

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

CALVIN P. CONGDEN,

Plaintiff,

Case No.

v.

Hon.

MICHIGAN DEPARTMENT OF
HEALTH AND HUMAN SERVICES, and
ALLISON ZINN, EMILEE HUDSON, and
ZOE LYONS in their individual and official
capacities;

Defendants.

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COMPLAINT AND JURY DEMAND

Plaintiff, CALVIN CONGDEN, by and through his attorney, NACHTLAW, P.C., hereby brings this action against Defendants MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, ALLISON ZINN, and ZOE LYONS and hereby states as follows:

INTRODUCTION

1. Plaintiff CALVIN CONGDEN brings this civil-rights action pursuant to the First, Second, and Fourteenth Amendments to the United States Constitution, the Rehabilitation Act of 1974, 29 U.S.C. § 794, *et seq.* and the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq* to remedy illegal discrimination and retaliation perpetrated by Defendants MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, EMILEE HUDSON, ALLISON ZINN, and ZOE LYONS.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343 as the claims asserted arise out of federal constitutional and statutory law.

3. Venue in this Court is proper under 28 U.S.C. § 1391(b) because all of the events giving rise to this claim took place in this district and the Defendants are governmental entities within the district or individuals who reside in this district.

4. Plaintiff filed a timely charge of disability discrimination and retaliation under the Americans with Disabilities Act with the U.S. Equal Opportunity Employment Commission (“EEOC”) and received a Dismissal and Notice of Right to Sue issued by the EEOC on July 31, 2017.

PARTIES

5. Plaintiff CALVIN CONGDEN is an individual who resides in Tipton, Michigan in the County of Lenawee, within this judicial district.

6. Defendant ALLISON ZINN is a managerial employee at Defendant MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES' location in Jackson County, Michigan. Upon information and belief, she resides in Jackson County, within this judicial district.

7. Defendant ZOE LYONS is a managerial employee at Defendant MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES' location in Jackson County, Michigan. Upon information and belief, she resides in Jackson County, within this judicial district.

8. Defendant EMILEE HUDSON is a managerial employee at Defendant MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES' location in Jackson County, Michigan. Upon information and belief, she resides in Jackson County, within this judicial district.

9. Defendant MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES is a State agency operated under the laws of the State of Michigan. Its principal place of business is in Lansing, Michigan and it operates an office in Jackson County, Michigan where Plaintiff worked at all times relevant to this suit.

STATEMENT OF FACTS

10. Plaintiff Calvin Congden is a U.S. Army veteran, a former corrections officer with the State of Michigan, and a former Child Protective Services officer tasked with protecting Michigan's most vulnerable children.

11. In the Army, Plaintiff served in operation Enduring Freedom while stationed at Guantanamo Bay Cuba, and received a Joint Service Commendation Medal for his service.

12. Plaintiff has been diagnosed with Post-Traumatic Stress Disorder ("PTSD") and anxiety.

13. From 1998 through 2015 Plaintiff worked for the Michigan Department of Corrections as a corrections officer with a satisfactory job performance record.

14. In summer 2015, Plaintiff transferred from his position as a Corrections Officer to a position as a Child Protective Services Officer at Defendant MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES' Jackson County location.

15. As a result of the transfer, Plaintiff was placed in a one-year at-will probationary period.

16. For many years, Plaintiff had been active in the community by giving back to local children in need. Among other things, each holiday season Plaintiff performed as Santa Claus at a charity event for Hillsdale Foster Care Children at a local bowling alley on his own time and at his own expense.

17. In December 2015, before the event, Plaintiff, dressed as Santa Claus, posted the following picture to his personal Facebook page of him holding a legally purchased rifle while standing in front of the Christmas tree in his home.



18. Plaintiff is legally entitled to own a firearm and has had extensive firearm training as a member of the U. S. Army and the Michigan National Guard.

19. The rifle pictured was legally purchased by Plaintiff for lawful purposes, including self and home defense.

20. Plaintiff's rifle was unloaded at the time of the picture and at all relevant times was handled in a safe, competent manner.

21. Plaintiff's military medals and commendations were visible in the background of this picture, as well as an American flag.

22. Additionally, Plaintiff often uses his personal Facebook page to communicate on matters of public concern, including the Second Amendment.

23. Soon after posting this picture, Defendant ZINN told Plaintiff's coworkers to beware of Plaintiff because he was a veteran, owned firearms, and "looked crazy" in the picture posted to Facebook depicting him dressed Santa Claus.

24. After learning of Defendant Zinn's statements, on January 10, 2016 Plaintiff contacted his State Representative and informed her of the potential discrimination against him as a State employee.

25. The next day, January 11, 2016, Plaintiff met with Defendant HUDSON. Plaintiff told Defendant HUDSON about Defendant ZINN's comments. Plaintiff strongly opposed Defendant ZINN's discriminatory behavior and informed Defendant HUDSON that he was a disabled veteran.

26. Later that same day, Plaintiff also met with Defendant LYONS in her office. Plaintiff again opposed Defendant ZINN's comments.

27. Defendant LYONS asked Plaintiff if he had contacted his state representative.

28. Plaintiff acknowledged that he had, and Defendant LYONS said she would look in to Defendant ZINN's comments.

29. Two weeks later, Plaintiff received his first disciplinary action. Prior to that time, Plaintiff had not received discipline of any kind while employed with Defendant MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES.

30. Over the next several months, Defendants HUDSON, and LYONS instituted and conspired to instate a series of meritless, pretextual, and discriminatory write-ups and counselings against Plaintiff.

31. Plaintiff was ostensibly faulted for falling behind on documentation and making simple grammatical errors.

32. Other employees, both probationary and full-time were not written up for identical conduct.

33. During Plaintiff's nine-month review, Defendant HUDSON told Plaintiff he was emotionally unfit to perform his job.

34. On July 5, 2016, Plaintiff received his one-year probationary rating, stating that his performance was "unsatisfactory" and that he would be terminated prior to the close of his probationary period.

35. On July 15, 2016, Plaintiff's employment was constructively terminated.

36. The real motivation for Plaintiff's termination was retaliation for his exercise of his constitutionally protected right to bear arms, his constitutionally protected speech, and his disability.

CAUSES OF ACTION

COUNT I

42 U.S.C. § 1983: First Amendment Retaliation *(Against Individual Defendants)*

37. Plaintiff hereby realleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

38. The Individual Defendants are "persons" covered by the meaning of 42 U.S.C. § 1983.

39. At all relevant times, Individual Defendants acted under color of state law by virtue of the performance of their duties as employees of the State of Michigan.

40. Plaintiff engaged in protected activity under the First Amendment of the United States Constitution by posting protected speech to his personal Facebook account, including by posting a picture of him holding a legally possessed firearm while dressed as Santa Clause.

41. Plaintiff engaged in protected activity under the First Amendment of the United States Constitution by complaining about the discrimination he encountered, including but not limited to, contacting his State representative.

42. The Individual Defendants' actions against Plaintiff were motivated in significant part by Plaintiff's constitutionally protected speech.

43. Plaintiff suffered an objectively adverse employment action when he was terminated on July 15, 2016.

44. But for Plaintiff's exercise of his constitutionally protected right to free speech, he would not have been terminated.

45. Individual Defendants violated Plaintiff's clearly established constitutional right to be free of retaliation for speech under the First Amendment to the U.S. Constitution and are not entitled to qualified immunity.

46. As a result of Individual Defendants' unlawful conduct, Plaintiff was harmed, and continues to be harmed, in that he has suffered economic and non-economic loss, including but not limited to, lost wages, damage to professional reputation, emotional distress, outrage and humiliation.

47. The Individual Defendants' actions were done with reckless disregard to Plaintiff's federally-protected rights, entitling him to punitive damages.

48. Plaintiff also seeks an injunction against the Individual Defendants in their official capacity reinstating Plaintiff to his position and preventing any further unconstitutional actions under *Ex Parte Young*, 209 U.S. 123 (1908).

COUNT II
42 U.S.C. § 1983: Second Amendment Retaliation
(Against Individual Defendants)

49. Plaintiff hereby realleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

50. The Individual Defendants are “persons” covered by the meaning of 42 U.S.C. § 1983.

51. At all relevant times, the Individual Defendants acted under color of state law by the performance of their duties established as employees of the State of Michigan.

52. At all relevant times, the Individual Defendants acted within the scope of their employment with regards to Plaintiff’s employment and termination.

53. The Second Amendment to the United States Constitution protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense or sporting, within their home. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

54. The protections of the Second Amendment were incorporated against the States with the passage of the Fourteenth Amendment. *McDonald v. Chicago*, 561 U.S. 742 (2010).

55. Plaintiff engaged in protected activity under the Second Amendment of the United States Constitution by legally possessing a firearm in his own home for a valid purpose and by posting a picture of him holding said legally-possessed firearm while dressed as Santa Claus.

56. The Individual Defendants' actions against Plaintiff were motivated in significant part by Plaintiff's exercise of his constitutionally protected right to bear arms.

57. Plaintiff suffered an objectively adverse employment action when he was terminated on July 15, 2016.

58. But for Plaintiff's exercise of his constitutionally protected right to bear arms, he would not have been terminated.

59. Individual Defendants violated Plaintiff's clearly established constitutional right to be free of retaliation for his exercise of his right to bear arms under the Second Amendment to the U.S. Constitution and are not entitled to qualified immunity.

60. As a result of Individual Defendants' unlawful conduct, Plaintiff was harmed, and continues to be harmed, in that he has suffered economic and non-

economic loss, including but not limited to, lost wages, damage to professional reputation, emotional distress, outrage and humiliation.

61. Individual Defendants' actions were done with reckless disregard to Plaintiff's federally-protected rights, entitling him to punitive damages.

62. Plaintiff also seeks an injunction against the Individual Defendants in their official capacity, reinstating Plaintiff to his position and preventing any further unconstitutional actions under *Ex Parte Young*, 209 U.S. 123 (1908).

COUNT III

Disability Discrimination - Rehabilitation Act of 1973, 29 U.S.C. § 794
(Against Defendant Michigan Department of Health and Human Services)

63. Plaintiff hereby realleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

64. Defendant MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES is a governmental program or activity that receives federal financial assistance and is thereby covered under the provisions of the Rehabilitation Act of 1974, 29 U.S.C. § 701, *et seq.*

65. On account of his medical and mental health conditions, Plaintiff is a qualified individual with a disability.

66. At all relevant times, Plaintiff was qualified to perform all aspects of his job, with or without reasonable accommodations.

67. Plaintiff suffered an objectively adverse employment action when he was terminated on July 15, 2016.

68. But for Plaintiff's disability, he would not have been terminated.

69. As a result of Defendant MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES' unlawful conduct, Plaintiff was harmed, and continues to be harmed, in that he has suffered economic and non-economic loss, including but not limited to, lost wages, damage to professional reputation, emotional distress, outrage and humiliation.

70. Defendant MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES' actions were done with reckless disregard to Plaintiff's federally-protected rights, entitling him to punitive damages.

COUNT IV

Disability Discrimination – Americans with Disabilities Act *(Against Individual Defendants in their Official Capacity)*

71. Plaintiff hereby realleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

72. Defendant MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES is an employer and Plaintiff is an employee as defined by the Americans with Disabilities Act, 32 U.S.C. § 12111(4)-(5).

73. On account of his medical and mental health conditions, Plaintiff is a qualified individual with a disability.

74. At all relevant times, Plaintiff was qualified to perform all aspects of his job, with or without reasonable accommodations.

75. Plaintiff suffered an objectively adverse employment action when he was terminated on July 15, 2016.

76. But for Plaintiff's disability, he would not have been terminated.

77. Consistent with *University of Alabama v. Garrett*, 531 U.S. 356 (2001), Plaintiff seeks injunctive relief under the ADA against the Individual Defendants in their official capacity to remedy their unlawful behavior.

RELIEF REQUESTED

WHEREFORE, Plaintiff CALVIN CONGDEN prays that this Honorable Court grant the following remedies:

- a. Compensatory damages for monetary and nonmonetary loss in whatever amount he is found to be entitled;
- b. Exemplary and punitive damages in whatever amount he is found to be entitled;
- c. A judgment for lost wages and benefits, past and future, in whatever amount he is found to be entitled;
- d. An order of this Court reinstating Plaintiff to the positions he would have if there had been no wrongdoing by Defendants;

- e. An injunction of this Court prohibiting any further unconstitutional or illegal acts by Defendants;
- f. An award of interest, costs and reasonable attorney fees; and

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment against Defendants and all relief requested in this Complaint.

Respectfully submitted,
NACHTLAW, PC

/s/ Joseph Michaels
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Dated: October 27, 2017

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DEMAND FOR JURY TRIAL

Plaintiff CALVIN CONGDEN, by and through his attorneys, NACHTLAW,
P.C. hereby demands a trial by jury on all claims pled herein.

Respectfully submitted,
NACHTLAW, PC

/s/ Joseph Michaels

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Dated: October 27, 2017