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"Don't Ask, Don't Tell" - Except in a Job Interview: The Discriminatory Effect of the Policy on a Veteran's Employment

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**“DON’T ASK, DON’T TELL” – EXCEPT IN A JOB INTERVIEW:
THE DISCRIMINATORY EFFECT OF THE POLICY ON A
VETERAN’S EMPLOYMENT**

AMANDA ALQUIST POPE*

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I. INTRODUCTION

A United States military veteran’s ability to receive benefits, such as preference in federal employment is, in part, based upon the reason for discharge. Lesbian, gay, or bisexual (LGB)¹ members of the military may be dishonorably discharged under the “policy concerning homosexuality in the armed forces,” commonly referred to as “Don’t Ask, Don’t Tell” (DADT).² Under this policy, the reason for discharge on a service member’s papers may be listed as “homosexual conduct,” “homosexual act,” or “homosexual admission.”³ One major discriminatory effect of this policy is that, given the narrative reason that appears on the dis-

* J.D., University of La Verne College of Law (2009). Amanda Alquist, *The Honeymoon is Over, Maybe for Good: The Same-Sex Marriage Issue Before the California Supreme Court*, 11 CHAP. L. REV. 23 (2008); Amanda Alquist, *The Migration of Same-Sex Marriage from Canada to the United States: An Incremental Approach*, 30 UNIV. OF LA VERNE L. REV. 200 (2008). This article is dedicated to all LGBT servicemembers and veterans who proudly serve our country.

¹ This article will refer only to LGB servicemembers. Transgender persons are not prohibited from serving in the military unless they also identify as gay, lesbian, or bisexual. *Transgender Issues*, SERVICEMEMBERS LEGAL DEF. NETWORK, <http://www.sldn.org/pages/transgender-issues>.

² 10 U.S.C. § 654 (2000).

³ *Id.* § 654(b).

charge form, this policy effectively forces LGB veterans to reveal their sexual orientation to any employer who requests to see these discharge papers (a process colloquially referred to as "outing," a term which will be used throughout this article).

This article will argue that even if the Military Readiness Enhancement Act of 2009⁴ is passed and DADT is repealed, veterans will still be caught in a catch-22 because the reason for veterans' discharge under this policy is reflected in their papers. In other words, they must out themselves to employers, thereby exposing themselves to further potential discrimination based on their sexual orientation or else forego the benefits afforded to military service. It will further argue that unless all veterans discharged under this policy are issued new papers that are neutral as to the reason for discharge, they will suffer ongoing exposure to discriminatory employment practices. The argument will be placed in the context of the historical treatment of homosexuals in the military, including the proposal,⁵ passage,⁶ and possible repeal⁷ of DADT.

II. A THUMBNAIL SKETCH OF THE HISTORY OF HOMOSEXUALS SERVING IN THE MILITARY

The current problem faced by LBG veterans in the employment context and the actual policy of DADT itself is preceded by a long history of discrimination against homosexuals openly serving in the military. From the inception of the United States military, sodomy could be cited as a reason for discharge.⁸ For example, discharge could be based upon a male service member's feminine characteristics in 1921.⁹ During World War II, members of the armed forces were separated based upon "undesirable habits or traits of character."¹⁰ Homosexuals who were discharged were deemed fit for future military service and permitted to rejoin the military if they were "rehabilitated."¹¹ In the 1950s, the military discharged members not only for conduct, but also for "homosexual tendencies,"¹² the definition of which became the subject of much litigation in the 1970s.¹³ In 1981, the Department of Defense

⁴ Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. (2009); Military Readiness Enhancement Act of 2010, S. 3065, 111th Cong. (2009).

⁵ See *infra* Section III.

⁶ See *infra* Section IV.

⁷ See *infra* Section VII.

⁸ See *Alexander, infra* note 20, at 405 (explaining that members of the military could be discharged for violating the civilian criminal act of sodomy).

⁹ Luker, *infra* note 20, at 281.

¹⁰ *Id.* (citing 139 CONG. REC. 1371 (1993)).

¹¹ *Id.*

¹² *Id.* at 282 (citing 139 CONG. REC. 1371 (1993)).

¹³ Virelli, *infra* note 21, at 1090.

eliminated separation based on homosexual tendencies and reinstated a mandatory separation policy.¹⁴ Separation based upon homosexual acts continued through the early 1990s based upon the premise “that as a class, homosexuals engaged in or were likely to engage in homosexual activity.”¹⁵

III. THE POLICY AND DISCHARGE

A United States military veteran’s ability to receive benefits and protection from discrimination on the basis of veteran status is based upon two factors. These factors include length of service and reason for discharge. For a lesbian, gay, or bisexual (LGB) member of the military, discharge may occur under DADT.¹⁶

In the U.S. Code, 10 U.S.C. § 654 (b) the discharge policy is as follows:

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.

¹⁴ Luker, *infra* note 20, at 283.

¹⁵ Woodruff, *infra* note 20, at 132.

