

## Civil Rights Update

By: *David A. Perkins and John K. Kim\**  
*Heyl, Royster, Voelker & Allen*  
*Peoria*

### **Supreme Court Adds Absence of Probable Cause to *Prima Facie* Case for *Bivens* Retaliatory-Prosecution Action in *Hartman v. Moore***

#### **Introduction**

The United States Supreme Court in *Hartman v. Moore*,<sup>1</sup> resolved a split among the Courts of Appeals on the issue of whether a *prima facie* case for a *Bivens* retaliatory-prosecution suit includes proof of the absence of probable cause. A *Bivens* action allows plaintiffs to bring suit against federal officials for damages resulting from constitutional violations.<sup>2</sup> A *Bivens* action is the federal analog to suits brought against state officials under Section 1983, which applies to state and local officers.

In *Hartman*, the defendants argued that they were entitled to qualified immunity because probable cause supported the underlying prosecution. Qualified immunity protects government officials who perform discretionary functions from liability for civil damages as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.<sup>3</sup> Under this “fair notice” rule, government officials may be held liable for their acts if “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.”<sup>4</sup> In short, the unfairness of holding officials responsible on grounds they could not have anticipated trumps the individual’s interest in vindicating transgressed rights. In dealing with a qualified immunity defense, courts typically use a two-step inquiry to determine whether the plaintiff alleged a deprivation of an actual constitutional right, and if so, whether that law was clearly established.<sup>5</sup> In *Hartman*, the plaintiff alleged that the United States Postal Service (“USPS”) inspectors retaliated against him for his lobbying efforts that were protected by the First Amendment. The defendants conceded that such a right was established, but argued that they were justified in their conduct because probable cause existed for the prosecution. Thus, the defendants urged the court to require the plaintiff to prove the absence of probable cause in an action for retaliatory-prosecution.

#### **Facts**

The plaintiff, William Moore, Jr., was the CEO of Recognition Equipment Inc. (“REI”), a government contractor, who lobbied Congress in an attempt to obtain a contract with the USPS to provide multiline optical readers, which would enable the USPS to efficiently sort and route mail. The USPS was considering using these multiline machines during the same time the USPS decided to promote the use of the four-digit extension to zip codes (“Zip+4”). REI had previously received \$50

million from the USPS to develop multiline technology, despite the Postmaster General's promoting the use of Zip+4, which provided enough routing information on one line of text.

Besides REI and Moore, who clearly had a financial interest in the use of the multiline technology, Members of Congress and other government research offices criticized the USPS' Zip+4 policy due to the foreign sources for the single-line machines, the burden of remembering four extra numbers, and the \$1 million per day in operational losses that would result from using single-line machines. Moore rode this wave of opposition by lobbying Members of Congress, testifying before congressional committees, and by supporting a "Buy American" rider to the USPS' 1985 appropriations bill. REI had pursued its lobbying agenda with a lobbying firm that one of the USPS' governors had recommended.

REI's lobbying efforts partially succeeded in that the USPS made what it called a "mid-course correction" in switching to the multiline technology. However, the correction did not include contracting with Moore and REI for the multiline equipment. Instead, the USPS awarded the contract, which was worth between \$250 million to \$400 million, to a competitor.

To make matters worse, Moore and REI found themselves under investigation by the USPS for alleged kickbacks that REI's lobbying firm directed to the USPS governor that recommended the firm to REI, as well as for REI's role in the search for a new Postmaster General. Despite very limited evidence linking Moore and REI to any wrongdoing, the U.S. Attorney's Office brought criminal charges against them and a grand jury indicted Moore, REI, and REI's vice-president. However, after six weeks of trial, the district court concluded that there was a "complete lack of direct evidence" connecting the defendants to any of the criminal charges and the court granted the REI defendants' motion for judgment of acquittal.<sup>6</sup>

### **Procedural History**

After the acquittal, Moore brought a *Bivens* action against the prosecutor and postal inspectors for violating his First Amendment rights for retaliating against him for his lobbying activities. Moore also argued that the inspectors pressured the U.S. Attorney's Office to bring the charges even though there was very little evidence. Moore also sought recovery under the Federal Tort Claims Act. The federal court for the Northern District of Texas dismissed the claims against the Assistant U.S. Attorney based on absolute immunity for his prosecutorial judgment, and rejected the abuse-of-process claim against the inspectors. The court then transferred the remaining claims to the district court for the District of Columbia ("D.C."), which dismissed the suit in its entirety. However, the Court of Appeals for the D.C. Circuit reinstated the retaliatory-prosecution claims.<sup>7</sup>

The D.C. District Court permitted limited discovery on the claims involving the inspectors, but again dismissed the claims against the United States and the prosecutor. The USPS inspectors moved for summary judgment arguing they were entitled to qualified immunity from the retaliatory-prosecution suit because the underlying criminal charges were supported by probable cause. The district court denied the motion and the Court of Appeals affirmed.<sup>8</sup> The Court of Appeals held that the "essential elements of a retaliatory-prosecution claim" were "first, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct."<sup>9</sup> The court further noted that if the plaintiff satisfied these two elements, then the burden shifted to the "State [to show] by a preponderance of the evidence that it would have reached the same decision as to whether to prosecute even had the impermissible purpose not been considered."<sup>10</sup> Accordingly, the Supreme Court granted *certiorari* and reversed the D.C. Circuit.

