From Pepper Spray to Public Perception

Description

The Complexities of Balancing Non-Lethal Force with First Amendment Rights

An often-overlooked issue in the context of law enforcement is the concern over potential violations of individual's First Amendment rights to freedom of speech and assembly. Police Departments around the Nation have faced widespread criticism and legal condemnation for their use of crowd control tactics in response to protests and large public gatherings. It is important to remember that in order to solve this issue, law enforcement must recognize the need to balance their duties to maintain public safety with the rights of protesters to free speech and assembly.

In a recent opinion by the Eighth Circuit, the court in Laney v. City of St. Louis considered an individual's claims against an officer for alleged use of excessive force and First Amendment retaliation. [1] This action was brought by citizen Derek Laney, after Lieutenant Boyher of the St. Louis Police Department used pepper spray against him during protests that broke out in the city. This case comes to the Eighth Circuit on appeal from the United States District Court for the Eastern District of Missouri. The district court ruled in favor of the defendant, Officer Scott Boyher. Finding no violation of the Plaintiff's First or Fourth Amendment constitutional rights, the court held that officer Boyher was entitled to qualified immunity.

The nature of the complaint against the officer makes this case worth noting. First, the Eighth Circuit had to assess excessive force and the applicability of qualified immunity. However, going further, the second claim alleged by the individual gave the court the opportunity to reaffirm the standard required for a claim based on First Amendment retaliatory grounds and the importance and extent of protections over freedom of speech principles.

SUMMARY

This case comes out of St. Louis, Missouri, following several protests that were in response to a previous officer's acquittal of murder. Protesters crowded around the Police Academy while riot officers were instructed to board buses in an attempt to deescalate the situation. Before the buses could leave, the protesters approached them and began throwing rocks and water bottles, ultimately blockading the road and the vehicles. In response to this obstruction, the city's Bicycle Response Team arrived to assist. The Response Team positioned themselves to create a bicycle barrier aimed at keeping the crowd under control and allowing the buses to leave the area. When some protesters tried to remain behind the barricade, officers used their bicycles to push them out of the way. Derek Laney, the appellant in this case, was infuriated because he believed that using bicycles to push women was abusive. When Laney approached an officer to voice his concerns, the officer attempted to use the bike to push him out of the way. In response, Laney extended his arms to avoid being struck by the bike and stepped to the side. The officer moved closer to Laney, forcing him to retreat backwards.

Lieutenant Boyher, who was located half a block away when he saw what he thought was a fight between Laney and the other officer. In efforts to both, stop what he believed would turn into a potential

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assault, and to keep Laney from interfering with the team's efforts to get the buses out, Boyher responded quickly. The lieutenant ran to the situation and pepper sprayed Laney. Laney brought excessive-force and First Amendment retaliation claims against Lieutenant Boyher.

ANALYSIS & IMPLICATIONS

While the focus of this piece centers on First Amendment principles as applied in the context of crowd control, it is necessary to summarize the court's finding on Laney's first claim of excessive force. The court tackled the question of whether Lieutenant Boyher's use of pepper spray against Laney, where he believed it would prevent the assault of another officer, was excessive. The Eighth Circuit reviewed the district court's finding under Graham v. Connor and referenced the circuit's prior precedents to support their finding. Taking into consideration further facts and circumstances that are omitted from this piece, the Court ultimately found that an officer can reasonably use non-lethal force (in this case, pepper spray) to drive an unruly protester away from a police line.

Mr. Laney's second claim for retaliation argued that Lieutenant Boyher used pepper spray in response to his criticism of the Bicycle Response Team's treatment of women. Under settled law, the First Amendment bars government officials from retaliating against individuals who express their opinions by speaking out.[2]

In assessing the retaliation claim, the Eight Circuit emphasized two critical points. First, the Court noted that the element of motive is central to any retaliation claim. The Court went on, asserting that the First Amendment indisputably protects Laney's comments to the officer. Further, there is no dispute that the use of pepper spray would chill a person of ordinary firmness from speaking out. Because both, the protected-activity and adverse-action requirements were unquestionably clear, the Court would move on to assess the "but-for" causation inquiry.

The Court asked, "would the use of the pepper spray have occurred absent the retaliatory motive"?[3] The Court answered yes and explained that the element of causation was missing even when viewing the facts in light most favorable to Mr. Laney. In their reasoning, the Court emphasized the following points. First, Mr. Laney himself acknowledged that the Lieutenant was not in the area when he made the comment criticizing the Bicycle Response Team. Next, assessing the seconds between the start of the incident and the use of the pepper spray, Mr. Laney and the Lieutenant had no prior interaction with one another. Lastly, because Lieutenant Boyher was out of hearing-range until the end of the interaction, it so follows that Laney's criticisms could not have played any role in the officer's decision to use non-lethal force.

Laney presented a second argument to the Court, asserting that, if not for his comments, his participation in the protests played a role in the officer's decision to use force. In answering this dispute, the court reaffirmed that this argument too, lacked the element of causation. The Eight Circuit explained that the officer's decision to use force was made based on his viewpoint at the time. The officer here witnessed a standoff between Laney and another officer, and in his view a risk of further violence existed, alongside the possibility that Laney may have already been assaulting the officer.

CONCLUSION

While it is uncontested that the protestor's speech is protected by the First Amendment, the court found that because the element of causation was missing, there was no factor linking the Laney's speech to

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the officer's decision to use nonlethal force. A reasonable officer could have reasonably believed that the situation posed a dangerous risk, in which it was necessary for the officer to intervene and drive Laney away from the barricade.

TAKEAWAY

The utilization of non-lethal force, such as pepper spray, is an effective means for law enforcement officials to de-escalate potentially violent situations, especially in the context of a public protest. In contrast, the actions of an individual, such as Laney, can easily be perceived as threatening when viewed from a distance. In this instance, it is clear that Lieutenant Boyher's actions were motivated by his desire to protect his fellow officer and to prevent the situation from escalating.

It is crucial for law enforcement officers to have appropriate tools at their disposal to manage complex situations effectively. The use of non-lethal force can be a necessary and effective means of de-escalation. The deployment of such force should be guided by a clear set of protocols that are grounded in best practices and informed by the particular context of the situation.

In the case of Laney, his actions could have been perceived as a threat to the safety of both the officers and the public at large. Pepper spray was an appropriate tool for the officer to use to neutralize the situation without resorting to lethal force.

Public perception of police behavior can be a contentious issue, particularly in the context of public protests. However, it is essential to evaluate each situation on its own merits and to avoid making blanket assumptions about the motivations of law enforcement officials. In this case, Lieutenant Boyher acted appropriately and with the goal of protecting his fellow officers and the public.

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[1] Laney v. City of St. Louis, 56 F.4th 1153 (8th Cir. 2023).

[2] Hartman v. Moore, 547 U.S. 250 (2006).

[3] Nieves v. Bartlett, 139 S. Ct. 1715 (2019).

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