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.	)	
	)	

MOTION FOR STAY OF DISCOVERY PENDING
A DECISION ON INTERLOCUTORY APPEAL

In its August 30, 2011 Memorandum Opinion (docket # 53), the Court granted in part and denied in part the federal defendants' motion to dismiss plaintiff's Amended Complaint. Only plaintiff's First Amendment claim against the individual federal defendants, Rebecca Smith and Terri Jones (collectively, the Transportation Security Officers (TSOs)), is extant. A decision of whether to file an interlocutory appeal from the August 30 decision remains under active consideration. Therefore, defendants Smith and Jones respectfully move this Court under Federal Rule of Civil Procedure 26(c) to stay discovery and the Court's other pre-trial deadlines, at least until after the Solicitor General of the United States determines whether an appeal should be filed.

BACKGROUND

The federal defendants' motion to dismiss the claims against the TSOs sued in their individual capacities raised as its primary basis the qualified immunity doctrine. On August 30, the Court dismissed plaintiff's Fifth Amendment equal protection and Fourth Amendment claims against the TSOs. With respect to the equal protection claim, the court stated that plaintiff had

failed to allege that any similarly situated passengers were treated differently. Memo Opinion at 30. Regarding the Fourth Amendment claim, the court stated that the government's argument for dismissal was based on a disputed factual assertion that plaintiff did not comply with the TSOs' direction to go to the AIT machine. Memo Opinion at 31. Even so, the court determined the Amended Complaint failed to allege an actionable Fourth Amendment violation by Smith or Jones. The court noted that the Amended Complaint alleged that plaintiff began to remove his clothes in the security screening area and continued to do so even after Smith told him that was unnecessary. *Id*. The court further relied on the concession at argument by plaintiff's counsel that plaintiff's behavior was 'bizarre" and that it was reasonable for the TSOs to summon the airport police to investigate, stating "nothing in the Complaint suggests a contrary inference." *Id.* at 33. In addition, the court noted the heightened security interest at airport security checkpoints. *Id*. at 31-32. Given these factors, the court determined Smith and Jones were entitled to qualified immunity on this claim.

The Court held, however, that plaintiff's First Amendment claim could not yet be dismissed on qualified immunity grounds. The Court identified the issue for decision as "whether the TSOs in fact radioed for assistance because of the message Plaintiff sought to convey, as opposed to Plaintiff's admittedly bizarre behavior or because of some other reasonable restriction on First Amendment activity in the security screening area." Memo Opinion at 34. The Court determined that the Amended Complaint raised a "material dispute over what the defendants did" and, because "Plaintiff's unrebutted claim facially states a cause of action," the court concluded that "the question of qualified immunity must await further discovery." *Id*. at 34. In so ruling on the dismissal motion, the Court submitted TSOs Smith and

Jones to discovery and pretrial proceedings, effectively denying their qualified immunity defense. *See, e.g., Jenkins v. Medford*, 119 F.3d 1156, 1159 (4th Cir. 1997).[1]

ARGUMENT

Qualified immunity "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow*, 457 U.S. at 818). Qualified immunity is designed to protect against the "substantial social costs" that result from suits for damages against individual officers, *Anderson v. Creighton*, 483 U.S. 635, 638 (1987), including the "substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed," *Iqbal*, 129 S. Ct. at 1953. Because these costs accrue regardless of a case's ultimate outcome, the Supreme Court "'repeatedly [has] stressed'" that courts should apply qualified immunity "'at the earliest possible stage in litigation.'" *Pearson*, 129 S. Ct. at 815 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). *Accord Dunbar Corp. v. Lindsey*, 905 F.2d 754, 763 (4th Cir. 1990). "[E]ven such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 457 U.S. at 817) (alteration in original). Indeed, the "basic thrust" of the doctrine is "to free officials from the concerns of litigation, including 'avoidance of disruptive

[1] In reaching its decision on plaintiff's Fourth Amendment claim,, the Court addressed whether the Amended Complaint supported an inference that the TSOs violated plaintiff's constitutional rights. Memo Opinion at 33. But, as to the First Amendment, the Court's opinion did not contain a similar analysis, *i.e.*, that the Amended Complaint alleged facts sufficient to support a reasonable inference that the TSOs were motivated by content discrimination in violation of the First Amendment. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

discovery.'" *Iqbal*, 129 S. Ct. at 1953 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)).

Therefore, as the Supreme Court has long since made clear, when an official raises the defense of qualified immunity, discovery bearing on the merits of the claim against that official should not proceed until the threshold question of immunity is resolved. *See Pearson*, 129 S. Ct. at 815 ("[T]he driving force behind creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials [will] be resolved prior to discovery") (internal quotation marks omitted, alteration in *Pearson)*; *Mitchell,* 472 U.S. at 526 ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to a dismissal before the commencement of discovery."); *Harlow*, 457 U.S. at 818 ("Until this threshold immunity question is resolved, discovery should not be allowed.").

The Supreme Court has underscored the importance of this protection from discovery by holding that the denial of such protection is immediately appealable under the collateral order doctrine. *See Iqbal*, 129 S. Ct. at 1945-46; *Behrens v. Pelletier*, 516 U.S. 299, 307-08 (1996). Further, in *Iqbal*, the Court concluded that, while the issue of qualified immunity remains an open one, all discovery in a case should be stayed. The Supreme Court rejected the "careful-case-management approach" under which limited discovery proceeds while threshold qualified immunity motions remain pending. *Iqbal*, 129 S. Ct. at 1953-54. In *Iqbal*, the Court explained:

> It is no answer to these concerns to say that discovery for petitioners [senior-level federal officials] can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove

> necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

Id.

In this case, the TSOs are in the process of determining whether to file an interlocutory appeal from the August 30 Memorandum Opinion. The Solicitor General must approve the filing of an appeal and the process of obtaining such approval is ongoing. The federal defendants have 60 days from the date of the Memorandum Opinion, see *Buonocore v. Harris*, 65 F.3d 347, 352 (4th Cir. 1995), to make this decision. Therefore, discovery should be stayed from the date of the filing of this motion until October 31, 2011, or until such time as an appeal may be filed on or before that date.[2]

Counsel for the federal defendants has conferred with counsel for plaintiff and for the Commission defendants. Counsel for plaintiff, Anand Agneshwar, has advised that plaintiff opposes this motion. Counsel for the Commission defendants, Henry Willett, has advised that the Commission defendants oppose this motion.

WHEREFORE, discovery in this case should be stayed until October 31, 2011, or until such time as an appeal may be filed on or before that date, pending a decision as to whether an interlocutory appeal of the August 30 Memorandum Opinion is authorized because the principle

[2] Discovery among the parties has been progressing, both in written form and through depositions. The individual federal defendants have not, however, been deposed as of this time.

of qualified immunity protects the individual federal defendants from discovery.[3]

DATED this 5th day of October, 2011.

Respectfully submitted,

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[3] Because a stay of discovery necessarily affects the other pre-trial deadlines set by the Court, at a minimum those deadlines coming up in the near future also should be adjusted to account for the stay of discovery. Those deadlines include the Settlement Conference (November 3, 2011) and the date for submitting a settlement memorandum (October 27, 2011); and defendants' deadline for expert disclosures (October 21, 2011).

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 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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