

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THOMAS G. SMITH,

Plaintiff,

v.

Case No. 2014-CV-807

NICHOLAS P. STROIK and
VILLAGE OF ARENA,

Defendants.

COMPLAINT AND JURY DEMAND

Introduction

1. Plaintiff Thomas G. Smith brings this civil rights action against Nicholas P. Stroik and the Village of Arena for the arrest and prosecution of Smith in retaliation for Smith's online Facebook comments criticizing the Village of Arena Police Department.

Parties

2. Plaintiff Thomas G. Smith is an adult currently residing in Statesville, Iredell County, North Carolina. At all times relevant to this Complaint, Smith resided in the Village of Arena, Iowa County, Wisconsin.

3. Defendant Village of Arena is a municipality incorporated by the State of Wisconsin and located in Iowa County, Wisconsin.

4. Defendant Nicholas P. Stroik was at all relevant times an adult resident of the State of Wisconsin, employed as a police officer by the Village of

Arena, and acting within the scope of his employment and under the Village's authority.

Jurisdiction and Venue

5. Smith asserts federal civil rights claims under 42 U.S.C. § 1983. Accordingly, this court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343.

6. The court also has supplemental jurisdiction over Smith's state law claim because it is a part of the same case or controversy as Smith's federal civil rights claims. 28 U.S.C. § 1367.

7. Venue in this court is proper under 28 U.S.C. § 1391(b)(2), because a substantial part of the events giving rise to Smith's claims occurred within Iowa County, Wisconsin, which is within the jurisdiction of the United States District Court for the Western District of Wisconsin.

Background

8. On or about July 19, 2012, members of the Village of Arena Police Department, including Defendant Stroik, canvassed Arena neighborhoods in search of several African-Americans suspected of burglary. Based on information and belief, the suspects were arrested later that night after a local resident apprehended them at gunpoint.

9. On July 20, 2012, Defendant Stroik posted on the "timeline" portion of the Village of Arena Police Department's Facebook page a message thanking local residents for their assistance in arresting the suspects.

10. Several Facebook users later posted comments on the Facebook post. While some comments praised the work of the Village of Arena police, others were highly critical.

11. For example, one Facebook user, Kim Marks, responded sarcastically to Defendant Stroik's "thank you":

You're so very welcome. Thanks for searching my house and accusing me of harboring so called dangerous fugitives, that I don't even know....wasting time searching peoples houses when the 'fugitives' were no where near there...and since when is it ok for a resident to point a gun at a couple if KID'S heads? If that was anyone else's kids pretty sure it would be a big deal. Oh wait though, they were black so It's ok. Thanks to everyone that made our town look like nothing but a racist, prejudice place to live..I'm embarrassed to say I'm part of that kind of community. If I were black I'd run too.

(all *sic*; ellipses in original).

12. A different Facebook user, Dana Willey, posted a comment that similarly accused a member of the Village of Arena Police Department of racism:

And don't anybody say it isn't about race because it is when I ask the cop specifically what they look like and his response is they will stand out because they don't belong here.

(all *sic*). Willey later identified Defendant Stroik as the police officer who told her that the African-American suspects would stand out because they did not belong in Arena.

13. Smith then chimed in. He posted two Facebook comments echoing the view that the police were racist, and otherwise expressing his displeasure with how the officers handled the matter.

Fuck the fucking cops they ant shit but fucking racist bastards an fucking all of y'all who is racist.

...

Fuck them nigers bitches wat you got on us not a dam thing so
fuck off dicks.

(All *sic*).

14. On July 22, 2012, Defendant Stroik found the above Facebook comments. Defendant Stroik then deleted not just Smith's comments, but also the comments of Marks and Willey criticizing the police. Defendant Stroik did not delete the few Facebook comments praising the police for its handling of the situation.

15. Defendant Stroik then requested that Smith be arrested and charged with two counts of disorderly conduct (Wis. Stat. § 947.01(1)), two counts of unlawful use of a telephone (Wis. Stat. § 947.012), and two counts of unlawful use of a computerized communication system (Wis. Stat. § 947.0125).

16. The Arena Police Department contacted Smith by telephone, asking him if he had posted the Facebook comments attributed to him. Smith told the police "I put it on there, I don't regret it and I mean it."

17. Later that evening, a member of the Arena Police Department arrested Smith at his home for disorderly conduct, unlawful use of a telephone, and unlawful use of a computerized communication system. Smith was then transported to Iowa County Jail, where he was held in custody until a bail hearing on July 23, 2012.

18. At the bail hearing, the court set bail conditions that, among other conditions, banned Smith from using a computer or phone unless to gain employment, and required him to provide the Iowa County Sheriff's Department with his computer passwords.

