

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

GERARDO VAZQUEZ-MENTADO :

Plaintiff, :

-vs- :

MORGAN BUITRON, JAVIER LORENZO and
JOHN DOES 1 and 2, individually and in
their official capacities as U.S. Border
Patrol Agents; KEVIN OAKS, Chief Border
Patrol Agent, Buffalo Sector in his
individual capacity; and the
UNITED STATES OF AMERICA,

Civil Action
No. 5:12-CV-797-LEK-ATB

Defendants. :

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS

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I. INTRODUCTORY STATEMENT

_____This supplemental memorandum of law in opposition to defendants' motion to dismiss is submitted by plaintiff GERARDO VAZQUEZ (VAZQUEZ) in accordance with this Court's order of March 4, 2013. It will discuss the impact, on the pending motion, of the January 30, 2013 report by the Immigrant Rights Clinic at NYU Law School and Families for Freedom entitled "Uncovering USBP: Bonus Programs for United States Patrol Agents and the Arrest of Lawfully Present Individuals" (NYULS report). The report, which is attached hereto as Exhibit 1, is based on documents obtained by its authors in a FOIA lawsuit. Families for Freedom v. U.S. Customs and Border Protection, 1:10cv02705 (S.D.N.Y). NYULS Report at 8, n.31, 28. It addresses practices of the Buffalo, New York Border Patrol sector.

POINT ONE

THE NYULS REPORT DOCUMENTS
PRACTICES OF DEFENDANT OAKS
WHICH SUFFICE TO DEFEAT THE
MOTION TO DISMISS AGAINST HIM

Defendant KEVIN OAKS was the Chief Border Patrol agent for the Buffalo, New York Border Patrol Sector at all times relevant to this action. Amended Complaint ¶10. VAZQUEZ avers that OAKS' training and supervision of the defendant agents who arrested him, or his failure to do so, led to his unlawful arrest. Amended Complaint ¶51. He also alleged his arrest stemmed from policies, customs and orders promulgated by OAKS. Amended

Complaint ¶52. VAZQUEZ' complaint further indicates, upon information and belief, that there is a pattern and practice of unlawful detentions and/or arrests of U.S. citizens by the Border Patrol in the Buffalo sector. Amended Complaint ¶50.

Defendant OAKS, in the pending motion, argues that these allegations are not specific enough, under Federal Rule of Civil Procedure 8, to state a cause of action. Defendants' Memorandum of Law in Support of Motion to Dismiss at 16-18; Defendants' Reply Memorandum at 9. He states that facts are lacking as to the challenged policies, customs and orders, and as to the detentions and arrests of other U.S. citizens. Id.

VAZQUEZ challenged these assertions. Memorandum of Law in Opposition to Motion to Dismiss at 18-20. His challenge is buttressed by the NYULS report.

The report indicates that 12 U.S. citizens were apprehended by the Rochester, New York station of the U.S. Border Patrol from 2006 to 2010. NYULS report at 9-10, 28 (figure based on I-44 forms produced in the FOIA litigation). As Chief Patrol agent of the Buffalo sector, OAKS had jurisdiction over both the Rochester and Oswego stations (where the agents who arrested VAZQUEZ were assigned). Amended Complaint 7-8, 10; U.S. Border Patrol Buffalo Sector General Information (attached hereto as Exhibit 2). OAKS was Chief Patrol agent of the Buffalo sector as of at least September 25, 2008. U.S. Customs and Border

Protection Press Release (attached hereto as Exhibit 3).

As a result of allegations made against local Border Patrol agents, OAKS issued a memo on June 28, 2010. Declaration of Walter H. Ruehle of March 11, 2013 ¶3, Exhibit A. His memo required all agents in the Buffalo sector to complete an I-44 form for all vehicle stops, for prolonged pedestrian stops, and for any stops which might be "contested" or deemed to be not "routine." Id. The purpose of completing the I-44 was to document the articulable facts which caused the agent to make the stop to help refute "inaccurate" accusations against agents. Id. Finally, the memo notes that this requirement was verbally transmitted to all sector agents in fiscal year 2009. Id.

