
AIR FORCE TECHNICAL SERGEANT)
JENNIFER SMITH (Ret.))
on behalf of herself and others similarly situated,)
Plaintiff and Class Representative)
)
v.)
)
UNITED STATES AIR FORCE)
Defendant)

APPEAL

1. This appeal seeks to address the U.S. Air Force’s biased and inadequate investigation of the pervasive sexual harassment endured by a decorated veteran who gave 17 years of her life to military service. The Air Force assigned oversight of most of the investigation to a commander who was himself a subject of the investigation, and the resulting report makes excuses for offenders, minimizes the seriousness of the offenses, and substitutes vague boilerplate for an intelligible account of the evidence. Ultimately, like the original complaint, this appeal seeks a remedy for the willful and repeated failure of Air Force officials to address pervasive sexual discrimination among its ranks.

BACKGROUND

2. Plaintiff and Class Representative Jennifer Smith is a former Air Force Technical Sergeant (“TSgt”) who, throughout the course of her exemplary military career, endured a hostile work environment where language, conduct, and images demeaning to women were both commonplace and widely tolerated by Air Force commanders.

3. TSgt Smith filed a written administrative complaint (“the Complaint”) with the Air Force Inspector General (“SAF/IG”) in October 2012, pursuant to 10 U.S.C. § 1561, seeking

redress for the harm inflicted upon her and upon other members of the Class. The Complaint is attached as Exhibit 1.

4. On November 6, 2012, representatives of the SAF/IG conducted an in-person complaint clarification interview of TSgt Smith. At TSgt Smith's request, this interview was recorded. A transcript of the interview ("Transcript") is attached as Exhibit 2.

5. The SAF/IG subsequently issued a Report of Investigation ("ROI") dated July 2013. It then issued an Amendment to the ROI dated October 2013. The Air Force did not provide either the original ROI or the Amendment to TSgt Smith until late October, 2013. The ROI, including the Amendment, is attached as Exhibit 3.

FACTS

Plaintiff's Service Record

6. Plaintiff TSgt Smith's service to her country has been exemplary. She enlisted as an Airman Basic at the age of 18, following her graduation from high school. In the 17 years since, she has deployed overseas on five occasions: twice to Iraq, and once each to Kuwait, Korea, and Germany. Her outstanding service has merited successive promotions through half a dozen ranks, most recently to Technical Sergeant. She has been awarded seven performance medals. Copies of the certificates awarding these medals and describing TSgt Smith's meritorious conduct are attached to the Complaint as Exhibit B.

7. TSgt Smith's performance reviews have garnered the high remarks of "clearly exceeding" expectations and "truly among the best." In an April 2012 performance review, Smith's most recent, her superior Captain Joseph P. Witt praises her as a "skilled ambassador" who "goes above and beyond," and whose leadership has been "brilliant." Captain Witt

characterizes TSgt Smith as a “mission-ready warfighter” and an “NCO [non-commissioned officer] to emulate,” and repeatedly recommended her immediate promotion.

8. In her February 2011 performance review -- prepared by a different supervisor, Lieutenant Colonel Jason L. Plourde -- TSgt Smith is described as “sensational,” “razor-sharp,” and a “gifted mentor” -- the “best of the best” under whose leadership “patriotism & morale skyrocketed.” Like Captain Witt, Lieutenant Colonel Plourde pressed for Smith’s immediate promotion, exhorting, “must promote now!” TSgt Smith’s last three performance reviews and most recent Air Force fitness evaluation are attached to the Complaint as Exhibit A.

Sexual Harassment and Hostile Work Environment

9. Over the course of her 17-year military career, TSgt Smith was subjected to each of the many forms of sexual harassment contemplated by the Air Force guidance on equal opportunity (AFI 36-2706, attached as Exhibit 4), which purports to establish a binding policy of “zero tolerance” for unlawful discrimination or harassment. *See, e.g.*, AFI 36-2706, para. 1.1. This problem persisted regardless of the base at which she was stationed, and despite her repeated complaints to various commanders.

