

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

David K Cahoon,

Plaintiff,

vs.

John R. Newhart,

Sheriff of the City of Chesapeake, Virginia,
in his individual and official capacity,

and

David Newby,

individually and in his official capacity
as Colonel with the Sheriff's Department
of the City of Chesapeake, Virginia.

Defendants.

Civil Action No. 2:07cv82

COMPLAINT

I. Preliminary Statement

1. This is a civil action wherein the plaintiff, David K. Cahoon, (the "plaintiff"), alleges that his former employer, John R. Newhart, the Sheriff of the City of Chesapeake, Virginia, engaged in retaliation against him in violation of 42 U.S.C. 1981 and 42 U.S.C. § 2000e-2(a) and other laws, for opposing alleged unlawful employment practices under 42 U.S.C. 1981 and Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §§ 2000e et seq. which provides relief against discrimination in employment on the basis of race and religion, (Count 1),
Further, pursuant to 42 U.S.C. § 1983, plaintiffs contend that defendants violated

plaintiff's First Amendment rights of free speech, (Count 2), right to petition the government, (Count 3), and right to associated freely, (Count 4).

II. Jurisdiction and Venue

2. Plaintiffs invoke the jurisdiction of this Court pursuant to 29 U.S.C. § 621 et seq, and 28 U.S.C. § § 1331 and 1337, and 42 U.S.C. § 2000-e et seq.. The matter in controversy arises under an act of Congress regulating commerce and relating to race discrimination.
3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 in that the Defendant was doing business in this district, and the activities giving rise to the plaintiff's claim took place in this district.
4. Plaintiff timely filed charges of discrimination and retaliation in violation of Title VII, with the EEOC and files this suit within 90 days of the receipt of the right to sue letter received by him.

EEOC DETERMINED REASONABLE CAUSE

5. The EEOC determined that "Based on the evidence of record there is reasonable cause to believe that the Charging Party [David Cahoon] was subjected to retaliatory discharge (or denied reappointment) in retaliation for having participated in a protected activity."

III. Parties

6. The Plaintiff, **David K Cahoon**, (hereinafter "Cahoon") is a Caucasian American citizen of the United States.
7. Defendant **John R. Newhart**, (hereinafter the "Sheriff" or "Newhart") is a Caucasian and a government official, the elected Sheriff for the City of

Chesapeake, within the Commonwealth of Virginia. At all times relevant to this action, Newhart was the Sheriff for the City of Chesapeake, Virginia and acted within the scope and course of his employment. Newhart is sued in his official and individual capacity.

8. Defendant, **David Newby** (hereinafter the “Newby”) is a Caucasian and a government official, the Chief Deputy Sheriff for the Sheriff’s Department for the City of Chesapeake, within the Commonwealth of Virginia, given the title of “Colonel”. At all times relevant to this action, Newby acted within the scope and course of his employment. Newby is sued in his official and individual capacity.

IV. - Facts

9. Plaintiff Cahoon was employed by the Sheriff of the City of Chesapeake, Virginia from August 1, 1984 until December 30, 2005 when he was terminated and/or not reappointed, (referred to herein as “terminated” or “termination”)
10. Upon the reelection of Newhart as Sheriff of the City of Chesapeake, Virginia, Newhart advised two individuals that they would not be reappointed to serve in the Sheriff’s office, the first was Tony C. Ellis who had filed a civil rights law suit alleging violations of Title VII, civil action 2:04cv721, United States District Court, Eastern District of Virginia, Norfolk Division, the second was plaintiff Cahoon who had cooperated with the investigation of that case, was interviewed by both parties and had been subpoenaed as a witness to testify in that case.
11. In December of 2005, plaintiff Cahoon was informed orally and in writing that the Sheriff had decided not to reappoint me when he was re-sworn into office in

January 2006. Col. David Newby stated the pretense to be due to Cahoon's "habit" of keeping notes.

