

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, <i>et al.</i> ,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:02cv2307 (JG) (SG)
)	
)	
JOHN ASHCROFT,)	
Former Attorney General of the)	
United States, <i>et al.</i> ,)	
)	
Defendants.)	
)	

**REPLY MEMORANDUM IN SUPPORT OF THE MOTION TO
DISMISS OF DEFENDANT JAMES ZIGLAR, FORMER COMMISSIONER OF
THE IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES**

**LAW OFFICES OF WILLIAM ALDEN
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January 12, 2011

Plaintiffs' Memorandum in opposition to the motion of Mr. Ziglar to dismiss the Fourth Amended Complaint does no more than repeat the vague and conclusional averments of that Complaint. It fails to allege plausible claims against Mr. Ziglar.

Insofar as Mr. Ziglar is concerned, plaintiffs place their reliance on the averments of ¶¶ 22, 23, 41, 47, 55-57 & 61-68 of the Fourth Amended Complaint. *Memorandum Of Law In Opposition To Defendants' Motions To Dismiss The Fourth Amended Complaint*, at 38, 40, 46, 48 & 86. Examination of those paragraphs reveals their inadequacy:

¶ 22 does not mention or refer to Mr. Ziglar at all;

¶ 23 avers in conclusional fashion that Mr. Ziglar formed part of a group of persons who adopted improper policies, but omits any details of what Mr. Ziglar himself did;

¶ 41 does not mention or refer to Mr. Ziglar at all;

¶ 47 alleges that Mr. Ziglar (a) received daily reports of arrests and detentions; (b) was aware that the FBI had no information tying class members to terrorism prior to treating them as "persons of interest" and was keeping a separate list of non-citizens for whom the FBI had not asserted any interest; and (c) "complied with" defendant Ashcroft's orders that the members of the class be detained until cleared. Here, again, these allegations either allege nothing wrong ("received daily reports") or fail to state with any particularity what Mr. Ziglar did to "comply" with defendant Ashcroft's orders.

¶ 55 repeats the allegation that Mr. Ziglar "complied" with defendant Ashcroft's allegedly improper detention policy, but provides no details as to how he did so or what he did;

¶ 56 alleges that Mr. Ziglar "closely" oversaw the implementation of this policy, again without providing details as to how he did so, then contradicts that allegation by stating that the FBI controlled the investigation and detention of class members;

¶ 57 does not mention or refer to Mr. Ziglar at all—it addressed *only* supposed actions by the FBI and defendant Mueller;

¶ 61 does not mention or refer to Mr. Ziglar at all;

¶ 62 alleges that Mr. Ziglar attended “many” of the meetings of a “small group of government officials” who met under the direction of defendant Ashcroft and that at these meetings, he “discussed” the policies at issue, all again with no detail of what Mr. Ziglar did or did not do;

¶ 63 does not mention or refer to Mr. Ziglar at all;

¶ 64 alleges that Mr. Ziglar “was ultimately responsible” for providing information to defendant Ashcroft about arrests and other developments of interest which defendant Ashcroft passed on to the President and that defendant Ziglar had twice daily briefings with his staff, without alleging anything about the content of the information passed along to defendant Ashcroft or of the staff meetings or how any of this alleged activity was wrong;

¶ 65 does not mention or refer to Mr. Ziglar at all, but alleges that the FBI carried out policy regarding the conditions of confinement of class members;

¶ 66 only glances at Mr. Ziglar, alleging that because “[t]here were not enough secure beds in federal facilities” the orders of defendants Ashcroft, Mueller, and Ziglar “to encourage the 9/11 detainees to cooperate” were implemented differently by officials of the Bureau of Prisons (“BOP”) (a separate government agency with which Mr. Ziglar had nothing to do) in different facilities; again, this does not allege how such an order was improper or harmed any plaintiff or how Mr. Ziglar played any role in the actions of the employees of the BOP in carrying out this so-called “order;”

¶ 67 alleges that Mr. Ziglar knew the FBI had not tied the putative class members to terrorism but authorized continued detention, then goes in to detail how defendant ***Mueller—not defendant Ziglar***—did so;

¶ 68 contains a number of allegations of how BOP officials, over whom Mr. Ziglar possessed no authority or control, carried out Mr. Ziglar’s policy to encourage detainees to cooperate, again, alleging nothing that Mr. Ziglar did nor did not do.

