

Federal Court rules that Elected Official Violated First Amendment when Banning Commenter on the Official's Public Facebook Page

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The District Court for the Eastern District of Virginia issued a recent decision that that should remind public officials and employees that if they have social media websites (Facebook, Twitter, etc.), the websites may be public forums and comments and commenters can only be restricted pursuant neutral policies or practices that are applied in an evenhanded manner.

In *Davison v. Loudoun County Board of Supervisors*, Defendant, Phyllis J. Randall, Chair of the Loudoun County Board of Supervisors, temporarily banned the Plaintiff from posting on her "Chair Phyllis J. Randall" Facebook page because she was offended by his criticism of her "colleagues on the School Board," whom he had accused unethical behavior.

Social media – and Facebook in particular – has become a vital platform for speech of all kinds. Indeed, the Supreme Court of the United States has opined that social media may now be "the most important" modern forum "for the exchange of views." *Packingham v. North Carolina* 137 S. Ct. 1730, 1735 (2017) (comparing social media to traditional public fora such as parks and streets).

In the *Davison* case, the court first found that the "Chair Phyllis J. Randall" Facebook page was "governmental" (as opposed to private) in nature, and thus subject to constitutional constraints. While she personally maintained and owned the Facebook page and posted on the page through personal devices, the court found that the page was governmental in nature because the page arose out of public, not personal reasons. In other words, because it was created when she was elected, it was still maintained by County employees, used to communicate with constituents, and referenced in County newsletters, the Court found that it was a public Facebook page.

Next, the court found that the Defendant violated Plaintiff's First Amendment rights when she temporarily blocked him from access to the Facebook page. The Defendant banned the Plaintiff because she was offended by his post. She did not ban the Plaintiff pursuant to any neutral policy or practice that she has applied in an evenhanded manner. In fact, to the extent she had a policy on commenting, it expressly invited any and all comments on any issues. In an early post, she stated:

Everyone, could you do me a favor. I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your thoughts. However, I really try to keep back and forth conversations (as opposed to one time information items such as road closures) on my county Facebook page (Chair Phyllis J. Randall) or County email (Phyllis.randall@loudoun.gov). Having back and forth constituent conversations are Foiable (FOIA) so if you could reach out to me on these mediums that would be appreciated. Thanks much, Phyllis

The court found that this sort of governmental "designation of a place or channel of communication for use by the public" is more than sufficient to create a forum for speech. Importantly, viewpoint discrimination is "prohibited in all forums."

The right to free speech is subject to some limitations, but the Supreme Court's First Amendment jurisprudence makes clear that speech may not be disfavored by the government simply because it offends. See *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (listing cases). Moreover, the suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment guards. By prohibiting Plaintiff from

participating in her online forum because she took offense at his claim that her colleagues in the County government had acted unethically, the court found that “Defendant committed a cardinal sin under the First Amendment.”

Therefore, the Court declared that Defendant did in fact violate Plaintiff’s right of free speech under the First Amendment to the United States Constitution.

While the Defendant’s actions in this case were contrary to law, the Court recognized that social media websites may be monitored because moderation is necessary to preserve social media websites as useful forums for the exchange of ideas. The court also indicated that neutral, comprehensive social media policies – eschewed by Defendant in this case – are acceptable. The court specifically stated that the Defendant could adopt new policies for the “Chair Phyllis J. Randall” Facebook page or to disallow comments altogether. Therefore, political subdivisions and their elected officials and employees who maintain public social media sites should work with their solicitors to generate neutral, comprehensive social media policies.

The case is available online at the following link: <https://cases.justia.com/federal/district-courts/virginia/vaedce/1:2016cv00932/348006/132/0.pdf?ts=1501081939>

Davison v. Loudon County Board of Supervisors, Docket No. 1:16cv932 (JCC/IDD), Document #132 (E.D. Va. July 25, 2017)

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