

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-1418

(Summary Calendar)

PATTIE WINTON, ET AL.,

Plaintiffs,

NANCY OLMSTEAD,

Plaintiff-Appellee,

v.

TOM THUMB STORES, ET AL.,

Defendants,

SCOTT DAGEN,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(CA 3 90 2232 D)

(July 29, 1993)

Before GARWOOD, DAVIS, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant, Scott Dagen, a police officer with the Town of Addison, appeals the district court's denial of his amended motion for summary judgment. Dagen contends that he is entitled to

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

qualified immunity because he was not responsible for Plaintiff Nancy Olmstead's arrest or, in the alternative, because there was probable cause for the arrest and he therefore acted reasonably as a matter of law. Olmstead maintains that the district court exceeded its jurisdiction by considering Dagen's motion because the court's authority was limited to its denial of Dagen's initial motion for summary judgment. Finding no error, we affirm.

I

Olmstead and co-plaintiff Pattie Winton were arrested for criminal trespass pursuant to a complaint by the manager of a Tom Thumb store in Addison. Olmstead and Winton had been shopping at the store, and Winton attempted to pay for some merchandise with a personal check. The cashier told Winton that the check verification system had reported a "Code 9," and that it was store policy not to accept "Code 9" checks. Winton then spoke to the manager, telling him that there must have been some error in the verification and requesting that he verify the check again.¹ The manager refused her request, and informed Olmstead and Winton that he was calling the police.² Officers Scott Dagen and Janice Romine responded to the call. Dagen and Romine spoke with Winton and the

¹ Dagen contends that at this point Olmstead and Winton became argumentative, and that they caused a disruption within the store.

² While Olmstead claims that she and Winton were told that they could either leave or stay until the police arrived, Dagen asserts that the manager asked them to leave the store.

manager.³ Olmstead and Winton were then arrested for criminal trespass.⁴ The charge against Olmstead was later dismissed. The parties agree that Romine, not Dagen, physically arrested Olmstead, although the police reports list Dagen as an arresting officer and indicate that Dagen gave Olmstead her statutory warnings. Olmstead filed an action under 42 U.S.C. § 1983 (1988) against several defendants, alleging false arrest and false imprisonment in violation of her 5th and 14th Amendment rights. Olmstead's suit against Dagen is the only matter on appeal.⁵

Dagen filed a motion for summary judgment based upon a claim of qualified immunity, which was denied by the district court due to Dagen's failure to attach evidence in support of his argument. After attaching affidavits to the original motion, Dagen filed a motion to reconsider, which was denied for lack of notice to Olmstead. With the court's permission, Dagen then filed an amended motion for summary judgment. The court denied this motion as well, holding in a memorandum opinion that Olmstead had presented issues of fact that required resolution by trial.

³ Olmstead claims that this conversation took place beyond her range of hearing, and that she was not told to leave even after the officers arrived. Dagen presented evidence that the manager told both Winton and Olmstead to leave in the officers' presence.

⁴ The charges against both Olmstead and Winton were later changed to disorderly conduct.

⁵ Plaintiffs Olmstead and Winton originally joined as defendants Tom Thumb Stores, the Town of Addison, and police officers Scott Dagen and Janice Romine. Romine was never served in the suit. Although the record is unclear, Winton evidently settled with Tom Thumb Stores, and then dismissed her claims against Dagen and the Town. With Olmstead as the sole plaintiff, the district court awarded summary judgment to the Town of Addison and Tom Thumb Stores, leaving only Olmstead's suit against Dagen unresolved.

Dagen appeals the district court's denial of his amended motion for summary judgment, contending that he is entitled to qualified immunity because he had no responsibility for Olmstead's arrest or, alternatively, because probable cause for the arrest existed, and his actions were therefore objectively reasonable as a matter of law. Olmstead claims that the district court exceeded its authority by allowing Dagen to file his motion to reconsider and amended motion for summary judgment.

