UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARJORIE A. CREAMER, Plaintiff-Appellant, v. LAIDLAW TRANSIT, INC., Defendant-Appellee.	No. 03-1019 (D.C. No. 92-S-1673) (D. Colo.)

ORDER AND JUDGMENT(*)

Before **MURPHY** and **PORFILIO**, Circuit Judges, and **BRORBY**, Senior Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

In August 1992, plaintiff-appellant Marjorie Creamer filed a complaint against her employer, Laidlaw Transit, Inc., alleging hostile work environment sexual harassment in violation of Title VII of the 1964 Civil Rights Act. This court affirmed the district court's judgment in favor of the defendant. *Creamer v. Laidlaw Transit, Inc.*, 86 F.3d 167, 172 (10th Cir. 1996). More than six years after this court's affirmance of the underlying judgment, Ms. Creamer filed a pro se motion in the district court styled "Plaintiff's Motion to Reopen with Additional Documents to Support and Add to the Archives." The district court denied Ms. Creamer's motion, and this appeal followed. We affirm.

We construe Ms. Creamer's motion as one filed under Fed. R. Civ. P. 60(b)(6) and review its denial for abuse of discretion, *see LaFleur v. Teen Help*, Nos. 02-4160, 02-4161, 02-4177, 2003 WL 22052834, at *6 (10th Cir. Sept. 3, 2003).(1)

Relief under Rule 60(b)(6) "is appropriate only when it offends justice to deny such relief. The denial of a 60(b)(6) motion will be reversed only if we find a complete absence of a reasonable basis and are certain that the decision is wrong." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1232 (10th Cir. 1999) (quotations and citations omitted).

Ms. Creamer's motion in the district court requested that the underlying case be reopened and that certain documents be added to the record. On appeal from the denial of that motion, Ms. Creamer reargues the facts of her case, contends that testimony from other employees should have been admitted at trial, claims that her attorney had a conflict of interest because he represented one of those employees in a later suit against Laidlaw, and charges the trial judge with bias and criminal libel.

"Appendix D."

As noted above, we have already affirmed the district court's judgment against Ms. Creamer on the merits of her claim against Laidlaw. *See Creamer*, 86 F.3d at 172. In doing so, we rejected Ms. Creamer's argument that a Ms. Danford should have been allowed to testify. *Id.* at 171. Any argument regarding another potential witness could presumably have been raised on direct appeal. Ms. Creamer's untimely contention now falls far short of the exceptional circumstance required for relief under Rule 60(b)(6). Because there is no showing as to how this potential witness's testimony would have changed the outcome of her case, Ms. Creamer's charges of attorney conflict similarly fail to support the right to such relief. Ms. Creamer did not raise the issue of judicial bias or libel in the motion to the district court. We will thus not address it on appeal. *See Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992).

We find no abuse of discretion in the district court's denial of Ms. Creamer's Rule 60(b)(6) motion. The judgment of the district court is therefore AFFIRMED. Ms. Creamer's motion for leave to proceed without prepayment of costs or fees, as well as her motions for sanctions and for oral argument are DENIED.

Entered for the Court

Michael R. Murphy

Circuit Judge

FOOTNOTES

Click footnote number to return to corresponding location in the text.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

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1. Ms. Creamer's motion was untimely if she intended to file pursuant to Rules 60(b)(1), (b)(2), or (b)(3) because those motions must be made no more than one year after the judgment. Rules 60(b)(4) and (b)(5) do not apply here.

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Appendix D.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MARJORIE CREAMER,)
Plaintiff,)
vs.) Case No. 16-0816-CV-W-FJG
)
DON EBERT, Kansas City Police Officer,)
Defendant.)

ORDER

Pending before the Court is Defendant Ebert's Motion to Dismiss (Doc. No. 8). Defendant Ebert argues that plaintiff's pro se complaint does not state a claim against him for violating plaintiff's rights under the Americans with Disabilities Act ("ADA"), nor has plaintiff specified which of her civil rights allegedly were violated by Defendant Ebert.

Although plaintiff's pro se complaint is not a model of clarity, the Court believes that plaintiff has sufficiently pled facts supporting a Section 1983 claim for excessive force[1] and a state law claim for false arrest.[2]

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[1] The elements of an excessive force claim are: (1) the defendant pinned plaintiff against a fence and/or kneed her in the back when arresting or stopping her; (2) the force used was excessive because it was not reasonably necessary to arrest or stop plaintiff; and (3) as a direct result, the plaintiff was injured. Model Civ. Jury Inst. 8th Cir. 4.40 (2013) (as modified using the facts pled by plaintiff).

[2] "A plaintiff has a cause of action for false arrest if the plaintiff is confined, without legal justification." Rankin v. Venator Group Retail, Inc., 93 S.W.3d 814, 819 (Mo.App. E.D.2002). "[T]here are only two elements: restraint of the plaintiff against his will, and the unlawfulness of that restraint." Bramon v. U–Haul, Inc., 945 S.W.2d 676, 680

Appendix E

Accordingly, defendant's motion to dismiss (Doc. No. 8) is **DENIED.**

IT IS SO ORDERED.

Date: April 20, 2017
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge

(Mo.App. E.D.1997).

Appendix E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MARJORIE CREAMER,
Plaintiff,
vs.
DON EBERT, Kansas City Police Officer,
Defendant.

