

Kristi Knowles

From: COD_ENotice@cod.uscourts.gov

Sent: Wednesday, June 16, 2010 4:28 PM

To: COD_NEF@cod.uscourts.gov

Subject: Activity in Case 1:09-cv-02802-REB-MEH Myers et al v. Koopman et al Motion to Vacate

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of Colorado

Notice of Electronic Filing

The following transaction was entered by Hamilton, Steven on 6/16/2010 at 4:27 PM MDT and filed on 6/16/2010

Case Name: Myers et al v. Koopman et al

Case Number: 1:09-cv-02802-REB-MEH

Filer: James (I) A. Alderden

James A. Alderden

Dennis V. Harrison

Larimer County

Larry Abrahamson

Larimer County Board of Commissioners, The

Dennis (I) V. Harrison

Eighth Judicial District of Colorado

Jeremy C. Myers

Great Western Salvage LTD

Brian (I) Koopman

Brian Koopman

Luke (I) Hecker

Luke Hecker

City of Loveland

City of Fort Collins

Document Number: 79

Docket Text:

Stipulated MOTION to Vacate Trial Date Pending Determination of Entitlement to Qualified Immunity by Defendants Larry Abrahamson, James A. Alderden, James (I) A. Alderden, City of Fort Collins, City of Loveland, Eighth Judicial District of Colorado, Dennis V. Harrison, Dennis (I) V. Harrison, Luke Hecker, Luke (I)

Hecker, Brian Koopman, Brian (I) Koopman, Larimer County, Larimer County Board of Commissioners, The, Plaintiffs Great Western Salvage LTD, Jeremy C. Myers. (Hamilton, Steven)

1:09-cv-02802-REB-MEH Notice has been electronically mailed to:

George H. Hass george@hshh.com, becki@hshh.com, jennifer@hshh.com, karen@hshh.com, tami@hshh.com

Jeannine Sue Haag jeannine@hshh.com, becki@hshh.com, george@hshh.com, jennifer@hshh.com, karen@hshh.com, tami@hshh.com

John R. Duval duvalj@ci.loveland.co.us

Joseph Patrick Sanchez sanchezj@hallevans.com, cmevf@hallevans.com, witts@hallevans.com

Kent N. Campbell kcAMPbell@wicklaw.com, kknowles@wicklaw.com

Randall R. Meyers randy.meyers@att.net, ljsconsultants@gmail.com

Steven M. Hamilton hamiltons@hallevans.com, cmevf@hallevans.com, wirkmanj@hallevans.com, yorkgj@hallevans.com

Thomas J. Lyons lyonst@hallevans.com, cmevf@hallevans.com, mandisc@hallevans.com, wilsonm@hallevans.com, witts@hallevans.com

William Glenn Ressue william@hshh.com, becki@hshh.com, george@hshh.com, jeannine@hshh.com, jennifer@hshh.com, karen@hshh.com, tami@hshh.com

1:09-cv-02802-REB-MEH Notice has been mailed by the filer to:

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP_dcecfStamp_ID=1071006659 [Date=6/16/2010] [FileNumber=2521791-0] [820f2772c078912378a31d54ae919bae584ca75fdec44d5544b022cb28a5cfc7d126d6717123f05969fd61eac9ef00bf7e97e0e126baf1cd790378bea6df5ab6]]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-02802-REB-MEH

JEREMY C. MYERS;
WESTERN SALVAGE LTD.,

Plaintiffs,

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;
DENNIS V. HARRISON, Chief of the Fort Collins Police Department, in his official and individual capacity;
JAMES A. ALDERDEN, Sheriff of Larimer County, Colorado, in his official and individual capacity;
CITY OF LOVELAND, a Colorado municipality;
CITY OF FORT COLLINS, Colorado, a municipality;
LARIMER COUNTY, a County, by and through the
LARIMER COUNTY BOARD OF COUNTY COMMISSIONERS;
LARRY ABRAHAMSON, District Attorney of the Eighth Judicial District in his official capacity; and
EIGHTH JUDICIAL DISTRICT OF COLORADO, a political subdivision of the State of Colorado,

Defendants.

**DENNIS V. HARRISON AND THE CITY OF FORT COLLINS'
MOTION FOR SUMMARY JUDGMENT**

Defendants City of Fort Collins, and Police Chief Dennis V. Harrison ("Defendants"), by and through their attorneys, Hall & Evans, L.L.C., pursuant to Fed. R. Civ. P. 56, hereby submit their Motion For Summary Judgment, and as grounds therefore, state as follows:

REB Civ. Practice Standard V.I.1. Certification

Undersigned counsel hereby certifies, in accordance with REB Civ. Practice Standard V.I.1., that the submitting party has read and complied with the Practice Standards of this Court governing the formatting and marshaling of this motion filed pursuant to Fed. R. Civ. P. 56.

INTRODUCTION

Plaintiffs filed a Complaint against Defendants alleging five claims based on 42 U.S.C §1983. Specifically, Plaintiffs claim Defendants violated their Fourth and Fourteenth Amendment rights through an alleged (1) unreasonable search and seizure, (2) malicious prosecution, (3) use of excessive force, (4) failure to train and supervise, and (5) a conspiracy. These claims generally arise from a September 6, 2007, execution of a no-knock search warrant by the Northern Colorado Drug Task Force ("NCDTF") at premises in Loveland, Plaintiff Jeremy Myers' arrest the next day, and the subsequent prosecution for charges relating to an alleged operation of a methamphetamine laboratory on those premises.

Defendant Police Chief Dennis V. Harrison moves for summary judgment on all of Plaintiffs' claims for relief because the undisputed evidentiary facts fail to establish an affirmative link between the alleged constitutional violations and Chief Harrison's personal participation in the alleged violations. Furthermore, if the Fort Collins Police Department's participation in the NCDTF alone is considered sufficient justification to expose Police Chief Harrison to personal liability, then the undisputed facts establish

that Defendant Harrison's actions were "objectively reasonable," and did not equate to any constitutional violation. Therefore, Chief Harrison is entitled to qualified immunity.

The City of Fort Collins moves for summary judgment on all of Plaintiffs' claims because the undisputed facts fail to prove that Chief Harrison engaged in any improper behavior. Further, the undisputed facts fail to prove that any alleged impropriety was reflective of any official practice, policy, or custom of Fort Collins or reflective of a direct causal link between any practice, policy, or custom of Fort Collins and any alleged constitutional violations.

STATEMENT OF UNDISPUTED MATERIAL FACTS¹

1. Defendant Harrison is the Chief of the Fort Collins Police Department ("FCPD"), and was so acting at all times relevant to this lawsuit. [Declaration of Dennis V. Harrison, ¶ 2, attached hereto as Exhibit 1].

2. The FCPD is a member of the NCDTF. FCPD's involvement in NCDTF investigations are coordinated and supervised by a designated FCPD Lieutenant. The designated FCPD Lieutenant works with the NCDTF Executive Officer Board to provide the NCDTF with assistance and resources when requested. [Harrison Declaration, ¶ 3, Ex. 1].

3. Defendant Harrison was not aware of, nor notified of the NCDTF search of the premises located at 1101 North Madison Street, Loveland, Colorado on September 6, 2007 prior to its execution. [Harrison Declaration, ¶ 4, Ex. 1].

¹ The following facts are undisputed for the purposes of this Motion for Summary Judgment only. Defendants specifically reserve the right to contest these facts at any later stage of proceedings in this matter including at trial.

4. Defendant Harrison had no knowledge of Loveland Police Detective Brian Koopman's investigation, application for a search warrant, execution of the search warrant or any other information about this lawsuit prior to September 6, 2007. [Harrison Declaration, ¶ 5, Ex. 1].

5. Defendant Harrison did not participate in the search of the premises located at 1101 North Madison Street, Loveland, Colorado, and did not direct or supervise anyone who did perform the search of said premises on September 6, 2007. [Harrison Declaration, ¶ 6, Ex. 1].

6. Defendant Harrison did not participate in the arrest and subsequent criminal prosecution of Plaintiff Jeremy C. Meyers. [Harrison Declaration, ¶ 7, Ex. 1].

