

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

(1) KENNETH BUCKLEY, on behalf of D.D.B.,)
a minor child, (2) PHILLIP and ANDREA)
CONNELLY, on behalf of E.J.D.C., a minor child,)
(3) CLINT and CATHY STAPLETON, on behalf of)
K.N.S., a minor child, (4) BOBBY and RUTH)
SWEET, on behalf of M.N.S., a minor child,)
(5) MICHELLE SUMTER, on behalf of M.N.S.,)
a minor child, (6) FRANCIS SHOEMAKER,)
on behalf of D.W.S.)
Plaintiffs.)

Case No. 10-CV-240 GKF PJC

v.)

(1) INDEPENDENT SCHOOL DISTRICT NO. 4)
of ROGERS COUNTY, OKLAHOMA a/k/a)
OOLOGAH TALALA PUBLIC SCHOOLS,)
(2) CARA JONES, individually, (3) MELISSA)
GIBSON, individually, (4) KENNETH KINZER,)
Individually, (5) RICK THOMAS, individually,)
(6) BOBBY SORDO, individually, (7) CITY OF)
OWASSO , a political subdivision,)
jointly and severally,)
Defendants.)

**PLAINTIFFS' RESPONSE AND OBJECTION TO DEFENDANT BOBBY SORDO'S
MOTION TO DISMISS**

COME NOW the Plaintiffs Kenneth Buckley, on behalf of D.D.B., a minor child,
Phillip and Andrea Connelly on behalf of E.J.D.C., a minor child, Clint and Cathy
Stapleton, on behalf of K.N.S., a minor child, Bobby and Ruth Sweet, on behalf of
M.N.S., a minor child, and Michelle Sumter, on behalf of M.N.S., a minor child, and
Frances Shoemaker, on behalf of D.W.S. and hereby submit their Response and
Objection to Defendant Bobby Sordo's Motion to Dismiss and Brief in Support. In
support thereof, Plaintiffs allege and state as follows:

INTRODUCTION

Plaintiffs filed this action on April 9, 2010 and the matter was subsequently removed by all Defendants. Plaintiffs filed their First Amended Complaint on the 29th day of April 2010 and Plaintiffs' First Amended Complaint seeks claims against Officer Sordo for unlawful search and seizure under the Fourth Amendment of the United States Constitution in violation of 42 U.S.C. § 1983. The allegations under the Fourth Amendment include that Sordo violated the Fourth Amendment right by targeting students, subjecting students to search without reasonable probable cause or suspicion, exceeding the scope of any justifiable search. Further, such claims include the Fourth Amendment violation for unreasonable seizure detaining the students without reasonable probable cause or suspicion, for excessive amounts of time, not allowing the students the right to contact their parents, allowing the students to be questioned by law enforcement without any type of warnings, Miranda or otherwise given to them or their parents to be notified, allowing students to be subjected to coercive interrogation tactics and in fact engaging in coercive interrogation tactics and conspiring with school officials in coercive interrogation tactics. Defendant Sordo asserts numerous facts in his "Introduction and Summary" that are untrue and not part of the record on a motion to dismiss. These facts are controverted by Plaintiffs' response [Doc. 33].

STANDARD OF REVIEW

In the instant case, Defendant is seeking dismissal pursuant to, *inter alia*, Fed. R. Civ. P. 12(b)(6). Under this rule, dismissal is proper only if "viewing the well-pleaded factual allegations in the [petition] as true and in the light most favorable to the non-moving party, the [petition] does not contain 'enough facts to state a claim to relief that is plausible on its face'." Anderson v. Suiters, 499 F.3d 1228-1232 (10th Cir. 2007)

[quoting Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1968-69 (2007)]. If, after viewing the Petition in a light most favorable to the Plaintiffs, the court has "reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims" then dismissal is improper. Ridge at Redhawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007). Plaintiffs clearly satisfy this burden.

Defendant Sordo appears to be arguing that the somewhat relaxed standard of reasonable suspicion instead of probable cause applies to him. See Ganwich v. Knapp, 319 F.3d 1115, 1120 (9th Cir. 2003) (Holding the seizure without probable cause is invalid unless special circumstances justify it.) Further, Officer Sordo is not a school official but rather a law enforcement officer and therefore the probable cause requirement rather than reasonable suspicion applies to him. Under any standard, however, Officer Sordo's conduct violates our Constitution and the constitutional rights of these students.

