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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BARBARA ORBAN,

Plaintiff,

v. CASE NO: 8:04-cv-1904-T-23MAP

CITY OF TAMPA,

Defendant.
_____/

ORDER

Barbara Orban sues the City of Tampa (the "City") for malicious prosecution in violation of civil rights enforceable under 42 U.S.C. § 1983 and for violation of her "right to due process of law guaranteed by the United States Constitution." Orban's claims result from a citation for careless driving and the consequent traffic court proceeding. Orban argues that the City's police officers cited her without probable cause because the City's policy requires that, absent a supervisor's approval otherwise, an officer issue a citation at each traffic accident. Orban also claims injury by the City's "policy" of allowing its police officers to submit "crash reports" instead of live testimony at traffic citation appeals. Orban alleges that the City's policies are unconstitutional and result in a malicious or bad faith prosecution in violation of civil rights enforceable under Section 1983 and that the citation and subsequent prosecution violated her due process rights under the Fourteenth Amendment.

A Section 1983 claim for malicious prosecution comprises both the violation of a federal right and the common law tort of malicious prosecution, which in turn comprises a prosecution (1) instituted or continued by the defendant, (2) furthered with malice and without probable cause, (3) terminated in the plaintiff's favor, and (4) damaging to the plaintiff. See e.g. Wood v. Kesler, 323 F.3d 872, 882 (11th Cir. 2003). Orban alleges as a predicate to her Section 1983 claims the violation of her Fourteenth Amendment right to procedural due process. The July 31, 2006, order (Doc. 83 at 7) granted the defendant's motion for summary judgment and dismissed counts two and three of Orban's claims because of "the existence of probable cause" for the careless driving citation.

The July 31st order also states that count four of the complaint fails to specify "(1) a specific constitutional injury, (2) a violation by the City of Orban's due process rights, (3) a sufficient causal connection between a practice of the City and any constitutional injury to Orban, and (4) an available and effective remedy to redress any constitutional injury." The order further required that the plaintiff show cause "why count four should not be dismissed for lack of standing, failure to allege a case or controversy, and failure to state a claim for relief." Orban's response merely iterates the plaintiff's earlier arguments on probable cause – arguments squarely rejected by the July 31st order.

The plaintiff's response to the July 31st order to show cause is a curious document. In the introductory paragraph, the plaintiff argues that count four should not be dismissed because it "is not a claim of malicious prosecution ... [and that] a

determination by the court as to whether or not there was probable cause for issuing a traffic citation is irrelevant" (Doc. 85 at 2). Yet the plaintiff's entire argument is premised on the alleged "fact" that a "citation was issued even though the investigating officer determined that there was no probable cause to issue the citation" (Doc. 85 at 2, ¶ 1). Indeed, the response is replete with similar references. See e.g. Doc. 85 at 3 ("pursuant to the Defendant's policy of issuing citations after every crash regardless of probable cause"); Doc. 85 at 4 ("Dr. Orban was issued a citation even though Officer Bowden did not feel there was probable cause for issuing the ticket"); Doc. 85 at 5 ("It is a due process violation for an officer to ignore his duty of finding probable cause before issuing a citation . . . ."); Doc. 85 at 5 ("Officer Bowden . . . issued a citation when he believed there was no probable cause"); Doc. 85 at 8 ("the officer violated Dr. Orban's due process rights by . . . issuing a citation when he believed he had no probable cause.").

The plaintiff also mischaracterizes the factual record by repeatedly stating that the City's policy requires issuance of a ticket "after every crash" because of some indirect financial interest by the City and that this "policy" explains Orban's citation (Doc. 85 at 4 n.3). However, Orban testified that she believed a traffic citation was issued to her because of her "characteristics", that is, "in retaliation for" the firing of one officer Maxwell following Orban's earlier traffic citation appeal. Orban testified at her deposition that (1) officer Maxwell was fired after Orban successfully appealed a speeding violation issued by him and (2) she believed officer Bowden issued the later citation out of retaliation (Doc 79-6 at 12; 28-31; 92) ("Well, I thought it was retaliation over the Maxwell firing.").

Moreover, officer Bowden testified the City has no policy requiring the mandatory issuance of a citation. Officer Bowden testified that he either issues a citation, asks for supervisory approval not to issue a citation, or withholds a citation even without supervisory approval (Doc. 79-7 at 89-91). Finally, as clarified in the July 31st order the "undisputed facts provide a sufficient basis to determine as a matter of law that the officers had probable cause to conclude Orban failed to drive in a careful and prudent manner" (Doc. 83 at 7).

