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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a non-profit corporation,

Plaintiff / Appellee / Cross-Appellant,

v.

UNITED STATES OF AMERICA and ROBERT M. GATES, SECRETARY OF DEFENSE, in his official capacity,

Defendants / Appellants / Cross-Appellees.

Case No. CV 04-8425-VAP (Ex)

NOTICE OF CROSS-APPEAL

Judge: Hon. Virginia A. Phillips

Complaint filed: October 12, 2004

Judgment Entered: October 12, 2010

TO THE ABOVE CAPTIONED COURT, DEFENDANTS, AND THEIR ATTORNEYS OF RECORD:

Plaintiff Log Cabin Republicans hereby gives notice that it cross appeals to the United States Court of Appeals for the Ninth Circuit. Log Cabin Republicans cross appeals from the portion of the Order Denying in Part and Granting In Part Motion to Dismiss, entered June 9, 2009, dismissing plaintiff's equal protection claim challenging 10 U.S.C. § 654 and its implementing regulations (Docket No. 83 at pages 18-20, 24). A copy of said Order is attached hereto. The Court entered Judgment in this case on October 12, 2010 and defendants / appellants filed their notice of appeal on October 14, 2010 as Docket No. 254. The Ninth Circuit case number for said appeal is 10-56634. This notice of cross-appeal is timely pursuant to Federal Rule of Appellate Procedure 4(a).

In addition to defendants' notice of appeal, this case was previously before the Ninth Circuit Court of Appeals as case numbers 08-56185 and 08-73194. Plaintiff is aware of no other related cases.

Dated: November 18, 2010

Respectfully submitted,

WHITE & CASE LLP

By: */s/ Dan Woods*
Dan Woods
Attorneys for Plaintiff / Appellee / Cross-Appellant Log Cabin Republicans

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a non-profit corporation, Plaintiff, v. UNITED STATES OF AMERICA and DONALD H. RUMSFELD, SECRETARY OF DEFENSE, in his official capacity, Defendants.	Case No. CV 04-8425-VAP (Ex) **[Motion filed on June 12, 2006]** **ORDER DENYING IN PART AND GRANTING IN PART MOTION TO DISMISS**

Defendants United States of America and Donald Rumsfeld's ("Defendants") Motion to Dismiss ("Motion") came before the Court for hearing on March 9, 2009. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court grants the Motion in part and denies it in part.

Log Cabin Republicans, ("Plaintiff" or "Plaintiff association"), a nonprofit corporation whose membership

includes current, retired, and former homosexual[1] members of the U.S. armed forces, challenges as "restrictive, punitive . . .discriminatory," and unconstitutional the "Don't Ask Don't Tell" policy ("DADT") of Defendants, including both the statute codified at 10 U.S.C. section 654 and the implementing regulations appearing at Department of Defense Directives ("DoDD" or "implementing regulations") 1332.14, 1332.30, and 1304.26. (First Amended Complaint ("FAC") ¶ 6.) Defendants' Motion to Dismiss ("Motion") Plaintiff's FAC is now before the Court.[2]

I. BACKGROUND

A. Facts

1. Plaintiff and its members

Assuming all the facts in Plaintiff's FAC are true, as the Court must when considering a motion to dismiss under Rule 12(b)(6), Plaintiff is a nonprofit corporation dedicated to the interests of homosexuals and organized under the laws of the District of Columbia. (FAC ¶ 10.) Plaintiff's members include current, retired, and former members of the U.S. armed forces who seek to serve "without fear of investigation, discharge, stigma,

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[1]The Court uses the term "homosexual" for the sake of consistency with the Ninth Circuit's opinion in Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008).

[2]The case was transferred to this Court's docket on October 8, 2008, upon the resignation of the Honorable George P. Schiavelli.

forfeiture of fundamental liberties, harassment and other negative repercussions" imposed in connection with their homosexuality. (FAC ¶¶ 8, 12, 17.)

a. Current members of the armed forces

Plaintiff association includes homosexual persons currently in the armed forces, among them "John Doe," ("Doe") a homosexual man, who submitted a declaration in support of the FAC. (FAC ¶¶ 17-21.) DADT prevents Doe from "communicat[ing] the core of his emotions and identity to others" and from exercising his "constitutionally protected right to engage in private, consensual homosexual conduct without intervention of the government." (FAC ¶ 20.)[3]

Doe fears that making his name public in connection with this action will subject him to "investigation and discharge" as well as "other possible harm." (FAC ¶ 21.)

b. Retired members of the armed forces

Plaintiff's members also include retired armed forces personnel who are homosexuals. They remain subject to DADT and "fear exercising their constitutional rights. . . or making public their own names" as they fear

[3]Plaintiff does not define "private, consensual homosexual conduct."

