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14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16 MICHAEL D. ALMY, JASON D. KNIGHT,
 and ANTHONY J. LOVERDE

17 Plaintiff,

18 v.

19 UNITED STATES DEPARTMENT OF
 20 DEFENSE; ROBERT M. GATES, Secretary
 of Defense; DEPARTMENT OF THE AIR
 21 FORCE; MICHAEL B. DONLEY, Secretary,
 Department of the Air Force; DEPARTMENT
 22 OF THE NAVY; and RAY MABUS,
 Secretary, Department of the Navy,

23 Defendants.
 24

Case No. 10-cv-05627-RS

**PLAINTIFF ALMY'S NOTICE OF
 MOTION AND MOTION FOR
 PARTIAL SUMMARY JUDGMENT**

Date: August 9, 2012

Time: 1:30 p.m.

Courtroom: 3, 17th Floor

Judge: Hon. Richard Seeborg

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NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on August 9, 2012, at 1:30 p.m. or as soon thereafter as the matter may be heard before the Honorable Richard Seeborg, in the District Court for the Northern District of California, in Courtroom 3 – 17th Floor, plaintiff Michael D. Almy will and hereby does move for partial summary judgment as to the first cause of action in the First Amended Complaint.

This motion is made pursuant to Federal Rule of Civil Procedure 56(a), and is based upon this notice of motion and motion, the accompanying memorandum of points and authorities, the declaration of Michael D. Almy, and the other pleadings and papers on file in this action, and such other evidence and argument as may subsequently be presented to the Court.

RELIEF SOUGHT

Plaintiff Almy respectfully seeks the following relief from this Court: summary judgment in favor of Plaintiff Almy on the first cause of action in the First Amended Complaint; and an order reinstating plaintiff to active duty in the U.S. Air Force.

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **PLAINTIFF ALMY'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

3 **I. INTRODUCTION**

4 This action arises out of the unlawful discharge of plaintiff Michael D. Almy from the
5 U.S. Air Force under the federal law commonly referred to as “Don’t Ask, Don’t Tell”
6 (“DADT”). Mr. Almy is a highly decorated veteran who served for thirteen years before he was
7 discharged in 2006.

8 In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court recognized a protected
9 substantive due process right to engage in private consensual sexual conduct with any adult,
10 including one of the same gender, without government intervention. The discharge of a service
11 member under DADT impaired this right. The Ninth Circuit held in *Witt v. Department of the Air*
12 *Force*, 527 F.3d 806 (9th Cir. 2008), that in order to discharge any service member under DADT,
13 *Lawrence* placed the burden on the military to prove that the discharge significantly furthers, and
14 is necessary to further, the military’s interest in maintaining morale, good order and discipline,
15 and unit cohesion. The undisputed material facts demonstrate that the military ended Mr. Almy’s
16 career without making this constitutionally required showing. Mr. Almy’s discharge proceedings
17 and subsequent discharge violated his substantive due process rights. Mr. Almy therefore
18 requests that this Court grant partial summary judgment on his as-applied substantive due process
19 claim.

20 Under the Repeal Act, which became law in late 2010, DADT was repealed on
21 September 20, 2011. The repeal did not render this case moot. Although gays and lesbians are
22 no longer barred from serving openly in the armed forces, the Department of Defense has not
23 willingly readmitted Mr. Almy. Consequently, Mr. Almy further requests that the Court enter an
24 order reinstating him to active duty in the U.S. Air Force.

25 **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

26 **A. Mr. Almy’s Record of Service**

27 In 1992, Mr. Almy graduated from Air Force ROTC as a distinguished graduate, in the
28 top ten percent of all graduates nationwide, and entered active duty the following year.

1 (Almy Decl. ¶¶ 2-3.) In 1998, Mr. Almy was named Officer of the Year for his unit of nearly
2 1,000 people. (*Id.* ¶ 5.)

3 In September of 1998, Mr. Almy began the first of his four deployments to the Middle
4 East, where he supported Operations Desert Fox, Southern Watch, and Iraqi Freedom.
5 (*Id.* ¶¶ 6, 7, 11.) During his third deployment to the Middle East, Mr. Almy was directly
6 responsible for facilitating communication activation at newly established bases throughout the
7 theater in Jordan, Saudi Arabia, and Iraq. (*Id.* ¶ 9.)

