IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

GARY D. PRICE,

Plaintiff,

vs.

CITY OF CORNING, et al.,

Defendants.

No. CIV S-07-2666-MCE-CMK

FINDINGS AND RECOMMENDATIONS

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Plaintiff, proceeding pro se, brings this civil rights action. Pending before the court is defendants' unopposed motion for summary judgment (Docs. 18, 33). Pursuant to Local Rule 78-230(c), the hearing on the motion was taken off calendar due to plaintiff's failure to file a timely opposition, and the matter was submitted on the record and briefs.

I. BACKGROUND

Plaintiff originally filed his complaint in the United States District Court for the District of Oregon on October 1, 2007. The District of Oregon found venue to be improper and transferred the case to this court on December 11, 2007. Plaintiff paid the full filing fee, so his complaint was not screened by the court pursuant to 28 U.S.C. § 1915(e)(2).

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Because plaintiff is proceeding pro se, the court is required to read his pleading liberally. See Haines v. Kerner, 404 U.S. 519, 520 (1972) (concluding that pro se pleadings are held to a less stringent standard than those drafted by lawyers). Reading plaintiff's complaint liberally, he appears to allege a variety of constitutional claims based on free speech, equal protection, illegal search, and freedom of religion. He also appears to assert claims based on alleged violations of various federal criminal statutes.

II. SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate when it is demonstrated that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Under summary judgment practice, the moving party

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

"[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

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If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. See Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen

Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

III. DISCUSSION

A. MUNICIPAL LIABILITY

The only defendants named in the caption of plaintiff's complaint are the City of Corning and the Corning Police Department. Plaintiff does not specifically name any individual as a defendant in this action. The complaint claims that several officers from the Corning Police Department violated his constitutional rights, including his rights to free speech, equal protection, and illegal searches. He does not allege any wrongdoing of the named defendants.

Municipalities and other local government units are among those "persons" to whom the federal civil rights statutes apply. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978). Counties and municipal government officials are also "persons" for purposes of § 1983. See id. at 691; see also Thompson v. City of Los Angeles, 885 F.2d 1439, 1443 (9th Cir. 1989). A local government unit, however, may not be held responsible for the acts of its employees or officials under a respondeat superior theory of liability. See Bd. of County Comm'rs v. Brown, 520 U.S. 397, 403 (1997). Thus, municipal liability must rest on the actions of the municipality, and not of the actions of its employees or officers. See id. To assert municipal liability, therefore, the plaintiff must allege that the constitutional deprivation complained of resulted from a policy or custom of the municipality. See id. A claim of municipal liability under § 1983 is sufficient to withstand dismissal even if it is based on nothing more than bare allegations that an individual defendant's conduct conformed to official policy, custom, or practice. See Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 624 (9th Cir. 1988).

Here, plaintiff does not allege that the actions of any individual officer was based on any official policy, custom, or practice of either named defendant. Absent such allegations, plaintiff cannot state a claim against the municipality defendants. However, even if plaintiff had alleged that the municipality defendants had a policy, custom, or practice which was violating his rights, the defendants have provided the court with the unopposed declaration of the Chief of Police, Anthony Cardenas, establishing that there is in fact no "policy, custom, or practice of the Corning Police Department or the City of Corning which acts to encourage, promote, establish, sanction, condone, or tolerate action or conduct which denies, restricts, diminishes, or adversely affects the constitutional rights of any citizen, including the plaintiff, or acts to deny any citizen equal protection of the law." (Declaration of Chief Cardenas, Doc. 27, at 4-5.) In addition, Chief Cardenas's declaration establishes that he has "never been instructed by the Corning City Council to adopt any policy, custom or practice that would act to deny, restrict, diminish, or adversely affect the constitutional rights of any citizen, or that would act to deny any citizen equal protection of the law." (Id. at 5.) He further states that if an officer violates the written policies and procedures of the police department, the officer's actions are investigated and disciplinary action is taken. (See id.)

