IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

DAVID WOOLSEY, individually,

Plaintiff,

vs. Civil Action No. 2 :18-cv-00745
Honorable Thomas E. Johnston,
Chief Judge.

RICHARD OJEDA, individually,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Now comes the Plaintiff, by and through counsel, John H. Bryan, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and moves the Court to deny the Defendant's motion to dismiss. In support hereof, the Plaintiff states as follows:

INTRODUCTION

This case arises from actions taken by Defendant Ojeda, in retaliation against the Plaintiff, David Woolsey, in response to a Facebook post made by the Plaintiff showing Defendant Ojeda speeding and illegally passing his vehicle across a double-yellow line within the Defendant State Senator's district. After the Plaintiff posted the video, and stated, "This is your State Senator, folks," the Defendant used his official Facebook account to take a retaliatory action against the Plaintiff by spreading false private information about him, calling out his employer to take action against him, as well as personally calling the employer the following day, culminating in the Plaintiff being fired.

FACTS ALLEGED IN THE COMPLAINT

On Friday, April 20, 2018, the Plaintiff and his co-worker were driving a furniture store delivery truck, heading from Logan, West Virginia towards Huntington, West Virginia. They were both employed by McCormick's Furniture Store in Logan. They were driving on Route 10, a winding two-lane road with a speed limit of 55 mph. Plaintiff was in the passenger seat. His coworker was driving. They noticed a red two-door Jeep Wrangler coming up quickly behind them. The Jeep then passed the furniture truck in a no-passing zone, crossing a double yellow line. The Plaintiff immediately noticed that the Jeep belonged to Defendant Ojeda due to the fact that his name covered the rear of the vehicle, and due to his vanity license plate. The Plaintiff had not yet begun to take video footage.

As they continued driving, they caught up to the Defendant as they noticed him on the side of the road putting up a campaign sign in front of a public school. Plaintiff confirmed that the driver of the Jeep was Defendant Ojeda, as he recognized him, and also confirmed that the illegal and reckless driving they witnessed was not in response to some emergency, but rather for political purposes.

A short while later, as they continued towards Huntington in the delivery truck, the Plaintiff and his coworker noticed Defendant Ojeda once again behind them in his red Jeep. Again, Defendant began to pass them around a double-yellow line. This time the Plaintiff pulled out his phone and filmed Defendant Ojeda passing them. He added the commentary that, "This is your State Senator, folks." The video showed Ojeda passing illegally, at a spot where the road

curved, and then showed him speeding on up the road. When the Plaintiff and his coworker arrived in Huntington, the Plaintiff uploaded the video to his personal Facebook page.[1]

Later that night, the Plaintiff was alerted by a friend to take a look at Defendant Ojeda's official Facebook page, which has over 50,000 followers. Plaintiff did so, and observed a video posted about the Plaintiff. In the video, the Defendant excoriates the Plaintiff for posting the video and criticizing him. He goes on a tirade insulting and slandering the Plaintiff. Defendant then names the Plaintiff's employer, McCormick Furniture Store, and calls on them to take action against the Plaintiff. He pressures his followers to do the same. The next day, Defendant personally calls the owner of McCormick Furniture Store and speaks to him about the Plaintiff, as he had threatened to do in the video. The following day, the Plaintiff was told by his employer, "You are interfering in a federal election," and fires the Plaintiff.

ARGUMENT

Defendant's primary theme of argument is a pretentious lecture in Complaint drafting from defense counsel. They complain about the Complaint being too long, and too specific, but yet also complain that the Complaint doesn't meet pleading requirements. Stylistic complaints seem to be the common theme. Cutting through the lengthy dissertation and advocacy, the Defendant's arguments appear to be that the Complaint lacks allegations of "threats, coercion or intimidation of government sanction, or adverse regulatory action . . ." and that it lacks allegations that "Defendant acted within his capacity as a state senator . . . ." Def.'s Mem. at 9. These arguments pertain to whether the Complaint properly alleges retaliation under the First

[1] The video was not posted to Defendant Ojeda's Facebook account. It was solely posted by the Plaintiff on the Plaintiff's personal Facebook page, where it could have been viewed by his Facebook "friends," who have elected to receive posts from the Plaintiff.

Amendment, and whether Defendant Ojeda acted under color of law. The Plaintiff took great care to explicitly allege in great detail both that Defendant Ojeda's actions were retaliatory in nature, and that he acted under color of law. The Complaint's allegations are sufficient to present factual issues on both retaliation and color of law.[2]

As the Complaint explains explicitly, Defendant Ojeda acted through his official Facebook page in retaliating against the Plaintiff.[3] Subsequent to the filing of the instant lawsuit, Defendant Ojeda wisely deleted his personal Facebook page, presumably so that one cannot in the future draw a distinction between his official conduct and his personal conduct. On April 20, 2018, both of Defendant Ojeda's accounts existed, and it was the official Facebook page on which the retaliatory video was posted. Whether the Defendant chooses to recognize it or not, actions harmful to private citizens taken through an elected politician's official Facebook page carries with it a legal significance, as well as potential legal liability.