Orban's application of the law to her factual allegations is equally flawed. The plaintiff's argument assumes that to avoid impinging her constitutional rights the police become the investigator, the prosecution, the judge, and the jury at the scene of an accident. Orban argues that before issuing a citation for careless driving a police officer must weigh the presumption under Florida law that the following vehicle is responsible for a rear-end collision against the rear-end driver's explanation to the contrary. This assumption is wrong. Department of Highway Safety and Motor Vehicles v. Saleme, 2007 WL 519165 at *9 (Fla. App. 3 Dist. Feb. 21, 2007), holds that a rear end driver must produce evidence showing that "there was a substantial and reasonable explanation as to why the rear driver was not negligent" so that the "trial judge [can] determine" how the "case may proceed to the jury." The "rear-end collision rule" is endorsed by the Florida Supreme Court in Gulle v. Boggs, 174 So.2d 26, 28-29 (Fla. 1965). The "purpose of the rule is to create a rebuttable presumption which shifts the burden to the rear driver in a rear-end collision to come forward with evidence which 'fairly and reasonably show[s]' that the presumption on the rear driver is misplaced."

2007 WL 519165 at *10 (quoting Boggs, 174 So.2d at 29). "If the rear driver produces sufficient evidence to rebut the presumption, the case is submitted to the jury without the aid of the presumption, 'to reconcile and evaluate the credibility of the witnesses and the weight of the evidence.'" Alford v. Cool Cargo Carriers, Inc., 936 So.2d 646, 650 (Fla. 5th DCA 2006) (quoting Boggs, 174 So.2d at 29 at 29). Orban cannot expect a police officer charged with investigating an accident to arrive at the scene, collect evidence, and weigh the evidence to adjudicate whether under Florida law the statutory presumption that a rear-end driver is at fault has been overcome by a "substantial and reasonable explanation."

Of course, the July 31st order found probable cause for officer Bowden's citation to Orban, and only Orban's conclusory allegation of a violation of her civil rights remains.[1] This is not enough. Orban states no Section 1983 claim because she fails to allege any deprivation of a constitutional right. In Vasquez v. City of Hamtramck, 757 F.2d 771, 772 (6th Cir. 1985), the plaintiff brought a Section 1983 malicious prosecution claim alleging that the defendant municipality, through a police officer, violated the plaintiff's civil rights by the police officer's enforcement of a "ticket quota policy." In granting the defendant city's motion for summary judgment, the court held:

> To state a section 1983 cause of action, a plaintiff must show a constitutionally protected right which he has been denied .... Vasquez's potential loss was limited to monetary loss and the inconvenience of contesting the tickets. These deprivations do not

[1]Even a claim that Officer Bowden negligently issued Orban's citation fails because a single instance of wrongdoing by an agent of the government is inactionable under Section 1983. Porter v. White, 2007 WL 107471 at *11 (11th Cir. Apr. 12, 2007), holds that "mere negligence or inadvertence on the part of law enforcement does not meet the fairness requirements imposed by the Due Process Clause [and] does not amount to a 'deprivation' in the constitutional sense."

> establish a section 1983 cause of action. The possible property deprivation ... is not actionable under 1983 where, as here, there are adequate state post-deprivation remedies to redress any injury.

Vasquez, 757 F.2d at 773.

Despite the plaintiff's repeated suggestion to the contrary, officer Bowden had probable cause to issue her citation. This finding precludes Orban's claim of a violation of her due process rights. See Lans v. Stuckey, 203 Fed. Appx. 956, 960 (11th Cir. 2006) (denying a section 1983 "official policy" claim against the city of Miami and holding that because "the district court [concluded that] there was probable cause for [the plaintiff's arrest], [the plaintiff] could not in any event have established that he was arrested illegally and suffered a constitutional violation.") Orban's claims fail as a matter of law because probable cause supports the officer's issuance of her citation.

Further, following her citation Orban appealed. More particularly, Orban received a citation, appealed the citation, lost her appeal, appealed again, and won her appeal (Doc. 79-4 at 63). Orban seized both a robust and full measure of due process. Orban also testified that she successfully appealed two earlier vehicle citations. Both her knowledge of and her exercise of her procedural rights is impressive, but any suggestion that she is deprived of her constitutional rights is not only false, but moot.

