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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

DECLARATION OF JAMES E.
LOBSENZ

I, JAMES E. LOBSENZ, do hereby declare under penalty of perjury under the laws of the United States of America that the following facts are true and correct:

1. I am counsel for the plaintiff. I have personal knowledge of the facts set forth here.

2. In the course of my duties as counsel for Major Witt I have contacted several people who serve, or who previously served, in the 446th Aeromedical Evacuation

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1 Squadron, to ask them for information pertinent to the case. The Ninth Circuit's 2008
2 decision ordered a remand so that the record could be developed on the second and third
3 factors of the heightened scrutiny test which it recognized. The Court said:

4 The Air Force attempts to justify the policy by relying on congressional findings
5 regarding "unit cohesion" and the like, but that does not go to whether the
6 application of DADT specifically to Major Witt significantly furthers the
7 government's interest and whether less intrusive means would achieve
8 substantially the government's interest. Remand is therefore necessary for the
9 district court to develop the record on Major Witt's substantive due process claim.

10 *Witt v. Department of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008). To prepare for
11 trial in this case, I have contacted witnesses who have personal knowledge about whether
12 Major Witt's presence in the 446th interfered with unit morale or unit cohesion, and how
13 members of her unit reacted to her suspension and discharge.

14 3. Central to the plaintiff's case is her contention that prior to Major Witt's
15 suspension in 2004, several gay and lesbian persons served in the 446th AES for many
16 years; that their sexual orientation was well known to members of the 446th; and that no
17 one was bothered by this fact; and that the unit morale, discipline and cohesion did not
18 suffer as a result. The Government maintains that there is little probative value to be
19 gained by deposing members of the 446th. But in fact several witnesses have told me that
20 during their years of service in the 446th AES they were aware of the presence in the unit
21 of 6-8 openly gay and lesbian servicemembers, and that their presence did not cause any
22 problems. Further, I anticipate that the scheduled deponents will testify that Major Witt's
23 reinstatement will have no negative effect on unit morale, cohesion or discipline.

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1 4. The list of names of unit members in the 446th was read to both Colonel
2 Walker and Colonel Moore-Harbert to determine their suspicion or knowledge of the unit
3 culture and its acceptance of gays and lesbians, and whether they would acknowledge it
4 under oath.

5 5. With respect to sexual orientation, Colonel Walker testified that, in her 28-
6 plus years in the Air Force, she never suspected or wondered whether any service member
7 was gay or lesbian. *See* Colonel Mary E. Walker Dep. (Attached here as App. F)
8 (hereinafter “Walker Dep.”) 45:15–46:13, Jan. 8, 2010.

9 6. Colonel Moore-Harbert was asked, in addition to the list of unit members,
10 whether she had ever encountered anyone – in the 446th or in any other unit – that she had
11 ever suspected was gay or lesbian. After demanding and receiving a definition of the
12 word “suspect” (“did it ever cross your mind”), she asserted that she could not remember
13 ever suspecting anyone in the Air Force of being gay or lesbian. *See* Colonel Janette
14 Moore-Harbert Dep. (Attached here as App. G) (hereinafter “Moore-Harbert Dep.”)
15 79:25–80:7, Feb. 25, 2010. Yet, moments later in her deposition, Colonel Moore-Harbert
16 admitted that she had learned that there was a report of a domestic violence incident (after
17 Major Witt was suspended) which resulted in local police going to the home of a female
18 officer in the 446th and a female enlisted service member who served under that officer’s
19 command. Colonel Moore-Harbert admitted that she eventually disciplined these two
20 service members for fraternization. But Moore-Harbert still insisted that she did not
21 know the two service members were lesbian. *See* Moore-Harbert Dep. 92:20-93:6.

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1 7. I have counted the number of times Colonel Moore-Harbert responded in
2 her deposition with “I don’t remember” or “Not that I can remember” to amount to over
3 300 instances. She also replied “I don’t know” over 65 times. The deposition lasted from
4 9:00am to 2:00pm with a one hour lunch break and multiple bathroom breaks.

5 8. In their answers to interrogatories, the Government listed Colonel Moore-
6 Harbert as a person who held the opinion that it would have a negative effect on unit
7 morale, cohesion or discipline if Major Witt, now a known lesbian, were to be reinstated
8 and returned to duty in the 446th. Attached here as App. A (Def.’s Resp. to Pl.’s Interrog.
9 No. 9).

10 9. At her deposition, Colonel Moore-Harbert confirmed that this was her
11 personal opinion. She was asked why she held this opinion and Colonel Moore-Harbert
12 speculated that on future deployments Major Witt might come in contact with other
13 service members that would be uncomfortable with Major Witt, now a known lesbian. *See*
14 Moore-Harbert Dep. 184:15-19; 185:7-13.

15 10. She was then asked again what evidence she had to support her opinion that
16 Major Witt’s presence would cause such problems, and she finally confessed she had
17 none:

18 Q. Now, I didn’t ask you whether it would be a concern. You told me it would be
19 a concern. I asked you: What evidence do you have that Major Witt
20 specifically would cause that reaction?

21 A. I have no evidence.

Moore-Harbert Dep. 186: 9-13.

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1 11. While Colonel Moore-Harbert confessed she had no evidence that suggested
2 that the reinstatement of Witt – now a known lesbian -- would harm unit morale, discipline
3 or cohesion, there is in fact a wealth of evidence to suggest the exact opposite. As attested to
4 by SMSgt. James Schaffer, Capt. Edmond Hrivnak, and Major Heather Julian, it is a fact
5 that a number of known gays and lesbians served in the 446th for several years and their
6 presence caused no problems at all. See James Schaffer Decl. ¶ 18; Edmond Hrivnak Decl.
7 ¶¶ 3-4; Heather Julian Decl. ¶ 8. And in response to the defendants’ requests for
8 production, plaintiff Witt has produced an email from a squadron servicemember [whose
9 name has been redacted] expressing that servicemember’s belief that despite efforts to “lay
10 low” in the unit, the servicemember believes that “most people” in the unit know about the
11 servicemember’s relationship with a same sex partner. A true and correct copy of this email
12 is attached as Appendix B to my declaration.

13 12. In the past month I have spoken by phone with Captain Jill Robinson about
14 being deposed in this case. She has not indicated any reluctance to be deposed. My notes of
15 our brief conversation show that when asked whether there are gays and lesbians in the 446th
16 AES she will say that “we have a ton of them in the squadron” and that “everyone knows”
17 they are there. She reports that although in theory the command is supposed to turn them in
18 for discharge, there is a culture in the 446th that since their presence causes no problems, no
19 action is taken.

20 13. Captain Robinson’s testimony is probative because she has fulfilled many
21 different roles in the unit for more than fifteen years, serving initially as an enlisted service

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1 member, then a non-commissioned officer, and finally as an officer. She would provide
2 three different perspectives. Captain Robinson is also expected to testify that the lesbian
3 officer involved in the domestic violence dispute was angry with Capt. Robinson because
4 the lesbian officer erroneously believed that Robinson had outed her. I spoke with Capt.
5 Robinson in the past month and she told me that she had gone to Colonel Moore-Harbert and
6 asked Moore-Harbert to explain to the angry officer that Capt. Robinson had not outed the
7 officer, and that Moore-Harbert learned of the officer's sexual orientation from a police
8 report regarding the domestic violence incident.

9 14. The Government implies that Lt. Colonel Hansen and Lt. Colonel Kenneth
10 Winslow would consider it burdensome and invasive to be deposed. Within the past ten
11 days I have spoken to Lt. Colonel Hansen and he never indicated that he felt this way. He
12 did contact me to inform me that he had a family vacation planned for the scheduled
13 deposition and he asked if the date of his deposition could be changed. I said certainly, and I
14 changed the date to one that would not conflict with his vacation. A copy of the email
15 exchange between myself and Lt. Colonel Hansen is attached as Appendix C.
16

17 15. I have had no contact with Lt. Colonel Winslow. Both Lt. Colonel Hansen
18 and Lt. Colonel Winslow cooperated with the plaintiff in the past, and both gave declarations
19 in support of Major Witt which were filed in the spring of 2006. Both Hansen and Winslow
20 supervised Major Witt and rated her on Officer Evaluation Reports. Plaintiff has reason to
21 believe that both have knowledge of events that have occurred in the four years since they
gave their original declarations, and that such information would contradict the Air Force's

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1 position reinstatement of Major Witt would negatively affect unit morale, discipline or
2 cohesion.

