

1999 WL 35307

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United States District Court, N.D. Illinois, Eastern
Division.

Sharon ANDERSON, et al., Plaintiffs,
v.
Mario CORNEJO, individually and in his official
capacity, et al., Defendants.

No. 97 C 7556.

|
Jan. 11, 1999.

MEMORANDUM OPINION AND ORDER

HART, District J.

*1 Forty-six African-American women allege that they were improperly searched when going through customs at O'Hare International Airport in Chicago, Illinois. Thirty-eight employees of the United States Customs Service are named as defendants (the "federal defendants"). The federal defendants are all named as being sued in their individual and official capacities.¹ Additionally, in one count, two physicians who aided in a body cavity search are named as defendants. The physicians are alleged to have acted jointly with the federal defendants. Presently pending is the federal defendants' motion to dismiss the claims made against them in the Fourth Amended Complaint or, alternatively, a motion for a more definite statement. The physician defendants do not join in the motion.

Before turning to the motion to dismiss, a few procedural issues need to be addressed. This case (97 C 7556) was originally filed in October 1997 with only Sharon Anderson as a plaintiff and not as a class action. In May 1998, a putative class action was filed (98 C 2829), with 18 of the present plaintiffs as named plaintiffs. Anderson likely would have fallen within the class that was alleged. In July 1998, 98 C 2829 was voluntarily dismissed and

the Third Amended Complaint was filed in 97 C 7556. The Third Amended Complaint named the plaintiffs from both suits and included class allegations. Although this case was first filed more than a year ago and class allegations were present in 98 C 2829 more than seven months ago and in 97 C 7556 for more than five months, no motion to certify a class has ever been filed. Class certification should be decided early in a case and preferably before any ruling on a motion to dismiss. *See Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, 474-75 (7th Cir.1997). Because class certification has not been promptly pursued, the class allegations will be dismissed without prejudice.

Although attorney Edward Fox filed an appearance for all plaintiffs in 98 C 2829, he never filed an appearance in 97 C 7556 for any plaintiff other than Anderson. When attorney Derrick Carter recently filed an appearance in 97 C 7556, it was only stated to be on behalf of Anderson. Apparently, both attorneys intend to represent all plaintiffs. By January 19, 1999, any counsel who is representing plaintiffs other than Anderson shall file an appropriate appearance form.

Two of the plaintiffs, Christina Dukes and Jamie Brown, are respectively alleged to have been 15 and 13 years old as of the September 17, 1998 filing of the Fourth Amended Complaint. Since they are minors, they do not have the capacity to bring suit in their own names. As to plaintiff Mildred Martinia, it is alleged that she is mentally retarded with the intelligence of an 11-year-old. Based on this allegation, it would appear that she is not competent to bring suit in her own name. By January 19, 1999, counsel for each of these plaintiffs shall take appropriate action to substitute in a next friend or other appropriate representative as a plaintiff in this case.² *See* Fed.R.Civ.P. 17(c).

*2 On a Fed.R.Civ.P. 12(b)(6) motion to dismiss, a plaintiff's well-pleaded allegations of fact are taken as true and all reasonable inferences are drawn in the plaintiff's favor. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164-65 (1993); *Swofford v. Mandrell*, 969 F.2d 547, 549 (7th Cir.1992). A complaint need not set forth all relevant facts or recite the law; all that is required is a short and plain statement showing that the party is entitled to relief. Fed.R.Civ.P. 8(a); *Doherty v. City of Chicago*, 75 F.3d 318, 322 (7th Cir.1996). A plaintiff in a suit in federal court need not plead facts; conclusions may be pleaded as long as the defendant has at least minimal notice of the

