IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ALFONSO VASQUEZ-PALAFOX,	)	
Plaintiff,	)	**No. 3:12-cv-2380-JZ**
v.	)	**Judge Jack Zouhary**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Alfonso Vasquez-Palafox, through counsel, hereby opposes Defendant United States of America's Motion for Summary Judgment. Doc. 18. There are genuine issues as to material facts and the Defendant is not entitled to judgment as a matter of law. Additionally, the United States is not immune from suit under the claims brought against it. A Memorandum of law follows and is incorporated herein and does not exceed the twenty-five pages granted by the Court after proper exclusions.

Respectfully submitted,

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SUMMARY OF BRIEF

1. Defendant primarily relies on facts from the Border Patrol Agents' declarations of January, 2013, in its Motion for Summary Judgment. Plaintiff relies on the much more detailed depositions of the Border Patrol Agents taken of Mathew Richardson on February 23, 2012, and Ramiro Corona on January 16, 2013. Both parties cite Plaintiff's deposition of March 9, 2012, although Plaintiff believes Defendant's counsel omits relevant parts of the Plaintiff's testimony there, including, for example, the fact that Palafox stated Agent Richardson had his hand on his gun throughout the incident. The hand on the gun, along with other factors, puts the "wait, wait, . . ." statement by Agent Corona to Palafox in a different context – an imprisonment rather than a "consensual encounter."
2. The Plaintiff agrees with Defendant's statement of the elements of the Ohio torts with the exception of the tort of false imprisonment. Defendant's counsel appears to merge the first two false imprisonment elements arguing that the detention must be "intentionally unlawful." Doc. 18, p. 8. Plaintiff believes the first two elements are: (1) intentional confinement; and, (2) without lawful justification or privilege. The merging of those two elements by Defendant's counsel, if accepted, improperly raises the burden of proof for Plaintiff.
3. The evidence in the depositions and declarations show there are genuine issues of material fact as to the existence of essential elements of each of the five FTCA tort claims.
4. Defendant is not entitled to immunity under Ohio Revised Code § 2744.03(A)(6). The Supreme Court of the United States has held since 1955 that the FTCA reference to the government being liable in tort if "under circumstances where the United States, *if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred*" does not allow state governmental immunity provisions as defenses.

28 U.S.C.A. § 1346(b)(1); *See Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955) and *Olson v. United States*, 546 U.S. 43 (2005).

5. Alternatively, even if Defendant fits within Ohio Revised Code § 2744.03(A)(6) immunity, the Agents here acted with malicious purpose, in bad faith, in a wanton manner, or with recklessness toward Plaintiff and thus negated any immunity under Ohio law. This is shown by the evidence developed in the earlier case, *Muñiz, et al. v. U.S. Border Patrol* (N.D. Ohio; 3:09-cv-2865), of intentional discrimination against and disparate impact on Hispanics. Also, a policing expert's report shows the effects on a law enforcement agency when [redacted] within the agency.

I. Introduction

Plaintiff Alfonso Vasquez-Palafox filed a Complaint in this Court alleging tort claims against the United States based on the actions of two Border Patrol Agents. Doc. 1. Mr. Palafox claims he was accosted on a street in Fremont, Ohio, and the Agents demanded information from him while holding him without his consent. Mr. Palafox therefore brings this Federal Tort Claims Act ("FTCA") action alleging that the Border Patrol Agents, and therefore the United States of America, committed the Ohio torts of false imprisonment, assault, deprivation of civil rights through ethnic intimidation, negligent infliction of emotional distress, and intentional infliction of emotional distress. Doc. 1, ¶¶ 1 – 2.

The United States attempts to characterize the incident in question as an isolated case that can only be analyzed without consideration of the incident's place in a larger pattern of behavior. Evidence developed in a related case gives the Court the opportunity to view this case within its proper context. Just as importantly, the evidence earlier developed provides the necessary link to show that the Border Patrol Agents' conduct attributable to the United States was done with malicious purpose, in bad faith, in a wanton manner, or with recklessness.

II. Factual Allegations

A. Standard Border Patrol Procedures

Border Patrol Agents on patrol are in uniform, carry a visible, holstered firearm, and also carry an intermediate force weapon. *Muniz v. U.S. Border Patrol*, (N.D. Ohio; 3:09-cv-2865), Doc. 164, ¶¶ 66 – 68.[1] Agent Ramiro Corona, in his deposition, stated that he was in uniform, armed, and had an adjustable steel baton during the incident here. Corona Dep. 22:21-22 and 23:10-16. Additionally, while he did not remember if the Border Patrol vehicle was equipped with a rifle he stated it would have been within sight of someone standing at the passenger window. Corona Dep. 22:23-24 and 23:1-5.