The declaration of Chief Cardenas establishes that there are no policies or customs of the defendant municipalities which result in any constitutional deprivation. Plaintiff does not dispute this fact. The allegations in plaintiff's complaint are insufficient to dispute the unopposed facts established by the defendants. Accordingly, both the City of Corning and the Corning Police Department should be granted summary judgment on this basis alone.

B. CRIMINAL STATUES

Plaintiff states that the defendants have violated various criminal statutes, including conspiracy (18 U.S.C. §§ 241 and 371), deprivation of rights (18 U.S.C. § 242), damage to religious property (18 U.S.C. § 247), kidnaping (18 U.S.C. §§ 1201 and 1203), malicious mischief (18 U.S.C. §§ 1362 and 1363), witness retaliation (18 U.S.C. § 1513), sabotage (18 U.S.C. § 2153), terrorism (18 U.S.C. § 2331), and torture (18 U.S.C. § 2340).

The federal statutes plaintiff identifies are part of the criminal code. Actions brought under these provisions are to be brought by the United States government and they contain no civil remedies for a private citizen. See generally Diamond v. Charles, 476 U.S. 54, 64 (1986) (holding that private citizens cannot compel enforcement of criminal laws); see also Allen v. Gold Country Casino, 464 F.3d 1044, 1048 (9th Cir. 2006) (holding that §§ 241 and 242 are criminal statues which do not give rise to civil liability); Keyter v. 230 Government Officers, 372 F. Supp. 2d 604, 610 (W.D. Wash. 2005) (citing Rockefeller v. U.S. Court of Appeals Office for Tenth Circuit, 248 F. Supp. 2d 17, 22 (D.D.C. 2003), and stating that "private citizens are not permitted to enforce criminal statutes or prosecute crimes"); Boisjoly v. Morton Thiokol, Inc., 706 F. Supp. 795, 806 (D. Utah 1988) (concluding that there is no private right of action for damages under § 1513); U.S. v. Johnson, 15 M.J. 676,682 n.5 (AFCMR 1983) (stating that § 2153 is applicable only during time of war or national emergency and "was meant to provide a means for federal prosecution"); Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429, 432 (E.D.N.Y. 2008) (concluding that the Antiterrorism Act of 1992 provides civil remedies for United State nationals injured in international terrorist attacks); Hooks v. Rich, 2006 WL 565909, *7 (S.D. Ga. 2006) (stating that there is no private right of action under § 2340). Accordingly, any claim plaintiff is attempting to raise pursuant to these criminal provisions must be dismissed.

C. CONSTITUTIONAL VIOLATIONS

To the extent plaintiff is claiming his constitutional rights have been violated, those allegations are difficult to understand. He appears to assert violations based on freedom of speech, freedom of religion, illegal search, and equal protection. The District of Oregon also found plaintiff may be alleging a violation of his Eighth Amendment rights. It appears he is claiming his Fourth Amendment rights were violated by a search conducted in 2004, and his First Amendment rights to free speech were violated by the Corning Police Department's alleged refusal to take police reports. Plaintiff's claim that his rights under the Eighth and/or Fourteenth Amendments are unclear, but may stem from his allegations of kidnaping, false imprisonment, harassment, and destruction of police records.

Plaintiff's claims appear to relate to a dispute he had with his neighbor in Corning and the actions of the Corning Police Department in relation thereto. He alleges that, between March 2006 and April 2007, he had continuing difficulties with his neighbor. During that time frame, the Corning Police Department was involved to the extent the officers took several police reports from both plaintiff and his neighbor. Plaintiff also alleges the police failed to take other reports and failed to act on the reports that were taken. He alleges the police harassed him, including threatening that he "is going to do jail time," and was going to be declared "a town nuisance." (Complaint at 5). He further alleges that "dispatch tapes were destroyed by the order of officer 211 an 207 Dyke an Kane [sic]" regarding a report he made of terrorist threats. (Complaint at 6). He also states that he "was arrested and falsely imprisoned by officers Bassit, Kane, an Dyke [sic]" on February 5, 2007, and that he was "kidnapped [sic] and falsely imprisoned." (Complaint at 6).