claim. Fed.R.Civ.P. 8(a)(2); *Jackson v. Marion County*, 66 F.3d 151, 153–54 (7th Cir.1995); *Albiero v. City of Kankakee*, 122 F.3d 417, 419 (7th Cir.1997). It is unnecessary to specifically identify the legal basis for a claim. *Albiero*, 122 F.3d at 419; *Bartholet v. Reishauer A.G. (Zürich)*, 953 F.2d 1073, 1078 (7th Cir.1992). It is also true, however, that a party can plead him or herself out of court by alleging facts showing he or she has no viable claim. *Jackson*, 66 F.3d at 153–54; *Tregenza v. Great American Communications Co.*, 12 F.3d 717, 718 (7th Cir.1993), *cert. denied*, 511 U.S. 1085 (1994); *Early v. Bankers Life & Casualty Co.*, 959 F.2d 75, 79 (7th Cir.1992). Further, as long as they are consistent with the allegations of the complaint, a plaintiff may assert additional facts in his or her response to a motion to dismiss. *Albiero*, 122 F.3d at 419; *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1428 (7th Cir.1996); *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 439–40 (7th Cir.1994); *Hrubec v. National Railroad Passenger Corp.*, 981 F.2d 962, 963–64 (7th Cir.1992). Although the complaint itself need not specifically or correctly identify the legal basis for any claim, in response to a motion to dismiss that raises issues as to a claim, the plaintiff must identify the legal basis for the claim and make adequate legal arguments in support of it. *Stransky v. Cummins Engine Co.*, 51 F.3d 1329, 1335 (7th Cir.1995); *Levin v. Childers*, 101 F.3d 44, 46 (6th Cir.1996); *Carpenter v. City of Northlake*, 948 F.Supp. 759, 765 (N.D.Ill.1996). *See also Teumer v. General Motors Corp.*, 34 F.3d 542, 545 (7th Cir.1994).

Plaintiffs allege that they are all African–American women with United States citizenship who, upon returning from abroad, were subjected to non-routine pat-down searches or more when passing through customs at O’Hare’s international terminal. The date on which any particular search occurred is not alleged; only that all the searches occurred “within the past 2 years.” With the exception of Count V, which is brought by plaintiffs Gwendolyn Richards and Jacqueline Waller against five specific federal defendants and the two physician defendants, no attempt is made to identify which defendants were involved in the searches of any particular plaintiff. Although Count V identifies the defendants named in that count, it does not specify which defendants were involved in Richards’s incident and which were involved in Waller’s. Also, like all the other counts, Count V does not specify the particular conduct that any defendant named in the count committed.

*3 It is generally alleged that there was no reasonable suspicion to support subjecting any plaintiff to a

non-routine search. It is also alleged that no ground existed that made any of the plaintiffs more suspicious than the usual passenger who is not subjected to a non-routine search: no narcotics sniffing dog responded to any plaintiff; no plaintiff had large amounts of cash; no plaintiff had bulges or other indications in her clothing that she was concealing something; no plaintiff had a significant criminal record; no plaintiff was believed to have falsely responded to any question; no plaintiff had needle marks or any other indication of drug use; and all plaintiffs had an itinerary consistent with business or vacation travel. For every plaintiff who was subjected to more than a pat-down search, there was never any further indication of hidden items: there were no bulges in underwear, nothing protruding from a body cavity, nor any scratches or lubricants indicating any contraband had been inserted in a body cavity. Instead, it is generally alleged that each plaintiff was selected for a non-routine search because she was an African–American woman.³

It is alleged that plaintiffs, like any person selected for a pat-down search, were taken into a small, windowless room for the examination. Some of the plaintiffs were also subjected to strip searches and body cavity searches. It is alleged that, under applicable administrative rules, such searches require the approval of a supervisor following an independent evaluation of the facts. It is further alleged, though, that supervisors generally approve such searches without independent consideration.

It is alleged that, during the pat-down searches, defendants sometimes pushed so hard that they caused pain and that the nature of the touching was the same on the entire body, including the breast and crotch area. During the body cavity searches, plaintiffs were required to strip, face a wall, bend over, and either grab their ankles or spread the cheeks of their buttocks. Some of the body cavity searches were visual and sometimes the plaintiff was touched, including the insertion of fingers into body cavities.