Border Patrol Agent in Charge Bammer stated that a consensual encounter between Border Patrol Agents and the public are initiated by greeting like "Hi, how are you doing today?" Bammer Dep. 208:11-16.[2]

B. Palafox Deposition Testimony[3]

Mr. Palafox was walking down a residential street in Fremont, Ohio, on November 3, 2009, on his way home with his son after picking up his son from school. Palafox Dep. 14:1-12, 21-24. Mr. Palafox described it as a warm day. Palafox Dep. 14:13-14. A Border Patrol vehicle passed them and then "turned around" and drove up alongside Plaintiff. Palafox Dep. 17:4–10. There were two Border Patrol Agents in the marked Border Patrol vehicle. Palafox Dep. 15:15-19; 18:17-20. The Border Patrol Agent sitting on the passenger side then, without any greeting,

[1] Answer by the Border Patrol admitting these facts. The allowed intermediate force weapons include taser, pepper spray, and collapsible steel baton. *Id.*

[2] Bammer Deposition is attached hereto. This is the Fed.R.Civ.P. 30(b)(6) deposition taken in *Muñiz* (N.D. Ohio; 3:09-cv-2865) of Border Patrol Agent in Charge Corey Bammer of the Sandusky Bay Station. The deposition is used here pursuant to Fed.R.Civ.P. 32.

[3] Palafox's deposition is attached to this filing.

asked Palafox if he knew the location of a certain street address. Palafox Dep. 17:22–24. Mr. Palafox told the Agent he did not know the location. Palafox Dep. 18:6-12.

Rather than driving away, or asking directions of a white woman who was standing outside her house nearby, the Border Patrol vehicle remained next to Mr. Palafox and the Agent started to question Mr. Palafox. Palafox Dep. 20:20 – 21:5. The driver of the Border Patrol vehicle, later identified as Agent Richardson, kept his hand on his weapon throughout the conversation. Palafox Dep. 28:15 – 29:4. Agent Corona spoke to Palafox "with his tone of voice, he was very intimidating." Palafox Dep. 29: 5-6.

The questions to Mr. Palafox were numerous. The passenger side Agent, later identified as Agent Corona, asked Mr. Palafox if he used any type of drugs. Palafox Dep. 21:19-20. After Mr. Palafox's denial, the Agent asked Mr. Palafox if he knew other Hispanics that worked in the fields. Palafox Dep. 21: 23 – 22:4. Mr. Palafox was asked if he knew "other people who sold drugs." Palafox Dep. 22:6-7. Mr. Palafox answered that he knew a white man who had sold drugs to his mother-in-law. Palafox Dep. 22:9-12. The Agent did not ask the drug seller's name or further questions about locating this person. The Agent then asked Palafox if he could have "business" with Mr. Palafox. Palafox Dep. 22:24 – 23:1. Mr. Palafox stated in his deposition that "I felt I had no option, so I gave him my telephone number and my address, but I didn't say anything about negotiating anything." Palafox Dep. 22:24 – 23:5.

Agent Corona asked Mr. Palafox where he worked and also if he knew "what state the other people had gone to that was working in the fields." Palafox Dep. 24:23-25. Mr. Palafox showed the Agent his immigration papers, although this was not in direct response to a question posed by the Agents. He actually initiated this because he was "nervous and scared and I just figured I better answer before they start asking." Palafox Dep. 25:13-15. Mr. Palafox did not

ask the Agents any questions because "[t]hey're officers. I couldn't ask them anything. If you were in my place, you would be nervous, too." Palafox Dep. 26:10-13.

Throughout the conversation Mr. Palafox "tried to leave, but there was one question after the other, and I mean I felt that if I refused to answer any of the questions or if I would have just tried to walk away or tried to run, I mean you see all this news on the television about, you know, things that can happen, so I just stayed." Palafox Dep. 29:9-14. When Palafox did try to walk away with his son Agent Corona said "[w]ait, wait, you know, let's talk a little bit more." Palafox Dep. 29:18-19. When asked by Border Patrol counsel how many times he tried to leave Palafox stated "from the moment that I saw the officer, I tried to leave." Palafox Dep. 29:23-24. When asked whether he told the Agents he "wanted to go," Palafox responded "I didn't feel I had the right for the same reason. I didn't know what the consequences were going to be and I didn't know if they were going to keep on interrogating me. I just literally felt held back." Palafox Dep. 30:1-4. The Agent told him not to "change my telephone number or move from where I lived." Palafox Dep. 32:23-25. Palafox's son was trying to pull him away and crying; the son also tried to run away. Palafox Dep. 20:17-19; 29:16-17; 19:15-17; 24:10. Mr. Palafox believes that once the Agent "saw that the lady outside her door wouldn't go back inside, they seemed to be in more of a hurry to leave." Palafox Dep. 36:21-23.

