IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-00217-REB-KLM

WILLIAM MONTGOMERY,

Plaintiff,

v.

MATTHEW CHERNAK,
MIKE HOWARD,
MATTHEW BROUGH.

Defendants.

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY AND TO VACATE THE SCHEDULING CONFERENCE

Plaintiff, by and through undersigned counsel, hereby responds in opposition to Defendants' request that the Court stay discovery and vacate the scheduling conference. In support, Plaintiff states as follows:

INTRODUCTION

This case involves straight-forward constitutional claims, seeking justice for the unconstitutional and retaliatory arrest, detention, and prosecution of Plaintiff, after he verbally questioned (and then moved to observe from afar) the Defendant officers during thier encounter with a third party. Amended Compl. at ¶¶ 1-3. The Defendant officers knew Plaintiff as an activist for homeless populations in the Ft. Collins area, where the incident took place. *Id*. They viewed him as a troublemaker from the start of the encounter. *Id.* Plaintiff did nothing more than to act as a peaceful protester by

bringing to their attention an obstruction to the use of public property, asking questions of the officers when they approached a man within the vicinity, and observing their conduct from afar. But the Defendant officers found Plaintiff's questions and criticism about their contact to be annoying. *Id.* at ¶¶ 34-36, 38. The Amended Complaint plausibly alleges that the Defendant officers overreacted to Plaintiff's verbal expressions by unreasonably viewing him as defying their authority and obstructing their interaction (even though there was no physical interference), and, as a result, the officers detained/arrested Plaintiff without probable cause. *Id.* at ¶¶ 36-49, 71-94. While some of the background facts relating to the history of the parcel of public property upon which Plaintiff lawfully entered are lengthy (*See id*. at ¶¶ 14-32), the type of claims at issue are not complex, nor are they novel. *See id.* at ¶¶ 72-75, 78-82, 85-93. The law is clearly established that police officers must possess objective, reasonably trustworthy evidence amounting to probable cause to justify an arrest. The law does not support detention/arrest to silence or retaliate against someone because the officers find verbal expressions to be offensive or annoying. Thus, the application of qualified immunity in this case is unwarranted – even simply to delay the case.

Defendants' Motion to Stay is predicated solely on the blanket assertion that defendants are (always) entitled to qualified immunity until the court resolves a motion to dismiss involving the assertion of qualified immunity. However, Defendants' assertion, and their motion, lacks substantial justification. Contrary to Defendants' assertion, a stay of discovery is not automatic in civil rights cases in this District and should not be treated as such. Defendants have not met their burden to show facts

supporting that *this case* is one in which qualified immunity would obviously apply during a threshold review, or that a stay of discovery is necessary to protect Defendants from any overly-broad or burdensome injury. To the contrary, Defendants suggestion that qualified immunity protection, simply, must be automatically afforded, as a matter of course, would force Plaintiff (and by extension any and all civil rights plaintiffs) to suffer unnecessary and inequitable costs and burdens.

I. Defendants are not entitled to an automatic stay merely because they assert the defense of qualified immunity.

Defendants' Motion to Stay discovery does not assert any particular burdens that the Defendant officers would suffer from by proceeding with discovery. Defendants only assert that there are generalized burdens associated with defending a lawsuit and that qualified immunity should shield them from any and all such burdens upon the mere invocation of the qualified immunity defense. This blanket contention that there is an automatic "entitlement" to a stay based upon the language of *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), is misleading, erroneous, and should be strongly repudiated.

