FILED
United States Court of Appeals
Tenth Circuit

June 16, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOANNA BLAUCH,

Plaintiff - Appellant,

v.

CITY OF WESTMINSTER, COLORADO, a home rule municipality; DONALD TRIPP, in his official and individual capacity; HERBERT ATCHISON, in his official and individual capacity; ANITA SEITZ, in her official and individual capacity; DAVID DEMOTT, in his official and individual capacity; KATHRYN SKULLEY, in her official and individual capacity; BRUCE BAKER, in his official and individual capacity; ALBERT GARCIA, in his official and individual capacity; EMMA PINTER, in her official and individual capacity; MARIA DE CAMBRA, in her official and individual capacity; SHANNON BIRD, in her official and individual capacity; MARK BROSTROM, in his official and individual capacity; TIFFANY SORICE, in her individual and official capacity,

Defendants - Appellees.

No. 20-1430
(D.C. No. 1:20-CV-00431-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in 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. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral

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Before **MORITZ**, **BALDOCK**, and **EID**, Circuit Judges.

Joanna Blauch appeals an order dismissing her pro se 42 U.S.C. § 1983 claims as frivolous or barred by absolute-immunity defenses. For the reasons below, we affirm.

Blauch's claims stem from her 2013 arrest for a domestic-violence incident. The arrest led to Blauch's criminal convictions for unspecified offenses following a jury trial prosecuted by Mark Brostrom, a prosecutor for the City of Westminster, Colorado. Blauch sought postconviction relief in municipal-court proceedings overseen by Judge Tiffany Sorice, though the result of those proceedings is unclear from the record. Later, Blauch filed this pro se complaint in federal court alleging constitutional violations under § 1983 and state-law claims against the City, Sorice, Brostrom, and ten other City officials. To remedy these violations, Blauch sought damages and unspecified declaratory and injunctive relief.

The district court granted Blauch's request to proceed in forma pauperis but dismissed her claims under 28 U.S.C. § 1915(e)(2)(B)(i) and (iii), determining that they were frivolous or subject to absolute-immunity defenses.[1] It also denied

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estoppel. But it may be cited for its persuasive value. See Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

[1] The district court also concluded that the applicable two-year statute of limitations barred some of Blauch's claims. We need not address this conclusion, however, because (as explained below) the district court properly dismissed all claims on other grounds.

Blauch's request to proceed in forma pauperis on appeal, certifying that any appeal from the dismissal would not be taken in good faith. See § 1915(a)(3). Blauch appeals.

On appeal, Blauch challenges several aspects of the district court's order dismissing her claims under § 1915(e)(2)(B). That statute requires federal courts to dismiss in forma pauperis claims if they are frivolous, if they fail to state a claim on which relief may be granted, or if they seek damages from a defendant who is immune from such relief. § 1915(e)(2)(B)(i)–(iii). A claim is frivolous if "it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). A claim is not frivolous, however, simply because it does not state a claim on which relief may be granted. See id. at 329–30. Although "[w]e generally review a district court's dismissal for frivolousness under § 1915 for abuse of discretion," our review is de novo if "the frivolousness determination turns on an issue of law." Fogle v. Pierson, 435 F.3d 1252, 1259 (10th Cir. 2006). De novo review likewise applies to dismissals on absolute-immunity grounds. See Gagan v. Norton, 35 F.3d 1473, 1475 (10th Cir. 1994). Because Blauch proceeds pro se, we liberally construe her arguments when applying these standards. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). But in doing so, we do not act as her advocate. Id.

Under these standards, Blauch raises no issue requiring reversal. Blauch largely repeats points she made below, ignoring the district court's dispositive reasons for dismissing her claims. Specifically, none of Blauch's arguments show that the district court improperly dismissed her complaint under § 1915(e)(2)(B).

At the outset, the district court properly dismissed the claims against Sorice and Brostrom. Both those defendants are entitled to absolute immunity because Blauch's claims arise from acts they performed in their judicial or prosecutorial capacities, respectively. See Hunt v. Bennett, 17 F.3d 1263, 1266 (10th Cir. 1994) (judicial immunity); id. at 1267 (prosecutorial immunity). Certain exceptions could overcome these immunity defenses, but Blauch does not allege them here.

