

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

ROBERT WAGNER,)	
)	
Plaintiff,)	
)	
vs.)	Case No.: 11-cv-_____
)	
MAYOR MARY LOU HANNON,)	(Judge _____)
individually, POLICE CHIEF MARK)	
KESSLER, individually, and the)	
Borough of Gilberton,)	(Filed Electronically)
)	
)	
Defendants.)	
)	

COMPLAINT

Plaintiff Robert Wagner brings this action against Defendants under 42 U.S.C. § 1983, seeking to vindicate rights protected by the First, Fourth and Fourteenth Amendments of the United States Constitution, and complaining and alleging as follows:

NATURE OF THE CASE

1. Plaintiff Robert Wagner, a Councilman of Gilberton Borough, has been unconstitutionally arrested and strip searched for exercising his First Amendment right to free speech. Mr. Wagner brings this action seeking declaratory and compensatory relief.

JURISDICTION AND VENUE

2. This action arises under the First, Fourth, and Fourteenth Amendments of the United States Constitution and is brought under 42 U.S.C. § 1983.

3. This Court has original jurisdiction over Plaintiff's federal law claims pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4) and 42 U.S.C. § 1983. This Court has jurisdiction to issue declaratory relief under 28 U.S.C. §§ 2201 and 2202.

4. Venue is proper under 28 U.S.C. § 1391(b) because Defendants reside in this judicial district and all the relevant events giving rise to the claims occurred in this judicial district.

PARTIES

5. Plaintiff Robert Wagner is and was, at all times relevant to this Complaint, a Councilman of Gilberton Borough. Mr. Wagner resides within this district, in Gilberton, Pennsylvania.

6. Defendant Mary Lou Hannon is and was, at all relevant times to this Complaint, the Mayor of Gilberton Borough. Ms. Hannon resides within this district, in Mahanoy Plane, Pennsylvania. Plaintiff sues Ms. Hannon in her individual capacity.

7. Defendant Mark Kessler is and was, at all relevant times to this Complaint, the Police Chief of the Gilberton Borough Police Department. Mr.

Kessler resides within this district, in Mahanoy Plane, Pennsylvania. Plaintiff sues Mr. Kessler in his individual capacity.

8. Defendant Gilberton Borough is a political subdivision of the Commonwealth of Pennsylvania. The Borough manages, directs and controls the Police Department, which employs Defendant Kessler.

FACTS

9. Plaintiff incorporates by reference as if fully set forth herein the allegations contained in the preceding paragraphs of this Complaint.

10. On the evening of July 13, 2010, Mr. Wagner called Police Chief Mark Kessler to complain that several teenagers were racing quads and dirt bikes in front of Mr. Wagner's house, creating a loud and hazardous condition that affected the entire neighborhood. As a Borough councilman, Mr. Wagner's neighbors complained to him and looked to him to do something about this recurring problem.

11. Unable to reach Chief Kessler, Mr. Wagner left a voicemail and used profanity to describe the actions of the teens and to express his dismay with his local law enforcement and government officials.

12. Mr. Wagner's left the following statement, as stated in the Affidavit of Probable Cause: "YO BOB WAGNER COUNCILMAN TEN OCLOCK AT FUCKEN NIGHT AND THESE KIDS ARE RACING BURING OUT UP AND

DOWN THE BLOCK WITH THE QUADS AND DIRT BIKES CHASING THE LITTLE FUCKEN GIRLS, WE HAVE TWO POLICE OFFICERS NOW AND THE REST OF THIS NEIGHBORHOODS GONNA BE TERRORIZED BY THIS SHIT, IM CALLING MARY LOU NOW AND IM GONNA GIVE HER THE SAME SHIT IM GIVING YOU THIS IS BULL FUCKEN SHIT HIRE TEN FUCKEN COPS IF YOU GOTTA TO STOP THIS SHIT EVERYBODYS CALLING ME BECAUSE THERE PISSED OFF AND IM A COUNCILMAN AND IM NOT DOING MY JOB HORSE SHIT IM NOT CATCHING THE ASS FOR THIS GOODBYE!” (sic).

