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 MOTION TO AMEND HER COMPLAINT

Defendants, Brian Koopman and Luke Hecker, by and through their attorneys at Nathan Dumm & Mayer, P.C., hereby submit their Response to Plaintiff's Motion to Amend her Complaint [ECF 31] and supporting authority as follows:

INTRODUCTION

In her initial Complaint, Plaintiff asserted that the Defendants violated her constitutional right to be free from malicious prosecution pursuant to the Fourteenth Amendment to the U.S. Constitution and further alleged a number of state tort claims. Plaintiff now seeks to amend her Complaint to add, or more appropriately to modify, her claims to include allegations that the Defendants violated her constitutional right to be

free from malicious prosecution pursuant to the Fourth Amendment to the U.S. Constitution. Although not stated in Plaintiff's Motion, based on Plaintiff's proposed amended complaint she actually seeks leave to alter both her first and second claims for relief, seeking to add violations of the Fourth Amendment on grounds of Malicious Prosecution *and* Failure to Train and Supervise. [See Proposed Amended Complaint, ¶¶[34-54]. Because the distinction between the first and second claims for relief does not differ for purposes of the Fourth Amendment analysis at issue, they will be analyzed together in this Response. Plaintiff further seeks to add the City of Loveland as a party to the lawsuit, alleging both state and federal claims against the City. Plaintiff's Motion under F.R.C.P. 15(a)(2) is futile because her Fourth Amendment claim is foreclosed by well-established 10th Circuit precedent. The addition of the City of Loveland to the lawsuit is similarly futile because Plaintiff has already pled federal constitutional claims against Chief Hecker in his official capacity and the City is immune from suit for Plaintiff's state law claims.

STANDARD OF REVIEW

A plaintiff seeking to amend his or her complaint under F.R.C.P. 15(a)(2) should be granted "leave when justice so requires." However, a motion for leave to file an amended complaint may be denied when the amendment would be futile. ***Jefferson County School Dist. No. R-1 v. Moody's Investor's Servs., Inc.***, 175 F.3d 848, 860-861 (10th Cir. 1999). An amendment is futile "when the proposed amended complaint would be subject to dismissal for any reason, including that the amendment would not

survive a motion for summary judgment." ***Bauchman for Bauchman v. West High School***, 132 F.3d 542, 561-62 (10th Cir. 1997).

A new party may be joined as a defendant in a lawsuit only if a "right of relief is asserted against them jointly, severally, or ... arising out of the same transaction and occurrence ..." and "any question of law or fact common to all defendants will arise in the action." F.R.C.P. 20(a)(2).

LEGAL ARGUMENT

Plaintiff's proposed amended complaint seeking to add a claim of malicious prosecution under the Fourth Amendment fails as a matter of law because Plaintiff was never seized or arrested by the Defendants.[1] Plaintiff's addition of the City of Loveland is also futile and duplicative of claims already pled by the Plaintiff, and furthermore, Plaintiff cannot obtain relief from the City based upon the state law claims pled in the amended complaint.

i. Plaintiff cannot seek relief under the 4th Amendment for purposes of malicious prosecution without establishing an arrest or prosecution

To properly frame the deficiencies of Plaintiff's proposed amended complaint seeking relief under the Fourth Amendment, it is necessary to understand the factual background of her malicious prosecution claim. It is undisputed that Plaintiff was never arrested for the events surmised in her initial Complaint (¶¶14-30), she was never charged with a crime arising out of those events, and she was never prosecuted in a

[1] Defendants' opposition to Plaintiff's claims under the Fourth Amendment does not indicate that the Defendants believe the Plaintiff's claims under the Fourteenth Amendment are meritorious. To the contrary, it is the Defendants position that some or all of Plaintiff's claims may be subject to dismissal based upon the lack of legal support for such claims.

criminal or administrative context for those events. At no point in time was she seized by any member of the Loveland Police Department, nor was she taken into custody by any law enforcement officer. The prosecutor for the 8th Judicial District for the State of Colorado specifically declined to bring criminal charges against the Plaintiff because the statute of limitations had expired for any crimes for which she was believed to have committed. [See Case Rejection Form, attached hereto as Ex. A]. Plaintiff's claim of malicious prosecution is, thus, premised solely on an investigation into her conduct and a search warrant that did not proceed to any further stage of arrest or criminal prosecution.