PROPOSITION NO. I

USAGE OF THE DRUG DOG TO SNIFF THE STUDENTS CONSTITUTES A *PER SE* SEARCH

Officer Sordo asserts that the usage of a drug dog does not constitute a search. However, Oologah-Talala Public Schools' policy specifically classified the dog's conduct as a search in relation to other activities such as "searching for drugs in school buildings, the dog will also search school parking lots and other school property as needed." The Officer uses the drug dog pursuant to an agreement with the School. The policy then adds that the drug dog will not be used to perform any type of student search. The school, and presumably Sordo, in crafting its policy believed that the dog sniffing items on school property constitutes a search but for some reason now believes that sniffing students does not constitute a search. Case law is somewhat conflicting. The Fifth and

Ninth Circuits have held that such conduct is in fact a search. See Horton v. Goose Creek Independent School Dist., 690 F.2d 470, 479 (5th Cir. 1982); B.C. v. Plumas Unified School Dist., 192 F.3d 1260, 1266 (9th Cir. 1999). In Doe v. Winfrow the court ruled that such conduct was not a search and the U.S. Supreme Court denied *certioari* but Justice Brennan wrote a poignant dissent. See id. 451 U.S. 1022 (1981). Justice Brennan noted the Supreme Court's "long abhorrence of unfocused, generalized, information-seeking searches." Id. at 1027. He further noted that the petitioner in the case was alerted on by the dog because she had a dog of her own that was in heat on the morning of the raid. See id. at n.1. The same reason that one Plaintiff here provided to Ms. Jones and Officer Sordo and they accused her of not being truthful. Likewise, Justice Brennan prophetically proclaimed that "schools cannot expect the students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms." Id. at 1027-28. In B.C., the Ninth Circuit adopted the district court's logic suggested by Justice Brennan. The Ninth Circuit affirmed and opined that it was "obvious that the degree of intrusion which occurs from having one's body subjected to examination by a dog is far greater than that which occurs upon the sniffing of unattended belongings." B.C., 192 F.3d at 479. This Court should adopt the reasoning of Horton as well as B.C. and the well reasoned dissent of Justice Brennan and conclude that a drug dog is a search when it sniffs students and that such was clearly established.

PROPOSITION NO. II

THAT USE OF THE DRUG DOG CONSTITUTED A SEARCH

Regardless of whether or not a drug dog sniffing students is always a search, it is certainly a search in the context of this case. Defendant Sordo had a contract with

Oologah-Talala Schools and as such the dog would not be used for search. Whether or not something is considered a search has always been measured in terms of reasonableness by the Supreme Court in relation to the expectation of privacy and the level of intrusiveness. See United States v. Jacobson, 466 U.S. 109, 113 (1984). The Fourth Amendment simply provides the “right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. U.S. Const., Amend. IV. “Its central requirement is one of reasonableness.” Illinois v. McArthur, 531 U.S. 326, 330 (2001).

Here, under any logical reasonableness analysis, the conduct of Officer Sordo and the dog in this case constituted a search. First, the dog was utilized to sniff several students in the midst of taking a final exam. The students were called in front of their peers to leave the classroom adding to an already frightening and extremely uncomfortable situation leaving the students’ peers to now believe the students to be in possession of drugs. One student even had her leg touched by Sordo. The students were allegedly alerted to by the dog and interrogated in an unconstitutional manner further supporting the conclusion that this was a search. Certainly, in this case, the conduct amounted to a search and as such Defendant’s motion should be denied.

PROPOSTION NO. III

THAT THE SEARCH OF PHONES, PROPERTY, BELONGINGS CONSTITUTES UNREASONABLE SEARCH

Defendant Sordo next asserts that the searches of the persons and property were lawful under T.L.O. This assertion is misplaced. Plaintiffs do not dispute that under New Jersey v. T.L.O., 469 U.S. 325 (1985), searches by school officials are allowed upon the slightly relaxed reasonable suspicion standard. See T.L.O. at 341. However, Officer Sordo is not a school official. Neverthelss, even under T.L.O., the

Supreme Court stated “the requirement of reasonable suspicion is not a requirement of absolute certainty.” Sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment.” T.L.O., 469 U.S. at 346. However, as stated in the first amended complaint the students were not alerted on but were targeted.

