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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.

Case No. C06-5195-RBL

DECLARATION OF SARAH DUNNE IN
SUPPORT OF PLAINTIFF’S OPPOSITION
TO DEFENDANTS’ MOTION TO AMEND
THE ORDER OF MAY 17, 2010

NOTE ON MOTION CALENDAR:
June 18, 2010

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

1. I am counsel for Plaintiff and have personal knowledge of the facts contained in this declaration.

2. Based on the facts which are known to Plaintiff’s counsel as of the date of this declaration concerning the specific conduct relating to conditioning informal non-party witness interviews, none of Plaintiff’s counsel intend to report this Court’s May 17 Order to the Washington State Bar or any other state’s bar.

3. On May 10, Sher Kung and I participated in a telephone conference call with government counsel concerning various discovery matters. Attached hereto as Exhibit A is a

1 true and correct copy of a letter dated May 11, 2010, from me to Bryan Dierderich memorializing
2 the May 10 telephone conference discussion. During this telephone conference, we learned that
3 Air Force counsel had never given an instruction, either in writing or orally, to preserve files and
4 documents that may be relevant to this litigation to Defendants, key decision-makers (such as
5 Generals Jumper, Duignan or Sherrard), or 446th unit members with relevant knowledge about
6 Major Witt's suspension or discharge. From deposition testimony and other discovery, we know
7 that relevant documents and electronic discovery was not preserved.

8 4. Attached hereto as Exhibit B is a true and correct copy of a letter dated May 12,
9 2010, from Bryan Dierderich to me in response to the May 11 letter.

10 5. Attached hereto as Exhibit C is a true and correct copy of the Defendants'
11 Consented Motion to Supplement the Record filed with the Ninth Circuit on October 24, 2010.

12 6. Attached hereto as Exhibit D is a true and correct copy of the discharge order for
13 Plaintiff dated July 2007.

14 7. Attached hereto as Exhibit E are true and correct copies of excerpts from Air
15 Force Instruction 36-3209, *Separation and Retirement Procedures for Air National Guard and*
16 *Air Force Reserve Members*, dated April 14, 2005.

17 I declare under penalty of perjury that the foregoing is true and correct, and that this
18 Declaration was executed on June 14, 2010, in Seattle, Washington.

19
20 _____
21 /s/ Sarah A. Dunne
22 Sarah A. Dunne, WSBA #34869
23
24
25
26

CERTIFICATE OF SERVICE

1 I hereby certify that on June 14, 2010, I electronically filed *Declaration of Sarah Dunne in*
2 *Support of Plaintiff's Opposition to Defendants' Motion to Amend the Order of May 17, 2010*
3 with the Clerk of the Court using the CM/ECF system which will send notification of such filing
4 to the following:

5 Peter Phipps
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9 Stephen J. Buckingham
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11 Bryan R. Diederich
12 bryan.diederich@usdoj.gov

13 Attorneys for Defendants

14 DATED this 14th day of June, 2010.

15
16
17 AMERICAN CIVIL LIBERTIES UNION OF
18 WASHINGTON FOUNDATION

19 By: /s/ Nina Jenkins
20 Nina Jenkins
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26

EXHIBIT A

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



May 11, 2010

Via E-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.
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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 and Steve,

Thank you for the productive phone conference yesterday concerning Defendants' Objections and Responses to Plaintiff's Second Set of Requests for Production of Documents and Things. I am writing to confirm our understanding of the agreements we reached yesterday relating to certain outstanding discovery matters.

Requests Nos. 1-8, 10 and 11

First, we asked about Defendants' ongoing efforts to respond to Requests for Production Nos. 1-8, 10 and 11. Our understanding is that you tasked an Information Technology (IT) group at Joint Base Lewis-McChord to run a search on the local server for the 446th AES for responsive documents, that some documents were found, and that DOJ will have an opportunity to review those documents and produce any responsive documents in the next week. We further understand that you have tasked an IT group located at a separate military base that has access to the 446th AES server at a different level to re-run similar searches to identify responsive documents. The target date for completion of this search is the end of this week with any responsive documents being produced shortly thereafter on a rolling basis. Finally, you also mentioned that because you suspect that reservists may not use their military email accounts regularly due to the infrequency of being on base, DOJ has tasked a JAG officer to call and speak with members directly to ask about their use of private email accounts. If members confirm that they do in fact use other services such as gmail or yahoo, the JAG officer will ask them to run a search with specific key terms in order to identify responsive documents. All responsive, non-privileged documents will be produced on a rolling basis, but no later than June 7.

