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The Local Government
Liability Beat

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United States Court of Appeals for Fourth Circuit Finds Police Department Social Media Policy Unconstitutional & Punishment of Two Officers Under That Policy to be Unconstitutional

By Jack Ryan, Attorney, Legal and Liability Risk Management Institute

In *Liverman v. City of Petersburg* [Virginia], [1] the United States Court of Appeals for the Fourth Circuit reviewed the discipline of two officers from the City of Petersburg Police Department that was based on posts they had made on Facebook. In it's review the court overturned the discipline and concluded that the police department's policy was "overbroad" because it prohibited too much, and therefore infringed on the officers' First Amendment rights.

The policy provisions the court took issue with are outlined as follows (actual policy language bold print):

The preface to the revised policy prohibits in sweeping terms 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 central provision of the policy, which we will refer to as the Negative Comments Provision, states:

> **"Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public's perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law."**

Another provision, which we label the Public Concern Provision, specifies:

> **Officers may comment on issues of general or public concern (as opposed to personal grievances) 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 instances must be judged on a case-by-case basis.**

The court also noted that the policy strongly discouraged officers from posting information about off-duty activities and provided that violations of the policy would be forwarded to the chief of police for "appropriate disciplinary action."

The court detailed the messages

that were posted by the involved officers and the disciplinary proceedings as follows:

> Liverman: Sitting here reading posts referencing rookie cops becoming instructors. Give me a freaking break, over 15 years of data collected by the FBI in reference to assaults on officers and officer deaths shows that on average it takes at least 5 years for an officer to acquire the necessary skill set to know the job and perhaps even longer to acquire the knowledge to teach other officers. But in todays world of instant gratification and political correctness we have rookies in specialty units, working as field training officer's and even as instructors. Becoming a master of your trade is essential, not only does your life depend on it but more importantly the lives of others. Leadership is first learning, knowing and then doing.

More than thirty people "liked" or commented on this post. Richards, also off-duty at the time, commented as follows:

> Richards: Well said bro, I agree 110%... Not to mention you are seeing more and more younger Officers being promoted in a Supervisor/ or roll. It's disgusting and makes me sick to my stomach DAILY. LEO Supervisors should be promoted by experience... And what comes with experience are "experiences" that "they" can pass around to the Rookies and younger less experienced Officers. Perfect example, and you know who I'm talking about..... How can ANYONE look up, or give respect to a SGT in Patrol with ONLY 1 1/2yrs experience in the street? Or less as a matter of fact. It's a Law Suit waiting to happen. And you know who will be responsible for that Law Suit? A Police Vet, who knew tried telling and warn the admin for promoting the young Rookie who was too inexperienced for that roll to begin with. Im with ya bro....smh*

Later that day, Liverman responded to Richards with a comment of his own:

> Liverman: There used to be a time when you had to earn a promotion or a spot in a specialty unit... but now it seems as though anything goes and beyond officer safety and questions of liability, these positions have been "devalued"...and when something has no value, well it is worthless.

Richards then replied:

> Richards: Your right..... The next 4yrs can't get here fast enough... From what I've been seeing I don't think I can last though. You know the old "but true" saying is.... Your Agency is only as good as it's Leader(s)... It's hard to "lead by example" when there isn't one....smh*

Among those who liked or commented on the Facebook postings, most were current or former Department officers.

Discipline:

Two sergeants, Liverman's and Richards's supervisors, learned of the exchange and notified Chief Dixon of the issue. Dixon determined that the statements violated the Department's social networking policy and instructed the sergeants to discipline the officers. In the disciplinary action forms, the Department stated that Liverman's follow-up comment and both of Richards's comments violated the Negative Comments Provision. They each received an oral reprimand and six months' probation, but were advised that such discipline would not affect their eligibility for promotion. Both the City Manager and Human Resources Director signed the personnel action forms indicating their probationary status.

Several weeks later, however, Chief Dixon altered the qualifications for promotion. The new protocol expressly excluded any officers on probation from participating in the promotion process. Accordingly, when Liverman and Richards applied for open sergeant positions, the Department notified them that they were ineligible to sit for the promotional exam.

Retaliation:

On October 1, 2013, the two officers sent a letter informing the City that they intended to challenge the disciplinary actions. Shortly thereafter, Liverman and Richards were the subject of several complaints and investigations within the Department. Based on the findings, Chief Dixon decided to fire Liverman, but Liverman resigned before receiving notice of his termination.

The officers then filed a lawsuit that made three basic claims. First, the social networking policy violated the officers' rights to free speech. Second, the officers challenged the discipline they received through application of this policy. Finally, the officers challenged their subsequent discipline as being the result of retaliation, as it came on the heels of their notification to the chief about challenging their initial discipline under the social networking policy.

