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LIEUTENANT COLONEL VICTOR J. FEHRENBACH

**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

LIEUTENANT COLONEL VICTOR J.
FEHRENBACH,

Plaintiff,

v.

DEPARTMENT OF THE AIR FORCE;
ROBERT M. GATES, Secretary of Defense;
MICHAEL B. DONLEY, Secretary,
Department of the Air Force; LT. GENERAL
GLENN SPEARS, Twelfth Air Force
Commander, COL. RONALD BUCKLEY,
366th Fighter Wing Commander,

Defendants.

Case No.

**VERIFIED COMPLAINT FOR
INJUNCTIVE RELIEF AND
DECLARATORY JUDGMENT**

NATURE OF THE ACTION

1. This is a civil action to restrain and declare unlawful any discharge of plaintiff Lieutenant Colonel Victor J. Fehrenbach (“Lt. Col. Fehrenbach”) from the United States Air Force (“Air Force”), or actions otherwise burdening or restricting his military career, by defendants on account of the colloquially known “Don’t Ask, Don’t Tell” federal policy concerning gay, lesbian and bisexual armed forces service members.

THE PARTIES

2. Plaintiff Lt. Col. Fehrenbach is a citizen of the United States and resident in the State of Idaho. He is an active duty Air Force officer assigned as Assistant Director of Operations in the 366th Operations Support Squadron at Mountain Home Air Force Base, Idaho. He is a trained Fighter Weapons Systems Officer, flying the F-15E Strike Eagle. During his nearly nineteen-year Air Force career in defense of the United States, Lt. Col. Fehrenbach has received numerous military awards and decorations, including one for heroism. He is also subject to imminent discharge from the Air Force under the colloquially known “Don’t Ask, Don’t Tell” federal policy concerning gay, lesbian and bisexual armed forces service members.

3. Defendant Department of the Air Force is a military department of the United States within which plaintiff Lt. Col. Fehrenbach is currently employed.

4. Defendant Robert M. Gates is the United States Secretary of Defense, sued here in his official capacity.

5. Defendant Michael B. Donley is the Secretary of the Department of the Air Force, sued here in his official capacity.

6. Defendant Lt. General Glenn Spears is Commander, Twelfth Air Force, sued here in his official capacity.

7. Defendant Col. Ronald Buckley is the Commander of the 366th Fighter Wing, sued here in his official capacity.

8. Relief is sought against each defendant as well as his agents, assistants, successors, employees, attorneys, and all persons acting in concert or cooperation with them or at their direction or under their control.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1346(a)(2) because the defendants are acting on behalf of the United States and this action arises under the United States Constitution (“Constitution”) including at least its First and Fifth Amendments; and federal laws, regulations, and policies, including the Administrative Procedure Act, 5 U.S.C. § 702, the federal statute governing the colloquially known “Don’t Ask, Don’t Tell” policy concerning gay, lesbian and bisexual armed forces service members (“DADT”), 10 U.S.C. § 654; federal regulations issued under DADT including Air Force Instruction (“AFI”) 36-3206, entitled *Administrative Discharge Procedures for Commissioned Officers* (June 9, 2004 modified effective March 25, 2010). (See Air Force Guidance Memo to AFI 36-3206, a true and correct copy is attached hereto as Exhibit 1.)

10. Venue is proper in this judicial district pursuant to at least 28 U.S.C. § 1391(e) because plaintiff Lt. Col. Fehrenbach resides in this judicial district and no real property is involved in the action, and because the Department of the Air Force maintains a base in this judicial district and a substantial part of the events giving rise to the claim occurred in this district.

FACTS

LT. COL. FEHRENBACH’S MILITARY CAREER

11. In 1991, Lt. Col. Fehrenbach graduated from the University of Notre Dame in South Bend, Indiana on a four-year Air Force Reserve Officers Training Corps (“ROTC”) scholarship, earning a Bachelor of Arts Degree in International Relations.

12. Following his graduation from Notre Dame, Lt. Col. Fehrenbach entered active duty in September 1991 as an Information Management Officer. He served as Squadron Section

Commander and Group Executive Officer at Mountain Home Air Force Base, Idaho, Kunsan Air Base, Republic of Korea, and Hurlburt Field, Florida. While at these assignments, he was awarded two USAF Achievement Medals and one USAF Commendation Medal, and was recognized as the 8th Fighter Wing Information Management Officer of the Quarter and 8th Fighter Wing Company Grade Officer of the Quarter. While at Kunsan Air Base, the USAF selected him at an initial screening board to enter the competitive USAF Undergraduate Navigator Training.

13. In 1994, Lt. Col. Fehrenbach began Joint Undergraduate Navigator Training at Randolph Air Force Base, Texas, and Naval Air Station Pensacola, Florida. He earned his Navigator wings in April 1996 and earned a slot for the most competitive, selective airframe, the F-15E Strike Eagle. He was also selected to attend follow-on training as an Electronic Warfare Officer. Later in 1996, he was reassigned to the 429th Electronic Combat Squadron at Cannon Air Force Base, New Mexico, flying the EF-111A Combat Raven. While at Cannon, he served on his first combat deployment to Prince Sultan Air Base, Kingdom of Saudi Arabia, in support of Operation SOUTHERN WATCH. Here, he earned his first combat flying hours, as well as an Air Medal and Aerial Achievement Medal. Upon his reassignment to F-15E flight training, he was awarded another Air Force Commendation Medal.