Defendants might deny them retirement benefits. (FAC ¶ 22.)

c. Former members of the armed forces

Those separated from the armed forces pursuant to DADT, including John Alexander Nicholson ("Nicholson"), are also members of Plaintiff association. (FAC ¶¶ 6, 7, 12.) Nicholson is homosexual, fluent in several languages, including Arabic, and has a Bachelor's degree in International Relations. He enlisted in the U.S. Army in 2001 and received training in human intelligence collection. (FAC ¶ 13.) While in the Army, pursuant to DADT, Defendants denied him the ability to communicate his emotions and identity to others as well as the right to engage in private, consensual sexual conduct with the sex to whom he is attracted without the government's intervention. (FAC ¶ 14.) Nicholson became subject to separation proceedings pursuant to DADT in 2002 and was discharged. (FAC ¶¶ 14.) His discharge caused Nicholson emotional distress. (FAC ¶ 14.) DADT continues to prevent Nicholson from returning to the Army. (FAC ¶ 16.)

2. DADT

DADT includes both the statutory language appearing at 10 U.S.C. section 654 and the implementing regulations appearing as DoDDs 1332.14, 1332.30, and 1304.26. (FAC ¶

28.) DADT can be triggered by three kinds of "homosexual conduct:" (1) by "homosexual acts"; (2) statements that one "is a homosexual"; or (3) marriage or an attempt to marry a person of the same biological sex. 10 U.S.C. § 654 (b); DoDD 1332.14 at E3.A4.2.4; 1332.30 at 1-1.

a. "Homosexual acts"

First, Defendants may initiate separation proceedings if a service member engages in a "homosexual act," defined as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." 10 U.S.C. §§ 654 (b)(1), (f)(3)(A)-(B). Such acts include holding hands and kissing. (FAC ¶ 31 citing DoDD 1332.14 at E3.A4.1.2.4.1.)

b. Statements one "is a homosexual"

Second, Defendants may initiate separation if a service member makes a statement "he or she is a homosexual . . . or words to that effect." 10 U.S.C. § 654(b)(2). These words create a presumption the service member is a "person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. § 654(b). A propensity

is "more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages or will engage in homosexual acts." DoDD 1332.14 at E3.A1.1.8.1.2.2.

c. Marriage or attempted marriage to a person of the same sex

The third route to separation under DADT, marriage or attempted marriage to a person of the same sex, is self-explanatory.

d. Discharge

Once Defendants find a service member has engaged in "homosexual conduct," as defined above, Defendants will discharge him or her unless the service member can demonstrate, by a preponderance of the evidence, that, inter alia, such acts are not his or her usual or customary behavior and that he or she has no propensity to engage in "homosexual acts." (FAC ¶¶ 30-33); 10 U.S.C. § 654(b)(1); DoDD 1332.14 at E3.A1.1.8.1.2.

3. Congressional findings of fact

Congress made 15 factual findings in connection with the statutory embodiment of DADT. They state, in relevant part:

- "There is no constitutional right to serve in the armed forces." 10 U.S.C. § 654 (a)(2).

- "Military life is fundamentally different from civilian life in that . . . the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society." 10 U.S.C. § 654(a)(8)(B).

- "The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces." 10 U.S.C. § 654(a)(9).

- "The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(15).

4. Impact of DADT

According to Plaintiff, pursuant to DADT Defendants have discharged nearly 10,000 members of the U.S. armed

forces, including those in non-combat positions. (FAC ¶ 34-36.) Nevertheless, Defendants have discharged 40% fewer persons pursuant to DADT since the outbreak of the wars in Afghanistan and Iraq. (FAC ¶ 36.)

B. Procedural History

Plaintiff filed its Complaint on October 12, 2004. On December 13, 2004, Defendants moved to dismiss the Complaint, alleging, inter alia, that Plaintiff lacked standing. The Honorable George P. Judge Schiavelli granted the motion to dismiss the Complaint with leave to amend on March 21, 2006.

