

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:15-CV-00166-WJM-NYW

TAMMY FISHER

Plaintiff,

v.

BRIAN KOOPMAN, Detective in the Loveland, Colorado Police Department, in his official and individual capacity;
LUKE HECKER, Chief of Loveland Police Department, in his official and individual capacity,

Defendants.

**DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTION TO MAGISTRATE
JUDGE'S RECOMMENDATION CONCERNING PLAINTIFF'S MOTION FOR LEAVE
TO FILE AMENDED COMPLAINT**

Defendants, by and through their attorneys, Nathan Dumm & Mayer, P.C., hereby submit their Response to ECF41, Plaintiff's Objection to Magistrate Judge Wang's Recommendation denying Plaintiff's Motion for Leave to Amend Her Complaint, and supporting authority as follows:

INTRODUCTION

Judge Wang recommended denial of Plaintiff's Motion to Amend her Complaint based upon Plaintiff's proposed additional claims as alleged in ECF31, which consisted of additional claims for Malicious Prosecution under the 4th Amendment to the U.S. Constitution, a derivative claim for Failure to Supervise under the 4th Amendment, and

to add the City of Loveland as a defendant. After Defendants filed their Response to Plaintiff's Motion to Amend and Plaintiff presumably saw the deficiencies in the proposed amendment, Plaintiff attempted, by way of a Reply, to assert a new and different claim under the Fourth Amendment, namely a claim that was *not* based on a theory of Malicious Prosecution. (ECF35 & ECF36, pg. 1). Thereafter, just a day prior to the scheduled hearing on this issue, without conferring, Plaintiff filed a supplement and another proposed amended complaint with redline changes that were different than what was submitted with the original Motion to Amend. (ECF37, ECF37-1 "Supplement/Amendment to Motion to Amend Complaint"). Judge Wang struck the new proposed Amended Complaint found in ECF37 and also struck the portion of the Reply regarding the new claim as impermissible under the Court's Rules. (ECF38). Judge Wang then took the original proposed amended complaint, ECF31, under advisement and thereafter recommended denial of the Motion for the reasons stated in ECF40.

Plaintiff's objection to Judge Wang's order does not address the merits of her analysis, but rather, in somewhat confusing fashion, seeks to argue the merits of the already stricken Supplement/Amendment to Motion to Amend. Because the only Motion to Amend properly before Judge Wang was ECF31, the Judge's order striking the Supplement/Amendment was appropriate and her Recommendation regarding the legal merits of ECF31 accurate. This particular motions practice, including the present Objection filed by Plaintiff, has become overly complicated because of Plaintiff's failure to comply with D.C.COLO.LCivR 7.1(d), which, in relevant part, requires parties to file motions as separate documents and not as part of a response or reply. Plaintiff has

nonetheless raised objection to this Court and is attempting to argue claims under the 4th Amendment that were never received properly by Judge Wang or the Defendants. In order to avoid compounding the confusion, the Defendants will follow Judge Wang's Recommendation and focus on the merits of *only* the original Motion to Amend the Complaint filed as ECF 31.

STANDARD OF REVIEW

An Article III Judge's review of a Magistrate Judge's Recommendation is *de novo*.

LEGAL ARGUMENT

Plaintiff's original complaint asserted claims of Malicious Prosecution and Failure to Supervise-Malicious Prosecution under the 14th Amendment to the U.S. Constitution, along with 10 state law claims. (ECF2, pgs. 9, 11, 13-23). The proposed amended complaint sought leave to add additional federal claims, also premised on Malicious Prosecution, but now under the 4th Amendment. The Plaintiff also sought to add the City of Loveland as a party despite the fact that Plaintiff had already named the Chief of Police, Defendant Hecker, in his official capacity as Chief of the Loveland Police Department.