In plaintiffs’ own words, these are the paragraphs upon which they rely to hold Mr. Ziglar in this case. But these allegations fail to state any plausible cause of action against Mr. Ziglar, because they have failed to plead how defendant Ziglar *through what he did or failed to do* may be held liable for any injuries plaintiffs may have suffered. The Fourth Amended Complaint thus fails the test of *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), which requires a complaint to set forth facts making out a “plausible” basis for believing the plaintiff can prove a legally-sufficient claim against Mr. Ziglar individually. In the same way, the Fourth Amended Complaint fails to allege sufficient personal involvement by Mr. Ziglar to overcome his defense of qualified immunity. And for these reasons, the Fourth Amended Complaint fails to allege sufficient facts to support the exercise of personal jurisdiction over Mr. Ziglar by this Court.

Specifically, the Fourth Amended Complaint fails to allege facts that state plausible claims—as opposed to a merely possible set of facts—that could support imposing liability on Mr. Ziglar for the conditions of confinement under which plaintiffs claim they were held. The only factual allegation about Mr. Ziglar in this regard, noted above, is that he was part of the group that desired to “exert maximum pressure” on those who had been “arrested in connection with the terrorism investigation.” Fourth Amended Complaint ¶61. This falls far short of the requirement that plaintiffs present a plausible allegation that Mr. Ziglar, by his own actions,

violated plaintiffs' rights through their conditions of confinement. The government exerts pressure on defendants every day, often maximum pressure, and can plausibly do so in a way consistent with all the requirements of the Constitution. This allegation is perfectly consistent with lawful behavior. It fails the *Iqbal* test.

Nor have plaintiffs alleged a plausible claim that Mr. Ziglar, himself, acted from any improper bias. The Supreme Court disposed of this argument in *Iqbal*, 129 S.Ct. at 1951, when it noted that “[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims.”

Plaintiffs similarly have failed to plead a plausible claim that Mr. Ziglar infringed their religious rights. Plaintiffs' allegations concerning religious restrictions do not mention any specific involvement by Mr. Ziglar. Fourth Amended Complaint ¶¶ 65 & 131-39. To the contrary, plaintiffs' allegations place responsibility for these restrictions upon other subordinate officials within the Department of Justice. In the same way, plaintiffs' complaint fails to allege Mr. Ziglar's plausible involvement in the so-called communications blackout or in interfering with communications with lawyers. The Fourth Amended Complaint makes no allegations that Mr. Ziglar did anything specific in connection with this aspect of the case.

With regard to conspiracy, setting aside the vague allegations of an agreement among defendants Ashcroft, Mueller, and Ziglar (which themselves are not plausible), plaintiffs have not sufficiently alleged that the goal of any such “agreement” was to compromise plaintiffs' constitutional rights, let alone to do so with unlawful animus. The law has long been settled, that such an unconstitutional purpose is an element of a § 1985 claim. *E.g., Griffin v. Breckinridge*, 403 U.S. 88, 102 (1971). The plaintiffs have simply failed to allege any facts that support a

plausible claim that Mr. Ziglar entered into an agreement with anyone to deprive plaintiffs of their rights.

Because the Fourth Amended Complaint treats Mr. Ziglar *exactly* as it treats defendant Ashcroft and Mueller, Mr. Ziglar respectfully adopts and incorporates herein all the arguments made by those defendants in the memoranda they are filing in this Court in support of their motions to dismiss the Fourth Amended Complaint on this point, that is, that this pleading fails to allege with sufficient specificity any basis for holding defendants liable, for overcoming the defense of qualified immunity, or for exercising personal jurisdiction in New York.

Defendant Ziglar expressly adopts and incorporates by reference all the arguments made by the other defendants in their opening and reply briefs regarding the lack of an implied cause of action under *Bivens v. Six Named, Unknown Agents*, 403 U.S. 388 (1971), and regarding qualified immunity. *Behrens v. Pelletier*, 516 U.S. 229, 305 (1996).

CONCLUSION

This Court should grant the Motion To Dismiss Of Defendant James Ziglar, Former Commissioner Of The Immigration And Naturalization Service Of The United States.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I directed that the Reply Memorandum In Support Of Motion To Dismiss Of Defendant James Ziglar, Former Commissioner Of The Immigration And Naturalization Service be electronically filed with the Clerk of Court using the CM/ECF system, which will send a notification of such filing ("NEF") to counsel as follows:

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I further certify that I directed that a complete and accurate copy of the Reply Memorandum In Support Of Motion To Dismiss Of Defendant James Ziglar, Former Commissioner Of The Immigration And Naturalization Service be mailed by first class mail, postage prepaid, to the following “non-filing user”:

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Date: January 12, 2011

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