The complaint specifically identifies the nine women who were subjected to only pat-down searches. All other plaintiffs are alleged to have been subjected to a strip and/or body cavity search. The two plaintiffs named in Count V are alleged to have also been handcuffed, transported to a hospital, x-rayed, and forced to undergo a gynecological examination. None of the searches resulted in the discovery of any contraband.

Additionally, it is alleged that defendants maintain a “negative search detail log” for each plaintiff. The

information in these logs include: name, addresses, date of birth, criminal history, physical description, travel destinations, airline, frequency of travel, and sometimes financial information.

Plaintiffs designate six counts. Count V is against specific defendants. All the other counts are against all the federal defendants, but not the physician defendants. Count I is labeled as an equal protection claim that plaintiffs were treated less favorably than similarly situated persons who were not African-American women. Count II is labeled as a claim of illegal search and seizure because the searches and seizures were not supported by reasonable suspicion. Count III is labeled as a procedural and substantive due process claim based on failing to inform plaintiffs of their rights and keeping them “incommunicado.” In response to the motion to dismiss, plaintiffs further clarify that they are also claiming that the intrusions on their bodily integrity constituted substantive due process violations. Count IV claims a violation of the constitutional right to privacy based on the maintenance of the search logs. In response to the motion to dismiss, plaintiffs clarify that the right to travel is also implicated. Count V alleges that forcing two of the plaintiffs to undergo a gynecological examination violated their Fourth Amendment right to be protected from unlawful searches and seizures. Count VI is labeled as a claim for declaratory and injunctive relief based on the various violations alleged in the other counts.

*4 As to Count I, defendants contend that plaintiffs have insufficiently pleaded discrimination because not supported by sufficient facts. Intent, however, need only be pleaded generally. *See* Fed.R.Civ.P. 9(b). The general allegations of discriminatory intent are sufficient to support Count I. *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir.1998); *Triad Associates, Inc. v. Robinson*, 10 F.3d 492, 497 (7th Cir.1993); *Council 31, AFSCME v. Ward*, 978 F.2d 373, 377 (7th Cir.1992). Count I will not be dismissed.

As to Counts II and V, defendants contend those claims are subject to dismissal for failure to adequately allege personal involvement in that plaintiffs fail to identify the specific conduct of any defendant. Alternatively, defendants request that plaintiffs be ordered to provide a more definite statement identifying which defendants each plaintiff makes a claim against and identifying each defendant’s involvement. Defendants argue that they need this information in order to raise defenses of qualified immunity. Plaintiffs argue that their claims satisfy the federal pleading standard and that they need further

discovery before they would be able to identify the conduct of each defendant. Plaintiffs contend that defendants did not identify themselves during the incidents and that they either didn’t wear identification or plaintiffs were unable to read the identification. Presently, plaintiffs have summaries from the search logs that list some or all of the defendants involved in a particular incident, but not their roles. As to 18 of the incidents, plaintiffs did not yet have the log summary as of the time they filed their surreply.

In *Crawford-El v. Britton*, 118 S.Ct. 1584, 1596 (1998), the Supreme Court indicated that, even if a claim is sufficiently pleaded to satisfy Rules 8 and 9, it “may” be appropriate to require a more definite statement so as to possibly enable a defendant to raise a qualified immunity defense and avoid discovery. Rule 12(e) provides in part: “If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading.”

Plaintiffs cannot perform the impossible. At this time, they will not be required to specifically identify the conduct of each defendant. To the extent they know, however, they will be required to identify which defendants were involved with which plaintiffs and the date of the search. Plaintiffs have identified which of them were subjected to pat-down searches and which were involved in strip and/or body cavity searches. As to the latter, defendants will have to assume both a strip and body cavity search was performed since alternative pleading is permitted and the construction more favorable to the plaintiff is what must be assumed on a motion to dismiss. Each defendant will also have to assume that he or she engaged in all the conduct alleged as regards any particular plaintiff that brings a claim against that defendant. If defendants believe that, as of the time of the search, clearly established law did not support that one or more of these types of searches required a reasonable suspicion or the Count II or V claim otherwise has insufficient legal support, they can move for dismissal based on qualified immunity. If further facts are necessary in order to raise the qualified immunity defense, defendants will have to wait until after sufficient discovery in order to raise qualified immunity on summary judgment or at trial. Since defendants do not otherwise contend that Counts II and V fail to state a claim upon which relief can be granted, those counts will not be dismissed.

