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' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
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I. INTRODUCTION

Despite the number of constitutional grounds upon which plaintiff challenges the so-called "Don't Ask, Don't Tell" statute, 10 U.S.C. § 654, and the corresponding Air Force Instruction ("AFI"), AFI 36-3209 (collectively the "DADT policy"), plaintiff cannot escape several realities that mandate dismissal of her action. First, controlling Ninth Circuit precedent expressly rejects plaintiff's challenges. See Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997); Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997). Nor does Lawrence v. Texas, 539 U.S. 558 (2003), disturb that chain of precedent. While Lawrence dealt with homosexual conduct, it was confined to review of a state criminal statute and did not extend to a military personnel policy, which receives the highest level of deference. Nor did Lawrence apply some form of heightened scrutiny; rather, it found that the state had no legitimate interest in an anti-sodomy statute. In contrast, an unbroken line of precedent establishes that the DADT policy serves the legitimate – and in fact compelling – government objectives of avoiding "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), and consequently survives rational basis review. Finally, plaintiff is procedurally ill-suited to challenge the DADT policy. She has not been discharged from the Air Force, and she has not been deprived of a liberty or property interest, nor is it likely that she will. Hence, her action is premature and should be dismissed on prudential grounds as well.

II. ARGUMENT

A. Rule 12(b)(6) dismissal is procedurally appropriate here.

Plaintiff argues that the complaint should not be dismissed because defendants have failed to establish (i) that the complaint does not state a claim for relief and (ii) that the DADT policy is rational. (Pl's Mem. in Opp. to Dismiss, Docket #28, at 2-5.) Plaintiff is incorrect; there is no procedural deficiency in dismissing plaintiff's complaint at this point in time.

First, the factual record is sufficient. Plaintiff admits that she engaged in homosexual conduct, (Witt Aff. ¶ 12, Docket #9), leaving no doubt that the DADT policy factually covered plaintiff's conduct.

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Second, plaintiff's argument is premised on Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), for the proposition that the military must make a showing that one of its policies survives rational basis review. Pruitt is readily distinguishable because here plaintiff challenges the constitutionality of not just a military policy (as was the case in Pruitt), but rather of the federal statute and the corresponding Air Force regulations that codify the DADT policy. Not surprisingly, the rational basis for the DADT policy was explained in the legislative history, S. Rep. No. 103-112 (1993); H.R. Conf. Rep. 103-357 (1993); H.R. Rep. No. 103-200 (1993), and has been repeatedly recognized by courts. Holmes, 124 F.3d at 1132-36; Philips, 106 F.3d at 1429; Able v. United States, 155 F.3d 628, 631-36 (2d Cir. 1998); Richenberg v. Perry, 97 F.3d 256, 260-62 (8th Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 927-31, 934 (4th Cir. 1996) (en banc); Cook v. Rumsfeld, No. 04-12546, 2006 WL 1071131, at *16-17 (D. Mass. Apr. 24, 2006).

Plaintiff's request for evidence of the DADT policy's rationality would not only be redundant of the congressional record but also would amount to a reversal of the burden of proof, because statutes are presumed to be constitutional, see SeaRiver Mar. Fin. Holdings, Inc. v. Mineta, 309 F.3d 662, 669 (9th Cir. 2002). As the Supreme Court has succinctly explained:

> A State, however, has no obligation to produce evidence to sustain the rationality of a statutory classification . . . A statute is presumed constitutional, and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record.

Heller v. Doe, 509 U.S. 312, 320-21 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)); see also Thomasson, 80 F.3d at 928 ("To sustain the validity of its policy, the government is not required to provide empirical evidence."). Thus, it is procedurally appropriate to dismiss plaintiff's challenge to the constitutionality of the DADT policy at this stage.

B. Plaintiff has not alleged a deprivation sufficient to trigger the Due Process Clause.

To maintain a claim under the due process clause, a person must have been deprived of a property or a liberty interest. Plaintiff concedes that she has not been deprived of a property interest. (Pl's Reply to Mot. for Prelim. Inj., Docket #25, at 9.) Consequently, plaintiff's due process counts rest on a liberty interest, which plaintiff identifies as an interest in preserving her

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reputation. According to plaintiff's arguments, her reputation would be constitutionally injured by a less than honorable discharge noting her homosexual conduct as the basis for the discharge. (Pl's Reply to Mot. for Prelim. Inj., Docket #25, at 9-11.)

