

10-37-cv
Zherka v. Amicone

1
2 UNITED STATES COURT OF APPEALS
3
4 FOR THE SECOND CIRCUIT
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8 August Term, 2010
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10 (Argued: January 11, 2011 Decided: March 2, 2011)
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12 Docket No. 10-37-cv
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14
15 SELIM ZHERKA,
16

17 *Plaintiff-Appellant,*
18

19 -v.-
20

21 PHILIP AMICONE, IN HIS CAPACITY AS MAYOR OF THE CITY OF YONKERS,
22

23 *Defendant-Appellee.**
24

25
26 Before:

27 POOLER, WESLEY, and CHIN, *Circuit Judges.*
28

29 Appeal from judgment of the United States District
30 Court for the Southern District of New York (Seibel, J.),
31 entered on December 22, 2009, which dismissed with prejudice
32 Plaintiff-Appellant's First Amendment retaliation claim on
33 the ground that state-law *per se* defamation does not
34 constitute concrete harm as required to maintain a cause of
35 action for constitutional tort against a public official

*The Clerk of the Court is directed to amend the official caption in accordance with this opinion.

1 where plaintiff does not allege "actual chilling."

2
3 **AFFIRMED.**

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6 RORY J. BELLANTONI, Lovett & Bellantoni, LLP,
7 Hawthorne, NY, *for Plaintiff-Appellant.*

8
9 BRIAN T. BELOWICH, DelBello Donnellan Weingarten Wise
10 & Wiederkehr, LLP, White Plains, NY, *for*
11 *Defendant-Appellee.*
12

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14 WESLEY, *Circuit Judge:*

15 Under the law of this Circuit, the viability of a prima
16 facie First Amendment retaliation claim depends on context.
17 Private citizens alleging retaliation for their criticism of
18 public officials must show that they engaged in protected
19 speech, persons acting under color of state law took adverse
20 action against them in retaliation for that speech, and the
21 retaliation resulted in "actual chilling" of their exercise
22 of their constitutional right to free speech. While in
23 certain situations a showing of some other form of concrete
24 harm may substitute for "actual chilling," a state-law
25 theory of *per se* defamation does not sufficiently
26 demonstrate harm and therefore does not establish a federal
27 retaliation claim. Accordingly, the district court's
28 judgment is **AFFIRMED.**

1 **I. BACKGROUND**

2

3 Selim Zherka owns and publishes the *Westchester*

4 *Guardian*, a weekly periodical covering Westchester County,

5 which encompasses the City of Yonkers. In the fall of 2007,

6 the *Guardian* was highly critical of the Mayor of Yonkers,

7 Philip Amicone, accusing him and his administration of,

8 *inter alia*, corruption, fiscal mismanagement, and police

9 brutality.

10 Zherka alleges that in retaliation for his publications

11 Amicone publicly defamed him at a campaign event.¹

12 Specifically, Zherka alleges that Amicone stated that Zherka

13 is a "convicted drug dealer," "Albanian mobster," and

14 "thug," and that Zherka would, if Amicone lost his re-

15 election bid, open "drug dens" and "strip clubs" throughout

16 Yonkers and "loot" the "pension funds" of Yonkers residents

17 and the city's own funds.

18 Shortly thereafter, Zherka sued Amicone, claiming

19 Amicone violated his First Amendment rights, and that

20 Amicone's alleged statements constitute *per se* defamation

¹It is arguable that Amicone was not speaking in his official capacity when he made the alleged statements, but we assume for purposes of analysis that he was.

1 under New York common law.² Zherka alleged prospective
2 chilling of his First Amendment rights; *per se* defamation;
3 irreparable injury to professional reputation; emotional
4 upset; anxiety; public humiliation; public shame; public
5 embarrassment; and being otherwise rendered sick and sore.
6 Zherka sought compensatory and punitive damages, as well as
7 attorney's fees and costs.³

8 Amicone admitted that he was present at the meeting,
9 but denied making the alleged statements. He raised
10 multiple affirmative defenses, including failure to state a
11 claim upon which relief could be granted, and no cognizable
12 injury or damages. Amicone moved for judgment on the
13 pleadings with an award of fees and costs.

14 Judge Seibel dismissed Zherka's First Amendment
15 retaliation claim with prejudice, on the ground that *per se*
16 defamation cannot constitute harm under this Court's
17 standard for this type of claim. She declined to exercise
18 supplemental jurisdiction over the remaining state-law

²Zherka also alleged a violation of his right to travel under the Fourteenth Amendment. He wisely withdrew this claim prior to the judgment below.

³Only costs were sought on the state-law claim. Attorneys' fees and costs were sought on the two federal claims, pursuant to 42 U.S.C. § 1988(b) (allowing for discretionary awards of "a reasonable attorney's fee" to prevailing parties other than the United States in suits brought under § 1983 and other civil rights statutes).

1 defamation claim, dismissing it without prejudice. Zherka
2 timely appealed to this Court, seeking reversal of the grant
3 of judgment on the pleadings.

