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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 TRIAL MEMORANDUM

PLAINTIFF'S TRIAL MEMORANDUM
No. C06-5195 RBL

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1 **A. JURISDICTION**

2 This Court has jurisdiction over the claims raised in this case pursuant to 28 U.S.C.
3 § 1331 and 28 U.S.C. § 1346 because plaintiff's claims arise under the Constitution of the
4 United States, the laws of the United States, and a regulation of an executive department of
5 the United States. This Court also has jurisdiction over the claims raised here under the
6 Administrative Procedures Act, 5 U.S.C. § 702 *et seq.*

7 At trial the plaintiff is pursuing the following claims: (1) her discharge violates her
8 substantive due process rights under the due process clause of the Fifth Amendment;¹ and (2)
9 her discharge violates her procedural due process rights under the due process clause of the
10 Fifth Amendment.

11 **B. DEFENDANTS BEAR THE BURDEN OF PROOF TO SHOW THAT MAJOR**
12 **WITT'S PRESENCE WOULD CAUSE A UNIT COHESION PROBLEM AND**
13 **THEY CANNOT MEET THEIR BURDEN.**

14 Although the Ninth Circuit held that intermediate scrutiny applies to the plaintiff's
15 substantive due process claim in this case, the Defendants persist in asking the question of
16 whether Congress "could have rationally" made the judgment in 1993 that open service by
17 gays and lesbians presented an unacceptable risk to unit cohesion. Thus Defendants seek to
18 have this Court apply the "rational basis" test to Congress' 1993 judgment that it is too risky
19 to allow any gay or lesbian person to serve openly in our armed forces.

20 This contention directly conflicts with the *Witt* decision which requires an as-applied
21 analysis of Plaintiff's substantive due process claim. Congress never made an as-applied
22 determination of whether the discharge of Witt was "necessary" to protect the unit cohesion

23 ¹ Plaintiff also raised a claim that her discharge violated the equal protection component of the due process
24 clause of the Fifth Amendment. A majority of the panel which decided the appeal in this case ruled that this
25 claim was foreclosed by prior Ninth Circuit precedent. *See Witt v. Department of the Air Force*, 527 F.3d 806,
26 821 (9th Cir. 2008)(foreclosed by *Phillips v. Perry*, 106 F.3d 1420 (9th Cir. 1997)) and *Witt*, at 823-24 (Canby, J.,
dissenting in part)(equal protection claim is *not* foreclosed by *Perry*). While plaintiff acknowledges that this
equal protection claim is not before this Court, she continues to reserve the right to raise this claim before the
Ninth Circuit *en banc* and before the United States Supreme Court.

1 of the 446th AES. Nor did Congress ever make any assessment of whether there was some
2 less restrictive alternative to Witt's discharge which would serve to maintain the unit
3 cohesion of the 44th AES.

4 The Defendants, not the plaintiff, have the burden of proof. It is not Witt's burden to
5 prove a negative (that her reinstatement would *not* cause a unit cohesion problem). It is the
6 Defendants' burden to show that unit cohesion *would* in fact be negatively affected.²
7 Indeed, it is well settled that the Government bears the burden of proving that it meets the
8 requirements imposed by intermediate scrutiny. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656,
9 666 (2004);³ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).⁴ "The
10 burden . . . is on those defending the discrimination to make out the claimed justification . . ."
11 *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 151 (1980). In sum, *Witt* holds
12 that it is the Defendants' burden to "justify" Witt's discharge by showing both that her
13 reinstatement *would* cause a unit morale problem, *and* that such a problem could not be
14 solved by any means less restrictive than refusing to reinstate her.⁵

15 Rather than confront the fact that they cannot carry their burden, Defendants seek to shift the
16 burden of proof to the plaintiff by arguing that she cannot prove there will not be unit cohesion
17 problems if she is reinstated to the 446th.⁶ By attempting to make it seem that Witt must prove

18 _____
19 ² The *Witt* opinion notes that in *Sell v. United States*, 539 U.S. 166 (2003), "the Court required the state *to justify*
20 its intrusion into an individual's recognized liberty interest against forcible medication -- just as *Lawrence [v.*
21 *Texas*, 539 U.S. 558 (2003)] determined that the state had failed *to 'justify* its intrusion into the personal and
22 private life of the individual.'" *Witt*, 527 F.3d at 818, quoting *Lawrence*, 539 U.S. at 578 (emphasis added).

