

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

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|---------------------------|---|------------------|
| ERIC H. HOLDER, JR., | : | |
| ATTORNEY GENERAL OF THE | : | |
| UNITED STATES OF AMERICA, | : | CIVIL ACTION |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | |
| | : | |
| DAVID HAMILTON, | : | No. 3:10CV-759-C |
| | : | |
| Defendant. | : | |

**UNITED STATES’ REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

On June 1, 2012, Eric H. Holder, Jr., Attorney General of the United States, by the undersigned attorneys, moved the Court for judgment as a matter of law because Defendant David Hamilton violated the Freedom of Access to Clinic Entrances Act (“FACE”), 18 U.S.C. § 248 (1994), when he pushed an escort who was accompanying a patient into a reproductive health care clinic. (Mot. Summ. J., Dkt. 45). Defendant’s response consists of allegations and denials that lack support in the record and/or assert non-material facts. (Def.’s Mot. Opp’n Summ. J., Dkt. 48). What remains is a record that demonstrates Defendant’s undisputed use of force to injure and interfere with a clinic escort, because that escort was helping a patient obtain reproductive health services. That is all that is necessary to show a violation of FACE.

Defendant principally contends that discrepancies exist about certain non-material facts and that the Attorney General has not proven that Defendant possessed the requisite intent and motive. Even if some tangential facts may be disputed, however, the undisputed, material facts conclusively establish that Defendant used force against an escort. Further, Defendant’s

argument about intent and motive is premised upon a misreading and misinterpretation of the statute at issue. Therefore, the Attorney General's Motion should be granted, and judgment should be entered for Plaintiff.

**REPLY TO DEFENDANT'S RESPONSE TO
PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. None.
2. Defendant's description of volunteer escorts' activity is not supported by the cited deposition testimony. In fact, Defendant's own testimony establishes that volunteer escorts accompany patients and their companions as they walk towards the EMW clinic ("the clinic"). (Hamilton depo. 32:9-14).
3. Defendant's response to this fact is unclear. However, Defendant does not appear to dispute the fact that "escorts provide a 'human buffer zone' against people trying to stop people from entering the clinic." (Fitts depo. at 72:11-19). Contrary to Defendant's response, this fact does not allege that anyone was prevented from entering the clinic.
4. This response does not appear to correlate with Plaintiff's Fact 4. Further, the supposed fact offered by Defendant is not material.
5. Defendant disputes this fact with no citation to anything in the record.
6. None.
7. None.
8. None.
9. Plaintiff's Fact 9 simply states that "While Jane Fitts was escorting a patient, she was pushed." Defendant has not addressed this statement, and has cited to no material in the record to dispute this fact. This fact should therefore be treated as undisputed.
10. None.

11. Plaintiff's Fact 11 states "Defendant pushed Jane Fitts." Defendant's responses to Fact 11 and to Fact 12, which seem directed to this fact, do not cite to any material in the record that contradicts the fact that Defendant pushed Jane Fitts. Although in response to Fact 12 Defendant initially denies that he pushed Ms. Fitts – again, with no citation – he then admits, referring to Ms. Fitts' arm, that he "push[ed] it down slightly." The fact that Defendant pushed Ms. Fitts must therefore be treated as undisputed.

12. See reply to Fact 11, above.

13. Defendant has denied this fact without offering support for the denial. As such, the testimony of Officer Aubin that Defendant jumped "into a crowd of escorts" is undisputed.

14. The deposition testimony that Defendant cites to dispute the fact that Officer Aubin observed Defendant aggressively attempting to stop people from entering the clinic does not address this issue; rather, the cited testimony concerns whether the officer remembered a specific conversation, and in which lane his car was parked. Additionally, Officer Aubin's Uniform Citation is admissible in evidence under Federal Rules of Evidence 803(1) and (6), as reflecting a present sense impression and a record of regularly conducted activity. This fact must therefore be treated as undisputed.

15. None.

16. None.

17. Defendant does not dispute the fact that Ms. Fitts' arm was bruised, but merely denies that he bruised it.

18. Defendant has denied this fact without offering any support for the denial. As such, the fact that Defendant's actions alarmed people is undisputed. Further, the Uniform Citation is not hearsay, as explained in paragraph 14, above.

