



# LEGAL DEFENSE TRUST

*MICHAEL P. STONE, GENERAL COUNSEL*

21800 Cactus Avenue, Riverside, CA 92518

Phone (951) 653-0130 Fax (951) 656-0854

## LEARNING POINTS



July 2018

### ***OFFICER'S IMPROPER REMARK ON FACEBOOK NOT PROTECTED UNDER THE FIRST AMENDMENT***

*Zucker v. City of Los Angeles*, 2018 Cal.App.Unpub. LEXIS 4271

Opinion filed June 21, 2018

*By Michael P. Stone, Esq., and Robert Rabe, Esq.*

In 2014, Benjamin Zucker had been employed by the LAPD for 19 years. He held the rank of police sergeant, and was a traffic enforcement supervisor at West Traffic Division. At the time of this matter, the LAPD did not have a policy regarding the use of personal Facebook accounts, and Zucker had not received training on the issue. On March 31, 2014, a Los Angeles Police Protective League director posted on his Facebook profile a link to a Daily News article. The article was about Police Officer Victoria Debellis's lawsuit, and was entitled, "LAPD officer says she was harassed because of gender, religion, suing City of Los Angeles." On the same day, while off-duty, in response to the linked article, Zucker posted the following comment on Director Cronin's Facebook profile: "I was born Jewish, raised Mormon and married to a Catholic that is Japanese, Portuguese & German. NOW, WHERE[']S MY MONEY? Kiss my ass ya greedy house mouse!" About 30 people

who were LAPD employees or associated with Cronin saw the posts on Cronin's Facebook profile.

On April 1, 2014, Debellis viewed Cronin's Facebook profile and saw the posts, including Zucker's comment. She found Zucker's Facebook profile and printed snapshots of it. One photograph depicted Zucker in his uniform, while another showed an LAPD badge. On Zucker's profile under "Work and Education," it stated "Los Angeles Police Department" and "City of Los Angeles." Debellis ran Zucker's name through the LAPD roster and identified his rank and serial number. Debellis made a complaint against Zucker with the department. Her complaint was investigated by an Internal Affairs workplace investigator. On April 1, 2015, the department served Zucker with a complaint, alleging one count of misconduct: "On or about March 31, 2014, you, while off duty, posted an improper remark on Facebook." The Board of Rights held a hearing on the complaint. The Board of Rights

found Zucker guilty of the misconduct allegation and recommended he receive an official reprimand. The Board found Zucker's Facebook profile showed "a clear nexus to the department" because it displayed a picture of Zucker wearing his LAPD uniform, representing himself as an LAPD sergeant. The Board concluded: "Although in an off-duty capacity, he placed himself in a position where his actions were subject to on-duty scrutiny by other department employees, and may have some influence on the outcome of an unresolved litigation." The Chief adopted the recommendation of the Board and issued an official reprimand, and a five-day suspension without pay.

Zucker filed a verified petition for a Writ of Mandate in the Superior Court. He alleged his Facebook comment, posted while he was off-duty, was protected under the First Amendment and, therefore, he should not have been disciplined. The trial court held a hearing on the petition and denied it. Zucker filed an appeal of that decision.

At the Board of Rights hearing, Zucker explained his Facebook posting: "Well, what I meant by that is that, you know, we work in a city that's very diverse. Everybody has their own quirks. Everybody has their own issues. And you know, at what point in time do we stop suing and being so litigious and stop suing everybody for every little thing, in some cases even looking to create a lawsuit, and actually get to work and do our jobs?" As for his comment "Kiss my ass, ya greedy house mouse," Zucker testified: "You know, we have so many people inside that people on the outside are overwhelmed." Zucker defined "house mouse" as someone who did not work in the field. When asked if "house mouse" was a derogatory term, he stated: "Not necessarily, not in and of itself. If it's somebody that ... works inside because they're injured, that's different. If it's somebody ... that doesn't do police work because they don't want to do police work, then yes, I have a problem with that." Zucker admitted that as a Department supervisor, he

should not comment on an ongoing lawsuit, and did not intend for Debellis to see his post. Zucker testified he would not have made the comment directly to Debellis as a supervisor. He stated: "If I had posted as Sergeant Zucker and I said that in uniform or in context - the context of being a supervisor or a police officer, yes, that is not right. But as Ben Zucker on my private page, with no nexus to the department, that's my First Amendment right."

The Court noted that "[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." Zucker commented on a news article about Debellis's lawsuit against the city that was posted on Cronin's Facebook profile. "[P]ublic concern is something that is a subject of legitimate news interest; that is a subject of general interest and of value and concern to the public at the time of publication." Zucker argued, the City conceded, and the Court agreed that Zucker spoke on a matter of public concern, by commenting on a news article about litigation against the City by an LAPD employee.

The Court noted that at least one portion of Zucker's comment, could be fairly interpreted as a personal insult: "Kiss my ass ya greedy house mouse!" Even then, the Court stated, such speech does not become unprotected simply because it included a personal complaint, so the Court assumed, without expressly deciding, that the entirety of Zucker's post related to a matter of public concern. That did not end the matter, because "[o]nce it is determined that the speech addresses a matter of public concern, the court must balance the employee's interest in making the statement against the public employer's interest in promoting efficiency." In balancing these interests, a court

must consider “whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise.” In particular, a police department “has a substantial interest in developing ‘discipline, *esprit de corps*, and uniformity.’”

Zucker asserted that the department must “demonstrate actual, material and substantial disruption” to justify restriction on his First Amendment right. The Court disagreed. A government employer’s showing of the potential disruptiveness of the speech is sufficient to outweigh its employee’s First Amendment right. It is not necessary “for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest[ed] before taking action.” The Court concluded that the Department’s showing of the potential disruptiveness of Zucker’s Facebook comment outweighed his First Amendment right because knowing other department employees would see his post, Zucker included a derogatory statement directed at Debellis. Her complaint of Zucker’s derogatory statement, and the resulting investigation show that the Facebook comment impaired harmony among co-workers and caused potential disruption to department operations. Accordingly, the Court concluded Zucker’s Facebook comment was not protected by the First Amendment and upheld the imposed penalty.

### **Comment**

Although this case was not published, the decision was well reasoned. It gives a fair warning to anyone who might, under similar circumstances, consider including a derogatory comment about a fellow employee using Facebook or another form of social media.

*Michael P. Stone* is RSA’s General Counsel and the founder and principal partner of Stone Busailah, LLP. His career in police and the law spans 51 years. He has been defending law enforcement for 38 years in federal and state, criminal, civil, administrative and appellate litigation.

*Robert Rabe* is Stone Busailah, LLP’s writs and appeals specialist. His 40 years practicing law include 16 years as a Barrister, Supreme Court of England and Wales, practicing in London, England.