APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 22-1726

Mason Murphy

Plaintiff - Appellant

v.

Michael Schmitt, Officer, in his individual capacity

Defendant - Appellee

Jerry Pedigo, Corporal, in his individual capacity and in his official capacity; Camden County, Missouri

Defendants

Appeal from United States District Court
for the Western District of Missouri - Jefferson City

Submitted: January 11, 2023
Filed: September 6, 2023
[Unpublished]

Appendix A

Before GRASZ, MELLOY, and KOBES, Circuit Judges.

PER CURIAM.

Officer Michael Schmitt stopped Mason Murphy while Murphy was walking on the wrong side of a rural road. Murphy refused to identify himself, and the two men argued for a few minutes before Schmitt arrested Murphy. Murphy sued Schmitt for First Amendment retaliation. The district court[1] granted Schmitt's motion to dismiss based on qualified immunity. We affirm.

I.

Schmitt was patrolling a rural road when he saw Murphy walking along the right side of the road with traffic. A Missouri statute requires pedestrians to "walk only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction." Mo. Rev. Stat. § 300.405. Schmitt stopped his car, approached Murphy, and asked Murphy to identify himself. Murphy refused to identify himself, and Schmitt put Murphy in handcuffs after nine minutes of argument. Murphy asked why Schmitt arrested him, and Schmitt refused to answer. On the drive to the sheriff's department, Murphy

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[1] The Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri.

again asked Schmitt why he was being arrested. Schmitt responded that the arrest was for "failure to identify." Once at the station, Schmitt can be heard making a call to an unknown individual and saying he "saw the dip shit walking down the highway and [he] would not identify himself." Schmitt then asked the unknown individual: "What can I charge him with?" Officers eventually identified Murphy by a credit card he was carrying. Officers confirmed Murphy had no outstanding warrants and released him.[2] Murphy was in the jail cell for approximately two hours.

Murphy asserts he was arrested in retaliation for exercising his First Amendment right to argue with police. Murphy filed a suit alleging unlawful detention and First Amendment retaliation. The district court granted Schmitt's motion to dismiss based on qualified immunity. The parties agree Schmitt had probable cause to stop Murphy because Murphy was in violation of Missouri Revised Statute § 300.405. Murphy appeals the dismissal of the First Amendment retaliation claim.

II.

We review the grant of a motion to dismiss based on qualified immunity de novo. Carter v. Huterson,

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[2] Schmitt's equipment captured interactions between Murphy and Schmitt from the time of Schmitt's initial approach to the time of Murphy's eventual release.

831 F.3d 1104, 1107 (8th Cir. 2016). To survive a motion to dismiss, a plaintiff must "state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

A First Amendment retaliation claim has three elements: "(1) [the plaintiff] engaged in a protected activity, (2) the government official took adverse action against [the plaintiff] that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity." Greenman v. Jessen, 787 F.3d 882, 891 (8th Cir. 2015) (citations omitted). In First Amendment retaliation cases, "probable cause should generally defeat a retaliatory arrest claim[.]" Nieves v. Bartlett, 139 S. Ct. 1715, 1727 (2019). The Supreme Court arguably reserved one "narrow qualification" to the general rule: "the no-probable-cause requirement should not apply when 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." Id. (discussing but not applying such an exception). Evidence as to the exception allows "an objective inquiry that avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard. Because this inquiry is objective, the statements and motivations of the particular arresting officer are 'irrelevant' at this stage." Id. (citation omitted).

The parties agree Schmitt had probable cause to arrest Murphy because Murphy was in violation of

Missouri Revised Statute § 300.405. Murphy argues the facts in this case fit into the possible Nieves exception because, like the hypothetical in Nieves, this is a situation where "officers have probable cause to make arrests, but typically exercise their discretion not to do so." Id. But here, Murphy has not pleaded facts sufficient to demonstrate a "facial plausibility" that police commonly see violations of § 300.405 on similar roads and fail to make arrests. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

The Supreme Court in Nieves gave an example of an individual who is arrested for jaywalking in an intersection where "jaywalking is endemic but rarely results in arrest" while the individual is "vocally complaining about police conduct[.]" Nieves 139 S. Ct. at 1727. Murphy relies heavily on the similarities between jaywalking and walking on the wrong side of the road to prove his point. While the crimes of jaywalking and walking on the wrong side of the road are similar, the totality of the circumstances between the example given in Nieves and the facts of this case differ. The hypothetical given by the Supreme Court specifies an arrest for jaywalking at an intersection where jaywalking is "endemic." Murphy's assertion that "[a] reasonable opportunity for further investigation or discovery will show that no one else in recent memory has been detained or arrested by any law enforcement officers . . . for walking on the wrong side of the road" does little to show officers typically witness violations of § 300.405 and exercise their discretion not to arrest. Murphy also asserts that "[w]alking on

the wrong side of the road occurs all the time on the highways with wide shoulders" and the situation was one "where officers have probable cause to make arrests, but typically exercise their discretion not to." These are "threadbare recitals of a cause of action's elements, supported by mere conclusory statements" that "are not entitled to the assumption of truth." Iqbal, 556 U.S. at 663–4. To "determin[e] whether a complaint states a plausible claim[,]" we "draw on . . . experience and common sense." Id. As a matter of experience and common sense the present allegations do not show violations of § 300.405 are so common as to be "endemic" or are so frequently observed as to give rise to a "reasonable inference" that officers "typically exercise their discretion" not to arrest.

The above notwithstanding, Murphy argues the subjective intent of Officer Schmitt is so apparent as to require a finding of retaliation. We disagree. The Supreme Court has been clear that "[a] particular officer's state of mind is simply 'irrelevant,' and it provides 'no basis for invalidating an arrest.'" Nieves, 139 S. Ct. at 1725 (citations omitted). Such a position is necessary as "[p]rotected speech is often a legitimate consideration when deciding whether to make an arrest." Id. at 1724. "To ensure that officers may go about their work without undue apprehension of being sued, we generally review their conduct under objective standards of reasonableness." Id. at 1725.

III.

Accordingly, we affirm the judgment of the district court.

GRASZ, Circuit Judge, dissenting.

The First Amendment prohibits a police officer from retaliating against an individual for engaging in protected speech. Murphy alleged Officer Schmitt arrested him because he challenged whether Officer Schmitt could force him to provide his name. The majority concludes that Murphy failed to state a claim because Officer Schmitt had probable cause to arrest Murphy for walking on the wrong side of the road. I respectfully dissent. Because Murphy plausibly asserted that the Sunrise Beach Police Department does not regularly enforce this law, his First Amendment retaliation claim survives under the exception adopted by the Supreme Court in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019).