*5 Defendants argue that the Count III procedural due process claims are subject to dismissal because plaintiffs have an adequate post-deprivation remedy under the FTCA. *Parratt v. Taylor*, 451 U.S. 527 (1981), and its progeny establish that there is no procedural due process claim based on a random and unauthorized action if an adequate post-deprivation remedy is available. This rule is not limited to § 1983 actions, but also applies to *Bivens* actions against federal employees. *Del Raine v. Williford*, 32 F.3d 1024, 1046–47 (7th Cir.1994); *id.* at 1052 (Manion, J., concurring); *Vennes v. An Unknown Number of Unidentified Agents of United States*, 26 F.3d 1448, 1452 (8th Cir.1994), *cert. denied*, 513 U.S. 1076 (1995); *Scherl v. Barry*, 1990 WL 114647 *2 (N.D.Ill. July 27, 1990). *Parratt*, however, is limited to random and unauthorized acts. Where the alleged conduct is pursuant to a custom or policy, it is not a random and unauthorized act and the availability of an adequate post-deprivation remedy is immaterial. *Wilson v. Civil Town of Clayton, Ind.*, 839 F.2d 375, 380–81 (7th Cir.1988); *Follkie v. City of Chicago*, 1997 WL 527304 *4 (N.D.Ill. Aug. 19, 1997). *See also Scherl*, 1990 WL 114647 at *2. Since plaintiffs have alleged a custom or policy of denying procedural due process rights, they allege a cognizable claim. The Count III procedural due process claim will not be dismissed.

Plaintiffs argue that the substantive due process claim referred to in Count III is the intrusion upon their bodily integrity when forcibly touched during the pat-down searches and when fingers were inserted during strip searches. Plaintiffs rely on *Wudtke v. Davel*, 128 F.3d 1057, 1062–63 (7th Cir.1997), which holds that sexual assault by a government actor is a violation of the substantive due process right to bodily integrity. *Wudtke* involved “serious sexual assault,”⁴ and the Seventh Circuit expressly declined to consider “how much less than that” would constitute a violation of substantive due process. *Id.* at 1063. In *Doe I v. Peterson*, 1998 WL 603274 (N.D.Ill. Sept. 8, 1998), a prosecutor sought sexual favors in return for dropping traffic charges. Following *Wudtke*, the court held that sexual battery of one plaintiff constituted a violation of substantive due process. *Doe I*, 1998 WL 603274 at *4. As to a second plaintiff, it was held that asking to see her tan line and requesting “a piece of ass” did not state a claim. *Id.* Plaintiffs do not cite any case and no case has been found that holds that an assault short of sexual assault or physical assault causing substantial injury is a violation of substantive due process. Moreover, defendants concede that the Fourth Amendment itself protects against improper invasions of bodily integrity during a search.

See Dunn v. Fairfield Community High School District No. 225, 158 F.3d 962, 965 (7th Cir.1998) (substantive due process is limited in scope and does not apply when there is a specific constitutional protection against a particular type of government behavior). Plaintiffs’ Count III substantive due process claim will be dismissed.

*6 Defendants contend Count IV should be dismissed because there is no constitutional provision against an agency keeping accurate records of its activities. Plaintiffs do not contend that the records were inaccurate, but that maintaining the records implicates the right to privacy. Further, in their answer brief, plaintiffs contend that keeping the records infringes on their “First Amendment” right to travel in that plaintiffs have become fearful of international travel because they fear the record keeping and its uses that could result. Plaintiffs also allege that the facts recorded go beyond any legitimate need for the information and are not reasonably related to Customs’ statutory mission.

