UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 11-cv-01280-JEB
	)	
RICHARD RETTA,	)	
	)	
Defendant.	)	
_____	)	

UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT RICHARD RETTA'S RULE 12(b)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED

The United States hereby opposes Defendant Richard Retta's Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim on Which Relief Can Be Granted.

The United States brought this action pursuant to the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248 (1994), because Defendant physically obstructed a patient and volunteer clinic escorts while protesting at the Planned Parenthood of Metropolitan Washington (PPMW), a reproductive health care facility. The Defendant, who was protesting the fact that PPMW provides abortion services to women, placed himself in the path of the patient and escorts in an attempt to intimidate and/or interfere with persons seeking to obtain or provide reproductive health services.

Defendant does not challenge the sufficiency of the allegations that he caused a physical obstruction or that he did so with the intent to interfere with or intimidate others. He challenges the sufficiency of the allegations only as to the last element of the statute, his motive for

engaging in the physical obstruction. Defendant also challenges the authority of the United States to seek statutory damages.

The United States has stated a claim upon which relief can be granted, and thus Defendant's Motion to Dismiss lacks merit and should be denied. First, whether the victims – both the patient and the escorts – were in fact obtaining or providing such services is simply not an element of a FACE violation and therefore need not be pled in the Complaint. The Complaint therefore adequately pleads that Defendant had the requisite motive. Second, escorts are covered under the statute as a matter of law, contrary to Defendant's argument that only those directly providing medical services are protected. Finally, the United States is entitled to pursue statutory damages for the victims of Defendant's violations.

Defendant's Motion to Dismiss should, therefore, be denied.

I. STANDARD OF REVIEW

In considering a motion to dismiss under Rule 12(b)(6), a district court is "required to" take "the allegations of plaintiff's complaint to be true and construe them in the light most favorable to" the plaintiff. Navab-Safavi v. Glassman, 637 F.3d 311, 317 (D.C. Cir. 2011). "To survive a motion to dismiss, the pleadings must suggest a plausible scenario that shows that the pleader is entitled to relief." Jones v. Horne, 634 F.3d 588, 595 (D.C. Cir. 2011) (internal quotations and alterations omitted).

Federal Rule of Civil Procedure 8(a) provides that a complaint must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint must set forth "only enough facts to state a claim to relief that is plausible on its face." Bell Atlantic v. Twombly, 550 U.S. 544, 570 (2007). The rule "does not impose a probability requirement at the pleading stage," but instead "simply calls for enough facts to raise

a reasonable expectation that discovery will reveal evidence of" the necessary element. Id. at 556. The Supreme Court subsequently explained that the plausibility standard "is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." Ashcroft v. Iqbal, --- U.S. ----, 129 S. Ct. 1937, 1949 (2009). Assessing whether a claim is "plausible" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 1949.

Additionally, as this Court has noted, "[a] motion to dismiss under Rule 12(b)(6) must rely solely on matters within the complaint." Curry v. Bank of Am. Home Loans Servicing, --- F. Supp. 2d ----, 2011 WL 3489306, *1 (D.D.C. Aug. 10, 2011) (citing Fed. R. Civ. P. 12(d)).

II. ARGUMENT

Defendant's motion to dismiss should be denied because (A) the United States need only allege that Defendant *believed* the victims were engaging in protected activities, and the United States has adequately done so; (B) escorts are covered under FACE; and (C) the United States is entitled to seek statutory compensatory damages. Defendant's arguments to the contrary are without merit and should be rejected.

A. The Complaint Adequately Alleges that Defendant Possessed the Requisite Motive

"To make out a violation [of FACE] the government ha[s] to prove that [Defendant] (1) by physical obstruction, (2) intentionally (3) injured, intimidated or interfered with or attempted to injure, intimidate or interfere with any person, (4) because that person is or has been obtaining or providing reproductive health services." United States v. Mahoney, 247 F.3d 279, 282 (D.C. Cir. 2001) (internal quotations and alterations omitted) (citing 18 U.S.C. § 248(a)(1)).

Defendant concedes that the first three elements of a FACE violation are properly pled. He argues only that the Complaint does not sufficiently allege the fourth element, based largely upon the unique and legally erroneous premise that this element focuses on the status of Defendant's victim, rather than Defendant's own motive and belief. Because the United States has adequately pled that Defendant believed the escorts and patient to be providing or obtaining such services, this Court should deny Defendant's motion.

