IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) RHONDA MENGERT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 19-CV-00304-JED-JFJ**
	)	
(1) U.S. TRANSPORTATION SECURITY ADMINISTRATION;	)	
(2) UNKNOWN U.S. TRANSPORTATION SECURITY ADMINISTRATION AGENT 1;	)	
(3) UNKNOWN U.S. TRANSPORTATION SECURITY ADMINISTRATION AGENT 2,	)	
	)	
Defendants.	)	

MOTION TO DISMISS OF THE TRANSPORTATION SECURITY ADMINISTRATION AND THE UNITED STATES OF AMERICA & BRIEF IN SUPPORT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Federal Rules

Come now Defendants Transportation Security Administration (TSA) and United States of America[1], through their undersigned attorneys, R. Trent Shores, United States Attorney for the Northern District of Oklahoma, and Rachael F. Zintgraff, Assistant United States Attorney, and pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6) respectfully move the Court to dismiss all of Plaintiff's claims against them. In support of this motion, Defendants rely on the following memorandum of points and authorities and all matters of record.

BRIEF IN SUPPORT

I. BACKGROUND AND SUMMARY OF ARGUMENT

Plaintiff Rhonda Mengert brings this action asserting claims of false imprisonment, intentional infliction of emotional distress (IIED), and violation of the Fourth Amendment arising from her pre-flight security screening at a Transportation Security Administration (TSA) checkpoint in Tulsa International Airport (TUL) on May 12, 2019. The events alleged in Plaintiff's Complaint, though not admitted, are summarized below.

At the checkpoint, Plaintiff was screened with a walk-through Advanced Imaging Technology (AIT) scanner. (Doc. 2 at ¶¶ 21, 23); *see also* Passenger Screening Using Advanced Imaging Technology, 81 Fed. Reg. 11,364, 11,365 (Mar. 3, 2016) (final rule) ("The AIT currently deployed by TSA is a millimeter wave imaging technology that can detect metallic and non-

[1] The United States is not named as a defendant in Plaintiff's Complaint, but by operation of Federal Rule of Civil Procedure 21 and 28 U.S.C. § 2679(d)(1), the United States should be substituted in place of "Unknown TSA Agent 1" and "Unknown TSA Agent 2" named in the Complaint as the sole defendant for Plaintiff's state law tort claims. The United States has filed a motion requesting such substitution based upon certification by the United States Attorney for the Northern District of Oklahoma that Unknown TSA Agent 1 and Unknown TSA Agent 2 were acting within the scope of their federal employment at the time of the events from which Plaintiff's claims arose. At this juncture, the undersigned attorney does not represent Unknown TSA Agent 1 and Unknown TSA Agent 2, who have been sued in their individual capacities, and this motion is submitted only on behalf of Defendants TSA and the United States.

metallic objects on an individual's body or concealed in his clothing without physical contact."). The AIT scanner alarmed to indicate the possible presence of an item being carried on Plaintiff's body or in her clothing, and she was therefore required to undergo a pat-down procedure to resolve the alarm. (Doc. 2 at ¶ 23-24); *see also* 81 Fed. Reg. at 11,365 ("The technology bounces electromagnetic waves off the body to detect anomalies. If an anomaly is detected, a pat-down of the area is usually performed to determine if a threat is present."). During the pat-down, the female TSA employee who was performing the procedure felt a "feminine hygiene product" that Plaintiff was wearing inside of her underwear. (Doc. 2 at ¶¶ 23-27). Plaintiff alleges that she was subsequently required to go with two female TSA employees to a private screening room at the checkpoint, lower her pants and underwear to remove the "feminine hygiene product" she was wearing, and show the item to the TSA employees "for their visual inspection." *Id.* at ¶ 37. Plaintiff further alleges that after the visual inspection was complete, she asked to leave the private screening room three times, but the TSA employees ignored her requests, and she was not permitted to leave until she asked a fourth time. *Id.* at ¶¶ 41-42. She claims that these events caused her to "experience severe emotional distress," which manifested with the physical symptoms of "racing heart, shortness of breath, uncontrollable shaking, [and] nausea." *Id.* at ¶¶ 43-44. She also claims that she "experiences these same symptoms whenever thinking of the incident," and that she is "regularly reminded of the incident" because she travels "regularly" by air. *Id.* at ¶¶ 45-47.

Plaintiff asserts several legal claims against TSA and the two TSA employees in their individual capacities. With regard to the employees, Plaintiff claims that they violated the Fourth Amendment and are therefore personally liable to her for money damages pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). At this

juncture, the undersigned attorney does not represent the TSA employees in their personal capacities, and this motion is not filed on their behalf and does not address Plaintiff's *Bivens* claims.

