UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ROSALINDA BAEZ,

Plaintiff,

-against-

JETBLUE AIRWAYS and TIFFANY MALABET,

Defendants.

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MEMORANDUM & ORDER

09-cv-0596 (ENV) (RML)

VITALIANO, D.J.,

Plaintiff Rosalinda Baez brought this action against JetBlue Airways and former JetBlue employee Tiffany Malabet based on an April 2009 incident in which Baez was arrested at John F. Kennedy airport for making an alleged bomb threat. In her October 22, 2009 amended complaint, Baez asserted violations of federal and state laws by both JetBlue and Malabet. About a year later, on October 15, 2010, the Court (per Garaufis, J.), granted in part and denied in part motions by JetBlue and Malabet to dismiss that complaint. Specifically, Baez's § 1983 claims against both JetBlue and Malabet were dismissed along with her false arrest and intentional infliction of emotional distress ("IIED") claims against JetBlue. Denied were JetBlue's motion to dismiss Baez's negligence and defamation claims as well as Malabet's motion to dismiss Baez's false arrest, IIED and defamation claims. Following a lengthy period of discovery, JetBlue and Malabet have now moved for summary judgment with respect to all of Baez's remaining claims. For the reasons

discussed below, the Court grants the motions in full.

Background

At approximately 6:30 on the morning of April 15, 2008, Baez arrived at JFK for a flight to Austin, Texas scheduled to depart at 8:05 a.m.[1] The ticketing agent did not inform Baez at check-in that the departure gate was located in a separate terminal, and, as a result, Baez arrived at the gate a mere ten minutes prior to the scheduled departure. As Baez approached the gate, Malabet, a JetBlue ticketing agent, emerged from the jet bridge and informed Baez that she had just closed the plane door and, therefore, could not allow Baez to board the plane. Baez, obviously upset with this turn of events, asked about her checked baggage, which was presumably already on the plane. According to Baez, Malabet informed Baez that her bag would remain on the plane and would be waiting for her in Austin. Baez then stated "Isn't that a security risk? What if there was a bomb in my bag?" Malabet responded "If there was a bomb, the TSA would have caught it." Baez then responded "TSA my ass" and walked away. (See Am. Compl. ¶¶ 25-26, Baez Depo. at 199-201.)

Malabet's recollection of the conversation is hazier. At her deposition, she initially testified that Baez's version of her own statement was accurate—that Baez "stated it as a question" and that Malabet "kn[e]w [that Baez] didn't make a bomb threat." (Malabet Depo. at 39, 44.) Malabet testified that "at [no] point in the

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[1] **The facts are drawn from the amended complaint, depositions, exhibits, Rule 56.1 Statements and affidavits submitted by the parties. All reasonable inferences are drawn in favor of Baez as the non-moving party.**

conversation did [Baez] ever tell [Malabet] that she had a bomb in her bag." (Id. at 50.) Malabet later shifted course, characterizing her earlier testimony as "a mistake" and testifying "I know [Baez] did state 'Well, I have a bomb in my bag so you should turn the plane around.'" (Id. at 60, 163.) However, later in the deposition, Malabet returned to her prior recollection, testifying that Baez never affirmatively stated that she had a bomb in her bag. (Malabet Depo. at 77-78, 92-93, 100, 104.) In short, throughout her deposition Malabet gives inconsistent and contradictory testimony about the specifics of her conversation with Baez.

In any event, it is undisputed that, following this conversation (in which Baez used the word "bomb" in reference to her checked luggage and questioned TSA's ability to detect bombs), Baez walked to the JetBlue customer service counter and was booked on a new flight to Austin, departing at 1:05 p.m. According to Baez, while she was re-booking her flight, Malabet walked over and told another JetBlue employee "This one thinks she's getting on a flight. This one's nasty. You see how nasty she is?" (Am. Compl. ¶ 33, Baez Depo. at 205.) After Baez received her new ticket, she walked to a wi-fi area in the terminal to work.

Shortly after JetBlue had re-booked Baez, Malabet relayed her earlier conversation with Baez to Malabet's supervisor, Indira Hutchins. Hutchins then called the Transportation Security Administration ("TSA") to report the incident, and TSA Officer Elkman Eastman immediately came to speak with Malabet. Malabet spoke for approximately five minutes with Officer Eastman and told him, in sum and substance, that Baez told her: "There is a bomb in my bag so you should turn the plane around." (Malabet Depo. at 59-60.) At that point, TSA, in

conjunction with JetBlue, decided to re-route the airplane, which had already taken off, to land in Richmond, Virginia rather than Austin. Upon landing police officers searched all of the plane's passengers and their luggage, but, unsurprisingly, did not find a bomb.