14. In 1998, Lt. Col. Fehrenbach was reassigned to the 4th Training Squadron and 334th Fighter Squadron at Seymour Johnson Air Force Base, North Carolina, as a Student F-15E Weapons Systems Officer. After 10 months of training, he was reassigned to the 494th Fighter Squadron at Royal Air Force Lakenheath, England. Immediately upon his arrival, due to his previous experience, he was tasked to join his squadron that was deployed to Aviano Air Base, Italy, in support of Operation ALLIED FORCE. Here, he served as the Chief of Scheduling for all F-15E combat operations over Kosovo. Due to these efforts, he was awarded yet another Air Force Commendation Medal. A year later, he redeployed to Aviano in support of Operation JOINT GUARDIAN, continuing peacekeeping operations over the Former Yugoslavia. Upon his reassignment, he was awarded his fourth Air Force Commendation Medal.

15. In 2001, Lt. Col. Fehrenbach was reassigned to the 335th Fighter Squadron at Seymour Johnson Air Force Base, North Carolina. Here, he served as Assistant Chief of Weapons and Tactics, Chief of Wing Training, and Flight Commander. On September 11, 2001, he was handpicked to serve as part of the initial alert crew immediately after the attacks on the United States. In the months that followed, he flew numerous sorties over Washington, DC, in defense of the nation's capital. He was then selected as the initial cadre to implement the most important technological advance for the F-15E in history—fighter data link—preparing for post-9/11 deployments. In early 2002, he deployed to Al Jaber Air Base, Kuwait in support of Operation ENDURING FREEDOM over Afghanistan and Operation SOUTHERN WATCH over Iraq. Here, he had several notable accomplishments: he employed the first munitions in his squadron, he flew numerous sorties destroying Taliban and Al Qaeda targets, he flew the longest combat sortie in squadron history, and he earned several Air Medals.

16. The following year, in preparation for conflict in Iraq, he was handpicked to serve in the elite Task Force Tiger—the first-ever joint combat employment of conventional fighter aircraft with special operations forces. Then in early 2003, he once again deployed to Al Udeid Air Base, Qatar, in support of Operation IRAQI FREEDOM. As part of the task force, he flew the initial sorties and he destroyed numerous high-value regime targets. Again, he was awarded several more Air Medals, including one for heroism while destroying an enemy ambush site under heavy, constant enemy fire. The commendation for heroism recognized Lt. Col. Fehrenbach's bravery in defense of his fellow service members:

Major Victor J. Fehrenbach distinguished himself by heroism while participating in aerial flight as F-15E Weapon Systems Officer, 335th Expeditionary Fighter Squadron, 379th Expeditionary Operations Group, 379th Air Expeditionary Wing, at Al Udeid Air Base, Qatar on 3 April 2003. On that date, as Major Fehrenbach provided combat airpower in support of coalition forces Operation IRAQI FREEDOM. In direct support of friendly ground forces securing Baghdad International Airport, Major Fehrenbach worked with two ground forward air controllers, providing immediate time-sensitive targeting of two enemy target arrays located near advancing friendly forces. Major Fehrenbach successfully employed nine laser-guided bombs, destroying two enemy missile launchers and 12 armored vehicles within striking

distance of coalition ground forces. While destroying these targets, Major Fehrenbach was targeted by constant enemy anti-aircraft artillery fire, one strategic surface-to-air missile, and eight tactical surface-to-air missiles. Major Fehrenbach used preemptive and reactive countermeasures and varied the attack axis for each strike to defeat these threats. His tactical prowess in a high threat environment denied enemy ground force attacks on advancing friendly forces, thereby allowing them to secure Baghdad International Airport safely, and furthering the success of coalition forces in Operation IRAQI FREEDOM. The professional heroism and airmanship displayed by Major Fehrenbach reflect great credit upon himself and the United States Air Force.

(Citation accompanying Lt. Col. Fehrenbach's September 4, 2003 Air Medal for Heroism, a true and correct copy is attached hereto as Exhibit 8.) Upon his reassignment, he was awarded his fifth Air Force Commendation Medal.

17. In 2004, Lt. Col. Fehrenbach was reassigned as an Instructor Weapons Systems Officer, Joint Undergraduate Navigator Training ("JUNT"), Training Wing SIX, Naval Air Station Pensacola, Florida. Here, he served as Flight Commander, Chief of Plans and Programming, Senior Air Force Liaison to the Wing Commander, and Commander of 325th Fighter Wing/Detachment 1. He accrued over 500 instructor hours and trained over 300 future Navy, Marine Corps, and Air Force weapons systems officers. He was recognized as Strike Fighter Instructor of the Quarter and was awarded the Navy Commendation Medal and the Meritorious Service Medal.

18. Since early 2007, Lt. Col. Fehrenbach has been assigned as Assistant Director of Operations and F-15E Weapons Systems Officer in the 366th Operations Support Squadron at Mountain Home Air Force Base, Idaho. Here, his duties include directing at least 190 airmen, overseeing commander special projects and programs, functioning as mission director for operational readiness exercises and inspections, and being responsible for over 110 fighter sorties daily. Lt. Col. Fehrenbach maintains mission-ready status as an F-15E Weapons Systems Officer, qualified in all air-to-air and air-ground missions, and directs operations as supervisor of flying.