12. Prior to his protected speech, generally described herein and participation in the Title VII case of Tony Ellis, plaintiff Cahoon's most recent evaluation ranked him as having "Outstanding Performance" with "a level of performance which is consistently outstanding, characterized by extraordinarily consistent work of the highest quality in scope, accuracy, and thoroughness, requiring minimum supervision," earning a score of 4.56 out of 5.00 points on his Evaluation of 3/23/05. His previous evaluations were similar.
13. Similarly on April 21, 2005, plaintiff Cahoon received special recognition by letter from the City of Chesapeake for outstanding achievement for reaching the 20th Anniversary with the City of Chesapeake. Over his career he received many similar awards and recognition.
14. Since 1985 Sheriff's Academy training, Cahoon had been instructed to keep notes of daily activities. During his 21 year career maintenance of records of observations while on duty was not only required by stressed. Lt. John Gregory presented his staff with small pocket notebooks with instructions to use them. Sheriff Newhart had on 2 prior occasions commended Cahoon for his note taking.
15. Plaintiff had performed his duties successfully as an employee of the Sheriff.
16. Plaintiff had been a productive and competent employee fully qualified for the position that he occupied as well as those of higher ranks to which he was not promoted.

17. In the later of 2005, creating a hostile work environment and in retaliation against Cahoon because he opposed racial discrimination and made it clear that he would testify truthfully regarding such behavior from the records of daily activities logged in his notebooks, he was informed by Newby that he would be terminated. No or inadequate discipline was imposed upon Newby despite the fact that the statement and action was grossly offensive and highly inflammatory and exemplified a behavior that is malicious, manipulative, inciting fellow employees, embarrassing the agency and the community, adversely impacting the efficient operation of the Sheriff's Department, diminishing the close working relationship of faithful employees, diminishing the trust and teamwork necessary in an environment which could place staff in a dangerous position, undermining the expectations and diminishing the confidence of the public in the Sheriff's department.
18. Because of his speech in which he made it clear that he opposed racial discrimination and that he would testify truthfully regarding such behavior from the records of daily activities logged in his notebooks when called as a witness in litigation by Tony C. Ellis, in Civil Action No. 2:04 cv 721 alleging racial discrimination, and subpoenaed in that action, Cahoon was terminated.
19. Because of his opposition to discrimination and practices made unlawful by Title VII, Cahoon was terminated.
20. There exists in the Sheriff's Department for the City of Chesapeake, Virginia a systematic and widespread pattern and practice of retaliation against those who oppose racial discrimination and who would testify truthfully regarding incidents

occurring in the Sheriff's Department for the City of Chesapeake, Virginia that may have a bearing on claims of racial discrimination or racial animosity towards African-Americans.

21. There exists in the Sheriff's Department for the City of Chesapeake, Virginia a policy and/or custom to retaliate against those who oppose racial discrimination and who would testify truthfully regarding incidents occurring in the Sheriff's Department for the City of Chesapeake, Virginia that may have a bearing on claims of racial discrimination or racial animosity towards African-Americans.
22. Grievances by these employees have also been unsuccessful.
23. Above stated retaliatory actions have been well known by the Sheriff and were directed by the Sheriff.
24. Plaintiff fully complied with the any grievance procedures, but without success.
25. Complaints made by Plaintiff have not been seriously addressed or were simply not addressed.
26. The Sheriff's grievance procedure in place is not efficient and is legally insufficient.
27. Newhart and Newby, in their individual capacities, acted with actual malice and/or reckless indifference amounting to malice towards Cahoon, agreeing and intending to oppress and injure him in the free exercise or enjoyment of rights and privileges secured to him by the Constitution and laws of the United States or because, inter alia, he had exercised those rights including the right to oppose unlawful employment practices under Title VII, to participate in proceedings

under Title VII, to state ones *intentions to testify truthfully when called as a*
witness.

28. 42 U.S.C. § 2000e-2. states in pertinent part as follows:

“Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

29. 18 U.S.C. § 241. states in pertinent part as follows:

Conspiracy against rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; ... They shall be fined under this title or imprisoned not more than ten years, or both....

