

In United States Federal Court, District of Oregon

**James Michael Murphy
5080 Riordan Hill Dr
Hood River, Oregon 97031
(Plaintiff)**

US Federal Civil Court Action - Violation
of the 14th Amendment of US Constitution

vs

Negligence, breach of contract (ORS 396.1
Violation of Substantial (Procedural) Due
Process (42 U.S.C Section 1983, 14th
Amendment)

Violation of privacy (ORS 396.160(7))

**Agency of the USAF , Sec of US Air Force
Commander-in-Chief of Military Forces (Donald D Trump)
Commander in Chief of ORNG Governors of Oregon (Katherine Brown); MG Michael E
Stencel - a dual status commander (DSC), ORANG; BG (ret) Jeffery Silver, BG James
Kriesel , Dr Heidi Kjos and Dr Jonathan Vinson, Oregon Military Department, an Oregon
State Government Entity)
(Defendants)**

Complaint:

The plaintiff was discharged from the USAF on 16 AUG 2016 Under Other Than Honorable Conditions (UOTHC) after being separated from the Oregon Air National Guard. USAF denied Plaintiff procedural civil rights officially afforded under DoDi 6025.13 enclosure # 7 and AFI 44-119, chapter 9. This intentional omission was also a breach of the Plaintiff's contract of appointment to the USAF and ORANG as a healthcare provider who has been accused of dereliction of (medical) duty. Additionally, the Plaintiff is seeking relief for malicious negligence by Oregon State employee MG Michael E Stencel (MG Stencel) and his staff in failing to comply with regulations as prescribed in the Oregon Code of Military Justice - including but not limited to articles 143 (a) , 37 , 15 , 17 , 120 C(2) (a-c) and DoDi 6025.1.

Jurisdiction and Venue

1. This is a civil action for damages, declaratory and injunctive relief, and attorney's fees, for negligence and violation of substantive due process and of the Equal Protection Clause under 42 U.S.C. 1983.
 2. Jurisdiction for the federal claims exists under 28 U.S.C. 1331 because this action arises under the laws of the United States.
 3. Venue is proper in this district because a substantial part of events occurred in or at the Portland Air National Guard Base, Portland, OR.
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1. ORS 30.275 (9) requires any action to be taken within 2 years. Tort notice was filed with the Department of Administrative Services in the State of Oregon in February 2016 within 180 days of identification of injury and was thus timely. This suit is filed within 2 years and is timely.

Parties

2. Plaintiff is and has been at all material times a citizen of the United States and a resident of Oregon. Plaintiff is a physician specialized in Anesthesiology with advanced certification in Pediatric Anesthesiology. Plaintiff enlisted in the Air Force Reserve in July 2005 where he was commissioned as an officer, certified as a USAF physician and flight surgeon and later serving in the Oregon Air National Guard (ORANG) . Plaintiff was recruited and signed a legally binding contract (Statement of Understanding (SOU)) under AFI 44-119, with considerations, as part of the plaintiff's appointment to the USAF and again as part of the Plaintiff's accession to the ORNG/Oregon Air National Guard.
3. Defendant United States Air Force as agency of the federal government, and specifically in their individual capacities Commander in Chief (Donald D Trump) and Secretary of AF (Heather Wilson) with the power, right and duty to control the manner in which discipline and separation are carried out and to see that all orders, rules, training, instructions

and regulations promulgated for the Agency were consistent with the federal constitution and DoD instructions.

4. Defendant Oregon Military Department (OMD) as an entity of the State of Oregon with the power, right and duty to control the manner in which discipline and separation are carried out and to see that all orders, rules, training, instructions and regulations promulgated for the Agency were consistent with the Oregon Code of Military Justice(OCMJ) and the Constitution of the United States of America.
5. Defendant MG Stencil as the Oregon State TAG, an employee of the State of Oregon breached his sworn duty of "supervision of all matters pertaining to the administration, discipline, mobilization, organization and training of the Oregon National Guard." MG Stencil was responsible for ensuring that all actions taken by the OR-NG were consistent with the Oregon Code of Military Justice (OCMJ) and the US Constitution.
6. ORANG Defendants in their individual capacities, BG (ret) Jeffery Silver, BG James Kriesel, Dr Heidi Kjos, Dr Jonathan Vinson were negligent in failing to further investigate additional evidence and/or withholding exculpatory evidence, conspiring to prevent the Plaintiff from receiving due process under the Oregon Code of Military Justice, Oregon Constitutional law and the 42 U.S.C. 1983 14th amendment.
7. Defendant Katherine Brown as the Governor of the State of Oregon, Commander-in-chief of Oregon Military Department with the power, right and duty to control the manner in which discipline and separation are carried out and to see that all orders, rules, training, instructions and regulations promulgated for the Agency were consistent with the State and Federal constitution regarding due processes and the ORCMJ.

