Tobey v. Napolitano et al Doc. 42

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

AARON TOBEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 3:11cv154-HEH**
	)	
JANET NAPOLITANO, et al.,	)	
	)	
Defendants.	)	
	)	

FEDERAL DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Despite plaintiff's attempts to re-construe the facts alleged in his Amended Complaint, he has not come forward with a sufficient basis to thwart a dismissal of his claims against the federal defendants on sovereign and qualified immunity grounds. Plaintiff has not established a basis for relief against the federal defendants under 42 U.S.C. § 1983. Nor, with respect to the individual capacity federal defendants, has plaintiff demonstrated that plaintiff's First Amended Complaint should not be dismissed under the doctrine of qualified immunity. Even accepting all the factual allegations as true, including the salient fact that plaintiff failed to follow the direction of the Transportation Security Officer at the security screening checkpoint to proceed through the Advanced Imaging Technology (AIT) scanner, the individual capacity defendants did not violate any right secured by the First, Fourth, or Fifth Amendments of the Constitution. In addition, even if this Court were to hold that the individual capacity defendants violated plaintiff's constitutional rights, they are entitled to qualified immunity because at the time they acted it was not clearly established that their actions were improper. Thus, plaintiff's claims should be dismissed with prejudice.

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1. Plaintiff Has Not Established Claims Against the Federal Defendants Under 42 U.S.C. § 1983

Plaintiff asserts he has alleged a claim against the federal defendants under 42 U.S.C. § 1983 because the federal defendants acted "jointly" with the Capital Region Airport Commission officials. Pl.'s Opp. Memo at 8. To bolster this claim, plaintiff points to the fact that the federal and Commission defendants have entered into agreements to "act collaboratively" to ensure safety and security at the Richmond International Airport. *Id.* at 10. Further, plaintiff states that the federal defendants "acted hand in glove" with Commission officials when Supervisory Transportation Security Office (STSO) Jones called the Richmond International Airport Police (RIC Police), who held plaintiff until a Federal Air Marshal questioned him. *Id.* at 10-11.

Notwithstanding plaintiff's rhetoric, the allegations set forth in the Amended Complaint do not rise to the level necessary to demonstrate that the federal defendants acted under color of state law and, thus, plaintiff has not made out a claim against these officials under 42 U.S.C. § 1983. Indeed, even plaintiff acknowledges, as he must, that federal officials "act under color of state law where they act in joint cooperation and coordination with state officials to deprive an individual of his or her constitutional rights." Pl.'s Opp. Memo at 9. In contrast to the circumstances here, the cases on which plaintiff relies for this proposition involved longstanding and comprehensive relationships between federal and state officials relating to a particular issue, investigation, or other matter. *See, e.g., Hampton v. Hanrahan,* 600 F.2d 600 (7th Cir. 1979) (federal defendants played a substantive role over a significant period of time in planning raid carried out by state officials), *rev'd on other grounds*, 446 U.S. 754 (1980); *Kletschka v. Driver*, 411 F.2d 436 (2d Cir. 1969) (court found that, in longstanding relationship between federal and state officials, state officials were in the position to, and did, exert strong influence on federal

officials).

Rather than alleging facts showing that the federal defendants were in close and near constant contact with the RIC Police and Commission officials, plaintiff's Amended Complaint discusses the existence of protocols and procedures relating to the maintenance of security at the Richmond International Airport. Am. Compl. ¶¶ 17-24. The mere fact that these policies exist is not sufficient, however, to make out a claim against the federal defendants under 42 U.S.C. § 1983. At most, plaintiff's Amended Complaint alleges that the federal and state officials worked together toward a common goal, *i.e.,* ensuring the security of the Richmond International Airport and the people who either work there or who are traveling as passengers on commercial airlines. Nothing in the Amended Complaint indicates that in striving to reach this goal, the federal defendants acted under anything but federal policies, rules, and regulations. Further, plaintiff has not alleged in his Amended Complaint any facts that establish actual communications relating to plaintiff between the state and federal officials. Instead, plaintiff alleges that the STSO called the RIC Police, Am. Compl. ¶ 33, and that the RIC Police detained plaintiff until after a Federal Air Marshal questioned him, *id.* ¶ 63. These facts do not amount to the level of involvement or cooperation between the state and federal officials that courts have required in order to find that a claim lies against federal officials under section 1983. *See Strickland v. Shalala*, 123 F.3d 863, 866 (6th Cir. 1997). Therefore, plaintiff claims against the federal defendants under 42 U.S.C. § 1983 should be dismissed.

