FILED
United States Court of Appeals
Tenth Circuit

June 16, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JEREMY DEAR,

Plaintiff - Appellant,

v.

SARITA NAIR; TIM KELLER; CITY OF ALBUQUERQUE,

Defendants - Appellees.

No. 21-2124
(D.C. No. 1:21-CV-00250-KG-KK)
(D. N.M.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **BALDOCK**, and **EID**, Circuit Judges.

Jeremy Dear alleges the City of Albuquerque, New Mexico, and two of its officials, violated his First Amendment rights by responding to his records-request suit with a counterclaim for malicious abuse of process seeking compensatory and punitive damages. The district court dismissed Dear's 42 U.S.C. § 1983 suit, reasoning that the officials did not act under color of state law when they caused the city to file its counterclaim, and that a municipality cannot violate a person's First Amendment rights

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

by filing a civil counterclaim against the person. Exercising jurisdiction under 28 U.S.C. § 1291, we reverse and remand for further proceedings.

I. Background

Dear sought documents related to his termination from the Albuquerque Police Department under New Mexico's Inspection of Public Records Act (IPRA), N.M. Stat. Ann. §§ 14-2-1 to 14-2-12. Albuquerque rejected his request, asserting the documents were "exempt from inspection" as "attorney work product" "because allowing their inspection would reveal the thought process used by the Legal Department to identify them." Aplt. App. at 17. Dear then sued the city in state court, seeking to enforce the provisions of the IPRA to get the documents.

The city responded by filing a civil counterclaim for malicious abuse of process and seeking discovery from Dear. It did so "due to the number of lawsuits filed against [Albuquerque] and its employees by [Dear], and due to the nature of the [IPRA] lawsuit brought by [Dear]." Aplee. Resp. Br. at 8. The city's counterclaim sought compensatory damages, punitive damages, and costs. The state court ultimately granted summary judgment in favor of Dear on the city's counterclaim, reasoning the First Amendment's Petition Clause provided him immunity from liability for exercising his right to file suit under the IPRA.

Dear rejoined with this § 1983 action, alleging that by filing its counterclaim and seeking discovery in the state-court IPRA suit, the city engaged in a vindictive civil prosecution to suppress his suit and free speech. He named as Defendants the city itself, the city's chief administrative officer, Sarita Nair, who he alleged

"directed [the] plan to use the judicial system to deny [Dear] his First Amendment right to petition his government for redress," Aplt. App. at 10, and the city's mayor, Tim Keller, who he alleged "failed to properly train, supervise, and admonish Defendant Nair," *id.* at 13.

The district court dismissed the § 1983 case with prejudice under Federal Rule of Civil Procedure 12(b)(6). It found Dear did not, and could not in a revised complaint, (1) sufficiently allege municipal action to maintain a § 1983 action because the Defendants did not act under color of state law, or (2) allege a viable First Amendment retaliation claim because its counterclaim against Dear was civil, and not criminal.

II. Discussion

"We review de novo the district court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim." *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1158 (10th Cir. 2021) (brackets omitted), *cert. denied*, 142 S. Ct. 1208 (2022). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A. Municipal Action

"A claim pleaded under § 1983 requires (1) deprivation of a federally protected right by (2) an actor acting under color of state law." *VDARE*, 11 F.4th at 1160 (internal quotation marks omitted). "The traditional definition of acting under

color of state law requires that the defendant in a § 1983 action exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1156 (10th Cir. 2016) (internal quotation marks omitted). "However, the fact that a tort was committed by an individual employed by the state does not, *ipso facto*, warrant attributing all of the employee's actions to the state." *Id.* (internal quotation marks omitted). "Rather, before conduct may be fairly attributed to the state because it constitutes action under color of state law, there must be a real nexus between the employee's use or misuse of their authority as a public employee, and the violation allegedly committed by the defendant." *Id.* (internal quotation marks omitted).

The district court found that Dear did not, and could not if he amended his complaint, allege that any Defendant acted under color of state law. Dear argues the district court erred in making this finding, and we agree with Dear.

The district court acknowledged Dear alleged "that Defendant Nair, supervised by Defendant Keller, authorized or directed attorneys for the City of Albuquerque to file a counterclaim and pursue discovery against Mr. Dear in an underlying state court case." Aplt. App. at 143. Taking these allegations at face value, Nair acted under color of state law by using his authority as the city's chief administrative officer to direct the city's attorney in the litigation. *See Beedle v. Wilson*, 422 F.3d 1059, 1068 (10th Cir. 2005) (holding that an allegation that a municipal hospital's executives caused the hospital to file a civil action against an individual was "sufficient to state a claim against the [h]ospital and its policy makers for the

infringement of [the individual's] First Amendment rights"). And Keller acted under color of state law by exercising his responsibilities as the city's Mayor to supervise Nair. *See West v. Atkins*, 487 U.S. 42, 50 (1988) ("[G]enerally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law."). We therefore conclude the complaint sufficiently alleged the individual Defendants acted under color of law because there is a "real nexus" between their use of "authority as . . . public employee[s], and the violation[s] alleged[]." *Schaffer*, 814 F.3d at 1156 (internal quotation marks omitted). With respect to Defendant Albuquerque, it necessarily acted under color of state law when it filed its counterclaim because it can only act via state law. *See Purcell v. City of Carlsbad*, 126 F.2d 748, 751 (10th Cir. 1942) ("[M]unicipalities are creatures of the laws of the state of which they are a part, and their powers are derived *solely* therefrom." (emphasis added)).

The district court relied on an unpublished Tenth Circuit case, *O'Connor v. Williams*, 640 F. App'x 747 (10th Cir. 2016), to reach a contrary conclusion. In *O'Connor*, the court addressed a § 1983 claim brought against a Colorado state representative for her action in seeking a protective order against a belligerent constituent. In that context, the court framed the "under color of state law" inquiry by reference to "whether [the state representative] used her authority—authority made possible only because of her elected office—to do something an ordinary citizen can't do." *Id.* at 751. And the court reasoned that the state representative did

not act under color of state law because in seeking a protective order, she was taking an action any ordinary citizen could take. *Id.*

The district court read *O'Connor* as holding that § 1983 liability cannot attach to any action if an ordinary citizen could also take that action. It therefore reasoned that because "[t]he ability to bring a counterclaim for malicious abuse of process is not 'something an ordinary citizen can't do[,]' . . . Dear failed to allege that any defendant acted 'under color of law.'" Aplt. App. at 144 (quoting *O'Connor*, 640 F. App'x at 751). And it further reasoned that "amending the complaint on this point would be futile because no set of facts will convert a counterclaim for malicious abuse of process into something an ordinary citizen cannot do." *Id.*

The district court's reasoning fails to account for the fact that Dear's complaint alleges Nair caused the counterclaim to be filed *by the city*. As Dear points out, "an ordinary citizen cannot initiate (even through a counterclaim) a civil prosecution against another citizen *on behalf of the government*." Aplt. Opening Br. at 9–10 (emphasis added).

Also, the district court's suggestion that municipal employees only act under color of law if they do something an ordinary citizen cannot do incorrectly states the law and misreads the unpublished *O'Connor* case. The test, as quoted above, is whether there is "a real nexus between the employee's use or misuse of their authority as a public employee, and the violation allegedly committed by the defendant." *Schaffer*, 814 F.3d at 1156 (internal quotation marks omitted). *O'Connor* applied this nexus test, asking whether the plaintiff had "establish[ed] a

real connection between [the] defendant's actionable conduct and her badge of state authority." 640 F. App'x at 751. Read in context, *O'Connor*'s fact-specific inquiry into whether the state representative had done something an ordinary citizen could not do was an application of the nexus test to the facts of that case, not a modification of the nexus test. And even if *O'Connor* did purport to modify the nexus test, it "is not binding precedent." *Id.* at 748 n.*; *see also* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

B. Constitutional Violation

The First Amendment's "Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011); *see also DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1289 (11th Cir. 2019) ("[A] citizen's public records requests and lawsuits against the government can clearly constitute protected First Amendment activity."). The "right to petition [is] one of the most precious of the liberties safeguarded by the Bill of Rights." *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (internal quotation marks omitted). "[T]he right is implied by the very idea of a government, republican in form." *Id.* at 524–25 (brackets and internal quotation marks omitted).

"Immunity flows from this right, protecting those who seek redress through the courts from liability for petitioning activities." *CSMN Invs., LLC v. Cordillera Metro. Dist.*, 956 F.3d 1276, 1282 (10th Cir. 2020). And "[b]ecause the First Amendment applies to state and local governments through the Fourteenth

Amendment, the petition clause applies fully to municipal activities." *Id.* at 1282 n.8 (internal quotation marks omitted).

To state a First Amendment retaliation claim, a plaintiff must allege:

> (1) that the plaintiff was engaged in constitutionally protected activity; (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct.

Shero v. City of Grove, 510 F.3d 1196, 1203 (10th Cir. 2007).

The district court found that Dear's complaint did not, and could not, allege a First Amendment retaliation claim because the city's counterclaim against Dear in the state court action was civil, and not criminal. It reasoned:

> In his thorough treatment of the standard for alleging a First Amendment claim based on vindictive prosecution, Mr. Dear does not address or acknowledge that his cited cases uniformly deal with allegedly vindictive *criminal* prosecutions. . . .
>
> This case involves neither criminal complaints nor a criminal prosecution. It does not even involve a civil enforcement action that could only be brought by a government actor. Instead, this case involves a counterclaim for a common law tort—a matter frequently brought by all manner of civil defendants in all manner of standard civil litigation.
>
> As such, Mr. Dear cannot show that his First Amendment rights have been violated or impinged by the filing of the counterclaim.

Aplt. App. at 145.

Dear argues the district court's reasoning "ignored clear precedent from this Circuit that vindictive prosecution taken in retaliation for First Amendment exercise is not limited to *criminal* prosecutions." Aplt. Opening Br. at 5. We agree.

In opposing the city's motion to dismiss, Dear cited *Beedle*. Aplt. App. at 110. *Beedle*, in turn, discussed two cases that involved criminal prosecutions, *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir.1996), and *Gehl Group v. Koby*, 63 F.3d 1528, 1534 (10th Cir. 1995), *abrogated on other grounds by Currier v. Doran*, 242 F.3d 905, 916 (10th Cir. 2001), and observed "[t]hese cases make clear that a governmental lawsuit brought with the intent to retaliate against a citizen for the exercise of his First Amendment rights is itself a violation of the First Amendment and provides grounds for a § 1983 suit." 422 F.3d at 1066. And *Beedle* held that a retaliatory *civil* libel suit filed by a municipality could violate a person's First Amendment rights. *Id.* at 1067 ("We conclude, therefore, that [the plaintiff] has sufficiently pled, for the purposes of surviving a 12(b)(6) motion, that the Hospital, as a governmental entity, violated his First Amendment rights by filing the malicious libel action against him.").[1]

The district court erred by finding Dear "cannot show that his First Amendment rights have been violated or impinged by the filing of the counterclaim,"

[1] Other circuits have similarly held or suggested that civil actions filed as retaliation for a plaintiff's exercise of First Amendment rights can support § 1983 liability. *See, e.g.*, *DeMartini*, 942 F.3d at 1300–09 (suggesting retaliatory suit filed by a town under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68, could result in § 1983 liability); *Greenwich Citizens Comm., Inc. v. Cntys. of Warren & Washington Indus. Dev. Agency*, 77 F.3d 26, 27–29 (2d Cir. 1996) (remanding for further fact-finding on municipalities' intent where jury found municipalities violated the First Amendment by bringing retaliatory counterclaims "for prima facie tort, interference with contract, and frivolous litigation"); *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1428 (8th Cir. 1986) (holding retaliatory counterclaim filed by municipality to condemn property supported § 1983 liability).

just because the counterclaim was "for a common law tort" that could be asserted by an ordinary citizen, Aplt. App. at 145. We held in *Beedle* that a retaliatory civil tort claim could give rise to § 1983 liability. 422 F.3d at 1067. And tort claims for malicious abuse of process fall within *Beedle*'s ambit.

We further see no reason government officials should be able to sidestep *Beedle*'s holding by bringing tort claims as counterclaims instead of bringing standalone actions. It will often be the case, as it was here, that when a citizen petitions the government for redress, the government has the procedural option to bring a counterclaim. If exercising this procedural option inoculated officials from liability for their actions, they might "feel free to wield the powers of their office as weapons against those who question their decisions." *Van Deelen v. Johnson*, 497 F.3d 1151, 1155 (10th Cir. 2007). This, in turn, would "do damage not merely to the citizen in their sights but also to the First Amendment liberties and the promise of equal treatment essential to the continuity of our democratic enterprise." *Id.*

In reaching this conclusion, we acknowledge this court's holding in *Shero* that government suits seeking declaratory judgments do not give rise to First Amendment retaliation claims. 510 F.3d at 1204. *Shero* reasoned that "[t]he nature and purpose of a declaratory judgment is to declare rights, not to attack the opposing party," and found it significant that in that case, "the state court was prohibited from awarding damages against [the §1983 plaintiff]." *Id.* (internal quotation marks omitted). But a counterclaim like the one brought by the city here that seeks compensatory and punitive damages is different. Being exposed to claims for monetary damages would

chill a person of ordinary firmness from exercising their right to petition the government. *See Beedle*, 422 F.3d at 1067 (holding complaint stated § 1983 claim for First Amendment retaliation where it alleged a municipal entity brought a civil action "with the purpose and effect of chilling [the § 1983 plaintiff's] speech and violating his First Amendment rights").

III. Conclusion

We reverse the district court's dismissal of the complaint and remand for further proceedings.

Entered for the Court

Allison H. Eid
Circuit Judge