¹⁶ 10 U.S.C. § 654.

(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.¹⁷

Discharge under this policy is usually "honorable" but may be classified as "other than honorable if combined with homosexual conduct."¹⁸ In addition, the discharge papers include a "narrative reason" for the discharge, and not simply a citation to a code section.¹⁹

A great deal has been written about the discriminatory effects of this policy on homosexual service members.²⁰ A significant, yet often over-looked effect of this policy occurs when a person's status as a veteran is in any way relevant to employment. If a potential employer asks to see the veteran's discharge papers, reading of the narrative reason effectively outs the LGB veteran's sexual orientation. In order to benefit in their post-service career from military experience, and in order to be protected from discrimination on the basis of veteran status, veterans must expose themselves to discrimination on the basis of sexual orientation. Even if DADT is repealed, the thousands of veterans who have been discharged under this policy over the last sixteen years will still face potential discrimination as long as the reason for discharge remains in their paperwork. Thus, the repeal of DADT must include a provision for issuing new discharge papers to these veterans that no longer reflect this discriminatory policy.

¹⁷ *Id.* § 654(b).

¹⁸ *Administrative Separation: DoD Regulations Implementing the Homosexual Conduct Policy* (1994), U.S. DEP'T OF DEFENSE, available at <http://www.sldn.org/page//website/the%20law/the%20law%20%20administrative%20separation.pdf>.

¹⁹ *Id.*

²⁰ See, e.g., William A. Woodruff, *Homosexuality and Military Service: Legislation, Implementation, and Litigation*, 64 UMKC L. REV. 121, 132-33 (1995); Debra A. Luker, *The Homosexual Law and Policy in the Military: 'Don't Ask, Don't Tell, Don't Pursue, Don't Harass'...Don't be Absurd!*, 3 SCHOLAR 267 (2001); Alastair Gamble, *How Do You Say Gay in Arabic? Being Essential Under "Don't Ask, Don't Tell,"* 21 HOFSTRA LAB. & EMP. L.J. 437 (2004); Sharon E. Debbage Alexander, *A Ban by Any Other Name: Ten Years of "Don't Ask, Don't Tell,"* 21 Hofstra Lab. & Emp. L.J. 403 (2004); Chad Carter & Antony Barone Kolenc, *"Don't Ask, Don't Tell," Has the Policy Met its Goals?*, 31 U. DAYTON L. REV. 1 (2005); Louis J. Virelli III, *Don't Ask, Don't Tell, Don't Work: The Discriminatory Effect of Veterans' Preferences of Homosexuals*, 38 J. MARSHALL L. REV. 1083 (2005); Emily B. Hecht, *Debating the Ban: The Past, Present and Future of "Don't Ask, Don't Tell,"* 246 N.J. LAW 51 (2007); Pamela Ludquist, *Essential to the National Security: An Executive Ban on "Don't Ask, Don't Tell,"* 16 AM. U.J. GENDER SOC. POL'Y & L. 115 (2007); Robert I. Corrales, *Don't Ask, Don't Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413 (2008).

IV. "DON'T ASK, DON'T TELL"

While the repeal of DADT has recently gained mainstream media attention, the statute itself has existed for nearly two decades, and it has been analyzed in the courts for its impact upon discharged service members. Understanding each prong of the DADT statute itself is important because each part was specifically enacted to address particular issues unique to homosexual service members.

A. THE STATUTE

The DADT statute was enacted in December 1993 after President Bill Clinton directed the Secretary of Defense to conduct a review of the military's outright ban on homosexuals in the military.²¹ The "Don't Ask" prong of the statute was established in early 1993 when the Joint Chiefs of Staff agreed not to ask new recruits if they were homosexual.²² After Congressional hearings to review the effect of the homosexual policy on the Armed Forces, DADT was presented to President Clinton in July 1993 and passed later that year.²³

While often shortened to "Don't Ask, Don't Tell," two more prongs, "Don't Pursue, Don't Harass," are also a part of the policy. "Don't Pursue" has existed since the statute's enactment to limit abusive investigative practices directed toward service members.²⁴ In 1998, the Department of Defense made several recommendations to prevent abusive practices in carrying out the policy.²⁵ Part of the recommendation included only allowing commanding officers to investigate after receiving credible information of homosexual conduct and no longer offering reduced sentences to service members during criminal proceedings in exchange for information regarding the homosexual conduct of a fellow service member.²⁶ These are important protections considering that under the statute, a service member who engaged in, attempted to engage in, or solicited another to engage in homosexual acts or who states that he or she is a homosexual creates a rebuttable presumption that the service member is a homosexual, with the burden to prove they do not have a propensity to engage in such conduct otherwise falling on the individual service member.²⁷ "Don't Harass" was

²¹ Virelli, *supra* note 20, at 1092 (citing President's Remarks Announcing the New Policy on Gays and Lesbians in the Military, 29 WEEKLY COMP. PRES. DOC. 1369 (July 19, 1993)).