II

A

Olmstead asserts that the district court's denial of Dagen's amended motion for summary judgment is not appealable because the district court had no jurisdiction to hear Dagen's motion to reconsider or his later amended motion for summary judgment. Olmstead claims that because neither *Mitchell v. Forsyth*⁶ nor the Federal Rules of Civil Procedure recognize a motion to "reconsider" a denial of summary judgment in qualified immunity cases, the district court's jurisdiction was limited to Dagen's first motion for summary judgment.

We rejected this argument in *Enlow v. Tishomingo County*, 962 F.2d 501, 506-07 (5th Cir. 1992). District courts have broad discretion to allow successive motions for summary judgment based

⁶ In *Mitchell v. Forsyth*, the Supreme Court held that "a district court's denial of a claim of qualified immunity, to the extent it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985).

on claims of immunity. *Id.* The court may reconsider a previously denied summary judgment motion regardless of whether the moving party has presented any new evidence. *Id.* at 507 n.16. Because the district court acted within its discretionary purview by allowing Dagen to file a motion to reconsider and a subsequent amended motion for summary judgment, we reject Olmstead's jurisdictional contention, and hold that the district court's denial of Dagen's amended motion is properly before this Court.

B

We review the district court's denial of Dagen's amended motion for summary judgment de novo. *Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). Summary judgment is appropriate only where the moving party has shown as a matter of law that no genuine issue of material fact remains unresolved. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). Once the movant makes this showing, the nonmoving party must go beyond the pleadings to designate specific facts showing a genuine issue for trial. *Id.* at 324, 106 S.Ct. at 2553. Mere allegations will not be sufficient to defeat the motion, and the non-movant must specify facts that are material to outcome of the suit. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248-250, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986). The existence of a genuine issue of material fact will preclude summary judgment where the motion is based on a claim of qualified immunity. *Enlow*, 962 F.2d at 511-13.

(1)

Dagen first argues that because he had no responsibility for and no duty to interfere with Olmstead's arrest, his conduct could not have been objectively unreasonable, and the district court thus erred by denying his claim of qualified immunity. The objective legal reasonableness of a police officer's conduct, assessed by comparison to clearly established legal rules, is determinative of the officer's eligibility for qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987). Dagen claims that he never touched Olmstead, but that it was his fellow officer on the scene, Janice Romine, who had physically arrested Olmstead.⁷ Dagen presented evidence that although he had more total experience than Romine, he was not the senior officer at the scene,⁸ and thus had no duty to supervise or interfere with Romine's arrest unless she was using excessive force, which the parties agree she was not. Dagen asserts that, because Romine bore full responsibility for Olmstead's arrest and because he had no clearly established legal duty to interfere with the arrest, he is entitled to qualified immunity and must be granted judgment as a matter of law.

Olmstead argues, however, that Dagen participated in her arrest, noting that the police reports list Dagen as an arresting officer and indicate that Dagen gave Olmstead her statutory

⁷ Olmstead does not dispute this fact, but contends that Dagen nonetheless had some level of responsibility for the arrest.

⁸ At the time of Olmstead's arrest, Addison Police Department policy charged the senior officer at an arrest scene with supervising the arrest.

warnings. See Record on Appeal, vol. III, at 591-92 (Arrest Report, Town of Addison Police Department). Although it is undisputed that Dagen did not physically arrest Olmstead, the record shows that Olmstead has raised an issue of material fact concerning Dagen's contention that he did not participate in and was not responsible for her arrest. The district court therefore properly denied summary judgment on this issue.

(2)

Dagen alternatively contends that because probable cause to arrest Olmstead existed, his actions at the time of the arrest were objectively reasonable as a matter of law, and the district court therefore erred by denying his motion. In assessing the reasonableness of an arrest, the court must determine whether a reasonable police officer could have believed probable cause to arrest the plaintiff existed. *Gassner v. City of Garland*, 864 F.2d 394, 397-98 (5th Cir. 1989). Because an officer might reasonably but mistakenly conclude that probable cause is present, the application of this standard requires an examination of the information possessed by the officer in question. See *Anderson*, 483 U.S. at 641, 107 S.Ct. at 3039-40.

Dagen relies on *Bodzin v. City of Dallas*, 768 F.2d 722 (5th Cir. 1985), to support his contention that probable cause existed to arrest Olmstead for criminal trespass.⁹ In *Bodzin*, a grocery

⁹ "Under Texas law, for a warrantless misdemeanor arrest to be valid, the officer must have probable cause to believe that the suspect has committed a crime *in his presence*." *Bodzin*, 768 F.2d at 724. Although there must be some nexus between the basis of arrest and the crime actually charged, the officer need not have the specific crime for which probable cause existed in mind at the

store manager demanded that the plaintiff leave store property. *Id.* at 723. When he refused, the manager called the police, telling the officers upon their arrival that Bodzin was on store property and that he had refused to leave. *Id.* The officers advised Bodzin that the store manager wanted him to leave, and when he again refused, the officers arrested him for criminal trespass. *Id.* at 724. This court upheld the arrest, rejecting Bodzin's argument that the manager was required to tell him to leave in the presence of the officers. *Id.* at 724-26. This court determined that because the store manager told the officers Bodzin had been ordered to leave, and because Bodzin had refused in their presence, the officers had probable cause to arrest Bodzin and therefore acted reasonably as a matter of law. *See id.* at 725-26.

Dagen contends that the present case is sufficiently similar to *Bodzin* to demonstrate his entitlement to qualified immunity. We disagree. In *Bodzin*, the facts concerning the conversations between the police, the manager, and Bodzin were undisputed. In the present case, several facts remain reasonably in dispute that render Dagen's reliance on *Bodzin* premature. First, although Dagen presented evidence to the contrary, Olmstead denies that the manager ever told Olmstead and Winton to leave the store. Olmstead presented deposition testimony that she and Winton were told that they could either leave or stay until the police arrived. *See Record on Appeal, vol. II, at 509-10 (Oral Deposition of Pattie*

time of the arrest. *See Gassner, 864 F.2d at 397-98.*

Winton); 529 (Oral Deposition of Nancy Olmstead). Olmstead explained that they chose to stay, believing that the police could help resolve the matter. *Id.* at 529 (Olmstead Deposition).

Second, in *Bodzin* the police officers conversed with the store manager regarding the manager's desire that Bodzin leave the premises. We there held that the officers, relying on this conversation, acted reasonably by arresting Bodzin after he refused to leave in the officers' presence. In the present case, however, the parties do not agree that the manager conveyed information to Dagen upon which a reasonable officer could have relied for probable cause to arrest Olmstead. Dagen presented evidence that the manager told the officers he had ordered Olmstead and Winton to leave prior to the officers' arrival, and that he again told Olmstead and Winton to leave in the officers' presence. Olmstead contradicts these claims, asserting that she was never told to leave by either the store manager or the police, although a conversation did take place between Winton, the manager, and the police out of her range of hearing. *See id.* vol. III, at 561-62 (Response to Amended Motion for Summary Judgment (citing Olmstead Deposition at 60, 125)). Olmstead's claim that no one ever told her to leave clearly disputes Dagen's claim that Olmstead was told to leave in his presence. Furthermore, considering the evidence in the light most favorable to Olmstead,¹⁰ her allegation that she was never told to leave casts doubt on Dagen's claim that the store

¹⁰ *See Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986).

manager told him otherwise. Because the record shows material facts regarding Dagen's level of knowledge and the existence of probable cause to be in dispute, we find Dagen's argument that *Bodzin* controls the present case to be without merit.

The objective reasonableness of Dagen's conduct is a decisive factor in this case. Olmstead has successfully raised material questions critical to the resolution of this issue. Construed in the light most favorable to Olmstead, a reasonable jury could find her version of the facts to be true. Accordingly, we hold that the district court committed no error in denying Dagen's motion.

III

For the foregoing reasons, we AFFIRM the district court's denial of Dagen's motion for summary judgment.