

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.

No. C06-5195 RBL

PLAINTIFF'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS
RESPONSIVE TO REQUESTS FOR
PRODUCTION NOS. 33 TO 36

**NOTE ON MOTION CALENDAR:
MAY 28, 2010**

I. INTRODUCTION

Plaintiff respectfully requests entry of an order compelling Defendants to respond to discovery requests central to the issues in this matter. Plaintiff has requested records that may exist in document files and also within the personnel files of former and current unit members in order to discover information about command's knowledge of other gay or lesbian servicemembers, and to acquire rebuttal evidence concerning unit morale. Defendants have categorically refused to produce any documents responsive to Requests for Production Nos. 33-36 ("Requests"). The parties have met and conferred but were unable to resolve this matter. Accordingly, Plaintiff moves pursuant to Federal Rule of Civil Procedure 37(a), and seeks relief from the Court in an order allowing her access to evidence. Plaintiff also seeks attorney's fees if the Court grants the motion.

1 **II. FACTS**

2 Central to Plaintiff's case is her contention that prior to Major Witt's suspension in 2004,
3 several gay and lesbian individuals served in the 446th Aeromedical Evacuation Squadron (AES)
4 for many years; that their sexual orientation was well known to members of the 446th AES; and
5 that no one was bothered by this fact; and that unit morale, discipline and cohesion did not suffer
6 as a result. Plaintiff also contends that currently several gay and lesbian individuals serve in the
7 446th AES; that their sexual orientation is well known to members of the 446th; and that no one is
8 bothered by this fact; that unit morale, discipline and cohesion does not suffer as a result; and
9 accordingly, that the reinstatement of Major Witt, a known lesbian, will not negatively impact
10 unit morale, cohesion or discipline.

11 Plaintiff's original Requests sought production of servicemembers' personnel files as
12 well as specific documents pertaining to discipline as a result of unit morale concerns (Requests
13 Nos. 33 and 34) and gay or lesbian relationships between unit members (Requests Nos. 35 and
14 36). (Requests for Production Nos. 33-36 of Pl.'s Second Set of Reqs. for Produc. of Docs. and
15 Things (Ex. A of Declaration of Sher Kung ("Kung Decl.") at 6-7)). However, the original
16 Requests are not at issue now because Plaintiff no longer seeks to discover the entire personnel
17 files of servicemembers; instead Plaintiff only asks for production of certain documents unique
18 to the identified individuals.

19 Specifically, Plaintiff has agreed to limit Requests for Production Nos. 33 and 34 to
20 documents pertaining to disciplinary action or admonishment (located in any paper or electronic
21 files and located in the personnel files of Servicemember-A or Servicemember-B), and does not
22 seek entire personnel files. (April 23, 2010 Letter to the government ("April 23 Letter") Kung
23 Decl. Ex. B at 9-10). Similarly, with respect to Request for Production No. 35, Plaintiff agreed to
24 limit the request to documents (located in any paper or electronic files and located in
25 Servicemember-C's personnel file) relating to Servicemember-C's relationship with
26 Servicemember-D. Plaintiff also agreed to narrow Request for Production No. 36 to seek all

1 documents showing that Servicemember-E’s supervisors are aware of his/her relationship with
2 another same-sex unit member, including documents of such nature contained within
3 Servicemember-E’s personnel file.¹

4 The documents sought after in the above Requests will support Plaintiff’s contentions by
5 showing that members known to be gay or lesbian in the unit have served and continue to serve,
6 and that command was aware of specific gay or lesbian members and did not pursue any
7 disciplinary action against them on the basis of sexual orientation. The Requests are also
8 expected to produce information that illustrates a situation in the unit that actually *did* negatively
9 impact unit morale.

