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Gay Vet's Separation Pay Claim Alive

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■ MILITARY

Gay Vet's Separation Pay Claim Alive

Claims Court allows discharged Air Force sergeant's suit challenging 50 percent penalty

BY ARTHUR S. LEONARD

The US Court of Federal Claims has refused a government motion to dismiss a lawsuit filed by a gay man, discharged from the Air Force under the Don't Ask, Don't Tell policy (DADT), who is challenging the Pentagon's policy that gave him only half the separation pay normally given to individuals involuntarily dismissed from the armed forces.

Judge Christine Odell Cook Miller's October 18 decision allows Richard Collins to move forward with his claim that this unequal treatment violates his equal protection rights under the Constitution's Fifth Amendment.

Collins, a staff sergeant who served "ably for over nine years," according to Miller, was honorably discharged from the Air Force in 2006 after his sexual orientation came to the attention of superior officers. Upon discharge, he received separation pay of \$12,851.24, rather than the 25,702.48 his base pay and years of service would have entitled him to.

Separation pay, mandated by statute, is designed to compensate those "fully qualified for retention" for the fact that the military budget sometimes requires trimming the ranks of those who had hoped to serve longer.

Under DADT, openly gay soldiers who were discharged were classed with those dismissed for drug and alcohol abuse.

The statute gives the Defense Department discretion in deciding what portion of full separation pay an individual is entitled to, and under DADT, openly gay soldiers who were discharged were classed with those dismissed for drug and alcohol abuse or deemed security risks in receiving only half pay.

Collins filed suit seeking to represent a class of all people who received honorable discharges under the DADT policy and were not given the full separation pay authorized under law.

Decisions made by government officials acting under statutory discretion are generally immune from monetary damage claims — unless authorized under a "money-mandating" law that is, in effect, a command by Congress to make a payment to somebody. Miller found that the separation statute fits that exception.

Miller also rejected the government's argument that Collins lacked a claim against which an articulable standard could be applied.

Ultimately, the judge concluded, the government was trying to argue the merits of the case — that is, whether giving only half separation pay to people who were honorably discharged under DADT is a violation of equal protection — rather than confining its dismissal motion to the question whether Collins has a claim for which the court is authorized to consider a remedy. Specifically, she was unwilling to accept the Defense Department's conclusion that the separation pay statute defined "fully qualified for retention" with sufficient clarity to make clear that Collins was ineligible for full compensation.

Miller concluded that it would be premature to terminate the litigation now.

The next step will be for the court to decide whether to certify the case as a class action, so that Collins would be suing not only for his own separation pay but also in a representative capacity for all those similarly situated, a decision she will make after an October 31 deadline for proposed discovery schedules from the two sides.

Beyond the potential that this case could affect all service members discharged under DADT, it also provides

one more vehicle for challenging disparate treatment of gay people by federal government agencies.

It should also be noted that the Air Force separation pay regulations, unlike the general ones issued by the Pentagon, uses the phrase "homosexual conduct" rather than "homosexuality." Since the repeal of DADT did not roll back the military's ban on sodomy — and military courts have not definitively settled the question of what behavior falls outside the protections of the 2003 Supreme Court sodomy ruling in *Lawrence v. Texas* — it remains possible that an Air Force member discharged for "homosexual conduct" could fall victim to the half-pay penalty.

Joshua A. Block of New York is Collins' lead counsel, with the American Civil Liberties LGBT Rights Project assisting with the case.



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