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UNITED STATES COURTHOUSE

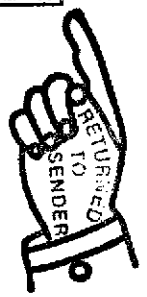
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06-CV-05195-MRET

FILED

UNITED STATES COURT OF APPEALS

JUN 10 2009

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK OF COURT
U.S. COURT OF APPEALS

MARGARET WITT,

Plaintiff - Appellant,

V.

DEPARTMENT OF THE AIR FORCE;
DONALD H. RUMSFELD, Secretary of
Defense; MICHAEL W. WYNNE,
Secretary, Department of the Air Force;
MARY L. WALKER, Commander, 446th
Aeromedical Evacuation Squadron,
McChord AFB,

Defendants - Appellees.

No. 06-35644

D.C. No. CV-06-05195-RBL

Western District of Washington,
Tacoma

MANDATE

The judgment of this Court, entered 5/21/08, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

By: Synitha Walker
Deputy Clerk

527 F.3d 806

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527 F.3d 806, 103 Fair Empl.Prac.Cas. (BNA) 585, 08 Cal. Daily Op. Serv. 6117, 2008 Daily Journal D.A.R. 7423
(Cite as: 527 F.3d 806)

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United States Court of Appeals,
Ninth Circuit.

Margaret WITT, Major, Plaintiff-Appellant,

v.

DEPARTMENT OF THE AIR FORCE; Robert M.

Gates,^{FN*} Secretary of Defense; Michael W.

Wynne, Secretary, Department of the Air Force;

Mary L. Walker, Colonel, Commander, 446th
Aeromedical Evacuation Squadron, McChord AFB,
Defendants-Appellees.

FN* Robert M. Gates is substituted for his
predecessor Donald H. Rumsfeld as Sec-
retary of Defense. Fed. R.App. P. 43(c)(2).

No. 06-35644.

Argued and Submitted Nov. 5, 2007.

Filed May 21, 2008.

Background: Air Force reservist nurse brought action against Air Force, Secretary of Defense, Secretary of Air Force, and her Air Force commander after she had been suspended from duty on account of her sexual relationship with civilian woman. The United States District Court for the Western District of Washington, Ronald B. Leighton, J., 444 F.Supp.2d 1138, dismissed action. Plaintiff appealed.

Holdings: The Court of Appeals, Gould, Circuit Judge, held that:

- (1) nurse suffered cognizable injury, as required to have standing on her claims under substantive due process and equal protection clauses;
- (2) record did not indicate that procedural due process claim was ripe for adjudication;
- (3) heightened level of scrutiny applied to substantive due process claim;
- (4) as-applied, rather than facial, heightened scrutiny analysis applied to substantive due process claim;
- (5) government advanced important governmental

interest through "Don't Ask, Don't Tell" policy (DADT);

(6) factual issue existed at pleading stage as to whether application of DADT specifically to nurse significantly furthered government's interest in "unit cohesion" and the like and whether less intrusive means would have substantially achieved government's interest; and

(7) suspension of nurse did not violate equal protection clause.

Affirmed in part, reversed in part, and remanded.

Canby, Senior Circuit Judge, concurring in part and dissenting in part.

West Headnotes

[1] Constitutional Law 92 ↪885

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(A) Persons Entitled to Raise Constitutional Questions; Standing

92VI(A)10 Due Process

92k885 k. In General. Most Cited

Cases

Constitutional Law 92 ↪915

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(A) Persons Entitled to Raise Constitutional Questions; Standing

92VI(A)11 Equal Protection

92k915 k. In General. Most Cited

Cases

Air Force reservist nurse suffered cognizable injury, as required to have standing under Article 3 to bring claim alleging that Air Force, Secretary of Defense, Secretary of Air Force, and her Air Force commander violated her rights under substantive due process and equal protection clauses by imposing long-term suspension on her, since she lost pay