As discussed above, the caption of plaintiff's complaints lists as defendants the City of Corning and the Corning Police Department only. It is unclear whether plaintiff intended the various individuals referenced in the complaint to also be named defendants. Assuming for the moment that he did, the officers would be entitled to qualified immunity as to the alleged constitutional violations.

Government officials enjoy qualified immunity from civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In general, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). In ruling upon the issue of qualified immunity, the initial inquiry is whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the defendant's conduct violated a constitutional right. See Saucier v. Katz, 533 U.S. 194, 201 (2001). If, and only if, a violation can be made out, the next step is to ask whether the right was clearly established. See id. This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition . . . ." Id. "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. at 202 (citation omitted). Thus, the final step in the analysis is to determine whether a reasonable officer in similar circumstances would have thought his conduct violated the alleged right. See id. at 205.

When identifying the right allegedly violated, the court must define the right more narrowly than the constitutional provision guaranteeing the right, but more broadly than the factual circumstances surrounding the alleged violation. See Kelly v. Borg, 60 F.3d 664, 667 (9th Cir. 1995). For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand [that] what [the official] is doing violates the right." See Anderson v. Creighton, 483 U.S. 635, 640 (1987). Ordinarily, once the court concludes that a right was clearly established, an officer is not entitled to qualified immunity because a reasonably competent public official is charged with knowing the law governing his conduct. See Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982). However, even if the plaintiff has alleged a violation of a clearly established right, the government official is entitled to qualified immunity if he could have "reasonably but mistakenly believed that his . . . conduct did not violate the right." Jackson v. City of Bremerton, 268 F.3d 646, 651 (9th Cir. 2001); see also Saucier, 533 U.S. at 205.

The first two steps in the qualified immunity analysis involve purely legal questions. See Trevino v. Gates, 99 F.3d 911, 917 (9th Cir. 1996). The third inquiry involves a legal determination based on a prior factual finding as to the government official's conduct. See

Neely v. Feinstein, 50 F.3d 1502, 1509 (9th Cir. 1995). In resolving these issues, the court must view the evidence in the light most favorable to plaintiff and resolve all material factual disputes in favor of plaintiff. Martinez v. Stanford, 323 F.3d 1178, 1184 (9th Cir. 2003).

For purposes of this discussion, the court will assume plaintiff's complaint satisfies the first two steps, although it is questionable whether he has satisfied the first requirement of alleging facts which show the violation of a constitutional right. Assuming the first two requirements are met, the court will address the third – whether the officers could have reasonably but mistakenly believed their conduct did not violate plaintiff's constitutional rights.

Plaintiff alleges his First, Fourth, Eighth, and Fourteenth Amendment rights were violated. Defendants have provided unopposed declarations from each individual officer identified in the complaint. These declarations clarify the contacts between the Corning police officers and plaintiff. The unopposed declarations provided to the court establish that the officers could have reasonably but mistakenly believed their conduct did not violate plaintiff's constitutional rights. The officers' actions, in arresting plaintiff for disturbing the peace at a city counsel meeting, detaining plaintiff pursuant to that arrest, and taking and investigating police reports based on plaintiff's conflicts with his neighbors, were done in such a way that, assuming a constitutional violation even occurred, a reasonable officer could have believed his conduct did not violate plaintiff's constitutional rights. The officers state that plaintiff's behavior at the city counsel meeting on February 5, 2007, provided reasonable and adequate probable cause to arrest him. They also state that the arrest was accomplished without unnecessary force and resulted in only a temporary deprivation or restriction of plaintiff's liberty. The declarations show that the officers acted in good faith. Under these circumstances, any reasonable officer would have believed that his conduct was lawful. Accordingly, to the extent plaintiff intended the individual officers to be named defendants, they are entitled to qualified immunity. Leave to amend the complaint would be futile, and should not be granted.

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IV. CONCLUSION

Based on the foregoing, the undersigned recommends that defendants' motion for summary judgment be granted, judgment be entered, and this case be closed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within 20 days after being served with these findings and recommendations, any party may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: January 26, 2009

Craig M. Kellison

CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE