

Federal Court Holds That Banning a Commenter From a Public Official's Public Facebook Page Violates the Commenter's Right to Free Speech

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Davison v. Loudoun County Bd. of Supervisors, 1:16CV932 (JCC/IDD), 2017 WL 3158389 (E.D. Va. July 25, 2017). The District Court for the Eastern District of Virginia issued a declaratory judgment holding that an elected official's Facebook page operated as a forum for speech under the First Amendment to the U.S. Constitution and that the elected official violated Plaintiff's right of free speech when the official banned Plaintiff from her Facebook page.

SUMMARY AND FACTUAL BACKGROUND

In *Davison v. Loudoun County Bd. 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 ("Facebook Page") because she was offended by his criticism of her "colleagues on the School Board," whom he had accused unethical behavior.

The Plaintiff sued under 42 U.S.C. § 1983 and alleged, among other things, that the temporary ban from the Facebook Page violated his rights to free speech. After conducting a bench trial, the court agreed with Plaintiff and held that the Facebook Page was a public forum and that the Defendant violated Plaintiff's First Amendment rights by banning him from that forum for making comments that offended the Defendant.

DISCUSSION

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

Next, the court found that the Defendant violated Plaintiff's First Amendment rights when she temporarily blocked him from access to the Facebook Page. Importantly, the Defendant banned the Plaintiff because she was offended by his post accusing her "colleagues on the School Board" of unethical behavior. Moreover, 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.

The court found that this sort of governmental "designation of a place or channel of communication for use by the public" was more than sufficient to create a public forum for speech.

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 restricted 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.

PRACTICAL ADVICE

While the Defendant's actions in this case were contrary to law, not all Facebook pages maintained by elected officials are governmental in nature. Moreover, if a Facebook page is public, it may still be monitored and inappropriate comments and commenters can be banned if done pursuant to an objective policy. 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 here by the Defendant – are acceptable. The court specifically stated that the Defendant could adopt new policies for the "Chair Phyllis J. Randall" Facebook page or 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 content-neutral, comprehensive social media policies to insulate themselves from potential First Amendment challenges.

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