Plaintiff's omissions are notable. She does not allege any injury to her reputation as a result of her suspension without points and pay. Thus, nothing as of yet has inflicted a constitutional injury to her reputation, and without an injury, her action should be dismissed.

The only reputational injury that plaintiff alleges relates to her *discharge* and not to her *suspension*. Plaintiff fears that she would receive a less than honorable discharge that would indicate homosexual conduct as the basis for the discharge. But, that injury is conjectural and premature at this point because plaintiff has not yet been discharged. As the First Circuit reasoned, "[T]he prospect of a general discharge under honorable conditions is not an injury of sufficient magnitude to warrant an injunction." Chilcott v. Orr, 747 F.2d 29, 33 (1st Cir. 1984); see also McCurdy v. Zuckert, 359 F.2d 492, 494 (5th Cir. 1966) (holding that the prospect of a general discharge was not an irreparable harm for the purposes of preliminary injunction). Even the Supreme Court has denied relief to a plaintiff seeking redress due to the prospect of a general discharge. Beard v. Stahr, 370 U.S. 41, 42 (1962). Consequently, without being discharged and without any liberty interest being implicated by her suspension, plaintiff has not identified a deprivation of a valid liberty interest, and thus she states no due process claims.

The prematurity of plaintiff's action has also led plaintiff to represent that the Air Force will a less than an honorable discharge. That is a misconception. The notice plaintiff received states that the recommended discharge is an honorable conditions discharge, not a general discharge, nor a discharge under other than honorable conditions. (See Compl., App. G, Docket #1 ("The type of discharge recommended is your case is an Honorable Conditions Discharge.") Because there would be no stigma associated with an honorable discharge, plaintiff's reputation is not threatened by her potential discharge under those conditions. Again, the prematurity of plaintiff's allegation becomes clear: because plaintiff has not been discharged – let alone with a less than an honorable discharge – she has not been deprived of a liberty interest, and thus she cannot sustain any due process claims. Moreover, as explained further below, it is undisputed

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that plaintiff will receive a hearing prior to discharge. See AFI 36-3209, § 2.30.2 ("A member being discharged for homosexual conduct is entitled to a board hearing.").

The problems with plaintiff's alleged deprivation of a liberty interest do not stop with premature assumptions. Even if plaintiff were to receive a general discharge under honorable conditions indicating her homosexual conduct as the basis for the discharge, that would not implicate a constitutionally protected liberty interest because plaintiff has openly admitted that she engaged in homosexual conduct, (see Witt Aff. ¶ 12, Docket #9). And, where a plaintiff openly acknowledges homosexual conduct, there is no injury to a protected liberty interest when an employer subsequently makes that information known. See Rich v. Sec'y of Army, 735 F.2d 1220, 1227 (10th Cir. 1984) (holding that plaintiff service member had no claim for injury to his reputation when the army revealed his homosexuality that he had already made known). As generally explained by another federal court, "One who openly admits to certain activities cannot later be heard to complain that his reputation has been damaged." Childers v. Dallas Police Dep't, 513 F. Supp. 134, 145 (N.D. Tex. 1981).

C. Plaintiff has no as-applied challenge because there is no as-applied challenge under rational basis review outside of the First Amendment context.