Blauch's § 1983 claims against the other individual defendants also fall short. As the district court observed, Blauch alleges no specific facts showing how these officials, a city manager and several city-council members, personally participated in the alleged constitutional violations at her trial and postconviction proceedings. See Henry v. Storey, 658 F.3d 1235, 1241 (10th Cir. 2011). We disagree, however, with the district court's view that this conclusion supports dismissal for frivolousness. Even though these claims ultimately fail because Blauch alleges no facts on a material element required to obtain relief, they at least invoke a recognized legal theory and avoid making baseless factual allegations. See Williams, 490 U.S. at 327. Accordingly, the district court should have dismissed the claims against the remaining individual defendants under § 1915(e)(2)(B)(ii) for failure to state a claim—not under § 1915(e)(2)(B)(i) for frivolousness—and we affirm on that alternative basis. See Johnson v. Raemisch, 763 F. App'x 731, 734–35 (10th Cir. 2019) (unpublished).

That leaves Blauch's claims against the City. To succeed on those claims, Blauch had to show that the City created some policy or custom that directly caused

her alleged injuries. Mocek v. City of Albuquerque, 813 F.3d 912, 933 (10th Cir. 2015). As in the district court, Blauch argues that the City adopted a policy "of 'lawsuit avoidance' to 'stay ahead of the ACLU' by falsifying and ignoring material evidence in multiple reported cases." Aplt. Br. 13 (quoting R. 241). But her argument faces the same problem on appeal that it faced below: she fails to support the existence of such a policy with "particular facts" and relies exclusively on "conclusory allegations." R. 373. And contrary to Blauch's view, this failure did not occur because the magistrate judge excluded "[b]ackground evidence" documenting examples of other people that the City has mistreated, Aplt. Br. 7; the district court rightly noted that the examples Blauch points to "do not involve the same type of conduct allegedly perpetrated against [her]," R. 374. Because Blauch did not allege a municipal policy that could have caused her injuries, the district court did not err in dismissing the claims against the City. See Mocek, 813 F.3d at 934 ("Aside from conclusory statements, no allegations in the complaint give rise to an inference that the municipality itself established a deliberate policy or custom that caused [plaintiff's] injuries."). But as with the previous set of claims, we note that the appropriate basis for dismissal was failure to state a claim rather than frivolousness. See Johnson, 763 F. App'x at 734–35.

None of Blauch's remaining arguments affect the district court's dispositive reasons for dismissing her complaint. Blauch contends that the district court ignored her objections to factual inaccuracies in the magistrate judge's recommendations and distorted facts in its dismissal order. But she does not say what facts the magistrate

judge inaccurately described or the district court distorted. And we are not persuaded by Blauch's argument that the district court's legal conclusions "were demonstrably based on almost entirely distorted facts." Aplt. Br. 36. As discussed above, our de novo review of the complaint persuades us that it was subject to dismissal under § 1915(e)(2)(B) for substantially the same reasons stated by the district court.

In sum, we affirm the dismissal of Blauch's § 1983 claims under § 1915(e)(2)(B). And because Blauch asserted no other federal claims, we also affirm the district court's decision not to exercise supplemental jurisdiction over Blauch's state-law claims. See Smith v. City of Enid, 149 F.3d 1151, 1156 (10th Cir. 1998) ("When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims."). As a final matter, we deny Blauch's motion to proceed in forma pauperis on appeal because although the complaint may have raised nonfrivolous claims, Blauch has "failed to show the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." Rolland v. Primesource Staffing, L.L.C., 497 F.3d 1077, 1079 (10th Cir. 2007) (emphasis added).

Entered for the Court

Nancy L. Moritz
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00431-LTB-GPG

JOANNA BLAUCH,

Plaintiff,

v.

CITY OF WESTMINSTER, COLORADO, a home rule municipality,
DONALD TRIPP, in his official and individual capacity,
HERBERT ATCHISON, in his official and individual capacity,
ANITA SEITZ, in her official and individual capacity,
DAVID DEMOTT, in his official and individual capacity,
KATHRYN SKULLEY, in her official and individual capacity,
BRUCE BAKER, in his official and individual capacity,
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EMMA PINTER, in her official and individual capacity,
MARIA DE CAMBRA, in her official and individual capacity,
SHANNON BIRD, in her official and individual capacity,
MARK BROSTROM, in his official and individual capacity, and
TIFFANY SORICE, in her official and individual capacity,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the second amended Complaint (ECF No. 16).[1] Plaintiff proceeds *pro se*. The matter has been referred to this Magistrate Judge for recommendation (ECF No. 18).[2] The Court has considered the entire case file, the

1 "(ECF No. ___)" is an example of the convention I use to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). I use this convention throughout this Recommendation.

2 Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive, or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed

applicable law, and is sufficiently advised in the premises. This Magistrate Judge respectfully recommends that the second amended Complaint be dismissed

I. Background

Plaintiff Joanna Blauch resides in Boulder, Colorado. Ms. Blauch initiated this action on February 19, 2020 by filing *pro se* a Complaint (ECF No. 1) and an Application to Proceed in District Court Without Prepaying Fees or Costs (Long Form) (ECF No. 2). In response to a cure order (ECF No. 4), Plaintiff filed an amended Complaint on the court-approved form on May 20, 2020 (ECF No. 10).