10. The Complaint and the Transcript describe a number of specific instances of sexual harassment and assault, and should be referred to for more comprehensive (but not exhaustive) inventory of these offenses. A few notable instances are highlighted below.

11. When she was stationed at Sembach Air Base in Germany in the mid-1990s, shortly after she enlisted, TSgt Smith was aggressively propositioned and harassed by her Master Sergeant. The Master Sergeant -- Plaintiff’s superior officer -- cornered her in his quarters, dropped his pants, and told her to “come over here and touch it, cunt.” TSgt Smith was able to

summon help, and with the assistance of several other airmen, escape the room. She later learned that the Master Sergeant was notorious for this pattern of behavior.

12. From 2001 to 2002, the Air Force assigned TSgt Smith to the 80th Fighter Squadron at Kunsan Air Base in Korea. During this time, TSgt Smith reported to the Vice Commander of the Wing, who is second in charge at Kunsan Air Base, for a routine records review. During the meeting, the Vice Commander told her to “relax” and offered her alcohol. He also instructed her to take off the top portion of her uniform. She refused and left his office.

13. While deployed in Iraq in 2010, TSgt Smith learned that she had cervical cysts and needed treatment. Her superior officer, Commander Lt. Col. Douglas Demaio, failed to keep this diagnosis confidential. Subsequently, the flight surgeon lewdly suggested in front of a group of four male pilots that “we can just throw [TSgt Smith] on the table and I can do it right here if someone can find me a speculum.”

14. Most recently, in January 2012, while stationed at Shaw Air Force Base in North Carolina, TSgt Smith discovered a large number of pornographic, suggestive, and sexually hostile materials stored on an Operations Group computer server. These materials included several squadron songbooks containing disturbingly misogynistic lyrics. For example, a song to be sung to the tune of “The Candy Man Can”:

Who can take two ice picks, Stick ‘em in her ears
Ride her like a Harley While you Fuck her in the rear . . .

Who can take one ice pick, Stick it in her ear
Sit back and watch her bleed to death, While you have another beer

Who can take a lady, Throw her in the road
Shove a grenade up her cunt, and watch the bitch explode . . .

Who can take a cheese grader [sic], strap it to his arm

Ram it up her cunt, and make pussy parmesan...

Chorus: The S&M man, The S&M man
The S&M man cause he mixes it with love
And makes the hurt feel good (The hurt feel good)

See Exhibits E and M to the Complaint. The entire Operations Group at Shaw -- about 400 people -- have access to this server. TSgt Smith reported the materials to Capt Michael Richard, who promised TSgt Smith that he would ensure their removal. Nine months later, on October 23, 2012, the materials were still there.

Air Force Inaction

15. Capt Richards' failure to remove hostile materials from the Operations Server is just one example of the Air Force's manifest acceptance of, and indifference to, sexual harassment of the women who serve in its ranks.

16. When TSgt Smith first raised the issue of the Operations Server materials with MSgt Disree Moore, MSgt Moore indicated that a complaint through established channels would be pointless, as military officials in the Air Force Military Equal Opportunity (MEO) Program and the SAF/IG would do nothing.

17. Similarly, when, at one point, TSgt Smith raised concerns about the presence of pornographic materials in the workplace, Chief Master Sergeant Ford did not contest the existence of the hostile work environment. Instead, he characterized the sexism and hostility as "part of the mentality" in the Air Force, and admitted that he would be "surprised" if anything were done about it.

18. TSgt Smith's former Flight Commander, Maj McAfee, exemplified the tolerant mentality when he attended an Air Force-sanctioned event costumed as a prisoner with a large,

fake erection tenting the front of his jumpsuit. At the same event, two other servicemen wore the same costume: a head-to-toe suit designed to resemble a penis and testicles. Photographs are attached to the Complaint as Exhibit R.

