

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN WASHINGTON
AT TACOMA DIVISION

MAJOR MARGARET WITT,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE
AIR FORCE; et al.,

Defendants.

Case No. C06-5195-RBL

PLAINTIFF’S MEMORANDUM
REGARDING ADMISSIBILITY OF TRIAL
EXHIBITS 63, 64, AND 80.

Plaintiff understands that Defendants object to the admission of trial exhibits 63, 64, and 80 on two grounds, relevance under Rule 402 and hearsay under Rule 802 of the Federal Rules of Evidence. The three proposed trial exhibits contain admissions by Defendant Secretary Robert Gates concerning the Don’t Ask Don’t Tell policy which is at issue in this case. Because these trial exhibits are relevant and not hearsay, the Court should admit them at trial.

A. The Three Proposed Trial Exhibits Contain Relevant Evidence: Admissions By Defendant Secretary Gates Concerning the Don’t Ask Don’t Tell Policy and the Feasibility of Allowing Open Service By Gay and Lesbian U.S. Servicemembers.

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

1 it would be without the evidence.” FED.R.EVID. 401. Pursuant to Rule 402, all relevant evidence
2 is admissible.

3 Trial Exhibit 63 is a transcript of the hearing held on February 2, 2010 before the Armed
4 Services Committee for the U.S. Senate. The witnesses included Defendant Secretary Gates and
5 the subject of the hearing included the Don’t Ask, Don’t Tell policy (DADT). (Dunne Decl. Ex.
6 A at 5.) At the hearing, Secretary Gates testified concerning DADT and stated, among other
7 things, that he “fully support[s] the president’s decision” to repeal DADT, that the question
8 before the Department of Defense (DoD) is not “whether the military prepares to make this
9 change but how we must,” that DoD will create a working group to design an implementation
10 plan as to how to repeal DADT; and that the implementation plan is also being created so that
11 DoD is “prepared to begin to implement any change in the law.” (*Id.* at 49-50, 55.) Secretary
12 Gates also testified directly about this case and acknowledged to Congress that DoD will ensure
13 that new rules and procedures are created given the Ninth Circuit decision. (*Id.* at 52.) This
14 transcript contains significant party admissions, or direct evidence, that contradict arguments
15 made by Defendants (Dkt 118 at 3, 11-12; Dkt 141 at 11-12; and Dkt 142 at 4;) that there is no
16 less restrictive alternative to discharging Major Witt due to her sexual orientation and that
17 Defendants cannot logistically implement the Ninth Circuit’s ruling in this case.

18 Defendants have also asserted that discovery into the views of unit members is irrelevant
19 (Dkt 131 at 13-14). But Defendant Secretary Gates testified in front of the U.S. Senate
20 committee that “we can’t possibly evaluate the impact on unit cohesion, on morale, on retention,
21 on recruitment and so on unless we encourage people to tell us exactly what they think and
22 exactly what their views are, honestly, and as forthrightly as possible.” (Dunne Decl. Ex. A at
23 56.) This is highly relevant evidence contradicting Defendants’ assertions. Most critically,
24 Secretary Gates further conceded that the military has made assertions justifying the DADT
25 policy “that have been made for which we have no basis in fact.” (*Id.* at 60.)

26 Trial Exhibit 64 is a transcript of the hearing held on February 3, 2010 before the Armed
27 Services Committee for the U.S. House of Representatives. The witnesses included Defendant
28 Secretary Gates and the hearing included testimony concerning the Don’t Ask, Don’t Tell policy
29 (DADT). (Dunne Decl. Ex. B at 66.) At the hearing, Secretary Gates voluntarily interjected and

1 stated in reference to the DADT policy and changing institutions that “stupid was trying to
2 impose a policy from the top without any regard for the view of the people who were going to be
3 affected.” (*Id.* at 87.) Secretary Gates also reiterated how important it was to survey
4 servicemembers and their families when assessing the “impact on unit cohesion, on morale,
5 [and] on retention.” (*Id.*)

