UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-24106-CIV-COOKE/BANDSTRA

JONATHAN CORBETT,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Plaintiff's Motion for Temporary Restraining Order (D.E. 8) filed on November 17, 2010. On December 10, 2010, this motion was referred to the undersigned for a report and recommendation by the Honorable Marcia G. Cooke pursuant to 28 U.S.C. § 636(b). Having reviewed this motion, the response and reply thereto, the court file and applicable law, the undersigned respectfully recommends that Plaintiff's Motion for Temporary Restraining Order be DENIED for reasons explained below.

INTRODUCTION

On November 16, 2010, Jonathan Corbett ("plaintiff"), proceeding *pro se*, filed a Complaint alleging violations of the Fourth Amendment to the United States Constitution with respect to the screening procedures recently implemented by the Transportation Security Administration ("TSA") and its parent agency, the Department of Homeland Security ("DHS"). Specifically, plaintiff alleges that the TSA's utilization of Advanced Imaging Technology ("AIT") machines and enhanced pat-down procedures on travelers at

airport security checkpoints constitutes a violation of the Fourth Amendment protections against unreasonable search and seizures. Plaintiff further alleges that he is experiencing emotional distress at the thought of being subjected to these screening procedures. In plaintiff's view, the use of these procedures which create nude images of passengers as well as the manual inspection of a traveler's genital and buttock areas is an invasion of privacy and unreasonable. Based on these and other allegations, plaintiff seeks, *inter alia,* declaratory and injunctive relief against the United States ("defendant" or "the government").

On November 16, 2010, plaintiff filed an Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction seeking to prohibit defendant from screening him at TSA security checkpoints through the use of AIT machines and/or by the manual pat-down of his genital and buttock areas and from denying him access to his flights for the failure to submit thereto. This motion was denied *without prejudice* by the Honorable K. Michael Moore, the Court finding that the requested relief was not a true emergency.

As a result, plaintiff filed the instant Motion for Temporary Restraining Order and/or Preliminary Injunction on November 17, 2010, continuing to seek an injunction precluding TSA from utilizing AIT machines and the revised pat-down procedures on him. Essentially, plaintiff seeks an injunction authorizing him to opt-out of these security procedures which he expects to encounter at the airport because such procedures would subject him to "extreme emotional distress" and constitute an "incurable invasion of privacy." See Plaintiff's Motion (D.E. 8), pg.2.

The government opposes plaintiff's motion for injunctive relief arguing that plaintiff

cannot establish any of the four prerequisites for obtaining a preliminary injunction.

STANDARD OF REVIEW

It is undisputed in this Circuit that under federal law plaintiff must establish four elements to obtain a temporary restraining order or preliminary injunction. Rule 65 of the Federal Rule of Civil Procedure authorizes the district court to grant preliminary injunctive relief at its discretion. See United States v. Lambert, 695 F.2d 536, 539 (11th Cir.1983); Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 332 (5th Cir.1981). In exercising its discretion, the court must consider and balance the following four recognized prerequisites to injunctive relief: (1) a substantial likelihood that the movant will prevail on the underlying merits of the case, (2) a substantial threat that the moving party will suffer irreparable damage if relief is denied, (3) a finding that the threatened injury to the movant outweighs the harm the injunction may cause defendant, and (4) a finding illustrating the extent to which granting the preliminary injunction will disserve the public interest. See Tally-Ho, Inc. v. Coast Community College District, 889 F.2d 1018, 1022 (11th Cir.1989).

Moreover, because an injunction "is an extraordinary remedy, it is available not simply when the legal right asserted has been infringed, but only when that legal right has been infringed by an injury for which there is no adequate legal remedy...." Alabama v. U.S. Army Corps of Engineers, 424 F.3d 1117, 1127 (11th Cir.2005) (emphasis added) (citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506, 79 S.Ct. 948, 79 S.Ct. 948 (1959)). The plaintiff has the burden of persuasion on *all* of the preliminary injunction factors. United States v. Jefferson County, 720 F.2d 1511 (11th Cir.1983) (emphasis added).

ANALYSIS

1. Substantial Likelihood of Success on the Merits

A. Jurisdiction

Plaintiff seeks to preliminarily enjoin the TSA from using either AIT machines or its revised "pat downs" against him as a screening method on the basis that these procedures constitute a violation of the Fourth Amendment protections against unreasonable searches. In response, the government first argues that plaintiff cannot show a likelihood of success on the merits because under 49 U.S.C. §46110 exclusive jurisdiction lies with the Court of Appeals over challenges to an aviation-related security order of the TSA. Consequently, the government maintains that this Court lacks subject matter jurisdiction.

The relevant portion of 49 U.S.C. § 46110 provides:

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security ... or the Administrator of the Federal Aviation Administration ...) in whole or in part under this part, part B, or subsection (1) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.
>
> ... When the petition is sent to the Secretary, Under Secretary, or Administrator, the court [of appeals] has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings.