At the motion-to-dismiss stage, deciding whether a complaint asserts a plausible claim is "a context-specific task." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Here, Murphy asserted a claim under the First Amendment for retaliatory arrest. Normally, a retaliatory arrest claim fails as a matter of law if the police officer had probable cause to arrest the plaintiff. *Nieves*, 139 S. Ct. at 1727. But the Supreme Court has "conclude[d] that the no-probable-cause requirement should not apply when 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." *Id.* More specifically, "a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* In this context, "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.'" *Id.* (quoting *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018)).[3]

As pled, Murphy was walking on the right side of the road, with traffic, when Officer Schmitt stopped his police car, exited, and demanded Murphy identify himself. Murphy declined to provide his name. Instead, he continually asked Officer Schmitt why he was detained. During the nearly ten minutes before Officer Schmitt arrested him, Murphy criticized and

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[3] The *Nieves* exception is not dicta. When announcing the rule, the Supreme Court used "conclude[d]," which denotes a holding. *Nieves*, 139 S. Ct. at 1727; *see also id.* at 1734 (Gorsuch, J., concurring in part and dissenting in part) ("I would hold, as the majority does, that the absence of probable cause . . . is not an absolute defense."); *id.* at 1741 (Sotomayor, J., dissenting) (referring to "today's holding" as including the exception). The Sixth and Tenth Circuits agree. *Hartman v. Thompson*, 931 F.3d 471, 484 n.6 (6th Cir. 2019); *Fenn v. City of Truth or Consequences*, 983 F.3d 1143, 1149 (10th Cir. 2020). *But see DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1296 (11th Cir. 2019). And when one examines the procedural history of *Nieves*, it is clear the "narrow qualification" was necessary to resolve the issue before the Court.

challenged Officer Schmitt. Officer Schmitt did not immediately provide a reason for the arrest.

Later events indicate Officer Schmitt was scrambling to justify the arrest. While in the police car, Officer Schmitt told Murphy he was arrested for "[f]ailure to identify." He then changed his tune when he told someone via his police radio that Murphy was stumbling and walking on the wrong side of the road. Yet Murphy was not stumbling or acting impaired. When Officer Schmitt arrived at the jail with Murphy, he made a phone call in which he described Murphy as a "dip shit walking down the highway" who "would not identify himself" and "ran his mouth off." He then asked, "What can I charge him with?" Later, Officer Schmitt falsely claimed that Murphy was drunk. Officer Schmitt even admitted on multiple occasions that he did not "smell anything" on Murphy. Despite all this, Officer Schmitt insisted Murphy "sit here for being an asshole." Roughly two hours later, Murphy was released.

Under these factual allegations, I cannot join the majority's conclusion that Murphy failed to state a plausible claim. If the Sunrise Beach Police Department regularly enforces the Missouri statute prohibiting a person from walking on the wrong side of the road, one would suspect Officer Schmitt and the other officers he spoke with would have had little trouble identifying that law as the basis for the arrest. Instead, viewing the factual allegations in the complaint in a light most favorable to Murphy, Officer Schmitt arrested Murphy for challenging and criticizing him

before later exploring various legal justifications for the arrest. Indeed, the allegations of post hoc decision-making indicate pretext, which supports application of the *Nieves* exception.

Consistent with these observations, and in light of *Nieves*, Murphy pled that "no one else in recent memory has been detained or arrested by any law enforcement officers in either Sunrise Beach or Camden County for walking on the wrong side of the road." This is critical because most, if not all, of the "objective evidence" about whether Sunrise Beach police officers commonly see people walking on the wrong side of the road, but typically exercise their discretion not to arrest, would not be in Murphy's possession *before* discovery. *See Ahern Rentals, Inc. v. EquipmentShare.com, Inc.*, 59 F.4th 948, 954 (8th Cir. 2023) (holding "allegations pled on information and belief are not categorically insufficient to state a claim for relief where the proof supporting the allegation is within the sole possession and control of the defendant or where the belief is based on sufficient factual material that makes the inference of culpability plausible"). Put differently, Murphy never had an opportunity to discover and present "objective evidence" of First Amendment retaliation under *Nieves* because the district court prematurely dismissed Murphy's complaint. It largely negates the Supreme Court's opinion in *Nieves* to require a plaintiff to show "objective evidence" of the type of selective enforcement needed *before* discovery. Yet the court effectively does so by affirming dismissal here.

The inquiry, of course, does not end there. Even if a plaintiff asserts a plausible constitutional claim, the next qualified immunity prong is whether the right was clearly established at the time of the alleged violation. *See Reichle v. Howards*, 566 U.S. 658, 664 (2012). At the Rule 12(b)(6) stage, we ask whether the defendant has shown he is "entitled to qualified immunity on the face of the complaint." *Vandevender v. Sass*, 970 F.3d 972, 975 (8th Cir. 2020) (quoting *Kulkay v. Roy*, 847 F.3d 637, 642 (8th Cir. 2018)).

As the Supreme Court has explained, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *accord Thurairajah v. City of Fort Smith*, 925 F.3d 979, 985 (8th Cir. 2019). "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987). Building on these First Amendment principles, the Supreme Court held that an individual has the right to be free from a retaliatory arrest, even if supported by probable cause, when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been arrested. *Nieves*, 139 S. Ct. at 1727; *cf. Reichle*, 566 U.S. at 665–66. At the time Murphy was arrested in 2021, this constitutional right was clearly established. *Nieves*, 139 S. Ct. at 1727; *see also Novak v. City of Parma*, 932 F.3d 421,

430–31 (6th Cir. 2019) (explaining the right was not clearly established until *Nieves* was decided in 2019). Thus, Officer Schmitt has not shown that he is entitled to qualified immunity on the face of the complaint. *See LeMay v. Mays*, 18 F.4th 283, 289–90 (8th Cir. 2021). I respectfully dissent.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

MASON MURPHY,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 2:21-CV-**
	)	**04195-MDH**
MICHAEL	)	
SCHMITT, et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court is Defendant Officer Michael Schmitt's motion to dismiss party. (Doc. 6). For the reasons set forth herein, the motion is **GRANTED**. Plaintiff's Complaint is dismissed as to Defendant Michael Schmitt.

BACKGROUND

Taking Plaintiff's allegations as true for purposes of a motion to dismiss, the Complaint (Doc. 1) states, in relevant part as follows:

Defendant Officer Michael Schmitt was at the time of the incident a police officer for Sunrise Beach a municipality in Camden County. Plaintiff sues Schmitt in his individual capacity only. Plaintiff was

walking on northbound Route F in Camden County on May 15, 2021, at approximately 9:30 p.m. He was a few hundred yards south of Route F's intersection with Route 5. Plaintiff was walking in the shoulder on the right side of the road, with traffic. Sunrise Beach Officer Michael Schmitt was driving his patrol vehicle on northbound Route F approaching Plaintiff's location. Schmitt stopped his vehicle and exited his vehicle. The ensuing events for the next hour, until Schmitt leaves the Camden County Jail after an hour and three minutes have elapsed, are on audio and video tape.

Schmitt approached Plaintiff on foot. RSMo. 300.405.2 requires pedestrians to walk against traffic when practicable, that is, on the left shoulder, not the right shoulder of the highway. Plaintiff alleges that at the time Officer Schmitt first approached Plaintiff, Schmitt had no reasonable suspicion that a crime had occurred, and that Plaintiff committed it. However, this allegation is not consistent with the other allegations in Plaintiff's Complaint. Plaintiff acknowledges that walking with traffic on a highway, as Plaintiff was doing, violates RSMo. 300.405.2. Plaintiff also alleges in his Complaint that a reasonable officer in Schmitt's position at that time would have known that he could have charged Plaintiff with walking on the wrong side of the road, and that Officer Schmitt has probable cause to arrest Plaintiff for violation of RSMo. 300.405.2.

