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national news

Meinhold stays in the Navy

Federal judges continue to chip away at ban on gay men and lesbians in the military

by Bob Roehr

The Navy cannot kick out Keith Meinhold simply because he says he is gay, ruled the 9th Circuit Court of Appeals on Aug. 31.

The decision hewed to a line of judicial restraint by avoiding broad constitutional questions to resolve the case on narrower grounds. It crafted fine lines between the status of being gay or lesbian, the speech of saying one is gay or lesbian, and proof of actual sexual conduct outlawed by the Uniform Code of Military Justice.

"A military service cannot discharge a service member solely because of a statement of sexual orientation devoid of a concrete, expressed desire to act on his homosexual propensity," wrote Pamela Ann Rymer for the three-member panel of conservative judges.

Thus the court affirmed "homosexual status," while still deferring to the military on the issue of "homosexual conduct" being detrimental to good order and discipline. Furthermore, it began to attack the "presumption" that saying one is lesbian or gay carries with it the intent to act upon that orientation, and hence violate the code. It began to outline the type of language that would cross the boundary between the two.

The decision marks the eighth consecutive time in the last 20 months that federal judges have chipped away at the policy banning gay men and lesbians in the military.

"The decision was a little bit more than we filed the suit expecting," said Meinhold's attorney, John Maguire. "All we were looking for was to get orientation carved out as a safe place where the government can't tell you what you can do and can't do because of your orientation. Now you can also declare your orientation."

He views the narrowness of the decision as positive, calling it "insurance against the Supreme Court overturning it." He sees the 9th Circuit Court as unlikely to hear further appeals and even questions the wisdom of the government pursuing such action.

Maguire is encouraged by the fact that the panel did not find the regulation unconstitutional, because, he said, when that happens, "The government goes back to the drawing board. What she [Rymer] has basically done is redraw it for them." "What she is saying is that for it to be constitutional, you can't take action against people for either being gay or acknowledging that they are gay."

New York law professor Art Leonard said, "It is a narrow win [because it only applies to Meinhold]. But it contains the seeds of a powerful refutation of the philosophy behind 'don't ask, don't tell.'"

"The fact that he said he was gay doesn't allow them to make all of these assumptions about his behavior," noted Beatrice Dohrn, legal director

with the Lambda Legal Defense and Education Fund. "In itself that is quite a victory."

She is particularly pleased with a section of the decision that reads: "Construing the regulation to apply to the 'classification of being homosexual' clearly implicates equal protection.... At least a serious question is raised whether it can ever be rational to presume that one class of persons will violate regulations whereas another class will not."

Dohrn sees this point being pressed further in the Able case being pursued by Lambda as the lead challenge to the "new" regulations of "don't ask, don't tell" promulgated this year. That case is now in preliminary motions and seems likely headed for trial in the spring.

"If the sexual acts that we are talking about are detrimental to the military mission, then why are they differently detrimental if you think, or know, or suspect that a person is engaging in them with a person of the same gender versus the opposite gender? If you look behind that, then what you get is it's all about gay identity, it's not about sex," Dohrn said.

Opponents had much the same read on the decision as did their gay and lesbian counterparts. "It casts a shadow over the military's new homosexual law," said retired Col. Bob Maginnis of the Family Research Council.

He went on to accuse government attorneys of mishandling the case, calling it "another attempt by the Clinton administration to overstep its boundaries in regulating the military."

Meanwhile, Zoe Dunning heads into administrative discharge hearings with the Navy on Sept. 26. She is charged with being a lesbian. She thinks the Meinhold ruling "helps our chances, both in the intramilitary proceedings and eventual federal court challenge."

Dunning said, "The government is sending out

a special 'don't ask, don't tell' SWAT team to prosecute my case. I'm expecting them to do as much mud-slinging as they can. Fortunately, my record is as clean as they come, but that doesn't make it any less scary a proposition."

Dixon Osburn, attorney with the Servicemembers Legal Defense Network, said of the Meinhold case, "One thing that service members who are gay need to understand about this decision is, it really will not affect their daily lives, yet."

He warned that the law works very slowly. "They [service members] are still going to be kicked out if they make a statement today." He urged caution.

Servicemembers Legal Defense Network, (202) 328-3244, is the principal national organization assisting those in the military charged with being lesbian or gay.



Keith Meinhold

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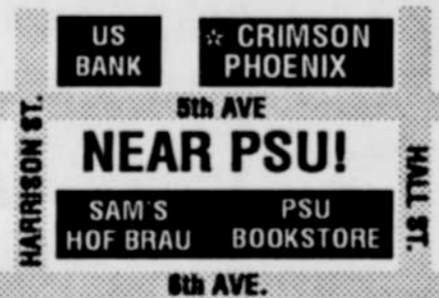


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