On April 28, 2006, Plaintiff timely filed its FAC, attaching the declaration of Nicholson, a current member of Plaintiff organization and a former member of the U.S. Army. According to the FAC, DADT violates the First and Fifth Amendments to the U.S. Constitution by violating guarantees to: (1) substantive due process; (2) equal protection; and (3) freedom of speech. On June 11, 2007, Plaintiff filed the declaration of Doe, a current member of Plaintiff organization, a homosexual, and a current U.S. Army reservist on active duty.

On June 12, 2006, Defendants filed their Motion; Plaintiff opposed; Defendants replied. After conducting a hearing on the Motion and receiving supplemental

authorities from both sides, the Court entered an order staying this action on May 23, 2008 in light of the Ninth Circuit's May 21, 2008 decision in Witt v. Dep't of the Air Force, 527 F.3d 806.

After the case was transferred to this Court in late 2008, it held a status conference on January 28, 2009, lifted the stay, set a hearing date for the Motion, and permitted the parties to submit additional authority regarding the substantive due process challenge. Defendants filed their supplemental brief addressing the issue of substantive due process on February 17, 2009 ("Defs.' Supp'l Br.") and Plaintiff filed its submission on February 27, 2009 ("Pl.'s Supp'l Br.").

II. LEGAL STANDARD

Under Rule 12(b)(6), a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. As a general matter, the Federal Rules require only that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964 (2007). In addition, the Court must accept all material allegations in the complaint – as well as any reasonable

inferences to be drawn from them – as true. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic, 127 S. Ct. at 1964-65 (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id. at 1965.

Although the scope of review is limited to the contents of the complaint, the Court may also consider exhibits submitted with the complaint, Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990), and "take judicial notice of matters of public record outside the pleadings," Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).

III. DISCUSSION

Defendants move for dismissal of Plaintiff's FAC on four grounds: (1) Plaintiff lacks standing to bring suit

on behalf of current members of the armed forces; and Plaintiff fails to state a claim for violation of the constitutional guarantees to (2) substantive due process; (3) equal protection; and (4) freedom of speech.

A. Standing

Plaintiff brings suit on behalf of its members who are homosexuals and current or former members of the armed forces. Pursuant to Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977), Plaintiff, as an association that has not suffered any injury itself, may assert associational standing to sue in a representative capacity for injuries to its members by showing: (1) at least one member would have standing, in his or her own right, to present the claim asserted by the association; (2) the interests sought to be protected are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires that the members participate individually in the suit. See Hunt, 432 U.S. at 343, 376-79.

1. Standing asserted under Complaint

The Court dismissed the original Complaint for lack of standing because Plaintiff failed to allege compliance with the first prong of the Hunt test: Plaintiff "fail[ed] to identify a single individual who is (1) an active member of [Plaintiff]; (2) has served or currently

serves in the Armed Forces; and (3) has been injured by the policy." (March 2006 J. Schiavelli Order ("2006 Order") 15:11-14.) The Court required Plaintiff "to identify, by name, at least one of its members injured by the subject policy if it wishes to proceed with this action." (2006 Order 17:9-10.)

The Court explicitly rejected Plaintiff's contention it ought to be able to bring suit on behalf of current members of the military without naming them because they fear discharge pursuant to DADT. (2006 Order 16.)

2. Standing asserted under the FAC

Plaintiff's FAC properly alleges standing to bring suit. It submits the declarations of Nicholson and Doe, current members of Plaintiff organization. Defendants assert Plaintiff nevertheless cannot assert the claims in the FAC on behalf of current service members.[4] (Mot. 7:8-9.) Defendants argue the 2006 Order requires Plaintiff to name a currently serving member of the armed forces. The plain text of the Order, however, requires Plaintiff only to name a current member of Plaintiff association, not a current member of the armed forces. (Mot. 8; 2006 Order 17:8-10.) Accordingly, the Court

[4]In its most recent briefing Defendants did not reiterate their challenge to Plaintiff's standing to sue on behalf of former service persons. Plaintiff produced the declaration of Nicholson, a former service member discharged pursuant to DADT.

denies the Motion insofar as it is based on the claimed failure to amend in compliance with the 2006 Order.