When questioned about the reasons that he believed he was targeted for being Hispanic, he gave a number of reasons. He stated that "if they really had a need to get to that address that they were asking for, . . . they could have just simply said, okay, well, go on, go on your way, I'll go on and look for somebody else who knows, but they didn't." Palafox Dep. 30:15-20. Palafox told Border Patrol counsel that when he had mentioned the white man who sold drugs the Agent disregarded that and continued to question him about where the Hispanics had gone. Palafox

Dep. 30:24 – 31:4. When Mr. Palafox started speaking in Spanish "that's when they came right at me" and "just kept asking and asking and asking more questions." Palafox Dep. 34:6-11. Palafox indicated another reason was "[p]erhaps because of my skin color, my hair." Palafox Dep. 33:13-14.

Mr. Palafox, in response to how long the questioning took, stated "I felt I couldn't leave. It seemed like a long time, my son was already crying, but perhaps 30 minutes or so." Palafox Dep. 24:9-11.

C. Deposition Testimony And Declaration Statements Of Border Patrol Agents Corona And Richardson[4]

Rather than repeat Border Patrol Agents' Corona's and Richardson's declarations of January 15, 2013, drafted more than three years after the incident in question, Plaintiff will highlight deposition statements of the Agents where they were questioned and gave a more lengthy description of the incident in question.

The two Sandusky Border Patrol Agents involved with the incident here were Agents Corona and Mathew Richardson. Richardson Dep. 9:23 – 10:22. Agent Richardson characterized the incident here as a "consensual encounter." Richardson Dep. 11:7. Both Agents stated that the reason for making contact with Palafox was to ask for directions. Corona Dep. 13:21-22; Richardson Dep. 13:9-10. Agent Corona believed the incident here lasted 7 to 10 minutes, Corona Dep. 23:22-23, while Agent Richardson stated it lasted "less than five minutes." Richardson Dep. 11:10-11.

[4] References in this section are from depositions of the two Sandusky Bay Station Border Patrol Agents. Agent Richardson's deposition was taken in the related case, *Muñiz, et al. v. U.S. Border Patrol, et al.* (N.D. Ohio; 3:09-cv-2865-JZ). Agent Corona's deposition was taken in this case on January 16, 2013. Richardson's deposition is attached to this filing. The Richardson deposition is used pursuant to Fed.R.Civ.P. 32.

The Agents were in the Fremont area investigating aliens and drug activity. Corona Dep. 15:6-10. One of the questions Corona directed to Palafox was where the Mexican farmworkers had gone after they left the immediate area. Corona Dep. 28: 17 – 29:10.

Richardson was asked in his deposition regarding Plaintiff "[d]id you observe that when you first saw him, that he looked Hispanic?" Richardson Dep. 13:15-16. Richardson stated "Uh-huh. You could tell. I mean, he looked Hispanic." Richardson Dep. 13:17-18. In contrast, he stated in his Declaration that he could not identify Plaintiff as Hispanic because he was "too far away" when they first noticed him. Doc. 18-1, p. 2, ¶5. Richardson stated he had never stopped a Canadian and asked him his nation of origin, Richardson Dep. 16:19-22, whereas if people he talked to had "an accent or something" he would ask "Hey, where are you from?" Richardson Dep. 16:19-22.

Agent Corona acknowledged in his deposition that he had a GPS system on his telephone, but stated that he did not use it at the time because he did not know how to use it. Corona Dep. 14:2-6. The Border Patrol vehicle was equipped with radio communication to dispatch enabling them to seek directions from their dispatcher, Corona Dep. 20:4-6, and there was a McDonalds restaurant nearby. Corona Dep. 15:2.

Corona stated he asked Palafox if the child with Palafox was Palafox's son. Corona asked because he had just "finished a case on child prostitution," although Corona acknowledged he did not see anything indicating Palafox posed any danger to the child. Corona Dep. 21:9-22. Corona also stated that Palafox responded to Corona's questioning that he, Palafox, knew of two people selling drugs. Corona Dep. 31:1 – 32:2. But Corona then said he did not try to get more information about the two people selling drugs because "I didn't really care at the time." Corona Dep. 33:10-11. Corona acknowledged that during his conversation with Palafox that he never

told Palafox he could walk away or that Palafox did not have to talk to Corona. Corona Dep. 40:16-22. During the conversation Palafox also told Corona that Palafox had full custody of his son. Corona Dep. 52:1-2. Corona also asked Palafox how long Palafox had lived in the area. Corona Dep. 27:4.

While Corona admitted writing down Palafox's name and telephone number, Corona Dep. 9:1-6, with the intent to "call him back, " Corona Dep. 20:20-21 and 21:1-2, he never attempted to call Palafox after this incident. Corona Dep. 20:17-18. No other written documentation of the incident was made, Corona Dep. 20:10-16, nor was dispatch informed of the incident. Corona Dep. 20:7-9.

Agent Corona stated the incident here was neither a "prolonged encounter" nor a "stop." Corona Dep. 53:19-24. He believes a prolonged encounter is more than 45 minutes, Corona Dep. 54:1-5, and even a prolonged consensual encounter of 45 minutes would not require an I-44 form to be filled out, Corona Dep. 54:20-23, whereas a prolonged stop would require an I-44 to be filled out. Corona Dep. 54:24 – 55:2. Agent Corona was trained on whether or not he needed a reasonable suspicion to make a stop. Corona Dep. 55:20-24.

