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FACEBOOK AND THE LIMITS ON GOVERNMENT EMPLOYEE FREE SPEECH

Employee postings on Facebook have the potential to cause headaches for employers and employees alike, as evidenced by the recent case of *Shepherd v. McGee*.¹ In *Shepherd*, an Oregon district court found that whatever First Amendment interest a government employee had concerning her Facebook postings was outweighed by the employer's interest in maintaining efficient operations.

The court in *Shepherd* ruled in favor of the Oregon Department of Human Services ("DHS") which had fired the plaintiff for posting on Facebook her personal feelings about individuals receiving public assistance. The plaintiff brought an action under 42 U.S.C. 1983 alleging DHS terminated her employment as a caseworker in retaliation for exercising protected First Amendment speech.

As an employee for DHS, the plaintiff investigated juvenile cases and made recommendations to prosecuting attorneys on child safety matters. Also, she would occasionally testify in protective custody hearings about a child's welfare. The plaintiff acknowledged that she was "to be a neutral appraiser of the settings in which the children live."² However, while working for DHS, the plaintiff posted several comments to her personal Facebook page about homes she had visited, questioning whether those living there should be receiving public assistance in the form of food stamps and other tax funded programs. Moreover, she posted a lengthy comment proposing her own "rules" for those on public assistance, including limiting what items may be purchased with food stamps, disallowing large televisions, limiting reproductive rights, and limiting tax credits.³

The court noted that the post was seen by a circuit judge and a defense attorney, both of whom were her Facebook friends. The Facebook posts were forwarded to DHS, which conducted an internal review and consulted the prosecuting attorneys who were likely to call the plaintiff as a witness in protective hearings. Both prosecutors were of the opinion that the Facebook post created an appearance of bias, and one advised he "would never be able to call her to the stand due to her credibility being terminally and irrevocably compromised."⁴ Further, the plaintiff agreed that, if called to testify, "she would have a hard time testifying and explaining her objectivity."⁵

Based on the internal investigation and input from the prosecuting attorneys, DHS terminated the plaintiff's employment on the grounds that her actions "compromised her ability to effectively perform her job."⁶ The plaintiff argued DHS had failed to show any "actual" disruption of her duties. The court disagreed and found that the prosecutor's opinion regarding the plaintiff's ability to testify during hearings was an "actual" disruption in their working relationship. Further, DHS was not required to wait until the plaintiff disrupted operations to establish impairment in efficiency.

In reaching its conclusion, the court noted that where, as here, the interests of a government employer

and a public employee are in the balance, “the employer must show greater disruption to its provision of services when the [employee’s] speech is at the core of First Amendment protection or is directed at a large audience.”⁷ The *Shepherd* court discounted the plaintiff’s First Amendment interest for two reasons: first, her speech was directed only to her Facebook friends rather than a larger audience; second, her comments did not strike at the core of First Amendment protection “because they were banter rather than speech intended to help the public actually evaluate the performance of a public agency.”⁸ After this substantial discount, the court concurred with DHS’s finding that the plaintiff could no longer effectively perform her duties as an impartial caseworker.

The court also opined that even if the plaintiff’s posts had been widely distributed and were at the heart of the First Amendment, “the balance would still tip in DHS’s favor given the record of potential disruption.”⁹

~~By *Macon Jones*, Assistant State Attorney, Eighth Judicial Circuit, Florida

Endnotes

1. *Shepherd v. McGee*, 2013 WL 5963076 (D. Oregon, Nov. 7, 2013).
2. *Id.* at 1.
3. *Id.* at 2.
4. *Id.* at 3.
5. *Id.* at 2.
6. *Id.* at 6.
7. *Id.* at 9.
8. *Id.*
9. *Id.*

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