On May 21, 2020, the Court granted Ms. Blauch leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915 and directed her to file a second amended Complaint within 30 days. (ECF No. 11). After obtaining an extension of time, Plaintiff filed a second amended Complaint on July 31, 2020, asserting deprivations of her constitutional rights pursuant to 42 U.S.C. § 1983. (ECF No. 16).

In the second amended Complaint, Ms. Blauch alleges that she was arrested by Westminster police officers in March 2013 after they were called to her home in conjunction with a domestic violence dispute. (ECF No. 16 at ¶¶ 27-31). Plaintiff told the police officers that the man inside the home had grabbed her by the wrist, drug her across the room, and then attempted to strangle her, as evidenced by the physical marks on her body. (*Id.*). The man apparently told the police that Plaintiff had struck him. (*Id.*). The police then arrested Ms. Blauch, but not the man who attempted to

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findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

strangle her. (*Id.*). When Plaintiff asked the officers why the man was not being arrested, the police responded: "because people will say that we always take the man." (ECF No. 16, ¶ 31). Ms. Blauch alleges that her attorney later told her that she was arrested because the police do not like her. (*Id.*, ¶ 32). Ms. Blauch asserts that Defendant Brostrom, the Westminster City Attorney, engaged in misconduct during the criminal prosecution, including suppressing evidence that the man who attempted to strangle her was a "heavy drinker" and "had a bad temper," instructing the jury to ignore relevant self-defense evidence, referring to an unrelated rape that Plaintiff had reported five days before the domestic incident, and asking the court to order a competency evaluation. (*Id.*, ¶¶ 35-39, 40). In court hearings in 2016, Defendants Brostrom and Westminster Municipal Judge Sorice continued to question Ms. Blauch about the unrelated rape, even though it was irrelevant to the domestic violence incident that resulted in her arrest. (*Id.*, ¶¶ 47-49). Ms. Blauch does not state whether she was convicted of the criminal charges, but she does complain about "ongoing retaliation" in connection with the supervision of her probation in February 2016. (*Id.* at ¶ 50). Ms. Blauch further alleges that when she attempted to obtain copies of public records in 2017, Defendant Brostrom, threatened to bring criminal charges against her. (*Id.*, ¶¶ 53, 55). Ms. Blauch also asserts that Defendant Brostrom made misleading statements to the municipal court in a January 2018 proceeding and that Defendant Sorice falsely stated in a February 2018 proceeding that criminal charges had been filed against Plaintiff on more than one occasion, and that both "before" and "after" photographs showing the strangulation injuries had been admitted at Plaintiff's trial. (*Id.* at ¶¶ 58, 62, 67, 75). Ms. Blauch asserts several claims for relief under the due

process and equal protection clauses of the Fourteenth Amendment, along with claims of unconstitutional invasion of privacy and unconstitutional retaliation. Ms. Blauch also asserts pendent state law tort claims. She requests monetary and equitable relief.

II. Standard of Review

The Court construes the second amended Complaint liberally because Ms. Blauch is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520- 21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not act as an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

Ms. Blauch has been granted leave to proceed pursuant to 28 U.S.C. § 1915. Therefore, the Court must dismiss any claims that are frivolous or which seek monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e)(2)(B)(i) and (iii). A legally frivolous claim is one in which the plaintiff asserts the violation of a legal interest that clearly does not exist or asserts facts that do not support an arguable claim. *See Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989).

III. Analysis of Claims

A. *Heck v. Humphrey*

To the extent Ms. Blauch seeks to recover damages under § 1983 in conjunction with an allegedly unlawful municipal court conviction, the claims appear to be barred by the rule of *Heck v. Humphrey,* 512 U.S. 477 (1994). In *Heck*, the United States Supreme Court held that if a judgment for damages favorable to a prisoner in a 42 U.S.C. § 1983 action necessarily would imply the invalidity of a criminal conviction or sentence, the § 1983 action does not arise until the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by an

authorized state tribunal, or called into question by the issuance of a federal habeas writ. *Id.* at 486-87. The Supreme Court later clarified that "a state prisoner's § 1983 action is barred (absent prior invalidation) no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit . . . if success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005). *See also Crow v. Penry*, 102 F.3d 1086, 1087 (10th Cir.1996) ("[*Heck*] applies to proceedings that call into question the fact or duration of parole or probation.").

If Ms. Blauch is challenging a municipal court conviction that resulted in a term of probation, she fails to allege that the conviction has been invalidated. Therefore, any claims challenging the municipal court conviction appear to be subject to dismissal without prejudice pursuant to *Heck*. See *Fottler v. United States*, 73 F.3d 1064, 1065 (10th Cir.1996) (stating that a dismissal under *Heck* is without prejudice).

To the extent Ms. Blauch's § 1983 claims are not barred by the rule of *Heck*, they are subject to dismissal on other grounds, as discussed below.

B. Personal Participation

Allegations of "personal participation in the specific constitutional violation complained of [are] essential" in a §1983 action. *Henry v. Storey*, 658 F.3d 1235, 1241 (10th Cir. 2011); *see also Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997) ("Individual liability . . . must be based on personal involvement in the alleged constitutional violation."). To establish personal participation, a plaintiff must show that each individual defendant caused the deprivation of a federal right. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985). There must be an affirmative link between the

alleged constitutional violation and each individual defendant's participation, control, direction, or failure to supervise. *See Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir. 1993). Supervisory officials may not be held liable for the unconstitutional conduct of subordinates on a theory of *respondeat superior*. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Therefore, in order to succeed in a § 1983 suit against a government official for conduct that arises out of his or her supervisory responsibilities, a plaintiff must allege and demonstrate that: "(1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation." *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010).

Ms. Blauch sues the Westminster City Manager, the Westminster Mayor and several Westminster City Council members in their individual capacities. However, she fails to allege specific facts to demonstrate that each of these Defendants was personally involved in the alleged deprivations of her constitutional rights. Consequently, the § 1983 claims asserted against Defendants Donald Tripp, Herbert Atchison, Anita Seitz, David Demott, Kathryn Skulley, Bruce Baker, Alberto Garcia, Emma Pinter, Maria de Cambria, and Shannon Bird, should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

C. City of Westminster

Ms. Blauch asserts § 1983 claims against the City of Westminster and City of Westminster officials, sued in their official capacities. The official capacity claims are construed as claims against the City of Westminster. *See Hafer v. Melo*, 502 U.S. 21,

25 (1991).

To hold the City of Westminster liable under § 1983, Plaintiff must allege specific facts to show that an unconstitutional policy or custom exists and that there is a direct causal link between the policy or custom and the alleged constitutional injury. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989); *Myers v. Oklahoma County Bd. of County Comm'rs,* 151 F.3d 1313, 1316-20 (10th Cir. 1998). Local government entities are not liable under 42 U.S.C. § 1983 solely because their employees inflict injury on a plaintiff. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694 (1978); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989); *Myers v. Oklahoma County Bd. of County Comm'rs*, 151 F.3d 1313, 1316-20 (10th Cir. 1998); *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 770 (10th Cir. 2013).

In the second amended Complaint, Ms. Blauch purports to show a municipal policy or custom based on the following allegations:

> 91. All named defendants except Brostrom were, at all times relevant, vested with final policymaking authority for the municipality. In that capacity, their acts or omissions established policies, procedures and/or practices for the same. These defendants developed and maintained policies, procedures, customs, and/or practices exhibiting reckless disregard of continuing unabated violations of protected rights of citizens. They were moving forces behind and proximately caused and continue to cause the violations of Plaintiff's protected rights as set forth herein and resulted from a deliberate choice to follow a course of action from among various available alternatives.
>
> 92. Defendants have created and tolerated an atmosphere of lawlessness well-known by the general public, extensively documented and reported on in various mediums and with the reputational perception of improprieties stretching all the way to Hollywood.

(ECF No. 16, ¶¶ 91-92).

Ms. Blauch's mere invocation of talismanic language tracking the *Monell*

standard is insufficient to show an arguable entitlement to relief against the City of Westminster. The amended Complaint is devoid of any specific facts to demonstrate that Plaintiff's alleged constitutional injuries were caused by a City of Westminster policy or custom.

Consequently, the § 1983 claims asserted against the City of Westminster and against the Westminster officials in their official capacities should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

D. Prosecutorial and Judicial Immunity

Ms. Blauch's § 1983 claims for damages against Defendant Brostrom, a Westminster City Attorney, sued in his individual capacity, are barred by absolute immunity to the extent the claims are based on actions taken by Brostrom in his role as a prosecutor. *See Imbler v. Pachtman*, 424 U.S. 409, 420-24 (1976); *see also Butz v. Economou*, 438 U.S. 478, 504 (1978). Initiating and pursuing a criminal prosecution are acts are "'intimately associated with the judicial process.'" *Snell v. Tunnell*, 920 F.2d 673, 686 (10th Cir. 1990) (quoting *Imbler*, 424 U.S. at 430). Plaintiff's allegations against Defendant Brostrom are based on actions taken by the Defendant in his role prosecuting cases for the City of Westminster, and, therefore, are protected by prosecutorial immunity.