Wasting no time, after Malabet's conversation with Officer Eastman, TSA located Baez in the terminal and detained her. At this point, TSA immediately passed custody of Baez to the FBI, and FBI agents interrogated Baez for approximately five hours. During this five hour period, FBI agents also conducted a separate two-hour interview with Malabet, who described in detail her recollection of the events of the day, including the specifics of her conversation with Baez. (Malabet Depo. at 74-78; JetBlue Rule 56.1 Statement, Ex. 9 (FBI Report).) As reflected in the FBI report and Malabet's deposition testimony, Malabet had told the FBI that Baez showed up late to board a plane for which she was a ticketed passenger; that Malabet advised Baez that she could not board the plane but that her checked baggage would remain on-board; and that Baez made the statements "What if I had a bomb in my bag?", "I have a bomb in my bag" and "TSA does not know how to do their fucking job." (FBI Report at 1.) Critically, the FBI report recorded that Malabet had attributed to Baez both statements—one an interrogatory and the other a declaration—the same statements she ascribed to Baez at her deposition. Any stumble in Malabet's recollection as to the precise words used by Baez was not, clearly, an invention of litigation but present in her original report to the FBI. Malabet also told the FBI that Baez was "extremely upset" during this encounter and that she had spoken in an angry and frustrated

manner. (Id.) Tellingly, moreover, Malabet had advised the FBI that Baez had made her comments about her checked luggage after being advised the luggage was aboard the flight.

Following these interviews FBI agents arrested Baez and, ultimately, charged her with making a bomb threat, in violation of 49 U.S.C. 46507.[2] As it turned out, the government did not pursue this charge to judgment. Instead, it was dismissed as part of a plea agreement in which Baez pled guilty to a drug crime for having marijuana in her checked luggage. The incident garnered significant national and international media coverage.

On her plea, Baez was sentenced to three years probation and, in somewhat of a scotch verdict, required to pay JetBlue $13,448.20 in restitution for costs relating to the original flight's re-routing. The restitution to be paid to JetBlue, the sentencing court specifically noted, was a "consequence of the offense [a bomb threat] alleged in the complaint as opposed to the misdemeanor [drug charges]" for which she had been convicted. (See United States v. Baez, 8-cr-560 (RJM) dkt. # 20, at 14.) The record recited no objection or appeal taken by Baez from that order. In seeming consequence of her arrest, Baez lost her job as a vice-president for Schematics, where she was earning $190,000 per year. Baez's ability to obtain

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[2] **Under 49 U.S.C. 46507 it is a felony when an individual "knowing the information to be false, willfully and maliciously or with reckless disregard for the safety of human life, gives, or causes to be given, under circumstances in which the information reasonably may be believed, false information about an alleged attempt being made or to be made to do an act that would violate § 46505," which, in turn, criminalizes "carrying a weapon or explosive on an aircraft." See 49 U.S.C. 46507.**

employment in her chosen field, she claims, continues to be significantly restricted by the fallout from this incident.[3]

JetBlue and Malabet now move for summary judgment on all of Baez's remaining claims. Defendants first argue that they are immune from suit based on a provision of the Aviation and Transportation Security Act ("ATSA"). In the alternative, they argue that, even assuming the invoked immunity does not exist, Baez's remaining claims are all without merit and that there are no material issues of fact in genuine dispute.

Standard for Summary Judgment

Pursuant to Rule 56, a federal district court must grant summary judgment upon motion and finding, based on the pleadings, depositions, interrogatory answers, admissions, affidavits, and all other admissible evidence that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The initial burden is on the moving party to demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986);

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[3] It is an interesting sidebar, of course, that if Malabet, as Baez charges, with deliberation falsely accused Baez of making a bomb threat and then passed that false threat along to TSA and the FBI knowing it to be false, she would be in violation of the very same section of law under which Baez had been originally charged and/or of lying to the FBI in the course of an investigation, in violation of 18 U.S.C. § 1001. No such charge was ever preferred by the government against Malabet.

Feingold v. New York, 366 F.3d 138, 148 (2d Cir. 2004). In determining whether the moving party has met this burden, a court must construe all evidence in a light most favorable to the nonmoving party, resolving all ambiguities and inferences in its favor. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); Gibbs-Alfano v. Burton, 281 F.3d 12, 18 (2d Cir. 2002). However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson, 477 U.S. at 247-48 (emphasis in original); Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp., 302 F.3d 83, 90 (2d Cir. 2002). Material facts are those which, given the substantive law, might affect the suit's outcome. Anderson, 477 U.S. at 248.