While Plaintiff acknowledges that proper deference should be afforded to the concerns discussed in *Harlow* and its progeny – which have been used to protect law enforcement officers from the burdens of discovery in some cases – the Court should be mindful to apply the protection only where it is appropriate. The court in *Harlow* established the protection of qualified immunity out of a concern about insubstantial lawsuits that would present undue interference with an officer's duties. *Harlow,* 457 U.S. at 806, 808. It is clear that the insubstantial lawsuits that *Harlow* intended to

discourage were those that were frivolous and expensive. *Id.* at 827. But even *Harlow* expressly acknowledged that "if the law [related to the alleged violation] was clearly established, the immunity defense ordinarily should fail…" *Id.* at 818. Thus, where a lawsuit facially alleges the violation of a right that is clearly established by the current state of prevailing law, it cannot be predictably dismissed based on a limited, threshold review. *Harlow*'s cautionary language relating to the discovery protection of qualified immunity makes clear that the immunity is meant to shield officers from the burdens of cases that can be determined to be "insubstantial," on their face, during a threshold review of the legal norms governing officer conduct, not those cases requiring close factual and/or legal scrutiny at the summary judgment stage. *See Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985).

Thus, courts following *Harlow* and its progeny have concluded that qualified immunity is not meant to shield government officials from <u>*all*</u> discovery, but only from discovery which is overly broad or burdensome. *See, e.g.*, *Maxey by Maxey v. Fulton,* 890 F.2d 279, 282 (10th Cir. 1989); *Tolliver v. True,* No. CIVA06CV02574WDMBNB, 2007 WL 1306459 *2 (D. Colo. 2007) (motions to stay should not be granted merely because a dispositive motion is pending). The court in *Tolliver* noted that motions to dismiss are denied more often than granted, which emphasizes that the likelihood of success regarding a motion to dismiss is of importance to a motion to stay discovery. It has been well established for almost thirty years that "the right to proceed in court should not be denied except under the most extreme circumstances." *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th

Cir. 1983). These considerations underscore why motions to stay are disfavored in this District. *See Wolf v. U.S.,* 157 F.R.D. 494, 495 (D. Kans. 1994); *Chavez v. Young Am. Ins. Co.,* No. 06-2419, 2007 WL 683973, at *2 (D. Colo. Mar. 2, 2007); *See also Bitco Gen. Ins. Corp. v. Genex Constr. LLC,* No. 16-CV-1084-WJM-NYW, 2016 WL 8608452, at *1–2 (D. Colo. Sept. 13, 2016).

While Defendants argue that the policies behind qualified immunity will be subverted if *any* pretrial proceedings or discovery are held before their motion to dismiss is decided, Defendants argue that this is the case if *any* civil rights lawsuits are permitted to proceed in the face of qualified immunity challenge – regardless of whether the assertion of qualified immunity is made in good faith and/or regardless of whether it is likely to resolve the case. This cannot be the law.

There are obvious costs associated with prematurely/erroneously granting the benefit of an automatic stay to defendants who do not deserve the benefit of qualified immunity. For the Court to accept Defendants' generalized contention that uttering the magic words "qualified immunity" presumptively requires the Court to stay *any* police misconduct case, without any kind of examination of the merit of Defendants' claim or the state of the law governing the types of claims at issue, brazenly implies that *every* civil rights claimant must shoulder the costs and burdens of premature/erroneous application of immunity and the burdens of delay – even in circumstances where qualified immunity is improperly invoked and/or unlikely to succeed. Such automatic delay – applied uniquely to civil rights claimants – incentivizes meritless assertions of qualified immunity, rewards complex/burdensome motions to dismiss, forces all

plaintiffs to disproportionately shoulder the costs/burdens associated with the assessment, and brings new life to the old adage "justice delayed is justice denied." This is clearly not what the court in *Harlow* had in mind.

