IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1162
Summary Calendar

HEIDI DE JESUS LOPEZ,

Plaintiff-Appellant,

VERSUS

MICHAEL B. DONLEY,
Secretary of the Air Force, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
3:92 CV 2629 D

June 7, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

I.

Heidi de Jesus Lopez ("de Jesus"), a first lieutenant in the United States Air Force, brought the instant action to enjoin the Air Force from conducting administrative pre-discharge proceedings. Her commander had notified her that he was initiating discharge proceedings against her for engaging in homosexual acts

[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

with an enlisted subordinate, for being bisexual, and for maintaining an unprofessional relationship with the enlisted subordinate in violation of the Air Force's policy on fraternization and professional relationships. As explained in a Memorandum Opinion and Order entered February 22, 1993, the district court denied the requested injunction.

After filing her notice of appeal pursuant to 28 U.S.C. § 1292(a)(1), de Jesus filed with this court a motion for injunction pending appeal; an administrative panel of this court denied that motion. Two Justices of the Supreme Court thereafter denied de Jesus's application for injunction pending appeal.

Thereafter, an Air Force Board of Inquiry ("BOI") held a hearing on March 4-5, 1993, on the matter of whether de Jesus should be discharged. The BOI did not find that de Jesus had admitted to being bisexual, but it did find that she had engaged in "homosexual acts with A1C Laura V. Little, an enlisted member who was her military subordinate," and that she did not qualify for the limited exception that would allow her to be retained. The BOI also found that de Jesus had "maintain[ed] an unprofessional relationship" with Little in violation of Air Force regulations.

The BOI recommended, accordingly, that de Jesus be given a general discharge. The next step appears to be that de Jesus's case is subject to review by a Board of Review and, ultimately, by the Secretary of the Air Force.

II.

We affirm essentially for the reasons set forth by the district court. That court held

> that the Air Force's initiation of discharge proceedings against Lt. De Jesus does not constitute final agency action and that judicial review is therefore premature. The actions taken thus far by the Air Force do not constitute a definitive position with any conclusive legal effect on Lt. De Jesus' position with the Air Force, nor do they determine any of her rights or obligations. The Air Force has made no determination regarding Lt. De Jesus' discharge, and before it may do so, it must complete . . . additional proceedings . . . . Accordingly, the Air Force's action is not final and not now subject to judicial review. [Citations omitted.]

De Jesus, however, argues that she "does not ask the court to hold unconstitutional the result of the administrative process, but rather the convening authority of the administrative process." De Jesus asserts that she cannot be discharged on account of homosexuality or bisexuality and that, therefore, she cannot be subjected to charges of the same.

We agree that this matter is not ripe for review, for there is no final agency action. See Taylor-Callahan-Coleman Counties Dist. Probation Dep't v. Dole, 948 F.2d 953, 958-59 (5th Cir. 1991) (requiring "deliberative determination of agency's position at highest available level" for judicial review to be appropriate). Moreover, de Jesus has not exhausted her administrative remedies. We have "firmly adhered to the rule that a plaintiff challenging an administrative military discharge will find the doors of the federal courthouse closed pending exhaustion of available administrative remedies." Hodges v. Callaway,

499 F.2d 417, 420 (5th Cir. 1974) (citations omitted) (case raising constitutional issues). Otherwise, the district court is without jurisdiction to entertain de Jesus's claims. See Von Hoffburg v. Alexander, 615 F.2d 633, 641 n.15 (5th Cir. 1980).

In Von Hoffburg, an allegedly homosexual member of the army sought a preliminary injunction to prevent her discharge, claiming, as de Jesus does, constitutional violations. We upheld the district court's dismissal of the claim for failure to exhaust, holding that "strict application of the exhaustion doctrine in military discharge cases serves to maintain the balance between military authority and the power of federal courts" by permitting final agency action to occur before judicial review. Id. at 637.

Also in regard to de Jesus's constitutional claims, we have no way of knowing, at this stage, whether de Jesus will be discharged or, if so, whether any such discharge would be on the ground of homosexuality or, instead, merely because of prohibited fraternization with a subordinate. We also are reminded that the instant appeal is not on the merits but is only an appeal from the denial of a preliminary injunction. Because of the incomplete nature of the administrative proceedings, the district court plainly did not abuse its discretion in denying relief.

The order of the district court is AFFIRMED. We express no view as to the underlying merits of de Jesus's claim.