19. Throughout his career in the Air Force, the Government has consistently given high praise and approval to Lt. Col. Fehrenbach's performance and contributions.

20. Upon information and belief, the United States has spent approximately \$20 million to train and educate Lt. Col. Fehrenbach for his position in the Air Force.

**THE AIR FORCE INVESTIGATES LT. COL. FEHRENBACH'S
SEXUAL ORIENTATION**

21. On May 16, 2008, Lt. Col. Fehrenbach was working as usual at Mountain Home Air Force Base in Idaho when his commander ordered Lt. Col. Fehrenbach to accompany him to the Air Force Office of Special Investigations ("AFOSI") office. Lt. Col. Fehrenbach followed the order and went with the commander towards the office.

22. While the commander was escorting Lt. Col. Fehrenbach to the office, Lt. Col. Fehrenbach asked if he was being accused of anything and stated that, if he was, he would not answer questions without first speaking to an attorney. The commander did not indicate whether Lt. Col. Fehrenbach was being accused of anything and continued to escort Lt. Col. Fehrenbach to the office. Indeed, the commander had been instructed by AFOSI not to divulge the subject matter of the upcoming interrogation to Lt. Col. Fehrenbach.

23. At the AFOSI office, Lt. Col. Fehrenbach was introduced to Boise Police Department ("BPD") detective Mike Vuchnich. At no time did the detective, the commander, AFOSI officers or anyone else inform Lt. Col. Fehrenbach of his Article 31 of the Uniform Code of Military Justice ("UCMJ") right not to make any statement regarding the offense of which he was accused or suspected, and that any statement made by him may be used as evidence against him in a trial by court-martial, 10 U.S.C. § 831, and that he was entitled to legal assistance from the staff judge advocate officer.

24. At no time before or during the interrogation did the detective, the commander, AFOSI officers or anyone else inform Lt. Col. Fehrenbach of the Department of Defense policy governing homosexual conduct, as required under AFI 36-3206, or that he was being investigated under DADT.

25. Detective Vuchnich took Lt. Col. Fehrenbach into a room where the two were alone, and began to interrogate him. Unknown to Lt. Col. Fehrenbach, the BPD and the AFOSI were already working together on a joint investigation related to the interrogation.

26. During the interrogation, Detective Vuchnich indicated that he was interrogating Lt. Col. Fehrenbach because a male civilian had accused Lt. Col. Fehrenbach of sexual assault at Lt. Col. Fehrenbach's private residence approximately sixty miles from Mountain Home Air Force Base, while Lt. Col. Fehrenbach was off-duty. Lt. Col. Fehrenbach became very concerned about this serious and false accusation.

27. Lt. Col. Fehrenbach also became very concerned about the potential for Air Force involvement in the detective's investigation and the potential effects on his Air Force career. Before responding to the accusation, Lt. Col. Fehrenbach stressed that he wanted to cooperate but repeatedly asked the detective if any information that he provided would be shared with military authorities. The detective did not inform Lt. Col. Fehrenbach that he was already working together with AFOSI and would share the information from the interrogation. Instead, the detective continually emphasized the need for Lt. Col. Fehrenbach to tell the truth in light of the serious accusation. The detective did not advise Lt. Col. Fehrenbach that he was recording the interrogation and that the recording would later be shared with AFOSI investigators.

28. Compelled by the necessity of exonerating himself, Lt. Col. Fehrenbach explained to the detective that he had engaged in sexual conduct, but it had been consensual.

29. Ultimately, the BPD, the Ada County Prosecutor's Office, the AFOSI, and the 366th Fighter Wing Office of the Staff Judge Advocate (366 FW/JA), all of which investigated the accusation against Lt. Col. Fehrenbach, found the sexual assault accusation to be meritless.

30. AFOSI and the BPD knew prior to interrogating Lt. Col. Fehrenbach that the civilian who has made the accusation was not a reliable or credible source of information. At the time he made those false statements, the civilian was already known by both the AFOSI and the BPD to have made similar false accusations against others in the past and to be unreliable and untrustworthy.

**AIR FORCE INITIATES SEPARATION PROCEEDINGS AGAINST
LT. COL. FEHRENBACH FOR HOMOSEXUAL CONDUCT**

31. On September 12, 2008, four months after the interrogation, Lt. Col. Fehrenbach received a memorandum from Lieutenant General Norman Seip of Davis-Monthan Air Force Base Arizona, indicating that Lt. Gen. Seip initiated administrative discharge proceedings against him for engaging in homosexual conduct at or near Boise, Idaho on or about May 12, 2008. (Seip Memorandum, a true and correct copy is attached hereto as Exhibit 2.)

32. Ironically, these proceedings were initiated one day after Lt. Col. Fehrenbach had been recommended by his superiors for a promotion. That recommendation stated : “Superstar! Top 2% / 400+ officers; ‘#1/11 [Weapons Systems Officers]’; ‘#1 USAF Strike Fighter Instructor’; ‘Top 5% of all [field grade officers]’ . . . Multiple kills vs Al-Qaeda, high-value Iraqi targets . . . ‘flawless results’ . . . ‘best I’ve seen’ . . . Top-tier officer . . . ‘My #1 officer/aviator’ . . . War hero, leader, 11 on a scale of 10! . . . Best on my staff!” (Promotion Recommendation, Sept. 11, 2008, a true and correct copy is attached hereto as Exhibit 3.)