Plaintiff further admits that Schmitt demanded that Plaintiff identify himself. Plaintiff declined to

identify himself. Plaintiff and Schmitt argued for approximately 9 minutes during which time Plaintiff continued to refuse to identify himself. After the 9 minutes of argument Schmitt put Plaintiff in handcuffs and put him in Schmitt's patrol car. At minute 23, still during the drive, Schmitt stated on his police radio that Plaintiff had been stumbling and walking on the wrong side of the road.

Several times Schmitt stated that Plaintiff was drunk. At minute 45 Schmitt stated to Plaintiff, "I suspected you were under something. For your safety I wanted to check you out and know who you are." Plaintiff alleges that the actions of Schmitt in his interaction with Plaintiff, particularly Plaintiff's detention and arrest, in the totality of the circumstances, show that Schmitt's detention and arrest of Plaintiff was made in retaliation for Plaintiff exercising his rights under the First and Fifth Amendments to argue with the police. Plaintiff alleges that his arguing with the police was constitutionally protected by the First Amendment and the Fifth Amendment. Plaintiff alleges that others have not been arrested for walking with traffic but admits Officer Schmitt had probable cause to do so. Plaintiff asserts that Plaintiff's walking on the wrong side of the road was insufficient to provoke the adverse consequence of arrest, particularly because other have not been arrested for the same conduct.

Plaintiff asserts claims for unlawful detention during the time before Officer Schmitt arrested him, under 42 U.S.C. § 1983 (Count I) and unlawful arrest

by Officer Schmitt in retaliation for exercise of First Amendment Rights under § 1983 (Count II).

STANDARD

A complaint must contain factual allegations that, when accepted as true, are sufficient to state a claim of relief that is plausible on its face. *Zutz v. Nelson*, 601 F.3d 842, 848 (8th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The Court "must accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Coons v. Mineta*, 410 F.3d 1036, 1039 (8th Cir. 2005) (internal citations omitted).

The complaint's factual allegations must be sufficient to "raise a right to relief about the speculative level," and the motion to dismiss must be granted if the complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555, 570 (2007). Further, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Ashcroft*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

Appendix B

DISCUSSION

I. Officer Schmitt is entitled to qualified immunity

"In § 1983 actions, qualified immunity shields government officials from liability [in their individual capacities] unless their conduct violated a clearly established constitutional or statutory right of which a reasonable official would have known." *Bishop v. Glazier*, 723 F.3d 957, 961 (8th Cir. 2013) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity shields police officers from lawsuits based on official conduct if reasonable officers in the same position could have believed their conduct was 'lawful, in light of clearly established law and the information the … officers possessed' at the time." *Waters v. Madson*, 921 F.3d 725, 734-35 (8th Cir. 2019) (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Courts consider two factors in analyzing qualified immunity: (1) whether the alleged facts demonstrate that the public official's conduct violated a constitutional right; and (2) whether the constitutional right was clearly established at the time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). "Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Id.* The second factor in the qualified

immunity analysis requires the constitutional right to be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (internal citations omitted). The plaintiff "bears the burden of proving that the law was clearly established." *Hess v. Ables*, 714 F.3d 1048, 1051 (8th Cir. 2013).

a. Officer Schmitt had at least arguable reasonable suspicion to detain Plaintiff (Count I).

First, Plaintiff argues that Officer Schmitt's stop of Plaintiff was "not a *Terry* stop and therefore Schmitt had no right to ask Murphy for identification." (Doc. 1 at ¶ 177). Plaintiff's pleaded facts indicate that Officer Schmitt observed Plaintiff violating a Missouri state law (Doc. 1 at ¶¶ 20, 33, 41, 65) and thus had at least arguable reasonable suspicion to conduct a stop.

To conduct a temporary investigative detention, "officers need only reasonable suspicion based on the totality of the circumstances." *Waters v. Madsen*, 921 F.3d 725, 736 (8th Cir. 2019). Reasonable suspicion requires less than probable cause and needs "at least some minimal level of objective justification." *Id.* (quoting *De La Rosa v. White*, 852 F.3d 740, 744 (8th Cir. 2017). Courts look only at the information the officer possessed at the time of the stop to determine whether an officer had reasonable suspicion to

conduct a temporary detention. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).

Even if an officer lacks reasonable suspicion, they are nonetheless entitled to qualified immunity if they have "*arguable* reasonable suspicion — that is, if a reasonable officer in the same position could have believed she had reasonable suspicion." *Id.* (citing *De La Rosa*, 852 F.3d at 745-46) (emphasis in the original).

In this case, Plaintiff pleads facts that plainly demonstrate Officer Schmitt had at least reasonable suspicion to detain Plaintiff. Plaintiff concedes that Officer Schmitt observed Plaintiff violating Mo. Rev. St. § 300.405.2. Plaintiff also admits that a "reasonable officer in Schmitt's position at that time would have known that he could charge Plaintiff with walking on the wrong side of the road." (Doc. 1 at ¶ 67). Such admissions by Plaintiff establish that: (1) Officer Schmitt observed Plaintiff violating the law and thus had, at a minimum, reasonable suspicion to conduct an investigatory stop, and (2) even if Officer Schmitt did not have reasonable suspicion to stop Plaintiff, he is still entitled to qualified immunity because reasonable officers in Officer Schmitt's position would have known Plaintiff could be charged with walking on the wrong side of the road.

b. Officer Schmitt is entitled to qualified immunity as to Plaintiff's retaliatory arrest claims (Count II).

To state a claim for retaliatory arrest, a Plaintiff must allege that "(1) he engaged in a protected activity, (2) [officers] took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in party by the exercise of the protected activity." *Revels v. Vincenz*, 382 F.3d 870, 876 (8th Cir. 2004). A retaliatory arrest claim requires showing of a fourth element: that the arrest is unsupported by probable cause or arguable probable cause. *Just v. City of St. Louis, Mo.*, 7 F.4th 761, 768 (8th Cir. 2021) (citing *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724 (2019)).

In order to overcome Officer Schmitt's claim that he is entitled to qualified immunity, Plaintiff needs a clearly established right to refuse to identify himself after he was lawfully detained for violating the law. No such clearly established right exists.

Whether a right is "clearly established" is a question of law for the court to decide. *Bishop v. Glazier*, 723 F.3d 957, 961 (8th Cir. 2013). For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In other words, the unlawfulness of an officer's actions must be "apparent" in light of pre-existing law.

Bishop, 723 F.3d at 961. As such, Plaintiff can establish a right is clearly established only if earlier cases give Officer Schmitt a fair warning that his alleged treatment of Plaintiff was unconstitutional. *Id.*

It is clearly established that a police officer may ask a suspect to identify himself. *See Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cty.*, 542 U.S. 177, 186-87 (2004). "The Supreme Court has declined to decide whether a person may be punished for refusing to identify himself in the context of a lawful investigatory stop that satisfies the Fourth Amendment." *Shephard v. Ripperger*, 57 Fed. App'x 270, 272 (8th Cir. 2003) (citing *Brown v. Texas*, 443 U.S. 47, 53 n.10 (1979)). "Because the legality of refusing to identify oneself to police is an open question, it is not clearly established for the purpose of denying qualified immunity." *Id.* (stating, "Because we conclude the law is not clearly established about whether refusing to identify oneself provides probable cause for arrest, the officers are entitled to qualified immunity in connection with their official acts.") (collecting cases).

