Policing Social Media Policies

Government

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Police officers in Petersburg had a First Amendment right to post to Facebook their complaints about their police department. A department policy limiting social media postings was unconstitutional. So held the U.S. Court of Appeals for the Fourth Circuit this week.

Two Petersburg officers posted and commented on Facebook about their concerns regarding how the Petersburg Police Department was being run. They complained about inexperienced officers being assigned to work as police instructors and promotions being given to inexperienced officers because of a desire for "instant gratification" and "political correctness." The posts bemoaned what the officers believed were promotional assignments becoming devalued or worthless. When discussing their gripes about "Rookies," they also made veiled references to officers but refrained from identifying any names. The posts claimed the department was leaderless. The posts and comments were "liked" by numerous current and former Petersburg Police Department officers.

The Petersburg Police Chief determined these posts and comments violated the Department's social media policy. The two officers responsible for the comments and posts were given six month probations and oral reprimands. Though initially advised the punishments would not affect their eligibility for promotion, several weeks later the promotion guidelines were amended to exclude candidates on probation.

The officers sued the City and the Petersburg Police Chief, alleging the social media policy and their punishments for violating it ran afoul of the First Amendment.

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The Court of Appeals began by noting that public employees do not relinquish their First Amendment rights to comment on matters of public interest and that, as public employees, they are likely to have informed opinions on those subjects. Some limitations, though, may be permissible on public employee speech. The Court noted that if public employees speak about matters of public concern, and the employer seeks to dissuade that speech, the courts must balance the public speech interests of the employee with the employer's interest in promoting the efficiency of public services.

The Petersburg Police Department's social media policy had two provisions relevant to the case couched in what the Court described as a "sweeping" prohibition against the dissemination of any information "that would tend to discredit or reflect unfavorably upon the [Department] or any other City of Petersburg Department or its employees." The first was the "Negative Comments" provision which prohibited "[n]egative comments on the internal operations [Department], or specific conduct of supervisors or peers that impacts the public's perception of the department." The second was the "Public Concern" provision which permitted speech on matters of public concern "so long as the comments do not disrupt the workforce, interfere with important working relationships or efficient work flow, or undermine public confidence in the officer."

The Court held both the Negative Comments and Public Concern provisions of the social media policy violated the First Amendment as overbroad regulations of speech. While social media may be a new phenomenon, the rights of citizens and employees to speech are long standing. "What matters to the First Amendment analysis is not only the medium of the speech, but the scope and content of the restriction."

The Court readily concluded that Petersburg's policy limited the officers' ability to speak about matters of public concern and characterized the policy as having "astonishing breadth." By their terms, the provisions limited officer discussion of "just about anything." Moreover, social media can be a place, the Court held, for "constructive public debate and dialogue" but the Department's policies cut short any such discussion.

The Court also held that Petersburg's broad policy proscription was not justified by "real, not merely conjectural" harms that it sought to avoid. The Court rejected that the Department's claim that its interest in maintaining camaraderie in the Department, a heightened concern because of the "paramilitary" nature of the Department, was sufficient to overcome the officers' First Amendment interests. General allegations of divisiveness, and a few officers seeking shift changes, were not enough to give rise to "real" harms from the Facebook postings – these harms the Court determined were "conjectural."

The facial overbreadth of the social media policy was so striking to the Court that it denied the all-important defense of "qualified immunity" typically afforded to government officials who act with the reasonable belief in the lawfulness of their actions. The Police Chief argued that this defense afforded

him and the Department protection for "bad guesses in gray areas" but the Court disagreed, finding that the policy was so overbroad that there was no question of its "patent unconstitutionality."

There can be little doubt that social media platforms, like Facebook or LinkedIn or Snapchat, are not only vehicles for employees to share their views, but they are microphones for sharing those views. When every patrol officer has a microphone, Departments might reasonably wonder if the amplified speech might be divisive or damaging to workplace morale and even to the chain of command. The Court emphasized those are real and important concerns. These concerns mirror, in a lot of ways, the high level of scrutiny paid to private employers and their social media policies by the National Labor Relations Board.

That said, traditional First Amendment considerations will apply even to new social media speech. Generally, speech about matters of public concern enjoys the highest level of Constitutional protection. Policies that seek to regulate that speech, in the absence of a real harm, even in highly regulated environments like police departments, run the risk of running afoul of the Constitution.