

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

PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT OF
MOTION

Note on Motion Calendar:
August 6, 2010

ORAL ARGUMENT REQUESTED

MOTION FOR SUMMARY JUDGMENT
NO. C06-5195 RBL

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I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 56, plaintiff Margaret Witt moves this Court for entry of summary judgment ruling that she was unconstitutionally discharged from the Air Force. In *Witt v. Department of the Air Force*, 527 F.3d 806, 819, 821 (9th Cir. 2008) the Court held that the application of “Don’t Ask Don’t Tell” (“DADT”) to Major Witt was subject to heightened scrutiny because it intruded upon her substantive due process rights. To withstand such heightened scrutiny, the Air Force is required to do three things.

We hold that . . . the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest.

Witt, 527 F.3d at 819. The Court held that “this heightened scrutiny analysis is as-applied rather than facial,” so that the relevant inquiry is “not whether DADT has some hypothetical, posthoc rationalization in general, but whether a justification exists for the application of the policy as applied to Major Witt.” *Id.*

The *Witt* Court held that although “it is clear that the government [had] advance[d] an important government interest” it was “unclear on the record before us whether DADT, as applied to Major Witt, satisfied the second and third factors.” *Id.* at 821. The Court rejected the contention that Congress had made findings which resolved these issues:

The Air Force attempts to justify the policy by relying on congressional findings regarding “unit cohesion” and the like, but that does not go to whether the application of DADT *specifically to Major Witt* significantly furthers the government's interest and whether less intrusive means would achieve substantially the government's interest.

Witt, 527 F.3d at 821 (emphasis added).

To survive summary judgment, defendants must show that there is a genuine issue of fact as to (1) whether Witt’s discharge from the 446th AES significantly furthered the Air Force’s interest in maintaining military effectiveness, and (2) that there were no less intrusive means

short of her discharge that would substantially achieve this interest. The defendants cannot make this showing for four separate reasons: (1) there is no evidence that unit cohesion has any effect on military effectiveness; (2) even if there were, there is no evidence that open integration of gays and lesbians in military forces has any negative effect on unit cohesion; (3) there is no evidence that Witt's presence as a open lesbian would cause any harm to the unit cohesion of the 446th;¹ and (4) even assuming there was some evidence that Witt's presence would cause some negative impact on the unit cohesion of the 446th, there are less restrictive alternative ways of dealing with his problem which do not require her discharge.

II. STATEMENT OF FACTS

The evidence² bearing upon the issue of whether Witt's sexual orientation undermines the unit cohesion of the 446th AES can be gathered from many different sources including the following: (1) The acknowledgment of the 446th Wing Commander, Colonel (now General) Crabtree, the commander who was ordered to initiate proceedings against Witt, that he had no evidence whatsoever to indicate that she was causing any unit cohesion problem; (2) the attitude of fellow members of the 446th towards Major Witt and their professed desire to have her return to the unit even though they now know for a fact that she is a lesbian; (3) the accepting attitude of unit members towards other gays and lesbians who have served, or who

¹ As the Circuit Court noted: "Indeed, the facts as alleged by Major Witt indicate the contrary. Major Witt was a model officer whose sexual activities hundreds of miles away from base did not affect her unit until the military initiated discharge proceedings under DADT and, even then, it was her suspension pursuant to DADT, not her homosexuality, that damaged unit cohesion." *Id.* at 821, n.11.

² In support of her motion, plaintiff relies upon the following declarations filed along with this motion: *Judith Krill* ("JK"); *Lisa Chisa* ("LC"); *Heidi Smidt* ("HS"); *Rod Boultinghouse* ("RB"); *Robin Chaurasiya* ("RC"); *Thomas Hansen* ("TH"); *Pat Doe* ("PD"); *David Poulsen* ("DP"); *Faith Mueller* ("Supp. FM"); *Anthony Greenwald* ("AG"); and *James Lobsenz* ("Supp. JL") (with attached excerpts from the depositions of Leah Crawford, Stacey Julian, Edmond Hrivnak, Mary Walker, Janette Moore-Harbert, Kevin Winslow, Jill Robinson, and Eric Crabtree).

In addition the plaintiff relies upon the previously filed declarations and affidavits of the following persons: *Margaret Witt* ("MW") (Dkt # 9); *Faith Mueller* ("FM") (Dkt #10); *Stacey Julian* ("SJ") (Dkt #11); *James Schaffer* ("JaS") (Dkt #12); *Julia Scott* ("JuS") (Dkt #13); *Sue Schindler* ("SS") (Dkt #14); *Sharon Carlson* ("SC") (Dkt #15); *Jill Brinks* (now Jill Robinson) ("JB") (Dkt #16); *Annie Thomas* ("AT") (Dkt #17); *Vince Oda* ("VO") (Dkt #18); *Elizabeth Kier* ("EK") (Dkt #19); *James Schaffer (Ret.)* ("Supp. JaS.") (Dkt #65); *Heather Julian* ("HJ") (Dkt #66); *Edmond Hrivnak* ("EH") (Dkt #67); *James Lobsenz* ("JL") (Dkt #68-2).

are currently serving in the 446th; (4) unit members' attitudes towards *straight* servicemembers in the 446th whose unprofessional sexual conduct has caused a decrease in unit morale; (5) Colonel Moore-Harbert's treatment of a female officer and a female enlisted servicemember when she learned that they were lesbians and were living together demonstrates acceptance of lesbians within the unit; (6) Moore-Harbert's admission that she has "no evidence" that Witt's presence in the 446th would have a negative effect upon unit morale or cohesion; (7) evidence regarding the experiences of gay and lesbian servicemembers who served in other military units; (8) governmental studies of the effects of service by gays and lesbians in the U.S. armed forces in general; (9) studies of the effects of ending a policy of excluding known gays and lesbians in the armed forces of the many foreign countries which now allow them to serve openly; and (10) generally accepted principles of social psychology pertaining to discrimination and the ability to predict behavior towards a minority group. As noted below, *all* of the evidence from all of these sources demonstrates that the policy of excluding known gays and lesbians does *not* significantly further the government's interest in maintaining unit cohesion.

A. General Crabtree's Admission That He Had No Evidence That Witt Negatively Impacted Unit Cohesion and That He Initiated An Investigation Simply Because He Was Ordered to Do So.

In the summer of 2004, General (then Colonel) Eric Crabtree, the Commander of the 446th Wing was notified that a complaint had been filed through the joint chief of staff that Major Witt was involved with a woman in the Spokane area. *Dep. EC* 14:22–25. Crabtree was directed by written order from the Commander³ of the Air Force Reserve Command Headquarters to investigate whether the allegations were true. *Id.*, at 15:1-8. The

³ Although General Crabtree testified that he believed that he received his order from General Sherrard, it appears that he was mistaken. The official website of Air Force Reserve Command shows that the commander of the Air Force Reserve in June of 2004 was initially Major General John J. Batbie. Sometime later that same month the Commander became Lieutenant General John A. Bradley. See <http://www.afrc.af.mil/library/history/commanders/index.asp>.

1 Commander of the Air Force Reserve, in turn, had been directed to do this by General John
 2 Jumper. *Id.*, at 16:6 – 17:21; 24:20 – 25:1; 26:20 – 27:1. Crabtree had never heard anyone
 3 make any negative comments about Major Witt, and prior to that time had no idea she was a
 4 lesbian. *Id.*, at 24:2-19.