D. Factual Evidence Of Malice, Bad Faith, Wanton Behavior, And Recklessness By The U.S. Border Patrol Agents At The Sandusky Bay Station

Defendant argues in its Motion that it is immune under applicable Ohio law unless the Plaintiff shows that the Border Patrol Agents acted with malicious purpose, in bad faith, in a wanton manner, or with recklessness. While Plaintiff does not agree with Defendant's legal position regarding immunity, see section III.D.1 *infra*, Plaintiff presents the following facts to show such motivation and action by the Defendant's Agents.

1. Use Of The Term [redacted] By Sandusky Bay Station Border Patrol Agents

Testimony by Sandusky Border Patrol Agents acknowledged the universal use of the term [redacted] by Border Patrol Agents. Bammer Dep. 68: 1-19. Agents defended its ongoing use as "part of our culture," York Dep.[5] 71: 5-8, and the Border Patrol Agent in Charge of the Sandusky Bay Station admitted that he has never "reprimanded any of the agents he supervises for using the term." Bammer Dep. 79: 14-25 and 80: 1-8.

Agent Richardson stated he knew that the term [redacted] originated from the term [redacted] and that [redacted] were people who had crossed the Rio Grande River from Mexico to the United States. Richardson Dep. 26:5-14. Richardson also admitted he had "probably" used the term in reference to people, had never been disciplined for using the term, and did not know of a Border Patrol Agent ever being disciplined for its use. Richardson Dep. 25:8 – 26:3.

2. 1956 Border Patrol Order Instructing Border Patrol Not To Use The Term Wetback

In 1954 the United States Border Patrol conducted an operation named "Operation Wetback." Additional Border Patrol Agents were brought into Texas from Florida and California. The operation "created a special task force that used light planes, jeeps, and the help of employers to combat the "wetback problem" by apprehending over one million undocumented Mexicans and sending them back to Mexico." Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. Davis L. Rev. 503, 521 (1998).

But in 1956 the chief Border Patrol enforcement officer of the Southwest Region instructed officers that "the word 'wetback' . . . should be deleted from the vocabulary of all Immigration officers." If a criminal record existed the person should be referred to as a 'criminal

[5] York's deposition is attached to this filing. The York deposition, also taken in the *Muñiz* case, is used pursuant to Fed.R.Civ.P. 32.

alien' and if not the person should be called a 'deportable alien.' National officials agreed, but replaced 'deportable alien' with the term 'border violator.'[6]

3. Statistical Evidence Of Disparate Impact Of Hispanics By The Sandusky Bay Station Border Patrol Agents

Kara Joyner is the head of the Bowling Green State University Center for Family and Demographic Research, receiving her Ph.D. in Sociology from the University of Chicago with special fields in demography and advanced statistics. Dr. Joyner analyzed the Apprehension Log of the Sandusky Bay Station of the Border Patrol for a period including the incident here in the related case, *Muñiz, et al. v. U.S. Border Patrol* (N.D. Ohio; 3:09-cv-2865).

Dr. Joyner's Executive Summary of her twenty-nine page analysis of Border Patrol apprehension statistics states:

> Apprehension ratios were calculated to assess the extent to which Hispanics and Mexicans were over-represented in the Sandusky Bay Station Log and other logs (i.e., U.S., the three borders, and the eight sectors within the Northern Border) in comparison to what we would expect on the basis of Hispanic and Mexican representation in the populations of areas corresponding to the logs. Results suggest that Hispanics and Mexicans are over-represented in all logs, including the logs for the United States as a whole; however, they are especially overrepresented in the Sandusky Log. For all three fiscal years, the Sandusky Bay log is documented to have significantly higher apprehension ratios than the DHS log as a whole. Although the disparity between Sandusky Bay Log and the national log narrowed over the course of the three years, arrests in some arrest landmarks (i.e., rest of Ohio undesignated counties) continue to involve only Hispanics.

Additionally, she stated that "this station continued to yield higher percentages of Mexicans than [Border Patrol] sectors with much higher Hispanic representation (i.e., Blaine, Buffalo, Houlton, and Swanton). Joyner Attachment, p. 5. The overrepresentation of Mexican apprehensions by the Sandusky Bay Station when compared to the undocumented Mexican population in Ohio was

[6] Copies of certified documents obtained from the United States' National Archives and Records Administration are attached to this filing. *See also*, Hernandez, *Migra! A History of the U.S. Border Patrol* (University of California Press, 2010), pp. 171 – 195.

257% in 2009, 180% in 2010, and 158% in 2011. Canadians represented .2% of the total apprehensions, a small percentage given that the border being patrolled is with Canada.

Finally, Dr. Joyner states "[o]nce arrest method and time period are held constant, logs for some arrest landmarks appear quite egregious in terms of Hispanic and Mexican representation." Joyner attachment, p. 14.

