

MARTIN AKERMAN v. DEPARTMENT OF THE ARMY

Docket # DC-0752-23-0457-I-1

MOTION IN LIMINE

Summary Page

Case Title : MARTIN AKERMAN v. DEPARTMENT OF THE ARMY

Docket Number : DC-0752-23-0457-I-1

Pleading Title : MOTION IN LIMINE

Filer's Name : Martin Akerman

Filer's Pleading Role : Appellant

Details about the supporting documentation

#	Title/ Description	Mode of Delivery
1	3 USERRA Disclosures on October 30, 2022	Uploaded

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Online Interview

1. Would you like to enter the text online or upload a file containing the pleading?

See attached pleading text document

2. Does your pleading assert facts that you know from your personal knowledge?

Yes

3. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE**

MARTIN AKERMAN,
Appellant,
V.
DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
DC-0752-23-0457-I-1

DATE: June 7, 2023

MOTION IN LIMINE

COMES NOW the Appellant, Pro Se, and pursuant to 5 CFR §§ 1201.55 and 1201.41, respectfully requests that this Board:

1. Exclude hearsay testimony for reasons set forth below.
2. Review the new evidence provided by the National Guard Bureau, (Dkt. 53 at 52 and 53) demonstrating "res ipsa loquitur" procedural fault by the Department of the Army.
3. Grant a 14-day extension for the Department of the Army to add a representative to this case and submit an answer to the jurisdictional order.
4. In the alternative, if the appropriate agency fails to respond within the requested extended period, Plaintiff requests a default judgment pursuant to the principle established in Wash. Metro. Area Transit Comm'n v. Reliable Limousine Serv., LLC, 776 F.3d 1, 4 (D.C. Cir. 2015), which holds that a default judgment is appropriate where the litigant's misconduct is characterized by "willfulness, bad faith, or fault."

CONFERENCE BEFORE MOTION IN LIMINE

5. The appellant called opposing counsel to discuss options prior to submitting this Motion in Limine. It is the appellant's duty to report that opposing counsel is opposed to an extension of time or requiring response by the Department of the Army, as requested herein, stating that Judge Henline already refused to allow the Army to keep a representative in the matter.

EXCLUSION OF HEARSAY AND BAD FAITH

6. The National Guard Bureau is not the Department of the Army and is unable to represent the Department of the Army without the consent of the Army. (see Dkt. 53 at 4; where the agency also willfully misinforms the court as to the actual position of the appellant as at the date of the constructive dismissal)
7. Issues of material fact in the National Guard Bureau response (Dkt. 53) will be addressed in a timely manner, whereby only a hearing can help deconflict the matter.

ADMISSION OF NEW EVIDENCE UNDER "RES IPSA LOQUITUR"

1. On May 22, 2023, the appellant sent a Notice of Appeal to the Merit Systems Protection Board to appeal the denial of Certification related to the denial of Discovery and Special Panel related to a timely petition for writ of habeas corpus. That matter is not the same as the USERRA claims of interference with the OWCP and OPM Disability Retirement.
2. On June 6, 2023, the attorney assigned to represent the National Guard Bureau confirmed that both the Department of the Army and the National Guard Bureau orchestrated and

perpetrated the civil forfeiture and related constitutional violations, including violating procedural safeguards afforded by 5 U.S.C. 7513 and 5 U.S.C. 6329b, on the appellant.

3. Additionally, the Office of Special Counsel and the Department of the Army have acknowledged procedural errors that obstructed the administrative resolution of my grievance. I thus seek redress for these injurious transgressions and procedural missteps that have marred my due process rights.
4. In accordance with the principles of *Urbano v. Dep't of the Army*, I respectfully request a thorough exploration of the evidentiary landscape. I submit that discovery will unearth material facts, resolve conflicts, and reveal the truth. This pursuit of truth through discovery aligns with the Board's unwavering commitment to uphold due process and ensure justice is served.

III. REQUEST FOR EXTENSION

5. Justice requires the proper joinder of all parties subject to the proceedings. The appellant is willing to allow, and humbly requests, additional time to allow the Department of the Army to review the docket and submit their response, followed by sufficient time for the appellant to submit his, for a total of 14 days.

USERRA JURISDICTION

6. This appeal invokes the jurisdiction of the Merit Systems Protection Board (MSPB) pursuant to 5 CFR §1201.
7. The allegations herein concern adverse actions, retirement appeals, and USERRA appeals, falling squarely within the MSPB's jurisdictional purview. I assert that my

retirement was involuntary, coerced by misinformation from my agency, and thus equivalent to a "constructive removal," inviting the MSPB's jurisdiction over my appeal. I also maintain that my attempts to enforce protections granted under Chapter 43 of Title 38 of the U.S. Code were significant factors in the agency's alleged discrimination and retaliation against me, providing further grounds for MSPB jurisdiction.

PETITION FOR WRIT OF HABEAS CORPUS AND REPLEVIN IN WANT OF ADMINISTRATIVE TRIAL COURT JURISDICTION

8. The factual basis for the original appeal involved allegations against Army Employee Bill Poppler and General Garduno of the Nevada Air National Guard. These individuals are alleged to have engaged in fraudulent activities, and deprived me of due process. The actions led to my placement on unpaid suspension on April 24, 2022, based on misleading and false pretenses.
9. The series of adverse experiences I endured, including civil forfeiture, false arrest, constructive discharge, and false imprisonment, potentially violated my rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution. I maintain that the agency's actions egregiously contravened my fundamental rights, invoking the Board's authority to hear this appeal by way of a Special Panel.

FACTS

10. In the months spanning from July 2021 through to April 2022, Martin Akerman, the appellant, took steps to formally report violations of the Uniformed Services Employment and Reemployment Rights Act (USERRA) to the Office of Special Counsel (OSC), the

Equal Employment Opportunity Commission (EEOC), and key figures in the leadership of both the Air Force and the National Guard Bureau. (attached)

11. In an unfortunate turn of events, Mr. Akerman was diagnosed with Post-Traumatic Stress Disorder (PTSD)—a debilitating condition—on October 5, 2022.
12. Later that month, on October 30, 2022, Mr. Akerman conveyed information about the aforementioned USERRA violations to the Eastern District of Virginia.
13. As the calendar flipped to November 2022, Mr. Akerman applied for Workman's Compensation, Social Security Disability Insurance (SSDI), and Disability Retirement, seeking aid and assistance in the face of his medical condition.
14. In the aftermath of Mr. Akerman's applications for these benefits, the respondents responded by either challenging every claim or by electing not to respond at all. In one particular instance, the Office of Personnel Management (OPM) did not receive the essential documentation required to process the Disability Retirement application.
15. Fast-forward to April 24, 2023, exactly a year since the alleged commencement of false imprisonment, Mr. Akerman filed for a writ of habeas corpus in the state of Nevada. Additionally, he lodged a claim with the Merit Systems Protection Board (MSPB) alleging forced retirement and interference with his retirement.

BALANCING TEST

16. The balancing test, as derived from *Urbano v. Dep't of the Army*, is a crucial instrument used to evaluate the merits of the allegations presented by Mr. Akerman. This test assesses the reasonableness of the petitioner's actions in the face of the alleged discriminatory treatment, the timing and nature of the events, and the petitioner's

activities under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Reasonableness of Mr. Akerman's Actions

Issue: The first issue to address is the reasonableness of Mr. Akerman's actions given the alleged discriminatory treatment.

Rule: The rule stipulates that the petitioner's reactions and actions should be reasonable in light of the alleged discrimination.

Analysis: In the matter at hand, Mr. Akerman alleges that he was misled into a coerced retirement, which he categorizes as a "constructive removal." He further argues that his efforts to expose fraudulent actions and protect an officer of the Air National Guard were met with retaliation, further supporting his claim of discrimination. Given the gravity and nature of these allegations, Mr. Akerman's actions—resisting such treatment and seeking legal redress—appear reasonable.

Conclusion: Thus, considering the alleged discrimination and retaliation, Mr. Akerman's actions meet the reasonableness criterion of the balancing test.

Nature of the Events Leading to Mr. Akerman's Appeal

Issue: The second issue pertains to the timing and nature of the events leading to Mr. Akerman's appeal.

Rule: The rule postulates that the timing and nature of the events involved should indicate a link between the alleged discrimination or retaliation and the adverse actions taken against the petitioner.

Analysis: In Mr. Akerman's case, he was placed on unpaid suspension shortly after his attempts to expose fraudulent actions and protect a colleague. The temporal proximity and nature of these events suggest a potential connection between Mr. Akerman's actions and the subsequent alleged retaliation.

Conclusion: Therefore, the timing and nature of the events in Mr. Akerman's case meet this criterion of the balancing test.

Mr. Akerman's activities under USERRA

Issue: The final issue involves Mr. Akerman's activities under USERRA.

Rule: The rule requires the petitioner to have taken action to enforce a protection granted under USERRA and that such action was a "substantial or motivating factor" in the alleged discrimination or retaliation.

Analysis: Mr. Akerman alleges that he was acting to enforce protections granted under Chapter 43 of Title 38 of the U.S. Code, and that these actions were significant factors in the agency's discrimination or retaliation against him.

Conclusion: Thus, given his alleged actions under USERRA and their impact, Mr. Akerman satisfies this criterion of the balancing test.

17. The principles embodied within our democratic system of governance mandate a vigorous response when fundamental rights and procedural propriety are called into question. In the face of these allegations, the Board, as the custodian of the merit system

principles, is well-positioned to ensure that justice is not merely done, but manifestly seen to be done. Mr. Akerman's appeal serves as a poignant reminder of the indispensable role of due process and fairness within our system, and the necessity to maintain unswerving commitment to these principles. Therefore, this Board should weigh his allegations with the seriousness they deserve, and undertake a diligent and unbiased review of the evidence, to ensure that the principles of justice and fairness are not merely platitudes, but robust safeguards of individual rights.

CONCLUSION AND RELIEF

18. I, the Appellant/Petitioner, respectfully request the court to rule in my favor. In particular, I seek Declaratory Relief directed towards the Office of Workman's Compensation Programs and the Office of Personnel Management (OPM), with the intention of providing a timely and effective remedy to mitigate the ongoing damages. While this court might not be in a position to award compensatory and punitive damages in the present case, I urge the court to grant any other relief it deems fair and appropriate in view of the facts and substantive legal arguments presented herein.
19. Justice requires the proper joinder of all parties subject to the proceedings. The appellant is willing to allow, and humbly requests, additional time to allow the Department of the Army to review the docket and submit their response, followed by sufficient time for the appellant to submit his, for a total of 14 days.
20. In light of the compelling evidence and substantive legal arguments presented, I, Mr. Akerman, respectfully implore this esteemed Board to issue a cease and desist order. This order is sought to prevent any further retaliatory or discriminatory actions against me.

Additionally, I request a formal declaration confirming the violation of my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the corresponding provisions of 5 U.S.C.

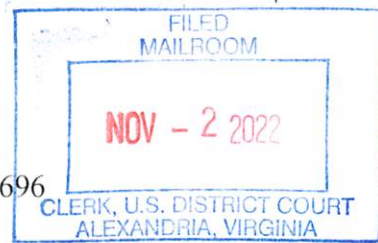
21. In conjunction with these measures, I seek a directive mandating the correction of agency records to accurately reflect the nature of my involuntary disability retirement, and to expunge any negative references associated with this grievance. In recognition of the substantial legal efforts invested in this case, I request an award of attorney's fees, litigation costs, and other related expenses, as provided under 5 U.S.C. § 7701(g). This should include costs both incurred and anticipated in the pursuit of this and related appeals.
22. In conclusion, I implore the Board to consider any other relief that, in its esteemed judgment, it deems to be just, proper, and equitable under the circumstances. This should be done with care to avoid any potential for a double recovery by factoring in remedies currently being pursued in other proceedings. It is with the utmost respect and faith in this court's pursuit of justice that I make these requests, confident in the understanding that the court will ensure that fairness and justice prevail.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'Martin Akerman', written over a horizontal line.

Martin Akerman, Pro Se

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**



MARTIN AKERMAN, Pro Se,

Plaintiff,

vs.

Lloyd J. Austin III, SECRETARY OF
DEPARTMENT OF DEFENSE, et. al.,

Defendants.

Civil Action No. 1:22cv696

JURY TRIAL
GRAND JURY REQUESTED

Date: 30 October 2022

▶ **SCANNED** ◀

OCT 30 2022

PRO SE PLAINTIFF'S ROSEBORO OBJECTION: INJURY BY FOREIGN STATE

MILITIA

Ghostwriting Certificate - LOCAL RULE 83.1(M) CERTIFICATION

I, Martin Akerman, the Pro Se Plaintiff, declare under penalty of perjury that no attorney has prepared, or assisted in the preparation of this ROSEBORO OBJECTION.

1. In Federal employment, a Decision-Maker must have power to decide. THIS WAS NOT FOLLOWED (The decision will be valid if it has “the knowledge and approval of an official with termination authority.” This power to terminate is derived from the power to appoint. The reply cannot be an empty formality in which the employee speaks and no one with the power to affect the outcome listens. An agency decision where the deciding official lacks the power to cancel or mitigate the action is unconstitutional. The deciding official must be able to invoke his or her discretion as to whether the proposed penalty is

warranted. Officials – no matter how pure their own motives – have the responsibility to ensure that the action has not been corrupted by someone else in the process who has a prohibited motive.) This misapplication of law is harmful to the Plaintiff. *Vandewall v. Department of Transportation*, 55 M.S.P.R. 561, 564 (1992), *Lange v. Department of Justice*, 119 M.S.P.R. 625, para 23 (2013), and *Buelna v. Department of Homeland Security*, 122 M.S.P.R. 262 para 27-28 (2014).

2. The Agency is guilty of “federalizing” members of the State National Guard and placing them in a situation where their livelihood is threatened and they are forced to break federal employment laws.
3. Members of State National Guard components do not have the power to appoint the Plaintiff nor to suspend the Plaintiff.
4. The proposing official on the Indefinite Suspension action is a Department of the Air Force Senior Executive working for the National Guard Bureau. The Air Force and/or the National Guard Bureau should be joindered in this case. The deciding official on the Indefinite Suspension action is a General Officer of the Nevada Air National Guard “federalized” and working for the National Guard Bureau. The State of Nevada, the Air Force, and/or the Department of Defense should be joindered in this case. As it relates to the decision to sustain the charges of the indefinite suspension, the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. (The deciding official, a Nevada Air National Guard Officer, does not have the termination authority needed to decide on the proposed suspension of a Tenured Department of the Army Civilian in the National Guard Bureau.)

5. The Colonel that took prohibited discriminatory actions and documented the Memorandum for Record related to the Merged Notices on 14 February 2022 and the decision to place the Plaintiff on Notice Leave is an Officer of the State of Arkansas Army National Guard "federalized" and working for the National Guard Bureau. The State of Arkansas and/or the Department of Defense should be joindered in this case.
6. The commander on the alleged Suspension of Access action, is a General Officer of the Arizona Army National Guard "federalized" and working for the Army National Guard, through alleged delegated signature authority to Mr. Mark Berglund of the Army National Guard. Additionally, The State of Arizona may need to be joindered in this case.
7. Members of the National Guard called into Federal service are, from the time when they are required to respond to the call, subject to the laws and regulations governing the Army or the Air Force, as the case may be, except those applicable only to members of the Regular Army or Regular Air Force, as the case may be.
8. Additionally, "federalized" members of the National Guard were forced to break anti-discrimination laws by documented proxy.
9. On 25 March 2022, the Plaintiff received evidence that the agency took impermissible discriminatory actions "but for" perceived mental impairment : "FEB 2, 2022: Mr. McNeill and senior leaders made preliminary decision to suspend subject's clearance based on information contained in the SOR regarding subject's mental health issues and concern for National Security." (Tab 27 at 8)
10. 8 February 2022 - Same person that took the impermissible discriminatory action conspired with Security office to suspend my access after an extension was granted by

the DOD CAF. Access suspension is additionally falsified - the Plaintiff verified that the Plaintiff still has an active SECRET clearance on 31 May 2022.

11. 14 February 2022 - Same person that took the impermissible discriminatory action on 8 February 2022 was the recommending official for the Indefinite Suspension.
12. 14 February 2022 - Same person that took the impermissible discriminatory action placed the Plaintiff on Notice Leave and out of the office involuntarily.
13. 18 Feb - 14 March 2022 - Same person that took the impermissible discriminatory action held ex parte communications with the deciding official.
14. 14 March 2022 - Someone that held ex parte communications with both the person that took the impermissible discriminatory action and the deciding official misinformed OPM LMER when they requested my files.

a. "Can you give me what you have available and then we can play cleanup when Ms. Deppe returns?"

15. A CONSTRUCTIVE DISCHARGE OCCURS WHEN AN EMPLOYEE RESIGNS FROM HIS/HER EMPLOYMENT BECAUSE (S)HE IS BEING SUBJECTED TO UNLAWFUL EMPLOYMENT PRACTICES. IF THE RESIGNATION IS DIRECTLY RELATED TO THE RESPONDENT'S UNLAWFUL EMPLOYMENT PRACTICES, IT IS A FORESEEABLE CONSEQUENCE OF THOSE PRACTICES AND CONSTITUTES A CONSTRUCTIVE DISCHARGE. COMMISSION DECISION NO. 72-2062, CCH EEOC DECISIONS (1973) ¶ 6366. **RESPONDENT IS RESPONSIBLE FOR A CONSTRUCTIVE DISCHARGE IN THE SAME MANNER THAT IT IS RESPONSIBLE FOR THE OUTRIGHT DISCRIMINATORY DISCHARGE OF A CHARGING PARTY.**¹

¹ EEOC 612.9(a) - Constructive Discharge

Certification and Closing

Under Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my knowledge, information, and belief that this motion: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Rule 11.

A. Certificate of Service

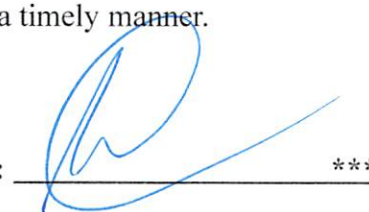
The undersigned hereby certifies that a true copy of the foregoing

**PRO SE PLAINTIFF'S ROSEBORO OBJECTION: INJURY BY FOREIGN STATE
MILITIA**

was mailed to the Clerk of the Court and Defendant's Counsel on the

30 st/nd/rd/th day of October, 2022 ***

and electronic service is expected to be provided to all Defendants, as listed and/or amended, and/or their respective Counsel, in a timely manner.

B. Signature of Pro Se Plaintiff:  ***

Martin Akerman, 2001 North Adams Street Unit 440

Arlington, VA 22201, 202-656-5601

makerman.dod@gmail.com

Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and all of the Parties.

Following is the list of the Parties in the case:

Name & Address	Documents	Method of Service
MSPB: Washington Regional Office	MOTION IN LIMINE	e-Appeal / e-Mail
Jenny Lin Naylor Agency Representative	MOTION IN LIMINE	e-Appeal / e-Mail