Plaintiff also claims that the TSA employees are liable in their individual capacities for committing the torts of false imprisonment and IIED. Because the Department of Justice has determined that the TSA employees were acting within the scope of their federal employment during the alleged events described in Plaintiff's Complaint, *see supra* n.1, the false imprisonment and IIED claims are deemed to be claims against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b)(1); 2671, *et seq.*, and they cannot be maintained against the employees in their personal capacities as "private citizens," (Doc. 2 at ¶¶ 62, 66).

When properly construed as FTCA claims against the United States, Plaintiff's false imprisonment and IIED claims are subject to the administrative exhaustion requirement of 28 U.S.C. § 2675(a). Under that statute, the Court lacks subject-matter jurisdiction over Plaintiff's claims unless they were presented to TSA, and the agency finally denied them, *before* Plaintiff filed her Complaint in this action. Final disposition of the claims by TSA is an "absolute prerequisite" to filing suit. *Lann v. Hill*, 436 F. Supp. 463, 466 (W.D. Okla. 1977); *see also Colorado Flying Academy, Inc. v. United States*, 724 F.2d 871, 874 n.9 (10th Cir. 1984). Here, Plaintiff did not present her claims to TSA before she filed her Complaint in this action. The Complaint was filed on June 5, 2019, and Plaintiff's counsel did not submit notice of the false imprisonment and IIED claims to TSA until on or about June 17, 2019. Accordingly, Plaintiff did not exhaust her administrative remedies prior to filing suit, and her false imprisonment and IIED claims should be dismissed for lack of subject-matter jurisdiction.

Even if Plaintiff had satisfied the exhaustion requirement, her FTCA claims would still be subject to dismissal on additional, independent grounds. The false imprisonment claim should be dismissed for lack of subject-matter jurisdiction under 28 U.S.C. § 2680(h), which expressly provides that the United States has not waived its sovereign immunity from "[a]ny claim arising out of . . . false imprisonment." *See Doe v. Lynch*, No. 14-cv-1100, 2015 WL 7017450, at *5 n.12 (W.D. Okla. Nov. 12, 2015) (noting in a case in which plaintiff failed to exhaust administrative remedies that § 2680(h) provided an independent, alternative basis for dismissal). The IIED claim should be dismissed for failure to state a claim upon which relief can be granted because the Complaint does not plausibly plead sufficient factual allegations to establish the required elements of IIED under Oklahoma law. Specifically, the allegations in the Complaint are insufficient to establish "extreme and outrageous" conduct or "severe" emotional distress as a matter of law. *Ridings v. Maze*, 414 P.3d 835, 839 (Okla. 2018) ("To establish a cause of action for [IIED], a plaintiff must [plead] extreme and outrageous conduct done intentionally or recklessly by the defendant which resulted in severe emotional distress in the plaintiff.").

Finally, with regard to TSA, Plaintiff asserts a claim seeking an injunction against the agency that would require it "to modify its policies and/or training" in an unspecified manner so as to "ensure that [Plaintiff] is not a victim of [allegedly injurious screening procedures] in the future." (Doc. 2 at ¶ 79). The Complaint does not identify the legal basis for seeking such an injunction, but it is clear that this Court lacks subject-matter jurisdiction to hear the claim under 49 U.S.C. § 46110. That statute provides that any challenge to a TSA "order," including TSA's Screening Checkpoint Standard Operating Procedures, can only be asserted in a petition for review filed in an appropriate Court of Appeals. Because the Courts of Appeals have exclusive

jurisdiction over the type of injunction claim asserted here, the claim should be dismissed with prejudice to re-filing in this Court or any other District Court.

II. STANDARDS OF REVIEW

A. Standard for dismissal under Rule 12(b)(1).

Federal courts are courts of limited jurisdiction and may exercise jurisdiction only when specifically authorized to do so. *Castenada v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994). "A court lacking jurisdiction must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Schneideman v. Shawnee Cnty. Bd. of Cnty. Comm'rs*, 895 F. Supp. 279, 280 (D. Kan. 1995). The party seeking to invoke a federal court's jurisdiction sustains the burden of establishing that such jurisdiction is proper. *Winnebago Tribe of Neb. v. Kline*, 297 F. Supp. 2d 1291, 1299 (D. Kan. 2004). When federal jurisdiction is challenged, the plaintiff bears the burden of showing why the case should not be dismissed. *Id.* "When a party challenges the allegations supporting subject-matter jurisdiction, the 'court has wide discretion to allow affidavits [and] other documents . . . to resolve disputed jurisdictional facts.' [] 'In such instances, a court's reference to evidence outside the pleadings does not convert the motion [to dismiss] to a Rule 56 motion [for summary judgment].'" *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1296 (10th Cir. 2003) (internal citations omitted).