5 Crabtree then sought and received authority from General Robert Duignan of the 4th AF to
 6 appoint an investigator and then appointed Major Adam Torem to do an investigation. *Id.* at
 7 29:16-23, 30:5-16 & Exs. 2 & 3. Crabtree's own opinion as to whether to start a fact-finding
 8 inquiry was simply irrelevant because he had been directed to start one. *Id.* at 32:9-21.
 9 Major Torem's completed report was given to Colonel Walker, the (then) commander of the
 10 446th AES. *Id.* at 41:3-11. Crabtree explained that "because of the way the "Don't Ask,
 11 Don't Tell" policy is written, Walker did not have discretion to do anything other than
 12 suspend Major Witt. *Id.* at 41:13-17. Crabtree then forwarded Walker's recommendation for
 13 a discharge to Headquarters, Air Force Reserve. *Id.* at 42:1- 43:5 & Ex. 6.

14 General Crabtree testified that after he carried out his orders in the Witt case, he was
 15 required to initiate two more discharges while he was stationed at the Air Force Reserve
 16 Personnel Center in Denver. *Id.* at 47:5-48:11. The "circumstances were very similar to
 17 [those in] Major Witt's case," in that both of the individuals were outed by members of the
 18 civilian community in Denver, and both were lesbians. *Id.* at 49:1-4, 49:22-25, 50:6-23. As
 19 in Witt's case, Crabtree had no reason to believe that either woman was causing any problem
 20 with unit morale or unit cohesion. *Id.* at 50:24 – 51:8.

21 When asked if he thought DADT was necessary, Crabtree said "That's a tough question."
 22 *Id.* at 55:18-21. He was not aware of any evidence that indicated that the open presence of
 23 gays and lesbians in the military has a negative effect on unit cohesion. *Id.* at 56:9-13.

24 **B. Attitudes of members of the 446th towards Major Witt.**

25 Long before Major Witt was suspended and discharged, many members of the 446th
 26

1 assumed or suspected that she was a lesbian. For example, in May of 2005, Major Sue
 2 Schindler stated that "Although Major Witt has never told me that she is homosexual, I have
 3 long assumed that she was a lesbian." SS, ¶12.⁴ Since it was widely assumed throughout the
 4 446th that she was a lesbian, confirmation of this fact through dissemination of the news that she
 5 was being discharged for homosexuality did not come as a surprise to other members of the unit.
 6 Her fellow servicemembers uniformly have stated that the fact of Witt's lesbianism made
 7 "absolutely no difference to" them, VO, ¶12; SS, ¶12; JB, ¶12; AT ¶13; FM, ¶13; SC, ¶15 ("no
 8 negative impact whatsoever upon me"); VO, ¶12 (same); did not change the fact that she was "a
 9 highly valuable, well-liked and well-respected member of" the 446th, and that they wanted to
 10 continue to serve with her. FM, ¶¶ 6, 9 & 13; SJ, ¶¶ 6 & 10; JaS, ¶¶ 8 & 11; JuS, ¶¶ 6 & 9; SS,
 11 ¶¶ 6 & 12; SC, ¶¶ 6 & 15; JB, ¶¶ 6 & 12; AT ¶¶ 6 & 13; VO, ¶¶ 5 & 12.

12 In the spring of 2005, her fellow officers opined that Witt "play[ed] an important role in
 13 ensuring the good order, morale and cohesion of [the] Unit." FM, ¶6; SJ, ¶6; JB, ¶6 ("[Witt]
 14 "was a natural leader . . . and knew how to bring out the best in other members of our unit.")
 15 They uniformly stated that they had never heard anyone complain about her, or voice any
 16 sentiment that they would not want to serve in the same unit with a gay or lesbian
 17 servicemember. VO, ¶10; FM, ¶12; SJ, ¶18; JaS, ¶18; JuS, ¶16; SS, ¶11; SC, ¶12; JB, ¶11; AT,
 18 ¶ 12. They opined that her continued presence in the unit would not have any negative impact
 19 upon unit morale, discipline, or combat readiness.⁵ On the contrary, they said the opposite,
 20 including that "everyone in the unit that I have talked to about it believes that it is grossly unfair
 21 and hopes that she will be allowed to return to the unit as soon as possible." VOP, ¶13. Thus,

22 ⁴ See also JB, ¶12 ("I have long assumed that she was a lesbian"); AT, ¶13 (same); SC, ¶15 (same); VO, ¶12 (same);
 23 FM, ¶13 ("I suspected"); JuS, ¶10 ("I was relatively certain that she was"); JK, ¶ 6 ("I had my own suspicions");
 24 HS, ¶ 4 ("I suspected she might be"); RB, ¶5 (same); SJ, ¶11 ("I have been aware of her sexual orientation for some
 time").

25 ⁵ VO, ¶ 12; JB, ¶12; JaS, ¶¶ 14 & 15; FM, ¶13; SS, ¶12; AT, ¶13; JuS, ¶ 14 ("I personally would love to have her
 26 back and I think over 99% of the people in the unit feel the same way."); SC, ¶ 15 ("I believe that the members of the
 446th would be very happy and supportive if Major Witt was allowed to return to our squadron and continue her
 service."); RB, ¶ 11 (her "reinstatement would have a positive impact on the unit").

1 the only evidence in the record is their testimony as to their belief that unit cohesion and morale
2 was, and would continue to be, *negatively* impacted by her *discharge*, not by her *presence*.⁶

3 Five years have elapsed since these members of the 446th attested to their positive views
4 about Major Witt and their desire to have her reinstated to the squadron. Nothing has changed.
5 *See Dep. EH 37:18 – 38:5*. The evidence continues to accumulate that it is Witt's removal and
6 absence from the unit that has damaged unit cohesion and morale. Unit members continue to
7 assert that it makes no difference to them that Witt is a lesbian, and that the sexual orientation of
8 a servicemember is simply irrelevant to them.

9 For example, MSgt. Leah Crawford said that when she heard that Witt was discharged for
10 being lesbian her reaction was that it did not make any difference to her what Witt's sexual
11 orientation was, *Crawford Deposition* ("LC"), at 11:10-23. "In my opinion, I, I think that my
12 unit doesn't have a care about whether a person is lesbian or not." *Id.*, 12:25 – 13:1. When
13 asked how she thought the unit would react if Witt were reinstated and rejoined the 446th she
14 replied, "I think nobody would be bothered by it." *Id.*, 12:7. When asked why she thought
15 that, she said simply that "everybody liked her" because "everyone likes a good worker." *Id.*,
16 12:9-10. "You want people who know their job and can do their jobs well. She was one of
17 those and she had a good personality." *Id.*, 12:11-13.

18 In September of 2006, the Air Force Reserve conducted an administrative discharge board
19 hearing in Witt's case at AFB Robbins. Several members of the 446th, including Major (now Lt.
20 Colonel) Kenneth Winslow, submitted letters and declarations to the board in support of Major
21 Witt. Despite the fact that he was a bit concerned that speaking up for Witt might negatively
22 affect his career, Major Winslow told the board of officers, "In my opinion Major Witt should

23 ⁶ VO, ¶15; FM 15; SJ, ¶¶ 14 & 19; JaS, ¶20; JuS, ¶17; SS, ¶13; SC, ¶14; JB, ¶13; AT, ¶14. *See also* JK, ¶8 ("The
24 unit felt very subdued and morale was low" after Witt was suspended); JK, ¶11 ("I never heard anyone express
25 approval of Major Witt's suspension or subsequent discharge. In fact I only heard the opposite – that members
26 were upset and angry over the decision to suspend Major Witt. . . ."); RB, ¶4 ("I believe her suspension affected
unit morale because Major Witt was one of us. When she left, it felt like we were losing a family member."); *Dep.*
EH 36:11-24.