RESPONSE TO DEFENDANT’S STATEMENT OF ADDITIONAL FACTS

19. Undisputed.
20. Undisputed that the clinic does not provide training or instruction to escorts. Disputed that the clinic “has no relationship with the escorts.” In fact, escorts provide a service to the clinic’s patients, and thus by extension to the clinic. (Br. Supp. Mot. Summ. J., Statement of Undisputed Material Facts 2-4, Dkt. 45-2).
21. Undisputed, although not material.
22. Undisputed, although not material.
23. Disputed. Escorts provide a service to the clinic’s patients, and thus by extension to the clinic. (Br. Supp. Mot. Summ. J., Statement of Undisputed Material Facts 2-4, Dkt. 45-2).
24. It is not disputed that the clinic director did not hear about the incident that forms the basis of this action until about a year after it happened, although the testimony cited by Defendant does not appear to support that assertion. In any event, this fact is not material.
25. Undisputed, although not material.
26. It is not disputed that police officers may have told everyone outside the clinic that they could not stop anybody from going where they wanted to go. However, it is disputed that police told the escorts not to form a “scrum,” as the testimony cited by Defendant does not establish this fact. In any event, this fact is not material.

ARGUMENT

Defendant does not dispute the material facts sufficient to establish a FACE violation. As Defendant admits, Defendant pushed Jane Fitts’ arm because she was escorting a patient into a reproductive health clinic. As a matter of law, Defendant has violated FACE, and the United States is entitled to summary judgment in its favor.

A. The Undisputed Facts Establish that Defendant Pushed Ms. Fitts because she was Escorting a Patient into a Reproductive Health Clinic.

The record establishes that: 1) Defendant pushed Ms. Fitts, 2) intentionally, which 3) injured Ms. Fitts and alarmed Ms. Fitts and others, 4) because Ms. Fitts was escorting a patient into a reproductive health clinic. FACE, 18 U.S.C. § 248 (1994).

1. Defendant used force against a volunteer clinic escort.

Defendant admits that he pushed clinic escort Jane Fitts. (Hamilton depo. 45:11-24). Defendant's admission, which is supported by Officer Aubin's eyewitness testimony (Aubin depo. 23:3-5), conclusively establishes that Defendant used force. The first element of a FACE violation is therefore established. Nothing in Defendant's Response changes this fact.

Defendant attempts to argue, without any support from the record, that somehow two separate use of force incidents occurred, one admittedly perpetrated by him and one perpetrated by an unknown party, and that Defendant pushed Ms. Fitts' lower arm, not her upper arm. No witness testified to two separate instances, however; instead, each party remembers the event (i.e. where on Ms. Fitts' arm she was pushed, or how hard the push was) slightly differently. Even if the record supported Defendant's new version of the facts, however, Defendant used force against Ms. Fitts at least once. That fact is the only material one for the purposes of the instant motion, and it is undisputed. The undisputed facts thus establish the first element of a FACE claim.

2. Defendant Intentionally Pushed Ms. Fitts.

The undisputed facts establish that Defendant acted intentionally. Defendant does not claim that he accidentally used force against Ms. Fitts. Instead, he admits that he moved her arm to get around her. (Hamilton Depo. 45:15-25). Further, Officer Aubin witnessed Defendant jump into a crowd of escorts, attempt to grab someone, and push someone. (Br. Supp. Mot.

Summ. J., Statement of Undisputed Material Facts 12-13, Dkt. 45-2). Officer Aubin witnessed Defendant acting in an aggressive manner. (*Id.*, Fact 14). Based on his observations, Officer Aubin then arrested Defendant. (*Id.*, Fact 15). These facts show that Defendant's use of force was intentional, and Defendant has not provided facts to the contrary. The undisputed facts thus establish the second element of a FACE claim.

3. Defendant's Push Injured and Intimidated Ms. Fitts and Others.

By pushing Ms. Fitts, Defendant injured and intimidated her and also intimidated other escorts. (*Id.*, Facts 17, 18). Even if this were disputed, however, Defendant does not have to have *actually* injured, intimidated, or interfered with anyone, as long as he had the intention to do so. Defendant's intention is undisputed. Defendant concedes that he purposefully pushed Ms. Fitts' arm. (Hamilton depo. 45:11-46:6). He did this because Ms. Fitts was blocking his path to the patient he wanted to address, so he needed to interfere with Ms. Fitts, restricting her freedom of movement, in order to get to the patient. (Hamilton depo. 32:4-33:22). As such, Defendant acted with intent, for he meant to push Ms. Fitts and was "aware of the natural and probable consequences of" his act. *United States v. Gregg*, 32 F. Supp. 2d 151, 156 (D.N.J. 1998) (citing S. Rep. No. 103-117 at 24 n. 39 (1993)) (defining intent for purposes of FACE).