### **The Majority's Decision**

In Justice Souter's majority decision,<sup>11</sup> the court identified the issue on appeal as "whether a plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges."<sup>12</sup>

Although the court ultimately agreed with the postal inspectors that a plaintiff must plead absence of probable cause, the court did not agree with their reasoning. The inspectors made two arguments. First, they argued that without the requirement, *Bivens* actions would be too readily available because retaliatory animus is too easy to claim, but too hard to defend against. The inspectors argued that the plaintiffs needed to carry an "objective" burden to filter out frivolous claims. The court agreed that an "objective" requirement was appropriate for this type of case, but rejected the notion that there was a need to filter out frivolous claims against federal prosecutors and federal officials. The court pointed out that in the two dozen retaliatory prosecution actions brought before the federal judiciary in the past 25 years, there was no disproportion of cases that did not require a showing of lack of probable cause.<sup>13</sup>

Second, the inspectors analogized a *Bivens* retaliatory-action to the tort of malicious prosecution, which they argued should inform the court of this "objective" requirement. In an action for malicious prosecution after an acquittal, a plaintiff must show that the action was initiated without probable cause. The court did not find this argument persuasive because it viewed referencing common-law torts only as a "source of inspired examples" instead of "prefabricated components of *Bivens* torts."<sup>14</sup>

Instead, the court focused on causal connection between the retaliatory animus and the plaintiff's injury. In a retaliation action under Section 1983, the plaintiff must show the causal connection between the defendant's retaliatory animus and the defendant's conduct that caused the injury.<sup>15</sup> In other words, the plaintiff must show that "but for" the defendant's retaliatory animus, the defendant would not have acted in such a way to injure the plaintiff. In such a case, once the plaintiff sufficiently alleges "but for" causation, the burden shifts to the defendant official to show that the adverse action would have occurred despite the retaliatory animus. The court pointed out that "[i]t may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway."<sup>16</sup>

However, the court pointed out two significant differences where the claimed retaliation is criminal prosecution. First, in a criminal prosecution, "there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge."<sup>17</sup> The court found that showing that there was no probable cause for the underlying criminal charge would reinforce the allegation that retaliation was the "but-for" basis for instigating the prosecution. Given its evidentiary significance, the court pointed out that most retaliatory prosecution cases would likely involve litigating the issue of probable cause.

Second, the court noted that in a retaliatory-prosecution case, the plaintiff's action is not against a prosecutor, due to absolute immunity, but it is against a non-prosecutor official. Absolute immunity only extends to the prosecutor's decision to prosecute, but not to prosecutor's administrative or investigative actions.<sup>18</sup> Accordingly, the plaintiff must show that the non-prosecuting official not only acted in retaliation, but that the official also induced the prosecutor to bring the charges. The "but for" causation lies in the fact that the prosecutor would not have brought the charges without the officials' urging or inducement. Thus, in contrast with the ordinary retaliation claim, where the plaintiff must prove that an individual's animus motivated the same person's action, in a retaliatory prosecution claim, the plaintiff must prove that the retaliatory animus of one person caused the actions of a second person, the prosecutor.

In *Hartman*, the court pointed out the distinct problem of causation. “Evidence of an inspector’s animus does not necessarily show that the inspector induced the action of a prosecutor who would have not pressed charges otherwise.”<sup>19</sup> Further, because of the longstanding presumption of regularity afforded to prosecutorial decision making, the plaintiffs face a mounting obstacle in proving facts that show the influence of an investigator on a prosecutor’s mind. Therefore, the court reasoned that “[s]ome sort of allegation, then, is needed both to bridge the gap between the nonprosecuting government agent’s motive and the prosecutor’s action, and to address the presumption of prosecutorial regularity.”<sup>20</sup> The court concluded that the connection that the plaintiff must allege and prove is the absence of probable cause.