10 **A. Requests for Production Nos. 33 and 34**

11 To the extent that Defendants rely on the unit climate surveys that they have previously
12 produced as probative evidence to gauge the morale of the 446th AES at select points in time,
13 Plaintiff seeks to put on evidence to rebut this reliance. Plaintiff has reason to believe that this
14 evidence exists in documents that are responsive to Requests for Production Nos. 33 and 34.
15 Deposition testimony has confirmed that several unit members once complained to higher-
16 ranking officers that a prior commander of the 446th AES appeared to be engaged in a
17 relationship with a married officer serving under his/her command. Captain Jill Robinson stated
18 that this perceived relationship did not seem appropriate and that it “got to be suffocating for us
19 to watch, so a group of us that were present from different AFCs went across to Command,
20 across the street to 446... and had a sit-down discussion about the perceptions and impact that it
21 had and the angst it had on the squadron.” (Capt. Jill Robinson Dep. (Kung Decl. Ex. C) 61:19-
22 24). Independently, Captain Edmond Hrivnak also made a formal complaint to the Operations
23 group commander, reporting that “we have a morale issue, esprit de corps issue, because of the
24 conduct of our commander and executive officer... it doesn’t matter if they’re having an affair,
25
26

¹ For purposes of this motion, Plaintiff will still refer to each Request for Production by its respective number, how-
ever, it should be noted that Plaintiff seeks to compel responses to the amended requests as stated above.

1 it's an unprofessional relationship and affecting morale, and I feel like you need to do something
2 about it.” (Capt. Edmond Hrivnak Dep. (Kung Decl. Ex. D) 46:11-17; *see id.* at 45:20-46:20).

3 **B. Requests for Production Nos. 35 and 36**

4 In assessing whether it would harm unit morale or cohesion if Plaintiff were reinstated to
5 duty in the 446th AES, it is highly relevant to consider the unit culture of tolerance and
6 acceptance of past and prior servicemembers known to be gay or lesbian. Plaintiff seeks
7 responses to Requests for Production Nos. 35 and 36 to highlight that command is aware of
8 particular gay or lesbian service members, and to discover how the same commander involved in
9 the suspension and discharge of Plaintiff handled other situations concerning gay or lesbian
10 members.

11 Servicemember-C and Servicemember-D are unit members known by numerous 446th
12 AES members to be gay or lesbian. *See, e.g., id.* at 34:13-35:8. Plaintiff propounded Request
13 for Production No. 35 because Colonel Moore-Harbert testified that she disciplined the two
14 same-sex servicemembers for fraternization when she received a police report recounting a
15 domestic violence dispute in the private home that the two members shared. (Col. Janette
16 Moore-Harbert Dep. (Kung Decl. Ex. E) 86:20-25). At the same time, Col. Moore-Harbert
17 refused to acknowledge that she was aware that these two servicemembers were romantically
18 involved with each other. *See id.* at 85:2-15, 92:20-93:6. What is more, when asked if she had
19 ever had every suspected *anyone* in the Air Force of being gay or lesbian, Moore-Harbert
20 answered, “I don’t know.” *Id.* at 80:7.

21 Depositions of unit members have indeed provided testimony to the contrary. Not only
22 have unit members confirmed that various former and current 446th AES members are assumed
23 and known to be gay or lesbian. *See* Robinson Dep. (Kung Decl. Ex. C) 37:16-24; *see also*
24 Hrivnak Dep. (Kung Decl. Ex. D) 28:5-10. Apparently Col. Moore-Harbert herself is also aware
25 of this fact. Col. Moore-Harbert’s knowledge is illustrated by an incident to which Capt.
26 Robinson testified involving herself, Servicemember-C, and Col. Moore-Harbert.

1 Servicemember-C was upset with Capt. Robinson because Servicemember-C incorrectly
2 suspected that Capt. Robinson had up-channeled information about the domestic violence dispute
3 Servicemember-C had with his/her same-sex partner, thereby outing him/her to Col. Moore-
4 Harbert. *See* Robinson Dep. 40:8-41:1. In trying to save the friendship with Servicemember-C,
5 Capt. Robinson asked Col. Moore-Harbert to explain to Servicemember-C that Capt. Robinson
6 was not the source of the information and did not in fact out Servicemember-C. *See id.* at 42:23-
7 45:21. Capt. Robinson testified that “the three of us talked” and Col. Moore-Harbert explained
8 that Capt. Robinson was not the person that outed Servicemember-C. *Id.*

9 Indeed, it appears that the current commander of the unit has continued to allow gay and
10 lesbian members to serve without any adverse action. Plaintiff also requested documents
11 pertaining to Servicemember-E and Servicemember-F, two other same-sex unit members,
12 because Plaintiff believes that at an earlier point in time, under prior command, they were
13 romantically involved with each other and cohabitating. The two members made special
14 arrangements with the commander of the unit to ensure that they would not serve in each other’s
15 chain of command.

