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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

MOTION TO DISMISS

06/12/2020
Without Oral Argument

Defendant, United States of America, through its counsel, William D. Hyslop, United States Attorney, and John T. Drake and Vanessa R. Waldref, Assistant United States Attorneys, hereby moves for partial dismissal of Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

I. INTRODUCTION

Plaintiff's third claim, for race discrimination under the Washington Law Against Discrimination ("WLAD"), must be dismissed for two independent reasons. First, the United States has not waived sovereign immunity for state-law civil rights

claims in general, or for claims under the WLAD in particular. Consequently, the Court lacks subject matter jurisdiction over this claim. Second, even if jurisdiction could be established (which it cannot), the Complaint fails to state a claim for relief under the WLAD. Unlike the plaintiff in a companion case, *Sosa Segura v. United States*, Plaintiff was not prevented from taking his planned Greyhound bus trip. Plaintiff therefore cannot establish that he was denied the right to "full enjoyment" of a place of public accommodation as the WLAD requires. Further still, the claim fails as a matter of law because the United States, having no connection to the place of public accommodation, is not a proper defendant. Plaintiff's WLAD claim must be dismissed with prejudice.

II. PLAINTIFF'S ALLEGATIONS

Plaintiff alleges that he was unlawfully detained by Border Patrol agents at the Spokane Intermodal Center in January 2019. ECF No. 1 at ¶ 1. Plaintiff contends that he was singled out for questioning based upon his race and/or national origin.[1] *Id.* at ¶¶ 1, 20, 63. Plaintiff alleges that the agents lacked reasonable suspicion or probable cause to initiate the questioning and to briefly detain him while they were attempting

[1] It is unclear whether Plaintiff is alleging race discrimination or national origin discrimination. Plaintiff inconsistently alleges that he was singled out based upon his race (North African), and his country of birth (Libya).

to confirm his claims of having been granted asylum by U.S. Citizenship and Immigration Services. *Id.* at ¶ 2. Plaintiff estimates that he was detained for approximately 20 minutes, after which time he re-boarded his bus and completed his planned Greyhound bus trip to Portland. *Id.* at ¶¶ 36-37.

Plaintiff asserts three claims under the Federal Tort Claims Act ("FTCA"): (1) false arrest; (2) false imprisonment; and (3) a claim for race or national origin discrimination under the WLAD. The instant motion seeks dismissal of the WLAD claim only.

III. LEGAL AUTHORITY

A. Rule 12(b)(1) Dismissal Standard

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); U.S. Const. art. III, § 2, cl. 1. Under Federal Rule of Civil Procedure 12(b)(1) and (h)(3), a district court must dismiss an action where it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1), (h)(3).

A Rule 12(b)(1) motion is addressed to the court's subject matter jurisdiction. Such a motion may be classified as either facial or factual. In the context of a facial challenge, court's inquiry is limited to the allegations in the plaintiff's complaint. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In addressing a factual challenge, the court may look beyond the complaint and consider extrinsic evidence. *Id.* The Court may consider declarations and other evidence to resolve

factual questions bearing on jurisdictional issues without converting the motion into one for summary judgment. *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009). "Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009).

B. Subject Matter Jurisdiction Under FTCA

The United States is immune from suit except in circumstances where it has waived sovereign immunity. *Blackburn v. United States*, 100 F.3d 1426, 1429 (9th Cir. 1996). A waiver of sovereign immunity must be "unequivocally expressed" in a statute. *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012). A court cannot exercise subject matter jurisdiction unless sovereign immunity has been waived. *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1127 (9th Cir. 2019). "Sovereign immunity is not merely a defense to an action against the United States, but a jurisdictional bar." *Powelson v. United States*, 150 F.3d 1103, 1104 (9th Cir. 1998); *see also F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."). If immunity has not been waived, the claim must be dismissed under Rule 12(b)(1). *Meyer*, 510 U.S. at 475.

The FTCA is a limited waiver of the United States' sovereign immunity. The statute waives 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). The "law of the place" refers to state law. *Meyer*, 510 U.S. at 478. Thus, the scope of the United States' liability—and, correspondingly, its waiver of sovereign immunity—is "determined by reference to state law." *Molzof v. United States*, 502 U.S. 301, 305 (1992); *see also Schwarder v. United States*, 974 F.2d 1118, 1122 (9th Cir. 1992) (courts "look to the law of the state in which the government official committed the tort to determine the scope of sovereign immunity"); *Jachetta v. United States*, 653 F.3d 898, 904 (9th Cir. 2011) (sovereign immunity only waived when government would be liable under state law).