23 ³ "As *the Government bears the burden of proof* on the ultimate question of [the statute's] constitutionality,
24 respondents must be deemed likely to prevail unless *the Government has shown* that respondents' proposed less
25 restrictive alternatives are less effective than [the statute]." (Emphasis added).

26 ⁴ "[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender *must carry the*
burden of showing 'an exceedingly persuasive justification' for it." (Emphasis added)

⁵ "[W]e must determine not whether DADT has some hypothetical, posthoc rationalization in general, but
whether *a justification* exists for the application of the policy as applied to Major Witt." *Witt*, 527 F.3d at 819
(emphasis added).

⁶ In response to the 19 declarations that Witt submitted in support of her summary judgment motion, the
Defendants argued that these 19 people had no personal knowledge as to how *other* people in the 446th would
react to her reinstatement, and thus their testimony on this point is inadmissible and barred by Fed. R. Evid. 602.
Of course these declarants obviously *do* have personal knowledge of their own attitudes towards serving
alongside gays and lesbians. And to the extent that their opinions as to the attitudes of others in their unit is

1 that her reinstatement will not cause a unit cohesion problem, the Defendants seek to draw
2 attention away from the fact that General Stenner, their own expert witness, has conceded that he
3 simply does not know what effect her reinstatement would have. *Dep. Stenner*, at 89:19 –
4 90:10.⁷

5 In sum, Defendants acknowledge that they cannot meet the burden of proof which the Ninth
6 Circuit has held is their responsibility to meet, and instead attempt to evade the rule of *Witt* by
7 claiming that a uniform rule of discharge of all known gays and lesbians is constitutionally
8 necessary in all cases.

9 **C. BECAUSE THEY CANNOT PROVE THAT MAJOR WITT'S DISCHARGE WAS**
10 **NECESSARY IN ORDER TO PREVENT A NEGATIVE EFFECT ON THE UNIT**
11 **COHESION OF THE 446th, THE DEFENDANTS ARGUE INSTEAD THAT A**
12 **"UNIFORM" RULE OF DISCHARGE OF ALL KNOWN GAYS AND LESBIANS IS**
13 **CONSTITUTIONALLY "NECESSARY." BUT THIS CONTENTION (1) IGNORES**
14 **THE NINTH CIRCUIT'S HOLDING THAT THE NECESSITY OF A DISCHARGE**
MUST BE DECIDED ON A CASE BY CASE BASIS, AND (2) IS CONTRADICTED
BY DEFENDANTS' OWN ACTIONS WHICH SHOW THE ABILITY TO USE
LESS RESTRICTIVE MEANS, AND (3) THE ABILITY TO MAKE AS-APPLIED
JUDGMENTS ABOUT A SERVICEMEMBER'S EFFECT ON UNIT COHESION.

- 15 **1. Two Years Ago The Commander of All Air Force Personnel in Europe Ordered All**
16 **Servicemembers to Treat Gay and Lesbian Servicemembers with Respect, To**
17 **Make Sure That They Fostered an Atmosphere of "Inclusion" in Their Units, And**
18 **to Foster a Standard of Mutual Respect Regardless of Sexual Orientation.**

19 Defendants purport to rely on the expert opinion of General Charles E. Stenner, who opines
20 that in order to foster unit cohesion, morale, good order and discipline, "the Air Force, an

21 based on what they have heard them say, or on what they have *not* heard them say, their opinions *are* based on
22 personal knowledge. Curiously, Defendants seem to think that the 1993 Congress' 17 year old "predictive
23 judgment" -- as to how some unknown group of servicemembers would react in the year 2010 to the presence of
24 some unknown, hypothetical, openly gay or lesbian servicemember, serving in some hypothetical military unit --
25 is *not* speculative, and *is* admissible.

26 ⁷ "Q. What about her reinstatement?"

A. I don't know.

Q. If – okay. Let me ask it this way. If she were reinstated, would her reinstatement cause a problem for basic
military functionality?

MR. PHIPPS: Objection: Speculation.

