Judge Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MAJOR MARGARET WITT, Plaintiff, v. UNITED STATES DEPARTMENT OF THE AIR FORCE, et al., Defendants.	No. C06-5195 RBL **DEFENDANTS' TRIAL BRIEF**

INTRODUCTION

The evidence at trial will establish that defendants are entitled to a judgment affirming the constitutionality of the Air Force's so-called "Don't Ask, Don't Tell" (DADT) policy as applied to plaintiff. That policy is codified in statute, *see* 10 U.S.C. § 654, and implemented by the Air Force Reserve through Air Force Instruction (AFI) 36-3209.

As a preliminary matter, the Court lacks jurisdiction over any claims for which plaintiff seeks relief in the forms of back pay or retirement credit. Any claims for which plaintiff seeks such relief must be dismissed because there is no valid waiver of sovereign immunity for pursuing those forms of relief in this Court. Also as to relief, plaintiff is not entitled to reinstatement to her former position as an Air Force Reserve flight nurse in the 446th Aeromedical Evacuation Squadron ("AES") because she does not meet the requirements for

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flight nursing and because Courts cannot order specific military assignments.

Beyond the preliminary, potentially dispositive jurisdictional issues, which came to light only recently, defendants are likewise entitled to summary judgment on plaintiff's procedural due process claim. Plaintiff cannot prevail on that claim because she received an honorable discharge without any stigma whatsoever. Absent deprivation of a constitutionally protected life, liberty, or property interest, plaintiff has no claim for constitutional procedural protections. Furthermore, plaintiff received the full process available with respect to her discharge – she had a full hearing, complete with testimony and statements, in front of an Air Force Reserve Discharge Board.

Finally, defendants satisfy the three-part as-applied analysis that governs plaintiff's substantive due process challenge. *See Witt v. Dep't of the Air Force*, 527 F.3d 806, 818 (9th Cir. 2008). First, defendants have an important governmental interest in unit cohesion, morale, good order, and discipline. Second, plaintiff's conduct posed a risk to those high standards of unit cohesion and morale, and her discharge advanced those interests. Third, if plaintiff were not discharged, then the DADT policy would not be uniformly applied, and in the military, the uniform application of a personnel policy is necessary to further unit cohesion and morale.

STATEMENT OF FACTS

Prior to her discharge from service, plaintiff served as an Air Force Reserve flight nurse in the 446th Aeromedical Evacuation Squadron (AES), which has a reputation for excellence in flight nursing performance. While in the 446th AES, plaintiff was subject to worldwide deployment. Those deployments could be with service members in and outside of her specific squadron – or even outside of the Air Force. The living and working conditions on deployment could involve limited privacy. Nonetheless, members of 446th AES volunteer for deployment assignments.

Plaintiff was suspended from the Air Force Reserve in November 2004. Plaintiff previously represented to this Court and the Court of Appeals that she was suspended from service due to a single, long-term same-sex relationship from 1997 to 2003. As will become evident at trial, however, that is not the full story. Plaintiff did not disclose previously that she had a sexual relationship with a married civilian woman that began in October 2003. After the

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woman's husband reported the relationship to the Air Force, the Air Force investigated plaintiff. It was similarly not in the appellate record that plaintiff had sexual relationships with two female Air Force officers during her service in the Air Force. Moreover, in at least two instances prior to her discharge, plaintiff told – or at a minimum acknowledged to – enlisted members of her squadron that she was a lesbian, thus placing them in a position of having to choose between loyalty to plaintiff as a superior officer and controlling Air Force policy. Nonetheless, due to her overall service record, plaintiff received an honorable discharge from the Air Force Reserve, effective October 1, 2007, and her discharge certificate contained no stigmatizing language or coding.

ARGUMENT

The focus of this trial will no doubt be on plaintiff's substantive due process challenge to the DADT policy. To preserve and possibly sharpen that focus, two preliminary matters should be addressed. First, because plaintiff seeks relief in the forms of back pay or retirement credit, the Court lacks jurisdiction over any claims for which she seeks such relief. Second, the Court of Appeals remanded plaintiff's procedural due process claim solely to examine whether the discharge paperwork is potentially stigmatizing. An examination of plaintiff's discharge certificate indicates that she received an honorable discharge without any stigmatizing language or coding. Without any stigmatizing effect from her discharge certificate, judgment should be entered for defendants on that claim.

Judgment should also be entered for defendants on plaintiff's substantive due process claim. Plaintiff's substantive due process challenge to the DADT policy is measured against a three-factor test created by the Court of Appeals: (1) whether there is an important governmental interest; (2) whether the application of the DADT policy significantly furthers that important governmental interest; and (3) whether the application of the DADT policy is necessary to further that important governmental interest. *See Witt*, 527 F.3d at 818. As explained further below, defendants satisfy each of those factors.