8 When he returned from Saudi Arabia in 2003, Mr. Almy was promoted to the rank of
9 Major and accepted a position as the Chief of Maintenance at the 606th Air Control Squadron
10 (“ACS”), where he was in charge of a directorate of 180 troops. (*Id.* ¶ 10.) In September 2004,
11 Mr. Almy’s unit deployed to three locations in Iraq in support of Operation Iraqi Freedom.
12 (*Id.* ¶ 11.) During this deployment, Mr. Almy’s unit controlled the airspace over two-thirds of
13 Iraq, and his troops maintained the communications systems necessary for that mission. This
14 included air support for the liberation of Fallujah, Iraq. Mr. Almy’s base came under daily mortar
15 attacks, one of which struck one of his Airmen and also caused significant damage to their
16 equipment. (*Id.*) Towards the end of this deployment to Iraq, Mr. Almy received the Leo
17 Marquez Field Grade Officer of the Year Award, which recognized Mr. Almy as one of the top
18 officers in his career field for the entire Air Force. (*Id.* ¶ 12.)

19 Mr. Almy received numerous other military awards and decorations during his service in
20 the Air Force. These accolades include the Joint Service Commendation Medal, three Air Force
21 Commendation Medals, the Air Force Achievement Medal, the Air Force Outstanding Unit
22 Award, the Air Force Organizational Excellence Award, the Combat Readiness Medal, the
23 National Defense Service Medal, the Armed Forces Expeditionary Medal, the Iraq Campaign
24 Medal, the Global War on Terrorism Expeditionary Medal, the Global War on Terrorism Service
25 Medal, the Humanitarian Service Medal, the Air Force Overseas Long Tour Ribbon, the Air
26 Force Longevity Service Award, the Small Arms Expert Marksmanship Ribbon, the Air Force
27 Training Ribbon, the Company Grade Officer of the Year award, the Senior Communications and
28 Information Badge, and a recognition as Distinguished Air Force ROTC Graduate. (*Id.* ¶ 13.)

1 Mr. Almy also received uniformly high praise from his military superiors and evaluators
2 during performance evaluations and promotion recommendations. For example, when Mr. Almy
3 served as the Chief of Maintenance in the 606th ACS at Spangdahlem Air Base, a supervisor
4 commented about Mr. Almy: “Outstanding leader of my largest directorate; immediate impact on
5 morale/mission—maintenance never stronger . . . Complete leader . . . Superb leader ready for
6 command; simply incredible results in every endeavor.” (*Id.* ¶ 14.)

7 **B. The Air Force Searches Mr. Almy’s Personal Computer Files**

8 During Mr. Almy’s fourth deployment in Iraq that began in 2004, the Air Force prohibited
9 Airmen from using private email accounts. (*Id.* ¶ 15.) Airmen in Iraq were forced to use
10 government-provided computers and email accounts for personal correspondence. (*Id.*)
11 Specifically, AFI 33-119 authorized service members to use their government email accounts for
12 personal correspondence for “morale, health, and welfare purposes.” (*Id.*) Mr. Almy therefore
13 used his Air Force email account for personal emails. (*Id.*) Nonetheless, Mr. Almy took steps to
14 segregate his work and personal correspondence. (*Id.*)

15 Shortly after Mr. Almy left Iraq in January 2005, during a purportedly “routine” review of
16 his computer files, another member of the Air Force found personal emails in a separate folder
17 labeled “Friends,” including at least one email from Mr. Almy to another man discussing same-
18 sex conduct. (*Id.* ¶ 16.) The search was conducted by someone outside Mr. Almy’s chain of
19 command. (*Id.*) In March 2005, these emails were brought to the attention of Mr. Almy’s
20 commander. (*Id.*)

21 A few days later, the commander confronted Mr. Almy with the emails, read him the
22 DADT law, and pressured him to acknowledge that he is gay. (*Id.* ¶ 17.) By mid-June 2005, the
23 Air Force had circulated a Discharge for Cause memorandum indicating that Mr. Almy was being
24 considered for discharge under DADT. (*Id.* ¶ 18.)

25 Mr. Almy subsequently was relieved of his duties, his security clearance—Sensitive
26 Compartmented Information, one of the highest level security clearances available in the
27 military—was suspended, and part of his pay was terminated. (*Id.* ¶¶ 19, 20.) Approximately a
28 year after Mr. Almy was relieved of his command duties, his Wing Commander formally

1 recommended to the Air Force Promotion Board that Mr. Almy be promoted to Lieutenant
2 Colonel “below promotion zone”—in other words, ahead of his peers—even though the Air Force
3 was actively pursuing Mr. Almy’s discharge. (*Id.* ¶ 28.)