²² Luker, *supra* note 20, at 285 (citing *The President's News Conference*, 1 PUB. PAPERS 23 (January 29, 1993)).

²³ *Id.* at 286 (citing 10 U.S.C. § 654 (1994)) (referring to the history of the policy as P.L. 103-160, Div. A, Title V, Subtitle G, § 571(a)(1), 107 Stat. 1670, passed by Congress on November 30, 1993).

²⁴ *Id.* at 287-88.

²⁵ *Id.* at 288.

²⁶ *Id.*

²⁷ Virelli, *supra* note 20, at 1093-94; see also Luker, *supra* note 20, at 297-302.

added as part of the military's anti-discrimination policy in February 2000 in the wake of the death of Private First Class Barry Winchell, who was murdered because of his sexual orientation.²⁸

The first part of the DADT statute details congressional findings relating to the purpose and organization of the United States military, including standards of conduct.²⁹ The final finding in this section states, "[t]he 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."³⁰ Immediately following these findings is the provision of the statute providing the discharge policy.³¹

The remaining portions of the statute provide for entry standards and documents³² and required briefings for service members regarding sexual conduct.³³ The statute then states that discharge will not occur if homosexual conduct was engaged in or an admission was made for the purpose of avoiding or terminating military service,³⁴ and separation of the member would not be in the best interest of the armed forces.³⁵ The final provision of the statute provides the definitions of "homosexual,"³⁶ "bisexual"³⁷ and "homosexual act," which are seemingly broad definitions due to their focus on the "propensity" toward homosexuality and seek to encompass not only actual acts but also potential acts as well.³⁸

²⁸ Luker, *supra* note 20, at 271-74; see also *What Is "Don't Ask, Don't Tell, Don't Pursue, Don't Harass?"*, SERVICEMEMBERS LEGAL DEF. NETWORK, <http://www.sldn.org/pages/what-is-dont-ask-dont-tell-dont-pursue-dont-harass> (last visited October 15, 2010).

²⁹ 10 U.S.C. § 654(a) (2000).

³⁰ *Id.* § 654(a)(15).

³¹ *Id.* § 654(b).

³² *Id.* § 654(c).

³³ *Id.* § 654(d).

³⁴ *Id.* § 654(e)(1).

³⁵ 10 U.S.C. § 654(e)(2).

³⁶ 10 U.S.C. § 654 (defining 'homosexual' as "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'").

³⁷ *Id.* (defining 'bisexual' as "a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts").

³⁸ 10 U.S.C. § 654(f) (2000) (defining 'homosexual acts' as "(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)").

The basic rationale behind this statute is the purported tenet that “homosexuality is incompatible with military service.”³⁹ DADT is often justified by its impact on unit morale, good order, and discipline.⁴⁰ Justification is premised on the belief that “allowing openly gay members to serve will harm the armed forces in light of the forced intimacy and lack of privacy that permeate military life.”⁴¹ Another rationale that is not often articulated by the military is that banning homosexuals from the military is supported by the “‘general societal commitment that homosexuality is a morally objectionable lifestyle’ that should not be ‘encouraged’ by the military.”⁴² A July 1993 poll showed that only forty percent of those surveyed favored allowing homosexuals to serve in the military with fifty-two percent opposed to such service.⁴³ Today such a statement would be out-dated at best, as a poll conducted in February 2010 showed that fifty-seven percent of American voters support allowing homosexuals to serve in the military with sixty-six percent stating a belief that the current policy is discrimination.⁴⁴ Regardless of the past justifications for this policy, and in considering its potential impact today, it should be noted that there are an estimated one million lesbian, gay, bisexual and transgender veterans in the United States⁴⁵ and 66,000 homosexual and bisexual service members in active duty.⁴⁶ This number reflects a large group of people subjected to employment discrimination, regardless of whether or not DADT is repealed. While repeal would benefit active members once they separate and seek employment, those already discharged under this seventeen-year-old policy face potential employment discrimination, as will be discussed below.

³⁹ Luker, *supra* note 20, at 287.

⁴⁰ Chad Carter & Antony Barone Kolenc, “Don’t Ask, Don’t Tell: Has the Policy Met its Goals?”, 31 U. DAYTON L. REV. 1, 4 (2005).

⁴¹ *Id.* at 4–5.

⁴² *Id.* at 5 (citing Gary L. Young, Jr., *Symposium: “Don’t Ask Don’t Tell: Gays in the Military, the Price of Public Endorsement:” A Reply to Mr. Marcossou*, 64 UMKC. L. REV. 99, 107 (1995)).

⁴³ *See id.* 26. (citing David F. Burrelli & Charles Dale, *Homosexuals and U.S. Military Policy: Current Issues*, 6–7 (CONG. RESEARCH SERV. RPT. FOR CONG. 2005)).

⁴⁴ *U.S. Voters Say Gays In Military Should Come Out, Quinnipiac University National Poll Finds*, QUINNIPIAC UNIV. POLLING INST., available at <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1422> (last visited Sept. 24, 2010).