33. An administrative Board of Inquiry (“BOI”) convened on April 14 and 15, 2009 to consider Lt. Col. Fehrenbach’s discharge pursuant to Air Force then-existing regulations issued under DADT. (*See* Excerpts from Record of Board of Inquiry Proceedings Volume 1 (“R. of Proc. Vol. 1”) at 58:16-17, a true and correct copy is attached hereto as Exhibit 4; AFI 36-3206, Exhibit 1.)

34. During the voir dire of the officers comprising the BOI who would evaluate Lt. Col. Fehrenbach’s administrative discharge, all but one expressed the opinion, based on their personal moral and religious beliefs, that homosexuality is wrong. (R. of Proc. Vol. 1 at 76:9-12, Exhibit 4). Despite those admitted biases, all were seated as members of the BOI.

35. The government submitted no evidence at the BOI that retention of Lt. Col. Fehrenbach would injure morale, order, discipline or unit cohesion.

36. At the conclusion of the BOI, the evaluating officers recommended that Lt. Col. Fehrenbach receive an honorable discharge from the Air Force. The board found that, based upon a preponderance of the evidence standard, Lt. Col. Fehrenbach engaged in homosexual acts

at or near Boise, Idaho on or about May 12, 2008, and that Lt. Col. Fehrenbach did not demonstrate that: (1) such conduct is a departure from his usual and customary behavior; (2) such conduct, under all the circumstances, is unlikely to recur; (3) under the particular circumstances of the case, his continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and (4) he does not have a propensity or intent to engage in homosexual acts. (R. of Proc. Vol. 1 at 266, Exhibit 4.)

37. The Board was not asked, and did not find, that the government had demonstrated that retention of Lt. Col. Fehrenbach would injure morale, order, discipline or unit cohesion.

38. Pursuant to AFI 36-3206 paragraph 6.1, the Air Force Personnel Board (“AFPB”) reviews officer discharge cases and makes recommendations to the Office of the Secretary of the Air Force or its designee when, as is the case here, a BOI recommends discharge. (AFI 36-3206, ¶ 6.1, Exhibit 1.) Under AFI 36-3206 paragraph 6.10, the officer is advised if the AFPB recommends retaining the officer and no further proceedings are required. If the recommendation is to discharge the service member, the AFPB sends the case to the Secretary of the Air Force or his designee for final action. (*Id.* ¶ 6.10.) Lt. Col. Fehrenbach’s counsel was advised on August 4, 2010, that the AFPB had met and made a recommendation to the Secretary’s designee.

THE DISCLOSURE OF LT. COL. FEHRENBACH’S CONDUCT HAS HAD NO EFFECT ON MORALE, DISCIPLINE, OR UNIT COHESION

39. During the BOI process, Lt. Col. Fehrenbach told few military people as possible about his pending discharge for homosexual conduct. Those he told were supportive and testified on his behalf at the BOI.

40. After the BOI decision in April 2009, many service members in Lt. Col. Fehrenbach’s unit learned that he was being discharged under DADT.

41. During the period from the initiation of administrative discharge proceedings (September 2008) through the present, Lt. Col. Fehrenbach’s military superiors and evaluators

have continued to provide glowing assessments of him in his annual performance evaluations and promotion recommendations:

- “Dynamic [officer]; [who] maintained infallible professionalism/attitude despite huge personal challenges . . . **[who] raised morale** . . . [and] who is a [p]roven leader/warrior; [who] handles every task w[ith] steady, professional focus.” (Officer Performance Reports for February 1, 2009 thru January 31, 2010 (emphasis added), a true and correct copy is attached hereto as Exhibit 28.)
- “Gifted communicator [who] . . . ensured . . . morale at pinnacle. Pure leadership; vision, experience, warrior ethos are second-ton-none . . . [a] [d]ynamic leader . . . [who] ‘single-handedly led the most revolutionary improvements in Predator history!’ . . . [P]roven leader/warrior, does it all!” (Officer Performance Reports for February 1, 2008 thru January 31, 2009, a true and correct copy is attached hereto as Exhibit 29.)

42. Knowledge of Lt. Col. Fehrenbach’s private, off base and off duty sexual life has not negatively impacted morale, order, discipline or unit cohesion.

43. Lt. Col. Fehrenbach remains highly regarded among his fellow service members because of his superior leadership skills, professionalism and proven record as an outstanding officer, trainer and mentor.

44. In no way would discharging Lt. Col. Fehrenbach from the Air Force for engaging in off duty consensual homosexual activity with a civilian in the privacy of his own home improve the military. On the contrary, particularly in this time of war, the Air Force desperately needs Lt. Col. Fehrenbach’s service. He is one of the most combat-seasoned and highly decorated aviators in his unit.

45. The discharge of Lt. Col. Fehrenbach will harm the readiness, morale and combat effectiveness of the military. The Government has recognized so much, previously praising him at least as a “[s]uperstar in all endeavors,” a “[w]ar hero,” a “morale champion,” a “[l]eader of leaders,” and an “invaluable asset to [his] flight and squadron” whose performance is “11 on a scale of 10,” “vital for continued [unmanned aerial vehicle] combat operations” and “crucial to [his] squadron’s success.” *See* Paragraphs 51 and 52 below.

