Defending Law Enforcement Employees in First Amendment Retaliation Cases

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Overview

- Legal standard for First Amendment retaliation claims
- Factual contexts where First Amendment retaliation claims arise
- Retaliatory arrests
- Recent Supreme Court cases addressing First Amendment retaliation in the retaliatory arrest context
- *Nieves v. Bartlett*
- Strategies at Summary Judgment and Trial

Basics of First Amendment Retaliation

- "[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech.

Hartman v. Moore, 547 U.S. 250, 256, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006)

- Must establish:

(1) constitutionally protected conduct;

(2) retaliatory action by a government official; and

(3) a causal connection between the two.

Basics – Protected Speech

- For our purposes, in the § 1983 context, the protected speech prong is generally easy to establish and often conceded by defendants.



Note: In the employment context, this prong is more often in dispute. The Court analyzes whether the employee spoke as a citizen on a matter of public concern.

Basics – Retaliatory Action

- Generally, the Circuits require that Plaintiff also show that the retaliatory action:
  - Was "sufficient to ***deter a person of ordinary firmness*** from exercising his constitutional rights." Third Circuit
  - Would "***chill a person of ordinary firmness*** from future First Amendment activity." Ninth Circuit
  - Would "would ***deter a similarly situated individual of ordinary firmness*** from exercising his or her constitutional rights." Second Circuit
  - Was "sufficiently adverse to ***deter the exercise of [free speech] rights***." This is an objective standard, viewed from the perspective of ***a person of "ordinary firmness."*** Seventh Circuit
  - Would "***chill a person of ordinary firmness*** from continuing to engage in that activity." Fifth Circuit

Basics – Causation

- Not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury.
  - must be a "but-for" cause. *Hartman*, 547 U.S. at 260.
- *Mt. Healthy* provides the test of general application:
  - Plaintiff has burden to show protected conduct was "substantial" or "motivating" factor for adverse action.
  - Defendant may rebut by preponderance that the same adverse action would have occurred without the protected conduct.
- *Mt. Healthy City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977) (employment case)

Basics – Causation

- Ways to prove causation:
  - (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory act, or (2) a pattern of antagonism coupled with timing to establish a causal link. *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007).
  - By "showing that protected activity was close in time to the adverse action." *Espinal v. Goord*, 558 F.3d 119, 129 (2d Cir. 2009).
    - 6 months since dismissal of inmate lawsuit sufficiently proximate to survive summary judgment
  - Direct Evidence: Defendant Statements. *See Watson v. Rozum*, 834 F.3d 417 (3d Cir. 2016).
  - Absence of Probable Cause

Factual Contexts

- When could you see a First Amendment retaliation claim in the civil rights context?
- Some examples:
  1. Retaliatory arrest involving a police officer
  2. Retaliatory prosecution involving a prosecutor
  3. Inmate discipline in a correctional facility involving correctional staff
  4. Code violations against homeowners/taxpayers
  5. Administrative hearings
- For our purposes, we will focus largely on retaliatory arrests.



Retaliatory Arrests

- The Supreme Court has recognized that causation is less straightforward in some First Amendment retaliation cases – notably those involving an arrest as the alleged retaliatory action.
- For example, an officer arrests a man for disorderly conduct. Prior to his arrest, the individual was yelling at the officer. The man could allege that his protected speech caused the officer to retaliate against and arrest him.
  - The temporal proximity test doesn't work well here.
  - Easy for Plaintiff to establish causation.

Retaliatory Arrests

- An individual's speech, protected or otherwise, is often a "wholly legitimate consideration" for officers when deciding to make an arrest.

- What if there is probable cause to arrest?

- What if the individual were ultimately convicted of the crime for which they were arrested?

Supreme Court cases

- *Hartman v. Moore*, 547 U.S. 250, 126 S. Ct. 1695 (2006)
  - Retaliatory prosecution case
  - Holding: In order to prove a retaliatory prosecution, Plaintiff must allege and prove that the criminal charges were brought without probable cause.
- *Reichle v. Howards*, 566 U.S. 658, 132 S. Ct. 2088 (2012)
  - Retaliatory arrest case; focused on qualified immunity
  - Holding: The First Amendment right to be free from retaliatory arrest for speech, even if the arrest was otherwise supported by probable cause, was not clearly established at the time of Plaintiff's arrest.
- *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1952 (2018)
  - Retaliatory arrest case; against the City itself
  - Holding: Under the circumstances of this particular case, the existence of probable cause did not bar plaintiff's First Amendment retaliatory arrest claim. Court declined to answer whether *Hartman* or *Mt. Healthy* govern retaliatory arrest claims.

Nieves v. Bartlett, 139 S. Ct. 1715, 204 L. Ed. 2d 1 (2019)

Arctic Man in Alaska



"Arctic Man, an event known for both extreme sports and extreme alcohol consumption" - Chief Justice Roberts

Nieves v. Bartlett

- The presence of probable cause for arrest defeats a First Amendment retaliatory arrest claim.

- The presence of probable cause will defeat most claims, EXCEPT where a plaintiff presents "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."

- To prevail on a First Amendment retaliatory arrest claim, plaintiff must establish:

  (1) official acted with a retaliatory motive; and

  (2) that motive was the "but-for" cause of plaintiff's injury.

Nieves v. Bartlett

- Causation problems
- Court adopted *Hartman* by requiring plaintiff to show a lack of probable cause in order to proceed.
  - *Reichle* recognized and *Lozman* reaffirmed that retaliatory arrest claims face some of the same causality challenges as those identified in *Hartman*.
  - Protected speech is often a "wholly legitimate consideration" for officers.
  - Officers frequently make "split-second judgments" when deciding whether to arrest and speech may convey vital information to them.
  - For both retaliatory prosecution and arrest claims, it is difficult to determine whether the adverse action was caused by the officer's malice or the plaintiff's potentially criminal conduct.
- The absence of probable cause "will generally provide weighty evidence that the officers' animus caused the arrest, whereas its presence will suggest the opposite."

Nieves v. Bartlett

- Bartlett argued that causation in retaliatory arrest cases need "is not inherently complex" because the "factfinder simply must determine whether the officer intended to punish the plaintiff for the plaintiff's protected speech."
- Court found this approach improperly dismissed the need for a threshold objective showing.
- Court observed that in the Fourth Amendment context, it "almost uniformly rejected invitations to probe the officers' subjective intent."
  - Bartlett's approach would make the constitutionality of an arrest vary from place to place and from time to time, depending on the officers' motives.
- In accord with common law approach for related tort claims → false imprisonment and malicious prosecution.

Nieves v. Bartlett

- BUT . . . "a narrow qualification": when officers have probable cause to arrest, but typically exercise their discretion not to do so.
  - Example: jaywalking



- The "no probable cause" requirement, thus, **should not apply** when a plaintiff presents objective evidence that he was arrested when other similarly situated individuals not engaged in the same protected speech had not been.

Nieves v. Bartlett

- Thomas's opinion – concurring in part and dissenting in part
- Gorsuch's opinion – concurring in part and dissenting in part
- Ginsburg's opinion – concurring in the judgment in part and dissenting in part
- Sotomayor's opinion – dissenting

Heck Implications?

- *Heck* held that when a plaintiff brings a § 1983 claim, the Court must consider whether a judgment in favor of the plaintiff would ***necessarily imply the invalidity of his conviction or sentence.***

- If it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Heck v. Humphrey, 512 U.S. 477, 487, 114 S. Ct. 2364, 2372, 129 L. Ed. 2d 383 (1994)

Strategies at Summary Judgment

- If retaliatory arrest, *Nieves* is very helpful.
  - Plaintiff's burden
  - Argue like you would a false arrest or malicious prosecution claim
- If First Amendment retaliation claim not involving an arrest, try to make parallels to *Nieves*.
  - Argue causation – were defendants even aware of plaintiff's protected conduct?
  - De minimis harm
  - Qualified immunity

Strategies

- Do not overlook (a) protected conduct and (b) adverse action elements, even though typically established
- Where retaliation will survive, consider risks of dismissing other claims – excluding valuable evidence; plaintiff impeachment?
- Establish officer motives: was the plaintiff's conduct really the worst thing your defendant has had to deal with?
- Demeanor of defendant is extremely important
- Third party witnesses/objective evidence
- If adverse action based upon plaintiff's conduct, cross examination can be crucial
- Prepare to litigate the scope of *Nieves* and its exception

Questions?