Moreover, any implied argument that the late application of qualified immunity risks unnecessarily burdening Defendants with *possibly* irrelevant discovery, overlooks the fact that premature application of qualified immunity to stay the proceedings, conversely, *will likely* have deleterious effects for Plaintiff's prosecution of the case (particularly if the broader pool of all civil rights plaintiffs affected by "automatic" stay is considered). In this District, the average time required for civil litigation is approximately 30 months, and resolution of a dispositive motion can last several months or more, resulting in "substantial delay." *See Marks v. Lynch,* No. 16-cv-02106-WYD-MEH, 2017 WL 491190, at *2 (D. Colo. Feb. 6, 2017). Unnecessary delay can cause meaningful evidentiary loss as minds fade and witnesses become unavailable. *Id.* Delay causes cases to linger on the court's docket lifelessly; inconveniencing the court and making the cases more difficult to manage. See *Martinez v. Carricato,* No. 16-cv-0098-WJM-KLM, 2016 WL 8608455, at *2 (D. Colo. April 8, 2016). Delays sap the momentum of a prosecution and cause individual plaintiffs to lose hope that they will be meaningfully heard. The public interest is supported only by a system in which civil rights claims may be allowed to proceed in a timely manner so that future plaintiffs are not deterred by the number of years it takes to seek justice. *See Chavez v. Young America Ins. Co.*, No. 06-2419, 2007 WL 683973 *2 (D. Colo. 2007).

The 2015 Amendments to the Federal Rules of Civil Procedure emphasize the importance of Rule 1's requirement of just and speedy determination in every case – especially those cases that highlight important public interest matters – and discourages the over-use, misuse, and abuse of procedural tools that result in delay. Thus, the Court must be skeptical of Defendants' claim of an automatic entitlement to stay, particularly where it is undeserved.

II. Defendants' shoulder the burden of proving a stay of discovery is appropriate, and Defendants have failed to meet that burden *in this case*.

While this Court unquestionably possesses the authority to issue a stay of discovery, the procedural mechanism by which a defendant properly seeks such protection is Rule 26(c). *See* Fed.R.Civ.P. 26 (a court may, for good cause shown, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including forbidding the disclosure or discovery); *see also Paulsen v. Anderson*, No. 15-cv-00800-PAB-KMT, 2015 WL 5818244 at *1 (D. Colo. Oct. 6, 2015); *Martinez v. Carricato,* No. 16-cv-0098-WJM-KLM, 2016 WL 8608455, at *2 (D. Colo. April 8, 2016). Pursuant to Rule 26(c), the party who seeks a stay of discovery has the burden of demonstrating good cause and "cannot sustain that burden by offering simply conclusory statements." *Id.*; *Bitco Gen. Ins. Corp. v. Genex Constr. LLC*, No. 16-CV-1084-WJM-NYW, 2016 WL 8608452, at *1 (D. Colo. Sept. 13, 2016). The court requires "particular and specific demonstration of fact" to support its request. *Id.* (citing *Christou v. Beatport, LLC,* No. 10-cv-02912-CMA-KMT, 2011 WL 650377 at *1 (D. Colo. Feb. 10, 2011)). The movant must show specific facts

demonstrating that the challenged discovery will result in a clearly defined and serious injury to the party seeking protection. *Exum v. United States Olympic Comm.,* 209 F.R.D. 201, 206 (D. Colo. 2002); *see also Tolbert-Smith v. Bodman,* 253 F.R.D. 2, 4 (D.D.C.2008). The defendant seeking the stay should bear the burden of demonstrating "a likelihood that the case will be finally concluded as a result of the ruling…" or that "discovery of the broad complaint would be wasteful and burdensome." *Collins v. Johnson Cty., Kansas*, No. CIV. A. 01-2227-JWL, 2001 WL 1155295, at *1 (D. Kans. 2001).

Defendants' Motion to Stay does not even attempt to meet this burden. Defendants spend the bulk of their motion quoting the general public policy interests associated with qualified immunity before conclusorily asserting that those public policy interests will be subverted if discovery is commenced. *See* Def. Mot. at 4. Defendants attempt to place the burden on Plaintiff by asserting that there is "no basis not to [stay]." Def. Mot. at 5. But that argument erroneously attempts to flip the burden of production back onto Plaintiff and does little to meet it. Defendants provide no factual basis as to why *this case* is one in which qualified immunity would obviously facially apply or why these Defendants are uniquely situated to suffer any particularly onerous burdens without a stay of discovery. Defendants have made no showing that the claims at issue are, in some way, novel, such that the norms and/or contours of the rights and violations at issue would have been unknown to the Defendant officers. To the contrary, the law is clearly established in the areas of unlawful arrest/prosecution