Plaintiff's attempt to challenge the DADT policy "as applied" to her is nothing more than an effort to impose an inappropriate form of heightened constitutional scrutiny. Her efforts must be rejected. The Ninth Circuit has made clear that as-applied challenges may not be brought under rational basis review. "Rather, the constitutional test requires only that the statute, as a general matter, serve a legitimate governmental purpose." Doe v. United States, 419 F.3d 1058, 1063 (9th Cir. 2005). Equally on point, the court in Doe rejected the argument that the court should consider a particular plaintiff's personal circumstances in evaluating the constitutionality of a statute under rational basis review. Id. Similarly, the Ninth Circuit repudiated the notion that an individual's merit or competence could provide a basis for an as-applied challenge to a statute under rational basis review in Russell v. Hug, 275 F.3d 812, 820 (9th Cir. 2002). In denying a lawyer's challenge to a state bar admission requirement for service on a federal bar panel, the Ninth Circuit reasoned:

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> [Plaintiff's] qualifications suggest that he would be fully capable of serving on the Northern District's Indigent Defense Panel, even without membership in the California Bar. But this fact does not refute the proposition that, as a general matter, [the] California bar membership requirement could help to ensure a minimum level of acceptable competence for lawyers on the whole. ***[Plaintiff's] contention that we must consider his personal circumstances when judging the reasonableness of [the] general requirement of membership in the California Bar is an impermissible attempt to ratchet up our standard of review from rational basis toward strict scrutiny.***

Id. (emphasis added). Plaintiff's similar paean for an as-applied challenge to the DADT policy should be rejected as an attempt to impermissibly elevate the level of constitutional scrutiny.[1]

Nor does Lawrence provide any support for such an as-applied challenge. There, the majority reached its result without considering the constitutionality of the state criminal statute "as applied" to Lawrence's particular situation. Lawrence, 539 U.S. at 578.

D. Plaintiff has no substantive due process claim, and heightened scrutiny does not apply here.

Beyond the fact that plaintiff has not been deprived of a liberty or property interest, binding precedent makes clear that the DADT policy survives rational basis review and does not violate substantive due process. Holmes, 124 F.3d at 1132-36. While plaintiff spends a great deal of time arguing that Lawrence upsets this precedent, plaintiff's argument does not find support in post-Lawrence case law. In contrast, a Ninth Circuit jurist reasoned that "Lawrence does not impliedly overrule Holmes, Holmes was based on the special needs of the military, a subject that Lawrence does not address. Thus, the two cases are not 'closely on point,' and Holmes remains the law of the circuit." Hensala v. Dep't of the Air Force, 343 F.3d 951, 959 (9th Cir. 2003) (Tashima, J., concurring). Other courts similarly reject the notion that Lawrence

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[1] Even if the Court were to break new ground and somehow allow an as-applied challenge under rational basis review, the legislative history is replete with references that Congress did consider situations such as the one plaintiff is in, and after reflection, concluded that the policy rationally served a legitimate government interest. For example, the Senate Armed Forces Committee explained that:

> The policy setting forth the grounds for discharge is conduct-based. There are no on-post/off-post, on-duty/off-duty, or public/private distinctions. The armed forces have a legitimate interest in the behavior of military personnel at all times and places, off-post as well as on-post. The Supreme Court has expressly rejected any requirement that military offenses be "service-connected." Solorio v. United States, 483 U.S. 435 (1987). Accordingly, the prohibitions apply at all times and in all places.

S. Rep. No. 103-112, at 294-95 (1993).

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created a fundamental right to consensual sexual conduct or private sexual intimacy that would merit any form of heightened scrutiny. See Muth v. Frank, 412 F.3d 808, 817-18 (7th Cir. 2005); Lofton v. Sec'y Dep't Children & Family Servs., 358 F.3d 804, 816 (11th Cir. 2004), cert. denied, 543 U.S. 1081 (2005); Cook, 2006 WL 1071131, at *7; Loomis v. United States, 68 Fed. Cl. 503, 518 (Fed. Cl. 2005).

