UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOHNNY L. DUNCAN	NO. 08-4091
VERSUS	SECTION: I
CITY OF AMITE, ET AL	MAGISTRATE: 3
	JURY TRIAL DEMANDED

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

MAY IT PLEASE THE COURT:

A. STATEMENT OF FACTS

Plaintiff herein is Johnny L. Duncan, a American citizen and a resident of the city of Amite, parish of Tangipahoa. (*See* Complaint, ¶ 5). The Defendants herein are, Reginald Goldsby, mayor, the city of Amite, city council members Walter Daniels, Jonathan Foster, Mark Vining, Charles Christmas, Buddy Till, the Amite City Police Department, Jerry Trabona, chief of police, Mike Moore, police supervisor, police officer K. Cefalu, and police officer D. McDonald. (¶¶ 6, 7, 8, 9, 10, 11, 12 and 13).

On August 5, 2007, around 8:15 a.m., Plaintiff was exiting a Burger King fast food establishment located in Amite, Louisiana with a Caucasian female friend, Carol Miller, when he was confronted by defendant police officers, alleging that someone complained about a sign observed in a blue pick-up truck two days earlier, and that said sign was now on Plaintiff's vehicle, which was parked on the Burger King parking lot. The person allegedly found the sign to be offensive. (¶¶ 16 and 17).

Plaintiff was asked by defendant Cefalu if he were the owner of the 2003 burgundy Pontiac Bonneville parked on the Burger King lot, bearing the business sign: **You Might Be A Nigger.** Plaintiff said that he was the owner of the vehicle, at which time defendant Cefalu stated that a complaint had been received about that very sign which was then affixed to a blue truck, which was parked at the Guaranty Bank. The complainant found the signed bearing those words to be offensive. (¶¶ 28, 29 and 30).

Plaintiff took issue with the alleged complaint because there were only four (4) such signs – two (2) remained on his car at all times, and the other two (2) were kept in his home, on his sofa. When Plaintiff inquired as to the identity of the complainant, it was not given to him. (¶¶ 31 and 32). Defendant Cefalu proceeded to tell Plaintiff that it was against the law for him to display those signs in his car while on a public road. Since his car was parked on the Burger King parking lot, Plaintiff denied being on a public road. Also, he advised defendant officers that the signs were advertisement for a book he was selling. Defendant Cefalu then proceeded to tell Plaintiff that "[t]he law is the law, and if you take that car on the public road, I will give you a ticket." (¶¶ 34, 35 and 36)

Plaintiff got into his vehicle and exited the Burger King parking lot, driving east onto Louisiana Hwy. 16, heading home. Defendants Cefalu and McDonald followed Plaintiff in their vehicle and, after a short distance, signaled for him to stop. Plaintiff did as ordered, and he was approached by Defendants Cefalu and McDonald, who had their citation book in their hands. Plaintiff requested that Defendant officers contact the police chief, Defendant Jerry Trabona, but was advised that he was fully aware of the situation. (¶¶ 39, 40, 41, 42, 43 and 44).

After Plaintiff had been detained by Defendants Cefalu and McDonald for approximately fifteen (15) minutes, Defendant Mike Moore, department supervisor, arrived. He informed Plaintiff that by displaying the sign on his vehicle, he was in violation of the law, because the sign contained obscene words. He informed Plaintiff that the defendant officers were carrying out their responsibilities in stopping him. He then departed the scene, leaving Plaintiff with Defendant officers Cefalu and McDonald. Upon his departure Defendants Cefalu and McDonald started removing the sign from Plaintiff's vehicle. When Plaintiff demanded a cessation of their actions, he was threatened. He was informed that he had a choice – remove the sign, or the vehicle would be towed and impounded. He informed Defendant officers that unless given a direct order to remove the signs, he would not do so. An order was given and Plaintiff reluctantly removed the sign. (¶¶ 45, 49, 50, 51, 52, 53 and 54). Plaintiff was issued a citation by Defendant Cefalu, citing him for violating La. R.S. 32:378.1, "display of obscene words." (¶ 56) The charge was subsequently dismissed by the Judge Chuck Reid. (¶ 64).

Plaintiff commenced these legal proceedings, contending Defendants violated rights guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. (¶¶ 62, 63, 64, 65, 66, 67, 68 and 69). Plaintiff also alleged supplemental state claims pursuant to La. Civil Code arts. 2315 and/or 2317. (¶ 71).

