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Some Harm, No Foul?

An Analysis of Two Recent Cases Involving the Contact Sports Exception

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In general, every person owes a duty of ordinary care to guard against injuries to others that might result as a reasonably probable and foreseeable consequence of negligent conduct. Illinois courts, in the interest of promoting sports, have adopted an exception to the typical duty of care. Under the "contact sports exception", voluntary participants in contact sports are not liable for injuries caused by negligent conduct, but owe each other duties to refrain from willful and wanton or intentional misconduct. In the most physical sports, such as football and hockey, the courts have even questioned the utility of some willful and wanton counts.

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In late 2009, the Illinois appellate court was asked to decide whether a hockey trainer is a voluntary participant in a contact sport. *Weisberg v. Chicago Steel*, 2009 WL 5196554 (2nd Dist. December 31, 2009). That decision followed a 2008 Illinois Supreme Court Decision wherein that court upheld the dismissal of a father's claims on his son's behalf pursuant to the contact sports exception, adding a new gloss to the standard contact sports exception. *Karas v. Strevell*, 227 Ill.2d 440 (2008). This article summarizes both cases.

The *Weisberg* case involved Michael Weisberg, an athletic trainer, who filed suit against the Chicago Steel, an amateur hockey team, and Chicago Steel player Cody Lampl, after suffering an injury resulting in vision loss. On October 24, 2004, a Chicago Steel player notified Weisberg that the team needed fresh water by banging a hockey stick on the locker room door. Weisberg, following the normal practice established between the trainers and the team, then went to the team bench to refill the water bottles. When he arrived at the bench a puck hit him in his right eye. The blow fractured the bones below his right eye and resulted in retinal tearing, which caused permanent vision loss.

As a result of his injury, Weisberg filed suit against both the Chicago Steel and Cody Lampl. The first count of the complaint alleged that the Chicago Steel was negligent in failing to prevent players from shooting pucks at the bench area. The second count of the complaint alleged that Lampl was negligent in shooting pucks at the water

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7th Circuit Opinions Reflect Changing Standard of Causation in 42 U.S.C. § 1983 Actions Involving Public Employee's First Amendment Rights

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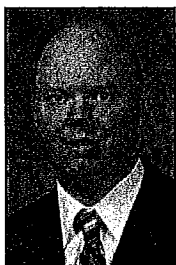
Recent years have seen the continued (or even increased) prevalence of litigation brought pursuant to the federal civil rights statutes. Common causes of action include employment discrimination actions brought against employers, and allegations of false arrest, retaliation, and the like, brought against state actors under 42 U.S.C. § 1983. In such cases, proof of causation becomes particularly important. Unlike many soft-tissue personal injury cases, where the existence of an injury itself may be challenged, it is typically undisputed that an individual's employment was terminated, or that an individual was incarcerated. Rather, the key question presented in these cases is what *caused* such an outcome. For purposes of a jury trial, whether the test for causation is "but-for," versus the so called "mixed-motive" standard, becomes critical.

In the context of employment cases brought under the Age Discrimination in Employment Act (ADEA), the United States Supreme Court recently clarified the causation standard. In *Gross v. FBL Financial Services*, 129 S.Ct. 2343 (2009), the Court held that a plaintiff bringing an ADEA disparate-treatment claim must prove that age was the "but-for" cause of the challenged adverse employment action. In reaching this conclusion, the Court applied a strict interpretation of the ADEA's statutory language, and distinguished that Act from Title VII. Title VII provides that an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, "even though other factors also motivated the practice."

Plaintiffs may no longer argue that, in order to prevail, they are only required to prove that their age was "one of" the reasons they were fired. They must now prove that but for their age, the plaintiff would not have been fired.

The *Gross* Court observed that the ADEA includes no language like that included in Title VII. As a result, the Court held that so-called "mixed-motive" instructions are therefore inappropriate in age discrimination cases brought under the ADEA. This obviously represents a radical restructuring of the landscape in such litigation, particularly from the point of view of the defense. Plaintiffs may no longer argue that, in order to prevail, they are only required to prove that their age was "one of" the reasons they were fired. They must now prove that but for their age, the plaintiff would not have been fired.