IV. ARGUMENT

A. The United States has not waived sovereign immunity for state civil rights claims in general or for claims under the WLAD in particular.

Plaintiff's WLAD claim alleges a violation of RCW 49.60.030(1)(b), the WLAD's public accommodation provision. ECF No. 1 at ¶¶ 59-61. The public accommodation provision provides, in relevant part:

> The right to be free from discrimination because of race, creed, color, national origin, sex, [and other protected characteristics] is recognized as and declared to be a civil right. This right shall include, but not be limited to . . . (b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement.

RCW 49.60.030(1)(b).

The Court lacks jurisdiction over this claim. As a threshold matter, the United States has not waived sovereign immunity for state-law civil rights claims under the

FTCA. Moreover, even if such claims were theoretically actionable under the FTCA, jurisdiction is lacking over this particular claim because a "private individual" would not be liable under the WLAD for the conduct alleged in Plaintiff's Complaint.

1. The United States has not waived sovereign immunity for state civil rights claims under the FTCA.

Plaintiff bears the burden of establishing an explicit, unequivocal waiver of the United States' sovereign immunity. *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007). Waivers of sovereign immunity "cannot be implied, but must be unequivocally expressed." *Id.* This is a "high standard." *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). Because waivers of sovereign immunity are "strictly construed . . . in favor of the sovereign," any doubts about whether an unequivocal waiver has occurred must be resolved in Defendant's favor. *Dunn & Black*, 492 F.3d at 1088; *see also F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012) ("Any ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires[.]") (citation omitted).

Plaintiff has not met this burden. The Ninth Circuit has expressly refused to countenance state civil rights claims under an analogous California statute. *See Delta Savings Bank v. United States*, 265 F.3d 1017, 1025 (9th Cir. 2001) (finding no waiver of sovereign immunity for discrimination claim asserted under public accommodation

provision of California's Unruh Civil Rights Act). That decision alone precludes a finding that the United States has waived sovereign immunity for such claims.[2]

Plaintiff will presumably rely on *Xue Lu v. Powell*, 621 F.3d 944 (9th Cir. 2010), and *Anderson v. United States*, 127 F.3d 1190 (9th Cir. 1997), as a basis for finding that sovereign immunity has been waived. But those cases are inapposite because neither directly addresses whether the United States waived sovereign immunity for the state law claims the plaintiffs in those cases asserted. To the extent *Xue Lu* and *Anderson* are in tension with *Delta Savings*, the tension must be resolved in Defendant's favor because (1) *Delta Savings* addresses sovereign immunity for public accommodation claims directly; and (2) waivers of sovereign immunity are strictly construed, with any doubts resolved in favor of the United States. *Dunn & Black*, 492 F.3d at 1088; *Cooper*, 566 U.S. at 290.

2. The United States has not waived sovereign immunity for the specific WLAD claim at issue.

As explained above, the United States has not waived sovereign immunity for state civil rights claims. Such claims are therefore not cognizable under the FTCA. But even if the Court concludes that such claims are not *categorically* prohibited, it

[2] Defendant acknowledges that the Court reached a contrary conclusion in ruling on the government's motion to dismiss in the *Sosa Segura* case. Defendant preserves the argument here, and invites the Court to revisit the question if it is inclined to do so.

would still need to determine whether the United States waived sovereign immunity for the specific claim at issue. As the Court appropriately recognized in *Sosa Segura*, that question hinges on whether a "private person" would be liable for the conduct alleged. 28 U.S.C. §§ 1346(b), 2674.

In applying the FTCA's "private person" standard, courts must analogize the government conduct at issue to that of a private actor in like circumstances. *United States v. Olson*, 546 U.S. 43, 46-47 (2005); *Dugard v. United States*, 835 F.3d 915, 918 (9th Cir. 2016). This is often referred to as the "private analogue" requirement. "Although the federal government [can] never be exactly like a private actor, a court's job in applying the standard is to find the most reasonable analogy." *Dugard*, 835 F.3d at 919. That task requires the court to select the analogue that most accurately captures the essence of the government conduct at issue. *Olson*, 546 U.S. at 46-47; *Dugard*, 835 F.3d at 918.

