The Florida Bar
Labor & Employment Law Section
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Publications Sub-Committee Co-Chairs

Eleventh Circuit: First Amendment Does Not Protect Speech That Implicitly Encourages Retaliatory Harassment By Coworkers

In *Booth v. Pasco County*,[1] two fire department employees filed EEOC charges against their employer. After their union refused their request for assistance, the employees filed another EEOC charge—against the union. A few weeks later, the union distributed to its membership a memo entitled "Update on Legal Issues," which, in relevant part, stated:

> Local 4420 members Jerry Brown and Anthony Booth have filed a Charge claiming unspecified discrimination with the U.S. Equal Employment Opportunity Commission against the Union and the County. The Executive Board and our attorney feel it is a frivolous claim with no grounds for support and we are extremely confident in winning but will still have to defend the charges. This could be very costly and generate a legal bill of $10,000 or more. If it becomes too costly the Union may have to assess its members additional fees to offset the cost. We will update you as it progresses.

The employees alleged that the memo was distributed in retaliation for their EEOC complaints and was designed to turn their fellow firefighters against them. The case went to trial on the retaliation claims, and a jury found in favor of the plaintiffs against both defendants. The union moved for judgment as a matter of law arguing, inter alia, that it had a First Amendment right to inform its members of union legal business and to speak out publicly to defend itself against charges of discrimination. The district court's rulings on several post-trial motions were appealed to the Eleventh Circuit.

The Eleventh Circuit assumed arguendo that the infringement on the union's speech was content based, as liability stems from the ideas expressed (e.g, there would not be liability if the union spoke positively, rather than negatively, about the employees' charges).[2] Under Supreme Court precedent, content-based regulations are presumptively invalid and not permitted except "in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"[3] Content-based speech restrictions also must be "narrowly tailored to serve a compelling state interest."[4]

Courts have held that certain workplace speech, despite being otherwise unlawful under Title VII, is protected by the First Amendment. In *Rodriguez v. Maricopa County Community College District*,[5] employees complained that a professor's race-based emails sent to college employees created a hostile work environment. Judge Kozinski, with Justice O'Connor sitting by designation, ruled that the emails were protected by the First Amendment and, thus, not unlawful harassment. The court noted that the professor's emails "were the effective equivalent of standing on a soap box in a campus quadrangle and speaking to all within earshot. Their offensive quality was based entirely on their meaning, and not on

any conduct or implicit threat of conduct that they contained."[6] The court acknowledged that certain workplace speech might not be protected. For instance, racial insults or sexual advances directed at particular individuals may be restricted based on their non-expressive qualities. Likewise, supervisory advocacy of discriminatory ideas constituting an implicit threat of discriminatory treatment could amount to unprotected intentional discrimination.

In *Booth*, the Eleventh Circuit held that, although the restriction on the union's speech was content-based and did not fall within the existing narrow First Amendment exceptions (e.g., fighting words, inciting imminent lawless action, obscenity), the union's speech nevertheless was not protected under the First Amendment. The court first found that the government has a compelling interest to prevent discrimination. The court next concluded that, unlike the professor's conduct in *Rodriguez*, the offensive nature of the union memo was not the meaning of the speech itself, but rather the implicit threat of conduct it contained. Specifically, the memo contained an implicit "call for reprisal" by naming the plaintiffs and warning that the cost of mounting a defense could result in additional dues assessments. As the district court had concluded:

> The problematic quality of the Union's legal updates memo is not that it displayed an unpopular point of view, expressed "offensive" or "disagreeable" thoughts or contributed the "wrong" produce to the "marketplace of ideas." . . . On the contrary, the crux of Plaintiffs' case is that the memo constituted a call for reprisal; specifically, that it was intended to (and did) spur others, namely union members, to take concrete, discriminatory actions towards them in order to punish them for filing charges of discrimination.[7]

More significantly to the court, it found that the union's speech involved "a matter of little or no public concern." In reaching this conclusion, the court looked narrowly to the memo's content, noting that liability for retaliation in this case was not based upon the union disclosing the charges in the memo or expressing its opinion that the plaintiffs' claims were "frivolous." Rather, as noted above, liability stemmed from the implicit "call for reprisal" (e.g., naming of the plaintiffs and the threat to make assessments).[8] Next, the court noted that the memo was disseminated only to a limited membership rather than the public at large.[9] Finally, the court looked to the memo's context, concluding that it was "merely a response to Plaintiffs' personal grievances." In so concluding, the court gave short shrift to the union's contention that the memo was consistent with its right (indeed duty) to keep its members informed on union legal matters and its right to speak out to defend itself against allegations of wrongdoing.

~By Jay P. Lechner, Jackson Lewis P.C.

Endnotes

1. 757 F.3d 1198 (11th Cir. 2014).
2. Initially, the district court at the summary judgment stage held that the union's speech was not protected because the anti-retaliation provision is "nothing more than a time, place and manner regulation of speech." *Booth v. Pasco County*, 829 F. Supp. 2d 1180, 1203 (M.D. Fla. 2011). But time, place and manner analysis applies only where the restriction is content-neutral, not content-based. *Ward v. Rock against Racism*, 491 U.S. 781, 789 (1989).
3. *R. A. V. v. St. Paul*, 505 U.S. 377, 382-383 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).
4. *Boos v. Barry*, 485 U.S. 312, 334 (1988).
5. 605 F.3d 703 (9th Cir. 2010).
6. *Id.* at 710.
7. *Booth v. Pasco County*, 854 F. Supp. 2d 1166, 1176 (M.D. Fla. 2012).
8. *But see Brandenburg v. Ohio*, 395 U.S. 444 (1969) (First Amendment does not permit government to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action).
9. *But see Rodriguez*, *supra* (emails were protected although disseminated only to college employees and not the public at large).

Section Bulletin Board

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2014

NOVEMBER 13-14, 2014

Litigating Employment Law Claims: 50 Years After Title VII (1783R)
Riverside Hotel, Fort Lauderdale

NOVEMBER 13, 2014

Labor Executive Council Meeting, 5:00 p.m.

NOVEMBER 18, 2014

12:00 noon – 12:50 p.m.
Audio Webcast: ***Effective and Ethical Use of Social Media in Employment Litigation (1805R)***
Ethan J. Wall, Social Media Law and Order, LLC, Miami

DECEMBER 16, 2014

12:00 noon – 12:50 p.m.
Audio Webcast: ***The Ins and Outs of Employee Leave and Accommodation Under the FMLA, Title VII, and the ADA (1806R)***
Scott E. Atwood, Atwood Law Firm, P.A., Fort Myers

2015

JANUARY 20, 2015

12:00 noon – 12:50 p.m.
Audio Webcast: ***What Every Employment Lawyer Should Know About Intellectual Property Law (1807R)***
Leslie J. Lott, Lott & Fischer, P.L., Coral Gables

JANUARY 29-30, 2015

15th Labor and Employment Law Annual Update and Certification Review (1832R)
Loews Portofino Bay Hotel
Orlando

JANUARY 29, 2015

Labor Executive Council Meeting, 5:00 p.m.

2015

FEBRUARY 24, 2015

12:00 noon – 12:50 p.m.
Audio Webcast: ***Working With Expert Witnesses Throughout Your Employment Law Case (1808R)***
Tracey K. Jaensch, FordHarrison, L.L.P., Tampa

MARCH 24, 2015

12:00 noon – 12:50 p.m.
Audio Webcast: ***Statistical Evidence in Employment Law Cases (1809R)***
Sherril M. Colombo, Littler Mendelson, P.C., Miami

APRIL 22, 2015

12:00 noon – 12:50 p.m.
Audio Webcast: ***What Every Lawyer Should Know About Litigating Benefit Claims (1916R)***
John P. Murray, The Murray Law Firm, P.A., Coral Gables

APRIL OR MAY, 2015

Advanced Labor Topics 2015 (1859R)

APRIL OR MAY, 2015

Labor Executive Council Meeting, 5:00 p.m.

JUNE 25, 2015

Labor Executive Council Meeting, 5:00 p.m.
The Florida Bar Annual Convention at
Boca Raton Resort & Club