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Why Urofsky v. Gilmore Still Fails to Satisfy

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Postscript:

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Table of Contents:

I. Introduction

{1} The United States Court of Appeals for the Fourth Circuit appears to have adopted the rule that any speech uttered by a governmental employee, in the course of performing the work for which the employee was hired, is per se not a "matter of public concern."[1] A majority of the court relies on its holdings in *DiMeglio v. Haines*[2] and *Boring v. Buncombe Co. Bd. of Educ.*[3] for that proposition.

{2} That fact was evident in questioning from the *en banc* panel of the Fourth Circuit during its rehearing of *Urofsky v. Gilmore*[4] on October 25, 1999. At issue was the constitutional protection afforded state-employed university faculty when accessing content of a lascivious nature from the Internet via state-owned computers. The Commonwealth of Virginia passed an act in 1996, subsequently amended in 1999, that prohibited such use of state-owned and state- leased computers without prior permission of the employee's agency head. Six state-employed faculty members sued the Commonwealth because the Act chilled their abilities to carry out their dual roles as educators and scholars.

II. The History of the Act

{3} When the Virginia General Assembly first passed the Act in 1996, it prohibited state employee access to all material that contained sexually explicit content. The plaintiffs challenged the Act and achieved an initial victory in federal district court. Because of that decision, Virginia's Office of the Attorney General recommended that the General Assembly revise the Act to restrict only sexually explicit content having lasciviousness as its dominant theme. The Attorney General recognized that the Act in its original form, as applied to state-employed university faculty, was too broad.

{4} The General Assembly responded to the recommendation and enacted the amended version on March 24, 1999. In the meantime, however, a three-judge panel of the circuit court heard oral arguments and issued its decision based on the original Act. That decision considered and disregarded the distinction between the two versions of the law. As a result, the court found that, even in its original form, the Act was not overly broad and did not infringe on the plaintiffs' free speech rights.

{5} The telling aspect of the Act's evolution is the recognition by the Attorney General and the General Assembly that the Act's language went beyond the framers' original intent. Even so, the court based its decision on the initial version and found for the Commonwealth because the speech in question was not a "matter of public concern."

III. The Essence of "Matters of Public Concern"

{6} The United States Supreme Court has not crafted a bright line test for determining "matters of public concern" in the employment context. It did state, however, in *Connick v. Meyers*,[5] that the speech's "content, form, and context"[6] and the "manner, time, and place"[7] of the speech were relevant factors to be considered when making that determination. The significance of these factors is that they recognize up front the almost universal interest the public-at-large has in the workings of government, but dismiss that interest in favor of an examination of the motivations the employee had in making the speech and the manner in which it was conveyed.

{7} For instance, in *Connick*, the plaintiff circulated a questionnaire to her colleagues in which she attempted to assess the degree of confidence they had in the district attorney's management of the office. The majority and dissent effectively differed only in their assessment of how much of the questionnaire pertained to "matters of public concern." Since the very nature of the office entailed involvement in the affairs of the citizens, the dissent viewed the questionnaire as being entirely one of public concern. On the other hand, the majority found but one question relevant to that issue.

{8} The essence of the distinction between the two schools of thought was the plaintiff's motivation behind the questionnaire. Because of the way in which she circulated it, combined with her obvious self-serving intent, the majority determined that she was speaking publicly on a matter of personal interest. Such speech does not rise to the level of that meriting protection merely because the public might also be interested in the same speech.

IV. *DiMeglio* and *Boring* Are True to The Supreme Court's Distinction

{9} If the speaker's motivation is an instructive factor in determining whether the speech meets the "public concern" threshold, how do the Fourth Circuit's holdings in *DiMeglio* and *Boring* reflect that test? To be sure, in the case of *Boring*, the plaintiff's speech as evidenced by her selection and production of a dramatic play whose subject matter was in violation of the school board's "controversial materials" policy was not a "matter of public concern." Instead, as the court chose to view the facts, her actions were self-serving, inasmuch as she made a conscious decision to circumvent an established policy.

{10} The facts in *DiMeglio* lead to a similar conclusion. The plaintiff, Frank DiMeglio, was speaking to a neighborhood organization about zoning issues facing a proposed real estate development. In the course of that meeting, he gave legal advice to the assembled members of the organization that tended to undermine an earlier managerial decision his supervisor made. His supervisor reprimanded DiMeglio and transferred him to a new assignment.

{11} The Fourth Circuit upheld the supervisor's actions by finding that DiMeglio's speech was not protected. DiMeglio expressed a personal opinion while acting in his role as a zoning inspector. Similar to Margaret Boring, Frank DiMeglio was insubordinate by acting contrary to the known wishes of his supervisor. Again, the self-serving aspect of their behaviors were important considerations in the court's decision to affirm the personnel actions taken against the two plaintiffs.

V. *Urofsky* Doesn't Fit the Mold

{12} We devote so much energy toward understanding what constitutes "matters of public concern" because that is the threshold issue. If the speaker cannot meet this burden, the *Pickering*[8] balancing test[9] is never invoked and the speaker's interests are not balanced against those of the governmental employer. Therefore, it is a critical issue.

{13} In its earlier holding, the Fourth Circuit determined that the plaintiffs were not speaking on "matters of public concern." The court wasted few words on this critical, threshold issue and left at least one observer scratching his head as to how curriculum in a public university setting could miss being included in that class. Instead, the court short-circuited the analysis by invoking *Boring*. It recognized the issue of curriculum and made a determination that such choices fall within the realm of the employer. Stare decisis. Case closed. Plaintiffs frustrated. Observers perplexed.