⁴⁵ Luker, *supra* note 20, at 287.

⁴⁶ Gary J. Gates, *Lesbian, gay, and bisexual men and women in the US military: Updated estimates*. WILLIAMS INST., available at <http://www.law.ucla.edu/williamsinstitute/pdf/GLBmilitaryUpdate.pdf>. (last visited Aug. 25, 2010) (“This research brief uses new data from the American Community Survey and the General Social Survey to provide updated estimates of how many lesbians, gay men, and bisexuals (LGB) are serving in the US military.”).

B. CASES

Two cases challenging DADT have reached the circuit courts of appeals. In *Cook v. Gates*, DADT withstood constitutional scrutiny while in *Witt v. Department of Air Force*, the plaintiff achieved a victory on remand. While neither of these cases directly addressed the issue of discrimination faced by LGB veterans seeking employment, any legal challenge to DADT itself is significant to a discussion of the policy. When courts scrutinize DADT, the rationale and justifications for its existence are examined in the context of the harm it causes specific veterans and such analysis will aid in the repeal process and help to end the outing of veterans to employers.

COOK V. GATES

In *Cook*, twelve former members of the United States armed services brought a claim against the government alleging that DADT violated their rights to the Due Process, Equal Protection, and the Free Speech Clauses of the Constitution.⁴⁷ The government's main claim was that "the plaintiffs' due process and equal protection claims failed because the Act was subject only to rational basis review, and Congress' 'unit cohesion' justification sufficed to sustain the law under this standard as a matter of law."⁴⁸ The United States District Court for the District of Massachusetts granted the government's motion to dismiss, and the service members appealed.⁴⁹ The First Circuit affirmed the district court's finding that the statute did not violate any of the constitutional claims brought by the members.⁵⁰ In doing so, the court stated that DADT "provides for the separation of a service person who engages in a *public* homosexual act or who coerces another person to engage in a homosexual act."⁵¹ The court also emphasized the great deference given to Congress in governing military affairs and found that "Congress ultimately concluded that the voluminous evidentiary record supported adopting a policy of separating certain homosexuals from military service to preserve the 'high morale, good order and discipline, and unit cohesion' of the troops."⁵² In regard to the service members' equal protection claim, the court found that because sexual orientation is not a suspect class, DADT passed rational basis because the policy was rationally related to accomplishing Congress' legitimate interests, stated above.⁵³

⁴⁷ *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008).

⁴⁸ *Id.* at 47.

⁴⁹ *Id.* at 47–48.

⁵⁰ *Id.* at 65.

⁵¹ *Id.* at 56 (emphasis added).

⁵² *Id.* at 59–60.

⁵³ 528 F.3d at 61–66.

Although the *Cook* court deferred to Congress and the military's rationale of needing to preserve unit cohesion, such a justification fails in a post-discharge employment context. LGB veterans who seek employment and face potential discrimination because of a DADT discharge, are doing so after separation from the military. Preserving good order, unit morale and cohesion are unrelated to a DADT discharge that outs a LBG veteran and remains on his or her discharge papers seen by employers.

WITT v. AIR FORCE

In the Ninth Circuit case of *Witt v. Department of Air Force*, an Air Force reservist nurse filed suit after she was suspended from duty because of her sexual relationship with a civilian woman.⁵⁴ The District Court dismissed the action, and the plaintiff appealed.⁵⁵ The Court of Appeals highlighted seven significant issues, of which four were particularly relevant: (1) the government advanced important governmental interest through DADT, (2) whether the application of DADT to the plaintiff significantly furthered the government's interest in "unit cohesion" was a question of fact, (3) whether less intrusive means here would have substantially achieved that interest, and (4) plaintiff's suspension did not violate the Equal Protection Clause.⁵⁶ As to these pertinent holdings, the Ninth Circuit affirmed in part and remanded as to the second conclusion above.⁵⁷

While the court found that the government advanced an important interest in "unit cohesion" by enacting DADT, the court remanded the issue of whether DADT, as applied to the facts of this case, actually furthered this interest and whether less intrusive means were available to further the stated interest.⁵⁸ Here, the court pointedly noted "Major Witt was a model officer whose sexual activities hundreds of miles away from base did not affect her unit until the military initiated discharge proceedings under DADT and, even then, it was her suspension pursuant to DADT, not her homosexuality, which damaged unit cohesion."⁵⁹ However, the court affirmed the lower court's finding that under rational basis review, no equal protection claim could survive.⁶⁰

⁵⁴ *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008).

⁵⁵ *Id.* at 809.

⁵⁶ *Id.* at 807.

⁵⁷ *Id.*

⁵⁸ *Id.* at 821.

⁵⁹ *Id.*

⁶⁰ 527 F.3d at 821.