As explained above, Plaintiff admits that he was detained after Officer Schmitt observed him violating the law. (Doc. 1 at ¶¶ 33, 34). Plaintiff's pleaded facts state that Plaintiff's detention was based both on reasonable suspicion and, as discussed below, probable cause. After observing Plaintiff violating the law, Officer Schmitt asked Plaintiff to identify himself, and Plaintiff repeatedly refused. (Doc. 1 at ¶¶ 30, 32). At the time of the events in the Complaint, it was not apparent that requesting Plaintiff's identification

after observing him violating the law violated any of Plaintiff's clearly established rights. Therefore, as a matter of law, Officer Schmitt is entitled to qualified immunity for Plaintiff's Count I because Plaintiff did not plead that he had a clearly established right to refuse to identify himself during a lawful detention.

Moreover, Plaintiff's claim for retaliatory arrest is also defeated because his arrest was supported by probable cause, both for violating Mo. Rev. Stat. § 300.405.2 and Mo. Rev. Stat. § 300.080. Notably, "individuals do not have a recognized 'First Amendment right to be free from a retaliatory arrest that is supported by probable cause.'" *Waters*, 921 F.3d at 742. "[A] First Amendment retaliatory arrest claim is defeated by a showing of probable cause (or arguable probable cause)." *Just v. City of St. Louis, Mo.*, 7 F.4th 761, 768 (8th Cir. 2021) (citing *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724 (2019)). Only a narrow exception applies to this general rule: "when 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." *Nieves*, 139 S. Ct. at 1727.

Plaintiff relies heavily on one example in dicta given by the *Nieves* Court: "an individual who has been vocally complaining about police conduct is arrested for jaywalking at [an intersection where jaywalking is endemic but rarely results in arrest]" can state a claim for retaliatory arrest even if there is probable cause to arrest them for jaywalking. *Id.* at 1727.

Even with this exception, the Court held that the plaintiff could not state a retaliatory arrest claim because the officers had probable cause to arrest him for disorderly conduct. *Id.* at 1727-28. The Court pointed out that the plaintiff spoke to the officers in a loud voice, was visibly drunk, and stood close to the officer, all of which gave the officers probable cause to arrest him. *Id.* at 1728.

Here, Plaintiff's speech was not merely criticism and challenge, like the speech at issue in *Hill*. Plaintiff admits that his refusal to identify himself was evasive. Multiple courts have determined that an individual does not have a clearly established right to be free from arrest for refusing to identify themselves. *See Shephard v. Ripperger*, 57 Fed. App'x 270, 272 (8th Cir. 2003) (citing *Brown v. Texas*, 443 U.S. 47, 53 n.10 (1979)) (stating, "Because we conclude the law is not clearly established about whether refusing to identify oneself provides probable cause for arrest, the officers are entitled to qualified immunity in connection with their official acts.") (collecting cases). As such, Officer Schmitt is entitled to qualified immunity.

Plaintiff relies on conclusory statements that "no one else in recent memory has been detained or arrested by any law enforcement officers in either Sunrise Beach or Camden County for walking on the wrong side of the road." (Doc. 1, ¶¶ 21, 68). Even accepting these statements are true for purposes of this motion to dismiss, Plaintiff's arguments fail to recognize the totality of the circumstances surrounding his detention and arrest. Officer Schmitt has

demonstrated that he is entitled to qualified immunity with respect to Plaintiff's claims.

CONCLUSION

Based on the foregoing, the Court concludes that Defendant Officer Michael Schmitt is entitled to qualified immunity with respect to Plaintiff's claims against him contained in Counts I and II of the Complaint. Therefore, Officer Schmitt's motion to dismiss party (Doc. 6) is **GRANTED**, and Michael Schmitt is dismissed as a party from the above-captioned case.

IT IS SO ORDERED.

Dated: February 28, 2022 *__/s/ Douglas Harpool__*
DOUGLAS HARPOOL
United States District Judge

Appendix C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 22-1726

Mason Murphy

Appellant

v.

Michael Schmitt, Officer, in his individual capacity

Appellee

Jerry Pedigo, Corporal, in his individual capacity and in his official capacity and Camden County, Missouri

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Appeal from U.S. District Court for the Western District of Missouri - Jefferson City (2:21-cv-04195-MDH)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judges Kelly, Erickson and Grasz would grant the petition for rehearing en banc. Judge Gruender did not participate in the consideration or decision of this

matter.

December 12, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MASON MURPHY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	
OFFICER MICHAEL SCHMITT, in his individual capacity	)	
	)	
CORPORAL JERRY M. PEDIGO, in his individual capacity, and in his official capacity,	)	**PLAINTIFF DEMANDS JURY TRIAL**
	)	
CAMEN COUNTY, MISSOURI	)	
	)	
Defendants.	)	

COMPLAINT FOR DAMAGES FOR FEDERAL CIVIL RIGHTS VIOLATIONS AND STATE LAW ASSAULT

Plaintiff Mason Murphy, by counsel W. Bevis Schock, states for his Complaint (a) under 42 U.S.C. 1983 for False Arrest and Retaliation for Exercise of First and Fifth Amendment Rights, (b) under *Monell*

for Policymaker Participation, Unofficial Custom, Failure to Train, and Failure to Supervise, and (c) under state law for assault:

INTRODUCTION

1. Mason Murphy was walking with traffic on Route F in Camden County. Sunrise Beach Officer Michael Schmitt demanded that Murphy identify himself. Murphy refused. Schmitt arrested Murphy. No one else has been arrested for walking with traffic. Camden County jail officers then made threats against Murphy for refusing to identify himself. In retaliation for arguing, Jail Supervisor Jerry Pedigo assaulted Murphy by threatening to immediately punch him in the face. Murphy sues Schmitt for False Arrest, Schmitt and Pedigo for Retaliation for Exercise of First Amendment Rights, Pedigo for Assault, and Camden County under *Monell* pursuant to Policymaker Participation.

PRELIMINARY ALLEGATIONS

Parties

2. Plaintiff Mason Murphy is an individual residing in Camden County, Missouri.

3. Defendant Officer Michael Schmitt was at the time of the incident a police officer for Sunrise Beach a municipality in Camden County. Plaintiff sues Schmitt in his individual capacity only.

4. At all relevant times Defendant Supervisor Jerry M. Pedigo was the Jail Supervisor for the Camden County Sheriff's Department, and the policy maker for the jail and detainee intake. Plaintiff sues Pedigo in his individual capacity and in his official capacity.

5. Camden County is a properly formed county in the State of Missouri.

Jurisdiction and Venue

6. Plaintiff brings this civil rights action pursuant to 42 U.S.C. § 1983 and § 1988; and the First, Fourth and Fourteenth Amendments to the United States Constitution.

7. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and 2201, with 42 U.S.C. §1983 and 42 U.S.C. 1988 being the statutes at issue.

8. Venue is proper in this Court under 28 U.S.C. § 1391 because the events which occurred are in Camden County, Missouri, which is within the Central Division of this Court.

9. This court has supplemental jurisdiction over Plaintiff's state law claim pursuant to 28 U.S.C. § 1367.

Color of State Law

10. At all relevant times, all Defendants acted under color of state law. Particularly, at all relevant

times, each Defendant acted under color of the laws, statutes, ordinances, regulations, policies, customs and usages of the State of Missouri.

Jury Demand

11. Plaintiff demands a jury trial on his claims for damages.

FACTS

12. Murphy was walking on northbound Route F in Camden County on May 15, 2021 at approximately 9:30 p.m. He was a few hundred yards south of Route F's intersection with Route 5.

13. At that location there is a broad shoulder.

14. Murphy was walking in the shoulder on the right side of the road, with traffic.

15. Murphy was in no way stumbling or giving any indication that he was impaired or in need of police assistance.

16. Sunrise Beach Officer Michael Schmitt was driving his patrol vehicle on northbound Route F approaching Murphy's location.

17. Schmitt stopped his vehicle and exited his vehicle.

18. The ensuing events for the next hour, until Schmitt leaves the Camden County Jail after an hour

and three Minutes have elapsed, are on audio and video tape, available at:

https://www.youtube.com/watch?v=ZhdaU4q22fY

19. Schmitt approached Murphy on foot.

20. RSMo. 300.405.2 requires pedestrians to walk against traffic when practicable, that is, on the left shoulder, not the right shoulder of the highway.

21. A reasonable opportunity for further investigation or discovery will show that no one else in recent memory has been detained or arrested by any law enforcement officers in either Sunrise Beach or Camden County for walking on the wrong side of the road in violation of RSMo. 300.405.2.

22. At the relevant time, walking on the wrong side of the road was therefore not an offense which would justify a *Terry* stop.

23. As the interaction was beginning, Schmitt had no reasonable suspicion that a crime had occurred and that Murphy had committed it.

24. Schmitt demanded that Murphy identify himself.

25. Schmitt was then using language or intonation indicating compliance was necessary.[1]

26. Due to the actions of Schmitt a reasonable person in Murphy's position would not then have thought himself free to go.[2]

27. Schmitt never told Murphy he was free to go.

28. Murphy had no duty to speak to the officer in any way whatsoever, and had a lawful right to terminate the interaction.[3]

29. Schmitt was then detaining Murphy unlawfully.

30. Murphy declined to identify himself.

31. Schmitt stated that "I am not trying to charge you, just trying to tell who you are."

32. Murphy and Schmitt argued for approximately 9 minutes during which time Murphy continued to refuse to identify himself.

33. At minute 2 Schmitt stated that Murphy was walking on the wrong side of the road.

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[1] *United States v. Davis*, No. 8:10CR438, 2011 WL 1456147, at *5 (D. Neb. Mar. 15, 2011).

[2] *United States v. Guerrero*, 374 F.3d 584, 589–90 (8th Cir. 2004).

[3] *United States v. Hester*, 910 F.3d 78, 84 (3d Cir. 2018).

34. At minute 5 Schmitt stated that he had a right to know Murphy's identity because Murphy was "walking down the highway."

35. Murphy was in no way combative.

36. Throughout the discussion Murphy was steady on his feet at all times, and no reasonable officer would think that his balance was impaired in any way.

37. Murphy over and over asked why he was being detained, and over and over Schmitt refused to provide a reason, and instead demanded to know Murphy's identity.

38. Murphy did not use sexually obscene speech or fighting words, nor did he disturb the peace.[4]

39. Criticism of law enforcement officers, even with profanity, is protected speech.[5]

40. Throughout the 9 minute conversation, however, a reasonable person in Murphy's position would not then have thought himself free to go.

41. At the end of the approximately 9 minutes, Schmitt still did not have and never had had a

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[4] *Cf. Webb v. English*, 3:19-cv-00975-MMH-JBT (M.D. Fla. Sept. 23, 2021).

[5] *See City of Houston, Texas v. Hill*, 482 U.S. 451, 461 (1987); *Hoyland v. McMenomy*, 869 F.3d 644 (8th Cir. 2017).

reasonable suspicion that a crime had occurred, and Murphy had committed it, other than walking on the wrong side of the road, for which pursuant to officer discretion persons are not arrested.

42. After the 9 minutes of argument Schmitt put Murphy in handcuffs and put him in Schmitt's patrol car.

43. At that time, Schmitt had no lawful reason to handcuff Murphy, because Schmitt had no reasonable suspicion that a crime had occurred and that Murphy had committed it.

44. Moments later Murphy's girlfriend, Taylor Semb, drove up and had a conversation with Schmitt about Murphy's circumstances.

45. Schmitt accused Semb of interfering with his investigation and demanded that she move on.

46. Semb drove off a short distance.

47. There ensued further continuous argument between Schmitt and Murphy, all over the issue of Murphy identifying himself, and with Murphy continually demanding to know the legal reason for his detention.

48. Schmitt gave no clear answer as to why he had stopped Murphy, put Murphy in handcuffs, or put Murphy in the patrol car.

49. At minute 17 Schmitt admitted he "doesn't smell anything," that is, Schmitt admits Murphy does not have alcohol odor on his breath.

50. Schmitt then drove down the road a short distance in his patrol car, with Murphy in handcuffs in the back seat, to where Semb was by then located.

51. Schmitt eventually ran a record check on Semb and at minute 18 she came back clean.

52. Schmitt again demanded to Semb that she make Murphy identify himself and to "talk some sense into him."

53. Schmitt and Semb walked to the patrol car where Murphy was in handcuffs in the back seat and opened the patrol car door.

54. Murphy immediately demanded to know why he was being detained.

55. Schmitt shut the patrol car door without answering.

56. Schmitt told Semb she was free to go.

57. Schmitt soon set off to the Camden County Sheriff's jail with Murphy in the back seat, still in handcuffs.

58. At the time Officer Schmitt drove off with Murphy in handcuffs in the patrol car Murphy became an arrestee.

59. During the drive, at minute 19 on the tape, Murphy demanded, as he had demanded previously, to know his charges and asked "what crime did I commit?"

60. Schmitt said "Failure to Identify."

61. In a voluntary interaction, not a *Terry* stop, the subject has an absolute right at any time to terminate the discussion for any reason or no reason.[6]

62. At that time, "Failure to identify" was not a crime, and not a lawful reason to detain Murphy.

63. At minute 23, still during the drive, Schmitt stated on his police radio that Murphy had been stumbling and walking on the wrong side of the road.

64. Murphy had never stumbled.

65. Plaintiff acknowledges that walking with traffic on a highway, as Plaintiff was doing, violates RSMo. 300.405.2.

66. At the time Schmitt had no idea he could charge Murphy with walking on the wrong side of the road.

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[6] *United States v. Hester*, 910 F.3d 78, 84 (3d Cir. 2018).

67. A reasonable officer in Schmitt's position at that time would have known that he could have charged Murphy with walking on the wrong side of the road.

68. A reasonable opportunity for further investigation or discovery will show that no one else in recent memory has been detained or arrested by any law enforcement officers in either Sunrise Beach or Camden County for walking on the wrong side of the road.

69. Later, at the station, at minute 49, Schmitt stated he would go to the local Prosecuting Attorney and ask what charges he could file.

70. During the drive Murphy told Schmitt that Schmitt was "fucking up", and had "no education to become a cop," and was a "retard."

71. At one point Murphy asked Schmitt if he was "ok?"

72. During the drive at minute 20 Schmitt stated over the radio that Murphy was combative.

73. The video tapes prove that Murphy was argumentative and insulting but never combative.

74. At minute 26 Schmitt called Murphy a "dumb ass."

75. Murphy responded that Schmitt was a "punk bitch with a badge."

76. Schmitt then stated, falsely, that Semb had called Murphy a "piece of shit."

77. At minute 35 Schmitt's patrol car entered the jail sally port.

78. Schmitt then exited the patrol car, leaving Murphy in the back seat in cuffs.

79. Schmitt then initiated a phone call to a person unknown to Plaintiff, although pursuant to context it appears that the person on the other line was some sort of colleague or superior to whom Schmitt had called for advice.

80. Only Schmitt's side of the call is audible.

81. Schmitt stated during the call that he had arrested Murphy because he "saw the dip shit walking down the highway and would not identify himself" and he "ran his mouth off."

82. At minute 36 Schmitt asked, "What can I charge him with?"

83. At minute 37 Schmitt admitted, "I can't smell anything on him."

84. At minute 39 Schmitt took Murphy into the Camden County Sheriff's Department.

85. There were then approximately four officers in the room, including Schmitt, Pedigo and two officers unknown to Plaintiff.

86. Murphy demanded to know why he was under arrest.

87. The officers would not answer but did keep demanding, over and over, that Murphy identify himself.

88. Throughout the time at the jail Murphy violated no jail regulations or rules.

89. Throughout this period various deputies, including Pedigo, berated Murphy.

90. Several times Schmitt stated that Murphy was drunk.

91. Murphy was not drunk.

92. At minute 42 in retaliation for Murphy refusing to identify himself, Pedigo stated that he was going to punch Murphy in the face.

93. Murphy asked if the event was being recorded and Pedigo answered yes.

94. Murphy then asked whether Pedigo was really going to punch him in the face.

95. Pedigo reiterated to Murphy that he was going to punch him in the face.

96. There was no purpose for immediate threat from Pedigo to punch Murphy in the face related to officer safety, whether Pedigo's or another officer's.

The statement was also not a reasonable means to maintain institutional safety and to preserve internal order.[7]

97. Pedigo delivered his threats in a manner in which would make a reasonable person believe that Pedigo was about to cause Murphy bodily harm.

98. Murphy reasonably believed that he was under immediate threat of bodily harm

99. A punch to the face is more than a de minimis injury.[8]

100. Pedigo thereby committed the state law crime of Assault, Fourth Degree, placing another in apprehension of immediate physical injury, RSMo. 565.056.1(3).

101. Pedigo thereby made himself civilly liable for assault, MAI 23.01.

102. On information and belief Pedigo was later fired for his threats to punch Murphy in the face.

103. At minute 43 Schmitt said, "Put him on a12", by which Schmitt meant he was asking for

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[7] *Hollingsworth v. City of St. Ann*, 800 F.3d 985, 990 (8th Cir. 2015)

[8] *Id.* at 990-91.

his colleagues assistance in completing the necessary paperwork to hold Murphy for 12 hours.

104. At minute 45 Schmitt stated to Murphy, "I suspected you were under something. For your safety I wanted to check you out and know who you are."

105. During the video Murphy engaged in no actions which would have led a reasonable officer to believe Murphy was intoxicated or "under something."

106. When Schmitt encountered Murphy on the highway Schmitt had no reason to believe Murphy was "under something."

107. Murphy had not consumed alcoholic beverages or any other intoxicating substance that day or that evening.

108. Murphy did not make any false statements or apparently false statements.

109. Officers removed Murphy's wallet from his person.

110. At minute 49 officers locked Murphy in a cell.

111. At minute 50 Schmitt admitted Murphy did not appear intoxicated.

112. At minute 50, after the parties were at the jail, another officer asked Schmitt "do you have resisting?"

113. Schmitt responded "Not really. Hard to get in the car and had to pull him in from the other side."

114. At minute 53 Officers used a credit card which had been in Murphy's wallet to determine Murphy's identity.

115. At minute 55 Schmitt called Murphy a "fucking retard."

116. At minute 56 Schmitt said Murphy could "sit here for being an asshole."

117. At minute 57 Schmitt initiated a phone call to Morgan County for a record check on Murphy, stating "please let there be a warrant".

118. At minute 58 Murphy came back clean and in response Schmitt said "damn".

119. At minute 61 Schmitt stated "I didn't want him walking down my highway."

120. At minute 61 Schmitt exited the jail, got back in his patrol car, and drove off.

121. Murphy remained locked in a jail cell for approximately two hours.

122. Officers then released Murphy.

123. Murphy was never charged with any crimes or offenses in connection with the incident.

124. The actions of Schmitt in his interaction with Murphy, particularly Murphy's detention and arrest, in the totality of the circumstances, show that Schmitt's detention and arrest of Murphy was made in retaliation for Murphy exercising his rights under the First and Fifth Amendments to argue with the police.[9]

125. The actions of Pedigo in his interaction with Murphy, in the totality of the circumstances, show that Pedigo's threats to punch Murphy in the face were made in retaliation for Murphy exercising his rights under the First and Fifth Amendments to argue with the police.

126. Schmitt had no warrant to arrest Murphy.

127. Missouri has no law making it a crime for a subject to refuse to identify himself to a law enforcement officer.

RETALIATION FOR EXERCISE OF FIRST AMENDMENT RIGHTS

Schmitt

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[9] *City of Houston v. Hill*, 482 U.S. 451, 461 (1987).

128. Murphy's non-combative arguing with the police was constitutionally protected by the First Amendment and the Fifth Amendment.

129. The law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for speaking out.[10]

130. Missouri's non-combative arguing with the police was the but for cause of Plaintiff's arrest.[11]

131. Causation is generally a jury question.[12]

132. In the alternative, others have not been arrested for walking with traffic.[13]

133. This was a circumstance where officers have probable cause to make arrests, but typically exercise their discretion not to.[14]

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[10] *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

[11] *Nieves v. Bartlett*, 587 U.S. ——, 139 S. Ct. 1715, 1722 (2019), cited favorably in *Graham v. Barnette*, 5 F.4th 872, 889 (8th Cir. 2021).

[12] *Graham v. Barnette*, 5 F.4th 872, 889 (8th Cir. 2021).

[13] *Nieves v. Bartlett*, 587 U.S. ——, 139 S. Ct. 1715, 1724 (2019).

[14] *Nieves v. Bartlett*, 587 U.S. ——, 139 S. Ct. 1715, 1724 (2019), cited favorably by *Just v. City of St. Louis, Missouri*, 7 F.4th 761, 769 (8th Cir. 2021)

134. At all times, from the initial contact through the time at the station, Murphy did not make any false statements or apparently false statements.[15]

135. At all times, from the initial contact through the time at the station, Murphy did not behave evasively.[16]

136. At all times, from the initial contact through the time at the station, there was no practical, non-technical probability that incriminating evidence was involved.[17]

137. Walking on the wrong side of the road occurs all the time on the highways with wide shoulders, and the police rarely, if ever, arrest a person for walking on the wrong side of the road, but did arrest Murphy who just has been protesting police conduct.[18]

138. Schmitt's detention and arrest of Murphy were adverse actions which would chill a person of ordinary firmness from arguing with the police.

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[15] *United States v. Arredondo*, 996 F.3d 903, 909 (8th Cir. 2021) (Gruender, J., dissenting).

[16] *United States v. Arredondo*, 996 F.3d 903, 909 (8th Cir. 2021) (Gruender, J., dissenting).

[17] *United States v. Arredondo*, 996 F.3d 903, 910 (8th Cir. 2021) (Gruender, J., dissenting).

[18] *Brown v. Trump*, 18-CV-00389, Doc 131, June 14, 2021.

139. Schmitt's detention and arrest of Murphy were as motivated by Murphy's exercise of the protected activity of arguing with the police.

140. Murphy's walking on the wrong side of the road was insufficient to provoke the adverse consequence of arrest, particularly because others have not been arrested for the same conduct.[19]

141. Schmitt does not have qualified immunity for his detention and arrest of Murphy.

Pedigo

142. Pedigo's assault on Murphy was an adverse action which would chill a person of ordinary firmness from arguing with the police.

143. Pedigo's assault on Murphy was motivated at least in part by Murphy's exercise of the First Amendment protected activity of arguing with the police.

144. Pedigo had no lawful right to assault Murphy.

MONELL

Policymaker Participation

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[19] *Nieves v. Bartless*, 139 U.S. 1715, 1727 (2019).

145. Pedigo, as the jail supervisor, was the policy maker for the Camden County jail.[20]

146. Camden County's unconstitutional governmental policy may be inferred from the single decision by Pedigo to assault Plaintiff.

147. Pedigo possessed final authority to establish municipal policy with respect to the action ordered.[21]

148. Pedigo was the highest official responsible for setting policy in that area of the government's business.[22]

149. Pedigo was a policy maker not a mere decision maker.

150. There was no written policy supporting assaulting arrestees in the jail in retaliation for exercise of First Amendment rights.

151. Pedigo's deliberate choice, as the jail supervisor, to follow the course of action of assaulting Murphy, in retaliation for exercise of First Amendment rights, made from among various alternatives, made

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[20] Whether Pedigo was the policy maker is a question of state law, for the court. *Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1214 (8th Cir. 2013)

[21] *Bolderson v. City of Wentzville*, *Missouri*, 840 F.3d 982, 985 (8th Cir. 2016).

[22] *Stockley v. Joyce*, 963 F.3d 809, 823 (8th Cir. 2020); *Bernini v. City of St. Paul*, 665 F.3d 997, 1007 (8th Cir. 2012).

him the person responsible for establishing final policy with respect to the assault in retaliation for exercise of First Amendment rights to argue with the police, and therefore his action was a policy of Camden County.[23]

152. The assault in retaliation for exercise of First Amendment rights to argue with the police was a constitutional violation.

153. Camden County therefore itself caused the constitutional violation.

CAUSATION

154. Murphy's exercise of his First Amendment right to argue with the police proximately caused Murphy's damages.

155. The Camden County Sheriff's Department's Policymaker Participation proximately caused Murphy's damages.

DAMAGES

156. At the time of his assault Murphy suffered fear.

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[23] *Stockley v. Joyce*, 963 F.3d 809, 823 (8th Cir. 2020); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986).

157. Murphy continues to suffer lack of confidence in law enforcement.

158. Murphy has not sought treatment from mental health professionals.

159. Murphy suffered garden variety emotional distress.

160. Murphy has no physical injuries.

161. Murphy has no special damages.

PUNITIVE DAMAGES

Federal Claims

162. The detention and arrest of Murphy by Schmitt in his individual capacity was malicious or recklessly indifferent to Plaintiff's constitutional rights.

163. The assault of Murphy by Pedigo in his individual capacity was malicious or recklessly indifferent to Plaintiff's constitutional rights.

164. The purpose of punitive damages is deterrence and retribution.[24]

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[24] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

165. The misconduct of Schmitt and Pedigo was unlawful and is capable of repetition, which must be deterred.[25]

166. An award of punitive damages would bear a reasonable relationship to the harm suffered and to damages in similar cases.[26]

167. Murphy is entitled to punitive damages against Schmitt in his individual capacity for his federal claims against him in his individual capacity.

168. Murphy is entitled to punitive damages against Pedigo in his individual capacity for his federal claims against him in his individual capacity.

State Law Claim

169. Pedigo's assault on Murphy shocks the conscience and was reprehensible conduct.

NO QUALIFIED IMMUNITY FOR FEDERAL RETALIATORY ARREST CLAIMS

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[25] *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003) (quoting *Gore*, fn. 3 *below*, 517 U.S. at 568).

[26] *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-86 (1996).

170. The right to be free from Retaliation for Exercise of First Amendment Rights is well established.[27]

171. Neither Schmitt nor Pedigo has qualified immunity for Plaintiff's federal retaliation claims.

NO OFFICIAL IMMUNITY FOR PEDIGO ON STATE LAW CLAIM

172. Pedigos' acts were willful and wanton.

173. Pedigo thus has no official immunity for Plaintiff's state law claim.[28]

§1988 ATTORNEY'S FEES AND COSTS FOR FEDERAL CLAIMS

174. In pursuit of these claims, Murphy is incurring reasonable statutory attorney's fees, taxable costs, and non-taxable costs compensable under 42 U.S.C. § 1988.

COUNT I
FEDERAL CLAIM
AGAINST MICHAEL SCHMITT

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[27] *Garcia v. City of New Hope*, 984 F.3d 655, 669 (8th Cir. January 5, 2021), and many other cases.

[28] *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 448 (Mo. 1986)

Appendix D

IN HIS INDIVIDUAL CAPACITY FOR UNLAWFUL DETENTION RETALIATION FOR EXERCISE OF FIRST AMENDMENT RIGHTS

175. Plaintiff incorporates all prior paragraphs.

176. Murphy did not stumble at any time.

177. The stop of Murphy by Schmitt was not a *Terry* stop and therefore Schmitt had no right to ask Murphy for identification.[29]

178. *First*, Schmitt's detention of Murphy during the approximately 17 minutes from the start of the encounter until Schmitt drove away from the scene with Murphy in the patrol car would chill a person of ordinary firmness from continuing to remain silent, and

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[29] *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt Cty.*, 542 U.S. 177, 186 (2004); *see also Abdel-Shafy v. City of San Jose* No. 17-CV-07323-LHK (N.D. Cal. Feb. 12, 2019) (subject arrested for not providing identification but had had a confrontation with another citizen at Starbucks and so officer had reasonable suspicion for *Terry* stop); *Lull v. Stewart*, No. 2:17-cv-01211-TLN-JDP (PS) (E.D. Cal Sep 2, 2021) (subject arrested for not providing identification but had parked illegally to load his kayak, so officer had reasonable suspicion for *Terry* stop); *Mucy v. Nagy*, No. 20-1950 (W.D. Penn. Aug 3, 2021), (summary judgment denied where subject had been in one car accident and had properly had his car towed and was no reasonable suspicion for *Terry* stop, and therefore plaintiff had a right not to provide identification).

179. *Second*, Murphy's exercise of right to argue with the police was the but for cause of Schmitt's detention of Murphy during that time,[30] and

180. *Third*, as a direct result, Murphy was damaged.[31]

181. The right to argue with the police without being subject to arrest is well established.[32]

Punitive Damages

182. The detention of Murphy by Schmitt during that time was malicious or recklessly indifferent to Plaintiff's constitutional rights.

183. Plaintiff is entitled to punitive damages for the purposes of (1) punishing Schmitt for engaging in misconduct and (2) deterring discouraging Schmitt and others from engaging in similar misconduct in the future.[33]

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[30] *Nieves v. Bartlett*, 587 U.S. ——, 139 S. Ct. 1715, 1722 (2019), cited favorably in *Graham v. Barnette*, 5 F.4th 872, 889 (8th Cir. 2021).

[31] 8th Cir Model Jury Instructions, 4.40; *Garcia v. City of New Hope*, 984 F.3d 655, 669 (8th Cir. 2021); *Scheffler v. Molin*, 743 F.3d 619, 621 (8th Cir. 2014)

[32] *City of Houston v. Hill*, 482 U.S. 451, 461 (1987).

[33] 8th Cir Model Jury Instructions, 4.72.

Appendix D

Prayer

WHEREFORE Plaintiff Mason Murphy prays for compensatory damages against Michael Schmitt in his individual capacity for Retaliation for Exercise of First Amendment Rights in a fair and reasonable amount, for punitive damages against Pedigo in his individual capacity in a fair and reasonable amount, and for costs and reasonable attorney's fees, and for such other relief as the court finds to be just, meet and reasonable.

COUNT II
FEDERAL CLAIM
AGAINST MICHAEL SCHMITT
IN HIS INDIVIDUAL CAPACITY
FOR FALSE ARREST IN
RETALIATION FOR EXERCISE OF FIRST
AMENDMENT RIGHTS

184. Plaintiff incorporates all prior paragraphs.

185. Plaintiff did not stumble when Schmitt first saw him.

186. During the 17 minutes from the start of the encounter until Schmitt put Murphy in the patrol car, Murphy had stood without difficulty balancing and with no odor, and as a result there was never reasonable suspicion for a *Terry* stop.

187. *First*, Schmitt's arrest of Murphy when Schmitt drove away from the scene with Murphy in

the patrol car would chill a person of ordinary firmness from continuing to remain silent, and

188. *Second*, Murphy's exercise of right to argue with the police was the but for cause of Schmitt's arrest of Murphy,[34] and

189. *Third*, as a direct result, Murphy was damaged.[35]

190. The right to argue with the police without being subject to arrest is well established.[36]

Punitive Damages

191. The arrest of Murphy by Schmitt was malicious or recklessly indifferent to Plaintiff's constitutional rights.

192. Plaintiff is entitled to punitive damages for the purposes of (1) punishing Schmitt for engaging in misconduct and (2) deterring discouraging Schmitt

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[34] *Nieves v. Bartlett*, 587 U.S. ——, 139 S. Ct. 1715, 1722 (2019), cited favorably in *Graham v. Barnette*, 5 F.4th 872, 889 (8th Cir. 2021).

[35] 8th Cir Model Jury Instructions, 4.40, *Garcia v. City of New Hope*, 984 F.3d 655, 669 (8th Cir. 2021), *Scheffler v. Molin*, 743 F.3d 619, 621 (8th Cir. 2014).

[36] *City of Houston v. Hill*, 482 U.S. 451, 461 (1987).

and others from engaging in similar misconduct in the future.[37]

Prayer

WHEREFORE Plaintiff Mason Murphy prays for compensatory damages against Michael Schmitt in his individual capacity for Retaliation for Exercise of First Amendment Rights in a fair and reasonable amount, for punitive damages against Pedigo in his individual capacity in a fair and reasonable amount, and for costs and reasonable attorney's fees, and for such other relief as the court finds to be just, meet and reasonable.

COUNT III
FEDERAL CLAIM
AGAINST JERRY M. PEDIGO
IN HIS INDIVIDUAL CAPACITY
FOR ASSAULT IN
RETALIATION FOR EXERCISE OF FIRST AMENDMENT RIGHTS

193. Plaintiff incorporates all prior paragraphs.

194. *First*, Pedigo's assault on Murphy would chill a person of ordinary firmness from continuing to remain silent, and

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[37] 8th Cir Model Jury Instructions, 4.72.

195. *Second*, Pedigo's assault on Murphy was motivated at least in part by Murphy's exercise of his right to remain silent, and

196. *Third*, as a direct result, Murphy was damaged.[38]

197. A person who is arrested has a well-established right to remain silent.

Punitive Damages

198. The assault by Pedigo was malicious or recklessly indifferent to Plaintiff's constitutional rights.

199. Plaintiff is entitled to punitive damages for the purposes of (1) punishing Defendant Pedigo for engaging in misconduct and (2) deterring discouraging Defendant Pedigo and others from engaging in similar misconduct in the future.[39]

Prayer

WHEREFORE Plaintiff Mason Murphy prays for compensatory damages against Jerry M. Pedigo in his

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[38] 8th Cir Model Jury Instructions, 4.40, *Garcia v. City of New Hope*, 984 F.3d 655, 669 (8th Cir. 2021).

[39] 8th Cir Model Jury Instructions, 4.72.

individual capacity for Retaliation for Exercise of First Amendment Rights in a fair and reasonable amount, for punitive damages against Pedigo in his individual capacity in a fair and reasonable amount, and for costs and reasonable attorney's fees, and for such other relief as the court finds to be just, meet and reasonable.

COUNT IV
STATE LAW CLAIM
AGAINST JERRY M. PEDIGO
IN HIS INDIVIDUAL CAPACITY
ASSAULT

200. Plaintiff incorporates all prior paragraphs.

201. *First*, Defendant Pedigo told Plaintiff he was going to punch him in the face with the intent to cause plaintiff apprehension of bodily harm, and

202. *Second*, defendant thereby caused plaintiff to be in apprehension of bodily harm.[40]

Punitive Damages

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[40] MAI 23.01, *Hickey v. Welch*, 91 Mo.App. 4, 14 (1901).

203. Defendant Pedigo's conduct was outrageous because of defendant's evil motive or reckless indifference to the rights of others.[41]

Prayer

WHEREFORE Plaintiff prays the Court for judgment against Defendant Pedigo in his individual capacity under state law for compensatory and punitive damages for assault plus Plaintiff's taxable costs, and for such other relief as may be just, meet and reasonable.

COUNT V
FEDERAL CLAIM
AGAINST CAMDEN COUNTY
POLICYMAKER PARTICIPATION

204. Plaintiff incorporates all prior paragraphs.

205. *First*, Defendant Pedigo told Plaintiff he was going to punch him in the face with the intent to cause plaintiff apprehension of bodily harm, in retaliation for exercise of first amendment rights, and

206. *Second*, defendant thereby caused plaintiff to be in apprehension of bodily harm.[42]

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[41] MAI 10.01.

[42] *Stockley v. Joyce*, 963 F.3d 809, 823 (8th Cir. 2020); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986).

Appendix D

207. *Third*, as a direct result, Murphy was damaged.

Prayer

WHEREFORE Plaintiff Mason Murphy prays for compensatory damages against Camden County for Retaliation for Exercise of First Amendment Rights in a fair and reasonable amount due to policymaker participation, and for costs and reasonable attorney's fees, and for such other relief as the court finds to be just, meet and reasonable.

Respectfully submitted,
Co-Counsel for Plaintiff

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