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Facebook Post May Be Protected Speech

Moser v. Las Vegas Metropolitan Police Department

United States Court of Appeals

for the Ninth Circuit

No. 19-16511, filed January 12, 2021

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"…we live in a time when a careless comment can ruin reputations and crater careers that have been built over a lifetime, because of the demand for swift justice, especially on social media."

Social media has allowed us to connect with friends in far-flung places and to share opinions on topics both mundane and momentous. But social media can also tempt impulsively made inflammatory comments that are later regretted. And even worse, employers often react by firing or punishing the poster for the ill-advised remarks. Here's an example:

Moser was a Las Vegas SWAT sniper. Upon learning of the capture of the suspect who shot a Metro police officer, Moser commented on Facebook **"…we caught that asshole ... it's a shame he didn't have a few holes in him...".** An anonymous tipster alerted Metro's department to his Facebook comment, prompting an internal affairs investigation. During his interview, Moser admitted his comment was "completely inappropriate" and said he ***had*** removed the comment prior to his interview. Moser was transferred out of SWAT and put back on patrol, (resulting in a pay decrease) and the Department found him to be in violation of the department's social media policy.

Moser sued Metro under 42 USC §1983, alleging violation of his First Amendment right of free speech.

The First Amendment rights of government employees are evaluated by balancing the free speech rights of employees against the government's interest in avoiding disruption and maintaining workforce discipline. For his speech to be protected, Moser must (1) demonstrate that he spoke on a matter of public concern; (2) spoke as a private citizen, and (3) that the speech was a substantial or motivating factor in the discipline he received. If he is able to demonstrate the factors 1-3, Metro must show that it was justified in treating Moser differently than if he was a member of the public by balancing his interest as a citizen in commenting on matters of public concern against Metro's interest, as the employer, in employee discipline and not disrupting public service. If Metro cannot meet its burden, the First Amendment protects Moser's speech, as a matter of law. (See *Pickering v. Bd. of Ed of Twp. High Sch. Dist.*, 391 U.S. 563 (1968).)

The district court conducted the analysis of the *Pickering* factors above, granted Metro's motion for summary judgment, and found Moser's discipline was justified. Moser appealed.

In deciding whether summary judgment was proper, the 9th Circuit Court had to analyze anew, the factors described above. Summary judgment is proper if the moving party (Metro) demonstrated to the Court that there were no facts in dispute.

In its analysis, the Court found that Moser's speech addressed an issue of public concern (the comment related to an issue of general interest to the public- the suspect's capture), that he spoke as a private citizen, not

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a public employee (Moser was home and off duty using his personal Facebook account) and that he was demoted because of his speech (his supervisors believed the Facebook comment revealed "that Moser had grown callous to killing").

However, unlike the district court, the 9th Circuit Court found a factual dispute regarding what Moser meant by his Facebook post. Metro believed Moser's comment advocated unlawful use of deadly force. Moser said he was implying that the officer who had been ambushed should have fired defensive shots. So, was the comment a hyperbolic political statement lamenting police officers being struck down in the line of duty - or a call for unlawful violence against suspects? The 9th Circuit Court found the issue was not one the district court could resolve.

The Court ruled the district erred in granting summary judgment for Metro, reversed the judgment, and sent it back to the district court for further proceedings. The Court suggested a jury trial to resolve the issues. If a jury decides, as Metro did, that Moser had advocated unlawful violence against the suspect, his post would not be protected under the First Amendment, and Moser's discipline could stand.

Takeaway

Those employed in public safety must understand that **no** social media post is "private" because, by definition, you are communicating your thoughts to one or more other individuals. A public employee, like Moser in this case, must assume that anything published on a social media platform might be reported to his or her Department (or become "public"). When one is discussing anything controversial on social media, never identify yourself as a peace officer or firefighter or that you are employed in public safety. If you are thinking about using social media to be critical of your Department, or take a view that others may find offensive, our suggestion would be - don't do it. Because, any such posting will not be protected under the First Amendment if it is likely to cause disruption within the Department or its relationship with the community it serves, expose the Department to legal liability, advocate unlawful conduct, or be racially charged. **As a reminder, when using social media, always think twice before you post.**

Stay Safe and Healthy!

Robert Rabe *is Stone Busailah, LLP's writs and appeals specialist. His 41 years practicing law include 16 years as a Barrister, Supreme Court of England and Wales, practicing in London, England.*