1 remain in the military.” *Dep. Kenneth Winslow* (“KW”), 38:1 -39:23 & Ex. 4. Winslow told the
 2 board that Witt’s “loss to this squadron, wing and the Air Force would be enormous. She has set
 3 the standard for officers in this unit.” *Id.*, Ex. 4.⁷ According to Winslow, if the Air Force had
 4 retained Witt, he did not think there would have been any problems reintegrating her into the
 5 unit. Similarly, if this Court were to order her reinstated in the 446th he does not think there
 6 would be any problems. *Id.* at 41:25 – 43:5.

7 MSgt. Lisa Chisa (Ret.), a former member of the 446th who was deployed overseas during
 8 both the Gulf War and Operation Iraqi Freedom, found out from someone in the unit that Witt
 9 was a lesbian and was being discharged for that reason: “The reaction in the unit was basically,
 10 ‘So what? What’s the big deal?’ The unit reacted with shock to her discharge and so did I.”
 11 LC, ¶ 13. *Accord Deposition Ed Hrivnak* (“EH”), 23:4-12.⁸

12 In the nearly four years which have passed since this Court last considered evidence of the
 13 attitudes of members of the 446th towards Major Witt, members of her unit have consistently
 14 demonstrated their continued support for reinstatement of Major Witt, and their disapproval of
 15 her discharge. Striking evidence of their support comes from the fact that Witt has repeatedly
 16 been invited to attend anniversary celebrations and retirement ceremonies both on and off base.
 17 For example, in the summer of 2008, Witt attended the 50th anniversary celebration of the
 18 squadron which was held on base. No one appeared to be disturbed that Witt attended the event
 19 and several people, including Colonel Moore-Harbert herself, interacted pleasantly with Witt.
 20 *Dep. KW*, at 49:15 – 50:16; *Dep. MH*, at 48:9 – 49:16; 52:6 – 54:12; *HS*, ¶8; *RB*, ¶10.

21 In May of 2007, there was a retirement ceremony for MSgt. Ed Hrivnak. Although Witt did
 22

23 ⁷ Major Winslow was Major Witt’s immediate supervisor and served as the Rater on three of her last four OPRs.
 24 *Dep. KW*, 12:6 – 13:10, 27:15-20, 34:11- 14, and Exhibits 1, 2 & 3.

25 ⁸ “A. I would say the general feel, talking to people would be like, “Okay, she’s gay, wow, no surprise there.”
 26 Everyone was in shock that she was gone. Q. What do you mean by that? A. I did not have a single person
 come up to me and say, ‘I am so glad we got rid of her.’ The comments that were made that were resounding,
 ‘gosh, what a loss of a good officer, what a loss of a good nurse, what a loss of a good friend. The Air Force
 really screwed up.’”

not attend it, over 150 people did and much of the ceremony was recorded on video by Hrivnak's wife. *Dep. EH* 38:6-25. During the ceremony Hrivnak narrated a slide show and one of the slides was a picture of Major Witt standing next to a C130. *Id.* at 39:1-17. Hrivnak made the comment that the Air Force was having to lower its standards in order to fill its personnel needs and yet it was discharging a fine officer like Major Witt simply because someone identified her a lesbian. *Id.* at 40:1-12. There was a spontaneous burst of applause in reaction to Hrivnak's remarks about Major Witt's discharge, and several people approached Hrivnak afterwards to thank him for saying that. *Id.* at 40:13 – 41:2 & *Supp. JL*, ¶ 15.

On October 31, 2007, Witt attended Sgt. James Schaffer's retirement ceremony which was held on base at AFB McChord. *Dep. MH*, at 60:1-24; *Supp. Decl. JaS*, ¶13.

At that party, the 446th AES presented Major Witt with a photograph signed by many members of the unit.

Colonel Moore-Harbert gave Major Witt a hug when the photo was presented and participated, along with everyone else, in the standing ovation given to Major Witt. *Id.* at ¶¶ 14-15.⁹ See also *Dep. SJ* 40:14-22 (the squadron applauded her). The photograph presented to Witt, showing a C-17 and a C-141 parked on the runway, was signed by over 25 members of the 446th including Moore-Harbert, *Dep. MH*, at 65:25 – 66:22 & Exhibit 1 ("Best wishes to you in all you do"); Winslow, *Dep. KW*, at 54:16-55:23 & Exhibit 5 ("Margie – you are my hero."); and Major Scott ("You are so missed . . ."). Moore-Harbert admits that she was not concerned that Witt's attendance at Schaffer's retirement ceremony would cause any problem. *Dep. MH*, at 61:16-24.

C. Attitudes of members of the 446th towards other gays and lesbians.

Although Witt is an exemplary servicemember, the accepting attitude of the 446th towards

⁹ Colonel Moore-Harbert acknowledges that it is entirely possible that she gave Witt a hug, but claims that she does not remember the hug, the standing ovation that Witt received, the flowers that were presented to Witt, the remarks that Sgt. Schaffer made about Major Witt, or signing the photograph which was given to Witt. *Deposition MH*, at 62:2 – 71:13; 77:2 – 78:10.

her cannot be explained as merely a product of the fact that she was such an outstanding officer and flight nurse. The unit's acceptance of gays and lesbians is *not* Witt-specific. Instead, the unit has been accepting of gays and lesbians for years. Many squadron members readily acknowledge that several gays and lesbians have served in the 446th in the past without any problems, and many are serving in the unit right now with the full knowledge and acceptance of their fellow service members. For example, Heidi Smidt, who served in the 446th from 1983 through 1996, reports:

Major Witt never told me that she is a lesbian but I suspected that she might be. I also assumed that some other members in our unit were gay or lesbian because they brought their partners on annual tour and roomed together. Additionally, I sometimes visited with members at their houses and saw same-sex housemates who appeared to be their partners. *I believe that most of the unit knew that there were numerous lesbians serving in the squadron.*

Prior to Major Witt joining the unit, *there were five or six members in our squadron that I believed to be gay or lesbian. There were lesbian couples that did not try to hide their relationship by the way they talked of each other, and by the fact that they always took trips together. I am aware of two lesbian couples who lived together while serving in the squadron, and it was never an issue.*

I think that the general unit attitude towards gay and lesbian members is indifference. I am not aware of any instance where a member's sexual orientation has interfered with job performance. . . .

HS, ¶¶ 4-6 (Bold italics added).

