

EXHIBIT D

Excerpts from the Deposition of Andrew Wiesen

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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. :

- - - - - x
VIDEOTAPED 30(b)(6) DEPOSITION OF DEFENDANTS
GIVEN BY ANDREW WIESEN
DATE: Friday, February 22, 2019
TIME: 9:14 a.m.
LOCATION: Winston & Strawn
1700 K Street, N.W.
Washington, D.C.

1 REPORTED BY: Denise M. Brunet, RPR
2 Reporter/Notary

3

4

Veritext Legal Solutions

5

1250 Eye Street, N.W., Suite 350

6

Washington, D.C. 20005

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 the responsibility section of this same
2 instruction. And so the waiver is granted by the
3 CENTCOM -- or, I'm sorry, the combatant commander.

4 Q Okay. So if you turn now to page 11,
5 section (e)(2), it identifies "a diagnosis of
6 human immunodeficiency virus (HIV), antibody
7 positive, with the presence of progressive
8 clinical illness or immunological deficiency" as a
9 medical condition usually precluding contingency
10 deployment; is that right?

11 A Yes.

12 Q And I just realized -- indeed, I had this
13 written correctly -- it doesn't have the word
14 "virus" there, but it should. Is that right?

15 A HIV is --

16 Q Yeah, so it's human immunodeficiency
17 virus --

18 A Yes.

19 Q -- HIV, but, nonetheless, would this
20 indicate that a diagnosis of human
21 immunodeficiency virus, HIV, antibody positive
22 without the presence of progressive clinical
23 illness or immunological deficiency does not
24 usually preclude a contingency deployment?

25 A The first sentence is referring to HIV

1 positivity with clinical disease or -- the second
2 sentence is getting at what you're asking about,
3 is HIV-positive without other evidence of clinical
4 disease.

5 Q Okay. So I was going to get there, but
6 let's go there right now. What's the difference?
7 Or let me phrase this in a better way. Isn't it
8 essentially saying that a waiver is required
9 regardless of whether there is clinical
10 progressive -- I'm sorry -- progressive clinical
11 illness or immunological deficiency?

12 A Yes.

13 Q Can you explain why, then, there is --
14 the first sentence is there?

15 A I can't explain. Does it actually add
16 clarification or does it make it more difficult to
17 understand what they were trying to get at? I
18 can't tell you exactly why it's there. They are
19 consistent in the fact that HIV positivity is
20 going to require a waiver, whether it's because
21 you have clinical disease or because you just have
22 HIV positivity.

23 Q Okay. So in practice, everyone -- every
24 service member living with HIV requires a waiver
25 to deploy on a contingency deployment?

1 A That's correct.

2 Q And so, for all intents and purposes, we
3 could eliminate that first sentence and the result
4 of this would be the same, that everyone living
5 with HIV must get a waiver before they can go on a
6 contingency deployment?

7 A Yes.

8 Q All right. Nonetheless, I will ask, what
9 is -- how is progressive clinical illness defined
10 for purposes of this policy?

11 A And I will just review. I don't think
12 they defined it for us in this, but the common
13 definition of progressive disease would be
14 development of significant opportunistic
15 infections, development of other disabilities
16 related to HIV, non-responsive to treatment,
17 treatment failure. Those would be the generally
18 understood meaning of progressive disease.

19 Q I'm going to hand you what we're going to
20 mark as Exhibit 6.

21 (Wiesen Deposition Exhibit Number 6 was
22 marked for identification.)

23 BY MR. SCHOETTES:

24 Q So the court reporter is handing you what
25 we've marked as Exhibit 6. And Exhibit 6 is the

EXHIBIT E

Excerpts from the Deposition of Martha Soper

CONFIDENTIAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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. :

- - - - - x
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
6
7
8

9 Veritext Legal Solutions
10 1250 Eye Street, N.W., Suite 350
11 Washington, D.C. 20005
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CONFIDENTIAL

Page 107

1 Q Thank you. If you'll look to page 10 of
2 this document, that is enclosure 3. And
3 enclosure 3 is entitled, "Medical conditions
4 usually precluding contingency deployment,"
5 correct?

