ORIGINAL

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RICHARD COLLINS, individually and on behalf of a class of all those similarly situated,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 10-778 C

CLASS ACTION COMPLAINT

PLAINTIFF RICHARD COLLINS, individually and on behalf of a class of all those similarly situated, brings this action pursuant to 28 U.S.C. §§ 1491(a)(1) and (2) against DEFENDANT UNITED STATES OF AMERICA, and alleges as follows:

NATURE OF ACTION

1. Plaintiff Richard Collins served ably and honorably in the United States Air Force for nine years before being involuntarily separated from the service pursuant to 10 U.S.C. § 654, colloquially known as the "Don't Ask Don't Tell" policy. The Air Force initiated separation proceedings against Mr. Collins after two civilian co-workers observed him exchange a kiss with his civilian boyfriend. The kiss occurred while Mr. Collins and his boyfriend were in a car stopped at an intersection ten miles off base and while Mr. Collins was off duty and out of uniform.

2. Because Mr. Collins was separated involuntarily after serving for more than six years, he is eligible for separation pay calculated pursuant to a statutory formula based on his

years of service and salary. *See* 10 U.S.C. §§ 1174(b)(1), 1174(d)(1). But because Mr. Collins is a gay man, the Department of Defense automatically cut his separation pay in half -- from $25,702.48 to $12,351.24.

3. Although several constitutional challenges to Don't Ask Don't Tell are currently pending, and two federal courts have already declared the policy to be unconstitutional, *see Log Cabin Republicans v. United States*, No. 04-08425-VAP, 2010 WL 3960791 (C.D. Cal. Oct. 12, 2010), *Witt v. U.S. Dep't of Air Force*, No. 06-5195-RBL, 2010 WL 3732189 (W.D. Wash. Sept. 24, 2010), Mr. Collins does not seek to challenge the constitutionality of the underlying Don't Ask Don't Tell policy. Rather, this action challenges an internal Department of Defense separation-pay policy (the "DoD separation-pay policy") -- which is not mandated by Don't Ask Don't Tell or its implementing regulations -- that automatically cut in half Mr. Collins's separation pay solely because he is a gay man.

4. Plaintiff brings this action on behalf of all persons who were similarly adversely affected by the DoD separation-pay policy at any time from November 10, 2004 through the present (the "Class Period").

5. On its face and as applied to Plaintiff and the Class, the DoD separation-pay policy violates the Fifth Amendment's guarantees of equal protection and substantive due process. Even if concerns about unit cohesion and military efficiency justified the discriminatory Don't Ask Don't Tell policy -- and they do not -- such concerns have no bearing on whether it is appropriate to reduce automatically a former service member's separation pay after that member has already been removed from service.

6. Plaintiff and the Class seek a monetary award of full separation pay and any further relief that this Court deems just and proper.

JURISDICTION AND VENUE

7. Pursuant to 28 U.S.C. §§ 1491(a)(1) and (2), this Court has jurisdiction and is the proper venue for Plaintiff's claims for money damages and accompanying relief against the United States founded upon the Constitution, 10 U.S.C. § 1174, and Department of Defense Instruction No. 1332.29.

PARTIES

8. Plaintiff Richard Collins is a former Staff-Sergeant in the United States Air Force and currently resides in Clovis, New Mexico.

9. Defendant, the United States of America, is the proper party to be sued under 28 U.S.C. § 1491(a)(1).

CLASS ACTION ALLEGATIONS

10. Plaintiff brings this action on behalf of himself and as a class action under the provisions of Rule 23(a) and (b) of the Rules of the United States Court of Federal Claims on behalf of all members of the following Class:

> All United States service members who at any time from November 10, 2004 through the present were involuntarily separated from the military and were, pursuant to 10 U.S.C. § 1174, entitled to full separation pay, but were deemed to be not fully qualified for retention and denied reenlistment or continuation because of homosexuality and therefore had their separation pay reduced by one-half.

11. Plaintiff does not know the exact number of Class members because such information is in the exclusive control of the Defendant. But, upon information and belief based on limited public data concerning persons discharged pursuant to Don't Ask Don't Tell, Plaintiff believes that there are more than one hundred Class members as described above, the exact number and their identities being known by the Defendant.

