

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:18-CV-03112-RBJ-STV

SEAN SLATTON,
Plaintiff,

v.

TODD HOPKINS,
BRANDON BARNES,
JOHN HUTTO,
AND FORT COLLINS POLICE DEPARTMENT
Defendants.

LETTER CONCERNING HOPKINS' INTENT TO FILE A MOTION TO DISMISS

Officer Hopkins, by and through Nathan Dumm & Mayer P.C., hereby submits a Letter pursuant to the Court's Practice Standards in advance of filing a motion to dismiss:

Mr. Slatton alleges two claims for relief: excessive force and unlawful seizure.

Mr. Slatton's excessive force claim is controlled by *Brooks v. Gaenzle*, 614 F.3d 1213, 1219 (10th Cir. 2010). In *Brooks*, the court considered whether a suspect could maintain an excessive force claim where the officer had used force, but the suspect had not been seized during the encounter. The Tenth Circuit rejected such claim because "it is clear restraint of freedom of movement must occur." *Id.* Mr. Slatton admits in his Third Amended Complaint that he backed away from Officer Hopkins during the encounter and then decided to "flee" from him. [ECF 81, ¶¶ 36-40]. Mr. Slatton's claim is thus subject to dismissal under *Brooks*. Counsel for Mr. Slatton acknowledged *Brooks* but indicated in conferral that they "found several distinguishing cases (albeit mostly in other circuits) but believe the claim has merit."

Mr. Slatton's unlawful seizure claim is actually two claims in one. He alleges that Officer Hopkins seized him during the initial use of force and again when Officer Hopkins radioed other

officers regarding Mr. Slatton's trespassing and obstruction. [See ECF 81, ¶¶ 87-88]. The first unlawful seizure is controlled by *Brooks*. Mr. Slatton's second unlawful seizure claim is also subject to dismissal because Officer Hopkins' statements over the radio were supported by probable cause and/or reasonable suspicion. As conceded in the Third Amended Complaint, Mr. Slatton received clear instructions to leave the property "in its entirety". [ECF 81, ¶¶ 1-2, 19]. Despite this instruction, he concedes he did not leave the property in its entirety, but instead chose to linger immediately outside the venue's doors. [*Id.*, 24]. In light of these undisputed facts, Mr. Slatton's actions provided ample evidence of reasonable suspicion and/or probable cause to detain him. In conferral, opposing counsel stated that Colorado's trespassing statute has a mens rea requirement (implying Mr. Slatton did not know he was trespassing). This is legally incorrect, but perhaps more importantly, Mr. Slatton concedes in his complaint that he received a clear instruction to leave the property "in its entirety." [*Id.*, ¶¶ 1-2, 19].

The motion will explain why Officer Hopkins is entitled to qualified immunity as to both claims. Mr. Slatton cannot show that the law was clearly established such that Officer Hopkins would have known he did not have probable cause or reasonable suspicion, especially given the clear commands noted above. The same is true for the force employed by Officer Hopkins. *See Mecham v. Frazier*, 500 F.3d 1200, 1205 (10th Cir. 2007) (holding that pepper spray on seated driver was not unconstitutional given plaintiff's verbal resistance to arrest).

Finally, while the parties disagree as to whether the relevant body camera footage should be considered on a motion to dismiss, a motion will explain that Mr. Slatton actually quotes key sections of the audio from the body camera footage. [ECF 81, ¶¶ 25, 26, 27, 28, 33, 35, 40]. He has thus incorporated the footage by reference. The footage is also, as admitted in pleadings filed

by Mr. Slatton, central to Mr. Slatton's claims and no party has challenged its authenticity. In reviewing the Third Amended Complaint and body camera, it is undisputed that Mr. Slatton disobeyed at least a half dozen commands to stop and/or show his identification and stated affirmatively that he was not complying with officers' attempts to arrest him.

The parties held an all-counsel conference call on December 9, during which they discussed these legal issues and the requirements from this Court's Practice Standards for approximately twenty minutes. Counsel for Mr. Slatton opposes the relief as stated herein. Officer Hopkins respectfully submits that notwithstanding Mr. Slatton's objections, his motion to dismiss should be accepted and considered on the merits since he raises qualified immunity as a defense, which must be decided at the earliest possible juncture by the Court.

Respectfully submitted this 10th day of December, 2019.

s/Nick Poppe

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2019, I electronically filed the foregoing **LETTER CONCERNING HOPKINS' INTENT TO FILE A MOTION TO DISMISS LETTER** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following at their e-mail addresses:.

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s/Nick Poppe

Nicholas C. Poppe