

Background

Before his retirement in 2018, Colonel Danaher served as the Chief of the Provision of Medical Care Division of the Air Force Medical Operations Agency. Among other things, the office that Colonel Danaher led oversees the training, support, and use of the Air Force Surgeon General's medical consultants. *See* Air Force Mission Directive 35, *Air Force Medical Operations Agency*, ¶ 3.5.3 (Oct. 19, 2016).

Colonel Danaher's and his office's potential as a source of information concerning the Air Force policies has been plain since the beginning of this case. He and his office are listed as one of the two primary points of contact in Major General LaBrutta's memorandum concerning the retention of airmen with asymptomatic HIV. Ex. A (US00021284). That document was produced to Plaintiffs on December 28, 2018. During the discovery period, Plaintiffs were also provided copies of emails between Colonel Karen Downes, Colonel Danaher, and others regarding the Air Force HIV policies. Ex. B (US00031448), Ex. C (US00040166), Ex. D (US00040197), Ex. E (US00040215). During the discovery period, Plaintiffs also were provided copies of two redacted documents from Colonel Danaher.² Ex. F (US00040398); Ex. G (US00040401).

Besides the documents that were produced to Plaintiffs during the discovery period, Plaintiffs were put on notice of Colonel Danaher's involvement in the Air Force's policy process during the deposition of Lieutenant Colonel Jason Okulicz. Lieutenant Colonel Okulicz is the chief of the Infectious Disease Service at Brooke Army Medical Center, the director of the HIV Medical Evaluation Unit for the Air Force, and the infectious disease consultant to the Air Force Surgeon General. Ex. H, Deposition of Lieutenant Colonel Jason Okulicz (Okulicz Depo.) 14:5-14. Lieutenant Colonel Okulicz was deposed by Plaintiffs on March 20, 2019. Lieutenant Colonel

² Defendants intend to submit the unredacted version of these exhibits under seal by separate motion.

Okulicz identified Colonel Danaher as one of the two individuals with whom he spoke to concerning the Air Force's HIV policies. Okulicz Depo. 124:22-125:15.

Discovery closed on May 10, 2019. ECF Dkt. 32. The Court held a pretrial conference in this case on May 16, 2019, and trial is set to begin on September 9, 2019. ECF Dkt. 128.

Applicable Standards

In general, a scheduling order may be modified only for good cause and with the judge's consent. Fed. R. Civ. P. 16(b)(4). To establish good cause, "the party seeking relief [must] show that the deadlines cannot reasonably be met despite the diligence of the party needing an extension." *Vernon Constr., Inc. v. Highland Mortg. Co.*, 187 Fed. App'x. 264, 265 (4th Cir. 2006); *see also* 3 James Wm. Moore et al., *Moore's Federal Practice* § 16.14[1][a], at 16-75 (3d ed. 2016) (stating that "the party seeking an extension must show that, despite due diligence, it could not have reasonably met the scheduled deadlines."); Fed. R. Civ. P. 16 advisory committee's note, 1983 Amendment, Discussion, Subdivision (b) ("[T]he court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension.").

Further, "[e]ven assuming that this information is relevant (in the broadest sense), the simple fact that requested information is discoverable under Rule 26(a) does not mean that discovery must be had." *Nicholas v. Wyndham Int'l, Inc.*, 373 F.3d 537, 543 (4th Cir. 2004). Under the Federal Rules, a court may limit "the frequency or extent of use of the discovery methods otherwise permitted" if it concludes that "(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2).

Argument

Plaintiffs have not demonstrated good cause to take the deposition of Colonel Danaher after the close of discovery. While Plaintiffs rest their motion on the recent production of documents by Defendants, that production is not sufficient to show that they were diligent in pursuing Colonel Danaher's deposition. Moreover, Colonel Danaher's testimony is unreasonably cumulative and, therefore, not proportionate to the needs of the case.

I. Plaintiffs Have Not Been Diligent In Pursuing Colonel Danaher's Deposition.

Plaintiffs have failed to demonstrate diligence in seeking to depose Colonel Danaher. Plaintiffs could have—and should have—known about Colonel Danaher's involvement with the Air Force's HIV's policies long before Defendants' production of documents on June 3, 2019. Colonel Danaher was listed as one of the two points of contact in the Major General LaBrutta's memorandum, which Plaintiffs have been aware of since the beginning of this case. Ex. A (US00021284). And during the discovery period, Defendants provided Plaintiffs with copies of several emails between Colonel Danaher and others regarding the Air Force HIV policies. Ex. B (US00031448), Ex. C (US00040166), Ex. D (US00040197), Ex. E (US00040215). Further, if any question could have existed that Colonel Danaher was a potential witness, that question should have been answered when Defendants produced a redacted copy of a report identifying Colonel Danaher and Lieutenant Colonel Okulicz, as well as a redacted email from Colonel Danaher to Lieutenant Colonel Okulicz. Ex. F (US00040398); Ex. G (US00040401).

Despite the fact that these documents were produced during discovery, Plaintiffs made no effort to depose Colonel Danaher until after the close of discovery. Indeed, Plaintiffs made no effort to even explore Colonel Danaher's involvement with the Air Force's HIV's policies until now. For example, during his deposition, Lieutenant Colonel Okulicz identified Colonel Danaher as someone who he conferred with concerning the Air Force's HIV's policies. Okulicz Depo. 124:22-

125:15. Plaintiffs made no attempt to question Lieutenant Colonel Okulicz about his conversations with Colonel Danaher. And they did not ask Lieutenant Colonel Okulicz any questions at his deposition regarding the redacted documents even though Lieutenant Colonel Okulicz is the infectious disease consultant to the Air Force Surgeon General. Likewise, Ms. Martha Soper testified that the Air Force's surgeon general directorate, which includes Colonel Danaher's office, took part of the coordination of the policy memoranda. Ex. I, Deposition of Martha Soper (Soper Depo.) 237:13-238:3; 238:16-239:6. In fact, during all of discovery, Plaintiffs have not asked for any nor given any indication they wanted to depose anyone from the Air Force outside of those individuals Defendants had designated as the Air Force's Rule 30(b)(6) witnesses, Lieutenant Colonel Okulicz, and one other individual from the Air Force personnel center.

Put simply, Plaintiffs have not diligently sought to depose Colonel Danaher.

II. Colonel Danaher's Testimony Is Unreasonably Cumulative And, Therefore, Not Proportionate To The Needs Of The Case.

The testimony that Plaintiffs seek from Colonel Danaher is also unreasonably cumulative of the testimony of witnesses whom Plaintiffs have already deposed or will depose. Colonel Danaher's testimony is expected to be about his actions as Chief of the Provision of Medical Care Division of the Air Force Medical Operations Agency and, more specifically, his office's position regarding the Air Force's HIV policies. But testimony concerning that office's position could have been provided by other witnesses. Plaintiffs have already deposed the Dr. Okulicz, the Air Force Surgeon General's infectious disease consultant who was overseen by Colonel Danhaer and his office, as well as Ms. Soper, who testified that she "participate[s] actively with the surgeon general's directorate, the personnel division" and other stakeholders to "discuss the development of health policies." Soper Depo. 26:11-16.

And even assuming Plaintiffs' failure to explore Colonel Danaher and his office's positions in these prior depositions is excusable, Colonel Danaher's testimony would be unreasonably cumulative of the testimony that Colonel Karen Downes is expected to provide at her deposition on July 24, 2019. *See* ECF Dkt. 170. Colonel Downes is being offered to provide testimony regarding the documents Defendants produced as a result of the Court's discovery orders. Colonel Downes was a military assistant for Ms. Soper, the Assistant Deputy for Health Policy for the Air Force. *See, e.g.,* Ex. B (US00031448). Colonel Downes was personally involved in the coordination of the Air Force policies at issue in this case, including coordinating with Colonel Danaher and his office. *See, e.g.,* Ex. B (US00031448). Thus, any testimony that Colonel Danaher could provide regarding his or his office's position would be unreasonably cumulative of testimony available from Colonel Downes.