16 **C. Defendants refuse to produce requested documents**

17 Plaintiff has attempted to avoid the necessity of filing this motion. Defendants have
18 objected to Requests for Production Nos. 33-36 on grounds that the Requests call for production
19 of materials protected from disclosure by the Privacy Act, 5 U.S.C. § 552a, that it is unduly
20 burdensome because it is not reasonably calculated to lead to the discovery of admissible
21 evidence, and because Defendants claim that the actual or purported relationships of other
22 members of Plaintiff’s unit have no bearing on Plaintiff’s effect on unit morale and cohesion.
23 (Defs.’ Objections and Resps. to Pl.’s Second Set of Reqs. for Produc. of Docs. and Things,
24 Defs.’ Objections to Reqs. for Produc. Nos. 33-36 (Kung Decl. Ex. F at 45-47)).

25 In a telephonic conference on April 13, government counsel restated their position that
26 the Privacy Act contains no exception permitting disclosure of the requested documents. (Kung

1 Decl. ¶ 8). On April 23, 2010, Plaintiff replied by email correspondence renewing and limiting
2 the requests, and reiterating that the Privacy Act provides no bar to the disclosure of such
3 information. Plaintiff also indicated willingness to agree to a protective order governing the use
4 and disclosure of any confidential records during this litigation, and attached a draft Stipulation
5 and Order to Protect Confidential Information for Defendants to review. (Kung Decl. Ex. B at 9-
6 10). Plaintiff anticipated that Defendants would respond sooner to the proposed protective order,
7 thus counsel had waited to meet and confer over the above-captioned Requests until May 10. On
8 May 10, 2010, parties engaged in a telephonic meet and confer and government counsel
9 confirmed that their client was unwilling to agree to a protective order, and still maintained the
10 position that the Privacy Act protects personnel files from disclosure. (Kung Decl. ¶ 9; Kung
11 Decl. Ex. G at 50).

12 III. ARGUMENT

13 A. **The Privacy Act provides no basis for Defendants’ refusal to produce the** 14 **requested documents.**

15 It is well-established that the Privacy Act provides no bar to the disclosure of information
16 in discovery during the course of litigation. *See, e.g., Laxalt v. McClatchy*, 809 F.2d 885, 888-89
17 (D.C. Cir. 1987); *Weahkee v. Norton*, 621 F.2d 1080, 1082-83 (10th Cir. 1980); *Hassan v.*
18 *United States*, 2006 WL 681038, at *2 (W.D. Wash. March 15, 2006). Indeed, the Privacy Act
19 contains an express exception to any prohibition on disclosure “pursuant to the order of a court
20 of competent jurisdiction.” 5 U.S.C. § 552a(b)(11); *see Laxalt*, 809 F.2d at 888-90 (D.C. Cir.
21 1987).

22 Courts have ruled that the only test for discovery of Privacy Act protected records is
23 relevance under Federal Rule of Civil Procedure 26(b)(1): “Parties may obtain discovery
24 regarding any matter, not privileged, that is relevant to the claim or defense of any party.” Fed.
25 R. Civ. P. 26(b)(1); *see Rinehart v. Life Insurance Company of North America*, 2009 WL
26 2240286, at *1 (W.D. Wash. July 27, 2009) (this Court noted that “[p]arties may obtain

1 discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense”);
2 *see also Laxalt*, 809 F.2d at 889 (rejecting the proposition that records subject to the Privacy Act
3 are exempt from civil discovery absent a specific showing of “need” and explaining that a “party
4 can invoke discovery of materials protected by the Privacy Act through the normal discovery
5 process and according to the usual discovery standards, and the test of discoverability is the
6 relevance standard of Rule 26(b)(1) of the [Federal Rules of Civil Procedure]”). When analyzing
7 this standard, “the relevancy of potential discovery should be liberally construed.” *United States*
8 *v. Lake County Board of Commissioners*, 2006 WL 1660598, at *1 (N.D. Ind. June 7, 2006)
9 (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)).