19. On August 10, 2012, the Iowa County District Attorney's Office filed a criminal complaint charging Smith with unlawful use of a computerized communication system and disorderly conduct. (*State v. Thomas G. Smith*, Iowa County Case No. 2012-CM-192).

20. On May 30, 2013, a jury found Smith guilty on both counts. The court entered convictions against Smith on June 10, 2013, and ordered Smith to 1 year of probation and 25 hours of community service, among other penalties.

21. Smith timely appealed his convictions. On July 3, 2014, the Wisconsin Court of Appeals ordered that the convictions be vacated and the charges dismissed, noting that there was no federal or state case law supporting the state's contention that the First Amendment would allow the criminalization of Smith's criticisms of the Village and its officers. *State v. Smith*, No. 2013AP2516 (Wis. App. July 3, 2014) (Lundsten, J.) (*unpublished*). The circuit court formally vacated the convictions and dismissed the charges on August 8, 2014.

**Count I: Defendant Stroik
Federal § 1983 Claim - Retaliatory Arrest**

22. The allegations of paragraphs 1-21 above are repeated and re-alleged as if set forth fully herein.

23. At all relevant times Defendant Stroik was acting under the color of the laws of the State of Wisconsin.

24. The content of Smith's Facebook comments was protected by the First Amendment to the United States Constitution, as incorporated against the states through the Fourteenth Amendment.

25. Defendant Stroik's decision to seek the investigation and arrest of Smith was motivated at least in part by a desire to retaliate against Smith for his protected First Amendment speech.

26. Defendant Stroik's actions in support of Smith's arrest caused Smith to suffer deprivations that would likely deter First Amendment speech.

27. Defendant Stroik's actions were not supported by probable cause that Smith committed a crime.

28. Defendant Stroik's actions in support of Smith's arrest violated Smith's First Amendment rights.

29. Defendant Stroik's violation of Smith's First and Fourteenth Amendment rights damaged Smith and entitle him to compensatory damages recoverable under 42 U.S.C. § 1983, including but not limited to mental and emotional distress, loss of liberty, pain and suffering, lost wages, diminished earning capacity, and legal expenses.

30. Defendant Stroik's violation of Smith's First and Fourteenth Amendment rights were done with malicious intent, or callous or reckless disregard for Smith's rights, and entitle Smith to recover punitive damages under 42 U.S.C. § 1983.

**Count II: Defendant Stroik
Federal § 1983 Claim – False Arrest**

31. The allegations of paragraphs 1-30 above are repeated and re-alleged as if set forth fully herein.

32. Defendant Stroik's actions in support of Smith's arrest without probable cause that Smith committed a crime violated Smith's rights under the Fourth and Fourteenth Amendments to the United States Constitution.

33. Defendant Stroik's violation of Smith's Fourth and Fourteenth Amendment rights damaged Smith and entitle him to compensatory damages recoverable under 42 U.S.C. § 1983, including but not limited to mental and emotional distress, loss of liberty, pain and suffering, lost wages, diminished earning capacity, and legal expenses.

34. Defendant Stroik's violation of Smith's Fourth and Fourteenth Amendment rights were done with malicious intent, or callous or reckless disregard for Smith's rights, and entitle Smith to recover punitive damages under 42 U.S.C. § 1983.

**Count III: Defendant Stroik
Federal § 1983 Claim – Retaliatory Inducement to Prosecute**

35. The allegations of paragraphs 1-34 above are repeated and re-alleged as if set forth fully herein.

36. Retaliation for Smith's protected First Amendment speech – the content of his Facebook comments – was a motivating factor in Defendant Stroik's decision to seek the prosecution of Smith.

37. Defendant Stroik's retaliatory actions, including but not limited to his request that charges be brought against Smith, were a but-for cause of Smith's prosecution in *State v. Thomas G. Smith*, Iowa County Case No. 2012-CM-192.

38. Defendant Stroik's actions in support of Smith's prosecution caused Smith to suffer deprivations that would likely deter First Amendment speech.

39. Defendant Stroik's actions were not supported by probable cause that Smith committed a crime.

40. Defendant Stroik's actions in support of Smith's prosecution violated Smith's First Amendment rights.

41. Defendant Stroik's violation of Smith's First and Fourteenth Amendment rights damaged Smith and entitle him to compensatory damages recoverable under 42 U.S.C. § 1983, including but not limited to mental and emotional distress, loss of liberty, pain and suffering, lost wages, diminished earning capacity, and legal expenses.

42. Defendant Stroik's violation of Smith's First and Fourteenth Amendment rights were done with malicious intent, or callous or reckless disregard for Smith's rights, and entitle Smith to recover punitive damages under 42 U.S.C. § 1983.

