

January 1989

## Employment Discrimination Summary

Tatiana Roodkowsky

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>



Part of the [Labor and Employment Law Commons](#)

---

### Recommended Citation

Tatiana Roodkowsky, *Employment Discrimination Summary*, 19 Golden Gate U. L. Rev. (1989).  
<http://digitalcommons.law.ggu.edu/ggulrev/vol19/iss1/10>

This Note is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

# EMPLOYMENT DISCRIMINATION

## SUMMARY

### *DUBBS v. CIA: HOMOSEXUAL EMPLOYEE'S DISCRIMINATION CLAIMS SUBJECT TO JUDICIAL REVIEW*

#### I. INTRODUCTION

In *Dubbs v. Central Intelligence Agency*,<sup>1</sup> the Ninth Circuit decided that the Central Intelligence Agency's (CIA's) denial of a security clearance to an individual may be subject to judicial review as a colorable equal protection violation if the denial of the clearance is based solely on a blanket policy denying security clearances to all persons who engage homosexual conduct.<sup>2</sup> The court also ruled that the CIA's refusal to grant a security clearance was not reviewable under the arbitrary and capricious standard of the Administrative Procedures Act.<sup>3</sup>

---

1. *Dubbs v. Central Intelligence Agency*, 866 F.2d 1114 (9th Cir. 1989) (per Norris, J.; the other panel members were Noonan, J. and Smith, D.J., sitting by designation).

2. *Id.* at 1119.

3. *Id.* at 1120-21; The Administrative Procedures Act, § 706(2), 5 U.S.C. Section 706(2) (1982) provides:

Scope of Review. . .[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall:

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ."

## II. FACTS

Plaintiff Julie Dubbs is an openly gay woman who works for a defense contractor.<sup>4</sup> In 1981, Dubbs' employer requested that she be granted a CIA or special security clearance for access to sensitive classified information.<sup>5</sup> The Director of Security for the CIA rejected the request, stating "[o]ur concern about homosexual activity is that such activity may be exploitable in a manner which may put sensitive information at risk."<sup>6</sup> The plaintiff alleged that the CIA's refusal to grant her a security clearance was the product of a blanket CIA policy denying security clearances to all homosexuals.<sup>7</sup> Dubbs argued that such a policy is constitutionally impermissible under Title VII of the Civil Rights Act.<sup>8</sup> Finally, she claimed that the CIA's refusal to grant her a security clearance was "arbitrary and capricious" and therefore violated section 706(2)(A) of the Administrative Procedures Act (APA).<sup>9</sup>

Three key issues were decided by the lower court. First, the district court reviewed whether the CIA had a policy of denying access to classified information based solely on an applicant's sexual orientation and, if it did, whether such a policy was unconstitutional.<sup>10</sup> The district court ruled that the CIA was entitled to summary judgment because the court determined that "no 'fairminded' trier of fact could conclude that the CIA has a blanket policy of denying security clearances to all persons who engage in homosexual conduct."<sup>11</sup> Second, the district court granted summary judgment for the CIA rejecting Dubbs' claim that homosexual conduct but not heterosexual conduct is a negative factor in considering individual security clearances.<sup>12</sup> Third, the district court implicitly ruled that CIA security clear-

---

4. *Dubbs v. Central Intelligence Agency*, 866 F.2d 1114 (9th Cir. 1989). Appellant Julie Dubbs worked for SRI International, a defense contractor. She is a Senior Technical Illustrator. Since November 1981, she has held a Top Secret industrial security clearance from the Department of Defense. *Id.* at 1116.

5. *Id.* at 1115.

6. *Id.* at 1116.

7. *Id.* at 1117.

8. *Id.* at 1120.

9. *Dubbs*, 866 F.2d at 1117.

10. *Id.*

11. *Id.*

12. *Id.*

ance determinations are not reviewable under the arbitrary and capricious standard of the APA.<sup>13</sup>

### III. COURT'S ANALYSIS

The Ninth Circuit first reversed the summary judgment granted by the lower court in favor of the CIA regarding Dubbs' contention that the CIA has a blanket policy of denying security clearances to all homosexuals.<sup>14</sup> In reversing the lower court's summary judgment, the Ninth Circuit relied upon various pieces of evidence presented to the trial court.<sup>15</sup> One of the key evidentiary items was a letter signed by William Kopatish, the CIA Director of Security.<sup>16</sup> Kopatish wrote the letter to Dubbs denying her security clearance and stated that "we [the CIA] have noted the recency and persistence of the pattern of your homosexual activity. Our concern about homosexual activity is that such activity may be exploitable in a manner which may put sensitive information at risk."<sup>17</sup> The Ninth Circuit also reviewed the testimony of Robert Gambino, a former CIA Security Director.<sup>18</sup> Mr. Gambino testified that homosexuality "raises a considerable doubt, a risk, and a risk which has to be resolved in favor of the agency."<sup>19</sup> The appeals court held that this evidence supported triable issues of fact as to whether or not the CIA has a blanket policy of denying security clearances to homosexuals.<sup>20</sup>

