

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

**DECLARATION OF SHER KUNG
IN SUPPORT OF REPLY
MEMORANDUM FOR MOTION
TO COMPEL PRODUCTION OF
DOCUMENTS RESPONSIVE TO
REQUESTS FOR PRODUCTION
NOS. 33 TO 36**

NOTE ON MOTION CALENDAR:
MAY 28, 2010

Pursuant to 28 U.S.C. § 1746, I, Sher Kung, hereby declare as follows:

1. I am counsel for the plaintiff and have personal knowledge of the facts contained in this Declaration.
2. Attached hereto as Exhibit A is a true and correct copy of excerpts of Defendants' Objections and Responses to Plaintiff's First Requests for Admission, Interrogatories, and Requests for Production.
3. Attached hereto as Exhibit B is a true and correct copy of excerpts from the deposition of Colonel Janette Moore-Harbert, dated February 25, 2010.
4. Attached hereto as Exhibit C is a true and correct copy of an email dated April 26, 2010, from Sarah Dunne to Bryan Diederich and Stephen Buckingham.

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5. Attached hereto as Exhibit D is a true and correct copy of a letter dated April 28, 2010, from Sarah Dunne to Bryan Diederich.

6. Attached hereto as Exhibit E is a true and correct copy of an email dated May 7, 2010, from Sher Kung to Bryan Diederich and Stephen Buckingham.

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on May 26, 2010 in Seattle, Washington.

/s/ Sher S. Kung
Sher Kung, WSBA # 42077

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on May 27, 2010, I electronically filed this *Declaration of Sher Kung in*
3 *Support of Reply Memorandum for Motion to Compel Production of Documents Responsive to*
4 *Requests for Production Numbers 33 to 36* with the Clerk of the Court using the CM/ECF system
5 which will send notification of such filing to the following:

6 Peter Phipps

7 peter.phipps@usdoj.gov

8 Marion J. Mittet

9 Jamie.Mittet@usdoj.gov

10 Bryan R. Diederich

11 bryan.diederich@usdoj.gov

12 Stephen J. Buckingham

13 Stephen.Buckingham@usdoj.gov

14
15 Attorneys for Defendants

16 DATED this 27th day of May, 2010.

17
18 AMERICAN CIVIL LIBERTIES UNION OF
19 WASHINGTON FOUNDATION

20 By: /s/ Nina Jenkins

21 Nina Jenkins

22 Legal Program Assistant

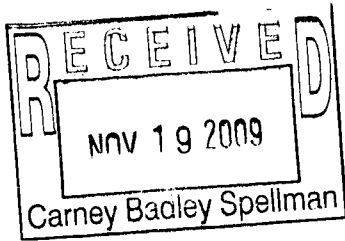
23 901 Fifth Avenue #630

24 Seattle, WA 98164

25 Tel. (206) 624-2184

26 njenkins@aclu-wa.org

EXHIBIT A



Judge Ronald B. Leighton

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MAJOR MARGARET WITT,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
THE AIR FORCE, et al.,

Defendants.

No. C06-5195 RBL

**DEFENDANTS' OBJECTIONS AND
RESPONSES TO PLAINTIFF'S FIRST
REQUESTS FOR ADMISSION,
INTERROGATORIES, AND
REQUESTS FOR PRODUCTION**

Pursuant to Rules 33, 34, and 36 of the Federal Rules of Civil Procedure, defendants the Department of the Air Force; Robert M. Gates, the Secretary of Defense; Michael B. Donley, the Secretary of the Air Force; and Colonel Janette Moore-Harbert, the commander of the 446th Aeromedical Evacuation Squadron, McChord Air Force Base, hereby submit the following objections and responses to Plaintiff's First Requests for Admission, Interrogatories, and Requests for Production to Defendants.

GENERAL OBJECTIONS

1. Defendants object to the definitions and instructions in Plaintiff's First Requests for Admission, Interrogatories, and Requests for Production to Defendants to the extent that they conflict with or purport to expand upon Defendants' obligations under the Federal Rules of Civil

1 If your response to this Request for Admission was "DENY" then pursuant to Rule 36(a)(4) state
2 in detail why you cannot truthfully admit it and answer the following interrogatory:

3 **OBJECTION:** Defendants object to this instruction to the extent that it purports to
4 impose an obligation that is not contained in Rule 36(a)(4). Instead, Rule 36(a)(4) requires a
5 detailed statement of "why the answering party cannot truthfully admit or deny it," only as an
6 alternative to admitting or specifically denying the statement. Fed. R. Civ. P. 36(a)(4).

