National News

Ruling on military policy has a silver lining

by Lisa Keen

There were a number of important firsts in a relatively obscure federal appeals court ruling last Friday. It marked the first time a federal appeals court has assessed the military's policy on Gay people who both identify themselves as Gay and who acknowledge having sex with people of the same gender. And it delivered the first extensive discussion about how far the U.S. Supreme Court's decision last year in the Colorado Amendment 2 case might reach into laws involving matters other than initiatives.

The verdict? The appeal ruled the military's policy is constitutional.

That constitutes a dark cloud for Gay legal activists working to overturn the "don't ask/don't tell" policy approved by Congress in 1993 and enacted in 1994. But it's a cloud with a silver lining: It looks like the Colorado decision might become a player in the military debate.

Romer v. Evans, the U.S. Supreme Court's 1996 decision finding the anti-Gay Colorado Amendment 2 initiative unconstitutional, made a strong appearance in Friday's decision — albeit in dissent. The somewhat splintered three-judge panel ruling seemed to indicate that a military case before the U.S. Supreme Court may well boil down to a balancing test between the *Romer* declaration that laws can't be based on animosity toward Gay people and the Supreme Court's frequent willingness to give the military a pass on respecting certain constitutional rights.

by Clint Steib

Matt Coles: "This decision is not emblematic of the kind of Gay-bashing that went on for years."

The decision Feb. 14 came in *Mark Philips v. U.S.*, a case in which Navy Petty Officer Philips, who was stationed aboard the *USS Nimitz* in November 1992, decided to come out after Bill Clinton won election as president. Clinton had promised during his campaign to end discrimination against Gays in the military if he was elected.

Philips's case is different from other challenges to the new policy because he, unlike the other plaintiffs, has acknowledged engaging in sex with a person of the same gender and stated that he intends to continue to do so. Only one other case, *Able v. U.S.*, challenges the military's policy based on both "status" and "conduct," but none of the six plaintiffs in that case have acknowledged any sexual activity.

In ruling against Philips, the U.S. Court of Appeals for the 9th Circuit said it had to uphold the discharge based on his "acts." It did not consider his second argument, that the policy violated his right to free speech.

Each of the three judges issued her or his own opinion: Two upheld the policy, one found it unconstitutional.

Judge Pamela Ryder (a Bush appointee) issued a 19-page decision which relied heavily on a 1993 Supreme Court ruling that said, in certain instances, the government can treat some people differently based on "any reasonably conceivable state of facts." It also relied heavily on a 1986 Supreme Court ruling that the courts must "give great deference to the professional judgment of military authorities."

Judge John Noonan (Reagan appointee) relied solely on deference in his five-page decision "concurring separately."

Judge Betty Fletcher (a Carter appointee) issued a 17-page dissent which relied heavily on the Supreme Court's ruling in *Romer*. Fletcher said the military policy is unconstitutional because the government fails to identify any explanation at all for how the presence of openly Gay people endangers unit cohesion.

"There is no reason to believe that engaging in private, consensual, off-base sexual activity with a member of the same sex somehow makes one a worse soldier than engaging in the same conduct with a member of the opposite sex." wrote Fletcher.

"The only way ... that 'unit cohesion' could conceivably be affected by the presence of gay men and lesbians in the military is by the negative reactions of service members opposed to homosexuality." And, citing the U.S. Supreme Court's decision in *Romer v. Evans*, Fletcher said the accommodation of these negative reactions toward Gay people "is not a legitimate government interest."

Fletcher said she believes the Supreme Court "rejected" the argument that its 1986 decision upholding sodomy laws against Gay people meant that discrimination based on homosexuality does not violate the equal protection clause of the constitution.

"Likewise," wrote Fletcher, "the *Romer* Court declined to exclude gay men and lesbians who engage in same-sex sexual relations from the protection of its ruling. The opinion did not differentiate between men and women who merely had a 'homosexual orientation' and those who engaged in 'homosexual conduct'; indeed, it struck down in its entirety Amendment 2, which encompassed both 'homosexual ... orientation [and] conduct.'"

Gay legal activist Chai Feldblum, who worked on the campaign that tried to stop the military's new policy, said she believes four, maybe five, justices of the Supreme Court could agree with the Fletcher dissent.

Of course, Fletcher is just one very liberal judge and, in this case, a judge in the minority of the panel's ruling. Friday's ruling leaves Philips and other Gay people still out of the military. But Matt Coles, executive director of the ACLU's National Lesbian and Gay Rights Project, said the Philips decision suggests that judges may be inclined to keep their rulings much more narrow now, because of *Romer*.