Plaintiff's exact theory of malicious prosecution under the Fourth Amendment was previously considered, and rejected, by the 10th Circuit in *Becker v. Kroll*, 494 F.3d 904 (10th Cir. 2007). In *Becker*, the plaintiff brought a malicious prosecution claim under the Fourth Amendment arising out of an investigation into her Medicaid billing practices and subsequent search of her property and medical files. ***Id.*** at 909-12. It was undisputed that the plaintiff in *Becker* had never been "arrested, incarcerated, or otherwise placed under the direct physical control of the state. Accordingly, Becker was never 'seized' in the traditional sense." ***Id.*** at 915. The 10th Circuit appropriately noted that a "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control ... [and] in our cases analyzing malicious prosecution under § 1983, we have always proceeded based on a seizure by the state – arrest or imprisonment." ***Id.*** at 914 (internal citations omitted).

The plaintiff in *Becker* urged the court to adopt Justice Ginsburg's theory of "continuous seizure" under the Fourth Amendment, despite the absence of any true governmental seizure, because she was investigated by and ultimately subjected to a search of her office by government officials. ***See id.*** at 915 (***citing Albright v. Oliver***, 510 U.S. 266, 279-80 (1994) (Ginsburg, J., concurring)). The court in *Becker* specifically "declined to accept Justice Ginsburg's invitation to expand Fourth Amendment liability in cases where the plaintiff has not been arrested or incarcerated." ***Id.*** Furthermore, the court stated that given plaintiff "never posted bond, was not required to appear in court, and had no specific restrictions on her freedom of movement," even the possibility of expanding the limits of constitutional claims under the Fourth Amendment would not be appropriate on the present facts. ***Id.***

Plaintiff's current lawsuit is nearly indistinguishable from the facts and legal precedent from *Becker*. Although Plaintiff alleges that she was subjected to an investigation and search by members of the Loveland Police Department, admittedly at no point was she seized or arrested for purposes of the Fourth Amendment, nor does she actually allege that a seizure or arrest took place in her initial or proposed amended complaint. Plaintiff's additional allegations concerning "Defendants' malicious actions, inactions, and intent to commit malicious prosecution"[2] are futile since they are not tethered to any intentional governmental seizure, which is a necessary condition for sustaining a claim for malicious prosecution. ***See Waller v. City and County of***

[2] Plaintiff's Proposed Amended Complaint, ¶42(a-c).

Denver, 14-CV-02109-WYD-NYW, 2015 WL 1816371, at *8 (D. Colo. Apr. 20, 2015) (denying leave to amend complaint to add § 1983 claim of malicious prosecution for failure to allege distinct and "constitutionally actionable seizure.") (internal citations omitted). Furthermore, Plaintiff's proposed allegation that "[t]he charges brought against Plaintiff terminated in favor of Plaintiff by their dismissal"[3] is inaccurate because it is an established fact that there were no charges brought; thus, it was impossible for Plaintiff to seek or obtain dismissal in her favor. [See Ex. A (specifically declaring that a "Case should not be filed")].

In Plaintiff's Motion for Leave to Amend her Complaint, Plaintiff states that there is good cause to grant leave because "Plaintiff has been made more fully aware of a pending criminal investigation involving Defendant Koopman ... [and] Plaintiff has been interviewed by the Weld County District Attorney." [Motion pg. 3]. What is missing from Plaintiff's analysis is any logical connection between asserting a claim of malicious prosecution under the Fourth Amendment and an unrelated "investigation" involving Defendant Koopman. Plaintiff still has not alleged a seizure in her proposed amended complaint and neither an investigation of a Defendant nor an interview with a District Attorney alters the factual posture of her case. Furthermore, the mere assertion of rumors and speculations regarding an inchoate investigation, without providing any factual or legal context, does not suffice under the standards of pleading in federal court. ***See Ashcroft v. Iqbal***, 556 U.S. 662, 679 (2009) ("[a] claim has facial plausibility

[3] Plaintiff's Proposed Amended Complaint, ¶43.

when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable of the misconduct alleged.").