Defendants have filed a Motion to Dismiss pursuant to Rule 12(b)(6), Fed.R.Civ.P., contending:

1. The Amite City Police Department is not amenable to suit;
2. The police officers are entitled to qualified immunity;
3. The Plaintiff has no claim against the City of Amite;

4. The mayor, the police chief, the police supervisor, and the city council are entitled to immunity; and

5. The plaintiff's Complaint should be dismissed because it is frivolous and/or malicious and lacks an arguable basis in law or fact.

For the reason set forth below, Plaintiff submits that Defendant's Motion to Dismiss should denied in part and granted in part.

LEGAL ARGUMENT

A. Claims Under § 1983

To state a valid claim under § 1983, a plaintiff must allege (1) violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins,* 487 U.S. 42, 48 (citing *Parratt v. Taylor,* 451 U.S. 525, 535), *overruled in part on other grounds by Daniels v. Williams,* 474 U.S. 327, 330-31(1986), and *Flagg Brothers, Inc.,* 436 U.S. 149, 155 (1978).

B. Applicable Legal Standard on Motions to Dismiss

A motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6) "is viewed with disfavor and is rarely granted." *Lowrey v. Texas A & M Univ. Sys.,* 117 F.3d 242, 247 (5th Cir. 1997). For a complaint to be dismissed for failure to state a claim, it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45 (1957); *Reeves v. City of Jackson, Mississippi,* 532 F.2d 491 (5th Cir. 1976). The Court must accept as true all well-pleaded facts contained in plaintiff's complaint and view them in the light most favorable to the plaintiff. *Baker v. Putnal,* 75 F.3d 190, 196 (5th Cir. 1996). In addition, all reasonable inferences are to be drawn in favor

of the plaintiff's claims. *Lowrey,* 117 F.3d at 247. The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid cause of action when examined in the light most favorable to the plaintiff and with every doubt resolved in the plaintiff's favor. *Lowrey,* 117 F.3d at 247.

B. Discussion

Plaintiff has alleged various claims pursuant to the First, Fourth, Fifth, Ninth and Fourteenth Amendment to the United States Constitution. In this opposition Plaintiff will focus on his more substantial claims, those pursuant to the First, Fourth and Fourteenth Amendment.

1. First Amendment Claim

The First Amendment provides, in pertinent part, that Government "shall make no law . . . abridging freedom of speech." U.S. Constitutional Amend 1. It is made applicable to the states by the due process clause of the Fourteenth Amendment. *Gitlow v. New York,* 268 U.S. 652 (1925). The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within a narrowly limited classes of speech. *Gooding v. Wilson,* 405 U.S. 518, 521-22 (1972). Even as to such classes, "the statute must be carefully drawn to be authoritatively construed to punish only unprotected speech." *Id.* States may by narrowly drawn statutes, prohibit obscenity. *Roth v. United States,* 354 U.S. 476, child pornography, *New York v. Ferber,* 458 U.S. 747 (1982), "fighting words". *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), and the incitement to imminent lawless activity, *Brandenburg v. Ohio,* 395 U.S. 568 (1969). States, however, may not criminalize speech that is merely insulting, *Gooding v. Wilson,* 405 U.S, 518 (1969). Although oftentimes provocative and challenging, speech "is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present

danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello v. Chicago,* 337 U.S 1, 4 (1949).

In the case at bar, Plaintiff had affixed to his car a sign stating, "You Might Be A Nigger." Someone allegedly complained about the sign, finding it offensive. Arguably offensive and insulting to some people, the words nonetheless are entitled to First Amendment protection. "It is firmly settled under our Constitution the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of the hearers." *Street v. New York,* 394 U.S. 576, 592 (1969).

Most instructive respective the issue at bar, to wit, whether the words "You Might Be A Nigger" printed on a sign affixed to Plaintiff's vehicle is entitled to constitutional protection, is *Cohen v. State of California*, 403 U.S. 15 (1971). In *Cohen,* there was a California statute prohibiting disturbance of the peace by offensive conduct. Defendant was convicted of violating the statute by walking through the courthouse corridor wearing a jacket bearing the words "Fuck the Draft". The Court held the conviction to be constitutionally infirm. In reaching that conclusion, the Court opined that since it rested "squarely upon his exercise of the 'freedom of speech' protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation in which be exercised that freedom, not as a permissible prohibition on the substantive message it conveys." *Id.* at 19. The Court acknowledged that the right of "freedom of speech" is not absolute but added that the instances in which limitations are allowed on that right "are not present here." *Id.* This case, according to the Court, "cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain

forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must, in some significant way, be erotic. It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket." *Id.* at 19-20

The Court addressed the "fighting words" limitation upon the exercise of "free speech," finding that it was inapplicable in the case. Acknowledging the fact that the four-letter word employed by defendant regarding the draft is commonly used in a provocative manner, the Court held that "in this instance it was clearly not directed to the person of the hearer. No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult." *Id.* at 20 (citation and internal quotation omitted).