4 5 **II. DISCUSSION⁴**

6
7 “To state a claim under Section 1983, a plaintiff must
8 allege facts indicating that some official action has caused
9 the plaintiff to be deprived of his or her constitutional
10 rights – in other words, there is an injury requirement to
11 state the claim.” *Colombo v. O’Connell*, 310 F.3d 115, 117
12 (2d Cir. 2002) (per curiam). Various forms of harm have
13 been accepted as satisfying this injury requirement in the
14 context of a claim that a public official has injured the
15 plaintiff in retaliation for her exercise of her First
16 Amendment rights.

17 “We have described the elements of a First Amendment
18 retaliation claim in several ways, depending on the factual
19 context.” *Williams v. Town of Greenburgh*, 535 F.3d 71, 76
20 (2d Cir. 2008). For example, public employees must show

⁴We review *de novo* the grant of a motion for judgment on the pleadings. See, e.g., *Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010). In this review, we accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff’s favor. *Id.*

1 adverse employment action. *Id.* For their part, inmates
2 must show “retaliatory conduct that would deter a similarly
3 situated individual of ordinary firmness from exercising . .
4 . constitutional rights.” *Gill v. Pidlypchak*, 389 F.3d 379,
5 381 (2d Cir. 2004) (internal quotation marks and citation
6 omitted).

7 By contrast, private citizens claiming retaliation for
8 their criticism of public officials have been required to
9 show that they suffered an “actual chill” in their speech as
10 a result. *Id.* (citing *Spear v. Town of W. Hartford*, 954
11 F.2d 63, 68 (2d Cir. 1992)). However, in limited contexts,
12 other forms of harm have been accepted in place of this
13 “actual chilling” requirement. *See, e.g., Dougherty v. Town*
14 *of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 91 (2d
15 Cir. 2002) (alleging retaliatory revocation of building
16 permit); *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 195 (2d
17 Cir. 1994) (alleging retaliatory failure to enforce zoning
18 laws); *see also Gill*, 389 F.3d at 383 (explaining that “the
19 *Gagliardi* plaintiffs’ retaliation claim apparently survived
20 a motion to dismiss because . . . they adequately pleaded
21 non-speech injuries”). Despite these limited exceptions, as
22 a general matter, First Amendment retaliation plaintiffs

1 must typically allege "actual chilling."

2 In this case, Zherka does not allege actual chilling.⁵

3 Rather, he seeks to meet the injury requirement by asserting
4 that defamation *per se* as recognized under New York law
5 identifies a cognizable injury without the necessity of
6 showing actual damage to his business or reputation. The
7 district court disagreed and concluded that presumed damages
8 under the New York law of *per se* defamation, unaccompanied
9 by any allegations of particular injury, were not
10 sufficiently tangible to serve as a substitute for "actual
11 chilling." We agree.

12 New York law has long recognized that "[w]hen
13 statements fall within" established categories of *per se*
14 defamation,⁶ "the law presumes that damages will result, and

⁵Indeed, it would be difficult for him to do so. After the alleged defamatory statements, the *Guardian* continued to publish articles critical of Amicone, with headlines (quoted by the defense in its motion for judgment on the pleadings and not contested in Zherka's memo of opposition) such as "Mayor Amicone Stumbles Over the First Amendment," "Dumb, Dumber and Dumbest," and "Scrooge Amicone - Rapes Taxpayers; Rewards Cronies." Far from chilling Zherka's speech, Amicone's alleged statements seem rather to have inflamed it.

⁶There are "four established exceptions [to the requirement that plaintiff allege special damages] consist[ing] of statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman." *Lieberman v. Gelstein*, 80 N.Y.2d 429, 435 (1992) (citations omitted). This final category is codified: "In an action of slander of a woman imputing unchastity to her, it is not necessary to allege or prove special damages." N.Y. Civ. Rights Law § 77 (McKinney 2009). The other three categories are uncodified. See generally 2 Ernest P. Seelman, *The Law of Libel and Slander in the State of New York* 869-75; see also Restatement (Second) of Torts §§ 570-74 (1977).

1 they need not be alleged or proven." *Lieberman v. Gelstein*,
2 80 N.Y.2d 429, 435 (1992). Defamation law plays an
3 important role, in that the state "has a pervasive and
4 strong interest in preventing and redressing attacks upon
5 reputation." *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

6 But § 1983 has a quite different purpose: it
7 "provide[s] a remedy when federal rights have been violated
8 through the use or misuse of a power derived from a State."
9 *Kletschka v. Driver*, 411 F.2d 436, 448-49 (2d Cir. 1969).

10 To that end, a requirement that plaintiffs allege "actual
11 chilling" ensures an identified injury to one's right to
12 free speech is established. Hurt feelings or a bruised ego
13 are not by themselves the stuff of constitutional tort.

14 See, e.g., *Sadallah v. City of Utica*, 383 F.3d 34, 38 (2d
15 Cir. 2004) (requiring a "state-imposed burden or alteration
16 of status . . . *in addition* to [a] stigmatizing statement")
17 (emphasis in original, internal quotation marks omitted).