Second, we asked whether Defendants, key decision makers (such as Generals Jumper, Dguinan or Sherrard), and 446th unit members with relevant knowledge

Letter to DOJ

May 11, 2010

Page 2

about Major Witt's suspension and discharge were asked to retain any files or documents concerning Major Witt's suspension and discharge via a litigation hold, either in writing or by oral instruction. Our understanding from you is that the Air Force has never given such an instruction either orally or in writing to Defendants, key decision makers, and 446th unit members with relevant knowledge about Major Witt's suspension and discharge. Thus, no litigation holds were put in place to prevent the destruction of documents that may have been relevant to Major Witt's suspension or discharge.

Based on your representation that DOJ is conducting a search for documents responsive to Requests Nos 1-8, 10 and 11 and will produce any remaining responsive documents on or before June 7, coupled with the absence of litigation holds, Plaintiff will not file a motion to compel with respect to these particular Requests because such a motion has no purpose if there are no documents remaining, either because they were destroyed or because they do not exist. Instead, Plaintiff may seek remedial relief relating to spoliation of evidence from the Court at a later date.

Request Nos. 25 and 31

We also discussed Request for Production No. 25 and you confirmed that Defendants have produced all responsive, non-privileged documents subject to any supplemental production pursuant to Rule 26(e). With respect to Request for Production No. 31, Defendants initially objected to the request for "all public statements made by the Defendants" concerning "U.S. Armed Forces personnel and sexual orientation or sexual conduct between two people of the same sex" on the basis that the materials are equally available to both parties because the documents were at some point in the public domain (either via a speech presented in a public forum or available on the Internet). To confirm whether Plaintiff has all responsive documents, I agreed that Plaintiff's counsel will search for any documents responsive to Request No. 31 available over the internet and produce the same; DOJ will contact the Department of Defense press office to confirm whether any responsive documents other than the ones produced by Plaintiff exist and if so, Defendants will produce those additional responsive documents.

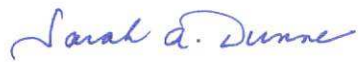
Request Nos. 33-36

With respect to Requests for Production Nos. 33-36, we understand that your client is unwilling to agree to a protective order, and objects to the production of members' personnel files, in whole or in part, based on the Privacy Act. Parties agree that Plaintiff will file a motion to compel on the above document requests, and will redact members' names in order to maintain privacy.

Letter to DOJ
May 11, 2010
Page 3

Please contact me if any of the above representations is inaccurate, or if you have any questions about the contents of the letter.

Sincerely,



Sarah A. Dunne
Legal Director

cc: James Lobsenz

EXHIBIT B



U.S. Department of Justice
Civil Division, Federal Programs Branch

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May 12, 2010

By First Class Mail & Electronic Mail

Sarah Dunne, Esq.
ACLU OF WASHINGTON FOUNDATION
705 Second Avenue, 3rd Floor
Seattle, Washington 98104

Received

MAY 17 2010


ACLU of Washington

Re: *Witt v. United States Dept. of the Air Force, et al.*, No. C06-5195 (W.D. Wash)

Dear Ms. Dunne,

I write in response to your letter of May 11, 2010 regarding our telephone conference of May 10, 2010. Your letter seems correct to me in all aspects save one. As I explained in our phone conversation yesterday, we believe that one reason that we have not identified much responsive e-mail is that unit members may not use their military e-mail accounts because of the limited time that they are on base. We are having a JAG member call current members of the unit identified in your interrogatory responses as being likely to have discoverable information to ask whether they use their military accounts at all. To the extent that they say that they do use their military accounts, we are asking them to search those accounts directly to insure that nothing is missed by server searches. We have not asked them to search their private e-mail accounts; those accounts are not in the possession, custody or control of the military.

Very truly yours,


Bryan R. Diederich

cc: James E. Lobsenz, Esq. (via electronic mail)

EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RECEIVED
OCT 24 2007
FEDERAL CIRCUIT

_____)
MARGARET WITT, Major,)
)
Plaintiff-Appellant,)
)
v.)
)
DEPARTMENT OF THE AIR FORCE,)
et al.,)
)
Defendants-Appellees,)
_____)

No. 06-35644

APPELLEES' CONSENTED MOTION TO SUPPLEMENT THE RECORD

Pursuant to Federal Rule of Appellate Procedure 27 and Ninth Circuit Rule 27, the appellees Department of the Air Force et al., hereby move that the record in this appeal be supplemented by including the attached document which shows the Air Force's final decision in appellant Witt's discharge proceeding. The reasons supporting this motion are as follows.

1. Briefing in this appeal has been completed, and the case is scheduled for oral argument on November 5, 2007, in Seattle, Washington.