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I. The Court Has No Jurisdiction over the Claims for Relief That Plaintiff Asserts.

In her original complaint, which she has not amended, plaintiff sought several forms of injunctive relief. These included a request for declaratory judgment, an injunction preventing her discharge from the Air Force Reserve, and an injunction preventing interference with her career in the Air Force Reserve.

In her proposed order for summary judgment, plaintiff departed from those original requests for relief. There, for the first time, she requested back pay, retirement credit, and her reinstatement to a particular unit, the 446th AES. *See* Pl.'s Mot. for Summ. J., Proposed Order (Docket # 102-1).

These new forms of relief present significant legal issues that should be resolved before trial for jurisdictional and prudential reasons. As a matter of jurisdiction, this Court cannot award plaintiff back pay and retirement credit. If plaintiff seeks to pursue those claims (which would exceed $10,000), she must do so in the Court of Federal Claims, which is vested with exclusive jurisdiction over such claims. Also, with respect to her request for reinstatement to the 446th AES, plaintiff does not meet the qualifying criteria to serve in that unit as a flight nurse, and even if she did, it is not appropriate for a court to order a specific military assignment.

A. The Court Lacks Jurisdiction over Plaintiff's Requests for Monetary Relief.

A federal court has jurisdiction for claims against federal agencies or federal officials only if there is a valid waiver of sovereign immunity codified in statute. *See Lane v. Pena*, 518 U.S. 187, 192 (1996); *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994); *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Here, as explained below, no waiver of sovereign immunity exists that would allow plaintiff in this Court to obtain relief in the forms of back pay and retirement credit. (To the extent plaintiff has actionable claims for back pay and retirement credit, she must proceed with those in the Court of Federal Claims.) Consequently, the Court lacks jurisdiction over any cause of action for which plaintiff seeks relief in the forms of back pay or retirement credit. Without jurisdiction, the Court must dismiss those claims before reaching the merits of this case. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *Ex parte McCardle,* 7 Wall. 506, 514 (1868) ("Jurisdiction is power to declare the law,

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and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

Plaintiff has not identified a valid waiver of sovereign immunity that would allow her to seek back pay and retirement credit as relief from this Court. Thus, she has failed to meet her burden of establishing that the Court has jurisdiction over those claims. *See United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 924 (9th Cir. 2009). Nor could plaintiff meet that burden. The relevant statutes containing waivers of sovereign immunity, such as the Administrative Procedure Act ("APA") and the Tucker Act, do not permit plaintiff to pursue back pay or retirement credit in this Court.

The APA's waiver of sovereign immunity does not apply here. That waiver extends only to claims for "relief other than money damages." 5 U.S.C. § 702. Claims that seek monetary compensation "to substitute for a suffered loss," constitute "money damages." *Bowen v. Massachusetts,* 487 U.S. 879, 895 (1988). In contrast, claims – even claims for money – that seek "the very thing to which [a plaintiff] was entitled," constitute specific relief, and not "money damages." *Id.* Applied here, plaintiff is not legally entitled to either back pay or retirement credit for time that she did not actually serve in the Air Force Reserve.[1] Instead, plaintiff's efforts to recover back pay and retirement credit, are classic "damages" recoveries; she seeks that money to substitute for compensation that she would have received had she actually served in the Reserve since November 2004. *See Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061, 1066 (9th Cir. 2008). Thus, because plaintiff's newly requested claims for back pay and retirement credit constitute "money damages" they fall outside of the APA's waiver of sovereign immunity.

In addition, the APA's waiver of sovereign immunity is limited to situations where there is "no other adequate remedy in a court." 5 U.S.C. § 704. This statutory provision again

[1] The statutory provisions covering pay for Reservists make clear that plaintiff is not entitled to any compensation for constructive service. *See* 37 U.S.C. § 206(a); *Greene v. United States*, 65 Fed. Cl. 375, 380 (2005); *Palmer v. United States,* 168 F.3d 1310, 1313-14 (Fed. Cir. 1999) ("[A] member who is serving in part-time reserve duty . . . has no lawful pay claim against the United States for unattended drills or for . . . unperformed training duty."). Similarly, there is no right to recover for "claims for relief that are an incident of and collateral to" a back pay claim, such as plaintiff's claim for constructive retirement credit. *Greene*, 65 Fed. Cl. at 381 (citing *Palmer*, 168 F.3d at 1314).