6 A Correct.

7 Q And if you turn to page 11, under (e),
8 infectious disease, (e)(2) says, "A diagnosis of
9 human immunodeficiency (HIV) antibody positive
10 with the presence of progressive clinical illness
11 or immunological deficiency." It goes on to say,
12 "The cognizant combatant command surgeon shall be
13 consulted in all instances of HIV seropositivity
14 before medical clearance for deployment."

15 That is referring to a waiver process,
16 correct?

17 MR. NORWAY: Objection. Form.

18 You may answer.

19 THE WITNESS: Correct.

20 BY MR. SCHOETTES:

21 Q So a waiver is required for all
22 individuals who are HIV-positive to engage in a
23 contingency deployment, correct?

24 MR. NORWAY: Objection. Form.

25 THE WITNESS: As identified in the

CONFIDENTIAL

Page 108

1 combatant command reporting instructions, correct.

2 BY MR. SCHOETTES:

3 Q So turning back now to Exhibit 6, does
4 this refresh your recollection as to whether HIV
5 is a condition referred to in DODI 6490.07?

6 A Yes, sir.

7 Q And is it?

8 A Yes, sir.

9 Q So does that mean that individuals with
10 HIV are to be categorized as deployable with
11 limitations under 1332.45?

12 MR. NORWAY: Objection. Form.

13 You may answer.

14 THE WITNESS: Yes.

15 BY MR. SCHOETTES:

16 Q And are individuals who are deployable
17 with limitations subject to retention
18 determinations under -- as outlined in 1332.45?

19 MR. NORWAY: Objection. Form.

20 You may answer.

21 THE WITNESS: They are subject to review
22 to see if there's any change in the condition.

23 BY MR. SCHOETTES:

24 Q Where does 1332 discuss that?

25 A That is how the Air Force monitors their

CONFIDENTIAL

Page 216

1 for Wednesday. Mr. Vallario sits as the board
2 president on Thursday. And there is a separate
3 board president on Wednesday, Thursday, Friday
4 [sic].

5 BY MR. SCHOETTES:

6 Q Understood. Staying with the -- I guess
7 it could be the -- your declaration, Exhibit 11,
8 under -- paragraph 5 on page A-416, the third
9 criteria listed that is pulled from the DODI
10 1332.18 -- and these apply to the medical
11 retention standards office's determination of
12 whether an airman's medical condition may cause
13 him to be unable to reasonably perform his duties.
14 The third one is, "whether the service member is
15 deployable individually or as part of a unit, with
16 or without prior notification to any location
17 specified by the Air Force."

18 How is this criteria applied to airmen
19 living with HIV?

20 MR. NORWAY: Objection. Form.
21 Ambiguity.

22 You may answer.

23 THE WITNESS: So this is one of the
24 criteria that's used for any airman, not just
25 airmen with HIV. So an airman in the Air Force

CONFIDENTIAL

Page 217

1 may deploy as an individual or as part of what we
2 call a UTC, a unit type code.

3 So an airman may deploy individually to
4 fill a shortfall that is -- requires only one
5 person. So that's how they can deploy
6 individually. It may be what we call a -- a
7 shortfall, a short -- you know, a shortfall for
8 deployment.

9 BY MR. SCHOETTES:

10 Q So if -- given that an airman living with
11 HIV is non-deployable on a contingency deployment
12 without a waiver, according to DODI 6490.07, under
13 what circumstances would that member be able to
14 deploy individually or as part of a unit with or
15 without prior notification to any location
16 specified by the Air Force?

17 MR. NORWAY: Objection. Form.

18 You may answer.

19 THE WITNESS: So the airman may deploy to
20 a location with -- if they have an assignment
21 limitation code provided there's a waiver
22 approved. However, if they are required to go to
23 a deployed location where a waiver won't be
24 provided, they cannot deploy.