B. Standard for dismissal under Rule 12(b)(6).

In considering a Rule 12(b)(6) motion, a court must determine whether the plaintiff has stated a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). A complaint must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). The standard requires "enough facts to state a claim to relief that is plausible on its face," and the

factual allegations "must be enough to raise a right to relief above the speculative level." *Id*. at 555–56, 570 (citations omitted); *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009). For the purpose of making the dismissal determination, a court must accept all the well-pleaded allegations of the complaint as true and must construe the allegations in the light most favorable to the plaintiff. *Twombly*, 550 U.S. at 555; *Alvarado v. KOB–TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007). However, a court need not accept as true those allegations that are conclusory in nature. *Erikson v. Pawnee Cnty. Bd. of Cnty. Comm'rs*, 263 F.3d 1151, 1154–55 (10th Cir. 2001).

III. ARGUMENT

A. Plaintiff did not exhaust the administrative remedies for her FTCA claims prior to filing suit as required by 28 U.S.C. § 2675(a).

Plaintiff's Complaint must be construed as asserting her claims for false imprisonment and IIED against the United States under the FTCA. *See supra* n.1; *Richman v. Straley*, 48 F.3d 1139, 1145 (10th Cir. 1995) (explaining that under 28 U.S.C. § 2679(d)(1), any claim sounding in tort pled "against an individual defendant who is a government employee acting within the scope of his employment is deemed an action against the United States," and "[t]he United States is then substituted as the sole defendant"). "The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies." *McNeil v. United States*, 508 U.S. 106, 113 (1993). "This exhaustion requirement is jurisdictional and cannot be waived." *Lopez v. United States*, 823 F.3d 970, 976 (10th Cir. 2016) (quotation omitted); *see also Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999) (describing administrative exhaustion as "a jurisdictional prerequisite"). To satisfy the FTCA's exhaustion requirement set forth in 28 U.S.C. § 2675(a), a plaintiff must have presented a claim to the appropriate federal agency, and the claim must have been finally denied by the agency, *before* the plaintiff files suit. *See D'Addabbo v. United States*, 316 F. App'x 722, 725 (10th Cir. 2008) (finding that plaintiff's submission to an agency of a letter

purporting to be a notice of claims "*after* filing suit" did not satisfy the FTCA's exhaustion requirement).

Here, there is no question that Plaintiff did not present her claims to TSA before she filed her Complaint in this action. The Complaint was filed on June 5, 2019, and Plaintiff's counsel did not submit notice of the false imprisonment and IIED claims to TSA until on or about June 17, 2019.[2] Exhibit 1, Declaration of Brett Barber. Accordingly, Plaintiff did not exhaust her administrative remedies prior to filing suit, and her false imprisonment and IIED claims should be dismissed for lack of subject-matter jurisdiction. *See Gabriel v. United States*, 683 F. App'x 671, 672 (10th Cir. 2017) ("The action was filed on July 14, 2014. As of that date, the plaintiff had not presented an administrative claim. Thus, the district court lacked subject-matter jurisdiction."); *Stone v. United States*, No. 06-cv-1024, 2006 WL 2990374 (W.D. Okla. Oct. 18, 2006) (finding no subject-matter jurisdiction over FTCA claims that were "prematurely filed" in court one day before they were presented to the relevant agency).

Importantly, Plaintiff's failure to exhaust her administrative remedies in accordance with 28 U.S.C. § 2675(a) *before* filing this lawsuit cannot be cured now, *after* she has already filed her Complaint with the Court. "[A] premature complaint cannot be cured through amendment, but instead, [a] plaintiff must file a new suit." *Duplan*, 188 F.3d at 1199 (quotation omitted); *see also Gabriel*, 683 F. App'x at 672 ("When a claim is unexhausted prior to suit under the [FTCA], the claimant cannot cure the jurisdictional defect while the suit is pending." (quotation omitted));

[2] Because it is clear that Plaintiff's counsel did not even present the notice of claims to TSA before filing suit, the Court need not consider any issues related to TSA's subsequent handling of the notice once it was received by the agency. *See Stevens v. United States*, 61 F. App'x 625, 627 (10th Cir. 2003) (explaining that when a plaintiff filed suit before exhausting administrative remedies, "the fact that he ultimately exhausted those remedies" with the relevant agency while the case remained pending "did not ripen the action" and give the district court subject-matter jurisdiction to adjudicate his claims).

