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FEATURED CASE:

Eighth Circuit Affirms Ruling in First Amendment Retaliation Case: Pepper Spray Use Deemed Crowd Control Measure, Not Retaliatory Action

***Aldridge v. City of St. Louis*, no 22-1735 (8th Cir. July 28, 2023)**

The case involved protestors suing city officials after an officer used pepper spray during a protest. The court ruled that the use of pepper spray was not a targeted retaliation against the protestors' First Amendment rights, but rather a crowd control measure. The court also dismissed *Monell* claims against the City due to the absence of individual liability and declined to consider state law claims.

Background: During a protest in the downtown area, officers tased and arrested a protestor, prompting other protestors, including the appellants, to follow them. While the crowd questioned and taunted officers, they remained non-violent.

Officer Olsten ("Olsten") was one of many officers present at the scene, and tensions escalated when protesters gathered around the arresting officers shouting questions and insults at the officers. At this point, Amir Brandy ("Brandy") shouted "I'm going to f*** you up." In response, Olsten stepped toward Brandy and said, "well, come on, f*** me up then" and "keep coming." Brandy noticed a pepper spray fogger in Olsten's hand, and an exchange of heated words followed.

An unidentified protestor shouted something provocative, and immediately after, Olsten used pepper spray on the crowd, affecting appellants along with others. Although some facts of the case are disputed, it was undisputed that Olsten "made a wide arc" and "targeted people who were within a 20-foot diameter."

Three appellants, Rasheen Aldridge "Aldridge", Jazmin Franks "Franks", and Crystal Brown "Brown" filed lawsuits against Olsten, Chief of Police John Hayden, and the City of St. Louis, alleging various claims, including a First Amendment retaliation claim under 42 U.S.C. § 1983. In the Aldridge case, the district court ruled in favor of Olsten on the First Amendment retaliation claim, as it was based on an excessive force allegation already dismissed by the court. The trial court also rejected the *Monell*

claim against the City due to the absence of individual liability and declined to consider state law claims.

Similarly, in the Franks and Brown cases, the district court granted summary judgment on the First Amendment retaliation claims, stating that Officer Olsten's use of pepper spray was not a response to their actions. The *Monell* claims against the City were also dismissed, as individual liability was not established. The district court did not consider state law claims in these cases.

Appeal: The appellants sued separately in district court and in each case, the district court granted summary judgment in favor of the city officials on all the federal claims and declined supplemental jurisdiction on the state law claims The Eighth Circuit consolidated the cases and affirmed the lower court's ruling.

Analysis:

I. First Amendment Retaliation
The appellants claimed that Olsten retaliated against them in violation of their First Amendment rights by deploying pepper spray during a protest. To prevail on a retaliation claim, the plaintiffs needed to show three elements:

1. They engaged in protected First Amendment activity (i.e., protesting).
2. The officers took adverse action against them that would deter a person of ordinary firmness from continuing the protected activity.
3. The officers' retaliatory animus was the motivation for the adverse action.

The court focused on the third element, the causal connection between Olsten's alleged retaliatory animus and the subsequent use of pepper spray. While Aldridge argued that Olsten targeted him due to his question about the use of a taser, the court found that more than just a temporal connection was required to establish retaliation. The video evidence did not show Olsten singling out Aldridge or displaying animus towards him. Instead, the court reasoned that Olsten's use of pepper spray was part of a crowd control mechanism, not a targeted retaliation against Aldridge or the other appellants. The deployment of pepper spray by Olsten in a wide arc suggests its utilization as a crowd control method rather than a retaliatory measure targeted at a specific protester.

II. *Monell* Claims
Each appellant also challenged the dismissal of their *Monell* claims against the City of St. Louis. Under *Monell*, local governments can be held liable for their own illegal acts but not for their employees' actions on a vicarious basis. To establish municipal liability, individual liability must first be found on an underlying substantive claim.
Since the court affirmed the dismissal of the First Amendment retaliation claims against Olsten, it also affirmed the grant of summary judgment in favor of the City of St. Louis on the *Monell* claims. Without individual liability, the City could not be held liable under *Monell*.

III. Supplemental Jurisdiction
The appellants argued that the district court should have exercised supplemental jurisdiction over their state law claims. However, the decision to exercise supplemental jurisdiction is discretionary and the court reviews it for abuse of discretion.

The court found that the district court's decision not to exercise supplemental jurisdiction over the state law claims was not an abuse of discretion. When all federal-law claims are eliminated before trial, the balance of factors under the pendent jurisdiction doctrine typically points towards declining to exercise jurisdiction over the remaining state-law claims.