If the moving party makes a *prima facie* showing that there are no genuine issues of material fact, the nonmoving party must go beyond the pleadings and put forth "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Davis v. New York, 316 F.3d 93, 100 (2d Cir. 2002). In so doing, the nonmoving party may not rely on conclusory allegations or speculation. Golden Pac. Bancorp v. FDIC, 375 F.3d 196, 200 (2d Cir. 2004) (citing D'Amico v. City of New York, 132 F.3d 145, 149 (2d Cir.1998)); Fed. R. Civ. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). Thus, to defeat a motion for

summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Jeffreys v. City of New York, 426 F.3d 549, 554 (2d Cir. 2005) (quoting Matsushita, 475 U.S. at 586). Nonetheless, the nonmoving party need not make a compelling showing; it need merely show that reasonable minds could differ as to the import of the proffered evidence. R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 59 (2d Cir. 1997).

Analysis

I. ATSA Immunity

Defendants argue that pursuant to ATSA they possess immunity from all of Baez's claims. The ATSA provides that "[a]ny air carrier . . . or any employee of an air carrier . . . who makes a voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism . . . to any employee or agent of the Department of Transportation, the Department of Justice, any Federal, State or local law enforcement officer, or any airport or airline security officer shall not be civilly liable . . ." 49 U.S.C. § 44941(a). As defendants contend, whether Baez said "what if there was a bomb in my bag?" or "there is a bomb in my bag," or made both statements as the FBI report reflects, either or both statements were sufficiently suspicious to justify Malabet warning TSA and the FBI that Baez was a potential security threat. Such nexus, they claim, provides JetBlue and Malabet with immunity from civil liability arising out of the statements Malabet made to TSA and the FBI about Baez.

As a matter of general law, immunity from tort liability does not come easily. See Indian Towing Co. v. United States, 350 U.S. 61 (1955). Congress passed ATSA in 2001 in response to the horrible events that occurred on September 11 of that year in order to provide "airlines and their employees [with] immunity against civil liability for reporting suspicious behavior." Air Wisconsin Airlines Corp. v. Hoeper, 517 U.S. __, 1 (2014). However, this immunity does not attach to "any disclosure made with actual knowledge that the disclosure was false, inaccurate or misleading," or to "any disclosure made with reckless disregard as to the truth or falsity of that disclosure." 49 U.S.C. § 44941(b).

In its quite recent pronouncement on ATSA immunity, the Supreme Court clarified that "a statement otherwise eligible for ATSA immunity may not be denied immunity unless the statement is materially false." Hoeper at 7. Underscoring the importance of free and unfettered communication of security threats to appropriate authorities, the Supreme Court in Hoeper adopted an "actual malice" standard for reviewing statements potentially subject to ATSA immunity, rejecting the argument that mere falsity alone, as opposed to a materially false statement, was sufficient to defeat immunity. Id. at 8. The Court concluded that "[a] material falsity requirement . . . serves the purpose of ATSA immunity . . . [by] ensur[ing] that air carriers and their employees would not hesitate to provide the TSA with the information it needed." Id. at 9. Further, "[i]t would defeat this purpose to deny immunity for substantially true reports, on the theory that the person making the report had not yet gathered enough information to be certain of its truth." Id. Applying that standard, Baez, in order to survive summary judgment, must present

evidence sufficient to show that a genuine issue of fact exists as to whether Malabet's statements to TSA and/or the FBI were materially false. With respect to the materiality requirement, "any falsehood cannot be material, for purposes of ATSA immunity, absent a substantial likelihood that a reasonable security officer would consider it important in determining a response to the supposed threat." Hoeper. at 13. "This standard is an objective one, involving the hypothetical significance of an omitted or misrepresented fact to a reasonable security official, rather than the actual significance of that fact to a particular security official." Id. (citations omitted).

On the summary judgment record, JetBlue and Malabet are entitled to immunity as a matter of law.[4] Dispositively, according to the FBI's

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[4] Whether application of ATSA immunity is a question for the jury or for the Court is unsettled. In *Hoeper*, plaintiff sued Air Wisconsin in Colorado state court and the trial court ruled that "the jury was entitled to find the facts pertinent to immunity" as well as whether, under those facts, immunity applied. *Hoeper* at *13-14. The Colorado Supreme Court unanimously reversed on this point, however, holding that "immunity under the ATSA is a question of law to be determined by the trial court before trial." *Id.* at *15. The majority opinion in *Hoeper*, unfortunately, declined to address this dispute. *See Hoeper* at *28 ("[W]e neither embrace nor reject the Colorado Supreme Court's unanimous holding 'that immunity under the ATSA is a question of law to be determined by the trial court.'") The dissent in *Hoeper* took issue with this aspect of the majority opinion, arguing that the materiality issue was a "mixed question of law and fact" and that "the jury has a vital role to play in the materiality inquiry." *Hoeper* at *37-38 (Scalia, J., dissenting). The dissent argued that the proper approach is to "ask whether a reasonable jury *could* find the . . . facts to be such that those statements were not only false, but *materially* false from the perspective of a reasonable TSA agent. If not, judgment for [defendant] is proper; but if so, the ATSA materiality question should be tried to a (properly instructed) jury." *Id.* (emphasis in original). No other federal court, current research reveals, has addressed this issue. Here, given the Court's conclusion that the challenged interview statement must be considered as a whole and not be

