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 OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

I. INTRODUCTION

The Ninth Circuit remanded this case for further proceedings "to develop the record on Major Witt's substantive due process claim," and directed that the relevant factual inquiry be made on an as-applied basis. *Witt v. Department of the Air Force*, 527 F.3d 806, 819, 821 (9th Cir. 2008). The relevant inquiry is "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." *Id.* at 819. Despite these clear instructions, defendants seek to prevent Witt from developing the record by preventing her from deposing members of the 446th because it would be too "disruptive."

On remand, in response to interrogatories asking them to identify any person known to hold the opinion that the presence within the 446th of a person known to be a

CARNEY BADLEY SPELLMAN
LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020

lesbian would have a negative impact on unit morale, unit discipline or unit cohesion, the defendants identified two witnesses: Colonel Janette Moore-Harbert and Colonel Mary Walker.[1] Without objection from defendants these two witnesses were deposed. The testimony they gave did ***not*** support the government's contention. For example, when asked what evidence she had to support her opinion that reinstatement of Witt would have a negative impact on the morale, discipline or cohesion of the 446th, Moore-Harbert finally answered, "I have no evidence."[2] And when Colonel Walker was asked if she had "ever held the opinion that Major Witt's presence in the 446th has a negative impact on unit cohesion or morale," she answered, "No."[3]

Although the Government did not object to the plaintiff deposing the witnesses that it had identified as supporting the Government's position in this case, as soon as Witt began noting the depositions of witnesses who are expected to give testimony favorable to her, the Government filed the present motion seeking to prevent these depositions from taking place. These deponents will give testimony demonstrating that the unit had a culture of acceptance of gay and lesbian service members and that the reinstatement of Major Witt, a known lesbian, will have no negative effect on unit cohesion, morale or discipline.[4]

The Government contends that these depositions will be burdensome to the deponents. And yet the deponents make no such claim. Some of those that plaintiff has been able to contact have sworn directly to the contrary.[5] Moreover, as the declaration of

---

[1] *See Defendants' Objection and Responses to Plaintiff's First Requests for Admission, Interrogatories, and Requests for Production,* Defendants' Answers to Interrogatory Nos. 1, 2, 3, 4, 7(b), & 9 (attached as App. A to James E. Lobsenz Decl. (hereinafter "Lobsenz Decl.").

[2] Colonel Janette Moore-Harbert Dep. (App. G of Lobsenz Decl.)(hereinafter "Moore-Harbert Dep.") 186:9-13, Feb. 25, 2010.

[3] Colonel Mary E. Walker Dep. (App. F of Lobsenz Decl.)(hereinafter "Walker Dep.") 145:16-19, Jan. 8, 2010.

[4] *See* Lobsenz Decl., ¶¶ 11-13, 15-17, and 19.

[5] Heather Julian Decl. ¶ 7 ("Stacey wants to talk to Mr. Lobsenz and has no objection to being deposed"); Ed Hrivinak Decl. ¶ 7.

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020

SMSgt. James Schaffer shows, efforts have been made to prevent Witt's attorneys from interviewing witnesses in the 446th.[6]

The bottom line is that the Government has no objection if plaintiff wants to depose the witnesses whom the Government has already identified as witnesses favoring their position (although as it turns out, Colonel Walker ultimately gave testimony that she did *not* hold the opinion that the Government claimed she held in its interrogatory responses), but it objects strenuously if Witt wants to depose witnesses who can be expected to provide information favorable to her.

In support of its position that discovery should be selectively forbidden (only the Government's identified partisans can be deposed), the Government fails to cite a single case. Indeed, the Government cites no case that holds that a deposition was too disruptive to the military function to be permitted. The Ninth Circuit has already held that this lawsuit was properly brought and that the facts need to be fully litigated so that the heightened constitutional scrutiny can be applied to Witt's due process claim.