7 **INTERROGATORY NO. 3**

8 Identify each person who either currently serves, or who has previously served, in the 446th
9 Aeromedical Evacuation Squadron, who is of the opinion that the presence of a known lesbian
10 within the 446th in the past had, or in the future would have, a negative impact on unit cohesion,
11 unit moral or unit discipline, and state all the facts known to defendants regarding such opinion.

12 When identifying each such person give their full name, rank, present duty assignment, present
13 address, or if not known the person's last known address, any known telephone number (home
14 and cell phone) and any known present email address (personal or military).

15 **RESPONSE:** Defendants incorporate by reference their objections to Request for
16 Admission No. 3 as objections to this interrogatory.

17 Defendants further object to this interrogatory because it asks two discrete questions:
18 (i) an identification of the persons who holds an opinion that the presence of a "known lesbian" in
19 the 446th Aeromedical Evacuation Squadron would have a negative impact on unit cohesion, unit
20 moral or unit discipline and (ii) an identification of all facts known to defendants regarding such
21 an opinion. Accordingly, this inquiry constitutes two separate interrogatories under Rule 33(a).

22 Defendants also object to this interrogatory as overly broad to the extent that it seeks
23 information for time periods predating Margaret Witt's assignment to 446th Aeromedical
24 Evacuation Squadron.

25 Defendants further object to this interrogatory as overly broad to the extent that it seeks
26 "all facts known to defendants regarding such opinion."

27 Moreover, defendants object to this interrogatory to the extent that it seeks the disclosure
28 of personal information protected by the Privacy Act.

1 Subject to and without waiving these objections and the General Objections, defendants
2 identify Colonel Janette Moore-Harbert and state that she is of the opinion that the presence of
3 Margaret Witt, a known lesbian, would negatively affect unit cohesion, morale, and discipline.

4
5 If your response to Request for Admission No. 3 was “DENY” then respond to the following
6 Request for Production:

7 **REQUEST FOR PRODUCTION NO. 3**

8 Produce every document which contains evidence supporting your denial.

9 **RESPONSE:** Defendants incorporate by reference their objections to Request for
10 Admission No. 3 and Interrogatory No. 3 as objections to this request for production.

11 Defendants further object to this request for production to the extent that it seeks sensitive
12 information regarding the status and/or evaluation of the readiness of military forces.

13 Defendants also object to this request for production to the extent that it seeks documents
14 that are outside of defendants’ possession, custody, or control.

15 Subject to and without waiving these objections, the General Objections and any
16 applicable privileges, defendants are unaware of any documents responsive to this request, *i.e.*,
17 that contain evidence of which persons hold opinions described in Request for Admission No. 3.

18
19 **REQUEST FOR ADMISSION NO. 4**

20 Admit or deny the truth of this statement: Defendants are unaware of the existence of any person
21 who either currently serves, or who has previously served, in the 446th Aeromedical Evacuation
22 Squadron, who has ever made any complaint of any kind regarding Major Witt’s conduct or
23 character.

24 **RESPONSE:** Defendants object to this request for admission as unduly burdensome to
25 the extent that it presupposes or requires information gathering that would be contrary to the
26 chain-of-command functionality of the military and/or that would compromise unit morale and
27 unit cohesion – Congress’s stated goals underlying 10 U.S.C. § 654.

28 Defendants also object to this request for admission because plaintiff’s use of the term

1 Subject to and without waiving these objections and the General Objections, defendants
2 state that no substantive answer is required to this interrogatory because their response to Request
3 for Admission No. 8 was not an admission.

4
5 **REQUEST FOR ADMISSION NO. 9**

6 Admit or deny the truth of this statement: The reinstatement of Major Witt to service within the
7 446th Aeromedical Evacuation Squadron would likely have a negative impact upon unit morale,
8 cohesion or discipline.

9 **RESPONSE:** Defendants object to this request for admission as unduly burdensome to
10 the extent that it presupposes or requires information gathering that would be contrary to the
11 chain-of-command functionality of the military and/or that would compromise unit morale and
12 unit cohesion – Congress’s stated goals underlying 10 U.S.C. § 654.

13 Defendants object to the term “negative impact” as vague, capable of multiple meanings,
14 and potentially misleading because it is unclear whether it refers to a person’s overall impact or
15 whether it refers to the specific impact of a particular act or attribute of that person.

16 Defendants object to plaintiff’s use of the term “unit” because it is vague and ambiguous,
17 as to whether that term as used by plaintiff refers to only members of the 446th Aeromedical
18 Evacuation Squadron or whether it applies to other groups of military personnel who on a given
19 assignment are required to work together as a unit.