In 2010, Witt's case against the Air Force went to trial in the U.S. District Court for the Western District of Washington.⁶¹ On September 24, 2010, U.S. District Court Judge Ronald Leighton ordered Major Witt be reinstated to service, which was the first time any judge has ordered the military to allow a homosexual service member to serve openly in the armed forces.⁶² The *Witt* ruling came shortly after a California District Court judge applied the intermediate scrutiny standard set forth by the Ninth Circuit, ruling DADT unconstitutional for violating the First and Fifth Amendments as well as the substantive due process rights of homosexual service members.⁶³ While the court in *Witt* did not specifically address the issue of employment discrimination faced by those discharged under DADT, the ruling was seen as a victory by supporters of a DADT repeal because the ruling showed the court's recognition that a service member's sexual orientation is not necessarily relevant to his or her ability to serve.

V. DISCHARGE UNDER "DON'T ASK, DON'T TELL"

Since 1994, more than 14,000 service members have been discharged for being gay.⁶⁴ Separation procedures are different for each branch of the military and differ for officers and enlisted personnel.⁶⁵ However, upon discharge from any military service, all veterans receive a DD Form 214 that lists (1) the discharge characterization; (2) the narrative

⁶¹ Gene Johnson, 'Don't Ask, Don't Tell' Court Ruling Create Dilemma For Military, HUFFINGTON POST, (Mar. 6, 2010), http://www.huffingtonpost.com/2010/03/06/dont-ask-dont-tell-court-n_488803.html.

⁶² Hal Bernton, *Judge orders Air Force to reinstate officer forced out by 'Don't Ask, Don't Tell'*, SEATTLE TIMES, Sept. 24, 2010, available at http://seattletimes.nwsourc.com/html/localnews/2012990206_witt25m.html.

⁶³ *Log Cabin Republicans v. United States of America*, No. 04-08425-VAP, 2010 U.S. Dist. LEXIS 93612, at *1 (C.D. Cal. Sep. 9, 2010).

⁶⁴ About "Don't Ask, Don't Tell," SERVICEMEMBERS LEGAL DEF. NETWORK, <http://www.sldn.org/pages/about-dadt> (last visited Oct. 12, 2010).

⁶⁵ For purposes of this article, discharge is generally described where the focus is on the resulting paperwork that can later affect a veteran's possible employment. For a detailed explanation of discharge procedures within each branch of the military, see U.S. COAST GUARD, *Personnel Manual, Chapter 12*, available at http://www.uscg.mil/directives/cim/1000-1999/CIM_1000_6A.pdf; BUREAU OF NAVAL PERSONNEL, *Naval Military Personnel Manual §1900*, available at <http://www.npc.navy.mil/ReferenceLibrary/MILPERSMAN/1000MilitaryPersonnel/1900Separation>; U.S. DEP'T OF THE ARMY, *Army Regulation 635-200: Active Duty Enlisted Administrative Separations*, available at http://www.apd.army.mil/pdffiles/r635_200.pdf; U.S. DEP'T OF THE AIR FORCE, *Air Force Instruction 36-3208: Administrative Separation of Airmen*, available at <http://www.e-publishing.af.mil/shared/media/epubs/AFI36-3208.pdf>; U.S. Marine Corps, *Separation and Retirement Manual*, available at <http://www.marines.mil/news/publications/Documents/MCO%20P1900.16F%20W%20CH%201-2.pdf>.

reason for discharge; and (3) the reenlistment code.⁶⁶ If one's records list DADT as the discharge characterization, the narrative reason for discharge, for example, may be listed as "homosexual conduct," "homosexual act," or "homosexual admission."⁶⁷ Under DADT discharges, the reenlistment code is a negative code, thus "prohibiting a service member . . . from ever reenlisting in any branch of the military."⁶⁸

Whether a discharge under DADT is classified as "honorable" or "less than honorable" is at the discretion of commanding officer, which results in wide-ranging outcomes for the veterans.⁶⁹ This means that some service members could be discharged under the same set of facts and circumstances as others with different resulting classifications. A separation is "honorable" when a commanding officer decides the member's service has "met the standards of acceptable conduct."⁷⁰ Louis J. Virelli explains that because DADT prohibits certain types of conduct, if this conduct is viewed as unacceptable by a commanding officer, some service members may receive less than honorable discharges.⁷¹ Thus, the potential for discrimination is great because the definition of "acceptable conduct" is determined on a case-by-case basis and classifications of DADT discharges are at the discretion of individual commanding officers. The dangers of such a subjective determination are great because the type of discharge a veteran receives is permanently a part of his or her military service record.

With a general discharge, the second highest level of discharge, a member's service is considered to have been "honest and faithful" but "significant negative aspects" overshadow the positive portion of service.⁷² "If the 'negative aspects' of an individual's service rise to the level of a 'pattern of behavior that constitutes a significant departure from the conduct expected' of service members, that service member faces a discharge under 'other than honorable conditions.'"⁷³ Considering the common justification that homosexuality is incompatible with military service, "it is not difficult to imagine how a commanding officer could justify a finding that homosexual conduct represents such a significant departure and merits a discharge under other than honorable conditions."⁷⁴

⁶⁶ Emily Hecht, *Debating the Ban: The Past, Present and Future of "Don't Ask, Don't Tell,"* 246 N.J. LAW. MAG. 51, 53 (2007).

