

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO: 00-2492 CIV-KING

SEP 11 2000  
F.L.A. 11A

VERNON BELLE GARRAWAY,

Plaintiff,

vs.

CITY OF MIAMI BEACH POLICE  
OFFICER SARGENT P. MASTERS,  
OFFICER E. DOMINGUEZ, AND  
OFFICER R. NORIEGA, individually,  
and CITY OF MIAMI BEACH CODE  
ENFORCEMENT INSPECTOR  
M. DAVILA, individually, and THE  
CITY OF MIAMI BEACH,

Defendants.

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**DEFENDANT DOMINGUEZ' REPLY TO RESPONSE TO MOTION TO DISMISS  
AND INCORPORATED MEMORANDUM OF LAW**

**COUNT I - FOURTH AMENDMENT CLAIM**

On August 18, 2000, Plaintiff served a Response to Defendant E. Dominguez' motion to dismiss, to which a reply is due on August 28, 2000. In that Response, Plaintiff argues that his complaint should not be dismissed because he has alleged a plain and simple statement in his complaint as required under the Rules of Civil Procedure. Plaintiff is mistaken because as we demonstrated in the initial motion, when suing an individual defendant for alleged violations of constitutional rights, Plaintiff has to meet a higher pleading standard and allege specific facts against that individual showing that those particular facts violated clearly established law. Plaintiff has not done so here.

A look at the complaint shows that the only allegations against Defendant Dominguez in count I for alleged Fourth Amendment violations are that because of the dispute between Plaintiff and the hotel guests, Defendant Dominguez arrived at the hotel and later escorted Plaintiff to his room to get identification. The complaint does not allege that Plaintiff was arrested by Defendant Dominguez, or that Defendant Dominguez ever handcuffed Plaintiff. In fact, the complaint states that prior to Defendant Dominguez escorting Plaintiff to his room, someone else had told Plaintiff that he was under arrest for failing to return the room charge. See compl. ¶ 10. These facts, therefore, do not rise to the level of a constitutional violation under the Fourth Amendment for illegal search and seizure.

Moreover, the allegations that Defendant Dominguez verbally harassed the Plaintiff is of no consequence because "state officials can act lawfully even when motivated by a dislike or hostility". See Foy v. Holston, 94 F.3d 1528, 1534 (11<sup>th</sup> Cir. 1996). Therefore, because the allegations in the complaint against Defendant Dominguez do not support a claim for a violation of the Fourth Amendment, count I against Defendant Dominguez should be dismissed.

Furthermore, analyzing those facts to determine whether Defendant Dominguez is entitled to qualified immunity shows that he is entitled to such defense because it is apparent that Plaintiff has not alleged a violation of clearly established rights under those facts and circumstances, and that no reasonable officer in Defendant Dominguez' shoes would have believed that his conduct was unlawful. Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557 (11<sup>th</sup> Cir. 1993). Accordingly, Defendant Dominguez is also entitled to qualified immunity on Plaintiff's Fourth Amendment claim against him in count I.

#### **COUNT IV - 1981**

Plaintiff argues that his claim under section 1981 should not be dismissed in count IV even though he does not allege "instances in which 'similarly situated' non-minorities were treated differently" as required by the Eleventh Circuit. See Brown v. City of Oneonta, 195 F.3d 111, 121 (2d Cir. 1999).

In his Response, Plaintiff argues (without legal support) that he is not required to allege the existence of non-minorities who were treated differently because he is not alleging that the Defendants selected to enforce the laws only against him because he is different than others. This argument is meritless because, in fact, this is exactly what Plaintiff is alleging. He is claiming that the Defendants treated him different than others because he is black. Accordingly, Plaintiff must satisfy the necessary elements under section 1981 which is to allege "instances in which 'similarly situated' non-minorities were treated differently." See Brown v. City of Oneonta, 195 F.3d 111, 121 (2d Cir. 1999) quoting Albert v. Carovano, 851 F.2d 561, 573 (2d Cir. 1988). Plaintiff has not done so and count IV should therefore be dismissed.

#### **CONCLUSION**

Based on the foregoing, Defendant Dominguez respectfully requests that counts I and IV against him be dismissed.

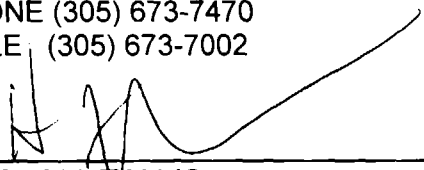
#### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy hereof was mailed to Jeffrey A. Blaker, Esq., Fuller Mullah & Associates, P.A., Attorneys for Plaintiff, 1111 Lincoln Road Mall, Penthouse 802, Miami Beach, Florida 33139 on the 28th<sup>st</sup> day of August, 2000.

Respectfully submitted,

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