Statutory Framework

8. The Oregon state constitution Article 1, section 10 states: -“No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and *every man shall have remedy by due [coarse] of law for injury done him in his person, property, or reputation.*”

9. 42 U.S.C. 1983, *Fourteenth Amendment* of the United States Constitution guarantees *substantive due process* to every citizen of the United States.
10. Michael E Stencel, a dual status (Federal and State employee) is charged with "...the supervision of all matters pertaining to the administration, *discipline*, mobilization, organization and training of the Oregon National Guard..." according to ORS 396.160 (2) and to "...perform all duties required by laws of the United States and the State of Oregon..." ORS 396.120 (3)
11. The Federal Civil Rights Act, 42 USC 1983 is applicable via the 14th Amendment and [*Fitzpatrick v. Bitzer*, 427 U.S. 445](#) (1976).
12. 5 U.S.C. 552a(g)(5) Privacy Act. The OMD is the official custodian of records for officers and enlisted personnel in the National Guard.
13. Oregon Code of Military Justice Article 120 c (2) requires specific punishment for certain described crimes including aggravated sexual assault defining a perpetrator this way: "... engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of: A) appraising the nature of the sexual act B) declining participation in the sexual act C) communicating unwillingness to engage in ———the sexual act Is guilty of aggravated sexual assault and *shall be punished as court ———martial may direct.*" [Emphasis added]
14. Oregon Code of Military Justice, Article 143(a) states that "...Non-judicial punishment may be used to effectuate the purpose and provisions of this code, but only to the extent *not inconsistent with this code or law...*" [Emphasis added.]
15. Oregon Code of Military Justice, Article 15 (h) states: Punishment may not be imposed by a commanding officer of grade of Major or higher upon any person subject to this code under this article if the person has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment."
16. Medical based AFI 44-119 chapter 9 and DoD 6025.13, enclosure #7 regulations require for the process for the Plaintiff a Quality Assurance investigation and Peer Review if the accusation was related to *dereliction of medical duties and not charged as a criminal sexual assault.*

First Claim for Relief: The Air Force violated the Department of Defense and Air Force Regulations, and in so doing denied Plaintiff substantive (procedural) due process, a Violation of Constitutional Right to Substantive Due Process - 42 U.S.C. 1983, Fourteenth Amendment to the U.S. Constitution

17. On or about August 16, 2016, Plaintiff was discharged under Other Than Honorable Conditions (OTHC) from the Air Force for dereliction of duty, in his performance as medical personnel. Discharge was promulgated as violation of medical duty however Plaintiff was not afforded procedural due processes entitled under AFI 44-119, chapter 9 and DoD Instruction 6025.13 enclosure 7. The following paragraphs are incorporated herein by reference.

Second Claim for Relief: Negligence. Oregon Military Department and The Adjutant General, MG Stencil failed in their duty to follow the Oregon Code of Military Justice and convene a court-martial as requested by the Plaintiff

18. On or about November 19, 2011, according to records, in conjunction with his duties as a USAF Physician, Plaintiff conducted a health screening examination as part of a regularly scheduled Preventive Health Assessment (PHA) on Staff Sergeant (SSgt) Hannah Mosebach. The screening was not memorable to the Plaintiff.
19. Two years later, on or about December 8, 2013, Plaintiff was advised that SSgt Mosebach alleged he had performed an unauthorized pelvic exam and Pap smear screening on her. Her accusation included intimidation by the Plaintiff (allegedly stating the lack of a need for a chaperone). If, *substantiated*, this constituted an aggravated sexual assault per OCMJ 120 c (2) requiring punishment as determined by court-martial.
20. SSgt Mosebach's accusation included Plaintiff alleged unauthorized exam 'penetrated' her vagina (via instrument or by the Plaintiff) which if *substantiated* would merit a sexual assault charge with the possibility of incarceration, if convicted.
21. On January 5, 2014, the Oregon National Guard requested the Office of Complex Administrative Investigations (OCI) investigate the allegation of sexual assault. The OR-NG was negligent in **not** notifying local law enforcement as *required by the DOD*.