Defendants also contend Plaintiff cannot assert claims on behalf of currently active service members because the 2006 Order granting leave to amend did not permit Plaintiff to bring suit on behalf of anonymous members or former members of the armed forces, despite their professed fear of investigation, discharge, and loss of retirement benefits. (2006 Order 16-17, Mot. 8-9.)

The Court declines to find Plaintiff's new allegations insufficient to justify standing. First, this is "the 'unusual case' where nondisclosure of the party's identity 'is necessary . . . to protect a person from harassment, injury, ridicule or personal embarrassment." (Contra Mot. 9.) Does I Thru XXXIII v. Advanced Textile Corp., 214 F.3d 1058, 1068 (9th Cir. 1981).

Even leaving aside the issue of the propriety of pseudonyms, however, the allegations are sufficient. Pursuant to Associated General Contractors of California, Inc. v. Coalition for Economic Equity, 950 F.2d 1401, 1406-07 (9th Cir. 1991), the declaration of one member of an association that he suffered a harm, coupled with

general assertions that other members would suffer similar harm, suffices to confer standing on an association. Associated Gen'l Contractors, 950 F.2d at 1406-07 (declaration one member was discouraged from bidding on contract enough to confer standing on organization to challenge ordinance regulating preferences in bidding). (Opp'n 4.) Here, as in Associated General Contractors, Plaintiff furnishes the declaration of a named member of the organization, Nicholson, stating he has been harmed, and asserts other members of the association will suffer similar fates. This satisfies the first prong of the Hunt test. See Associated Gen'l Contractors, 950 F.2d at 1406-07; Hunt, 432 U.S. at 333, 341-43. Accordingly, the Court finds Plaintiff has standing to bring suit on behalf of current and former homosexual members of the armed forces.

B. Substantive Due Process

Plaintiff asserts DADT violates the substantive due process rights of its members. Defendant moves the Court to dismiss this claim. Plaintiff relies on Witt, where the Ninth Circuit remanded the case for an as-applied substantive due process review, and Lawrence v. Texas, where the Supreme Court held a Texas criminal sodomy law violated substantive due process. Witt, 527 F.3d at 821; Lawrence, 539 U.S. 558, 578-79 (2003). In contrast, Defendants cite older Ninth Circuit precedent,

particularly Holmes v. California Army National Guard, 124 F.3d 1126, 1132-36 (9th Cir. 1997) and Philips v. Perry, 106 F.3d 1420, 1425-29 (9th Cir. 1997), in which the Ninth Circuit upheld DADT.

1. Witt's heightened scrutiny

In its 2008 Witt decision, the Ninth Circuit adopted a "heightened scrutiny" standard to assess whether DADT comports with the substantive due process guarantee of the U.S. Constitution. Witt, 527 F.3d at 821. The Ninth Circuit adopted the following test:

> when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in Lawrence, 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.

In the same discussion, the Ninth Circuit also explicitly "h[e]ld that this heightened scrutiny analysis is as-applied rather than facial, . . ." and the Ninth Circuit emphasized "we must determine 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." The

as-applied inquiry "is necessary to give meaning to the Supreme Court's conclusion that 'liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.'" Witt, 527 F.3d at 819.

The parties dispute the effect and application of Witt here. Defendants claim it limits all substantive due process challenges to DADT to as-applied rather than facial attacks. (Defs.' Supp'l Br. 7.) Plaintiff argues it has the right to choose its own litigation strategy, including a facial challenge, and points out the congruity between association standing and a facial challenge. (Pl.'s Supp'l Br. 5.)

Witt expresses a strong preference for as-applied challenges and clearly limits the heightened scrutiny standard it announces to such challenges. For example, the decision stresses consideration of "the facts of the individual case," an inquiry impossible in a facial challenge. Witt, 527 F.3d at 819; (see Defs.' Supp'l Br. 8.) Nevertheless, Defendants do not direct the Court to language forbidding facial challenges or forbidding associations from challenging DADT.

Accordingly, nothing in Witt bars Plaintiff from asserting a facial challenge to DADT, although in doing

so it will not be able to rely upon Witt's heightened scrutiny standard as the Ninth Circuit limited this standard to as-applied challenges. (Contra Pl.'s Supp'l Br. 3.)