As the Supreme Court has recently noted, social media – and Facebook in particular – has become a vital platform for speech of all kinds. *See* Packingham, 137 S. Ct. at 1735-36.[4] Indeed, social media may now be "the most important" modern forum "for the exchange of views." Id. at 1735. The First Amendment applies to speech on social media with no less force than in other

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[2] Plaintiff's counsel attempted to separate the argument section into "A" and "B" in order to match the Defendant's memorandum. However, the Defendant intertwined issues between the two sections, so to do so would have been impossible within the page limitation. Therefore, the argument will be consolidated.

[3] *See* Complaint at paragraphs 24, 33, 46-52.

[4] Packingham v. North Carolina, 137 S. Ct. 1730 (U.S. 2017)

types of forums. *See, e.g.*, Bland v. Roberts, 730 F.3d 368, 386 n.14 (4th Cir. 2013), as amended (Sept. 23, 2013) (*quoted by* Davison at 30-31).[5]

Indeed, since the filing of the instant Complaint, another social media case was in the news involving the President of the United States and Twitter. Out of the Southern District of New York, in a case filed by the Knight First Amendment Institute at Columbia University, the plaintiffs claimed that the Twitter account "@realDonaldTrump" could not legally retaliate against Twitter users by banning them. *See* Knight First Amendment Ins., et al. v. Donald J. Trump, et al., Case No. 1:17-cv-05205-NRB (S.D.N.Y. May 23, 2018). The Southern District held that the @realDonaldTrump account was now a "public forum," despite the fact that it predated the President's political office, and that he therefore could not retaliate against certain Twitter user's political speech:

> We hold that portions of the @realDonaldTrump account -- the "interactive space" where Twitter users may directly engage with the content of the President's tweets -- are properly analyzed under the "public forum" doctrines set forth by the Supreme Court, that such space is a designated public forum, and that the blocking of the plaintiffs based on their political speech constitutes viewpoint discrimination that violates the First Amendment. In so holding, we reject the defendants' contentions that the First Amendment does not apply in this case and that the President's personal First Amendment interests supersede those of plaintiffs.

Id. at 2.

The Court further held that, actions via the @realDonaldTrump account qualified as under color of law, even though it was previously a personal account for Donald Trump first created in 2009:

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[5] *Quoting* the Complaint at 53. *Citing* Davison v. Loudoun County Board of Supervisors, Memorandum of Decision, 1:16-cv-932 (July 25, 2017 E.D. Va.) (finding legislator's Facebook page censorship was First Amendment retaliation under color of law).

> [T]he standards for whether an action was taken "under color of state law" and for whether an action constitutes "state action" are identical, *see* Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982), and an official takes action under color of state law when he "exercise[s] power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West v. Atkins, 487 U.S. 42, 49 (1988) (*quoting* United States v. Classic, 313 U.S. 299, 326 (1941)). Invoking this standard, defendants contend that the act of blocking is not state action triggering First Amendment scrutiny because blocking is a functionality made available to every Twitter user, Stip. ¶ 28, and is therefore not a power possessed by virtue of state law . . . .
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> No one can seriously contend that a public official's blocking of a constituent from her purely personal Twitter account -- one that she does not impress with the trappings of her office and does not use to exercise the authority of her position -- would implicate forum analysis, but those are hardly the facts of this case.

Id. at 45.

The facts underlying the color of law analysis *sub judice* are substantially similar to the facts in both recent decisions of Packingham[6] and Knights.[7] As described in paragraph 48 of the Complaint:

> Senator Ojeda maintains a Facebook page entitled "OjedaForCongress," over which he exerts plenary control. He uses it as his official Facebook account, both as a member of the West Virginia Senate, and as a candidate for the 3rd congressional district. He uses the Facebook page to share information with his constituents, as well as for campaign purposes. In the "About" section of the OjedaForCongress Facebook page, the page mentions both that he is a West Virginia State Senator for District 7, and that he is currently running for the U.S. House of Representatives for West Virginia District 3. In numerous posts on the OjedaForCongress Facebook page, it features quotes signed "WV Sen. Richard Ojeda." In hundreds of posts on the said Facebook page, Defendant Ojeda discusses political issues both in his capacity as a sitting state senator, as well as a congressional candidate, and invites discussion from members of the public on the page. Numerous posts on the page promote and invite attendance at events related to Defendant Ojeda's work as a senator. In some posts, he films himself on the floor of the legislature, or posts live videos from the floor of the legislature. Many of the posts are expressly addressed to the constituents of his district. Ojeda frequently, if not constantly, uses the comments section of his posts to engage with his constituents. Moreover, upon

[6] Packingham v. North Carolina, 137 S. Ct. 1730 (U.S. 2017).