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In the context of certain civil rights actions brought pursuant to 42 U.S.C. § 1983, it appears the *Gross* opinion is having an impact in the Seventh Circuit. This is evident with respect to civil rights claims brought by public employees, alleging retaliation following the exercise of free speech under the First Amendment. Currently, the Seventh Circuit's Pattern Civil Jury Instructions require only that the plaintiff in such a suit prove that their exercise of protected speech is a "substantial" or "motivating" factor in causing the retaliatory conduct. (See, 7th Circuit Pattern Civil Jury Instruction No. 6.01, Public Employee's First Amendment Retaliation Claim, "[p]laintiff's [protected speech] was a reason, alone or with other reasons, that Defendant relied on [when Defendant engaged in the alleged retaliatory conduct].") However, following the *Gross* decision, this standard of causation appears to be changed.

In *Fairley v. Andrews*, 578 F.3d 518 (7th Cir. 2009), two prison guards at the Cook County Jail in Chicago resigned their positions of employment. They subsequently filed suit against their former coworkers, as well as their supervisors, the Sheriff's office, and Cook County. The guards' suit was brought pursuant to 42 U.S.C. § 1983, and under a workplace retaliation theory. The guards alleged that various defendants unlawfully violated their First Amendment rights. The specific allegations were that the plaintiffs were assaulted and threatened, because the plaintiffs had reported prisoner abuse to jail supervisors, and because those plaintiffs had provided deposition testimony in a prisoner abuse case, which was helpful to the prisoner. *Id* at 521. Plaintiffs characterized this conduct as protected speech under the First Amendment.

During the trial phase of *Fairley*, the court granted defendants' motion to exclude all evidence of the co-worker assaults and threats occurring before plaintiffs had given their deposition in the prisoner-abuse case. Plaintiffs argued that – in light of that ruling – they could not prove their case, as the assaults and threats had primarily occurred *prior* to the depositions, and thus much of their evidence was now inadmissible. In light of that position, the trial court entered judgment in favor of the defendants, and the matter was brought before the Seventh Circuit Court of Appeals.

On appeal one issue considered was whether a First Amendment retaliation claim requires that the retaliatory conduct occur *after* the protected speech. Defendants contended – and the trial court agreed – that there could be no First Amendment retaliation against the plaintiffs, because the insults, assaults and other conduct preceded plaintiffs' depositions. Judge Easterbrook, writing for the panel, observed that threatening penalties for *future* speech also offends the First Amendment, and falls under the rubric of "prior restraint." *Id* at 525. Thus, on that point, the district court was overruled.

In the opinion, the appellate court took the opportunity to address the causation issue. The court observed that:

Plaintiffs must show that their potential testimony, not their internal complaints, caused the assaults and threats. This means but-for causation. Some decisions ... say that a plaintiff just needs to show that his speech was a motivating factor in defendant's decision. These decisions do not survive *Gross*, which holds that unless a statute ... provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law. The record has evidence from which a reasonable jury could find causation; no more is necessary at this stage, but the instructions at trial must reflect the holding of *Gross*.

Id, at 525-526. (See also, *Gunville v. Walker*, 583 F.3d 979, 984, FN1 (7th Cir. 2009), "[u]ntil the Supreme Court's recent decision in [*Gross*], plaintiffs could prevail in a First Amendment § 1983 action if they could demonstrate that their speech was a motivating factor in the defendant's decision. After *Gross*, plaintiffs in federal suits must demonstrate but-for causation unless a statute ... provides otherwise.")

In light of *Gross* and *Fairly*, the pattern jury instructions should be modified in federal cases involving allegations of first amendment violations against a public employer. However, more generally, the *Fairly* opinion appears to signal the Seventh Circuit's view that the *Gross* rationale should be applied broadly. Thus, in any matter brought under a federal civil rights statute, the defense should scrutinize the underlying statutory framework in order to determine whether there is a basis for a mixed-motive, or substantial-factor instruction. In the absence of any clear statutory language supporting such an instruction, but-for causation appears to be the appropriate standard. ■