The apprehension statistics of the Sandusky Bay Station show a statistically significant overrepresentation of apprehended Mexicans and Hispanics when compared to both their representation in the local population and in the Ohio unauthorized alien population. The Patrol's own statistics show a discriminatory effect against Hispanics.

4. Evidence Regarding The Effect On Law Enforcement Officers' Behavior By Their Use Of [redacted]

Former Police Chief Blaricom, an expert on police practices, stated in his expert report in *Muñiz* that, after reviewing listed documents, "it is my considered professional opinion that the USBP displays an unhealthy culture of bias against persons of Hispanic descent." Blaricom Attachment, p. 5. He states that "[w]hat law enforcement officers call classes of people reflects what they really think of them and history has established that derogatory terms facilitate biased treatment by serving to dehumanize the recipients/victims." *Id*. Blaricom states that the use of the term [redacted] derived from [redacted] and is synonymous with Hispanic aliens. The term is tolerated and no action is taken to inhibit or forbid its use within the leadership of the Sandusky Bay Station. *Id.* at 5-6. He concludes that "if the supervisors use and tolerate derogatory terms to describe Hispanic people, such a blatantly adverse attitude will be readily adopted by their subordinates and hardly serve to deter them from practicing "biased policing" and/or inspire them to provide for the "equal treatment" of that specifically identified class. *Id*. at 6.

III. Legal Arguments

A. Standard for Summary Judgment

Summary judgment is appropriate where the moving party demonstrates that there is no genuine issue of material fact as to the existence of an essential element of the nonmoving party's case on which the nonmoving party would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Of course, [the moving party] always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id*. at 323 (cites omitted).

A fact is "material" for purposes of a motion for summary judgment where proof of that fact "would have [the] effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984) (quoting Black's Law Dictionary 881 (6th ed. 1979)) (citations omitted). A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248 (1986).

Conversely, where a reasonable jury could not find for the nonmoving party, there is no genuine issue of material fact for trial. *Feliciano v. City of Cleveland*, 988 F.2d 649, 654 (6th Cir. 1993). The court must examine the evidence and draw all reasonable inferences in favor of the non-moving party. *Bender v. Southland Corp*., 749 F.2d 1205, 1210-1211 (6th Cir. 1984).

If this burden is met by the moving party, the non-moving party's failure to make a showing that is "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," will mandate the entry of

summary judgment. *Celotex*, 477 U.S. at 322-323. The non-moving party may not rest upon the mere allegations or denials of his pleadings, but the response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts which demonstrate that there is a genuine issue for trial. Fed.R.Civ.P. 56(e). The rule requires the non-moving party to introduce evidence of evidentiary quality demonstrating the existence of a material fact. *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir. 1997).

B. Applicable Law

The Federal Tort Claims Act acts as a limited waiver of federal sovereign immunity and provides a tort remedy for persons injured by wrongful acts or omissions of the federal government. 28 U.S.C. § 1346(b) grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and "render[ed]" itself liable. *Richards v. United States*, 369 U.S. 1, 6 (1962). This category includes claims that are:

> "against the United States, for money damages, ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, *if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred*." 28 U.S.C. § 1346(b)(1).

The FTCA thus looks to the law of the state where the alleged tort occurred for the elements of tort actions. The incident in question here took place solely within Ohio and Ohio tort law therefore establishes the elements for the different torts alleged in Plaintiff's Complaint.

C. There Are Genuine Issues Of Material Fact Regarding Plaintiff's Claims

Plaintiff does not agree with Defendant that it must show that the Border Patrol Agents here needed to act with malicious purpose, in bad faith, in a wanton manner, or with recklessness. See argument at III.D. 1. infra. Plaintiff, however, does believe that the evidence

shows that the Border Patrol Agents acted with malicious purpose, in bad faith, in a wanton manner, or with recklessness toward Plaintiff and therefore includes that argument as to each of the tort claims.

. **1. The Border Patrol Agents Here Committed All The Elements Necessary To Commit The Tort Of Assault**

The elements of the tort of assault under Ohio law are: (1) a willful act; (2) a threat or attempt to harm or touch another offensively with a definitive act by someone who has the apparent ability to commit the harm or offensive touching; (3) reasonable fear of such contact as a result of the threat or attempt; and, (4) the actor knew with substantial certainty that his act would cause harmful or offensive touching. *Stokes v. Meimaris*, 111 Ohio App.3d 176, 186-87 (Ct. App. 1996); *Smith v. John Deere Co*., 83 Ohio App.3d 398, 406 (Ct App.1993); Assault – Civil Aspects § 2, Ohio Jurisprudence 3rd.

There is evidence in the record here of all the elements of assault. The Agents here turned around to approach Palafox for "directions," even though they could have obtained directions beforehand especially given their trip to Fremont was part of an investigation, had GPS available, could have sought assistance from dispatch, or gone to a nearby McDonalds. Additionally, the approach for "directions" was certainly unconventional – most persons doing such would have simply stopped on the street and asked for directions across the street.