Major Judith Krill (Ret.), attests to the same type of knowledge:

At the time I left the 446th AES in 2009, *I suspected that there were 5-10 gay and lesbian members serving in the unit. My suspicions are based on my personal observations of demeanor as well as on my experience with seeing servicemembers off for deployment.* As Unit Deployment Manager during my last five years of service, I worked full time in the unit. When members were being deployed, and had to take a commercial flight out of Sea-Tac airport, they came on base in the early morning around 3:00 a.m. to pick up weapons. I then drive them to Sea-Tac to catch their flight. Family members were required to drive separately, and I sometimes saw a same-sex partner show up at McChord or at the airport to see a member off. It was readily apparent to me that the same-sex individual was not just a roommate or friend by the fact that he or she had made the effort to drive separately at such an early hour for an extra goodbye

1 embrace and moment with the servicemember. The same-sex partner showed a level of
2 commitment for the member that a traditional roommate would not.

3 My personal opinion is that a member's sexual orientation is irrelevant to her ability to
4 perform the job, so long as the sexual orientation does not interfere with the member's
5 professionalism. The general unit attitude regarding gay and lesbian members was also
6 that sexual orientation is a nonissue, so long as it did not interfere with professionalism.

7 JK, ¶¶ 4-5 (bold italics added). *Accord Supp. FM*, ¶ 1.¹⁰

8 MSgt. Stacey Julian related that there were four or five gay or lesbian people in the 446th
9 when he joined the unit in 1984 and he identified two of them – who are no longer in the service
10 – as Major Peshay and Master Sergeant Bill Barkley. *Dep. SJ* 25:10 – 26:17, 27:4-24, 28:2-7.¹¹
11 Major Peshay served as a flight nurse during the Vietnam War. *Id.* at 27:13-17; 30:1-11. No one
12 in the unit ever complained about serving with them. *Id.* at 31:11-19. *See also SJ*, ¶13. MSgt.
13 Hrivnak believes there were six lesbians and two gay men in the unit when he retired in May of
14 2005. *Dep. EH* 28:2-23. As of 2010, Captain Robinson believed there were about six gay and
15 lesbian people serving in the 446th. *Dep. Jill Robinson*, (“JR”) 37:16-38:8.

16 MSgt. Rod Boultinghouse attests to the fact that it was widely known in the unit that two
17 servicemembers were lesbians living together. *RB*, ¶¶ 6-7.¹² No one cared:

18 The unit attitude towards gay and lesbian members has always been pretty open and
19 receptive. In my experience, no gay or lesbian members ever made others feel

20 ¹⁰ “I retired from the Air Force in September 2008. At that time, I suspected that there were at least ten gay and
21 lesbian members serving in the 446th AES. My suspicions are based on my perceptions and on conversations I have
22 had with members who have mentioned a partner. I believe the general unit attitude towards gay and lesbian
23 members is acceptance. It is commonplace now to work alongside gays and lesbians.”

24 ¹¹ Similarly, Captain Robinson identified Barkley and a woman named Toni Wilson as former members of the
25 446th who were assumed to be gay and lesbian while they were in the unit, and who came out after they retired.
26 *Dep. Robinson*, 35:2 – 37:7. Colonel Moore-Harbert claims that it never crossed her mind that Toni Wilson was
a lesbian. *Dep. MH*, 58:16 – 59:19.

¹² “At the time I retired, *I suspected there were 6-8 other gay and lesbian members in the 446th AES. These
suspicions were based on my personal observations* of the members’ social group of friends, and the clientele they
hung around.

“Prior to Major Witt joining the unit, there were a couple other members who I suspected were gay or lesbian.
One woman lived with her partner and she often spoke of her partner, under the assumption that we all knew that she
was a lesbian. *It was widely known in the unit that the two women were a couple. Another male member was
assumed to be gay by many members due to his mannerisms.* He also spoke of a partner and was well accepted by
the unit. In all my service in the 446th AES, I never heard any negative comments due to members’ perceived sexual
orientation.”

uncomfortable, and they served with professionalism and integrity.

I deployed overseas in 1990 for Desert Storm, in 2003 and in 2005. I do not recall ever hearing anyone say anything negative on deployment about gay or lesbian members, or not wanting to serve with them.

RB, ¶ 8-9. *Accord Dep. EH 31:16-23* (“widely known” gays and lesbians in the unit).

This is not only the opinion of straight servicemembers. It is also the opinion of gay and lesbian servicemembers, such as MSgt. Lisa Chisa, (who left the 446th in 2007). LC, ¶12.¹³ Chisa has described her relationship with a civilian woman, how she made her relationship known to the commander Colonel Mary Walker, and how other unit members reacted when Chisa confirmed their suspicion that Chisa was lesbian:

I started a romantic relationship with a civilian woman in August 2003. We had previously been friends for over ten years. I started living with her in January 2004.

At the end of 2003, the ex-partner of the woman with whom I was beginning a relationship threatened to go to then Commander Colonel Walker. I had obtained a restraining order against the ex, who had drinking problems. ***I informed the First Sergeant Theron Smith of the situation. I also told MSgt. Patricia Martin and asked her to relay the information to Colonel Walker.***

Sometimes my partner would come on base to attend unit briefings regarding deployment.

In 2005, my partner and I had a party at our house and five or six members of the 446th were invited including Captain Jill Brinks Robinson and Master Sergeant Leslie Pellegrini. At that party the guests were invited to help us choose the likely candidate to donate sperm for our child. ***Both Capt. Robinson and MSgt. Pellegrini had long assumed that my partner and I were engaged in a relationship and they indicated no surprise when I finally confirmed it at an earlier party. In fact, Capt. Robinson and MSgt. Pellegrini felt it was long overdue and had simply been wondering when I would finally tell them that my partner and I were together.***

LC, ¶¶ 5-8 (bold italics added). *See also Dep. Jill Robinson 32:9-17, 33:4-20, 34:1-19.* Like Major Witt, MSgt. Chisa also attended the 50th Anniversary celebration of the 446th and no one

¹³ “[T]he members of the 446th simply do not express any problem with the presence or suspected presence of gay or lesbian members in the squadron. While I was in the unit it was always viewed as a nonissue. In my view, the important aspect of oneself at work was professionalism.”

1 objected to her attendance despite the fact that her sexual orientation was readily apparent to
2 anyone. LC, ¶¶ 10-11.¹⁴

3 Another former member of the 446th, who is still serving in the Air Force Reserve, attests to
4 the fact that many people in the unit knew for a fact that he/she was a homosexual. Under the
5 pseudonym "Pat Doe" this member states:

6 I am gay or lesbian. My close friends in the 40th/446th AES that I socialized with knew
7 that I was gay or lesbian because I expressly confirmed it, and I was often present with
8 my partner at social events. I believe that at least twenty other members in the 40th/446th
9 knew that I was gay or lesbian. Other unit members also may or may not have known. I
10 believe that Colonel Moore-Harbert knew of my sexual orientation because she saw me
11 with my partner on various occasions. She never expressed any problem with us. My
12 sexual orientation has never given rise to any problems in my service in the 40th/446th
13 AES; it has been a non-issue. Nobody cared.

14 PD, ¶ 3.

15 Many of the deponents in this case have acknowledged that they are personally opposed to
16 DADT and they hope to see it ended soon. Sgt. Crawford testified that her thoughts on DADT
17 were the "complete opposite" of Air Force policy; that not allowing gays and lesbians in the
18 military seemed "unright" to her, and that in her opinion saying that they could stay in the
19 military only so long as they did not say they were gay or lesbian "sounds as though they don't
20 want gays and lesbians because if you say that you are, you're out." *Dep. LC*, at 19:15-25. She
21 believes DADT is "obsolete" and "it should not be a policy at all." *Id.* at 32:14-17. *Accord Dep.*

22 ¹⁴ "I was inseminated in 2005 and gave birth to a baby girl in 2006. My wife and I are raising this child together.
23 We registered as domestic partners in the state of Washington in July 2009. We consider each other to be spouses."

