FILED
United States Court of Appeals
Tenth Circuit

April 5, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KRISTINA ZEMAITIENE,

Plaintiff - Appellant,

v.

SALT LAKE COUNTY; JAMES WINDER, former Chief of Police in his official capacity; UNIFIED POLICE DEPARTMENT OF GREATER SALT LAKE; TAYLORSVILLE CITY, a/k/a City of Taylorsville; TRACY WYANT, Taylorsville Precinct Chief of Police in his official capacity; JOEL KNIGHTON, in his individual and official capacity; DENISE LOVENDAHL, in her individual and official capacity; CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, d/b/a Deseret Industries; RICK RICKS, in his individual and official capacity; MELANIE PERRY, in her individual and official capacity; OFF DUTY SERVICES,

Defendants - Appellees.

No. 21-4091
(D.C. No. 2:17-CV-00007-DAK)
(D. Utah)

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

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

Kristina Zemaitiene, proceeding pro se, appeals from the district court's judgment in favor of the defendants in her civil-rights case. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm a majority of the judgment, but we vacate the judgment in favor of one defendant on Count 17 and remand for further proceedings.

BACKGROUND

Ms. Zemaitiene worked in a store operated by Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints, doing business as Deseret Industries (Deseret). One day, she saw an altercation in the parking lot, with two people struggling with a third person. She ran to help the third person. But things were not as they seemed. Unknown to her, the two "assailants" were off-duty police officers who had been hired to provide undercover security at the store, and they were attempting to arrest the "victim," a suspected shoplifter. When Ms. Zemaitiene arrived, the suspect got in his car and drove away.

The officers identified themselves to Ms. Zemaitiene as undercover police officers working security at the store. One of the officers pulled out her police badge, then allegedly chest-bumped Ms. Zemaitiene twice. The officers went into the store and met with Deseret employees to discuss the incident. After waiting in the hall while the employees and officers spoke in an office, Ms. Zemaitiene entered the office and reported to one of the employees, a Deseret assistant manager, that the

officers had assaulted a store customer. She further accused the officer who chest-bumped her of sexual assault. That officer then arrested Ms. Zemaitiene for interfering with the shoplifter's arrest and issued her a written citation. The assistant manager suspended Ms. Zemaitiene from work and barred her from all of Deseret's stores. A few days later, she resigned from her employment.

As a result of the incident, Ms. Zemaitiene was charged in justice court with interfering with an arresting officer. The prosecutor later amended the misdemeanor charge to an infraction. Ms. Zemaitiene was convicted of interfering with an arresting officer both in justice court and in the state district court, following a trial de novo.

Ms. Zemaitiene brought seventeen federal and state claims against (1) the two police officers and their governmental supervisors and employers (collectively, the Governmental Defendants), (2) two Deseret employees who met with the officers (the Store Employees), (3) Deseret, and (4) the company that contracted with Deseret to provide security, Off Duty Services, LLC (ODS). The district court disposed of the claims in three separate orders. First, it dismissed the claims against the Governmental Defendants and the Store Employees; second, it dismissed the claims against ODS; and third, it granted summary judgment to Deseret.

Ms. Zemaitiene now appeals. Because she proceeds pro se, we construe her filings liberally, but we do not act as her counsel. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

DISCUSSION

I. Firm Waiver Rule

The magistrate judge filed three reports and recommendations regarding the defendants' dispositive motions. Ms. Zemaitiene, however, did not file objections to two of the three reports. "This court has adopted a firm waiver rule under which a party who fails to make a timely objection to the magistrate judge's findings and recommendations waives appellate review of both factual and legal questions." *Morales-Fernandez v. INS*, 418 F.3d 1116, 1119 (10th Cir. 2005). We do not apply this rule, however, "when (1) a *pro se* litigant has not been informed of the time period for objecting and the consequences of failing to object, or when (2) the interests of justice require review." *Id.* (internal quotation marks omitted). Noting the failure to file objections, this court issued an Order to Show Cause why the firm waiver rule should not apply, to which Ms. Zemaitiene responded.

The first exception does not apply here. Although Ms. Zemaitiene proceeded pro se, all the reports advised her of the time period for filing objections and that her failure to do so might work a waiver. And Ms. Zemaitiene does not contend that she was not properly notified.

Ms. Zemaitiene's response instead discusses her challenges in preparing filings and receiving the district court's orders, matters which go to the interests of justice exception. Although we "have not defined the interests of justice exception with much specificity," we have noted that "a *pro se* litigant's effort to comply, the force and plausibility of the explanation for [her] failure to comply, and the

importance of the issues raised are all relevant considerations in this regard." *Id.* at 1119-20 (internal quotation marks omitted).

This suit alleges violations of Ms. Zemaitiene's constitutional rights, and constitutional questions generally present important issues. Nevertheless, Ms. Zemaitiene's efforts to comply and the nature of her explanations for her failures to comply weigh against applying the interests of justice exception.

A. March 6, 2020, Report and Recommendation

The first report to which Ms. Zemaitiene failed to object was the magistrate judge's March 6, 2020, recommendation that the district court grant the motions to dismiss filed by the Governmental Defendants and the Store Employees. Having received no objections, the district court adopted the report on March 24, 2020. Ms. Zemaitiene then requested an extension of time to object, noting that she relied on public library access to prepare her filings and that the libraries had closed due to the COVID-19 pandemic. The district court enlarged the time to file objections until 14 days after the library system reopened to the public.

On October 21, 2020, the district court issued an order finding that the Salt Lake County libraries had reopened by appointment on July 13, 2020, and had fully reopened on October 5, 2020. Because more than 14 days had passed since the full reopening and Ms. Zemaitiene still had not filed objections, the district court reaffirmed its March 24 order. Three months later, Ms. Zemaitiene moved for another extension of time. The district court denied the motion as untimely.

Ms. Zemaitiene states that she was unaware of the district court's October 21, 2020, order because the postal service returned it to the court as undeliverable. (Ms. Zemaitiene did not have a mailing address and was relying on general delivery at the time.) She further states that, although the libraries were open, their services were limited, and due to the threat of COVID-19 and her personal circumstances, she was uncomfortable visiting in the fall of 2020.

The COVID-19 pandemic undeniably has caused great disruption. But the district court took account of the pandemic and Ms. Zemaitiene's need to access the library by granting what turned out to be a six-month extension. After the libraries reopened, however, Ms. Zemaitiene failed to demonstrate diligence. Rather than contacting the court and seeking a further extension based on limited access and her individual concerns about COVID-19, she let her deadline pass without taking any action. Moreover, she did not promptly seek an extension after the district court issued its October 21, 2020, order. Although the postal service returned the order as undeliverable, it was her responsibility to ensure she remained aware of developments in her case.

For these reasons, we decline to apply the interests of justice exception to the firm waiver rule with regard to the March 6, 2020, report. We therefore do not review the district court's rejection of the claims against the Governmental Defendants and the Store Employees.

B. May 25, 2021, Report and Recommendation

The other report to which Ms. Zemaitiene failed to object was the magistrate judge's May 25, 2021, recommendation that the district court grant the motion for summary judgment filed by Deseret. Having received no objections, the district court adopted the report on June 24, 2021.

Ms. Zemaitiene states that she did not file objections to the May 25, 2021, report because she believed it was invalid, given that she previously had moved for the recusal of both the magistrate judge and the district judge because of their membership in the Church of Jesus Christ of Latter-day Saints. The magistrate judge denied her motion to recuse on May 25, 2021, the same day he issued the report. The district judge subsequently denied her motion to recuse himself also.

This court has held that membership in the Church of Jesus Christ of Latter-day Saints is not a sufficient ground to support a judge's recusal. *See In re McCarthey*, 368 F.3d 1266, 1270 (10th Cir. 2004) (holding that "merely because [the district judge] belongs to and contributes to the Mormon Church would never be enough to disqualify him"); *see also Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 660 (10th Cir. 2002) ("[C]ourts have consistently held that membership in a church does not create sufficient appearance of bias to require recusal."). Accordingly, Ms. Zemaitiene was not justified in (1) moving for the judges' recusal on the ground of their church membership, or (2) failing to file objections to the May 25, 2021, report because of her belief that the judges should be recused.

For these reasons, we decline to apply the interests of justice exception to the firm waiver rule with regard to the May 25, 2021, report. We therefore do not review the district court's decision rejecting the claims against Deseret.

II. Motion to Dismiss by ODS

Ms. Zemaitiene did file objections to the magistrate judge's report recommending that the district court grant the motion to dismiss filed by ODS.[1] The arguments relating to ODS therefore are not subject to the firm waiver rule.

We review de novo the grant of a Rule 12(b)(6) motion to dismiss. *VDARE Found. v. City of Colo. Springs*, 11 F.4th 1151, 1158 (10th Cir 2021), *cert. denied*, 2022 WL 585900 (U.S. Feb. 28, 2022) (No. 21-933). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). The Supreme Court has specified:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Id. (citations and internal quotation marks omitted).

[1] The magistrate judge issued his report and recommendation on September 24, 2020. On October 20, 2020, the district court noted that Ms. Zemaitiene had not filed objections and adopted the recommendation. But then the district court granted Ms. Zemaitiene an extension to file objections, and it considered her objections before ultimately readopting the recommendation.

Ms. Zemaitiene named ODS in three counts: Counts 7 and 8, under 42 U.S.C § 1983, and Count 17, alleging a state-law respondeat superior claim. ODS moved to dismiss all three counts. Ms. Zemaitiene moved to strike ODS's motion, claiming it was untimely. But she did not otherwise respond.

The magistrate judge recommended denying the motion to strike and granting the motion to dismiss. He recommended dismissing both § 1983 claims because Ms. Zemaitiene failed to establish that ODS, a private company, was acting under the color of state law. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) ("[T]he under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." (internal quotation marks omitted)). The magistrate judge further stated that Ms. Zemaitiene's allegations were too conclusory to state a claim for conspiracy. *See, e.g.*, *Shimomura v. Carlson*, 811 F.3d 349, 359 (10th Cir. 2015) ("Conclusory allegations of conspiracy [do] not suffice."). And he stated that the third claim would also necessarily fail because a plaintiff cannot pursue respondeat superior liability under § 1983. *See Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1216 (10th Cir. 2003). The district court accepted the recommendation.

1. § 1983 Claims

On appeal, Ms. Zemaitiene argues she pleaded that ODS acted under color of state law, and she can satisfy that requirement by applying the "public function" test, the "symbiotic relationship" test, and/or the "joint action" test. *See Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995) (recognizing various

tests for establishing state action). But even assuming the district court erred in concluding she failed to plead sufficient facts to establish that ODS acted under color of state law, we nevertheless affirm the dismissal of the § 1983 claims against ODS. *See Issa v. Comp USA*, 354 F.3d 1174, 1178 (10th Cir. 2003) (recognizing that, even if a district court errs, "we may affirm the district court's dismissal order if we independently determine that plaintiff failed to state a claim").

Count 7 alleges "Civil Conspiracy to Violate the Right to Equal Protection," based on Ms. Zemaitiene's nationality. R. at 80. To state a claim for conspiracy, a plaintiff must "allege[] specific facts showing . . . an agreement and concerted action between" the defendants to violate the plaintiff's constitutional rights. *Shimomura*, 811 F.3d at 359. And to overcome a motion to dismiss, a plaintiff must plead facts to establish a plausible claim, meaning the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 555 (2007). Conclusory allegations are insufficient to state a claim. *Iqbal*, 556 U.S. at 678-79; *Shimomura*, 811 F.3d at 359. Ms. Zemaitiene's allegations with regard to Count 7 against ODS are speculative and conclusory, and as such, they do not state a plausible claim for relief.

Count 8 alleges "Deliberately Indifferent Policies, Practices, Customs, Training, and Supervision in violation of the First, Fourth, Fifth and Fourteenth Amendments." R. at 82. An entity may be liable for constitutional violations caused by its policies and procedures. *See Dubbs*, 336 F.3d at 1216; *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769-70 (10th Cir. 2013). But

Ms. Zemaitiene's complaint treats the defendant employers as an undifferentiated whole, and fails to adequately identify or discuss any policy, practice, or custom *of ODS*, or lack of training or supervision *by ODS*, that allegedly led to constitutional violations. *Cf. Pahls v. Thomas*, 718 F.3d 1210, 1228 (10th Cir. 2013) ("Plaintiffs must do more than show that their rights were violated or that defendants, as a collective and undifferentiated whole, were responsible for those violations." (internal quotation marks omitted)). Her conclusory, boilerplate allegations do not state a plausible claim for relief against ODS in Count 8.

2. Respondeat Superior Claim

The district court correctly held that Ms. Zemaitiene cannot pursue a § 1983 claim against ODS based on respondeat superior liability. *See Dubbs*, 336 F.3d at 1216. But Ms. Zemaitiene pleaded her Count 17 as a state-law claim, not a § 1983 claim. *See* R. at 95 ("State Law Claim (Respondeat Superior)"); *id.* at 406 ("Plaintiff brings this claim under the state law authorizing suits against employers for the actions of their employees."). Therefore, *Dubbs* is inapplicable; the relevant questions are whether Utah would recognize a claim for respondeat superior against ODS, and if so, whether Ms. Zemaitiene pleaded sufficient facts to establish a plausible claim. The district court did not address those questions.

When the district court does not address an issue, we generally remand for it to consider the argument in the first instance. *See Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1227 (10th Cir. 2013). We note, however, "[t]he Supreme Court has encouraged the practice of dismissing state claims or remanding them to state court when the federal

claims to which they are supplemental have dropped out before trial." *Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, 956 F.3d 1228, 1238 (10th Cir. 2020). Accordingly, although we vacate the judgment in favor of ODS on Count 17, the district court may decline to exercise supplemental jurisdiction over this sole remaining claim on remand.

III. Motions to Recuse

Ms. Zemaitiene also challenges the denials of her motions to recuse. We review the denial of recusal for abuse of discretion. *See id.* at 1239. As stated above, however, the motions were based solely on the judges' membership in the Church of Jesus Christ of Latter-day Saints, which this court has held is an inadequate ground for recusal, *see McCarthey*, 368 F.3d at 1270; *Bryce*, 289 F.3d at 660. The judges therefore did not abuse their discretion in denying the recusal motions.

CONCLUSION

We affirm the district court's judgment in favor of the Governmental Defendants, the Store Employees, and Deseret. We also affirm the judgment on Counts 7 and 8 in favor of ODS. But we vacate the judgment on Count 17 in favor of ODS and remand for the district court either to consider the claim in the first instance, or to decline to exercise its supplemental jurisdiction.

Entered for the Court

Allison H. Eid
Circuit Judge