II. STATEMENT OF PERTINENT FACTS

In assessing whether it would harm unit morale or cohesion if Witt were reinstated to duty in the 446th, it is highly relevant to consider the past experience of the 446th with servicemembers who were widely known throughout the unit to be gay or lesbian. Moore-Harbert testified at her deposition that in her entire career in the Air Force she "did not remember" anyone ever telling her that they knew, or believed, or suspected, that some other member of the Air Force was gay or lesbian. Moore-Harbert Dep. 78:11-79:24. When asked if she had ever suspected *anyone* in the Air Force of being gay or lesbian, Moore-Harbert answered, "I don't know." *Id.* at 80:7.

Indeed, unit members to be deposed are expected to provide testimony that several

[6] James Schaffer (Ret.) Decl. ¶¶ 7 &12

CARNEY BADLEY SPELLMAN
LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020

members of the 446th were known to be gay or lesbian by most other unit members and there was no negative effect on unit morale or discipline. Major Heather Julian, the wife of deponent Stacey Julian, declares:

> I believe that over the past decade 5 or 6 different people who are gay or lesbian have served in the 446th, that virtually everyone in the unit had the same beliefs, and that no one had any problem with their serving in the unit.[7]

Moore-Harbert was asked by name if she ever suspected particular individuals of being gay or lesbian. This was done not because the plaintiff needed to discover the sexual orientation of these individuals, but to see whether Moore-Harbert suspected or had knowledge of the unit culture, and whether she would admit this under oath.[8] She did not. Indeed, Moore-Harbert denied knowing two women in the unit were lesbians. Thereafter, when confronted with questions about her having issued letters of admonishment and counseling for improper fraternization to two female servicemembers who had been involved in a domestic violence incident while living together off-base, Moore-Harbert denied she knew that their sexual orientation was lesbian, said "I don't know" when asked if it crossed her mind, and insisted that all she knew was that they were rooming together and that one was under the command of the other.[9]

One of the witnesses scheduled to be deposed is expected to testify that one of these two lesbian servicemembers was angry with her because she suspected (incorrectly) that the deponent had outed her to Colonel Moore-Harbert. The deponent went to Moore-Harbert and asked her to explain to the angry officer that she (the deponent) had *not* outed her, and that Moore-Harbert had learned of her sexual orientation from a police report

---

[7] Julian Decl. ¶ 8. *See also* Schaffer Decl. ¶ 18 ("gay and lesbian service members have served in the 446th for many years and everyone knows this . . . and no one cared.") *See also* Lobsenz Decl. ¶ 11 App. B, redacted, where a servicemember states that most people in the unit already know of the servicemember's relationship with a "partner."

[8] *See* Lobsenz Decl. ¶¶ 4-6.

[9] Moore-Harbert Dep. 83:6-88:25; 91:1-93:24.

CARNEY BADLEY SPELLMAN
LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020

regarding the domestic violence incident.[10] Moore-Harbert granted this request and explained to the lesbian servicemember that the deponent had not outed her.

Other deponents are expected to testify, consistent with the declaration of retired SMSgt. Schaffer that beginning as early as the spring of 2006, Colonel Moore-Harbert personally ordered the members of the 446th not to cooperate with Witt's legal team:

> We were addressed at that meeting by Colonel Janette Moore-Harbert, the commanding officer of the 446th AES.
>
> Colonel Moore-Harbert told us that there have been some issues raised with respect to Major Margaret Witt and the Don't Ask Don't Tell policy of the armed forces. She explained that there have been legal issues raised and that lawyers for Major Witt had been "poking around." ***She told us that we were not allowed to talk to Major Witt's lawyers in any way, shape or form.*** She instructed us that if we were contacted by anyone, we should refer the person who contacted them to Public Affairs.[11]

At her own deposition, Moore-Harbert testified that MSgt. Stacey Julian told her he had been contacted by Witt's attorneys and [he] was requesting or asking what he should do."[12] But as Major Heather Julian's declaration attests, her husband "wants" to talk to Major Witt's legal team but he can't until the interview is approved by the Air Force."[13]

