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SUPREME COURT RULES IN FAVOR OF OFFICERS IN FIRST AMENDMENT RETALIATION CLAIM

Nieves v. Bartlett, No. 17-1174

United States Supreme Court, decided May 28, 2019

By Robert Rabe Esq.

In *Nieves v. Bartlett*, the Supreme Court considered whether individuals who allege they were arrested in retaliation for their speech, in violation of the First Amendment, are barred from seeking damages under 42 U.S.C. §1983, if there was probable cause to arrest for any crime. The Court held that *probable cause* to make an arrest *defeats* a claim that the arrest was in retaliation for speech protected by the First Amendment.

Claims of retaliation for the exercise of First Amendment rights are recognized under §1983. To prove a First Amendment retaliatory arrest claim, a plaintiff must show that he engaged in constitutionally protected conduct, and he was subjected to an adverse action by the defendant officer. Now, following *Nieves v. Bartlett*, a plaintiff bringing a retaliatory arrest claim must *also plead and prove the absence of*

probable cause for the arrest. Absent such a showing, the retaliatory arrest claim will fail.¹

This case involves an arrest that took place at Alaska's Arctic Man, which Chief Justice Roberts described as "an event known for both extreme sports and extreme alcohol consumption." According to Sergeant Nieves, he was speaking with a group of attendees when an intoxicated Bartlett started shouting at them not to talk to the police. When Nieves approached him, Bartlett began yelling at the Nieves to leave. Rather than escalate the situation, Nieves left. Trooper Weight stated that Bartlett then approached him in an aggressive manner while he was questioning a minor, stood between him and the teenager, and yelled with slurred speech that Weight should not speak with the minor. When Bartlett stepped toward Weight, the officer pushed him back.

¹If the plaintiff proves the absence of probable cause, then another test governs. The plaintiff must then show that the retaliation was a substantial or motivating factor behind the arrest and, if that showing is made, the defendant officer can

prevail only by showing that the arrest would have been initiated without respect to retaliation.

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Nieves observed the confrontation and initiated an arrest. Bartlett claims that Nieves said to him “bet you wish you would have talked to me now”, after he was handcuffed.

Bartlett sued under 42 U.S.C. section 1983, claiming that the officers violated his First Amendment rights by arresting him in retaliation for his speech - his initial refusal to speak with Nieves and his intervention in Weight’s discussion with the minor. The District Court granted summary judgment for the officers, holding that the existence of probable cause to arrest Bartlett precluded his claim. The Ninth Circuit reversed, holding that probable cause does not defeat a retaliatory arrest claim. As noted above, the Supreme Court held that because there **was** probable cause to arrest Bartlett, his retaliatory arrest claim failed as a matter of law, and reversed the decision of the Ninth Circuit.

The Supreme Court rejected a focus on an officer’s motive. Allegations about the officer’s mental state, something easy to allege and difficult to prove, would impose on officers “overwhelming litigation risks,” in which a stray comment by the officer envelops him in “years of litigation.” This would cause “undue apprehension” in officers, making it hard for “all but the most resolute” to discharge their duties.

The Court did carve out a “narrow qualification” to the no-probable-cause requirement “for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.” This exception is necessary because “an unyielding requirement to show the absence of probable cause could pose a risk that some police officers may exploit the arrest power as a means of suppressing speech.” Thus, a plaintiff can overcome the requirement if he “presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.” If the plaintiff can show such objective evidence, then “the plaintiff’s claim may

proceed in the same manner as claims where the plaintiff has met the threshold showing of the absence of probable cause.” For example, where “jay walking” is an offense, to enforce the statute only against the person complaining about police conduct might still be deemed to be retaliatory, even though there was probable cause to do so.

In order to not become THAT officer - the one the Court decides has “exploit[ed] the arrest power” - you should insure that in a group situation, ALL similarly situated individuals are arrested, not just the one with the mouth making all the noise and criticizing law enforcement (or any other group).²

Stay Safe!

Robert Rabe is Stone Busailah, LLP’s writs and appeals specialist. His 41 years practicing law include 16 years as a Barrister, Supreme Court of England and Wales, practicing in London, England.

² Such arrests should be made even though speech by an individual may be a “wholly legitimate consideration” for officers deciding whether to make an arrest.