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210 F.3d 371, Davidian v. O'Mara, (C.A.6 (Tenn.) 2000)

\*371 210 F.3d 371

MOORE, Circuit Judge.

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United States Court of  
Appeals, Sixth Circuit.

**Geoffrey DAVIDIAN, Plaintiff-  
Appellant,  
v.**

**T. Michael O'MARA,  
individually and in his  
official capacity  
as Cookeville City Attorney;  
Jim Shipley, individually and  
in his official capacity as  
Cookeville City Manager; City  
of**

**Cookeville, Defendants-  
Appellees.**

**No. 99-5423.**

April 7, 2000.

On Appeal from the United  
States District Court for the  
Middle District of Tennessee.

Before NORRIS, MOORE, and  
COLE, Circuit Judges.

OPINION

This appeal was brought by a freelance reporter who claims that city officials from Cookeville, Tennessee retaliated against him after he had published several articles that portrayed certain city officials in an unfavorable light. Plaintiff Geoffrey Davidian, who publishes a self-described "watchdog" newspaper called *The Putnam Pit*, brought this 42 U.S.C. § 1983 suit against the City of Cookeville and two city officials in their official and individual capacities after these defendants allegedly kept him from gaining access to public municipal records.

The district court granted summary judgment in favor of the defendants, adopting a magistrate judge's report and recommendation that explained that the defendants had not engaged in retaliation and concluded that the city officials were entitled to qualified immunity. Because Davidian has failed to provide sufficient evidence to show that the defendants engaged in an adverse action that would chill a person of ordinary firmness from criticizing local officials, we AFFIRM the district court's grant of summary judgment on Davidian's claim that his First Amendment rights were adversely affected

by retaliatory conduct.

#### I. BACKGROUND

In May of 1996, Geoffrey Davidian, a freelance journalist who had spent over a year investigating an alleged murder in Cookeville, Tennessee, began publishing *The Putnam Pit*, a newspaper that reports on a variety of public issues involving local government in Cookeville and Putnam County, Tennessee. In his paper, Davidian relied on public records from the City of Cookeville to show that public officials had engaged in unethical and illegal behavior. One of the articles in the paper criticized Cookeville's City Attorney, T. Michael O'Mara, for allegedly charging the city \$8,730 to prosecute a speeding violation involving Davidian.

Shortly after the paper had been circulated, O'Mara sent a letter to Davidian that informed him that he would no longer be given access to the city's public records unless he could show that he was a citizen of the State of Tennessee. The letter explained that:

The City of Cookeville has allowed you access to its records for some time in an attempt to cooperate with you. This effort and cooperation seems fruitless as you grow more demanding and belligerent in your requests.

The Tennessee Open

Records Act requires that the records of the City of Cookeville be open to 'citizens' of the State of Tennessee. When you provide evidence that you are a citizen of the State of Tennessee, the City will respond to your records request.

\* \* \*  
\* \* \*

The City of Cookeville has and will continue to conduct its affairs with normal business courtesies. Verbal harassment, intimidation and threats will not cause the City to change its method of doing business.

Joint Appendix ("J.A.") at 197 (O'Mara's June 3, 1996 Letter). O'Mara claims that he sent this letter to Davidian because Davidian had tried to "bully" people at city hall to get records, insisting that they take time away from their regular jobs and immediately wait on him. J.A. at 184-85 (O'Mara Dep.). Jim Shipley, Cookeville's City Manager, also testified that several city employees had complained that Davidian's requests were bothersome and were forcing them to do excessive levels of work. J.A. at 162-63 (Shipley Dep.).

Because Davidian was not a citizen of Tennessee, city officials--relying on their interpretation of the Tennessee Open Records Act (FN1)--began denying him

access to the city's public records. In particular, Davidian was denied access to O'Mara's records regarding his legal bills to the city and he was denied the personnel records that belonged to Mike Mayes, the Administrator of Cookeville General Hospital. Davidian responded by hiring his son, Elijah Davidian, who is a citizen of Tennessee, to request the records. The city, however, allegedly denied Elijah Davidian access to the records because of his association with *The Putnam Pit*.

**\*371\_** Davidian then sent the city a fax in which he argued that he was entitled to the records pursuant to § 14.04 of the Cookeville City Charter. Section 14.04 reads in relevant part:

Be it further enacted, That all records and accounts of every office, department, or agency of the city shall be open to inspection by any citizen of Cookeville, any representative of a citizens' organization of Cookeville or any representative of the press at all reasonable times and under reasonable regulations established by the city manager or city council, except health and personnel records of a confidential nature, and records and documents the disclosure of which would tend to defeat the lawful purpose which they are intended to accomplish.