EFFECT OF DISCHARGE ON LT. COL. FEHRENBACH

46. If discharged, Lt. Col. Fehrenbach will lose his job, income, right to pension (since he is being discharged approximately one year short of the twenty year mark), health and life insurance, and all other benefits associated with being an Air Force officer.

47. If discharged, Lt. Col. Fehrenbach will be terminated from a career which is central to his life and identity, and has been for nearly nineteen years.

48. If discharged, Lt. Col. Fehrenbach will suffer and continue to suffer the most serious and irreparable injuries in that he has been and will continue to be prevented from fully exercising his most fundamental and significant constitutional rights.

49. If discharged, Lt. Col. Fehrenbach will suffer a stigma from being discharged involuntarily from the military for violating Air Force regulations.

EFFECT OF DISCHARGE ON THE PUBLIC

50. The public will also suffer injury if it is deprived of Lt. Col. Fehrenbach's service by an unjust discharge because he is an extraordinary airman.

51. The government provided the following assessments of Lt. Col. Fehrenbach's performance in connection with the numerous military awards and decorations he received:

- "Fehrenbach's superior leadership . . . was critical to the success of joint undergraduate navigator training;" and
- "With no notice, he was hand-picked as detachment commander. Major Fehrenbach immediately enforced discipline, boosted morale, and improved communications among nine units, supporting more than 850 airmen." (Citation accompanying Lt. Col. Fehrenbach's February 1, 2007 Meritorious Service Medal, a true and correct copy is attached hereto as Exhibit 14.)
- "Fehrenbach's professional skill and leadership were instrumental to the squadron's unparalleled combat success in four major combat operations, supporting the Global War on Terrorism;"
- "His rock-solid flight discipline contributed to the squadron reaching unprecedented safety milestones, earning Boeing's 100,000 and 110,000 Accident-Free Flying Hour Awards, firsts for any F-15E unit;"
- "As initial cadre for the new F-15E Fighter Data Link upgrade, Major Fehrenbach trained over 80 aircrew and was a linchpin in attaining operational capability in less than 30 days, ensuring the squadron was ready for its first-ever combat employment in Afghanistan;"

- “[H]e submitted a myriad of flying training improvements that were adopted by Air Combat Command, significantly enhancing and streamlining aircrew training throughout the Combat Air Force;” and
- “Due to his superior aviation prowess, Major Fehrenbach was selected for the initial combat air patrols on 11 September 2001 in support of Operation INFINITE JUSTICE, and later flew 15 alert patrols over the capital in support of Operation NOBLE EAGLE, guarding vital National assets from further attack.” (Citation accompanying Lt. Col. Fehrenbach’s February 9, 2004 Air Force Commendation Medal, a true and correct copy is attached hereto as Exhibit 10.)
- “Fehrenbach’s actions directly contributed to establishing security and civil stability in Iraq.” (Citation accompanying Lt. Col. Fehrenbach’s March 12, 2004 Air Medal, a true and correct copy is attached hereto as Exhibit 12.)
- “Fehrenbach provided combat airpower in support of coalition forces Operations IRAQI FREEDOM. . . . His tactical prowess in a high threat environment denied enemy ground force attacks on advancing friendly forces, thereby allowing them to secure Baghdad International Airport safely, and furthering the success of coalition forces in Operation IRAQI FREEDOM.” (September 4, 2003 Air Medal for Heroism citation, Exhibit 8.)
- “Fehrenbach’s exceptional aviation skill directly contributed to coalition forces securing a vital airfield and command bunker, a key strategic objective in Operation IRAQI FREEDOM.” (Citation accompanying Lt. Col. Fehrenbach’s December 24, 2003 Air Medal, a true and correct copy is attached hereto as Exhibit 9.)
- “Fehrenbach provided expert air to ground delivery of both laser guided and general purpose weapons in a demanding troops in contact combat environment, ensuring success of the ground operation with minimal friendly casualties.” (Citation accompanying Lt. Col. Fehrenbach’s February 26, 2004 Air Medal, a true and correct copy is attached hereto as Exhibit 11.)
- “Fehrenbach’s professionalism, leadership, and dedication significantly contributed to the increased combat capability of the 8th Fighter Wing;” and
- “Fehrenbach also single-handedly rewrote the wing’s incentive/orientation flight regulation . . . [resulting in] a much more streamlined, efficient program which provided 24 additional flights per quarter, significantly enhancing morale wing-wide.” (Citation accompanying Lt. Col. Fehrenbach’s 1994 Air Force Commendation Medal, a true and correct copy is attached hereto as Exhibit 5.)
- “Fehrenbach successfully completed the EF-111A electronic warfare officer replacement training course, attaining a 97 percent academic average and earning ‘Commendable’ and ‘Best Seen to Date’ ratings for his mission qualification check-ride combat briefing;” and
- “Fehrenbach planned and coordinated 16 successful combat training missions, earning an ‘Excellent’ rating for mission preparation.” (Citation accompanying Lt. Col. Fehrenbach’s 1996 Air Force Commendation Medal, a true and correct copy is attached hereto as Exhibit 6.)
- “Fehrenbach reorganized an ailing life support section;” and
- “Fehrenbach coordinated all mobility, munitions, training, and billeting requirements for a 12-aircraft, 169-personnel deployment. His outstanding skills as squadron Electronic

Warfare Officer directly contributed to the preparation of 12 aircrew for their initial strike certification boards; resulting in a 100 percent pass rate.” (Citation accompanying Lt. Col. Fehrenbach’s February 14, 2001 Air Force Commendation Medal, a true and correct copy is attached hereto as Exhibit 7.)

