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Reply to: Florida

June 30, 2017

VIA E-MAIL ONLY
Major General Eric J. Wesley
Commanding Officer, Fort Benning
1 Karker Street, McGinnis-Wickam Hall,
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Eric.J.Wesley.mil@mail.mil

RE: Religious accommodation exemptions from DTM 16-005 "transgender" mandates

Dear Major General Wesley:

By way of brief introduction, Liberty Counsel is a litigation, education, and public policy organization with an emphasis on First Amendment liberties. We have offices in Florida, Virginia, and Washington, D.C., and hundreds of affiliated attorneys across the nation.

Liberty Counsel has been recently contacted by a number of Army officers, enlisted personnel and civilian employees within the Fort Benning chain-of-command regarding the mandate of the June 30, 2016 Department of Defense ("DOD") Directive-type Memorandum ("DTM") 16-005, "Military Service of Transgender Service members," directing they complete by July 1, 2017 "transgender" "training" and implement "guidance." The training and its implementation violate their sincerely-held religious beliefs. Some have requested or are in the process of requesting reasonable accommodation from being subjected to the requirements of the training and its implementation. The problems associated with the Directive led to a justifiable belief among many that the Directive would be rescinded by Secretary of Defense James Mattis well in advance of the July 1, 2017 deadline. Yesterday during the debate over the Defense Authorization Act, Members of Congress, including those with military service, criticized the Directive and called upon Secretary Mattis to stop the implementation of the Directive.

Pending rescission of the Directive, Liberty Counsel hereby requests on behalf of these constituents at Fort Benning that you direct command compliance with the Religious Freedom Restoration Act (RFRA), and with DOD Instruction DoDI 1300.17, which provides personnel an avenue for religious accommodation and exemption from compliance with transgender directives

which violate their conscience or religious beliefs. The accommodation of these Soldiers’ beliefs by means of exemption will have no effect on the accomplishment of the Army’s actual mission.

The Soldiers and civilians who have contacted Liberty Counsel subscribe to Christian belief as set forth in the Bible, that God created humans male and female; that sex is innate, and unchangeable; and that their faith prohibits them from seeing or being seen in a state of undress, and from sleeping, showering or performing private bodily functions with members of the opposite sex who are not their spouse. These Soldiers are also aware and subscribe to the belief that science confirms the biblical account: there are over 6,500 unique differences between males and females,[1] beyond the xy and xx chromosome differences that are embedded in male and female DNA. These differences are encoded genetically and manifested physiologically before birth, and remain throughout life. Physiological differences between males and females are recognized by differential physical training and fitness standards set forth by DOD and the armed services. Traditionally, DOD policy has respected basic American cultural, religious and scientific beliefs that govern societal relationships and interactions between the sexes.

Liberty Counsel is further aware that some commanding officers have dismissed the sincerely-held religious beliefs of these Soldiers, and are not facilitating the approval of religious accommodations on these issues.

With all respect, the military is not free to ignore the religious free exercise rights of service members, and it is arguable as to whether the “transgender” Directive is even a “lawful order.” A “lawful order” “must relate to military duty, which includes **all activities reasonably necessary to accomplish a military mission**, or **safeguard or promote the morale**, **discipline**, **and usefulness of members of a command** and **directly connected with the maintenance of good order in the service**,” *Manual for Courts–Martial, United States* pt. IV, para. 14.c.(2)(a)(iv) (*MCM*). The Directive appears to violate all of these attributes of a lawful order. None of the activities it requires are “reasonably necessary” to accomplish a military mission – they actually interfere with the Army’s mission “to fight and win our Nation's wars by providing prompt, sustained land dominance across the full range of military operations and spectrum of conflict in support of combatant commanders.” The Directive further *destroys* morale, discipline, and usefulness of members of a command, by violating the religious and sexual privacy rights of Soldiers. The Directive discards the maintenance of good order in the service.

If the Directive is lawful, because “[a]n order is presumed to be lawful,” *United States v. Ranney*, 67 M.J. 297, 301–02 (C.A.A.F.2009) (citation omitted) (internal quotation marks omitted), *overruled by United States v. Phillips*, 74 M.J. 20, 22–23 (C.A.A.F.2015), and “the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order,” *MCM* pt. IV, para. 14.c.(2)(a)(iv), then personnel are still entitled to seek an accommodation from the requirements of the Directive.

The Army here must grant such religious accommodation, and bears a heavy burden to justify a refusal under the Religious Freedom Restoration Act (“RFRA”), as well as under DoD Instruction

1 *The landscape of sex-differential transcriptome and its consequent selection in human adults*, Gershoni and Pietrokovski, *BMC Biology* (2017) 15:7; DOI 10.1186/s12915-017-0352-z

1300.17.

RFRA provides that the “Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.” 42 U.S.C. § 2000bb–1(a). As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), “ ‘exercise of religion’ ” is broadly defined as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000bb–2 (4) (cross-referencing “exercise of religion” as defined in RLUIPA, 42 U.S.C. § 2000cc–5(7)(A)). “RFRA applies to the military.” *United States v. Sterling*, 75 M.J. 407, 414–15 (C.A.A.F. 2016), *cert. denied*, No. 16-814, 2017 WL 2407485 (U.S. June 5, 2017).