Further, as discussed in the United States' Motion, it stands to reason that Defendant, as a six-foot, six-inch former semi-professional basketball player (Hamilton depo. 9:16-10:4) would have been aware that the natural and probable consequences of pushing Ms. Fitts would be to injure, intimidate, and/or interfere with her and to intimidate others, such as the patient she was accompanying. The undisputed facts thus establish the third element of a FACE claim.

4. Defendant Pushed Ms. Fitts because she was Assisting a Reproductive Healthcare Patient.

Defendant pushed Ms. Fitts because she was attempting to provide safe access to a patient of a reproductive health services clinic. Defendant does not dispute that his presence at the clinic was “motivated by his desire to promote alternatives to abortion.” (Def. Br. at 7). Defendant likewise does not dispute that he pushed Ms. Fitts in order to access a patient she was escorting into a reproductive health services clinic. (*Id.* at 10). Defendant additionally admits that Ms. Fitts is a volunteer clinic escort. The record establishes that Ms. Fitts was part of an organized group of escorts that held periodic trainings (Fitts depo. 24:20-25:19) during which they discussed issues such as consent and respect for clients. (Huffman depo. 11:16-24). Ms. Fitts was thus part of a group dedicated to assisting patients in obtaining reproductive health services.

Defendant repeatedly claims that Ms. Fitts was somehow obstructing others. (Def. Br. at 11, 13). But even if that were true, Ms. Fitts’ conduct is not relevant, for it cannot provide an excuse for Defendant’s use of force. *See New York v. Cain*, 418 F. Supp. 2d 457, 474 (S.D.N.Y. 2006) (finding that defendants’ frustration at escorts’ shielding patients from defendants did not present a cognizable defense for use of force in FACE case). The undisputed facts thus establish the fourth and final element of a FACE claim.

B. The Undisputed Facts entitle Plaintiff to Judgment as a Matter of Law.

All of the relevant parties, including Defendant, Ms. Fitts, and the arresting officer, confirm the essential detail of the incident in question: Defendant pushed Ms. Fitts’ arm. (Hamilton depo. 45:11-24; Fitts depo. 53:11-12; Aubin depo. 23:3-5). This admitted and undisputed act constitutes force as a matter of law under FACE. *See New York v. Cain*, 418 F. Supp. 2d 457, 473 (S.D.N.Y. 2006) (“[F]orce is broadly defined . . . there is no exception for fleeting and *de minimis* contact.”) (internal quotation marks and citations omitted).

As a volunteer clinic escort, Ms. Fitts is protected by FACE. *See, e.g., United States v. Scott*, 975 F.Supp. 428, 433 (D. Conn. 1997) (FACE protects escorts who are assisting patients and staff in obtaining access to clinics); *United States v. Hill*, 893 F.Supp. 1034, 1039 (N.D. Fla. 1994); *Greenhut v. Hand*, 996 F.Supp. 372, 376 (D.N.J. 1998). The fact that escorts like Ms. Fitts had little formal relationship with the clinic is of no moment, as has been determined in similar cases. In *United States v. Scott*, 958 F. Supp. 761 at 766 (D. Conn. 1997), for example, the court found that local students and other citizens volunteered as escorts, and were organized independently of the clinic, with no apparent “official” relationship to the clinic. The escorts’ purpose there, as here, was “to ensure safe access to and exit from [the clinic] by the clinic’s doctors, staff, patients, and people who accompany them.” *Id.* Despite the fact that the escorts were independently organized volunteers, the court found these escorts protected under FACE. *Id.* at 773.

Here, similarly, Ms. Fitts and other escorts provide a service to patients by helping to facilitate those patients’ access to reproductive health services, as she was doing when the incident at issue here occurred. (Ahola depo. 37:11-23; Fitts depo. 50:14-19, 72:11-19). As such, Ms. Fitts was providing reproductive health services when Defendant used force against her, and Defendant would not have engaged in that intentional use of force but for the fact that Ms. Fitts was providing those services.

CONCLUSION

Despite Defendant’s attempt to create disputed facts in an effort to defeat summary judgment, the undisputed material facts establish each element of this FACE claim, and therefore Plaintiff is entitled to judgment as a matter of law. For the foregoing reasons, and those

expressed in Plaintiff's Motion, this Court should grant the Motion for Summary Judgment and enter judgment for Plaintiff.

Dated: July 26, 2012

Respectfully submitted,

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ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE
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CIVIL ACTION

Plaintiff,

v.

DAVID HAMILTON,

No. 3:10CV-759-C

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2012, 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 Fleisher
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