After Palafox stated he could not assist the Agents with directions Agent Corona continued to ask Palafox multiple questions in an intimidating tone. Throughout the conversation Agent Richardson had his hand on his gun and this was visible to Palafox. This was a willful act. Palafox stated in his deposition that he was intimidated and fearful of the Agents and what might happen if he attempted to end the conversation. Plaintiff asserts that

Agent Richardson purposely kept his hand on his gun to intimidate and frighten Palafox in order to ensure that Palafox would answer Corona's questions.

The Border Patrol culture of using [redacted] toward Hispanics also condones treatment of Hispanics that would not be allowed against upper middle class white people. Additionally, Plaintiff believes that if the Agents had approached a white lawyer on the street for "directions" they would not have used the tactics used against Plaintiff – hand on gun, intimidating tone, multiple questions unrelated to directions sought, etc.

These acts by the Agents – the approach, the tone taken, the hand on the gun, the "wait, wait" statements when Palafox tried to walk away - were done with malicious purpose, in bad faith, in a wanton manner, or with recklessness. The Agents were attempting to intimidate and scare Palafox – and they succeeded. Whether they would have actually harmed Palafox is not at issue, only their apparent ability to do so.

2. The Border Patrol Agents Here Committed The Tort Of Ethnic Intimidation

Ohio law establishes a civil remedy for ethnic intimidation. ORC § 2307.70(A). Plaintiff must show he suffered an injury or loss to person or property as a result of an act committed in violation of, among others, ORC § 2927.12. A person can violate § 2927.12, by committing certain crimes with the motivation for their commission being "by reason of the race, color, religion, or national origin of another person or group of persons." ORC § 2927.12(a). Those crimes include aggravated menacing and menacing, ORC §§ 2903.21 and 2903.22.

Aggravated menacing is defined as: ". . . knowingly caus[ing] another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family." Ohio Rev. Code Ann. § 2903.21. Menacing is defined as engaging in a pattern of conduct that will " . . . knowingly

cause another person to believe that the offender will cause physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family.." Ohio Rev. Code Ann. § 2903.22.

The Agents here engaged in a pattern of conduct that caused Palafox to believe that the Agents would cause Palafox or his son to be physically harmed. The approach by the Agents, the tone, the hand on the gun, and the unrelenting questioning caused Palafox to believe this. And there is ample evidence to show that this conduct toward Palafox was as a result of race, color, or national origin. The Border Patrol's apparent unwillingness to reign in its own use of racial or ethnic slurs sends messages to its Agents as to what is acceptable behavior towards Hispanics – the "less than" or "subhuman" message in allowing racial or ethnic slurs sets up a culture that allows intimidation, profiling, and implied threats of physical harm.

3. The Border Patrol Agents Committed All The Elements Of The Ohio Tort Of False Imprisonment

The elements of the Ohio tort of false imprisonment are (1) intentional confinement; (2) without lawful justification or privilege; (3) without consent; (4) within a limited area; and, (5) for an appreciable time, however short. *Bennett v. Ohio Dept. of Rehab & Corr*., 60 Ohio St.3d 107, 109 (1991); *Feliciano v. Kreiger*, 50 Ohio St.2d 69, 71 (1977) quoting 1 Harper & James, The Law of Torts (1956) 226, Section 3.7.

Palafox attempted to leave this incident on numerous occasions, but was not allowed to because he was directed by one Agent to "wait, wait" while the other Agent had his hand on his gun. The Agents acted deliberately and intentionally to hold Mr. Palafox in close proximity to their vehicle, without his consent, and with no legal justification. While the Agents described the time frame as somewhere between less than 5 and 10 minutes, Palafox stated it was "perhaps 30

minutes or so." Given the numerous questions and the amount of information provided it is obvious that Palafox's estimate of the time frame is more accurate.

As noted above, these acts by the Agents – the approach, the tone taken, the hand on the gun, the "wait, wait" statements when Palafox tried to walk away - were done with malicious purpose, in bad faith, in a wanton manner, or with recklessness. The Agents were attempting to intimidate and scare Palafox – and they succeeded. Whether they would have actually harmed Palafox if he had attempted to leave is not at issue, only their apparent ability to do so.

4. The Border Patrol Agents Committed All The Elements Of The Ohio Tort Of Negligent Infliction of Emotional Distress

The elements of the Ohio tort of negligent infliction of emotional distress are (1) actual threat of physical harm to the person; (2) serious emotional distress; and, (3) emotional distress must be reasonably foreseeable. Serious emotional distress is found when a reasonable person would be unable to cope adequately with the mental distress engendered by the circumstances of the case. There is no need for contemporaneous physical injury. *Heiner v. Moretuzzo*, 73 Ohio St.3d 80, 87 (1995); *High v. Howard*, 64 Ohio St.3d 82, 85-86 (1992); *Schultz v.Barberton Glass Co*., 4 Ohio St.3d 131, 136 (1983); and, *Paugh v. Hanks*, 6 Ohio St.3d 72 (1983).