J.A. at 338-39 (Cookeville City Charter) (emphasis added). Shipley responded to the fax with a letter that stated that he did not believe that Davidian was a "representative of the press" because *The Putnam Pit* was not a newspaper of general circulation. J.A. at 139 (Shipley's November 8, 1996 Letter). Davidian also tried to get access to the public documents by telling city officials that he had entered into an oral agreement to write articles for another newspaper, *The Putnam Star*. Davidian claims that this led city officials to contact *The Putnam Star* and persuade the newspaper to breach its agreement with Davidian.

Davidian eventually filed suit in Chancery Court for Putnam County in an attempt to get access to the records. The Chancery Court ruled that the city did not need to turn its records over to Davidian under the Tennessee Open Records Act, but it concluded that the city was required to turn public records over to his son. Davidian acknowledges that, after the Chancery Court's decision and since filing a federal civil rights lawsuit, he has been given access to all of the records that he had requested. J.A. at 111-112 (Davidian Dep.).

Davidian subsequently filed this 42 U.S.C. § 1983 suit seeking damages against the City of Cookeville, Jim Shipley, and T. Michael O'Mara

for the alleged violation of his First Amendment rights. (FN2) In his amended complaint, Davidian argued that his constitutional rights were violated when these defendants denied him access to the city's public records and when they kept him from distributing his newspaper at city hall. (FN3) Davidian also raised state law claims of slander, malicious interference with a contractual relationship, and outrageous conduct. The district court referred the case to a magistrate judge, who recommended that the district court grant the defendants' motion for summary judgment on grounds that Davidian had failed to provide sufficient evidence to sustain his First Amendment claim and on grounds that the city officials were entitled to qualified immunity. The district court adopted the magistrate judge's report and recommendation, granting summary judgment in favor of the defendants and declining to exercise supplemental jurisdiction over the state law claims.

## II. ANALYSIS

Davidian challenges the district court's decision to grant summary judgment in favor of the defendants, arguing that he has provided sufficient evidence to sustain his First Amendment claim. This court reviews a grant of summary judgment de novo, viewing the facts in the record and any inferences to

be drawn from them in the light most favorable to the non-moving party. *Johnson v. United States Postal Serv.*, 64 F.3d 233, 236 (6th Cir.1995). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c).

Davidian claims that city officials kept him from examining public municipal records in retaliation for statements that he made about certain public officials in *The Putnam Pit*. The defendants respond that Davidian has not provided sufficient evidence to show that they violated his First Amendment rights, and they argue that, even if they have engaged in unconstitutional conduct, they are entitled to qualified immunity. There is a considerable amount of overlap between the defendants' claim that they have not engaged in unconstitutional conduct and their claim that they are entitled to qualified immunity. Indeed, we have typically started our qualified immunity inquiry by asking whether a plaintiff has sufficiently asserted a constitutional violation at all. See *Mattox v. City of Forest Park*, 183 F.3d 515, 520 (6th Cir.1999); see also *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) ("A necessary concomitant to the determination of whether the constitutional right asserted

by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all."). Thus, we must determine, as a threshold matter, whether Davidian has provided sufficient evidence to show that city officials engaged in retaliatory conduct that adversely affected his First Amendment rights when they refused to provide him with public municipal records.

**\*371\_** A plaintiff cannot establish a claim that his First Amendment rights have been adversely affected by retaliatory conduct unless that plaintiff shows: (1) that the plaintiff was engaged in a constitutionally protected activity; (2) that the defendants' adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of plaintiff's constitutional rights. *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir.1998); *Mattox*, 183 F.3d at 520.

In the present case, Davidian has easily shown that he was engaged in constitutionally protected political speech when he published *The Putnam Pit*--a newspaper that contained articles that were critical of several local public officials. *Bloch*, 156 F.3d at

678; see also *Glasson v. City of Louisville*, 518 F.2d 899, 904 (6th Cir.1975) ("The right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is 'the central meaning of the First Amendment.'" ) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964)). Furthermore, there is sufficient evidence, based on the fact that Davidian was denied access to the city's public records less than two weeks after *The Putnam Pit* was first published, to show that the decision to deny access was motivated at least in part by the statements that Davidian made in his newspaper. Accordingly, Davidian can sustain his First Amendment retaliation claim as long as he has provided sufficient evidence to show that the defendants' adverse action caused him to suffer an injury that would chill a person of ordinary firmness from continuing to publish articles that were critical of local public officials.