2. Lawrence's impact on Holmes

As Witt does not compel the Court to deny the Motion, we turn next to whether Lawrence or Holmes[5] provides guidance here.

According to Defendants, Lawrence is not pertinent, because it discusses application of a criminal statute in a civilian setting, and is irrelevant to the validity of Holmes. (See Reply 5 citing Galbraith v. County of Santa Clara, 307 F.3d 1119, 1123 (9th Cir. 2002) (discussing the application of Supreme Court opinions to Ninth Circuit precedent) and Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (same).)

Defendants rely on Holmes in vain. The Holmes Court relied on Bowers v. Hardwick, 478 U.S. 186 (1986), which

[5]Holmes upheld DADT in the face of a substantive due process challenge. See Holmes, 124 F.3d at 1136. (Mot. 19.) Defendants also rely on Philips for the proposition that DADT is not based on mere negative attitudes and that it responds to the unique needs of military life. However, Philips discusses equal protection concerns, not substantive due process. (See Mot. 19; Reply 5); Philips, 106 F.3d at 1429.

Lawrence overturned. Holmes, 124 F.3d at 1136;[6] Lawrence, 539 U.S. at 578 ("Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled"). Lawrence unequivocally overruled Bowers; therefore, it removed the foundation on which Holmes rested. (Opp'n 5 citing Lawrence, 539 U.S. at 578.)

As the foundation on which Holmes rested was dissolved by Lawrence, the Court cannot conclude Plaintiff's substantive due process claim lacks merit. The Court DENIES the Motion as to the substantive due process claim.

C. Equal Protection

Plaintiff claims DADT violates the Fifth Amendment's equal protection clause because (1) it treats homosexual service persons differently than similarly-situated heterosexual persons based on impermissible considerations and because (2) homosexuals either are

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[6] At page 1136, the Holmes court relies on Schowengerdt v. United States, 944 F.2d 483, 490 (9th Cir. 1991) where the court found plaintiff's "substantive due process claim with respect to the old" pre-DADT policy was "foreclosed by Bowers v. Hardwick, 478 U.S. 186. . .". Holmes also relies on High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563 (9th Cir. 1990) which in turn relied on Bowers for the proposition that persons do not have a fundamental right to engage in intimate homosexual conduct. High Tech Gays, 895 F.2d at 571.

part of a suspect class or exercise a fundamental right. (Opp'n 16.)

Defendants assert Plaintiff does not state an equal protection claim, as homosexuals are not a suspect or a quasi-suspect class according to Ninth Circuit precedent undisturbed by Lawrence, which was not decided on equal protection grounds. (See Mot. 20); Witt, 527 F.3d 806 (discussing Lawrence). The Ninth Circuit upheld DADT under rational basis review in Holmes, 124 F.3d at 1132 ("homosexuals do not constitute a suspect or quasi-suspect class"), Philips, 106 F.3d at 1425-29, and High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 571, 576-78 (9th Cir. 1990) (relying on Bowers for proposition "homosexual activity is not a fundamental right" and "homosexuals cannot constitute a suspect or quasi-suspect class").

Plaintiff offers three reasons why the Court should depart from this precedent. Plaintiff first asserts Lawrence "established a fundamental right to engage in intimate, consensual physical acts and relationships with persons of the same gender." (Opp'n 17.) Witt foreclosed this interpretation, by finding Lawrence did not discuss equal protection and did not disturb Philips's holding that DADT complies with the

Constitution's guarantee of equal protection. See Witt, 527 F.3d at 821.

Second, Plaintiff relies on Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005), in which the Ninth Circuit considered the asylum claim of a homosexual Lebanese man. Karouni is distinguishable on its facts as an asylum case.

Third, Plaintiff asserts it should be permitted to conduct discovery and present evidence at the appropriate stage of the case on this issue. As Plaintiff has not succeeded in stating an equal protection claim under existing law, however, it has not shown how discovery would cure the legal infirmity. Accordingly, the Court GRANTS the Motion as to Plaintiff's equal protection claim.

D. First Amendment

Plaintiff claims DADT violates its members' First Amendment rights because it is "likely to chill the exercise of constitutionally protected speech" and is "overbroad," applying to "every facet" of Plaintiff's members' lives. (Opp'n 19, 21, 22.) Plaintiff challenges two ways Defendants use speech to discharge service members: (1) statements of sexual orientation as admission of propensity to engage in "homosexual acts";

(2) statements of homosexual orientation not used as admissions.