_____ Read together, the NYULS report; Exhibit 1 at 28 (which analyzes only the bus and train station arrests at the Rochester station, one of the six stations within the Buffalo sector); and the OAKS memo; Declaration of Walter H. Ruehle of March 11, 2013, Exhibit A; establish the following: VAZQUEZ, along with at least 12 other U.S. citizens, were arrested by Buffalo sector agents between 2006 and 2010.¹ Within the same time frame, Rochester-based agents apprehended at least 290² persons in lawful status.

¹It is not clear from the report how many of the 12 other arrests occurred before VAZQUEZ' arrest, nor how many of them were founded upon the required probable cause.

²The report notes that the actual numbers may be higher, since the reporting requirement did not formally go into effect until 2010 and because the Border Patrol transfers some persons

NYULS Report at 10. OAKS was aware that allegations were being made against his agents, presumably allegations that they were making unlawful arrests. He was aware of these allegations prior³ to VAZQUEZ' arrest. As a result, he issued a policy imposing a reporting requirement using form I-44.

As head of the Buffalo sector, it can be safely inferred that OAKS saw the I-44s. What, if anything, he then did to prevent his agents from making unlawful apprehensions is unknown at this time and is a proper subject of discovery.

_____Furthermore, the report strongly infers that OAKS created a culture in which problematical arrests occurred. During his tenure, a bonus system was in effect in the Buffalo sector. NYULS Report at iv. Cash awards, extra vacation time, and gift cards were awarded to agents on the basis of unspecified criteria. NYULS Report at 5-7. In the absence of criteria, the sector's singular emphasis on arrest numbers appeared to play at least some role in deciding who received how much. NYULS Report at 4 (policy of closely monitoring and circulating arrest numbers encourages arrests), 7 (lack of criteria for awarding bonuses disturbing in light of agency's focus on arrest numbers), 8

to ICE before confirming their status. NYULS Report at 1, 3.

³While the OAKS memo does not indicate when in fiscal year 2009 he imposed the verbal reporting requirement, the probability is quite high that he did so prior to VAZQUEZ arrest, which was one day before the end of that fiscal year.

(apprehension numbers only numerical data sent from the Rochester station to Buffalo Sector Headquarters and describing procedure). Nominees for cash awards and extra vacation time had their nominations vetted at the sector level, presumably by OAKS, the sector head. NYULS Report at 5-7. In 2009, the year VAZQUEZ was arrested, the total value of these bonuses amounted to approximately \$160,000. NYULS Report at 5-7.

The report, based upon an examination of 290 I-44s, concludes that Rochester agents arrested persons first and asked questions later, placing the burden on the arrestee to establish their status. NYULS Report at 2, 9-10, 23. Given the Buffalo sector's focus on arrest numbers, and the bonus system, this state of affairs is not surprising. The report infers that OAKS' administration of the bonus system was at least partially responsible for creating an arrest-first culture.

VAZQUEZ' arrest occurred in the context of this culture. He was arrested and taken to the Border Patrol station without any investigation of the validity of his New York driver's license or of his claim of U.S. citizenship. Amended Complaint ¶18-25. Notwithstanding his evidence and claims, he was twice told by the arresting defendants that he was illegal. Amended Complaint ¶20, 24.

One of the arrests described in the report is directly relevant to VAZQUEZ' claim against OAKS. A U.S. citizen, in

possession of a valid Georgia driver's license, was arrested on March 17, 2009. NYULS Report at 10. This arrest, occurring six months before VAZQUEZ', supports his argument that defendant OAKS had not properly trained agents on the significance of the possession of valid domestic driver's licenses, which cannot be issued unless the applicant possesses a valid Social Security number.⁴ Plaintiff's Memorandum of Law at 6, 12-13, 19; "Social Security Number Requirements," Georgia Department of Driver Services (attached hereto as Exhibit 4) (noting this requirement as of January 1, 2003).

III. CONCLUSION

For the reasons set forth herein, and in his principal memorandum of law, plaintiff respectfully requests that this Court deny defendants' motion to dismiss in its entirety, and grant such other and further relief as it may deem just and proper.

⁴The inspector's Field Manual (IFM), the source of the policy requiring that the validity of the driver's licenses be checked, applies to Border Patrol agents. IFM 2.6(a)(1) (in referring to persons responsible for providing a safe work environment, includes Chief Patrol Agents); 18.3 (immigration officer includes Border Patrol agents). Hyperlinks to these sections are provided at pages 11 and 13 of Plaintiff's principal Memorandum of Law.

Respectfully submitted,

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