6 Trial Exhibit 80 is a transcript of a press conference held by the DoD on March 25, 2010
7 with Secretary Gates and Admiral Mike Mullen which addressed DADT. During the press
8 conference, Secretary Gates explained the changes to the DoD regulations concerning DADT
9 that he recently approved. (Dunne Decl. Ex. C at 132.) His statements confirm that the U.S.
10 military can make changes to personnel regulations relating to DADT within 45 days. When
11 asked whether the current study being undertaken by the DoD concerned *whether* to implement a
12 repeal of DADT or *how* to “actually implement” a repeal of DADT, Secretary Gates answered:
13 “The study is about how you would implement it.” (*Id.* at 135.) Put simply, these are admissions
14 by the head of the DoD that the institution can successfully make changes to its personnel
15 regulations and that there are less restrictive alternatives than discharge for allowing a gay or
16 lesbian servicemember to serve openly within the U.S. military.

17 Because the three proposed Trial Exhibits (63, 64 and 80) all contain relevant evidence
18 pertaining to issues at the heart of this case, the Court should admit them as evidence.

19 **B. A Statement Made By a Party is Not Hearsay.**

20 Rule 801(d)(2) states in relevant part that “A statement is not hearsay if. . .[t]he statement
21 is offered against a party and is (A) the party’s own statement, in either an individual or a
22 representative capacity.” *United States v. Matlock*, 415 U.S. 164, 172 (1974) (holding that the
23 out-of-court statements by a party “would surmount all objections based on the hearsay rule” and
24 “would be admissible for whatever inferences the trial judge could reasonably draw”); *see also*
25 *Matylinsky v. Budge*, 577 F.3d 1083, 1094 (9th Cir. 2009) (finding that statements made by a
26 defendant party offered against the defendant are excluded from the definition of hearsay under
27 Rule 801(d)(2)(A)).

28 Secretary Gates is a defendant party in this lawsuit. (Dkt. 60 at 1-2.) Put simply,
29 Secretary Gates’ testimony in front of Congress during the two committee hearings and his

1 statements made at a DoD press conference constitute admissions by a party-opponent and
2 accordingly, are not hearsay pursuant to Rule 801(d)(2). *Matylinsky*, 577 F.3d at 1094.

3 **CONCLUSION**

4 For the reasons set forth above, Plaintiff respectfully requests that the Court deny
5 Defendants' request to exclude proposed Trial Exhibits 63, 64, and 80.

6
7 DATED this 3rd day of September, 2010. Respectfully submitted,

8
9 **ACLU OF WASHINGTON FOUNDATION**

10 By: /s/ Sarah A. Dunne
11 Sarah A. Dunne, WSBA#34869
12 Sher Kung, WSBA#42077
13 ACLU of Washington Foundation
14 901 Fifth Avenue, Suite 630
15 Seattle, WA 98164
dunne@aclu-wa.org
skung@aclu-wa.org

16 Jim Lobsenz, WSBA #8787
17 Carney Badley Spellman
18 700 Fifth Avenue, Suite 5800
19 Seattle, WA 98104
(206) 622-8020
Lobsenz@carneylaw.com

20 Attorneys for Plaintiff
21
22
23
24
25
26
27
28
29

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2010, I electronically filed this *Plaintiff's Memorandum Regarding Admissibility of Trial Exhibits 63, 64, 65 and 80* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Peter Phipps

peter.phipps@usdoj.gov

Marion J. Mittet

Jamie.Mittet@usdoj.gov

Bryan R. Diederich

bryan.diederich@usdoj.gov

Stephen J. Buckingham

Stephen.Buckingham@usdoj.gov

Attorneys for Defendants

DATED this 3rd day of September, 2010.

AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON FOUNDATION

By: /s/ Sarah A. Dunne

Sarah A. Dunne, WSBA #34869

901 Fifth Avenue #630

Seattle, WA 98164

Tel. (206) 624-2184

dunne@aclu-wa.org