Moles v. Lappin, No. 08-cv-594, 2010 WL 796756, at *9 (W.D. Okla. Feb. 26, 2010) ("If Plaintiff [had] not exhaust[ed] administrative remedies at the time he filed this action, his failure to do so is a jurisdictional defect that cannot be cured by a subsequent amendment of the complaint."). "Allowing claimants generally to bring suit under the FTCA before exhausting their administrative remedies and to cure the jurisdictional defect by filing an amended complaint would render the exhaustion requirement meaningless and impose an unnecessary burden on the judicial system." *Duplan*, 188 F.3d at 1199 (citations omitted). "Congress intended to require complete exhaustion . . . *before* invocation of the judicial process." *McNeil*, 508 U.S. at 112 (emphasis added).

Because Plaintiff irretrievably failed to present her false imprisonment and IIED claims to TSA before filing her Complaint in this action, the claims cannot be maintained as part of this case. Accordingly, Defendants TSA and the United States respectfully request that dismissal of the claims be with prejudice to their re-assertion in this action (i.e., Plaintiff should be denied leave to file an amended complaint including the claims). The dismissal should be without prejudice to Plaintiff re-filing the claims in a *new* action if Plaintiff remains unsatisfied after exhausting her administrative remedies. *See Gabriel*, 683 F. App'x at 673-74; *Duplan*, 188 F.3d at 1199 (explaining that prematurely filing unexhausted FTCA claims in court must be cured by filing a new suit).

B. The Court lacks subject-matter jurisdiction over Plaintiff's claim for false imprisonment under 28 U.S.C. § 2680(h).

As an alternative basis for dismissal, the Court lacks subject-matter jurisdiction to hear Plaintiff's claim for false imprisonment under 28 U.S.C. § 2680(h), which expressly provides that the United States has not waived its sovereign immunity from "[a]ny claim arising out of . . . false imprisonment." Because the United States has not consented to be sued for false imprisonment under the circumstances alleged in Plaintiff's Complaint, the Court lacks subject-matter

jurisdiction over the claim, and it should be dismissed. *See Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 853 (10th Cir. 2005) (explaining that when the United States retains its sovereign immunity from a claim under §2680(h), "the cause of action must be dismissed for want of federal subject matter jurisdiction").[3]

C. Plaintiff's Complaint fails to state a claim for IIED under Oklahoma law.

Plaintiff's claim for IIED is also subject to dismissal on alternative grounds: it should be dismissed for failure to state a claim upon which relief can be granted because the factual allegations pled in the Complaint are insufficient to plausibly establish the required elements of IIED under Oklahoma law.[4] Specifically, the allegations in the Complaint are insufficient to establish "extreme and outrageous" conduct or "severe" emotional distress as a matter of law. *Ridings*, 414 P.3d at 839 (Okla. 2018).

To state a plausible claim for IIED under Oklahoma law, "a plaintiff must allege that '(1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's conduct caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe.'" *Romero v. City of Miami*, 8 F. Supp. 3d 1321, 1334 (N.D. Okla. 2014) (Dowdell, J.) (quoting *Schovanec v. Archdiocese of Okla. City*, 188 P.3d 158, 175 (Okla. 2008)). The sufficiency of a plaintiff's allegations is judged "by the narrow standards

[3] As an exception to the general bar to false imprisonment claims, the United States has waived its sovereign immunity from such a claim if it is based on "acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. § 2680(h). That exception is not applicable to this case because the TSA employees who screened Plaintiff at the airport security checkpoint in TUL are not "investigative or law enforcement officers" within the meaning of the FTCA. *See, e.g., Hernandez v. United States*, 34 F. Supp. 3d 1168, 1182 (D. Colo. 2014).

[4] Under the FTCA, the law of the place where the allegedly tortious acts or omissions occurred governs tort claims asserted against the United States. 28 U.S.C. § 1346(b)(1); *Richards v. United States*, 369 U.S. 1 (1962).

laid out in the Restatement Second of Torts, § 46." *Id.* (citing *Gaylord Entm't Co. v. Thompson*, 958 P.2d 128, 149 (Okla. 1998)). In this case, the allegations in the Complaint do not meet the Restatement standards with regard to the second and fourth elements required to state a claim – extreme and outrageous conduct and severe emotional distress.