30. Newhart and Newby knowingly with intent to retaliate took actions harmful to

Cahoon, including interference with his lawful employment and livelihood for

providing to law enforcement officers truthful information relating to the

commission or possible commission of a Federal offense in violation of 18 USC

§1513 provides in pertinent part as follows:

"Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both. Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

V. Count One

Violation of 42 U.S.C. §§ 2000e-3 Retaliation Against Sheriff Newhart

31. The allegations of each of the foregoing paragraphs are incorporated herein as if realleged.
32. Sheriff Newhart and the Sheriff's Department or Office of the Sheriff is an employer subject to Title VII under 42 U.S.C.A. § 2000e(b), having 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and/or the agent of that person.
33. Plaintiff engaged in protected activities under Title VII in opposing the alleged unlawful employment practices of Sheriff Newhart and the Sheriff's Department of the City of Chesapeake, Virginia.
34. Plaintiff suffered adverse employment action which was causally connected between the plaintiff's actions and the harm suffered.
35. Plaintiff's termination is the sort of harm the anti-retaliation provisions are intended to prevent or to provide a remedy for violation thereof.¹

¹ The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject the standards applied in the Courts of Appeals that have treated the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination provision and that have limited actionable retaliation to so-called "ultimate employment decisions. The anti-retaliation provision protects an individual ... from retaliation that produces an injury or harm. ...[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" ...Title VII... does not set forth "a general civility code for the American workplace." ... An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience....The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. ... by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers....[T]he provision's standard for judging harm must be objective. *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2414-2415 (U.S. 2006)

36. Aforementioned acts and utterances by Defendants were made because of Plaintiff's expressed opposition to earlier discriminatory acts and utterances, and because of his stated intention to testify truthfully regarding activities logged in his notebooks which Tony Ellis alleged supported his claims of racial discrimination.
37. As a result of Defendants' retaliatory actions, Plaintiff has suffered lost income in the form of lost wages, raises and lost career opportunities.
38. Plaintiff is now suffering and will continue to suffer irreparable harm and injury as a result of Defendants' retaliatory acts and utterances as set forth herein.
39. As a direct result of Defendants' retaliatory and wrongful acts as set forth herein, Plaintiff has suffered medical expenses, emotional distress, humiliation, embarrassment and mental anguish, and lost income.
40. The acts of the defendants and the employees or agents of defendants were not isolated or trivial.

VI. Count Two
42 U.S.C. § 1983 Action for Violations of
First Amendment to the United States Constitution-Speech
Against Sheriff Newhart and Newby

41. The allegations of each of the foregoing paragraphs are incorporated herein as if realleged.
42. The actions of Defendants prohibiting plaintiffs from testifying truthfully regarding incidents recorded in plaintiff's notebooks including but not limited to incidents that Tony Ellis contended supported his complaints of racial discrimination and threatening or imposing punishment for such speech was and

is demeaning and humiliating to the plaintiffs and is an unconstitutional infringement upon plaintiff's' right to freedom of speech.

43. The Sheriff is responsible for the acts of his deputy sheriffs under Virginia law.²

44. The supervisory defendants tacitly authorized or were indifferent to the specified condition stated herein and are therefore personally liable under 42 U.S.C. § 1981.

The supervisory indifference and/or tacit authorization of their subordinates' misconduct was a causative factor in the constitutional injuries they inflicted on the plaintiffs.

45. The actions of Defendants were committed by Defendants under color of the policy and procedures of Sheriff Newhart and the Sheriff's Department for the City of Chesapeake, Virginia, the ordinances of the City of Chesapeake and the laws of the Commonwealth of Virginia.

46. The actions of Defendants violated plaintiffs' rights under the Constitution of the United States.

47. Defendants' restraint of plaintiffs' speech is an ongoing violation of the First Amendment of the United States Constitution and is as such a per se irreparable harm.

