FIRST AMENDMENT RETALIATION LEGAL ANALSYIS

Mr. White has a cause of action based upon excessive detention in retaliation for expressive speech protected by the First Amendment. This cause of action has been recognized in this District, Allen v. City of New York , (S.D.N.Y. 1-3-2007) (Hon. Mag. G. Gorenstein). According to this recent case law, the excessive detention claim would be viewed by the same three factors as a First Amendment Retaliation arrest claim; (1) the plaintiff has an interest protected by the First Amendment; (2) the defendants' actions were motivated or substantially caused by the plaintiff's exercise of that right; and (3) defendants' actions effectively chilled the exercise of the plaintiff's First Amendment right. Curley v. Village of Suffern, 268 F.3d 65, 73 (2d Cir. 2001) (*citing* Connell v. Signoracci, 153 F.3d 74, 79 (2d Cir. 1998)).

Other courts have upheld a First Amendment retaliation claim in matters that alleged conduct other than a simple false arrest. In Saleh v. City of New York, 06 Civ. 1007 (SHS), Judge Stein ruled that a cause of action for First Amendment retaliation did lie wherein the police officer contacted the Immigration and Customs Enforcement ("ICE") about an individual who was in the U.S. illegally. The Court stated that while

> [I]t may be sound practice for NYPD officers to alert ICE when they encounter unlawful aliens under normal circumstances, [a First Amendment Retaliation claim will exist when the officer notifies ICE] for retaliatory purposes [as this conduct will] run afoul of the Constitution. Saleh, at slip op. 17.

Moreover, Judge Stein lambasted the police conduct as violative of the Plaintiff's Constitutional rights irrespective of whether there may have been a legitimate rationale for the officer to contact ICE;

> With respect to such retaliation, the law is clear: '[t]he rights to complain to public officials and to seek administrative and judicial relief are protected by the First Amendment.' Gagliardi v. Village of Pawling, 18 F.3d 188, 194 (2d Cir. 1994). When officials take adverse action against those who exercise this right, they can be held liable for a constitutional violation. Id. at 194-95. A defendant's ability to justify the purported adverse action on non-retaliatory grounds is irrelevant because `[a]n act in retaliation for the exercise of a constitutional right is actionable under section 1983 even if the act, when taken for different reasons, would have been proper.' Franco v. Kelly, 854 F.2d 584, 590 (2d Cir. 1988) (*quoting* Howland v. Kilquist, 833 F.2d 639, 644 (7th Cir. 1987)).

The Second Circuit has applied the same pragmatic approach to First Amendment Retaliation claims of excessive detention where an officer while undertaking an arrest was threatened by the criminal defendant with a false arrest lawsuit. Kerman v. City of New York, et al, 261 F.3d 229 (2nd Cir. 2001). In that case, the criminal defendant's arrest was based upon an anonymous call that there was an emotionally/mentally-disturbed individual who had stopped taken medication. After the NYPD had arrived on the scene, they began to effectuate the arrest of allegedly emotionally disturbed individual. This individual objected to the arrest and threatened to sue the arresting officer. The allegation made by the criminal defendant as a Plaintiff in his civil lawsuit was that after making this threat to sue the officer, the Officer retaliated by having the criminal defendant involuntarily committed to Bellevue for observation. While the District Court dismissed the entire civil matter, the Second Circuit reversed finding that the Plaintiff had alleged a valid retaliation claim.

The Second Circuit examined the three-prong test of First Amendment Retaliation in the context of a forced hospitalization;

> Before plaintiff can survive summary judgment on his First Amendment retaliation claim, he must show that (i) he has an interest protected by the First Amendment, (ii) the defendants' actions were motivated by or substantially caused by the plaintiff's exercise of that right and (iii) the defendants' actions chilled the exercise of those rights. Connell v. Signoracci, 153 F.3d 74, 79 (2d Cir. 1998).
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> Kerman v. City of New York, et al, 261 F.3d 229, 241-42 (2nd Cir. 2001).

In finding in favor of Mr. Kerman, the criminal defendant, the Second Circuit initially examined the first and third prongs of the test:

> Kerman's right to criticize the police without reprisal clearly satisfies the **first prong** of this test. "[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." City of Houston v. Hill, 482 U.S. 451, 461, 107 S.Ct. 2502, 96 L.Ed.2d 398. Speech directed at police officers will be protected unless it is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." Posr v. Court Officer Shield No. 207, 180 F.3d 409, 415 (2d Cir. 1999) (internal quotation marks and citations omitted). Also, the **third prong** of the Signoracci test is clearly met: an involuntary overnight trip to Bellevue has an obvious chilling effect.
> Id. at 242 (emphasis added).

Similarly, a comparable review would find that Mr. White has satisfied the first and third prong of the analysis. Mr. White has the right to question the efficiency of the police and criminal procedures and charges being brought against him without fear of reprisal. Mr. White's statement that both he and the officer knew that the Judge would dismiss the summons is not *'likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.'* Of course, an overnight trip through the New York County penal system has as obvious a chilling effect as an involuntary trip to Bellevue. Moreover, due to this overnight arrest, Mr. White stopped working as a pedicab operator and moved out of New York City and out of New York State. This is clear evidence of the chilling effect this arrest had on Mr. White.

The subjective aspect of the 2nd prong required more of a specific analysis from the Second Circuit Court before finding in favor of the criminal defendant.

> Kerman does not rely on claims of generalized malice but points to direct evidence of Crossan's actual mental state; i.e., Crossan's comment that he would teach Kerman a lesson and give him something to sue for. Resolving all factual disputes in Kerman's favor, as we must when reviewing a grant of summary judgment, we find that Kerman has adequately alleged a retaliatory motive.
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> Id. at 242.

This same subjective evidence is seen distinctly, and twice, in the subject case. Like the comment made by the arresting officer in the Kerman matter, Mr. White's arresting officer responded specifically to his First Amendment statement indicating the actual mental state of the arresting officer. His statement in response to Mr. White reveals retaliatory animus of the officer;

"If you want to see a Judge so badly, you will see one now."

Secondly, since the officer had previously handed Mr. White a pink summons, the officer had at that moment indicated a conclusion had been reached regarding Mr. White's arrest. This indication included that the arresting officer had concluded whatever arrest analysis deemed appropriate, utilized both subjective and objective factors and determined the appropriate response to the situation to be the issuance of a pink summons and sending Mr. White on his way. Only when Mr. White added in one additional factor, his exercise of his First Amendment expression, did the officer change the result. The very existence of the pink summons is evidentiary proof that the arresting officer had made up his mind about the immediate penalty to be faced by Mr. White and punished Mr. White with excessive detention in retaliation for Mr. White making an expression protected by the First Amendment.