Davidian attempts to show that he has satisfied this element of his retaliation claim by comparing the adverse action taken in this case to the adverse action taken in *McBride v. Village of Michiana*, 100 F.3d 457 (6th Cir.1996), a case in which we held that city officials were not entitled to qualified immunity after they allegedly retaliated against a reporter for exercising her First Amendment rights. In *McBride*,

a reporter who had written several unfavorable articles about local public officials alleged that, after she had written these articles, city officials began making threats to her safety, harassed her on the street, engaged in a campaign to force her employers to use other reporters, denied her access to public records, and verbally harassed her at town meetings. We concluded that this type of harassment was sufficient to state a cause of action for retaliation, and we went on to conclude that the city officials were not entitled to qualified immunity because "[t]he law is well settled in this Circuit that retaliation under color of law for the exercise of First Amendment rights is unconstitutional." *Id.* at 461 (quoting *Zilich v. Longo*, 34 F.3d 359, 365 (6th Cir.1994), cert. denied, 514 U.S. 1036 (1995)).

There are some similarities between the adverse actions taken in *McBride* and the adverse actions taken in the present case. For instance, Davidian claims that city officials denied him access to public records, and he has alleged that they interfered with the potential employment relationship he had with *The Putnam Star*. Nevertheless, we conclude that, unlike the adverse actions taken in *McBride*, the adverse conduct in this case is not severe enough to chill a person of ordinary firmness from continuing to publish

unfavorable articles about city officials. Indeed, Davidian has provided no evidence that city officials engaged in the type of harassing and physically threatening behavior that went on in *McBride*. Moreover, the record, even when construed in the light most favorable to Davidian, shows that city officials were generally cooperative in providing Davidian with public information. J.A. at 138-56 (Letters between Shipley and Davidian). Although some city officials may have made it more difficult for Davidian to obtain the information as quickly as he wanted it, this is not the type of conduct that rises to the level of a First Amendment retaliation claim. As this court explained in *Mattox*, "[A] constitutional tort--like any tort--requires injury, and allowing constitutional redress for every minor harassment may serve to trivialize the First Amendment." *Mattox*, 183 F.3d at 521.

**\*371\_** The fact that Davidian was temporarily denied access to public information certainly may have had an adverse impact on the sources that Davidian cited in his newspaper, e.g., without access to the city's sources, he no longer would have been able to rely on public records to show that city officials had engaged in unethical and illegal behavior. However, the city's decision to prevent Davidian from getting access

to public records did nothing to chill Davidian from continuing to write articles that were critical of local public officials. City officials may have tried to limit Davidian's sources, but they did not engage in the type of threatening or intimidating behavior that is specifically designed to chill a person of ordinary firmness from continuing to exercise First Amendment rights.

Because Davidian has failed to provide sufficient evidence to show that the defendants engaged in an adverse action that would chill a person of ordinary firmness from continuing to criticize local officials, the claim against the city officials was properly dismissed on qualified immunity grounds, and the claim against the city was properly dismissed on grounds that Davidian has failed to assert a constitutional violation at all.

### III. CONCLUSION

For the reasons stated above, we AFFIRM the district court's grant of summary judgment in favor of the defendants with regard to Davidian's claim that his First Amendment rights were adversely affected by retaliatory conduct. Furthermore, because there are no overwhelming judicial economy reasons for exercising supplemental jurisdiction in this case, we AFFIRM the district court's decision to

decline to exercise supplemental jurisdiction over Davidian's state law claims.

(FN1.) The Tennessee Open Records Act states in relevant part:

All state, county and municipal records ... shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

TENN.CODE ANN. § 10-7-503.

(FN2.) Davidian brought a separate suit against the City of Cookeville and Jim Shipley, Cookeville's City Manager, arising out of the denial of access to electronic computer files concerning parking tickets, denial of access to "cookie" files in the city's computers, and a denial of a link from the city's web page. See *The Putnam Pit, Inc. v. City of Cookeville*, 23 F.Supp.2d 822 (M.D.Tenn.1998). The district court granted summary judgment in favor of the defendants, and Davidian appealed the case to this court. The case was argued before this court on October 29, 1999.

(FN3.) Davidian has failed to argue on appeal that the defendants violated his constitutional rights when

they allegedly restricted his ability to distribute his newspaper at city hall. Because Davidian's appellate brief does not address this issue, we limit our review to the district court's decision to grant summary judgment on Davidian's claim that the defendants violated his constitutional rights by retaliating against him for criticizing local public officials. See, e.g., *McMurphy v. City of Flushing*, 802 F.2d 191, 198-99 (6th Cir.1986).