22. Breach of a Legally Binding Contract (SOU): with considerations; Air Force Instruction 44 -119 Chapter 9 and DoDi 6025.13 , enclosure #7. Plaintiff had a *contractual entitlement* to due process regulations related to medical practice in the military including the *dereliction of (medical) duty*. A contractual obligation supported by the findings and conclusions of State Air Surgeon, ID- ANG, Col. Ralph Sutherlin, in the OR-NG Command Directed Investigation (CDI) that was tasked and presented to MG Stencil.
23. On the OCI report dated August 21, 2014, (Investigation Number OR1401) the sexual assault accusation was found *substantiated* and submitted to the Oregon National Guard TAG. However, a court martial was not ordered and no further investigations were conducted until after separation board via a CDI by Col Ralph Sutherlin ID- ANG.
24. A senior Air JAG of the Oregon National Guard, Colonel Tom Patton, conducted a review of the investigation and concluded that the “investigator’s ‘*substantiated*’ finding was completely wrong, and does not comport with the legal standard for an administrative investigation, because it was not supported by the preponderance of the evidence.” There was no proof or evidence to support the OCI conclusions.
25. October 2014 Plaintiff received a Letter of Notification (LON) that the OMD determined Plaintiff should be separated from the military but provided the Plaintiff the opportunity for a hearing before a separation board. There was no court martial ordered in spite of the fact that OCI found the accusation of a sexual assault *substantiated* and no follow up investigations were conducted (despite multiple requests by the Plaintiff). Plaintiff was defamed, but not charged with sexual assault and subjected to administrative separation for *dereliction of (medical) duties*, requiring a lower standard of evidence.
26. March, 2015, Plaintiff requested trial by court-martial as was his right according to OMCJ Article 15 (h), but was refused by the TAG and Command as communicated to the Plaintiff by the State IG .

Third Claim for relief: NEGLIGENCE. MG Stencil and the OMD failed to investigate further, in spite of the findings of a knowingly “flawed” OCI report

27. The Plaintiff, upon review of the entire OCI report, noted several discrepancies in the accuser's medical history including but not limited to a suspicious random specific request for a "pap" smear (from a male physician assistant) and the concealment of mental health issues and medications from the military for over 8 years in direct violation of DoD instruction 6025.10 while remaining in a world wide qualified / deployable status. Plaintiff brought these discrepancies to the attention of the command.
28. On or about October 29, 2014, **Plaintiff reported** the sexual assault allegations to the Port of Portland Police (local law enforcement). On or about January, 2015, SSgt Mosebach filed a police report, claiming sexual assault. District Attorney Christopher Ramras (now Judge) declined to prosecute, citing the Plaintiff's favorable polygraph, the accuser's recent overly friendly email (that did not get a response). The DA provided his analysis to Plaintiff, who provided it to the OMD and the Secretary of the Air Force.
29. On December 5, 2014, a Quality Assurance Officer was appointed to conduct a Quality Assurance Review into the allegations of sexual assault following the regulations as described under Chapter 9 of AFI 44 – 119 (identical to DoD 6025.13 enclosure 7.).
30. On April 8, 2015, the Quality Assurance Officer concluded, based on his review of the OCI investigation OR1401 and other documents, that one could "...neither prove nor disprove the allegation [of whether the Plaintiff had performed the pelvic exam or Pap test]..."
31. MG Stencil, was aware that the accuser had received a letter of reprimand, dated April 2014, for disobeying direct orders regarding her broadcasting of the accusation and had lied on several occasions to her supervisors and Col Jennifer Parady. MG Stencil was well aware of the significant credibility issues with the accuser at the time he issued the LON.
32. From May 6 – 9, 2015, an Administrative Discharge Board was convened and determined Plaintiff should be separated UOTH conditions from the military for dereliction of duty. The decision to charge Plaintiff with dereliction of duty and proceed with an administrative hearing, in violation of OCMJ Article 120 c (2) and OCMJ Article 143 (a).

