UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 9:19-cv-81189-RKA

JAMES TRACY,

Plaintiff,

v.

RICKEY LEON BETHEL, JR., AMY GRANDE, TRACY CLARK HAYNIE and GIA SHAW,

Defendants.
_____/

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

COMES NOW Plaintiff, JAMES TRACY, by and through the undersigned counsel, hereby files this Response in Opposition to Defendants' Motion to Dismiss [D.E. 23] and states:

Response to Defendants' Introduction

While it is true that Plaintiff is a former tenured professor who is, *inter alia,* seeking reinstatement in First Amendment claims pending before the U.S. Court of Appeals for the Eleventh Circuit, given the legal standard for motions to dismiss, it is unclear why Defendants have referenced *Tracy v. FAU, et al.,* or Plaintiff's controversial and constitutionally protected speech in their motion to dismiss (hereinafter "Motion"), other than as an attempt to prejudice Plaintiff before the Court. Nevertheless, and despite Defendants' or their attorneys' viewpoints about Plaintiff or his freedom of speech, it is alleged unequivocally in Plaintiff's pleading [D.E. 17] that each Defendant in the above-captioned action violated clearly established[1] federal law.

[1] See *Collier v. Dickinson*, 477 F.3d 1306 (11th Cir. 2007)(reversing dismissal of DPPA claims against public officials); see also *Welch v. Theodorides-Bustle*, 677 F.Supp.2d 1283, 1286 (N.D. Fla. 2010)("If any disclosure by a public official was automatically proper, there could never be a claim under the Act

Because the Defendants are not entitled to qualified immunity and Plaintiff's Second Amended Complaint satisfies the *Twombly* and *Iqbal* pleading standard, the Defendants misrepresent the law, as well as Plaintiff's pleadings, and ask this Court to depart from the legal standard on a motion to dismiss and disregard well settled precedent in this circuit.

Procedural Posture

Besides pretending Plaintiff's pleadings are legally insufficient, Defendants' Motion disingenuously suggests the Second Amended Complaint is somehow improper or is a third bite at the apple. However, there has been no dismissal of Plaintiff's claims or pleadings in this consolidated action and there was nothing improper about Plaintiff exercising his right to file separate civil actions on August 23, 2019, against each individual Defendant for separate violations of the Driver's License Privacy Protection Act ("DPPA"). The record shows that following the Court's *sua sponte* Order to Show Cause [D.E. 4], Plaintiff did not object to consolidation of the cases against Defendants Bethel and Shaw, but reserved his right to move for separate trials. [D.E. 5]. On August 30, 2019, the Court issued an Order [D.E. 6] directing Plaintiff to file a single combined complaint against Defendants Bethel and Shaw and on September 8, 2019, Plaintiff properly filed the first Amended Complaint [D.E. 8]. Subsequently, Defendants Bethel, Shaw, Haynie and Grande retained joint defense counsel and filed unopposed motions to consolidate the cases; the Court then entered Orders [D.E. 13 and D.E. 14] granting further consolidation and ordering Plaintiff to file the Second Amended Complaint, which was properly filed on September 23, 2019 [D.E. 17]. On October 7, 2019, Defendants, filed their *first* motion to dismiss [D.E. 23] in the consolidated actions, which should be denied for many reasons, including but not limited to the facts and law set forth herein.

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against a public official. The statutory language does not support such a conclusion, and the law of the circuit is to the contrary.")

Legal Standards

A. Motions to Dismiss

The U.S. Supreme Court has set forth standards governing a motion to dismiss. The Federal Rules of Civil Procedure require merely "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all factual allegations contained in the complaint. *Twombly*, 550 U.S. at 555. The court must accept the complaint's allegations as true "even if [the allegations are] doubtful in fact." *Id*. A complaint thus "does not need detailed factual allegations." *Id*. Nor must a complaint allege with precision all the elements of a cause of action. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514–15 (2002); *see also Welch*, 677 F.Supp.2d at 1286 (denying motion to dismiss DPPA claims stating, "it is hard to plead a negative with great specificity . . . *Twombly* and *Iqbal* do not require useless details; they call instead for a context-specific inquiry into the adequacy of a pleading . . . and alleging generally that there was no proper purpose for the disclosure, is enough.")

