Court of Appeal Upholds Discipline of a Police Officer for an Off-Duty Facebook Post

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On June 21, 2018 the California Court of Appeals, Second District, issued a non-published decision upholding the discipline of a police officer for his off-duty Facebook comment, and denying the officer’s claim that the disciplinary action was improper because his Facebook comment was not expressly prohibited by department policy or alternatively because it was protected by the First Amendment. After being issued an official reprimand and receiving a five-day suspension without pay, the officer filed a writ in court against the City of Los Angeles (“City”) to overturn the finding of misconduct and discipline. The appellate court affirmed the trial court’s decision, ruling that because the police officer’s comment could potentially disrupt the department’s regular operation, his speech was not protected and the comment constituted misconduct according to department policy.

Facts of the Case

Benjamin Zucker was employed by the Los Angeles Police Department (“LAPD”). In March 2014, Zucker made the following comment on a fellow officer’s Facebook post regarding a pending lawsuit involving that officer against the City:

“I was born Jewish, raised Mormon and married to a catholic that is Japanese, Portuguese & German. NOW WHERE IS MY MONEY? Kiss my ass ya greedy house mouse!”

The next day, the officer involved in the suit against the City saw the comment and, through Zucker’s Facebook profile, determined that he was an LAPD officer. She immediately filed a complaint with LAPD regarding Zucker’s comment. The Board of Rights held a hearing on the complaint and found Zucker guilty of posting an improper remark on Facebook while off-duty and recommended he receive discipline.
He was issued an official reprimand and suspension in October 2015. Two months later, Zucker filed a writ to overturn LAPD’s decision.

The court ruled in favor of the City, finding the Facebook comment to be misconduct in violation of LAPD policy and thus deserving of the discipline. The appellate court affirmed.

The Basis for Discipline
Administrative regulations affecting government employment must afford employees due process rights. Standards must be clear and specific so that the employee understands the charges brought against them. Additionally, standards must not prohibit expression or operate as a restraint on speech when matters of public interest are concerned. Discipline for past speech is acceptable, but chill of potential speech is not.

Zucker claimed that because LAPD had no policy regulating off-duty social media use at the time of the incident, and the applicable LAPD Manual standards of conduct are vague and operate as unconstitutional restraints on speech before it occurs, his due process rights were violated. The court disagreed. Because LAPD had no off-duty social media use policy, it relied on LAPD Manual standards of conduct as the basis for Zucker’s misconduct. Although the applicable standard “conduct unbecoming of an officer” has no inherent or objective content to clarify what conduct is prohibited, the court found it is common knowledge to a police officer that a derogatory Facebook comment referencing an employee of the Department is prohibited. Moreover, the court noted that the standard operated as a disciplinary action after the fact rather than a prior restraint on speech which made it constitutional. Thus, Zucker had adequate notice of the constitutionally sound basis for his discipline.

First Amendment Protection of Government Employee Speech
The First Amendment protects the right to speech and allows public employees to speak as citizens in certain circumstances. A public employee’s speech is constitutionally protected only if: (1) the employee spoke as a citizen about a matter of public concern; and (2) the employer cannot justify placing heightened restriction on its employee’s speech compared to that on the general public. A public employer must show the speech has “potential disruptiveness” on effective operation.
Zucker claimed that his Facebook comment was protected because a lawsuit against the City by its employee is a matter of public concern, and the City could not show that the speech led to actual and substantial disruption of its operations. The court agreed that Zucker’s comment was a matter of public concern. However, the court disagreed with the second claim and clarified that a public employer need only show “potential disruptiveness” on operations to justify heightened speech restrictions on employees. The court reasoned that the department personnel complaint filed by one employee against another is evidence of impaired harmony among co-workers and caused potential disruption to LAPD operations. Therefore, Zucker’s Facebook comment was not protected by the First Amendment.

Public Employee Discipline for Off-Duty Misconduct
A public employee can be disciplined for off-duty misconduct if: (1) the misbehavior discredits the government agency; and (2) the misconduct is rationally related to the person’s employment.

Zucker claimed that there was insufficient evidence to prove both that his off-duty Facebook comment discredited LAPD and that the comment was rationally related to LAPD. The court again disagreed stating that his derogatory Facebook comment directed at an LAPD officer was viewed by members of the public, which discredited LAPD. Because it was apparent from his Facebook profile that he is an LAPD officer, Zucker’s comment and his ties to the LAPD were rationally related.

Future Implications
The First Amendment is meant to protect public employees’ right to speak while also recognizing the public employer’s interest in promoting efficiency. The Zucker decision clarifies that a government employer need only show “potential intrusiveness” into its operations to justify restrictions on its employee’s speech. Additionally, the Zucker case highlights the problems that arise from social media. Interactions, even off-duty, can impact the workplace. An employee can be disciplined for off-duty misconduct if pictures and biographies on social media relate to the employer. The case also stresses that social media policy must be disciplinary action after improper use rather than a prior restraint that unconstitutionally chills potential speech. While this case is not a published decision, and not citable as controlling authority, it does provide direction regarding an employer’s ability to discipline an employee for improper use of social media, even while off duty.

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