33. Administration hearings are decided by predominance of evidence, a lower standard of evidence than required by court-martial. They do not provide subpoena power or allow depositions and have very limited discovery powers. The assigned military counsel (Capt Jodi Carlisle) provided grossly inadequate representation, was careless and failed to use even ordinary skills, which led to a harmful outcome for the plaintiff. Capt Carlisle is currently under review by the USAF Office of Professional Responsibility. There exists an abundance of evidence of Unlawful Command Influence surrounding the entire separation board matter, in violation of Article 37(a) of the OMCJ.
34. On November 8, 2015 , IAW AFI 44-119 , a Peer Review Panel was tasked to *review the clinical practice/performance* of the Plaintiff. **Instead**, they started with the assumption the Plaintiff had performed the exam, stating in their report: “The PRP was in agreement that [they] were to review the provided materials with *the assumption that the alleged act had occurred.*” [Emphasis added] As such, the PRP did not act as a peer review in that they did not actually review clinical practice or performance at hand — whether or not a dereliction of duty had actually occurred.
35. Stencel and his command were negligent in their failure to discipline SSgt Mosebach for violations of DODi 6025.19 (3)(d): concealing her mental health issues from the military for over 8 years, her dependence on psychological medications and her refusal to provide her civilian medical (gyn) and mental health records to the military as requested.
36. Inexplicably in February 2016 ; the USAF Western Region Medical Law Branch/ AF-MOA and the Legal Advisor to the AF Surgeon General, *suddenly* determined that AFI 44-119 did **not** apply to the ANG, despite the contractual agreement with the Plaintiff upon accession to the ANG. The ORANG failed to offer alternative due process procedures. The applicability of DoDi 6025.13, enclosure #7 to the ANG was not addressed and it’s protections were denied.

Fourth Claim for relief: OMD and Stencel failed in their duty to discipline Major Adams and Col Wilde for violations of the Privacy Act

34. Privacy rights of the Plaintiff and accuser were unlawfully violated when USAF JAG Major Michael Adams and Col Marshall Wilde directly disobeyed the Oregon TAG order and publicly released the OCI report to attorney Joel Shapiro , the Multnomah County Circuit Court and to the media. Col Wilde refused to seal the submission to the court . The report, that was constructed to advise Commanders, was marked For Official Use Only, it ‘substantiated’ a criminal act without any proof or evidence and contained defamatory material regarding the Plaintiff, as well as personally identifiable information (PII) about both the Plaintiff and the accuser.

Conclusion

The actions of the USAF denied the Plaintiff Procedural due process and remedy in due course for harms done to the Plaintiff’s person, property and reputation. The failure to properly investigate the accusation resulted in an Oregon Medical Board proceeding and revocation of the Plaintiff’s medical license, the loss of a position at Womack Army Medical Center, personal bankruptcy, and loss of reputation, both personal and professional.

The OMD negligently determined a single, flawed investigation was sufficient to determine the guilt or innocence of the Plaintiff, then conspired to cement the injustice by denying the Plaintiff a court-martial and thus denying the requirement of a higher standard of proof, despite the conclusion of the OCI investigation that the Plaintiff was guilty of aggravated sexual assault. *Prima facie*, in a court-martial, the Plaintiff would have been found innocent, as evidenced by testimony of Tom Patton, analysis by Multnomah County D.A. (now Judge) Christopher Ramras, and finally the judgment of Chief Administrative Law Judge John Mann who found for the Oregon Medical Board that the OCI report and testimony of the accuser did not present a predominance of evidence substantiating the allegations.

The OMD and named individuals conspired to determine that an appropriate, medical-clinic based investigation was not applicable to the Plaintiff, and a proper quality assurance investigation and peer review was deemed not applicable to the ORANG. The Quality Assurance assess-

ment that was completed determined the evidence did not substantiate the accusation. A Peer Review was done on the basis that the group assumed the guilt of the Plaintiff and was thus not valid and it did not assess the obvious fact that an assault could not have occurred.

OMD, General Stencil and, by extension, Governor Brown, acted in a willful and intentional way to corrupt disciplinary actions with the predetermined purpose of finding the Plaintiff guilty. Despite the clear claim of aggravated sexual assault, the decision was made to charge Plaintiff with dereliction of duty, a charge with a significantly lower standard of proof. Legitimate and legally correct critical assessments of the OCI report were submitted to the OMD but were ignored. OMD and MG Stencil violated their contract with the Plaintiff by not following regulations directing investigation and response to adverse actions in the medical corps as delineated by AFI 44- 119. When those processes were initiated by Womack , the result was exculpatory: no military medical facility removed Plaintiff's credentials.

Prayer for Relief

Entitlement (Monell v Dept of Social Services and Adickes v. Dress)

Wherefore, the Defendants's conduct caused Plaintiff to suffer severe economic damages. Requesting a jury trial and a judgment declaring that the acts of the defendants described above are in violation of the Fourteenth Amendment to the Constitution. Acts of MG Stencil, OMB and ORANG constitute negligence. Request compensation for lost income and all other compensation denied or lost to Plaintiff as the a result of Defendant's unlawful actions, in an amount to be proven at trial; For compensatory damage for Plaintiff's emotional damage and damage to reputation; For *punitive* damage to be determined at trial; Attorney's fees; and further relief as the Court may deem just, proper and appropriate. **Let this never happen again !**

Respectfully Submitted on 15 AUG 2018 .

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