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

Rhonda Mengert *Plaintiff* v. U.S. Transportation Security Administration *et al*. *Defendants*	Case No. 19-CV-304 (JED) (JFJ) **PLAINTIFF'S [PROPOSED] SUR-REPLY TO MOTION TO DISMISS BY INDIVIDUAL DEFENDANTS**

I. Introduction

In their reply to Plaintiff's opposition to their motion to dismiss, the individual defendants have doubled-down on their bad-faith argument that Plaintiff could redress her injuries in the Court of Appeals, including an argument, for the first time, that a) perhaps the individual defendants were authorized by the TSA to conduct a strip search, and b) perhaps forcing a woman to take down her pants and underwear for government inspection isn't actually a strip search. The reply further misstates Plaintiff's position on the effect of agency policy on the availability of qualified immunity

The individual defendants' arguments are without merit, and Plaintiff briefly addresses them below.

II. Argument

A. Plaintiff Has "Plausibly" Alleged That TSA Rules Prohibit Strip Searches

The individual defendants claim that "Plaintiff has no basis to plausibly claim that the Individual Defendants contravened the SOP, because the SOP is Sensitive Security Information (SSI) that is not public." Reply to Mot. to Dismiss, D.E. #29, p. 6[1].

At the outset, the word "plausibly" in the context of the sufficiency of a complaint invokes *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). But *Iqbal* holds a complaint to be "plausible" when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 678. Here, the individual defendants are asking the Court not to reject an *inference* that Plaintiff has made, but to reject a pure assertion of fact. The Court may not do so on a motion to dismiss just because the individual defendants find it "implausible" that Plaintiff would have knowledge of such a fact.

But more importantly, just because the Screening Checkpoint SOP, which is the document that sets out the rules for passenger screening, is non-public does not mean that Plaintiff knows nothing about it.

First, as the individual defendants concede, Plaintiff has attached a TSA official blog post that indicates that TSA protocols do not include strip searches. Reply to Mot. to Dismiss, p. 10, fn. 9. A public admission by the agency is a valid basis for the assertion made by Plaintiff. Exhibit A, Declaration of Jonathan Corbett, ¶ 10.

[1] Page numbers as stamped in the ECF header.

Second, TSA spokespersons have repeatedly stated that TSA protocols do not include strip searches, including in response to a media inquiry *for this very case*. *See* Exhibit B, Puhak, Janine, "TSA sued by grandmother for 'traumatizing' strip search: lawsuit," Fox News, June 7th, 2019 ("'…TSA does not conduct strip searches and is committed to ensuring the security of travelers, while treating passengers of all ages with dignity and respect,' a spokesperson said on June 7."); *See also* CBS News, "84-year-old claims TSA strip-search," December 3rd, 2011 ("While we regret that the passenger feels she had an unpleasant screening experience, TSA does not include strip searches as part of our security protocols, and one was not conducted in this case.")[2] [3].

Third, Plaintiff and the general public can come to learn the procedures specified in the SOP through experiencing the checkpoint. The fact of the matter is that millions of women travel through TSA checkpoints while wearing feminine hygiene products annually, but despite long-term study of TSA abuse incidents by Plaintiff's counsel, Plaintiff is one of only two persons known to Plaintiff's counsel who has ever been strip searched by TSA for wearing a pad, and the other was a Muslim woman who was apparently on a DHS watch list[4]. Exhibit A, ¶ 6. It is rational to conclude that if millions of similarly-situated people have one experience with TSA employees, but two have a different experience, that the two encountered TSA employees who were doing something other than following protocol.

[2] https://www.cbsnews.com/news/84-year-old-claims-tsa-strip-search/

[3] Whether or not these sources would be admissible evidence is not pertinent: they are cited here only to show that Plaintiff had a reasonable belief for the inclusion of this allegation in her complaint. Proof will be the litigants' burden at a later time, after discovery.

[4] https://www.thecut.com/2018/08/muslim-woman-forced-show-tsa-bloody-pad-during-search.html

Fourth, just because a document is SSI does not mean that others have not disclosed the relevant contents to Plaintiff or her counsel. SSI is *un*classified information for which disclosure is *non-criminal*. *See* 49 C.F.R. § 1520.17 (consequence for SSI disclosure is civil penalty). It is certainly possible that one of the ~50,000 TSA screeners, all of whom have access to this SSI, have made statements to Plaintiff, her counsel, the public, or otherwise, because they felt disgusted by the behavior of the individual defendants and were willing to confirm that strip searches are not included. Exhibit A, ¶ 8. Given that a TSA spokesperson did so publicly as discussed *supra*, it is even arguable that the "no strip search policy," by itself, is no longer even SSI at all.

And finally, if the SOP did mandate the strip search encountered by Plaintiff, the individual defendants would have filed a motion to dismiss for lack of subject matter pursuant to 49 U.S.C. § 46110. The Department of Justice is well-aware of how, and more than willing, to file such a motion when it is to their benefit. *Corbett v. United States*, Case No.: 10-CV-24106 (S.D. Fla., Apr. 29th, 2011) (successful motion to dismiss under § 46110 when policy contained in SOP challenged in district court). They have also been more than willing to file SSI material *ex parte, in camera*, when it benefits them. *Corbett v. Transp. Sec. Admin.*, No. 15-15717 at *23 (11th Cir., July 19th, 2019). They have not done so here because they know that the SOP does not allow the strip search alleged by Plaintiff in her complaint.

The individual defendants' argument that Plaintiff has no way of knowing the same is a blatant attempt to mislead the Court as to the SOP's contents. If Plaintiff is somehow mistaken, the individual defendants are free to use the defense that their actions were in accordance with the SOP in a later filing, but they may not contradict Plaintiff's assertions of pure fact at this juncture

– especially not with a non-denial that challenges not what Plaintiff alleged, but how Plaintiff could know what Plaintiff alleged.

