‘I Was Just Following Orders’ – Ohio’s Sixth Circuit Applies Fourth Amendment’s Good-Faith Exception to First Amendment Retaliation Claims

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In describing a U.S. Supreme Court holding as “mixed precedent,” the Sixth Circuit recently found qualified immunity in a First Amendment retaliation claim, *Hall v. Navarre*.[1] In 2019, the U.S. Supreme Court set out the standard for First Amendment retaliation in *Nieves v. Bartlett*: If there was probable cause for an arrest, then the subjective intent (the retaliatory animus) of the officer is irrelevant, unless the plaintiff can prove that the arrest was atypical in similar circumstances.[2] With much criticism, the *Nieves* holding overturned years of precedent requiring plaintiffs to present evidence on the retaliatory animus of the officer. In dissent, Justice Sotomayor criticized the majority opinion, saying it was unfairly “hybridizing two different constitutional protections” by applying the Fourth Amendment’s objective reasonableness standard to First Amendment retaliation claims. Citing prior Supreme Court precedent, Justice Sotomayor wrote:

> “The (*Whren*) Court explained that while “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,” that does not make evidence of an officer’s “actual motivations” any less relevant to claims of “selective enforcement” under the Equal Protection Clause. First Amendment retaliation claims and equal protection claims are indistinguishable for these purposes; both inherently require inquiry into “an official’s motive.”[3]

Although Justice Sotomayor was the only full dissent, there were three concurrences that also questioned the objective standard of review. (See opinions of J. Thomas, J. Gorsuch, and J. Ginsburg.)

Unlike *Nieves*, the plaintiff in *Hall v. Navarre* was not arrested by an officer that had personally witnessed the circumstances that led to Hall’s arrest – the distinction is critical to the Sixth Circuit analysis. In 2020, Mr. Hall attended several “Black Lives Matter” protests. In one such protest he scuffled with Officer Navarre – neither party was injured and no citations were issued. One month later, at another protest, Mr. Hall was in the street when officers engaged to break up the protest. Officer Navarre tackled Mr. Hall, causing him injury, restrained him in zip ties and sat him upon the curb for processing. Mr. Hall was transported to the hospital before he was issued a citation. Officer Barr had arrived on the scene earlier and had witnessed Mr. Hall detained on the curb. A short time later, Officer Barr was ordered by a supervisor (not Officer Navarre) to write citations for the protesters. Despite Mr. Hall’s absence, and Officer Barr not witnessing the alleged conduct, Officer Barr wrote Mr. Hall several citations. There was no evidence of how Officer Barr received Mr. Hall’s information to issue the citation.

Mr. Hall’s charges were dismissed and he brought two civil suits, including a claim for First Amendment retaliation against Officer Barr. The Sixth Circuit granted qualified immunity finding that the allegations failed the “clearly established” compo-

nent of the analysis, despite the holding in *Nieves*.[4] In finding that there was no "clearly established right" of a person to be free from arrest by an officer following another's orders, the Sixth Circuit held there was "no binding precedent interpreting either (the First or Fourth Amendment, which) clearly required (Officer) Barr to disregard his superior's order until he could independently verify its validity."[5] In coming to this conclusion, the Sixth Circuit cited to the varying concurring and dissenting opinions of *Nieves*.

The Sixth Circuit held that the fact that the officer was ordered to write the citation was critical to the determination of qualified immunity. The court referred to "two poles" that anchor the legal framework for qualified immunity in those instances in which officers defend themselves by referring to an order from a supervisor:

> "At one end is the understanding that an officer cannot benefit from qualified immunity's shield simply by asserting that he was 'following orders.' At the other is the notion that qualified immunity may be warranted when reasonable officers could conclude that they have probable cause for their conduct based on plausible instructions from a supervisor when viewed objectively in light of their own knowledge of the surrounding facts and circumstances."

This is referred to as the "good-faith exception" that has traditionally only been applied in Fourth Amendment claims.[6] Without relying on *Nieves*, for the first time and under a partial dissent, the Sixth Circuit applied the Fourth Amendment's "good-faith exception" to First Amendment retaliation claims, which by their very nature imply a subjective analysis. Yet, the decision seems to follow the general framework of *Nieves* in holding probable cause as the nearly decisive evidence in a civil rights claim.

The Sixth Circuit's decision is impactful because it implies no further analysis was needed as to whether there actually was probable cause or whether the citation was retaliatory, despite the exception in *Nieves* which questions an officer's customary discretion in making an arrest. Historically, in instances of an alleged chain of animus, the court would need to consider whether the official that pushed for a citation, in this case Officer Navarre who had a history of scuffling with Mr. Hall, had an animus that was part of a causal chain that led to the arrest or prosecution.[7] However, in Hall, the order, without any first-hand undermining observations by Officer Barr, was sufficient for this court to grant qualified immunity from the First Amendment retaliation claim.

References

[1] *Hall v. Navarre*, 118 F.4th 749, 763 (6th Cir.2024).
[2] *Nieves v. Bartlett*, 587 U.S. 391 (2019).
[3] *Nieves*, 587 U.S. at 426 (dissent, J. Sotomayor) citing *Whren v. U.S.*, 517 U.S. 806 (1996) and *Crawford-El v. Britton*, 523 U.S. 574 (1998).
[4] *Hall*, 118 F. 4th at 764 (6th Cir.2024)
[5] Id.
[6] *Messerschmidt v. Millender*, 565 U.S. 535 (2012)
[7] *Hartman v. Moore*, 547 U.S. 250, 262 (2006).

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