1. Statements of homosexual orientation as admission of propensity to engage in "homosexual acts"

The Ninth Circuit has upheld Defendants' use of a service member's statement he is homosexual as an admission of his likelihood to engage in "homosexual acts." (Mot. 21-22 citing Holmes, 124 F.3d at 1136 and Philips, 106 F.3d at 1430; Reply 14.)[7] Holmes found this use of homosexual persons' statements did not implicate the First Amendment while the Philips court did not reach the issue. Holmes, 124 F.3d at 1136 ("because [plaintiffs] were discharged for their conduct and not for speech, the First Amendment is not implicated"); Philips 106 F.3d at 1430 (approving "the district court's restraint in declining unnecessarily to reach" the First Amendment issue). While the Court cannot rely on Holmes for its holding rested on Bowers, Lawrence did not disturb Holmes' holdings about the use of speech as admissions. Instead, the proposition that it is permissible to use protected speech as an admission in criminal prosecutions remains good law; according to Defendants, this principle extends to non-criminal discharge proceedings. (Mot. 22-23 citing Wisconsin v.

[7] Witt did not address a First Amendment claim.

Mitchell, 508 U.S. 476, 489 (1993) and Wayte v. United States, 470 U.S. 598 (1985).)

In Wayte, the Supreme Court upheld the government's use of a young man's letters addressed to the government, in which he stated he had not registered for military service and had no intention to do so, to prosecute him for nonregistration for military service. 470 U.S. at 598-601, 614. The Court found his exercise of his First Amendment rights did not confer immunity from prosecution. Id. at 614.

Accordingly, Wayte permits Defendants to use service members' statements they are homosexual as admission of their propensity to engage in "homosexual acts."

Plaintiff's contention DADT is overbroad and over-inclusive, regulating even private speech, is unavailing: private speech can be employed as an admission. (See Opp'n 21-22.) So long it is constitutional for Defendants to regulate "homosexual acts" that take place anywhere through DADT, it is constitutional for Defendants to use admission of homosexual orientation as showing a likelihood to engage in "homosexual acts." The Court GRANTS the Motion to the extent Plaintiff's FAC seeks to mount a First Amendment challenge to DADT's use of certain statements as admissions.

2. Other uses of statements

Plaintiff claims the First Amendment bars Defendants from discharging service members for speech alone. In other words, Plaintiff asserts Defendants cannot lawfully use service members' statements they are homosexual for uses other than showing a tendency to engage in "homosexual acts." The Holmes and Philips courts did not rule on this issue. (Opp'n 21;) Holmes, 124 F.3d at 1136 ("because [plaintiffs] were discharged for their conduct and not for speech, the First Amendment is not implicated"); Philips, 106 F.3d at 1430 (plaintiff "was discharged because . . . he had engaged in homosexual acts. . . [his] statements were used as evidence, not the reason for discharge"; approving "the district court's restraint in declining unnecessarily to reach" the First Amendment issue). Discharge on the basis of statements not used as admissions of a propensity to engage in "homosexual acts" would appear to be discharge on the basis of speech rather than conduct, an impermissible basis. (See Opp'n 25 citing Holmes, 124 F.3d at 1138 (Reinhardt, J., dissenting).)

This Court cannot determine from the face of the FAC whether Nicholson was, or Doe could yet be, discharged based on statements alone. The FAC does not allege Nicholson or Doe was discharged, or is subject to discharge, merely for a self-identifying statement

regarding his homosexuality. Nevertheless, construing the facts in favor of the non-moving party, the Court cannot conclude Plaintiff will not be able to show these facts. Accordingly, the Court DENIES the Motion insofar as Plaintiff founds its FAC on service members' statements alone.

IV. CONCLUSION

For the reasons above, the Court DENIES the Motion insofar as it attacks Plaintiff's standing to bring suit; DENIES the Motion as to Plaintiff's substantive due process claim; GRANTS the Motion as to Plaintiff's equal protection claim; and GRANTS IN PART and DENIES IN PART the Motion as to Plaintiff's First Amendment claim.

Dated: June 9, 2009

Virginia A. Phillips

VIRGINIA A. PHILLIPS
United States District Judge