⁶⁷ *Id.* at 53.

⁶⁸ *Id.*

⁶⁹ Virelli, *supra* note 20, at 1096.

⁷⁰ *Id.* (citing Department of Defense Directive 1332.14, E3.A2.1.3.2.2.1 (1993)).

⁷¹ *Id.* (citing Department of Defense Directive 1332.14, 4.1.1. (1993)).

⁷² *Id.* (citing Dep't of Defense Directive 1332.14, E3.A2.1.3.2.2.2. (1993)).

⁷³ *Id.* (citing Dep't of Defense Directive 1332.14, E3.A2.1.3.2.2.3–E3.A2.1.3.2.2.3.1.1. (1993)).

⁷⁴ *Id.*

All military service members are governed also by *the Uniform Code of Military Justice (UCMJ)* under Title 10 of the United States Code.⁷⁵ A member found to have engaged in homosexual conduct may be prosecuted under Article 125,⁷⁶ which states: "any person found guilty of sodomy shall be punished as a court-martial may direct."⁷⁷ The potential for a court-martial is relevant in the employment context because "employers may tend to disregard the distinction between the administrative discharge and discharges resulting from courts-martial [and], [a]s a consequence, any discharge except an honorable one can be the ticket to a lifetime of rejected job applications."⁷⁸ Given that it is not illegal for a potential employer to ask whether a veteran has been honorably or dishonorably discharged,⁷⁹ a discharge based upon a court-martial for engaging in homosexual conduct would out an LGB veteran without protection from sexual orientation discrimination (as will be discussed in the following section).

VI. EMPLOYMENT AFTER DISCHARGE

There are two ways in which a veteran's discharge status could negatively affect potential employment. In the federal government, a veteran's ability to receive preference during the hiring process for certain jobs is based in part upon the discharge classification. In other jobs, a veteran's ability to return to pre-service employment is conditioned upon receiving a certain discharge. A proposed federal law would protect a LGB veteran's ability to gain employment after active duty by prohibiting discrimination based upon sexual orientation but while discussed below, this law would not provide a remedy for an other than honorable discharge, which is possible under DADT.

A. PROTECTIONS & PREFERENCES FOR SERVICE MEMBERS

First, Title 38 of the United States Code governs veterans' employment preference for federal jobs, a point-based system directly impacted by a DADT discharge because to receive preference, a veteran must

⁷⁵ 10 U.S.C. § 802 (2000).

⁷⁶ *Military to Review Sodomy Ban: As Part of Examination of Repeal of "Don't Ask, Don't Tell," Plans to Review Prohibition on Sodomy and Oral Sex*, CBS NEWS (Mar. 3, 2010), <http://www.hreonline.com/HRE/story.jsp?storyId=94802510> (noting that the Pentagon is currently conducting a study regarding homosexuals serving in the military and will review laws regarding sexual conduct).

⁷⁷ 10 U.S.C. § 925(b) (2000).

⁷⁸ *Employers*, DD214, <http://www.dd214.us/dd214andjobs.html> (last visited Oct. 16, 2010).

⁷⁹ See Keisha-Ann G. Gray, *Questioning Job Applicants*, HUMAN RESOURCE EXEC. ONLINE (Oct. 9, 2010), <http://www.hreonline.com/HRE/story.jsp?storyId=94802510>.

have been discharged from the Armed Forces under honorable conditions.⁸⁰ Second, the Uniform Services Employment and Reemployment Rights Act (USERRA) protects a military persons' employment while they serve in active duty.⁸¹

The Veterans Employment Opportunities Act of 1998 gives veterans access to federal job opportunities by requiring that (1) agencies allow eligible veterans to compete for vacancies advertised under the agency's merit promotion procedures when the agency is seeking applications from individuals outside its own workforce; and (2) all merit promotion announcements open to applicants outside an agency's workforce include a statement that these eligible veterans may apply.⁸² While challenged even prior to the 1998 Act, the United States Supreme Court noted federal and state preference statutes have been repeatedly upheld based upon a finding that they are "designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations."⁸³ In federal hiring, the preference appears in the form of increased points attached to civil service examination scores as either five or ten additional points depending upon a veteran's eligibility.⁸⁴ States vary on how they grant preference, with some following the federal point system and others granting outright preference.⁸⁵ In California, for example, after first passing certain civil service exams, disabled veterans are then awarded an extra fifteen points.⁸⁶ Ten points are awarded to all other veterans, five points to widows or widowers of veterans, and five points to spouses of fully disabled veterans, each with certain restrictions based on length of service.⁸⁷

During the application process, veterans who are eligible to claim preference on their application or résumé under the point-based system discussed above must produce a DD Form 214 prior to appointment to document their entitlement to this preference.⁸⁸ According to the DD Form 214 website, "employers can only verify military service through a DD Form 214. For that reason, they will generally request an

⁸⁰ 38 U.S.C. § 4304 (2006).