25 BY MR. SCHOETTES:

CONFIDENTIAL

Page 218

1 Q So my question again is specific to
2 airmen living with HIV. And I want to understand
3 if an airman is living with HIV, which by
4 definition means that the airman cannot deploy
5 without -- cannot engage in a contingency
6 deployment without a waiver, how it would be
7 possible for that airman to meet the criteria set
8 forth in section -- in number 3.

9 MR. NORWAY: Objection. Form.
10 You may answer.

11 THE WITNESS: So if they're not granted a
12 waiver, they cannot deploy.

13 BY MR. SCHOETTES:

14 Q And section 3 says that they need to be
15 able to deploy with or without prior notification,
16 which indicates that it could be very quickly that
17 they would have to deploy, correct?

18 MR. NORWAY: Objection. Form.
19 You may answer.

20 THE WITNESS: Correct.

21 BY MR. SCHOETTES:

22 Q So they might not have time to apply for
23 a waiver.

24 MR. NORWAY: Objection. Form.
25 You may answer.

CONFIDENTIAL

Page 219

1 THE WITNESS: So that's what the
2 assignment limitation code C is for. It's to flag
3 a member in the system that they cannot deploy to
4 a certain location without a waiver or, you know,
5 they have limitations on where they can deploy.

6 So if -- if there was a short notice fill
7 that came up and this member had an assignment
8 limitation code, but they were perhaps the next
9 person in the queue to deploy, they might be in
10 the queue, but then, upon review of the deployment
11 requirements, they would be identified as
12 non-deployable.

13 BY MR. SCHOETTES:

14 Q So they wouldn't be able to deploy
15 individually in that instance without prior
16 notification to the location the Air Force wanted
17 to send them?

18 MR. NORWAY: Objection. Form.

19 You may answer.

20 THE WITNESS: Correct.

21 BY MR. SCHOETTES:

22 Q And every service member living with HIV
23 who is retained in the service has an assignment
24 limitation code -- I'm sorry -- retained in the
25 Air Force has an assignment limitation code that

CONFIDENTIAL

Page 220

1 is a C code, correct?

2 MR. NORWAY: Objection. Form.

3 You may answer.

4 THE WITNESS: Correct.

5 BY MR. SCHOETTES:

6 Q Which means, for purposes of this
7 criteria, all airmen living with HIV are really in
8 the same position?

9 MR. NORWAY: Objection. Form.
10 Objection. Mischaracterizes the policies.

11 You may answer.

12 THE WITNESS: So, yes, airmen with the
13 assignment limitation code are identified as
14 having a deployment-limiting condition, an
15 assignment limitation code that, in order for them
16 to deploy to location X, they do or do not need a
17 waiver. So --

18 BY MR. SCHOETTES:

19 Q They do need a waiver, you're saying?

20 A They do or do not. It depends on the
21 location. So you could be deployed CONUS,
22 state-side -- the continental United States, I'm
23 sorry. So in some of those -- and that could be
24 in a contingency operation as well. So we do have
25 state-side contingency operation deployments.

CONFIDENTIAL

Page 221

1 Q Right. But for purposes of this
2 criteria, what it says is you must be able to go
3 to any location specified by the Air Force,
4 correct?

5 MR. NORWAY: Objection. Form.
6 Objection. Mischaracterizes the statement.

7 You may answer.

8 THE WITNESS: Yes.

9 BY MR. SCHOETTES:

10 Q And they must be able to do so with or
11 without prior notification, according to this
12 standard, this criteria?

13 MR. NORWAY: Objection. Form.

14 You may answer.

15 THE WITNESS: Yes.

16 BY MR. SCHOETTES:

17 Q So once again, I'll ask, how could any
18 airman living with HIV meet the criteria set forth
19 in section -- at number 3?

20 MR. NORWAY: Objection. Form.

21 You may answer.

22 THE WITNESS: Again, this is the medical
23 standards office determination and their criteria
24 that they use, whether or not an airman would be
25 referred to the physical evaluation board for a

CONFIDENTIAL

Page 222

1 fitness for duty determination.

