

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

RICHARD ROE; VICTOR VOE; and )  
OUTSERVE-SDLN, INC., )  
 )  
Plaintiffs, )  
 )  
v. )

PATRICK M. SHANAHAN, in his official )  
capacity as Acting Secretary of Defense; )  
HEATHER A. WILSON, in her official )  
capacity as Secretary of the Air Force; and )  
the UNITED STATES DEPARTMENT OF )  
DEFENSE, )  
 )  
Defendants. )

No. 1:18-cv-1565-LMB-IDD

**MEMORANDUM IN SUPPORT OF DEFENDANTS’  
UNOPPOSED MOTION TO MODIFY PRELIMINARY INJUNCTION**

On February 15, 2019, the Court issued Memorandum Opinion, ECF No. 72, and Order, ECF No. 73, granting in part Plaintiffs’ Motion for a Preliminary Injunction, ECF No. 33. The Court:

ORDERED, ADJUDGED, and DECREED that defendants be and are ENJOINED from separating or discharging from military service Richard Roe, Victor Voe, and any other similarly situated active-duty member of the Air Force because they are classified as ineligible for worldwide deployment or deployment to the United States Central Command (“CENTCOM”) area due to their HIV-positive status.

ECF No. 73 (“February 15 Order”). Defendants now move to modify the February 15 Order to accommodate HIV-positive active duty Airmen who wish to proceed with separation from the Air Force. Plaintiffs do not oppose this motion.

**BACKGROUND**

The Air Force complied with the Court’s February 15 Order by rescinding the discharge orders for any active duty HIV-positive Airman who had received a separation determination from

the Disability Evaluation System (“DES”) based on the finding that the Airman was ineligible for worldwide deployment or deployment to the United States Central Command (“CENTCOM”) area due to their HIV-positive status. Declaration of Col. Damon Menendez (“Menendez Decl.”) ¶ 4. For administrative efficiency, the Air Force also placed all pending DES cases initiated by an HIV diagnosis in abeyance for the pendency of this litigation. *Id.* ¶ 5. The Air Force Personnel Center immediately notified all the Airmen effected by the preliminary injunctive relief of their change of status. *Id.* ¶ 6.

Some HIV-positive Airmen who are similarly-situated to Plaintiffs Richard Roe and Victor Voe have asked the Air Force to continue with their separations. At least five active-duty HIV-positive Airmen have informed the Air Force that they wish to be discharged after receiving determinations from the DES for substantially the same reasons as Roe and Voe. *See* Menendez Decl. ¶ 11, Exs. A-C. A sixth HIV-positive Airman has his case held in abeyance by the DES, and he would like to continue his proceedings so that he can be discharged if the DES makes a separation recommendation. *Id.*, Ex. D.

When an Airman expressed his wish to be excluded from the February 15 Order, the Air Force Personnel Center offered him an attorney from the Office of Airmen’s Counsel, so that he could understand the legal consequences of his decision.<sup>1</sup> Menendez Decl. ¶ 8. Four of the airmen have provided a written statement in support of their desire to separate or continue DES processing. *Id.*, Exs. A-C. A fifth and sixth Airman, A1C B.G. and SSgt. J.B., have expressed their desire to separate to Col. Menendez of the Air Force Personnel Center. *Id.* ¶ 11.

The Defendants respectfully request that the Court modify the February 15 Order to accommodate the wishes of these Airmen.

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<sup>1</sup> Three of the Airmen accepted counsel, the rest elected to proceed unrepresented. *See* Menendez Decl., ¶ 11, Exs. A-E

### **APPLICABLE LEGAL STANDARDS**

This Court has “both statutory and equitable authority to modify” injunctive relief. *Transp. Inc. v. Mayflower Servs., Inc.*, 769 F.2d 952, 954 (4th Cir. 1985). “The Court may modify the injunction if Defendants, as the moving party, can demonstrate a significant change in factual circumstances that renders the continued enforcement of the original injunction inequitable.” *Inst. for Justice v. Media Grp. of Am., LLC*, No. 1:15-CV-1410, 2016 WL 8230638, at \*1 (E.D. Va. Feb. 2, 2016) (citing *Horne v. Flores*, 557 U.S. 433, 447 (2009); *United States v. Snapp*, 897 F.2d 138, 141 (4th Cir. 1990)). “A motion to modify a preliminary injunction is meant only to relieve inequities that arise after the original order,” *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 60 F.3d 823 (4th Cir. 1995).

### **ARGUMENT**

Defendants move to modify the preliminary injunction to relieve an inequity that has arisen as the result of the February 15 Order: the prohibition of disability separation for HIV-positive active-duty Airmen who wish to separate but cannot as a result of the preliminary injunction.