THE WITNESS: I go back to the fact that we applied a uniform – we uniformly applied a policy through the
due process up until the discharge board and that's – that's where we are.

BY MS. DUNNE: And so my question is, if she were reinstatement – excuse me – if she were reinstated, the
question is, would that reinstatement somehow affect negatively basic military functionality?

A. I don't know."

1 institution globally organized and globally assigned, needs a uniform personnel policy, not
2 different personnel policies for separate geographical regions.” *Defendants’ Supplemental*
3 *Response to Plaintiff’s Interrogatory No. 12(d)* (Docket #131-1, at p. 31, ll. 19-22). Similarly,
4 Defendants also rely on Col. Moore-Harbert’s testimony that at any moment members of the
5 446th may be deployed overseas. *See Defendants’ Motion for Summary Judgment*, at 9, ll. 3-6,
6 citing *Deposition Moore-Harbert*, at 184, ll. 10-14.

7 But such unsupported assertions regarding the alleged “necessity” of purging the ranks of all
8 known gays and lesbians because they might be deployed overseas are flatly contradicted by
9 documents, such as the Memorandum issued on May 5, 2008 by General Roger A. Brady, which
10 direct Air Force personnel to treat gay and lesbian servicemembers serving overseas with
11 respect. *Trial Exhibit No. 75*. General Brady is the Commander of U.S. Air Forces Europe and
12 of the Air Component Command, at Ramstein AFB; as well as the Director of Joint Air Power
13 Competency Center, Ramstein.⁸ He commands all Air Force personnel in 51 countries covering
14 one-fifth of the globe.⁹ His memo specifically directed all Air Force personnel to maintain a
15 work environment free from discrimination on the basis of, *inter alia*, “sexual orientation”:

- 16 1. Each and every member of the United States Air Forces in Europe, military and
17 civilian alike, has a vital role in our nation’s defense and a direct responsibility for
18 executing all assigned missions. Our responsibility to each other is to provide a
19 workplace and living environment free from discrimination and harassing behavior.
20 Now, more than ever, we need every Airman fully focused on mission
21 accomplishment. Our Airmen and their families have the right to live and work in an
22 environment free of harassment regardless of race, religion, ethnicity, national origin,
23 gender, ***or sexual orientation. The standard is mutual respect, plain and simple.***
- 24 2. Our diversity is one of our greatest strengths. Commanders and leaders at every level
25 ***must seek ways to embrace diversity and foster an environment of inclusion – not***
26 ***exclusion. . . .***

Trial Exhibit No. 75, Memorandum for U.S. Air Force Europe Units, May 5, 2008 (emphasis
added)(Appendix A).

⁸ www.af.mil/information/bios/bio.asp?bioID=4769 (Appendix B).

⁹ *Id.*

1 General Brady's command to treat gays and lesbians with respect neatly illustrates the fact
2 that there *are* less restrictive alternatives to the default practice of simply discharging all known
3 gays and lesbians. Even assuming the existence of some unit where there is some reluctance to
4 serve alongside gay and lesbian servicemembers, the armed forces have the ability to command
5 tolerance and to order any such reluctant servicemembers exercise a professional commitment to
6 mission accomplishment by putting aside their personal biases, just as soldiers in the 1940's and
7 1950's were commanded to put aside any personal feelings of bias which made them reluctant to
8 serve alongside black soldiers.¹⁰

9 **2. Defendants' Insistence on the Need for A Uniform Rule Applicable Across the**
10 **Globe Conflicts With Both the Law They Cite and the Military's Past Experience**
11 **With Regulations Which Allowed for the Retention of Some Known Gay Soldiers.**

12 Defendants' entire argument ultimately boils down to the "opinion" of General Stenner
13 (which is really a legal conclusion) that it is constitutionally "necessary" to have a "uniform"
14 rule across geographical boundaries of the United States. The uniform rule General Stenner
15 supports is the rule adopted by the First Circuit, that all discharges of known gays and lesbians
16 are constitutionally valid because every single one of them poses an unacceptable risk to unit
17 cohesion. Defendants claim that this uniform rule is constitutionally necessary, and that no
18 possible less restrictive alternative exists, because any gay or lesbian servicemember like Major
19 Witt could be deployed at any time to a new location and thus could be required to work with
20 members of a different unit. This argument simply ignores the Ninth Circuit's ruling in this
21 case, which requires an "as-applied" analysis. This necessitates a determination of whether there
22 *is* – in fact -- a unit cohesion problem in the plaintiff's particular unit.