1. The Motive Element Requires Only that Defendant *Believed* that the Victims Were Obtaining or Providing Reproductive Health Services

Defendant's legally unsupported approach to the motive element flips FACE on its head and improperly shifts the statute's focus away from the offender's conduct and onto that of the offender's victim. He thus splinters a single element into two. See, e.g., Def. Richard Retta's Statement of Points and Authorities Supporting his Rule 12(b)(6) Mot. to Dismiss (D.E. 6), at 3, 13-19 (Aug. 17, 2011) [hereinafter Def.'s Mot.]. Without any reference to case law or other supporting authority, Defendant contends that the fourth element of FACE requires the United States to plead that the victim was in fact seeking to obtain or provide reproductive health services. Defendant would thus insulate himself and others from liability, however egregious their conduct, if they happened to be mistaken in believing that their targets were seeking to obtain or offer reproductive health services. Defendant's argument is inconsistent with the statutory construction and purpose of FACE and its motive element, as construed by the D.C. Circuit and numerous other courts. It is also inconsistent with the way that courts have interpreted similar civil rights statutes on which FACE was modeled.

FACE includes a single motive element, which prohibits a person from physically obstructing another person "because that person is or has been obtaining or providing reproductive health services." 18 U.S.C. § 248(a)(1). The D.C. Circuit has consistently

interpreted this language as a single element focused on the defendant's subjective state of mind, not on the victim's status or conduct. Mahoney, 247 F.3d at 282 (describing a single fourth element); Terry v. Reno, 101 F.3d 1412, 1420 (D.C. Cir. 1996) (describing "[t]he statute's motive requirement—that a person violates the Act by engaging in proscribed conduct 'because' a person is obtaining or providing reproductive health services"). The legislative history of FACE supports the view that the defendant's belief controls whether liability will attach. See S. Rep. No. 103-117, at 24-25 (1993) (describing FACE's singular "motive element"). The victim need not be a patient or staff at all. See H.R. Rep. No. 103-306, at 12 (1993) (covering family of patients or staff); S. Rep. No. 103-117, at 22 (1993) (same). The statute protects an individual entering a clinic so long as the defendant believed the person to be entering to obtain or provide reproductive health services.

Other courts interpreting FACE similarly focus on the defendant's own perception rather than the victim's actual conduct. See United States v. Balint, 201 F.3d 928, 934 (7th Cir. 2000) (finding sufficient evidence of motive in "the defendants' concession that they wanted to protect fetuses, [one of the defendants'] commitment to the pro-life cause and the Clinic's notoriety as an ongoing provider of abortion services"); Holder v. Hamilton, No. 10-0759, Memorandum Opinion and Order (D.E. 18), at 6 (W.D. Ky. Aug. 12, 2011) (holding that the defendant's "viewpoint on abortion is relevant to the claims alleged . . . to the extent that it provides evidence of motive"); New York v. Cain, 418 F. Supp. 2d, 457, 475 (S.D.N.Y. 2006) (holding that the motivation requirement was satisfied because defendants' goal in protesting at the clinic was to discourage women from getting abortions); United States v. Gregg, 32 F. Supp. 2d 151, 157 (D.N.J. 1998) (finding defendants' statements expressing their opposition to abortion and engaging in a blockade during an anti-abortion protest to be sufficient to demonstrate motive).

FACE's motive element is not unique. Indeed, the civil rights statutes on which FACE was based likewise require proof of the defendant's – not the victim's – purpose. FACE, and specifically its motive element, "is modeled on several Federal civil rights laws," including the Fair Housing Act and the Voting Rights Act. See S. Rep. No. 103-117, at 17, 18, 24-25 (1993) (citing 42 U.S.C. § 3631 and 18 U.S.C. § 245(b)); H.R. Rep. No. 103-306, at 10 (1993) (same); see also Terry, 101 F.3d at 1420-21 (affirming constitutionality of FACE's motive element by analogizing it to the motive element of other civil rights statutes). Both these statutes contain provisions similar to those in other federal civil rights statutes, including Title VII, the ADA, and the ADEA, which have been held to require only a showing of the defendant's subjective belief.

For example, in a recent Title VII retaliation case, this Court expressly adopted the Third Circuit's "perception theory of retaliation," and held that the statute "focuses on the employer's subjective reasons for taking adverse action against an employee. Thus, it matters not whether the reasons behind the employer's discriminatory animus are actually correct as a factual matter." Johnson v. Napolitano, 686 F. Supp. 2d 32, 35 (D.D.C. 2010) (internal alterations omitted) (quoting Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 571 (3d Cir. 2002)).[1] The anti-retaliation provisions of Title VII of the Civil Rights Act of 1964 are materially identical to FACE. Compare 42 U.S.C. § 2000-e3(a) (prohibiting discrimination against an individual "*because* [the individual] *has* opposed any practice made an unlawful employment practice by

[1] Both the district court and the Third Circuit, which was interpreting the ADA and ADEA, also cited a hypothetical example of discrimination even outside the retaliation context:

> [I]f an employer refuses to hire a prospective employee because he thinks that the applicant is a Muslim, the employer is still discriminating on the basis of religion even if the applicant he refuses to hire is not in fact a Muslim. What is relevant is that the applicant, whether Muslim or not, was treated worse tha[n] he otherwise would have been for reasons prohibited by the statute.

Johnson, 686 F. Supp. 2d at 35-36 (quoting Fogleman, 283 F.3d at 571) (internal alterations omitted); see 29 U.S.C. § 623(d); 42 U.S.C. § 12203(a)-(b).

this subchapter" (emphasis added)) with 18 U.S.C. § 248(a)(1) (prohibiting physical obstruction "*because* that person is or *has been* obtaining or providing reproductive health services" (emphasis added)). In Johnson, the complaint alleged sufficient facts "to demonstrate that the [defendant] perceived her as having participated in . . . [protected activity] and retaliated against her based upon this perception." 686 F. Supp. 2d at 35. The fact that the complaint did not allege that the plaintiff actually engaged in protected activity "is of no moment . . . . It is irrelevant to the issue of whether the [defendant] *perceived*" the individual as having engaged in such activity. Id. at 36 (emphasis in original). The court further explained, "A perception theory of retaliation does not rest on whether the [individual] *actually asserts participation* in a protected activity; rather, the theory applies so long as the [defendant] *believed* that the [individual] was engaged in protected activity." Id. (emphasis added).

The perception theory has also been applied in cases involving similarly constructed labor statutes. See Fogarty v. Boles, 121 F.3d 886, 891 (3d Cir. 1997) ("[T]he discharge of employees under the mistaken impression that they had participated in protected statutory activity is enough to violate [the National Labor Relations Act and the Fair Labor Standards Act.]") (citing retaliation provisions of 29 U.S.C. § 151 and 29 U.S.C. § 201); Saffels v. Rice, 40 F.3d 1546, 1549-50 (8th Cir. 1994) (citing 29 U.S.C. § 215(a)(3)); Brock v. Richardson, 812 F.2d 121, 123-25 (3d Cir. 1987) (same); NLRB v. Parr Lance Ambulance Serv., 723 F.2d 575, 580 (7th Cir. 1983) (citing 29 U.S.C. §§ 157 and 158(a)(1)); Henning & Cheadle, Inc. v. NLRB, 522 F.2d 1050, 1052 (7th Cir. 1975) (same) ("The Board correctly noted that the Act is violated if an employer acts against the employees in the belief that they have engaged in protected activities, whether or not they actually did so.") (citing NLRB v. Link-Belt Corp., 311 U.S. 584, 589-590 (1941)).

As applied in this case, it simply "does not matter whether [Defendant's] perception was factually correct." See Fogleman, 283 F.3d at 572. The United States need only plead that Defendant acted because he subjectively believed that the victims were engaged in the protected activity. The United States' Complaint more than meets this requirement.[2]

2. The Complaint Contains Specific Allegations Regarding Defendant's Motive

The United States has properly alleged that Defendant *believed* that the patient and escorts were obtaining or providing reproductive health services. The Complaint contains specific allegations about the services offered at the clinic, Defendant's strong remarks to the patient and escorts, his history at the clinic, the patient and escorts' attempt to enter the clinic that prompted Defendant's reaction, and the conduct that constituted the alleged obstruction. The Court should therefore reject Defendant's erroneous assertion that the United States fails to state a claim upon which relief can be granted.

Defendant's motive can be inferred from his history of protest activity, Compl. ¶¶ 8-15, and his actions as pled in the Complaint. PPMW is a facility that provides reproductive healthcare services.[3] Id. ¶ 7. Defendant has regularly protested outside PPMW for over a decade, Compl. ¶ 8, and he does so in an aggressive and vocal manner, id. ¶ 9, to the point of frequently following closely alongside patients up to the door of the clinic, id. ¶¶ 10, 12, or in front of escorts, id. ¶ 11, frequently following people into the street, id. ¶ 15, or down the block,

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[2] Moreover, should the Court find that the fourth element of FACE does require the United States to plead the patient's or escorts' status or purpose rather than Defendant's motive, then any deficiencies in the Complaint can easily be remedied, and the United States would respectfully request leave to amend to make those allegations clear.