In its review of the facts here, the Fourth Circuit began with a review of the cases and rules regarding free speech and public employees, recognizing that a public employee can be restricted in their speech in many circumstances. The court asserted:

> The legal framework governing public employee speech claims is well known. Public employees may not "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest." *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). Underlying this principle is the recognition that "public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers." *City of San Diego v. Roe,* 543 U.S. 77, 82, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004) (per curiam). Nonetheless, a citizen who accepts public employment "must accept certain limitations on his or her freedom." *Garcetti v. Ceballos,* 547 U.S. 410, 418, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). Government employers enjoy considerable discretion to manage their operations, and the First Amendment "does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick v. Myers,* 461 U.S. 138, 149, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

Thus, there are several steps that a court will apply in deciding whether an officer, or any public employee's speech is protected by the First Amendment:

- Is the speech about a matter that would be of public concern? Note, speech that is purely personal is not protected and any review will end if the court determines that the speech is purely personal
- If the court has determined that the speech is a matter of public concern, the court will turn to a balancing of the employee's interest as a citizen in commenting on the matter of public concern versus the interests of the law enforcement agency (or any governmental entity) "in promoting the efficiency of the public services it performs through its employees."
- Note: Speech that is found to be disruptive to the law enforcement operation may be subject to restriction even if it is a matter of public concern.

The court noted that the government or law enforcement agency's burden is higher when the policy serves as a "prior restraint" on speech rather than isolated after he fact disciplinary actions. In such cases the agency must demonstrate that the harms to be suffered in the agency's operations are real and not just speculation.

In applying the principles to the officers' social media postings, the court began by finding that the officers' posts concerning a lack of experience among trainers and supervisors was a "matter of public concern." The court then noted:

> The threshold question in this case is whether the Department's policy regulates officers' rights to speak on matters of public concern. There can be no doubt that it does: the restraint is a virtual blanket prohibition on all speech critical of the government employer. The explicit terms of the Negative Comments Provision prevent plaintiffs and any other officer from making unfavorable comments on the operations and policies of the Department, arguably the "paradigmatic" matter of public concern.

Having found that the policy prohibited officers from speaking on matters of public concern, the court then moved to the second question as to whether the officers interest in exercising their First Amendment rights as citizens outweighed the law enforcement agency's need for efficient operations. The Court took significant issue with the language from the policy that sought to "prohibit the dissemination of any information on social media 'that would tend to discredit or reflect unfavorably upon the [Department.]'"

The court noted:

> We do not, of course, discount the capacity of social media to amplify expressions of rancor and vitriol, with all its potential disruption of workplace relationships that Connick condemned. But social networking sites like Facebook have also emerged as a hub for sharing information and opinions with one's larger community. And the speech prohibited by the policy might affect the public interest in any number of ways, including whether the Department is enforcing the law in an effective and diligent manner, or whether it is doing so in a way that is just and evenhanded to all concerned. The Department's law enforcement policies could well become a matter of constructive public debate and dialogue between law enforcement officers and those whose safety they are sworn to protect. After all, "[g]overnment employees are often in the best position to know what ails the agencies for which they work." [citations omitted].

Having found that the Police Department's policy impacted speech on matters of public concern and that that the policy placed a heavy burden on the employee's expressive conduct, the court then shifted to the next question, specifically, whether the Police Department "established 'real, not merely conjectural harms' to its operations."

The court then looked at the department's concerns and whether they justified such a policy.

> Chief Dixon's primary contention is that divisive social media use undermines the Department's interests in maintaining camaraderie among patrol officers and building community trust . . . Here, however, the Department fails to satisfy its burden of demonstrating actual disruption to its mission. Apart from generalized allegations of budding "divisiveness" and claims that some "patrol officers sought [shift] transfers," J.A. 502, Chief Dixon presented no evidence of any material disruption arising from plaintiffs' – or any other officer's – comments on social media. We do not deny that officers' social media use might present some potential for division within the ranks, particularly given the broad audience on Facebook. But the speculative ills targeted by the social networking policy are not sufficient to justify such sweeping restrictions on officers' freedom to debate matters of public concern . . .

Defendants' fallback argument is that, even if the Negative Comments Provision itself is overbroad, the Public Concern Provision significantly narrows the reach of the social networking policy. This second provision, which permits comments on "issues of general or public concern . . . so long as the comments do not disrupt the workforce," J.A. 162, is ostensibly more aligned with the case-by-case analysis of Connick and Pickering. But the milder language in a single provision does not salvage the unacceptable overbreadth of the social networking policy taken as a whole. Indeed, the Public Concern Provision does not purport to nullify or otherwise supersede the blanket censorship endorsed by the Negative Comments Provision. If the Department wishes to pursue a narrower social media policy, then it can craft a regulation that does not have the chilling effects on speech that the Supreme Court deplored. We cannot, however, allow the current policy to survive as a management and disciplinary mechanism.