Finally, Plaintiffs' request for yet another deposition is excessive. Plaintiffs have already deposed 16 fact witnesses in this case and *Harrison v. Esper*. Defendants have agreed to Plaintiffs' requests for an additional three fact depositions after the close of discovery. *See* ECF Dkt. 170. Colonel Danaher's deposition is "unreasonably cumulative or duplicative," and similar testimony can be (or could have been) "obtain[ed] from some other source that is more convenient, less burdensome, or less expensive." *See* Fed. R. Civ. P. 26(b)(2).³

³ Plaintiffs also incorrectly assert that Colonel Danaher is unrepresented and "willing" to sit for a deposition. When undersigned counsel spoke with Colonel Danaher and his counsel on July 3, 2019, Colonel Danaher indicated that he wanted to "take no position regarding the re-opening of discovery or the taking of his deposition." Ex. J. Furthermore, regardless of whether Colonel Danaher chooses to engage outside counsel, the Department of Justice still has the right to represent the Government in connection with the actions taken by Colonel Danaher in his official capacity as an Air Force officer, and to confidentially investigate the extent and basis of Colonel Danaher's proposed testimony. *See, e.g., In re Allen*, 106 F.3d 582, 605-06 (4th Cir. 1997) (holding that communications between a government agency's counsel and a former employee of the agency are privileged). Accordingly, Plaintiffs' request will impose additional burdens on the Government and Colonel Danaher beyond being deposed.

EXHIBIT A

US00021284



DEPARTMENT OF THE AIR FORCE
WASHINGTON DC



11 Oct 17

MEMORANDUM FOR AFPC/CC

FROM: HQ USAF/AIP

SUBJECT: Retention of Airmen with Asymptomatic HIV

Airmen with asymptomatic HIV infection, defined as laboratory evidence of Human Immunodeficiency Virus (HIV) infection without the presence of progressive clinical illness or immunological deficiency, shall be referred to Air Force Personnel Center (AFPC) Medical Standards Branch in the Medical Service Officer Management Division (DP2NP) for a case review.

AFPC/DP2NP will determine if the Airman may be returned to duty with an Assignment Limitation Code (ALC-C) or if medically necessary, be referred to the Integrated Disability Evaluation System (IDES). Asymptomatic HIV alone is not unfitting for continued service.

Airmen with laboratory evidence of HIV infection and with the presence of progressive clinical illness or immunological deficiency shall be referred into the IDES.

Our points of contact are Lt Col Matthew Huibregtse, AF/A1PPP (703-571-0827, matthew.j.huibregtse.mil@mail.mil) and Col Patrick Danaher, AFMOA/SGHM, (210-395-9140, patrick.j.danaher6.mil@mail.mil).

A handwritten signature in black ink that reads "Robert D. Labrutta".

ROBERT D. LABRUTTA
Major General, USAF
Director, Military Force Management Policy

cc:
AFMOA/CC

BREAKING BARRIERS...SINCE 1947

EXHIBIT B

US00031448

From: Downes, Karen M Lt Col USAF SAF-MR (US)
Sent: Wednesday, June 6, 2018 5:51 PM
To: Palumbo, Guy M CIV USAF AFPC (US); Prater, Shane T Col USAF SAF-MR (US); Vallario, John K CIV USAF SAF-MR (US); Hern, Tammy L CIV USAF (US); Danaher, Patrick J Col USAF AFMOA (US)
Cc: Soper, Martha P CIV USAF SAF-MR (US); Harp, Mary J CIV (US)
Subject: HIV Clarification Memo
Attachments: HIV clarification Memo.pdf
Signed By: karen.downes@us.af.mil

ALCON,

Attached is the HIV clarification memo. It will come out in TMT for distribution, but wanted to send it ahead to you all.

Thank you.

V/r

Karen

//signed//

Karen M. Downes, Col, USAF

703-697-8822

IMA to Assistant Deputy, Health Policy

Office of the Secretary of the Air Force Assistant Secretary (Reserve Affairs & Airman Readiness)

5D742

1660 Air Force Pentagon

Washington, DC 20330-1660

"Attitudes are caught not taught"

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EXHIBIT C

US00040166

From: Soper, Martha P CIV USAF SAF-MR (US)
Sent: Tuesday, January 2, 2018 8:20 AM
To: McWhirter, Matthew A Maj USAF AF-A1 (US); Downes, Karen M Lt Col USAF SAF-MR (US)
Cc: Huibregtse, Matthew J Lt Col USAF (US)
Subject: RE: HAF242613 (2Ltr) UPR006187-17 - Personnel Policies Regarding Members of the Armed Forces Infected with HIV

Good morning Matt and team,

I hope everyone had a wonderful New Year, welcome to 2018!

We'll look forward to the new draft of the memo and the comments from both A1 and SG.

Thanks for all your work,

Martie

Martie Soper, RN, MSHS
Assistant Deputy, Health Policy
Office of the Secretary of the Air Force
Assistant Secretary (Reserve Affairs & Airman Readiness)
SAF/MRR, Rm 5D742, Pentagon
Washington, DC 20330
O: 703-693-9512
C: 404-405-6109

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-----Original Message-----

From: McWhirter, Matthew A Maj USAF AF-A1 (US)
Sent: Tuesday, January 02, 2018 7:10 AM
To: Downes, Karen M Lt Col USAF SAF-MR (US) <karen.m.downes2.mil@mail.mil>; Soper, Martha P CIV USAF SAF-MR (US) <martha.p.soper.civ@mail.mil>
Cc: Huibregtse, Matthew J Lt Col USAF (US) <matthew.j.huibregtse.mil@mail.mil>
Subject: RE: HAF242613 (2Ltr) UPR006187-17 - Personnel Policies Regarding Members of the Armed Forces Infected with HIV

Ma'am,

Attached is the version signed by MG Labrutta.

Right prior to the new year...we were making some traction on the new memo through the A1 and hopefully the TMT will be to you all soon (if not already).

Be safe and strong
Maj McWhirter

MATTHEW A. MCWHIRTER, Major, USAF
Chief, Retirements and Separations
AF/A1PPS, Room 4D950
DSN: 671-0826 -- COMM: 703-571-0826

-----Original Message-----

From: Downes, Karen M Lt Col USAF SAF-MR (US)
Sent: Saturday, December 30, 2017 9:59 PM
To: Soper, Martha P CIV USAF SAF-MR (US) <martha.p.soper.civ@mail.mil>
Cc: McWhirter, Matthew A Maj USAF AF-A1 (US) <matthew.a.mcwhirter.mil@mail.mil>; Huibregtse, Matthew J Lt Col USAF (US) <matthew.j.huibregtse.mil@mail.mil>
Subject: RE: HAF242613 (2Ltr) UPR006187-17 - Personnel Policies Regarding Members of the Armed Forces Infected with HIV

Nope, Mr. Sitterly never signed. MG LaBrutta signed one out. I will look and see if I have it. I don't. I will ask Matt and Matt if they have it.

/////

Matt/Matt,
Do you have the signed memo from MG LaBrutta?

Thanks!
V/r
Karen

//signed//
KAREN M. DOWNES, Lt Col, USAF
703-697-6429
IMA to Assistant Deputy, Health Policy
Office of the Secretary of the Air Force Assistant Secretary (Reserve
Affairs & Airman Readiness)
5D742
1660 Air Force Pentagon
Washington, DC 20330-1660

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-----Original Message-----

From: Soper, Martha P CIV USAF SAF-MR (US)
Sent: Thursday, December 28, 2017 7:27 AM
To: Downes, Karen M Lt Col USAF SAF-MR (US) <karen.m.downes2.mil@mail.mil>
Subject: FW: HAF242613 (2Ltr) UPR006187-17 - Personnel Policies Regarding Members of the Armed Forces Infected with HIV

Karen, you've seen the email trail on this with the concerns from Col Danaher. Apparently they are working it as well.

Did Mr. Sitterly ever sign the updated memo or do we have the one signed by Maj Gen Labrutta?

Martie Soper, RN, MSHS
Assistant Deputy, Health Policy
Office of the Secretary of the Air Force
Assistant Secretary (Reserve Affairs & Airman Readiness)
SAF/MRR, Rm 5D742, Pentagon
Washington, DC 20330
O: 703-693-9512
C: 404-405-6109

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-----Original Message-----

From: Soper, Martha P CIV USAF SAF-MR (US)
Sent: Wednesday, December 27, 2017 12:24 PM
To: Danaher, Patrick J Col USAF AFMOA (US) <patrick.j.danaher6.mil@mail.mil>
Cc: Fischer, William D Col USAF AF-A1 (US) <william.d.fischer4.mil@mail.mil>
Subject: RE: HAF242613 (2Ltr) UPR006187-17 - Personnel Policies Regarding Members of the Armed Forces Infected with HIV

Good afternoon Col Danaher,

I have the memo signed by Maj Gen Labrutta - which Mr. Fedrigo had requested that memo be pulled back for Mr. Sitterly's signature. It should not have been signed by A1. I'll follow up on where the updated memo is.

Best,
Martie

Martie Soper, RN, MSHS
Assistant Deputy, Health Policy
Office of the Secretary of the Air Force
Assistant Secretary (Reserve Affairs & Airman Readiness)
SAF/MRR, Rm 5D742, Pentagon
Washington, DC 20330
O: 703-693-9512
C: 404-405-6109

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-----Original Message-----

From: Danaher, Patrick J Col USAF AFMOA (US)
Sent: Wednesday, December 27, 2017 11:33 AM
To: Soper, Martha P CIV USAF SAF-MR (US) <martha.p.soper.civ@mail.mil>
Cc: Fischer, William D Col USAF AF-A1 (US) <william.d.fischer4.mil@mail.mil>
Subject: RE: HAF242613 (2Ltr) UPR006187-17 - Personnel Policies Regarding
Members of the Armed Forces Infected with HIV

Good Morning Ms. Soper,

Thank you for the reply. Is the memo on which SAF/MR coordinated final and
are you able to provide a copy (either draft or final)?

V/r,

Pat

PATRICK J. DANAHER, Col, USAF, MC
Chief, Provision of Medical Care Division
Chief Internal Medicine Consultant to the AF Surgeon General
Air Force Medical Operations Agency (AFMOA)
2261 Hughes Avenue, Suite 153
JBSA Lackland, Texas 78236-1025
210-395-9140 commercial
969-9140 DSN
patrick.j.danaher6.mil@mail.mil

-----Original Message-----

From: Soper, Martha P CIV USAF SAF-MR (US)
Sent: Wednesday, December 27, 2017 9:43 AM
To: Toney, Kimberly K SES USAF AFPC (US) <kimberly.toney.2@us.af.mil>;

Danaher, Patrick J Col USAF AFMOA (US) <patrick.j.danaher6.mil@mail.mil>;
Fischer, William D Col USAF AF-A1 (US) <william.d.fischer4.mil@mail.mil>;
Izawa, Emi CIV USAF AF-A1 (US) <emi.izawa2.civ@mail.mil>
Cc: Miller, Robert I Brig Gen USAF AFMOA (US)
<robert.i.miller.mil@mail.mil>; Okulicz, Jason F Lt Col USAF USARMY MEDCOM
BAMC (US) <jason.f.okulicz.mil@mail.mil>; Cheatham, Thomas N Col USAF AFMSA
(US) <thomas.n.cheatham2.mil@mail.mil>; McIntee, Marie-France M (Marie) Lt
Col USAF AFMSA (US) <mariefrance.m.mcintee.mil@mail.mil>; Downes, Karen M Lt
Col USAF SAF-MR (US) <karen.m.downes2.mil@mail.mil>; Igl, Ann M Col USAF
SAF-MR (US) <ann.m.igl.mil@mail.mil>; Labrutta, Robert D Maj Gen USAF AF-A1
(US) <robert.d.labrutta.mil@mail.mil>; Dieterle, Charles E Maj USAF AFGSC A3
(US) <charles.dieterle@us.af.mil>; Menendez, Damon L Col USAF (US)
<damon.menendez@us.af.mil>; Tillery, Randy G CIV USAF AFPC (US)
<randy.tillery.1@us.af.mil>
Subject: RE: HAF242613 (2Ltr) UPR006187-17 - Personnel Policies Regarding
Members of the Armed Forces Infected with HIV

Good morning Ms. Toney and Col Danaher,

SAF MR is available for discussions on how best to respond to the TMT
tasker. SAF MR recently coordinated on a memorandum providing direction on
the retention of Airman with Asymptomatic HIV.

Please let us know how you'd like to proceed.

Best,
Martie Soper

Martie Soper, RN, MSHS
Assistant Deputy, Health Policy
Office of the Secretary of the Air Force
Assistant Secretary (Reserve Affairs & Airman Readiness)
SAF/MRR, Rm 5D742, Pentagon
Washington, DC 20330
O: 703-693-9512
C: 404-405-6109

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-----Original Message-----

From: TONEY, KIMBERLY K SES USAF AFPC AFPC/CA
[mailto:kimberly.toney.2@us.af.mil]
Sent: Wednesday, December 27, 2017 8:39 AM

To: Danaher, Patrick J Col USAF AFMOA (US)
<patrick.j.danaher6.mil@mail.mil>; Fischer, William D Col USAF AF-A1 (US)
<william.d.fischer4.mil@mail.mil>; Izawa, Emi CIV USAF AF-A1 (US)
<emi.izawa2.civ@mail.mil>
Cc: Miller, Robert I Brig Gen USAF AFMOA (US)
<robert.i.miller.mil@mail.mil>; Okulicz, Jason F Lt Col USAF USARMY MEDCOM
BAMC (US) <jason.f.okulicz.mil@mail.mil>; Cheatham, Thomas N Col USAF AFMSA
(US) <thomas.n.cheatham2.mil@mail.mil>; McIntee, Marie-France M (Marie) Lt
Col USAF AFMSA (US) <mariefrance.m.mcintee.mil@mail.mil>; Soper, Martha P
CIV USAF SAF-MR (US) <martha.p.soper.civ@mail.mil>; Downes, Karen M Lt Col
USAF SAF-MR (US) <karen.m.downes2.mil@mail.mil>; Igl, Ann M Col USAF SAF-MR
(US) <ann.m.igl.mil@mail.mil>; Labrutta, Robert D Maj Gen USAF AF-A1 (US)
<robert.d.labrutta.mil@mail.mil>; Dieterle, Charles E Maj USAF AFGSC A3 (US)
<charles.dieterle@us.af.mil>; Menendez, Damon L Col USAF (US)
<damon.menendez@us.af.mil>; Tillery, Randy G CIV USAF AFPC (US)
<randy.tillery.1@us.af.mil>
Subject: RE: HAF242613 (2Ltr) UPR006187-17 - Personnel Policies Regarding
Members of the Armed Forces Infected with HIV

Col Danaher

Thank you for sharing this very pertinent information -- we look forward to
a discussion asap. We all need MR guidance to proceed.

Have a great day.

