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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MOHANAD ELSHIEKY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 2:20-CV-00064-SAB

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Defendant United States of America, through counsel, William D. Hyslop, United States Attorney, and John T. Drake and Derek Taylor, Assistant United States Attorneys, submits the following reply in support of its Motion to Dismiss.

I. INTRODUCTION

The instant motion is not merely a reprise of the government's unsuccessful motion to dismiss in the *Sosa Segura* case. While certain discrete issues have been

raised and preserved for a potential appeal, there are *new* issues and *new* authority that mandate dismissal. Plaintiff has virtually ignored these new aspects of the motion.

Plaintiff has no answer to *Liranzo v. United States*, 690 F.3d 78 (2d Cir. 2012), which counsels that the Border Patrol agents' alleged conduct must be compared to that of private citizens acting "entirely in [a] private capacity." When that comparison is applied, there is no liability under the WLAD (and, by extension, no jurisdiction). Plaintiff similarly fails to overcome the key factual distinction between this case and *Sosa Segura*: that Plaintiff boarded his bus and completed his trip after speaking with the agents. Plaintiff thus fails to state a "full enjoyment" claim on the facts alleged.

II. REPLY ARGUMENT

A. The proper "private person" comparison under the FTCA is a private citizen acting in a purely private capacity.

Whether the Court has jurisdiction over Plaintiff's WLAD claim hinges on whether a "private person" would be liable for the acts attributed to the Border Patrol agents. 28 U.S.C. §§ 1346(b), 2674. The proper "private person" comparison is to a private citizen acting "*entirely in [a] private capacity*." *Liranzo v. United States*, 690 F.3d 78, 94-95 (2d Cir. 2012) (emphasis added). *Liranzo* forecloses any comparison to a security guard, because a security guard would necessarily not be acting "entirely in a private capacity."

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1. There is no basis for distinguishing *Liranzo* on state law grounds.

Plaintiff attempts to sidestep *Liranzo* on the ground that the claims in that case arose under New York law rather than Washington law. ECF No. 6 at 12-13. That argument is not persuasive. *Liranzo* does not turn on the vagaries of New York law. The case analyzes the private analogue requirement in universal terms, focusing on its history and purpose and how it has been applied by federal courts across the country. *Liranzo*, 690 F.3d at 86-97. The fact that the claims arose under New York law made little difference to the court's holding—as evidenced by the fact that the court simply *assumed* that New York law applied. *Liranzo*, 690 F.3d at 95 n. 17 ("[W]e assume New York law applies because the initial arrest and detention occurred in New York. We express no opinion as to whether Louisiana law might apply to some portion of Liranzo's claims based on the time he was confined in Louisiana.").

Liranzo is directly on point, and its reasoning is highly persuasive. It is also fully consistent with *United States v. Olson*, 546 U.S. 43, 46-47 (2005), and other Supreme Court cases addressing the private analogue requirement. The Court should follow the Second Circuit's approach and analyze the Border Patrol agents' alleged[1]

[1] Plaintiff claims that Defendant "does not dispute" allegations that the Border Patrol agents "acted based on discriminatory and retaliatory reasons explicitly prohibited by

conduct as if they were private parties acting "entirely in a private capacity." *Liranzo*, 690 F.3d at 94-95. When that analogy is applied, there is no liability under the WLAD—and, by extension, no jurisdiction under the FTCA.

2. A security guard would not be personally liable under the WLAD.

Plaintiff attempts to resurrect the security guard analogy by arguing that a security guard could be personally liable under the WLAD. ECF No. 6 at 12. The only support Plaintiff offers for that claim is a "*cf.*" (compare) citation to *State v. Arlene's Flowers*, 193 Wn.2d 469 (2019). But *Arlene's Flowers* does not support Plaintiff's argument. The discussion of personal liability in that case focused on a claim asserted by the Washington Attorney General under an entirely different statute, the Consumer Protection Act (CPA), which allows *corporate officers* of a business to be held personally liable if they personally participate in wrongful conduct that violates the statute. *Arlene's Flowers*, 193 Wn.2d at 534-535 (citing *State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 322 (1976) and *Grayson v. Nordic Constr. Co.*, 92 Wash.2d 548, 553-54 (1979)).

No CPA claim has been asserted in this case. And even if the CPA was somehow implicated, a security guard would certainly not qualify as a corporate

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law." ECF No. 6 at 13. To be sure, those and many other allegations are disputed. For purposes of this Rule 12 motion, however, the allegations are accepted as true.

officer who could be personally liable. The Court should disregard this misguided argument.