23 Oddly, in their summary judgment briefing the Defendants cited to *Gonzales v. O'Centro*
24 *Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) in support of their contention that

25 ¹⁰ See *Witt*, 527 F.3d at 820, n.10, and *Pruitt v. Cheney*, 963 F.2d 1160, 1165 (9th Cir. 1991), quoting *Palmore v.*
26 *Sidoti*, 466 U.S. 429, 433 (1984): "[p]rivate biases may be outside the reach of the law, but the law cannot,
directly or indirectly, give them effect."

1 the need for a uniform national rule satisfies the *Witt* standard of heightened scrutiny. But in
2 *Gonzales* the Court actually *rejected* the contention that a uniform rule was so necessary as to
3 make the refusal to make individualized determinations constitutionally acceptable. In that case
4 a Christian Spiritist sect filed suit against the U.S. Attorney General and other law enforcement
5 officers, seeking a preliminary injunction against enforcement of the Controlled Substance Act
6 against them. The Act made it illegal for their adherents to consume a sacramental tea that
7 contained a hallucinogenic drug (dimethyltryptamine, known as “DMT”). The Government
8 defendants argued that a uniform rule against the use of this tea was necessary because
9 enforcement would be hampered if the defendants had to make exceptions, and that a uniform
10 rule of prohibition was the least restrictive alternative means of advancing three compelling
11 governmental interests. *Id.* at 426. The Supreme Court *rejected* this argument, holding that the
12 Government had failed to show that allowing exceptions on a case by case basis was
13 unworkable, noting that exceptions had been permitted in the past and the feared insuperable
14 difficulties had not materialized:

15 The Government argues that the effectiveness of the Controlled Substances
16 Act will be “necessarily . . . undercut” if the Act is not uniformly applied,
17 without regard to burdens on religious exercise. Brief for Petitioners 18. The
18 peyote exception, however, has been in place since the outset of the Controlled
19 Substances Act, and there is no evidence that it has “undercut” the
20 Government’s ability to enforce the ban on peyote use by non-Indians.

19 *Gonzales*, 546 U.S. at 434-35.¹¹

20 In *Gonzales* the Government failed to prove that a refusal to recognize a religious exception
21 to the “no use of DMT” rule was necessary in order to accomplish legitimate government

22 ¹¹ In so ruling, the Supreme Court noted that in prior cases it had held that exemptions for Amish children from a
23 compulsory school attendance law were constitutionally required. *See Wisconsin v. Yoder*, 406 U.S. 205, 236 (1963)
24 (State required “to show with more particularity how the admittedly strong interest . . . would be adversely affected
25 by granting an exemption to the Amish.”). Similarly, in some freedom of association and freedom of speech cases,
26 the Court has held that legitimate concerns about retaliation and harassment compel the constitutional recognition of
exceptions to a uniform rule of disclosure of the identity of contributors and supporters of candidates and ballot
propositions. *Brown v. Socialist Workers*, 459 U.S. 87, 93 (1982) (where evidence shows reasonable probability of
that compelled disclosure will leads to threats or harassment an exemption from disclosure requirement is
constitutionally required); *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (same).

1 interests. Similarly, the Defendants in this case will not be able to prove (1) that it is necessary
2 to discharge *all* openly gay and lesbian servicemembers, *including* those who pose no risk to unit
3 cohesion, and (2) that there is no less restrictive alternative to enforcement of an absolutely
4 “uniform” rule that “no gays will be allowed to serve openly.” The Government acknowledges
5 that there is evidence that in the 23 other countries that have permitted gays and lesbians to serve
6 openly; that there have been no problems there; and that the feared negative impact on unit
7 cohesion or military effectiveness simply failed to materialize (just as it did when the generals
8 expressed alarm at the anticipated effects of racial integration of the armed forces, *see Decl.*
9 *Kier*, ¶¶ 25-28 (Docket #19). In addition, there is also the evidence of “exceptions” which have
10 from time to time been permitted in this country. For example, in the pre-DADT era when the
11 military’s regulations expressly *permitted* exceptions, openly gay soldiers such as Sgt. Perry
12 Watkins were explicitly found to have rendered fine service without having any negative impact
13 upon unit performance, morale or discipline. *Watkins v. United States Army*, 875 F.2d 699, 702
14 (9th Cir. 1989)(en banc).¹²

