. Defendants proceed to argue that, “[b]y reducing th[e] risks [of adulterous behavior], [P]laintiff’s discharge further[ed] unit cohesion, morale, and good order and discipline.” *Id.* at 11.

Whatever the merits of the abstract argument that some hypothetical administrative discharge might have been justified because an act of adultery might have created a unit morale problem, such an argument has no relevance here because the Air Force never sought to take disciplinary action, or to file court-martial charges, or to seek an administrative discharge on

1 those grounds. In fact, the only time adultery was ever mentioned was when the appointed
2 investigator, Major Adam Torem, confirmed that no one was interested in taking any disciplinary
3 action on these grounds. Major Torem's investigative report, which defendants have placed in
4 the record, clearly states:

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

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

24 It follows that evidence of Plaintiff's adultery over a span of 5 weeks in late 2003 is
25 simply not relevant to any material issue in this case and has no purpose other than to confuse the
26 issues and waste the time and resources of the Court. Moreover, because such evidence is
27 clearly irrelevant under Federal Rule of Evidence 401, it is inadmissible under Federal Rule of
28 Evidence 402. Accordingly, the Court should exclude evidence of any adulterous acts
29 committed by Plaintiff with Laurie McChesney over 5 weeks in late 2003.

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CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant her Motion in Limine and exclude all documents or testimony regarding Plaintiff’s commission of adulterous acts with Laurie McChesney.

DATED this 16th day of August, 2010. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2010, I electronically filed *Plaintiff's Motion in Limine to Exclude Evidence* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 16th day of August, 2010.

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