4 C. Discharge Proceedings

5 On July 7, 2005, Mr. Almy was sent a notification of a Show-Cause Action Initiated under
6 AFI 36-3206. This notification required Mr. Almy to establish why he should be retained on
7 Active Duty. In February 2006, Mr. Almy received formal notice that administrative board
8 proceedings would be held to determine whether to recommend a discharge under DADT.
9 (*Id.* ¶ 21.) When Mr. Almy was notified that a Board of Inquiry was being convened, he decided
10 to conditionally waive his rights to this Board because the decision of the Board would be
11 reviewed by the same person who would have the ultimate deciding authority even without the
12 hearing. (*Id.* ¶ 22.) Mr. Almy requested that he be allowed to submit statements on his own
13 behalf as part of the conditional waiver. (*Id.* ¶ 23.)

14 Along with a personal statement, Mr. Almy submitted letters written by many of his
15 colleagues—both superiors and subordinates—who resoundingly supported his retention.
16 (*Id.* ¶ 24.) For instance, a retired Army Colonel wrote, “My view is that Major Almy has been,
17 and will continue to be an excellent officer.” (*Id.* ¶ 26.) The Lieutenant Colonel who was Mr.
18 Almy’s squadron commander during the discharge process also wrote, “I am convinced the Air
19 Force, its personnel, mission and tradition remains unchanged and unharmed despite his alleged
20 [violations of DADT].” (*Id.*)

21 At the end of the administrative separation proceedings, the Air Force discharged Mr.
22 Almy under DADT based on the contents of his personal emails. He received an Honorable
23 Discharge dated July 21, 2006. (*Id.* ¶ 30.)

24 Mr. Almy was discharged from the Air Force against his will. (*Id.* ¶ 31.) Had he not been
25 discharged under DADT, he would have remained on active duty in the Air Force to this day.
26 (*Id.*) Mr. Almy wishes to be reinstated into active duty in the Air Force so he can once again
27 serve his country and fulfill the commitment he made to the Air Force. (*Id.*)
28

1 **D. Procedural History**

2 On December 13, 2010, Plaintiffs Almy, Jason D. Knight, and Anthony J. Loverde
3 (collectively, “Plaintiffs”) filed a complaint asking this Court to right the Constitutional wrong
4 they each suffered.¹ ECF No. 1. Rather than respond to the Complaint on the merits, the
5 Government moved to transfer the action to the Court of Federal Claims or, in the alternative, to
6 dismiss. ECF No. 19. The Government argued that Plaintiffs’ claims for credit towards
7 retirement for the time each would have served had they not been discharged were “monetary
8 remedies” over which this Court had no jurisdiction. *Id.*

9 Plaintiffs informed the Government that they primarily wished to return to service and
10 that, to hasten this cause, they would disavow any perceived “monetary remedies” in this action.
11 But twice having asked the Government for permission to amend their Complaint, and twice
12 having been refused, Plaintiffs were forced to seek leave to amend from this Court. ECF No. 30.
13 On May 3, 2011, the Court granted Plaintiffs’ motion for leave to amend and denied the
14 Government’s motion to transfer. ECF No. 37.

15 Plaintiffs filed their First Amended Complaint on May 4, 2011. ECF No. 38. On July 27,
16 2011, after the Government’s time to appeal the denial of its motion to transfer expired, Plaintiffs
17 filed a motion for partial summary judgment. ECF No. 43. The motion was based on the same
18 grounds and sought the same relief as does this motion, except that Plaintiffs brought the July 27
19 motion on behalf of all three individual plaintiffs. *See id.* On August 19, 2011, the Government
20 filed a motion to dismiss or, in the alternative, a cross-motion for summary judgment and
21 opposition to Plaintiffs’ motion for partial summary judgment. ECF No. 49.

22 At a Case Management Conference on August 25, 2011, it was suggested that Plaintiffs
23 might achieve their goal of returning to service more quickly through negotiations with the
24 Government. Plaintiffs agreed to pursue that course of action. The Court therefore denied the
25 parties’ cross-motions without prejudice. ECF No. 55. Nearly a year has since passed, however,

26 _____
27 ¹ At that time, DADT had not yet been repealed. Even now, the fully implemented repeal
28 has not provided a remedy for Mr. Almy.

1 and the Government has only reinstated Plaintiffs Knight and Loverde to active service. Mr.
2 Almy has yet obtain a satisfactory resolution to his Constitutional injury.