15 Since the enactment of DADT in 1993, “exceptions” are no longer allowed. But as the
16 experience of former Air Force Sergeant Anthony Loverde shows, frequently the very same
17 servicemember who has been discharged under DADT continues to serve the country as a
18 civilian employee, often working on a daily basis with the same unit he or she was discharged
19 from. As attested to in his perpetuation deposition, after openly disclosing that he was a gay
20 man, Loverde encountered no problems whatsoever when he served openly for two more
21 months prior to his DADT discharge. *After* his discharge, he continued to serve in Iraq and
22 Afghanistan as an employee of a defense contractor working alongside *the same*
23 servicemembers as before, using the same showering facilities, and displaying a gay flag.
24 Despite the fact that he was now openly acknowledging his sexual orientation, he encountered

25 _____
26 ¹² Watkins was deployed abroad in South Korea when he was retained. After his discharge board decided to retain him, he continued to serve openly without any problems for many years.

1 no problems working with them.

2 While Defendants claim that it would be impossible to have a non-uniform rule, the fact is
3 that the armed forces no longer even has a “uniform” rule about uniforms. Notwithstanding a 30
4 year old ban on wearing articles of religious clothing, the Army recently decided to allow a
5 devout Sikh doctor to wear a turban instead of the usual Army headgear:

6 The decision does not overturn an Army policy from the 1980s that regulates
7 the wearing of religious items, the acting deputy chief of staff, Maj. Gen. Gina
8 Farrisee, wrote in a letter to Captain Kalsi dated Thursday and posted online
9 by the Sikh Coalition.

10 Instead, the Army’s decision follows a longstanding practice of deciding such
11 requests on a case-by-case basis, the letter said. General Farrisee said *the*
12 *Army had weighed Captain Kalsi’s request against factors such as “unit*
13 *cohesion, morale, discipline, safety and/or health.”*

14 *Army Allows a Sikh Doctor to Serve Wearing a Turban*, (bold italics added).¹³ The contention
15 that they cannot possibly make case-by-case assessments of the impact on unit cohesion of
16 allowing an exception to a policy banning all open lesbians is thus contradicted by the fact that
17 the military has a long-standing practice of making precisely such case-by-case determinations
18 of the impact it would have on unit cohesion to except an “openly” Sikh soldier from a policy
19 that normally prohibits him from “telling” people he is Sikh by wearing his turban.

20 **3. Because This is an As-Applied Challenge to Witt’s Discharge, Deference to a**
21 **Congressional Judgment is Neither Required Nor Even Possible.**

22 Defendants claim that this Court is required to give deference to a Congressional judgment
23 made 17 years ago, even though that judgment had nothing to do with the particular
24 circumstances of Major Witt, or with the 446th AES.¹⁴

25 ¹³ http://www.nytimes.com/2009/10/24/nyregion/24sikh.html?_r=2&ref=us.

26 ¹⁴ In support of this contention, the Defendants have cited to *Roby v. U.S. Navy*, 76 F.3d 1052 (9th Cir. 1996). And yet in that case the Court of Appeals expressly noted that the challenged regulation “is not being challenged on constitutional grounds.” *Id.* at 1056. “At most,” then Court said it was “being asked to disregard the test because it might be subjective [citation] or difficult to apply [citation].” *Id.* at 1057. The *Roby* Court concluded, “Where a regulation is not being challenged on constitutional grounds we owe the military great deference.” *Id.* at 1058. In this case, the application of the DADT statute to Witt *is* being challenged on constitutional grounds, and thus *Roby* is not on point.