Vr

KT

-----Original Message-----

From: Danaher, Patrick J Col USAF AFMOA (US)
[mailto:patrick.j.danaher6.mil@mail.mil]
Sent: Friday, December 22, 2017 12:33 PM
To: FISCHER, WILLIAM D Col USAF HAF AF/AF/A1P <william.fischer@us.af.mil>;
IZAWA, EMI GS-14 US Air Force HAF AF/AF/A1P <emi.izawa.1@us.af.mil>
Cc: TONEY, KIMBERLY K SES USAF AFPC AFPC/CA <kimberly.toney.2@us.af.mil>;
Miller, Robert I Brig Gen USAF AFMOA (US) <robert.i.miller.mil@mail.mil>;
OKULICZ, JASON F Lt Col USAF AETC 59 MDOG/SGOMI <jason.okulicz@us.af.mil>;
CHEATHAM, THOMAS N Col USAF HAF AF MEDICAL SPT AG FO/SG3
<thomas.cheatham.1@us.af.mil>; MCINTEE, MARIEFRANCE M Lt Col USAF AFMSA
AFMSA/SG3PF <mariefrance.mcintee@us.af.mil>; SOPER, MARTHA P GS-15 USAF HAF
844 CS/Pentagon <martha.soper.1@us.af.mil>; DOWNES, KAREN M Lt Col USAF HAF
SAF/MRR <karen.downes@us.af.mil>
Subject: HAF242613 (2Ltr) UPR006187-17 - Personnel Policies Regarding
Members of the Armed Forces Infected with HIV

Col Fischer,

This TMT tasker just came to my attention today. Do you know who at A1 is
working it? It has direct bearing on our ongoing discussions regarding
retention of Airmen with HIV. Specifically, in the attached 22 Sep 2014

response to Congress, the Under Secretary of Defense for Personnel and Readiness states the following at the top of page 13 of the PDF: "A Service member infected with HIV or HBV is not retired or separated solely on the basis of being infected. However, an infected member whose condition deteriorates and interferes with the successful performance of their military occupation may be referred to the Disability Evaluation System (DES) for a physical disability evaluation, which provides for a fair and full review to determine fitness for duty."

The AF stopped adhering to this guidance regarding retention of Service Members with HIV in about 2015. The attached memo from the ASD/HA pertaining to NDAA 2018 directs the Services to give an update on a variety of personnel topics pertaining to HIV by 8 January 2018. The first topic is: "A description of policies addressing the enlistment or commissioning, retention deployment, discharge, and disciplinary policies regarding individuals with this condition." It seems like the AF could give one of three responses:

1. Returning to pre-2015 practice of retaining Airmen with asymptomatic HIV via a pre-DES process (adhere to 22 Sep 2014 memo).
2. Continuing practice of retaining some and separating other Airmen with asymptomatic HIV via the DES (continue nonadherence to 22 Sep 2014 memo).
3. Continuing to evaluate policy pertaining to retention of Airmen with asymptomatic HIV.

Are you available for a call next week to discuss?

Thank you!

V/r,

PATRICK J. DANAHER, Col, USAF, MC
Chief, Provision of Medical Care Division Chief Internal Medicine Consultant
to the AF Surgeon General Air Force Medical Operations Agency (AFMOA)
2261 Hughes Avenue, Suite 153
JBSA Lackland, Texas 78236-1025
210-395-9140 commercial
969-9140 DSN
patrick.j.danaher6.mil@mail.mil

EXHIBIT D

US00040197

From: McWhirter, Matthew A Maj USAF AF-A1 (US)
Sent: Friday, January 12, 2018 8:15 AM
To: Fischer, William D Col USAF AF-A1 (US)
Cc: Danaher, Patrick J Col USAF AFMOA (US); Okulicz, Jason F Lt Col USAF USARMY MEDCOM BAMC (US); Huibregtse, Matthew J Lt Col USAF (US)
Subject: RE: Retention of Airmen with HIV
Attachments: Tab 1 - SAF-MR Memo - HIV Retainability (12 Jan 18).docx

Sir,

It looks like Dr. Fore approved it to be sent forward yesterday. We'll see if we can get them to push it to the SAF/MR office today.

AF/JA had some comments, so I've updated the letter...attached is the new DRAFT.

Be safe and strong
Maj McWhirter

MATTHEW A. MCWHIRTER, Major, USAF
Chief, Retirements and Separations
AF/A1PPS, Room 4D950
DSN: 671-0826 -- COMM: 703-571-0826

-----Original Message-----

From: Fischer, William D Col USAF AF-A1 (US)
Sent: Friday, January 12, 2018 7:50 AM
To: Huibregtse, Matthew J Lt Col USAF (US)
<matthew.j.huibregtse.mil@mail.mil>; McWhirter, Matthew A Maj USAF AF-A1 (US) <matthew.a.mcwhirter.mil@mail.mil>
Cc: Danaher, Patrick J Col USAF AFMOA (US)
<patrick.j.danaher6.mil@mail.mil>; Okulicz, Jason F Lt Col USAF USARMY MEDCOM BAMC (US) <jason.f.okulicz.mil@mail.mil>
Subject: RE: Retention of Airmen with HIV

Team,

Can you get with the Front Office and see where our TMT is regarding Asymptomatic HIV?

We provided the follow-on info, so they should be good now.

I'm hoping it's with SAF/MR.

Thanks,
-- Col Fischer

WILLIAM D. FISCHER, Col, USAF
Chief, Military Force Policy Division
AF/A1PP, Room 4D950A
703-695-4225 (DSN 225)
william.d.fischer4.mil@mail.mil

-----Original Message-----

From: Danaher, Patrick J Col USAF AFMOA (US)
Sent: Thursday, January 11, 2018 2:34 PM
To: Fischer, William D Col USAF AF-A1 (US) <william.d.fischer4.mil@mail.mil>
Cc: Okulicz, Jason F Lt Col USAF USARMY MEDCOM BAMC (US)
<jason.f.okulicz.mil@mail.mil>
Subject: Retention of Airmen with HIV

Bill,

Happy New Year to you!

I wanted to check in to see if you had perchance heard anything back from SAF/MR on this topic?

Thank you,

Pat

PATRICK J. DANAHER, Col, USAF, MC
Chief, Provision of Medical Care Division Chief Internal Medicine Consultant
to the AF Surgeon General Air Force Medical Operations Agency (AFMOA)
2261 Hughes Avenue, Suite 153
JBSA Lackland, Texas 78236-1025
210-395-9140 commercial
969-9140 DSN
patrick.j.danaher6.mil@mail.mil

EXHIBIT E

US00040215

From: Fischer, William D Col USAF AF-A1 (US)
Sent: Friday, January 12, 2018 8:29 AM
To: McWhirter, Matthew A Maj USAF AF-A1 (US)
Cc: Danaher, Patrick J Col USAF AFMOA (US); Okulicz, Jason F Lt Col USAF USARMY MEDCOM BAMC (US); Huibregtse, Matthew J Lt Col USAF (US)
Subject: RE: Retention of Airmen with HIV

Thanks...getting close !!

WILLIAM D. FISCHER, Col, USAF
Chief, Military Force Policy Division
AF/A1PP, Room 4D950A
703-695-4225 (DSN 225)
william.d.fischer4.mil@mail.mil

-----Original Message-----

From: McWhirter, Matthew A Maj USAF AF-A1 (US)
Sent: Friday, January 12, 2018 8:15 AM
To: Fischer, William D Col USAF AF-A1 (US) <william.d.fischer4.mil@mail.mil>
Cc: Danaher, Patrick J Col USAF AFMOA (US) <patrick.j.danaher6.mil@mail.mil>; Okulicz, Jason F Lt Col USAF USARMY MEDCOM BAMC (US) <jason.f.okulicz.mil@mail.mil>; Huibregtse, Matthew J Lt Col USAF (US) <matthew.j.huibregtse.mil@mail.mil>
Subject: RE: Retention of Airmen with HIV

Sir,

It looks like Dr. Fore approved it to be sent forward yesterday. We'll see if we can get them to push it to the SAF/MR office today.

AF/JA had some comments, so I've updated the letter...attached is the new DRAFT.