contemporaneous record of the agents' interview of Malabet, Malabet reported that Baez confronted her with the question "What if there is a bomb in my bag?" In other words, since Baez does not dispute that she asked that question, she acknowledges that Malabet made a truthful report to the FBI regarding a statement she made at an airport jetway concerning a bomb in her luggage. In addition to being truthful, the report was self-evidently material to air travel security. "Actual malice" could not hope to find a footing in such a report. It is for this reason that Baez urges the Court to parse Malabet's overall interview statements and focus on those that omitted, in plaintiff's view, the magic words "what if," appearing to attribute a straight declaration to Baez that there was a bomb in her luggage. The stratagem finds a dry hole. See Hoeper at 28 ("to accept [plaintiff's] demand for such precise wording would vitiate the purpose of ATSA immunity.") Even assuming, as the Court must for purposes of this motion, that the declarative statements Malabet attributed to Baez were never said, those misrepresentations do not erase the impact of the truthful statements Malabet reported to the FBI about what Baez admits she said regarding a bomb in her luggage, about TSA's inability to detect bombs, and about her intention to be on the very same flight as the bags subject to her bomb inquiry. The totality of Malabet's report, including those truthful statements about which there is no genuine dispute, establishes, the Court

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parsed, even if such questions are, as the *Hoeper* dissent suggests, for the jury, on the strength of the undisputedly truthful statements made by Malabet, on the issue of the absence of material falsity in Malabet's overall report to government officials, summary judgment would still be appropriate.

finds, the absence of actual malice, and, to the extent that there were falsehoods by omission in Malabet's report of this incident to government officials charged with responsibility for air transportation security, such falsehoods were not material when adjudged by the standard the Supreme Court announced in *Hoeper*.

Recapitulating more specifically, a review of the undisputed material facts shows that Malabet spoke with TSA Officer Eastman for approximately five minutes. She conveyed that an agitated passenger, who had missed her flight, used the word bomb in relation to her luggage. (Malabet Depo. at 58-62.) Malabet further informed Officer Eastman that JetBlue had re-booked Baez on a later flight and she remained somewhere in the terminal. (Id.) Consistent with TSA regulations as well as guidance from the Federal Aviation Administration and the Department of Transportation, Officer Eastman took this threat seriously despite the distinct possibility (given that Baez planned to be aboard the flight with the bags) that it was not real. See 49 C.F.R. § 1544.30 (airline must notify TSA "[u]pon receipt of any bomb threat"); In the Matter of Stevens, FAA Order No. 98-24, at 3 (Dec. 18, 1998) ("[C]laiming one is joking is not a valid defense [under 49 U.S.C. § 46302], because Congress designed the statute to prevent the alarm and disruptions that result from false information about a bomb, regardless of whether the false information was intended as a joke."); Dep't of Transportation News Release, November 22, 1999 (Warning passengers, "[d]o not joke about having a bomb or firearm in your possession. Security personnel are trained to react when they hear these words. Penalties can be severe, and can include the possibility of time in prison and/or fines.") Moreover, given that Malabet explained the entire context of

the incident to Officer Eastman—including saying Baez was angry and agitated as a result of missing the flight that contained the threatening luggage—it is simply not credible to contend that Officer Eastman would have reacted differently if Malabet had reported only those statements including the two magic words, "what if," and made no mention of those without them

Plainly, the alleged omission in this case is precisely the type of minor verbal inaccuracy that the Supreme Court decided, under a similar set of facts, was protected by ATSA immunity. *See Hoeper* at *32 ("[A] statement that would otherwise qualify for ATSA immunity cannot lose that immunity because of some minor imprecision, so long as 'the gist' of the statement is accurate.") And, it is undisputed, Baez admits that she used the word "bomb" in reference to her checked luggage when talking to an airline gate agent and then questioned TSA's ability to detect bombs. A reasonable gate agent would report that information to the airlines, the airline would contact TSA and a reasonable officer, when confronted with such a report, would consider Baez to be a potential security threat and would seek the "bomb" declarant out for further questioning, which is precisely what occurred.

Once TSA officers located Baez, FBI agents took over and interrogated Baez for approximately five hours. During this time, FBI agents also separately interviewed Malabet, who repeated her entire conversation with Baez, as well as responding to other inquiries concerning the incident. As discussed above, the FBI Report regarding this incident, produced to the parties pursuant to a non-party subpoena, reflects, in addition to memorializing information that Baez was angered

because she was not aboard the suspected bomb threat flight, that Malabet told the FBI that Baez said "What if I had a bomb in my bag?" and "I have a bomb in my bag," among other comments. (Passeri Decl. Ex. 9.) The criminal complaint against Baez also includes both of these statements. (Passeri Decl. Ex. 10.)

Baez contends that the inclusion of Malabet's alleged misstatement in the FBI report and criminal complaint demonstrate that this purported misstatement was material to the FBI's decision to arrest and charge her. Not so. All that is demonstrated by these documents is that Baez and Malabet both had lengthy conversations with FBI agents where they discussed in detail the events of the day, including their recollections of their conversations with each other. After reviewing all of the evidence, the FBI decided to charge Baez with making a false bomb threat. Contrary to Baez's contention, this charging decision cannot be attributed to a parsed difference in words spoken by Malabet during the course of a two-hour interview, in which, overall, she accurately relayed how Baez had spoken the word "bomb" at the jetway leading to a departing flight containing luggage referenced in the same statement as the word "bomb". Accordingly, under these facts, JetBlue and Malabet are entitled to immunity as a matter of law under 49 U.S.C. § 44941(a).

More profoundly, ATSA immunity was created to encourage airline personnel to freely report even snippets of conversations relating to potential bomb threats, *see Hoeper* at 7-9, and for TSA and the FBI, but not the airline or its employees to assess the threat. An airline passenger who angrily confronts an airline boarding agent in one of the world's busiest air terminals and uses the words "bomb" and "luggage" and disparages the TSA's ability to detect such threats

cannot be heard to complain when the boarding agent honestly reports the use of those words, even if in some of the telling misrepresentations by omission might have been given.[5] ATSA immunity was designed to ensure that the sort of words that Baez does not dispute she used were reported. That is precisely what Malabet and JetBlue did and they are immune from accounting for that report in an action seeking to impose civil liability.

II. Negligence[6]

JetBlue argues that Baez has failed to uncover any evidence supporting her negligence claims.[7] "Under New York law, an employer can be held liable under theories of negligent hiring, negligent supervision, negligent retention, and negligent training." Dewitt v. Home Depot U.S.A., Inc., 2012 U.S. Dist. LEXIS 130963, at *18 (E.D.N.Y. 2012). "All such claims are based on the employer's direct negligence." Id. Further, to support a finding of negligent hiring, training, supervision or retention, a plaintiff must demonstrate that the "employer knew or should have known of the employee's propensity for the conduct which caused the injury." Bouche v. City of Mount Vernon, 2012 U.S. Dist. LEXIS 40246, at *30 (S.D.N.Y. 2012); see also Ehrens v. Lutheran Church, 385 F.3d 232, 235 (2d Cir. 2004). A plaintiff must also show (1) that the tortfeasor and her employer were in an

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[5] **Again, the Court does not find that Malabet made any false statements. The Court, as it must on summary judgment, merely draws the inference most favorable to Baez as the non-moving party.**

[6] **Although the Court concludes defendants are entitled to immunity under ATSA for all claims asserted by Baez, because each of these claims also fails for independent reasons, the Court will address those deficiencies as well.**

[7] **Baez has not brought any negligence claims against Malabet individually. (Am. Compl. ¶¶ 93-116.)**

employer-employee relationship, and (2) the tort was committed on the employer's premises. See Ehrens at 235.

JetBlue concedes that Baez has met the latter two prongs of the direct negligence test—i.e. that Malabet was a JetBlue employee and that the challenged conduct took place on work premises. However, JetBlue vigorously disputes that Baez has uncovered any evidence showing "tortious propensities" by Malabet and, accordingly, argues that the Court should dismiss all of Baez's negligence claims against it. The Court agrees.

A. Negligent Hiring

A claim for negligent hiring "requires the employer to answer for a tort committed by an employee against a third person when the employer has either hired or retained the employee with knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm." Sandra M. v. St. Luke's Roosevelt Hosp. Ctr., 33 A.D.3d 875, 878 (2d Dep't 2006). "The employer's negligence lies in his having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention of his employees." Id. at 878-879.

Baez has failed to point to any evidence that JetBlue knew of Malabet's allegedly tortious propensities at the time of hiring. To the contrary, the evidence shows compellingly that JetBlue followed its standard hiring procedure when evaluating Malabet—she was interviewed by two JetBlue employees and received positive reviews; an outside agency, HireRight, conducted a background check on

Malabet that revealed no issues; and Malabet passed a drug and alcohol dependency test and had no criminal history.

Plaintiff attempts to make much of evidence showing that (1) Malabet had previously applied for four different jobs at JetBlue but had been rejected, and (2) Malabet's job application contained minor gaps in her job history and did not contain any references. Baez contends that JetBlue had a duty to fully investigate Malabet prior to hiring and the "deficiencies" in Malabet's application outlined above demonstrate JetBlue's alleged failure to conduct a comprehensive review of Malabet's background and, as such, support Baez's claim for negligent hiring. However, critically, "the duty to investigate a prospective employee, or to institute specific procedures for hiring employees, is triggered only when the employer *knows* of facts that would lead a reasonably prudent person to investigate the prospective employee." Sandra M. at 879 (emphasis added). Here, there is no evidence that JetBlue actually knew anything about Malabet that should have caused JetBlue to conduct a more thorough investigation than it did. Further, the alleged deficiencies that Baez points to in Malabet's job application were all quite minor, and certainly do not demonstrate any propensity on the part of Malabet to engage in the sort of tortious conduct alleged here.

B. Negligent Retention

Similarly, to avoid summary judgment on a negligent retention claim, a plaintiff must "offer evidence that defendant negligently failed to terminate an employee—that is, that the defendant knew or should have known of an employee's propensity to commit acts meriting dismissal, yet failed to act accordingly."

Tesoriero v. Syosset Cent. Sch. Dist., 382 F. Supp. 2d 387, 401-402 (E.D.N.Y. 2006). Baez offers just two pieces of evidence to support her negligent retention claim: first, that Malabet had been late to work 10 times during the first six months of her employment at JetBlue and, second, that she had entered between 30-50 Passenger Name Record ("PNR") entries in JetBlue's computer system during her period of employment. Baez argues that Malabet had a history of contentious interactions with passengers and should have been terminated.

Plaintiff's proffer of Malabet's shortcomings does not come close to meeting the standard for a negligent retention claim. With respect to Malabet's PNR entries, the evidence actually demonstrates that there were multiple reasons why an employee might create a PNR entry, including changing a reservation or giving away a free seat. Indeed, PNR entries are not even reviewed by a supervisor unless a passenger complains. Further, Malabet's alleged history of tardiness clearly has no bearing on her propensity to commit the sort of tortious conduct alleged here. For these reasons, Baez's claim for negligent retention falls. See Dewitt at *26 ("Because plaintiff has not presented any evidence that [defendant] knew or should have known of the [employees] propensities to commit acts meriting dismissal, summary judgment is granted on the negligent retention claim.")

C. Negligent Supervision

"Under New York law, a plaintiff asserting a claim for negligent supervision must prove: (1) the tortfeasor and defendant were in an employee-employer relationship; (2) the employer knew or should have known of the employee's propensity for the tortious conduct; and (3) the tort was committed on the

employer's premises or with the employers chattels." Papelino v. Albany College of Pharm. of Union Univ., 633 F.3d 81, 94 (2d Cir. 2011) (citation omitted). As discussed above, there is no evidence indicating that JetBlue knew or should have known of Malabet's alleged tortious propensities during her period of employment.

Baez asserts that (1) JetBlue did not provide Malabet with any written or oral feedback during her time at JetBlue, and (2) that JetBlue improperly assigned Malabet the job duties of "Ground Security Coordinator" on the day of the incident, a role for which she was allegedly too inexperienced. This argument is a red herring. Even if true, such facts utterly fail to demonstrate a tortious propensity by Malabet that JetBlue was or should have been aware of, that suggest any negligence in JetBlue's supervision of Malabet.

D. Negligent Training

To make out a negligent training claim, a plaintiff "must demonstrate deficiencies in the training of employees that, if corrected, could have avoided the alleged harm." Baez v. JetBlue Airways Corp., et al., 745 F. Supp. 2d 214, 225 (E.D.N.Y. 2010). Plaintiff asserts that JetBlue never provided Malabet with any training on how to respond to bomb threats and that if Malabet had received such training she likely would have responded more appropriately to Baez's remarks.

The record evidence, however, does not support Baez's assertion. Malabet testified that, prior to the incident, she had received "classroom training" on a variety of topics, including "TSA procedures" and "TSA safety and security protocols." (Malabet Depo. at 165.) Malabet's employee records at JetBlue show that she, undisputedly, completed numerous training classes at JetBlue prior to the

incident with Baez, including sessions on topics such as "Airport Safety" and "Airport Security." (Passeri Decl. Ex. 20.) Finally, Baez now admits that Malabet received "initial and recurrent training" on "communicating with customers, closing flights, and reporting threats." (Plaintiff's Counter-Statement to JetBlue Rule 56.1 Statement ¶¶ 52-53.) In short, the evidence overwhelmingly demonstrates that Malabet received ample training on how to respond to potential security threats, and with no facts in dispute, is fatal to Baez's negligent training claim. See Dewitt at *26 (granting summary judgment on negligent training claim where evidence demonstrated employees received both initial and ongoing training.)

In sum, because Baez has presented no evidence that JetBlue was or should have been aware of a propensity by Malabet to commit the alleged injurious conduct, it grants summary judgment in favor of JetBlue on all direct negligence claims even assuming, *arguendo*, that ATSA immunity does not lie. See Dewitt at *18 ("Because the court finds, construing all the evidence in the light most favorable to the plaintiff, that he has failed to make a sufficient showing—let alone any showing—that [defendant] knew or should have known of the propensity of any of [its employees] to commit the alleged injurious conduct . . . summary judgment is granted in favor of [defendant] on all the direct negligence claims.")