13. Mr. Wagner also called Mayor Mary Lou Hannon and complained to her about the incident, again using profanity to describe the actions of the teens and his dismay.

14. At no time did Mr. Wagner threaten either Chief Kessler or Mayor Hannon.

15. The next day, Chief Kessler filled out a police criminal complaint, signed an affidavit of probable cause, and presented that paperwork to Magistrate Judge Bernadette J. Nahas, contending that Mr. Wagner’s telephone calls amounted to harassment.

16. Upon information and belief, Mayor Hannon directed and/or ratified Chief Kessler’s actions.

17. There was no probable cause for the prosecution of Mr. Wagner. It was, rather, purely retaliation for his exercise of his right to speak and to express himself in the words of his choosing.

18. Upon information and belief, Defendants Kessler and Hannon acted intentionally for the purpose of, or with willful and wanton disregard for, violating Mr. Wagner's constitutional rights.

19. On July 14, 2010, Chief Kessler arrested Mr. Wagner.

20. Mr. Wagner was then arraigned on two counts of misdemeanor harassment under 18 Pa. Cons. Stat. § 2709(a)(4).

21. Unable to post bail, Mr. Wagner was transported to Schuylkill County Prison, where he was processed, strip searched, and held for about six hours until his wife was able to post bail on his behalf.

22. The arrest caused Mr. Wagner to undergo public humiliation and emotional distress.

23. Mr. Wagner's charges were dismissed on August 4, 2010.

COUNT I

24. Under the First and Fourteenth Amendments of the United States Constitution, U.S. Citizens have the right to use common profanity.

25. By using Pennsylvania's harassment statute, 18 Pa. Cons. Stat. § 2709(a)(4), to arrest and prosecute Plaintiff in retaliation for his constitutionally

protected speech, Defendants Hannon and Kessler, acting under the color of state law, violated Plaintiff's clearly established rights under the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. Plaintiff was damaged as a result.

26. In taking these actions, the individual defendants acted under color of law.

27. These constitutional violations were directly and proximately caused by policies, practices and/or customs implemented and enforced by the Borough of Gilberton, through its policy making officials, Kessler and Hannon.

COUNT II

28. By arresting Plaintiff under 18 Pa. Cons. Stat. § 2709(a)(4) in retaliation for Plaintiff's use of profanity, Defendants, acting under the color of state law, violated Plaintiff's clearly established right to free speech under the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. Plaintiff was damaged as a result.

29. In taking these actions, the individual defendants acted under color of law.

30. These constitutional violations were directly and proximately caused by policies, practices and/or customs implemented and enforced by the Borough of Gilberton, through its policy making officials, Kessler and Hannon.

COUNT III

31. By causing the arrest, detention and strip search of Plaintiff without probable cause, Defendants, acting under the color of state law, violated Plaintiff's clearly established right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. §1983. Plaintiff was damaged as a result.

32. In taking these actions, the individual defendants acted under color of law.

33. These constitutional violations were directly and proximately caused by policies, practices and/or customs implemented and enforced by the Borough of Gilberton, through its policy making officials, Kessler and Hannon.

REQUEST FOR RELIEF

34. WHEREFORE, Plaintiff Robert Wagner requests that this Honorable Court grant the following relief:

- (a) Enter a declaratory judgment that Defendants violated Plaintiffs' rights under the First, Fourth and Fourteenth Amendments;
- (b) Enter an award for compensatory damages against Defendants;
- (c) Enter an award for punitive damages against Defendants Kessler and Hannon;

(d) Enter an award for costs, expenses and counsel fees pursuant to 42 U.S.C. §1988; and

(e) Enter such other relief as this Honorable Court may deem just and proper.

Dated: October 6, 2011

Respectfully submitted,

/s Irene Ayzenberg-Lyman
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