24 "In the summer of 2008 I attended the celebration of the 50th anniversary of the 446th AES. This celebration was
25 held on base at McChord. I brought my partner and our daughter with me to the celebration. At the celebration I
26 saw many old friends who were still serving in the 446th, as well as some friends who were no longer in the Air
Force. No one at the 50th anniversary celebration indicated in any way that they had a problem with my coming to
the celebration with my wife. I did not refer to her as my "wife" or as my "partner" but since she was there with me
and our daughter and [sic], it could have been readily apparent to anyone who spoke to us."

One of the unit members who encountered Chisa and her partner at the 50th anniversary celebration, MSgt. Stacey
Julian, confirmed that neither he nor, so far as he could tell, any other unit member, appeared to be bothered by the
fact that Chisa attended the celebration with her lesbian partner. *Dep. SJ* 36:6 – 38:13.

EH 63:12 – 64:4;¹⁵ Dep. SJ 60:1-7; Dep. JR 68:5-25; 77:6-21.

Members of the 446th have expressed their fear that since the Air Force discharged Witt for being lesbian, other gay and lesbian members of the 446th might also be discharged if the Air Force found out just how many gays and lesbians were in the unit. Both MSgt. Hrivnak and Captain Robinson expressed concern that a particular officer who was “almost a carbon copy of Margie” might be at risk. See Dep. EH, 78:19 - 80:25 (bold italics added).¹⁶

D. Attitudes of 446th members towards straight servicemembers whose conduct in the workplace has harmed unit morale.

Significantly, many members of the 446th have clearly demonstrated that they have the ability to distinguish between sexual *orientation* per se, which does *not* threaten unit morale, and unprofessional personal *conduct*, which *does* threaten unit morale regardless of whether the relationship is between gay people of the same gender or between straight people of opposite genders. Many members of the 446th perceived that their commander, Colonel Linda Carneal, was having an unprofessional relationship with Captain Kevin Windsor, a junior officer under her command, and because they felt strongly that unit morale was suffering many of them complained to their superiors who took action to put an end to the relationship. See, e.g., Supp. Decl. FM, ¶ 5.

Colonel Mary Walker, who succeeded Carneal as the commander of the 446th, admitted that she had heard that Colonel Carneal and Major Windsor had had an unprofessional

¹⁵ Hrivnak testified that in his opinion review of DADT was “long overdue. I mean, the -- you look at history, there’s plenty of militaries out there that have a lot of gays and lesbians in the service that has not been a problem, going back to the Greeks and the Roman Army. There are European armies have gays and lesbians serving, and they have no problem. Our country is way behind the times.”

¹⁶ “My concern is that if the Air Force did start to investigate this and that they found out *what the rest of us already knew in the 446th that there were other gay and lesbian members present that a witch hunt would start* and that they would actively start to seek out the other gay and lesbian members in the squadron.

* * *

“I actually called Jill Brinks last night . . . And she told me – she said, “*I’m concerned that this is going to turn into a witch hunt; I’m concerned about [name redacted], specifically, and she’s concerned that it might have an adverse effect on other people’s careers* or it might hinder her [Brinks] retirement. . . “*I’m very concerned about [name redacted]’s career. I know she’s close to retirement, and she is almost a carbon copy of Margie* in the sense of leadership, professionalism and her combat record is unparalleled . . .”

relationship. Dep. MW, 32:2 – 33:22.¹⁷ Their relationship gave rise to complaints that Carneal was showing favoritism to Major Windsor and created a morale problem in the unit. *Id.* at 33:23 – 34:1; 35:9 – 36:9; Dep. EH 45:17 – 46:20. See also Dep. Jill Robinson, 61:6 – 62:11 (“seven or eight of us” told Colonel Spencer about the impact that it had on the unit and six months later Colonel Carneal retired).

The unit’s attitude towards Colonel Carneal’s unprofessional relationship with Major Windsor demonstrates that servicemembers are not disturbed by a fellow servicemember’s sexual orientation per se, but they are disturbed by perceived unprofessional conduct in the workplace which threatens unit morale regardless of whether the conduct is between two straight people or two gay people.

E. Colonel Moore-Harbert’s Treatment of Officer “A” and Sgt. “B” When She Learned That They were Lesbians Living Together.

At her deposition, Colonel Moore-Harbert testified that she “did not know” if she had ever suspected¹⁸ any member of the Air Force of being gay or lesbian, and claimed that she “did not remember” if anyone had ever told her that they knew, believed or suspected that another service member was gay or lesbian. *Moore-Harbert Dep.* at 79:25 – 80:7; 78:11–79:24. The testimony of Captain Jill Robinson, however, demonstrates that Moore-Harbert’s testimony is not credible. Dep. JR 39:20 – 51:22.

Captain Robinson first learned about the domestic violence incident which occurred between Servicemember “C” and her partner Servicemember “D”¹⁹ when Robinson and

¹⁷ Colonel Moore-Harbert testified that she had heard the same thing, and she too spoke to Colonel Spencer about her “concern of appearance of favoritism.” Dep. MH, at 32:18-25; 34:7 – 35:2.

¹⁸ Moore-Harbert asked for a definition of “suspected” and was advised that suspected meant that it had “crossed her mind.” *Id.* at 57:18 – 58:15; 79:25 – 80:4.

¹⁹ The letter C has been substituted for the officer’s true name and the letter D has been substituted for the sergeant’s true name. The defendants are well aware of both names. If the Court wishes to know their true names, the plaintiff will supply them to the Court. Both C and D have been listed as potential trial witnesses in the interrogatory answers the plaintiff has made to the defendants. The letters C and D have been used in this brief in order to be consistent with the lettering given to the same individuals in previous briefing. See Docket No. 84, Plaintiff’s Motion to Compel Production of Documents, at p. 2, *ll.* 25-26; Docket No. 85, Declaration of Sher Kung, Appendix F, Request for Production No. 35 at p. 26, *ll.* 13-14.

1 MSgt. Leslie Pellegrini saw bruises on D's arm. *Id.* at 40:2-4.²⁰ D told Robinson that she had
 2 discovered some e-mails indicating that C had met someone else and D was unsure whether
 3 her relationship with C was going to continue. *Id.* at 50:9-18. D and C got into a fight in
 4 their home and D received the bruises when C physically restrained her. *Id.* at 50:19 – 51:3.

5 A accused Robinson of informing Colonel Moore-Harbert of the incident and of outing C
 6 as a lesbian. *Id.* at 40:12 – 41:1; 42:17-21. Robinson told C she had not outed her. *Id.* at
 7 43:3 – 44:6. Robinson spoke to Colonel Moore-Harbert and asked her to explain to C that
 8 Robinson was not the one who informed Moore-Harbert about the domestic violence incident
 9 or about C's lesbian relationship with D, and Moore-Harbert agreed to do that. *Id.* at 44:12-
 10 18. Robinson testified that she "was there when the three of us talked" and that Moore-
 11 Harbert explained to C that Robinson "wasn't the source," that Robinson "didn't have access"
 12 to the police report about the domestic violence incident, and that Robinson had not outed
 13 her. *Id.* at 44:22 – 45:25.

