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Lesbian Baiting in the Military: Institutionalized Sexual Harassment Under "Don't Ask, Don't Tell, Don't Pursue"

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LESBIAN BAITING IN THE MILITARY: INSTITUTIONALIZED SEXUAL HARASSMENT UNDER “DON’T ASK, DON’T TELL, DON’T PURSUE”

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The fact that I wasn’t dating openly sparked rumors that I was
homosexual. . . . You can’t win.

— Air Force Lieutenant Kelly Flinn¹

* J.D. Candidate, Washington College of Law, American University, 1999; B.A., American University, 1992. I wish to thank Michelle Benecke, Kelly Corbett, and Nancy Polikoff for their insights and guidance on this Comment; my mother, Ann Damiano, for her love and support; my great-grandmother, Sabina Tarentino, for teaching me bravery and endurance; and Nada, for getting me through it all.

1. Elaine Sciolino, *From a Love Affair to a Court Martial*, N.Y. TIMES, May 11, 1997, at 1, *quoted in* C. DIXON OSBURN & MICHELLE M. BENECKE, SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE FOURTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE” 57 (1998) [hereinafter SLDN, FOURTH ANNUAL REPORT]. Lieutenant Flinn rose to national fame in 1997 when the military discovered her affair with a married civilian man, which is against Air Force regulations. *Id.* at A1. Rather than face a court martial and a possible nine-and-one-half years in prison, Flinn accepted a general discharge from the Air Force. *Id.* at A1. In doing so, Flinn is no longer eligible for veterans’ benefits and must pay the Air Force an estimated \$18,000-\$19,000 owed for the cost of her academy education, which she expected to pay off while serving in the military. *Id.* at A1.

INTRODUCTION

Female servicemembers endure challenges to their careers that their male counterparts generally have not faced since the inception of the military.² For many years the United States did not permit women to serve their country at all.³ Later, however, the United States permitted women to serve only in auxiliary branches of the military.⁴ Eventually the military disbanded the women's auxiliary corps and permitted women to serve in the main branches of the military with their male counterparts.⁵

A hostile climate still exists toward women servicemembers despite the many years that the United States has attempted to incorporate women into the main branches of the military.⁶ In addition to sexual harassment and policies that may create obstacles for women's advancement within the military,⁷ lesbian baiting also serves as an

2. A significant exception that exemplifies male challenges as servicemembers is the plight of male African-American servicemembers who suffered segregation in the United States military until 1948. See J. MORRIS MACGREGOR, JR., *INTEGRATION OF THE ARMED FORCES: 1940-1965* 227 (Wash., D.C.: Center of Military History, United States Army 1981); Michael R. Kauth & Dan Landis, *Applying Lessons Learned from Minority Integration in the Military*, in *OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY* 86, 86-90 (Gregory M. Hereck, Jared B. Jobe, & Ralph M. Carney eds., 1996).

3. Despite this, some women managed to serve their country and went to war by dressing as men. See LILLIAN FADERMAN, *SURPASSING THE LOVE OF MEN: ROMANTIC FRIENDSHIP AND LOVE BETWEEN WOMEN FROM THE RENAISSANCE TO THE PRESENT* 58-60 (1981) (discussing the story of Deborah Sampson, who dressed as a man and fought as a soldier in the American Revolutionary War, and who was known to have sexual relations with women). A doctor discovered her gender when he treated her for a near-fatal wound. *Id.* at 58-60. The government ultimately granted her a soldier's pension. *Id.* at 58-60. See also RANDY SHILTS, *CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY VIETNAM TO THE PERSIAN GULF* 14 (1993) (discussing the memoirs of Union General Philip Sheridan, which described two women disguised as men while fighting in the Fifteenth Missouri Regiment during the Civil War, found engaging in sexual relations together).

4. See ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 28 (1990) (noting that women served in the Navy as clerical staff during World War I). During World War II, however, the military allowed women to serve in Women's Army Corp, the Navy WAVES, and the Coast Guard SPARS. *Id.*

5. See James D. Milko, Comment, *Beyond the Persian Gulf Crisis: Expanding the Role of Servicewomen in the United States Military*, 41 AM. U. L. REV. 1301, 1305 (1992) (describing the historical roots of the auxiliary corps).

6. See, e.g., THE SECRETARY OF THE ARMY'S SENIOR REVIEW PANEL ON SEXUAL HARASSMENT 47 (1997) (finding that soldiers distrust the Army's equal opportunity policy and that Army leaders are the critical factor in maintaining and enforcing an environment of respect).