18 Where chilling is not alleged, other forms of tangible
19 harm will satisfy the injury requirement, since "standing is
20 no issue whenever the plaintiff has clearly alleged a
21 *concrete* harm independent of First Amendment chilling."
22 *Gill*, 389 F.3d at 383 (emphasis added). In our view, the

1 presumed damages of defamation *per se* under New York law do
2 not establish a concrete harm sufficient for a federal claim
3 of First Amendment retaliation.

4 "The common law of defamation is an oddity of tort law,
5 for it allows recovery of purportedly compensatory damages
6 without evidence of actual loss." *Gertz v. Robert Welch,*
7 *Inc.*, 418 U.S. 323, 349 (1974). *Gertz* recognized the
8 tension between the state's interest in protecting a
9 citizen's reputation on the one hand, and the
10 "constitutional command of the First Amendment" on the
11 other. *Id.* There, the question was whether the state's
12 common law of defamation provided an action based upon
13 constitutionally protected speech. The Supreme Court found
14 that states were prohibited by the First Amendment from
15 permitting recovery of presumed or punitive damages absent a
16 showing of malice. *Id.*⁷

17 This case does not require us to measure the
18 constitutional dimensions of a state's tort law. It simply
19 asks: is the injury presumed by state law to arise from mere
20 utterance of words solid enough ground on which to construct

⁷"The constitutionality of the common law rule that nominal damages may be recovered for a defamatory communication that is actionable *per se*, even in the absence of proof of harm to reputation, is now somewhat uncertain." Restatement (Second) of Torts § 569 cmt. c (1977).

1 a federal constitutional tort claim? We have before us, in
2 a sense, "speech against speech." Zherka's publications are
3 core protected speech under the First Amendment. Amicone's
4 alleged retaliation did not come in the form of denial of a
5 permit or threat of a lost contract. Rather, it was a group
6 of statements - none very kind - about Zherka. Retaliatory
7 insults or accusations may wound one's soul, but by
8 themselves they fail to cross the threshold of measurable
9 harm required to move government response to public
10 complaint from the forum of free speech into federal court.⁸

11 Our holding today does not rule out the use of non-*per*
12 se claims of defamation in § 1983 First Amendment
13 retaliation claims. Where concrete harm is alleged and
14 specified, the claim may proceed. Allegations of loss of
15 business or some other tangible injury as a result of a
16 defendant's statements would suffice to establish concrete
17 harm. But the presumed injury of New York's theory of *per*
18 se defamation is inadequate.

⁸Some other appellate courts have rejected similar attempts to use allegedly defamatory statements, without a showing of harm, as a basis to claim First Amendment retaliation. While our sister circuits apply a different standard, inquiring in all cases whether a person of "ordinary firmness" would have been deterred by the alleged retaliation, even under this standard allowing for a broader range of actionable conduct they have consistently rejected claims like Zherka's. This similarity of outcome confirms our sense that *per se* defamation is insufficient to establish a constitutional tort. See, e.g., *Zutz v. Nelson*, 601 F.3d 842, 849 (8th Cir. 2010); *Mezibov v. Allen*, 411 F.3d 712, 722 (6th Cir. 2005).

1 We need not decide if allegations of emotional and
2 psychological harm would establish compensable injury in a
3 First Amendment retaliation claim.⁹ Zherka did allege both,
4 but in a most cursory fashion. As pleaded, the allegations
5 are insufficient to establish facial plausibility under the
6 standard set by *Bell Atlantic Corp. v. Twombly*, 550 U.S.
7 544, 556 (2007). In any event, Zherka's attorney affirmed,
8 in response to a direct question from Judge Seibel, that *per*
9 se defamation was the only harm alleged.

10 The arena of political discourse can at times be rough
11 and tough. Public officials must expect that their
12 decisions will be subjected to withering scrutiny from the
13 populace. A public official's response to that criticism is
14 subject to limits, but the injury inflicted by that response
15 must be real. Without that limitation, the Constitution
16 would change from the guarantor of free speech to the
17 silencer of public debate.

⁹Our sister circuits have explicitly left this possibility open as a result of their reliance on the "person of ordinary firmness" standard in all types of First Amendment retaliation cases. See, e.g., *Mattox v. City of Forest Park*, 183 F.3d 515, 521 (6th Cir. 1999) ("We recognize that in some cases 'injury based on embarrassment, humiliation, and emotional distress' is sufficient to be actionable under § 1983." (quoting *Bloch v. Ribar*, 156 F.3d 673, 679-80 (6th Cir. 1998))). By contrast, our requirement of actual chilling or concrete harm in this particular type of retaliation case demands more than the test applied by our sister circuits.

III. CONCLUSION

The district court's judgment of December 22, 2009 dismissing with prejudice Plaintiff-Appellant's First Amendment retaliation claim is hereby **AFFIRMED**.