Be safe and strong
Maj McWhirter

MATTHEW A. MCWHIRTER, Major, USAF
Chief, Retirements and Separations
AF/A1PPS, Room 4D950
DSN: 671-0826 -- COMM: 703-571-0826

-----Original Message-----

From: Fischer, William D Col USAF AF-A1 (US)
Sent: Friday, January 12, 2018 7:50 AM
To: Huibregtse, Matthew J Lt Col USAF (US) <matthew.j.huibregtse.mil@mail.mil>; McWhirter, Matthew A Maj USAF AF-A1

(US) <matthew.a.mcwhirter.mil@mail.mil>
Cc: Danaher, Patrick J Col USAF AFMOA (US)
<patrick.j.danaher6.mil@mail.mil>; Okulicz, Jason F Lt Col USAF USARMY
MEDCOM BAMC (US) <jason.f.okulicz.mil@mail.mil>
Subject: RE: Retention of Airmen with HIV

Team,

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Asymptomatic HIV?

We provided the follow-on info, so they should be good now.

I'm hoping it's with SAF/MR.

Thanks,
-- Col Fischer

WILLIAM D. FISCHER, Col, USAF
Chief, Military Force Policy Division
AF/A1PP, Room 4D950A
703-695-4225 (DSN 225)
william.d.fischer4.mil@mail.mil

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From: Danaher, Patrick J Col USAF AFMOA (US)
Sent: Thursday, January 11, 2018 2:34 PM
To: Fischer, William D Col USAF AF-A1 (US) <william.d.fischer4.mil@mail.mil>
Cc: Okulicz, Jason F Lt Col USAF USARMY MEDCOM BAMC (US)
<jason.f.okulicz.mil@mail.mil>
Subject: Retention of Airmen with HIV

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SAF/MR on this topic?

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Pat

PATRICK J. DANAHER, Col, USAF, MC
Chief, Provision of Medical Care Division Chief Internal Medicine Consultant
to the AF Surgeon General Air Force Medical Operations Agency (AFMOA)
2261 Hughes Avenue, Suite 153
JBSA Lackland, Texas 78236-1025
210-395-9140 commercial
969-9140 DSN
patrick.j.danaher6.mil@mail.mil

EXHIBIT F

US00040398

TALKING PAPER

ON

RETENTION OF AIRMEN WITH HUMAN IMMUNODEFICIENCY VIRUS (HIV)

SITUATION

- HIV infection is potentially disqualifying for continued service and requires disposition through a Medical Evaluation board (MEB) or Review in Lieu Of (RILO).
- Until 2015, Airmen with asymptomatic HIV infection were “returned to duty” (RTD) by AFPC.
- Beginning in 2015, AFPC has recommended RTD for some Airmen with asymptomatic HIV infection and “separation” for others based primarily on a CENTCOM administrative prohibition against deployment of HIV-infected Service Members (SMs) to that AOR.

BACKGROUND

- There are 231 Active Duty (AD) AF members with HIV as of April 2017. There are about 40-50 new cases of HIV diagnosed in ADAF members annually.
- DoDI 6485.01, “Human Immunodeficiency Virus (HIV) in Military Service Members,” 7 June 2013, directs that SMs with HIV infection will undergo “evaluation of fitness for continued service in the same manner” as those “with other chronic or progressive illnesses” (Enclosure 3, 2.c).
- All AD Airmen with asymptomatic HIV infection are seen annually at the AF HIV Medical Evaluation Unit (MEU) in San Antonio (IAW AFI 44-178, “Human Immunodeficiency Program”, 4 March 2014, Certified Current 28 June 2016).
- The MEU completes a narrative summary (NARSUM) for each Airman with HIV infection which is forwarded to AFPC. Unlike NARSUMs for Airmen with other medical conditions potentially disqualifying for continued service, HIV NARSUMs are submitted by a single provider who ensures consistency, completeness and quality.
- AFPC evaluates NARSUMs IAW DoDI 1332.18, “Disability Evaluation System”, 5 August 2014. Their role is to determine “return to duty, separation, or retirement of Service members because of disability in accordance with chapter 61 of Reference (c).” Disability is defined as “Any impairment due to disease or injury, regardless of degree, that reduces or prevents an individual’s actual or presumed ability to engage in gainful employment or normal activity. To constitute a disability, the medical impairment, mental disease, or physical defect must be severe enough to interfere with the Service member’s ability to adequately perform his or her duties.”

- Evaluation of NARSUMs at AFPC occurs in two phases. First, DP2NP reviews all NARSUMs (pre-Integrated Disability Evaluation System [IDES] process). Second, cases that DP2NP does not RTD are referred to the Informal Physical Evaluation Board (IPEB), the initial step in the IDES process.

--



- Until 2015, all AD Airmen with asymptomatic HIV were RTD with an ALC-C by DP2NP.
- Beginning in 2015, the IPEB instructed DP2NP to refer all cases of asymptomatic HIV into the IDES.
- Recently, the IPEB recommended "Discharge With Severance Pay" for an AD Airman with asymptomatic HIV infection.

-



- The MEU is now aware of several additional similar cases.
- The Army and Navy RTD all AD members with asymptomatic HIV infection via a pre-IDES process.

-



ASSESSMENT

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RECOMMENDATION



EXHIBIT G

US00040401

Downes, Karen M Col USAF SAF-MR (USA)

From: Danaher, Patrick J Col USAF AFMOA (US)
Sent: Wednesday, April 11, 2018 12:58 AM
To: Okulicz, Jason F Lt Col USAF USARMY MEDCOM BAMC (US)
Cc: Downes, Karen M Lt Col USAF SAF-MR (US)
Subject: Airmen with HIV Statistics

Jason--

Karen-

Thank you,

Pat

PATRICK J. DANAHER, Col, USAF, MC
Chief, Provision of Medical Care Division Air Force Medical Operations Agency (AFMOA)
2261 Hughes Avenue, Suite 153
JBSA Lackland, Texas 78236-1025
210-395-9140 commercial
969-9140 DSN
patrick.j.danaher6.mil@mail.mil

EXHIBIT H

*Deposition of Lieutenant Colonel Jason
Okulicz*

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

3 RICHARD ROE, ET AL.,)
4 Plaintiffs,)
5 VS.) CIVIL ACTION NUMBER:
6 PATRICK M. SHANAHAN, ET AL.,) 1:18-CV-01565
7 Defendants.)

8
9 *****

10 ORAL/VIDEO DEPOSITION OF
11 LT. COL. JASON OKULICZ, M.D.
12 MARCH 20, 2019

13 *****

14
15 ORAL DEPOSITION OF LT. COL. JASON OKULICZ, M.D.,
16 produced as a witness at the instance of the Plaintiffs,
17 was duly sworn, was taken in the above-styled and
18 numbered cause on the MARCH 20, 2019, from 1:36 p.m. to
19 5:30 p.m., before Chris Carpenter, CSR, in and for the
20 State of Texas, reported by machine shorthand, at the
21 offices of Hoffman Reporting, 206 E. Locust Street, San
22 Antonio, TX 78212, pursuant to the Federal Rules of
23 Civil Procedure and the provisions stated on the record
24 or attached hereto.
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A P P E A R A N C E S

FOR THE PLAINTIFFS:

Scott Schoettes
LAMBDA LEGAL
105 West Adams, Suite 2600
Chicago, IL 60603-6316
(312) 663-4413
sschoettes@lambdalegal.org

FOR THE DEFENDANTS:

Keri Berman
US DOJ, CIVIL DIV.
1100 L Street
Washington DC 20001
(202) 616-8366
keri.l.berman@usdoj.gov

ALSO PRESENT:

Major Gregory Morgan
Steve Lopez, videographer
Chris Carpenter, CSR, RPR

1 proceedings or anything like that where you were given
2 -- you've given sworn testimony?