Further, even if Defendant Brostrom's alleged interference with Plaintiff's request for public records in 2016 was not a prosecutorial function, Ms. Blauch's vague and conclusory allegations fail to show how Defendant Brostrom's conduct violated her constitutional rights.

Defendant Sorice, a Westminster municipal judge, is entitled to absolute immunity against damages liability in a civil rights action for actions taken in her judicial capacity, unless she acted in the clear absence of all jurisdiction. *See Mireles v. Waco*, 502 U.S. 9, 11-12 (1991); *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978); *Hunt v. Bennett*, 17 F.3d 1263, 1266-67 (10th Cir. 1994). Judicial immunity "is not overcome by allegations of bad faith or malice," *Mireles*, 502 U.S. at 11, or an assertion that the judge acted in error or exceeded her authority, *see Stump*, 435 U.S. at 1105. Further, a judge acts in the clear absence of all jurisdiction only when she "acts clearly without any colorable claim of jurisdiction." *Snell v. Tunnell*, 920 F.2d 673, 686 (10th Cir.1990).

In the second amended Complaint, Ms. Blauch complains about actions taken by Defendant Sorice in her judicial capacity and there are no facts to suggest that Defendant Sorice acted in the clear absence of all jurisdiction. Therefore, the claims for damages against Defendant Sorice are barred by judicial immunity.

Prosecutorial and judicial immunity do not bar courts from providing equitable relief. *See Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 736 (1980). However, Ms. Blauch does not request any specific injunctive or declaratory relief, and she does not allege any misconduct by Defendants Brostrom and Sorice after February 2018. A "plaintiff cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured in the future." *Facio v. Jones*, 929 F.2d 541, 544 (10th Cir.1991); *see also Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1266 (10th Cir.2004) (McConnell, J., concurring) ("[A] declaratory judgment action involving past conduct that will not recur is not justiciable."). Moreover, Section 309(a) of the Federal Courts Improvement Act ("FCIA"), Pub.L. No.

104-317, 110 Stat. 3847 (1996) bars injunctive relief in any section 1983 action "against a judicial officer for an act or omission taken in such officer's judicial capacity . . . unless a declaratory decree was violated or declaratory relief was unavailable." Because Ms. Blauch does not allege these specific circumstances in her pleading, absolute judicial immunity bars her claims for injunctive relief. *See Lawrence v. Kuenhold*, No. 06-1397, 271 F. App'x 763, 766 n. 6 (10th Cir. Mar. 27, 2008) (unpublished).

The § 1983 claims asserted against Defendants Brostrom and Sorice, in their individual capacities, should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and (iii).

Finally, because the Court is recommending dismissal of all of the federal claims asserted in the second amended Complaint, the Court should decline to exercise supplemental jurisdiction over the pendent state law claims. *See* 28 U.S.C. § 1367(c)(3).

IV. Recommendations

For the reasons set forth herein, this Magistrate Judge respectfully

RECOMMENDS that the § 1983 claims asserted against Defendants City of Westminster, and the official and individual capacity claims asserted against Donald Tripp, Herbert Atchison, Anita Seitz, David Demott, Kathryn Skulley, Bruce Baker, Alberto Garcia, Emma Pinter, Maria de Cambria, and Shannon Bird, be dismissed without prejudice pursuant to *Heck v. Humphrey*, to the extent the claims challenge the validity of a municipal court conviction; any § 1983 claims not barred by *Heck* should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). This Magistrate Judge further

respectfully

RECOMMENDS that the § 1983 claims asserted against Defendants Brostrom and Sorice, in their individual capacities, be dismissed without prejudice pursuant to *Heck v. Humphrey,* to the extent the claims challenge the validity of a municipal court conviction; any § 1983 claims not barred by *Heck* should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and (iii). This Magistrate Judge further respectfully

RECOMMENDS that the Court decline to exercise supplemental jurisdiction over the state law claims, pursuant to 28 U.S.C. § 1367(c)(3).

DATED August 19, 2020.

BY THE COURT:

Gordon P. Gallagher
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00431-LTB-GPG

JOANNA BLAUCH,

Plaintiff,

v.

CITY OF WESTMINSTER, COLORADO, a home rule municipality,
DONALD TRIPP, in his official and individual capacity,
HERBERT ATCHISON, in his official and individual capacity,
ANITA SEITZ, in her official and individual capacity,
DAVID DEMOTT, in his official and individual capacity,
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EMMA PINTER, in her official and individual capacity,
MARIA DE CAMBRA, in her official and individual capacity,
SHANNON BIRD, in her official and individual capacity,
MARK BROSTROM, in his official and individual capacity, and
TIFFANY SORICE, in her official and individual capacity,

Defendants.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge filed August 19, 2020 (ECF No. 19). Plaintiff has filed timely written objections to the Recommendation (ECF No. 25), after being granted extensions of time to do so (ECF Nos. 22, 24). The Court has therefore reviewed the Recommendation *de novo* in light of the file and record in this case. Plaintiff's specific objections are addressed below.