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prevents plaintiff from pursuing relief such as back pay and retirement credit here. If plaintiff had a substantive legal basis for back pay and retirement credit, then she would have to pursue that relief in the Court of Federal Claims. Under the Tucker Act, monetary claims against the United States founded upon the Constitution, acts of Congress, executive regulations, or contracts, and seeking amounts in excess of $10,000, must be brought in the Court of Federal Claims. *See* 28 U.S.C. §§ 1346, 1491; *Glines v. Wade*, 586 F.2d 675, 681 (9th Cir. 1978), *rev'd on other grounds sub nom.*, *Brown v. Glines*, 444 U.S. 348, 361 (1980).[2] If plaintiff could recover back pay or retirement credit on any legal theory, the Court of Federal Claims could order those forms of relief and other appropriate relief "as an incident of and collateral to" the entry of a monetary judgment. 28 U.S.C. § 1491(a)(2); *see also Infiniti Info. Solutions, LLC v. United States*, 2010 WL 2983004, at *2 n.2 (Fed. Cl. July 29, 2010) (explaining that the Court of Federal Claims "has power under the Tucker Act to grant declaratory and injunctive relief in cases where monetary relief is granted"). Thus, an "adequate remedy" is available to plaintiff in the Court of Federal Claims, and as a result, she "cannot proceed in the district court under the APA." *See Suburban Mortg. Assocs., Inc. v. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1128 (Fed. Cir. 2007).

In sum, as a matter of jurisdiction, the Court must dismiss any remaining claim, *i.e.*, the substantive due process count and/or the procedural due process count, for which plaintiff requests back pay or retirement credit as relief.

B. Plaintiff Is Not Entitled to Reinstatement as an Air Force Flight Nurse.

Plaintiff cannot be reinstated to her former position as a flight nurse in the United States Air Force Reserve in the 446th AES, as she has recently requested. *See* Pl.'s Proposed Order on Mot. for Summ. J. at 1-2 (Docket #102-1). That is so because plaintiff does not meet the

[2] A separate provision of the Tucker Act, the so-called "Little Tucker Act," confers concurrent jurisdiction in the district courts for certain claims against the United States that are limited to money damages "not exceeding $10,000 in amount." *See* 28 U.S.C. § 1346(a)(2). Although district courts have concurrent jurisdiction for claims less than $10,000, a plaintiff cannot proceed in district court without waiving the ability to receive over $10,000. *See United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 927 (9th Cir. 2009). Here, plaintiff has not waived or otherwise limited her claims for back pay and retirement credit, and thus there is no concurrent jurisdiction under the Little Tucker Act. *See id.* at 928.

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requirements to serve as an Air Force flight nurse and because it is not appropriate for a court to make military assignments.

The Air Force cannot "assign to the Reserve . . . a nurse who does not actively practice nursing." Air Force Instruction (AFI) 36-2115, ¶ 1.11.5, *available at* www.e-publishing.af.mil. Air Force Instructions specifically define what constitutes actively practicing nursing:

> Active engagement in nursing is defined as a nurse who is employed or working voluntarily in a position that requires a registered nurse (RN). The minimum requirement for active engagement in nursing is 180 hours per calendar year.

Id. ¶ 1.11.5.1. Plaintiff does not meet those requirements. She admits that she was not actively engaged in the practice of nursing for the required 180 hours per annum between 2005 and 2010. *See* Pl.'s Objections & Resps. to Defs.' Second Set of Interrogs. at 2-3 (Ex. A-29) (estimating that plaintiff did not engage in the practice of nursing in 2005, 2006, 2007, or 2008, and that she engaged in the practice of nursing for 90 hours in 2009 and for 40 hours in 2010). Plaintiff thus was not "employed or working voluntarily in a position that requires a registered nurse," nor did she meet met the minimum time requirements in that position. AFI 36-2115, ¶ 1.11.5. Without such evidence, plaintiff cannot satisfy the minimum requirements for flight nursing. This Court should not order plaintiff's reinstatement to a position requiring a particularized skill set for which she is not qualified. *See, e.g.*, *Blankenship v. United States*, 84 Fed. Cl. 479, 487 (Fed. Cl. 2008) (holding that "it is the [military], not the court," that must decide "plaintiff's qualifications" and "must determine who is and is not fit to serve as a naval pilot").

Even if plaintiff were actively practicing nursing, the Court should not reinstate plaintiff to a specific position in a particular unit of the Air Force Reserve. The Supreme Court has long held that "judges are not given the task of running the [military]." *Orloff v. Willoughby,* 345 U.S. 83, 93 (1953). Thus, even were plaintiff entitled to relief on the merits, the responsibility for determining whether plaintiff is fit to return to service, and in what capacity, would be vested in the military, and principles of deference to military expertise would require the Court to refrain from making specific military assignments. *See id.*; *King v. United States*, 50 Fed. Cl. 701, 710 (2001) ("Assignments . . . are matters wholly internal to the military and inappropriate for judicial review."); *see also Gilligan v. Morgan,* 413 U.S. 1, 10 (1973).

