

SECOND CIRCUIT REVIEW

Prisoners' Rights and the Concept of 'Aggregate Deterrent Effect'

By Martin Flumenbaum and Brad S. Karp

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In *Walker v. Senecal*, — F.4th —, 2025 WL 715398 (2d Cir. Mar. 6, 2025), the U.S. Court of Appeals for the Second Circuit considered whether allegations of a prison officer's destruction of a prisoner's draft lawsuit, followed by the officer's threat of retaliation if the prisoner were to file a grievance about the destruction, and a physical assault by other officers who repeated the threat, together amount to an adverse action that could survive a motion to dismiss and motion for summary judgment under 42 U.S.C. §1983 for alleged violations of the prisoner's constitutional rights to freedom of speech, due process, and the equal protection of the laws.

In a *per curiam* opinion joined by Chief Judge Debra Ann Livingston, Circuit Judge Steven Menashi, and Senior Circuit Judge Dennis Jacobs, the court vacated the district court's judgment that Walker failed to assert an adverse action, holding that the district court "erred in failing to



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consider the aggregate deterrent effect" of the officer's conduct in its assessment of whether an adverse action had occurred.

The Second Circuit clarified that though the officer's destruction of legal materials and threat of retaliation related to different forms of protected speech, a court may still consider their deterrent effect in the aggregate because the protected speech was "intertwined."

To succeed on a First Amendment retaliation claim, a plaintiff must establish: "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." An adverse action requires conduct of "the type that would deter a similarly

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situated individual of ordinary firmness from exercising [their] constitutional rights.”

The court must, however, “bear[] in mind that prisoners may be required to tolerate more than average citizens, before a retaliatory action taken against them is considered adverse.” Second Circuit “precedent allows a combination of seemingly minor incidents to form the basis of a constitutional retaliation claim once they reach a critical mass.” “While incidents that are relatively minor and infrequent will not meet that standard,” retaliatory conduct reflecting a “pattern of nearly constant harassment will do so.”

Second, when taken together, Walker’s allegations were sufficient to establish a genuine dispute of material facts as to whether the effect was adverse.

Factual Background

Carlton Walker is a prisoner at New York State’s Bare Hill Correctional Facility (located near the Canadian border and Montreal and Ottawa). Walker alleged that in September 2017, a prison officer, Richard Senecal, stopped Walker outside the prison mess hall, grabbed legal materials he was holding, and then “ripped out the first 18 pages” of a drafted amended complaint Walker had written. Senecal told Walker that “he took the pages because Walker was challenging [] prison conditions” and the draft named both the NYS-DOC Commissioner and Superintendent.

On Oct. 2, 2017, Walker informed Senecal that he planned to file a grievance against him for ripping out the pages. Senecal responded that if Walker “ever put his name on any grievance concerning him ripping out the pages, he would make sure that Walker ended up dead or in the Box,” referring to the prison’s Special Housing Unit.

That same day, another officer repeated Senecal’s threat, noting that “Senecal is crazy, and means what he said.” On Oct. 3, 2017, two officers “rushed” into the bathroom after Walker, and “slapped Walker around, pushed him, and roughed him up.” They asked Walker “if he saw how easily he could get killed for filing grievances against Officer Senecal” and reiterated Senecal’s threat that filing grievances against him would mean “going to the Box or ending up dead.”

Walker further alleged that Senecal “recruited” another prison officer, Brian Benware, to take two retaliatory actions on Oct. 10, 2017: (1) filing a “fabricated” misbehavior report against Walker and (2) firing Walker from his position as a law clerk in the prison law library. Senecal allegedly instigated these actions because before Benware took both actions, Walker saw him “leave out of the Law Library, and go to an area where Officer Senecal was hanging out with other officers.”

The findings of the misbehavior report were ultimately upheld through an internal grievance procedure and in state court. See *In re Walker v. Yelich*, 95 N.Y.S.3d 648, 649 (N.Y. App. Div. 2019).

Walker also alleged that on five occasions between March 23, 2018 and June 29, 2018, Senecal either conducted or directed other officers to conduct a series of searches of Walker. After the final search, Senecal threatened that if Walker filed a grievance against him, he would impose a ban on recreation whenever he was on duty.

Walker sued Senecal, Benware, Governor Andrew Cuomo, Attorney General Letitia James, and each of the judges of the New York Court of Appeals under 42 U.S.C. §1983 in the U.S. District Court for the Northern District of New York, alleging violations of his constitutional rights to

freedom of speech, due process, and the equal protection of the laws.

The District Court's Ruling

The district court addressed Walker's claims in three stages. First, it screened Walker's *pro se* complaint pursuant to 28 U.S.C. §1915A and identified cognizable claims for retaliation against Senecal and Benware.

