



SHERIFFS MAJOR DENIED IMMUNITY FOR VIOLATION OF FIRST AMENDMENT

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On November 28, 2016, the Eleventh Circuit Court of Appeals of decided *Bailey v. Wheeler*, in which serves as an excellent review of the law as it pertains to retaliation under the First Amendment. The relevant facts of *Bailey*, taken directly from the case, are as follows:

Bailey had more than seventeen years of law-enforcement experience when he joined the City of Douglasville Police Department (“Police Department”) as a police officer in March 2010. So it is not surprising that between May 2010 and June 2012, Bailey received above-average employee performance appraisals from his supervisors.

But Bailey’s time employed with the Police Department was far from perfect. On April 26, 2011, Bailey filed a written complaint with his chief, reporting that Police Department officers and Douglas County Sheriff’s Office (“Sheriff’s Office”) deputies were racially profiling minority citizens and committing other constitutional violations. Bailey also complained that law-enforcement officers made racially offensive comments and jokes about minorities, describing black males as “black as shoe polish wearing all black” and remarking that the City of Douglasville’s (“City”) logo was a “lynching tree.” Finally, Bailey expressed concern that he would lose his job for “making the complaints and speaking out about racial profiling and other violations.”

Although repercussions of Bailey’s complaint did not follow immediately, in the fall of 2012, Bailey’s supervisors ordered Bailey to rewrite incident reports that he had previously filed, and they conducted an investigation of Bailey. When Bailey reminded his supervisors that rewriting incident reports violated Police Department policy, he was initially placed on administrative leave with pay, then suspended for three days without pay, and then charged on November 8, 2012, with conduct unbecoming an officer. Eight days later, though Bailey had no prior write-ups or reprimands on his record, Bailey was terminated from his position with the Police Department.

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Two days after that, on November 18, 2012, Bailey appealed his termination to the City. In his appeal, Bailey wrote that he believed that he was fired for speaking out against profiling, other unconstitutional conduct, and racially offensive remarks made by that Police Department officers and Sheriff's Office deputies.

The City held a hearing on Bailey's appeal on February 8, 2013. That very night, two deputies in a Sheriff's Office vehicle followed Bailey as he drove his personal car from Douglasville into the City of Atlanta. When Bailey entered his intended destination, the two deputies followed him in and stared him down.

Things did not improve for Bailey. The next day, February 9, 2013, Wheeler issued the BOLO on Bailey, displaying Bailey's photograph, calling him a "loose cannon," and warning law-enforcement officers to "[c]onsider this man a danger to any [law-enforcement officer] in Douglas County and act accordingly." And for the second day in a row, law enforcement—this time vehicles from both the Sheriff's Office and the Police Department—followed Bailey as he drove his personal car.

About three weeks went by, and Bailey was permitted to return to work at the Police Department. At that time, the Police Department's chief advised Bailey that Bailey could cancel the BOLO against him by calling the Sheriff's Office.ⁱⁱ

Bailey filed suit in federal court and alleged that Wheeler violated his First Amendment rights under the U.S. Constitution and defamed him under Georgia law. The district court denied qualified immunity on the First Amendment claim and denied official immunity on the state law claim. Wheeler appealed the denial of immunity to the Eleventh Circuit Court of Appeals.

On appeal, the Eleventh Circuit first set out to examine whether the district court properly denied qualified immunity for Wheeler on retaliation claim under the First Amendment. As a reminder, Major Wheeler, with the sheriff's department, is the individual who issued the "BOLO" for Bailey, calling him a "loose cannon," a "danger" to law enforcement officers, and instructing law enforcement officers to "act accordingly."

In examining the First Amendment issue, the court first stated

To state a claim for retaliation under the First Amendment, a plaintiff must demonstrate that (1) he engaged in protected speech; (2) the defendant's conduct adversely affected the protected speech; and (3) a causal connection exists between the speech and the defendant's retaliatory actions. See [Smith v. Mosley](#), 532 F.3d 1270, 1276 (11th Cir. 2008); [Bennett v. Hendrix](#), 423 F.3d 1247, 1250 (11th Cir. 2005).ⁱⁱⁱ [emphasis added]

Wheeler does not deny that Bailey engaged in protected speech, the first element that he must prove for his retaliation claim under the First Amendment. Rather, he argued that Bailey cannot prove the second element, particularly that Wheeler's conduct adversely affected Bailey's protected speech. The court noted that the standard in this element is whether the defendant's (Wheeler) conduct would "deter a person of ordinary firmness" from engaging in the protected speech.^{iv}

When the court applied the facts of the case to objective standard of whether Wheeler's conduct would have deterred a person of ordinary firmness from engaging in protected speech, the court held in the affirmative that Wheeler conduct would have such an effect. The court noted that a "BOLO" of a "loose cannon," a "danger" and that instructs law enforcement officers to "act accordingly" while displaying Bailey's photograph implies to law enforcement officers that he is mentally unstable. This may cause an officer to fear for his or her life if they perceive even an innocent action, such as reaching for a wallet, to be a threat. The court stated

We think that this situation, which potentially seriously endangered Bailey's life, easily would deter a person of ordinary firmness from exercising his First Amendment rights.^v

As such, the court held that Bailey met the second element of the retaliation claim.

The court then examined the third element of the retaliation claim, particularly whether there is a "causal connection" between the protected speech and the retaliatory conduct. Wheeler argued that there is no connection because Bailey did not file the complaint of profiling and racial bias with the sheriff's department; rather, he filed that complaint at his own department (City of Douglasville). It is important to note that at this stage of the case, the court of appeals is required to view the facts in a light most favorable to Bailey (the plaintiff) when there are factual disputes. Then, a jury would ultimately decide credibility and what version of events to credit.

As to this third element, the court noted that Bailey, in the written complaint at his department, complained of racial profiling and other constitutional violations committed by both his department and the sheriff's department. Further, when Bailey left his termination appeal hearing, he was followed by a sheriff's car and a police car. This, combined with the "BOLO" issued by Major Wheeler from the sheriff's department, provided sufficient evidence of a causal connection to deny immunity for Wheeler on this issue. The court stated

Viewed in the light most favorable to Bailey, these allegations allow for the reasonable inferences that the Police Department communicated with the Sheriff's Department about Bailey's complaints prior to Wheeler's issuance of the BOLO, that the Sheriff's Office and Wheeler knew about the termination-appeal hearing, and that Wheeler issued the BOLO at least in part in retaliation for Bailey's complaints. As it pertains to the communications among law enforcement about Bailey's complaints, the timing of the Sheriff's Office's employees' following of Bailey and the issuance of the BOLO, the use of the term "loose cannon" in the BOLO, and the fact that Bailey's chief instructed him that Bailey could have the BOLO cancelled by calling the Sheriff's Office all support this reasonable inference. Similarly, all of these allegations other than those relating to Bailey's having been followed can reasonably be read to support the inference that Wheeler knew about the termination-appeal hearing and that he issued the BOLO in retaliation for Bailey's reports that local law-enforcement officers had engaged in civil-rights abuses of minority citizens. For these reasons, we conclude that Bailey sufficiently alleged that Wheeler violated Bailey's First Amendment rights when he issued the BOLO.^{vi}

The court also held that Bailey's right to be free from such retaliation for First Amendment protected speech was clearly established such that a reasonable law enforcement officer should have known that conduct violated the constitution.

As such, the court of appeals affirmed the denial of qualified immunity for Wheeler on the First Amendment retaliation claim.

The court then examined whether the district court erred in denying official immunity for Wheeler on the state law defamation claim. The court described the official immunity standard in Georgia as follows:

Under this [official] immunity, a state official may not be held liable for injuries caused through his performance of discretionary functions unless he acts “with actual malice or with actual intent to cause injury.” [Ga. Const. art. I, § 2, para. IX\(d\)](#); [Brown v. Penland Constr. Co, Inc., 281 Ga. 625, 641 S.E.2d 522, 523 \(2007\)](#). Here, Bailey contends that Wheeler acted with actual malice in issuing the BOLO, and Wheeler responds that the complaint does not allege sufficient facts to reasonably infer actual malice.

In the context of Georgia’s official immunity doctrine, “ ‘actual malice’ requires a deliberate intention to do wrong.” [Merrow v. Hawkins, 266 Ga. 390, 467 S.E.2d 336, 337 \(1996\)](#). It “does not include ‘implied malice,’ *i.e.*, the reckless disregard for the rights or safety of others.” [Murphy v. Bajjani, 282 Ga. 197, 647 S.E.2d 54, 60 \(2007\)](#). Instead, actual malice requires more than “harboring bad feelings” or “ill will” about another; “rather, ill will must also be combined with the intent to do something wrongful or illegal.” [Adams v. Hazelwood, 271 Ga. 414, 520 S.E.2d 896, 898 \(1999\)](#). To overcome official immunity, a plaintiff’s allegations must demonstrate that the defendant deliberately intended “to cause the harm suffered by the plaintiff []”; it is not enough that the defendant merely intended to do the act purportedly resulting in the claimed injury. [Murphy, 647 S.E.2d at 60](#); see [West v. Davis, 767 F.3d 1063, 1073 \(11th Cir. 2014\)](#) (quoting [Kidd v. Coates, 271 Ga. 33, 518 S.E.2d 124, 125 \(1999\)](#)); cf. [Reed v. DeKalb Cty., 264 Ga.App. 83, 589 S.E.2d 584, 588 \(2003\)](#).^{vii} [emphasis added]

The court then stated that they had already held that Bailey’s allegations were sufficient to support a reasonable inference that Wheeler retaliated against Bailey for exercising his First Amendment rights. Similarly, if the allegations establish retaliation, they are also sufficient to establish a reasonable inference that Wheeler acted with “actual malice,” or a deliberate intent to do wrong, in issuing the “BOLO.”

Therefore, the court of appeals affirmed the denial of official immunity on the state law defamation claim.

ⁱ No. 15-11627 (11th Cir. Decided November 28, 2016)

ⁱⁱ Id. at 1-2

ⁱⁱⁱ Id. at 3

^{iv} Id. at 4

^v Id. at 5

^{vi} Id. at 6

^{vii} Id. at 8