20 Subject to and without waiving these objections and the General Objections, defendants
21 admit the statement.

22
23 If your response to this Request for Admission was “ADMIT” then answer the following
24 interrogatory:

25
26 **INTERROGATORY NO. 9**

27 Identify every person known to defendants who holds the opinion that the reinstatement of
28 Major Witt to service within the 446th Aeromedical Evacuation Squadron would likely have a

1 negative impact on the unit morale, cohesion or discipline of the 446th Aeromedical Evacuation

2 Squadron. When identifying each such person give their full name, rank, present duty assignment,
3 present address, or if not known the person's last known address, any known telephone number
4 (home and cell phone) and any known present email address (personal or military).

5 **RESPONSE:** Defendants incorporate by reference their objections to Request for
6 Admission No. 9 as objections to this interrogatory.

7 Defendants further object to this interrogatory's request that defendants identify "every
8 person known to defendants" as overly broad and unduly burdensome to the extent that it requires
9 an identification of any person, however unrelated to the facts of this litigation, who holds such an
10 opinion. Defendants likewise object to this interrogatory as inconsistent with Federal Rule of
11 Civil Procedure 26(a) governing the disclosure of expert testimony and the Court's pretrial
12 scheduling order setting an expert disclosure date of March 17, 2010. Defendants also object to
13 this interrogatory to the extent that it seeks to learn information protected by the work-product
14 doctrine.

15 Moreover, defendants object to this interrogatory to the extent that it seeks the disclosure
16 of personal information protected by the Privacy Act.

17 Subject to and without waiving these objections and the General Objections, defendants
18 identify Colonel Janette Moore-Harbert.

19
20 If your response to Request for Admission No. 9 was "ADMIT" then respond to the following
21 Request for Production:

22 **REQUEST FOR PRODUCTION NO. 9**

23 Produce every document which contains evidence supporting your admission.

24 **RESPONSE:** Defendants incorporate by reference their objections to Request for
25 Admission No. 8 and Interrogatory No. 8 as objections to this request for production.

26 Defendants further object to this request for production to the extent that it seeks sensitive
27 information regarding the status and/or evaluation of the readiness of military forces.

28 Defendants also object to this request for production to the extent that it seeks documents

EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MAJOR MARGARET WITT,)	
)	
Plaintiff,)	
)	
v.)	No. C06-5195 RBL
)	
UNITED STATES DEPARTMENT OF THE)	
AIR FORCE, et al,)	
)	
Defendants.)	

DEPOSITION UPON ORAL EXAMINATION OF
COLONEL JANETTE MOORE-HARBERT

TAKEN AT

Carney Badley Spellman
701 Fifth Avenue, Suite 3600
Seattle, WA 98104

FEBRUARY 25, 2010

THURSDAY, 9:00 A.M.

Reported by:

MARIE WHITE, CSR # WH-IT-EM-*29906

1 A. I'm just trying to make sure that it's the right
2 document that we are talking about.

3 Q. As far as you're concerned did you see any
4 interrogatory answer that was not true to your
5 knowledge?

6 A. I don't remember without having the document in front
7 of me.

8 Q. Okay, well, in Question No. 3 -- let's back up.

9 You didn't sign the answers; did you? You didn't
10 sign at the end. You read them, but you didn't sign.
11 Why is that?

12 A. I don't remember signing anything.

13 Q. Why didn't you?

14 A. I don't remember a requirement to sign.

15 Q. Okay. So you would not have any problem signing, as
16 far as you are concerned they are true?

17 A. I have to look at the document and make sure that I
18 consulted with my Counsel.

19 Q. Okay. In the Answer to No. 3, the Air Force gave this
20 answer: Defendants identify Colonel Janette
21 Moore-Harbert and state that she is of the opinion that
22 the presence of Margaret Witt, a known lesbian, would
23 negatively affect unit cohesion, morale and discipline.

24 Is that true?

25 MR. PHIPPS: Objection, completeness.

1 A. Yes.

2 Q. What is your reason for saying that?

3 A. My reason really is not based so much on an engarrison
4 function. My reason is based more on a deployment
5 function. What I look at with our unit is there is a
6 couple of things. To give you a broad scale again, my
7 unit does not deploy out as a unit. It deploys in bits
8 and pieces. It deploys as a crew, it deploys as an
9 element, and it deploys anywhere.

10 And the feasibility of it deploying in a hard
11 billet all the time is not rendered. We don't know
12 where the members are going to go into a tent city type
13 of location, an extended barracks type of a location
14 with communal showers.