⁸¹ 38 U.S.C. §§ 4301-35 (2006).

⁸² *Vets Info Guide*, U.S. OFF. OF PERSONNEL MGMT. (Oct. 12, 2010 3:41 PM), <http://opm.gov/staffingPortal/Vetguide.asp>.

⁸³ *Pers. Adm't of Mass. v. Feeney*, 442 U.S. 256, 265 (1979).

⁸⁴ *Veteran's Preference*, VETERAN, <http://www.fedshirevets.gov/job/vetpref/index.aspx> (last visited Sept. 30, 2010).

⁸⁵ *Feeney*, 442 U.S. at 262.

⁸⁶ CAL. GOV'T CODE § 18973.1(a)(1) (West 2009).

⁸⁷ *Id.* at § 18973.1(b)(1).

⁸⁸ U.S. OFF. OF PERSONNEL MGMT, *supra* note 82.

‘undeleted certified copy.’”⁸⁹ The website further explains that two versions of the DD Form 214 exist: both a short, edited version and a long, unedited version.⁹⁰ Considering that the edited copy omits the characterization of service and reason for discharge, employers generally seek the unedited long copy.⁹¹ Whether for a state or federal position, it is the production of this entire document that outs a LGB veteran. With a lack of protection from sexual orientation discrimination at the federal level and a majority of states (see *infra* subsection B), veterans discharged under DADT are in a catch-22. To seek employment preference means to out oneself where sexual orientation discrimination protection is probably lacking, but to stay silent by not seeking preference denies the veteran a great benefit of military service.

The Uniform Services Employment and Reemployment Rights Act (USERRA) ensures employment protection for individuals who leave employment positions to perform military service.⁹² In 2009, more than two thousand veterans filed claims with the federal government under USERRA seeking employment protection.⁹³ USERRA prohibits employers from discriminating against past and present members of the uniformed services as well as applicants to the uniformed services.⁹⁴ However, the assurance of a veteran’s employment is usually dependent upon the reason for discharge. In showing an employer their DD Form 214 to regain access to their position, veterans discharged under DADT effectively out themselves as discussed above. Additionally, if the form lists the reason for discharge as “homosexual conduct,” the veteran may not have received an honorable discharge and the employee loses the right under USERRA to be reemployed in his or her civilian job.⁹⁵

B. SEXUAL ORIENTATION DISCRIMINATION LAW

There is currently no national consensus on the best way to guard against sexual orientation discrimination in the workplace, and only some states forbid discrimination based on sexual orientation and gender identity.⁹⁶ The Employment Non-Discrimination Act (ENDA) is a proposed federal law that would prohibit discrimination against

⁸⁹ DD214, *supra* note 78.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *VETS USERRA Fact Sheet 3*, U.S. DEP’T OF LABOR (Oct. 17, 2010, 1:22 PM), http://www.dol.gov/vets/programs/userra/userra_fs.htm.

⁹³ *Id.* at [http://www.dol.gov/vets/regs/fedreg/final/2009%20USERRA%20 Report%20to%20 Congress%20-Final.pdf](http://www.dol.gov/vets/regs/fedreg/final/2009%20USERRA%20Report%20to%20Congress%20-Final.pdf).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Issues*, LAMBDA LEGAL (Oct. 17, 2010, 1:35 PM), <http://www.lambdalegal.org/issues/employment-workplace/>.

employees on the basis of sexual orientation.⁹⁷ In 2009, a version of the previously introduced ENDA bills was introduced in Congress to provide protection in the workplace from discrimination on the basis of sexual orientation and gender identity, and committee hearings have been held in both the House of Representatives and the Senate.⁹⁸ There is no law forbidding an employer from refusing to hire an LGB employee.⁹⁹ Therefore, the disclosure of sexual orientation to a potential employer who requests to see the discharge papers of a veteran discharged under DADT creates harm without recourse. ENDA would thus protect veterans after their discharge papers out them, but would not prevent their outing in the first place, as newly issued, neutral papers would.

VII. REPEALING “DON’T ASK, DON’T TELL”

Introduced in the 111th Congress, the Military Readiness Enhancement Act (MREA) sought to repeal DADT and replace it with a military non-discrimination policy.¹⁰⁰ “The MREA expressly repeals 10 U.S.C. § 654 and establishes a detailed policy, prohibiting the Secretary of Defense from ‘discriminating on the basis of sexual orientation against any member of the armed forces or against any person seeking to become a member of the armed forces.’”¹⁰¹ In 2005, Congressman Marty Meehan (D-Mass.) introduced the Act¹⁰² and it was re-introduced in 2007 and 2009.¹⁰³ MREA seeks “to amend title 10 of the United States Code to enhance the readiness of the Armed Forces by replacing the current policy concerning homosexuality in the Armed Forces with a policy of nondiscrimination on the basis of sexual orientation.”¹⁰⁴ On May 27, 2010, the House of Representatives voted to attach an amendment to the annual National Defense Authorization Act to repeal DADT.¹⁰⁵ Senate Republicans, joined by a handful Democrats, voted to block the measure from coming to the floor for debate on September 21, 2010, and it was not repealed.¹⁰⁶ For an eventual repeal, there would

⁹⁷ *Employment Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN (Oct. 17, 2010, 1:50 PM), http://www.hrc.org/laws_and_elections/enda.asp.