2. The Individual Capacity Defendants Are Entitled to Qualified Immunity and, Thus, Plaintiff's Constitutional Tort (Bivens) Claims Against Them Should Be Dismissed

A court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all. *Siegert v. Gilley*, 500 U.S. 226, 231 (1991); *Jean v. Collins*, 221 F.3d 656, 658 (4th Cir. 2000) (citation omitted). *Accord Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2080 (2011); *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Second, if such a violation exists, the court must decide whether that right was "clearly established" at the time the officer acted, such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202; *see Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

In his opposition, plaintiff disputes the federal defendants' characterization of the facts set forth in his Amended Complaint. Yet, as much as plaintiff attempts to obfuscate the facts as alleged, the inescapable conclusion based on the Amended Complaint logically leads to the conclusion that the individual capacity defendants did not violate a known constitutional right of plaintiff and, even if the Court were to determine otherwise, they did not act in such a manner that a reasonable officer would understand that his conduct was unlawful under the circumstances presented in this case.

Under the facts alleged, plaintiff was traveling from the Richmond International Airport at one of the traditionally busiest times of the year for travel by commercial airlines – during the holiday season, between Christmas and New Year's -- on December 30, 2010. Am. Compl. ¶ 25. After being cleared by the pre-screening agent, plaintiff proceeded to the conveyor belt in the checkpoint security screening area and placed his personal items on the belt. *Id.* ¶¶ 28-29.

Plaintiff then reached the passenger screening location, where TSO Smith "directed Plaintiff away from the magnetometer . . . and toward an AIT unit." *Id.* ¶ 30.[1] Instead of entering the AIT unit, plaintiff removed his T-shirt and sweat pants, placed them on the conveyor belt, and stood in athletic running shorts, revealing the Fourth Amendment-related message to TSA screening agents and other persons present in the checkpoint screening area. *Id.* ¶¶ 30-31. Plaintiff alleges that TSO Smith informed him that removal of his clothing was unnecessary, but plaintiff responded that he wished to so do to express his view that the enhanced screening procedures, including AIT, are not constitutional. *Id.* ¶ 32. Plaintiff claims that defendant Smith then radioed for assistance and that either defendant Jones or another STSO directed plaintiff to stay where he was in front of the AIT unit, "whereupon Defendant Jones sought intervention" by the RIC Police. *Id.* ¶ 33. Plaintiff alleges that, "shortly thereafter, the RIC Police officers seized him, collected his belongings, and took him to the police station where he was questioned; eventually plaintiff was cleared and permitted to board a flight." *Id.* ¶¶ 55-64.

Based on these factual allegations, TSO Smith directed plaintiff to proceed through the AIT machine and plaintiff did not follow this direction. Instead, plaintiff went from the AIT back to the conveyor belt and removed articles of his clothing to reveal the Fourth Amendment

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[1] Plaintiff claims that the magnetometer, or metal detector, constitutes TSA's "primary screening apparatus," Am. Compl. ¶ 30, and that the Advanced Imaging Technology (AIT) Unit amounts to "secondary screening." *Id.* ¶ 16. Contrary to plaintiff's allegations, TSA uses AIT, together with the magnetometer, as a primary security screening tool. *See EPIC v. Napolitano,* Slip Op. At 3 (D.C. Cir. July 15, 2011) (attached as Exh. 1). In fact, it was the adoption of the procedures which, in part, implemented the widespread use of AIT as a primary screening method that engendered protests such as plaintiff's and others. *See* Pl.'s Opp. Memo at 23 (citing articles).

written on his chest. Thus, it was only after plaintiff failed to follow the TSO's direction to proceed through the AIT during one of the busiest travel seasons when protests of TSA's new procedures were at their height that the STSO called the RIC Police. Even accepting as true that plaintiff was "quiet, composed [and] polite," Am. Compl. ¶ 65, plaintiff's actions do not merely constitute a "peaceful protest," Pl.s Opp. Memo at 6, but rather amount to a deliberate act by plaintiff not to follow TSO Smith's direction. Am. Compl. ¶¶ 30-31.

1. Fourth Amendment

The facts of this case present a novel question of the extent to which the Fourth Amendment requires probable cause to detain an individual who enters a security screening checkpoint prior to boarding a commercial airline, but who then fails to follow the direction of the screening TSO.[2] Most of the cases addressing issues relating to the Fourth Amendment in this context, after the events of September 11, 2001, have focused primarily on the search of individuals rather than their seizure or detention. *See, e.g., United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (en banc); *United States v. Hartwell*, 436 F.3d 174 (3d Cir. 2006); *Gilmore v. Gonzales*, 435 F.2d 1125 (9th Cir. 2006). For this reason, there is no clearly established constitutional right with respect to the Fourth Amendment claim that plaintiff raises here. Moreover, when applying by analogy the principles of the cases that have addressed the appropriate scope of a search under the Fourth Amendment in the airport screening context, it is clear that the Amended Complaint does not properly plead a constitutional violation.

Contrary to plaintiff's characterizations, the federal defendants do not "rely almost

[2] Plaintiff did not cite to any cases that have addressed this specific issue in his opposition memorandum, and the federal defendants' counsel likewise has been unable to locate prior cases where courts have reached this issue.

exclusively” on the decision in *Aukai*, 497 F.3d 955, for the proposition that the individual capacity defendants did not violate a clearly established Fourth Amendment right of plaintiff. Pl.’s Opp. Memo at 13. The federal defendants cited to several cases which acknowledge that, because the government has a compelling interest in preventing terrorist attacks on airplanes, there is no probable cause requirement to search passengers who opt to proceed through the security screening checkpoint. Fed. Defs.’ Memo at 12-13. A passenger who enters the security checkpoint screening process is on notice that he will be searched and, once his belongings are placed on the conveyor belt, he cannot withdraw. *United States v. Herzbrun*, 723 F.2d 773, 776 (11th Cir. 1984); *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973); *Hartwell*, 436 F.3d 174, 178-79 (3d Cir. 2006); *Aukai*, 497 F.3d at 961; *Singleton v. Comm’r of Internal Revenue*, 606 F.2d 50, 52 (3d Cir. 1979). *See also* 49 C.F.R. § 1540.107(a) (no individual may board an aircraft without complying with security checkpoint procedures).

The Fourth Amendment is not violated where passengers are not permitted to disengage from an administrative search. *Aukai*, 497 F.3d at 961 ("The constitutionality of an airport screening search, however, does not depend on consent . . . requiring that a potential passenger be allowed to revoke consent to an ongoing airport security search makes little sense in a post-9/11 world. Such a rule would afford terrorists multiple opportunities to attempt to penetrate airport security by 'electing not to fly' on the cusp of detection until a vulnerable portal is found."); *see also Hartwell*, 436 F.3d at 181 n.12 ("Hartwell argues that once the TSA agents identified the object in his pocket and he refused to reveal it, he should have had the right to leave rather than empty his pockets. We reject this theory."); *Torbet v. United Airlines*, 298 F.3d 1087, 1090 (9th Cir. 2002) (after entering a security checkpoint screening and, thus, consenting

to a search, "the Fourth Amendment does not require that passengers be given a safe exit once detection is threatened.").

Plaintiff attempts to distinguish *Aukai* based on his gloss on the facts alleged in the Amended Complaint, which he claims do not demonstrate that plaintiff failed to cooperate with the TSO after entering the checkpoint security screening process. As discussed above, the Amended Complaint contains allegations indicating that plaintiff did not follow the TSO's direction to proceed through the AIT and, thus, plaintiff's basis for distinguishing *Aukai* is unfounded.

Moreover, plaintiff relies on the fact that no TSA official undertook "to determine whether plaintiff was a security risk." Pl.'s Opp. Memo at 15. Suspicionless checkpoint searches are permissible under the Fourth Amendment when a court finds a reasonable balance between "the gravity of the public concerns served by the [search], the degree to which the [search] advances the public interest, and the severity of the interference with individual liberty." *Illinois v. Lidster*, 540 U.S. 419, 427 (2004). *See also Von Raab*, 489 U.S. at 674 (quoting United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974) ("When the risk is the jeopardy to hundreds of human lives . . . inherent in the . . . blowing up of a large airplane, the danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing . . . damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.")); *United States v. Rendon*, 607 F.3d 982, 989 (4th Cir. 2010) (recognizing special needs exception to Fourth Amendment's warrant requirement).

Preventing terrorist attacks and maintaining the safety of the more than 700 million

passengers annually is of paramount importance. *See Aukai*, 497 F.3d at 958-59; *Hartwell*, 436 F.3d at 178. Airport checkpoints advance the public interest inasmuch as "absent a search, there is no effective means of detecting which airline passengers are reasonably likely to hijack an airplane." *Singleton,* 606 F.2d at 52. "It is hard to overestimate the need to search air travelers for weapons and explosives before they are allowed to board the aircraft. As illustrated over the last three decades, the potential damage and destructions for air terrorism is horrifically enormous." *United States v. Marquez*, 410 F.3d 612, 616 (9th Cir. 2005). Thus, despite plaintiff's self-serving claim that he did not pose a security risk, "as yet there is no foolproof method of confining the search to the few who are potential hijackers." *Marquez*, 410 F.3d at 616.

Under the circumstances described in plaintiff's Amended Complaint, it is apparent that the TSOs who manned the security screening checkpoint on December 30, 2010 did not violate an established Fourth Amendment right of plaintiff. Even if the Court were to determine otherwise, it is clear that these officials did not violate a "clearly established" right of plaintiff such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier,* 533 U.S. at 202. *Accord Al Kidd*, 131 S. Ct. at 2085. TSOs are the officials on the front lines of the federal government's efforts to prevent terrorism and maintain the security of commercial airlines. To assist them in carrying out this function of "paramount" importance, TSA has layers of policies, rules, and regulations relating to the importance of security screening checkpoint for air passengers.[3] Here, the individual capacity defendants were

[3] Plaintiff's Amended Complaint cites to just one of these policies, TSA MD 100.4. But in addition to the MD, there are regulations, *see, e,g,* 49 C.F.R. §§ 1503.401 (allowing TSA to assess civil penalties for such interference); 1540.105(a)(2) (prohibiting individuals from

confronted by an individual who engaged in unpredictable behavior and who did not follow a direction to proceed through the AIT scanner at a time of year when passenger volume is at its highest. "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects all but the plainly incompetent or those who knowingly violate the law." *Al Kidd*, 131 S. Ct. at 1085. When considered in the totality of the circumstance, the TSOs acted reasonably in detaining plaintiff until the RIC Police arrived and they are entitled to qualified immunity.

2. First Amendment

Plaintiff claims that the individual capacity federal defendants violated his First Amendment right to free speech because their conduct resulted in plaintiff's arrest by the Commission defendants.[4] Pl.'s Opp. Memo at 17. Plaintiff relies primarily on two facts that are not supported by the allegations in his Amended Complaint: (1) that it was the message plaintiff conveyed that caused the TSOs to call the RIC Police; and (2) that plaintiff did not interfere with the checkpoint screening process. *Id*. at 19. Neither of these facts is supported by a fair reading of plaintiff's Amended Complaint. Instead, the Amended Complaint demonstrates that the TSOs

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entering a secured or sterile airport area "without complying with the systems, measures, or procedures being applied to control access to, or presence or movement in, such areas."); 1540.107(a) ("No individual may . . . board an aircraft without submitting to the screening and inspection of his or her person . . . in accordance with the procedures being applied to control access to that area or aircraft . . . ."); *see also* 49 U.S.C. §§ 44901-44903, as well as Standard Operating Procedures and other TSA guidelines. *Redfern v. Napolitano*, No. 1:10cv12048, 2011 WL 1750445 (D. Mass. May 9, 2011); *Durso v. Napolitano*, No. 1:10cv02066, 2011 WL 2634183 (D.D.C. July 5, 2011)