14 Moore-Harbert advised C that she was going to be admonished for violating the Air
 15 Force's fraternization policy by maintaining a house with an enlisted person (D). *Id.* at 47:22
 16 – 48:1; 48:12-15; 48:22-24.²¹ Moore-Harbert never indicated that she intended to take any
 17 action against C for being a lesbian, but C was concerned that since the information was out
 18 there something might happen to her. *Id.* at 48:25 – 49:9. Thereafter C began a relationship
 19 with someone else and D left the 446th. Despite the fact that word about C's lesbian
 20 relationship with D got out, after the incident Robinson never heard anyone voice any
 21 complaint about serving in the unit with C. *Id.* at 51:19-22.

22 Moore-Harbert's treatment of C demonstrates that it was not only entirely possible to

24 ²⁰ Even though A never told Robinson that she was a lesbian, well before the domestic violence incident
 25 Robinson knew that A and B lived together and believed that they were having a lesbian relationship. *Id.* at
 26 41:2-16. Robinson had been to the home that A and B shared. *Id.* at 41:25 – 42:4.

²¹ Although Moore-Harbert testified that she eventually disciplined both A and B for fraternization, she insisted
 that she never knew that the two of them were lesbians. *Id.* at 92:20-93:6.

1 have a known lesbian serve in the 446th without causing any problems, it has already
 2 happened and it continues to be the case today.²² Although she has known for several years
 3 now that C is a lesbian, Moore-Harbert has never initiated any suspension or discharge of C.

4 Officer C is still serving in the 446th today. Moore-Harbert has known for more than
 5 three years that C is a lesbian. Officer C thinks that since the fall of 2006 most of the unit
 6 knows she is a lesbian. Yet Officer C, like Major Witt, is highly respected and everyone is
 7 happy to work with her. The presence of C in the unit, a widely known lesbian, demonstrates
 8 that it does not undermine unit cohesion to have a known lesbian serving in the unit.

9 **F. Admission by Colonel Moore-Harbert That She Has No Evidence that Witt's Return**
 10 **to the 446th Would Negatively Affect Unit Cohesion.**

11 Colonel Moore-Harbert is the only person identified by the defendants as holding the
 12 opinion that Witt's return to the 446th would negatively impact unit morale discipline or
 13 cohesion,²³ and she readily acknowledges that she has "no evidence" to support her opinion.
 14 *Dep. MH*, at 186:9-13. She concedes that Witt was a respected officer, that she did her job
 15 well, that she cannot remember anyone ever saying that they did not want to work with her,
 16 or that she caused a morale or discipline problem. *Id.* at 122:19 – 123:12.²⁴

17 Q. So from any source has anyone ever given you information suggesting that she
 18 creates a problem for unit morale or discipline?

19 ²² Captain Robinson testified that she believes that if Colonel Moore-Harbert had been the commander in 2004
 20 when Major Witt was being investigated for being a lesbian that Moore-Harbert "would have reacted differently
 21 to orders coming from outside the squadron and above" to discharge Witt. Robinson believes that if Moore-
 22 Harbert had been the commander at that time "she would have said, 'I'm not doing it; she's no problem in the
 23 unit'." *Dep. JR*, 74:12 – 75:9.

24 ²³ Although the defendants identified Colonel Mary Walker as also holding this opinion, at her deposition when
 25 asked if she had "ever held the opinion that Major Witt's presence in the 446th has a negative impact on unit
 26 cohesion or morale," Colonel Walker answered, "No." *Dep. MW*, at 145:16-19.

²⁴ Moore-Harbert served as the additional rater for Witt's last OPR which covered the time period between April
 13, 2004 and April 12, 2005. *Dep. MH*, at 164:4-25. Moore-Harbert confirmed that when she signed the OPR
 on July 11, 2005, she knew at that time that Witt was a lesbian. Nevertheless she agreed with the comments of
 the rater, Major Thomas Hansen, that Witt was a dynamic nursing leader; that she was recognized by her peers
 for strong character, leadership skills and knowledge base; that she was committed to continuing good squadron
 cohesion and morale; *that she was an excellent role model of professional military officership; and that she*
set the standard for professional conduct for junior officers and fellow peers to emulate for career success. *Id.*
 at 165:8-25 (emphasis added); 166:23 – 167:19; 168:7-11; 169:9-21.

1 A. From a source, no. I don't remember hearing that from anybody.

2 *Dep. MH*, at 123:16-20.

3 Referring to the possibility that the unit might be deployed to "a location with communal
4 showers" Moore-Harbert stated that she had a concern about Major Witt deploying with the
5 unit "if there are personnel that are uncomfortable with the aspect [sic] of Major Witt. And if
6 they would be uncomfortable deploying in that type of a setting." *Dep. MH*, at 184:11-19.
7 Moore-Harbert said that "if that happens" such a member would be distracted. *Id.* at 185:2-6.
8 When asked "What evidence did you have that anyone in the 446th would be uncomfortable
9 with [Major Witt's] presence?" Moore-Harbert answered: "Again, I don't remember
10 anybody specifically coming up to say that." *Id.* at 187:7-10. When asked "What evidence do
11 you have that it would happen specifically with regard to Major Witt?" she testified that it
12 "would be a concern" to her. *Id.* at 186:5-6. The question was then posed again and Moore-
13 Harbert responded as follows:

14 Q. Now, I didn't ask you whether it would be a concern. You told me it would be a
15 concern. I asked you: What evidence do you have that Major Witt would specifically
16 cause that reaction?

16 A. I have no evidence.

17 *Dep. MH*, at 186:9-13.²⁵

18 **G. The Experience of Gays and Lesbians Who Have Served Openly in Other Units**

19 Prior to the existence of DADT, the regulations governing sexual orientation and military
20 service *allowed* for openly gay servicemembers to be retained in the service *provided* there was a
21 finding that the member's sexual orientation had no negative effect on unit morale, discipline or
22 cohesion. Under these regulations Sergeant Perry Watkins served in the United States Army as
23

24 ²⁵ When asked again if she had any evidence to substantiate her concern: "So I'm asking you, other than maybe
25 some gut feeling that it might cause a concern, what evidence do you have that she would likely have a negative
26 impact on the morale of the 446th?" she replied, "I have no evidence except for the length of time that I have
been doing this job, working through the deployments to take a look at what could be a distraction that is going
to take away from the capability of the members to perform the mission." *Id.* at 187:24 – 188:7.

1 an openly gay man for 15 years, thanks to the unanimous finding of a board of officers that
 2 although his "homosexuality was well known," it caused no problems, and did not have any
 3 deleterious effect on unit morale, discipline or performance.²⁶

4 In 1981 President Reagan promulgated new regulations, including AR 635-200, chapter 15,
 5 "which mandated the discharge of all homosexuals regardless of merit," and eliminated the
 6 exception clause which allowed for gay and lesbian service members to continue serving openly
 7 provided they did not negatively affect unit cohesion. *Id.* at 702.²⁷ These in turn were replaced
 8 in 1993 by the enactment of DADT (10 U.S.C. § 654) and DoD Directive 1332.20, which also
 9 absolutely forbids any gay or lesbian person from serving openly.²⁸

10 **H. The Government's Own Studies Conclude That There is No Evidence That The**
 11 **Presence of Gays and Lesbians in The Military Undermines Unit Cohesion.**

12 As noted by Professor Kier, Defense Department studies of the effects of allowing gays
 13 and lesbians to serve openly in the military have failed to find any adverse effect on unit
 14 cohesion. *Decl. Kier*, ¶¶ 32. Similarly, studies of police and fire departments which have
 15 openly integrated gays and lesbians found no adverse impact. *Id.*, ¶ 31.