² 1995 U.S. Dist. LEXIS 19952 CARLTON V. WILLIAMS (E.D. Va. 1995) n.2. (The United States Court of Appeals for the Fourth Circuit has held that a sheriff may be responsible for the acts of a deputy sheriff. *Scott v. Vandiver*, 476 F.2d 238, 242 (4th Cir. 1973). The Fourth Circuit found that under South Carolina law, the sheriff was responsible for the deputy's acts and was not insulated by the doctrine of respondeat superior, and that section 1983 allowed the court to resort to state law to supply the elements of the civil rights claim. *Id.* at 240_43. In *Whited v. Fields*, 581 F. Supp. 1444 (W.D. Va. 1984), the United States District Court for the Western District of Virginia analyzed a section 1983 claim against a sheriff for the acts of his deputies and found the sheriff responsible for such acts. *Id.* at 1455 (stating that "not only is the sheriff liable civilly for the acts of his deputy in Virginia, but he also is liable criminally and can be fined for the conduct of his deputy"). The court found that under a section 1983 action involving a sheriff and his deputy in Virginia, the doctrine of respondeat superior applied and the sheriff is not automatically insulated from liability. *Id.* at 1456; see also *Witt v. Harbour*, 508 F. Supp. 378, 379 n.3 (W.D. Va. 1980), *aff'd*, 644 F.2d 883 (4th Cir. 1981). Contrast, 1997 U.S. Dist. LEXIS 12274 MARTIN V. CHESAPEAKE CIRCUIT COURT (E.D. Va. 1997), 951 F. Supp. 579 COUNTS V. NEWHART (E.D. Va. 1996) 1996 U.S. Dist. Lexis 18235 n.11, 1995 U.S. Dist. LEXIS 19950 MCBRIDE V. MCCABE (E.D. Va. 1995) JOSEPH FRANKLIN McBRIDE, III, Plaintiff, where the courts do not address the unique nature of the Sheriff under Virginia law that makes the Sheriff liable for all of his deputies.

48. The interests of the Sheriff, as employer, in promoting the efficiency of the public services it performs through its employees does not outweigh the interests of the plaintiffs, as citizens, in commenting upon matters of public concerns.
49. Any alleged interests of the Sheriff, as employer, in promoting the efficiency of the public services it performs through its employees must be weighed against the requirement that employees called to testify must be free to do so without fear of retaliation or reprisals and the public policy behind Title VII, and other civil rights laws.
50. The speech or actions of plaintiff regarded matters of public concern
51. No compelling governmental interest will be or was served by Defendants' restriction of plaintiff's speech.
52. Defendants' restriction of plaintiffs' speech is not content-neutral.
53. Defendants' restriction of plaintiffs' speech is not narrowly tailored to serve any significant government interest.
54. Defendants' restriction of plaintiffs' speech does not leave open ample alternative channels of communication.
55. The restriction imposed by Defendants is imposed because of disagreement with the message and was viewpoint discrimination.
56. Defendants acted in contravention of clearly established principles that speech like that of Plaintiff's is constitutionally and otherwise protected by the laws of the United States and does not lose its protection simply because Defendants

believe that the speech is critical, bluntly worded or directed at governmental officials.³

57. Defendants' actions towards plaintiffs constituted selective enforcement of asserted rules by Defendants, and were based upon content and discriminated against plaintiffs' viewpoint.

58. The restrictions imposed upon plaintiffs were not reasonable time, place and manner restrictions.

Policy and/or Custom

59. Notwithstanding any printed statement to the contrary, Sheriff Newhart and the Sheriff's Department of the City of Chesapeake Virginia had an official policy and/or custom of content discrimination, prohibiting employees from testifying truthfully if such testimony was deemed adverse to the department and Newhart or unflattering to Sheriff Newhart.

60. The termination was pursuant to and based upon the official custom and/or policy, and done at the direction of Sheriff Newhart.

61. The policy or custom is so permanent and well settled as to constitute a custom or usage with the force of law in the Sheriff's Office for the City of Chesapeake, Virginia.

62. The policy and/or custom infringes, chills or otherwise restrains constitutionally protected speech.

³ (e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) - a "profound national commitment [exists] to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"; *Garrison v. Louisiana*, 379 U.S. 64, 67-79 (1964); *Healy v. James*, 408 U.S. 169 (1972).

63. The actions of the named officials herein are those having final authority to establish the policy of the City of Chesapeake as well as the Sheriff's Office for the City of Chesapeake, Virginia due to their high rank, authority and practice within the City.
64. The named officials herein are of such high rank within the Sheriff's Office and the City of Chesapeake as to be free from close review by higher authorities.
65. The constitutional injuries of Plaintiff resulted from the official policy and/or custom of Sheriff Newhart and the Sheriff's Office for the City of Chesapeake and the City of Chesapeake.
66. Sheriff Newhart and the Sheriff's Office for the City of Chesapeake, Virginia had actual or constructive knowledge that the named officials were engaged in conduct that posed a "pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff, and the Sheriff's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices, and there was an affirmative causal link between Sheriff Newhart and the Sheriff's Office and the particular constitutional injury suffered by the plaintiff.
67. As a result of Defendants' actions against the plaintiff, the plaintiff has suffered lost income in the form of lost compensation and other benefits and privileges of employment and has suffered emotional distress, humiliation, embarrassment and mental anguish.
68. The acts of Defendants complained of herein violated the rights of the plaintiff to freedom of speech under the First Amendment of the Constitution of the United

States, by without limitation, chilling plaintiff's speech, engaging in viewpoint discrimination, and restricting his speech based upon content.

VII. Count Three
42 U.S.C. § 1983 Action for Violations of
First Amendment to the United States Constitution-Petition Government
Against Sheriff Newhart and Newby

69. The preceding averments and allegations of this Complaint are incorporated herein by this reference.
70. The acts of Defendants complained of herein violated the rights of the plaintiffs to petition the government for a redress of grievances under the First Amendment of the Constitution of the United States, by without limitation, chilling plaintiff's petitioning, engaging in viewpoint discrimination, and restricting his petition based upon content.

VIII. Count Four
42 U.S.C. § 1983 Action for Violations of
First Amendment to the United States Constitution-Association
Against Sheriff Newhart and Newby

71. The preceding averments and allegations of this Complaint are incorporated herein by this reference.
72. Plaintiff, who had associated with Tony Ellis an African American with complaints of racial discrimination against Sheriff Newhart was restricted by defendants in his association and communication with African Americans and those complaining under Title VII and other civil rights statutes.
73. The acts of Defendants complained of herein violated the rights of the plaintiff to assemble under the First Amendment of the Constitution of the United States, by

without limitation, restricting plaintiff's right to associate and communicate with persons and groups that oppose discrimination based upon race or seek to assert their rights under the laws of the United States.

WHEREFORE, with respect to Counts 1-4, the plaintiff respectfully prays that this Court:

- a. Issue a declaratory judgment that the defendants acts, policies, practices and procedures complained of herein violated the plaintiffs' civil rights as secured by 42 U.S.C. § 2000e et. seq; and the First Amendment of the United States Constitution; and
- b. Order the defendants to make whole the plaintiff by providing appropriate back pay and other benefits wrongly denied in an amount to be shown at trial and other affirmative relief; to expunge from Cahoon's personnel file all references to his discharge or non-reappointment;
- c. Order the defendant Sheriff Newhart to reinstate Cahoon with full benefits and/or award front pay if appropriate in an amount to be proved at trial;
- d. Enjoin further retaliation by the defendants and restrictions and violations of plaintiff's First Amendment rights;
- e. Order the defendants Sheriff Newhart and Newby to fully compensate plaintiff for the damages suffered by him, including without limitation damages for emotional distress, humiliation, embarrassment, injury to reputation, any and all medical bills and injury to earning capacity, losses to savings and the like, both past and future, awarding compensatory damages in the amount of \$10,000,000.00 or such greater amount as may be proved at trial or such other sum as the law may provide;.

f. Order the defendants Newhart and Newby, in their individual capacities to pay punitive damages to plaintiff.

g. Grant plaintiff his attorney's fees, costs and other disbursements; and

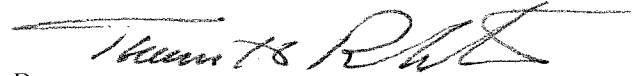
h. Grant such addition relief as the Court deems just and proper.

A TRIAL BY JURY IS REQUESTED

This 23rd day of February, 2007

Respectfully submitted,

David K Cahoon

By 

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