Discrimination - Army

Ben-Shalom Wins Right to Re-Enlist

by Laurel Faust

On Jan. 10, Judge Myron L. Gordon ruled in the Eastern District Federal Court of Wisconsin that the Army Reserve regulation denying Army Sgt. Miriam Ben-Shalom the right to re-enlist because she is a lesbian is unconstitutional.

Photo: Laurel Faust

SSGT Miriam Ben-Shalom

The Court, which in August issued a preliminary injunction preventing the Army from enforcing this regulation, issued a permanent injunction on Jan. 10.

"I have a permanent restraining order prohibiting the army from ever denying me my sexual orientation," says Ben-Shalom, "and indeed I can say I'm a lesbian if I want, so you know what: I'm a lesbian!"

The Court also ruled that the Army had denied Ben-Shalom's First Amendment right to freedom of speech, and her Fifth Amendment right of Equal Protection. As Ben-Shalom's attorney, Pat Berrigan explains, "The army was chilling her First Amendment rights by having a regulation that used her statement [that she is a lesbian] as evidence to discharge her. Judge Gordon found that it's perfectly legal in Wisconsin, and probably everywhere, to say to somebody, 'I am a lesbian.' It's protected speech."

Under the Fifth Amendment of the Constitution, in order to prove that equal protection has been denied, Berrigan explains that a class of individuals must be identified as being burdened by the law. "In this situation, the class is individuals of homosexual orientation and there's no doubt that individuals of homosexual orientation are being burdened by this regulation. They're being denied the right to serve in the military," states Berrigan.

He further explains that the court system uses three different levels of scrutiny in determining whether equal protection has been denied. Strict scrutiny is applied to individuals who are members of suspect classes—classes of individuals which historically have been mistreated, such as blacks. Intermediate scrutiny is applied to groups such as women, who have been burdened to a somewhat lesser degree (as viewed by the court). And finally there is the rational basis test, which states that, at minimum, there has to be some "rational basis" for the burdening of individuals.

In the case of Perry Watkins, a homosexual black Army sergeant who is undergoing a parallel litigation process on the West Coast, the Ninth Circuit Court of Appeals found that homosexuals are indeed a suspect class which is entitled to strict scrutiny. Judge Gordon affirmed this ruling, and further added that even under the easiest test, the rational basis test, the Army had failed to prove its case.

"He [Judge Gordon] said that this law didn't rationally advance any government interest, and that the government had miserably failed to show any rational reasons for singling out individuals of homosexual orientation for dismissal from the service," reports Berrigan.

Both Ben-Shalom and her attorney are extremely pleased with the 23-page decision of the court.

"And for once a judge stood up and said, 'You come to this court time and time again, you offer no proof for your contentions that gays are a threat to national security.' He just shredded them [the army]," remarks Ben-Shalom.

"You know that I was really frustrated with having been put in the same category as an arsonist or a kleptomaniac, which is what they did in terms of what kind of 'criminal' I am. He [Gordon] used their own words against them and said that their own words showed deep-seated prejudice against homosexuals—which merits enhanced judicial scrutiny."

According to Ben-Shalom, the Court reacted quite negatively to the "inflammatory rhetoric" of the Army [which compares Ben-Shalom, who is Jewish, to a Nazi, along with other negative types]. "I think the time is coming now when the judiciary is going to take a look at the sort of institutional discrimination and bigotry that exists within all branches of the Armed Forces, and I think you're going to see a real change," Ben-Shalom predicts.

The Ben-Shalom case has a wider scope of influence than might initially be perceived. Though this case's immediate jurisdiction lies over the State of Wisconsin, other persons in the military who are discriminated against because they are gay or lesbian can point to the Ben-Shalom case as a precedent. And further, the case

Frontiers, Jan 25 - Feb 8, 1989, p 11

has applications not only in the military, but civilian life.

"What has happened in this case has developed through such a course that it has really strong application in civilian areas, because the military is the most restrictive working environment today, even more restrictive than civilian employees for the government. Given that, why should civilians have more strictures placed upon them?" asks Ben-Shalom, who encourages gays and lesbians to use this case "as a tool" for their own freedom.

An unusual turn of the case, which surprised both Berrigan and Ben-Shalom, occurred when Gordon not only awarded the customary provision of costs—which includes statutory costs such as the filing fee and the service charge—but also encouraged Ben-Shalom to sue for attorney's fees. Customarily, the court decides a case on its merits and the litigant must file a petition to receive attorney fees.

Under the Equal Access Act this process can be completed only after it is proven that the person filing is the prevailing party [the winner of the case], and that the losing party [in this case, the Army] did not have a substantially justified case. The second criterion is more difficult to prove.

The next step in the Ben-Shalom case will most likely be the Seventh Circuit Court of Appeals, to which both Berrigan and Ben-Shalom are sure the Army will appeal. Berrigan intends to move to dismiss the Army's appeal that the issue is moot. "There isn't a preliminary injunction in effect anymore, it's a permanent injunction," asserts Berrigan.

Ben-Shalom says, "You can look for me to be in the Supreme Court probably by the end of 1989, and I think I'll win there, too." ■

[Reprinted with permission from Bravo!*]*