A RFRA inquiry is triggered by a “religious exercise.” RFRA defines “ ‘religious exercise’ ” as “any exercise of religion, *whether or not compelled by, or central to, a system of religious belief*.” 42 U.S.C. § 2000bb–2(4) (emphasis added) (cross-referencing 42 U.S.C. § 2000cc–5(7)(A)). A “ ‘religious exercise’ ” under RFRA “involves ‘not only belief and profession but the performance of (or abstention from) physical acts' that are ‘engaged in for religious reasons.’ ” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2770, (2014) (quoting *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)). Service members who believe in the biological nature of sex cannot address “transgender” persons by false gender pronouns or titles. Service members have a reasonable expectation of privacy from unwanted exposure to members of the opposite sex in barracks, showers, and bathrooms. There are no “female Soldiers with male genitalia” regardless of an arbitrary “gender marker change” in “DEERS.” Military medical providers with conscientious or religious objections to referring unnecessary and harmful surgery for gender-confused Soldiers have the right to opt out of doing so. Opt-outs must further be given to Soldiers who cannot conscientiously lie to subordinates about the nature of sex and gender during or after “training,” or use fake, agenda-laden labels foisted upon them by the Directive.

A service member establishes a prima facie RFRA case by showing by a preponderance of the evidence that the government action (1) substantially burdens (2) a religious belief (3) that the member sincerely holds. *See*, *e.g.*, *Holt v. Hobbs*, 135 S.Ct. 853, 862, (2015); *United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir.2007); *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir.2001). If the RFRA claimant establishes a prima facie case, the burden shifts to the government to show that its actions were “**the least restrictive means of furthering a compelling governmental interest**.” *United States v. Quaintance*, 608 F.3d 717, 719–20 (10th Cir.2010). (Emphasis added). Courts agree that a substantial burden exists where a government action places “ ‘substantial pressure on an adherent to modify his behavior and to violate his beliefs.’ ” *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C.Cir.2008).

The burden established by the Directive, its “training” and the implementation here is “substantial.” Reports from those who have taken the training indicate that the required online training requires individuals to accept as true numerous false statements about the nature of sex, gender, biology and morality. Instead of the previous long-standing policies and practices founded in common cultural norms based on the understanding that words like “male” and “female” refer to actual males and females consistent with biological sex, the “training” purports to require the following policies:

1. Approving medically-unnecessary surgeries and harmful and unproven hormone replacement, despite such violating officers’ consciences and religious beliefs (and medical officers’ oath to “do no harm”);
2. Addressing gender-confused Soldiers “identifying” as the opposite sex by false gender pronouns and false gender titles (e.g., he, him, his; she, her, hers; “Sir” or “Ma’am”);
3. Requiring female Soldiers (and vice versa) to sleep, shower and perform private bodily functions in the presence of members of the opposite biological sex.
4. Forcing female Soldiers to observe the male genitals (and vice versa) of “transgender” Soldiers providing urine samples, contrary to previous policy of same-sex observation only as required under DoD Instruction (DoDI) 1010.16, implementing the Military Personnel Drug Abuse Testing Program (MPDATP): "[s]pecimens are collected under the direct observation of a designated individual of the same **sex** as the Service member providing the specimen." (Emphasis added).
5. Breaking down good order and discipline by permitting “transgender” Soldiers to engage in public cross-dressing while off-duty.
6. Requiring compliance with ludicrous fictions like “pregnant male Soldiers” or “female Soldier prostate exams.”

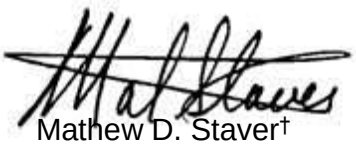
The Directive requires that Soldiers must comply with these policies, and commanding officers must enforce that compliance – without regard to the conscience or religious beliefs of officers, enlisted, or civilian employees. Commanding officers tasked with training Soldiers are particularly hard-hit, as they must affirm objective lies as “true,” in the face of common biological knowledge.

The Directive thus not only fails to take into account RFRA, but also DOD Instruction (“DoDI”) 1300.17, which states that “**Requests for religious accommodation will be resolved in a timely manner** and **will** be approved when accommodation would not adversely affect mission accomplishment, **including military readiness, unit cohesion, good order, discipline, health and safety, or any other military requirement**.” (Emphasis added). As stated in DoDI 1300.17 4e2, “Only if it is determined that the needs of mission accomplishment outweigh the needs of the Service member may the request be denied.” Per DoDI 1300.17 4d, “In so far as practicable, **a Service member’s expression of sincerely held beliefs (conscience, moral principles, or religious beliefs) may not be used as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment**.” Here, the mission of the Army is “to fight and win our Nation's wars by providing prompt, sustained land dominance across the full range of military operations and spectrum of conflict in support of combatant commanders.” Perversely, the transgender directives substantially interfere with the Army’s mission, are contrary to good order and discipline, undermine morale of male and female Soldiers, and violate the religious beliefs of many of the Nation’s best warfighters.

Biological sex is an immutable characteristic. The Directive’s “training” requires Soldiers and civilians to affirm their agreement with numerous false ideas with fake “definitions” invented by LGBT radicals intent on normalizing behavior that is the result of gender confusion or a sexual fetish. The online training requires personnel to affirm statements which they know are objectively false. This is inconsistent with their religious beliefs, but also with Army values such as integrity and courage, and commitment to truth itself.

Therefore, we hereby request on behalf of Liberty Counsel’s constituents at Fort Benning that you direct compliance with the Religious Freedom Restoration Act, and with DOD Instruction. DoDI 1300.17 provides personnel an avenue for religious accommodation and exemption from compliance with transgender directives which violate their conscience or religious beliefs. The accommodation of these Soldiers’ and civilians’ beliefs by means of exemption will have no effect on the accomplishment of the Army’s actual mission.

Sincerely,



Mathew D. Staver†

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VIA U.S. Mail

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