The court dismissed with prejudice the allegations against Governor Cuomo, Attorney General James, and the judges of the New York Court of Appeals. Second, in 2021, in an opinion authored by Judge David Hurd, the Northern District of New York adopted a magistrate judge's report and

More recently, in a landmark 2019 case brought jointly with the Department of Financial Services, the Manhattan DA's Office charged Standard Chartered Bank with violating anti-money laundering laws by processing transactions for entities in sanctioned countries.

recommendation, granting in part Defendants' motion to dismiss, and dismissing allegations related to Senecal's interfering with his access to the mess hall, a missed meal, preventing him from eating in the "special diet" area, asking him to show his diet card, threatened recreation ban, and pat frisks, as well as the retaliation claims against Benware.

Third, in 2023, in an opinion authored by District Judge Anne Nardacci, the court granted summary judgment to Senecal, finding that Walker's retaliation claim failed as a matter of law because he could not establish that Senecal's destruction of legal materials and threat were actionable retaliation related to Walker's protected speech.

The district court found that Walker fell short of establishing an adverse action. Relying

on *Davis v. Goord*, 320 F.3d 346, 353 (2d Cir. 2003), the district court appreciated "the effort required for an inmate to author a civil rights complaint," but found that the destruction of 18 pages of Walker's draft complaint was "*de minimis*" as Walker had not been deterred from filing his 88-page amended complaint, and it was "equally unlikely" that an individual of ordinary firmness would have been deterred. *Walker v. Senecal*, 2023 WL 3051647, at *5 (N.D.N.Y. Apr. 24, 2023).

The court also found that neither of Senecal's threats constituted an adverse action because the threats (1) that Walker would end up dead was "insufficiently direct and specific" and (2) to place Walker in the Box was "unaccompanied by subsequent action." The court granted Senecal's motion for summary judgment.

The Second Circuit Reverses

The Second Circuit explained that it was error to not consider the aggregate deterrent effect of Senecal's conduct. First, the district court erred by not considering Senecal's threat in conjunction with Walker's allegations that officers attacked him and repeated the threat because (1) a physical attack by officers can suffice as an adverse action and (2) Walker had plausibly alleged a connection between the attack and his protected speech.

Second, when taken together, Walker's allegations were sufficient to establish a genuine dispute of material facts as to whether the effect was adverse.

The Second Circuit clarified that though Senecal's threat and the destruction of legal materials related to different forms of protected speech—filing a complaint and writing a grievance—a court can still consider the aggregate deterrent effect of a course of conduct when "the two instances of protected speech were intertwined." *Walker*, 2025 WL 715398, *7 n.4.

Specifically, Walker's ability to file a grievance to seek redress for Senecal's destruction of his complaint causally "relates to the deterrent effect of the destruction." Thus, Senecal's threat, destruction of legal materials, and the assault by two officers were related and should be considered in the aggregate.

In contrast, the Second Circuit found that the allegations regarding Senecal's interfering with his access to the mess hall, a missed meal, preventing him from eating in the "special diet" area, asking him to show his diet card, threatened recreation ban, and pat frisks were properly disregarded by the district court.

The Second Circuit made clear that unlike other circuits, where the act of destroying a legal complaint, on its own, is sufficient to give rise to a viable Section 1983 First Amendment claim, see *Bell v. Johnson*, 308 F.3d 594, 604 (6th Cir. 2002), its holding here assessed the "deterrent effect" and the "specific circumstances" in which the destruction occurred. *Walker*, 2025 WL 715398, at *7.

Taking all the circumstances together, the court found that the combination of Walker's allegations of (1) the destruction of his legal complaint, (2) the subsequent threat from Senecal, and (3) the assault by two other officers who repeated the threat together established a genuine dispute of material fact as to whether a similarly situated individual of ordinary firmness would have been deterred from pursuing their First Amendment rights.

The court further held that Walker adequately alleged the third element of a retaliation claim—whether there was a causal connection

between the protected conduct and the adverse action—and concluded that Walker had identified a genuine dispute as to whether the adverse actions alleged were causally related to his protected speech, and therefore could not be resolved on summary judgment by the district court.

The court affirmed dismissal against Benware, however, holding that Walker failed to plausibly allege that Benware knew of the protected speech or that it played a substantial part in Benware's actions.

The district court's dismissal of Walker's additional due process and equal protection claims—which sought declaratory and injunctive relief against Governor Cuomo, Attorney General James, and each of the judges of the New York Court of Appeals for their alleged failure to provide him with a full and fair opportunity to establish his innocence and obtain release—was likewise affirmed by the court.

The court "s[aw] no error" in the district court's reasoning that those claims could only be brought in a *habeas* action where Walker sought such relief related to "the very fact or duration of his physical imprisonment."

Conclusion

The Second Circuit's decision in *Walker v. Senecal* clarifies that where different instances of protected speech are intertwined, so long as they relate to the same deterrent effect, a court can consider them in the aggregate for Section 1983 First Amendment claims, providing a slightly widened opening for the protection of prisoners' rights.