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2 HONORABLE RONALD B. LEIGHTON
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6 UNITED STATES DISTRICT COURT
7 WESTERN WASHINGTON
8 AT TACOMA DIVISION

9 MAJOR MARGARET WITT,

10 Plaintiff,

11 v.

12 UNITED STATES DEPARTMENT OF
13 THE AIR FORCE; ET AL.,

14 Defendants.
15
16

No. C06-5195 RBL

17 PLAINTIFF'S REPLY
18 MEMORANDUM IN SUPPORT OF
19 MOTION TO COMPEL
20 PRODUCTION OF DOCUMENTS
21 RESPONSIVE TO REQUESTS FOR
22 PRODUCTION NOS. 33 TO 36

23 **NOTE ON MOTION CALENDAR:**
24 **MAY 28, 2010**
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27
28 **INTRODUCTION**

29 Defendants oppose the motion to compel production of documents, claiming that the
30 information requested is irrelevant to the claims in this litigation. Defendants' contentions have
31 no merit because the inquiry into Plaintiff's effect on unit cohesion and morale cannot be
32 examined in a vacuum, and the requested information is germane to the inquiry. Further,
33 Defendants tellingly do not address the deposition testimony in this case raised by Plaintiff in her
34 moving papers, which confirms that certain relationships have impacted the morale of unit
35 members, and other relationships show that command has allowed the presence of other gay or
36 lesbian members to serve in the unit. Finally, contrary to Defendants' mistaken assertion, the
parties all agree that a protective order should govern the production of these documents and

1 Plaintiff respectfully requests the Court to enter her proposed order granting this motion that
2 contains such language.

3
4 **A. Information concerning Command's treatment of other gay or lesbian**
5 **servicemembers and concerning a perceived relationship that negatively**
6 **impacted unit morale is highly relevant to the assessment of Plaintiff's effect**
7 **on unit cohesion and morale.**

8 Defendants attempt to argue that the only evidence relevant to this case is Plaintiff's
9 isolated effect on unit cohesion and morale. In their opposition, Defendants merely make the
10 conclusory statement that information concerning other servicemembers' relationships has no
11 bearing on Plaintiff's effect on unit cohesion and morale. Defendants fail to acknowledge any
12 evidence obtained in this litigation up to now, of which shows that the unit commander of the
13 446th AES has permitted unit members to engage in same-sex relationships, or that unit morale
14 has been negatively influenced by other perceived sexual relationships between unit members.

15 In their opposition, Defendants do not address the deposition testimony Plaintiff
16 presented in the moving papers. (Pl.'s Mot. To Compel at 3-5 (Dkt. No. 84)). This testimony
17 supports a finding that the requested documents are relevant. Furthermore, discovery evidence
18 obtained thus far shows that the current unit commander, Colonel Moore-Harbert, is of the
19 opinion that Major Witt's known sexual orientation would negatively affect unit cohesion,
20 morale, and discipline and that Major Witt's reinstatement with the 446th AES would likely have
21 a negative impact on unit morale, cohesion or discipline. (Defs.' Objections and Resps. to Pl.'s
22 First Reqs. for Admis., Interrogs. and Reqs. for Produc. Nos. 3 and 9 (Kung Reply Decl. Ex. A at
23 5-9)). At the same time, when asked, "What evidence do you have that Major Witt specifically
24 would cause that reaction?" Col. Moore-Harbert answered, "I have no evidence." (Col. Janette
25 Moore-Harbert Dep. (Kung Reply Decl. Ex. B at 12-16) 186:10-13; *see also id.* at 183:19-184:1,
26 186:14-188:7). In light of this testimony, it is significant that Col. Moore-Harbert disciplined
two same-sex servicemembers for fraternization only, and that the servicemembers still remain
serving. Because Defendants rely on the commander's assessment of Plaintiff's effect on unit

1 cohesion and morale, any records that indicate the presence of other gay or lesbian unit members
2 and her treatment of these unit members is relevant to discrediting this assessment.

3 Additionally, Defendants rely on the unit climate surveys as a reliable gauge of the
4 morale of the 446th AES at various points in time. (*See* Defs.’ Mot. for Protective Order at 11
5 (Dkt. No. 63)). Since Defendants put at issue the unit climate surveys, Plaintiff is entitled to put
6 on evidence of factors that have affected the morale of unit members, such as the perceived
7 relationship between a prior commander and officer.