"The judges seem strained incredibly to make very narrow rulings and restrict them to the military, and that's good," said Coles. "This decision is not emblematic of the kind of Gay-bashing that went on for years."

Feldblum agreed. While the *Philips* decision overall "is a loss," she said, "I am incredibly heartened by the reasoning and approach of the three judges." She said their approaches are "absolutely" influenced by *Romer*.

"This case and *Romer* indicate that we can directly challenge and win a conduct-based challenge," said Feldblum.

But Coles said that, even with the restraint shown by the judges here, he thinks it is still very much an uphill battle to get the courts over their strong tendency to defer military policy to the military.

For that reason, Gay legal activists are not really eager to have a military case rushed to the Supreme Court. They would like the Supreme Court's first elaboration on how far *Romer* reaches to be a case in which the high court is more likely to "expand" that reach, not "limit" it, explained Beatrice Dohrn, legal director for Lambda Legal Defense and Education Fund, which has been working in partnership with the ACLU on the military cases.

Plus, noted Dohrn, "we have to get courts first to a place where they recognize that the [military] policy is based on animus." The Philips decision, she said, "reminds me of how badly a lot of judges want to view [the ban] on homosexual conduct as something rational, and not animus-based."▼

LEGAL BRIEFS

NO HIGH TREATMENT: The U.S. Supreme Court indicated Feb. 18 that it will not review a lower court decision which said the federal government could limit the use of marijuana for medical purposes.

In *Carl Olsen v. Drug Enforcement Agency*, a man with AIDS from Iowa asked the DEA to reclassify marijuana to make it available for medicinal purposes to people with terminal illnesses. The DEA refused, and the man, Olsen, petitioned the U.S. Court of Appeals for D.C. to intervene. The court also rejected the man's plea and, by refusing to hear the case, the Supreme Court allows that refusal to stand.

HIGH SCRUTINY: The U.S. Supreme Court did hear oral arguments Wednesday in a case, *Boerne v. Flores*, which examines the constitutionality of the 1993 Religious Freedom Restoration Act. While the case does not involve Gay issues directly, the law has potential implications in cases where employers, landlords, or others cite religious beliefs as their reason for discriminating against Gay people.

The case before the court Wednesday originated when the Catholic archbishop of Boerne, Texas, P.F. Flores, applied to the city for permission to expand his church building. The city said no, because of a local ordinance which protects historic landmarks — such as Flores's 74-year-old building. Flores filed suit, saying the denial violated the federal Religious Freedom Restoration Act. The act, passed in 1993, prohibits any government — local or federal — from interfering with a religious activity without some compelling reason to do so — one of the most difficult legal standards to meet.

The city argued that the Restoration Act violates the separation of church and state clause of the U.S. Constitution. A federal district court in Texas said it violates the separation of powers by attempting to undo a specific U.S. Supreme Court ruling. The 5th Circuit U.S. Court of Appeals disagreed with both arguments and ruled that the Restoration Act is constitutional.

Most of the questions and comments tossed out by the justices during oral argument seemed to indicate the Supreme Court will strike down the law. Justice Sandra Day O'Connor (a Reagan appointee) noted that the law might be used by prisoners to claim that smoking marijuana is a religious practice. Justice Anthony Kennedy (Reagan appointee) said the law requires that "every law and ordinance and regulation must grant religious preference" and that that seems "quite inconsistent with our traditions."

D.C. FORUM TUESDAY: The D.C. Bar Task Force on Sexual Orientation in the Legal Workplace is holding a forum Tuesday, Feb. 25, to discuss just that. Leading the discussion will be attorney Riley Temple, a partner at Halprin, Temple & Goodman and former chair of the Whitman-Walker Clinic board. Panelists will include National Public Radio's general counsel, Neal Jackson; former Clinic legal director Ruth Eisenberg; Arnold & Porter managing partner James Sandman; and White House counsel Charles Ruff.

The forum will take place as part of the D.C. Bar's 1997 Winter Convention, at the Washington Convention Center at 900 Ninth St., NW, from 10:45 a.m. until 12:15 p.m.

The D.C. Bar's Task Force has also recently sent out surveys to 5,000 randomly selected bar members to get information about sexual orientation discrimination at local law firms, and it will send out surveys to a list of openly Gay lawyers as well.

— Lisa Keen