[7] Knight First Amendment Ins., et al. v. Donald J. Trump, et al., Case No. 1:17-cv-05205-NRB (S.D.N.Y. May 23, 2018).

> information and belief, Defendant Ojeda engages in the practice of censoring the discussions by way of blocking those who disagree or criticize him.

The Complaint further describes in detail the alleged facts which make up the "totality of the circumstance" analysis under the color of law issue:

> The "totality of the circumstances" show that the retaliatory video and subsequent phone call can be traced to the conduct of a government official. There exists a "requisite nexus" with Ojeda's "public office" to be fairly attributable to the government. *See* Rossignol at 523. Ojeda's identity as a state senator played a role in the retaliation against the Plaintiff insofar as his actions were facilitated by his apparent authority and status as a legislator. As in Rossignol, Ojeda's actions "arose out of public, not personal, circumstances." Rossignol at 524; *see also* Davison at 17 ("the Facebook page was self-evidently for the purpose of Defendant's election to public office"). The said Facebook page has been the primary and preferred means by which Defendant Ojeda holds back and forth constituent conversations. Ojeda has further used the page to solicit participation in various constituent issues and political issues and events. Defendant Ojeda has used the page to keep his constituents abreast of his activities as state senator and of important events in local government, such as the West Virginia teacher's strike, as well as the Frontier employees' strike. Defendant Ojeda has gone through great efforts to swathe the OjedaForCongress Facebook page in the trappings of his office as state senator. Defendant has operated the OjedaForCongress Facebook page while "purporting to act under the authority vested in him by the state." Hughes v. Halifax Cnty. Sch. Bd., 855 F.2d 183, 186-87 (4th Cir. 1988). Defendant Ojeda at all relevant times acted as a state official who is cloaked with official power, whether or not his actions were in fact in excess of the authority actually delegated to him under state law. Ojeda attempted to cloak himself in the power of state law as a state senator when he threatened the Plaintiff and called for action against Plaintiff's employment, both of whom were constituents in Ojeda's district. Defendant Ojeda maintained the said official Facebook page even before he declared his candidacy for Congress, and will maintain and operate the page following the election.

Quoting Complaint at paragraph 50.

The retaliatory video posted to Defendant Ojeda's Facebook page "arose out of public, not personal, circumstances." Rossignol at 524. In Davison, the retaliation was related to a question asked at a town hall, and subsequently taken up on a Facebook page. The Court found a First Amendment retaliation violation following a bench trial, merely for an hour-long Facebook

ban. Here, Sen. Ojeda posted a four minute video insulting and humiliating the Plaintiff and calling for action against, or by, Plaintiff's employer, in response to Plaintiff's public political expression. Just to be sure sufficient damage was inflicted, Defendant Ojeda followed that up with a personal phone call to the employer the following day. McCormick's Furniture Store has been in business in Ojeda's district for 70 years, and did not want to suffer retaliation and economic harm due to Plaintiff's political expression. *Quoting* Complaint at 51.[8]

The Plaintiff's video was protected by the First Amendment. "Criticism of official conduct is not just protected speech, but lies at the very heart of the First Amendment." Rossignol at 522. If the Supreme Court's First Amendment jurisprudence makes anything clear, it is that speech may not be disfavored by the government simply because it offends. *See* Matal v. Tam, 137 S. Ct. 1744, 1763 (2017) (quoted by Davison at 29). The suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment guards. *See* Rossignol at 521-22 (quoted by Davison at 29). Such retaliation is considered a "cardinal sin under the First Amendment." *See* Davison at 29-30.

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[8] Defendant's counsel comments numerous times regarding the content of the phone call between Defendant Ojeda and the Plaintiff's employer, attempting to insert a factual dispute into their memorandum. Notwithstanding the fact that they are arguing their motion under Rule 12, their arguments pertaining to the substance of the phone call are a red herring. It makes no difference at this point what Defendant Ojeda claims to have said during the phone call. Even assuming he is telling the truth, he admitted to an intention to contact the Plaintiff's employer for the purpose of harming the Plaintiff. Irregardless, the Defendant has not yet testified under oath about the conversation. Likewise, it makes no difference what the Plaintiff's employer will testify to regarding the substance of the conversation. Plaintiff's counsel did in fact call Mr. McCormick during his pre-filing investigation. However, the conversation was not a cross-examination, and the witness was not under oath. The important facts, which are alleged in the Complaint was that the phone call was threatened, that it occurred, that it was motivated by the Defendant's intention to retaliate against the Plaintiff, and that the Plaintiff suffered harm as a result. The factual issues over specifically what was said, and was not said, or the effect thereof, can be fleshed out in discovery and at trial. *See e.g.,* Mendocino Envt'l Ctr. , 192 F.3d at 1300; *quoting* Ariz. Students' Ass'n v. Ariz. Bd. of Regents, 824 F.3d 858, 867 (9th Cir., 2016) (plaintiff need only show that the defendant "intended to interfere" with the plaintiff's First Amendment rights and that it suffered some injury as a result; the plaintiff is not required to demonstrate that its speech was actually suppressed or inhibited.).