Orban's further allegation of constitutional injury resulting from the City's "policy" of allowing officers to submit "crash reports" is equally moot and otherwise without merit. The Senior Administrative Judge for the Traffic Division for the City specifically allows officers of the police department to submit reports in place of live testimony. Orban twice challenged the allegations of the police report and achieved the dismissal of her citation

despite the existence of these allegedly "false" reports. Thus, Orban fails to allege a constitutional injury and her "inconvenience in defending the allegedly malicious prosecution is an insufficient basis for a section 1983 claim." Vasquez, 757 F.2d 771, 773 (citing Baker v. McCollan, 443 U.S. 137 (1979) for the proposition that a Section 1983 claim "grounded in the inconvenience [that the plaintiff] suffered" is not actionable).

Orban's claim that the City's alleged "policy" resulted in a violation of her substantive due process rights (Doc. 85 at 12-13) also fails. "A plaintiff seeking to assert a substantive due process claim must allege the deprivation of a cognizable interest in life, liberty, or property; a mere allegation of 'arbitrary' government conduct in the air, so to speak, will not suffice." Gravitte v. North Carolina Division of Motor Vehicles, 33 Fed. Appx. 45, 48-49 (4th Cir. 2002); citing Collins v. City of Harker Heights, 503 U.S. 115, 129-130 (1992) (the plaintiff must have a "liberty interest" before an analysis of whether the deprivation of that liberty was "arbitrary in the constitutional sense."). Further, Orban would have to establish that the City's actions "were so egregious as to ... shock the conscience." Vasquez, 757 F.2d at 773 (citing Rochin v. California, 342 U.S. 165, 172 (1952)). A challenge to the City's ticket issuance policy simply fails. See Vasquez, 757 F.2d at 773; Gravitte, 33 Fed. Appx. 45, 48-49 (finding that a North Carolina "ticket quota" policy violated neither the due process nor the privileges and immunities clauses of the Constitution). At most, Orban was inconvenienced by her citation appeals. Simply stated a "citizen does not suffer a constitutional injury every time [s]he is subject to the petty harassment of a state agent." 757 F.2d at 773.

Despite Orban's dismissive characterization of the July 31st order as "comments",[2] the July 31st order directs that, on pain of dismissal, Orban specify "(1) a specific constitutional injury, (2) a violation by the City of Orban's due process rights, (3) a sufficient causal connection between a practice of the City and any constitutional injury to Orban, and (4) an available and effective remedy to redress any constitutional injury." Rather than appropriately respond to the July 31st order, Orban's response offers a mere conclusory allegation that the plaintiff has standing. A plaintiff "who invokes the jurisdiction of a federal court bears the burden to show '(1) an injury in fact, meaning an injury that is concrete and particularized, and actual or imminent, (2) a causal connection between the injury and the causal conduct, and (3) a likelihood that the injury will be redressed by a favorable decision.'" Camp Legal Defense Fund, Inc. v. Atlanta, 451 F. 3d 1257, 1269 (11th Cir. 2006) (citing Granite State Outdoor Adver., Inc. v. Clearwater, 351 F. 3d 1112, 1116 (11th Cir. 2003). At summary judgment, a plaintiff must "'set forth' by affidavit or other evidence 'specific facts.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (quoting Fed. R. Civ. P. 56(e)). "If the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." Warth v. Seldin, 422 U.S. 490, 499 (1975). The plaintiff was allowed leave to respond to the July 31st order and evidence standing. At best, Orban asserts merely a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens [that] normally does not warrant the exercise of jurisdiction."

[2]The July 31st order is hereby incorporated by reference, and Orban's claims fail for all of the reasons set forth therein.

The City's motion for summary judgment (Doc. 78) on count four is **GRANTED**. The Clerk is directed to (1) enter judgment in favor of the City and against Orban on count four, (2) terminate any pending motions, and (3) close the case.

ORDERED in Tampa, Florida, on May 11, 2007.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

Angela Merkle

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Docket Text:
ORDER granting [78]--motion for summary judgment as to Count IV. The Clerk shall ENTER JUDGMENT in favor of the City and against Orban on Count IV, TERMINATE pending motions, and CLOSE the case. Signed by Judge Steven D. Merryday on 5/11/2007. (BK)

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