7. For example, the United States government has not permitted women to serve in combat duty. *Military Survey Found Support for Women in Combat*, OMAHA WORLD-HERALD, Oct. 22, 1997, at 1. But see Cindy Richards, *U.S. Poised to Knock Down Last Legal Barriers to Women in Combat*, CHI. SUN-TIMES, May 31, 1991, at 39 (reporting that following the Persian Gulf War, Congress repealed many of the restrictions that kept women from combat duty, but the impact varies according to each branch of service). Because serving combat duty is nearly imperative for advancement into the higher ranks of the military, the government has excluded women from advancing into the upper echelons of the military. Ironically, many women soldiers did serve combat support jobs in the Persian Gulf War. See Patricia Schroeder, *A 200-year-old Revolutionary Idea: Permitting Women in Combat*, USA TODAY, May 30, 1991, at 12A (noting that

effective tool to keep women in an inferior role in the military, and furthermore, to reaffirm the military's patriarchal power structure.⁸

Lesbian baiting is a type of sexual harassment.⁹ Servicemembers Legal Defense Network, a self-professed "watchdog" over the Department of Defense's implementation of the policy "Don't Ask, Don't Tell, Don't Pursue," explains the effects of the military's policy on women:

[w]omen, straight and gay, are accused as lesbians when they rebuff advances by men or report sexual abuse. Women who are top performers in nontraditional fields also face perpetual speculation and rumors that they are lesbian.¹⁰

The regulation on gays and lesbians serving in the military, commonly known as "Don't Ask, Don't Tell, Don't Pursue,"¹¹ actually worsened the plight of gay and lesbian servicemembers in many circumstances even though the media and the government lauded the policy when it was issued.¹² The regulation has taken a particular

while the government did not permit women to fly fighters and other armed aircraft, women did fly slower, unarmed aircraft into and out of combat areas during the Persian Gulf War). Congress ultimately permitted women to participate in combat assignments, excluding ground combat. 10 U.S.C. § 113 (1997).

8. See generally discussion *infra* Part II. The physical design of military technology, such as weapons and planes, may also keep women in lower ranks. See Nina Richman-Loo & Rachel Weber, *Gender and Weapons Design*, in *IT'S OUR MILITARY, TOO!: WOMEN AND THE U.S. MILITARY* 136, 138 (Judith Hicks Stiehm ed., 1996) (noting that despite policies that appear to be gender-neutral, aircraft and ship design generally have been crafted to fit male, not female, bodies comfortably).

9. See C. DIXON OSBURN, MICHELLE M. BENECKE & KIRK CHILDRESS, *SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE THIRD ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE"* 21 (1997) [hereinafter SLDN, THIRD ANNUAL REPORT] (defining lesbian baiting as "the practice of pressuring and harassing women by calling or threatening to call them, lesbian").

10. SLDN, THIRD ANNUAL REPORT, *supra* note 9, at 21-22.

11. See 10 U.S.C. § 654 (1997) (implementing regulation). A full analysis of the policy "Don't Ask, Don't Tell, Don't Pursue," is beyond the scope of this Comment, but has been amply evaluated. See Stefanie L. Bishop, Comment, *U.S. & Great Britain: Restrictions on Homosexuals in the Military as a Barricade to Effectiveness*, 14 DICK. J. INT'L L. 613, 616-24 (1996) (summarizing 50 years of policy banning homosexuals from the U.S. military, with an emphasis on the policy, "Don't Ask, Don't Tell, Don't Pursue"); Arthur A. Murphy, Leslie M. MacRae & William A. Woodruff, *Gays in the Military: What About Morality, Ethics, Character and Honor?* 99 DICK. L. REV. 331, 354 (1995) (arguing that the Justice Department and the Pentagon missed the mark when it neglected to cite moral reasons as a basis for the policy "Don't Ask, Don't Tell, Don't Pursue"); Alan N. Yount, Comment, *Don't Ask, Don't Tell: The Same Old Policy in a New Uniform?*, 12 J. CONTEMP. HEALTHL. & POL'Y 215, 217-18, 222-23 (1995) (comparing the policy "Don't Ask, Don't Tell, Don't Pursue" to its predecessor and criticizing the new regulation); Scott W. Wachs, Note, *Slamming the Closet Door Shut: Able, Thomasson and the Reality of "Don't Ask, Don't Tell,"* 41 N.Y.L. SCH. L. REV. 309, 319-33 (1996) (evaluating the implementation of the policy "Don't Ask, Don't Tell, Don't Pursue" in the federal courts of New York and Virginia, and concluding that courts should uphold the regulation).

12. See generally SLDN, THIRD ANNUAL REPORT, *supra* note 9, at 3 (detailing various ways in which the implementation of the policy "Don't Ask, Don't Tell, Don't Pursue" was used to initiate witch hunts, to harass, and to discharge involuntarily gay and lesbian servicemembers).

toll on women, both lesbian and heterosexual, because it can and has been used as a threat to prevent women from reporting sexual harassment.¹³ Women who report sexual harassment or sexual abuse have all too often been accused of being lesbian.¹⁴ Furthermore, these women find investigations initiated against them after reporting unwanted conduct instead of against their harassers or abusers.¹⁵ Lesbian baiting is a powerful tool to keep women “in their place,” not just in the military, but in other societal contexts as well.¹⁶