Also protected is the Plaintiff's actions of placing political yard signs in his personal yard, which was also the subject of Defendant Ojeda's retaliation. *Quoting Complaint at 52*.

The Defendant argues that he himself has a First Amendment right to respond to the Plaintiff's speech. The Court in Knight addressed the same argument, although in a case with a much more compelling interest in First Amendment speech:

> To be clear, a public official does not lose his First Amendment rights upon taking office. *Cf*. Garcetti v. Ceballos, 547 U.S. 410, 417 (2006). "The interest of the public in hearing all sides of a public issue," an interest that the First Amendment seeks to protect, "is hardly advanced by extending more protection to citizen-critics than to [public officials]." Bond v. Floyd, 385 U.S. 116, 136 (1966). That is, no set of plaintiffs could credibly argue that they "have a constitutional right to prevent [government officials] from exercising their own rights" under the First Amendment. X-Men Sec., Inc. v. Pataki, 196 F.3d 56, 70 (2d Cir. 1999). Further, "[n]othing in the First Amendment or in [the Supreme] Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 285 (1984).
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> No First Amendment harm arises when a government's "challenged conduct is simply to ignore the [speaker]," as the Supreme Court has affirmed that "[t]hat it is free to do." Smith v. Ark. State Highway Emps., Local 1315, 441 U.S. 463, 466 (1979) (per curiam). Stated otherwise, "[a] person's right to speak is not infringed when government simply ignores that person while listening to others," or when the government "amplifies" the voice of one speaker over those of others. Minn. State Bd., 465 U.S. at 288. Nonetheless, when the government goes beyond merely amplifying certain speakers' voices and not engaging with others, and actively restricts "the right of an individual to speak freely [and] to advocate ideas," it treads into territory proscribed by the First Amendment. Id. at 286 (*quoting* Smith, 441 U.S. at 464) . . . .
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> In sum, we conclude that the blocking of the individual plaintiffs as a result of the political views they have expressed is impermissible under the First Amendment. While we must recognize, and are sensitive to, the President's personal First Amendment rights, he cannot exercise those rights in a way that infringes the corresponding First Amendment rights of those who have criticized him.

Knight at 64-65, 67-68. Thus, while Defendant Ojeda certainly has his own First Amendment right to express his political speech, he does not have the right to use his official Facebook

account as a State Senator to go beyond "merely amplifying certain speakers' voices and not engaging with others, and actively restricts 'the right of an individual to speak freely [and] to advocate ideas,' it treads into territory proscribed by the First Amendment." Knight at 68 (*quoting* Smith, 441 U.S. at 464).

Moreover, Defendant Ojeda went well beyond President Trump's actions in blocking Twitter users, or the Davison defendant's actions of blocking Facebook users. He verbally castigated, and singled out for pecuniary harm, one of his own constituents, who had criticized him in an official capacity on Facebook. This had the purposeful effect of rendering the Plaintiff speechless, and it also purposefully made a public example out of the Plaintiff in order to deter other potential political critics. Thus, in response to criticism of Defendant Ojeda, as a sitting State Senator, took to his official Facebook page, which as alleged in the Complaint is a primary method Senator Ojeda communicates with his constituents, to damage the Plaintiff personally, including calling for the Plaintiff's employer to fire the Plaintiff. Defendant Ojeda's conduct is, by definition, the suppression of critical commentary - a "quintessential form of viewpoint discrimination" and a "cardinal sin under the First Amendment." *See* Rossignol at 521-22 (quoted by Davison at 29-30).

The Defendant argues that the Plaintiff has failed to allege sufficient "retaliation" under the First Amendment. However, the damage incurred to the Plaintiff as a result of Defendant Ojeda's public retaliation far exceeds the harm required under the First Amendment. As the Knight Court recognized:

> To be sure, we do not suggest that the impact on the individual plaintiffs (and, by extension, on the Knight Institute) is of the highest magnitude. It is not. But the law is also clear: the First Amendment recognizes, and protects against, even *de minimis* harms.

> *See* Six Star Holdings, LLC v. City of Milwaukee, 821 F.3d 795, 805 (7th Cir. 2016) (rejecting an argument of "*de minimis*" First Amendment harm and approving an award of nominal damages); Lippoldt v. Cole, 468 F.3d 1204, 1221 (10th Cir. 2006) (similar); KH Outdoor, LLC v. City of Trussville, 465 F.3d 1256, 1261 (11th Cir. 2006) (similar); Risdal v. Halford, 209 F.3d 1071, 1072 (8th Cir. 2000) (similar); *cf*. Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); N.Y. Progress & Prot. PAC v. Walsh, 733 F.3d 483, 486 (2d Cir. 2013) (same). Thus, even though defendants are entirely correct in contending that the individual plaintiffs may continue to access the content of the President's tweets, Stip. ¶¶ 55-56, and that they may tweet replies to earlier replies to the President's tweets, Stip. ¶¶ 57-58, the blocking of the individual plaintiffs has the discrete impact of preventing them from interacting directly with the President's tweets, Stip. ¶ 54, thereby restricting a real, albeit narrow, slice of speech. **No more is needed to violate the Constitution**.