As to the proposed amendment to Plaintiff's first claim, controlling 10th Circuit case law forecloses a claim of malicious prosecution under the 4th Amendment where a government entity has not subjected a party to a deprivation of their liberty by institution of legal process. *Becker v. Kroll*, 494 F.3d 904, 914-15 (10th Cir. 2007). Judge Wang stated correctly that "[t]he law is settled in this Circuit that to succeed on a Fourth

Amendment malicious prosecution claim, Plaintiff must have been arrested or incarcerated.” (ECF40, pg. 4). Plaintiff has admitted that she was never arrested or otherwise detained by any law enforcement officer in the Loveland Police Department. The prosecutor for the Eighth Judicial District for the State of Colorado specifically declined to bring charges against Plaintiff because the statute of limitations had run on any claims for which she may have been charged. (See Ex. A to ECF35, attached hereto). Plaintiff chose to amend her complaint to add a claim of malicious prosecution under the 4th Amendment despite the lack of factual predicate necessary to sustain that claim. For the reasons stated in Judge Wang’s Recommendation, Plaintiff’s assertion of a 4th Amendment Malicious Prosecution claim is futile.

To the extent Plaintiff is objecting to Judge Wang’s Recommendation regarding the second claim in her amended complaint, which alleged a failure to supervise similarly premised on a theory of Malicious Prosecution under the 4th Amendment, such claim is not cognizable absent a sustainable claim under the 4th Amendment. **Myers v. Okla. Cnty. Bd. of Cnty. Comm’rs**, 151 F.3d 1313, 1316 (10th Cir. 1998). Since the 10th Circuit’s opinion in **Becker v. Kroll** forecloses Plaintiff’s 4th Amendment claim asserted against the individual defendants in their personal capacities, Plaintiff’s derivative failure to supervise claim must also fail.

Plaintiff also objects to Judge Wang’s Order regarding the addition of the City of Loveland to the lawsuit and cites the rule of joinder of parties under the Federal Rules of Civil Procedure. (ECF41, ¶8). Despite several references by the Defendants and now a Recommendation by Judge Wang, Plaintiff continues to ignore the fundamental point

that her claims against the individual Defendants in their official capacities are the equivalent of suing the City of Loveland. *See, e.g., Watson v. City of Kansas City, Kan.*, 857 F.2d 690, 695 (10th Cir. 1988). Thus, amending her complaint to add the City is the very definition of futile.

In addition to the above issues, in her Objection Plaintiff seems to argue that her Supplement/Amendment to Motion to Amend her Complaint should be considered by this Court. (ECF41, ¶7). As memorialized in Judge Wang's Order to Strike Plaintiffs Supplement/Amendment (ECF 38 and ECF40), Plaintiff failed to seek leave to file a sur-reply and impermissibly sought to add additional constitutional claims in her Reply brief. *See, e.g., Pirnie v. Key Energy Servs., LLC*, 2009 WL 1386997, at *1 (D. Colo. May 15, 2009). Among other violations, Plaintiff's actions specifically violated this Court's Practice Standards, III(B). Plaintiff also failed to confer with defense counsel prior to filing the pleadings as required by D.C.Colo.LCivR. 7.1. Plaintiff does not have grounds to seek appeal of Judge Wang's Order to Strike given her failure to comply with the Federal Rules of Civil Procedure and the Local Rules governing practice in the U.S. District Court for the District of Colorado. Defendants would further note that unnecessary motions practice will likely delay disposition of this case, especially as it pertains to any motions by the Defendants' on grounds of qualified immunity.

CONCLUSION

Based on the facts of this case, Plaintiff's claims of Malicious Prosecution under the 4th Amendment are contrary to clearly established law in this Circuit. Her attempt to argue multiple Amended Complaints in one Motion only complicates otherwise facially

deficient constitutional claims. For the reasons set forth herein and in Judge Wang's Recommendation, Plaintiff's Objection should be dismissed.

Respectfully submitted this ____ day of July, 2015.

s/

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on _____, I electronically filed the foregoing **RESPONSE TO PLAINTIFF'S OBJECTION TO MAGISTRATE WANG'S RECOMMENDATION** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following at their email address. I also emailed a courtesy copy as follows:

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