

Municipality's Retaliation against Newspaper for Unfavorable Press Leads to Civil Rights Claim

Articles June 12, 2019

Press and Journal, Inc. v. Borough of Middletown, Civil Action No. 1:18-CV-2064 (M.D. Pa. 2018) (Borough faces a civil rights claim for retaliation against newspaper for unfavorable press coverage).

BACKGROUND

The *Middletown Press & Journal* ("Journal") is a newspaper of general circulation in Dauphin County. For over 100 years, the Borough of Middletown advertised in the Journal, placing notices for meetings of Borough council and the local zoning hearing board, advertisements for public events and other notices required by law to be published in a newspaper of general circulation. In the ten-year period from June 2008 to May 2018, the Borough ran 207 such legal advertisements in the Journal.

In June 2018, the Borough informed the Journal that it was ending all advertising with the newspaper. When the Journal inquired why the Borough was no longer advertising in the newspaper, the Borough responded with a letter, signed by the mayor and six of the Borough's seven council members, providing the following explanation for the Borough ending its advertising relationship with the Journal:

"This decision was arrived at through discussion of a number topics that we feel have been detrimental to the efforts and initiatives of the Borough, including articles and editorials published in the Press and Journal over the past year. . . . Through these disheartening and demoralizing instances of distasteful sensationalism, misrepresentation of information and statements, unfounded speculation, questionable sourcing and observable bias, we feel that the Press and Journal is not entirely committed to presenting the news of our community with an acceptable amount of impartiality or accuracy of facts."

The Borough's letter further stated that "[s]hould the Press and Journal demonstrate reliability to professionally and responsibly report on actions and statements of Borough Council and Management, as well critiquing us from a founded and balanced position, we will be happy to patron your newspaper again."

A representative of the Journal attended a public meeting of the Borough council and read from a letter expressing that the Borough's actions were unconstitutional infringements of the Journal's First Amendment rights and requesting that the Borough reconsider its decision. Copies of the letter then were provided to the mayor and council members, which the mayor ripped in half and threw on the Council table.

Subsequently, the Journal initiated a suit in federal district court accusing the Borough of a violation of the Journal's First Amendment rights. The Borough filed a motion to dismiss the complaint contending that it did not state a viable claim. The federal district court rejected the Borough's motion and allowed the Journal's suit to proceed.

DISCUSSION

Independent contractors who provide services to governmental entities enjoy certain protections under the First Amendment. In *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), the United States Supreme Court examined whether the First Amendment protects independent contractors from the termination or non-renewal of at-will government contracts in retaliation for their exercise of freedom of speech. The Court held that such protection exists in

the context of a pre-existing commercial relationship with the government.

In a related case decided that same day, *O'Hare Truck Services, Inc. v. City of Northlake*, 518 U.S. 712 (1996), the Supreme Court considered whether First Amendment rights held by government employees also applied to an "independent contractor, who, in retaliation for refusing to comply with demands for political support, . . . is removed from an official list of contractors authorized to perform public services." In *O'Hare*, the local government allegedly removed an independent contractor, who had provided towing services to the municipality for many years, from an official rotation list of towing-service companies in retaliation for the contractor's exercise of political association. The Supreme Court held that these allegations stated an actionable claim for violation of the contractor's First Amendment rights.

In this context, the federal court observed that, although there was no contract between the Journal and the Borough ensuring continued placement of advertisements in the newspaper, the Journal had provided services continuously for a significant period of time. These ongoing services ceased when the Borough terminated the business relationship expressly due to dissatisfaction with the Journal's coverage of Borough matters. Under these circumstances, the court concluded that the Journal stated plausible claims against the Borough for viewpoint discrimination in contravention of the right to free speech and free press; content discrimination in violation of the right to free speech and free press; and violation of the right to freedom of association.

CONCLUSION

Governmental entities may enter into contracts with vendors for the provision of services on terms that reserve the right to terminate the relationship at any time and without cause (commonly referred to as "at-will" contracts). While government officials are accorded broad discretion to terminate at-will relationships without cause, that discretion cannot be exercised as a means of punishing, or to impose conditions upon, the expression of political viewpoints by those doing business with the government. Instead, such decisions must be made without consideration of the content of a service provider's speech.

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