Case No. 16-0816-CV-W-FJG

ORDER

Pending before the Court is Plaintiff's Application for Appointment of Counsel (Doc. No. 27).

Plaintiff has requested appointment of counsel. Although a civil litigant does not have a constitutional or statutory right to a court-appointed attorney, the district court may make such an appointment at its discretion. Wiggins v. Sargent, 753 F.2d 663, 668 (8th Cir. 1985). The appointment of counsel "'should be given serious consideration . . . if the plaintiff has not alleged a frivolous or malicious claim'" and the pleadings state a prima facie case. In re Lane, 801 F.2d 1040, 1043 (8th Cir. 1986)(quoting Nelson v. Redfield Lithograph Printing, 728 F.2d 1003, 1005 (8th Cir. 1984)). The Court must also consider plaintiffs' inability to obtain counsel on his own and plaintiff's need for an attorney. Id. The inquiry regarding plaintiffs' need for counsel should focus on the following, non-exclusive factors: (1) the factual and legal complexity of the case; (2) plaintiff's ability to investigate the facts and present the claim; and (3) the existence of conflicting testimony. Id. at 1043-44.

The Court is unconvinced that plaintiff should be appointed counsel at this stage of the proceedings. First, the Court notes that plaintiff must make "a reasonably diligent effort under the circumstances to obtain counsel." Bradshaw v. Zoological Society, 662 F.2d 1301, 1319 (9th Cir. 1981). In Bradshaw, the court found that contacting ten attorneys was sufficient. Another court found that contacting only four attorneys would

Appendix F.

On January 8, 2018, plaintiff filed a document entitled "Request for 1st Set Interrogatories Admission and a Motion to Hearing Summary Judgment," (Doc. No. 54), in which she stated for the first time that "Defendants [sic] failed to request for admission of interrogatories as plaintiff answered; numerous requests are absurd and are 'less than central to this case' of excessive force violation 1983. . ." Plaintiff then details what she calls an illegal action of "helmet to helmet contact" in a professional football game, which has no apparent relationship with the present action. Plaintiff also asserts that as a matter of law she has the right to a summary judgment hearing to present a case to a judge.[1] Plaintiff does not detail which of defendant's requests for admission or interrogatories are "absurd," and plaintiff does not discuss her failure to provide releases for her medical records, employment records, social security/disability records, and prison records.

On January 17, 2018, defendant filed a motion to dismiss plaintiff's complaint with prejudice for failure to comply with this Court's Orders, pursuant to Fed. R. Civ. P. 37(b), and in the alternative, moves to dismiss due to plaintiff's failure to attend her own deposition and comply with defendant's discovery requests, pursuant to Fed. R. Civ. P. 37(d). Defendant notes that as of the date of filing the motion to dismiss, plaintiff had not provided defendant with any additional discovery responses or records releases, as ordered by the Court. Defense counsel notes that she has made several good faith attempts to communicate with plaintiff regarding scheduling her deposition and obtaining discovery responses; however, plaintiff has not responded to defense counsel's communications regarding discovery issues.

[1] This assertion is incorrect as a matter of law.

Appendix G.

On January 8, 2018, plaintiff filed a document entitled "Request for 1st Set Interrogatories Admission and a Motion to Hearing Summary Judgment," (Doc. No. 54), in which she stated for the first time that "Defendants [sic] failed to request for admission of interrogatories as plaintiff answered; numerous requests are absurd and are 'less than central to this case' of excessive force violation 1983. . ." Plaintiff then details what she calls an illegal action of "helmet to helmet contact" in a professional football game, which has no apparent relationship with the present action. Plaintiff also asserts that as a matter of law she has the right to a summary judgment hearing to present a case to a judge.[1] Plaintiff does not detail which of defendant's requests for admission or interrogatories are "absurd," and plaintiff does not discuss her failure to provide releases for her medical records, employment records, social security/disability records, and prison records.

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[1] This assertion is incorrect as a matter of law.

Appendix G.

Plaintiff's response or suggestions in opposition to defendant's motion to dismiss was due on or before January 31, 2018. As of the date of this Order, plaintiff has not responded to the motion to dismiss.

As noted by defendant in its motion to dismiss (Doc. No. 56), under Rule 37(b), a district court may dismiss a party's action or claims in whole or in part if that party fails to comply with the court's order to provide discovery. Fed. R. Civ. P. 37(b)(2)(A). Plaintiff was cautioned that failure to provide responses to defendant's discovery requests on or before January 8, 2018, may result in sanctions, up to and including dismissal of this action, for failure to comply with Court Orders under Fed. R. Civ. P. 37(b). See Doc. No. 51. Nonetheless, as of the date of this Order, plaintiff has failed to comply with the court's order to respond to reasonable discovery requests, including providing releases for plaintiff's medical records, employment records, social security/disability record, and prison records. Under these circumstances, the Court finds that defendant's motion to dismiss (Doc. No. 56) must be **GRANTED**, and plaintiff's action is **DISMISSED WITH PREJUDICE.** All remaining motions (Doc. Nos. 52, 53, 54, 55, 57, and 60) are **DENIED AS MOOT.**

The Clerk's office is directed to mail a copy of this order via first-class mail to plaintiff at the following address: Marjorie A. Creamer, PO Box 25164, Kansas City, MO 64119.

IT IS SO ORDERED.

Date: March 1, 2018
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge

Appendix G.

Additional material from this filing is available in the Clerk's Office.