2. Plaintiff Margaret Witt brought this action for declaratory and injunctive relief seeking to prevent her discharge from the Air Force. Excerpts of Record ("ER") 1, 15. The Air Force had initiated an administrative proceeding to separate Witt, then a major in the Air Force Reserve, pursuant to 10 U.S.C. 654 and its implementing Air Force regulation, which govern military service by homosexuals. ER 34.

3. The district court dismissed the action. *Witt v. Department of the Air Force*, 444 F. Supp.2d 1138 (W.D. Wash. 2006) (ER 382-394). It rejected Witt's arguments that her discharge for engaging in homosexual acts or stating that she is homosexual would violate substantive or procedural due process, equal protection, or freedom of speech and association.

4. Witt appeals from that judgment. While the appeal was pending, the Air Force held an administrative hearing in Witt's separation proceeding. The board of three officers found that, while a member of the Air Force Reserve, Witt had engaged in homosexual acts and had stated that she is homosexual. The board recommended that Witt be separated from the Air Force with an honorable discharge.

5. Witt moved to supplement the record to include the board's findings and recommendations. Appellant's Unopposed Motion to Expand the Record (filed Oct. 16, 2006). This Court granted that motion. Order entered Sep. 26, 2007.

6. Subsequent to Witt's motion, the Air Force completed its administrative proceeding. As the attached document shows, the Director of the Air Force Review Boards Agency, acting on behalf of the Secretary of the Air Force, directed that Witt be honorably discharged.

7. The same reasons that supported this Court's order making the board's recommended decision a formal part of the record apply

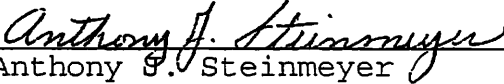
as well to the attached document. In considering this appeal, the Court should have before it the document showing the completion of the administrative discharge proceeding, which occurred while the appeal was pending.

8. Counsel for Witt, James E. Lobsenz, has authorized us to state that he consents to the granting of this motion.

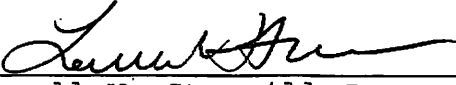
9. Undersigned counsel apologizes for providing this document to this Court at this late date. Undersigned counsel learned of the document on September 18, 2007. Since that time, undersigned counsel obtained and reviewed the administrative record and consulted with opposing counsel regarding this motion. That process was not completed until today.

For the foregoing reasons, this Court should order that the record on appeal be supplemented to include the attached document showing the completion of the Air Force's proceeding to discharge Witt.

Respectfully submitted,



Anthony S. Steinmeyer
(202) 514-3388



Lowell V. Sturgill Jr.
(202) 514-3427
Attorneys, Appellate Staff
Civil Division, Room 7529
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2007, I served a copy of the foregoing Appellees' Consented Motion to Supplement the Record on counsel for the appellant by overnight delivery service and on counsel for the *amici curiae* by first-class mail by causing copies to be sent to:

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ANTHONY J. STEINMEYER
Attorney for Appellees



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office of the Assistant Secretary

JUL 10 2007

ACTION
of the
SECRETARY OF THE AIR FORCE

The Secretary of the Air Force directs that Major Margaret H. Witt, 532-52-6256, be discharged from the United States Air Force with an Honorable discharge. This action is taken pursuant to AFI 36-3209.

This action is taken under the authority delegated by Secretary of the Air Force Order 240.8.


JOE G. LINEBERGER
Director
Air Force Review Boards Agency

EXHIBIT D

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE RESERVE COMMAND
155 RICHARD RAY BLVE
ROBINS AIR FORCE BASE, GEORGIA 31098-1635

RESERVE ORDER
A-412

12 July 2007

By direction of the President, the Air Force relieves **MAJOR MARGARET H. WITT, SSN: [REDACTED]** (AFSC X46F3; functional account code: 564000; position control number: 0070632) from assignment 446th Aeromedical Evacuation Squadron, McChord AFB WA and discharges her with an Honorable Conditions Discharge from all appointments in the United States Air Force Reserve effective 1 October 2007. Mailing address: 1022 W. 19th Ave, Spokane WA 99203. Authority: AFI 36-3209, Homosexual Conduct.

FOR THE COMMANDER



TERESA A. HAMS, Colonel, USAF
Chief, Military Personnel Division
Directorate of Personnel

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1-Servicing Reserve Pay Office

RO A-412

EXHIBIT E

14 APRIL 2005

Incorporating Through Change 2, 31 July 2008



Personnel

**SEPARATION AND RETIREMENT
PROCEDURES FOR AIR NATIONAL GUARD
AND AIR FORCE RESERVE MEMBERS**

COMPLIANCE WITH THIS PUBLICATION IS MANDATORY

ACCESSIBILITY: Publications and forms are available on the e-Publishing website at www.e-publishing.af.mil for downloading or ordering.