- “As planning and production department head, [Fehrenbach’s] efforts resulted in the on-time and quality production of 254 naval flight officers and weapons systems officers.” (Citation accompanying Lt. Col. Fehrenbach’s January 11, 2007 Navy and Marine Corps Commendation Medal, a true and correct copy is attached hereto as Exhibit 13.)

52. His military superiors and evaluators provided the following assessments of him in his annual performance evaluations and promotion recommendations (in addition to those discussed earlier):

- “#1 pick for first-ever OSS/ADO; textbook leadership . . . Engineered ORE readiness; coordinated all logistics/personnel req’s for seven flight/four OREs--OSS war ready . . . Directed recognition program . . . morale at pinnacle . . . Superstar FGO; proven leader/warrior . . . can do it all! . . . [P]ure gold leadership under pressure . . . Visionary . . . vital for continued UAV combat ops . . . Pure leadership; vision, experience, warrior ethos are second to none.” (Officer Performance Report for February 1, 2007 through January 31, 2008, a true and correct copy is attached hereto as Exhibit 27.)
- “Rock-solid leader; awesome credentials . . . Unbelievable leadership . . . Team Builder! Literally grabbed Det 1 from clutches of failure, transformed ops into msn, customer showcase! . . . Relentless! . . . Electrifying impact; wish all my CCs had half his fire; rocket-propelled leader . . . Dynamite enabler . . . Brilliant JUNT WSO instructor . . . Top 5% of 477 officers; impressive leadership across the [board] . . . superstar.” (Officer Performance Report for August 30, 2006 through January 31, 2007, a true and correct copy is attached hereto as Exhibit 26.)
- “My ‘go-to’ host for [distinguished visitors] visits . . . lauded by all! . . . Model mentor . . . Peerless leader.” (Officer Performance Report for December 30, 2005 through August 29, 2006, a true and correct copy is attached hereto as Exhibit 25.)
- “#1/86 O-4s in my multi-service command! Leader of leaders; hands-down #1 advisor on all my USAF issues . . . Takes care of people . . . Model mentor . . . Top 2% of over 400 officers in TW-6!” (Officer Performance Report for December 30, 2004 through December 29, 2005, a true and correct copy is attached hereto as Exhibit 24.)
- “Top 5% of field grade officers; peerless leader, manager, instructor--made major improvements to operations . . . Exemplary organization skills; my #1 choice to run two of VT-86’s most demanding department head jobs . . . My #1 USAF Strike Fighter Instructor; ready for the toughest jobs . . . The best--consistently lauded on student critiques as the squadron’s #1 Most Effective Strike Fighter Instructor . . . Leader and mentor.” (Officer Performance Report for December 30, 2003 to December 29, 2004, a true and correct copy is attached hereto as Exhibit 23.)
- “Combat centurion; [his] legacy of success continued . . . Consummate professional . . . his mentoring laid cornerstone of [squadron’s] future . . . Superb mentor; prepares officers for leadership positions . . . Epitome of leadership, both on and off the job; prime driver for social and off-duty events--morale champion . . . Superstar in all endeavors,

shapes flight personnel into impeccable professionals, outstanding flight mentor.” (Officer Performance Report for February 7, 2003 to December 29, 2003, a true and correct copy is attached hereto as Exhibit 22.)