III. Defamation

Plaintiff sets forth defamation claims against both JetBlue and Malabet, and both claims survived defendants' motions to dismiss. "Under New York law, establishing a claim for defamation requires a showing: (1) that defendants made a false defamatory statement of fact; (2) that the statement was published to a third

party; (3) that the statement concerned the plaintiff; (4) that the defendant was responsible for making the statement; and (5) that the statement was slander per se or caused special damages." Garrison v. Toshiba Bus. Solutions (USA), Inc., 907 F. Supp. 2d 301, 307 (E.D.N.Y. 2012) (citation omitted). "A statement is defamatory per se—and thus, injury is assumed and no proof of special damages is required—if it accuses the plaintiff of a serious crime; tends to injure her in her trade, business, or profession . . . or if the statement is so severe that serious injury to the plaintiff's reputation can be presumed." Sang Lan v. Time Warner, Inc., 2013 U.S. Dist. LEXIS 56816, at *66-67 (S.D.N.Y. 2013). Baez contends that Malabet's statements to TSA, Malabet's co-workers and the FBI that Baez said "I have a bomb in my bag" satisfy all five prongs because those statements: (1) were false; (2) were published to third parties (TSA, co-workers and the FBI); (3) concerned Baez; (4) Malabet (and JetBlue vicariously) were responsible for making them; and (5) constituted defamation per se because Malabet accused Baez of a serious crime—namely, making a bomb threat.

Defendants advance two arguments to parry plaintiff. First, defendants argue that the amended complaint rested its defamation claim on statements allegedly made by JetBlue and Malabet to news media disparaging Baez's character, a theory that Baez abandons in her opposition papers. Defendants cry foul, urging that the Court should not allow Baez to proceed now based on a theory not pleaded in her amended complaint. Indeed, it is indisputable that the central thrust of Baez's defamation claim in the Amended Complaint regards alleged statements made by Malabet and JetBlue to the news media. (See Am. Compl. ¶¶

84-92) ("Defendants provided false and misleading information to various news agencies and/or media outlets regarding plaintiff.") Baez has abandoned this theory in her briefing, unsurprisingly, because discovery revealed that all of the press statements Baez attributed to defendants actually came either from Baez herself or from publicly available sources. (See Passeri Decl., Ex. 14; Marzulli Decl.; Baez Depo. at 271-75.)

It is black letter law that a party may not raise a claim for the first time in summary judgment briefing, and therefore defendants have a strong argument that Baez has waived her ability to raise this theory of defamation. See, e.g., Brandon v. City of New York, 705 F. Supp. 2d 261, 278 (S.D.N.Y. 2010). However, it is also true that the amended complaint alleges, in part, that Malabet "maliciously and deliberately lied [to JetBlue officials and TSA] about the words stated by plaintiff Rosalinda Baez during their conversation." (Am. Comp. ¶ 41.) In addition, Baez's attorney pursued this theory of defamation during Malabet's deposition. Consequently, the Court will consider this theory of defamation, which it concludes, in any event, lacks merit.

Under New York law a statement is not defamatory when it is "substantially true." Biro v. Condé Nast, 883 F. Supp. 2d 441, 458 (S.D.N.Y. 2012); Croton Watch Co. v. Nat'l Jeweler Magazine, Inc., 2006 U.S. Dist. LEXIS 55753, at *17 (S.D.N.Y. 2006) ("The purportedly defamatory statements need only be substantially true, so that minor inaccuracies cannot give rise to an actionable defamation claim.") A statement is substantially true if the statement "would not have a different effect on the mind of the reader from that which the pleaded truth would have produced."

Mitre Sports Int'l, Ltd. v. HBO, Inc., 2010 U.S. Dist. LEXIS 37494, at *3 (S.D.N.Y. 2010.) As discussed above, Baez's current theory of defamation rests entirely on Malabet omitting the words "what if" when repeating some of her bomb-related statements to TSA and FBI agents. Consistent with the Court's conclusion that this omission, again, assumed for purposes of the motion, would not be material to any reasonable person obligated to make or consider such reports, the Court also concludes that the purported misstatements were substantially true; she angrily used the words "bomb" and "luggage" in confronting an airline boarding agent at a jetway in JFK. Therefore, Baez's defamation claims against JetBlue and Malabet fail as a matter of law.

Finally, it is unclear what damages Baez claims based on her current theory of defamation. The damages cited in the amended complaint flowed from alleged statements made by defendants to the press, which Baez thought contributed to her loss of employment. Baez has not articulated what damages resulted from the allegedly defamatory statements that she claims led to her arrest, particularly in light of the fact that Baez ultimately pled guilty to a marijuana violation as part of a plea agreement and was sentenced to pay restitution to JetBlue for the diversion of the flight her statements to Malabet had caused.

IV. False Arrest

Under New York law, to prevail on a claim for false arrest, a plaintiff must show that "(1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged." Singer v. Fulton County Sheriff,

63 F.3d 110, 118 (2d Cir. 1995). Moreover, a plaintiff seeking to advance a false arrest claim against a private defendant faces a steep burden. Indeed, for a private defendant to be liable for false arrest, "the defendant must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal to the point where the officer is not acting of his own volition." Curley v. AMR Corp., 153 F.3d 5, 13 (2d. Dep't 2005). Further, and essential to the disposition of this claim, "[i]t is not enough that the defendant's words or actions caused a police officer to confine [her]; plaintiff must show that the defendant directed an officer to take [her] into custody." Du Chateau v. Metro-North Commuter R.R. Co., 253 A.D.2d 128, 132 (1st Dep't 1999.)

Here, the evidence does not show that Malabet acted with such "undue zeal" that the agents were not "acting of [their] own volition." Curley at 13. To the contrary, FBI agents, it is undisputed, interrogated Baez for approximately five hours in addition to speaking with Malabet for two hours, and only at the conclusion of these conversations did they elect to arrest and charge Baez. As discussed above, Baez had ample opportunity during this interview—where, it goes without saying, Malabet was not present—to explain her version of the story, and the FBI still decided to arrest her and file a criminal complaint. In short, there is absolutely no evidence that Malabet participated in this ultimate decision to arrest Baez. Further, there is also no evidence that Malabet *intended* for Baez to be arrested; indeed, Malabet consistently testified at her deposition that she never expected the FBI to arrest Baez. Summary judgment against Baez on her claim for

false arrest is warranted.[8]

V. Intentional Infliction of Emotional Distress

To prevail on an IIED claim, a plaintiff must show "(1) extreme and outrageous conduct, (2) intent to cause, or reckless disregard of a substantial probability of causing, severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress." Hamlett v. Santander Consumer USA, Inc., 931 F. Supp. 2d 451, 457 (E.D.N.Y. 2013) (quoting Conboy v. AT&T Corp., 241 F3d 242 (2d Cir. 2001)). Malabet contends that Baez's claim fails because Malabet's conduct was not sufficiently "extreme and outrageous," as New York law defines these terms. Indeed, "the standard for stating a valid claim of intentional infliction of emotional distress is rigorous, and difficult to satisfy." Conboy at 258. In fact, "[t]he conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Id. (citation omitted).

Here, Malabet reporting to authorities that Baez used the word "bomb" in reference to her checked luggage was in no way outrageous—indeed, it was mandated by TSA security protocol. It is true, as Baez points out, that "New York

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[8] **Baez's false arrest claim also fails for an independent reason. While her airline luggage did not contain a bomb, it did contain marijuana. She was prosecuted for that offense and she pled guilty to marijuana possession. See, e.g., Keyes v. Albany, 594 F. Supp. 1147, 1154 (N.D.N.Y. 1984) ("[A] § 1983 claim for false arrest or false imprisonment is barred by a plea of guilty, just as the state claim is similarly precluded."); see also Bennett v. New York City Hous. Auth., 245 A.D.2d 254 (2d Dep't 1997). This unassailed conviction slams the courthouse door on Baez's claim. Heck v. Humphrey, 512 U.S. 477, 486-87 (1994).**

State courts have sustained IIED claims where there is some combination of public humiliation, false accusations of criminal or heinous conduct, verbal abuse or harassment, physical threats, permanent loss of employment, or conduct contrary to public policy." Chen v. City of Syracuse, 2009 U.S. Dist. LEXIS 16227, at *17 (N.D.N.Y. 2009) (citing Stuto v. Fleishman, 164 F.3d 820, 828 (2d Cir.1999)). Baez, naturally, seizes on the clause "false accusations of criminal or heinous conduct" to support her claim. However, as discussed above, Malabet's statements were not *false*—at not least not materially so. Further, Baez utterly fails to identify any other outrageous conduct by Malabet besides from her allegedly telling a fellow JetBlue employee that Baez was "nasty," which cannot be described as "beyond all bounds of decency." Accordingly, Baez's IIED claim against Malabet fails as a matter of law.

Conclusion

For the foregoing reasons, defendants are entitled to immunity for all of Baez's claims under the ATSA. Further, all of Baez's claim also fail for the independent reasons discussed above.

The Clerk of Court is directed to enter judgment for defendants and to close this case.

SO ORDERED.

Dated: **Brooklyn, New York**
July 3, 2014

s/Eric N. Vitaliano

ERIC N. VITALIANO
United States District Judge