RELEASABILITY: There are no releasability restrictions on this publication.

OPR: HQ ARPC/XPX, HQ USAF/RE
Supersedes AFI 36-3209, 1 February 1998

Certified by: NGB/CF (Brig Gen Paul A. Weaver)
Pages: 189

This instruction applies to all officer and enlisted members not serving on active duty with the Regular Air Force. **Chapter 5** applies to members assigned to the Retired Reserve not receiving retired pay. Recalled members are subject to this instruction if they are removed from retired status and returned to an active status. This instruction implements AFPD 36-32, *Military Retirements and Separations*, 28 May 1993, and establishes procedures for administrative separation or discharge of Air National Guard (ANG) and Air Force Reserve members under those conditions and reasons outlined herein.

Privacy Act Statement. This instruction directs collecting and maintaining information protected by the Privacy Act of 1974 authorized by 10 U.S.C., Sections 10204 and 8013. System of records F036 ARPC G, Request for Discharge from the ANG and Air Force Reserve, apply.

SUMMARY OF CHANGES

This interim change incorporates recent changes to mandatory retirement ages as specified in the FY07 NDAA. A margin bar indicates newly revised material.

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Attachment 2

GUIDELINES FOR SEPARATION AND SERVICE CHARACTERIZATION

A2.1. General Considerations About Service Characterization

A2.1.1. Base the characterization of service on the quality of the member's service as reflected in the military record, including personal conduct, performance of duty, and the reason for discharge. Determine the quality of service according to standards of acceptable personal conduct and performance of duty. Follow the standards found in the *Uniform Code of Military Justice (UCMJ)*, Air Force directives, state military code, and the time-honored customs and traditions of military service.

A2.1.2. As a rule, base service characterization on a pattern of behavior rather than on an isolated incident. Evaluate the frequency and seriousness of disciplinary infractions. If a military record contains derogatory data, consider the total service in the current enlistment or period of service. Give due consideration to the member's age, length of service, grade, aptitude, physical and mental condition, and the standards of acceptable conduct and performance of duty. There are circumstances, however, in which the conduct or performance of duty reflected by a single incident, particularly in a misconduct case, may provide the basis for the service characterization.

A2.1.3. Consider conduct in the civilian community even if it is not subject to UCMJ jurisdiction or state military code in characterizing service. Conduct in the civilian community that brings discredit on the USAF, ANG, or AFRC; or conduct prejudicial to good order and discipline, adversely affects the quality of a member's service. The burden of proof to the contrary rests with the respondent (that is, the member being considered for separation). See specific restrictions for members not on active duty or ADT in paragraphs [A2.2.2.](#) and [A2.2.3.](#)

A2.2. Types of Service Characterization:

A2.2.1. Honorable. The Honorable characterization is appropriate when the quality of the member's service generally has met USAF standards of acceptable conduct and performance of duty. It may also be appropriate when a member's service is otherwise so meritorious that any other characterization would be inappropriate.

A2.2.2. Under Honorable Conditions (General). If a member's service has been honest and faithful, but significant negative aspects of conduct or performance of duty outweigh positive aspects of the member's military record. **NOTE:** Use conduct in the civilian community of a member who is not on active duty or ADT to characterize service as General only if the conduct has an adverse impact on the effectiveness of the Air Force, including military morale and efficiency.

A2.2.3. UOTHC. A member's service may be characterized as UOTHC only if the member is given an opportunity for a hearing by an administrative discharge board or requests discharge in lieu of trial by court martial. However, conduct in the civilian community of a member not on active duty or ADT may be used to characterize service as UOTHC only if the conduct directly affects the performance of military duties. Examples of conduct that directly affects the performance of military duties include but, are not limited to the following:

A2.2.3.1. Missing muster or screening;

A2.2.3.2. Missing a UTA, IADT, OR ADT;

A2.2.3.3. Offenses which involve either a military member or a DoD agency as a victim.

A2.2.4. Characterization of service as UOTHC may be appropriate when the reason for separation is based on one or more acts or omissions that constitute a significant departure from the conduct expected. Examples of this type conduct are:

A2.2.4.1. The use of force or violence to produce serious bodily injury or death;

A2.2.4.2. Abuse of a special position of trust;

A2.2.4.3. Disregard by a superior of customary superior-subordinate relationships;

A2.2.4.4. Acts or omissions that endanger the security of the US;.