"Under Oklahoma law, the trial court must assume a gatekeeper role" with regard to whether alleged conduct is sufficiently extreme and outrageous. *Id.* (quotation omitted). The Court should dismiss an IIED claim when the alleged conduct is not "so outrageous in character, *and* so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Breeden v. League Servs. Corp.*, 575 P.2d 1374, 1376 (Okla. 1978) (emphasis added). When the allegations in a complaint amount to no more than mere "indignities, threats, annoyances, [and] petty oppressions," they are not sufficient to state a claim for IIED. *Id.* "The level of offense necessary to prove an IIED claim – that the conduct be 'so extreme in degree, as to go beyond all possible bounds of decency' – constitutes, by its own terms, a very high burden" for a plaintiff to satisfy in pleading a complaint. *Romero*, 8 F. Supp. 3d at 1334. Alleged "[c]onduct could reasonably be viewed as highly offensive while still not rising to the level of extreme and outrageous." *Id.*

In this case, it is clear that the alleged conduct of TSA employees was not extreme and outrageous as a matter of law. Plaintiff alleges that, after an alarm during AIT screening indicated the presence of an item in her groin area and TSA employees could not confirm during a pat-down that the item was safe for air travel,[5] she was made to lower her shorts and underwear in a private

[5] Courts have "had little trouble concluding that the substantial danger to life and property that could result from airplane terrorism outweigh[s] the possible intrusion of TSA's AIT and pat-down screening procedures on airline passengers." *Corbett v. TSA*, __ F.3d __, 2019 WL 3244082 (11th Cir. July 19, 2019). We live "[i]n a world where air passenger safety must contend with such nuanced threats as attempts to convert underwear into bombs." *George v. Rehiel*, 738 F. 3d 562,

screening room in the presence of two other members of her gender. (Doc. 2 at ¶¶ 34-40). She further alleges that she had to show the female TSA employees a "feminine hygiene product" she was wearing. *Id.* And she alleges that after her screening was complete, she had to ask four times before she was allowed to leave the private screening room. *Id.* at ¶¶ 41-42. These allegations amount to no more than indignities, annoyances, and petty oppressions. Even if it was subjectively "embarrassing," "disturbing," "humiliating," and "offensive," *id.* at ¶¶ 67-68, for Plaintiff to lower her clothing and show the feminine hygiene product she was wearing, the intrusion on her privacy was no more severe than what could be routinely experienced in a women's locker room, where states of partial undress and feminine hygiene products are subject to observation by other members of the same gender. *See generally Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 531 (3d Cir. 2018) (noting that communal "locker rooms and restrooms are spaces where it is not only common to encounter others in various states of undress, it is expected"); *see also* Doc. 2 at ¶ 53 (stating that "nearly every woman in the country has worn many times in her life" the same item Plaintiff was wearing). Given the prevalence of communal locker rooms in American society – at workplaces, schools, and community spaces like public pools – a privacy intrusion akin to what is experienced there is certainly not "so extreme in degree" as to be "utterly intolerable in a civilized community." *Breeden*, 575 P.2d at 1376. In other words, even if the TSA employees were wrong

578 (3d Cir. 2013); *see also Corbett v. TSA*, 767 F.3d 1171, 1180 (11th Cir. 2014) ("For example, on December 25, 2009, a terrorist attempted to detonate a nonmetallic explosive device hidden in his underwear while aboard an American aircraft flying over the United States, for which Al Qaeda claimed credit.") (citation omitted). While Plaintiff and others who are not transportation security professionals may not grasp the critical importance of fully resolving an AIT alarm in the groin area even when doing so entails some intrusion on passenger privacy, the Court should not overlook the need to ensure that screening is sufficiently thorough in light of modern threats. *See United States v. McCarty*, 648 F.3d 820, 825 (9th Cir. 2011) (noting that "thin, flat explosives called 'sheet explosives' may be disguised as a simple piece of paper or cardboard, and may be hidden in just about anything").

in conducting a visual inspection of the feminine hygiene product Plaintiff was wearing, brief exposure to the view of other members of the same gender while in a state of partial undress in a private setting is not an experience that is outrageously outside the bounds of society. *See Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1558 (10th Cir. 1995) ("Nothing short of *extraordinary* transgressions of the bounds of civility will give rise to liability for [IIED]." (quotation omitted)).

Plaintiff's allegations that TSA employees "ignored" her requests to leave "without any reason apparent" until she had asked four times, Doc. 2 at ¶ 41-42, also do not suffice to elevate her screening experience into something extreme and outrageous. Accepting Plaintiff's allegations about her conversation with TSA employees as true for the purposes of this motion, they describe nothing more than garden variety rudeness of the type commonly experienced in poor customer service interactions and everyday workplace and social situations. *See, e.g.*, *Young v. City of Idabel*, 721 F. App'x 789, 805 (10th Cir. 2018) (applying Oklahoma law and noting that "rude or hostile treatment" without more "is not enough to meet the IIED standard"); *Starr*, 54 F.3d at 1559 (noting the "bounds between what is merely rude and objectionable and what is actionable"); *Miller v. Miller*, 956 P.2d 887, 901 (Okla. 1998) ("The test [for IIED] is whether the alleged tortfeasor's conduct is simply one of those unpleasant examples of human behavior which we all must endure for time to time, or whether it has so totally and completely exceeded the bounds of acceptable social interaction that the law must provide redress."); *Eddy v. Brown*, 715 P.2d 74, 77 (Okla. 1986) ("Not every . . . offensive verbal encounter may be converted into a tort[.]"). In sum, even if Plaintiff's screening experience "could be considered highly offensive to a reasonable person," that is not enough to support an IIED claim. *Romero*, 8 F. Supp. 3d at 1334. The standard for pleading an IIED claim is more "onerous," and the allegations in the Complaint here are insufficient to meet it. *Id.*

