IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION



No. 5:24-CV-00176-BO

MICHAEL J. FORBES,
614 Northampton Rd.,
Fayetteville, N.C., 28310, *pro se*.

*Plaintiff*,

v.

THE UNITED STATES ARMY,
Christine E. Wormuth et al.,
101 Army Pentagon,
Washington, D.C., 20310

*Defendant.*

REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S REQUEST FOR EXEMPTION OF RULES

This 29th day of July, 2024.

This memorandum is in reply to the Defendant's response to a MOTION TO REQUEST FOR EXEMPTION OF RULES by the Plaintiff, *pro se,* pertaining to a Complaint, which alleged Constitutional and Privacy Act violations. The violations of the Act are of certain provisions, namely: (e)(1), (e)(2), (e)(3), (e)(4), (e)(5), (e)(7), (e)(10), and (m)(1) and the claims are located in the STATEMENT OF FACTS FOR PARTIAL SUMMARY JUDGMENT included in the MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT.

Jurisdiction, standing, 'disclosure' and 'MWPA' defenses have been addressed in other filings; this brief will only address new defenses and arguments presented in the Defendant's Response to MOTION TO REQUEST EXEMPTION OF RULES. The Plaintiff argues,

a. the Plaintiff's request is not "futile" and is completely within the purview of the Court's discretion or as the Defendant cited "…or with leave of court" [Fed. R. Civ. P. 15(a)(2)] of whom it was requested.

b. the Plaintiff's complaint described the Privacy Act violations and provided *prima facie* evidence of their occurrence with appended claims,

c. thankfully, the Defendant walked back its steadfastness on the non-existent MWPA claim by adding the word "perhaps" in its response (nothing more is argued on this point herein).

## ARGUMENT

Argument note: a metaphorical quotation by the Defendant was expanded on in the Plaintiff's REPLY TO RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT as inspired by the the Defendant's 4th Circuit case citation that used a 'fencing' metaphor [Def. cited McCray, 741 F.3d at 483] in which the Maryland Department of Transportation's dismissal ruling was overturned, the Plaintiff (McCray) was not provided the opportunity for discovery due to a District Court's summary judgment stemming from that defendant's Motion to Dismiss. The Plaintiff continues to utilize further extension of that analogous metaphorical association herein.

Simply placing the Plaintiff's claims where they belong brings the Plaintiff's complaint into compliance with standard legal requirements; it merely rights an acknowledged neophytic error of a *pro se* litigant who has never studied any aspect of law prior to his realization he had a

right to sue the Defendant on December 12, 2023. As argued throughout this case, the Plaintiff has proven this case is not frivolous and will let those arguments stand.

However, the Defendant's use of a Fed. R. Civ. P. 8(a)(2) is worth discussion. The *Iqbal* case the Defendant cited is a *Bivens* action wherein the behavior of individuals that directly took unlawful action against a plaintiff are potentially liable to assume damages born by a plaintiff; conversely, this case is an agency case brought under the Privacy Act.[1] The case immediately followed the Defendant's citation with the following:

> *Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.*

The Plaintiff can and has demonstrated factual allegations merely with the following subset (non-inclusive) of evidence: 1) the Brigade Commander issued orders to participate in a survey that is not 'incident to service;' 2) the orders did not comply with the Privacy Act; 3) the orders stripped the Plaintiff of his statutory and Constitutional rights; 4) the Plaintiff requested assistance from IG and did not receive it; 5) the Subject Matter Expert (the Psychologist) did not provide the Privacy Act information: 6) the Psychologist reported the Plaintiff as disrespectful; 7) the Brigade Commander investigated the Plaintiff for the disrespect regardless of his and the Psychologist's failures to comply with the Privacy Act; 8) the Brigade Commander oversaw a slanted investigation; 8) the Psychologist authorized a psychological medical evaluation after the investigation of her complaint began (despite the conflict of interest); 9) summarily the

[1] The *Iqbal* case cited the *Trombley* case, which was a case proffered under the Sherman Act, 15 USC § 1.

investigation resulted in the Plaintiff being slotted for administrative separation from his contractual service due to unsubstantiated disrespect.