2 So they have the criteria, and if there's
3 any question on whether or not they can meet these
4 standards, then they would be referred to the
5 physical evaluation board.

6 BY MR. SCHOETTES:

7 Q But I still want to get an answer to this
8 question: How could an airman with HIV meet the
9 criteria set forth at number 3?

10 MR. NORWAY: Objection --

11 BY MR. SCHOETTES:

12 Q Let me try it a different way. What
13 circumstance would an airman with HIV have to be
14 in in order to meet the criteria set forth at
15 number 3 when the medical retention standards
16 office is making the determination?

17 MR. NORWAY: Objection. Form.

18 You may answer.

19 THE WITNESS: So airmen with asymptomatic
20 HIV are provided an assignment limitation code C,
21 so that flags the airman for certain criteria for
22 deployment. That's for all airmen. And that's
23 going through this medical standards branch.

24 BY MR. SCHOETTES:

25 Q So is it correct that no airman living

CONFIDENTIAL

Page 223

1 with HIV would be able to meet the standards set
2 forth at criteria 3 because they have a C
3 limitation code?

4 MR. NORWAY: Objection. Form.
5 Objection. Mischaracterizes the policy.

6 You may answer if you can.

7 THE WITNESS: That is true. Uh-huh.

8 BY MR. SCHOETTES:

9 Q I'm going to introduce what I'm going to
10 mark as Exhibit 12.

11 (Soper Deposition Exhibit Number 12 was
12 marked for identification.)

13 BY MR. SCHOETTES:

14 Q If you would -- first of all, are you
15 familiar with this document?

16 A Yes, sir, I am.

17 Q I obviously don't expect you to review
18 the whole thing. It's a large document. What is
19 this document, Exhibit 12?

20 A This is the Air Force instruction 48-123,
21 Air Force guidance memorandum, 2018-2. The
22 subject is guidance memorandum, Air Force
23 instruction 48-123, medical examinations and
24 standards. And it's dated 28 January 2018.

25 Q I'd like you to turn to page 67 of this

CONFIDENTIAL

Page 262

1 solely on his HIV status, then?

2 A It looks like his -- the deployability is
3 based on the duty -- the assignment limitation
4 code and his deployed location.

5 Q His deployed location? Was he deploying
6 to a particular location?

7 MR. NORWAY: Objection. Form.

8 You may answer.

9 THE WITNESS: Well, he wouldn't be able
10 to deploy because of his limitation code,
11 assignment limitation code.

12 BY MR. SCHOETTES:

13 Q He wouldn't be able to deploy to certain
14 locations?

15 A Correct.

16 Q But he wasn't actually slated to deploy
17 to any location in particular, was he?

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

20 You may answer if you can.

21 THE WITNESS: I have no idea.

22 BY MR. SCHOETTES:

23 Q And you said he wouldn't be able to
24 deploy, but, in fact, he could receive a waiver to
25 deploy, couldn't he?

CONFIDENTIAL

Page 263

1 MR. NORWAY: Objection. Form.

2 You may answer.

3 THE WITNESS: Well, it would be up to the
4 combatant command surgeon general directorate to
5 authorize a waiver. But for the locations that
6 his career field most often deploys to, they will
7 not approve a waiver for anybody with HIV.

8 BY MR. SCHOETTES:

9 Q And that's definitive, they will not?

10 MR. NORWAY: Objection. Form.

11 Objection. Outside of scope.

12 You may answer.

13 THE WITNESS: They will not.

14 BY MR. SCHOETTES:

15 Q Is Roe's limited deployability the reason
16 that he was separated, that he was due to be
17 separated?

18 MR. NORWAY: Objection. Form. Objection
19 to the extent that it mischaracterizes the
20 decision.

21 You my answer.

22 THE WITNESS: It was -- yes. The
23 deployment -- the deployability status is in
24 conjunction with the determination to reasonably
25 be able to perform duties. And he is not