3 16. Attached as Appendix D is a true and correct copy of Major Witt's last Officer
4 Evaluation Report (OER) written by Lt. Colonel Hansen (then Major Hansen) that
5 specifically states Major Witt being "committed to continuing squadron cohesion and
6 morale." This OER was written and signed in May 2006, after the lawsuit had been filed
7 and it was public knowledge that Major Witt is a lesbian.

8 17. The Government also contends that it would be burdensome for others, such
9 as TSgt. Leah Crawford, to be deposed. In the fall of 2006, TSgt. Crawford, without my
10 asking her to do so, voluntarily provided a letter in support of Major Witt. Her letter was
11 intended for use at the administrative discharge board hearing held at AFB Robbins in
12 Georgia, and in fact, it was offered and admitted as an exhibit at that hearing. A copy of her
13 letter is attached as Appendix E. TSgt. Crawford has been on annual tours with Major Witt
14 multiple times and can testify as to her conduct on tour.

15 18. In the past two months, witnesses have informed me that they have been
16 forcefully discouraged from talking to Witt's lawyers. I have attempted to speak with Sgt.
17 Stacey Julian, a 446th AES member who had provided me with a declaration in 2006. I
18 left telephone messages for him in the past month which were not returned. However,
19 when I spoke with Sgt. Julian's wife, who is a retired member of the 446th, she told me
20 that her husband "wants to talk to you, but he can't right now" because he had been
21 ordered not to. *See* Julian Decl. ¶¶ 4-5. *See also* Schaffer Decl. ¶¶ 7-8.

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1 19. Sgt. Stacey Julian is the unit member who deployed with Major Witt more
2 times than any other unit member and can testify as to her conduct on deployment. He
3 has also served in the unit for over 15 years and can testify about the unit culture and the
4 acceptance of gay and lesbian service members within the unit.

5 20. Testimony concerning Major Witt's conduct during deployment is relevant
6 given the testimony by Colonel Moore-Harbert. *See* Moore-Harbert Dep. 184:15-19;
7 185:7-13. Colonel Walker and Colonel Moore-Harbert cannot provide this evidence
8 because Colonel Walker has not deployed since 1991 (*see* Walker Dep. 152:13-23) and
9 there is no evidence that Colonel Moore-Harbert has been deployed since 1995.

10 21. Attached to this declaration as Appendix A are true and correct copies of the
11 Defendants' Answers to Plaintiff's first Interrogatories numbers 1-4, 7(b) & 9, in which
12 Colonel Mary E. Walker and Colonel Janette Moore-Harbert are identified as opinion
13 witnesses for the defendants.

14 22. Attached to this declaration as Appendix F are true and correct copies of
15 excerpts from the deposition of Colonel Mary E. Walker, who was identified as a
16 Government opinion witness in this case.

17 23. Attached to this declaration as Appendix G are true and correct copies of
18 excerpts from the deposition of Colonel Janette Moore-Harbert.
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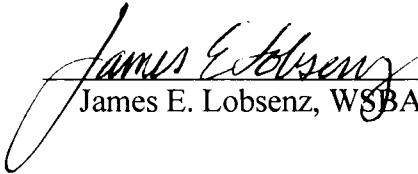
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DATED this 9th day of March, 2010.


James E. Lobsenz, WSBA No. 8787

DECLARATION OF JAMES E.
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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:

James E. Lobsenz	<u>Lobsenz@carneylaw.com</u>
Peter J. Phipps	<u>Peter.phipps@usdoj.gov</u>
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 DEBORAH A. GROTH

DECLARATION OF JAMES E.
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