

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.

**PLAINTIFF'S OBJECTION TO MAGISTRATE'S RECOMMENDATION
CONCERNING PLAINTIFF'S MOTION FOR LEAVE TO AMENDED COMPLAINT
(DOC #40, FILED 07/07/2015)**

Plaintiff, by and through her Attorney, Randall R. Meyers, and pursuant to Fed.R.Civ.P. 72(a), hereby objects to Magistrate Wang's Order denying Plaintiff's Motion for leave to amend her complaint.

BACKGROUND

1. On July 7, 2015, the magistrate entered an Order recommending denial of the Plaintiff's Motion for Leave to Amend her Complaint. (Docket # 31). In summary, Plaintiff ultimately seeks amendment of her complaint to include Counts to address an alleged violation of her Fourth Amendment rights against unreasonable search and seizure, an alleged procedural due process violation under the Fourteenth Amendment – Malicious Prosecution, and an alleged substantive due process violation under the Fourteenth Amendment – Malicious Prosecution

against Defendants Koopman and Hecker. Plaintiff also seeks to allege a due process Fourteenth Amendment violation for failure to supervise and train against Hecker and the City of Loveland.

2. Plaintiff also sought the lesser amendments of dropping the City of Loveland from the first proposed amendment as to the state based claims.

3. Magistrate Wang concluded that since no arrest or seizure was involved in this case, the operative case was *Becker v. Kroll*, 494 F.3d 904, 915 (10th Cir. 2007). Further, the Magistrate opined that “Plaintiff’s malicious prosecution theory rests instead on the “institution of the legal process itself” against her, and Defendant Koopman’s use of an affidavit containing false facts. Her theory does not demonstrate how her liberty was restrained and does not comport with the controlling law of the Tenth Circuit”. The Magistrate misconstrues the nature of Plaintiff’s complaint against the Defendants.

ARGUMENT

4. Magistrate Wang’s reasoning mirrors the Response filed by Defendants (Doc. #35). Assuming, arguendo, that both the Magistrate and the Defendants are correct in their application of *Becker*, this, in turn, would effectively render null and void one half of the Fourth Amendment. As Plaintiff argued in her Reply (Doc. #36), the Fourth Amendment to the U.S. Constitution proscribes both unreasonable searches and seizures.

Becker is actually a seizure case. The *Becker* court, analyzing that under the facts presented to it, opined that those facts did not amount to a seizure and therefore *Becker* was not seized within the meaning of the Fourth Amendment. Plaintiff does not contest this, nor does she attempt to argue that the facts of her case support any argument that she was ever seized within the meaning of the Fourth Amendment. Instead, Plaintiff argues that her Fourth

Amendment rights were violated by an unreasonable search. *Becker* is inapposite. Magistrate Wang reads *Becker* too narrowly.

A careful reading of Plaintiff's original complaint reveals that she premises her claims on the Fourth Amendment violation of an unreasonable search in that Defendant Koopman falsified, or omitted, information in his affidavit for a search warrant and in his police reports. Thus, Plaintiff has always grounded her complaints in the Fourth Amendment's proscription against unreasonable searches.

In fact, Plaintiff's original complaint already alleges a §1983 Fourteenth Amendment violation – malicious prosecution - against both Defendants but does not designate whether this is a substantive or procedural violation. Plaintiff also alleges in her original complaint a cause of action for a §1983 Fourteenth Amendment violation – failure to train and supervise - against Defendant Hecker.

5. Plaintiff's premise is simple enough. She alleges the Defendants violated her Fourth Amendment rights based on an unreasonable search. Further, such a claim is cognizable under Tenth Circuit and U.S. Supreme Court precedent. "It has long been established that an arrest and search without probable cause that a crime has been committed violates the Fourth Amendment. *Shroff v. Spellman*, No. 09-1084 (10th Cir. 5/4/2010) (citing *Cortez v. McCauley*, 478 F.3d 1108, 1117 (10th Cir. 1995)). See also footnote 3 in *Draeger v. Grand Central, Inc.* 504 F2d. 142 (10th Cir. 1974) "There is a substantial body of law which establishes that warrantless arrest without probable cause, or warrantless search without probable cause, will support an action for damages under 42 U.S.C. § 1983." And *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993) "The boundary for defendant's conduct establishing the "contours of the right" involved is the Fourth Amendment,

which proscribes unreasonable searches.” See also *Schneckloth v. Bustamonte*, 93 S.Ct. 2041, 412 U.S. 218 (U.S. 1973), “It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is “per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.”

6. This case does not involve a warrantless search in that Defendant Koopman did, upon affidavit, secure a warrant to search Plaintiff’s cell phone records but in so doing included within his affidavit false statements and/or knowingly or recklessly omitted from the affidavit information which, if included, would have vitiated probable cause. This is a violation of the Fourth Amendment. *Wolford v. Lasater*, 78 F.3d 484 (10th Cir. 1996).

Supplement/Amendment to Motion to Amend Complaint (Doc. #37)

7. Plaintiff did not intend for her Supplement/Amendment to Motion to Amend Complaint (Doc. #37) to be construed a Sur-Reply. The filing consisted only of a different version of the proposed amended complaint (with strikes through and underlines) in compliance with D.C.COLO.LCivR 15.1(b). The filing was prior to the hearing scheduled on Plaintiff’s Motion for Leave to Amend. The supplemental version contained an additional claim; a violation of the Fourth Amendment based on an unreasonable search and also dropped the City of Loveland as a Defendant in the state based tort claims.

Loveland as Defendant

8. Fed. R. Civ. P. 20(a)(2) permits a defendant to be joined in an action if any right to relief is asserted against it “jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences,” and there exists in the action any question of law or fact common to all defendants.

Plaintiff seeks to allege that the City of Loveland violated her Fourteenth Amendment due process rights by the failure to train or supervise its employees. The Magistrate incorrectly concluded that while such a claim is cognizable, that Plaintiff has no viable Fourth Amendment claim. *Myers v. Okla. Cnty. Bd. of Cnty. Commr's*, 151 F.3d 1313, 1316 (10th Cir. 1998).

Conclusion

In order to properly frame her complaint, Plaintiff rightfully seeks leave to amend her complaint to include a § 1983 count under the Fourth and Fourteenth Amendments for unreasonable search and seizure - against all defendants; a § 1983 count under the Fourth and Fourteenth Amendments for malicious prosecution - against all defendants; and a § 1983 count under the Fourth and Fourteenth Amendments for failure to train and supervise - against Defendants Hecker and the City of Loveland.

DATED the 17th day of July, 2015.

RANDALL R. MEYERS:

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 17th day of July 2015, I electronically filed the foregoing **OBJECTION TO MAGISTRATE'S RECOMMENDATION CONCERNING PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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And I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participants name:

N/A

/s/ Patricia Ortiz
Patricia Ortiz