LEGAL DEFENSE TRUST
Training Bulletin

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OFF-DUTY OFFICER'S "SLEAZY" COMMERCIAL PROMOTION OF HIS WIFE'S PORN PHOTOS RESULTS IN TERMINATION

NINTH CIRCUIT UPHOLDS REMOVAL BASED ON "CONDUCT UNBECOMING" RULE AND NO FIRST AMENDMENT PROTECTION

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The termination of an Arizona police officer for participating in his wife's business venture has been upheld by the Ninth Circuit Court of Appeals, as the court in *Dible v. City of Chandler*, 2007 DJDAR 13692 (September 5, 2007) rejected the officer's argument that the termination violated his freedom of speech.

The wife's business venture was the sale of photographs under contract with an operator of a commercial website, depicting the wife having sex and in sexually suggestive positions. Officer Ronald Dible's wife posted pictures on a website under a pseudonym, portraying her in sexual poses and activities with Dible, with another woman, and with what the court described as "inanimate objects." Dible himself did some of the filming. The sole purpose of the business venture was to make money.

The web home page showed a partially nude photo of Mrs. Dible, and offered more photos if the viewer paid a fee and accepted the terms of a contract with the website operator. The couple also offered a similar series of photos on a CDROM. Except for

one photo, Officer Dible's face was generally not shown.

The couple also promoted their website in events called "barmeets" in local bars, where followers could meet Mrs. Dible in person and pose for suggestive, partially nude photos with her. Officer Dible participated in some of these photos. Some of the attendees at the barmeets recognized Mrs. Dible.

Dible did not disclose this business activity to his department, but rumors led to an investigation, in which Dible gave several misleading answers. The local press picked up the rumors that Dible was running the website. A lieutenant investigating the case found that the press coverage had "severely impacted" the officers' working situation, and that officer morale had "really hit bottom."

Dible was terminated for bringing discredit to the department, and giving false answers to investigators. He appealed the termination to the Merit Board, which conducted an evidentiary hearing. At the hearing, officers testified to the effects of the publicity on their standing in the community. A female officer testified that an arrestee had called her a "porn whore," and that when she had responded to a bar fight, a customer "began gyrating, told her to take off her clothes, and harassed her about the website." The female recruitment officer testified that the website was mentioned at five successive recruitment trips she had conducted, and that the website was expected to "negatively impact the department's efforts to recruit female officers for years to come." *Id.* at 16393.

After the Merit Board affirmed the termination and Dible appealed the decision and filed a federal civil rights action, which was removed to the federal court.

The District Court found that Dible's participation in the website was not protected by the First Amendment as "freedom of speech." In affirming the termination, the Ninth Circuit observed that a claim of termination in retaliation for an exercise of free speech must be subjected to a balancing test that varies according to whether the "speech" including expressive conduct, is related or unrelated to the employment, and according to whether the speech or conduct relates to a matter of public concern or not.

The Ninth Circuit cited two recent Supreme Court cases in which some justices expressed the idea that indecency is entitled to only minimal First Amendment protection. The *Dible* opinion concludes, "it is a bit difficult to give that activity the same weight as the right to engage in political debate or to lecture on religion and black history, or to write articles about the environment. Especially is that true where, as here, the employee admits that he was not interested in conveying any message whatsoever and was engaged in the indecent public activity solely for profit." *Id.* at 13695.

The Court noted that the government's justification for its action must be based on more than mere speculation, but observed that "It would not seem to require an astute moral philosopher or a brilliant social scientist to discern the fact that Ronald Dible's activities, when known to the public, would be 'detrimental to the mission and functions of the employer.'" *Id.*, quoting

from *Waters v. Churchill*, 511 U.S. 661, 673 (1994).

Alluding to the public expectations of police officers, the Court stated that "The law and their own safety demand that they be given a degree of respect, and *the sleazy activities of Ronald and Megan Dible could not help but undermine that respect.*" *Id.* (italics added) The C ourt quoted from a federal precedent that part of a police officer's job "is to safeguard the public's opinion of them." Therefore, "whether Ronald Dible's activities were related to his employment or not, the City could discipline him for those activities without violating his First Amendment rights." *Id.* at 13696.

The *Dible* opinion relies heavily on a recent Supreme Court case, *City of San Diego v. Roe,* 543 U.S. 77 (2004), which upheld the termination of a police officer who published a video of himself stripping off a police uniform and masturbating. The *Roe* opinion generally suggested that an officer would benefit more from the balancing test if he or she were terminated for speech or expressive conduct unrelated to work.

In contrast to Officer Dible, Officer Roe "had gone out of his way to identify himself with police work." *Dible, id.* at 13694. But even though Officer Dible had tried "to keep the police out of the pictures," his police officer identity was discovered. The *Dible* opinion rhetorically questions "whether a police officer can ever disassociate himself" from his police identity to receive the more favorable balancing test for speech or conduct unrelated to work, but concluded that it was not necessary to answer that question in this case because Dible could properly be terminated under either balancing test. The opinion also illustrates how "conduct unbecoming" and "bringing discredit" rules can be applied to purely off-duty conduct when the department can demonstrate harm to its legitimate interests in maintaining efficiency, morale, order, discipline and public confidence.

Considering the long history of sustained discipline for bringing discredit to the department, no one should be surprised by the result in *Dible*. It will be interesting to watch for the eventual case that will answer the Court's rhetorical question whether a police officer's public speech and expression can ever be treated as sufficiently unrelated to police work to receive full constitutional protection.

STAY SAFE!

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