**Count IV: Defendant Village of Arena
Federal § 1983 Claim – Unconstitutional Policy**

43. The allegations of paragraphs 1-42 above are repeated and re-alleged as if set forth fully herein.

44. At all times relevant to this complaint, the Village of Arena Police Department's Facebook page was an online forum that allowed the Department and local residents (among others) to comment publicly on matters related to the

activities and policies of the Village of Arena Police Department. (The Facebook page has since been deleted.)

45. Defendant Stroik was an “administrator” of the Village of Arena Police Department’s Facebook page, and as such had the ability to publish posts on the “timeline” portion of the Facebook page, and delete comments to such posts made by other Facebook users.

46. When a Facebook user posts a comment on a timeline post, his or her Facebook “friends” may see in their Facebook “news feed” page both the original timeline post as well as their friend’s comment on the post.

47. Thus, by posting a comment on a Facebook timeline post, a Facebook user is expressing their view not just to the original audience of the Facebook timeline post, but to all of their Facebook friends as well.

48. The Village of Arena failed to adequately train Defendant Stroik on the protections afforded by the First and Fourteenth Amendments to comments made on the Village of Arena Police Department’s Facebook page by other Facebook users.

49. For example, Defendant Stroik deleted all of the Facebook comments criticizing the Village of Arena Police Department, including the comments of Marks and Willey, but left up all of the comments praising the Department. Whether the Department’s Facebook page was a traditional public forum, a designated forum, or a nonpublic forum, such viewpoint discrimination violates the First and Fourteenth Amendments.

50. Given the ever-increasing popularity of Facebook and other social media as the means of communication between the public and their government, the Village of Arena's failure to adequately train Defendant Stroik amounts to deliberate indifference to an obvious need for such training, which is likely to result in incorrect decisions.

51. As a result of the Village of Arena's failure to adequately train Defendant Stroik, Defendant Stroik initiated the arrest and prosecution of Smith in violation of his rights under the First, Fourth, and Fourteenth Amendments, as described in the paragraphs above.

52. The Village of Arena's failure to adequately train and Defendant Stroik violated Smith's rights under the First, Fourth, and Fourteenth Amendments.

53. The Village of Arena's violation of Smith's First, Fourth, and Fourteenth Amendment rights damaged Smith and entitle him to compensatory damages recoverable under 42 U.S.C. § 1983, including but not limited to mental and emotional distress, loss of liberty, pain and suffering, lost wages, diminished earning capacity, and legal expenses.

**Count V: Defendant Village of Arena
State Claim – Indemnification**

54. The allegations of paragraphs 1-53 above are repeated and re-alleged as if set forth fully herein.

55. The acts of Defendant Stroik complained of in this matter were committed while Defendant Stroik was carrying out his duties as an employee of the Village of Arena.

56. At all relevant times, Defendant Stroik was acting within the scope of his employment with the Village of Arena.

57. The Village of Arena is statutorily required to pay the judgment against Defendant Stroik in this matter. Wis. Stat. § 895.46.

WHEREFORE, Plaintiff Thomas G. Smith requests a judgment in his favor granting him the following relief:

1. As to Defendant Stroik,
 - a. Compensatory damages;
 - b. Punitive damages;
 - c. Reasonable attorneys' fees, costs, and litigation expenses; and
 - d. Any other relief this Court deems just and appropriate.
2. As to Defendant Village of Arena:
 - a. A judgment holding Defendant the Village of Arena jointly and severally liable for the judgment against Defendant Stroik as his indemnitor under Wis. Stat. § 895.46;
 - b. Compensatory damages;
 - c. Reasonable attorneys' fees, costs, and litigation expenses; and
 - d. Any other relief this Court deems just and appropriate.

JURY DEMAND

Smith demands a trial by jury on all issues so triable.

Respectfully submitted,

THOMAS G. SMITH,
by his attorney,

/s/ Thomas B. Aquino
Thomas B. Aquino

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Madison, WI 53703
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State Bar No. 1066516

Dated: November 24, 2014

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from another district (specify), 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23, DEMAND \$, CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE, DOCKET NUMBER

DATE, SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #, AMOUNT, APPLYING IFP, JUDGE, MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, (except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.**

Example: U.S. Civil Statute: 47 USC 553
Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____)	
<i>Plaintiff</i>)	
)	
v.)	Civil Action No.
)	
_____)	
<i>Defendant</i>)	

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*: _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____)	
<i>Plaintiff</i>)	
)	
v.)	Civil Action No.
)	
_____)	
<i>Defendant</i>)	

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

A lawsuit has been filed against you.

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If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

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I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*: _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc: