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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

SARA SABOW AND JOHN D. SABOW,) SA CV 93-991 AHS(EEx)
)
Plaintiffs,) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW
v.) AFTER BENCH TRIAL IN
) SUPPORT OF JUDGMENT
THE UNITED STATES OF AMERICA,) FOR DEFENDANT
)
Defendant.)
_____)

I.

INTRODUCTION

Plaintiffs Sara Sabow and John David Sabow, M.D., bring this action to recover money damages under the Federal Tort Claims Act (FTCA), 28 U. S. C. §§ 1346, 2671, et seq. Plaintiffs are the widow and brother of decedent, United States Marine Corps ("USMC") Col. James Sabow. Remaining for trial were tort claims by plaintiffs asserting injury, first, due to alleged conduct by defendant, through its agents and representatives at a meeting with plaintiffs held on March 9, 1991 ("the March meeting"), and, second, due to the alleged attempt by USMC General Adams to influence the status of Dr. Sabow's medical license. The law of

1 the case is set forth in Sabow v. United States, 93 F.3d 1445
2 (9th Cir., 1996).

3 Trial of the cause to the Court took place on January
4 19, 20, 21, 25, and 26, 2000. At the conclusion of plaintiffs'
5 case, defendant made an oral motion for judgment as a matter of
6 law under Rule 52(c). The Court deferred ruling until the
7 exhibits and submissions of the parties were reviewed. Having
8 issued summary findings in favor of defendant from the bench on
9 January 26, 2000, the Court now enters additional findings of
10 fact and conclusions of law in support of judgment for defendant.

11 If certain findings of fact should more correctly be
12 termed conclusions of law and if certain conclusions of law
13 should more correctly be termed findings of fact, then each entry
14 so regarded is deemed to be the other.

15 II.

16 FINDINGS OF FACT

17 A. Preliminary Facts

18 1. On January 22, 1991, Col. James Sabow was found
19 dead at his residence at the Marine Corps Air Station at El Toro,
20 California ("MCAS-El Toro" or "El Toro"). The conclusion of
21 several investigations was that his death had resulted from
22 suicide.

23 2. Plaintiffs did not believe the investigative
24 results. Over the course of the next several weeks, they made
25 their displeasure with the investigative outcome known.

26 3. With the death of Col. Sabow, the Inspector
27 General's investigation into Col. Sabow's alleged misconduct
28 ceased.

1 4. Dr. Sabow has always been convinced from the time
2 of his brother's death to the present day that Col. Sabow would
3 never have committed suicide because of his religious background,
4 family ties, and military record of accomplishments.

5 5. Plaintiffs have never believed that the decedent
6 either did anything wrong or committed suicide.

7 6. In the eight years since the death, Dr. Sabow has
8 made statements to the print media and testified before Congress
9 to make known his views of his brother's death and the military
10 and civilian investigations conducted into that death.

11 B. The Meeting of March 9, 1991

12 7. On March 9, 1991, in an effort to address the
13 concerns of plaintiffs, seven military and civilian employees and
14 former employees of the United States Marine Corps and Navy sat
15 down with these two plaintiffs in a meeting. Those in attendance
16 at the meeting were: Base Commander, USMC Brigadier General
17 Wayne T. Adams; USMC Lt. General J.K. Davis; USMC Brigadier
18 General David V. Shuter; USMC El Toro Staff Judge Advocate
19 General Col. Wayne Rich; USMC Provost Marshal Major J.W. Goodrow;
20 Naval Investigative Service ("NIS") Special Agent Michael
21 Barrett; NIS Special Agent Burt Nakasone, and plaintiffs Sara
22 Sabow and John David Sabow, M.D.

23 8. The March meeting occurred on a Saturday in a
24 conference room in the office of the base command at El Toro.
25 The circumstances were meant by defendant to be informal: e.g.,
26 there were no formal remarks, no transcription of the
27 proceedings, no set time limit, no refreshments. Water was
28 available to all. All participants were free to leave at

1 anytime, including the Sabows. None chose to do so. Moreover,
2 although they could have requested that a break be taken at
3 anytime, neither Dr. Sabow nor Mrs. Sabow ever so requested. Nor
4 did plaintiffs request refreshments.

5 9. The purpose of the meeting was to provide the
6 Sabows with as much of the factual predicate for the conclusion
7 that the decedent had committed suicide as was consistent with
8 law and military procedure. Dr. Sabow thought the meeting was
9 also to provide information about the investigation of Col. James
10 Sabow (before his death) regarding misuse of government property.

11 10. Those employees of the Navy and the Marine Corps
12 present at the meeting were keenly aware of both the pain that
13 the family had endured and the delicacy of the issue under
14 discussion. Many of them had been personal friends of the
15 decedent and Mrs. Sabow, had attended his funeral, and had
16 rendered assistance to his family in the aftermath of the death.

17 11. At the time of the meeting, several of the
18 attendees were also aware that prior to his death, the decedent
19 had been relieved of his duties by General Adams at the request
20 of the Inspector General of the United States Marine Corps,
21 Hollis Davison.

22 12. As Inspector General of the Marine Corps, it was
23 General Davison's responsibility to conduct investigations into
24 allegations of waste, fraud, or abuse on the part of Marine Corps
25 personnel.

26 13. Inspector General Davison had come to El Toro to
27 investigate accusations against several military members,
28 including Col. Sabow, for the misappropriation/misuse of military

1 personnel and equipment.

2 14. Although the allegations did not amount to
3 heinous crimes on the full spectrum of criminal activity, the
4 alleged conduct, if true, was felonious and might have ended the
5 decedent's career.

6 15. Prior to his departure from MCAS-El Toro and
7 prior to Col. Sabow's death, Inspector General Davison briefed
8 General Adams on his investigation into the alleged misconduct of
9 Col. Sabow, including the potential charges that might eventually
10 be preferred against Col. Sabow.

11 16. Those at the meeting were present to help the
12 Sabows by supplying information and answering their questions as
13 much as protocol would permit.

14 17. The meeting was convened by General Adams. Much
15 of the information conveyed was provided by Col. Rich, who
16 recently arrived at El Toro to serve as the Staff Judge Advocate
17 General. Col. William Lucas, the former Staff Judge Advocate
18 General, was not present, although Dr. Sabow had requested his
19 attendance.

20 18. Col. Rich had not been at El Toro during the
21 pendency of the investigations into the alleged misconduct by, or
22 the death of, Col. Sabow. However, he had been briefed on these
23 events. He was prepared to and did discuss the matters in issue
24 with the Sabows.

25 19. At the meeting, Dr. Sabow did a great deal of the
26 talking. The witness' demeanor and manner of testifying is
27 consistent with this observation, for the witness was loud,
28 animated, and forceful in his testimony. At the meeting, Dr.

1 Sabow repeatedly and adamantly stated that his brother would
2 never have committed suicide and denied that his brother was
3 capable of any serious misconduct.

4 20. Both Col. Rich and General Adams related that
5 they had been informed that the evidence against the decedent
6 developed by the Inspector General's team tended to show to the
7 contrary.

8 21. Both plaintiffs, but especially Dr. Sabow, became
9 very heated in their accusations of incompetence and cover up.
10 At times, the meeting was intense. Dr. Sabow was impeached by
11 his inconsistent statement concerning the nature of the
12 defendant's agents' behavior during the meeting.

13 22. Ultimately, Rich and/or Adams informed the Sabows
14 of his understanding that the evidence of wrongdoing by the
15 decedent had been strong. That understanding was not based on
16 personal participation in that investigation nor a belief in its
17 premises but on information conveyed to General Adams during the
18 Inspector General's investigation and at the exit interview
19 conducted by the Inspector General on January 17, 1991.

20 23. After approximately three hours, a break in the
21 proceedings was taken. As the other meeting participants moved
22 about, in and out of the room, the Sabows and General Adams
23 continued to talk. At no time were the doors locked or was exit
24 forbidden.

25 24. The Sabows accused Adams and others of being
26 intent on destroying Col. Sabow's public reputation. General
27 Adams heatedly denied the Sabows' charges.

28 25. When the meeting reconvened, General Adams

1 absented himself and all other military participants from the
2 room so that the Sabows could meet privately with the two NIS
3 special agents, Barrett and Nakasone, who had participated in the
4 death investigation and reviewed the forensic evidence. As
5 before, the circumstances were informal. The Sabows were free to
6 leave or to take a break at any time.

7 26. Dr. Sabow challenged the statements and
8 explanations offered by the agents, dismissed their conclusion of
9 death by suicide, and concluded the second part of the meeting
10 after approximately forty five minutes. The Sabows then
11 departed.

12 C. The Medical License Letter-Writing Incident

13 27. At some time after the March meeting, in the
14 Spring of 1991, a woman identifying herself as an office employee
15 of Dr. Sabow called the office of Dr. Christopher Moor and spoke
16 with his wife, Mrs. Valerie Moor. Dr. Moor was General Adams'
17 personal private physician in Yuma, Arizona.

18 28. During her conversation with Dr. Sabow's
19 receptionist/nurse, Mrs. Moor was asked to convey General Adams
20 medical records by telefax to Dr. Sabow. When Mrs. Moor
21 responded that Dr. Moor did not have a telefax machine, she was
22 asked to send the records by overnight mail. When Mrs. Moor
23 asked whether General Adams was being treated by Dr. Sabow's
24 office, she was given a response that led her to assume so. Mrs.
25 Moor said she would have to consult with her husband regarding
26 the request.

27 29. The following day, Mrs. Moor received another
28 call from Dr. Sabow's office. In response to a question, Mrs.

1 Moor stated that she had not sent the requested records. At some
2 point during this conversation, Dr. Sabow took the phone,
3 identified himself, and told Mrs. Moor that he needed the records
4 immediately. When asked if General Adams was there being treated
5 by Dr. Sabow, Dr. Sabow responded that the General was not there
6 at the time. Dr. Moor's office did not send any records.

7 30. Dr. Sabow caused the impression to be created
8 that he was General Adams' emergency treating physician in order
9 to obtain the unauthorized release of General Adams' confidential
10 medical records from his personal physician, Dr. Moor.

11 31. Following the March meeting, General Adams
12 learned of the unsuccessful efforts by Dr. David Sabow to try to
13 obtain General Adams' medical records.

14 32. General Adams instructed the Staff Judge Advocate
15 to look into the matter to determine if any violations of law or
16 medical ethics had occurred and to draft an appropriate letter
17 for his consideration.

18 33. A letter to the South Dakota Board of Medical
19 Examiners (i.e., the medical licensing authority of the state
20 wherein Dr. Sabow was licensed to practice medicine) was drafted
21 for General Adams' use. The letter was never sent.

22 34. Dr. Sabow received a copy of this unsigned,
23 undated, unsent letter in July of 1991 from Leslie Williams. She
24 had merely found a packet of materials on her desk one day and
25 mailed the package to Dr. Sabow in South Dakota as instructed by
26 a "Post-It" note.

27 35. The sending of this package of information (see
28 Exhibits received for limited purpose of showing information

1 plaintiff Dr. Sabow says was received in July of 1991) was
2 designed to assist Dr. Sabow in his crusade to clear his late
3 brother's good name and to resolve his questions concerning the
4 cause of death; the package was not intended to cause emotional
5 distress to plaintiffs nor did it do so, intentionally or
6 negligently.

7 36. Plaintiffs have shown that they were emotionally
8 distressed before, during, and after the March meeting. The
9 meeting itself did not cause their distress, although its
10 circumstances – the content and the fact of its occurrence –
11 exacerbated their distress and discontent.

12 37. There is no connection to be made that what the
13 defendant's agents did at the meeting in any way intentionally or
14 negligently inflicted the distress that plaintiffs experienced.

15 38. The allegations of the complaint are not
16 supported by the evidence. There was no locked room, no forcible
17 containment, no denial of bathroom privileges, nor refusal of
18 water or food breaks. As to the last, it is clear that none were
19 wanted and none were requested. As plaintiffs testified, this
20 was, at least in plaintiffs' view, a serious business meeting and
21 they wanted to learn all they could learn. However, that they
22 did not hear what they wanted to hear does not constitute
23 outrageous conduct by defendant.

24 39. The proposition that the defendant brought its
25 various employees and agents to the March meeting as part of a
26 conspiracy to browbeat the Sabows into refraining from "going
27 public" with their complaints is not credible. The witnesses,
28 including plaintiffs, establish, on the one hand, that nothing

1 told to plaintiffs would have been given credence by them. On
2 the other hand, nothing shows an intent or negligent behavior by
3 defendant to make or cause the plaintiffs to suffer.

4 **III.**

5 **CONCLUSIONS OF LAW**

6 1. Jurisdiction over this suit lies under the
7 Federal Tort Claims Act. It is axiomatic that "the United
8 States, as sovereign, is immune from suit save as it consents to
9 be sued, ... and terms of its consent to be sued in any court
10 define that court's jurisdiction to entertain the suit." Lehman
11 v. Nakshian, 453 U.S. 156, 160, 69 L. Ed. 2d 548, 101 S. Ct. 2698
12 (1981) (quoting United States v. Testan, 424 U.S. 392, 399
13 (1976)). Where the United States waives its immunity from suit,
14 as it does under the Federal Tort Claims Act, "limitations and
15 conditions upon which the government consents to be sued must be
16 strictly observed and exceptions thereto are not to be implied."
17 Lehman, 453 U.S. at 161 (quoting Soriano v. United States, 352
18 U.S. 270, 276 (1957)).

19 2. In enacting the Federal Tort Claims Act, Congress
20 created a limited waiver of sovereign immunity designed to
21 provide compensation to victims of "ordinary common law torts."
22 Dalehite v. United States, 346 U.S. 15, 28, 97 L. Ed. 1427, 73 S.
23 Ct. 956 (1953); Feres v. United States, 340 U.S. 135, 142, 95 L.
24 Ed. 152, 71 S. Ct. 153 (1950). The Act does not create a
25 substantive cause of action against the United States; it confers
26 only a procedural remedy. Richards v. United States, 369 U.S. 1,
27 7 L. Ed. 2d 492, 82 S. Ct. 585 (1962).

28 3. Sections 1346(b) and 2674 of the Federal Tort

1 Claims Act precondition jurisdiction and liability upon the
2 existence of an actionable duty under state law, providing in
3 pertinent part that "[t]he United States shall be liable,
4 respecting the provisions of this title relating to tort claims,
5 in the same manner and to the same extent as a private individual
6 under like circumstances" 28 U.S.C. § 2674. Because
7 the alleged torts occurred in California, the liability of the
8 United States, if any, is governed by the substantive law of
9 California as it applies to private defendants.

10 4. Under California law, the acts complained of do
11 not constitute a claim for which relief can be granted under the
12 Federal Tort Claims Act.

13 5. The elements of the tort of intentional
14 infliction of emotional distress are:

- 15 (a) extreme and outrageous conduct by defendant;
- 16 (b) the intention of causing, or reckless disregard
17 of the probability of causing, emotional
18 distress;
- 19 (c) a plaintiff's suffering severe or extreme
20 emotional distress; and
- 21 (d) actual and proximate causation of the emotional
22 distress by defendant's outrageous conduct.

23 Agarwal v. Johnson, 25 Cal. 3d 932, 946, 603 P.2d 58, 160 Cal.
24 Rptr. 141 (1979); Christensen v. Superior Court, 54 Cal. 3d 868,
25 903, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991).

26 6. There is liability for conduct which exceeds "all
27 bounds usually tolerated by a decent society, of a nature which
28 is especially calculated to cause, and does cause, mental

1 distress." Cole v. Fair Oaks Fire Protection Dist., 43 Cal. 3d
2 148, 155 n. 7, 729 P.2d 743, 233 Cal. Rptr. 308 (1987) (internal
3 quotations omitted). All persons must necessarily be expected
4 and required to be hardened to a certain amount of rough language
5 and to occasional acts that are definitely inconsiderate or
6 unkind. Golden v. Dungan, 20 Cal. App. 3d 295, 311, 97 Cal.
7 Rptr. 577, 588 (1971).

8 7. Ordinarily, mere insulting language, without
9 more, does not constitute outrageous conduct. The tort of
10 intentional infliction of emotional distress does not extend to
11 mere insults, indignities, threats, annoyances, petty oppressions
12 or other trivialities. Id. at 304.

13 8. "Severe" emotional distress is distress of such
14 substantial quantity or enduring quality that no reasonable
15 person in a civilized society should be expected to endure it.
16 Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376,
17 394, 89 Cal. Rptr. 78, 88 (1970); Newby v. Alto Riviera
18 Apartments, 60 Cal. App. 3d 288, 296, 131 Cal. Rptr. 547, 552
19 (1976).

20 9. A defendant's behavior may be considered
21 outrageous if defendant: (1) abuses a relation or position which
22 gives him power to damage the plaintiff's interest; (2) knows the
23 plaintiff is susceptible to injuries through mental distress; or
24 (3) acts intentionally or unreasonably with recognition that the
25 acts are likely to result in illness through mental distress.
26 Cole, 43 Cal. 3d at 155 n.7. Defendant's behavior has not been
27 shown to be outrageous by any measure, including the foregoing.

28 10. Although a comment may be rude and in bad taste,

1 it may not necessarily reach the level of conduct required to
2 establish the "outrageous conduct" required to prove intentional
3 infliction of emotional distress. Koch v. Goldway, 817 F.2d 507,
4 510 (9th Cir. 1987).

5 11. It is not enough that the defendant's conduct be
6 intentional to be outrageous and, therefore, subject to
7 liability. The conduct "must be directed at the plaintiff, or
8 occur in the presence of a plaintiff of whom the defendant is
9 aware." Christensen, 54 Cal. 3d at 903.

10 12. The conduct of Marine Corps personnel at the
11 March meeting and as it relates to the medical license letter
12 sent to South Dakota does not rise to the level of intentional
13 infliction of emotional distress. The "pattern of conduct"
14 alleged by plaintiffs and necessarily assumed to be true by the
15 appellate court for purposes of its review did not exist.

16 13. With respect to the letter-writing incident, as
17 both an equitable and legal matter, Dr. Sabow is not a victim of
18 emotional abuse as a result of this incident.

19 14. Plaintiffs fail to prove any cause of action for
20 intentional infliction of emotional distress.

21 15. The elements of a negligent infliction of
22 emotional distress claim are:

- 23 (a) The defendant engaged in negligent conduct;
- 24 (b) The plaintiff suffered serious emotional
25 distress, and
- 26 (c) The defendant's negligent conduct was the cause
27 of the serious emotional distress.

28 See Thing v. La Chusa, 48 Cal.3d 644, 257 Cal. Rptr. 865, 771

1 P.2d 814 (1989); Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916,
2 921, 167 Cal. Rptr. 831, 616 P.2d 813 (1980); Bro v. Glaser, 22
3 Cal. App. 4th 1398 (1994); Lawson v. Management Activities, Inc.,
4 69 Cal. App. 4th 652, 656, 81 Cal. Rptr. 745 (1999) (cause of
5 action is based on negligence).

6 16. "Serious emotional distress" is an emotional
7 reaction which is not an abnormal response to the circumstances.
8 It is found where a reasonable person would be unable to cope
9 with the mental distress caused by the circumstances. Thing v.
10 La Chusa, 48 Cal. 3d 644, 668, 257 Cal. Rptr. 865, 771 P.2d 814
11 (1989).

12 17. The conduct of the USMC personnel at the March
13 meeting and in relation to the medical license letter does not
14 constitute the tort of negligent infliction of emotional
15 distress.

16 18. Plaintiffs' alleged injuries were not caused by
17 any act or omission of an employee of the United States acting
18 within the course and scope of their employment. See United
19 States v. Coffey, 233 F.2d 41 (9th Cir. 1956); Garza v. United
20 States, 809 F.2d 1170 (5th Cir. 1987); Schmidt v. United States,
21 179 F.2d 724 (10th Cir.), cert. denied, 339 U.S. 986 (1950).

22 19. To litigate the truth or falsity of the parties'
23 and witnesses' statements made at the March meeting opens inquiry
24 into matters which are beyond the Court's jurisdiction and not
25 relevant to the remaining claims.

26 20. Plaintiffs acknowledge in their proposed Findings
27 of Fact and Conclusions of Law, lodged January 12, 2000, that the
28 "Court is not empowered" to pass upon the "two ultimate questions

1 of fact raised by the Sabow family. Nor does the Sabow Family
2 any longer insist this Court do so in this litigation." p. 174,
3 11. 9-12.

4 21. Plaintiffs fail to prove any cause of action
5 against the United States. The Court therefore finds in favor of
6 defendant and awards defendant costs.

7
8 **IV.**

9 **CONCLUSION**

10 Accordingly, and for the foregoing reasons, judgment
11 is granted to defendant United States. Plaintiffs have not
12 carried their burden of proof. The evidence does not demonstrate
13 intentional conduct or negligence which proximately caused the
14 damages complained of.

15
16 IT IS SO ORDERED.

17 IT IS FURTHER ORDERED that the Clerk shall serve a copy
18 of this Order on counsel for all parties. The Clerk is directed
19 to enter judgment in accordance with the foregoing.

20 Dated: February ____, 2000.

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23 _____
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE
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