12. The Class is so numerous and geographically dispersed that joinder of all members is impracticable.

13. There are questions of law and fact common to the Class including:

i. Whether the Defendant implemented, during the Class Period, a separation-pay policy that provides only half separation pay to service members who are otherwise entitled to full separation pay but are deemed to be not fully qualified for retention and are denied reenlistment or continuation because of homosexuality;

ii. Whether the DoD separation-pay policy violates the Fifth Amendment's guarantee of equal protection;

iii. Whether the DoD separation-pay policy unconstitutionally burdens and penalizes Plaintiff's and the Class's fundamental rights and protected liberty interests, in violation of the Fifth Amendment's guarantee of substantive due process;

iv. Whether the conduct of Defendant, as alleged in this Complaint, caused injury to Plaintiff and the other members of the Class; and

v. The appropriate class-wide measure of damages.

14. Plaintiff is a member of the Class, Plaintiff's claims are typical of the claims of the Class members, and Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff's interests are coincident with, and not antagonistic to, those of the other members of the Class.

15. Plaintiff is represented by counsel who are competent and experienced in the prosecution of constitutional claims and class-action litigation.

16. Through its separation-pay policy the Department of Defense has acted or refused to act on grounds generally applicable to the Class.

17. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages.

18. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The Class is readily definable and is one for which records should exist. Prosecution as a class action will eliminate the possibility of repetitious litigation. Treatment as a class action will permit a large number of similarly situated persons to adjudicate their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would engender. This class action presents no difficulties in management that would preclude maintenance as a class action.

FACTUAL BACKGROUND

Facts related to Plaintiff Collins

19. Plaintiff Richard Collins served honorably in the United States Air Force for over nine years.

20. Mr. Collins first enlisted on April 2, 1997, in Jackson, Mississippi. He chose to enlist because he was committed to serving his country. Mr. Collins's exemplary military record in the Air Force reflects that commitment.

21. After completing basic training at Lackland Air Force Base in San Antonio, Texas, Mr. Collins was stationed at Aviano Air Force Base in Italy, where he worked with F16C/D Fighter jet equipment.

22. While in Italy, Mr. Collins's responsibilities grew and he quickly advanced. By his second year of service, Mr. Collins was responsible for the control, issuance, and upkeep of over $20 million worth of F-16 Fighter jet support equipment, and he managed the Test, Management, and Diagnostic Equipment account, which was valued at over $1 million. Mr. Collins's superiors also selected him from a group of thirteen service members to be promoted to the rank of Senior Airman six months earlier than his peers.

23. In 1999, Mr. Collins was transferred to Luke Air Force Base in Arizona and assumed duties as a weapons load crewmember. During his service at Luke Air Force Base, the Air Force recognized Mr. Collins's excellence in service by awarding him the General Leo Martinez Award for Best Weapons Loader, an award which is issued annually to only a single service member in all of the 50 Air Force bases throughout the country.

24. Mr. Collins subsequently began work as a Unit Training Manager at Cannon Air Force Base in New Mexico. In that position, Mr. Collins developed, delivered, and evaluated education and training programs for up to 950 personnel. Mr. Collins also served as the unit commander's key staff member for all enlisted specialty-training issues.

25. During the course of his service, the Air Force awarded Mr. Collins many other medals, including an Air Force Good Conduct Medal, an Air Force Achievement Medal, and a Kosovo Campaign Medal.

26. On or about January 6, 2006, Mr. Collins exchanged a kiss with his boyfriend while in a car, off-duty and out of uniform, approximately ten miles away from Clovis Air Force Base. On information and belief, two civilian Cannon Air Force Base employees observed the kiss from their car, which was stopped at an intersection across the street from Mr. Collins and his boyfriend.

27. When Mr. Collins's commander, Lt. Colonel Alexander Karibian, learned of the incident from the two civilian base workers, he initiated an inquiry into the allegation.

28. On January 26, 2006, Master Sergeant Dennis C. Krzyzowski, ordered Mr. Collins to report to the base legal office. During that meeting, Lt. Colonel Karibian detailed the allegations against Mr. Collins and informed him that an investigation into his alleged homosexual conduct had already begun.

29. On February 14, 2006, Lt. Colonel Karibian notified Mr. Collins that the inquiry was complete and he was recommending that Mr. Collins be honorably discharged from the United States Air Force for homosexual conduct, specifically, engaging in a homosexual act under AFPD 36-32, AFI 36-3208 ¶ 5.36.2.1, and 10 U.S.C. § 654. Lt. Colonel Karibian also stated that although he had recommended an honorable discharge, the discharge administrative hearing board would have the ultimate decision making authority in determining whether Mr. Collins would be discharged under less than honorable conditions.

30. On February 21, 2006, Mr. Collins signed a conditional waiver of rights to an administrative discharge hearing. Mr. Collins's agreement to waive an administrative hearing was contingent upon his receiving an honorable discharge. The waiver agreement did not apprise Mr. Collins that, after receiving an honorable discharge, his separation pay could be cut in half based on "[h]omosexuality," notwithstanding his receipt of an honorable discharge.

31. On March 10, 2006, Mr. Collins received an honorable discharge. Mr. Collins was a level E-5 Staff Sergeant Unit Training Manager at the time of his separation.

32. Based on his compensation and years of service, Mr. Collins expected to receive $25,702.48 in separation pay after he was discharged. On March 10, 2006, however, when Mr. Collins visited the Relocations & Employment Office, he learned for the first time that his

separation pay had been cut in half -- from $25,702.48 to $12,351.24 -- because of "[h]omosexuality."

Facts Common to the Class

33. In order to ease service members' transition to civilian life, Congress has provided separation pay for long-serving members who are involuntarily separated from service.

34. 10 U.S.C. § 1174 provides that certain service members who are involuntarily separated from the military are entitled to separation pay calculated based on the member's years of active service and current monthly basic pay. 10 U.S.C. § 1174(d)(1). Service members are eligible for separation pay if they have completed more than six but less than 20 years of service immediately before their discharge. *See id.* at §§ 1174(a)(1), 1174(a)(2), 1174(b)(1), 1174(c).

35. The statute also authorizes the Department of Defense to establish criteria under which a discharged service member's separation pay may be cut in half. *Id.* at §§ 1174(a)(2), 1174(b)(2), 1174(c)(1).

36. The Department of Defense's separation-pay policy is set forth in DoD Instruction No. 1332.29. The Secretaries of the military departments have also promulgated implementing instructions for their departments consistent with DoD Instruction No. 1332.29. *See* DoD Instruction No. 1332.29 § 4.3.2.

37. Under current policy, the Department of Defense provides only half separation pay to service members such as Plaintiff and the Class, who receive honorable discharges and are otherwise entitled to full separation pay but are deemed to be "not fully qualified for retention and [are] denied reenlistment or continuation" because of "[h]omosexuality." *See* DoD Instruction No. 1332.29 § 3.2.3.1.4.

38. The requirement that a service member must be "fully qualified for retention" is not mandated by statute or defined in the Department of Defense's regulations. For purposes of awarding separation pay, however, the Department of Defense has concluded that service members who are separated pursuant to Don't Ask Don't Tell are categorically "not fully qualified for retention" and barred from receiving full separation pay.

39. Nothing in 10 U.S.C. § 654 or any other statute requires the Department of Defense to cut separation pay in half for service members who are involuntarily separated pursuant to Don't Ask Don't Tell. The separation-pay policy is not part of Don't Ask Don't Tell's implementing regulations. Indeed, the relevant portions of DoD Instruction No. 1332.29 were promulgated on June 20, 1991 -- several years *before* the enactment of the Don't Ask Don't Tell statute.

40. Far from implementing the Don't Ask Don't Tell statute, DoD Instruction No. 1332.29 reflects an outdated policy of equating sexual orientation with misconduct. The Instruction thus lists "[h]omosexuality" along side "[d]rug abuse rehabilitation failure" and "[a]lcohol abuse rehabilitation failure" as conditions that prevent a service member from being "fully qualified for retention." The separation-pay policy also refers to "[h]omosexuality" as grounds for involuntary separation, which reflects the Department of Defense's view in 1991 that a service member's private sexual orientation could itself be grounds for separation whether or not the service member engaged in any "homosexual conduct."