16
 17
 18 ²⁶ "In 1975, the Army convened a board of officers to determine whether Watkins should be discharged because of
 19 his homosexual tendencies. On this occasion his commanding officer, Captain Bast, testified that Watkins was "the
 20 best clerk I have known," that he did "A fantastic job—excellent," *and that Watkins' homosexuality did not affect*
 21 *the company. A sergeant testified that Watkins' homosexuality was well known but caused no problems and*
 22 *generated no complaints from other soldiers.* The four officers on the board unanimously found that "Watkins is
 23 suitable for retention in the military service" and stated, "In view of the findings, the Board recommends that SP5
 24 Watkins be retained in the military service *because there is no evidence suggesting that his behavior has had either*
 25 *a degrading effect upon unit performance, morale or discipline, or upon his own job performance. . . .*" *Watkins*
 26 *v. United States Army*, 875 F.2d 699, 702 (9th Cir. 1989) (en banc) (bold italics added).

²⁷ For a discussion of the pre-DADT army regulations on homosexuality see *Watkins v. U.S. Army*, 721 F.2d
 687, 689-690 (9th Cir. 1983). This was the first of two panel decisions which preceded the Ninth Circuit's *en*
banc decision in the *Watkins* case.

²⁸ Occasionally, however, the actions of courts or of individual commanders have made it possible for a few gay and
 lesbian servicemembers to serve openly for significant periods of time. Their experiences provide additional support
 for the conclusion that unit cohesion is not harmed when gay and lesbian servicemembers serve openly. For one
 such example, see the *Declaration of Lieutenant Robin Chaurasiya*, a lesbian who continued to serve without any
 problems for a significant period of time after she was outed by a disgruntled ex-boyfriend who sent an email to
 Chaurasiya's squadron commander at Scott AFB.

I. Studies of Foreign Countries Which Have Ended Their Ban on Gays and Lesbians Serving Openly Show That There was No Negative Impact on Military Performance.

At least 23 countries have changed their policies to expressly permit gays and lesbians to serve openly in the armed forces. Studies of these countries consistently show that despite dire predictions of problems that such a policy change will cause, no problems have been encountered in any of these countries. *Id.*, ¶¶ 11-18.

J. Social Science Studies Show That There is No Evidence To Support the Contention That Integration of a Disfavored Group Undermines Unit Cohesion.

There is no social science evidence which supports the current rationale for prohibiting homosexuals from serving openly. “To the contrary, decades of social science research provides overwhelming evidence that the open integration of homosexuals in the armed forces does not hurt combat performance.” *Kier*, ¶ 9. “[E]xtensive social scientific studies show that the presence of openly gay and lesbian service members does not disrupt the performance of cohesive units or undermine a unit’s morale, good order and discipline.” *Id.*, ¶10. DADT rests upon two assumptions: (1) that primary group cohesion enhances military effectiveness and (2) that openly gay and lesbian personnel would disrupt unit cohesion and thus military performance. *Id.*, ¶ 19. Research shows that both assumptions are wrong. *Id.*, ¶¶ 19-23.

Just as Colonel Moore-Harbert has admitted she has no evidence to support her “concern” that reinstatement of Major Witt to the 446th would cause any unit morale or cohesion problem, as long ago as 1993 the Department of Defense admitted that it could not provide any evidence to support its argument that in general the open presence of gays and lesbians in the armed forces caused any problem. *Id.*, ¶¶ 34-35.

K. Accepted Principles of Social Psychology Explain Why Commanders Overpredict the Incidence of Problems Posed by Allowing Gays and Lesbians To Serve Openly.

Historically, our national experience with the integration of new social groups, such as blacks and women, into the U.S. military shows that despite alarmist predictions by military

1 authorities that integration would undermine unit cohesion, no such problems arose. *Kier*, ¶¶ 24-
 2 29. Military predictions that white soldiers would not accept black soldiers, and predictions that
 3 unit cohesion and military performance would suffer, proved to be incorrect. *Id.*, ¶¶ 27-28.

4 Professor Greenwald, an expert in social and cognitive psychology, explains that it has been
 5 known for decades that people mistakenly overestimate the problems that will result when a
 6 minority group is integrated into an ongoing work group. He identifies four factors that would
 7 lead military authorities to erroneously predict the behavior of and attitudes of straight
 8 servicemembers if gays and lesbians are allowed to serve openly in the armed forces. First, they
 9 are likely to underestimate the number of gays and lesbians who are currently in their unit, and
 10 to incorrectly assume that the unit has few or none. *Id.*, ¶¶ 10-11. Second, they are likely to
 11 over-estimate the non-acceptance of gays and lesbians by other members of the unit. *Greenwald*
 12 *Decl.*, ¶¶ 12-16. Third, they are likely to overpredict the negative impact that the presence of a
 13 known gay or lesbian would have in the unit. *Id.*, ¶ 17. Fourth, they are likely to mispredict
 14 both their own future behavior, and the future behavior of other unit members, when they are
 15 called on to work together with known gays and lesbians. *Id.*, ¶ 18.²⁹ Greenwald concludes that
 16 the predictions of people like Colonel Moore-Harbert, that the presence of a known homosexual
 17 in the unit will be disruptive, are “much more likely than not to be in error.” *Id.*, ¶ 20.

20 The more a person has contact with a known homosexual, the more accepting they are likely
 21 to become, and this is true even when the contact is involuntary. *Id.*, *Addendum*, ¶ 6, citing to
 22 Axelton & Saucier, “The effects of contact on sexual prejudice: A meta-analysis,” 61 *Sex Roles*
 23

24
 25 ²⁹ Prof. Greenwald discusses the classic LaPiere study published in 1934 in which people were asked to predict
 26 whether they would serve a Chinese couple at their restaurant or hotel and despite the fact that over 90 percent
 predicted they would not, nearly 100% did in fact serve them. *Greenwald Decl.*, ¶ 18.

178 (2009). Moreover, when studies conducted in other countries were compared to studies conducted in the United States, the effect of improving attitudes of acceptance was slightly *greater* in the U.S. than it was in foreign countries. *Id.*, ¶ 8.

L. Opinion Polls Regarding the Attitudes of Veterans Towards Gays and Lesbians Show Increasing Acceptance of Allowing Them to Serve Openly.

As Professor Greenwald notes, opinion polling shows a pattern “of historically declining support for DADT (between 1993 and 2006) among war veterans,” and that pattern “is consistent with the conclusion that presence of homosexual members in military units does not damage morale.” *Id.*, ¶¶ 14-15. When veterans of the Iraq and Afghanistan wars were polled researchers found “essentially zero correlation” between the presence of known gays or lesbians in their units, and unit cohesion or readiness. *Id.*, ¶ 15, citing Moradi & Miller, “Attitudes of Iraq and Afghanistan war veterans towards gay and lesbian service members,” 36 *Armed Forces & Society* 397 (2010).