1 While the Defendants have cited to *Rostker v. Goldberg*, 453 U.S. 57 (1981) for the
2 general proposition that courts must give deference to the military judgments of Congress,
3 they ignore the ultimate holding of *Rostker* that “[w]e of course do not abdicate our ultimate
4 responsibility to decide the constitutional question.” *Id.* at 67. In fact, *Rostker* flatly holds
5 that Congress is *not* “free to disregard the Constitution when it acts in the area of military
6 affairs. In that area, as any other, Congress remains subject to the limitations of the Due
7 Process Clause *Id.*

8 Moreover, *Rostker* involved a facial challenge to a statute which required men, but not
9 women, to register for the draft. The Court noted, “Whenever [a court is] called upon to
10 judge the constitutionality of an Act of Congress, ‘the gravest and most delicate duty that this
11 Court is called upon to perform,’ [citation], the Court accords great weight to the decision of
12 Congress.” *Id.* at 64. In this case, this Court is *not* called upon to judge the constitutionality
13 of the DADT statute; it is merely called upon to decide the constitutionality of its *application*
14 to one military officer. It is precisely because as-applied analysis “enables courts to avoid
15 making unnecessarily broad constitutional judgments” that the Ninth Circuit held that as-
16 applied analysis was appropriate in this type of case. *Witt*, 527 F.3d at 819, quoting *Cleburne*
17 *v. Cleburne Living Center*, 473 U.S. 432, 437 (1985). Therefore no great deference is
18 required in this case, and since Congress never made any determination as to how Major
19 Witt’s presence would affect unit cohesion, no deference is even possible.

20 Even before *Witt* decided that *Lawrence had* elevated the applicable constitutional
21 standard to intermediate scrutiny, in a case involving a lesbian officer’s challenge to her
22 discharge the Ninth Circuit had already recognized that the admonition that military decisions
23 “are not to be lightly overturned by the judiciary” is “best applied in the process of judging
24 whether the reasons put forth on the record for the [military’s] discrimination against [the
25 servicemember] are rationally related to the [military’s] permissible goals.” *Pruitt v. Cheney*,
26

1 963 F.2d at 1166. In light of the change in the law occasioned by *Lawrence* and *Witt*, the
2 *Pruitt* statement of the proper degree of deference must now be restated as follows: The
3 admonition not to lightly overturn a military discharge “is best applied in the process of
4 judging whether the reasons put forth on the record” for the servicemember’s discharge “will
5 significantly further the government’s interest and whether less intrusive means would
6 achieve substantially the government’s interest.” *Witt*, 527 F.3d at 821.

7 **D. BECAUSE THE INVESTIGATION OF WITT FOR HOMOSEXUAL CONDUCT**
8 **WAS NOT INITIATED BY HER SQUADRON COMMANDER AS REQUIRED**
9 **BY AIR FORCE REGULATIONS, HER SEPARATION FROM THE AIR FORCE**
10 **VIOLATED PROCEDURAL DUE PROCESS.**

11 Air Force Instruction 36-3209, ¶¶ 1.22 and 2.33 restrict the authority to initiate an inquiry
12 into homosexual conduct to a servicemember’s “unit commander.” The regulation further
13 provides that “only the unit commander is authorized” to initiate such an investigation, and
14 that “unless otherwise specified” the term unit commander refers to the servicemember’s
15 “immediate commander” who is usually her squadron commander, but who may also be a
16 squadron section chief appointed by her squadron commander. AFI 36-3209, Attachment 11
17 Guidelines, ¶¶ A.11.1.1 & A.11.6.2.

18 In the present case it is undisputed that Witt’s immediate commander, Colonel Mary
19 Walker, the commander of the 446th Aeromedical Evacuation Squadron, was *not* the person
20 who initiated the inquiry into Witt’s conduct. *Deposition Mary Walker*, 102:3-23.¹⁵ The

21 ¹⁵ “Q. What I’d first like to direct your attention to is 11.1. That first page there, A11.1, it’s entitled
22 “Responsibility.” Would you agree with me that this first sentence, let me read it, “Only the member’s
23 commander is authorized to initiate fact-finding inquiries involving homosexual conduct.” It goes on after
24 that, and if you feel that the rest of that is important to my question, you let me know. But I would like to
25 ask you now, *do you agree with me that the only person who could initiate fact-finding inquiries into
26 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.*”

1 regulations explicitly provide that the immediate commander is “responsible for insuring . . .
2 that no abuse of authority occurs.” ¶ A.11.1.2. This provision of the regulation is thus
3 designed to protect the interests of the servicemember to be investigated.