49 U.S.C. §46110(a), (c) (2005). Consequently, if the TSA Security Directive at issue is an "order" within the meaning of Section 46110(a), a court of appeals would have exclusive jurisdiction to review that order.

Addressing this jurisdictional issue, the Eleventh Circuit in construing Section 46110(a)'s predecessor statute found at §1486(a), found that the term "order" is to be interpreted expansively. See Green v. Brantley, 981 F.2d 514, 519 (11th Cir. 1993). The Green court further found that the exclusive jurisdiction of the courts of appeals is restricted to encompass only final orders. In addition, the Court found that the agency record must be adequate enough to support judicial review. In Green, the plaintiff was a Designated Pilot Examiner who held a FAA certificate. When the FAA cancelled Green's certificate, he filed suit in the federal district court seeking recovery for constitutional torts he alleged were committed in conjunction with the certificate termination. The Eleventh Circuit found that the merits of Green's constitutional arguments were "inescapably intertwined with a review of the procedures and merits surrounding the FAA's order." Green, 981 F.2d at 521. Because the statute that authorized the FAA action on Green's certificate (the predecessor to the statute at issue in this case) provided for NTSB review of the FAA's order with a right to appeal to a federal court of appeals, Green's suit in federal district court was held to be an impermissible collateral challenge to the agency's action. Therefore, the district court lacked subject-matter jurisdiction over Green's suit. Id.

The same is true here. Plaintiff's constitutional claim that the TSA has infringed upon his Fourth Amendment rights by subjecting him to the new screening procedures necessarily require a review of the procedures. At a minimum, plaintiff's constitutional argument are "inescapably intertwined" with a review of TSA protocol and the merits of the subject TSA Security Directive. Most significantly, courts have held that Security Directives issued by the TSA are "orders" within the meaning of § 46110. See Green v.

Transportation Security Administration, 351 F.Supp. 2d 1119, 115 (W.D. Wash. 2005) (holding that TSA security directives establishing a no-fly list or selectee list for enhanced screening were "orders" over which court of appeals has exclusive jurisdiction); Thompson v. Stone, 2006 WL 770449 (E.D. Mich. 2006)(Fourth Amendment challenge to TSA screening procedures is "inescapably intertwined" with a review of the procedures and merits surrounding TSA's procedures governing screening procedures with disabilities and screening persons in general so that jurisdiction is solely with the courts of appeals).

The regulations governing the TSA are set forth in 40 C.F.R. §§1500 *et seq.* The regulations provide that an individual may enter a "sterile area" which is controlled by TSA or board an aircraft without submitting to the screening and inspection of his or her person in accordance with the screening procedures being applied to control access to the area or aircraft under this subchapter. See 40 C.F.R. § 1540.107. The TSA procedures concerning the use of AIT machines and the revised pat-down were recently implemented on October 29, 2010. See Pistole Dec. ¶ 25 (D.E. 10, Exh. A).

Based on the foregoing, the undersigned finds that these screening procedures constitute a final order of the TSA. The undersigned further finds that these procedures combined with other TSA documents constitute a sufficient administrative record for review by the courts of appeals. As a result, the undersigned concludes that this Court does not have jurisdiction to adjudicate plaintiff's claim so that he is unlikely to succeed on the merits.[1]

[1]Although not presently before this Court, the undersigned would be inclined to recommend the granting of Defendant's Motion to Dismiss for lack of subject matter jurisdiction based on the above findings.

B. Constitutional challenges

The government further argues that even if this Court has jurisdiction, plaintiff is not likely to prevail since the TSA screening procedures are not in violation of the Fourth Amendment.

The Fourth Amendment to the United States Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." See U.S. Const. Amend. IV. It protects individuals from government searches of their person because the Fourth Amendment vests individuals with the right to be free from "unreasonable government intrusions into their legitimate expectations of privacy." United States v. Chadwick, 433 U.S. 1, 7, 97 S.Ct. 2476 (1977). "[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable', for example, searches now routine at airports and at entrances to courts and other official buildings." Chandler v. Miller, 520 U.S. 305, 323, 117 S.Ct. 1295 (1997); *see also* City of Indianapolis v. Edmond, 531 U.S. 32, 47-48, 121 S.Ct. 4447 (2000) (noting that the need for such measures to keep airports and government buildings safe can be acute). Thus, "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." See National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66, 109 S.Ct. 1384 (1989)

Airport check points 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 v. Comm'r of Internal Revenue, 606 F.2d 50, 52 (3d Cir. 1979). "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 destruction from air terrorism is horrifically enormous." United States v. Marquez, 410 F.3d 612, 616 (9th Cir. 2005). However, even with the grave threat posed by airborne terrorist attacks, the vital and hallowed strictures of the Fourth Amendment still apply: these searches must be reasonable to comport with the Constitution. Id.

Balancing the intrusion on plaintiff's privacy against the government's interest in the safety of the passengers and the public at large, the undersigned finds that the subject TSA screening procedures are reasonable and not in violation of the Fourth Amendment. Following the tragic events of September 11, 2001, Congress tasked TSA with protecting the public from violence and piracy aboard aircrafts. See 49 U.S.C. § 44903(b). It is evident that the security conducted by TSA is in furtherance of a legitimate governmental interest to deter and prevent terrorist attacks against this country's airline industry.

To that end, TSA subjects plaintiff and other passengers to additional screening in its efforts to protect the public from terrorist attacks. The government has demonstrated that the use of AIT machine and revised pat-down procedures is not more extensive than necessary and not as intrusive as plaintiff suggests in view of the increased threat of non-metallic explosives. Specifically, the AIT machines do not produce photographs. See Pistle Dec. ¶ 37 (D.E. 10, Exh. A). Rather, the AIT's applies a filter that displays body contours

and outlines rather than a detailed image of a person's anatomy. Id. Further, the security officer viewing the image does not see the passenger as the images are viewed in separate location. Id., ¶38.

In addition, TSA provides notice to the public of the use of the AIT machines and advises the passenger that they may decline AIT screening and, instead, undergo a pat-down. Id. ¶ 39. These pat-downs are necessary to detect explosives, chemical weapons or other dangerous items that could be secreted in the body. Id. ¶¶ 43, 46 & 49. To ensure that pat-downs are minimally invasive, they are conducted by the same gender security officers and passengers have the right to request a private screening with a witness. Id. ¶ 51.

While plaintiff contends that the challenged procedures are unreasonably invasive, the undersigned finds that they do not violate the Fourth Amendment. Thus, plaintiff has failed to establish a likelihood of success on the merits on his constitutional claim.

2. Irreparable Harm

Plaintiff argues that he will experience "extreme emotional distress and an incurable invasion of privacy" if the challenged TSA screening procedures are applied to him. See D.E. 8, pg. 2. Plaintiff further argues that his business will suffer irreparable harm in that alternative forms of transportation such as trains are not convenient or practical.

Even assuming these allegations to be true, the undersigned finds that they do not rise to the level of irreparable harm. Plaintiff is free to avoid additional screening by electing not to travel by air and by taking other means of transportation to reach his destinations. Plaintiff does not have a constitutional right to fly by commercial aircraft because the Constitution does not guarantee the right to travel by any particular form of

transportation. Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir 1999) ("burdens of a single mode of transportation does not implicate the right to interstate travel."); 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 . . . .") Indeed, irreparable harm is not demonstrated when there are available alternatives even when the alternatives are less convenient. See Molloy v. Metro Transp. Autho., 94 F.3d 808, 813 (2d. Cir. 1996) (*citing* Jayaraj v. Scappini, 66 F.3d 36, 39 (2d Cir.1995) (noting injuries such as expenditures of money, time, and energy, are not enough to warrant preliminary injunction)).

Accordingly, the undersigned finds that plaintiff cannot establish he is irreparably harmed due the security screening process.

3. Potential Harm to the Government and the Public Interest

Plaintiff contends that the issuance of a preliminary injunction allowing him to board an aircraft without being subjected to the TSA screening procedures would result in no harm to the public whatsoever. The undersigned strongly disagrees. Contrary to plaintiff's contention, the relief he seeks would cause substantial harm to the public as it would compromise TSA airport screening procedures and undermine TSA's statutorily mandated efforts to prevent terrorist attacks. Plaintiff cannot be allowed to bypass additional screening based solely on his assertion that he "has no criminal record", "is a law-abiding citizen and poses no threat to the public". See Plaintiff's Motion (D.E. 8), pg. 3. Indeed, under plaintiff's theory the vast majority of air travelers would not be required to submit to AIT machine security screening. TSA cannot treat plaintiff differently than any other traveler.

Protecting the public from terrorist attacks clearly outweighs the minimal intrusion

upon plaintiff. The fact that plaintiff seeks to exempt only himself from the screening does not mitigate the potential harm to national security in that the success of the screening process depends on its universal application. The government has shown the utility of the challenged screening methods to neutralize threats of air transportation related terrorism. Simply stated, the interests of national security and the safety of the public would be compromised if an injunction were issued.

RECOMMENDATION

For all the foregoing reasons, the undersigned recommends that Plaintiff's Motion for Temporary Restraining Order be DENIED.

The parties may serve and file written objections to this Report and Recommendation with the Honorable Marcia G. Cooke, United States District Judge, within ten (10) days of the date this Report and Recommendation. See 28 U.S.C. sec. 636(b)(1)(c); United States v. Warren, 687 F.2d 347 (11th Cir. 1982), cert. denied, 460 U.S. 1087 (1983); Hardin v. Wainwright, 678 F.2d 589 (5th Cir. Unit B 1982); see also Thomas v. Arn, 474 U.S. 140 (1985).

Respectfully submitted at Miami, Florida this 1st day of March, 2011.

Ted E. Bandstra
United States Magistrate Judge

Copies furnished to:
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