Nevertheless, plaintiff argues that Lawrence mandates that some form of heightened scrutiny apply to her claims. It does not. This is most plainly evidenced by the fact that plaintiff cannot identify what level of scrutiny the majority applied in Lawrence. Thus, plaintiff argues that Lawrence could mandate strict scrutiny, intermediate scrutiny, or a novel form of scrutiny that involves a more searching inquiry. (Pl's Mem. in Opp. to Dismiss, Docket #28, at 5-16.) The Lawrence majority, however, did not plainly identify its level of scrutiny, but instead concluded that there was not a legitimate interest in anti-sodomy criminal laws; thus, the state statute did not pass rational basis review. Lawrence, 539 U.S. at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

Other cases upon which plaintiff relies to support some form of heightened scrutiny are inapplicable here. First, Thorne v. City of El Segundo, which involved a freelanced, unregulated examination of a job candidate's sexual history, is easily distinguished from the deliberate, careful reasoning behind the DADT policy. 726 F.2d 459, 462, 470 (9th Cir. 1983). Moreover, the Ninth Circuit in Thorne explicitly left open the possibility that a policy such as DADT would be constitutional:

> We do not hold that the City is prohibited by the constitution from questioning or considering the sexual morality of its employees. If the City chooses to regulate its employees in this area or to set standards for job applicants it may do so only through regulations carefully tailored to meet the City's specified needs.

Id. at 470. Again, as the Ninth Circuit contemplated in Thorne, the DADT policy was carefully developed to further the military's interests in avoiding an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion. Second, United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004), is a criminal case, like Lawrence, and did not implicate the DADT

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policy. Even so, Marcum did not find a fundamental right to engage in homosexual conduct. Id. at 205 ("[W]e will not presume the existence of such a fundamental right in the military environment when the Supreme Court declined in the civilian context to expressly identify such a fundamental right.").

Finally, homosexual activity does not merit heightened scrutiny because unlike fundamental rights that receive substantive due process protection, it involves conduct and not merely a condition. As General Colin Powell explained:

> Unlike race or gender, sexuality is not a benign trait. It is manifested by behavior. While it would be decidedly biased to assume certain behaviors based on gender or membership in a particular racial group, the same is not true for sexuality. We have successfully mixed rich and poor, black and white, male and female, but open sexuality in units is not just the acceptance of benign characteristics such as color or gender or background. It involves matters of privacy and human sexuality that, in our judgment, if allowed to exist openly in the military, would affect the cohesion and well-being of the force.

S. Rep. No. 103-112 at 281. Thus, even if homosexual *orientation* were to receive some form of heightened constitutional review (which no court has held) that would not mean that homosexual *conduct* would correspondingly receive such protection. And, as been made abundantly clear, the DADT policy applies to instances or propensities to engage in homosexual *conduct*, and not to homosexual orientation.

E. Plaintiff states no claim under the irrebuttable presumption doctrine.

As explained in defendant's motion to dismiss, the irrebuttable presumption doctrine has been heavily criticized and rarely applied. Contrary to plaintiff's assertions (Pl's Reply to Mot. for Prelim. Inj., Docket #25, at 5-6), the doctrine as articulated in Cleveland School Board of Education v. LaFleur, 414 U.S. 632 (1974), has been narrowly limited to its facts, which involved school employment policies for pregnant teachers. No clearer evidence could exist for this point than the Ninth Circuit's factual distinguishing of LaFleur in a nearly identical setting – a subsequent challenge to a school's employment policy for pregnant teachers. deLaurier v. San Diego Unified Sch. Dist., 588 F.2d 674, 682 (9th Cir. 1979). There, the Ninth Circuit held that the mandatory employment policy for pregnant teachers should be upheld because it was rational. Id. at 683. Similarly, because the DADT policy survives rational basis review, see Holmes, 124

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F.3d at 1132-36, the irrebuttable presumption doctrine does not apply to it.[2]

Even more fundamentally, however, the irrebuttable presumption doctrine has been discredited since the 1970s, with two circuits refusing to apply it altogether. As the Seventh Circuit explained:

> The "irrebuttable presumption doctrine" of LaFleur flowered briefly, with courts requiring the government to make individualized determinations on matters affecting a wide range of interests. In 1976, however, the Supreme Court declined to apply the doctrine, and instead upheld a mandatory retirement rule. Since that time the continuing validity of the doctrine has been questioned repeatedly; this court refused to apply it as early as the 1979 case of Trafelet v. Thompson, 594 F.2d 623 (7th Cir. 1979).
>
> * * *
>
> The irrebuttable presumption doctrine has been discredited because it is unworkable regardless of the interest which might have invoked it. We decline to revive the doctrine in this case and accordingly reject [plaintiff's . . .] due process argument.

Schanuel v. Anderson, 708 F.2d 316, 318-19 (7th Cir. 1983) (citations omitted). The Fifth Circuit reached a similar conclusion in refusing to apply the irrebuttable presumption doctrine. Hawkins v. Agric. Mktg. Serv., Dep't of Agric., 10 F.3d 1125, 1133 (5th Cir. 1993). In so doing, the court chronicled the history of the doctrine, noting that commentators agreed that the doctrine received a death blow after Weinberger v. Salfi, 422 U.S. 749 (1975), repudiated the irrebuttable presumption analysis. Id. at 1132-33. Notably, even the Tribe hornbook cited by plaintiff recognizes that "most commentators have regarded the Court's invocation of the irrebuttable presumption doctrine as analytically confused and ultimately unhelpful." Lawrence Tribe, American Constitutional Law § 16-34, at 1622 (2d ed. 1988).

Beyond its questionable legal standing, there should be no doubt that the irrebuttable presumption doctrine does not apply here. See Richenberg, 97 F.3d at 262 (rejecting the argument that the DADT policy contains an irrebuttable presumption). The DADT policy allows service members implicated by the policy to demonstrate conditions that would exempt them from the application of the policy. See 10 U.S.C. § 654(b)(1); AFI 36-3209, § 230.1.1. The fact that plaintiff cannot make such a showing does not mean that the DADT policy is somehow

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[2] Plaintiff's irrebuttable presumption argument also fails because it is a due process claim, and as shown above, plaintiff has not been deprived of a constitutionally protected liberty or property interest.

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constitutionally infirm; it merely means that the policy legitimately applies to plaintiff. See Martinez v. Bynum, 461 U.S. 321, 330 n.10 (1983) (noting that the irrebuttable presumption doctrine does not apply where plaintiff has an opportunity for rebuttal).

In short, the irrebuttable presumption doctrine provides plaintiff no claim here both as a matter of law (it has been rejected, and the DADT policy is rational) and as a matter of application (the DADT policy allows service members an opportunity for rebuttal).

F. Plaintiff has no procedural due process claim for a denial of a hearing.

Again, as made clear above, plaintiff has no due process claim because she has not been deprived of a liberty or a property interest. Plaintiff's suspension does not constitute a deprivation (no loss of a property right nor injury to her reputation); thus, the suspension does not trigger a due process right to a hearing.

Nonetheless, Air Force procedures provide more than is required by due process. Plaintiff could have applied to the Air Force Board of Corrections of Military Records (the "AFBCMR") to challenge her suspension. See 10 U.S.C. § 1552(a)(1); 32 C.F.R. § 865.0. Plaintiff has not done so.

Plaintiff misreads circuit precedent in citing Correa v. Clayton, 563 F.2d 396 (9th Cir. 1977), for her assertion that application to the AFBCMR is appropriate only after a discharge from service. (Pl's Reply to Mot. for Prelim. Inj., Docket #25, at 7-9.) While it may be the usual case to apply to the AFBCMR after a discharge, Correa never states that a service member seeking to challenge a pre-discharge suspension, and not the discharge itself, needs to await a discharge decision. Thus, at bottom, it is important to recognize that even here, where plaintiff has brought a premature challenge to her possible discharge, Air Force procedures nevertheless allow her to contest her suspension – even where no liberty interest is at stake.

Finally, by way of broader perspective, it is undisputed that plaintiff is entitled to a hearing before she is discharged from the Air Force. See AFI 36-3209, § 2.30.2. Therefore, she will not be deprived of any constitutionally protected interest without a hearing. For all these reasons, plaintiff's denial-of-a-hearing argument is unfounded and must be dismissed.

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G. Plaintiff does not state a claim under the Equal Protection Clause.

Plaintiff's equal protection argument amounts to an effort to have the Court deviate from settled precedent and apply a heightened standard of equal protection scrutiny to homosexual conduct. (Pl's Mem. in Opp. to Dismiss, Docket #28, at 19-21.) Plaintiff's efforts to do so should be rejected.