Plaintiff provides short shrift to her analysis regarding futility, simply stating that "Plaintiff's proposed Amended Complaint makes similar factual and legal allegations to those made in the original complaint ..." [Motion pg. 4]. Defendants respectfully disagree that asserting a Fourth Amendment claim is a similar legal allegation to a claim under the Fourteenth Amendment, especially in light of 10th Circuit precedent applying different standards of review for claims of malicious prosecution. ***See, e.g, Becker***, 494 F.3d at 917-18 (separating due process claims alleging malicious prosecution from claims based on unlawful seizure).[4]

Because Plaintiff's amendment adding a claim of malicious prosecution under the Fourth Amendment in her first claim for relief fails, her amendment to her second claim for relief, Failure to Supervise, must also fail. A claim for failure to train and/or supervise brought pursuant to § 1983 is only cognizable if a plaintiff adequately alleges and proves an underlying constitutional violation by a government actor. ***Myers v. Okla. County Bd. of County Comm'rs***, 151 F.3d 1313, 1317 (10th Cir. 1998) (municipal liability can be established on policy or custom but only upon showing of "an already established constitutional deprivation."). Since Plaintiff has not adequately pled a claim under the Fourth Amendment for malicious prosecution, allegations of such a violation based upon a failure to supervise are futile.

[4] Even assuming Plaintiff could set forth competent evidence regarding a violation of the Fourth Amendment without being arrested, the lack of clearly established precedent in the 10th Circuit regarding such a theory would almost inevitably lead to dismissal on grounds of qualified immunity. ***See, e.g., Pearson v. Callahan***, 555 U.S. 223, 243-45 (2008).

ii. Amending the Complaint to add the City of Loveland is similarly futile

Plaintiff's attempt to add the City of Loveland to both her federal and state claims is duplicative of her initial complaint, is futile, and will not provide any further relief based on Plaintiff's current claims, assuming she is entitled to any relief at all.

For purposes of Plaintiff's federal constitutional claims, in her initial complaint she named Chief Luke Hecker as a Defendant in his individual and official capacity. Naming a municipal official in his official capacity is identical to a suit against the municipality itself. ***See, e.g., Watson v. City of Kansas City, Kan.***, 857 F.2d 690, 695 (10th Cir. 1988). Therefore, Plaintiff's proposed amended complaint seeking to add the City as a party is the very definition of futile, as it is duplicative and indistinguishable from claims already pled. Furthermore, Plaintiff in her *ad damnum* clause is seeking punitive damages for her alleged injuries. To the extent she is seeking punitive damages against a municipal entity for violations of the U.S. Constitution, such relief is barred as a matter of law. ***City of Newport v. Fact Concerts, Inc.***, 453 U.S. 247, 271 (1981).

For purposes of Plaintiff's state law tort claims, the City of Loveland is immune from suit based upon the Colorado Governmental Immunity Act. C.R.S. § 24-10-101, *et al.* Allowing Plaintiff to add the City to ten state law claims for relief will only necessitate the filing of a motion to dismiss the City as immunity is clearly afforded for each of those claims. By way of limited example, clearly established case law holds that municipal entities are immune from suits alleging defamation, negligent hiring, negligent supervision, respondeat superior, and tortious interference with a contract. ***See, e.g, Gray v. City of Manitou Springs***, 598 P.2d 527, 528 (Colo. App. 1979) ("[w]e agree

with the trial court that the city is immune from suit for defamation."); ***Kahland v. Villarreal***, 155 P.3d 491, 493 (Colo. App. 2006) (dismissing claims of negligent supervision and hiring against municipal entity on CGIA grounds); ***A.B. ex rel. B.S. v. Adams-Arapahoe 28J School Dist.***, 831 F. Supp. 2d 1226, 1259-60 (D. Colo. 2011) (holding that school district immune from suit under theory of respondeat superior where allegations do not fall within enumerated exception under CGIA); ***Grimm Const. Co., Inc. v. Denver Bd. of Water Comm'rs***, 835 P.2d 599, 601 (Colo. App. 1992) (holding that a tortious interference claims against a government entity triggers CGIA immunity). None of Plaintiff's state law claims fall within the enumerated sections waiving governmental immunity under state law; thus, Plaintiff's attempt to add the City of Loveland to the current lawsuit is futile. ***See*** C.R.S. § 24-10-106(1)(a-h) (denoting eight limited instances in which immunity is waived for state tort claims, none of which implicate Plaintiff's claims).

CONCLUSION

Plaintiff's Motion for Leave to Amend her Complaint fails to set forth any claims with merit and would result in unnecessary and costly motions for dismissal. Specifically, Plaintiff's Motion to add claims under the Fourth Amendment and to add the City as a party-defendant are in direct conflict with existing federal court precedent regarding § 1983 litigation and the alleged state claims are barred as a matter of law.

WHEREFORE, the Defendants respectfully request that the Court deny Plaintiff's Motion for Leave to Amend her Complaint as futile.

Respectfully submitted this ____ day of June, 2015.

s/
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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on _____, I electronically filed the foregoing **STIPULATION** 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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