The Air Force has been notified by six Airmen subject to the Court’s preliminary injunction who wish to receive a medical discharge and separate from the military. Of these, five are not parties or involved in this litigation in any way. The sixth, SSgt J.B., was identified in a declaration submitted by Plaintiff OutServe in support of its standing.<sup>2</sup>

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<sup>2</sup> SSgt J.B. was initially disclosed by Plaintiffs as a witness in support of their case and identified in Mr. Peter Perkowski’s declaration filed in support of Plaintiffs’ motion for preliminary injunction. *See* Declaration of Peter Perkowski ¶¶ 23-27, ECF No. 40. Plaintiffs subsequently informed Defendants that they would not rely on SSgt. J.B. In conferring on this motion, Defendants have asked Mr. Perkowski, an attorney employed by OutServe, at least three separate times whether he or OutServe continue to provide SSgt J.B. legal representation. Mr. Perkowski has not confirmed or denied whether he or OutServe is providing representation to SSgt J.B.

It is not uncommon for a service member undergoing DES review to want to separate and be relieved of a lengthy enlistment obligation following an initial discharge decision. In fact, of the five Airmen identified in this motion as wishing to move ahead with separation, four, A1C J.H., A1C E.R., SrA D.R., and A1C B.G., accepted the discharge decision from the Informal Physical Evaluation Board, and did not appeal that initial decision at all. Menendez Decl. ¶ 11. The fifth Airman, SSgt J.B., who appealed his discharge decision through the Secretary of the Air Force Personnel Council, decided to accept his discharge decision after the injunction briefing and hearing were complete in this case. *Id.* The sixth airman, SrA K.P., is awaiting the adjudication of the Informal Evaluation Board. *Id.*

These Airmen do not want the relief requested by Roe and Voe. The February 15 Order disrupted their plans. Now they find themselves in limbo for the pendency of the litigation unless the Court modifies the injunction. A1C E.R. plans to pursue higher education, and his inability to separate is delaying his education plans. Menendez Decl. ¶ 11, Ex. B. A1C J.H., who is deployed to Japan, had already shipped his household goods back to his home in the United States and was in the process of relocating, when the Court issued the February 15 Order that caused his separation date to be rescinded. *Id.*, Ex. A. SrA D.R. had downsized his belongings and packed his car in preparation to leave his base and return to his home of record when he received notification of the injunction barring his departure. *Id.*, C. A1C B.G. simply wishes to get on with his post-military life as quickly as possible. *Id.* SrA K.P., whose DES case is currently held in abeyance, wants to know if he will be found fit so that he can continue his military career or alternately have the opportunity to separate if he is found unfit for continued service. *Id.*, Ex. D. It is an inequitable outcome to force these HIV-positive Airmen to continue to serve, contrary to their plans and personal desire.

Likewise, it is also inequitable to force these Airmen to wait through the pendency of this litigation to proceed with their separations. SSgt. J.B. and SrA D.R.'s separation dates were originally scheduled on February 25, 2019. *Id.* ¶ 11. A1C J.H., A1C E.R., A1C B.G.'s separation dates were originally scheduled for March 28, 2019. *Id.* In an effort to minimize the disruption caused by the February 15 Order, the Air Force Personnel Center has been able to offer the Airmen limited relief by giving them the option to remain on active duty in an unpaid leave status. *Id.* ¶ 9. This status can facilitate the Airmen's planned relocations, while allowing the Air Force to remain in compliance with the injunction. *Id.* But this solution is of limited value at best, as the Airmen remain subject to recall. *Id.* While on active duty, even in unpaid leave status, the Airmen cannot pursue outside professional full-time employment. They also cannot receive any of their separation, retirement, or disability benefits, and they may experience difficulty accessing their educational benefits. *Id.*

The only other option to allow these Airmen to transition to civilian life is for the Airmen to request, and the Air Force grant, a voluntary discharge. *Id.* ¶ 10. This option is not adequate, however, because an Airman receiving a voluntary discharge would lose significant benefits—their Veterans' Affairs medical benefits, educational benefits, and in some cases, severance and disability pay—that they would receive through a medical discharge through the DES. *Id.*

Defendants respectfully request that the Court modify the February 15 Order to permit these six Airmen, as well as any Airman affected by the preliminary injunction who wishes to separate, to receive a medical discharge. The parties have agreed that the following proposed modification (in underline) to the February 15 Order will allow the Air Force enough flexibility to accommodate the wishes of HIV-positive Airmen who wish to separate:

ORDERED, ADJUDGED, and DECREED that defendants be and are ENJOINED from separating or discharging from military service Richard Roe,

Victor Voe, and any other similarly situated active-duty member of the Air Force because they are classified as ineligible for worldwide deployment or deployment to the United States Central Command (“CENTCOM”) area due to their HIV-positive status. If an Airman wishes to be excepted from this Order and be separated or discharged, the Air Force shall provide them a written notice that their consent to separation is not required and that a federal lawsuit may result in his or her retention. After receiving such a notice, the Airman may make a written request to proceed with his or her separation or discharge, and then the Air Force may proceed with the separation or discharge.