The Seventh Circuit has held that, at least as to accurate records of a person’s indictment and conviction, federal courts are without jurisdiction to order the expungement of records of an executive branch agency. *United States v. Janik*, 10 F.3d 470, 472 (7th Cir.1993).⁵ *Dicta* indicates that this is a general rule regardless of the nature or accuracy of the records. *See id.* (“*Scruggs* suggests, though it does not hold, that federal courts are without jurisdiction to order any Executive Branch agency, typically the FBI, to expunge records); *id.* at 473 (“To obtain expungement of records maintained by the FBI or any other Executive Branch agency, Janik (or anyone else) must go directly to the Executive Branch. If the Executive Branch refuses, Congress can act to confer jurisdiction on the federal courts. Congress has not so acted and we hold that we are without jurisdiction to order any Executive Branch agency to expunge Janik’s records.”); *Scruggs v. United States*, 929 F.2d 305, 306 (7th Cir.1991) (“Judges lack supervisory powers over the behavior of the Executive Branch of the government.”). However, neither *Janik* nor *Scruggs* involved situations where the keeping of the record was itself a constitutional violation. Even *Scruggs*, 929 F.2d at 306, suggests: “It may be that a statute [granting jurisdiction] is unnecessary if the Constitution *forbids* the keeping of a record—if the presence of a record is itself a violation of the supreme law of the land. *Scruggs* does not argue, however, that it is unconstitutional to keep a record of an arrest that violated the fourth amendment.” If maintaining the logs is itself a violation of a constitutional right, plaintiffs would be entitled to a remedy, whether damages, injunctive, or

both.

Keeping the kind of information that plaintiffs allege is in the logs does not violate the constitutional right to privacy. *Cf. Makula v. Village of Schiller Park*, 1995 WL 755305 *2, *8–9 (N.D.Ill.Dec. 14, 1995) (constitutional right to privacy not violated by village ordinance requiring that owners of multifamily residences maintain and make available to the village records of (a) each owner's name, address, birth date, and work and home telephone numbers; (b) the same information about any management agent; (c) copies of management agreements; (d) janitor's name, address, and telephone numbers; (e) information about company that services fire alarms and elevators; (f) annual plans and budgets for improvements; (g) test results of fire alarm and emergency lighting systems; and other information); *Whalen v. Roe*, 429 U.S. 589 (1977) (not a violation of right to privacy to have municipalities keep information as to persons who were prescribed certain drugs). Therefore, plaintiffs can only succeed on Count IV if their right to travel is violated.

*7 First, plaintiffs incorrectly characterize this right as a First Amendment right. The right to travel within the United States is protected by the First Amendment. However, the right to travel internationally is not a First Amendment right, but a liberty interest protected by the due process clause. *Haig v. Agee*, 453 U.S. 280, 306–06 (1981); *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978); *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1438–39 (9th Cir.1996). This is an important distinction because interference with international travel is not subjected to the scrutiny of a fundamental right, but instead is subjected to rationality analysis. *Aznavorian*, 439 U.S. at 177; *Newcomb*, 82 F.3d at 1439; *Duncan v. Goedeke & Cleasey*, 837 F.Supp. 846, 850 (S.D.Tex.1993).

Plaintiffs do not contend that the information being kept is irrationally related to Customs' mission, only that it is not reasonably necessary and is beyond what Customs legitimately needs. In any event, regardless of the conclusory assertions in their brief, if the facts alleged show a rational relationship, the claim must be dismissed. All the types of information alleged to have been retained in the logs is at least rationally related to Customs preventing contraband from entering the country. Whether it is a reasonable, necessary, or effective means of implementing that goal is for Customs to decide, not this court. Since the action is rational, even if keeping the information inhibits the right to travel internationally,

such interference does not violate the Constitution. Count IV will be dismissed.