The proper analogue in this context is a *private citizen* acting in a *private capacity*. The Second Circuit's decision in *Liranzo v. United States* is instructive. The plaintiff in *Liranzo* was a U.S. citizen who was detained by ICE agents after he was mistakenly identified as a removable alien. 690 F.3d 78, 82 (2d Cir. 2012). The plaintiff sued under the FTCA, asserting claims for false arrest, false imprisonment, and "other torts allegedly committed by government officials in connection with his immigration detention." *Id.* at 82-83. The district court dismissed the claims for lack

of jurisdiction, finding that no private analogue existed under state law. *Id.* at 84. The Second Circuit reversed. After performing an exhaustive review of the history and purpose of the FTCA's private analogue requirement, the court held that the proper analogue for allegedly unlawful immigration detentions is private conduct by private citizens: "the proper analogy seems to us to be a person who, *entirely in his or her private capacity*, places someone under arrest for an alleged violation of the law." *Id.* at 94-95 (emphasis added).[3]

In the *Sosa Segura* case, this Court analogized the Border Patrol agents' conduct to that of a *private security guard* rather than a private citizen acting in a private capacity. Most respectfully, that was error. The problem with that analogy is that it assumes a connection between the agents and the Intermodal Center—namely

[3] *Liranzo*'s analogy to a private person acting "entirely in his or her private capacity" supports Plaintiff's ability to pursue his claims for false arrest and false imprisonment under the FTCA. Plaintiff presumably will not dispute *Liranzo*'s application to *those* claims. If Plaintiff attempts to distinguish *Liranzo* as to his WLAD claim, he would effectively be inviting the use of different, materially inconsistent analogues to the same alleged conduct.

an employment or agency relationship.[4] That assumption is inaccurate from a factual standpoint because the agents were neither employed by the Intermodal Center nor serving its interests in an agency capacity (or any other capacity). And, relatedly, that assumption improperly supplies the very predicate for FTCA liability that Defendant maintains is missing.

As Defendant argued in the *Sosa Segura* case, and as explained further below,[5] discrimination in a place of public accommodation is only actionable under the WLAD when it can be *connected to* the place of public accommodation through *the actions of an owner, employee or agent.* In choosing a security guard as the private analogue in *Sosa Segura*—a person who would necessarily have been hired by the Intermodal Center or one of its tenants—the Court improperly supplied the required connection with no factual basis for doing so.

When properly analogized to the conduct of a private citizen acting in a private capacity, the agents' alleged conduct does not give rise to liability under the WLAD. Accordingly, this claim must be dismissed for lack of jurisdiction.

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[4] As a matter of common understanding, private security guards are hired by the business whose premises they protect. They are either directly employed by the business or contracted through a third-party company.

[5] *See* Section IV.B, *infra*.

B. The Complaint fails to state a claim under the WLAD because: (1) Plaintiff was not denied the "full enjoyment" of a place of public accommodation on the facts alleged; and (2) the United States, having no connection to the place of public accommodation, is not a proper defendant.

Plaintiff fails to state a claim under the WLAD for two independent reasons. First, Plaintiff was not denied the right to "full enjoyment" of the Intermodal Center. Unlike the plaintiff in the *Sosa Segura* case, Plaintiff has not alleged that he was prevented from taking his planned Greyhound bus trip. On the contrary, the Complaint reflects that Plaintiff re-boarded his bus after speaking with the Border Patrol agents and completed his trip. Second, even if Plaintiff could establish that his right to "full enjoyment" was infringed, the claim would fail as a matter of law because the United States has no connection to the Intermodal Center, and is therefore not a proper defendant.

1. Plaintiff was not denied the right to "full enjoyment" of a place of public accommodation on the facts alleged.

To state a claim for relief under the WLAD, Plaintiff must demonstrate that he was deprived of the right to "full enjoyment" of a place of public accommodation. RCW 49.60.030(1)(b). The essence of "full enjoyment" in this context is the right to *purchase and utilize services offered for sale* in a place of public accommodation. *See* RCW 49.60.040(14) (defining "full enjoyment" as "the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public" without being discriminated against); *see also Evergreen Sch. Dist. No.*

114 v. Wash. State Human Rights Comm'n, 39 Wn. App. 763, 775 (1985) (WLAD prevents "operators and owners of businesses catering to the general public" from discriminating against patrons); *Patrice v. Murphy*, 43 F. Supp. 2d 1156, 1162 (W.D. Wash. 1999) (RCW 49.60.030(1)(b) was designed to "outlaw discrimination by those who make money serving the masses. The statute does not intrude into the purely private sphere."); *Floeting v. Grp. Health Coop.*, 192 Wn.2d 848, 852-53 (2019) (right to full enjoyment means "the right to purchase any service or commodity" offered at a place of public accommodation).

