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 MOTION FOR SANCTIONS AGAINST ATTORNEYS FOR INDIVIDUAL DEFENDANTS**

I. Introduction

All clients are entitled to zealous advocacy, even (some may say, especially) when the client is the United States of America or its agencies or employees. However, zealous advocacy is not a license to present defenses that have no basis in law, and attorneys have an obligation to avoid presenting arguments to the Court for bad faith purposes, even (some may say, especially) when the attorney works for the United States Department of Justice.

The start of the Department of Justice's defense in this litigation came with a near-frivolous argument that no reasonable jury could find that an illegal strip search of a grandmother in the back room of an airport is "extreme and outrageous." Gov't. Defendants' Mot. to Dismiss, D.E. #21, pp. 28 – 32[1]. Plaintiff warned defense counsel that this argument pressed the boundaries of what a reasonable attorney might believe would have merit, Opp. to Gov't. Defendants' Mot. to

[1] All page number references correspond to the numbers generated by the CM/ECF system and stamped at the top of every page, not the page numbering generated by the defendants in the footer.

Dismiss, D.E. #22, p. 24, a warning which they rejected, Reply to Opp. to Gov't. Defendants' Mot. to Dismiss, D.E. #23, p. 8, fn. 4.

In their latest motion, the individual defendants' motion to dismiss, D.E. #25, government arguments graduated from "that's a really big stretch" to "that has absolutely no basis in existing law." One argument in particular, described *infra*, is objectively wrong and no reasonable attorney would have believed otherwise. And, despite objection by Plaintiff's counsel to defense counsel, they have refused to retract or modify it.

Motions for sanctions are not routine filings and not favored for minor transgressions. Plaintiff is not here to ask the Court to hold the government in default, remove attorneys from the case, or any of the more severe sanctions at the Court's disposal. But, the government should be put on notice that arguments made for the sole purposes of complicating this case, confusing the court, or delaying the resolution of this case will not be tolerated. For the foregoing reasons, the Court should dissuade the government from making future frivolous filings by imposing some level of sanctions upon defense counsel, and accordingly Plaintiff respectfully asks the Court to order the government to pay attorney's fees for Plaintiff's reply to the individual defendants' motion to dismiss and this motion for sanctions.

II. Safe Harbor Notice

Rule 11(c)(2) contains a "safe harbor" provision, requiring a party seeking sanctions under Rule 11 to give the party on the receiving end of a sanctions motion notice of the allegedly improper filing and 21 days to cure it.

Plaintiff served a copy of this motion[2] upon defense counsel on January 8th, 2020. The safe harbor provision has been satisfied.

III. Standard of Review

When considering a Rule 11 motion alleging frivolity, the Court must determine "whether a reasonable and competent attorney would believe in the merit of an argument." *Dodd Ins. Servs., Inc. v. Royal Ins. Co. of Am.*, 935 F.2d 1152, 1155 (10th Cir. 1991), *citing White v. Gen. Motors Corp.*, 908 F.2d 675, 680 (10th Cir. 1990). Objectiveness is paramount – an attorney's good faith belief in the merit of an argument is insufficient. *White* at 680; *Collins v. Daniels*, 916 F.3d 1302, 1320 (10th Cir. 2019) (rejecting "empty-head pure-heart" defense).

IV. Argument

The motion to dismiss filed by the individual defendants at D.E. #25 contains legally frivolous claims. None of these arguments constitute a request to extend, modify, or reverse existing law or establishing new law.

[2] The version served on January 8th complained of three frivolous arguments; this version deletes two of those three to focus on presenting only the most blatant violation of Rule 11. Plaintiff identified the other two frivolous arguments in her opposition to the individual defendants' motion to dismiss.

A. *The Individual Defendants' Argument That Plaintiff Can Seek Review in the Court of Appeals Is Contrary to Clearly Established Law*

In their Motion to Dismiss, the individual defendants twice make the argument that Congress has provided an avenue for redress for Plaintiff in the Court of Appeals, *e.g.*:

> "Here, Plaintiff plainly has some procedure to defend and make good on [her] position outside the *Bivens* arena. Airline passengers may potentially seek injunctive relief from TSA screening procedures that they believe to be unconstitutional. Congress has provided for, and channeled, such relief through a petition for review in an appropriate federal court of appeals. 49 U.S.C. § 46110."

See Motion to Dismiss, pp. 15 (*citation and quotations omitted*); *see also* p. 21.

However, the attorneys for the individual defendants are well aware that § 46110 applies only to "orders" of the agency. *See* § 46110 (using the word "order" ten times within 5 paragraphs). The term "order" under § 46110 applies to final, written decisions of the agency complete with administrative record sufficient to enable judicial review. *Green v. Brantley*, 981 F.2d 514, 519 (11th Cir. 1993). A verbal command by a TSA screener never constitutes an "order" as defined by § 46110. *Id*. The rogue actions of TSA screeners *in violation of* agency policy cannot even arguably be challenged in the Court of Appeals.