- “My #1 officer/aviator; combat veteran and staff officer--gets the job done on time and right the first time . . . Air-to-ground expert and ‘Top Gun’ . . . destroyed multiple al-Qaida targets . . . Skillfully managed wing training . . . Innovator . . . Combat leader and outstanding professional officer on the ground or airborne! . . . Outstanding officer, leader, and decorated warrior.” (Officer Performance Report for January 7, 2002 to February 6, 2003, a true and correct copy is attached hereto as Exhibit 21.)
- “Superstar; 1/12 select alert aircrew supporting Operation NOBLE EAGLE in defense of nation’s capitol. . . #1 of 11 [Weapon System Operators] in my flight--quintessential leader and superb aviator--setting the standard in C Flight . . . tactical role model for young aviators to match . . . lauded by 4 [Operations Group Commander] as ‘best seen in his career!’ . . . Squadron Expert . . . Indispensible . . . Absolutely superior aviator/problem solver; excels at every task . . . Dynamic leader; informal leadership is crucial to squadron’s success; sets and enforces highest standard . . . Showcase officer . . . Flawless management . . . Highest caliber officer and aviator.” (Officer Performance Report for January 7, 2001 to January 6, 2002, a true and correct copy is attached hereto as Exhibit 20.)
- “First-rate officer and aviator--perfect mix of talent and dedication--invaluable asset to flight and squadron . . . Tenacious and thorough . . . [t]op-notch performer with the motivation to succeed at any task . . . Superior officer--energetic, committed to mission accomplishment--consistently produces superb results . . . Highly dedicated performer.” (Officer Performance Report for March 4, 2000 to June 6, 2001, a true and correct copy is attached hereto as Exhibit 19.)
- “Outstanding aviator and officer--top electronic warfare officer in my flight--tremendous leadership skills . . . Outstanding contributor, superb leader . . . Stalwart performer . . . #1 in 1999 for bombing deliveries . . . Outstanding USAF ambassador . . . Gifted officer and aviator with natural leadership skills.” (Officer Performance Report for March 4, 1999 through March 3, 2000, a true and correct copy is attached hereto as Exhibit 18.)
- “[A]n outstanding officer and highly talented [Electronic Warfare Officer]--[he] sets the standard for others to follow . . . [he] authored new smart packs ensuring smooth transition for incoming aircrews--combat readiness improved . . . Fehrenbach is a proven performer.” (Officer Performance Report for May 1, 1997 through April 30, 1998, a true and correct copy is attached hereto as Exhibit 17.)
- “[A] model executive officer, intelligent, motivated, versatile, and a natural leader . . . Multitalented with unlimited potential . . . Fehrenbach can do it all--true leader, exceptional officer--[he] made a positive impact on the 8 FW at all levels. . . . Give this outstanding officer any challenge, he will excel.” (Officer Performance Report for June 15, 1993 through June 14, 1994, a true and correct copy is attached hereto as Exhibit 16.)
- “[A] young officer ready and willing to meet any challenge. . . . As editor of the squadron biweekly newsletter, his personal touch ensured an informative and interesting document which improved morale and communications and has been copied by four other squadrons. . . . Fehrenbach is an outstanding officer ready for increased responsibility. Augment into the Regular Air Force now.” (Officer Performance Report for December 25, 1992 through June 14, 1993 a true and correct copy is attached hereto as Exhibit 15.)

CLAIMS FOR RELIEF

CLAIM ONE
(DENIAL OF SUBSTANTIVE DUE PROCESS – AS APPLIED)

53. Lt. Col. Fehrenbach incorporates by reference and re-alleges each preceding paragraph as if fully set forth herein.

54. Lt. Col. Fehrenbach is about to be discharged from the Air Force based solely on a finding that he exercised his constitutional right under the Fifth Amendment's Due Process Clause to engage in private, sexual conduct with a consenting adult of the same gender.

55. Lt. Col. Fehrenbach's discharge would be an unconstitutional application of 10 U.S.C. § 654 and the regulations and guidance that implement it, including but not limited to Air Force Instruction ("AFI") 36-3206.

CLAIM TWO
(DENIAL OF PROCEDURAL DUE PROCESS – RELIANCE ON INVOLUNTARY STATEMENT)

56. Lt. Col. Fehrenbach incorporates by reference and re-alleges each preceding paragraph as if fully set forth herein.

57. Lt. Col. Fehrenbach's imminent discharge is the direct result of Lieutenant General Norman Seip's and the BOI's consideration of statements he made during an interrogation in order to exonerate himself from false criminal allegations.

58. Those statements were involuntary and unreliable and reliance on them to deprive Lt. Col. Fehrenbach of liberty and property violates the Fifth Amendment.

CLAIM THREE
(DENIAL OF PROCEDURAL DUE PROCESS – BIASED DECISIONMAKERS)

59. Lt. Col. Fehrenbach incorporates by reference and re-alleges each preceding paragraph as if fully set forth herein.

60. The members of the BOI held preconceived notions about homosexuality that prevented them from rendering an impartial verdict.

61. Use of biased decisionmakers to deprive Lt. Col. Fehrenbach of liberty and property violates the Fifth Amendment.

CLAIM FOUR
(VIOLATION OF APA – INITIATION OF DISCHARGE PROCEEDINGS)

62. Lt. Col. Fehrenbach incorporates by reference and re-alleges each preceding paragraph as if fully set forth herein.

63. Lt. Col. Fehrenbach's discharge proceeding was initiated in contravention of Air Force Instruction ("AFI") 36-3206, which required "credible information" that there was a basis for discharge before initiating a fact-finding inquiry.

64. There was no credible information that would warrant an inquiry. The only evidence was the statement of a civilian with a reputation as a liar and the statements of Lt. Col. Fehrenbach that were obtained in coercive circumstances and without Article 31 warnings.

65. Initiating the discharge was done without observance of procedures required by law; arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; and unsupported by substantial evidence, all in violation of the Administrative Procedures Act.

CLAIM FIVE
(VIOLATION OF APA – BOI PROCEEDINGS)

66. Lt. Col. Fehrenbach incorporates by reference and re-alleges each preceding paragraph as if fully set forth herein.

67. The determination of the BOI that Lt. Col. Fehrenbach should be discharged was based on unreliable statements.

68. The statements of Lt. Col. Fehrenbach were obtained in coercive circumstances and without Article 31 warnings.

69. The members of the BOI held preconceived notions about homosexuality that prevented them from rendering an impartial verdict.

70. The BOI's determination was done without observance of procedure required by law; arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; and unsupported by substantial evidence, all in violation of the Administrative Procedures Act.