Knight at 68-69 (emphasis added). Although the Defendant argues that allegations of "threats, coercion or intimidation of government sanction, or adverse regulatory action . . ." must be present in the Complaint, retaliation is viewed objectively and is not limited to coercion or threats.

A plaintiff may bring a Section 1983 claim alleging that public officials, acting in their official capacity, took action with the intent to retaliate against, obstruct, or chill the plaintiff's First Amendment rights. Gibson v. United States , 781 F.2d 1334, 1338 (9th Cir. 1986). To bring a First Amendment retaliation claim, the plaintiff must allege that (1) it engaged in constitutionally protected activity; (2) the defendant's actions would "chill a person of ordinary firmness" from continuing to engage in the protected activity; and (3) the protected activity was a substantial motivating factor in the defendant's conduct—i.e., that there was a nexus between the defendant's actions and an intent to chill speech. O'Brien , 818 F.3d at 933–34 (*citing* Pinard v. Clatskanie Sch. Dist. 6J , 467 F.3d 755, 770 (9th Cir. 2006) ; Mendocino Envt'l Ctr. v. Mendocino County , 192 F.3d 1283, 1300 (9th Cir. 1999)); *see also* Blair v. Bethel Sch. Dist. ,

608 F.3d 540, 543 (9th Cir. 2010). Further, to prevail on such a claim, a plaintiff need only show that the defendant "intended to interfere" with the plaintiff's First Amendment rights and that it suffered some injury as a result; the plaintiff is not required to demonstrate that its speech was actually suppressed or inhibited. Mendocino Envt'l Ctr. , 192 F.3d at 1300; *quoting* Ariz. Students' Ass'n v. Ariz. Bd. of Regents, 824 F.3d 858, 867 (9th Cir., 2016).

The Supreme Court has recognized a wide variety of conduct that impermissibly interferes with speech. For example, the government may chill speech by threatening or causing pecuniary harm, Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 674, 116 S.Ct. 2342, 135 L.Ed. 2d 843 (1996) ; withholding a license, right, or benefit, Baird v. State Bar of Ariz. , 401 U.S. 1, 7, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971) ; prohibiting the solicitation of charitable donations, Vill. of Schaumburg v. Citizens for a Better Env't , 444 U.S. 620, 633, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) ; detaining or intercepting mail, Blount v. Rizzi , 400 U.S. 410, 417–18, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971). Importantly, the test for determining whether the alleged retaliatory conduct chills free speech is objective; it asks whether the retaliatory acts " 'would lead ordinary student[s] ... in the plaintiffs' position' to refrain from protected speech." O'Brien , 818 F.3d at 933 (*quoting* Pinard , 467 F.3d at 770).

The Defendant fails to acknowledge the objective factual issues alleged in the Complaint, such as whether objective retaliation occurred as a result of Ojeda's actions of making the video and the phone call. The Defendant also fails to acknowledge the pecuniary damage which occurred to the Plaintiff in losing his job, which as of the date of this writing, is still causing economic damage to the Plaintiff. Unlike the cases where individuals were nominally harmed by an hours-long Facebook or Twitter ban, the Plaintiff suffered real consequences in response to

protected political criticism. Those consequences came as a direct and foreseeable result of the public official whom was criticized. If such dramatic, outrageous and compelling facts such as these do not state a First Amendment claim, then very few other scenarios could do the same.

In addition to the chilling of the Plaintiff's, and others, speech, the Complaint also alleges that the Defendant caused the termination of Plaintiff's employment. Defendant argues that the Complaint should specifically allege the substance of the conversation between Defendant Ojeda and Mr. McCormick, and that the substance must include a governmental order or threat which compelled the termination of the Plaintiff. However, First Amendment retaliation cases have long been prosecuted on circumstantial evidence and evidence of temporal proximity. A plaintiff may establish motive using direct or circumstantial evidence. Ulrich v. City & County of San Francisco , 308 F.3d 968, 979 (9th Cir. 2002) (*citing* Allen v. Iranon , 283 F.3d 1070, 1074 (9th Cir. 2002)). In cases involving First Amendment retaliation in the employment context, courts have held that a plaintiff may rely on evidence of temporal proximity between the protected activity and alleged retaliatory conduct to demonstrate that the defendant's purported reasons for its conduct are pretextual or false. Id. at 980. At the pleading stage, a plaintiff adequately asserts First Amendment retaliation if the complaint alleges plausible circumstances connecting the defendant's retaliatory intent to the suppressive conduct. O'Brien , 818 F.3d at 933–34, 935; *quoting* Ariz. Students' Ass'n v. Ariz. Bd. of Regents, 824 F.3d 858, 870 (9th Cir., 2016); *see also* Guilloty Perez v. Pierluisi, 339 F.3d 43 (1st Cir., 2003) (The proximity in time between the protected activity and the alleged retaliation is circumstantial evidence of motive.); Pike v. Osborne, 301 F.3d 182, 185 (4th Cir. 2002) (The Court will draw an inference of retaliation from

the timing of the firing, even where the evidence of a causal relationship is thin and circumstantial.).