M. Admission by Defendant Gates That There Are Alternate Ways of Dealing With Any Negative Impact on Unit Cohesion Which Repeal of DADT Might Cause.

On February 2, 2010, while testifying before the Senate Armed Services Committee defendant Gates announced that he had “appointed a high level working group within the defense department which would review all of the issues associated with properly implementing a repeal of the don’t ask, don’t tell policy.” *Supp. JL*, Appendix A, Bates No. 2912. “The mandate of this working group is to thoroughly, objectively and methodically examine all aspects of this question, and produce its finding and recommendations in the form of an implementation plan by the end of this calendar year.” He further stated, “The question before us is not whether the military prepares to make this change, but how we must – how we best prepare for it.” *Id.*, at 2911. Secretary Gates said that the defense department would take as a guiding principle the need to minimize disruption and polarization within the ranks” and asserted: “I am confident this can be achieved.” *Id.*, at 2912.

Moreover, he specifically addressed the possibility of negative impacts on unit cohesion and flatly asserted that the working group would devise ways to deal with the problem:

[T]he working group will examine the potential impacts of a change in the law on military effectiveness, including how a change might affect unit cohesion, recruiting and retention, and other issues critical to the performance of the force. ***The working group will develop ways to mitigate and manage any negative impacts.***

Id. (emphasis added).

III. ARGUMENT

Under Rule 56(c), “the nonmoving party, may avoid summary judgment against it only by” showing a genuine issue of material fact as to each “element essential to its case and on which it will bear the burden of proof at trial.” *Parth v. Pomona Valley Hospital*, 584 F.3d 794, 798 (9th Cir. 2009), quoting *Celotex Corp. v. Cattret*, 477 U.S. 317, 322 (1986). Here the defendants cannot meet that standard with respect to several essential elements of its case upon which they bear the burden of proof under the *Witt* standard.

A. There is No Evidence That Unit Cohesion Has Any Effect On Military Effectiveness or Readiness.

Fifty years of research has failed to uncover evidence to support the proposition that primary group cohesion enhances military effectiveness. *Kier Decl.*, ¶ 20. Scholars do not agree that there is even a *correlation* between the two. *Id.* Scholars stress the importance of distinguishing between social cohesion, which is the extent to which group members like each other, and task cohesion, which is the extent to which group members share the same goals. *Id.* at ¶ 21. Social cohesion is the type of cohesion that some argue is disrupted by the open presence of gays and lesbians in the military. *Id.* Research has consistently failed to find a positive relationship between social cohesion and performance, and has found that high levels of social cohesion often undermine task performance. *Id.* Since there is no evidence to show that the social cohesion of a military unit has any effect on military effectiveness, the defendants cannot show that a genuine issue of fact exists as to whether discharging gays and

1 lesbians in general significantly furthers the interest of promoting military effectiveness.

2 **B. There is No Evidence That Allowing Gays and Lesbians To Serve Openly Negatively**
 3 **Affect Unit Cohesion.**

4 Even assuming that there was some evidence to show that good unit cohesion significantly
 5 furthers the interest of military effectiveness,³⁰ there is no evidence to show that allowing gays
 6 and lesbians to serve openly negatively impacts unit cohesion. *Kier Decl.*, ¶¶ 23-30. “Our
 7 historical experience . . . shows that the integration of new social groups into the United States
 8 military does not disrupt unit cohesion or degrade military performance, even when military
 9 authorities had forecast serious risks to combat effectiveness.” *Id.* at ¶ 24. “[T]hose who oppose
 10 the integration of open homosexuals into the U.S. armed forces because they believe it would
 11 decrease unit cohesion and degrade combat effectiveness are mistaken, just as those who
 12 opposed racial and gender integration of the military were mistaken.” *Id.*, at ¶ 30.

13 **C. There is No Evidence That Major Witt’s Reinstatement Would Negatively Affect The**
 14 **Unit Cohesion of the 446th AES.**

15 Even if there were some evidence to show that in general allowing gays and lesbians to serve
 16 openly occasionally has a negative impact on unit cohesion, the defendants cannot show a
 17 genuine issue of fact exists as to whether discharging Major Witt significantly furthers the unit
 18 cohesion of the 446th AES. All the evidence shows that her discharge *harmed* unit morale, and
 19 that the 446th AES has no problem accepting and working with gay and lesbian servicemembers.

20 **D. Defendants Cannot Show That There is No Less Restrictive Alternative to Discharge**
 21 **of Major Witt Which Will Protect the 446th From A Negative Impact on Unit**
 22 **Cohesion. Defendant Gates Has Conceded That Alternate Ways of Dealing With**
 23 **Any Possible Negative Impact on Unit Cohesion Exist.**

24 Even if there were some evidence to indicate that the unit cohesion of the 446th would be
 25 negatively impacted by allowing Witt to serve in the unit, the defendants cannot show the
 26

³⁰ See *Decl. Kier*, ¶ 22, stating that because “this claim about the link between cohesion and performance persists despite overwhelming evidence to the contrary,” scholars have gone on to examine “the second part” of the rationale for DADT, which is the contention that openly gay and lesbian servicemembers would degrade unit cohesion, and thereby undermine military performance.

1 existence of a genuine issue of fact regarding the proposition that other than Witt's discharge,
2 there is no other less restrictive alternative way of addressing the problem.

3 Twenty-three other countries have changed their policies to allow gays and lesbians to
4 serve openly, and there is no evidence that this change caused any negative impact on either
5 unit cohesion or military effectiveness in any of those countries. Thus, it defies logic to assert
6 that there is no less restrictive alternative means of maintaining good unit cohesion and
7 military effectiveness within the 446th AES that could be employed, and that the only way of
8 furthering these goals within the 446th is to discharge Major Margaret Witt.

9 Most significantly, in his public testimony given earlier this year before the Senate Armed
10 Forces Committee, defendant Gates conceded that there are less alternative restrictive means
11 of dealing with any negative impact that ending DADT might have on unit cohesion. He flatly
12 stated that his department "will" devise ways to "mitigate and manage any negative impacts."
13 *Supp. JL*, Appendix A, Bates No. 2912. Thus, he has conceded that there are less restrictive
14 alternatives. Since defendant Gates is required to prove that there are *not* any less restrictive
15 alternatives in the case of Major Witt, and since he has conceded that there are less restrictive
16 alternatives which will permit total elimination of DADT in all cases, he clearly cannot meet
17 his burden of proof in this case.

18 Since the defendants cannot meet their burden under Rule 56(c) and (e)(2) to show a
19 genuine issue of material fact on these necessary elements of its case, the Court should grant
20 summary judgment to the plaintiff.

21 **IV. CONCLUSION**

22 For these reasons, plaintiff asks the Court to grant her motion for summary judgment, and to
23 enter a judgment directing the defendants to reinstate her to her former position in the United
24 States Air Force in the 446th Aeromedical Evacuation Squadron stationed at AFB McChord.

25 DATED this 22nd day of July, 2010.

26 MOTION FOR SUMMARY JUDGMENT – 24
NO. C06-5195 RBL

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MOTION FOR SUMMARY JUDGMENT – 25
NO. C06-5195 RBL

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 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:

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MOTION FOR SUMMARY JUDGMENT – 26
NO. C06-5195 RBL

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