3. The security guard analogy fails because it supplies a missing connection between the Border Patrol agents and the Intermodal Center.

In its opening brief, Defendant demonstrated that the security guard analogy improperly assumes a connection—namely an employment or agency relationship—between the Border Patrol agents and the Intermodal Center. ECF No. 4 at 9-10.

The thrust of Plaintiff's response is that the absence of a connection between the agents and the Intermodal Center is "irrelevant." ECF No. 6 at 18. But Plaintiff is mistaken. What Plaintiff fails to understand is that the WLAD is an exercise of the State of Washington's *police power*. *See* RCW 49.60.010 (WLAD "is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state"). The State can exercise that power over *businesses that serve the public* because they are engaged in commerce and hold themselves out as being open to everyone. *Evergreen Sch. Dist. No. 114 v. Wash. State Human Rights Comm'n*, 39 Wn. App. 763, 775 (1985); *Patrice v. Murphy*, 43 F. Supp. 2d 1156, 1162 (W.D. Wash. 1999).

Plaintiff's argument extends the statute far beyond that realm. If Plaintiff's argument were accepted, anyone who enters a place of public accommodation would be subject to the WLAD simply by virtue of having walked through the door. Acts of discrimination between one private citizen and another would be outlawed. Any

customer who made another customer feel "not welcomed, accepted, solicited, or desired," RCW 49.60.040(14), could be hauled into court and sued for damages, attorney's fees and costs.

Respectfully, Plaintiff's position is completely lacking in credibility. There is not one iota of evidence that the Washington Legislature intended to outlaw *private discrimination* between *private citizens* who have no connection to a place of public accommodation. As an exercise of police power, the statute only applies to places of public accommodation and those who they employ.

Far from being "irrelevant," a connection between the Border Patrol agents and the Intermodal Center is central to establishing liability. Comparing the agents to security guards artificially supplies that connection when there is no factual basis for doing so, and also contravenes the rule that the agents must be analogized to private citizens acting "entirely in [a] private capacity." *Liranzo*, 690 F.3d at 94-95.

B. Plaintiff fails to state a claim for denial of the right to "full enjoyment" of a place of public accommodation because he accessed and made full use of the Intermodal Center's services.

The plaintiff in *Sosa Segura* argued that he was denied "full enjoyment" of the Intermodal Center because he was transported away from the facility and ***missed his connecting bus***. The fact that the plaintiff missed his bus was the centerpiece of his

liability argument—a point he emphasized repeatedly in opposing the government's motion to dismiss. ECF No. 8 at 1, 9, 13, 18.[2]

This Court found the missed bus argument persuasive. At the conclusion of the motion hearing, the Court declined to dismiss the WLAD claim because, on the facts alleged in the complaint, the plaintiff was "prevented . . . from using a bus ticket that he purchased to board the bus and take the trip that he had planned." Drake Decl., ECF No. 5, Ex. A at 38.

The Plaintiff in this case, who was *not* transported away from the Intermodal Center and did *not* miss his connecting bus, disavows the significance of the missed bus trip in *Sosa Segura*. Despite being represented by the same three law firms and four of the same attorneys, Plaintiff now insists that the right to "full enjoyment" is not about access to goods and services, but focuses on the more ephemeral experience of being made to feel "not welcome, accepted, desired or solicited." ECF No. 6 at 14-16.

The fact that Plaintiff is backing away from the argument that carried the day in *Sosa Segura* speaks volumes. As the parties and the Court recognized in *Sosa Segura*, the right to "full enjoyment" is a right of *equal access* to the goods or services that a

[2] Sosa Segura v. United States, Case No. 2:19-CV-00219-SAB.

place of public accommodation provides. It does not extend to mere "mistreatment" as Plaintiff contends.[3]

1. "Full enjoyment" is a right of equal access to the goods or services that a place of public accommodation provides.

The right to "full enjoyment" is a right of equal access to the goods or services that a place of public accommodation provides. Contrary to Plaintiff's assertions, no Washington court has ever interpreted "full enjoyment" to more broadly prohibit any "mistreatment" that makes a person feel not welcome, accepted, desired or solicited. Indeed, the two Washington cases on which Plaintiff relies, *Evergreen School District* and *Floeting v. Group Health*, expressly foreclose that interpretation.

