

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

RICHARD ROE, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	1:18-cv-1565 (LMB/IDD)
PATRICK M. SHANAHAN, in his)	
official capacity as Acting)	
Secretary of Defense, <u>et al.</u> ,)	
)	
Defendants.)	

ORDER

On February 15, 2019, the Court issued a preliminary injunction barring defendants “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” [Dkt. No. 73]. In the accompanying Memorandum Opinion [Dkt. No. 72], the Court explained that any relief granted must be no broader than necessary to redress the imminent, irreparable injuries for which plaintiffs have made a clear showing of a likelihood of success on the merits. Accordingly, the injunctive order did not address several conceptually distinct issues that were not adequately developed by the parties, including (i) the HIV-related policies of other military departments, (ii) the policies related to “HIV-positive servicemembers who are on restricted duty of one kind or another,” (iii) “the enlistment of HIV-positive individuals,” and (iv) “the reenlistment of HIV-positive servicemembers whose terms of service had expired.”

Plaintiff OutServe-SLDN, Inc. (“OutServe”) has moved to amend the preliminary injunction. OutServe claims that Q.S., a pseudonymous senior airman, faces separation from service on February 19, 2019 “on the basis of his HIV status and inability to deploy because of that status.” Memo. in Supp. of Pl. OutServe-SLDN’s Mot. to Amend Prelim. Inj. [Dkt. No. 75]

1. Because Q.S. is “not an active-duty Airman, but is instead a member of the Air National Guard” of an unnamed state, OutServe asks the Court to remove the adjective “active-duty” from its injunctive order. *Id.* at 1-2. Defendants have opposed OutServe’s motion to amend the injunction, and the Court finds that oral argument would not aid the decisional process.

Q.S. is not similarly situated to named plaintiffs Richard Roe and Victor Voe or to the other active-duty members of OutServe who have been ordered discharged because of HIV-related deployability restrictions. To begin, Q.S. is a member of the Air National Guard (“ANG”). Neither plaintiffs’ complaint nor their memoranda in support of their motion for a preliminary injunction made any effort whatsoever to address the policies governing HIV-positive members of the ANG. As defendants have pointed out, the National Guard is a separate institution, and the Court is left to speculate with respect to how the ANG’s policies might differ from the Air Force policies extensively addressed in the parties’ submissions. Further, at least as the record stands, OutServe has not provided adequate factual details about Q.S., his condition, or the decision he claims was unlawful. The declaration prepared by OutServe’s Legal & Policy Director states only that Q.S. “was ‘not selected for reenlistment’ because “his HIV status renders him non-deployable” [Dkt. No. 40]. OutServe did not attach any documents from Q.S.’s case or otherwise explain who made that decision based on what authority or facts. Finally, Q.S. does not face discharge or separation from service in the same way as Roe, Voe, and the four identically situated members of OutServe (K.R., S.H., D.N., and J.B.). Rather, the decision Q.S.

disputes is that he was “not selected for reenlistment.” Again, at least at this stage of the litigation, the parties have not squarely addressed the policies related to enlistment or reenlistment of active-duty or ANG members who are HIV positive.

Because OutServe has not presently demonstrated a factual and equitable entitlement to the relief it seeks, the Court may leave for another day the questions whether a non-active-duty ANG member is similarly situated to an active-duty member of the Air Force and whether the decision to preclude a servicemember from reenlisting based on HIV-related deployability restrictions is irrational or arbitrary. Accordingly, it is hereby

ORDERED that OutServe’s Motion to Amend Preliminary Injunction [Dkt. No. 74] be and is DENIED WITHOUT PREJUDICE.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 19th day of February, 2019.

Alexandria, Virginia

ls/ LMB

Leonie M. Brinkema
United States District Judge