⁹⁸ *Id.*

⁹⁹ LAMBDA LEGAL, *supra* note 96.

¹⁰⁰ Military Readiness Enhancement Act of 2009, *supra* note 4.

¹⁰¹ Ludquist, *supra* note 20, at 133.

¹⁰² *Id.* at 131-32 (citing H.R. Rep. No. 109-1059 (2005)).

¹⁰³ *Id.* at 131-32 (citing H.R. Rep. No. 110-1246 (2007)); *Tell Congress: Pass the Military Readiness Enhancement Act*, SERVICEMEMBERS LEGAL DEF. NETWORK (Aug. 9, 2010, 1:08 PM), <http://www.sldn.org/page/s/dadpetition>.

¹⁰⁴ Military Readiness Enhancement Act of 2009, *supra* note 4, at 1.

¹⁰⁵ *In Congress: The Path to Repeal*, SERVICEMEMBERS LEGAL DEF. NETWORK (Oct. 9, 2010, 1:09 PM), <http://www.sldn.org/pages/in-congress>.

¹⁰⁶ Anne Flaherty, *Senate Republicans block bill that would have allowed gays to serve openly in military*, AP (Sept. 30, 2010 8:30 PM), http://hosted.ap.org/dynamic/stories/U/US_GAYS_MILITARY?SITE=PAREA&SECTION=HOME&TEMPLATE=DEFAULT.

still be other legislative hurdles including the completion of a Pentagon review and Presidential approval.¹⁰⁷

Today, DADT is often seen as outdated because the military is the only federal employer that forces the discharge of an employee based upon sexual orientation. It seems likely that DADT will be repealed in the near future considering the similar stances of both President Obama¹⁰⁸ and the American public¹⁰⁹ against the policy.

However, even if DADT is repealed, there are more than 14,000 service members who have been discharged under this policy since 1994¹¹⁰ who would still face future employment discrimination. Unless these veterans are issued new discharge papers that are neutral in nature and no longer refer to the policy, they will be continually outed every time they are required to show their DD Form 214 in order to receive veteran benefits, such as the veteran preference statutes discussed *infra*.

VIII. CONCLUSION

Throughout American history, homosexual service members have faced discharge for behavior, conduct, and mere statements regarding their identity. For the past sixteen years, homosexuals have been banned from service under DADT, which has caused nearly 14,000 service members to be discharged since the enactment of the statute.¹¹¹ As recently as 2008, the constitutionality of DADT has been challenged in district courts and has always passed a rational basis review. However, the military's premise that homosexuality is incompatible with military service, and that allowing homosexuals to serve in the military is contrary to good order and morale continues to serve as a justification for the discriminatory policy.

These justifications, however, cannot carry over into the employment context because LGB veterans seeking employment are discriminated against *after* the opportunity of military service is taken away from them. A DADT discharge remains on a veteran's discharge paperwork seen by employers. Without laws prohibiting sexual orientation

¹⁰⁷ *See id.*

¹⁰⁸ *Statement by the President on Votes to Repeal "Don't Ask, Don't Tell,"* WHITE HOUSE (Sept. 30, 2010, 7:20 PM), <http://www.whitehouse.gov/the-press-office/statement-president-votes-repeal-don-t-ask-don-t-tell>.

¹⁰⁹ SERVICEMEMBERS LEGAL DEF. NETWORK, *supra* note 64 ("polling shows that seventy-five percent of Americans support allowing gays to serve openly in our nation's military").

¹¹⁰ *Id.*

¹¹¹ *About "Don't Ask, Don't Tell,"* SERVICEMEMBERS LEGAL DEF. NETWORK, <http://www.sldn.org/pages/about-dadt> (last visited Oct. 12, 2010).

discrimination in the workplace, veterans must choose between revealing they are a veteran (and their sexual orientation status) and staying silent (and foregoing employment benefits).

Until DADT is repealed and all service members formerly discharged under this policy are guaranteed neutral discharge papers, LGB veterans will continue to suffer potential discrimination during the employment process. If passed, the Employment Non-Discrimination Act (ENDA) would be the first federal employment legislation to protect individuals from sexual orientation discrimination. Veterans then would not have to forego their veteran employment benefits out of fear of the consequence of being “outed” by discharge papers. However, passing ENDA is not enough and more is needed to protect LGB veterans. Repealing DADT is another necessary step to end discrimination faced by LGB veterans seeking employment but part of the repeal process must include retroactively issuing neutral discharge papers to the thousands of LGB veterans discharged under DADT who have served this country and sacrificed on its behalf.