[3] Even if the Complaint does not allege that PPMW provides *only* reproductive health services, Def.'s Mot. at 3, the fact that the clinic provides reproductive health services at all provides further support for the inference that Defendant was acting on his belief that the victims were obtaining or providing reproductive health services.

id. ¶ 14, yelling, id. ¶ 12, and stepping on people's shoes, id. ¶ 13. Defendant did not confine his protest activity to a grocery store, shopping center, library, or other non-controversial locations, and that is because he was motivated by the desire to prevent abortions.

Moreover, the actual conduct that constituted the violation itself demonstrates Defendant's motive. The Complaint alleges that, on the day of the incident that constitutes the FACE violation, Defendant, after speaking with the patient, id. ¶ 17, followed the patient to the clinic entrance and yelled at the escorts that they should not escort the patient into the clinic, id. ¶ 19. He then blocked the patient from continuing into the building and continued to do so despite pleas from the escorts. Id. ¶¶ 20-21, 23. Defendant would have understood that the escorts were indeed escorts based on their own conduct – escorting the patient to the clinic entrance, id. ¶ 19, "repeatedly ask[ing] Defendant to move out of the patient's way so that she could enter the Clinic, and otherwise attempt[ing] to guide the patient into the Clinic," id. ¶ 21. The patient repeatedly attempted to walk around Defendant to enter the clinic, id. ¶ 23, and he, in turn, repeatedly shifted position to remain in the way of the patient, id. ¶ 25. He was so persistent that others had to intervene and offer extraordinary assistance in order to help the patient circumnavigate Defendant. Id. ¶ 25. Perhaps most telling in regards to the question of motive is the allegation that, as he stood in front of the patient and escorts, Defendant shouted, "Don't go in there. Don't let them kill your baby." Id. ¶ 22.

Defendant is clearly mistaken that the United States relies upon a single paragraph in the Complaint as the basis for its claim that Defendant possessed the requisite motive for a FACE violation. Def.'s Mot. at 18 (citing Compl. ¶ 27). The "common sense" inference is that, based on his strong reaction and vehement remarks, Defendant understood the patient to be seeking some type of reproductive health services and that the escorts were acting in their capacity as

such. See Iqbal, 129 S. Ct. at 1950. Therefore, Plaintiff has adequately pled that Defendant possessed the necessary motivation.[4]

B. Volunteer Clinic Escorts are Covered under FACE

This Court should find meritless Defendant's contention that escorts do not, as a matter of law, provide reproductive health services, as this position flies in the face of judicial consensus. The FACE Act clearly covers escorts. Thus, as discussed above, the Complaint adequately alleges that Defendant physically obstructed volunteer clinic escorts because he believed they were escorting the patient into PPMW, a reproductive health care facility. Compl. ¶¶ 18, 19, 21, 24, 25. The Court should accordingly deny Defendant's motion to dismiss.

Defendant's contention that escorts are not persons who "provid[e] reproductive health services" and are thus excluded from coverage under the FACE Act does not find any support in law. Def.'s Mot. at 16. Several courts have held that "FACE protects escorts who are assisting patients and staff in obtaining access to clinics." United States v. Scott, 975 F. Supp. 428, 433 (D. Conn. 1997) (citing S. Rep. No. 103-117, at 22 (1993) (stating that "[p]ersons injured in the course of assisting patients or staff in gaining access to a facility" can bring suit under FACE)). See also Cain, 418 F. Supp. 2d 457, 474-78 (granting a preliminary injunction where defendants pushed and threatened escorts); New York v. Kraeger, 160 F. Supp. 2d 360, 378 (N.D.N.Y. 2001) (finding FACE violation where defendant stepped on staff escort's heels).

Defendant further argues, without citing to any authority, that the Complaint is deficient because it does not allege facts establishing "a medical services relationship between the so-called 'escorts' and the medical facility identified in the Complaint" or "a medical services

[4] Defendant speculates about a number of potential fact scenarios outside of the pleadings. Def.'s Mot. at 14, 16, 18. Such evidence is not relevant to a 12(b)(6) motion and may instead be presented at trial or as part of a motion for summary judgment. Fed. R. Civ. P. 12(d).

relationship between the 'escorts' and the alleged 'patient.'" Def's Mot. at 17. As noted by the Defendant himself, FACE defines "reproductive health services" more broadly than medical services alone, and "includes medical, surgical, counseling or referral services relating to the human reproductive system . . . ." 18 U.S.C. § 248(e)(5); see Def's Mot. at 14.