The hand on the gun was an actual threat of physical harm. Mr. Palafox was sufficiently traumatized to decide he needed to come forward and seek to stop future incidents for himself and others. He also remembers many details of the incident and testified how scared and intimidated he was during the incident. Finally, Palafox believes that the Agents well knew that his distress at being threatened by the hand on the gun was forseeable – in fact, that the Agent was counting on Palafox being scared and intimidated. This intent to scare or intimidate Palafox was at least negligent. Palafox was unable to cope adequately with this distress because he

wanted to end the incident as soon as the Agents approached, but was unable to because of his fear.

As noted, these acts by the Agents – the approach, the tone taken, the hand on the gun, the "wait, wait" statements when Palafox tried to walk away - were done with malicious purpose, in bad faith, in a wanton manner, or with recklessness. The Agents were attempting to intimidate and scare Palafox – and they succeeded.

5. The Border Patrol Agents Committed All The Elements Of The Ohio Tort Of Intentional Infliction of Emotional Distress

The elements of the Ohio tort of intentional infliction of emotional distress are (1) the tortfeasor intended to cause or know or should have known that their behavior would cause emotional distress; (2) the conduct is extreme and outrageous as to go beyond all possible bounds of decency and can be considered utterly intolerable in a civilized community; (3) the actions were the proximate cause of the plaintiff's injury; and, (4) the plaintiff suffered serious mental anguish of a nature that no reasonable person could be expected to endure. *Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1110 (6th Cir. 2008); *Shugart v. Ocwen Loan Servicing, LLC*, 747 F. Supp.2d 938, 944-45 (S.D. Ohio 2010); *Dunn v. Medina General Hosp.* 917 F. Supp. 1185, 1194 (N.D. Ohio 1996); *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 374 (1983)(requires the Defendant to have intentionally or recklessly cause emotional distress, rather than using the phrase "knew or should have known" that is used by the above federal courts); Torts, § 13, Ohio Jurisprudence, Third Edition.

The hand on the gun was an actual threat of physical harm and Agent Richardson knew or should have known that this conduct would cause Mr. Palafox emotional distress. Palafox believes the conduct here was extreme and outrageous and that the Agents would not have engaged in the conduct in an equally innocent circumstance involving whites. Mr. Palafox

believes that no reasonable person should have to be threatened and intimidated by law enforcement officers asking for "directions" and then questioned at length about matters unrelated to the initial inquiry.

As noted, these acts by the Agents – the approach, the tone taken, the hand on the gun, the "wait, wait" statements when Palafox tried to walk away - were done with malicious purpose, in bad faith, in a wanton manner, or with recklessness. The Agents were attempting to intimidate and scare Palafox – and they succeeded.

D. The Defendant United States Is Not Immune From Suit

1. The United States Is Not Immune From Suit Under Ohio Revised Code § 2744.03(A)(6)

Defendant argues it is immune from suit under a section of Ohio law that provides immunity for employees of Ohio political subdivisions. But the Federal Tort Claims Act waives sovereign immunity under circumstances where the United States "***if a private person****, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."* 28 U.S.C. § 1346(b)(1). By the plain meaning of the FTCA's waiver of immunity the Defendant here must be treated as would a private person under Ohio law, not as an employee of a political subdivision.

Most importantly, the Supreme Court of the United States has rejected the Defendant's reasoning since 1955. *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955). The Supreme Court there rejected the federal government's argument that there was "no liability for negligent performance of 'uniquely governmental functions.' " The court said to look to the state-law liability of private entities, not to that of public entities, when assessing potential tort liability under the FTCA"in the performance of activities which private persons do not perform." The

Supreme Court has continued its adherence to this principle. *Olson v. United States*, 546 U.S. 43 (2005).

Applying *Olson*, the Ninth Circuit held that "*Olson* requires us to examine the law regarding the liability of a private person for false arrest, assault and battery, and intentional infliction of emotional distress." *Tekle v. United States*, 511 F.3d 839, 854 (9th Cir. 2006). In *Tekle* the officers involved were federal law enforcement officers who had gone to execute search and arrest warrants. The Ninth Circuit, interpreting *Olson's* reversal of previous Ninth Circuit precedent, stated the analysis of the Federal Tort Claims Act causes of action against the United States must be viewed as if a private individual, not officers of California political subdivisions, took the actions.

Given longstanding Supreme Court precedents the United States here is plainly wrong in arguing that the FTCA claims must be view as if the Border Patrol Agents were employees of Ohio political subdivisions and thus entitled to immunity under ORC § 2744.

