Dangerous Discharge

Will Dornan’s PWA military ban survive legal combat?

April 1, 1996 By Catherine Hanssens

Last February, President Clinton was presented with the opportunity to demonstrate his seriousness about ending policies that harm people with HIV. It was an opportunity lost, however. With the stroke of his pen, Clinton put into law Section 567 of the Defense Authorization Act, which requires that all HIV positive servicepeople be discharged no later than six months after his signature dries.

Under the former Defense Department policy, members of the armed forces who tested HIV positive were allowed to remain on active duty as long as they were fit but were prohibited from serving abroad or in combat. The 1,049 HIV positive servicepeople account for only one-fifth of medically nondeployable personnel permitted to serve as long as they meet standard health requirements. None of the remaining military personnel who are nondeployable for disabilities or illnesses other than HIV are affected under the newly enacted provision.

Although the President and Pentagon spokespeople promise support for a bipartisan bill repealing the provision, it’s not safe to rely on White House lip service or congressional support for legislation benefiting people with HIV. If service members lose their careers because of HIV, legal action will be inevitable.

Unfortunately, the Americans with Disabilities Act (ADA) does not apply to the federal government, and a handful of cases have concluded that the Rehabilitation Act of 1973, which provides similar protection for those with disabilities against discrimination by federal agencies, does not apply to the military. However, Section 567’s distinction between servicemembers with HIV and those with other nondeployable medical conditions may prove to violate the Constitution’s equal protection guarantees.

The government violates the equal protection clause when it singles out one group for punitive treatment without a rational reason. The likelihood that a court will find the action unconstitutional is increased if it can be shown that the action is motivated solely by a hostile purpose. Defense Department spokespeople have stated that Section 567’s arbitrary discharge of HIV positive service members is “unwarranted and unwise, unnecessary as a matter of sound military policy and disruptive to the military programs in which they play an integral role.” Thus, the only rationale to date is the prejudice and stereotyping evident in the opinions of its sponsor, Rep. Robert Dornan (R-CA), who has voiced his contempt for “the homosexuals, drug abusers and

prostitutes” who unfairly avoid combat by becoming HIV positive. Clearly, discharged servicepeople can argue that their termination is motivated solely by Dornan’s “hostile purpose.”

Even without the evidence of a hostility, the separation of those nondeployable service members with HIV from other nondeployables is unconstitutional if there is no rational basis for treating the HIV positive group differently. While it is true that the military traditionally receives a significant amount of deference from the courts, Section 567 would be found to violate the right of those with HIV to equal protection of the laws if it were concluded that the separation of HIV positive nondeployables from all other nondeployables is irrational. The Pentagon’s statements that the provision serves no military purpose supports this conclusion.

A large percentage of those with HIV have served for a decade or more. Some have children with HIV who depend on their parents’ health benefits for basic care. It’s neither humane nor practical to discharge these people. If Congress fails to come to the same conclusion, hopefully the courts will decide Section 567 is unconstitutional. A coordinated attack on this provision will be critical, and service members with HIV should contact a legal defense organization before pursuing legal action on their own.

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