The Report of Investigation

19. The July 2013 Report of Investigation, including its October 2013 Amendment, represents a continuation of the Air Force's inaction in response to sexual harassment, and is inadequate.

20. The investigation is fatally flawed by the fact that the allegations relating to Shaw Air Force Base -- which constitute the majority of incidents of sexual harassment recounted in the Complaint -- were relegated to a Command-Directed Investigation ("CDI"). That is, they were investigated by the same chain of command that condoned the repeated sexual harassment encountered by TSgt Smith and others. This approach is at odds with the SAF/IG's stated commitment to "ensur[e] the existence of responsive complaint investigations characterized by objectivity, integrity, and impartiality." ROI at 2.

21. Unbelievably, the SAF/IG permitted the CDI to be overseen by a commander who *was himself a subject of the investigation*: Major General ("Maj Gen") Wells. Specifically, during a meeting between TSgt Smith and Maj Gen Wells in the squadron lounge, a pair of bright yellow ladies' panties hung, in plain sight, from the tooth of a tiger head mascot mounted on the wall. In dereliction of his duty to provide for an environment free from sexual harassment, Maj Gen Wells ignored them. *See* AFI 36-2706. Rather than address this glaring and irreconcilable conflict of interest, the SAF/IG isolated the complaint against Maj Gen Wells, concluded that the allegation against him was unsubstantiated, and allowed him to continue as

the commander directing the investigation. *See* ROI at 6 n.7. The evidentiary basis upon which the SAF/IG exonerated Maj Gen Wells is not stated.

22. Moreover, the ROI is vague and unintelligible. Allegations are numbered and addressed in turn, but frequently in boilerplate terms that make it impossible to determine the specific nature of the allegation, or how it relates to any particular incident described in the Complaint. Some allegations seem not to relate to the Complaint at all, but the source of the allegation is not stated. *See, e.g.*, Allegation 18, ROI at 20; Allegation 30, ROI at 25. Findings are frequently stated without providing any details about the investigation or the evidence. For instance, in several places, the ROI simply recites that an allegation is not substantiated because the “[p]reponderance of evidence does not support” it, and provides no further information. *See, e.g.*, Allegation 12, ROI at 12; Allegation 15, ROI at 19.

23. In some cases, the ROI states that there is “no evidence” to substantiate a complaint, despite the fact that TSgt Smith is a highly credible complainant whose statements were made under penalty of discipline. *See, e.g.*, Allegation 29, ROI at 24-25.

24. Several other allegations are deemed not substantiated because the “[p]reponderance of the evidence supporting finding that [the] allegation did not occur during the alleged time frame.” *See, e.g.*, Allegation 24, ROI at 22-23; Allegation 25, ROI at 23. This ignores the possibility that TSgt Smith’s recollection may simply be off by a week or a month. There is no apparent effort to determine whether the harassment in fact took place at another time. In effect, the ROI dismisses these allegations on a technicality.

25. Although 16 of TSgt Smith’s allegations *are* deemed substantiated, the report says nothing about how or even whether the offenders were punished. In the absence of assurances

that offenders have in fact been subject to meaningful consequences, the Air Force's putative "zero tolerance" policy appears toothless, undermining rather than reinforcing the goal of equal opportunity.

26. Disturbingly, the ROI repeatedly minimizes and makes excuses for substantiated incidents of sexual harassment. For example, the IG summary notes that of 102 enlisted members interviewed, 25% reported seeing inappropriate materials on network drives, but goes on to comment that only 5% "were offended by what they saw." ROI at 7. Whether the very airmen who participate in a culture of tolerance for sexual harassment consider inappropriate materials to be "offensive" is hardly relevant. The fact that the investigator included such a survey in the investigation and ROI is further evidence of the Air Force's failure to address or even appreciate the seriousness of the problem.

27. The ROI also goes out of its way to excuse "doofer books" -- pornographic self-made books -- as a longstanding Air Force tradition, characterizing the inclusion in these books of admittedly "inappropriate comments that were sexual in nature" as merely "misguided." ROI at 4 n.5.