Second, the Ninth Circuit reversed the district court's summary judgment granted to the CIA on the issue of whether homosexual conduct but not heterosexual conduct is considered a negative factor in granting security clearances.<sup>21</sup> The court rejected the CIA contention that judicial scrutiny would be "excessively intrusive into the affairs of the CIA"<sup>22</sup> if the alleged violations of the defendant's constitutional rights were subject to

---

13. *Id.* at 1117-18.

14. *Dubbs v. Central Intelligence Agency*, 866 F.2d 1114, 1118 (9th Cir. 1989).

15. *Id.* at 1118-19.

16. *Id.* at 1119.

17. *Id.* at 1116.

18. *Id.* at 1118.

19. *Dubbs*, 866 F.2d at 1118-19.

20. *Id.* at 1119.

21. *Id.* at 1120.

22. *Id.*

review by the courts.<sup>23</sup>

The primary authority relied on by the court was *Webster v. Doe*,<sup>24</sup> which factually and legally resembles the Dubbs case. In *Webster*, an ex-CIA employee sued the CIA claiming that he was fired solely on the basis of his sexual orientation.<sup>25</sup> The CIA contended that the implementing statute, the National Security Act,<sup>26</sup> precluded consideration of colorable constitutional claims arising out of an alleged abridgement of an employee's civil rights.<sup>27</sup> The CIA argued that "judicial review even of constitutional claims will entail extensive 'rummaging around' in the Agency's affairs to the detriment of national security."<sup>28</sup> This argument was dismissed by the Supreme Court, which found that lower courts have "the latitude to control any discovery process which may be instituted so as to balance [a plaintiff's] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission."<sup>29</sup>

Third, the Ninth Circuit reviewed Dubbs' claim that the CIA acted in an "arbitrary and capricious" manner in denying her a security clearance based on her sexual preference.<sup>30</sup> The appeals court affirmed the district court's "apparent ruling that the CIA's denial of a security clearance was not reviewable under the 'arbitrary and capricious' standard [of the APA]."<sup>31</sup> Again, the court held the Supreme Court's decision in *Webster* as controlling.<sup>32</sup> In *Webster*, the Supreme Court held that CIA employment termination, although reviewable under the constitution, is not reviewable under the APA.<sup>33</sup>

---

23. *Id.*

24. *Webster v. Doe*, 108 S. Ct. 2047 (1988).

25. *Id.*

26. National Security Act, § 102(c), 50 U.S.C. § 403(c) (1982) as amended, provides that: "[t]he Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States. . . ."

27. *Webster v. Doe*, 108 S. Ct. at 2048.

28. *Id.* at 2054.

29. *Id.*, citing *Kerr v. United States District Court*, 426 U.S. 394 (1976) (holding that in camera review of prisoners' records was appropriate for discovery).

30. *Dubbs*, 866 F.2d at 1120.

31. *Id.*

32. *Id.* at 1121.

33. *Id.*

## IV. CONCLUSION

The Ninth Circuit concluded that the CIA's denial of a security clearance to an avowed homosexual was judicially reviewable.<sup>34</sup> This holding was consistent with the recent Supreme Court decision, *Webster*.<sup>35</sup> In applying *Webster* to the case at bar, the Ninth Circuit indicated that the CIA may not shield itself from judicial scrutiny in a case concerning alleged constitutional infraction of an employee's civil rights.<sup>36</sup> However, the court also held that the CIA is not subject to judicial review under the APA's "arbitrary and capricious" standard.<sup>37</sup>

This case is once again before a lower court.<sup>38</sup> The plaintiff has been allowed to pursue her allegations that the CIA's policies in granting and denying security clearances violate the constitutional rights of a homosexual employee.<sup>39</sup>

*Tatiana Roodkowsky\**

---

34. *Dubbs v. Central Intelligence Agency*, 866 F.2d 1114, 1118 (9th Cir. 1989).

35. *Id.*

36. *Id.*

37. *Id.* at 1121.

38. *Id.* at 1121.

39. *Id.* at 1119.

\* Golden Gate University School of Law, Class of 1990.