In Paige v. Coyner, 614 F.3d 273 (6th Cir., 2010), the Sixth Circuit faced a strikingly similar fact pattern. The plaintiff attended a public meeting held by the Warren County Port Authority, where she raised concerns regarding a proposed interstate-highway project. A county official then retaliated against Paige by calling her employer and saying false things about her speech. Paige filed an action under 42 U.S.C. 1983 alleging that her private employer fired her as a result of the county official's call. Paige further alleged that the county official intended the result when making the call, thereby violating Paige's First Amendment right of free speech. Id at 275. The Court found that a jury might find that the firing was a reasonably foreseeable consequence of the phone call by the county official:

> Here, the state actor (Coyner) initiated the entire chain of events. And, as discussed in more detail below, Coyner will be potentially liable for the result of that chain of events-Paige's firing-only if that result was a reasonably foreseeable consequence of Coyner's phone call. *See* Powers v. Hamilton County Pub. Defender Comm'n, 501 F.3d 592, 609 (6th Cir.2007) (holding that a state action in a § 1983 claim is liable for the reasonably foreseeable consequences of his conduct). Coyner could thus be liable not because the firing itself was state action, but because a jury might find that the firing was a reasonably foreseeable consequence of the action taken by Coyner. In other words, once there has been state action (here, the phone call), the proper test for the scope of responsibility for events flowing from that action is reasonable foreseeability, not how close the nexus is between the private actors and the state actors.
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> The district court thus erred in applying Blum to the instant case and by framing the issue as whether [the private employer's] actions in firing Paige could be fairly attributed to the state. Blum's tests are limited to suits where the private party is the one allegedly responsible for taking the constitutionally impermissible action. Here, Coyner is clearly a state actor because she works on behalf of local government entities, and Paige contends that Coyner violated § 1983 when Coyner called [plaintiff's employer] and made false statements in retaliation for Paige's criticism of the proposed interstate project. Paige has therefore properly alleged state action.

Id. at 280. The Paige Court looked at each of the elements and found that the complaint's allegations satisfied each of them:

> In order to succeed on a retaliation claim, a plaintiff must first allege that she "was engaged in a constitutionally protected activity." Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir.1998). Paige contends that she engaged in protected activity by attending the Port Authority hearing and voicing her opinion concerning a proposed interstate project. The First Amendment clearly protects the right to speak publicly about such matters. *See* Glasson v. City of Louisville, 518 F.2d 899, 904 (6th Cir.1975) (noting that "freedom of expression upon public questions is secured by the First Amendment") . . . .
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> Next, a plaintiff must allege that "the defendant's 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." Bloch, 156 F.3d at 678. As discussed above, Paige contends that, by calling her employer and making false statements regarding Paige's public speech, Coyner took an adverse action against her. The injury that Paige alleges was caused by this adverse action was her termination from Bunnell Hill. Losing one's job and accompanying benefits is certainly severe enough to deter a person of ordinary firmness from speaking at public meetings. *See* Harris v. Bornhorst, 513 F.3d 503, 519 (6th Cir. 2008) (holding that the adverse action element was met because the state official "actually prevented [the § 1983 plaintiff] from securing the career he wants," and that "[a] more effective deterrent is difficult to imagine").
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> The second part of this element-causation-is the closest issue in the case. To survive a motion to dismiss, Paige's allegations must plausibly establish that Coyner is legally responsible for Paige losing her job. This requires Paige to establish both cause in fact and proximate cause. *See* Powers, 501 F.3d at 608 ("Traditional tort concepts of causation inform the causation inquiry on a § 1983 claim.").
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> "Cause in fact is typically assessed using the 'but for' test, which requires us to imagine whether the harm would have occurred if the defendant had behaved other than it did." Id. Bunnell Hill had been aware of Paige's various civic activities, including attending meetings and expressing opinions about development projects in Warren County, but had never previously objected. Paige had been employed by Bunnell Hill for over five years. Most importantly, Bunnell Hill specifically cited the information relayed in Coyner's call as a reason for terminating Paige. The temporal proximity between Coyner's allegedly retaliatory call and Paige's termination also suggests that, but for the call, Paige would have remained employed by Bunnell Hill. Paige has therefore alleged sufficient facts to establish as plausible that, but for Coyner's call, she would not have been terminated by Bunnell Hill.