3 A. I participated in a hearing before. I did not
4 give any testimony.

5 Q. Can you tell me what your current position is
6 in the Air Force?

7 A. So I am the chief of the Infectious Disease
8 Service at Brooke Army Medical Center. I am also the
9 director of the HIV Medical Evaluation Unit for the Air
10 Force. I'm also the Air Force consultant to the -- to
11 the Air Force Surgeon General. Excuse me. Let me
12 restate that. I am the infectious disease consultant to
13 the Air Force Surgeon General. And I believe those are
14 probably my main titles.

15 Q. Let's start with the first one. What are your
16 responsibilities as the chief infectious --

17 A. The infection disease service?

18 Q. Yeah.

19 A. So I'm in charge of the Infectious Disease
20 Specialty here at Joint Base San Antonio. I'm in charge
21 of a number of infectious disease staff, fellows who are
22 in training, researchers, nurses, clinicians, support
23 staff, and so I am the department chief, essentially, is
24 what that means.

25 Q. Got it. And what does the -- I keep forgetting

1 MS. BERMAN: Objection, calls for
2 speculation.

3 You can answer.

4 A. This letter dated May of 2018 was approximately
5 nine years of me being director of the HIV MEU, and so
6 the statement I made basically states that this -- this
7 does not appear to be the way things were done before.
8 Although, as I mentioned, I do not make decisions for
9 fitness determinations.

10 So the reason -- my impression of the
11 reason that this decision -- that these types of
12 decisions were made was due to a interpretation of a
13 2012 DODI. I think it was a 2012 DODI, whereas
14 HIV-infected service members should be treated like any
15 other members with chronic diseases. So that is my
16 impression of why the reasoning had changed at and
17 actually a little bit before the point of this letter
18 being written.

19 Q. (By Mr. Schoettes) Are you -- do you know which
20 DODI allegedly changed in 2012 regarding this topic?

21 A. I don't remember the DOD name. There's not an
22 HIV-specific DODI. It just has to maintain -- I think
23 it's in regards to retention of individuals with chronic
24 medical conditions.

25 Q. Are you familiar with the series of guidance

1 memos that were issued on this topic of retention of
2 service -- airmen with HIV?

3 MS. BERMAN: Objection, vague.

4 You can answer.

5 A. I'm aware of a number of different either
6 conversations or memos regarding this topic, and -- but
7 I do -- without having a specific memo, I'm not able to
8 really describe what the content any particular memo
9 was.

10 Q. (By Mr. Schoettes) In this e-mail that's dated
11 from May 29th of 2018 that you wrote, it does not
12 mention what Roe's assignment was or his AFSC. Would
13 the particular assignment or duty have affected your
14 assessment as to whether he should be returned to duty?

15 A. I think in earlier years, HIV-infected service
16 members were returned to duty almost uniformly unless
17 there was some compelling medical reason. So the reason
18 I -- and, again, I'm -- I believe the reason I didn't
19 mention AFSC in this letter is because the particular
20 AFSC hadn't been relevant in the past regarding HIV
21 fitness for duty.

22 Q. And did you learn after this -- after issuing
23 this letter that the person's AFSC was now considered
24 relevant in making these determinations?

25 A. I had -- at some point in time, I had received

1 information that I believe the AFSC mattered and the
2 time and service mattered for the individual. That is,
3 again, loosely, from my standpoint, I don't have a
4 strict criteria, that -- those were two factors that
5 were considered that, in my opinion, had not been
6 considered previously.

7 Q. And do you recall how that information was
8 communicated to you?

9 A. May have been communicated either by
10 Mr. Palumbo or may have been communicated to me through
11 Colonel Pat Danaher, who was the previous -- chief --
12 medical chief -- chief of medical consultants at AFMALA,
13 or may have been communicated with me directly on a
14 phone call with either or both of those individuals. I
15 don't recall when I learned that information, per se.

16 Q. And do you recall specifically what they said
17 would be the relevance of the person's AFSC?

18 A. My understanding of the relevance of the ASFC
19 is that if it was a particular career field that
20 deployed a lot, that would be a consideration because
21 the service member would not be able to deploy to
22 CENTCOM. I am, also -- my understanding for the AFSC is
23 that if it was a career field in need, then I would
24 presume that would be more likely for a member to be
25 retained. If it was a saturated career field, then that

1 may be a factor in a person's decision to be retained or
2 not.

3 Q. Were you told that there was a particular level
4 of historical deployment in a particular AFSC that would
5 trigger discharge of a services member living with HIV?

6 MS. BERMAN: Objection, vague.

7 You can answer.

8 A. I was never given a particular interval of
9 deployment or any criteria about deployment or pace of
10 deployment, to my knowledge, that would affect -- that
11 would -- would make that decision clear.

12 Q. I'm going to hand you what we will have marked
13 as Exhibit 8.

14 (Exhibit 8 marked for identification.)

15 Q. (By Mr. Schoettes) Do you recognize Exhibit 8?

16 A. I do not recognize Exhibit 8.

17 Q. Do you see at the top that it describes it as
18 being an Asymptomatic HIV Cases Summaries?

19 A. Yes, I see that.

20 Q. Do you see that the individual with -- about
21 whom we were just speaking is listed as the third case?

22 A. Yes, I see that.

23 Q. Do you see that this -- well, it says that the
24 purpose is to provide a summary of Air Force personnel
25 board decisions on ten cases considered on 18 October

EXHIBIT I

Deposition of Martha Soper

CONFIDENTIAL

Page 1

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

- - - - - x
NICHOLAS HARRISON and :
OUTSERVE-SLDN, INC., :
Plaintiffs, :
vs. : No. 1:18-cv-00641
JAMES N. MATTIS, In His : LMB-IDD
Official Capacity As Secretary:
of Defense; MARK ESPER, In His:
Official Capacity As the :
Secretary of the Army; and the:
UNITED STATES DEPARTMENT OF :
DEFENSE, :
Defendants. :

- - - - - x
RICHARD ROE, VICTOR VOE, and :
and OUTSERVE-SLDN, INC., :
Plaintiffs, :
vs. : No. 1:18-cv-01565
JAMES N. MATTIS, In His :
Official Capacity As Secretary:
of Defense; HEATHER A. WILSON, :
In Her Official Capacity as :
Secretary of the AIR FORCE; :
and the UNITED STATES :
DEPARTMENT OF DEFENSE, :
Defendants. :

VIDEOTAPED 30(b)(6) DEPOSITION OF
THE UNITED STATES AIR FORCE FOR THE ROE CASE
GIVEN BY MARTHA P. SOPER

DATE: Wednesday, March 6, 2019
TIME: 9:20 a.m.

CONFIDENTIAL

Page 2

1 LOCATION: Winston & Strawn
2 1700 K Street, N.W.
3 Washington, D.C.
4 REPORTED BY: Denise M. Brunet, RPR
5 Reporter/Notary

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9 Veritext Legal Solutions
10 1250 Eye Street, N.W., Suite 350
11 Washington, D.C. 20005

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CONFIDENTIAL

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A P P E A R A N C E S

On behalf of the Plaintiffs:

SCOTT A. SCHOETTES, ESQUIRE

Lambda Legal

11 East Adams

Suite 1008

Chicago, Illinois 60603

(312) 663-4413

sschoettes@lambdalegal.org

On behalf of the U.S. Department of Justice:

ROBERT M. NORWAY, ESQUIRE

U.S. Department of Justice

Civil Division

1100 L Street, Northwest

Washington, D.C. 20005

(202) 353-0889

robert.m.morway@usdoj.gov

(Appearances continued on the next page.)

CONFIDENTIAL

Page 4

1 APPEARANCES (continued):

2

3 On behalf of the United States Air Force:

4 GREGORY MORGAN, ESQUIRE

5 CHARLES GARTLAND, ESQUIRE

6 Air Force Legal Ops Agency

7 1500 West Perimeter Road

8 Joint Base Andrews, Maryland 20762

9 (240) 612-4727

10 gregory.j.morgan.mil@mail.mil

11

12 ALSO PRESENT: Solomon Francis, Videographer

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CONFIDENTIAL

Page 26

1 Q Okay. I just want to make sure I'm being
2 respectful.

3 A Thank you.

4 Q What are your responsibilities in your
5 current position?

6 A My role and responsibility is to work in
7 the development in health policies for active
8 guard and reserve component members.