B. The Driver's License Privacy Protection Act ("DPPA")

In 1994, "[c]oncerned that personal information collected by States in licensing of motor vehicle drivers was being released – even sold – with resulting loss of privacy for many persons, Congress provided federal statutory protection. It enacted the Driver's Privacy Protection Act . . . ." *Maracich v Spear*, 570 U.S. 48 (2013). Subject to specific exceptions, the Act provides that state departments of motor vehicles and their officers, employees, and contractors "shall not knowingly disclose or otherwise make available to any person or entity" personal information

"obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721(a)(1)-(2). Personal information includes data "that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address . . . , telephone number, and medical or disability information." *Id.* § 2725(3). The Act established a private right of action against a "person who knowingly obtains, discloses or uses personal information . . . for a purpose not permitted" under the statute. *Id.* § 2724 (a).

To state a claim under the DPPA, Plaintiff must merely allege that defendant(s): (1) knowingly obtained, disclosed or used personal information, (2) from a motor vehicle record, (3) for a purpose not permitted. *Id.* The plain meaning of the third factor is that it is only satisfied if shown that obtainment, disclosure, or use was not for a purpose enumerated under § 2721(b). *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107, 1111 (11th Cir. 2008). As noted in *Welch*, "it is hard to plead a negative with great specificity; that there was no permissible purpose for the disclosure is about as precise as one could be." *Welch*, 677 F. Supp. 2d at 1287; *See also Santarlas v. Atchley*, WL 2452301 (M.D. Fla. May 21, 2015) (denying motion to dismiss adequately pled DPPA claims). "To sufficiently allege a claim under the DPPA sufficient to survive a motion to dismiss a plaintiff must only 'allege that a defendant knowingly obtained . . . personal information in a manner not permitted under the Act.'" *Watts v. City of Palm Beach Gardens, et al*, 2013 WL 12333610, at *3 (S.D. Fla. Sept 12, 2013); *Rios v. Direct Mail Express, Inc.*, 435 F.Supp.2d 1199, 1202 (11th Cir. 2006).

C. Qualified Immunity

Qualified immunity may protect government officials and employees performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have

known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To state a claim for qualified immunity, the plaintiff must assert a violation of a statutory or constitutional right, and the alleged right must be clearly established at the time of the alleged misconduct. *See Saucier v. Katz*, 533 U.S. 194 (2001). In *Collier*, the Eleventh Circuit held that Florida Department of Highway Safety and Motor Vehicle officials who obtained a driver's personal information were not entitled to qualified immunity. 477 F.3d at 1311-12. The *Collier* court found that the plain language of the DPPA and the case law gave clear notice to defendants of the clearly established federal law. The words of the DPPA alone are 'specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity.'" *Id.* (quoting *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002) (holding that statutory language alone, even in the "total absence of case law" can be sufficient to provide fair notice)); *See also Watts*, 2013 WL 12333610 at *4 (holding that if a complaint sufficiently stated a claim against an individual for a DPPA violation, then the defense of qualified immunity would not automatically be available). The DPPA clearly states that it is "unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted." 18 U.S.C. § 2722(a). The statute does not discriminate between obtaining or disclosing federally protected personal information. *Watts v. City of Miami*, 2016 WL 8939143, at *8, (S.D. Fla. Feb. 19, 2016); *See also Santarlas v. Miner*, 2015 WL 3852981, at *4 (M.D. Fla. June 22, 2015) (denying motion to dismiss in DPPA case where plaintiff alleged individual defendants, acting in the scope of their employment, accessed plaintiff's information through DAVID when they did not have a legitimate law enforcement purpose or other permitted purpose). The statutory right was clearly established more than two decades ago when DPPA was enacted into law. 18 U.S.C. § 2721 (1994); *See also Mallak v. Aitkin Cnty.*, 9 F. Supp. 3d

1046, 1063-64 (D. Minn. 2014) (denying defendants qualified immunity against DPPA claims at motion to dismiss stage).

While it is also true that the purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, qualified immunity does not protect the plainly incompetent or one who knowingly violates federal law. *Vinyard*, 311 F.3d at 1346 (internal cites omitted). Under well-defined qualified immunity framework, a public official seeking immunity must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. *Terrell v. Smith*, 668 F.3d 1244, 1250 (11th Cir. 2012). The inquiry is not whether it was within the defendant's authority to commit the allegedly illegal act, instead a court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties. The scope of immunity 'should be determined by the relation of the [injury] complained of to the duties entrusted to the officer.' *In re Allen*, 106 F.3d 582, 594 (4th Cir. 2005) (quoting *Doe v. McMillan*, 412 U.S. 306, 319–20 (1973)). The words of the DPPA alone are "specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity." *Vinyard*, 311 F.3d at 1350 (holding that statutory language alone, even in the "total absence of case law" can be sufficient to provide fair notice). Moreover, the case law defining the reach of the DPPA provides all officials fair notice of the long standing federal law. *See Reno v. Condon*, 528 U.S. 141, 144 - 45 (2000); *Mallak*, 9 F. Supp. 3d at1056 ("The DPPA can be understood by examination of its ordinary meaning and by applying common sense."). The case law defining the statute's scope could be no clearer.