Numerous courts have found that escorts, as well as other non-medical staff, are considered essential to the provision of clinic services and are covered under the FACE Act. A medical relationship is simply not required. United States v. Hill, 893 F. Supp. 1034, 1039 (S.D. Fla. 1994) ("It appears that Congress was concerned not only with the safety of doctors and nurses, but also with the safety of others who are essential the provision of clinic services. . . . [E]scorts are considered an integral part of the functioning of clinics."); Greenhut v. Hand, 996 F. Supp. 372, 376 (D.N.J. 1998) (finding that FACE covered an untrained volunteer plaintiff because "nothing in the statute indicates that it covers only trained providers of reproductive services such as doctors, nurses, or social workers"). Even maintenance workers play an integral part in ensuring that a clinic can provide patients with reproductive services and are therefore covered by FACE. United States v. Dinwiddie, 76 F.3d 913, 927 (8th Cir. 1996) (recognizing that even maintenance workers play an integral part in the business of providing patients with reproductive services). FACE thus provides coverage for the PPMW escorts, and the Complaint should be sustained.

C. The United States May Seek Statutory Compensatory Damages

FACE allows the Court to grant statutory compensatory damages to victims of a FACE violation in a case brought by the United States.[5] Such relief is not limited to cases brought only

[5] While Defendant's challenge regarding the inclusion in the Complaint of a request for statutory damages is not appropriately addressed as part of a 12(b)(6) motion, the United States interprets this portion of the motion as a motion to strike. See Simba v. Fenty, 754 F. Supp. 2d

by private plaintiffs, as Defendant argues. Def.'s Mot. at 19-20. In fact, FACE explicitly provides that, in cases brought by the United States, "the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, *and compensatory damages* to persons aggrieved *as described in paragraph (1)(B).*" 18 U.S.C. § 248(c)(2)(B) (emphasis added).[6] Paragraph (1)(B) expressly allows for the recovery of statutory compensatory damages. 18 U.S.C. § 248 (c)(1)(B).

The Third Circuit has squarely addressed this issue. In United States v. Gregg, the court stated, "[B]y using the term 'compensatory damages' in § 248(c)(2)(B), Congress plainly meant to incorporate all of the text relevant to compensatory damages as set out in § 248(c)(1)(B). Therefore, the phrase 'compensatory damages' as used in § 248(c)(2)(B) authorizes the attorney general to elect an award of statutory damages." 226 F.3d 253, 260 (3d Cir. 2000). The court further noted that "the legislative history demonstrates that Congress intended that statutory damages be awarded in a civil action initiated by an attorney general" because "[t]he House confirmed that '[t]he Act authorizes the U.S. Attorney General . . . to bring civil causes of action on behalf of aggrieved persons for the *same relief available in private actions*.'" Id. at 260-61 (quoting H.R. Rep. No. 103-106, at 3 (1993) (emphasis added by the court)). The court concluded that Congress intended for the Attorney General to "be entitled to the same relief as a private party," and granted the compensatory statutory damages of $5,000. Id. at 261; see also S. Rep. No. 103-117, at 22 (1993) (not differentiating between private actions and actions brought by the United States regarding availability of statutory damages); H.R. Rep. 103-306, at 12

19, 23 (D.D.C. 2010) (finding that injunctive relief is not a claim, but a remedy, and finding that a Rule 12(b)(6) motion was "an inappropriate method of challenge.").

[6] Moreover, the terms "plaintiff" (in (c)(1)(B)) and "persons aggrieved" (in (c)(2)(B)) are used interchangeably because the Attorney General of the United States, as a named plaintiff, brings cases in lieu of "persons aggrieved," who would otherwise be private "plaintiff[s]." See also 18 U.S.C. § 248(c)(1)(A) ("person aggrieved" acts as plaintiff).

(same). This Court should do likewise and hold that, as a matter of law, the United States may seek statutory damages in the amount specified in the statute.

III. CONCLUSION

For the foregoing reasons, this Court should deny Defendant Richard Retta's Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim on Which Relief Can Be Granted in its entirety.

Dated: September 2, 2011

Respectfully submitted,

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	)	
Defendant.	)	
	)	

CERTIFICATE OF FILING

I hereby certify that on September 2, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will provide notice of such filing to all registered parties.

s/Aaron B. Zisser
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UNITED STATES DISTRICT COURT
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RICHARD RETTA,	)	
	)	
Defendant.	)	
	)	

ORDER

Upon consideration of Defendant Richard Retta's Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim on Which Relief Can Be Granted, the United States' opposition thereto, and the briefing and arguments submitted by both parties, it is hereby ORDERED that Defendant's Motion to Dismiss is DENIED. Defendant shall file and serve his Answer to the Complaint within fourteen (14) days of the date of this Order.

SO ORDERED this ___ day of ____, 2011.

BY THE COURT:

_____
Hon. James E. Boasberg
JUDGE, UNITED STATES DISTRICT COURT