9 Q And can you describe with a bit more
10 detail what that entails?

11 A So I participate actively with the
12 surgeon general's directorate, the personnel
13 division, in outside agencies as well, for the
14 OSD, the health affairs policy divisions, and we
15 work together to discuss the development of health
16 policies that are required for -- to be
17 implemented following, perhaps, the National
18 Defense Authorization Act which sets forth in law
19 the requirements for different policies to be
20 implemented.

21 So I coordinate with the multiple
22 agencies and multiple services for the OSD-level
23 implementation, the DODIs, D-O-D-I-S, as well as
24 then how the Air Force would follow through with
25 the implementation of the DODI requirements.

CONFIDENTIAL

Page 27

1 Q And do you serve in the same capacity
2 with respect to Air Force instructions?

3 A Those are -- I -- I do. I provide
4 assistance in the development of those.
5 Generally, I'm a final reviewer of the final
6 product, but I'll work with the SG division or the
7 A1 division to make sure that the requirements in
8 the Air Force instructions meet the requirements
9 of the DODI.

10 Q What was your position before your
11 current position?

12 MR. NORWAY: Objection. Outside of
13 scope.

14 You may answer.

15 THE WITNESS: Okay. I was on an active
16 duty tour at the Pentagon and I was the deputy
17 director for the medical division.

18 BY MR. SCHOETTES:

19 Q And when did you assume that position?

20 A I arrived there in May of 2012 and served
21 until my retirement, until October of '14.

22 Q So you assumed your current role in
23 retirement; is that correct?

24 A Yes, sir.

25 Q And what were your responsibilities as --

CONFIDENTIAL

Page 235

1 You may answer.

2 THE WITNESS: Correct.

3 BY MR. SCHOETTES:

4 Q And there were no changes to the policies
5 that Mr. Palumbo was now reading in a different
6 way; is that correct?

7 MR. NORWAY: Objection. Form.

8 You may answer.

9 THE WITNESS: There were no -- no. There
10 was -- it was more of an interpretation of the
11 policy.

12 BY MR. SCHOETTES:

13 Q Do you know why Mr. Palumbo thought it
14 was necessary to refer such individuals to the
15 PEB, given the statement that asymptomatic HIV
16 alone is not unfitting for continued service?

17 MR. NORWAY: Objection. Form.

18 Objection. Outside the scope. Are you asking for
19 her personal opinion?

20 MR. SCHOETTES: Yes.

21 MR. NORWAY: Okay. You may answer.

22 THE WITNESS: My interpretation of this
23 discussion was that Mr. Palumbo felt that the
24 medical standards branch was not referring anybody
25 to the DES -- I'm going to say the DES -- because

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1 the statement alone, asymptomatic HIV alone is not
2 unfitting. Therefore, the discussion ensued with
3 the insertion of the next line, airmen with
4 laboratory evidence of HIV infection and with
5 presence of progressive clinical illness or
6 immunological deficiency shall be referred into
7 the IDES.

8 So this did categorize airmen with HIV to
9 be processed through the DES. It's not saying
10 that HIV alone is unfitting for continued service.
11 It's just directing airmen to go through the DES
12 for a determination. And this memo was in
13 coordination at the time of the discussions
14 because there was a lot of discussions on how to
15 work with our airmen with -- with asymptomatic HIV
16 and -- as being an asset to the Air Force, what
17 are the criteria that -- have we done the Air
18 Force and the airmen the full justice of being
19 fully evaluated for fitness for duty?

20 BY MR. SCHOETTES:

21 Q And -- but the change being implemented
22 by Mr. Palumbo was going to be a negative change
23 for some individuals, airmen, living with HIV,
24 correct?

25 MR. NORWAY: Objection. Form.

CONFIDENTIAL

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1 Objection. Mischaracterizes the policy.

2 You may answer.

3 THE WITNESS: It can be perceived that
4 way and, unfortunately, General Labrutta, who
5 signed this memo out, was new to the headquarters
6 Air Force. He thought he had the authority to do
7 this and sign this memo. And there were
8 subsequent memos that were issued.

9 BY MR. SCHOETTES:

10 Q Because he did not actually have the
11 necessary authority to sign this memo?

12 A Correct.

13 Q You said that there were discussions
14 about how you were going to ensure that service
15 members living with HIV, airmen living with HIV,
16 that their service was appropriately recognized
17 and appreciated and -- let me just go back.

18 You said there were discussions around
19 this topic of this memo. Who was involved in
20 those discussions?

21 A At the time there was Mr. John Fedrigo,
22 Lieutenant General -- well, I think he was a major
23 general at the time -- Brian Kelly. And I can't
24 remember if it was Major General Roosevelt Allen,
25 who was from the surgeon directorate's division,

CONFIDENTIAL

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1 the Air Force SG, and Mr. Labrutta, or General
2 Labrutta, was involved in these discussions as
3 well.

4 Q Was the Secretary of the Air Force
5 involved in these discussions?

6 A No, sir.

7 Q Did you know if General Labrutta or any
8 of the other individuals you just named were
9 having discussions with the Secretary of the Air
10 Force about this topic?

11 MR. NORWAY: Objection. Outside of
12 scope.

13 You may answer.

14 THE WITNESS: I do not know.

15 BY MR. SCHOETTES:

16 Q When was it recognized that Major General
17 Labrutta did not have the necessary authority to
18 issue this memo?

19 MR. NORWAY: Objection. Outside of
20 scope.

21 You may answer if you can.

22 THE WITNESS: He was -- the memo was in
23 coordination with the Air Force surgeon general
24 directorate and the personnel division and the
25 SAFMRM -- MRB, rather. And that's the board that

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1 works for AFPC.

2 So it was going through a formal
3 coordination. And General Labrutta, to my
4 understanding, thought it was for him to sign, and
5 he signed it versus it finishing going through the
6 formal coordination process.

7 BY MR. SCHOETTES:

8 Q And so then did it go out and was
9 published with his signature?

10 MR. NORWAY: Objection. Form.

11 You may answer.

12 THE WITNESS: I believe it was.

13 BY MR. SCHOETTES:

14 Q And going back to this first paragraph,
15 so -- you referred to the third paragraph talking
16 about airmen with laboratory evidence of HIV
17 infections and with the presence of progressive
18 clinical illness or immunological deficiency shall
19 be referred into the IDES.

20 Is the IDES different than the DES?

21 A So the DES is the Disability Evaluation
22 System. There are three components to the DES.
23 There is the IDES, which is the Integrated
24 Disability Evaluation System. There is -- and the
25 integration is that portion with the VA, where the

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1 VA does the medical exams.

2 The other portion is the -- what we call
3 the TDRL, the temporary retired duty list --
4 disability list, rather. So we call it TDRL.

5 And the third portion is called PDRL,
6 permanently disability retired list. So it's
7 very -- DES and IDES in the field are used
8 synonymously.

9 BY MR. SCHOETTES:

10 Q So then in the first sentence, though, it
11 talks about "Airmen with asymptomatic HIV
12 infection, defined as laboratory of human
13 immunodeficient virus infection without the
14 presence of progressive clinical illness or
15 immunological deficiency, shall be referred to Air
16 Force Personnel Center, medical standards branch
17 in the medical service officer management division
18 (DP2NP) for a case review."

19 So this is indicating that everyone with
20 HIV is going to be evaluated for referral to the
21 DES?

22 MR. NORWAY: Objection. Form. Objection
23 to the extent it mischaracterizes the role of the
24 DP2NP.

25 You may answer.

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1 THE WITNESS: So basically what it's
2 saying is what the practice had been in 2006. So
3 all cases went to the medical standards
4 branch/DP2NP for case review. And DP2NP would
5 determine -- at the time, they were returning
6 airmen with HIV back to duty with an assignment
7 limitation code.