3 **III. LEGAL STANDARD**

4 Summary judgment or partial summary judgment should be granted if the Court finds
5 “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as
6 a matter of law.” Fed. R. Civ. P. 56(a). To prevail on a motion for summary judgment, the
7 moving party must show that there are no triable issues of fact as to matters upon which it has the
8 burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The “mere
9 existence of some alleged factual dispute between the parties will not defeat an otherwise
10 properly supported motion for summary judgment; the requirement is that there be no genuine
11 issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis
12 omitted).

13 Once the moving party has met its initial burden, an opposing party must set forth facts
14 showing the existence of a genuine dispute of material fact. *See* Fed. R. Civ. P. 56(c)(1); *see also*
15 *Celotex*, 477 U.S. at 322 n.3. While the Court must construe all evidence and reasonable
16 inferences drawn from the evidence in favor of the non-moving party, *see Anderson*, 477 U.S. at
17 261 n.2; *Brookside Assocs. v. Rifkin*, 49 F.3d 490, 492-93 (9th Cir. 1995), mere disagreement or
18 the bald assertion that a genuine issue of material fact exists does not preclude the use of
19 summary judgment. *See Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989).

20 **IV. MR. ALMY’S DISCHARGE UNDER “DON’T ASK, DON’T TELL”** 21 **VIOLATED HIS SUBSTANTIVE DUE PROCESS RIGHTS**

22 To constitutionally discharge any service member under DADT, the military was required
23 to prove that the application of DADT in that specific instance significantly furthered, and was
24 necessary to further, the government’s interest in maintaining military morale, good order and
25 discipline, and unit cohesion. Here, the undisputed facts show that the military discharged Mr.
26 Almy without making the constitutionally required showing. The discharge therefore violated
27 Mr. Almy’s substantive due process rights as a matter of law.
28

1 **A. The Substantive Due Process Analysis**

2 **1. Heightened Scrutiny Applies to Discharges Under DADT**

3 In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court recognized a
4 constitutional right to engage in private, consensual sexual conduct with any adult, including one
5 of the same gender, without government interference. *Id.* at 578. This substantive due process
6 right reflects the “promise of the Constitution that there is a realm of personal liberty which the
7 government may not enter.” *Id.* (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847
8 (1992)). Having recognized this right, the *Lawrence* Court struck down a Texas statute that made
9 consensual homosexual sodomy a crime because the law “furthers no legitimate state interest
10 which can justify its intrusion into the personal and private life of the individual.” *Lawrence*, 539
11 U.S. at 578.

12 As the Ninth Circuit explained in *Witt v. Dep’t of the Air Force*, “the Supreme Court
13 applied a heightened level of scrutiny in *Lawrence*.” 527 F.3d 806, 817 (9th Cir. 2008). Under
14 this heightened scrutiny analysis,

15 when the government attempts to intrude upon the personal and
16 private lives of homosexuals, in a manner that implicates the rights
17 identified in *Lawrence*, [1] the government must advance an
18 important governmental interest, [2] the intrusion must significantly
19 further that interest, and [3] the intrusion must be necessary to
20 further that interest. In other words, for the third factor, a less
21 intrusive means must be unlikely to achieve substantially the
22 government’s interest.

23 *Id.* at 819.

24 Any discharge of a service member under DADT required this heightened level of
25 scrutiny because it “implicates the rights identified in *Lawrence*.” *Id.* Furthermore, the inquiry
26 “is as-applied rather than facial.” *Id.* at 819. A court must decide “not whether DADT ha[d]
27 some hypothetical, post hoc rationalization in general, but whether a justification exist[ed] for the
28 application of the policy” to the individual service member. *Id.*

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2. Applying Heightened Scrutiny, the Government Could Not Discharge a Service Member Under DADT Without Showing That the Specific Discharge Significantly Furthered, and Was Necessary to Further, Morale, Good Order and Discipline, and Unit Cohesion

With respect to the first prong of the heightened scrutiny analysis, 10 U.S.C. § 654 clearly stated the governmental interest advanced in support of DADT: protection of “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). *Witt* acknowledged “that the government advances an important governmental interest” because “DADT concerns the management of the military.” 527 F.3d at 821. Accordingly, the inquiry focuses on the second and third prongs. The government could not discharge a service member under DADT absent a showing that “the application of DADT *specifically* to” the service member significantly furthered, and was necessary to further, the government’s stated interest in morale, good order and discipline, and unit cohesion. *Id.* (emphasis added). A discharge under DADT is unconstitutional if the government did not meet this burden. In discharging Mr. Almy, the military failed to offer any evidence to satisfy its burden.

B. Mr. Almy’s Discharge Under DADT Violated His Substantive Due Process Rights

The undisputed material facts demonstrate that Mr. Almy’s discharge under DADT cannot survive heightened scrutiny. At no point before the 2006 discharge did the Air Force meet, or even attempt to meet, its burden of proving that the discharge significantly furthered, and was necessary to further, the government’s interests in morale, good order and discipline, and unit cohesion. Rather, the Air Force impermissibly placed the burden on Mr. Almy to show that he should have been retained through its policies generally and through a Show-Cause Action initiated under AFI 36-3206, specifically. (*See* Almy Decl. ¶ 21.)

The Air Force ignored evidence that Mr. Almy’s discharge would actually *harm* the government’s interests in maintaining morale, good order and discipline, and unit cohesion. Although the United States Constitution did not require Mr. Almy to demonstrate that he was an asset to the Air Force, the numerous references attached to his Conditional Waiver showed that

1 Mr. Almy’s peers and superiors firmly believed that he was an exceptional Air Force officer.
2 (*See id.* ¶ 26.) For example, one senior Air Force officer wrote that he was convinced “the Air
3 Force, its personnel, mission and tradition remains unchanged and unharmed despite his alleged
4 [violations of DADT].” (*Id.*) Evidence like this, submitted on behalf of Mr. Almy, establishes
5 that Mr. Almy’s discharge could not have furthered the government’s interests. The Air Force
6 offered no evidence to the contrary.

7 More tellingly, perhaps, is the fact that, during the deployment when the allegedly harmful
8 emails were sent, Mr. Almy received the Leo Marquez Field Grade Officer of the Year Award,
9 which recognized Mr. Almy as one of the top officers in his career field for the entire Air Force.
10 (Almy Decl. ¶ 12.) Similarly, Mr. Almy’s Wing Commander formally recommended Mr. Almy
11 for a promotion above his peers—even while discharge proceedings were pending. (*See id.* ¶ 28.)
12 The evidence demonstrates that the Air Force believed that Mr. Almy was a stellar officer, and
13 that he was an asset, rather than a detriment, to its interests.

14 The Air Force therefore failed to meet its constitutional burden under *Lawrence*. *See Witt*,
15 527 F.3d at 821. As a result, the discharge proceedings and subsequent discharge of Mr. Almy
16 violated his right to substantive due process as a matter of law.

17 **V. MR. ALMY SHOULD BE REINSTATED TO ACTIVE DUTY STATUS**
18 **INTO THE U.S. AIR FORCE**

19 As demonstrated above, the undisputed material facts establish that Mr. Almy was
20 unconstitutionally discharged under DADT. The remedy he seeks for these constitutional
21 violations is reinstatement to active duty status in the U.S. Air Force.

22 Judicial relief for military service members who have been wrongfully discharged is
23 premised on the central principle of making the injured service members “whole.”
24 *Dilley v. Alexander*, 627 F.2d 407, 413 (D.C. Cir. 1980). A court’s remedy must attempt to return
25 a successful plaintiff to the position he would have occupied “but for” his illegal release from
26 duty. *See id.* Here, but for his illegal release from duty, Mr. Almy would still be serving in the
27 military and would have continued to do so in the future. (Almy Decl. ¶ 31.) He now intends to
28 resume his military service at the earliest possible opportunity. (Almy Decl. ¶ 31.) Accordingly,

1 Mr. Almy should be reinstated into active duty. *See Meinhold v. Dep't of Defense*, 34 F.3d 1469,
2 1480 (9th Cir. 1994) (reinstating wrongfully discharged officer to the Navy);
3 *Washington v. Garrett*, 10 F.3d 1421, 1431 (9th Cir. 1993) (ordering reinstatement with back pay
4 and benefits); *Witt v. Dep't of the Air Force*, No. C06-5195-RBL, Docket No. 164 (Findings of
5 Fact and Conclusions of Law) (W.D. Wash. Sept. 24, 2010) (ordering reinstatement for wrongful
6 discharge under DADT).

7 **VI. CONCLUSION**

8 The undisputed material facts demonstrate that the military discharged Mr. Almy under
9 DADT without proving that his discharge significantly furthered, and was necessary to further,
10 the government's interest in maintaining morale, good order and discipline, and unit cohesion.
11 The absence of this constitutionally required showing violated Mr. Almy's substantive due
12 process rights under the Fifth Amendment to the U.S. Constitution, as recognized in *Lawrence*.
13 Mr. Almy therefore respectfully requests that the Court grant his motion for partial summary
14 judgment and order that he be reinstated to active duty in the U.S. Air Force.

15
16 Dated: July 5, 2012

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