Persons who engage in homosexual conduct do not constitute a suspect or a quasi-suspect class, and consequently do not trigger any form of heightened scrutiny. See Holmes, 124 F.3d at 1132; Philips, 106 F.3d at 1425; High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990); see also Doe, 419 F.3d at 1062 ("Where such classification is not predicated on membership in a suspect or quasi-suspect class, the Constitution requires only that the classification rest on grounds reasonably related to the achievement of any legitimate governmental objective."). Nor does the Lawrence majority opinion provide any suggestion that persons who engage in homosexual activity should receive more favorable treatment under the Equal Protection Clause. To the contrary, the majority expressly declined to engage in an equal protection analysis. Lawrence, 539 U.S. at 574-75.

Similarly, the equal protection analysis that plaintiff cites from Justice O'Connor's concurrence in Lawrence (Pl's Mem. in Opp. to Dismiss, Docket #28, at 20) is the rational basis test, much like what the Supreme Court applied to a Colorado constitutional amendment prohibiting legal protections to homosexuals in Romer v. Evans, 517 U.S. 620 (1996). In contrast to Lawrence and Romer, where the state law at issue did not survive rational basis review, the DADT policy has repeatedly been upheld as rational, both after Romer, see Holmes, 124 F.3d at 1132; Philips, 106 F.3d at 1425; Able, 155 F.3d at 636, and after Lawrence, see Cook, 2006 WL 1071131, at *17 (rejecting an equal protection challenge to DADT under rational basis review); Loomis, 68 Fed. Cl. at 522 ("Every Circuit court which has address the matter has held that DADT survives rational basis review when subjected to an equal protection challenge."). Thus, no heightened scrutiny applies here, and plaintiff does not state an equal protection claim.

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H. Plaintiff states no actionable First Amendment claim.

Plaintiff's free speech claims should be dismissed in light of controlling precedent, which has held that the DADT policy does not violate the First Amendment. Holmes, 124 F.3d at 1136; Philips, 106 F.3d at 1430; see also Richenberg, 97 F.3d at 262-63; Thomasson, 80 F.3d at 931-34. Similar to Philips, plaintiff is subject to discharge due to her admitted homosexual conduct in violation of the DADT policy. Philips, 106 F.3d at 1430. To hold otherwise would mean that the legal significance of admissions would be subject to invalidation on First Amendment grounds. See id. ("[U]se of an admission of homosexuality is not precluded by the First Amendment."). As even plaintiff's oft-cited case, Pruitt v. Cheney, makes clear, a person who engages in homosexual conduct cannot bring a First Amendment claim after being discharged as a result of admitted homosexuality. 963 F.2d at 1164, 1167 (dismissing plaintiff's First Amendment claims).

Moreover, plaintiff's novel argument for near-absolute First Amendment protection for engaging in intimate homosexual activity is not readily decipherable from her complaint, and should be dismissed for that reason. Nor has plaintiff provided any authority for the proposition that homosexual conduct is a protected form of intimate expression under the First Amendment. At the most basic level, there is no legal foundation for invalidating the DADT policy on this ground. For instance, plaintiff's citation to Justice Douglas's separate writing in USDA v. Moreno, 413 U.S. 528, 542-44 (1973), for the proposition that a person has a right to choose his or her living partners (Pl's Opp. to Mot. to Dismiss, Docket #28, at 21-22) does not mean that there is a First Amendment protection to engage in homosexual conduct. Similarly, plaintiff's reference to Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987) in an attempt to establish some freedom of association argument (Pl's Mem. in Opp. to Dismiss, Docket #28, at 21-22) fails as well. Rotary Club deals with a state statute preventing gender discrimination, and does not ever suggest that associational interests extend to encompass any form of sexual activity, let alone homosexual conduct.

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III. CONCLUSION

For the foregoing reasons, plaintiff's constitutional challenges to the DADT policy do not state a claim for relief, and her complaint should be dismissed with prejudice.

Dated: June 9, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2006, I electronically filed the foregoing Defendants' Reply in Support of Defendants' Motion to Dismiss with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following person:

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