41. There is no sound justification for the Department of Defense's current policy of automatically cutting in half the separation pay of service members who are involuntarily separated from the military as a result of Don't Ask Don't Tell -- much less an important justification that could survive heightened scrutiny. Congress has cited the promotion of unit

cohesion and military efficiency as justifications for 10 U.S.C. § 654. Even if those concerns justified the discriminatory Don't Ask Don't Tell policy -- and they do not -- such concerns have no bearing on whether it is appropriate to reduce automatically a former service member's separation pay after that member has already been removed from service.

COUNT ONE
Equal Protection

42. Plaintiff incorporates by reference all preceding allegations as if fully set forth herein.

43. 10 U.S.C. § 1174 is a money-mandating statute entitling Plaintiff and the Class to an award of separation pay calculated pursuant to a statutory formula based on their years of service and salary.

44. The Department of Defense implements 10 U.S.C. § 1174 through its separation-pay policy, which is codified in DoD Instruction No. 1332.29.

45. The separation-pay policy subjects former service members to disparate treatment based on their sexual orientation by automatically halving former service members' separation pay based on "[h]omosexuality."

46. Automatically halving the separation pay of former service members based on their sexual orientation does not further the government's interest in unit cohesion and military efficiency, or any other legitimate state interest.

47. Automatically halving the separation pay of former service members based on their sexual orientation is not narrowly tailored to serve a compelling governmental interest and is not necessary to significantly further an important governmental interest; indeed, it is not rationally related to any legitimate governmental interest whatsoever.

48. The separation-pay policy's disparate treatment of former service members based on their sexual orientation constitutes invidious discrimination that violates the Fifth Amendment's guarantee of equal protection.

49. Once the unconstitutional portions of the separation-pay policy have been severed from the administrative scheme, 10 U.S.C. § 1174 and the remainder of DoD Instruction No. 1332.29 entitle Plaintiff and the Class to a monetary award of full separation pay.

COUNT TWO
Substantive Due Process

50. Plaintiff incorporates by reference all preceding allegations as if fully set forth herein.

51. 10 U.S.C. § 1174 is a money-mandating statute entitling Plaintiff and the Class to an award of separation pay calculated pursuant to a statutory formula based on their years of service and salary.

52. The Department of Defense implements 10 U.S.C. § 1174 though its separation-pay policy, which is codified in DoD Instruction No. 1332.29.

53. The separation-pay policy burdens and penalizes service members' fundamental rights and protected liberty interests in intimate association and private consensual sexual conduct by automatically halving service members' separation pay based on "homosexuality."

54. Automatically halving the separation pay of separated service members based on their intimate association and private consensual sexual conduct does not further the government's interest in unit cohesion and military efficiency, or any other legitimate state interest.

55. Automatically halving the separation pay of former service members based on their intimate association and private consensual sexual conduct is not narrowly tailored to serve

a compelling governmental interest and is not necessary to significantly further an important governmental interest; indeed, it is not rationally related to any legitimate governmental interest whatsoever.

56. The Department of Defense's separation-pay policy unconstitutionally burdens and penalizes former service members' fundamental rights and protected liberty interests, in violation of the Fifth Amendment's guarantee of substantive due process.

57. Once the unconstitutional portions of the separation-pay policy have been severed from the administrative scheme, 10 U.S.C. § 1174 and the remainder of DoD Instruction No. 1332.29 entitle Plaintiff and the Class to a monetary award of full separation pay.

PRAYER FOR RELIEF

WHEREFORE: Plaintiff and the Class respectfully pray for the following relief:

A. A monetary award of full separation pay for Plaintiff and the Class;

B. That Plaintiff and the Class be awarded pre-judgment and post-judgment interest at the highest legal rate from and after the date of service of this Complaint to the extent provided by law;

C. Reasonable costs, expenses, and attorneys' fees pursuant to 28 U.S.C. § 2412; and

D. Any further relief that the Court deems just and proper.

Dated: November 8, 2010

Respectfully submitted,

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