and First-Amendment rights.[1] *See, e.g.*, *Cortez v. McCauley,* 478 F.3d 1108, 1115-16 (10th Cir. 2007); *Stearns v. Clarkson,* 615 F.3d 1278, 1282-83 (10th Cir. 2010); *City of Houston v. Hill,* 482 U.S. 451, 462-63 (1987); *Wilkins v. DeReyes,* 528 F.3d 790, 802 (10th Cir. 2008)*; Pierce v. Gilchrist,* 359 F.3d 1279, 1292 (10th Cir. 2004); *Taylor v. Meachum,* 82 F.3d 1556, 1564 (10th Cir. 1996); *see also, generally,* Doc. 24. Defendants have not cited to any overly burdensome discovery requests that must be avoided at this specific juncture. There are none pending. Defendants have not made a showing of any unique factual matters that make a routine Scheduling Conference and 26(a)(1) Disclosure (typically handled by counsel with minimal involvement of the parties) to be overly burdensome. Thus, the idea that Defendants will suffer onerously burdensome demands on their time merely by permitting the case to proceed past a Scheduling Conference is a dramatic exaggeration.

Most importantly, an automatic delay is not appropriate in this case, where Defendants have attempted to criminalize Plaintiff's protected, First Amendment, expression, and Defendants seek a delay of the prosecution of the case merely because Plaintiff is seeking a remedy for that misconduct. A cursory review of the briefing regarding Defendants' Motion to Dismiss demonstrates that Defendants have dug in their heels to unreasonably interpret verbal expression as criminal conduct. *See* Doc. 24, 28. Granting the benefit of even a temporary stay of discovery to Defendants on this basis improperly gives Defendants the benefit of qualified immunity (even if only

[1] Although Defendants assert that the law is not clearly established when it comes to First Amendment retaliation, Defendants argue this is only so if there exists probable cause – a nuanced legal issue with limited applicability where Plaintiff argues there is no probable cause.

temporarily) where it should not be provided. Plaintiff did nothing to deserve the original detention, arrest, confinement, or criminal prosecution, other than speak to and observe the officers. Plaintiff should not be forced to endure additional delay merely because Defendants improperly *claim* qualified immunity protection should be afforded.

Finally, Defendants make no factual showing that an *indefinite* stay of discovery would be warranted in this case, as opposed to a stay for a more finite period of time (such as two-to-three months). If the Court finds that *Harlow* applies and that the Defendants should be provided protection from discovery, any such stay should be limited to a period of time that ensures Plaintiff is not too severely prejudiced. As indicated in the complaint, the incident occurred almost 2.5 years ago, and Defendants contributed to much of the delay in the filing of this lawsuit by forcing the prosecution to drag on for almost two years. Additional delay could cause serious concerns regarding the efficacy of evidence that is permitted to grow or remain stale and/or which may go missing as more time passes and parties/witnesses move, quit jobs, pass on and memories, naturally, fade.

A stay of discovery is not warranted under these circumstances.

WHEREFORE, for all the foregoing reasons, Plaintiff respectfully requests that this Court DENY Defendants' motion to stay discovery.

COUNSEL FOR PLAINTIFF

s/ Raymond K. Bryant

Raymond K. Bryant
Civil Rights Litigation Group, PLLC
1543 Champa St. #400

Denver, CO 80202
P: 720-515-6165
F: 720-465-1975
Raymond@rightslitigation.com

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 2018 I electronically filed the foregoing **PLAINITFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY AND TO VACATE THE SCHEDULING CONFERENCE** with the Clerk of the Court using the CM/ECF systems which is expected to send notification of such filing to the following e-mail addresses:

Thomas J. Lyons, Esq.
Christina S. Gunn, Esq.
Hall & Evans, L.L.C.
1001 17th Street, Suite 300,
Denver, CO 80202
303-628-3300 /
Fax: 303-628-3368
lyonst@hallevans.com /

s/ Raymond K. Bryant