

## CLAIMANT ARRESTED WITH PROBABLE CAUSE CAN NEVERTHELESS SUE PUBLIC ENTITY FOR FIRST AMENDMENT RETALIATION

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The United States Supreme Court recently held that under the circumstances of this case, the plaintiff did not have to establish a lack of probable cause for his arrest in order to claim that a public entity had him arrested in retaliation for exercising his First Amendment rights.

Homeowner owned a floating home in a marina. He sued the city alleging it had violated the open meeting laws when it voted to use its eminent domain power to seize waterfront homes for private development. The city council held a closed-door session, in part to discuss Plaintiff's suit. Plaintiff claimed that during this meeting, councilmembers devised an official plan to intimidate him, and that many of his subsequent disputes with city officials and employees were in furtherance of the city's retaliation plan. Five months after the closed-door meeting, the council held a public meeting. During the public comment session, Plaintiff began to speak about the arrests of officials from other jurisdictions. When he refused a councilmember's request to stop making his remarks, the councilmember told the police officer in attendance to "carry him out." The officer handcuffed Plaintiff and ushered him out of the meeting.

Plaintiff claimed that his arrest was in retaliation for his open meeting law suit and his prior public criticisms of city officials. The State's attorney determined that there was probable cause for his arrest, but decided to dismiss the charges.

Plaintiff again sued the city, alleging that a number of the city's actions against him – including his arrest – were retaliatory. The district court instructed the jury that Plaintiff, to prevail on his claim of retaliatory arrest at the city council meeting, had to prove (among other things) that the officer lacked probable cause to make the arrest. A jury returned a verdict for the city and the 11<sup>th</sup> Circuit affirmed.

The United States Supreme Court vacated the 11<sup>th</sup> Circuit decision, and held that, under the circumstances of this case (not a typical retaliatory arrest claim), Plaintiff did not need to prove that he was arrested without probable cause. Plaintiff's allegation that the city had an official policy or practice motivated by retaliation separated this case from the typical retaliatory arrest claim. Typical retaliatory arrest claims involve ad hoc, on-the-spot decisions by individual officers, whom a citizen can seek to be disciplined or removed from service. An official retaliatory policy can be long term and pervasive, however, and there may be little practical recourse when the government itself orchestrates the retaliation. Accordingly, on these facts the Court held that probable cause does not defeat the specific retaliation claim alleged here. The Court remanded the case back to the 11<sup>th</sup> Circuit for a determination on whether "the City has proved that it would have arrested Plaintiff regardless of any retaliatory animus."

Justice Thomas dissented, concluding that plaintiffs should have to plead and prove a lack of probable cause to bring any § 1983 claim. In Justice Thomas' opinion, there is no justification for deviating from the historical practice simply because the plaintiff frames his claim in terms of the First Amendment. Under traditional arrest-based torts, police officers need the safe harbor of probable cause in the First Amendment context to be able to do their jobs effectively.

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