CLAIM SIX
(DENIAL OF SUBSTANTIVE DUE PROCESS – FACIAL)

71. Lt. Col. Fehrenbach incorporates by reference and re-alleges each preceding paragraph as if fully set forth herein.

72. 10 U.S.C. § 654 subjects persons to discharge for exercising their constitutional right under the Fifth Amendment’s Due Process Clause to engage in private, sexual conduct with a consenting adult of the same gender.

73. 10 U.S.C. § 654 is unconstitutional on its face, as are all regulations, including, but not limited to Air Force Instruction (“AFI”) 36-3206, issued under 10 U.S.C. § 654.

CLAIM SEVEN
(DENIAL OF EQUAL PROTECTION – SEXUAL ORIENTATION AND GENDER)

74. Lt. Col. Fehrenbach incorporates by reference and re-alleges each preceding paragraph as if fully set forth herein.

75. 10 U.S.C. § 654 and the regulations issued under it discriminate against service members who engage in off-duty, consensual relations in the privacy of an off-base home with a person of the same sex and subjects them to different treatment from service members who engage in off duty, consensual relations in the privacy of an off-base home with a person of the opposite sex.

76. This facial disparate treatment on the basis of sexual orientation and gender violates Lt. Col. Fehrenbach’s equal protection rights under the Fifth Amendment.

CLAIM EIGHT
(VIOLATION OF THE FIRST AMENDMENT)

77. Lt. Col. Fehrenbach incorporates by reference and re-alleges each preceding paragraph as if fully set forth herein.

78. Lt. Col. Fehrenbach has the right to freedom of speech, to freedom against compelled speech, to receive information, and to expressive association which the First Amendment to the Constitution guarantees.

79. 10 U.S.C. § 654 and the regulations implementing it impermissibly restrict, punish, chill and burden all service members’ First Amendment rights on the basis of content and

viewpoint “24 hours each day . . . on base or off base . . . on duty or off duty.” 10 U.S.C. § 654(a)(9)-(10).

80. Lt. Col. Fehrenbach’s discharge is the direct result of the content of his speech, namely statements he made during an interrogation in order to exonerate himself from false allegations. Based entirely on those statements, the Air Force has acted to separate him from the Air Force under 10 U.S.C. § 654 and the regulations implementing it.

81. The imminent discharge of Lt. Col. Fehrenbach under 10 U.S.C. § 654 and the regulations implementing it would violate his First Amendment rights.

82. 10 U.S.C. § 654 is unconstitutional on its face, and was unconstitutional as applied to Lt. Col. Fehrenbach.

PRAYER FOR RELIEF

WHEREFORE, Lt. Col. Fehrenbach respectfully requests that the Court:

A. Issue a temporary restraining order and/or a preliminary injunction and a permanent injunction enjoining defendants, their agents, assistants, successors, employees, attorneys, and all persons acting in concert or cooperation with them or at their direction or under their control, from discharging Lt. Col. Fehrenbach for his conduct described herein.

B. Issue a temporary restraining order and/or a preliminary injunction and a permanent injunction enjoining defendants, their agents, assistants, successors, employees, attorneys, and all persons acting in concert or cooperation with them or at their direction or under their control, from enforcing the “Don’t Ask, Don’t Tell” statute, 10 U.S.C. § 654, and regulations, including, but not limited to Air Force Instruction 36-3206, entitled *Administrative Discharge Procedures for Commissioned Officers* issued under that statute, against Lt. Col. Fehrenbach.

C. Issue a declaratory judgment, declaring that the “Don’t Ask, Don’t Tell” statute, 10 U.S.C. § 654, and regulations issued under it, including, but not limited to Air Force

Instruction 36-3206, entitled *Administrative Discharge Procedures for Commissioned Officers*, are on their face null and void as violating the United States Constitution.

D. Issue a declaratory judgment, declaring that the “Don’t Ask, Don’t Tell” statute, 10 U.S.C. § 654, and regulations issued under it, including, but not limited to Air Force Instruction 36-3206, entitled *Administrative Discharge Procedures for Commissioned Officers*, are, as applied to Lt. Col. Fehrenbach, null and void as violating the United States Constitution.

E. Issue a temporary restraining order and/or a preliminary injunction and a permanent injunction, prohibiting defendants from failing to promote Lt. Col. Fehrenbach, or taking any other action to hinder his career as an officer of the United States Air Force, where such action is based upon the grounds that he was found to have violated the “Don’t Ask, Don’t Tell” statute, 10 U.S.C. § 654, and regulations issued under it, including, but not limited to Air Force Instruction 36-3206, entitled *Administrative Discharge Procedures for Commissioned Officers*.

F. Grant plaintiff’s costs, including reasonable attorneys’ fees.

G. Grant such other relief that the Court considers proper.

Dated: 8/11/2010

MORRISON & FOERSTER LLP

By: /s/ M. Andrew Woodmansee
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LIEUTENANT COLONEL VICTOR J.
FEHRENBACH

VERIFICATION

I, Lieutenant Colonel Victor J. Fehrenbach, certify and declare that I have read the foregoing Verified Complaint for Injunctive Relief and Declaratory Judgment and know its contents. The Complaint is being filed by my attorneys on my behalf. Based on personal knowledge and information and belief, I allege that the matters stated in the document described above are true. I declare under penalty of perjury under the laws of the United States and the State of Idaho that the foregoing is true and correct.

Executed this 10th day of August, 2010 at Chicago, Illinois.



Lt. Col. Victor J. Fehrenbach