[4] As discussed *supra* at 2-3, plaintiff has not established that the federal and Commission defendants were acting "in concert" during the events of December 30, 2010, nor has plaintiff sufficiently alleged a "conspiracy" between the federal and Commission defendants. *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977); *Granville v. Hunt,* 411 F.2d 9, 11 (5th Cir. 1969).

took the actions at issue because of plaintiff's failure to follow TSO Smith's direction to proceed through the AIT, and not because of the message plaintiff had written on his chest.[5] Further, under the circumstances in the Richmond International Airport on December 30, 2010, as discussed above at 4, 5 n.1, it was not unreasonable for the individual capacity federal defendants to equate plaintiff's failure to follow TSO Smith's direction with an interference with screening personnel.

As set forth in 49 C.F.R. § 1540.109, "[n]o person may interfere with, assault, threaten, or intimidate screening personnel in the performance of their screening duties under this subchapter." As the court noted in *Rendon v. Transportation Security Administration*, 424 F.3d 475 (6th Cir. 2005), "this regulation serves a substantial government interest, as its purpose is to prevent individuals from interfering with screeners in the performance of their duties, which are to both ensure that those screened are not potentially carrying weapons and to conduct the screening of passengers as efficiently as possible." *Id.* at 479. Further, TSA's checkpoint screening policies are applied to all members of the air traveling public who wish to fly via commercial airlines. 49 U.S.C. §§ 44901-44903; 49 C.F.R. §§ 1540.105(a)(2); 1540.107(a). *Compare Roberts v. United States Jaycees*, 468 U.S. 609, 622-23 (1984). The requirement simply obligates a person who wants to travel on an airplane to consent to the checkpoint screening requirements, which has nothing whatsoever to do with freedom of expression or petitioning the Government. *See*, *e.g.*, *Arcara v. Cloud Books*, 478 U.S. 697, 706-07 (1986) Inasmuch as the prevention of interference with screeners and the checkpoint security screening

[5] For this reason, the cases plaintiff cites for the proposition that content and viewpoint First Amendment claims are valid are inapposite here. Pl.'s Opp. Memo at 17-18.

process serves a valid governmental interest to prevent acts of terrorism on commercial airlines, plaintiff has not established a claim that his First Amendment rights have been violated.

3. <u>Fifth Amendment</u>

Plaintiff argues that he has made out an equal protection claim under the Fifth Amendment because he was treated differently from other passengers in other airports on different days who protested TSA's screening policies in a similar fashion, *i.e.,* by removing articles of clothing. Pl.'s Opp. Memo at 22-23. As the Supreme Court has observed many times,"[t]he Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike."' *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). And, in fact, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). Obviously, plaintiff has not made a cognizable equal protection claim as he has not proffered any facts demonstrating that TSA TSOs treated other passengers in the Richmond International Airport on December 30, 2010, who also engaged in a protest of TSA's screening policies, in a disparate manner. Because plaintiff has not identified any such similarly situated passengers, his claim must fail.

Further, as stated in TSA MD 100.4, "TSA's layered security strategy includes an overlapping system of screening and searches. No single security measure or method is sufficiently reliable to be depended upon in isolation." Fed. Defs.' Memo Exh. A at 6. Thus, it is apparent that there is no right or wrong way to handle a specific issue as it arises during the security screening process. Accordingly, plaintiff has not established a clear violation of the Fifth Amendment, nor that the individual capacity federal defendants acted unreasonable under

the circumstances present here.[6]

WHEREFORE, the Federal defendants respectfully request that the Court dismiss plaintiff's Amended Complaint, with prejudice, as to the federal defendants and for such further relief as the Court deems appropriate.

DATED this 18th day of July, 2011.

Respectfully submitted,

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[6] Contrary to plaintiff's assertion, Pl.'s Opp. Memo at 21, there is no constitutional right to travel by a particular means. *See Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 54 (2d Cir. 2007) ("[T]ravelers do not have a constitutional right to the most convenient form of travel"); *Gilmore,* 435 F.3d at 1136-37 (there is no right to air travel, even when that is the most convenient means); *City of Houston v. FAA*, 679 F.2d 1184, 1198 (5th Cir. 1982) (same).

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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