

Sixth Circuit Rules that Brandished Firearm Could Be 'Threat of Violence' Infringing on Constitutionally-Protected Free Speech

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In an opinion published on May 31, 2023, *MacIntosh v Clous* [1], the Sixth Circuit Court of Appeals held that the conduct of a county commissioner who responded to a constituent's criticisms during a virtual public meeting by brandishing a rifle at the camera was sufficient to support an unconstitutional retaliation claim that could not be immediately dismissed based on qualified immunity. In doing so, the court relied upon its 1994 decision in *Zilich v. Longo*, which held that "no reasonable official could possibly believe that it is constitutionally permissible to retaliate against a political opponent with physical threats, harassment, and vandalism." [2]

On January 20, 2021, Patricia MacIntosh spoke at a virtual public meeting held by the board of commissioners of a Northern Michigan county. MacIntosh criticized what she perceived as the commission's recent endorsement of the "Proud Boys," a group that, just 14 days earlier, participated in the January 6, 2021, insurrection at the U.S. Capitol. MacIntosh asked the commission to "please make some sort of public statement for the community that you do not accept" the Proud Boys' actions. As she was speaking, Commissioner Ron Clous stood up, exited the view of the camera, and then returned holding an assault rifle, which he displayed to the camera with a smirk. MacIntosh alleged that she received anonymous, threatening phone calls following the incident and that she was frightened to speak at public meetings because of Commissioner Clous' conduct toward her. She sued the county and Clous for violating her First Amendment rights.

The case came to the Sixth Circuit on appeal after the district court denied Clous' motion to dismiss. The Sixth Circuit held that the plaintiff, MacIntosh, sufficiently pled that the defendant "undertook 'an adverse action' that would deter 'a person of ordinary firmness from'" continuing to engage in constitutionally protected speech, citing her allegations that she was frightened to speak at subsequent public meetings and that other speakers at subsequent hearings refused to give their names when criticizing the county commissioners.

The court also held that because its precedent firmly established that private citizens have a right to engage in constitutionally protected speech without threats of violence, the plaintiff had sufficiently alleged a violation of a clearly established constitutional right and her claim could not be immediately dismissed based on qualified immunity. "On multiple occasions," the Sixth Circuit explained, "we have held that when an official responds to speech with threats of physical harm, that response constitutes an adverse action that would deter a person of ordinary firmness from speaking." The court rejected Clous' argument that holding up his firearm could not be deemed a threat and was, instead, merely his own constitutionally protected speech in support of the Second Amendment. The Sixth Circuit explained, "[v]irtually smirking and displaying a high-powered rifle at someone during a tension-filled public meeting is pregnant with dangerous meaning" in the same way verbal threats are. The court concluded that the plaintiff had satisfied her burden to allege that this conduct was adverse action undertaken with the intent to injure her and have a chilling effect on her First Amendment rights.

If you have questions about the obligations of municipal bodies during public hearings, please contact the authors of this article or your Miller Canfield attorney.

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[1] *MacIntosh v. Clous*, __ F.4th __, No. 22-1015, 2023 WL 3735409 (6th Cir. May 31, 2023)

[2] *Zilich v. Longo*, 34 F.3d 359, 365 (6th Cir. 1994)