A2.2.4.5. Acts or omissions that endanger the health and welfare of other members of the Air Force; or

A2.2.4.6. Deliberate acts or omissions that seriously endanger the health and safety of other persons.

A2.3. Other Separations with No Service Characterization:

A2.3.1. Dropped From the Rolls of the Air Force. An officer or enlisted member may be dropped from the rolls of the Air Force when authorized by this instruction. (HQ USAF takes final action on all cases).

A2.3.2. Entry Level Separation. A separation based on an action that starts while the enlisted member is in entry-level status.

A2.3.3. Release From Custody and Control of The Air Force (By Reason of Void Enlistment). When a member does not require characterization or an entry level separation, describe the separation as an order of release from custody and control of the Air Force.

A2.4. Period Considered in Characterizing Service. Determine characterization of service solely on the member's military record in the period of service that is ending.

A2.4.1. Prior service activities, including records of conviction by court-martial, records of absence without leave, or commission of other offenses for which punishment was not imposed shall not be considered on the issue of characterization. To the extent that such matters are considered on the issue of retention or discharge, the record of proceedings may reflect express direction that such information shall not be considered on the issue of characterization.

A2.4.2. Preservice activities may not be considered on the issue of characterization except as follows: in a proceeding concerning fraudulent entry into military service, evidence of preservice misrepresentations about matters that would have precluded, postponed, or otherwise affected the member's eligibility for enlistment may be considered on the issue of service characterization.

A2.5. Limitations on Service Characterization:

A2.5.1. In some cases you may not consider evidence used to show that a basis for discharge exists, when you are deciding how to characterize the member's service. Consult a staff judge advocate for help in deciding how to use such evidence. If the discharge authority directs the issuance of a General

or UOTHC discharge, the instrument that directs discharge must show how other circumstances of the member's military record warrant such a characterization.

A2.5.2. On the issue of characterization, don't consider conduct that has been the subject of judicial proceedings resulting in an acquittal, or other action having the same effect.

EXCEPTIONS:

- When such action is based on judicial determination about matters other than the guilt or innocence of the respondent.
- When a judicial proceeding was conducted in a state or foreign court, refer it to the Office of the Air Force Personnel Council for final decision.

A2.5.3. You may not discharge a member UOTHC if the sole basis for discharge is a serious offense that resulted in conviction by a court-martial if court-martial did not impose a punitive discharge.

EXCEPTION: The Air Force Personnel Council may approve such a discharge.

A2.5.4. Additional limitations that apply to service characterizations:

A2.5.4.1. Drug Abuse. Under the provisions of AFI 36-2701, governing self-identification or treatment for drug abuse, don't consider the following items when deciding on the issue of characterization:

A2.5.4.1.1. A member's voluntary self-identification for treatment for drug abuse.

A2.5.4.1.2. The evidence the member voluntarily provides in connection with the self-identification.

A2.5.4.1.3. The results of mandatory urinalysis testing for controlled substances may not be used if the testing was conducted during a command directed examination or referral of a specified member for a valid medical purpose according to the Manual for Court-Martial Rules of Evidence 312(f), when there is a reasonable suspicion of drug abuse or during an examination of a specified member in conjunction with the member's participation in a drug treatment and rehabilitation program.

NOTE: A command-directed examination as described in AFI 36-2701 is one conducted to determine:

A2.5.4.1.3.1. A member's competence for duty.

A2.5.4.1.3.2. The need for counseling, or other medical treatment.

A2.5.4.1.4. Exceptions:

A2.5.4.1.4.1. The evidence discussed in subparagraphs **A2.5.4.1.** and **A2.5.4.1.3.** to impeach or rebut evidence of drug abuse (or non-abuse) if the member first introduced the subject.

A2.5.4.1.4.2. Independently derived evidence, including the results of mandatory urinalysis testing not specifically excluded from consideration, when you are deciding the issue of service characterization.

A2.5.4.2. Homosexual Conduct. A discharge UOTHC may be issued, only if it is found that during the current term of service the member attempted, solicited, or committed a homosexual act:

A2.5.4.2.1. By using force, coercion, or intimidation.

A2.5.4.2.2. With a person under 16 years of age.

A2.5.4.2.3. With a subordinate in circumstances that violate customary military superior-subordinate relationships.

A2.5.4.2.4. Openly in public view.

A2.5.4.2.5. For compensation.

A2.5.4.2.6. Aboard a military vessel or aircraft.

A2.5.4.2.7. In another location subject to military control under aggravating circumstances, noted in the findings, that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft