



1           5.       The living and working conditions on deployment could involve limited privacy;  
2 nonetheless, members of 446th AES volunteer for deployment assignments.

3           6.       Starting in October 2003, plaintiff engaged in a sexual relationship with Laurie  
4 McChesney.

5           7.       At the time that plaintiff began her relationship with Laurie McChesney, Laurie  
6 McChesney was married to Pat McChesney; the McChesneys later divorced.

7           8.       In June 2004, Pat McChesney sent an email to the Air Force Chief of Staff stating  
8 that plaintiff had engaged in such a relationship with his then-wife and that he had subsequently  
9 filed for divorce.

10          9.       The Air Force subsequently began an investigation of plaintiff, which determined  
11 that in addition to the relationship with Laurie McChesney, plaintiff had been involved in a six-  
12 year relationship with another woman, Tiffany Jenson.

13          10.      Also, in the course of her Air Force career, plaintiff had sexual relationships with  
14 two female Air Force officers.

15          11.      Furthermore, in at least two instances prior to her discharge, plaintiff told – or at a  
16 minimum acknowledged to – enlisted members of her squadron that she was a lesbian, thus  
17 placing them in a position of having to choose between loyalty to plaintiff as a superior officer  
18 and controlling Air Force policy.

19          12.      Plaintiff was suspended from earning pay or retirement points in the Air Force  
20 Reserve in November 2004, and the discharge process began.

21          13.      Plaintiff requested and received a full discharge board hearing in which she was  
22 represented by both civilian and military counsel.

23          14.      At the hearing, which was conducted on September 28 and 29, 2006, plaintiff  
24 was given the opportunity to make a sworn statement subject to cross-examination or an unsworn  
25 statement without the possibility for cross-examination, and she made an unsworn statement; she  
26 also submitted documents and statements from others on her behalf.

27          15.      After evidence of plaintiff's statements and acts was before the discharge board,  
28 on September 29, 2006, the discharge board recommended that plaintiff be discharged under the

1 Air Force's Don't Ask, Don't Tell (DADT) policy, which is codified in statute, *see* 10 U.S.C.  
2 § 654, and implemented in the Air Force Reserve through Air Force Instruction 36-3209.

3 16. On July 6, 2007, the Air Force Personnel Board recommended that plaintiff be  
4 discharged under the Air Force's DADT policy.

5 17. On July 10, 2007, the Secretary of the Air Force's designee directed that plaintiff  
6 be discharged with an Honorable discharge.

7 18. Ultimately, plaintiff received an Honorable discharge, effective October 1, 2007.

8 19. Plaintiff's discharge certificate contained no stigmatizing language or coding.

9 20. To further unit cohesion, morale, good order, and discipline, the Air Force, an  
10 institution globally organized and globally assigned, needs uniform personnel policies, not  
11 different personnel policies for separate geographical regions.

12 21. This need for uniformity extends to the DADT policy; it cannot applied differently  
13 in various geographical regions without disruptions to unit cohesion, morale, good order, and  
14 discipline.

15 22. If plaintiff were not discharged, then the DADT policy would not be applied  
16 uniformly and that would disrupt unit cohesion, morale, good order, and discipline.

17 23. At no point in time in the last six years has plaintiff actively engaged in the  
18 practice of nursing at the rate of 180 hours per year.

## 19 20 **PROPOSED CONCLUSIONS OF LAW**

21 1. The Court lacks jurisdiction over any claim for which plaintiff seeks back pay or  
22 retirement credit.

23 a. Plaintiff's claims for back pay and retirement credit as a member of the  
24 Air Force Reserve constitute "money damages," and are outside of the  
25 waiver of sovereign immunity contained in the Administrative Procedure  
26 Act, *see* 5 U.S.C. §§ 701 - 706.

27 b. If plaintiff did state a legally cognizable claim for back pay and retirement  
28 credit, then she would have an adequate remedy in the Court of Federal

1 Claims, which would have exclusive jurisdiction over those claims.

- 2 2. The Court cannot reinstate plaintiff to her former unit, the 446th AES.
- 3 a. Plaintiff does not meet the requirements for serving as an Air Force flight
- 4 nurse because she has not been actively engaged in the practice of nursing.
- 5 b. Due to principles of deference to the military, the Court cannot reinstate
- 6 plaintiff to any particular unit.
- 7 3. Plaintiff has no actionable procedural due process claim.
- 8 a. Plaintiff has not been deprived of a constitutionally protected life, liberty,
- 9 or property interest.
- 10 b. Even if plaintiff were deprived of a constitutionally protected life, liberty,
- 11 or property interest, she has received the full process to which she is due
- 12 by virtue of having a full discharge board hearing.
- 13 4. The Air Force's DADT policy is constitutional as applied to plaintiff.
- 14 a. The Air Force has an important governmental interest in unit cohesion,
- 15 morale, good order, and discipline.
- 16 b. Because plaintiff's conduct, which was inconsistent with standards of
- 17 military officership, posed a risk to unit cohesion, morale, good order, and
- 18 discipline, her discharge from the Air Force significantly furthers unit
- 19 cohesion, morale, good order, and discipline.
- 20 c. It is necessary to discharge plaintiff under the DADT policy, and no less
- 21 restrictive alternative exists for permitting plaintiff to continue to serve.
- 22 d. The liberty interest identified by the Court of Appeals is outweighed here
- 23 by unique military interests and thus the application of the DADT policy to
- 24 plaintiff is constitutional.

25  
26 Dated: August 31, 2010

Respectfully submitted,

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28 TONY WEST

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4 **AT TACOMA**

5 **CERTIFICATE OF SERVICE**

6 I hereby certify that on August 31, 2010, I electronically filed the foregoing Defendants'  
7 Proposed Findings of Fact and Conclusions of Law, with the Clerk of the Court using the  
8 CM/ECF system which will send notification of such filing to the following persons:

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