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CHAPTER 37. GENERAL SERVICE REQUIREMENTS > § 654. Policy concerning homosexuality in the armed forces

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*10 USCS § 654*

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TITLE 10. ARMED FORCES  
SUBTITLE A. GENERAL MILITARY LAW  
PART II. PERSONNEL  
CHAPTER 37. GENERAL SERVICE REQUIREMENTS

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10 USCS § 654 (2002)

§ 654. Policy concerning homosexuality in the armed forces

(a) Findings. Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that--

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) 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.

(9) 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) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) 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.

(b) Policy. A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that--

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) Entry standards and documents.

(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) Required briefings. The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including

the policies prescribed under subsection (b).

(e) Rule of construction. Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that--

- (1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and
- (2) separation of the member would not be in the best interest of the armed forces.

(f) Definitions. In this section:

(1) The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay" and "lesbian".

(2) The term "bisexual" means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) The term "homosexual act" means--

(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).

**HISTORY:**

(Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, § 571(a)(1), 107 Stat. 1670.)

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

Other provisions:

Regulations. Act Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, § 571(b), 107 Stat. 1673, provides: "Not later than 90 days after the date of enactment of this Act, the Secretary of Defense shall revise Department of Defense regulations, and issue such new regulations as may be necessary, to implement section 654 of title 10, United States Code, as added by subsection (a)."

Savings provision. Act Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, § 571(c), 107 Stat. 1673, provides: "Nothing in this section or section 654 of title 10, United States Code, as added by subsection (a), may be construed to invalidate any inquiry, investigation, administrative action or proceeding, court-martial, or judicial proceeding conducted before the effective date of regulations issued by the Secretary of Defense to implement such section 654."

Sense of Congress. Act Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, § 571(d), 107 Stat. 1673, provides: "It is the sense of Congress that--

"(1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces under the interim policy of January 29, 1993, should be continued, but the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate if the Secretary determines that it is necessary to do so in order to effectuate the policy set forth in section 654 of title 10, United States Code, as added by subsection (a); and

"(2) the Secretary of Defense should consider issuing guidance governing the circumstances under which members of the Armed Forces questioned about homosexuality for administrative purposes should be afforded warnings similar to the warnings under section 831(b) of title 10, United States Code (article 31(b) of the Uniform Code of Military Justice)."

**NOTES:**

RESEARCH GUIDE

## Annotations:

Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on Basis of Gay, Lesbian, or Bisexual Sexual Orientation or Conduct. 96 ALR5th 391.

## INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Constitutionality
3. Standing
4. Injunction
5. Application

## 1. Generally

In deciding to issue preliminary injunctions in case brought by six gay or lesbian members of armed forces challenging constitutionality of law embodying "don't ask, don't tell" policy, district court should have required plaintiffs to prove likelihood of success on merits rather than only "serious questions going to merits," since governmental policies implemented through legislation or regulations developed through presumptively democratic processes are entitled to higher degree of deference and should not be enjoined lightly. *Able v United States* (1995, CA2 NY) 44 F3d 128, 67 BNA FEP Cas 1095, 65 CCH EPD P 43399.

Claim of members of United States Armed Services, alleging that they are homosexuals and that Services' policy and regulations as to homosexuals violated their right to equal protection, is not dismissed, because although government is entitled to deference where constitutional rights of service members are implicated, plaintiffs are entitled to attempt to prove that findings underlying statute are based solely on prejudice or fear of prejudice, or otherwise that there is no rational relationship between statute's classifications of gay and lesbian service members and legitimate government purpose. *Able v United States* (1994, ED NY) 863 F Supp 112, app den (1994, ED NY) 870 F Supp 468, 67 BNA FEP Cas 1092, remanded (1995, CA2 NY) 44 F3d 128, 67 BNA FEP Cas 1095, 65 CCH EPD P 43399.

Military's "Don't Ask, Don't Tell" policy, implemented under 10 USCS § 654, which discharges homosexuals from military service who admit to being homosexuals, did not substantially further government's interest in preventing unit polarization as required under heightened scrutiny standard of First Amendment, where silent homosexuals were allowed to serve, even though they still could read gay literature, frequent gay bars, march in gay rights parades, and vociferously advocate right of gays to serve, thus causing same degree of debate, unrest, and polarization as that caused by person who admitted homosexuality. *Thorne v United States DOD* (1996, ED Va) 916 F Supp 1358, 71 BNA FEP Cas 565, summary judgment gr, dismd (1996, ED Va) 945 F Supp 924 and affd without op (1998, CA4 Va) 139 F3d 893, reported in full (1998, CA4 Va) 1998 US App LEXIS 6904 and cert den (1998, US) 142 L Ed 2d 307, 119 S Ct 371.