Finally, the Court addressed the ability of the State to protect sensitive individuals to unwanted exposure from appellant's crude expression. To accomplish this purpose within the confines of the protections afforded by the First Amendment, the State must demonstrate "that substantial privacy interests are being invaded in an essentially intolerable manner." *Id.* The Court summarily disposed of that issue, finding that individuals in the courthouse "could effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* at 21.

Applying the law to the facts at bar, it is without doubt that Plaintiff has stated a valid cause of action and has met the requirements of § 1983. First, he has a First Amendment right of freedom of expression. Since his sign bearing the words "You Might Be A Nigger" was not

obscene, did not constitute fighting words, and did not invade the substantial privacy interest of any individual, he was well within that right when he posted the sign on his vehicle. That right was violated when he was (a) issue a citation, and (b) compelled to remove it, under threat of his vehicle being towed. Second, Defendants were acting under color of law when they detained him, compelled him to remove the sign, and issued him a citation.

2. Fourth Amendment Claim

Plaintiff left the Burger King, where he had been dining, and proceeded onto the public highway. Defendants followed and ordered him to bring his vehicle to a halt. Plaintiff submitted to their demand. After stopping him, they issued him a citation pursuant to La..R.S. 32:378.1, relative to the "display of obscene words." Plaintiff alleged that Defendants, in stopping him, violated his rights pursuant to the Fourth Amendment of the United States Constitution. The Fourth Amendment provides, in pertinent part, that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. VI.

The initial inquiry is whether Plaintiff was the subject of a "seizure" within the meaning of the Fourth Amendment. "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement." *Brendlin v. California,* 127 S.Ct. 2400, 2405 (2007) (citations and internal quotations omitted). The law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver "even though the purpose of the stop is limited and the resulting detention itself brief." *Id.* at 2406 (citations and internal quotations omitted).

Once a determination has been made that Defendants have engaged in a seizure of decedent, it becomes necessary to determine whether that seizure comported with constitutional requirements, whether it was reasonable. Plaintiff was told by Defendants that he was stopped because some anonymous individual saw Plaintiff's sign and "found the sign offensive." As set forth in detail earlier, Plaintiff's right to display the sign on his vehicle is protected by the First Amendment. Clearly, it is not reasonable to seize an individual solely because someone is offended by the exercise of his First Amendment rights.

Furthermore, to comport with the Fourth Amendment, "[i]n order to make a warrantless arrest in a public place, the arresting officer must have probable cause to believe that the suspect has committed, is committing or is about to commit a crime." *Fontenot v. Cormier,* 55 F.3d 669, 674 (5th Cir. 1995), *citing Harper v. Harris County,* 21 F.3d 597, 601 (5th Cir. 1994). In order to "stop and investigate" whether criminal activity is afoot, officers must have "reasonable suspicion" that the detained individual committed a crime. *Terry v. Ohio,* 392 U.S. 1 (1968).

In the immediate case, it was obvious to the officers that Plaintiff had committed no crime whatsoever. His actions do not constitute a crime under the plain meaning of the statute pursuant to which he was cited. Thus, his continued physical detention during the stop, and the actual issuance of the citation, were both unlawful seizures of his person and actionable under 42 U.S.C § 1983.

Plaintiff has stated a valid cause of action pursuant to the Fourth Amendment and § 1983. First, his person was seized. Second, the seizure was unreasonable. Third, it was done under color of state law.

3. The Police Officers Are Not Entitled to Qualified Immunity

Having determined that defendants the seizure of plaintiff and the removable of his sign were unreasonable, it must be determined whether defendants can avail themselves of the defense of qualified immunity.

The doctrine of qualified immunity shields a government official from liability for damages under § 1983 only so long as his conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 102 S.Ct. 2727, 2738 (1982). A right is "clearly established" if it meets one of three tests: (1) it is defined with reasonable clarity; or (2) the Supreme Court or this Circuit has affirmed its existence; or (3) a reasonable defendant would understand from existing law that his acts were unlawful." *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1064 (2d Cir. 1993). For a right to be clearly established, there does not have to be a prior case directly on point, but the unlawfulness of the precipitating acts must be apparent in light of existing law. *Hassan v. Lubbock Independent School District,* 55 F.3d 1075, 1078 (5th Cir. 1995)

A necessary concomitant to the determination of whether the constitutional right asserted by the plaintiff is clearly established at the time defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. *Siegert v. Gilley,* 111 S.Ct. 1789, 1793 (1991).