Plaintiff has made perfectly clear that she is not suing to challenge an "order" of the agency. *See* First Amended Complaint, D.E. #12, ¶ 3 (individual defendants' actions "in direct opposition to written TSA procedures"), ¶ 58 ("…in clear violation of agency policy…"); Plaintiff's Opposition to Second Motion to Dismiss, D.E. #22, p. 29 ("Plaintiff has been quite clear that the two TSA screeners were sued not for following the SOP, but for violating it."). Frankly, if the individual defendants had followed the order of the TSA that dictates passenger screening

procedures and prohibits strip searches, Plaintiff's injury would never have happened and we would not be here today.

Plaintiff's request in her first amended complaint that the Court order additional training for TSA screeners – relief requested against agency, not the individual defendants – does not justify the individual defendants' argument because: 1) it cannot be construed as a demand that the Court modify a TSA order, and 2) it is obviously not a remedy for Plaintiff's existing injuries. Plaintiff wants TSA to train their employees *as to the already existing order* that they may not strip search passengers. There is no ambiguity here: the order should stay as-is, and should be disseminated far and wide to TSA screeners and managers everywhere. Furthermore, the training of TSA screeners cannot possibly constitute an avenue for "redress" of Plaintiff's *existing* injuries: it is no more than a request that the Court try to prevent a *future* injury. No amount of "training" the Court could possibly order would compensate Plaintiff for being humiliated and traumatized last May.

In short, if Plaintiff were to petition the Court of Appeals to adjudicate the actions of the individual defendants, the petition would be summarily dismissed with costs for lack of subject matter jurisdiction because § 46110 does not apply and jurisdiction is thus squarely in the district courts pursuant to general federal question jurisdiction conferred by 28 U.S.C. § 1331. "Section 46110 does not grant the court of appeals direct and exclusive jurisdiction over every possible dispute involving TSA. The district court's federal question jurisdiction is preempted by § 46110 as to those classes of claims reviewable under § 46110. The district court, therefore, may retain jurisdiction over claims challenging TSA's orders when § 46110 does not explicitly allow us to hear them." *Latif v. Holder*, 686 F.3d 1122, 1127, 1128 (9th Cir. 2012) (*internal citations and quotations omitted*)

Accordingly, it appears that the individual defendants have included – and refused to modify, after receiving a safe harbor notice – their remarks about remedies in the Court of Appeals, as well as implying that said remedies indicate that Congress has provided a *Bivens* alternative for injuries such as those suffered by Plaintiff, for no purpose but to muddy the waters and attempt to confuse the Court. The Court should find these arguments on pages 15 and 21 of the Individual Defendants' Motion to Dismiss to be frivolous in violation of Fed. R. Civ. P. 11(b)(2).

B. *The Individual Defendants Have Not Sought Extension, Modification, or Reversal of Existing Law or for Establishing New Law*

A party is permitted to argue a position that is not supported by existing law so long as they make a "nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2).

This rule does not save defense counsel.

First, there is no language in the individual defendants' motion to dismiss that would indicate to a reader that their argument was based on hope for a change in the law rather than a definitive statement of existing law. Nowhere to be found is a concession that existing law is different, let alone an explanation as to why modern circumstances or judicial error counsel a change. Defendants baldly mislead the Court as to the law.

Second, defense counsel has provided (and there likely exists) no good reason to change the position the law takes on these matters. There exists no good reason to change that injuries caused by violation of TSA policy are not covered by 49 U.S.C. § 46110. Congress unambiguously wrote that statute to cover only "orders" of the agency – that is, written statements imposing rights

or obligations, not *ad hoc* barking by low-level checkpoint employees – and the district courts are clearly better equipped to handle such fact-intensive challenges.

C. The Appropriate Sanction is Attorney's Fees

Rule 11(c)(4) provides that:

> "A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."

While the Court has the power to strike pleadings, preclude defenses, remove attorneys, and other more serious sanctions, Plaintiff submits that covering the cost of replying to the offending motion plus the cost of moving for sanctions will, hopefully, be sufficient to send a message to defense counsel and dissuade future frivolous filings.

As such, the Court should order Plaintiff to file documentation of the time required to make such filings and, upon verification that Plaintiff has submitted a reasonable fee details, order that the sanction be fixed in that amount or whatever other amount the Court deems reasonable.

V. Conclusion

For the foregoing reasons, the court should **grant** Plaintiff's motion for sanctions and order Plaintiff to file documentation of attorney's fees incurred to deal with the individual defendants' frivolous claims.

Dated: Tulsa, OK

February 3rd, 2020

Respectfully submitted,

/s/

Jonathan Corbett, Esq.
Attorney for Plaintiff
CA Bar #325608
958 N. Western Ave. #765
Hollywood, CA 90029
E-mail: jon@corbettrights.com
Phone: (310) 684-3870
FAX: (310) 684-3870