Since Witt was suspended from the 446th in November of 2004, and later discharged, there have been a number of events, such as retirement ceremonies for individual members[14] and celebrations of the 40th anniversary of the unit, which Witt has attended. Some of these events were held on base. Moore-Harbert testified at her deposition that although she attended SMSgt. Schaffer's retirement ceremony, she did not remember that the attending members of the 446th gave Witt a standing ovation at that ceremony that was held off base in late 2007 after this lawsuit had been filed.[15] Moore-Harbert was forced to acknowledge the

---

[10] Lobsenz Decl. ¶ 13.
[11] Schaffer Decl. ¶ 7 (bold italics added), ¶ 12.
[12] Moore-Harbert Dep. 191:10-193:24.
[13] Julian Decl. ¶¶ 4-7; Lobsenz Decl. ¶ 18.
[14] Schaffer Decl. ¶¶ 13-16; Moore-Harbert Dep. 60:1-62:21.
[15] Moore-Harbert Dep. 63:5-21.

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020

fact that the 446th gave Witt a commemorative photo of the 446th as a present, although she claimed not to remember signing it.[16] She claimed not to recall that Major Witt also received a bouquet of roses.[17] The witnesses scheduled to be deposed are expected to provide evidence of these events which Colonel Moore-Harbert does not remember.

Finally, some of the deponents are expected to confirm that several members of the unit complained to higher ranking officers that the female commander of the 446th was having an inappropriate relationship with a married male officer serving under her command.[18] Neither of these straight officers was discharged, even though their relationship actually caused servicemembers to make complaints up the chain of command.[19] Since the Government relies on the unit climate surveys as probative evidence to gauge the morale of the 446th AES at select points in time, testimony from these deponents is relevant to rebut this reliance. The Government contends that commanders looked to the survey results to assess morale, thus Witt should be given the opportunity to paint the context in which the surveys were taken. This involves consideration of unit relationships that actually *did* have a negative effect on unit morale and cohesion.

In sum, the scheduled deponents will provide evidence Colonels Walker and Moore-Harbert cannot because either they do not know it or cannot recall.[20]

III. ARGUMENT

A. Cases Holding That Damages Actions Cannot Be Brought Against the Military or Its Officers Are Not Relevant Since Plaintiff's Suit Does Not Seek Money Damages.

The Government cites several cases which hold that lawsuits *for money damages*,

---

[16] Moore-Harbert Dep. 64:13-66:22. She admitted this type of photo was customarily given to people at retirement ceremonies and that the photos were paid for by members of the 446th. *Id.* at 65:2-9, 71:14-72:24.
[17] Moore-Harbert Dep. 67:19-21.
[18] This was neither Colonel Walker nor Colonel Moore-Harbert; it was the commander prior to Walker.
[19] Hrivnak Decl. ¶¶ 5-6.
[20] Lobsenz Decl. ¶¶ 4-17, 19.

CARNEY BADLEY SPELLMAN
LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020

whether they be based on statutes, such as the Federal Tort Claims Act ("FTCA"),[21] or the Civil Rights Act of 1964,[22] or the Constitution,[23] may not be brought. But none of these cases are on point. Plaintiff Witt has not sued for money damages. She seeks only injunctive and declaratory relief to remedy a constitutional injury. *See Wilkins v. United States*, 279 F.3d 782, 790 (9th Cir. 2002) ("we reverse the dismissal of the remaining claims for injunctive and declaratory relief" brought by servicemember making constitutional challenge to chaplaincy program).

Indeed, one of the cases the Government cites, expressly distinguished the situation where the plaintiff is not seeking damages but is seeking injunctive relief for an alleged constitutional wrong. In *Jackson v. Brigle*, 17 F.3d at 284 the Court expressly noted that the case before it was *not* comparable to either *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), as amended (1992), cert. denied, 506 U.S. 1020 (1992) or *High Tech Gays v. Def. Indus. Sec. Clearance Office,* 895 F.2d 563 (9th Cir. 1990). In *Jackson*, the plaintiff was seeking money damages either under the FTCA or pursuant to a *Bivens* action. In *Pruitt* a lesbian military officer sought (and obtained) injunctive relief for violation of her constitutional rights against the Secretary of Defense and the Army. In *High Tech Gays*, the plaintiffs, gay and lesbian civilian employees of the government sought injunctive