This Comment evaluates how the military uses the policy “Don’t Ask, Don’t Tell, Don’t Pursue” to keep female servicemembers silent when they are sexually abused, harassed, or threatened with sexual abuse or harassment by fellow servicemembers.¹⁷ The military has also used, and continues to use, the policy of discharging female servicemembers when they accomplish non-traditional successes, such as earning an elite position in a field where women are not traditionally successful, or even present. Part I evaluates the policy of “Don’t Ask, Don’t Tell, Don’t Pursue” to determine how the policy is implemented, and how this implementation contributes to the problem of lesbian baiting in the military. Part II discusses the particulars of lesbian baiting itself, and how the military uses lesbian baiting to keep women in a subservient position in the United States military. Part III examines the recent allegations of sexual harassment in the military and attempts to determine what kind of impact lesbian baiting had on the decisions that female accusers make. Part III also discusses lesbian baiting of women who work in non-traditional fields in the military. Part IV recommends that

13. See SLDN, THIRD ANNUAL REPORT, *supra* note 9, at 21-25 (detailing reports of female servicemembers who have reported sexual harassment to their commanding officers, only to find themselves the subject of an investigation into alleged homosexual conduct).

14. See SLDN, THIRD ANNUAL REPORT, *supra* note 9, at 22 (finding that commanders too often respond to allegations of sexual harassment by investigating women under the guise of “Don’t Ask, Don’t Tell, Don’t Pursue”).

15. SLDN, THIRD ANNUAL REPORT, *supra* note 9, at 22.

16. See SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM 19, 20 (1988) (asserting that lesbian baiting is an insidious method of oppressing women by combining sexism and homophobia to keep women in gender roles when they try to resist the status quo).

17. Servicemembers Legal Defense Network finds that lesbian baiting is a powerful threat to women in the military. It stated:

[t]oo often, commanders respond to [speculation and rumors that female servicemembers are lesbian] by investigating the women under the guise of enforcing “Don’t Ask, Don’t Tell, Don’t Pursue,” rather than disciplining men who start such rumors or who perpetrate sexual abuse. As a result, many women do not report sexual harassment or assault out of fear that they will be accused as lesbian, investigated and discharged. Other women report that they give in to sexual demands specifically to avoid being rumored to be a lesbian.

SLDN, THIRD ANNUAL REPORT, *supra* note 9, at 22.

women must be kept safe from lesbian baiting in the military. The Comment concludes that the military itself, and not solely female servicemembers, would benefit from the eradication of lesbian baiting in the military.

I. “DON’T ASK, DON’T TELL, DON’T PURSUE”

Even before it became law, the political compromise that became the policy of “Don’t Ask, Don’t Tell, Don’t Pursue,”¹⁸ was not viewed as much of an improvement upon its predecessor.¹⁹ Its colloquial name is a misnomer; gay, lesbian and bisexual servicemembers are regularly asked, pursued and harassed under the “new” law.²⁰ They are harassed at a rate comparable to the pre-1993 policy,²¹ which explicitly relegated gays, lesbians and bisexuals to a role “incompatible” with military service.²²

18. 10 U.S.C. § 654 (1997).

19. See *Little Change Seen in New Gay Policy*, SACRAMENTO BEE, July 23, 1993, at A21 (reporting that the new regulations largely embody the then-current rules); Peter Grier, *Clinton’s Policy on Gays in Military Leaves Many Questions, Gray Areas in Practice, Commanders in the Field Will Determine What the New Policy Means to Those in the Service*, CHRISTIAN SCIENCE MONITOR, July 23, 1993, at 1 (reporting that commanders will implement the policy “Don’t Ask, Don’t Tell, Don’t Pursue” with very little guidance); Mark Thompson, *Clinton’s Policy on Gays Causes Confusion, Anger*, L.A. DAILY NEWS, July 25, 1993, at N1 (reporting that even President Clinton did not seem to understand the new regulations after the Secretary of Defense had to correct the President when he declared that under this policy servicepersons could not pronounce themselves as being gay).

20. Congress’ findings regarding the policy concerning homosexuality in the Armed Forces include:

13. The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.

14. The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces’ high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

15. The 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.

10 U.S.C. § 654(a) (13) (1997).

21. In fiscal year 1996, the Department of Defense discharged 850 servicemembers under “Don’t Ask, Don’t Tell, Don’t Pursue,” which was a “five-year high, and the highest rate of discharge since 1987.” SLDN, THIRD ANNUAL REPORT, *supra* note 9, at i. In 1997, the military discharged 997 servicemembers under the policy “Don’t Ask, Don’t Tell, Don’t Pursue” which was a 67% increase over discharges in 1994, the first full year that the policy was in effect. Tim Weiner, *Military Discharges of Homosexuals Soar; Rise of 67% Since the “Don’t Ask, Don’t Tell” Policy Was Created*, N.Y. TIMES, Apr. 7, 1998, at A24.

22. 32 C.F.R. pt. 41, app. A, pt. H.1. (1992) (repealed):

[h]omosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members