Turning now to proximate cause, we have explained that the concept deals with determining the proper scope of responsibility:

[C]ourts have framed the § 1983 proximate-cause question as a matter of foreseeability, asking whether it was reasonably foreseeable that the complained of harm would befall the § 1983 plaintiff as a result of the defendant's conduct. Even if an intervening third party is the immediate trigger for plaintiff's injury, the defendant may still be proximately liable, provided that the third party's actions were foreseeable. Id. at 609. Under Powers, Bunnell Hill's intervening act of terminating Paige's employment does not relieve Coyner of liability if Coyner reasonably should have foreseen that the company would fire Paige as a result of the call . . . .

The final element of a First Amendment retaliation claim requires the plaintiff to show that "the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights." Bloch, 156 F.3d at 678. A defendant's motivation for taking action against the plaintiff is usually a matter best suited for the jury. Harris, 513 F. 3d at 519-20. And Paige alleges several facts that would allow a jury to find that Coyner was motivated at least in part by Paige's comments criticizing the proposed interstate project. For example, Coyner had a personal interest in the project because it was one of the first major projects that she was in charge of as the Director of the Warren County Office of Economic Development. Coyner also had a visibly negative reaction to Paige's critical comments during the Port Authority hearing.

Finally, one could reasonably infer from the fact that Coyner made allegedly false statements about Paige's speech during the call to Bunnell Hill that Coyner was acting with a retaliatory motive. Proof of Coyner's retaliatory motive may also arise from the fact that she called Paige's employer only one week after Paige spoke at the hearing. Temporal proximity between the protected conduct and the adverse action by the state actor "alone may be significant enough to constitute indirect evidence ... to create an inference of retaliatory motive." Muhammad v. Close, 379 F.3d 413, 417-18 (6th Cir. 2004) (citation and internal quotation marks omitted) (holding that on remand the district court should consider whether the temporal proximity between an inmate's grievances against a prison officer and that officer's charges against the inmate alone could create a genuine issue of material fact that the officer was acting with a retaliatory motive when he brought the charges against the inmate).

Coyner is of course free to rebut these allegations on summary judgment or at trial by establishing that she was motivated by any number of nonretaliatory goals. In Worrell v. Henry, 219 F.3d 1197 (10th Cir.2000), for example, the court suggested that public officials who were being sued in a First Amendment retaliation case after they pressured the district attorney to not hire a person who had previously testified for the defense in an important criminal case could be motivated by a desire to "provide[ ] effective law enforcement" rather than retaliating against the plaintiff for his testimony. Id. at 1213.

> Similarly, Coyner could have been motivated purely by business concerns rather than a desire to punish Paige for speaking out negatively against one of Coyner's proposed projects. She might have simply wanted to ensure that Bunnell Hill would adequately perform if it were awarded any development contracts or, more generally, that Bunnell Hill was fully behind the Port Authority and the Board's goals of developing the area. In this way, Paige might have just been doing her job-i.e., directing development in the area. But because Paige's complaint alleges facts that, if taken as true, could establish that Coyner was acting with a retaliatory motive, Paige has satisfied the third and final element of Bloch. She has therefore alleged sufficient facts to have her complaint survive a Rule 12(b)(6) motion to dismiss.
>
> This is not to say that public officials lack the right to inquire into the motivations and goals of their colleagues or constituents. **What they cannot do, however, is take action in order to punish a citizen for exercising his or her constitutional rights. That is, "an act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper**." Bloch, 156 F.3d at 681-82 (citation and internal alteration omitted). Thus, although Coyner's call to Bunnell Hill would be proper if prompted by purely business or governmental concerns, it would run afoul of § 1983 if prompted by retaliatory motives.

Paige at 282-283 (emphasis added); *see also* Mead v. Independence Ass'n., 684 F.3d 226 (1st Cir. 2012) (citing and acknowledging the Paige holding).

The Defendant cites Suarez Corp. Indus. v. McGraw, 202 F.3d 676 (4th Cir., 1999) to stand for the argument that the Defendant must have engaged in "threats, coercion or intimidation," because he was engaging in speech. However, defense counsel left out an important premise of the Suarez holding:

> In this case, SCI, the private citizen, alleges that McGraw and Rodd, public officials who were in the process of suing SCI for violations of West Virginia law, retaliated against SCI by: (1) making alleged defamatory statements to the media and to other attorneys general; (2) making truthful statements to the BBB; and (3) making defamatory statements to Dun & Bradstreet.15 McGraw and Rodd's alleged retaliatory acts are in the nature of speech. Therefore, the interests in conflict are SCI's First Amendment right to speech versus McGraw and Rodd's First Amendment speech rights, as well as their duty to keep the public and other law enforcement officials informed about consumer fraud and their ongoing investigation and prosecution of SCI.

> **Because none of McGraw and Rodd's statements concerned private information about an individual, we find that the appropriate inquiry to determine whether McGraw and Rodd adversely affected SCI's First Amendment speech rights to be whether their speech was threatening, coercive, or intimidating so as to intimate that punishment, sanction, or adverse regulatory action will imminently follow**. *See* X-Men Sec., 196 F.3d 56; Penthouse Int'l, 939 F.2d at 1016; Hammerhead Enters., 707 F.2d at 39.

Suarez at 688-689 (emphasis added). Suarez was based on the factual scenario where the Attorney General and his staff were speaking out about a public matter which the Attorney General's office was in the process prosecuting and regulating. The point was, that the regulatory and prosecutorial actions themselves could not legally be product of speech threatening to use those powers coercively, or through intimidation. The holding literally has no relation to the outrageous actions of Defendant Ojeda as he attacked a private citizen with allegations of private information, in an attempt to get him fired and harm him publicly in response to a Facebook post criticizing his driving. Ojeda had no legitimate role in discussing the Plaintiff which should be afforded a public interest or special protection.

As noted in the Suarez opinion, citing Penthouse Int'l Ltd. v. Meese, 939 F.2d 1011, 1015 (D.C. Cir. 1991), the holding related to a matter of public concern which is exactly in the job description of a state attorney general:

> The requirement that public official's speech include a threat, coercion, or intimidation, to adversely affect a citizen's First Amendment rights recognizes that a balance must be struck between the citizen's right to exercise his First Amendment rights and the public official's personal First Amendment rights, as well as his duty to the public to speak out about matters of public concern. *See* Penthouse Int'l Ltd. v. Meese, 939 F.2d 1011, 1015 (D.C. Cir. 1991) ("As part of the duties of their office, these officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate.")..

Suarez at FN 13. The Suarez court also acknowledged that, where the statements by a public official accompany harm to a tangible interest, as in the instant matter, they may be actionable even without retaliatory actions:

> [I]n limited circumstances, non-retaliatory speech may be actionable. For example, in Paul v. Davis, 424 U.S. 693 (1976), the United States Supreme Court acknowledged that defamatory statements, when accompanied by a harm to a more tangible interest, were actionable under the Fifth and Fourteenth Amendment Due Process Clauses. *See* id. at 701-02.

Suarez at FN 14.

Even if Suarez applied to the instant case, it would be distinguishable. In Suarez, there were no allegations that the West Virginia Attorney General was misusing his office in a manner so as to engage in threats, coercion, or intimidation. To the contrary, in the matter *sub judice*, the Complaint alleges that the Defendant retaliated against the Plaintiff about matters which were wholly personal to the Plaintiff, and which were not matters of public concern, and which had nothing to do with the Defendant's office or duty. For instance, the Defendant accused the Plaintiff of erratic driving, being a shoe-licker for a political opponent, being a low caliber person, making his parents ashamed of him due to his socio-economic status, and being a liability to McCormick's Furniture Store - the Plaintiff's employer. Defendant then went beyond mere speech and made a personal phone call to the Plaintiff's employer the next day. The Suarez court would refer to such statements as "concerning private information about an individual," and therefore not included within the Suarez holding (assuming it was applicable). Once more, the conduct left the realm of merely speech when the Defendant personally contacted the Plaintiff's employer for the purpose of economically harming the Plaintiff. Thus, the Defendant's retaliation is not protected under the Suarez holding.

CONCLUSION

Although the area of the First Amendment as it relates to social media presents dynamic issues to the federal courts, it has always been clear that the suppression, or retaliation against critical commentary by government officials is a violation of the First Amendment. It is furthermore clear that the standard for damages under a retaliation claim is low. The First Amendment protects against even *de minimis* harm - a threshold far surpassed by the Plaintiff's substantial and real actual damages. The two primary contested issues are 1) whether Ojeda's actions, as alleged in the Complaint, if true, qualify as retaliation; and 2) whether Ojeda's actions, as alleged in the Complaint, if true, were performed under color of law. Both issues are questions of fact.[9] The Complaint properly states a claim for relief in a very thorough manner. Defendant is free to rebut the allegations at the dispositive motions stage and/or at trial.

WHEREFORE, the Plaintiff respectfully requests that this Honorable Court deny the Defendants' motion to dismiss and for such other and further relief as this Court deems just and fit.

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[9] Every jury trial under 42 U.S.C. 1983 has to utilize, or stipulate, to an instruction for the jury's determination of whether the defendant(s) acted under color of law. Though it is rarely at issue.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

DAVID WOOLSEY, individually,

Plaintiff,

vs. Civil Action No. 2 :18-cv-00745
Honorable Thomas E. Johnston,
Chief Judge.

RICHARD OJEDA, individually,

Defendant.

CERTIFICATE OF SERVICE

I, John H. Bryan, do hereby certify that I have delivered a true copy of the foregoing PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS upon counsel of record by using the CM/ECF System, this the 14th day of June, 2018, and addressed as follows:

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