## 2. Constitutionality

In action by 6 self-identified homosexual members of Armed Services, court declares 10 USCS § 654 constitutional, where statute prohibits statement "I am homosexual or have homosexual propensities," because § 654(b)(2) advances a substantial governmental interest and restricts speech no more than is reasonably necessary. *Able v United States* (1996, CA2 NY) 88 F3d 1280, 71 BNA FEP Cas 419, 68 CCH EPD P 44233, on remand, injunction gr (1997, ED NY) 968 F Supp 850, 71 CCH EPD P 44999, revd on other grounds (1998, CA2 NY) 155 F3d 628, 74 CCH EPD P 45501.

Discharge of servicemember who stated that he was homosexual and had engaged in and intended to continue to engage in homosexual acts did not violate servicemember's right to equal protection since his discharge under "acts" prong of statute is constitutionally permissible because relationship between Navy's mission and its policy on homosexual acts renders distinction between acts and status rational; nor did his discharge violate his First Amendment right to free speech since his statements were used as evidence, not as reason for discharge. *Philips v Perry* (1997, CA9 Wash) 106 F3d 1420, 97 CDOS 1038, 97 Daily Journal DAR 1551, 70 CCH EPD P 44721, amd (1997, CA9 Wash) 97 CDOS 2848, 97 Daily

Journal DAR 5031.

Statute setting forth policy on homosexuals in military, and its implementing regulations, are constitutionally valid; both circuit precedent and that from other circuits establishes that military has legitimate interest in discharging service members on account of homosexual conduct in order to maintain effective armed forces. Holmes v California Army Nat'l Guard (1997, CA9 Cal) 124 F3d 1126, 97 CDOS 7165, 97 Daily Journal DAR 11571, 71 CCH EPD P 45000, reh, en banc, den (1998, CA9) 155 F3d 1049, 98 CDOS 7548, 98 Daily Journal DAR 10518, 74 CCH EPD P 45513.

Statute mandating termination of service of member of armed forces for engaging in homosexual conduct does not violate equal protection clause of Fifth Amendment; government justifications rationally related prohibition to goals of promoting unit cohesion, enhancing privacy and reducing sexual tension. Able v United States (1998, CA2 NY) 155 F3d 628, 74 CCH EPD P 45501.

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10 USCS § 654 does not constitute unconstitutional bill of attainder, where statute creates rebuttable presumption that military officer who states he or she is homosexual has propensity to engage in homosexual acts, but policy expressed by statute does not fall within historical meaning of legislative punishment, since under policy homosexuals are not barred from military simply because they are homosexuals, and statute leaves open possibility of qualifying for continued military service when homosexual overcomes presumption that he or she does engage in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. Richenberg v Perry (1995, DC Neb) 909 F Supp 1303, 68 CCH EPD P 44121, injunction den (1995, CA8 Neb) 73 F3d 172, 69 BNA FEP Cas 883 and affd (1996, CA8 Neb) 97 F3d 256, 68 CCH EPD P 44259, reh, en banc, den (1997, CA8) 1997 US App LEXIS 1040 and cert den (1997, US) 139 L Ed 2d 12, 118 S Ct 45.

### 3. Standing

Plaintiffs had standing to challenge § 654(b)(1) since they all stated that they were homosexuals and thus member of allegedly disadvantaged group, statute imposes government-imposed barrier to homosexual conduct in providing for separation of servicemembers who engage, attempt to engage, or solicit homosexual acts, and Act treats homosexuals and heterosexuals differently even though they have engaged in similar acts within broad range of sexual conduct. Able v United States (1996, CA2 NY) 88 F3d 1280, 71 BNA FEP Cas 419, 68 CCH EPD P 44233, on remand, injunction gr (1997, ED NY) 968 F Supp 850, 71 CCH EPD P 44999, revd on other grounds (1998, CA2 NY) 155 F3d 628, 74 CCH EPD P 45501.

### 4. Injunction

Air Force Captain who admitted to his commanding officer that he was homosexual was not entitled to injunction preventing his discharge pending appeal since he did not have substantial likelihood of success on merits of appeal challenging constitutionality of statute, nor had he shown irreparable injury since if he prevailed on appeal he would be entitled to reinstatement with full back pay and benefits or other comparable monetary relief. Richenberg v Perry (1995, CA8 Neb) 73 F3d 172, 69 BNA FEP Cas 883.