15 And the concern that really is there is concerning
16 Major Witt deploying is if there are personnel that are
17 uncomfortable with the aspect of Major Witt. And if
18 they would be uncomfortable deploying in that type of a
19 setting.

20 Again it is the aspect of not only a deployment
21 and to be able to support the mission, because what
22 happens with that it ends up being also a distraction.
23 If they're concerned about who they are billeted with,
24 then that can be a distraction. And the main mission
25 is for them to get out and be able to take care of live

1 favoritism, that you have to do something different.

2 That again makes that an issue of taking a look at
3 morale of the troupes. Because then they are not
4 focused on what they need to be focused on, which is
5 their mission. So yes, I believe that that would be a
6 concern.

7 MR. LOBSENZ: Move to strike as
8 nonresponsive.

9 Q. Now, I didn't ask you whether it would be a concern.

10 You told me it would be a concern. I asked you: What
11 evidence do you have that Major Witt specifically would
12 cause that reaction?

13 A. I have no evidence.

14 Q. Okay. If you have no evidence that she would cause
15 that concern, could you explain to me why this answer
16 was given to Interrogatory No. 39?

17 Interrogatory No. 39 was: Identify every person
18 who holds the opinion that reinstatement of Major Witt
19 within the 446th would likely have a negative impact on
20 unit morale, cohesion or discipline of the 446th.

21 And the Answer given said that they identified
22 you.

23 So if you have no evidence that she would cause
24 those kinds of concerns, why would you answer that you
25 have an opinion that she likely would cause a negative

1 impact on the unit morale of 446th?

2 MR. PHIPPS: Objection, completeness.

3 A. Because we have been deploying our people for a lot of
4 years, and I believe putting somebody in a situation
5 that they are uncomfortable in is going to create a
6 distraction.

7 Q. What evidence did you have that anyone in the 446th
8 would be uncomfortable with her presence?

9 A. Again, I don't remember anybody specifically coming up
10 to say that. The reality is is that I would take a
11 look at how it would impact the mission.

12 If I put up volunteer sheets, and Major Witt would
13 be on that sheet, and members did not sign up because
14 they were uncomfortable with that, that could be an
15 indication that I'm not able to support my mission.

16 I mean it's -- the issue is is feasibly could it
17 impair my mission. And that is what I'm concerned
18 about.

19 Q. You just answered it could impair your mission. And
20 you have answered you have no evidence of that. And
21 yet the Air Force has given an opinion, has answered
22 that you are the opinion that likely would have a
23 negative impact.

24 So I am asking you, other than maybe some gut
25 feeling that it might cause a concern, what evidence do

1 you have that she would likely have a negative impact
2 on the morale of the 446th?

3 A. I have no evidence except for the length of time that I
4 have been doing this job, working through the
5 deployments to take a look at what could be a
6 distraction that is going to take away from the
7 capability of the members to perform the mission.

8 Q. Okay. Maybe your answers to this will be the same, but
9 the Air Force has also identified you, I think, as a
10 person that is of the opinion that the suspension of
11 Major Witt had a positive impact on the morale of the
12 446th; is that correct?

13 MR. PHIPPS: Objection, completeness.

14 A. Well, it gets back to the issue again of --

15 Q. Just is that correct? Are you, do you have that
16 opinion?

17 A. I'm trying to basically -- my, the thought process is
18 based off the fact of making sure that my members are
19 ready and comfortable and be able to go out to deploy.
20 And that is exactly what I am looking at. And if a
21 situation were a member is distracted and cannot, my
22 job is to eliminate or to try to help facilitate to
23 eliminate the feasibility of them being distracted and
24 not focusing on the mission.

25 And if that was an issue regarding that the

EXHIBIT C

Sher Kung

From: Sarah Dunne
Sent: Monday, April 26, 2010 10:09 AM
To: Diederich, Bryan (CIV); Buckingham, Stephen (CIV); Phipps, Peter (CIV)
Cc: Jim Lobsenz; Sher Kung
Subject: FW: Witt v. Air Force
Attachments: 2010-04-23--SD ltr to Diederich re protective order.pdf; 2010-04-23 DRAFT Stipulation and Order to Protect Confidential Information.docx

Bryan and Steve,

Any response on the protective order governing the production of confidential records in this case? We want to produce medical records this week to you but want a protective order in place before doing so. The sooner we can get a proposed protective order to the judge, the sooner he'll sign it and we can produce Major Witt's medical records. If you object to producing confidential personnel documents on other grounds, just confirm that in writing but still provide me with any revisions you have to the proposed protective order. I would like to get a protective order in place for all confidential records produced during the course of discovery in this matter. Nothing in the proposed protective order precludes you from objecting to the production of documents on other grounds.