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II. Plaintiff Cannot Recover for Her Procedural Due Process Claim.

Plaintiff has not been deprived of a constitutionally protected life, liberty, or property interest, and for that reason she has no valid procedural due process claim. *See generally Bd. of Regents v. Roth,* 408 U.S. 564, 569 (1972). The Court of Appeals remanded plaintiff's procedural due process claim for limited purposes: to examine the "discharge papers [that] reflect the reasons for her discharge," and to determine whether those papers "will result in a stigma." *Witt*, 527 F.3d at 812*; see id.* at 813 n.3 ("Here, [plaintiff] alleges *only* a right to be free of a stigma that may or may not occur . . . .") (emphasis added). Put simply, without some indication on her formal discharge certificate that would be potentially stigmatizing, plaintiff's procedural due process claim fails. Here, plaintiff has received an honorable discharge from the Air Force Reserve, and her discharge certificate contains no potentially stigmatizing information, such as text or coding. *See* Form 256 (Ex. A-1). Thus, plaintiff has not been deprived of a constitutionally protected interest arising from her discharge status. *See Schultz v. Wellman*, 717 F.2d 301, 307 n.15 (6th Cir. 1983) (finding that an honorable discharge "does not carry with it any of the stigma or restrictions on future employment which might conceivably trigger due process considerations"); *see also, e.g.*, *Sims v. Fox*, 505 F.2d 857, 862 (5th Cir. 1974) (holding that an Air Force Reserve officer has no property interest in continued military employment). For that reason, plaintiff's procedural due process claim fails.

Moreover, plaintiff received more than constitutionally adequate process. Before her discharge, plaintiff received notice of her discharge proceedings and had a full evidentiary hearing before an Air Force Reserve discharge board. *See generally* Admin. R. (Ex. A-31). At that hearing, plaintiff was represented by both military and civilian counsel, and she was permitted to make statements and submit evidence in support of her case. *See id.* Because plaintiff's hearing "satisfied any requirements which might be imposed by the due process clause," plaintiff "has no cause to complain that the investigation triggering the hearing denied [her] the procedural protections afforded by the due process clause." *See United Farm Workers of Am., AFL-CIO v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1258 (9th Cir. 1982); *see also Beller v. Middendorf*, 632 F.2d 788, 806 (9th Cir. 1980) (holding that where "plaintiffs were

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allowed to introduce evidence to support their arguments that the Secretary should exercise his discretion to retain them," plaintiffs' due process interests were protected), *overruled in part on other grounds Witt*, 527 F.3d at 819-20. For these reasons as well, plaintiff has no procedural due process claim here.

III. Trial Evidence Will Establish that Plaintiff Cannot Satisfy the As-Applied Test Required for Her Substantive Due Process Claim.

In evaluating plaintiff's substantive due process challenge to the DADT policy, the Court of Appeals created a three-factor test. That test examines (1) whether there is an important governmental interest; (2) whether the application of the DADT policy significantly furthers that important governmental interest; and (3) whether the application of the DADT policy is necessary to further that important governmental interest. *See Witt*, 527 F.3d at 818. Defendants will establish each of these three factors at trial.

A. The First Factor Is Satisfied Here Because the Military's Interest in Unit Cohesion, Morale, Good Order, and Discipline Is an Important Governmental Interest.

Defendants satisfy the first factor of the as-applied analysis. Both the Ninth Circuit (as part of its holding) and plaintiff (through an admission) recognize that defendants have important governmental interests in unit cohesion, morale, good order, and discipline. *See Witt*, 527 F.3d at 821; Pl.'s Resp. to Req. for Admis. No. 1 (Feb. 15, 2010) (Ex. A-38). Defendants therefore satisfy this first factor.

B. The Second Factor Is Satisfied Because Plaintiff's Conduct Risked the High Standards of Unit Cohesion, Morale, Good Order, and Discipline.

The remand order in this case required an examination of the specific facts of plaintiff's conduct and her military service. *See Witt*, 527 F.3d at 819 (describing the inquiry as "whether a justification exists for the application of the policy as applied to Major Witt"). Consistent with that order, the evidence indicates that plaintiff's conduct risked unit cohesion, morale, good order, and discipline. This showing is made through the following evidence that was not in the record when the Court of Appeals considered this case:

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- plaintiff had an extra-marital affair with a married woman, which was reported to the Chief of Staff of the Air Force by the woman's husband;
- plaintiff engaged in sexual relationships with two female officers of the Air Force; and
- plaintiff told – or at least acknowledged to – enlisted members of her squadron that she was a lesbian.

By these actions, plaintiff risked unit cohesion, morale, good order, and discipline. Discharging plaintiff from the Air Force eliminated those risks. Even plaintiff admits that "unit cohesion and morale are furthered by minimizing potential distractions, disturbances, or risks to unit cohesion and morale." Pl.'s Resp. to Defs.' Req. for Admis. No. 2 (Ex. A-38). Thus, these facts demonstrate that the Air Force's important governmental interests were significantly furthered because, by discharging plaintiff from service, defendants prevented her from posing a risk to unit cohesion, morale, good order, and discipline.

Also on remand, it has become clear that the facts regarding plaintiff and her military service were the same as the conditions that Congress determined would constitute unacceptable risks to unit cohesion, morale, good order, and discipline. *See* 10 U.S.C. § 654(a)(5)-(12). The specific conditions that Congress contemplated when it enacted the DADT statute apply directly to plaintiff's military service. Each of the following will be proved at trial:

- as a service member, plaintiff was required to make extraordinary sacrifices;
- military life and civilian life are fundamentally different;
- the military standards of conduct apply even when off-base or off-duty;
- while serving, plaintiff had the potential for worldwide deployment; and
- if deployed, plaintiff could experience living and working conditions that would involve limited privacy.

See Frank Dep. at 202:14 – 204:11 (Ex. A-36). Thus, the conditions of plaintiff's military service are the conditions that Congress relied on in determining that the DADT statute was necessary. Because those same conditions are present both at a general level (as determined by Congress) and at a specific level (as will be confirmed at trial), it is appropriate to follow

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Congress's conclusion that service members "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" in this instance. 10 U.S.C. § 654(a) (15). Even under an as-applied analysis, which focuses on facts and circumstances, judicial deference to that congressional judgment on matters of military affairs is at its apex – especially where the same facts are present that led to the congressional judgment. *See Witt*, 527 F.3d at 821; *see also Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997); *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986); *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). Thus, under the as-applied analysis, the second factor is satisfied.

C. The Third Factor Is Satisfied Because Uniform Application of Personnel Policies Is Essential to Unit Cohesion, Morale, Good Order, and Discipline.

The third factor is satisfied because the uniform application of Air Force personnel policies, such as the DADT policy, is essential to unit cohesion and morale. If plaintiff were not discharged, then the DADT policy would not be applied uniformly in a widely known manner. For instance, plaintiff's continued military service necessarily would result in the application of a different personnel policy to her than to other service members, such as those in the First Circuit, where the DADT statute was upheld as constitutional. *See Cook v. Gates*, 528 F.3d 42, 60 (1st Cir. 2008). That non-uniform application of the policy would result in logistical difficulties and perceived potential unfairness that would risk undermining unit cohesion and morale. *See* Frank Dep. at 168:11 – 170:17 (Ex. A-36). Subjecting the military's policies to different standards of review, moreover, would pose severe logistical problems. A plaintiff in the Ninth Circuit could not be transferred, deployed, or sent on a training mission outside of the geographical boundaries of the Ninth Circuit without subjecting him or her to discharge under the fully constitutional application of the DADT policy in other jurisdictions. Similarly, the potential perceived unfairness to other service members in *other* units could not be avoided. To avoid these negative impacts on unit cohesion and morale, plaintiff's discharge is necessary.

This result is again confirmed by the congressional findings. After considering the potential for worldwide deployment under conditions with little or no privacy and forced

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intimacy, Congress determined that the DADT policy was "necessary in the unique circumstances of military service." 10 U.S.C. § 654(a)(13). The factual predicates for that conclusion are also present here. While in the Air Force Reserve, plaintiff was subject to worldwide deployment under conditions of little or no privacy. Thus, the conditions of plaintiff's military service were the same as those that led Congress to conclude that the DADT policy was "necessary in the unique circumstances of military service." *Id.* As explained above, Congress's judgment in this area is entitled to great deference and should not be second-guessed by courts. *See Witt*, 527 F.3d at 821; *see also Turner Broad. Sys.*, 520 U.S. at 195; *Goldman*, 475 U.S. at 508; *Rostker*, 453 U.S. at 70. Accordingly, the third factor is satisfied here as well.

CONCLUSION

For the foregoing reasons, the record at trial will require judgment in defendants' favor.

Dated: August 31, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2010, I electronically filed the foregoing Defendants' Trial Brief, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

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