28. Similarly, the ROI gratuitously notes, in its discussion of a substantiated allegation concerning a document containing sexually suggestive images stored on a network drive, that it was "one document . . . out of 5,041 collected from the 20 O[perations] G[roup] network drives." ROI at 26. The implication, which seems to be that TSgt Smith's complaint about this document is petty, is inconsistent with the Air Force's stated "zero tolerance" policy.

29. Finally, the ROI engages in victim-blaming by attempting to undermine TSgt Smith's credibility. Specifically, the CDI deemed Allegation 13 not substantiated on the grounds

that “Preponderance of the evidence does not support finding that complainant was subjectively offended by the video in question at the time,” going on to observe that “the complainant danced and sang to the video and never complained about the video to [her superior.] The evidence also supports the conclusion that complainant and [her superior] had a friendly and professional working relationship.” ROI at 18. In addition to being irrelevant, this recitation of supposedly exculpatory evidence illustrates the inability of the Air Force to acknowledge the dynamics of sexual harassment, and the potential for reprisals against those who speak up. In a hostile work environment, participation in a demeaning activity cannot be taken as acceptance or approval.

30. The ROI also cites facts apparently intended to belie the idea that there was a hostile work environment for servicewomen at Shaw, or that sexual harassment occurred. For instance, the IG summary notes that between 2008 and 2012, no reports of sexual harassment were made to the 20 FW Military Equal Opportunity Office.

31. On the contrary, when taken together with other facts, this absence of reports reflects that sexual harassment is endemic to the Air Force, and that existing policies and practices are failing. Consider that of 205 witnesses interviewed, nearly half reported personally seeing either inappropriate or offensive material in the workplace. ROI at 6. TSgt Smith provided extensive documentary evidence in the exhibits to her Complaint, and the CDA substantiated 16 of her allegations. Moreover, the Air Force’s own health and welfare investigation found, branchwide, over 30,000 instances of pornographic, unprofessional, and offensive materials. Health and Welfare Inspection Report, attached as Exhibit 5. These facts do not affirm a workplace free of sexual harassment; they reveal a workplace so hostile that women consider it either dangerous or futile to report.

32. In the October 2013 Addendum to the ROI, SAF/IG reversed its finding of substantiation on two allegations. Briefly, the subject of the allegations originally refused to cooperate with the investigation. When he later changed his mind and submitted to an interview, SAF/IG accommodated him. Among the facts the CDI considered in reversing its prior determinations was the lack of complaints either to him or to the Equal Opportunity Office. As discussed, these are inappropriate and misleading indicators. This officer, against whom SAF/IG originally substantiated *five* allegations of condoning and/or contributing to a hostile work environment, has recently been promoted to Colonel.

33. Finally, the ROI investigation is admittedly incomplete, with certain allegations deemed too difficult to pursue. This is inadequate to meet the requirements of 28 U.S.C. § 1561, which mandates that an investigation be conducted without regard to the recency of the events or the difficulty of exhausting leads.

34. In providing the ROI to TSgt Smith, the Air Force failed to inform her of her right to appeal, as required by its own policy. AFI 90-301 (attached as Exhibit 6), para. 3.65.5.

RELIEF SOUGHT

35. A full and impartial investigation of all of TSgt Smith's allegations, conducted by military officials outside of the chain of command;

36. A revised report of investigation with a clear and fulsome discussion of each allegation, available evidence, and the basis for each determination;

37. Where allegations are substantiated, meaningful disciplinary action, including, at a minimum, documentation of the incident(s) in the airman's permanent personnel record; and

38. Other relief, as required by law and by the Air Force's stated policy of zero tolerance for sexual discrimination or harassment.

39. This appeal is being transmitted via FedEx on January 7, 2014. The Board should respond to TSgt Smith's counsel, as stated on DD Form 149.