It should be clear that the court was not troubled by the provision it refers to as the "public concerns provision" in the way it was by the "negative comments provision" which it determined was overbroad and unconstitutional.

Having determined that the policy was unconstitutional the court then turned to the disciplinary actions related to the officers in this case.

First, the court found that the officers were speaking on a matter of public concern rather than a matter that was personal in nature. The court noted that others joining the discussion on Facebook served as evidence that inexperienced instructors or supervisor within the police department was a matter of public concern.

Second, the court looked at balancing the public interest of inexperienced trainers and supervisors versus the disruption to the Police Department by a public airing of this issue. The court then found that Chief Dixon failed to establish that the officers' "social media comments would meaningfully impair the efficiency of the workplace."

Due to the fact that the department could not establish that the comments would meaningfully impair the efficiency of the department, the court concluded that the discipline given to the officers was unconstitutional.

Finally, the court fond that the law was clearly established and therefore Chief Dixon was not entitled to Qualified Immunity.

Summary: Policy:

The Petersburg Police Department Policy was Unconstitutional due to the Negative Comments Provision that states:

"Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public's perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law."

This court determined this provision was overbroad and would restrict speech/expression that was protected by the First Amendment

Discipline of these Officers:

The discipline given to these officers was unconstitutional because they were:

1. Speaking on a Matter of Public Concern AND
2. The Chief did not establish that the comments would Meaningfully Impair the Efficiency of the Police Department.

Bottom Line:

Agencies should review Social Networking Policies and any policy limiting employee speech/expression to determine if there are provisions within the policy which would prohibit protected speech that would not impact agency operations.

* "Smh" is an acronym for "shaking my head."

Endnotes

1. *Liverman v. City of Petersburg,* 2016 U.S. App. LEXIS 22282 (4th 2016).

Personnel Liability 2017

The Risk Management Programs of GMA and ACCG are once again presenting this important training seminar for all city and county member organizations committed to preventing or minimizing losses due to personnel liability claims and litigation. The program will be presented by attorneys from the law firm of Elarbee, Thompson, Sapp & Wilson, LLP. The program will address the following areas:

- **Employee Use, Misuse, and Abuse of Personal Technology in the Workplace**. With advances in modern technology, it is now quite common for employees to openly and secretly take photos or make audio or video recordings in the workplace. To what extent may local government employers restrict or prohibit the use of smart phones and other personal technology by their employees?
- **What Local Government Employers Need to Know about Employment Retaliation Law, Including the Georgia Whistleblower Act?** July 1, 2017 will mark the tenth anniversary of the Legislature's extension of the Georgia Whistleblower Act (GWA) to local government employers in 2007. Less than two years later, the number of federal retaliation charges filed with the EEOC exceeded the number of discrimination charges for the first time in the Commission's history, and they now represent nearly one-half of all charges filed with the EEOC. Without question, state and federal retaliation claims are now the favorite weapons of attorneys who sue local government employers. Learn about recent developments in the law of employment retaliation, how these developments and current litigation trends may affect your organization, and what steps you can take to avoid or minimize liability.
- **Interactive Session: Social Media.** Efforts by local government employers to restrict their employees' social media activity implicate the First Amendment and numerous other workplace privacy issues. Given that applicable legal and constitutional standards are evolving almost as quickly as new social media platforms are introduced, what may local government employers do to protect their organizations from the use, misuse, and abuse of social media by their employees?
  - ➜ When does employee social media activity implicate the First Amendment? If an employee's social media activity is protected under the First Amendment, when can the local government employer still act to protect its legitimate interests?
  - ➜ How does a local government employer's policy restricting political activity apply to social media activity?
  - ➜ Can an employee's off-duty social media activity violate the local government employer's workplace harassment policy or standards of conduct?
  - ➜ When does an employee's social media activity constitute protected whistleblowing?
  - ➜ Should an applicant's social media activity be reviewed by the local government employer prior to making the hiring decision?
  - ➜ Does the local government employer violate its employees' privacy rights by monitoring their social media activity? By taking disciplinary action against them based on their social media activity?
  - ➜ What sort of restrictions can the local government employer lawfully impose on its employees' social media activities? Can the local government employer completely prohibit its employees from engaging in social media activity?
- **Recent Developments Affecting Return-to-Work (RTW) Policies.** RTW policies are intended to facilitate and encourage the prompt and safe return of employees to work following injury or illness. In light of recent developments, however, strict adherence to such policies may run afoul of the Americans with Disabilities Act, the Family and Medical Leave Act, among other laws. Learn what your organization can do to avoid such a result.

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