RESPONSE TO DEFENDANTS' ARGUMENT

A. Plaintiff's Second Amended Complaint satisfies *Twombly* and *Iqbal* standards

Defendants' Motion misrepresents both the law in this circuit, as well as Plaintiff's well pled allegations, baldly suggesting Plaintiff's Second Amended Complaint is "shotgun" or contains no specific averments while at the same time admitting Plaintiff "is claiming individual harm by individual acts" and that the Defendants' alleged unlawful inquiries were intended to "harm injure, harass, and/or invade the Plaintiff's privacy". *See* Defendants' Motion at p. 11 [D.E. 23]. But if Plaintiff's pleading had been a shotgun pleading, the proper remedy would have been for Defendants to move for a more definite statement. *See Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955, 983 (11th Cir. 2008). Plaintiff's pleading is clearly not a shotgun pleading, which may explain why the Defendants did not move for a more definite statement.

Defendants' Motion improperly asks the Court to consider various questions or theories of the case that the parties should certainly have the opportunity to explore during discovery. However, the Defendants' or their counsel's questions and theories should not be considered by the Court in ruling on the motion, so Plaintiff need not respond to them at this time. As for Defendants' claims that "there are no specific averments as to any individual Defendant" in Plaintiff's complaint, in reality, the pleading at issue contains over forty specific averments directed at the individual Defendants, including at least eleven directed at Defendant Bethel (Sec. Am. Compl. ¶¶ 18, 25, 29, 30, 31, 32, 33, 34, 35, 37, 38); Defendant Grande (Sec. Am. Compl. ¶¶ 19, 42, 46, 47, 48, 49, 50, 51, 52, 54, 55); Defendant Haynie (Sec. Am. Compl. ¶¶ 20, 59, 64, 65, 66, 67, 68, 69, 71, 72); and Defendant Shaw (Sec. Am. Compl. ¶¶ 21, 76, 80, 81, 82, 83, 84, 85, 86, 88, 89). Exhibit "A" to the Sec. Am. Compl. [D.E. 17-1] is an official report (hereinafter "Report") from the State of Florida's Driver and Vehicle Information Database, also known as

"DAVID", showing Defendant Bethel's thirteen inquiries and Defendant Grande's two inquiries on December 18, 2015, Defendant Haynie's seven inquiries on December 17, 2015, and two inquires on January 14, 2016, and Defendant Shaw's two inquiries on December 17, 2015.

Moreover, the Second Amended Complaint clearly and unequivocally alleges each of Defendants' inquiries set forth in Exhibit "A" were "unwarranted" and "unlawful". Defendants' claim that the Report contradicts Plaintiff's allegations is also baseless. While Plaintiff may not yet fully know why Defendants—four separate law enforcement officers working for his former employer—obtained Plaintiff's confidential personal information shortly after his notice of termination, or precisely what Defendants did with his protected information after obtaining it, or who the information was disclosed to, and other relevant information not contained in the Report, these questions can be addressed by the parties in discovery. Defendants set forth no authority concerning DAVID reports, and it is plainly improper to ask the Court to look outside the four corners of the complaint, let alone consider Defendants' baseless argument or theory that vague "purpose codes" in the Report somehow indicate Defendants' conduct was lawful. *See St. George v. Pinellas County*, 285 F.3d 1334, 1337 (11th Cir. 2002) (holding that in reviewing a motion to dismiss, "the scope of the review must be limited to the four corners of the complaint."). The Second Amended Complaint clearly alleges each individual Defendant violated clearly established law, including but not limited to the following allegations:

- Defendants Bethel, Grande, Haynie and Shaw each "invaded Plaintiff's legally protected interest under the DPPA" (Sec. Am. Compl. ¶¶ 29, 46, 63 80);
- Defendants Bethel, Grande, Haynie and Shaw "did unlawfully access Plaintiff's private personal information by entering Plaintiff's identifying information into the DAVID system for no lawful purpose and retrieved and obtained the Plaintiff's private personal information and record" (Sec. Am. Compl. ¶¶ 30, 47, 64, 81);

- "the information retrieved and accessed by [each Defendant] . . . was obtained in willful and/or reckless disregard of the law, and/or for the purpose and intent to harm, injure, harass and/or invade the privacy of Plaintiff." (Sec. Am. Compl. ¶¶ 31, 48, 65, 82);

- "[a]s law enforcement personnel with access to DAVID, the Defendants were trained on the prohibitions of 18 U.S.C. §§ 2721 through 2725, as well as on similar Florida prohibitions against wrongful use of the data systems to access personal information." (Sec. Am. Compl. ¶ 13).