Alternatively, the cases cited by Defendant are distinguishable. While the district court in *Ellerbe v. U.S.,* 2011 WL 4361616 (N.D. Ohio April 21, 2011) held that the Ohio Revised Code precluded Plaintiff's action, the Sixth Circuit in upholding the grant of summary judgment for the United States did so on other grounds and not under the Ohio immunity provision. *Ellerbe v. U.S., et al.* 2012 WL 006111431643 (Sixth Circuit September 13, 2012).

The Defendant also cites *Priah v. United States*, 590 F.Supp.2d 920, 943 (N.D. 2008), but that case wrongly relied on *Ewolski v. City of Brunswick*, 287 F.3d 492, 517 (6th Cir. 2002). *Ewolski* actually involved the actions of police officers in a § 1983 action so they were protected by ORC § 2744. The *Priah* court also relied primarily on the discretionary function exemption to the FTCA, not ORC § 2744.

The *Howard* decision cited by Defendant does uphold dismissal of FTCA claims under ORC § 2744, stating without any citation that it is analogizing the federal jailers to Ohio jailers. The *Howard* court provides no explanation as to how this is treating the United States as a "private person" as required by the plain language of the FTCA, rather than a public employee.

2. Even If Immune Under Ohio Revised Code § 2744.03(A)(6), The Evidence Shows That Border Patrol Agents Act Towards Hispanics With Malicious Purpose, In Bad Faith, In A Wanton Manner, Or With Recklessness

Discriminatory intent is shown, again, by the Sandusky Bay Station's Agents when communicating through emails and through their deposition testimony. This discriminatory intent is shown by the use [redacted] by Sandusky Bay Station Border Patrol Agents in written and oral communications. The use of the term is defined in Wikipedia as:

[redacted]

The Civil Rights Division of the United States Department of Justice considers [redacted] as derogatory racial or ethnic slurs. In its Findings Letter to the Maricopa County Arizona Attorney on December 15, 2011, the Civil Rights Division, in a section titled "Direct Evidence of Discriminatory Bias":

> In MCSO's jails, detention officers direct racial slurs at Latino inmates. Detention officers also insult or ignore Latino inmates when they attempt to communicate in Spanish. A detention officer confirmed that officers on her shift frequently tell Latino LEP inmates to speak in English. Other detention officers observed similar hostility:

[7] http://en.wikipedia.org/wiki/Wetback_(slur)

> detention officers learn curse words in Spanish, enabling them to swear at Latino inmates, and report hearing staff using slurs when referring to Latino persons. **Our investigation also found that MCSO detention officers call Latinos "wetbacks,"** "Mexican bitches," "fucking Mexicans," and "stupid Mexicans" when either talking among themselves or addressing Latino inmates.[8] (emphasis added)

Additionally, in employment law litigation calling persons a [redacted] is considered a derogatory racial slur. *See, e.g., Cerros v. Steel Technologies, Inc.*, 398 F.3d 944 (7th Cir. 2005); *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239 (5th Cir. 1993); *E.E.O.C. v. Ceisel Masonry, Inc.*, 594 F.Supp.2d 1018 (N.D. Ill. 2009); *E.E.O.C. v. Rotary Corp.*, 297 F.Supp.2d 643 (N.D.N.Y. 2003); *Escalante v. IBP, Inc.*, 199 F.Supp.2d 1093 (D. Kansas 2002); *LaRocca v. Precision Motorcars, Inc.*, 45 F.Supp.2d 762 (D. Neb. 1999).[9] Apparently only in the Border Patrol world are persons allowed to use [redacted] on the job.

Even if Defendant United States is entitled to protection under ORC § 2744 the "culture" of the Border Patrol allowing referring to Hispanics or Mexicans as [redacted] coupled with evidence demonstrating the statistically significant overrepresentation of Mexicans and Hispanics apprehended by the Sandusky Bay Station on the Northern Border, provides the necessary ground for finding that Border Patrol Agents act with malicious purpose, in bad faith, in a wanton manner, or with recklessness. The "culture" of the Border Patrol creates racial animus against Hispanics and Mexicans and gives the Agents permission to act in ways toward them that the Agents would not consider in acting toward whites.

[8] http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf

[9] The number of cases that find "wetback" or its abbreviation "wet" as derogatory racial or ethnic slurs are too many to document here. A brief search in Westlaw will easily identify over one hundred. That is not to say that the use of the term one time has been held to violate equal employment legal standards, only to say that it is universally recognized as a derogatory racial or ethnic slur in employment discrimination litigation.

IV. Conclusion

Defendant United States' Motion for Summary Judgment should be denied since it is not immune and there are genuine issues of material fact on all of the tort claims brought under the Federal Tort Claims Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(f) the undersigned declares under penalty of perjury that the foregoing Plaintiff's Memorandum in Opposition is within the limitations pursuant to the Judge's Order on February 15, 2013 (Doc. 22).

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2013, a copy of the foregoing Plaintiff's Memorandum in Opposition was filed electronically under Seal. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. An electronic version of the filing will be sent by e-mail this same date to counsel for the parties.

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