Coates' Canons NC Local Government Law

The First Amendment and Facebook Rants: A Case Example

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First Amendment analysis of government employee speech is seldom a precise exercise. The law is complicated. The courts are firm in their notion that the cases turn on their facts and hard-and-fast rules are not really available.

Let's look at a real-life North Carolina situation and see how the free speech issues might play out. The names have been changed to protect me. In fact, I just completely made them up. But the circumstances really happened.

Smith County employs Fred as an emergency medical technician (EMT). One evening, after bringing an accident victim to Smith County Hospital, Fred posts these observations on his Facebook page:

"I'm back at this God forsaken place. Nothing has changed—only gotten worse. I can't take anymore of this place. But if you want good quality care, go to Marvin Hospital in Williams County where the good folks will help ya! We get good service there and everyone is so friendly! Not anywhere near Smith, where you lay for hours and never get treated!"

This posting comes to the attention of the emergency room director at Smith, who is not happy with Fred. She prints it out and shows it to the county emergency medical services director, who is not happy with Fred. The director talks to the county manager., who is not happy with Fred. The manager is considering disciplinary action, maybe even dismissal.

But, the manager wonders, is Fred's Facebook posting protected free speech? "If I take disciplinary action against him, might I open the county up to a First Amendment lawsuit?"

Here is my best shot at the analysis in this very interesting situation. The analysis has three parts, and Fred's speech is protected only if the answers to all three parts go his way.

First, was Fred speaking as part of his job duties? If so, the speech is simply not

protected by the First Amendment. Why is this true? Because the U.S. Supreme Court has recently said so. Its 2006 decision, *Garcetti v. Ceballos*, 547 U.S. 410, the Court says that if a government employee is speaking as part of her job duties, she is speaking as an *employee* doing the work she is paid to do, and not as a *citizen* exercising constitutionally-protected rights. This new restriction makes it much harder for public employees to win free speech cases.

So what about Fred? Answer in his case: No. It is not part of his EMT job to comment on the quality of the hospital compared to other hospitals. When he posted those comments, it is clear that he was speaking (however indiscreetly) as a citizen, not in furtherance of his job. So go to the second part.

Second, when Fred posted his Facebook comments, did any of the comments constitute speech on a matter of public concern? If no, they are not protected. The U.S. Supreme Court has made this clear over the years. Comments by a government employee that are of *personal* concern ("My supervisor's husband is a real slime ball"), not of interest to the community at large, are simply beyond the protection of the First Amendment, and the public employer may discipline the employee if it chooses. The initial Supreme Court case in this line of thinking was *Connick v. Myers*, 461 U.S. 138 (1983).

Answer in Fred's case: Yes. The quality of hospital services offered to the community (especially in comparison to those offered in another community) is a matter of public concern. So go to the third part.

Third, in the balance of interests, whose interests are more important: Fred's interest in freely expressing himself on a matter of public concern, or the county's interest in preserving its good relationship with the hospital and the hospital's ability to serve the interests of patients? The Supreme Court first articulated this balancing requirement in 1968: The challenge, it said, "is to arrive at a balance of the interests of the [government employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it provides through its employees." *Pickering v. Board of Education*, 391 U.S. 563.

In Fred's case, this question is, I think, very close.

Fred's interest is significant. We all as citizens have a high interest in our constitutional rights of freedom of speech. In addition, in this case Fred is in a position to have direct knowledge of the relative abilities and performance of the two hospital

emergency rooms. In a 1987 case, in which a North Carolina public school teacher had spoken up during a controversial principal-selection process and the issue was the balance of the interests, the federal court of appeals said this, in striking the balance in the teacher's favor: "[The teacher] had particular expertise on the issue of [a candidate's] performance. The public has a need to hear from those who know concerning the performance of public officials." *Piver v. Pender County*, 835 F.2d 1076, 1081 (4th Cir.).

But the county's interest is also high. Emergency medical is a vital service, and any level of disruption can directly threaten patient health and safety. If the Facebook comments cause other county emergency medical or hospital employees to shun Fred or feel uncomfortable working with him, there is a the possibility of danger to patients. Of course, such a reaction is by no means certain by other employees, and even if there is such a reaction, there is no certainty of patient danger. Nonetheless, I think that the threat to patient safety is enough to tip the scales in favor of the county. I think that way especially because of the nature of Fred's speech. It is a rant. It is not a careful analysis of problems with suggestions for improvement. It is vindictive, not constructive. Nonetheless, the question is close.

So, what can the county do? (1) It can do nothing and hope that Fred's intemperate comments do no further harm. Or (2) it can counsel Fred, explaining the county's concerns. The county can request his cooperation in removing the Facebook comments and refraining from such comments in the future. If Fred cooperates, great. If he does not, the county could decide to discipline or dismiss him. Or (3) the county can decide that this one instance merits some kind of action beyond counseling or asking for cooperation—it may wish to go ahead with discipline or dismissal of Fred.

If the county disciplines or dismisses him, it may of course face a legal challenge, and the analysis would be the one I have outlined above. Would a court agree with my conclusion? Who knows?