

Public Employee's Social Media Post Justifies Discharge

Articles August 25, 2020

Carr v. PennDOT, 2020 WL 2532232 (Pa. 2020) (Pennsylvania Supreme Court sustains the termination of employment of a public employee for a social media post).

Background

The Pennsylvania Department of Transportation (PennDOT) hired Rachel Carr as a seasonal/non-permanent employee and then promoted her to the position of Roadway Programs Technician I. Upon her promotion, Carr was subjected to a 180-day probationary period. Shortly thereafter, while off-duty and at home, Carr posted a "rant" through her personal Facebook account to the closed Facebook group "Creeps of Peeps." She also posted several responses to comments made by members of the Facebook group to the original post. Carr's Facebook profile identified her as a Roadway Programs Technician employed by the Department.

Carr originally posted the following:

Rant: can we acknowledge the horrible school bus drivers? I'm in PA almost on the NY boarder [sic] bear [sic] Erie and they are hella scary. Daily I get ran [sic] off the berm of our completely wide enough road and today one asked me to t-bone it. I end this rant saying I don't give a flying **** about those babies and I will gladly smash into a school bus[.]

Some of her subsequent responses to comments included the following:

If you see a vehicle coming perpendicular you [sic] with no turn signal on, do you pull out from your stop sign anyway? Lmk when you're done googling perpendicular. Good then, you don't? Then they shouldn't either. . . And that's my problem? They broke traffic law[s], which I'm abiding and I'm in the wrong? Get f***ed. What world do you live in that I'd deliberate [sic] injure myself in stead [sic] of somebody else. [sic]. . . No I'm saying you don't care about the random f***s that drive your kids and are you serious? Haha. . . I care about me. . .

Your children and your decision to chance them with a driver you've never been a passenger with is your problem. A vehicle pulls out in front of me or crosses the yellow line, that's their problem. A sedan, school bus or water truck. You're [sic] kids your problem. Not mine

Carr's posts were forwarded to PennDOT, resulting in Carr's termination. Carr challenged her discharge before the Civil Service Commission as an impermissible infringement upon her right to free speech. The Commission sustained the termination, concluding:

[T]he Commission is at a complete loss to find any reasonable public interest in a rant about harming children or a bus driver. [Carr]'s remarks do not provide any educational information to the public or serve to inform them about any public matter. Furthermore, even if the Facebook rant contains an inkling of public interest, we find [that] . . . [Carr]'s Facebook rant caused disruption to the appointing authority's reputation and mission that outweighed [Carr's] interest in her free speech. Thus, [Carr]'s Facebook rants do not constitute protected free speech.

The Commonwealth Court reversed that decision, holding that Carr's comments involved a matter of public concern and were protected by the First Amendment. On further appeal, the Pennsylvania Supreme Court overruled the lower court's decision and sustained PennDOT's decision to terminate Carr.

Discussion

The United States Supreme Court, in *Pickering v. Bd. of Educ. Of Twp. High Sch. Dist.*, 391 U.S. 563 (1968), established a balancing test when considering the government's interests as an employer and the free speech rights of government employees to determine whether an employee's speech on a matter of public concern has a reasonably foreseeable adverse effect on the government employer. In applying that test, the Pennsylvania Supreme Court has noted that "[a]s the public importance of the speech increases, the government's difficulty of justifying disciplinary action taken against the employee because of the speech will increase proportionately, and as the public importance of the speech decreases, the government's burden of showing injury before it may discipline an employee, for First Amendment purposes, will proportionately decrease."

The Court concluded that even if Carr did not intend to drive her vehicle into a school bus as suggested by her social media post, her words alone served to erode the public's trust in PennDOT's mission and, therefore, could justify her discharge. The Court observed: "Clearly, few statements could be more contrary to the Department's mission of providing safe roadways for the traveling public than Carr's comment, 'I don't give a flying **** about those babies and I will gladly smash into a school bus.'" The Court also noted that complaints subsequently received by PennDOT about Carr's social media posts demonstrated the negative impact on public trust.

Practical Advice

First Amendment case law recognizes that, when acting as an employer, government has a greater interest to regulate the speech of its employees than it possesses in connection with regulation of the speech of the citizenry in general. Thus, courts have acknowledged that when a person enters government service, the person by necessity must accept certain limitations on his or her freedom of speech. The Pennsylvania Supreme Court's decision in Carr demonstrates the limitations of a government employee's free speech rights whenever their exercise conflicts with the interests of the government employer.

In determining whether employee's speech outside the work setting can justify disciplinary action, the first inquiry requires a determination of whether the speech involves a matter of public concern. Speech implicates a "public concern" if its content or context addresses a matter of political, social, or other area of interest to the community. This contrasts with an employer's discipline for speech on matters of purely private interest, where there is no threat to debate of public issues. If the speech is found to encompass a public concern, the second inquiry requires a determination of whether the speech has a potential to adversely affect the government employer's operation. This entails a balancing of the employee's free speech with the entity's interest in preventing impaired performance, workplace disruption and interference with the entity's operations.