The plaintiff in *Evergreen School District* was a middle school student whose teacher made a racially offensive statement while teaching a lesson. *Evergreen Sch. Dist. No. 114 v. Wash. State Human Rights Comm'n*, 39 Wn. App. 763, 764 (1985). The student filed a claim with the Washington Human Rights Commission (HRC),

[3] Plaintiff's suggestion that Defendant is hoping to "undo the past 70 years of progress, returning to a time when society excused discriminatory treatment on segregated buses," ECF No. 6 at 15, is offensive. Defendant is simply making a legal argument about how an opaque provision of the WLAD should be interpreted. To suggest that Defendant is advocating for a return to pre-Civil Rights era bus segregation is disingenuous and strains the bounds of proper advocacy.

which found that the teacher had violated the WLAD and awarded the student $1,500 in damages. *Id.* at 768-70.

In defending the award on appeal, the HRC made the same argument that Plaintiff advances here: that the student was denied the "full enjoyment" of a place of public accommodation because she was made to feel "unwelcome or unaccepted." *Id.* at 770. The court rejected that argument, holding that being made to feel unwelcome or unaccepted, standing alone, is not actionable. *Id.* The court emphasized that the right to "full enjoyment" is, at bottom, a right of *equal access—i.e.*, the right to use places of public accommodation "on equal footing with all others." *Id.* at 777. In light of the statute's focus on equal access, the court explained, actions that merely cause a person to feel unwelcome or unaccepted, without limiting his or her access to the goods or services that the place of public accommodation provides, does not state a claim for relief. *Id.* at 774-77.

Floeting v. Group Health likewise focuses on equal access as the hallmark of "full enjoyment." Contrary to Plaintiff's suggestion that the case did not involve a deprivation of services, ECF No. 6 at 17-18, the plaintiff expressly alleged that he received "substandard" medical treatment as a result of being sexually harassed. *Floeting v. Grp. Health Coop.*, 192 Wn.2d 848, 851, 859 (2019). The Court held that the defendant's substandard medical treatment violated the "fundamental object" of the public accommodation statute, which is "to vindicate the deprivation of personal

dignity that surely accompanies *denials of equal access* to public establishments." *Id.* at 855 (emphasis added) (quotation omitted).

While not cited by Plaintiff in support of his expanded reading of the statute, *Arlene's Flowers* provides further confirmation that "full enjoyment" is a right of equal access. *Arlene's Flowers* involved claims of sexual orientation discrimination by a flower shop that refused to sell flowers to a same-sex couple for their wedding. 193 Wn.2d 469, 483-87 (2019). The case pitted the couple's right to "full enjoyment" of the flower shop (a place of public accommodation) against the owner's religious beliefs. The key issue was a constitutional question: whether the State's interest in prohibiting discrimination was compelling enough to restrict on the owner's right to free exercise of religion. *Id.* at 518-32. The Court sided with the couple, holding that the State did have a sufficiently compelling interest, which the Court characterized as "*ensuring equal access to public accommodations*." *Id.* at 523 (emphasis added); *see also id.* at 529-30 (collecting cases holding that state public accommodation laws are a legitimate exercise of a state's interest in "ensuring full and equal access" to places of public accommodation).

These cases foreclose Plaintiff's novel interpretation of "full enjoyment." The bottom line is that Plaintiff was able to board his connecting bus and make full use of the services that the Intermodal Center provides. Plaintiff's allegations of being made to feel "not welcome, accepted, desired, or solicited," without an infringement of his

right of equal access to the services the Intermodal Center provides, do not state a claim on which relief can be granted.

2. Plaintiff's invocation of the WLAD's liberal construction rule precludes a finding of jurisdiction.

As the party invoking the Court's jurisdiction, Plaintiff bears the burden of establishing an unequivocal waiver of the United States' sovereign immunity. *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012). Waivers of sovereign immunity are strictly construed in favor of the sovereign, with any doubts resolved *against* a finding of jurisdiction. *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007).

By asking the Court to "liberally construe" the statute, Plaintiff effectively concedes that there is reason to doubt whether the WLAD imposes liability for merely being made to feel unwelcome in a place of public accommodation. That doubt must be resolved in favor of the United States and against a finding of jurisdiction. *Dunn & Black*, 492 F.3d at 1088. Plaintiff cannot satisfy his burden by resorting to a liberal construction rule.

III. CONCLUSION

The Court should dismiss Plaintiff's WLAD claim under Rule 12(b)(1) for lack of subject matter jurisdiction, or, alternatively, under Rule 12(b)(6) for failure to state a claim.

DATED this 26th day of May, 2020.

William D. Hyslop
United States Attorney (EDWA)

/s/John T. Drake
John T. Drake
Derek Taylor
Assistant United States Attorneys

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2020, I caused to be delivered via the method listed below the document to which this Certificate of Service is attached (plus any exhibits and/or attachments) to the following:

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