The Eighth Circuit Court of Appeals affirmed the district court's judgments against the appellants. The court found that the lack of evidence linking Olsten's actions to retaliatory animus and the absence of individual liability against Olsten meant that the First Amendment retaliation and *Monell* claims against the City of St. Louis failed. The court also upheld the district court's decision not to exercise supplemental jurisdiction over the state law claims.

Aldridge v. City of St. Louis

SHORT SUMMARIES:

7th Circuit – Jails – Delayed Medical Treatment – Wrongful Death

We seem to be seeing more cases involving medical care in a jail. In this case, the 7th Circuit reversed a lower court decision to grant summary judgment to the officers. The claim alleged that a pretrial detainee suffered cardiac arrest and died as a result of delayed medical treatment. The allegations were that an inmate saw his cellmate having difficulty breathing and made an emergency call to an officer over an intercom in the cell placed there for emergencies. The inmate called for help asserting that his cellmate could not breathe. The officer claimed that he could not understand the inmate and thought he was complaining about the plumbing and told him that the system was for emergencies and shouldn't be used for other purposes during the middle of the night. Time passed and the dying inmate continued to struggle for air. The cellmate tried again. This time other officers were there, and the earlier officer now understood it was a call for help and help was dispatched however too late. The lower court decided the case on causation grounds concluding that the inmate would have died in any event. The panel found the question open and a factual dispute for the jury. As to the different recollections of what was said over the call for help, that too, was for the jury.

Jackson v. Sheriff of Winnebago County, Il

7th Circuit – First Amendment – Campaign Signs – Facebook

An attorney runs for the office of State's Attorney. As campaigns often go, politics can be brutal. A county board member removed one of the candidate's signs believing it to have been unlawful and at the next board meeting told the board that he had done so under the mistaken belief the sign was unlawful. The Board determined to take no further action believing the issue was resolved. The Chief of the Town police while in uniform endorsed the candidate's opponent for the election and during the campaign as part of a perjury/bribery investigation the candidate's Facebook information was subpoenaed. All of these actions caused the now defeated candidate to sue. The case was dismissed and the 7th Circuit found no reason to rule otherwise mentioning as it did so that the claim was convoluted and that a lack of a reply brief made it even more difficult to find merit in the candidate's suit. The Facebook subpoena sought an injunction which the court concluded wasn't the proper recourse. The whole sign issue stepped into the quicksand of the failure to allege an action taken under color of state law and the board heard that its member had made a mistake, so it didn't approve post hoc of any unconstitutional activity. As to the endorsement – huh? The candidate didn't allege how the endorsement violated the constitution.

Reardon v. Danley

9th Circuit – Probable Cause – First Amendment – Street Performers

WARNING – WARNING – this is a Ninth Circuit decision so prepare yourselves appropriately. Las Vegas is truly one of the most magical cities in the world. It can take you to Venice, New York, or Paris. It can elevate your dreams or dash your hopes. Over 1/10th of the population of the United States visits the city each year (i.e., around 49.5 million visitors) and billions of dollars are wagered there. With so many people and so much money, the police have much to do. Scams are an obvious source of problems for unsuspecting tourists whether sober or enjoying themselves. To cut down on some of the scams and the rampant sidewalk hustles, the city imposed regulations on sidewalk hustles. But, then came the 9th Circuit in Berger *v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) following which the police entered an MOU that limited enforcement of the various city and county codes applicable to street performers. So, two young women come to LV and begin their performances as "sexy cops" and show their willingness to pose for photos. The plain clothes police approach and ask the price for a photo. The women let them know the photos are free and they only pose for a tip. The officers take them up on that offer and take photos. No tip seemed forthcoming. One of the women asks about the tip. Reminds them of the idea of posing for tips. Mentions to them that they had a verbal agreement to tip and that the camera should delete photos if no tip provided. The women are arrested and when the other protests, she too is arrested. The latter files suit after her case is dismissed. The District Court sides with the officers. The 9th Circuit - Street performances are protected by the First Amendment see *Berger; o*nly one of the women arguably pushed aggressively for a tip, so because the latter did not, no probable cause to arrest her; just because of propinquity, she cannot be found to have consorted with the other to violate the law, so no probable cause due to her association with the other performer.

All I can say is that I remember the days when I was a prosecutor and charging someone for being an accessory or coconspirator under the common law seemed so much easier. But, what do we know: officers must tread carefully, in enforcing laws involving potentially expressive activity or they and the government will be on the wrong side of the litigation lottery.

Santopietro V. Howell