B. The Search of Plaintiff Was a Strip Search

The individual defendants claim that "As actually alleged, what the Individual Defendants did was not a 'strip search.'" Reply to Mot. to Dismiss, p. 10, fn. 9.

The First Amended Complaint states that the individual defendants "informed Mengert that she was to take down her pants and underwear down to her knees and remove the feminine hygiene product for their visual inspection." First Amended Complaint, ¶ 37. After objection, Plaintiff was told that her cooperation was mandatory, and on that basis, she complied. *Id*., ¶¶ 38 – 40.

The individual defendants cite *Wood v. Hancock County Sheriff's Dept*, 354 F.3d 57 (1st Cir. 2003), for the proposition that the alleged search wasn't a strip search, but Plaintiff's counsel is left wondering if he is reading the same case. In *Wood*, the plaintiff was forced to remove all of his clothing during a jail admission process. In the First Circuit, a strip search was not permitted under the circumstances, so jail officials tried to defend by calling it a "clothing search" instead of a strip search. After the district court instructed that a "strip search involves a deliberate, visual inspection of the naked body of a prisoner which includes the examination of the mouth and armpits," *Wood* at 62, the jury found for the defendants. The First Circuit *reversed,* holding that the instruction was *in error* because it unduly limited the definition of a strip search. *Id*. at 64 ("Whether or not the officers set out deliberately to inspect a prisoner's naked body is not the question; it is, rather, whether the officers did, in fact, perform such a search.").

Flatly, the *Wood* court rejected the idea that you can look at a person's naked body without having conducted a strip search so long as you also inspect something that person is wearing, and no Tenth Circuit law supports that idea either. If Plaintiff were offered the option to remove her feminine hygiene product without taking down her pants and underwear, it would be a different story, but as the complaint is written, no reasonable lawyer, nor a reasonable TSA screener, nor any other reasonable lay person would fail to comprehend that the allegations made in the complaint are that of a strip search.

C. Plaintiff Has Not Argued That Mere Violation of Agency Policy Constitutes a Fourth Amendment Violation

Whether because Plaintiff was unclear in her briefs or otherwise, the individual defendants misconstrue Plaintiff's argument regarding the effect of agency policy on the availability of qualified immunity.

The individual defendants frame Plaintiff's position as follows: "Plaintiff contends that the Individual Defendants are not entitled to qualified immunity because under TSA's SOP, it was clearly established that screening employees were prohibited 'from conducting strip searches.' (Doc. 28 at 19). Plaintiff's argument is plainly meritless. For purposes of the qualified immunity analysis, a particular constitutional right cannot be clearly established by an agency document." Reply to Mot. to Dismiss, p. 8.

Plaintiff does not argue that the mere violation of policy forfeits a qualified immunity defense. Rather, Plaintiff argues that strip searches are presumptively Fourth Amendment

unreasonable unless authorized by law – a position clearly established in every circuit[5] – and that given that neither law *nor agency policy* authorized them (and in fact, agency policy *forbids* TSA checkpoint screeners from conducting them), no reasonable TSA screener would have thought that they were within the boundaries of the law in conducting a strip search. For that matter, any person, TSA screener or otherwise, understands that without authorization, the law prohibits them from forcing people to remove their clothes.

In other words, just as the Court would never grant qualified immunity to "a high school janitor [who conducted a] strip search a student suspected of stealing a roll of toilet paper," Opp. to Mot. to Dismiss, p. 19, even though there is probably no case that says janitors may not strip search student toilet paper bandits, the Court should find that no TSA screener could have thought the same because, just like for the janitor: 1) the law is clearly established that strip searches are unconstitutional absent justifying circumstances, and 2) there is no statute, case, or even administrative policy that would have made a high school janitor or a TSA screener think that a justifying circumstance applied. "It is undisputed that qualified immunity 'do[es] not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.'" *Estate of Lockett v. Fallin*, 841 F.3d 1098, 1107 (10th Cir. 2016), *quoting* *Mullenix v. Luna*, 136 S. Ct. 305 (2015).

Government officials who violate the public cannot hide behind qualified immunity if their conduct "obviously" violates the rights of the people just by doing so in a novel way. *Hope v.*

[5] For example, *Foote v. Spiegel*, 118 F.3d 1416, 1425 (10th Cir. 1997), requiring police officers to have reasonable suspicion before strip searching *an arrestee*. Plaintiff was not an arrestee, wearing a feminine hygiene product is not even remotely suspicious, and the individual defendants do not even argue that they had reasonable suspicion… so where did the individual defendants find authorization in the law?

Pelzer, 536 U.S. 730 (2002). In *Hope*, the majority found that specific means of prisoner abuse was not similar to a previous case, but was so "obviously" misconduct that the guards were "on notice their conduct is unlawful." *Id*. at 738, 739. Even the dissent in *Hope* concluded that "[c]ertain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address 'materially similar' conduct." *Id*. at 753.

Granted, Plaintiff has no idea what was going through the minds of the individual defendants, and they may have *subjectively* thought that what they were doing was in the best interest of aviation safety, but that would be *objectively* unreasonable because they were unauthorized. To defeat qualified immunity on Plaintiff's Fourth Amendment claim, only objective reasonableness is relevant. Reply to Mot. to Dismiss, p.10. And there is not an objectively reasonable reason in the world why these screeners would have thought this search was okay.

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III. Conclusion

For the foregoing reasons, Defendants' motion to dismiss should be **denied** in its entirety and individual defendants should be **ordered** to answer the first amended complaint within 14 days.

Dated: Tulsa, OK
January 28th, 2020

Respectfully submitted,

/s/

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