On a separate note, I did notice on Friday when reviewing the docket for the Log Cabin DADT case that the gov't agreed to a protective order in that matter releasing documents covered by the Privacy Act.

Please let me know if you have any revisions or would like to discuss this further. Thanks.

Sarah A. Dunne
Legal Director
ACLU of Washington Foundation
705 Second Ave, Suite 300
Seattle, WA 98104
206.624.2184
dunne@aclu-wa.org
www.aclu-wa.org

This message is intended only for the people to whom it is addressed and is intended to be a confidential attorney-client/attorney-work product communication. If this message is not addressed to you, please delete it and notify me.

From: Sarah Dunne
Sent: Friday, April 23, 2010 10:28 AM
To: Phipps, Peter (CIV); 'Diederich, Bryan (CIV)'; Buckingham, Stephen (CIV)
Cc: Jim Lobsenz; Sher Kung
Subject: Witt v. Air Force

Bryan and Steve,

Please see attached correspondence. Also attached is a word version of the draft protective order in case you have revisions. Please call me if you have questions or wish to discuss the proposed protective order governing the release of confidential information in this litigation.

Thanks,
Sarah

Sarah A. Dunne
Legal Director

ACLU of Washington Foundation
705 Second Ave, Suite 300
Seattle, WA 98104
206.624.2184
dunne@aclu-wa.org
www.aclu-wa.org

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EXHIBIT D

SARAH DUNNE
LEGAL DIRECTOR

NANCY TALNER
STAFF ATTORNEY

ROSE SPIDELL
STAFF ATTORNEY
FLOYD AND DELORES JONES
FAMILY FELLOW

SHER KUNG
PERKINS COIE FELLOW

LINDSEY SOFFES
ROPES & GRAY FELLOW



April 28, 2010

Via E-mail and Regular U.S. Mail

Bryan R. Diederich
Peter J. Phipps
Stephen J. Buckingham
Civil Division, Federal Programs Branch
U.S. Department of Justice
20 Massachusetts Ave., N.W.
Washington, D.C. 20001

AMERICAN CIVIL
LIBERTIES UNION
OF WASHINGTON
FOUNDATION
705 2ND AVENUE, 3RD FL.
SEATTLE, WA 98104
T/206.624.2184
F/206.624.2190
WWW.ACLU-WA.ORG

JESSE WING
BOARD PRESIDENT

KATHLEEN TAYLOR
EXECUTIVE DIRECTOR

Re: *Witt v. U.S. Air Force et al.*, No. C06-5195 (W.D. Wash.)

Dear Bryan,

I am writing to follow-up on the voice message I just left you concerning our request to enter a protective order governing the production of confidential information and documents in this litigation. On April 23, we sent you a proposed Stipulation & Order for Defendants' review and approval, and I contacted you again about it via email on Monday, April 26. We have not received any response. We will not produce Plaintiff's confidential medical records unless a protective order is in place to protect against improper disclosure to the general public.

Please let us know if you have any revisions to the proposed protective order. Once we have an agreed upon protective order, we can file the document with the Court for final approval and produce the requested documents to the Defendants.

Sincerely,

Sarah A. Dunne
Legal Director

cc: James Lobsenz

EXHIBIT E

Sher Kung

From: Sher Kung
Sent: Friday, May 07, 2010 12:08 PM
To: Phipps, Peter (CIV); Diederich, Bryan (CIV); 'Buckingham, Stephen (CIV)'
Cc: Lobsenz Jim; Sarah Dunne
Subject: Witt v. Air Force protective order
Attachments: 2010-04-23--SD ltr to Diederich re protective order.pdf; 2010-04-23 DRAFT Stipulation and Order to Protect Confidential Information.docx

Bryan and Steve,

I am writing to check in about the draft protective order governing the production of confidential records that we sent to you on April 23 and 26 (attached). Sarah followed up again through correspondence on April 29. On April 30, I spoke with Steve, and my understanding is that the delay in response is not due to revising the language of the order, but that DOJ has additional issues to address. Please let us know when we can expect your revisions and of course if you have an alternative protective order to propose, we are happy to consider that.

Thanks

Sher

From: Sarah Dunne
Sent: Monday, April 26, 2010 10:09 AM
To: Diederich, Bryan (CIV); Buckingham, Stephen (CIV); Phipps, Peter (CIV)
Cc: Jim Lobsenz; Sher Kung
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Bryan and Steve,

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Sarah

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