Defendants rely exclusively on the drug dog allegedly alerting on students. However, this is highly improbable in that even assuming everything Defendants state was true, 21.4% accuracy rate of the dog and falls far short of the sufficient probability akin to reasonable suspicion or probable cause or any other justification. Further, the evidence strongly suggests that students were selected and targeted and thus no reasonable suspicion existed. In fact, one student was not even alerted on but was called to the office. Numerous students were told that their name had been implicated and students were coerced into giving names of other students. Further, the dog was commanded with “here” as it approached several students and it was pulled back after leaving another student. These facts combined with the discrepancies in Ms. Jones’ affidavit strongly suggests no reasonable suspicion but a generalized witch hunt that Justice Brennan lamented.

Thus, the first prong under T.L.O., assuming it even applies, whether or not the search was justified at its inception, specifically whether or not reasonable suspicion existed is debunked and the second prong is whether or not the searches were reasonably related in scope assuming justified at its inception again assuming the T.L.O. standard applies. Here, Officer Sordo asserts that students gave consent despite the clear language in the first amended complaint that no consent was received. However, the individual Defendants did not have permission and consent to search cell phones nor

did they have permission to read cell phone messages or look at pictures. Therefore, Defendants' assertion that search of property and persons was lawful should be denied.

PROPOSITION NO. IV

THE INDIVIDUAL PLAINTIFFS WERE REQUIRED TO HAVE MIRANDA READ TO THEM BY OFFICER SORDO AND FAILURE TO DO SO EXACERBATED THE UNREASONABLENESS OF THE DETENTION

In Miranda v. Arizona, 834 U.S. 436 (1966), the Supreme Court ruled that government officials must immediately advise people of their Fifth Amendment and Sixth Amendment rights before the individual waives those rights. The requirement to provide this notice is known as a person's Miranda rights. Numerous cases have held that a Miranda warning is required when a student is questioned by law enforcement even on school property. See State v. Doe, 948 P.2d 166 (Idaho App. 1997); In re: Killitz, 651 P.2d 1382 (Ore. App. 1992); State v. D.R., 930 P.2d 350 (Wash. App. 1997). Further, Oklahoma law 10A O.S. § 2-2-301 specifically prohibits custodial interrogations without the students being fully advised of constitutional and legal rights.

For whatever reason, Officer Sordo chose not to read the rights to the students apparently because he was afraid the students would exercise their rights or the parents would and prohibit any coercive interrogations. It is highly doubtful that the parents would accept such tactics if they were allowed to be present. Notably, E.J.D.C. was subject to potential criminal proceedings and had to submit herself to the Intake Office of Juvenile Affairs. Therefore, Officer Sordo clearly without equivocation was required to Mirandize the students as well as applicable Oklahoma law.

PROPOSITION NO. V

QUALIFIED IMMUNITY DOES NOT PROTECT DEFENDANT SORDO

In the instant case, Defendant Sordo is asking for qualified immunity. Government officials are entitled to qualified immunity if their conduct does not violate clearly established statutory or Constitutional rights of which a reasonable person would have known. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). A right is “clearly established” if “the contours of [that right] are sufficiently clear that a reasonable official would understand that what he is doing violates that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987). “Before a liability will attach, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” Anderson, 483 U.S. at 640. Plaintiffs do not need to show that the specific conduct in question has been declared unlawful just that upon a reasonable application of existing law the conduct was unlawful. See id. The conduct of Sordo was unlawful and its unlawfulness was clearly established and as such, the motion to dismiss should be denied.

WHEREFORE, for all of the foregoing reasons, Plaintiffs respectfully requests that Defendant Sordo's Motion to Dismiss should be denied.

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CERTIFICATE OF ELECTRONIC FILING

This is to certify that a correct copy of the above document has been sent via the Court's ECF notification system this 28th day of May 2010 to:

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