---

[21] *United States v. Ferres*, 340 U.S. 135, 146 (1950) (Congress did not authorize servicemembers to bring claims under the Federal Tort Claims Act ("FTCA") against the military for injuries which are service-connected); *United States v. Johnson*, 481 U.S. 681, 689-91 (1987)(same); *United States v. Shearer*, 473 U.S. 52, 57 (1985)(same, rejecting suits for negligence causing off base injuries); *Jackson v. Brigle*, 17 F.3d 280 (9th Cir. 1994)(rejecting suit under FTCA because injuries were service-connected).

[22] The Government cites to *Hodge v. Dalton*, 107 F.3d 705 (9th Cir. 1997); *Mier v. Owens*, 57 F.3d 747 (9th Cir. 1995); and *Gonzalez v. Dep't of the Army*, 718 F.2d 926 (9th Cir. 1983). But these cases simply hold that the military is immune *from suit for damages* under Title VII of the Civil Rights Act of 1964 because Congress did not waive the Government's sovereign immunity when it enacted the statute.

[23] *Chappell v. Wallace*, 462 U.S. 296, 305 (1983): "We hold that enlisted military personnel may not maintain a suit ***to recover damages*** from a superior officer for alleged constitutional violations." (Bold italics added). At the same time it rejected the contention that a constitutionally-based *Bivens*-type damages action should be permitted, the Court also emphasized that suits for other types of relief from constitutional wrongs remained proper: "This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." *Id.*

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020

relief from the denial of security clearances on constitutional grounds. As the *Jackson* court noted:

> Neither of these cases involved claims for damages under the FTCA or *Bivens* and neither had anything whatsoever to do with *Feres* immunity.

Jackson, 17 F.3d at 284. *Neither does this case.*

The Government misrepresents the law when it suggests that all suits against the military for violation of constitutional rights are barred by a general doctrine of judicial deference to the military. The Government cites to *Zaputil v. Cowgill*, 335 F.3d 885, 886-87 (9th Cir. 2003) for the proposition that "[t]he Ninth Circuit has also barred constitutional claims brought by a service member," and notes that *Zaputil* involved due process and involuntary service claims. But the Government ignores the fact that *Zaputil* involved a claim for money damages, and the holding was that this claim was barred by the *Feres* doctrine:

> The *Feres* doctrine prevents Zaputil ***from recovering civil damages*** for any injuries caused by the military decisions about which she complains.

Zaputil, 335 F.3d at 889 (bold italics added). Thus, it is disingenuous for the Government to claim that *Zaputil* stands for the proposition that all suits raising constitutional claims against the military are barred. Suits for *money* are barred and that is all.

B. The Ninth Circuit Has Long Held That Suits Brought By Gay and Lesbian Servicemembers Against the Military Raising Claims of Constitutional Injury And Seeking Injunctive or Declaratory Relief are *Not* Barred and That Servicemembers Must Be Allowed to Develop the Record In Support of their Claims.

The Government relies on cases which held that certain claims brought against the military -- quite *unlike* the claims brought here – are simply not reviewable because judicial deference to the military precludes the litigation of such claims. But it has long been established in this Circuit that claims that the military has violated the constitutional rights of

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020

gay and lesbian servicemembers *are* reviewable.[24]

The Ninth Circuit has consistently rejected the contention that "deference to the military" prohibits litigation of such claims:

> The Ninth Circuit has consistently entertained servicemembers' constitutional challenges to military policies on the merits. We have adopted, and frequently reaffirmed, the test of *Mindes v. Seaman*, 453 F.2d 197, 201-02 (5th Cir. 1971), to determine whether we may consider a constitutional challenge to a particular military decision. [Citation and footnote omitted]. For example, in *Pruitt v. Cheney,* 963 F.2d 1160, 1166 (9th Cir. 1991)(as amended), we rejected the Army's argument that deference to the military should bar an equal protection challenge to a servicemember's discharge. Such deference was "best applied in the process of judging whether the reasons put forth on the record for the Army's discrimination against Pruitt are rationally related to any of the Army's permissible goals." *Id.* Similarly, in *Phillips v. Perry,* 106 F.3d 1420, 1421, 1425-26 (9th Cir. 1997*)*, we considered on the merits (and rejected) equal protection and First Amendment challenges to the military's "Don't Ask/Don't Tell" policy, [footnote omitted] noting that we have repeatedly considered such challenges.

