

**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, <i>et al.</i> ,	)	
	)	
Defendants.	)	

**MEMORANDUM ORDER**

**(Granting in Part and Denying in Part Defendants’ Motion to Dismiss; Granting Plaintiff’s Motion to File Second Amended Complaint Under Seal; Granting Defendants’ Motion for Stay of Proceedings Pending Appeal)**

THIS MATTER is before the Court on Federal Defendants’ Motion to Dismiss Plaintiff’s Second Amended Complaint (Dk. No. 65), filed on October 21, 2011. On August 30, 2011, this Court dismissed all but Plaintiff’s First Amendment individual-capacity claim against Defendants Rebecca Smith and Terri Jones, both of whom are agents of the Transportation Security Administration (TSA) at Richmond International Airport. Subsequently, the Court granted Plaintiff leave to file an amended complaint naming “Jane Doe,” also a Richmond-based TSA agent, as an additional defendant.<sup>1</sup> These three remaining individual defendants (the “Federal Defendants”) now move the Court to dismiss Plaintiff’s Second Amended Complaint.

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<sup>1</sup> On August 10, 2011, the Court entered an Order permitting Plaintiff to move for joinder of additional parties “up to ten (10) days after his counsel learns the identity of any persons not previously identified by the defendants who may be properly named as a defendant(s)....” (Dk. No. 47.)

Central to the Court's resolution of the present motion is the fact that the allegations and arguments at issue are identical to those addressed in the Court's Memorandum Opinion of August 30, 2011.<sup>2</sup> Indeed, the Plaintiff's Second Amended Complaint differs from his First Amended Complaint only insofar as it adds Jane Doe as a defendant. Likewise, the contentions contained in the Federal Defendant's motion are substantially equivalent to those set forth in their initial motion to dismiss.

As explained in this Court's Order of August 30, 2011, the disputed question of fact remains whether the Federal Defendants' actions were motivated by the content of Plaintiff's expression. (*See* Dk. No. 53 (finding further discovery necessary to determine "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")). Because the Court previously reviewed Plaintiff's parallel claims against Defendants Smith and Jones, the record in this case squarely addresses Plaintiff's present claims against Defendant Doe. No additional analysis is required.

For the reasons set forth in the Court's August 30 Order, the Federal Defendants' Motion is hereby GRANTED IN PART and DENIED IN PART. Specifically, Counts One, Two, and Three are DISMISSED as to Defendant Doe in her official capacity, and

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<sup>2</sup> Because it re-asserted already-dismissed claims against already-dismissed parties, Plaintiff's Second Amended Complaint has been the source of some confusion in this case. To be clear, the Court's grant of leave and Plaintiff's filing of an amended complaint *in no way* revived Plaintiff's previously dismissed claims. The Court's Order of August 30, 2011, which granted the Commission Defendants' Motion to Partially Dismiss and granted in part the Federal Defendants' Motion to Dismiss, remained (and is) fully in effect.

Counts One and Three are DISMISSED as to Defendant Doe in her individual capacity. As a result, only Plaintiff's First Amendment claim against the Federal Defendants in their individual capacities remains extant.

Also pending is Plaintiff's Motion for Leave to File Second Amended Complaint Under Seal (Dk. No. 75), filed on November 8, 2011. Upon due consideration, that Motion is GRANTED. Plaintiff is DIRECTED to file under seal his Second Amended Complaint with the Federal Defendants' actual names substituted for their pseudonyms.<sup>3</sup> Plaintiff's re-filing of his Second Amended Complaint will have no effect on the portion of this Order dismissing all but Plaintiff's First Amendment claim against the Federal Defendants in their individual capacities. Thus, in the interest of clarity, Plaintiff is further DIRECTED to revise his Second Amended Complaint, as submitted pursuant to this Order, to contain only his First Amendment individual-capacity claim against the Federal Defendants. Plaintiff is DIRECTED to omit from his supplemental Second Amended Complaint any claims or parties dismissed as a result of the instant Order and/or the Court's Order of August 30, 2011.

Additionally before the Court is an unopposed Motion for Stay of Proceedings Pending Appeal (Dk. No. 72), filed by Defendants Smith and Jones on November 4, 2011. On October 31, 2011, Smith and Jones appealed to the Court of Appeals for the Fourth Circuit this Court's partial denial of their motion to dismiss on the basis of qualified immunity. Plaintiff has consented to a stay in this case pending the resolution


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<sup>3</sup> This grant of leave should not be interpreted as permitting any further amendment or revision to Plaintiff's Second Amended Complaint, substantive or otherwise, other than the nominal clarification and omission of dismissed claims as indicated here.

of that appeal. Accordingly, the Motion is GRANTED. It is hereby ORDERED that all proceedings in this case, including discovery, are STAYED until the Fourth Circuit disposes of the defendants' appeal, and pending further order of this Court.

The Clerk is DIRECTED to send a copy of this Order to all counsel of record.

It is so ORDERED.

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Henry E. Hudson  
United States District Judge

Date: Nov. 15, 2011  
Richmond, VA