All of these items have factual evidence that has been provided by the Plaintiff; the only caveat to this statement is that the Court has not been provided the extreme slant to the *ad hominem* attacks found in the investigation until it gets the entire investigation, which had unproven and untrue allegations and perceptions delivered via generalizations and hearsay, that included thievery, blackmail, racism, and homophobia, among others; they were 'outright false and made up out of whole cloth.' Notably, none of these claims were provided to the Plaintiff at the onset of the investigation, they were only provided after he was delivered a General Officer Memorandum of Reprimand five months later. The slant of this investigation is evidentiary and supports facial and factual allegation of an unlawful order that resulted in multiple unsubstantiated claims against the Plaintiff in an investigation directly stemming from the violations of the Privacy Act. The question that must be answered after factual allegations are presented is, "Did the Defendant (an agency) act within its statutory authority" in this case?

The recent Supreme Court ruling on what has come to be widely known as the *Chevron* doctrine overturned legal standing that has endured for decades; it now holds:

> *The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; Chevron is overruled... Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority....* [LOPER BRIGHT ENTERPRISES ET AL. v. RAIMONDO, SECRETARY OF COMMERCE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22–451. Argued January 17, 2024—Decided June 28, 2024]

Chief Justice Roberts explained in his opinion that *Chevron* deference is inconsistent with the Administrative Procedure Act, which sets out the procedures that federal agencies must follow as well as instructions for courts to review actions by those agencies. While the Plaintiff did not bring this case under APA law, a Plaintiff-cited case (specifically, the Anthrax case [Doe v. Rumsfeld, 341 F. Supp. 2d 1, 3 (D.D.C. 2004)]) infers that he may attempt to, if necessary.

One final point regarding Fed. R. Civ. P. 8, which only transpired after the filing of the Plaintiff's complaint came to light, puts a sharper point on the Plaintiff's 'foil.' The Department of the Army Inspector General (DAIG) just published the "Company-level Command Team Training Booklet, June 2024," a training document with 12 situational lessons in it; "Situation 7: Unofficial Social Media" clearly states, "Pressuring Soldiers to join an external organization is never appropriate."[2]

This Court is more than capable to decide whether the factual ordering of the Plaintiff to become a permanent client of an unofficial third-party was "pressuring," and whether it was, "appropriate," pursuant to DAIG doctrine, or "within its (the Defendant's) statutory authority," according to the *Chevron* ruling. Notably, the recent *Chevron* ruling severely diminishes DAIG's opinion on the matter, but it is cited due to the obvious, common-sense nature of the agency's opinion and the responsibility the agency had to remediate this case prior to it becoming a legal matter; in fact, it has been against the law (that they cited in the publication and referenced on

[2] *See* Enclosure B01, "Situation 7," *excerpt of* "Company-level Command Team Training Booklet," *(highlighted, bottom of page 45)*, Department of the Army Inspector General (DAIG), July, 2024.

the next page) to coerce Soldiers to third party corporations long before the DAIG's July 2024 booklet publication.

The DAIG document goes further to explain why an agency official cannot "pressure or incentivize his Soldiers to…join an external (non-Army) entity…." and, cited, 5 CFR § 2635.702,

> ***An employee shall not use his public office*** *for private gain,* ***for the endorsement of any product, service or enterprise****, or for the private gain of friends, relatives, or persons whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations...*
>
> *(a) [Inducement or coercion of benefits.]* ***An employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit****, financial or otherwise,* ***to himself*** *or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.* (emphasis added)

This paragraph of the law (5 CFR § 2635.702) was not included by DAIG in their booklet:

> *(b) Appearance of governmental sanction. Except as otherwise provided in this part,* ***an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses*** *his personal activities or those* ***[activities] of another****.*

Now, the argument turns away from the Fed. R. Civ. P. 8 and turns to tort law; Marcus Allen was a Federal Bureau of Investigation (FBI) Agent who was placed essentially 'let-go' in 2022. He later filed suit for being placed on unpaid leave status after having his top-secret clearance revoked. The nature of the case speaks directly to the importance the Plaintiff places on this case, which is predisposed on the forced answering of unlawful questions by an employer and being investigated for fabricated crimes. Albeit Mr. Allen had a duty to answer lawful clearance adjudication questions, but similar to the Plaintiff's case. That said, neither he, nor his colleagues that investigators chose to procure interrogatories from, should have been asked those questions[3] based on Mr. Allen's self-reporting of his participation in a free speech action; moreover, given our 1st Amendment, he should never have to be asked the particular content of the questions pertaining his support of former President Trump, his COVID vaccine beliefs, or his attendance of 2nd Amendment rallies as long as he is acting lawfully in his daily life. His case was brought under:

[3] *See* Enclosure B02, Exhibit 2 of a Letter via Electronic Transmission to Inspector General Michael E. Horowitz, U.S. Department of Justice, Office of the Inspector General from Empower Oversight, Whistleblowers & Research, June 8, 2024.

*...28 USC §§ 1331 and 1346. This Court may award Plaintiff's declaratory and injunctive relief pursuant to the Declaratory Judgment Act and this Court's inherent equitable jurisdiction.... Venue is proper under 28 USC § 1391."*[4]

Ultimately, the plaintiff in that case had his top-secret clearance unlawfully revoked in an unlawful clearance investigation, which resulted in his being put on unpaid leave. Similarly, the Plaintiff in this case, self-reported the slanted investigation results in mid-2023 and his clearance has been in a state of internal investigative review since then. The slanted investigation and the agency's intent to remove the employee is eerily similar to what is currently underway with the Plaintiff. The good news for the plaintiff in the *Allen* case was announced just last week (July 26, 2024), in that the Plaintiff, Marcus Allen, "was vindicated...when the bureau restored his clearance and paid him more than two years of back pay," according to CNN.[5] The cited article went on to quote a portion of a letter written by Mr. Allen's attorney, Tristan Leavitt, of Empower Oversight after a Joint Stipulation of Dismissal was entered in the plaintiff's case on June 3, 2024:

*Leavitt told Horowitz he believed the documents detailing the security clearance review for his client were "**shocking**" evidence of an "**abuse of authority and a violation of our client's rights under the First Amendment.**"*[6]

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[4] Quoting from the COMPLAINT filed in the case of *Marcus O. Allen v. Christopher A. Wray*, case #0:22-cv-4536 in the United States District Court for the District of South Carolina, dated December 15, 2022.

[5] "In shocking litmus test, FBI security inquiry tried to unmask employee's Trump support, memos show," *Just the News*, July 26, 2024, *online at:* https://justthenews.com/accountability/political-ethics/tuefbi-tried-unmask-employees-trump-support-while-conducting

[6] *See* Enclosure B03, *letter via electronic transmission to* Inspector General Michael E. Horowitz, U.S. Department of Justice, Office of the Inspector General from Empower Oversight, Whistleblowers & Research, June 8, 2024,

This letter was soon (June 20, 2024) followed by two letters from Rep. Jim Jordan, the Chairman of the Committee on the Judiciary, to both the FBI Director[7] and FBI Inspector General (IG)[8] requesting investigations of allegations of the "politicization and bias" at the FBI for possible use in the Subcommittee on the Weaponization of the Federal Government. The letter to the FBI IG stated: "The FBI's treatment of Allen was **not only disgraceful, but also illegal."** (emphasis added)

As previously briefed, the Plaintiff believes similar questioning and 'purge' actions are being employed by the Department of the Army and Department of Defense as well, and should be investigated; the Department of Defense should be investigated for potential corrupted administrative separations, such as what the Plaintiff is currently enduring.

Note: Could this be why, on May 15, 2024, the Department of Defense has given:

> *notice of a new Department-wide system of records pursuant to the Privacy Act of 1974 for the* ***DoD-0020****, "****Military Human Resource Records****" system of* ***records and this proposed rulemaking****. In this proposed rulemaking, the Department proposes to exempt portions of this system of records from certain provisions of records from certain provisions of the Privacy Act because of*

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*online at:* https://justthenews.com/sites/default/files/2024-06/Empower%20Oversight%20letter%20to%20Horowitz%20re%20Marcus%20Allen%2006-04-2024.pdf.

[7] *See letter from* Rep. Jim Jordan *to* FBI Director, Christopher Wray, June 20, 2024, *online at:* https://justthenews.com/sites/default/files/2024-06/2024-06-20%20JDJ%20to%20Wray%20re%20FBI%20Disclosures%20and%20Political%20Questions_Redacted.pdf.

[8] *See letter from* Rep. Jim Jordan *to* FBI Director, Christopher Wray, June 20, 2024, *online at:* https://justthenews.com/sites/default/files/2024-06/2024-06-20%20JDJ%20to%20Horowitz%20re%20FBI%20Disclosures%20and%20Political%20Questions_Redacted.pdf.

*national security requirements, and to prevent* ***the undermining of evaluation materials used to determine potential for promotion****...[?]*

*The DoD* ***proposes to modify 32 CFR part 310 to add a new Privacy Act exemption rule for the DoD-0020,*** *Military Human Resource Records system of records. The DoD proposes this exemption because* ***some of its military personnel records may contain classified*** *national security information and disclosure of those records to an individual may cause damage to national security.*(emphasis added)[9]

Essentially, going forward, all Government personnel (including Mr. Allen or the Plaintiff), may never (outside a sealed lawsuit) retrieve any merit-based or otherwise determined personnel assessments that they may be forced to lawfully or unlawfully participate in. All of what happened to Mr. Allen, or could have happened to the Plaintiff , will likely occur behind a 'classified curtain.' and become onerous for anyone to retrieve via the Freedom of Information Act or the Privacy Act. This Plaintiff opines that this is a likely huge lack of transparency and requires immediate Congressional investigation and oversight.

From a macro-perspective, the Ethics Law of the Executive Branch (5 CFR § 2635) sums this case up in the following two ways as it directly "includes Officers…of the uniformed services:"

*(8)* ***Employees shall act impartially and not give preferential treatment to any private organization*** *or individual.*

[9] *See* Enclosure B04, Proposed Rules, Federal Register / Vol. 89, No. 95 / Wednesday, May 15, 2024.

*(14)* ***Employees shall endeavor to avoid any actions creating the appearance that they are violating the law*** *or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a* ***reasonable person with knowledge of the relevant facts****.* (emphasis added)

As the Plaintiff has elsewhere argued, Privacy Act compliance has become so common in our society that reasonableness, or any test of the same, of a Brigade Commander (Colonel) or a licensed Command Operational Psychologist (field-grade Major), can easily be expected and satisfied, respectively.

## CONCLUSION

The Plaintiff has remarked in various ways to various agency officials in the employ of the Defendant on multiple occasions, that in effect, 'no matter the obstacle, the Plaintiff will not break, will not bend, will not back down' in his efforts to find justice for the Defendant's violations of his statutory rights; he intends this goal even though he is forced to seek a fair venue for it on a *pro se* basis. Prior to proffering his complaint, the Plaintiff acutely understood his vulnerabilities in the Commander-defaulted system in service of our country, and he errantly believed 'cooler heads would prevail' once the Defendant realized its violation. The Defendant ignored and rebuffed him in this regard. Later, the Plaintiff acknowledged and expected that he would realize future vulnerabilities as a *pro se* filer but wanted only to 'choose a foil, and fence' the Defendant on the evidence provided. Now, the Plaintiff is doing his very best to rapidly learn

legal strategy and procedures but is fully aware he is making mistakes; these mistakes are being documented for future use should this 'fencing' effort fail to remediate the Defendant's violations of the Plaintiff's statutory and Constitutional rights and liberties. In this initial undertaking, the Plaintiff limited his case to the Privacy Act as it provides for immediate remediation as defined in the DoD Privacy Policy and the Privacy Act. Thusly, damages stemming from the resolution of the Defendant's actions at this time will be significantly lower than the relief sought after an administrative separation. That said, as argued herein through successful litigation, the 'powder is still dry' on other metaphorical weapons of choice to be used in other duels to be had in the future, if necessary. Now and in this current endeavor, the Plaintiff only seeks to be made whole and for the Defendant to curtail its invasive, rights-limiting efforts; currently, the Plaintiff does not wish punitive relief. This Court has an opportunity to remediate this *prima facie* controversy now. By accepting the corrected efforts of this earnestly forthright *pro se* filer, or allowing him to put the claims where they belong (in the complaint), this controversy can be expeditiously settled, one way or the other. This would save both the Defendant, and the Plaintiff, time, resources and potential damages as this controversy could drag on for years to come. The Plaintiff awaits the Court's order or decision.

CERTIFICATE OF COMPLIANCE

This document complies with the page limit and word count of Local Rule 7.2, in that it is 12 pages long and contains 2868 words.

Dated: July 29, 2024

Michael J. Forbes, *pro se*