Wilkins, 279 F.3d at 788.

In *Pruitt* the Army urged the Court to affirm the dismissal of a lesbian Army officer's constitutional claim on the grounds that the military policy of excluding gays and lesbians was rational. The Army made this argument even though the plaintiff had not had any opportunity to develop the record to support her constitutional claim. The Ninth Circuit rejected this suggestion, holding that if it deferred to the military judgment "in the absence of any supporting factual record, we would come close to denying reviewability at all." *Pruitt*, 963 F.2d at 1166-67. The *Pruitt* court noted that for decades, dating back to then Judge Kennedy's opinion in *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), the Ninth Circuit had reviewed constitutional challenges to military personnel actions taken against gay and lesbian servicemembers after permitting the servicemembers to develop the record. In *Pruitt*

[24] This Circuit applies the *Mindes* test under which a servicemember must meet two threshold requirements in order to obtain judicial review of a military decision: he must allege "(a) a violation of a recognized constitutional right . . . and (b) exhaustion of available intraservice remedies." *Khalsa v. Weinberger*, 779 F.2d 1393, 1398 (9th Cir.), *reaffirmed,* 787 F.2d 1288 (1985).

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020

the Court noted: "The Army does not ask us to deny review; it asks us to uphold a regulation without a record to support its rational basis. This we decline to do." *Pruitt*, 963 F.2d at 1167.

> Assuming that Pruitt supports her allegations with evidence, we will not spare the Army the task, which those cases imposed, of offering a rational basis for its regulation, ***nor will we deprive Pruitt of the opportunity to contest that basis.***

Pruitt, 963 F.2d at 1166 (bold italics added).

The Government makes the same type of request in this case which it made in *Pruitt*, but instead of trying to preclude the making of a record by asking the Circuit Court to affirm without remanding the case, it asks this Court to preclude the making of a record by prohibiting the plaintiff from conducting discovery after the case has been remanded. The Government's request would render nugatory the Ninth Circuit's decision reversing the dismissal of Witt's case, and would flatly contradict Circuit and District precedent such as *Pruitt* and *Cammermeyer v. Aspin,* 850 F.Supp. 910, 915-916 (W.D.Wash. 1994), dismissed as moot sub nom. and refusing to vacate district court opinion, *Cammermeyer v. Perry,* 97 F.3d 1235 (9th Cir. 1996).

C. Defendants Have Not Shown Good Cause for Issuance of a Protective Order. None of the People to Be Deposed Claim They Will be Burdened By Giving testimony. On the Contrary, Several Have Indicated Their *Desire* to Be Deposed.

A party seeking a protective order under Rule 26(c) "bears the burden of showing that specific prejudice or harm will result if no protective order is granted." *Stormans, Inc. v. Selecky,* 251 F.R.D. 573, 576 (W.D. Wash. 2008) (citing *Beckman Indus. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992)). The Government cites three cases in support of its request that the Court prohibit Witt from deposing members of the 446th AES. Two of these cases have *nothing* to do with requests to prohibit a party from taking a deposition and the third in dicta strongly suggests that such an order would be improper.

San Jose Mercury News v. U.S. District Court, 187 F.3d 1096 (9th Cir. 1999) involved the question of whether the trial court should have permitted a nonparty newspaper

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020

to intervene in a case so that it could gain access to a document that had already been produced in discovery by the defendant.[25] This Court is quite familiar with the second case, *Stormans, Inc. v. Selecky,* since it is its own decision. *Stormans* did **not** involve an attempt to preclude the opposing party from conducting discovery. Although the plaintiffs initially objected to providing certain information about their employers' identities in their answers to interrogatories, they agreed to answer the interrogatories and merely requested that their answers be protected against disclosure to the public. Finding that the plaintiffs had "substantiate[d] their argument with a specific example" of harm that could result if the names of their employers were disclosed, this Court issued a protective order prohibiting disclosure of this limited class of information to the public. *Id.* at 576. Thus, no discovery was prohibited in either *Stormans* or *Mercury News*, and neither opinion involved any issue about whether to allow depositions.