An analysis of a claim of qualified immunity involves a two-step process. First, the court has to determine "if the plaintiff has stated a violation of a clearly established constitutional right." *Morin v. Cairn,* 77 F.3d 116, 120 (5th Cir. 1996). If one has been stated, then the court must proceed to "examine the reasonableness of defendant's conduct." *Id.*

It is without dispute that Plaintiff was issued a summons because of a sign on his car stating, "You Might Be A Nigger", which offended some anonymous person. Plaintiff' s First Amendment right to said sign on his vehicle was clearly established at the time of Defendants' conduct. Plaintiff's right to be free from unreasonable seizure was clearly established at the time of defendants' conduct. *See Cohen v. State of California*, 403 U.S. 15 (1971)

The next question becomes one of whether Defendants' action in issuing the summons to Plaintiff was "objectively reasonable." *Harlow.* As made clear by the Supreme Court in *Malley v. Briggs,* 106 S.Ct. 1092, 1096 (1985), the doctrine of qualified immunity does not shield "the plainly incompetent or those who knowingly violate the law." Defendants contend that their actions were objectively reasonable because the summons was issued pursuant to a "law pertaining to the display of obscene language [which] is a valid law." Defendants' argument is legally incorrect.

First, the statute under which Plaintiff was issued the summons does not criminalize Plaintiff's conduct. La. R.S. 32:378.1(A) provides:

> No person owning or operating a Louisiana registered motor vehicle on any of the public streets in this state shall affix to any part of such motor vehicle any sticker, decal, emblem, or other device containing patently obscene words, photographs, or depictions that are displayed to members of the public not occupying such vehicle. For the purposes of this Section, "obscene" shall have the meaning of "obscenity" as contained in R.S. 14:106.

As set forth in R.S. 14:106(A), obscenity is the intentional:

> (1) Exposure of the genitals, public hair, anus, vulva, or female breast nipples in any public place or place open to public view, or in any prison or jail, with the intent of arousing sexual desire or which appeals to prurient interest or is patently offensive.

> (2)(a) Participation or engagement in, or management, operation, production, presentation, performance, promotion, exhibition, advertisement, sponsorship, electronic communication, or display of, hard core sexual conduct when the trier of fact determines that the average person applying contemporary standards would find that the conduct taken as a whole, appeals to the prurient interest; and the hard core sexual conduct, as specifically defined herein, is presented in a patently offensive way; and conduct taken as a whole lacks serious literary, artistic, political, or scientific value.

The purpose of the statute is to protect individuals and the general public from exposure to hard core sexual conduct. *State v. Ludwig,* 468 So.2d 1151, 1152 (La. 1985). Applying the definition of obscenity set forth in R.S. 14:106 to conduct proscribed in R.S. 32:378, it is obvious that the conduct for which Plaintiff was issued a summons, to wit, affixing a sign to his vehicle bearing the five words "You Might Be A Nigger," is not criminalized under R.S. 32:378. Several factors require this conclusion: (1) the sign did not display "genitals, public hair, anus, vulva, or female breast or nipples," (2) there was no display of hard core sexual conduct which appealed to the prurient interest, and (3) the sign was not displayed in a sexually patently offensive manner. These facts are self evident.

Penal statutes cannot be extended by implication to cover acts not expressly provided for in the statute. *In re State in Interest of Ogletree,* 244 So.2d 288 (4th Cir. 1971). Since affixing a sign on one's vehicle is not a crime under the law, Defendants' decision to issue a summons to Plaintiff was not objectively reasonable; as a matter of fact, it was objectively unreasonable. No reasonable police officer could conclude that the sign exposed the general public "to hard core sexual conduct." *Ludwig, id.* The defense of qualified immunity is not available to the Defendants in this case.

4. The Plaintiff Has A Claim Against The City

In his Complaint Plaintiff alleges that "[t]he City of Amite . . . was at all times relevant responsible for the conduct of it employees. . . [.]" (¶ 7). In addition to alleging jurisdiction under the Constitution and laws of the United States, Plaintiff alleged supplemental jurisdiction pursuant to "state statutory laws." (¶ 2). If there is a determination that Defendants did in fact violate Plaintiff's constitutional rights, the city of Amite would be liable to Plaintiff under the principle of "respondeat superior."