Applicability of *Heck v. Humphrey*

Plaintiff objects to dismissal of her claims pursuant to the rule of *Heck v. Humphrey*, 512 U.S. 477 (1994) because she is not in custody and has no access to habeas corpus relief. See *Cohen v. Longshore,* 621 F.3d 1311, 1317 (10th Cir. 2010) (holding that "a petitioner who has no available remedy in habeas, through no lack of diligence on his part, is not barred by *Heck* from pursuing a § 1983 claim."). The Court finds it unnecessary to rule on Plaintiff's objection because the Magistrate Judge recognized in the Recommendation that it was unclear whether the rule of *Heck* applied, and, therefore, recommended dismissal of the § 1983 claims on the alternative ground that the claims are frivolous or seek monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e)(2)(B)(i) and (iii).

Claims against the Westminster city manager and city council members

The Court has carefully reviewed Plaintiff's objections to the dismissal of Defendant Donald Tripp (Westminster city manager) and the Defendant Westminster city council members, Herbert Atchison, Anita Seitz, David Demott, Kathryn Skulley, Bruce Baker, Alberto Garcia, Emma Pinter, Maria de Cambria, and Shannon Bird. The Court over-rules the objections because the Magistrate Judge concluded correctly that Plaintiff fails to allege specific facts in the second amended Complaint to demonstrate each Defendant's personal participation in the alleged deprivations of her constitutional rights.

Claims against the City of Westminster

Plaintiff objects to dismissal of the § 1983 claims asserted against the City of Westminster on the ground that she adequately pleaded her alleged constitutional

injuries were caused by a municipal policy or custom—to "stay ahead of the ACLU" by falsifying and ignoring material evidence in multiple reported cases. (ECF No. 25, at pp. 39, 46; *see also* ECF No. 16, at pp. 9, 20). However, this allegation is not supported by particular facts. As the Tenth Circuit has recognized, conclusory allegations of a municipal policy or custom are insufficient:

> The complaint makes a variety of conclusory allegations such as those that Denver had a "policy, custom, and/or practice of suppressing and/or destroying material evidence to gain an unfair advantage" and a "policy, custom and/or practice of covering up official misconduct to avoid civil liability, which[ ] has fostered a culture of misconduct and an environment where such illegal and unconstitutional behavior is approved and condoned." R. Vol. III at 102. The complaint resembles the one we found lacking in *Mocek* in that it "cites no particular facts in support of these 'threadbare recitals of the elements of a cause of action.'" [*Mocek v. City of Albuquerque*, 813 F.3d 912, 934 (10th Cir. 2015)] (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)).

Carbajal v. McCann, No. 18-1132, 808 F. App'x 620, 638 (10th Cir. Mar. 30, 2020) (unpublished).

Plaintiff asserts that any pleading deficiencies in her claim against the City of Westminster are the result of Magistrate Judge Gallagher's order "barr[ing] Plaintiff from presenting relevant reported specific incidents of other individuals within the City of Westminster police department or courts." (ECF No. 25, at p. 19). In a February 20, 2020 Order, Magistrate Judge Gallagher instructed Plaintiff:

> The body of the Complaint is 65 pages and includes 55 pages of "background" and "facts" before any claim for relief is pleaded. The amended Complaint should not include any unnecessary commentary and narrative; any reference to other individuals' negative experiences with the City of Westminster police department or courts; or, any attachments. Instead, the amended pleading should set forth only those specific factual allegations that are pertinent to the claims for relief that Plaintiff is asserting.

(ECF No. 4, at p. 3). To the extent Plaintiff relies on the allegations of her original Complaint to show a municipal policy or custom, the Court's review of that pleading reflects that the alleged instances of municipal misconduct committed against other individuals as described therein do not involve the same type of conduct allegedly perpetrated against Plaintiff by the Defendants in the instant action. Therefore, the objection to the recommended dismissal of the City of Westminster is over-ruled.

Claims against the prosecutor

Plaintiff objects to dismissal of the § 1983 claims asserted against Defendant Brostrum, a Westminster City Attorney, based on prosecutorial immunity. Plaintiff maintains that she has stated an actionable claim for relief against Defendant Brostrum pursuant to the Tenth Circuit's holding in *Bledsoe v. Vanderbilt*, 934 F.3d 1112 (10th Cir. 2019). In *Bledsoe*, the Tenth Circuit held that a prosecutor is not entitled to absolute immunity from suit for fabricating evidence against an individual during the preliminary investigation of a crime. *Id.* at 1118. *Bledsoe* is inapposite because Plaintiff does not allege that Defendant Brostrum fabricated evidence during a preliminary investigation. Instead, she states that there were "before" and "after" photos of her physical appearance which substantiated her allegation that a man had strangled her immediately prior to her arrest; that only the "after" photos were presented at her municipal court trial on unspecified charges in 2013; and that in November 2015, Defendant Brostrum discovered the existence of "before" photos which proved Plaintiff had been acting in self-defense, but Brostrum did not take action to nullify her conviction. (ECF No. 25, at pp. 23-24, 51; ECF No. 16 at pp.15, 29-30).

Plaintiff further maintains that under *Imbler v. Pachtman*, 424 U.S. 409 (1976), a prosecutor is not entitled to absolute immunity for failing to bring late-discovered material evidence to the Court's attention and seek to have the conviction vacated. In *Imbler*, the Supreme Court noted that "after a conviction, the prosecutor is also bound by the ethics of his office to inform the appropriate authority of after-acquired or other [material] information that casts doubt upon the correctness of the conviction." 424 U.S. at 427 n. 25. This statement simply recognizes that certain acts, although afforded absolute prosecutorial immunity, could subject a prosecutor to professional discipline by an association of his peers, a mechanism which helps to ensure that prosecutors are deterred from improper conduct. The prosecutor's decision not to request that Plaintiff's conviction be vacated based on after-acquired evidence is a discretionary prosecutorial act protected by absolute immunity. *See, e.g. Ellibee v. Fox,* No. 06-3382, 244 F. App'x. 839, 844-45 (10th Cir. Jun. 21, 2007) (unpublished) ("'Absolute immunity applies to the adversarial acts of prosecutors during post-conviction proceedings, including direct appeals, habeas corpus proceedings, and parole proceedings, where the prosecutor is personally involved in the subsequent proceedings and continues his role as an advocate.'") (quoting *Spurlock v. Thompson*, 330 F.3d 791, 799 (6th Cir. 2003)); *Cousins v. Lockyer,* 568 F.3d 1063, 1069 (9th Cir. 2009) (state attorney general entitled to prosecutorial immunity with respect to § 1983 claim which alleged attorney general could have effectuated plaintiff's post-conviction release, where attorney general's office had handled an appeal in another case which resulted in the invalidation of the penal code provision pursuant to which plaintiff was incarcerated).

The Court over-rules Plaintiff's written objection to the dismissal of the § 1983 claims asserted against Defendant Brostrum, which are based on Brostrum's conduct in initiating and prosecuting a municipal court action against Plaintiff, and in representing the City of Westminster in any related appellate or post-conviction proceeding because the prosecutor is entitled to absolute immunity. *See Imbler,* 424 U.S. at 430-31 (holding that prosecutors entitled to absolute immunity from suits for civil damages when such suits are based on the prosecutor's performance of functions "intimately associated with the judicial phase of the criminal process."). *See also Buckley v. Fitzsimmons,* 509 U.S. 259, 273 (1993) (affirming that "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity"). To the extent any allegations against Defendant Brostrum are not protected by prosecutorial immunity, the allegations are vague and fail to state an arguable violation of Plaintiff's constitutional rights. *See Carbajal*, 808 F. App'x at 632-33.

Clams against the judge

Plaintiff also objects to the recommended dismissal of Defendant Sorice (a Westminster municipal judge) based on judicial immunity. As discussed in the Recommendation, Defendant Sorice is entitled to judicial immunity for making statements on the record in a court proceeding, whether or not the statements were accurate, and for issuing court orders, regardless of whether the court orders violated Plaintiff's civil rights. *See Mireles v. Waco,* 502 U.S. 9, 11-12 (1991); *Stump v. Sparkman,* 435 U.S. 349, 356-57 (1978). The second amended Complaint does not contain any allegations that Defendant Sorice acted outside her jurisdiction or other

than in her role as a judge. Therefore, Plaintiff's written objection to the dismissal of the § 1983 claims against Defendant Sorice based on judicial immunity is over-ruled.

Finally, Plaintiff objects to the Magistrate Judge's distillation of the factual allegations alleged in the second Amended Complaint. However, the Recommendation need not restate the entirety of the factual allegations contained in a plaintiff's pleading. More importantly, even if the Magistrate Judge inadvertently misunderstood some of Plaintiff's factual allegations, the Court finds that the misunderstanding did not affect the correctness of the substantive analysis.