The Government purports to rely on *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 70 (2d Cir. 2003) for the proposition that "a court may prevent a proposed deposition" if it would create an inappropriate burden. There the plaintiff sought to depose opposing counsel and the district court temporarily prohibited that, stating that the plaintiff first had to use the discovery device of written interrogatories to see if that mechanism of discovery would suffice. In dicta the opinion, written by then Judge Sotomayor, strongly suggested that the district court had erred. But she concluded "we need not rule definitively on that matter because we have recently been advised that [attorney] Friedman has consented to the deposition, thereby rendering this appeal moot." *Id.* at 67.

Relying on Supreme Court precedent, Judge Sotomayor noted that the rules allowing

[25] The Circuit Court *granted* the newspaper's petition for a writ of mandamus and ordered the district court to allow the paper to challenge the previously entered protective order – which the parties had stipulated to – which denied public access to the document. The Court held the paper was entitled to challenge the stipulated determination that there was "good cause" to keep the document secret. 187 F.3d at 1103.

CARNEY BADLEY SPELLMAN
LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020

parties to take depositions were very liberal:

> The deposition-discovery regime set out by the Federal Rules of Civil Procedure is an extremely permissive one to which courts have long "accorded a broad and liberal treatment to effectuate their purpose that civil trials in the federal court [need not] be carried out in the dark.

Id. at 69, quoting *Schlagenhof v. Holder*, 379 U.S. 104, 114-115 (1964). "Moreover, the rules generally do not place any initial burden on parties to justify their deposition and discovery requests." *Id.*

In the present case, plaintiff does not seek to take the deposition of opposing counsel and there is no contention that plaintiff seeks to discover any privileged information. Accordingly, *In re Subpoena* is of little relevance, and to the extent that it is relevant, it *supports* the plaintiff's position that she is entitled to depose unit members because they have knowledge of facts directly relevant to the question of whether it would harm unit morale, cohesion or discipline to have known gays and lesbians serving in the 446th.

IV. CONCLUSION

The defendants have no right to selectively choose which members of the 446th the plaintiff is to be permitted to depose. Granting the defendants' motion would be contrary to the Circuit Court's decision in this case, to prior Circuit precedent such as *Pruitt*, to Rule 26(c), and would simply assist the defendants in preventing the plaintiff from accumulating evidence that her reinstatement would not negatively impact unit morale or cohesion. Plaintiff asks this Court to deny the motion.

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020

DATED this 9th day of March, 2010.

CARNEY BADLEY SPELLMAN, P.S.

By s/ James E. Lobsenz
James E. Lobsenz, WSBA #8787
Cooperating Attorney for the American Civil Liberties Union of Washington Foundation
Attorneys for Plaintiff
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Telephone: (206) 622-8020
Facsimile: (206) 622-8983
E-Mail: lobsenz@carneylaw.com

THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

By s/ Sarah A. Dunne
Sarah A. Dunne, WSBA #34869
Sher Kung, WSBA #42077
Attorney for Plaintiff
ACLU of Washington Foundation
705 Second Avenue, Suite 300
Seattle, WA 98104
Telephone: (206) 624-2184
E-Mail: dunne@aclu-wa.org

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 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:

Aaron H. Caplan	Aaron.caplan@lls.edu
Peter J. Phipps	Peter.phipps@usdoj.gov
Marion J. Mittet	Jamie.mittet@usdoj.gov

DEBORAH A. GROTH

CARNEY BADLEY SPELLMAN

LAW OFFICES
A PROFESSIONAL SERVICE CORPORATION
700 FIFTH AVENUE, #5800
SEATTLE, WA 98104-5017
FAX (206) 467-8215
TEL (206) 622-8020