In *Jenkins v. Jeff. Par. Sheriff's Office,* 402 So.2d 669 (La. 1981), plaintiff filed suit seeking damages against the sheriff of Jefferson Parish in his personal and official capacities for damages sustained in an automobile accident involving plaintiff and an on-duty deputy sheriff. The trial and appeals courts dismissed the sheriff from the lawsuit. The issue before the court was whether the sheriff could be held liable in his official capacity for torts committed by a deputy sheriff during the course and scope of his employment.

First, the Court noted "[n]o one but the sheriff can be viewed as the employer of deputies." *Id.* at 671. In concluding that the sheriff was responsible in his official capacity for the conduct of his deputies, the Court stated:

> The Legislature, in enacting Act 318 of 1978, has clearly indicated its intention that governmental responsibility for torts committed by a public employee could be placed on the public officer most closely related to the tortfeasor. The Legislature also removed the previous statutory immunity enjoyed by the sheriff. Moreover, . . ., neither the state not the parish . . . exercises any significant control over sheriff's deputies. We conclude that

> the sheriff is the appropriate governmental entity on which to place responsibility for the torts of a deputy sheriff.
>
> However, in the employment relationship which gives rise to delictual responsibility, the sheriff acts solely in his official capacity; he cannot reasonably be viewed as acting in a personal capacity in the employment relationship. Therefore, if the sheriff as an employer is to be held vicariously liable for the torts of his employee, he is liable only because he is the sheriff and is only liable to the extent that he holds the office.

Id.

This decision was cited in *Hall v. St. Helena Par. Sheriff's Dept.,* 668 F.Supp. 535 (M.D. La.1987), as the legal basis for imposing official liability on the sheriff in an action by plaintiffs alleging excessive force. After acknowledging the inapplicability of the principle of *respondeat superior* in § 1983 actions, the court held that "[t]he result is different, however, under pendent state law claims. Under Louisiana law, a parish sheriff is liable in his official capacity as an employer of a deputy, for the deputy's torts in the course and scope of employment. Louisiana Civil Code art. 2320; *Jenkins v. Jeff. Par. Sheriff's Office,* 402 So.2d 669 (La. 1981). Although Sheriff Bridges is not liable under § 1983, he is liable under the general principles of louisiana law, in his official capacity, for Lea's tort." *Id.* at 540.

Therefore, in the case at bar, if it is determined that Defendants violated plaintiff's rights, Defendant, city of Amite, can be held liable in his official capacity as the employer of Defendants. The only requirement is that the tort must have occurred during the course and scope of Defendants' employment – which it did.

4. Defendant, Sergeant Mike Moore, Is Liable In His Supervisory Capacity.

A supervisory official may be held liable only when he is either personally involved in the acts causing the deprivation of a person's constitutional rights, or there is a sufficient causal connection between the official's act and the constitutional violation sought to be redressed. *Thompkins v. Belt,* 828 F.2d 298, 304 (5th Cir. 1987); *Douthit v. Jones,* 641 F.2d 345, 346 (5th Cir. 1981).

In his complaint Plaintiff states that he was advised by "[p]olice [s]upervisor Mike Moore that he [Plaintiff] was in violation of the law for having signs (**YOU MIGHT BE A NIGGER** by Johnny Duncan) because his signs contained obscene words, and that the other defendant officer[s] w[ere] doing their job." (¶ 49). Defendant Moore concluded, albeit wrongly and unreasonably, that Plaintiff's sign was obscene. In so doing, he gave Defendants the green light to issue a summons to Plaintiff, in violation of his First Amendment rights. Obviously, had he informed said Defendants otherwise, the summons would not have been issued to Plaintiff. In failing to do so, he permitted, participated and/or acquiesced in the issuance of the summons. Therefore, he is likewise liable for the violation of Plaintiff's rights.

Regarding the issue of qualified immunity, Defendant Moore, for the very same reasons that the defense is not available to Defendants Cefalu and McDonald, is not able to avail himself of it.

5. Plaintiff's Complaint Is Meritorious

Defendants contend that "Plaintiff's Complaint should be dismissed because it is frivolous and/or malicious and lacks an arguable basis in law or fact." This contention can be

summarily dismissed, for, as set forth in detail herein, Plaintiff has alleged a valid cause of action pursuant to the First, Fourth and Fourteenth Amendments to the United States Constitution. Those claims are meritorious and are more than sufficient to withstand a Motion to Dismiss.

Respectfully submitted:

RONALD L. WILSON (#13575)

KATIE SCHWARTZMANN (#30295)

BY: /s/ Ronald L. Wilson