Importantly, whether the TSA employees' alleged conduct violated the Fourth Amendment or any other applicable law or policy is a separate inquiry from determining if the conduct rose to the "extreme and outrageous" level required to state a claim for IIED. *See Pebsworth v. Spirit AeroSystems, Inc.*, No. 16-cv-644, 2018 WL 1569496, at *4 (N.D. Okla. Mar. 30, 2018) ("[A]lleged law violations, even physical violations such as assault and battery, do not automatically trigger liability for IIED."). For example, in *Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir. 2003), the Court of Appeals for the Tenth Circuit considered Fourth Amendment and IIED claims based on the same set of facts and held that the constitutional claim could proceed but the tort claim could not. The plaintiffs in *Dubbs* complained that their "pre-school children enrolled in the Head Start program in Tulsa . . . were subjected to intrusive physical examinations, including genital examinations and blood tests, on school premises without parental notice or consent." 336 F.3d at 1197. The district court granted summary judgment in favor of the defendants on both the plaintiffs' Fourth Amendment claim and IIED claim under Oklahoma law. With respect to the constitutional claim, the Court of Appeals reversed the district court, finding that a violation of the Fourth Amendment would be established if the plaintiffs proved at trial that they did not consent to the physical exams of their children. *Id.* at 1207-12. With respect to the IIED claim, however, the Court of Appeals affirmed the district court's holding that the defendants' conduct in performing the physical exams did not "rise to the level of extreme outrageousness required for liability on a claim of [IIED]" regardless of whether the plaintiff parents could prove that they did not consent to the exams. *Id.* at 1218.

Comparing this case to *Dubbs*, it is clear that Plaintiff's allegations here are not sufficient to state a claim for IIED. *See Zeran v. Diamond Broadcasting*, 203 F.3d 714, 721 (10th Cir. 2000) (evaluating whether alleged conduct was extreme and outrageous through comparison "to the

kinds of conduct that have sustained IIED claims" in other cases). In *Dubbs*, the challenged search procedures involved touching exposed genitals and blood testing of pre-school children, allegedly without their parents' consent. Despite the obvious gravity of the defendants' conduct in searching the children, the Court of Appeals held that it was not extreme enough to support an IIED claim. Plaintiff's alleged screening experience in this case was far less invasive and offensive. Accordingly, her IIED claim should be dismissed.

Plaintiff's Complaint also fails to state sufficient factual allegations to establish that she suffered truly "severe" emotional distress. *See Zeran*, 203 F.3d at 721 ("It is also the trial court's initial responsibility to determine whether the distress allegedly suffered by the plaintiff is severe emotional distress.") (citation omitted); *Wheeler v. Spirit AeroSystems, Inc.*, No. 13-cv-421, 2013 WL 5520012, at *5 (N.D. Okla. Oct. 1, 2013) ("The Court is to make a . . . threshold determination with regard to the fourth prong, the presence of severe emotional distress."). As with the standard for pleading extreme and outrageous conduct, stating sufficient factual allegations to establish "severe" distress is also "a high bar to clear." *Young*, 721 F. App'x at 805. To state a claim for IIED, a plaintiff's complaint must allege distress "of such a character that 'no reasonable person could be expected to endure it.'" *Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1389 (10th Cir. 1991) (applying Oklahoma law and quoting Restatement (Second) of Torts § 46, cmt. j). Accordingly, a plaintiff must present factual allegations that plausibly establish interference with her "ability to conduct [her] daily life affairs." *Zeran*, 203 F.3d at 721. "[F]ederal courts in Oklahoma considering" the sufficiency of a complaint have held that "general allegations of emotional distress do not comply with federal pleading requirements." *Velazquez v. Helmerich & Payne Int'l Drilling Co.*, No. 15-cv-17, 2015 WL 871339, at *6 (N.D. Okla. Feb. 27, 2015) (citations omitted).

In this case, Plaintiff's factual allegations concerning her emotional distress are the type of "general allegations" that are insufficient to establish the level of severity that is "an essential element" of a claim for IIED. *Id.* Plaintiff's only support for her conclusory allegation that she "experience[d] severe emotional distress during and after the incident," Doc. 2 at ¶ 43, is a list of the physical symptoms that she allegedly suffered "during the incident," *id.* at ¶ 44, and suffers again "whenever thinking of the incident," *id.* at ¶ 45. Those symptoms are "racing heart, shortness of breath, uncontrollable shaking, [and] nausea." *Id.* at ¶¶ 44.[6] The Court of Appeals for the Tenth Circuit has rejected evidence of similar symptoms as insufficient to support a claim. *Daemi*, 931 F.2d at 1389 (holding that distress that "made [plaintiff] literally sick to his stomach" for which he sought treatment from a doctor was "legally insufficient under Oklahoma law" to establish a claim for IIED). Plaintiff has not alleged that she sought treatment for her emotional distress or its symptomatic manifestations. Nor has she alleged "that the distress interfered with [her] ability to conduct [her] daily life affairs" to such a degree that no reasonable person would be able to cope. *Zeran*, 203 F.3d at 721. Indeed, Plaintiff has expressly alleged that she successfully continues to travel by air despite her emotional distress; she is plainly able to endure the distress and cope while conducting her life. (*See* Doc. 2 at ¶ 46) (alleging that Plaintiff "has already had to travel" since filing the Complaint). The burden of having to manage "transient" emotional distress that arises in particular situations is not actionable, but "a part of the price of living among people." Restatement (Second) of Torts § 46, cmt. j. Accordingly, while Defendants do not intend to trivialize Plaintiff's subjective distress, the law is clear that her allegations are insufficient to meet the objective pleading standard for stating actionable severity. *See Zeran v. Diamond*

[6] Plaintiff also alleges that she experienced "panic," Doc. 2 at ¶ 44, but that refers to a mental state rather than a physical symptom. The conclusory allegation of "panic" appears indistinct from the conclusory allegation that Plaintiff "experience[d] severe emotional distress," *id.* at ¶ 43.

Broadcasting, Inc., 19 F. Supp. 2d 1249, 1254 (W.D. Okla. 1997) (noting that when the level of distress is not severe, an IIED claim cannot proceed even if "the court sympathizes with the plaintiff and acknowledges and does not intend to belittle the distress and discomfort he experienced"), *aff'd*, 203 F.3d 714 (10th Cir. 2000).

D. Under 49 U.S.C. § 46110, the Court lacks subject-matter jurisdiction over Plaintiff's claim seeking an injunction.

Finally, Plaintiff's claim seeking an injunction against TSA should also be dismissed for lack of subject-matter jurisdiction. Plaintiff seeks a Court order requiring "TSA to modify its policies and/or training" in an unspecified manner "to ensure that she is not a victim" of the alleged harm she suffered at TUL in the future. (Doc. 2 at ¶ 79). The Complaint does not identify any legal basis for the request for an injunction. There is no allegation stating a particular statute that gives the Court subject-matter jurisdiction over the injunction request, nor is there any indication of which substantive law TSA's policies purportedly violate. Notwithstanding this vagueness, it is clear that Plaintiff's claim for an injunction seeks judicial review of an "order" issued by the Administrator of TSA. Under 49 U.S.C. § 46110, any review of such an order can be obtained only by filing a petition for review in an appropriate Court of Appeals. The Courts of Appeals have "*exclusive* jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the . . . Administrator of [TSA] . . . to conduct further proceedings." 49 U.S.C. § 46110(c) (emphasis added); *see also Pinkerton v. TSA*, No. 11-cv-421, 2014 WL 1310203, at *7-8 (N.D. Okla. Mar. 31, 2014) (Dowdell, J.) (holding that TSA's revocation of a hazardous materials endorsement on a commercial driver's license "is an order exclusively reviewable in the United States Courts of Appeals" under 49 U.S.C. § 46110). Because the statute grants the Courts of Appeals exclusive jurisdiction over claims seeking review of TSA orders, this Court lacks subject-matter jurisdiction over Plaintiff's claim for an injunction. *See, e.g., Corbett v. United States*, 458

F. App'x 866 (11th Cir.) (affirming district court's dismissal for lack of subject-matter jurisdiction of "a complaint asserting that the use of AIT devices and pat-down searches" violated the Fourth Amendment), *cert. denied*, 568 U.S. 819 (2012); *Durso v. Napolitano*, 795 F. Supp. 2d 63 (D.D.C. 2011) (finding no subject-matter jurisdiction over Fourth Amendment claims challenging TSA's use of AIT and pat-downs "because the challenged screening procedures are employed pursuant to a TSA order").