4 While not every violation of a regulation is a procedural due process violation, if the
5 procedure prescribed by the regulation “is intended to protect the interests of a party before
6 the agency,” then it must be “scrupulously observed,” and failure to do so does constitute
7 a due process violation. *Sameena, Inc. v. United States Air Force*, 147 F.3d 1148, 1153 (9th
8 Cir. 1998) (bold italics added). *Accord Lopez v. Fed. Aviation Admin.*, 318 F.3d 242, 247
9 (D.C. Cir. 2003). Since the requirement that an investigation can only be initiated by the
10 servicemember’s immediate commander is designed to prevent “abuse of authority,” it is
11 precisely the type of regulation which, when violated, gives rise to a procedural due process
12 violation. Because it was violated in this case, the Plaintiff’s procedural due process rights
13 were violated, and thus her discharge was unconstitutional and must be set aside.

14 **E. THE RELIEF REQUESTED IS AVAILABLE.**

15 **1. Sovereign Immunity Has Been Waived by The APA Because A Suit For** 16 **Reinstatement and Back Pay is Not “a Suit for Money Damages.”**

17 Defendants have erroneously asserted that there has been no waiver of sovereign immunity
18 which would allow this Court to award the plaintiff back pay and reinstatement of her lost
19 retirement credit. Defendants overlook the fact that the Ninth Circuit has specifically held that
20 the Administrative Procedures Act constitutes a waiver of sovereign immunity in suits against
21 military officials in which the plaintiff alleges that the officials violated the Constitution.

22 In *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), overruled on other grounds by *Witt v.*
23 *Department of the Air Force, supra*, three gay and lesbian Navy enlisted personnel brought suit
24 against the Secretary of the Navy and the Secretary of Defense, alleging unconstitutional
25 military discrimination against them. The plaintiffs, like Witt, sought back pay, as well as
26 injunctive relief to prevent their discharge. *Id.* at 793. The *Beller* Court rejected the defendants’

1 contention that the suit was barred by sovereign immunity. *Beller* relied upon the Court's earlier
2 decision in *Glines v. Wade*, 586 F.2d 675 (9th Cir. 1978), rev'd on other grounds sub nom.
3 *Brown v. Glines*, 440 U.S. 957 (1980). In *Glines*, the Court held that sovereign immunity did
4 not bar suit in any case where the plaintiff alleged that the defendant acted "in violation of the
5 Constitution" because 5 U.S.C. § 702 includes an express waiver of sovereign immunity for
6 actions "in a court of the United States seeking relief other than money damages." *Glines*, 586
7 F.2d at 681, cited in *Beller*, 632 F.2d at 796. Thus, the *Beller* Court held that the APA waived
8 sovereign immunity as a bar to the plaintiffs' suit which was properly brought for violation of
9 her Fifth Amendment rights (just as Witt's case was). *Id.* at 797.

10 Defendants have mistakenly contended that because Witt is seeking an award of back pay
11 and lost retirement credits that her suit is an action for money damages to which the APA
12 sovereign immunity waiver does not apply. They erroneously asserted that simply "because . . .
13 her claims for back pay and retirement credit . . . would undoubtedly be paid from the public
14 treasury, [they] constitute claims for money damages." *Defendants Opposition to Plaintiff's*
15 *Motion for Summary Judgment*, at 20, *ll.* 16-19. But Defendants have ignored the holding of
16 *Bowen v. Massachusetts*, 487 U.S. 879 (1988) which rejected precisely this contention. *Bowen*
17 holds that simply because money is requested, that does *not* mean that a suit is an action for
18 money damages, and thus it does *not* mean that the intentionally broad waiver of sovereign
19 immunity¹⁶ set forth in 5 U.S.C. § 702 does not apply.

20 Our cases have long recognized the distinction between an action at law for
21 damages – which are intended to provide a victim with monetary compensation
22 for an injury to his person, property, or reputation – and an equitable action for
23 specific relief – ***which may include an order providing for the reinstatement of***
24 ***an employee with back pay***, or for 'the recovery of specific property or monies,
ejectment from land, or injunction either directing or restraining the defendant
officer's actions. [Citation]. ***The fact that a judicial remedy may require one***
party to pay money to another is not sufficient reason to characterize the relief

25 ¹⁶ "[I]t is undisputed that the 1976 amendment to § 702 was intended to broaden the avenues for judicial review
26 of agency action by eliminating the defense of sovereign immunity in cases covered by the amendment."
Bowen, 487 U.S. at 891.