- Defendants' inquiries "did not fall within the DPPA's permitted exceptions for procurement of Plaintiff's private information." (Sec. Am. Compl. ¶¶ 32, 49, 66, 83);

- Each Defendant "knew or should have known that his/her actions were unlawful and in violation of the DPPA." (Sec. Am. Compl. ¶¶ 33, 50, 67, 84);

- "Plaintiff has suffered harm because his private information has been obtained unlawfully, including ongoing harm by virtue of the increased risk that his protected information is in the possession of Defendant . . . who obtained it without a legitimate purpose. This is precisely the harm Congress sought to prevent by enacting DPPA." (Sec. Am. Compl. ¶¶ 34, 51, 68, 85).

B. Defendants Are Not Entitled to Qualified Immunity

Because Plaintiff has sufficiently asserted claims under the DPPA at this stage of the proceedings—i.e., Plaintiff's allegations, if true, establish the violation of a statutory right—the Court need not address Defendants' arguments regarding qualified immunity. *See Collier*, 477 F.3d at 1310-12 ("find[ing] that the plain language of the DPPA clearly, unambiguously, and expressly creates a statutory right which may be enforced by enabling aggrieved individuals to sue persons who disclose their personal information in violation of the DPPA" and that this statutory right was clearly established); *See also Mallak*, 9 F. Supp. 3d at 1063 (concluding that where a plaintiff sufficiently alleged a violation of the DPPA, defendants were not entitled to qualified immunity at the motion to dismiss stage). Notably, Defendants do not cite any DPPA cases where a motion to dismiss was granted on qualified immunity grounds.

A closer examination of past DPPA cases in our circuit (like the various[2] *Watts* cases) reveals no support for Defendants' unsupportable claim that the Defendants are entitled to qualified immunity before discovery has commenced; but rather makes clear that dismissal of DPPA claims is not appropriate at the motion to dismiss stage. *See Watts*, 2016 WL 8939143, at *8 (S.D. Fla. Feb. 19, 2016) (denying individual defendants' motion to dismiss based on qualified immunity); *See also Watts v. City of Port St. Lucie*, 2015 WL 7736532 (S.D. Fla. Nov. 30, 2015) (denying individual defendants qualified immunity at motion to dismiss stage); *See e.g., Barnett v. Baldwin Cty. Bd. of Educ.*, 60 F. Supp. 3d 1216, 1235-40 (S.D. Ala. 2014) (dismissing claims against individual defendants in their official capacity as duplicative, but discussing claims against the individual defendants in their individual capacity that remained pending). Defendants' Motion baselessly suggests Plaintiff or his attorneys have been "sneaky" or that Plaintiff's filings are somehow defective, when nothing could be further from the truth. Notwithstanding, even if the Defendants or their counsel actually believe the Defendants did not violate federal law when they obtained Plaintiff's highly confidential personal information more than two dozen times without his permission, those beliefs or the factual basis for those beliefs, if any—which can be addressed in discovery and summary judgment—should not be considered by the Court at the motion to dismiss stage of the above-captioned consolidated action.

WHEREFORE, Plaintiff respectfully requests that Defendants' Motion to Dismiss be denied and the Court grant any and all further relief as is just and proper.

Dated: 10/20/2019

Respectfully submitted,

/s/ Louis Leo IV
Louis Leo IV, Esq.
FL Bar No. 83837

[2] The *Watts* cases involved hundreds of defendants and claims—not just DPPA violations—but notably Watts' DPPA claims against defendants in their individual capacities survived motions to dismiss because the individual defendants in those cases were not entitled to qualified immunity at the motion to dismiss stage of proceedings.

Email: louis@floridacivilrights.org
Joel Medgebow, Esq.
FL Bar No. 84483
Email: joel@medgebowlaw.com
Florida Civil Rights Coalition, P.L.L.C.
4171 W. Hillsboro Blvd. Suite 9
Coconut Creek, FL 33073
Telephone: (954) 478-4223
Fax: (954) 239-7771

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October, 2019, a true and correct copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system. I further certify that the foregoing document was served via transmission of Notice of Electronic Filing generated by CM/ECF to any and all active CM/ECF participants.

/s/ Louis Leo IV
Louis Leo IV, Esq.