ECF No. 73 (“February 15 Order”). The limited modification to the preliminary injunction that Defendants request will ameliorate any harm that may arise from the injunction to Airmen who wish to separate from the Air Force with a medical discharge.

### CONCLUSION

For these reasons, Defendants respectfully request that the Court grant their Motion to Modify the Preliminary Injunction and modify its February 15 Order accordingly.

DATE: April 5, 2019

Respectfully submitted,

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/s/

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Defendants. )

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**DECLARATION OF COLONEL DAMON MENENDEZ IN SUPPORT OF MOTION TO  
MODIFY PRELIMINARY INJUNCTION**

1. My name is Colonel Damon Menendez. I am the Deputy Director of Airman and Family Care, assigned to the Air Force Personnel Center, Joint-Base San Antonio, Texas. I have held this position since July 2016. In this capacity, I am responsible for oversight of the Air Force’s Physical Evaluation Boards, which operate as the retention evaluation authority on behalf of the Secretary of the Air Force in support of the Disability Evaluation System. My duties also include the following: the Air Force’s Wounded Warrior Casualty, Airman and Family Readiness, and Medical Continuation orders programs.

2. Counsel from the Air Force’s General Litigation Division made me aware of this lawsuit while in the exercise of my official duties.

3. I submit this declaration in support of Defendants’ Motion to Modify the Preliminary Injunction. I base this declaration on my personal knowledge, my background, training and

experience, and on my review and consideration of information available to me in the performance of my duties, including information furnished by Department of Defense military and civilian personnel in the course of their official duties.

4. After the Court issued its order on February 15, 2019, the Air Force Personnel Center took immediate steps to ensure no actively serving Air Force members with HIV were separated through the Disability Evaluation System on the basis of non-deployability resulting from the HIV diagnosis. To comply with the court's order, the Air Force Personnel Center rescinded all pending discharge orders for all Airmen ordered to be separated or retired through the Disability Evaluation System as a result of non-deployability related to HIV infection.

5. The Air Force also decided to voluntarily hold all ongoing Disability Evaluation System cases involving Airmen living with HIV in abeyance. Airmen who receive a new HIV diagnosis while this case is pending will continue to be referred for evaluation by the Medical Retention Standards office, after which they may be returned to duty with an assignment limitation code or be referred for evaluation by a Medical Evaluation Board. But, newly diagnosed Airmen will not be further processed through the Disability Evaluation System unless they request that their cases proceed. This process allows the Air Force to return service members to duty when it can and to administratively track the cases of other members through the Disability Evaluation System while this litigation is ongoing. The Air Force may reevaluate the logistical management of the Disability Evaluation System cases for the members affected by the injunction based upon the needs of the Air Force.

6. During the process of implementing the Court's injunction, the Air Force Personnel Center notified all injunction-affected Airmen of their discharge order rescission; or, for those Airmen with cases still being reviewed, to ensure awareness that their Disability Evaluation

System process would be held in abeyance. Five of the Airmen who were notified their discharge orders were rescinded expressed a preference to separate from the Air Force as planned. In addition, one Airman, whose case had not been finalized through the Disability Evaluation System, expressed a preference to continue processing so that he can separate if he is found unfit for continued service. It is possible that other Airmen whose cases are being held in abeyance are still considering the ramifications of the injunction on their options. Additionally, some Airmen whose cases are newly referred to the Disability Evaluation System may prefer to have their cases continue to a final decision as soon as possible.

7. At the time the injunction issued, there were 11 Airmen with discharge orders which were rescinded in response to the Court's order. There were also 11 Airmen in various stages of the Disability Evaluation System whose cases are now being held in abeyance.

8. All affected Airmen were offered the opportunity to consult with attorneys assigned to the Office of Airmen's Counsel, which provides independent legal representation to Airmen undergoing evaluation through the Disability Evaluation System. Three of the five Airmen who expressed a preference to separate consulted with attorneys, while two declined representation after being informed counsel was available to them. Additionally, the one Airman whose case adjudication was not complete elected not to consult with the Office of Airmen's Counsel after being informed counsel was available to him.