1 as “money damages.”

2 *Bowen*, 487 U.S. at 893 (emphasis added).¹⁷ Since “an equitable action for specific relief” such
3 as “an order for reinstatement of an employee with back pay” is *not* an action for money
4 damages, the waiver of sovereign immunity set forth in 5 U.S.C. § 702 applies to this case.

5 **2. Since The Court of Claims Does Not Have the Power to Grant Equitable Relief,**
6 **and Thus Cannot Grant “Complete Relief,” This Court Has the Power to**
7 **Order Both Reinstatement and Back Pay.**

8 The Defendants have argued that the only possible way that plaintiff Witt can sue for an
9 award of back pay is to bring suit in the Claims Court under the Tucker Act. As noted
10 above, the plaintiff need *not* rely solely on the Tucker Act as a basis for a waiver of
11 sovereign immunity. Moreover, even assuming that plaintiff could establish a waiver of
12 sovereign immunity under *both* the Administrative Procedures Act *and* the Tucker Act, she
13 still would not be required to bring suit for back pay in the Claims Court. *Bowen*
14 specifically rejected this argument as well.

15 *Bowen* reaffirmed the well established principle that the Court of Claims does not have
16 the power to grant equitable relief: “Indeed, we have stated categorically that ‘the Court of
17 Claims has no power to grant equitable relief.’” *Id.* at 905. Since the Court of Claims does
18 *not* have the power to order the equitable remedy of reinstatement, it does not have the
19 power to provide “complete relief” to the plaintiff. In *Bowen* the Supreme Court
20 expressly held that the District Court’s jurisdiction to award “complete relief” was “not
21 barred by the possibility that a purely monetary judgment may be entered in the Claims
22 Court.” *Id.* at 910. The same is true in this case.

23 **F. CONCLUSION**

24 Here, as in *Gonzales*, the defendants’ plea that a uniform rule is necessary and that a case-
25 by-case approach is unworkable is simply untenable:

26 The Government’s argument echoes the classic rejoinder of bureaucrats

¹⁷ The Court refused to construe the term “money damages” as if it meant “monetary relief.” *Id.* at 896.

1 throughout history: If I make an exception for you, I'll have to make an
exception for everybody, so no exceptions.

2 *Gonzales*, 546 U.S. at 436. Even in the case of military service, the Supreme Court has
3 recognized that constitutional rights may compel the government to grant an exemption from a
4 general law that requires military service in times of war. *See Seeger v. United States*, 380 U.S.
5 163 (1965) (affirming the reversal of a conviction for refusal to submit to induction because
6 conscientious objector was entitled to exemption from a statute compelling military service).

7 The *Witt* Court held that a uniform rule precluding military service by all known gays and
8 lesbians is *not* constitutional. *Witt* holds that the law categorically prohibiting all gays and
9 lesbians from serving openly *cannot* be applied to a servicemember without a more
10 particularized showing that its application is justified because service by that servicemember will
11 harm the national security interests of the country. In this case the Defendants will not be able to
12 prove that Major Witt will cause a negative impact on unit cohesion and that nothing short of her
13 complete removal from the Air Force will prevent that negative impact. Thus, they will not be
14 able to carry their burden of proving that application of DADT to Witt is necessary to further any
15 important governmental interest. Even assuming, for the sake of argument, that there is some
16 Air Force unit, somewhere on the planet, where a unit cohesion problem might result if Major
17 Witt were assigned to that unit, the Defendants will not be able to prove that there are no less
18 restrictive alternatives to the discharge of Major Witt which could successfully mitigate such a
19 hypothetically possible future negative effect.

20 Accordingly, this Court should find that the Defendants cannot carry their burden of showing
21 a constitutionally adequate justification for the discharge of Major Witt. Therefore, her
22 discharge violated her due process rights and she is entitled to reinstatement in the Air Force
23 Reserve.

1 DATED this 31st day of August, 2010.

2
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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 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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