On *de novo* review the Court concludes that the Recommendation is correct. Therefore, the Recommendation is accepted and adopted.

The Court further observes that the § 1983 claims which are based on conduct occurring more than two years before Plaintiff initiated this action on February 19, 2020, are barred by the two-year statute of limitations applicable to § 1983 actions filed in Colorado. *See Blake v. Dickason*, 997 F.2d 749, 750-51 (10th Cir. 1993). Magistrate Judge Gallagher warned Plaintiff about the statutory time bar in a May 21, 2020 Order directing her to file an amended Complaint (ECF No. 11) and afforded her an opportunity to demonstrate an entitlement to equitable tolling under Colorado law. (*See id.* at pp. 9-10). Plaintiff failed to do so. Instead, she alleges in the second amended Complaint that her causes of action did not accrue until fabricated evidence was used against her in a February 20, 2018 municipal court proceeding. (ECF No. 16, at p. 30; *see also* ECF No. 1, at p. 47). Under federal law, a cause of action accrues "when the plaintiff knows or has reason to know of the injury which is the basis of h[er] action." *Kripp v. Luton*, 466 F.3d 1171, 1175 (10th Cir. 2006); *see also Fogle v. Pierson,* 435

F.3d 1252, 1258 (10th Cir. 2006) ("A § 1983 action accrues when facts that would support a cause of action are or should be apparent.") (internal quotation marks omitted). It is clear from the allegations of the second amended Complaint that Plaintiff knew or had reason to know of the injuries which are the basis of this action before February 19, 2018. Therefore, claims based on conduct occurring prior to February 19, 2018 are time-barred. *See Yellen v. Cooper,* 828 F.2d 1471, 1476 (10th Cir. 1987) (recognizing that the court may dismiss a claim sua sponte on the basis of an affirmative defense if the defense is "obvious from the face of the complaint" and "[n]o further factual record [is] required to be developed in order for the court to assess the [plaintiff's] chances of success."); *see also Fratus v. DeLand,* 49 F.3d 673, 676 (10th Cir. 1995) (stating that dismissal under § 1915 on the basis of an affirmative defense is permitted "when the claim's factual backdrop clearly beckons the defense").

Accordingly, for the foregoing reasons, it is

ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 19) is accepted and adopted. It is

FURTHER ORDERED that the § 1983 claims asserted against Defendants City of Westminster, and the official and individual capacity claims asserted against Donald Tripp, Herbert Atchison, Anita Seitz, David Demott, Kathryn Skulley, Bruce Baker, Alberto Garcia, Emma Pinter, Maria de Cambria, and Shannon Bird, are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). It is

FURTHER ORDERED that the § 1983 claims asserted against Defendants Brostrom and Sorice, in their individual capacities, are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and (iii). It is

FURTHER ORDERED that the Court declines to exercise supplemental jurisdiction over any state law claims asserted in the second amended Complaint, pursuant to 28 U.S.C. § 1367(c)(3). It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this dismissal would not be taken in good faith.

DATED: October 20, 2020

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00431-LTB

JOANNA BLAUCH,

Plaintiff,

v.

CITY OF WESTMINSTER, COLORADO, a home rule municipality,
DONALD TRIPP, in his official and individual capacity,
HERBERT ATCHISON, in his official and individual capacity,
ANITA SEITZ, in her official and individual capacity,
DAVID DEMOTT, in his official and individual capacity,
KATHRYN SKULLEY, in her official and individual capacity,
BRUCE BAKER, in his official and individual capacity,
ALBERT GARCIA, in his official and individual capacity,
EMMA PINTER, in her official and individual capacity,
MARIA DE CAMBRA, in her official and individual capacity,
SHANNON BIRD, in her official and individual capacity,
MARK BROSTROM, in his official and individual capacity, and
TIFFANY SORICE, in her official and individual capacity,

Defendants.

JUDGMENT

Pursuant to and in accordance with the Order of Dismissal entered by Lewis T. Babcock, Senior District Judge, on October 20, 2020, it is hereby

ORDERED that Judgment is entered in favor of Defendants and against Plaintiff.

DATED at Denver, Colorado, this 12th day of November, 2020.

FOR THE COURT,

JEFFREY P. COLWELL, Clerk

By: s/ S. Phillips,
Deputy Clerk

FILED
United States Court of Appeals
Tenth Circuit

July 16, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOANNA BLAUCH,

Plaintiff - Appellant,

v.

CITY OF WESTMINSTER, COLORADO, a home rule municipality, et al.,

Defendants - Appellees.

No. 20-1430
(D.C. No. 1:20-CV-00431-LTB-GPG)
(D. Colo.)

ORDER

Before **MORITZ**, **BALDOCK**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

All other pending motions filed by the appellant are denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

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