The facts alleged in the Complaint, accepted as true, do not establish that Plaintiff was deprived of the right to full enjoyment of the Intermodal Center. Unlike the plaintiff in the *Sosa Segura* matter, Plaintiff has not alleged that he was prevented from taking the bus trip that he had purchased. To the contrary, the Complaint reflects that Plaintiff promptly re-boarded his bus after speaking with the Border Patrol agents and then completed his planned trip to Portland:

> After the officers let him go, Mr. Elshieky boarded the bus, which by now was late because of the CBP officers' detention of Mr. Elshieky. The bus immediately left after Mr. Elshieky boarded for the second time.

ECF No. 1 at ¶ 36; *see also* ECF No. 1 at ¶ 37 (alleging that Plaintiff suffered anxiety "during his 6.5 hour bus ride to Portland").

The fact that Plaintiff completed his trip is a key factual distinction between this case and *Sosa Segura*. Indeed, the fact that the plaintiff in *Sosa Segura* was prevented

from completing his bus trip is precisely what prompted the Court to deny the government's motion to dismiss the WLAD claim in that case:

> I will find plaintiff has stated a valid claim which can proceed beyond the pleading stage and into the discovery stage. I'm not convinced that the statute, the Washington Law Against Discrimination, includes the requirement that the government claims; specifically, that the defendant own, operate, or exercise control over the place of public accommodation. But even if that language were a requirement of the statute, I think, as pled, there was a[n] exercise of control by . . . the defendant's agents, the government agents involved, *when they prevented the plaintiff from using a bus ticket that he purchased to board the bus and take the trip that he had planned.*
>
> So I'll deny this motion. I will prepare a written order.

Drake Decl., Ex. A at 38 (emphasis added); *see also id.* at 15 ("[E]ssentially, what your clients did was they prevented the plaintiff from using this bus station for the purpose it's there for, which is to get on a bus, and he couldn't do that, and he missed his bus.").

While Defendant respectfully disagrees with the Court's decision in *Sosa Segura*, there can be no question that the Court's rationale supports the opposite outcome here. Having been detained for brief questioning, and then allowed to re-board his bus and complete his trip, Plaintiff was not denied the right to "full enjoyment" of the Intermodal Center on the facts alleged. The Court should adhere to its prior reasoning and dismiss Plaintiff's WLAD claim for failure to state a claim.

2. The WLAD claim fails as a matter of law because the United States, having no connection to the Intermodal Center, is not a proper defendant.

There are four elements to a WLAD public accommodation claim: (1) the plaintiff is in a protected class; (2) the defendant is a place of public accommodation; (3) the defendant engaged in discrimination; and (4) the discrimination was linked to the plaintiff's protected status. *State v. Arlene's Flowers, Inc.*, 193 Wn.2d 469, 501-02 (2019); *Floeting v. Grp. Health Coop.*, 192 Wn.2d 848, 853 (2019). The second and third elements—that the defendant is a place of public accommodation and that the defendant engaged in discrimination—confirm that the only proper defendant for a WLAD public accommodation claim is the place of public accommodation itself. There is no cause of action against third parties who have no connection to the place of public accommodation. In other words, the claim can only be asserted *against* a place of public accommodation for discrimination *perpetrated by* the place of public accommodation or one of its employees or agents. No Washington court has ever construed the claim to apply more broadly to persons who have no connection to the place of public accommodation.[6]

[6] *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508 (2001), is not to the contrary. *Demelash* involved allegations of discrimination by security guards who were *employees* of the defendant's business. The case stands for the unremarkable

Plaintiff has not alleged the requisite connection between Defendant and the Intermodal Center. No such connection exists. Accordingly, Defendant is not liable for the alleged discrimination as a matter of law.[7] Plaintiff has no claim against the United States stemming from the alleged conduct of Border Patrol agents who were not employed by the Intermodal Center or acting as its agents. This claim must be dismissed with prejudice.

V. CONCLUSION

For the reasons stated above, Defendant respectfully requests that Plaintiff's WLAD claim be dismissed for lack of subject matter jurisdiction, or, alternatively, for failure to state a claim.

DATED this 20th day of April, 2020.

William D. Hyslop
United States Attorney (EDWA)

/s/John T. Drake
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proposition that a place of public accommodation can be vicariously liable for the discriminatory acts of its employees.

[7] Defendant acknowledges that the Court decided this question adversely to the government in the *Sosa Segura* case. Defendant preserves the argument here, and would invite the Court to revisit the question if it is so inclined.

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 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:

Name & Address	Method of Delivery
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