Preliminary injunction will issue, in action by lesbian and gay members of United States Armed Services challenging constitutionality of new policy and regulations as to homosexuals in armed forces, enjoining United States and Secretary of Defense from investigating, discharging, or taking other adverse action against plaintiffs because they have identified themselves as homosexuals, because: (1) showing of possible violation of constitutional rights constitutes irreparable harm justifying preliminary injunction; (2) exhaustion of administrative remedies is not required when plaintiffs raise constitutional questions and when irreparable injury will occur without preliminary injunctive relief; (3) plaintiffs have

established serious questions going to merits of dispute; and (4) hardship to 6 plaintiffs is evident and immediate and their free speech rights to pursue this case will be chilled without injunctive relief, so balance of hardships tips decidedly in favor of plaintiffs. *Able v United States* (1994, ED NY) 847 F Supp 1038, 64 BNA FEP Cas 692, 64 CCH EPD P 42966.

#### 5. Application

Servicemember who informed his commanding officer that he was homosexual failed to rebut presumption that he had propensity or intent to engage in homosexual acts, despite his testimony that he did not intend to engage in such acts, since on cross-examination he admitted to being sexually attracted to men. *Richenberg v Perry* (1996, CA8 Neb) 97 F3d 256, 68 CCH EPD P 44259, reh, en banc, den (1997, CA8) 1997 US App LEXIS 1040 and cert den (1997, US) 139 L Ed 2d 12, 118 S Ct 45.

Navy service member's discharge from U.S. Navy on grounds that he engaged in homosexual acts must be upheld, where discharged service member stated to superior that he was homosexual but had never engaged in homosexual acts with other servicemen although he did frequent gay bars while off duty, which led to consensual sexual encounters, because while service members cannot be discharged solely because they are homosexuals, under Uniform Code of Military Justice (10 USCS § 654(a), (b), (f), service members may be discharged because of homosexual acts. *Philips v Perry* (1995, WD Wash) 883 F Supp 539, 66 CCH EPD P 43469, affd (1997, CA9 Wash) 106 F3d 1420, 97 CDOS 1038, 97 Daily Journal DAR 1551, 70 CCH EPD P 44721, amd on other grounds (1997, CA9 Wash) 97 CDOS 2848, 97 Daily Journal DAR 5031.

Individual, who, pursuant to military's "old policy," had been denied benefits of voluntary separation incentive and special separation benefit program (10 USCS §§ 1174a and 1175) solely on ground that individual admitted that he was homosexual, was entitled to have his eligibility reviewed under military's new policy, as codified at 10 USCS § 654; such denial of benefits raised serious equal protection questions. *Elzie v Aspin* (1995, DC Dist Col) 897 F Supp 1, 68 BNA FEP Cas 1674.

Admittedly homosexual sergeant's case is remanded with instructions that his status in Marine Corps and his eligibility for voluntary retirement program be reviewed under military's current "Don't Ask, Don't Tell" policy as codified at 10 USCS § 654, where sergeant had met all eligibility requirements for enrollment in program based on very distinguished service since 1982, but was discharged after stating publicly that he was homosexual, because new policy was enacted since discharge, and it is difficult to conceive how military's stated rationale--military morale and discipline--for discharging professed homosexuals applies to prevent homosexuals from receiving retirement benefits already earned. *Elzie v Aspin* (1995, DC Dist Col) 897 F Supp 1, 68 BNA FEP Cas 1674.

Challenge of homosexual serviceman to his separation from service under 10 USCS § 654 "Don't Ask, Don't Tell" policy is unsuccessful, where he was assigned to serve as supply officer on fast-attack nuclear submarine preparing for top secret mission, because deference towards congressional and presidential judgment in military context is great, and serviceman could not show that application of policy to his situation clearly violated his First, Fifth, or Eighth Amendment rights. *Selland v Perry* (1995, DC Md) 905 F Supp 260, 67 CCH EPD P 43897, affd without op (1996, CA4 Md) 100 F3d 950, reported in full (1996, CA4 Md) 1996 US App LEXIS 29054 and cert den (1997) 520 US 1210, 137 L Ed 2d 819, 117 S Ct 1691.

Department of Defense's "Don't Ask, Don't Tell" policy regarding homosexuals in military was constitutionally applied to servicemember, where he denied to Board of Review having engaged in any homosexual conduct with any military student or servicemember and denied engaging in homosexual conduct during performance of military duty or while on military installation, because such statements were sufficient to create presumption that he has engaged in, or has intent to engage in, homosexual conduct with nonservicemembers while off base and off duty, and such conduct may be constitutionally prohibited and provides sufficient grounds for separation. *Watson v Perry* (1996, WD Wash) 918 F Supp 1403, affd, request den (1997, CA9 Cal) 124 F3d 1126, 97 CDOS 7165, 97 Daily Journal DAR 11571, 71 CCH EPD P 45000, reh, en banc, den (1998, CA9) 155 F3d 1049, 98 CDOS 7548, 98 Daily Journal DAR 10518, 74 CCH EPD P 45513.

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