Count VI contains plaintiffs' claims for declaratory and injunctive relief. Defendants only argue that this count should be dismissed if all the other counts are dismissed. Since other counts remain, defendants do not state a basis for dismissing Count VI. However, a substantial jurisdictional issue exists regarding this count and the parties will be required to address it. Persons that are subjected to unlawful treatment by law enforcement officers often cannot seek prospective relief after the conduct ends because they cannot reasonably expect to again be subjected to such treatment. *See generally City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Garcia v. City of Chicago*, 24 F.3d 966, 969 (7th Cir.1994), *cert. denied*, 514 U.S. 1003 (1995). The parties will be required to address the issue of whether plaintiffs have standing to seek declaratory and injunctive relief.

IT IS THEREFORE ORDERED that:

(1) Class certification is denied. Claims of the putative class are dismissed without prejudice.

(2) By January 19, 1999, attorneys for plaintiffs shall file appropriate appearance forms.

(3) By January 19, 1999, appropriate representatives shall be substituted in for plaintiffs Christina Dukes, Jamie Brown, and Mildred Martinia.

(4) Defendants' motion for a more definite statement [39–2] is granted in part and denied in part. By January 25, 1999, plaintiffs shall file a statement listing the following information in regard to each plaintiff: (a) the date of the alleged unlawful search, (b) the known defendants alleged to have been involved in the unlawful search, and (c) whether unknown defendants are also alleged to have been involved in the unlawful search.

*8 (5) Defendants' motion to dismiss [39–1] is granted in part and denied in part. The Count III substantive due process claim and Count IV in its entirety are dismissed.

(6) By January 25, 1999, the federal defendants shall file a brief (and, if appropriate, accompanying motion to dismiss) addressing the question of whether this court has jurisdiction over the official capacity claims and whether plaintiffs have standing to pursue declaratory and injunctive relief.

(7) By February 1, 1999, the federal defendants shall answer the remaining allegations of the Fourth Amended Complaint.

which time the parties shall present an original and one copy of a joint, written discovery scheduling plan.

(8) Document discovery shall be completed by March 12, 1999. All discovery is to be completed by June 30, 1999.

All Citations

Not Reported in F.Supp.2d, 1999 WL 35307

(9) Status hearing set for February 4, 1999 at 9:15 a.m. at

Footnotes

- ¹ The nature of the official capacity claims is unclear. The United States has sovereign immunity except to the extent waived. For constitutional torts, damages claims against the United States must be made pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671–80. *See Carlson v. Green*, 446 U.S. 14, 20 (1980); *Bagola v. Kindt*, 131 F.3d 632, 638 (7th Cir.1997); *Sterling v. United States*, 85 F.3d 1225, 1228–29 (7th Cir.1996). There is no indication that plaintiffs intend to bring an FTCA claim against the United States. The Administrative Procedures Act, 5 U.S.C. § 702, may waive immunity for the declaratory and injunctive relief. *See Czerkies v. United States Department of Labor*, 73 F.3d 1435, 1437–38 (7th Cir.1996). This issue need not be resolved at the present time since the United States does not move to dismiss the official capacity claims. However, because it goes to the court's jurisdiction, *see Amwest Surety Insurance Co. v. United States*, 28 F.3d 690, 693 (7th Cir.1994), the parties will be required to address the issue.
- ² As to Martinia, if it is believed that she is competent to bring suit in her own name, she must (through counsel) bring a motion setting forth the pertinent facts and law and requesting that she be permitted to continue this suit in her own name.
- ³ Both in the complaint and additionally in their briefs, plaintiffs allege some of the evidence from which a discriminatory intent can be inferred. Those allegations need not be recited here because, as is held below, the general allegation of discriminatory intent is sufficient.
- ⁴ One of plaintiff's supervisors forcibly touched plaintiff's breasts, kissed her, and, on three occasions, forced her to perform oral sex on him.
- ⁵ Apparently all other circuits that have decided the issue disagree. *See Sealed Appellant v. Sealed Appellee*, 130 F.3d 695 (5th Cir.1997), *cert. denied*, 118 S.Ct. 1523 (1998); *Doe v. United States*, 964 F.Supp. 1429, 1432 (S.D.Cal.1997). This court, however, is bound to follow the Seventh Circuit.