{14} The result is unsatisfying. Even if we were to concede the implicit holdings of *DiMeglio* and *Boring* such that they fall in line with *Connick*, the distinction between those cases and *Urofsky* is so pronounced that it begs a different analysis. Until *Urofsky*, all of the cases in the federal circuit courts and the United States Supreme Court could rather easily distinguish between the motivations of the speakers. Either they were speaking out as employees or they were doing so as private citizens. The former are not protected, while the latter are.

{15} But, university faculty belong to a distinct class of speakers. True, they are employees. It is also true that the speech at issue here is uttered while they are on the clock. However, they differ from their non-

faculty, state-employed brethren in several material respects. First, they have dual responsibilities to their employers one is teaching, and the other is advancement of their respective disciplines through research. It is the latter responsibility through which these distinctions should be viewed. Second, their efforts are discretionary. Third, the very nature of research requires intellectual curiosity and creativity. Fourth, they have professional duties that may sometimes chafe under a rigid set of constraints imposed by their employers. Fifth, their activities are calculated to have an impact on the public-at-large.

{16} While, there may be ancillary motivations behind a faculty member's research activities (i.e., self-aggrandizement, the recognition of one's peers, personal satisfaction), the chief motivation is advancing knowledge for the public good. That motivation is central to the inquiry into "matters of public concern." The Fourth Circuit cannot maintain its credibility and dismiss *Urofsky* if it also fails to inquire into the distinctions between it, *DiMeglio,* and *Boring*.

VI. The Fourth Circuit Focuses on Damages

{17} Perhaps bolstered by Justice O'Connor's well-written discourse in *Waters v. Churchill*[10] on why the government has greater latitude in limiting the speech of its employees, the Fourth Circuit seemed to concentrate its questions during oral arguments on the degree to which the plaintiffs were adversely affected by the Act. While Judge Luttig appeared to characterize the Act as one which merely denied employee access to "smut," Chief Judge Wilkinson's enlightened view inquired into the potential for the Act to limit legitimate research into fields of public concern, such as medical research.

{18} Because the Act does not serve as an outright ban on access to restricted materials, but merely requires prior agency permission, the court searched for an understanding of the actual damages to the plaintiffs. The plaintiffs' attorney noted that several of the faculty had declined to issue assignments or to pursue certain research topics in anticipation of their need to access the forbidden content. However, in no case had a faculty member been denied access by his agency head in an instance when he sought prior permission under the Act. The lack of actual damages seemed to be the pivotal factor in the court's questioning of the attorneys. The court noted that the Act does not proscribe total access to lascivious content. Instead, it merely ensures that such access is necessary in the agency head's determination.

VII. The Same Outcome Is Expected

{19} The *en banc* panel probably will reach the same result as the court's three-judge panel did earlier this year the court likely will deem the Act constitutional. The court will expend little effort explaining why the threshold "matters of public concern" issue is not met, once again predicated on *Boring*. If analysis of any depth and direction is offered, this observer expects it will be in the area of damages to the plaintiffs, or the lack thereof.

{20} This will be the correct result, but the analysis will be unsatisfying. The Supreme Court has articulated a compelling methodology for determining the circumstances under which plaintiffs have a right to speak out on "matters of public concern." Beginning with *Pickering*, through *Connick*, and against the backdrop of *Waters*, the Court has made clear its interpretation of the interests of the parties and the factors to be considered in protecting those interests.

{21} Damages suffered by the plaintiffs is one of the factors, but it is not the only factor. The brunt of the inquiry balances the needs of the government, as an employer, against the rights of employees to speak out on "matters of public concern." The fact is, that under the Act, the employees have not had that right infringed upon. The Act makes such speech inconvenient, but it does not deny it.

{22} The district court did a thorough job in analyzing the factors under *Pickering*. While its decision is arguable, at least the court recognized the respective interests of the parties and appropriately applied them to the law. One can only hope that the Fourth Circuit will now do the same.

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[**]. **NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

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[1]. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

[2]. 45 F.3d 790 (4th Cir. 1995).

[3]. 136 F.3d 364 (4th Cir. 1998).

[4]. Urofsky v. Gilmore, 167 F.3d 191 (1999).

[5]. 461 U.S. 138 (1983).

[6]. *Id*. at 147.

[7]. *Id*. at 153.

[8]. Pickering v. Board of Education, 391 U.S. 563 (1968).

[9]. In *Pickering*, the Court set out six factors that should be weighed to determine the speaker's constitutionally protected speech. They included (1) the need to "maintain[] either discipline by immediate superiors or harmony among coworkers"; (2) "close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning"; (3) the detrimental impact of the statements upon the employer; (4) the essentiality for public employees to participate in the free and open debate on matters of public concern; (5) the extent to which the fact of employment relates to the

subject matter of the speech; and (6) the consequences exacted on the speaker as a result of his speech. *See* Michael D. Hancock, Note, *The Fourth Circuit's Narrow Definition of "Matters of Public Concern" Denies State-Employed Academics Their Say:* Urofsky v. Gilmore, 6 RICH. J.L.& TECH. 11 (Fall 1999) <http://www.richmond.edu/jolt/v6i2/note3.html>.

[10]. Waters v. Churchill, 511 U.S. 661 (1994).

Related Browsing

See also State Bans Employees From Indecent Internet Activity; U.S. Fourth Circuit En Banc Hearing of Urofsky v. Gilmore by Julie A. Roscoe.