ARGUMENT

I. Defendant Dennis V. Harrison

A. Lack of Personal Participation

Burden of Proof: "A defendant cannot be liable under § 1983 unless personally involved in the deprivation." *Olsen v. Stotts*, 9 F.3d 1475, 1477 (10th Cir. 1993). The complaint must allege an affirmative link between the alleged constitutional violation and the specific individual's participation in that violation. *Stidham v. Peace Officer Standards and Training*, 265 F.3d 1144, 1157 (10th Cir. 2001).

Elements: Officials who are not personally involved in the alleged violation are not subject to a civil rights claim under a *respondeat superior* theory merely because they hold positions of authority. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986); *McKee v. Heggy*, 703 F.2d 479, 483 (10th Cir. 1983). A supervisor's liability can

only be based on his failure to stop a subordinate's constitutional violation of which he is aware. *Woodward v. City of Worland*, 977 F.2d 1392, 1399-1400 (10th Cir. 1992). Mere negligent supervision does not state a claim. *Id.* Plaintiff must show more than the fact that a reasonable supervisor would have known about the employee's misconduct. *Id.* Relief is not possible without a demonstration that the supervisor participated in the misconduct, personally directed the misconduct, or, with actual knowledge of the misconduct, approved of it, acquiesced in it or failed to stop it. *Id.*

Elements not supported: Fort Collins Police Chief Dennis Harrison had no knowledge of Loveland Detective Brian Koopman's criminal investigation, application for a search warrant, or the warrant's execution at the premises located at 1101 North Madison Street, Loveland, Colorado until sometime after September 6, 2007. [See Harrison Declaration, ¶¶ 4-5, Ex. 1]. Chief Harrison did not direct or supervise anyone who did perform the search, and did not participate in any way in the arrest and subsequent criminal prosecution of Plaintiff Jeremy C. Meyers. [See *Id.*, ¶¶ 6-7]. To establish supervisory liability under § 1983, a plaintiff must establish a "deliberate, intentional act" by a supervisor such that there is a "sufficient causal connection" between the supervisor and the constitutional violation. *Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1151 (10th Cir. 2006). A plaintiff must show active participation or acquiescence through personal participation, exercise of control or direction, failure to supervise, or tacit authorization of the offending acts. *Id.* at 1152-53.

There is no evidence that Chief Harrison personally participated in any alleged unconstitutional actions, or that he exercised control, directed, or tacitly authorized a

subordinate's alleged unconstitutional actions. Therefore, any claim alleged against Chief Harrison pursuant to 42 U.S.C. § 1983 must be dismissed from this action.

B. Qualified Immunity

Burden of Proof: After an individual defendant raises the affirmative defense of qualified immunity, the burden shifts to the plaintiff. *Scull v. New Mexico*, 236 F.3d 588, 595 (10th Cir. 2000); *Adkins v. Rodriguez*, 59 F.3d 1034, 1036 (10th Cir. 1995). At that point, “[t]he plaintiff initially bears a heavy two-part burden when the defendant pleads the defense of qualified immunity.” *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996); *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995). The plaintiff must demonstrate: (1) the defendant’s conduct violated the law; and (2) the law was clearly established when the alleged violation occurred. *Reynolds v. Powell*, 370 F.3d 1028, 1030 (10th Cir. 2004). In *Pearson v. Callahan*, 555 U.S. ___, 129 S.Ct. 808 (2009), the Supreme Court held that the court has discretion to determine “which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.”

Elements: “In an action under section 1983, individual defendants are entitled to qualified immunity unless it is demonstrated that their alleged conduct violates clearly established constitutional rights of which a reasonable person in their positions would have known.” *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1251 (10th Cir. 1999). The inquiry is an objective one, focused on “whether the officers’ actions [were] objectively reasonable in light of the facts and circumstances confronting them, without

regard to underlying intent or motivation." *Weigel v. Broad*, 544 F.3d 1143, 1151 (10th Cir. 2008).

Elements not supported: If the Fort Collins Police Department's participation in the NCDTF alone is sufficient to expose Chief Harrison to personal liability, the undisputed facts establish that Chief Harrison's actions were 'objectively reasonable' in light of the facts and circumstances confronting him, and did not equate to any constitutional violation.