10
11 **B. The personnel information requested by Plaintiff is relevant to the claims in
this litigation.**

12 Since the Privacy Act allows disclosure of documents and personnel files upon court
13 order, the inquiry for this Court simply becomes whether the information sought is relevant to
14 Plaintiff’s claims. As stated above, Plaintiff’s Requests are relevant to the issue of unit morale
15 and cohesion for the purpose of showing command’s tolerance and inaction upon knowing that
16 there are gay or lesbian members serving in the 446th AES, and to frame the context in which
17 morale is assessed in the unit.

18 This Court recognizes that “employees’ personnel records may be relevant to establishing
19 an employment discrimination or civil rights claim.” *Rinehart*, 2009 WL 2240286, at *2 (citing
20 *Ivy v. Outback Steakhouse, Inc.*, 2006 WL 3813555, at *3 (W.D. Wash. December 26, 2006)
21 (finding that an employee plaintiff alleging sexual harassment against her employer was entitled
22 to discovery of requested personnel files of supervisors or managers “to the extent that these
23 personnel files contain[ed] documents relating to accusations of harassment, complaints of
24 harassment, or information relevant to the alleged harassment climate at the restaurant as
25 observed, described, or addressed by other employees or managers. . .”).

1 In *Weakhee*, 621 F.2d at 1082, the court found that “[t]he files sought in plaintiffs’
2 request were personnel files of EEOC employees who plaintiff claims were hired or promoted in
3 discriminatory preference over him. The qualifications and job performance of these employees
4 in comparison with the plaintiffs’ qualifications and performance is at the heart of this
5 controversy.” *See also Broderick v. Shad*, 117 F.R.D. 306, 312 (D.D.C. 1987) (ordering the
6 production of government personnel records under exception 11 of the Privacy Act and FRCP 26
7 because they were relevant to plaintiff’s claim of gender discrimination and promotions).

8 Similarly, the latter two Requests here seek to discover any records of discipline or
9 special accommodations concerning gay or lesbian unit members. This is relevant to the Court’s
10 evaluation of the effect of Plaintiff’s reinstatement on unit cohesion and morale because the
11 records illustrate a climate of tolerance towards gay and lesbian servicemembers by the unit
12 commanders.

13 Requests for Production Nos. 33 and 34 seek to discover negative influences on 446th
14 AES unit morale before Plaintiff was suspended in order to rebut Defendants’ evidence that
15 relies on comparing unit morale before and after Plaintiff’s suspension. It is illogical to evaluate
16 Plaintiff’s past impact and would-be impact upon reinstatement if her sexual orientation were
17 considered in a bubble. As noted above, both Capt. Robinson and Capt. Hrivnak testified to the
18 negative impact that the appearance of relationship between Servicemember-A and
19 Servicemember-B’s had on the unit. Thus, Defendants’ objection that the “purported
20 relationships of other members of Plaintiff’s unit have no bearing on Plaintiff’s effect on unit
21 morale and cohesion” mischaracterizes the inquiry at hand, because in order to effectively
22 evaluate Plaintiff’s effect on unit morale in an as-applied inquiry, it is necessary to consider the
23 climate of the unit overall and other factors that shape unit morale.

24
25 **C. Plaintiff is willing to enter a protective order to protect against disclosure of**
26 **identities.**

1 Parties share an interest in handling confidential documents in a careful manner. (Kung
2 Decl. ¶ 9; Kung Decl. Ex. G). Defendants have offered no explanation for why a standard
3 protective order would not protect the privacy of the persons and issues involved. Plaintiff thus
4 submits a copy of a proposed order that complies with the Privacy Act, 5 U.S.C. § 552a(b)(11).
5

6 **IV. CONCLUSION**

7 For the reasons stated above, Plaintiff requests entry of an order compelling Defendants
8 to produce documents responsive to the above-captioned Requests. Because there was no
9 substantial justification for Defendants' opposition and refusal to agree to a protective order,
10 Plaintiff also seeks attorney's fees for this motion.
11

12
13 DATED this 13th day of May, 2010.

Respectfully submitted,

14 AMERICAN CIVIL LIBERTIES UNION
15 OF WASHINGTON FOUNDATION

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Attorneys for Plaintiff

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on May 13, 2010, I electronically filed *Plaintiff's Motion to Compel*
3 *Production of Documents Responsive to Requests for Production Nos. 33 to 36 and Proposed*
4 *Order* with the Clerk of the Court using the CM/ECF system which will send notification of such
5 filing to the following:

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