

Employment Practices Liability

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Supreme Court Addresses Retaliatory Arrest Based Upon First Amendment Protections

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On May 28, 2019, the U.S. Supreme Court held in *Nieves, et al. v. Bartlett* that generally, a claim for retaliatory arrest based upon protected speech fails unless the individual who was arrested can demonstrate that there was no probable cause to arrest him or her. However, the majority opinion also provided for a narrow exception to this general rule—where there is probable cause for an arrest, but under the specific circumstances police officers typically would exercise their discretion not to make an arrest, an individual may be able to bring a claim for retaliatory arrest based upon protected speech if he or she can present objective evidence that he or she was arrested when other similarly situated individuals who did not engage in the same type of protected speech were not arrested.

Chief Justice Roberts issued the majority opinion, in which Justices Breyer, Alito, Kagan and Kavanaugh joined. Justice Thomas joined the majority opinion except as to Part II-D, and he issued an opinion concurring in part and concurring in the judgment. Justice Gorsuch issued an opinion concurring in part and dissenting in part. Justice Ginsburg issued an opinion concurring in the judgment in part and dissenting in part. Justice Sotomayor issued a dissenting opinion.

Background: Mr. Bartlett sued Sergeant Nieves and Trooper Weight following his arrest on the last night of Arctic Man, a weeklong winter sports festival held in the remote Hoodoo Mountains near Paxson, Alaska.

According to Sgt. Nieves, at approximately 1:30 a.m., he was asking some of the festival attendees to move their keg of beer inside their RV so because minors had been sneaking alcohol from it. Bartlett, a bystander, began to belligerently yell to the RV owners that they should not speak with the police. In response, Sgt. Nieves approached Bartlett in an attempt to explain the situation; however, Bartlett was heavily intoxicated and yelled at Sgt. Nieves to leave. Sgt. Nieves left so that the situation would not be escalated. Bartlett disputes most of this encounter. He claims he was not drunk; he did not yell at Sgt. Nieves; and it was Sgt. Nieves who became aggressive because Bartlett refused to speak with Sgt. Nieves.

According to Trooper Weight, a few minutes later, Trooper Weight was questioning some minors as to whether they had been consuming alcohol. During this discussion, Bartlett approached in an aggressive manner and stood between Trooper Weight and a minor. Then, Bartlett yelled with slurred speech that Trooper Weight should not be speaking with the minor, and Bartlett stepped very close to him in a combative manner. In response, Trooper Weight pushed Bartlett. Bartlett denies that he was aggressive, and he asserts that he had to stand close to Trooper Weight so that he could be heard over loud music.

Sgt. Nieves witnessed the encounter between Trooper Weight and Bartlett, and therefore, initiated an arrest. According to Sgt. Nieves, Bartlett resisted arrest, and therefore the officers had to force Bartlett to the ground and threaten to tase him. According to Bartlett, he did not resist arrest, but instead was trying to avoid aggravating a back injury. Bartlett claims that as he was arrested, Sgt. Nieves stated, “Bet you wish you would have talked to me now.”

The officers claimed that Bartlett interfered with an investigation and initiated a physical confrontation with Trooper Weight. Bartlett was charged with disorderly conduct and resisting arrest. He sustained no injuries, was released a few hours later, and the criminal charges were ultimately dropped.

Bartlett sued the officers under 42 U.S.C. § 1983 for deprivation of his First Amendment rights. Bartlett claims that his protected speech was his refusal to speak with Sgt. Nieves and when he interjected himself into the discussion between Trooper Weight and the minors. The District Court granted summary judgment for the officers on the basis that the officers had probable cause to arrest Bartlett, which precluded Bartlett’s claim for retaliatory arrest in violation of the First Amendment. The Ninth Circuit reversed, and the officers petitioned for Supreme Court review.

Issue: The U.S. Supreme Court answered the following question: Whether probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment.

Court’s Analysis: The Court generally answered the certified question in the affirmative; however, as discussed below, the Court also carved out a narrow qualification to this rule.

In so holding, the Court focused on prior holdings involving First Amendment retaliation in various contexts. At its core, the First Amendment precludes government actors from subjecting an individual to retaliatory actions on the basis of engaging in protected speech. However, to succeed on a First Amendment claim, a plaintiff must demonstrate that the speech was the “but-for” cause for the adverse action taken by the government actor against the plaintiff. If the government action would have nonetheless occurred without the speech present, the speech was not the “but-for” cause.

The Court focused on retaliatory prosecution cases in which the Court has placed the burden of proof on the plaintiff to demonstrate the absence of probable cause for the underlying criminal charge in order to have a successful claim. Rather than focusing on the subjective animus of an officer, a retaliatory prosecution plaintiff must demonstrate that the decision to press charges was objectively unreasonable because it was not supported by probable cause. The Court generally agreed that the same standard was appropriate as a threshold showing for retaliatory arrest cases, reasoning that the absence of probable cause will typically provide strong evidence that the officer’s animus was the cause for the arrest, and conversely, the presence of probable cause will suggest the opposite. The Court did not agree that the appropriate review would be whether the officer intended to punish the plaintiff for the plaintiff’s protected speech, especially in light of the fact that officers frequently are required to make quick judgments in uncertain situations regarding whether to arrest an individual, “and the content and manner of a suspect’s speech may convey vital information” as to whether the arrestee will cooperate or continues to be a threat. In coming to this conclusion, the majority opinion was cognizant of the effect any other decision could have on the ability of an officer to do his or her job—if an officer might be inhibited in doing his or her job if they are concerned about being sued, and thus, such cases must always be reviewed under “objective standards of reasonableness.”

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If a plaintiff can demonstrate a lack of probable cause, the analysis returns to the Court's previously articulated *Mt. Healthy* test: "The plaintiff must show that the retaliation was a substantial or motivating factor behind the arrest, and, if that showing is made, the defendant can prevail only by showing that the arrest would have been initiated without respect to retaliation."

However, this "no-probable-cause rule" is not completely inflexible. The Court was aware of the fact that there are situations where probable cause may exist, yet officers exercise their discretion to not make an arrest, such as when an officer observes an individual jaywalking. The Court expressed a concern that under a *per se* rule, officers would exploit their arrest power in an effort to suppress speech. Accordingly, the Court established a narrow qualification to the rule previously articulated regarding a showing of probable cause. In these types of cases where probable cause does little to prove or disprove the causal connection between an officer's animus and the arrest, the "no-probable-cause" requirement does not apply if a plaintiff offers objective evidence that he was arrested when other similarly situated individuals did not engage in similar speech and also were not arrested. Yet, the subjective motives of the arresting officer remain irrelevant at this stage of the inquiry. If a plaintiff satisfies this exception, then the factfinder should continue to assess the case under the *Mt. Healthy* test set forth above.

Conclusion: Following the articulation of the rules above, the Court held that Bartlett's claim against both officers failed as a matter of law because they had probable cause to arrest him. The Court agreed with the District Court, stating: "A reasonable officer in Sergeant Nieves's position

could have concluded that Bartlett stood too close to Trooper Weight and spoke loudly in order to challenge him, provoking Trooper Weight to push him back."

In coming to this conclusion, the Court had to weigh several competing interests, including a citizen's First Amendment rights, rules that might chill a law enforcement officer in carrying out his duties, and the costs of protracted litigation. Accordingly, it is recommended that law enforcement agencies provide frequent and up to date training regarding First Amendment protections of the citizens they interact with and what constitutes probable cause to make various arrests.

Cindy Cieslak is a partner at Rose Kallor, LLP. Rose Kallor, LLP regularly represents and advises private and public sector employers on matters pertaining to the employer-employee relationship, including discrimination, harassment, and wage and hour issues. If you have questions about this legal update, please contact Rose Kallor, LLP at 860-361-7999. If you wish to receive future updates on labor and employment related topics, please contact Jacqueline Smith, CIRMA Communications Associate at jsmith@ccm-ct.org.

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