The NCDTF members' reliance on Detective Koopman's investigation and the search warrant was reasonable. Detective Koopman is an experienced detective who is a court-certified methamphetamine lab expert and instructor. Detective Koopman had personally investigated close to fifty methamphetamine laboratories and participated in the execution of close to two hundred search warrants prior to the execution of the search warrant related to this case. [See Affidavit of Brian Koopman, ¶¶ 1, 5, Doc. No. 56-1].

In a criminal case, evidence seized pursuant to a warrant issued by a neutral and detached judge or magistrate later found invalid is admissible if the executing officer acted in objective good faith and with reasonable reliance on the warrant. *United States v. Leon*, 468 U.S. 897, 922 (1984). *Leon* recognized four situations in which an officer cannot be found to have relied on a warrant in good faith: (1) the issuing judge "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth"; (2) the issuing judge "wholly abandoned his judicial role"; (3) the warrant was "so facially deficient--i.e., in failing to

particularize the place to be searched or the things to be seized –that the executing officers cannot reasonably presume it to be valid”; and (4) “[the] affidavit [is] so lacking in probable cause as to render official belief in its existence *entirely unreasonable*.” *Leon*, 468 U.S. at 923 (emphasis added) (quotations omitted).

The *Leon* doctrine applies not only to suppression issues in criminal cases but in qualified immunity cases as well. *Malley v. Briggs*, 475 U.S. 335 (1986). In *Malley*, the Supreme Court held “the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon*...defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional [search].” *Id.* at 344. “Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost.” *Id.*

The first three *Leon* factors are not in play with regard to Chief Harrison; the only question is whether Chief Harrison, as Police Chief of the FCPD, could have “harbored an objectively reasonable belief in the existence of probable cause.” *Leon*, 468 U.S. at 926. The answer is yes. Detective Brian Koopman’s affidavit for a no knock search warrant set forth detailed facts based on his investigation, and information from a confidential informant, which a police officer would reasonably believe provided probable cause to support the search warrant. [See Affidavit for a No Knock Warrant, Doc. No. 56-2]. “The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law.” *Pearson*, 129 S.Ct. at 823.

In addition, while not conclusive evidence of an officer's reasonable belief, a judge found the affidavit sufficient to establish probable cause and issued the warrant. [See Affidavit for a No Knock Warrant, Doc. No. 56-2; Affidavit of Brian Koopman, ¶ 2, Doc. No. 56-1]. Moreover, a District Attorney reviewed Detective Koopman's search warrant affidavit before it was presented to the judge. [See Affidavit for a No Knock Warrant, p. 5, Doc. No. 56-2]. In such situations the threshold over which officers must pass to be entitled to qualified immunity is quite low. "Just as reviewing courts give 'great deference' to the decisions of judicial officers who make probable-cause determinations, police officers should be entitled to rely upon the probable-cause determination of a neutral magistrate when defending an attack on their good faith for either seeking or executing a warrant." *United States v. Corral-Corral*, 899 F.2d 927, 939 (10th Cir. 1990).

If the search is somehow believed to have been erroneously authorized, the consequences of the error should not be visited on Chief Harrison, where the only possible basis for establishing his personal liability is the fact that he is the police chief of a police department that happens to be a member of the NCDTF. Assuming, *arguendo*, that Plaintiffs can establish that Chief Harrison was aware of the search prior to its execution, Chief Harrison would have been reasonable in relying upon Detective Koopman, and the search warrant affidavit. "Once [a] warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law. Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the

deterrance of Fourth Amendment violations." *Leon*, 468 U.S. at 921. (citation and quotations omitted). Therefore Chief Harrison is entitled to qualified immunity.

II. Defendant City of Fort Collins

Burden of Proof: A local government may not be sued under 42 U.S.C. § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom inflicts the injury that the government as an entity is responsible under § 1983. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 694-695, 98 S.Ct. 2018 (1978).

Elements: To sustain a municipal liability claim for § 1983 violations, the plaintiff must show: (1) the existence of a municipal custom or policy; and (2) a direct causal link between the custom or policy and the violation alleged. *Anaya v. Crossroads Managed Care Systems, Inc.*, 195 F.3d 584, 592 (10th Cir. 1999) (quoting *Hollingsworth v. Hill*, 110 F.3d 733, 742 (10th Cir. 1997)).