Plaintiff's claim seeks an order directing TSA to change its procedures for conducting passenger security screening at airport checkpoints. Those procedures are established in the agency's Screening Checkpoint Standard Operating Procedures (SOP). *See, e.g.*, *Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 3 (D.C. Cir. 2011) ("[D]etails of the screening process" are "documented in a set of Standard Operating Procedures not available to the public."). That document "is an 'order' within the meaning of § 46110." *Durso*, 795 F. Supp. 2d at 69; *accord Corbett*, 458 F. App'x at 869 ("[C]onstruing the term 'order' broadly, the SOP was an order under § 46110."); *Blitz v. Napolitano*, 700 F.3d 733, 740 (4th Cir. 2012) ("[T]he Checkpoint Screening SOP constitutes an order of the TSA Administrator under § 46110."); *Roberts v. Napolitano*, 463 F. App'x 4, 5 (D.C. Cir. 2012) (holding that TSA's "SOPs are 'orders' within the meaning of section 46110").[7] Accordingly, Plaintiff's claim necessarily seeks review of a TSA order, and it can only be asserted in a petition for review in an appropriate Court of Appeals.

Moreover, even if Plaintiff's claim can be read such that it is not a direct challenge to TSA's screening procedures, the claim is still barred in this Court under the "inescapable-intertwinement

[7] The Court of Appeals for the Tenth Circuit has not specifically considered whether TSA's SOP is an "order" within the meaning of 49 U.S.C. § 46110, but it has generally addressed what constitutes an "order" under the statute in a manner consistent with precedent from the circuits cited here. *See Tulsa Airports Improvement Trust v. FAA*, 839 F.3d 945, 949-50 (10th Cir. 2016).

doctrine" applicable to Section 46110. The doctrine requires that Section 46110 be interpreted to "give the courts of appeals [exclusive] jurisdiction over not only challenges to final [TSA] orders but also any claims inescapably intertwined with the review of those orders." *Durso*, 795 F. Supp. 2d at 69; *accord Pinkerton*, 2014 WL 1310203, at *8 ("District courts are precluded from hearing matters that are 'inescapably intertwined' with orders falling within exclusive review statutes such as § 46110."); *Corbett*, 458 F. App'x at 871 (holding that "Corbett cannot escape the jurisdictional limitations of § 46110 by claiming that he asserts a broad constitutional challenge" because such a challenge "is inextricably intertwined with the SOP"). "A basic purpose" of the "inescapable-intertwinement doctrine" is to prevent plaintiffs from avoiding the jurisdictional requirement of Section 46110 "through creative pleading."[8] *Durso*, 795 F. Supp. 2d at 70.

Here, no matter how Plaintiff's claim for an injunction is construed, this Court's consideration of the claim would necessarily implicate review of TSA's SOP. This Court could not act on Plaintiff's request to "order the TSA to modify its policies and/or training," Doc. 2 at ¶ 79, pertinent to how TSA employees perform screening functions at the checkpoint without evaluating the SOP and understanding its relationship to any particular policy to which Plaintiff raises a challenge. Accordingly, even if Plaintiff's claim is not read as a direct challenge to TSA's SOP, adjudication of the claim would certainly be inescapably intertwined with review of the SOP. The claim is therefore barred from being heard in this Court, and it should be dismissed for lack of subject-matter jurisdiction. *See Pinkerton*, 2014 WL 1310203, at *8.

[8] Given the vagueness of the claim for an injunction in this case, it appears possible that Plaintiff's counsel has deliberately engaged in this sort of creative pleading with the goal of circumventing Section 46110. Plaintiff's counsel Jonathan Corbett was himself the *pro se* plaintiff in the *Corbett* case, 458 F. App'x 866, so he should be well aware that Section 46110 bars the assertion in district court of any claims intertwined with review of TSA's screening procedures. *See also Corbett*, 2019 WL 3244082, at *2 (noting that Mr. Corbett "has brought at least five suits challenging [TSA's] screening policies" on his own behalf as a pro se plaintiff).

IV. CONCLUSION

For the foregoing reasons, Defendants TSA and the United States respectfully request that all of Plaintiff's claims against them be dismissed with prejudice to their reassertion in this action, but without prejudice to re-filing in a new action as appropriate.

Respectfully submitted,

UNITED STATES OF AMERICA

R. TRENT SHORES
United States Attorney

s/Rachael F. Zintgraff
RACHAEL F. ZINTGRAFF, OBA No. 31597
Assistant United States Attorney
110 West 7th Street, Suite 300
Tulsa, Oklahoma 74119
T: 918-382-2700
F: 918-560-7948
Rachael.Zintgraff@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification of such filings to the parties entitled to receive notice.

s/Sarah Coffey
Sarah Coffey
Paralegal Specialist