8 BY MR. SCHOETTES:

9 Q If they were asymptomatic?

10 A Correct.

11 Q So if they didn't have the presence of
12 progressive clinical illness or immunological
13 deficiency?

14 A Correct.

15 Q But this was then changing that policy in
16 the next paragraph?

17 A Right. So in the next paragraph, it says
18 DP2NP "will determine if airman may be rushed to
19 dotted with assignment implementation code or, if
20 medically necessary, be referred to the IDES.
21 Asymptomatic HIV alone is not unfitting for
22 continued service."

23 So some of these airmen may have
24 additional conditions aside from HIV. So those
25 combined effect would -- may cause for a referral

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1 to IDES.

2 Q And you said 2006. Did you mean --

3 A I'm sorry --

4 Q -- 2016?

5 A Yes, sir, I'm sorry.

6 Q But the focus here is on if there is a
7 medical necessity to refer to -- the individual to
8 the Integrated Disability Evaluation System,
9 correct?

10 MR. NORWAY: Objection. Form.

11 You may answer.

12 THE WITNESS: Correct.

13 BY MR. SCHOETTES:

14 Q Okay. You can set that exhibit aside.
15 I'm going to hand you what we're going to mark as
16 Exhibit 14.

17 (Soper Deposition Exhibit Number 14 was
18 marked for identification.)

19 BY MR. SCHOETTES:

20 Q And before we talk about Exhibit 14, I
21 wanted to ask what actions were taken to address
22 the fact that Exhibit 13 had gone out without a
23 signature from someone with the proper authority?

24 MR. NORWAY: Objection. Outside of
25 scope.

EXHIBIT J

Email Exchange with Colonel Danaher

Norway, Robert M. (CIV)

From: Danaher, Patrick J. [REDACTED]
Sent: Wednesday, July 03, 2019 11:55 AM
To: Norway, Robert M. (CIV); Berman, Keri L. (CIV)
Cc: Cutri-Kohart, Rebecca (CIV); 'jhoyt@hoyleftgalllc.com'
Subject: RE: Harrison v. Esper and Roe v. Esper Litigation

You are welcome and the summary statement is accurate.

Yes, please direct future communications to Mr. Hoyt with me cc'd.

Thank you,

Patrick J. Danaher, MD, FACP, FIDSA
Deputy Chief, Medicine Service, STVHCS, MC 111
7400 Merton Minter Blvd, San Antonio, TX, 78229
Office: [REDACTED]
iPhone: [REDACTED]
http://www.southtexas.va.gov/services/Medical_Service.asp

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From: Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>
Sent: Wednesday, July 03, 2019 10:49 AM
To: Danaher, Patrick J. <Patrick.Danaher@va.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>
Cc: Cutri-Kohart, Rebecca (CIV) <Rebecca.Cutri-Kohart@usdoj.gov>; 'jhoyt@hoyleftgalllc.com' <jhoyt@hoyleftgalllc.com>
Subject: [EXTERNAL] RE: Harrison v. Esper and Roe v. Esper Litigation

Dr. Danaher and Mr. Hoyt,

Thank you for speaking with us. As discussed, we will represent to plaintiffs that Dr. Danaher takes no position regarding the re-opening of discovery or the taking of his deposition.

Also, please let us know if we should direct future communications to Mr. Hoyt.

Best regards,
Rob Norway

From: Norway, Robert M. (CIV)
Sent: Wednesday, July 03, 2019 10:26 AM
To: Danaher, Patrick J. [REDACTED]; Berman, Keri L. (CIV) <kberman@CIV.USDOJ.GOV>
Cc: Cutri-Kohart, Rebecca (CIV) <rcutrik@CIV.USDOJ.GOV>; 'jhoyt@hoyleftgalllc.com' <jhoyt@hoyleftgalllc.com>
Subject: RE: Harrison v. Esper and Roe v. Esper Litigation

Dr. Danaher,

Thank you for speaking with us this morning. The information for the conference line is:

Phone number: [REDACTED]

Access Code: [REDACTED]

Best,
Rob Norway

From: Danaher, Patrick J. [REDACTED]
Sent: Wednesday, July 03, 2019 10:09 AM
To: Berman, Keri L. (CIV) <kberman@CIV.USDOJ.GOV>; Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>
Cc: Cutri-Kohart, Rebecca (CIV) <rcutrik@CIV.USDOJ.GOV>; 'jhoyt@hoylegalllc.com' <jhoyt@hoylegalllc.com>
Subject: RE: Harrison v. Esper and Roe v. Esper Litigation

I am OK with those limitations. Still good for 11:00 ET. Do you have a conference line we can dial into?

From: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>
Sent: Wednesday, July 03, 2019 9:00 AM
To: Danaher, Patrick J. [REDACTED]; Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>
Cc: Cutri-Kohart, Rebecca (CIV) <Rebecca.Cutri-Kohart@usdoj.gov>; 'jhoyt@hoylegalllc.com' <jhoyt@hoylegalllc.com>
Subject: [EXTERNAL] RE: Harrison v. Esper and Roe v. Esper Litigation

Good Morning Dr. Danaher,

We can speak with you at 11:00 ET today if you're still available. One of the things we would like to discuss with you is the possibility of DOJ's representation of you at a deposition or any other proceeding related to this litigation. Your brother-in-law may join the call if you will be more comfortable, however please be advised that his presence will preclude attorney-client privilege from being established between you and the government attorneys on this call. Consequently the substance of what can be discussed during this call may be limited.

Thank you,

Keri L. Berman
Trial Attorney, Civil Division
United States Department of Justice
Tel: 202-305-7538
Keri.L.Berman@usdoj.gov

From: Danaher, Patrick J. [REDACTED]
Sent: Tuesday, July 02, 2019 10:12 PM
To: Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>
Cc: Berman, Keri L. (CIV) <kberman@CIV.USDOJ.GOV>; Cutri-Kohart, Rebecca (CIV) <rcutrik@CIV.USDOJ.GOV>; 'jhoyt@hoylegalllc.com' <jhoyt@hoylegalllc.com>
Subject: RE: Harrison v. Esper and Roe v. Esper Litigation

Good Evening,

I am available for a call tomorrow (7/3) between 1000-1200 or 1315--1345 ET.

I have cc'd my brother-in-law, Ted Hoyt, who is an attorney. I have discussed this matter with him and would like him to join the call.

Best Regards,

Patrick J. Danaher, MD, FACP, FIDSA
Deputy Chief, Medicine Service, STVHCS, MC 111
7400 Merton Minter Blvd, San Antonio, TX, 78229
Office: [REDACTED]
iPhone: [REDACTED]
http://www.southtexas.va.gov/services/Medical_Service.asp

From: Norway, Robert M. (CIV) [<mailto:Robert.M.Norway@usdoj.gov>]
Sent: Tuesday, July 02, 2019 3:13 PM
To: Danaher, Patrick J. [REDACTED]
Cc: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Cutri-Kohart, Rebecca (CIV) <Rebecca.Cutri-Kohart@usdoj.gov>
Subject: [EXTERNAL] Harrison v. Esper and Roe v. Esper Litigation

Dr. Danaher,

I am an attorney at the U.S. Department of Justice. I represent the Government (including the Department of Defense) in *Harrison v. Esper* and *Roe v. Esper*, civil lawsuits brought in the US District Court for the Eastern District of Virginia concerning the service of individuals living with HIV in the military.

It is my understanding that Plaintiffs' counsel in this action have or intend to reach out to you in regards to this lawsuit.

Would you be available sometime today or tomorrow to speak to my colleagues Keri Berman (cced), Rebecca Cutri-Kohart (cced), and I about the litigation?

Best regards,
Robert M. Norway
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: 202-353-0889 | robert.m.norway@usdoj.gov