Elements not supported: The Plaintiffs cannot establish that any Fort Collins' policy or custom existed that was a direct causal link to the alleged injuries they suffered. Plaintiffs allege, without factual or legal support, that Fort Collins' policy makers had policies or practices "that allowed: (a) improper conduct of surveillance procedures; (b) improper determination of the correct address of the property to be searched; (c) improper and incorrect use of a confidential informant; (d) improper preparation of an affidavit for a no-knock search warrant; (e) improper conduct of a search pursuant to a warrant; (f) perjury; (g) malicious prosecution; (h) unnecessary

damage to property; and (i) improperly pursuing an arrest prior to determining laboratory results of seized evidence." [Plaintiffs' Complaint and Jury Demand, p. 17, ¶ 40].

However, "it is not enough for a § 1983 Plaintiff merely to identify conduct properly attributable to the municipality. The Plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 404 (1997).

Under these standards, Fort Collins can only be liable for its official customs or policies, or for the actions of a final policymaker. A custom is a "persistent and widespread" practice that "constitutes the standard operating procedure of the local governmental entity." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). There is no evidence to establish that Fort Collins, through its deliberate conduct, was behind Plaintiffs' injuries. Therefore, any claim alleged against the Fort Collins pursuant to 42 U.S.C. § 1983 must be dismissed from this action.

CONCLUSION

For all of the foregoing reasons, Defendants City of Fort Collins, and Police Chief Dennis V. Harrison respectfully request that this Court dismiss the Plaintiff's Complaint against them in their entirety with prejudice, and for all other and further relief as this Court deems just and appropriate.

Dated this 11th day of June 2010.

Respectfully submitted,

s/ Joseph P. Sanchez
Joseph P. Sanchez, Esq.
Steven M. Hamilton, Esq.
Thomas J. Lyons, Esq.
Hall & Evans, L.L.C.
1125 17th Street, Suite 600
Denver, Colorado 80202
Telephone 303-628-3300
Facsimile 303-628-3368
Email sanchezj@hallevans.com
hamiltons@hallevans.com
lyonst@hallevans.com

*Attorneys for Defendants Dennis V.
Harrison and City of Fort Collins*

CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 11th day of June 2010, I electronically filed **DENNIS V. HARRISON AND THE CITY OF FORT COLLINS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following e-mail address:

Randall R. Meyers
LAW OFFICE OF RANDALL R. MEYERS
315 W. Oak, Suite 100
Fort Collins, Colorado 80521
randy.meyers@att.net
Attorney for Plaintiffs

Kent N. Campbell, Esq.
Kimberly B. Schutt, Esq.
WICK & TRAUTWEIN, L.L.C.
323 S. College Ave., Suite 3
Fort Collins, CO 80524
kcampbell@wicklaw.com
kschutt@wicklaw.com

John R. Duval, Esq.
LOVELAND CITY ATTORNEY'S OFFICE
500 E. 3rd Street
Loveland, CO 80537
duvalj@ci.loveland.co.us
Attorneys for Defendants Brian Koopman, Luke Hecker and City of Loveland

George H. Hass, Esq.
Jeannine S. Haag, Esq.
William G. Ressue, Esq.
LARIMER COUNTY ATTORNEY'S OFFICE
224 Canyon Ave., Suite 200
P.O. Box 1606
Fort Collins, CO 80522
george@hshh.com; jeannine@hshh.com
william@hshh.com
Attorneys for Defendants James A. Alderden, Larimer County, Larimer County Board of County Commissioners, Larry Abrahamson and

Eighth Judicial District of Colorado

s/ Summer Witt, Paralegal to

Joseph P. Sanchez, Esq.
Steven M. Hamilton, Esq.
Thomas J. Lyons, Esq.
Hall & Evans, L.L.C.
1125 17th Street, Suite 600
Denver, Colorado 80202
Telephone 303-628-3300
Facsimile 303-628-3368
Email sanchezj@hallevans.com
hamiltons@hallevans.com
lyonst@hallevans.com

*Attorneys for Defendants Dennis V.
Harrison and City of Fort Collins*