The court pointed out that a prosecutor’s disclosure of retaliatory thinking on his part or evidence that the prosecutor was simply a rubber stamp for investigatory officials would aid in closing the gap, reasoned that those examples were likely to be rare and “poor guides in structuring a cause of action.”<sup>21</sup> In the instant case, the prosecutor had stated that he was not motivated by the merits of the case, but sought the indictment because he wanted to attract the interest of a law firm that was looking for a tough trial lawyer. The court reasoned that Moore could not succeed with his retaliatory-prosecution claim in only showing that the prosecutor was an unabashed careerist. Instead, Moore would have to show that the prosecutor lacked probable cause, and that the inspectors had retaliatory animus. Lastly, the court reasoned that placing this “no probable cause” pleading requirement on the plaintiff did not add any undue cost or burden because a party was likely to raise the issue at some point to prove causation.

### **Dissent**

Justice Ginsburg filed a dissent in which Justice Breyer joined. Justice Ginsburg found the precedent applied by the D.C. Circuit sufficient. The D.C. Circuit held that where a plaintiff shows that his First Amendment conduct was the basis for the criminal charges, the burden shifts to the defendants to prove that the charges would have been brought despite the retaliatory animus. Justice Ginsburg found convincing the evidence of retaliatory motive, which came “close to the proverbial smoking gun.”<sup>22</sup> The record indicated that the postal inspectors engaged in “unusual prodding” in their urging a reluctant prosecutor to indict Moore.<sup>23</sup>

Further, Justice Ginsburg noted that because the posture of Moore’s case was only directed toward the postal inspectors, she would not impose the majority’s pleading requirement. Justice Ginsburg argued that the majority’s proof-burden allocation only checked “*entirely* ‘baseless prosecutions.’” This would allow retaliating officials to present evidence that was barely sufficient to establish probable cause in persuading a prosecutor to press charges. Justice Ginsburg argued that the officials acting to retaliate could accomplish their mission cost free, while the victim would incur costs in mounting a legal defense and would sustain injury to reputation, both of which are not compensable under federal law. Thus, Justice Ginsburg would have used the D.C. Circuit’s speech-protective formula, which provided for the possibility of recovery in rare cases, such as Moore’s, where strong motive evidence combined with weak probable cause evidence to show that the prosecution would not have occurred “but for” the postal inspector’s retaliatory animus.

### **Conclusion**

The court in *Hartman v. Moore*, in determining whether the postal inspectors were entitled to qualified immunity, further defined the essential elements of a Section 1983 retaliatory-prosecution claim. In resolving the circuit split, the plaintiffs must now plead and prove the absence of probable cause. The absence of probable cause reinforces the causation requirement that without the prodding of the federal official that harbored retaliatory animus against the plaintiff, a prosecutor would not have initiated the criminal charges.

### Endnotes

- <sup>1</sup> *Hartman v. Moore*, 126 S. Ct. 1695 (2006)
- <sup>2</sup> *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971).
- <sup>3</sup> *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982).
- <sup>4</sup> *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034 (1987).
- <sup>5</sup> *See Wilson v. Layne*, 526 U.S. 603, 609, 119 S. Ct. 1692 (1999).
- <sup>6</sup> *See United States v. Recognition Equipment Inc.*, 725 F. Supp. 587, 596 (D.C. Cir. 1989).
- <sup>7</sup> *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995).
- <sup>8</sup> *Moore v. Hartman*, 388 F.3d 871 (D.C. Cir. 2004).
- <sup>9</sup> *Id.* at 877.
- <sup>10</sup> *Id.* at 878.
- <sup>11</sup> Chief Justice Roberts and Justice Alito did not participate.
- <sup>12</sup> *Hartman*, *supra* note 1, 126 S. Ct. at 1701-02.
- <sup>13</sup> *Id.* at 1703.
- <sup>14</sup> *Id.* at 1702.
- <sup>15</sup> *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 593, 118 S. Ct. 1584 (1998).
- <sup>16</sup> *Hartman*, 126 S. Ct. at 1704.
- <sup>17</sup> *Id.*
- <sup>18</sup> *Compare Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S. Ct. 984 (1976), *with Buckley v. Fitzsimmons*, 509 U.S. 259, 274-75, 113 S. Ct. 2606 (1993), *and Burns v. Reed*, 500 U.S. 478, 492-95, 111 S. Ct. 1934 (1991).
- <sup>19</sup> *Hartman*, 126 S. Ct. 1705.
- <sup>20</sup> *Id.* at 1706.
- <sup>21</sup> *Id.*
- <sup>22</sup> *Id.* at 1707 (Ginsburg, J. dissenting).
- <sup>23</sup> *Id.*

**ABOUT THE AUTHORS:** David A. Perkins is a partner in the Peoria firm of *Heyl, Royster, Voelker & Allen*. He concentrates his practice in the areas of civil rights, municipal liability, insurance fraud, and first party property claims. Mr. Perkins received his B.A. in 1985 from the University of Illinois at Springfield and his J.D. from the University of Iowa in 1987. He is a member of the Peoria County, Illinois State, and American Bar Associations.

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