8 Defendants also claim that disclosure of this information should be barred because it has
9 potential to cause undue annoyance or embarrassment and Defendants cited one case to support
10 this contention. *See Gay-Straight Alliance of Okeechobee High Sch. v. Sch. Bd. of Okeechobee*
11 *County*, 242 F.R.D. 644 (S.D. Fla. 2007). In *Okeechobee*, the Court denied the defendants’
12 attempt to inquire about the sexual orientation of club members, names of anonymous
13 participants, and participants’ personal lives outside of school, because that information was not
14 necessary or even relevant to deciding the plaintiff’s rights under the Equal Access Act. *Id.* at
15 644-45. Unlike the circumstances in the *Okeechobee* case, Plaintiff’s requests for evidence here
16 are directly tied to the inquiries at hand: unit cohesion and morale.

17
18 **B. Plaintiff has been willing to enter into a protective order governing the
disclosure of the requested information.**

19 Defendants are mistaken about Plaintiff’s position. Plaintiff does not assert that
20 Defendants should have disclosed information governed by the Privacy Act without a court
21 order; instead, Plaintiff is well aware that Exception 11 of the Privacy Act allows for disclosure
22 of information only pursuant to a court order. For this reason, Plaintiff proposed a draft
23 Stipulation and Order to protect the confidentiality of such documents and information. (Kung
24 Decl. Ex. B) (Dkt. No. 86). The proposed Stipulation and Order constituted an appropriate order
25 of the court pursuant to the Privacy Act disclosure requirement. *See e.g. Laxalt v. McClatchy*,
26 809 F.2d 885, 887 (D.C. Cir. 1987) (where parties agreed to a Stipulation and Order authorizing

1 limited disclosure of information pursuant to the Privacy Act). Plaintiff anticipated that parties
2 would exchange other confidential information in the discovery period, and the draft of the
3 Stipulation and Order was intended to serve the purpose which Defendants cite: “limit [] the
4 persons having access to information, their freedom to discuss the information to which they are
5 given access, and the uses to which the information may be put.” (Defs’ Opp’n to Pl’s Mot. to
6 Compel at 4-5 (Dkt. No. 88)).

7
8 **C. Plaintiff is entitled to attorney’s fees because Defendants’ refusal to enter
into a protective order has no merit.**

9 Defendants contend that Plaintiff is not entitled to seek fees for filing this motion because
10 Defendants are statutorily prohibited from releasing information absent a court order, thus
11 Plaintiff’s position has no merit. Defendants overlook Plaintiff’s attempts to avoid having to
12 burden this Court with unnecessary motion practice. For over two weeks, Plaintiff offered to
13 enter into a protective order, and waited for Defendants’ response to the proposed Stipulation
14 and Order. (Correspondence between counsel (Kung Decl. Ex. C, D and E at 18-24)). Plaintiff
15 is entitled to seek fees because of Defendants’ delay and refusal to agree to the Stipulation and
16 Order. It is meritless to assert that the commander’s treatment of current gay or lesbian members
17 in the unit is irrelevant to this case. It is also meritless to put at issue the unit climate surveys
18 which gauge unit morale, while then attempting to hinder Plaintiff’s ability to put forth evidence
19 of a perceived relationship that affected morale. The requested documents are thus reasonably
20 calculated to lead to the discovery of relevant evidence. Moreover, discovery will close on June
21 7, which is less than two weeks away. Defendants have continuously delayed Plaintiff’s efforts
22 to effectively conduct discovery, thus compelling Plaintiff to file this motion that could have
23 been reasonably resolved with the proposed Stipulation and Order.

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1 **CONCLUSION**

2 For the reasons stated above, Plaintiff requests entry of an order compelling Defendants
3 to produce documents responsive to the above-captioned Requests, and also seeks attorney's fees
4 for this motion.

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6 DATED this 27th day of May, 2010.

7 Respectfully submitted,

8 AMERICAN CIVIL LIBERTIES UNION
9 OF WASHINGTON FOUNDATION

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on May 27, 2010, I electronically filed *Plaintiff's Reply Memorandum in*
3 *Support of Motion to Compel Production of Documents Responsive to Requests for Production*
4 *Nos. 33 to 36 and Proposed Order* with the Clerk of the Court using the CM/ECF system which
5 will send notification of such filing to the following:

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15 DATED this 27th day of May, 2010.

16
17
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