9. The Air Force Personnel Center continues to make every effort to work with Airmen whose desired transition to civilian life was interrupted by the injunction in coordination with their respective commanders, while remaining in full compliance with the injunction. The Air

Force Personnel Center, in coordination with their respective commander, provided each Airman requesting injunction relief two options (1) to remain in place, or (2) to relocate to their home of record or home of selection while awaiting adjudication of this motion. Those Airmen who remain in place will remain in active duty status, report to work, and receive all appropriate benefits. Those Airmen electing to relocate to their home will remain on active status but will be placed in an unpaid leave duty status. This status will allow the Air Force to remain in compliance with the injunction while facilitating the Airman's desire to proceed with their respective relocation plans while awaiting the Court's decision on this motion. However, Airmen in unpaid leave status cannot fully transition from service. Because these Airmen remain on active status, they are subject to recall. These Airmen cannot receive separation or retirement benefits, and they will be unable to transition their medical care from the Department of Defense to the Department of Veterans' Affairs. They may also experience delays in fully accessing their Department of Veterans' Affairs educational benefits without the appropriate discharge paperwork.

10. Under Attachment 9 to Air Force Instruction 44-178, the Airmen discussed in this declaration have the option to request separation under the plenary authority of the Secretary of the Air Force. While this option would allow the Airmen to separate, it would result in a voluntary discharge rather than the medical discharge that they are entitled to under the Disability Evaluation System. Accepting a voluntary discharge would deprive some Airmen of medical retirement pay, and would deny others of a disability severance payment to which they are entitled. Neither the Air Force nor the effected Airmen wish to effect the separation using the voluntary discharge mechanism in Attachment 9 to Air Force Instruction 44-178.

11. The following six Airmen have stated their preference to separate:

a. SSgt J.B. is an active duty Airman assigned to an Air Force Base in Oklahoma. On November 7, 2018, the Secretary of the Air Force Personnel Council found him unfit for continued military service. Before the injunction issued, J.B. was scheduled to be temporarily retired on February 25, 2019. J.B. told the Air Force Personnel Center that he wishes to be separated.

b. A1C J.H. is an active duty Airman currently assigned to an Air Force Base in Japan. On January 18, 2019 the Informal Physical Evaluation Board found him unfit for continued military service and recommended permanent retirement. He opted not to appeal the decision and accepted retirement. Prior to the injunction, he was scheduled to retire on March 28, 2019. In anticipation of his transition, he shipped his household goods and was scheduled to depart Japan for his home of record during the first week of March. He indicated he prefers to continue with the process of relocating back to the United States from Japan. A written statement from A1C J.H. is attached to this declaration as Exhibit A.

c. A1C E.R. is an active duty Airman currently assigned to an Air Force Base in Alabama. On December 11, 2018 the Informal Physical Evaluation Board found him unfit for continued military service. He opted not to appeal the decision and transition to the temporary retirement list, effective March 28, 2019. He indicated he prefers to retire so he may relocate to start his post military life. According to his commander, the Airman is exceptionally gifted and expressed an intent to pursue higher education following his transition from service. A written statement from A1C E.R. is attached to this declaration as Exhibit B.

d. SrA D.R. is an active duty Airman currently assigned to an Air Force Base in Arkansas. On November 29, 2018, the Informal Physical Evaluation Board found him unfit for continued military service due to deployment restrictions related to HIV diagnosis. He opted not

to appeal the decision and his discharge with severance was scheduled for February 25, 2019. In anticipation of his transition, he downsized his belongings and packed everything he owned into his car. He was out-processing from his current base of assignment and planned to drive to his home of record on the day the Air Force was notified of the injunction. He indicated he prefers to separate and continue with his relocation and military transition plans. A written statement from SrA D.R. is attached to this declaration as Exhibit C.

e. AIC B.G. is an active duty Airman currently assigned to an Air Force Base in Alabama. On December 6, 2018 the Informal Physical Evaluation Board found him unfit for continued military service. He opted not to appeal the decision and his discharge with severance was scheduled for March 28, 2019. He has indicated that he prefers to separate and begin his post-military life as quickly as possible.

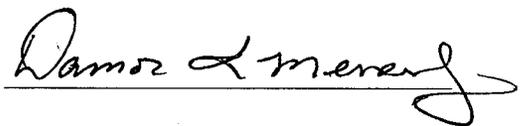
f. SrA K.P. is an active duty Airman currently assigned to an Air Force Base in Alaska. Adjudication of his disability evaluation case was incomplete as of the date of the injunction. The Informal Physical Evaluation Board is currently holding his case in abeyance. SrA K.P. wishes to have his case proceed through the Disability Evaluation System so he can expeditiously separate from the Air Force if he is found unfit for continued service. Regardless of the outcome, Sr A K.P. does not want his case to be held in abeyance as a result of the injunction. A written statement from SrA K.P. is attached to this declaration as Exhibit D.

12. On behalf of the Air Force, I request that the Court's order be modified in order to allow these Airmen to separate or retire from the Air Force, or continue with Disability Evaluation System processing in accordance with their wishes. The Air Force also requests that the

injunction be modified to allow other similarly situated HIV-infected Airmen who voluntarily express their wish to separate to do so.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 4th of April, 2019.

A handwritten signature in black ink, appearing to read "Damon Menendez", written over a horizontal line.

Colonel Damon Menendez